

Examples from three (3) conservation easements including cultural values/resources in one way or another in the easements, each in a different way:

North Olympic Land Trust has worked with the Jamestown S’Klallam Tribe on several occasions to utilize a Tribe-sponsored Floodplains by Design grant from the Washington Department of Ecology. The Tribe is a third-party beneficiary of the grant-funded easements. While the focus of the easements is agricultural land (floodplain) protection, the Trust and Tribe mutually want to ensure cultural values are specified in the easements as well.

- The “Dungeness Hub” conservation easement covers land that is in a known cultural resource area and has a high likelihood of cultural resources on site, and the Trust and Tribe wanted to ensure a higher level of protection for such resources in the easement itself, to wit:

- o Recitals:

- 1.3. The Property possesses agricultural (including productive soils), habitat, scenic and open space, and cultural values of great importance to Grantor, the people of Clallam County and the people of the State of Washington (collectively, “Conservation Values”). The Conservation Values are detailed as follows, and are worthy of preservation via protection of the Property in substantially its present state:...
- 1.3.4. Cultural Values: The Property also may support cultural values of the Jamestown S’Klallam Tribe (“Tribe”), or other indigenous peoples, native to the lands in and around the Property, as it may contain cultural resources and artifacts of significant importance to such parties (collectively, the “Cultural Values”), which Cultural Values the Parties desire to protect and agree constitute a component of the Conservation Values. It is further understood that if activities on the Property trigger applicable provisions of federal and Washington State laws and regulations related to the Cultural Values, that the Tribe’s Historic Preservation Officer (“THPO”) will be consulted, on a timely basis, for input into the planning process. The Parties agree to follow the guidance set out in the the Department of Archeology and Historic Preservation (“DAHP”) publication “Washington State Standards for Cultural Resources Reporting,” as updated from time-to-time, in the planning process.

- o Purpose: 3.1. The purpose of this Easement is to preserve and protect in perpetuity the Conservation Values of the Property described in the above Recitals, and to prevent any use of, or activity on, the Property that will significantly impair or interfere with the Conservation Values (the “Purpose”). More specifically, the primary purpose of this Easement is to ensure that the Property remains available for agricultural use by preserving and protecting its agricultural soils and agricultural viability and productivity, as well as its scenic and open space characteristics. To the extent that the protection of Cultural Values is consistent with maintaining the opportunity for agricultural

**Commented [AD1]:** Ultimately, grant funding requirements/restrictions and IRS requirements/restrictions often limit what can currently be done to include cultural values in the protections/coverage of a conservation easement.

**Commented [AD2]:** Note that these examples are not put forth as the “right way” to incorporate cultural values in a conservation easement, but only as examples and to hopefully generate discussion and ideas regarding their effectiveness and shortcomings/drawbacks, and to ultimately lead to ideas for other/better approaches for inclusion.

**Commented [AD3]:** Perhaps a different word than “specified” here? “represented”? “elevated”?

**Commented [AD4]:** So in this easement, “cultural values” are part of the “Conservation Values” protected under the easement.

activity and the protection of the Habitat Values, it is within the Purpose of this Easement to protect such Cultural Values by preventing any use of the Protected Property that will impair or interfere with its Cultural Values, as further provided herein.

