Coalition of Oregon Land Trusts Law Forum
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Nancy Duhnkrack: COLT pro-bono program manager
Wendy Gerlach: COLT pro-bono team member
The Oregon CE Statute

ORS 271.715
“Conservation easement” means a nonpossessory interest of a holder in real property imposing limitations or affirmative obligations the purposes of which include* retaining or protecting natural, scenic, or open space values of real property, ensuring its availability for agricultural, forest, recreational, or open space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical**, architectural, archaeological, or cultural*** aspects of real property.

• *Not “limited to”
• ** Preserving historical aspects of real property includes traditional cultural use aspects.
• *** Preserving cultural use of real property includes traditional cultural use aspects.
Oregon Statutory Authority cont.

- **ORS 271.745**: states that a conservation easement is valid even though it “imposes affirmative obligations upon the owner of an interest in the burdened property or upon the holder.”

- This supports the position that a valid conservation easement can include an affirmative duty of the landowner to provide access in support of traditional, cultural, historic, and recreation uses.
Role of Land Trust or Tribes

Tribe can be:
• Holder of CE
• Co-holder of CE
• Beneficiary of CE

This discussion focuses on the situation where land trust holds a CE on a third (non-tribal) person’s land.
Third Party Beneficiary?

ORS 271.715: “‘Third-party right of enforcement’ means a right provided in a conservation easement or highway scenic preservation easement to enforce any of its terms granted to a governmental body, charitable corporation, charitable association or charitable trust, which, although eligible to be a holder, is not a holder.”

• Note that this does not name a tribal government specifically, but tribes are recognized sovereign nations, so there’s a strong argument that tribes are included.
Defining cultural resources (for access)

Traditional social and cultural activities:

- Social gatherings and ceremonies
- Spiritual occasions and observances
- First foods gathering
- Hunting and fishing
- Archeological sites
- Other
Involving local tribal peoples in project

• Consult with local tribes about desired tribal access including uses, management of access and gathering (tribal management of access by its members), introductions and interactions with landowner.

• Rely on tribes for information about specific first foods, hunting & fishing, cultural and sacred sites.

• Confidentiality and cultural sensitivity.

• Support tribes over time in engagement with landowner, if requested.
Conservation Easement Language Examples

• Specify tribal-related resources in conservation values.
• Very simple example:

“The Property’s cultural Conservation Values are preserved by allowing local indigenous peoples to continue to use the Property, which is in an area that is their prehistoric home, for hunting, gathering, and ceremonial purposes.”
Conservation Easement Language Examples

RECITAL LANGUAGE:

“Tribal Access Area: This Easement seeks to provide use compatible with other Conservation Values of the Easement Property by indigenous peoples with historic connections to the region in which the Easement Property is located [which peoples shall be considered to consist of, for purposes of this Easement, members of the ________ tribe, ____________ tribal nation, ____________ band, including dispersed members] ‘Tribal Persons.’”

CONSERVATION VALUES OVERVIEW LANGUAGE:

“The Easement Property, in its current state, is a relatively undeveloped area that possesses (i) significant natural resources (plant and wildlife habitat), (ii) important open space (including farmland, forestland, and scenic), (iii) cultural (including indigenous cultural and spiritual), and (iv) public recreation and education values.”
Specific Conservation Values Language:

Specific Conservation Values Include:

“Cultural importance to indigenous peoples who have used, visited, and occupied the Easement Property since time immemorial for cultural, hunting, gathering, and spiritual purposes, including the value of maintaining healthy and sustainable native plant and animal populations as they relate to such indigenous uses (“Indigenous Values”). Plants and animals of particular value for indigenous peoples include ____________. Locations of indigenous cultural, anthropological, and spiritual value, as well as locations of traditional gathering grounds, are shown on Exhibit B-__.”

Remember to include tribal access related provisions in other parts of the CE (in addition to conservation value and access provisions):

• easement maps.
• baseline report.
• management plan.
Consider specific types of use

Types of use and key provisions:

• Specific uses permitted (ceremonies, planting, harvesting, fire?).

• Any surface alterations and vegetation management permitted?

• Limitations: number of people, seasonal, location on property.

