Conservation Easement Amendment Policy & Procedure

Approved by Board of Directors March 26, 2020

The following policy and procedures are adapted from "Amending Conservation Easements: Evolving Practices and Legal Principles," Land Trust Alliance, 2nd edition 2017. The full text of that document should be reviewed before amending easements.

AMENDMENT PHILOSOPHY. Conservation easements are written to last in perpetuity. As a charitable organization, chartered under state law, and as a federally tax-exempt nonprofit entity, the McKenzie River Trust (MRT) has legal and ethical responsibilities to ensure perpetual protection of our easements. When MRT accepts a perpetual conservation easement, we promise the easement grantor, our board and staff, funding sources and the public that we will uphold the easement in perpetuity.

Any change to any conservation easement should be approached with great caution and careful scrutiny. An amendment request may be considered, such as to address mutual errors, add acreage, clarify or add restrictions, improve enforceability, and remove reserved rights, however, any amendment should only change the easement to enhance its protection or at, at a minimum, have a neutral effect on the protected conservation values.

AMENDMENT PRINCIPLES. *A conservation easement amendment should meet all of the following principles and not be more permissive than these Principles allow:*

1. Clearly serve the public interest and be consistent with MRT's mission.
2. Comply with all applicable federal, state and local laws.
3. Not jeopardize MRT's tax-exempt status or status as a charitable organization under federal or state law.
4. Not result in private inurement or confer impermissible private benefit.
5. Comply with MRT's conflict of interest policy.
6. Be consistent with the conservation purpose(s) and intent of the easement.
7. Be consistent with the documented intent of the donor, grantor and any direct funding source.
8. Have a net beneficial or neutral effect on the relevant conservation values protected by the easement.
9. Include current legal requirements and monitoring procedures.

POLICY

If a proposed amendment of a conservation easement meets the Amendment Principles set forth above, is recommended by MRT staff after the screening process described below, is approved by a majority vote of the MRT board directors, and approved by any other required parties, the amendment may be implemented.

ALTERNATIVES TO AMENDMENTS.

Discretionary Approval - if a discretionary approval provision is in the original easement MRT may approve, under certain conditions, activities that are restricted or not specifically addressed by the easement without amending the easement. Caution should be exercised so that such approvals do not have the effect of encouraging a proliferation of approval requests for new uses, many of which may be unacceptable.

Interpretation Letter - MRT may write an interpretation letter to a landowner responding to a question about whether particular uses or activities would be allowed on land encumbered by an easement.

Discretionary Waiver - a discretionary waiver refers to MRT's ability to choose not to enforce against technical easement violations. This approach may be used to address minor, technical and/or relatively short-term violations of an easement that do not impact the purposes or conservation values of the easement, do not involve private benefit or private inurement, and otherwise comply with the law.

CORRECTIVE DEEDS

Modifications that merely correct mutual mistakes in the original easement can be recorded as "corrective deeds" or "corrective conservation easements" rather than "amendments." These include corrections of minor errors and oversights mutually acknowledged by the grantor and MRT. All corrections should be consistent with the Amendment Principles and the MRT's amendment policy and procedures. An advantage to using the term "corrective deed" or "corrective conservation easement" as opposed to "amendment" is the title; it acknowledges a correction of an error, rather than a substantive change in the easement's provisions or intentions of the original parties to the easement.

INITIATING THE PROPOSED AMENDMENT

The initial request. Usually the landowner initiates an amendment request, but MRT may also do so, for example to revise archaic language in older easements. In such circumstances, the amendment process may vary because MRT is seeking landowner approval. Regardless, all provisions of this amendment policy must be upheld.

Discussion and negotiation. Usually, there's a "soft start" to amendment requests. A landowner may call to discuss the desired change informally. This conversation can help MRT understand what easement modifications may be requested. In some cases, techniques other than amendment may better address the problem, and amendment can be avoided.

Process requirements. Early in the process, MRT should provide the amendment policy to the landowner. The policy informs the landowner about the criteria under which MRT

evaluates amendment requests. MRT can explain the practical details in the policy and procedures, how costs are handled, and MRT's process and anticipated timeline.

Landowner's legal counsel. Also, early in the process, MRT should advise the landowner, in writing, to obtain his or her own legal counsel.

The written request. The landowner (or MRT) must submit the formal amendment request in writing, including a map of the property affected (if applicable), the reasons the proposed amendment is warranted, and a deposit to cover the estimated costs to MRT, although deposits will not be required for amendments initiated by MRT.

Site visit. MRT will visit the site to identify the amendment's potential effects on the conservation values and purposes of the easement. Photos taken during the site visit can document the pre-amendment condition of the land, supplementing baseline and monitoring photos that may not be fully up to date or may not focus on the specific part of the easement land in question.

Title report. MRT will obtain a title report to understand if there are other interest holders, mortgages or liens on the property that went into effect subsequent to the original easement. These may need to be addressed or subordinated to validate the amendment or to prevent a possible foreclosure.