- Permitted Uses:
  - 5.2. Compliance with Regulatory Requirements. All reserved and permitted uses and activities under this Easement shall be carried out in a manner that complies with all applicable federal, state, and local laws, regulations and requirements, including without limitation the permitting requirements of DAHP (Washington Administrative Code 25-48-060, RCW 27.44 and RCW 27.53) regardless of any conflicting provisions in this Easement.
  - 5.4. Maintenance and Construction of Buildings and Other Improvements. Grantor and Grantee understand that the Property may contain cultural resources of importance to the Jamestown S' Klallam Tribe or other indigenous peoples, and acknowledge that the permitted uses and activities under this Section 5.4 are subject to the permitting requirements of the DAHP (Washington Administrative Code 25-48-060, RCW 27.44 and RCW 27.53) regardless of any conflicting provisions in this Easement. The Parties agree to follow the guidance set out in the DAHP publication "Washington State Standards for Cultural Resources Reporting," as updated from time-to-time, and that the THPO will be consulted, on a timely basis, for input in the planning process for construction and expansion of buildings and other improvements.
  - 5.4.2. Construction of New Improvements and Expansion of Existing Improvements Within the Building Envelope. So as to encourage the clustering of structures and other Improvements within a designated area, thereby both protecting the Conservation Values and ensuring much of the Property remains in undeveloped open space available for growing crops, except as otherwise expressly provided in this Section 5.5., all new Improvements must be located within the Building Envelope containing approximately 2.08 acres, as described and shown in **Exhibit B** (Site and Building Envelope Survey). Grantor may construct additional Improvements (or expand or enlarge existing Improvements) within the Building Envelope, including residential structures as otherwise permitted in this Section 5.5, provided that, for any new or expanded Impervious Surfaces in the Building Envelope over One Hundred Square Feet (100 s.f.), Grantor shall submit plans to Grantee in writing at least thirty (30) days before the intended action, and obtain approval from Grantee in accordance with the approval provisions of Section 7. All such activities shall also comply with the limitations on Improvements and Impervious Surfaces set forth in Section 6 below. In the event the Building Envelope is rendered

unusable in full or in part due to the potential presence of cultural resources, an area equal in size to the unusable portion of the Building Envelope may be established in a different area of the Property with approval of the Grantee in accordance with Section 7, and subject to the following requirements:

1. no more than two (2) separate areas of the Property may comprise the Building Envelope, and the Parties agree that the areas shall be as close together as possible while complying with the other requirements of this Section 5.4.;

2. the overall area(s) of the Building Envelope shall not exceed 2.08 acres in total and shall always remain subject (along with the rest of the Property) to the Impervious Surface limit in Section 6;

3. before any construction or placement of Improvements in the new Building Envelope area, the area being replaced shall be restored to its natural condition and – to the extent compatible with the cultural resources – be made and kept available for agricultural activity, including without limitation removal of any Improvements thereon;

4. a survey commissioned by Grantor shall be completed to show the location of the new Building Envelope area;

5. each Beneficiary consents in advance to the location of the new Building Envelope area;

6. in addition to ensuring compliance with all of the above requirements, Grantee shall, in determining whether to approve a particular location as a new Building Envelope area, ensure that impact on prime farmland soils is minimized and that construction or placement of Improvements in the new area otherwise has no greater impact on the Conservation Values than the area it would replace; and

7. once the new Building Envelope area has been determined via the above process, this Easement shall be amended to reflect said new Building Envelope, with such amendment complying in all respects with Section 13 below.

- Another conservation easement is not yet finalized as of this writing, but covers land less expected to have cultural resources directly on site – although resources being present is certainly possible (as with all lands in this place of traditional living and travels of the Tribe). The easement thus does not include the specificity of Dungeness Hub re: requirements and accommodations for cultural resources, but includes more general language intended to help ensure that current and future owners follow required practices, to wit from the easement’s Permitted Uses section:

- o **5.3 Cultural Resources.** The Parties understand that the Property may contain cultural resources of importance to the Jamestown S’Klallam Tribe or other

indigenous peoples, and acknowledge that the uses and activities permitted under Section 5 of this Easement are subject to the requirements of the Jamestown S'Klallam Tribe's Inadvertent Discovery Plan (as may be updated). In the event of discovery of cultural resources in the Building Envelope (as defined in Section 5.6) that impacts Grantor's ability to exercise reserved rights under this Easement, the Parties will work together to ensure ability of Grantor to exercise its reserved rights in a substantially similar manner elsewhere on the Property, provided such alternative exercise of rights shall not impact the Conservation Values.

