



June 13, 2019

Board of County Commissioners
Clackamas County

Members of the Board:

Approval of a Property Use Agreement between Clackamas County
and Sandy River Basin Watershed Council

Purpose/Outcomes	Provides temporary use of and access to certain County-owned properties that will be utilized during the course of the Sandy-Salmon River Confluence Restoration Project.
Dollar Amount and Fiscal Impact	N/A
Funding Source	N/A
Duration	Valid through December 31, 2020
Strategic Plan Alignment	<ul style="list-style-type: none">• Build public trust through good government• Honor, utilize, promote and invest in our natural resources
Previous Board Action	N/A
Contact Person	Rick Gruen, Manager, Business and Community Services, County Parks & Forest, 503-742-4345

BACKGROUND:

The Sandy-Salmon River Confluence Restoration Project (“Project”) will provide critical floodplain restoration and lays the groundwork for improved community resiliency in an area that is not only an essential zone for biodiversity, but which also encompasses key year-round recreation areas that contribute significantly to the local economy.

Clackamas County, through Business and Community Services County Parks and Property Disposition, owns land within the proposed project area, including Barlow Wayside Park (which sits at the confluence of the Sandy and Salmon rivers). This Property Use Agreement allows the County to partner with the Sandy River Basin Watershed Council on the Project by providing temporary access to and use of County-owned properties that are part of the Project site.

County Counsel has reviewed and approved the Property Use Agreement as to form and content.

RECOMMENDATION:

Staff recommends Board approval of a Property Use Agreement between Clackamas County and the Sandy River Basin Watershed Council and further authorizes the Director or Deputy Director of Business and Community Services to sign the Property Use Agreement on behalf of the County.

ATTACHMENTS:

Property Use Agreement between Clackamas County and the Sandy River Basin Watershed Council

Respectfully submitted,

Laura Zentner, CPA
Director, Business and Community Services

This PROPERTY USE AGREEMENT (herein referred to as this "Agreement") is for the use, access, development, and construction of the Sandy/Salmon River Confluence Restoration Project (the "Project") on or along certain County owned properties and is between the Sandy River Basin Watershed Council, an Oregon non-profit, public benefit corporation ("SRBWC") and Clackamas County, a political subdivision of the State of Oregon ("COUNTY") is effective on the last date of signature below.

Recitals

The proposed Sandy-Salmon River Confluence Restoration Project will serve as a critical demonstration of the technical approach to floodplain restoration. In addressing habitat and infrastructure risk together, this project lays the groundwork for improved community resiliency in an area that is an essential zone for biodiversity and also encompasses key year round recreation areas that contribute significantly to the local economy. COUNTY owns land within the project area and looks to partner with the Sandy River Basin Watershed Council and others by providing temporary use and access to the project sites. Accordingly, in consideration of the terms and conditions set forth herein SRBWC and COUNTY agree as follows:

1. Purpose; Project Description. SRBWC and COUNTY have entered into this Agreement to permit SRBWC the use and access of certain County-owned properties as part of the development and construction of the Sandy/Salmon River Confluence Restoration Project (herein referred to as the "Project"). The County properties are more specifically described in Exhibit A, attached hereto and incorporated herein.
2. SRBWC's Obligations. SRBWC shall complete the following:
 - a. Construction of the Project. SRBWC shall design, plan and construct the Project in accordance with the concept design attached hereto as Exhibit B (the "Project Design"). SRBWC shall not materially change the Project Design without COUNTY's prior written consent. Construction of the Project is solely SRBWC's obligation, and will be performed solely at SRBWC's expense.

- i. At COUNTY's request, SRBWC shall provide COUNTY with copies of any contract entered into with respect to the Project.
- ii. SRBWC shall require as-built plans from the design contactor for the Project. At COUNTY's request, SRBWC shall provide COUNTY with copies of the as-built plans.
- iii. SRBWC shall provide a staff person to oversee all contractors working on county properties connected to the Project. SRBWC shall provide updates as requested by COUNTY regarding the status of the project. During construction, SRBWC staff shall be on site on a weekly basis to oversee construction activities and ensure the project is being constructed in accordance with the Project Design. County may inspect construction of the Project on County-owned property at any time.
- iv. SRBWC shall obtain all required permits or authorizations for the Project. This obligation includes, but is not limited to, any and all necessary authorizations to comply with the terms and conditions of that certain conservation easement entered into by and between Clackamas County and the City of Portland Water Bureau on June 12, 2017 and recorded in the real property records of Clackamas County as document no. 2017-039276.

