RCO Conservation Easement Requirements

## Introductory Key

🗹=**Required** provisions

🞎=Provisions to **strongly consider**

“Arial typeface”=Sample language

*[Italicized/bracketed language]*=text choices, which may or may not apply

## Recitals: Background Information

1. Separately identify the portion of the Property that contains the habitat or conservation value that will be protected, or protected and restored or enhanced, by the conservation Easement.

The portion of the Property containing conservation values and protected by this Easement is described in Exhibit \_\_ (description) and shown in Exhibit \_\_ (site map), which are attached and incorporated into this Easement by this reference.

1. Note conservation values provided by the Property.

The Conservation Zone provides habitat and other natural values (collectively, the "Conservation Values"), as more particularly described in Recitals \_\_ and \_\_ below.

1. Refer to the baseline documentation

The specific conservation values of the Property are documented in an inventory of relevant features of the Property, dated \_\_\_\_\_\_\_\_\_\_\_\_ *[on file at the offices of Grantee][attached hereto as Exhibit \_\_\_]* and incorporated by this reference (“Baseline Documentation”), which consists of reports, maps, photographs, and other documentation that the parties agree provide, collectively, an accurate representation of the Property at the time of conservation easement acquisition, and which is intended to serve as an objective information baseline for monitoring compliance with the terms of this grant.

## Conveyance and Consideration

1. Track statutory language necessary to convey real property interests in Washington State.
2. Identify term of conservation easement (e.g., thirty-year-term or in perpetuity).

## Purpose

1. Identify habitat protection as one of the specific purposes of the conservation easement.

*Purpose*. The purpose of this Easement is to assure that the Conservation Zone will be retained predominantly in its natural condition *[as "a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem,"]*, and to prevent any use of, or activity on, the Conservation Zone that will *[significantly]* impair or interfere with the Conservation Values of the Conservation Zone (the "Purpose"). This Purpose includes the protection of habitat as defined in Recital I.\_\_ of this Easement. Grantor intends that this Easement will confine the use of, or activity on, the Conservation Zone to such uses and activities that are consistent with this Purpose. *[Except as specifically provided for in Section \_\_, t][T]*his Easement shall not be construed as affording to the general public physical access to the Property.

1. Identify, as appropriate, any plans to monitor, protect, maintain, restore or enhance the Conservation Zone.

*Stewardship Plan*. To further this Purpose, Grantee may develop a plan for stewardship of the Conservation Zone (the "Stewardship Plan") [*which is attached as Exhibit \_\_ and incorporated into this Easement by this reference*]. The Stewardship Plan [*is intended to describe*][*describes*] activities to monitor, protect, maintain, and *[restore] [enhance]* the original and natural conditions of the Conservation Zone.

## Rights Conveyed to Grantee

1. List the rights that are being conveyed to the organization holding the conservation easement (Grantee).

To accomplish the purpose of this Easement the following rights are conveyed to Grantee by this Easement:

1. Provide right of organization to preserve conservation values of the property.

*[Identification] Protection [Restoration] [Enhancement]*. To *[identify,]* preserve and protect *[in perpetuity]* and to *[restore] [enhance]* *[maintain] [and manage]* the Conservation Values of the Conservation Zone.

1. Provide right of organization to enter the land for inspection and enforcement, and where applicable, environmental monitoring, maintenance, restoration, and enhancement.

### Access

1. To enter the Property *[annually]*, at a reasonable time and upon prior written notice to Grantor, for the purpose of making a general inspection of the Conservation Zone to monitor compliance with this Easement.
2. To enter the Property *[, or allow Grantee's invitees or licensees to enter the Property,]* at reasonable times and upon prior written notice to Grantor, for the purpose of *[restoring] [enhancing] [maintaining] [managing]* the Conservation Values of the Conservation Zone through implementation of the Stewardship Plan.
3. To enter the Property at such other times as are necessary if Grantee has a reason to believe that a violation of the Easement is occurring or has occurred, for the purpose of mitigating or terminating the violation and otherwise enforcing the provisions of this Easement. Such entry shall be upon prior reasonable notice to Grantor, and Grantee shall not in any case unreasonably interfere with Grantor's use and quiet enjoyment of the Property.
4. Provide right to injunction to prevent any activity on or use of the property that is inconsistent with the purpose of the conservation easement and to require restoration of the land to condition at time of the grant of easement.