- **5.6.2. Construction of New Improvements and Expansion of Existing Improvements Within the Building Envelope.** So as to encourage the clustering of residential uses and other structures within a designated area, thereby both protecting the Conservation Values and preventing conflicts between agriculture and forest habitat and residential uses, except as otherwise expressly provided in this Section 5.6., all new Improvements must be located within the building envelope containing two (2.00) acres, as described and shown in **Exhibit C** ("Building Envelope"). Grantor may construct additional Improvements (or expand or enlarge existing Improvements) within the Building Envelope, including residential structures as otherwise permitted in this Section 5.6, provided that any new or expanded Impervious Surfaces in the Building Envelope over Two Hundred Square Feet (200 s.f.) – including without limitation the Residence (as defined below in Section 5.6.3) – require Grantee's advance consent in accordance with the consent provisions of Section 7. All such activities shall also comply with the limitations on Improvements and Impervious Surfaces set forth in Section 6 below. In the event a discovery of cultural resources impacts Grantor's ability to exercise reserved rights under this Section 5.6.2, the Parties shall work together to ensure Grantor can exercise the reserved rights in a substantially similar manner elsewhere on the Property, provided, however, that any alternative exercise of reserved rights shall have the same or less impact on the Conservation Values.

**Commented [AD5]:** IRS is unlikely to approve this as may amount to a "floating" building envelope, but not an issue for a grant-funded CE as long as funders approve.

On another easement project in Pierce County, Washington (funded by the County and Washington State Conservation Commission – both of whom supported inclusion of cultural resource protections in the easement although it was primarily an agricultural conservation easement), it was my farm and forest landowner client who insisted on the easement both a) including cultural values in its protections, and b) laying the groundwork for access to the property for the Nisqually Indian Tribe related to such values. Although the Cultural Values were necessarily secondary to the funded conservation values (Ag and habitat), to wit:

- In the Recitals:
  - 1.4. The Protected Property also supports cultural values of the Nisqually Indian Tribe and other indigenous peoples native to the lands in and around the Protected Property, such as traditional activities, practices, and education,

and the protection, restoration, and sustainable use of natural resources important for such cultural uses, all of which are also of great importance to Grantor, Grantee, the people of Pierce County, and the people of the State of Washington (collectively, the “Cultural Values”). Such activities and practices include, but are not limited to, spiritual retreats and ceremonies, the gathering of vegetation and plant materials, such as cedar bark, for weaving, and the growing or harvesting of native camas.

- 1.11. Grantee is a publicly supported, tax-exempt non-profit organization, qualified under sections 501(c)(3) and 170(h) of the Internal Revenue Code, and is also a non-profit nature conservancy corporation authorized to acquire and hold conservation easement interests under RCW 64.04.130 and RCW 84.34.210. The Grantee has primary responsibility for management and enforcement of the terms of this Easement. Grantor, as owner of the Protected Property, has the right to protect and preserve the Agricultural Conservation Values, Habitat Values, and Cultural Values and desires and intends to transfer such rights to Grantee in perpetuity commencing on the date on which this Easement is first recorded in the public records of Pierce County (the “**Effective Date**”).
  - 1.12. The Parties intend that the Agricultural Conservation Values, Habitat Values, and Cultural Values be preserved and maintained in perpetuity by permitting only those land uses on the Protected Property that do not impair or interfere with the Agricultural Conservation Values, Habitat Values, or Cultural Values.
- The Purpose:
- 3.1. Purpose. The “Purpose” of this Easement is to protect the Agricultural Conservation Values and Habitat Values of the Protected Property forever and prevent any use of the Protected Property that will impair or interfere with a) its Agricultural Conservation Values, thereby maintaining the opportunity for agricultural activity upon the Protected Property pursuant to RCW 79A.15.130(1); or b) its Habitat Values. In the Forest Area, the Agricultural Conservation Values are of secondary importance to the Habitat Values. Outside the Forest Area, the Habitat Values are of secondary importance to the Agricultural Conservation Values. To the extent that the protection of Cultural Values is consistent with the protection of the Habitat Values and maintaining the opportunity for agricultural activity, it is within the Purpose of this Easement to protect such Cultural Values by preventing any use of the Protected Property that will impair or interfere with its Cultural Values, provided that the protection of Agricultural Conservation Values and Habitat Values shall remain primary over protection of the Cultural Values.
- Rights conveyed to Grantee:
- 4.1 Protection. Grantee shall have the right to identify, protect, preserve, maintain and conserve in perpetuity and to enhance, restore, or improve by mutual agreement with Grantor the Agricultural Conservation Values and/or