• Kinds of access—pedestrian, vehicular, etc.

• Liability protections....
Tribal access specific language


Nothing contained in this Easement shall grant to the public a right to enter upon or to use the Easement Property where no such right existed in the public prior to the execution of this Easement. Notwithstanding the foregoing, the Conservation Values protected by this Easement include Indigenous Values as described in Recital B above, and this Easement grants to indigenous peoples with historic connections to the Easement Property, including members of the [__________ Tribe] [and dispersed descendants of other tribes and bands traditionally connected to the Easement Property region], the right of access to the Easement Property [limited to zones of Indigenous Values/traditional cultural/spiritual/gathering/hunting zones as specified in Exhibit B-____] for purposes including cultural, hunting, gathering, and spiritual uses, subject to the overall Conservation Values and as further specified in and limited by the Management Plan.

Only plant and animal material may be removed in connection with such purposes, subject to the terms of this Easement and to applicable laws relating to protected plant or animal species. Removal of mineral or archeological material is prohibited.

Any removal of material shall be for personal or community use and shall not be for sale or other commercial use.

[Access rights pursuant to this Section shall only be exercisable upon 10 day’s prior written notice to Landowner and Landowner’s written consent, which shall not be unreasonably withheld.]

Access and use rights shall not include (i) access more than one hour after sundown or one hour prior to sunrise, (ii) groups of over 20 people, (iii) igniting or using fire, or (iv) motorized access] without the prior written consent of Landowner at Landowner’s sole discretion. Access rights are subject to and shall not interfere with Landowner’s customary uses of Easement Property and any persons accessing Easement Property pursuant to this paragraph must leave all gates and other material (excluding plant and animal material subject to gathering rights) as found.

The access rights granted pursuant to this paragraph shall be in addition to, and not limiting of, treaty and other rights of indigenous peoples.
Tribal access language (cont.)

“The Management Plan shall detail specific activities allowed in connection with any public or tribal access, identify plants of indigenous cultural value (as described in the Baseline Report), and necessary management and access practices to sustain those uses and Conservation Values.

Access-based uses could include:
- Gathering of fruits, berries, mushrooms, tubers, bulbs, roots, and other foods.
- Basketmaking and gathering of needed wood and grass materials.
- Medicinal gathering.
- Seed gathering.
- Education about and engaging in cultural, spiritual, and other traditional practices.
- Visiting spiritual, historic, and burial sites.
- Fishing.
- Game hunting.

The Management Plan shall also state applicable limits on such practices such as ‘no more than ___ of each species may be removed per person and no more than ___ of material in total from the Property, in any 24-hour period.’”
Recreational Immunity

- ORS 105.682: “an owner of land is not liable in contract or tort for any personal injury, death or property damage that arises out of the use of the land for recreational purposes, gardening, woodcutting or the harvest of special forest products when the owner of land either directly or indirectly permits any person to use the land for recreational purposes, gardening, woodcutting or the harvest of special forest products.”

- Applies to members of the general public; generally applies if no fee charged for accessing land.

- Consider potential insurance implications nonetheless.

- *Overarching issue: can a CE provide access only for a subset of persons?*
Review of issues to keep in mind:

• Conservation values: one use generally should not impair another.
• Consider clearly stated heirarchy of values.
• Baseline might include status of first foods plants; other tribal resource information.
• Management plan could include tribal-related values and resources.
• Commercial uses usually not permitted, including commercial use of gathered materials.
• Be specific about what tribal groups may access (all tribal members, certain tribes or bands, how tribal members engage with tribal government in exercising access rights).
• Clarity about landowner space (building area envelopes) and possible notification of landowner.
• Possible seasonal restrictions.
• Hunting?
• Trash, noise, off road use? Indemnification or clean up obligation?
Other options: alternatives to CE

• A CE is perpetual: would a separate, amendable access agreement better serve the purposes of tribes and others (landowner, CE holder, etc.)?

• Cultural Access easements:
  • A separate agreement between landowner and tribe; not integrated into CE.
  • Advantages of tribe negotiating directly with landowner
  • Shorter and more directly focused on tribal access.
  • Not required to be perpetual.