*Injunction and Restoration*. To enjoin any use of, or activity on, the Conservation Zone that is inconsistent with the Purpose of this Easement, including trespasses by members of the public, and to require *[or undertake]* the restoration of such areas or features of the Conservation Zone as may be damaged by uses or activities inconsistent with the provisions of this Easement, all in accordance with Section\_\_.

1. Provide right of organization to enforce terms of the conservation easement.

To enforce the terms of this Easement, consistent with Section \_\_.

## Permitted Uses and Activities

1. Tailor "permitted uses and activities" to the land, the parties, the reasons for protection, and needs of the landowner to enjoy the property. Permitted uses might include modification of existing structures, construction of roads or structures in specified areas, access by grantor for passive recreation, agricultural or timber harvesting activities in specified areas or under specified conditions.
2. Include ability to undertake stewardship activities on the property.

Stewardship Activities. The undertaking of any activity pursuant to any Stewardship Plan covering the Conservation Zone is consistent with the purpose of this Easement.

## Prohibited Uses and Activities

1. Tailor "prohibited uses and activities" to the land, the parties, the reasons for protection, and needs of the landowner to enjoy the property. Prohibited uses might include agricultural or timber harvesting activities in specified areas, land subdivision, construction of roads or structures, hunting, or mining.

## Notice and Approval

1. Require advance notice to organization if landowner plans to undertake certain permitted actions that could be inconsistent with the purpose of the conservation easement.
2. Provide right of organization to approve, deny or condition proposed actions of landowner.
3. Provide addresses of landowner and organization for required notices under the easement.

## Dispute Resolution and

1. Provide right of organization to give notice of violations to landowner, with demand for repair or restoration.

## Grantee's Remedies

Notice of Violation, Corrective Action. If Grantee determines that Grantor is in violation of the terms of this Easement or that a violation is threatened, Grantee shall give written notice to Grantor of such violation and demand corrective action sufficient to cure the violation and, where the violation involves injury to the Conservation Zone resulting from any use or activity inconsistent with the Purpose of this Easement, to restore the portion of the Conservation Zone so injured to its prior condition in accordance with a plan approved by Grantee.

*Grantor's Failure to Respond*. Grantee may bring an action as provided in subsection\_\_\_ if Grantor:

1. Fails to cure the violation within thirty (30) days after receipt of a notice of violation from Grantee; or
2. Under circumstances where the violation cannot reasonably be cured within a thirty (30) day period, fails to begin curing the violation within the thirty (30) day period and fails to continue diligently to cure such violation until finally cured.

*Grantee's Action.*

1. *Injunctive Relief*. Grantee may bring an action at law or in equity in a court having jurisdiction to enforce the terms of this Easement:
	1. To enjoin the violation, *ex parte* as necessary, by temporary or permanent injunction; and
	2. To require the restoration of the Property to the condition that existed prior to any such injury.
2. *Damages.* Grantee shall be entitled to recover damages for violation of the terms of this Easement or injury to any Conservation Values protected by this Easement, including, without limitation, damages for the loss of environmental values. Without limiting Grantor's liability in any way, Grantee [*,in its sole discretion, may*][*shall first*] apply any damages recovered to the cost of undertaking corrective or restoration action on the Conservation Zone.

*Emergency Enforcement*. If Grantee, in its sole discretion, determines that circumstances require immediate action to prevent or mitigate significant damage to the Conservation Values of the Conservation Zone, Grantee may pursue its remedies under this section without prior notice to Grantor or without waiting for the period provided for cure to expire.

*Scope of Relief*. Grantee's rights under this section apply equally in the event of either actual or threatened violations of the terms of this Easement. Grantor agrees that Grantee's remedies at law for any violation of the terms of this Easement are inadequate and that Grantee shall be entitled to the injunctive relief described in this section, both prohibitive and mandatory, in addition to such other relief to which Grantee may be entitled, including specific performance of the terms of this Easement, without the necessity of providing either actual damages or the inadequacy of otherwise available legal remedies. Grantee's remedies described in this section shall be cumulative and shall be in addition to all remedies now or hereafter existing at law or in equity.

1. Consider providing that costs of enforcing the terms of the easement are to be borne by landowner unless landowner prevails in court.

