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STATE OF WASHINGTON

RECREATION AND CONSERVATION OFFICE

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Item #14: Policy Regarding the Process and Criteria to Implement RCW 77.85.130(7)

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Approved by the Director:

Proposed Action: Briefing

Summary

RCW 77.85.130(7) allows property acquired with Salmon Recovery Funding Board (Board) funds to be conveyed to a federal agency, if the agency complies with all terms of the original grant or the Board approves changes in the grant terms *and* if the property will retain adequate habitat protections. The RCW has not yet been applied, but a proposal to use the statute for a conveyance of property likely will come before the Board for its determination in 2009.

Staff Recommendation

Staff proposes developing a process and criteria to assist the Board in making any determinations regarding proposed conveyances under RCW 77.85.130(7).

Background

In 2005, the legislature created the statutory authority to allow the conveyance of Board-funded property to federal agencies. The legislation provides flexibility so that properties acquired with a Board grant can be conveyed to governmental entities that may have



different legal requirements, while still maintaining the intent of the original grant. RCW 77.85.130 (7) has yet to be applied.

The relevant statutory language states that:

“Property acquired or improved by a project sponsor may be conveyed to a federal agency if: (a) The agency agrees to comply with all terms of the grant or loan to which the project sponsor was obligated; or (b) the board approves: (i) Changes in the terms of the grant or loan, and the revision or removal of binding deed of right instruments; and (ii) a memorandum of understanding or similar document ensuring that the facility or property will retain, to the extent feasible, adequate habitat protections; and (c) the appropriate legislative authority of the county or city with jurisdiction over the project area approves the transfer and provides notification to the board.”

A project sponsor is proposing to use the statute to convey property in Chelan County to the US Forest Service. By federal rule, the Forest Service cannot accept property with encumbrances; hence the Board will need to approve any changes in the grant terms, including proposed habitat protections. This matter will likely come before the Board for its determination in 2009.

Analysis

For conveyances where the original grant terms are revised or removed and alternative habitat protections proposed, the statutory direction of “ensuring, to the extent feasible, adequate habitat protections” raises several key issues, including how to:

- ensure “adequate habitat protections” and what might be required to demonstrate “feasible” and “adequate;”
- meet the intent of the original conservation purposes of the grant agreements;
- develop a process and criteria that can be applied consistently across all requests for conveyances under RCW 77.85.130(7); and
- create a positive precedent for future conveyances.

An established process and criteria would help to address these issues and ensure that determinations regarding adequacy of habitat protections are well-founded and consistent. Such a process also would help to ensure that conveyance proposals and their accompanying instruments are fully developed before coming before the Board for a decision. The process would be triggered by a project sponsor’s request for a conveyance and implemented by RCO staff. The Board would have final approval of the conveyance. The process could include the following:

1. Direct engagement of the RCO grant manager in the development of the agreement mechanism to help ensure parties thoroughly consider the appropriate level and scope of habitat protections.
2. Grant manager and policy review through adopted RCO criteria (see below).
3. Technical review/assessment of substitute protections.
4. Board approval of the conveyance and determination of “adequate habitat protections.”

Potential criteria that would help guide the process and inform the development of alternative habitat protections include:

1. How do the proposed protections meet the original intent of the grant agreement and project?
2. Do the substitute protections meet the stated mission of the Board?
3. What is the enforceability of substitute protections?
4. What is the extent and longevity of substitute protections?
5. What is the likelihood of future uses on the land (e.g., commercial value of land, resource value of land, location of land, etc.)?
6. What mechanism formalizes the agreement (e.g., memorandum of understanding, letter of intent, etc.)?

Other criteria may be applicable depending upon the circumstances of a proposed conveyance. For example, see Attachment A regarding the proposed White River conveyance and potential revenue generation. This attachment is provided as an example only because the proposal is not yet ready for board evaluation.

Next Steps

Based on Board discussion and direction, RCO staff will develop a proposed process and potential criteria for Board consideration at its February 2009 meeting.

Attachments

- A. Background on Proposed White River Conveyance

Attachment A: Background on Proposed White River Conveyance

The Chelan/Douglas Land Trust sponsored a project to acquire property at the mouth of the Icicle River. The Board funded the acquisition, providing \$1,337,800. The Chelan/Douglas Land Trust (CDLT) was subsequently unable to purchase the target property, and asked the Board allow them to use the funds to purchase other valuable habitat at the confluence of the White River and Lake Wenatchee. The Board authorized this change, contingent on approval of the Chelan County Lead Entity Citizens Committee. Chelan County, the supporting organization for the lead entity, expressed concern about the loss of private lands within the county. To garner the support of the County Commissioners, the CDLT agreed to give the lands acquired in the White River to Chelan County, so that the County could exchange these lands with the US Forest Service for lands with lesser conservation value. The County would then sell these lands to private buyers.

Governing Authorities

The White River property can be conveyed by the CDLT to the county with approval by the RCO Director because counties are eligible sponsors under this grant program. Chelan County would assume the Deed of Right and all of the original encumbrances on the land.

The County wants to exchange the property with the US Forest Service (USFS). The USFS is not an eligible project sponsor, but statutory authority allows for such a transfer with Board approval if the statutory requirements are met. The statutory authority to transfer the land to the USFS exists in RCW 77.85.130 (7). US Forest Service policy however does not allow for acceptance of properties with deed restrictions. The Forest Service can accept the property, but cannot accept it with the encumbrances, including the Deed of Right. RCW 77.85.130 addresses this issue by allowing for a conveyance of the property, without encumbrances, to the Forest Service with Board approval and a memorandum of understanding that details adequate habitat protections.

Legal Issues Regarding Revenue

Chelan County would acquire properties from the US Forest Service in this exchange. The county is proposing to sell these properties. The proposed sale raises legal issues about restrictions on tax exempt bonds and the indirect generation of revenue from sale of or use of land purchased with Board funds.

The RCO will request legal review of the relevant questions, including the following.

- May revenue be generated indirectly or directly with land purchased with Board funds?
 - If yes, what if any restrictions apply to the use of those revenues?
 - Would some use of the revenues violate restrictions regarding federally tax-exempt bonds (such as benefiting private business)?
 - Are there any legal instruments to ensure legal and appropriate use of revenues (e.g., contract)?

- Can RCO require revenues go to other conservation purposes (e.g., purchasing other conservation land, easements, etc)?
 - Would revenue need to go to acquisition if original grant was for acquisition? That is, must it be the same type of project/transaction?
 - May funds be returned to RCO and distributed for other conservation purposes?

Current Status

The Forest Service, working with Chelan County and the Chelan Douglas Land Trust, has developed a draft letter of intent highlighting proposed habitat protection conditions. It is likely that a request for approval of the conveyance will come before the Board in early 2009. RCO staff is participating in discussion with the Land Trust, the Forest Service and Chelan County.