Evaluating the request. Once the proposal is clear, it should be evaluated against the Amendment Principles listed above. This evaluation may reveal the need for more due diligence and prompt other questions, including:

- How does the proposed amendment affect stewardship and administration of the easement?
- Will MRT members and the public understand the amendment or at least not find it objectionable? If not, can steps be taken to improve public perception?
- Does MRT understand the community ramifications of the amendment?
- Are there other parties that must or should be engaged in the process or that hold a legal interest in the easement?
- Are there any stakeholders that it would be wise to engage?
- Are there any conflicts of interest to be resolved?
- Are there any title issues to resolve?
- Are there property tax concerns?
- Is additional expert advice needed, such as from real estate appraisers, natural resource experts, fish and wildlife experts, or other professional advisors?
- Should baseline documentation be updated and who should pay the cost to do so?
- What information needs to be gathered to prepare Form 990 if the amendment is consummated?
- Will a Form 8283 need to be prepared?
- Should other questions be addressed for the particular amendment proposal?
- Is the easement amendment a high or low risk to MRT and are there actions that can move the amendment to a lower level of risk?

COMPLETING THE AMENDMENT

Recommendation and vote. The staff that reviewed the amendment request will make a recommendation to the board of directors where a majority vote will be required for the approval of the amendment.

Notification of the landowner. Whether MRT grants or denies an amendment request, it must thoroughly document the specific reasons for its action, couched in the context of the easement amendment review criteria set forth in these amendment policies and procedures. MRT must then clearly communicate to the landowner, in writing, the basis of the decision to grant or deny the amendment request. Landowners need to know that MRT's decision is based on applicable laws and its amendment policy and that the policy is applied fairly to all proposed amendments.

Baseline documentation. An amendment that changes reserved rights or any other easement terms may potentially affect the land's conservation values, as documented in the original easement baseline. If so, baseline documentation should be updated to reflect the condition of the property at the time of the amendment. An amendment that protects a new suite of conservation values should trigger an update to the baseline documentation. Any land added through the amendment needs baseline documentation.

Legal review and amendment drafting. MRT will prepare the formal amendment document. Legal review and participation in amendment decisions is critical throughout the amendment process. Legal review will encompass potential public hearings or review by public agencies if necessary or appropriate.

Signature and recording. The amendment document is signed by the landowner and MRT and recorded in the appropriate public land records after final title examination and any necessary steps are completed.

Form 8283. If the amendment qualifies for a tax deduction, MRT should request a copy of the appraisal and complete Form 8283 following normal land trust procedures.

Notification of outside parties. Notifying public entities or other parties about the completion of an amendment is at the discretion of MRT. IRS Form 990 effectively provides public notice on the Internet for those who look for it.

COSTS

Normally, if an amendment is proposed by a landowner, the landowner will have to bear all of MRT's costs associated with the amendment. However, if MRT initiates an amendment, it will ordinarily bear its costs and all closing costs. However, there are numerous factors that might result in MRT determining that fairness requires it to bear some of the costs, even when the landowner initiates the amendment process. Examples of such cases would include, without limitation, cases where the need for an

amendment resulted from a mutual error or where the amendment is needed to resolve an ambiguity in the easement terms to the benefit of both parties or where the net result of an amendment initiated by a landowner is to enhance significantly the conservation values to be protected by the easement. The issue of cost allocation will be dealt with in each situation after the amendment is clear and its net consequences are reasonably understood. At that point, MRT will discuss the effect of this provision and obtain the landowner's express written agreement to be bound by the cost allocation proposed by MRT.

CERTAIN CONDEMNATION PROCEEDINGS

Amendment of a conservation easement in lieu of condemnation proceedings is not covered by the statement of Amendment Principles, above, but is addressed in the policies and procedures set forth in this section.

If a condemning authority indicates an interest in condemning some or all of an easement property, MRT will work diligently to prevent a net loss of protected conservation values and will use its reasonable best efforts to preserve the intent of the original easement to the extent possible under the circumstances.

MRT recognizes that it may be impossible effectively to prevent condemnation for proper public purposes. When part of a MRT easement property is to be condemned by a public entity, the easement may be amended, or terminated in part or whole, in lieu of engaging in full condemnation proceedings, provided that:
1. MRT determines that the exercise of eminent domain would be lawful, and the condemning authority has made all determinations and taken all actions that are required by law as conditions to its pursuing condemnation proceedings
2. MRT determines that the best interest of all parties would be better served, on balance, by negotiating a settlement with the condemning authority rather than engaging in litigation.
3. MRT will use the compensation in a manner consistent with the conservation purposes of the original easement.

MRT staff and board will work to carry out the policies set forth above in this section, referring to the Amendment Procedures only as deemed useful in the circumstances. Approval of an amendment in lieu of condemnation will require a majority vote by the board. Some of the steps set forth under the Amendment Procedures will apply to an amendment in lieu of condemnation with MRT staff determining whether and how to apply those steps under the specific circumstances.