In the event Grantee must enforce the terms of this Easement, the costs of restoration necessitated by acts or omissions of Grantor, its agents, employees, contractors, family members, invitees or licensees in violation of the terms of this Easement and Grantee's reasonable enforcement expenses, including attorneys' and consultants' fees, shall be borne by Grantor or those of its personal representatives, heirs, successors, or assigns, against whom a judgment is entered. *[In the event that Grantee secures redress for an Easement violation without initiating or completing a judicial proceeding, the costs of such restoration and Grantee's reasonable expenses shall be borne by Grantor and those of its personal representatives, heirs, successors, or assigns who are otherwise determined to be responsible for the unauthorized use or activity.] [If Grantor ultimately prevails in any judicial proceeding initiated by Grantee to enforce the terms of this Easement, each party shall bear its own costs.]*

1. Consider providing that enforcement of the terms of the easement is at discretion of organization.

Forbearance by Grantee to exercise its rights under this Easement in the event of any breach of any terms of this Easement by Grantor, its agents, employees, contractors, family members, invitees or licensees shall not be deemed or construed to be a waiver by Grantee of such term of any of Grantee's rights under this Easement. No delay or omission by Grantee in the exercise of any right or remedy upon any breach by Grantor shall impair such right or remedy or be construed as a waiver.

1. Consider providing that landowner waive claims and defenses, based upon waiver, laches, estoppel, or prescription.

Grantor acknowledges that it has carefully reviewed this Easement and has consulted with and been advised by counsel of its terms and requirements. In full knowledge of the provisions of this Easement, Grantor hereby waives any claim or defense it may have against Grantee or its successors or assigns under or pertaining to this Easement based upon waiver, laches, estoppel, or prescription*.*

1. Strongly consider providing that organization cannot bring enforcement action against landowner for injury to the property resulting from circumstances beyond landowner's control.

Nothing contained in this Easement shall be construed to entitle Grantee to bring any action against Grantor to abate, correct, or restore any condition on the Conservation Zone or to recover damages for any injury to or change in the Conservation Zone resulting from causes beyond Grantor's control, including, without limitation, natural changes, fire, flood, storm, or earth movement, or from acts of trespassers, that Grantor could not reasonably have anticipated or prevented or from any prudent action taken by Grantor under emergency conditions to prevent, abate, or mitigate significant injury to the Conservation Zone resulting from such causes. *[In the event the terms of this Easement are violated by acts of trespassers that Grantors could not reasonably have anticipated or prevented, Grantor agrees, at Grantee's option, to join in any suit, to assign its right of action to Grantee, or to appoint Grantee its attorney in fact, for the purpose of pursuing enforcement action against the responsible parties.]*

## Costs, Liabilities and Insurance, Taxes

1. Consider providing that landowner remains responsible for property and for maintaining adequate comprehensive general liability insurance coverage.

## Environmental Compliance, and Indemnification

1. Consider providing that landowner still pays property taxes, reduced or otherwise.
2. Require landowner to represent and warrant that no toxic or hazardous substances are found on the property.

Grantor represents and warrants that, after reasonable investigation and to the best of Grantor's knowledge.

1. Grantor and the Property are in compliance with all federal, state, and local laws, regulations, and requirements, applicable to the Property and its use, including without limitation all federal, state, and local environmental laws, regulations, and requirements;
2. There has been no release, dumping, burying, abandonment or migration from off-site onto the Property of any substances, materials, or wastes that are hazardous, toxic, dangerous, or harmful or are designated as, or contain components that are, or are designated as, hazardous, toxic, dangerous, or harmful and/or that are subject to regulation as hazardous, toxic, dangerous, or harmful by any federal, state or local law, regulation, statute, or ordinance;
3. There is no pending or threatened litigation affecting the Property or any portion of the Property that will materially impair the Conservation Values of the Conservation Zone. No civil or criminal proceedings have been instigated or are pending against Grantor or its predecessors by government agencies or third parties arising out of alleged violations of environmental laws, and neither Grantor nor its predecessors in interest have received any notices of violation, penalties, claims, demand letters, or other notifications relating to a breach of environmental laws.
4. Require landowner to be responsible for environmental cleanup on the property unless caused through the activities of the organization or agency.