Habitat Values and/or Cultural Values of the Protected Property, as provided herein.

- Permitted Uses
  - o (within the Agricultural Use section) 5.2.5. Agricultural chemicals, including without limitation pesticides and herbicides, may be used on the Protected Property only in the amounts and with the frequency constituting the minimum necessary to accomplish reasonable agricultural objectives. The use of such chemicals shall be conducted in such a manner as to minimize the adverse effect on the Habitat Values and Cultural Values and to avoid any impairment of the natural ecosystem. Agricultural chemicals may be used in the Forest Area only in support of the Habitat Values.
  - o 5.4. Cultural Activities. Grantor may engage in, and allow others to engage in, cultural activities to the extent consistent with the Cultural Values, including but not limited to non-commercial cultural education and recreation, spiritual retreats, the gathering of vegetation and plant materials, such as cedar bark for weaving, and the growing and harvesting of native camas (“Cultural Activities”). All Cultural Activities conducted on the Protected Property shall be subject to the terms and conditions set forth under Section 6 below with respect to the Building Envelopes and carried out in compliance with the Purpose and terms of this Easement. Improvements (as such term is defined in Section 5.5.1) related to Cultural Activities are allowed within the Building Envelopes (as such term is defined in Section 6.6.2 below), provided such improvements are for non-industrial and non-commercial purposes (except as permitted under Section 6.4 below).
- Prohibited Uses
  - o **6.1. General.** Any use of, or activity on, the Protected Property inconsistent with the Purpose or other terms of the Easement is prohibited, and Grantor acknowledges and agrees that it will not conduct, engage in, or permit any such use or activity. Without limiting the generality of the foregoing, the following uses of, or activities on, the Protected Property are either: (a) inconsistent with the Agricultural Conservation Values, Habitat Values and/or Cultural Values and Purpose of this Easement and prohibited herein or (b) limited as provided herein to make such uses or activities consistent with the Agricultural Conservation Values, Habitat Values, Cultural Values, and Purpose of this Easement.
  - o **6.2. No Conversion to Incompatible Uses.** Grantor shall not convert the Protected Property to industrial or suburban/residential development or to any other use that is incompatible with the Habitat Values, maintaining the opportunity for agricultural activity, or the Cultural Values on the Protected Property.
  - o (within “Additional Improvements Within the Building Envelopes”) 6.6.2.2. Where a proposed new, renovated, expanded or enlarged Improvement is for

non-agricultural purposes and is not a Residential Dwelling Unit (as defined below ) – for instance an Improvement in support of the Cultural Values or for education purposes (e.g. an interpretive center) – prior written consent is given by Grantee for such Improvements as provided for in Section 7, which consent shall not be withheld provided all such proposed Improvements are confirmed to be located completely within the Building Envelopes and otherwise comply with this Easement.

- (within “Limitations on Transfers”) 6.13.3. The following acts and events shall require notice to, but shall not require the consent of, Grantee: i) Any mortgage, deed of trust, real estate contract, or similar document providing security for an indebtedness of Grantor, provided such security instrument shall be subject and automatically subordinate to this Easement; ii) any gift, bargain, sale or devise of fee simple absolute title to the Protected Property, provided that such conveyance is of the entire Protected Property as required in Section 6.3; and iii) a license or other use agreement permitting use of the Protected Property for activities and purposes which are permitted under this Easement in support of the Cultural Values.

*end*