*Remediation*. If, at any time, there occurs, or has occurred, a release in, on, or about the Property of any substance now or hereafter defined, listed, or otherwise classified pursuant to any federal, state, or local law, regulation, or requirement as hazardous, toxic or dangerous to the air, water or soil, or in any way harmful or threatening to human health or environment, Grantor agrees to take all steps necessary to assure its containment and remediation, including any cleanup that may be required, unless the release was caused by Grantee, in which case Grantee should be responsible for remediation.

1. Require landowner to remain responsible for losses, personal injuries, environmental concerns, and other damages unless caused by fault or negligence of the organization.

Grantor hereby agrees to release and hold harmless, indemnify, and defend Grantee and its members, directors, officers, employees, agents, and contractors and the personal representatives, heirs, successors, and assigns of each of them (collectively "Indemnified Parties") from and against all liabilities, penalties, costs, losses, damages, expenses, causes of action, claims, demands, or judgments, including, without limitation, reasonable attorneys' and consultants' fees, arising from or in any way connected with:

1. Injury to or the death of any person, or physical damage to any property, resulting from any act, omission, condition, or other matter related to or occurring on or about the Property that is not a consequence of any activity of any of the Indemnified Parties undertaken under the rights granted to Grantee under this Easement;
2. Violations or alleged violations of, or other failure to comply with, any federal, state or local environmental law or regulation relating to pollutants or hazardous, toxic or dangerous substances or materials, including, without limitation, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 U.S.C. 9601 *et seq.*) and the Model Toxics Control Act (MTCA) (Chapter 70.105D Revised Code of Washington), by any person other than any of the Indemnified Parties, in any way affecting, involving, or relating to the Property, unless such violations or alleged violations are due to the acts or omissions of any of the Indemnified Parties on the Property;
3. The presence or release in, on, from, or about the Property, at any time, of any substance now or hereafter defined, listed, or otherwise classified pursuant to any federal, state, or local law, regulation, or requirement of hazardous, toxic or dangerous to the air, water, or soil, or in any way harmful or threatening to human health or the environment, unless caused solely by any of the Indemnified Parties;
4. The obligations, covenants, representations, and warranties specified in this section.

## Extinguishment, Valuation and Subsequent Transfer

1. Provide that conservation easement may be extinguished in whole or in part before expiration of its term only if: (a) the organization determines that the purpose of the conservation easement is no longer practical to accomplish and the parties agree to extinguish the easement or release a portion of the conservation zone from the conservation easement; (b) a court determines that the purpose of the conservation easement is no longer possible to accomplish; or (c) the property is taken by eminent domain. Refer to the Assignment of Rights.

*Extinguishment*. This Easement may be terminated or extinguished, whether in whole or in part, before expiration of the term of the Easement only under one or more of the following circumstances:

1. The parties jointly agree to extinguish this Easement, or release a portion of the Conservation Zone from the terms of this Easement, upon a determination by Grantee in its discretion that circumstances have rendered the Purpose of this Easement impractical to achieve. Grantee's determination shall be in accordance with the provisions of the Assignment of Rights referenced in Section \_\_\_.
2. Upon petition by one or all of the parties, a court having jurisdiction over this Easement determines by judicial proceedings that circumstances have rendered the Purpose of this Easement impossible to achieve.
3. All or any of the Conservation Zone is taken by exercise of the power of eminent domain or acquired in lieu of condemnation, whether by public, corporate, or other authority. *[Grantor and Grantee shall act jointly to recover the full value of the interest in the Conservation Zone subject to the taking or in lieu purchase and all direct or incidental damages resulting from the taking or in lieu purchase. All expenses reasonably incurred by Grantor and Grantee in connection with the taking or in lieu purchase shall be paid out of the amount received.]*

Grantor and Grantee agree that the proceeds to which Grantee shall be entitled, after the satisfaction of prior claims, from any sale, exchange, or involuntary conversion of all or any portion of the Conservation Zone subsequent to such termination or extinguishment, shall be determined, unless otherwise provided by Washington law at the time, in accordance with Section \_\_ of this Easement.

1. Specify how to determine the fair market value of the real property interest held by the organization.

This Easement constitutes a real property interest immediately vested in Grantee, which, for the purpose of Section \_\_ of this Easement, the parties stipulate to have a fair market value determined by *[multiplying the fair market value of the Property unencumbered by the Easement (minus any increase in the value after the effective date of this Easement attributable to improvements) by the ratio of the purchase price for the Easement to the fair market value of the Property, without deduction for the purchase price for the Easement, as of the effective date of this Easement]*.

1. Require landowner to reference conservation easement in subsequent deeds and notify organization of sale or transfer and name of prospective transferee (but landowner's failure to do so must not impair the validity of the conservation easement or limit its enforceability in any way).

*Subsequent Transfer*. Grantor agrees to:

1. Incorporate the terms of this Easement by reference in any deed or other legal instrument by which it divests itself of any interest in all or a portion of the Property, including, without limitation, a leasehold interest;
2. Describe this Easement in and append it to any executory contract for the transfer of any interest in the Property;
3. Give written notice to Grantee of the transfer of any interest in all or a portion of the Property no later than forty-five (45) days before the date of such transfer. Such notice to Grantee shall include the name, address, and telephone number of the prospective transferee or the prospective transferee's representative.

The failure of Grantor to perform any act required by this subsection shall not impair the validity of this Easement or limit its enforceability in any way.

## Easement Amendment

1. Consider allowing for amendment of the conservation easement, provided that the amendment does not affect the qualification of the conservation easement or the status of the organization or agency under applicable laws, is consistent with the original purpose of the conservation easement and does not shorten its duration, and is in accordance with the Assignment of Rights.

If circumstances arise under which an amendment to or modification of this Easement would be appropriate, Grantor and Grantee are free to jointly amend this Easement; *provided* that no amendment shall be allowed that will affect the qualification of this Easement or the status of Grantee under any applicable laws, including without limitation Chapter 64.04.130, Chapter 84.34 Revised Code of Washington *[,or Section 170(h) of the Internal Revenue Code of 1986, as amended]* (or any successor provision((s)) then applicable). Any such amendment shall be consistent with the original Purpose of this Easement and shall not shorten its duration, shall be in accordance with the provisions of the Assignment of Rights referenced in Section \_\_\_, and shall be recorded in the official records of \_\_\_\_\_\_\_\_\_\_ County, Washington, and any other jurisdiction in which such recording is required.

## Assignment and Succession

1. Provide right of organization to assign (transfer) easement to another organization or entity eligible under the RCO, which also *qualifies* under Washington law [and Internal Revenue Service regulations], in accordance with the Assignment of Rights.

*Assignment*. This Easement is transferable, but Grantee may assign its rights and obligations under this Easement only to an organization that is authorized to acquire and hold conservation easements under Chapter 64.04.130 or Chapter 84.34.250 Revised Code of Washington (or any successor provision((s)) then applicable) *[and a qualified organization at the time of transfer under Section 170(h) of the Internal Revenue Code of 1986, as amended (or any successor provision then applicable), and the applicable regulations promulgated there* under] and in accordance with the provisions of the Assignment of Rights referenced in Section \_\_\_. As a condition of such transfer, Grantee shall require that the transferee exercise its rights under the assignment consistent with the Purpose of this Easement. Grantee shall notify Grantor in writing, at Grantor's last known address, in advance of such assignment. The failure of Grantee to give such notice shall not affect the validity of such assignment nor shall it impair the validity of this Easement or limit its enforceability in any way.

1. Provide for assignment of certain rights in the conservation easement to the State of Washington through the Interagency Committee for Outdoor Recreation.

Grantor hereby acknowledges its authorization and approval of the assignment of certain rights in this Easement to the State of Washington through the Interagency Committee for Outdoor Recreation, which rights shall be co-held by Grantee and the State of Washington through the Recreation and Conservation Office. This Assignment of Rights shall be substantially in the form attached to this Easement as Exhibit \_\_.

## Recordation

1. Require that the organization or agency record the conservation easement instrument. (Recordation is the only way to put the world at large on constructive notice of the conservation easement.)

## Subordination

1. Require consent by mortgage holders, owners of easements, lease holders, and other lien holders necessary to "bind" those parties to the terms of the conservation easement.

## General Provisions

1. Provide that interpretation and performance of the conservation easement is governed by the laws of the State of Washington.
2. Provide for liberal construction in favor of the grant of the conservation easement to effect the purpose of the conservation easement.
3. Provide that conservation easement terms are binding upon parties and their successors and assigns.
4. Require execution and acknowledgment by landowner and organization or agency.