SRBWC shall provide copies of all permits affecting COUNTY properties before commencing activities on the Project Site that require a permit. Nothing herein shall be construed as obligating the County or any other agency with respect to any discretionary action relating to permits or other required authorizations necessary for construction of the Project including but not limited to, comprehensive planning, rezoning, variances,

environmental clearances or any other governmental approvals that are or may be required.

b. **Warranty and Liens.**

i. Warranty. SRBWC agrees to perform all construction in a workmanlike manner and warranties all work, including landscaping, against defects in materials or workmanship for a period of one (1) year from date of Project completion.

ii. Liens. SRBWC shall indemnify, defend and hold COUNTY harmless from and against any and all contractor's, laborer's, materialsmen's and mechanic's liens and claims filed against County property relating to the Project. SRBWC shall keep County property free and clear of claims and liens.

c. Third-Party Beneficiary. COUNTY shall be designated as a third party beneficiary in any contract entered into by SRBWC for construction of the Project that will occur all, or in part, on County-owned property. COUNTY shall not be liable for any obligation of SRBWC arising from any contract entered into for construction of the Project.

d. Volunteers. SRBWC may elect to work with volunteers or youth crews to complete work tasks or monitor the Project. SRBWC shall coordinate volunteer activities and ensure all volunteers sign SRBWC waivers releasing SRBWC and COUNTY from any and all liability claims when present on COUNTY-owned properties. COUNTY may request copies of signed SRBWC volunteer waiver forms.

e. Signage. SRBWC shall provide four (4) mutually acceptable Restoration Project "Construction Zone" signs to notify the public of construction hazards. SRBWC will install and maintain these signs along roads, entrances, and/or convenient viewing locations on COUNTY property associated with the PROJECT.

- f. Monitoring Reports. SRBWC shall be solely responsible for providing any monitoring reports required by SRBWC project funders. Upon COUNTY request, SRBWC shall provide COUNTY with copies of such monitoring reports.
- g. Project Tours. SRBWC may elect to provide limited tours of the Project to the public and private individuals during the term of this Agreement. SRBWC shall restrict such tours to area of the Project and shall provide COUNTY at least 24 hour notice of any tours.
- h. Public Access. SRBWC shall minimize construction impacts to public users of the County-owned properties. SRBWC and COUNTY shall agree, in writing, on a mutually acceptable schedule for closing all or a portion of the County-owned properties as needed during construction of the Project.
- i. Funding. Prior to beginning construction of the Project, SRBWC shall secure funding for one hundred percent (100%) of the total Project costs, including contingencies for the performance of all aspects of the work, and provide COUNTY proof, in a form acceptable to County in its sole discretion, that it has obtained such funding. If SRBWC is unable to secure the funding required under this subsection, this Agreement will terminate and the parties shall have no other obligations to each other.
- j. Insurance. SRBWC shall purchase and maintain at the SRBWC's expense, the following types of insurance, covering the SRBWC, its employees, and agents:
 - i. The most recently approved ISO (Insurance Services Office) Commercial General Liability policy, or its equivalent, written on an occurrence basis, with limits not less than \$1,000,000 per occurrence and \$1,000,000 aggregate. The policy will include coverage for bodily injury, property damage, personal injury, contractual liability, premises and products/completed operations.

- ii. Automobile insurance with coverage for bodily injury and property damage and with limits not less than minimum of \$1,000,000 per occurrence; and
- iii. Workers' Compensation insurance meeting Oregon statutory requirements including Employer's Liability with limits not less than \$500,000 per accident or disease.
- iv. COUNTY, its elected officials, departments, employees, and agents shall be named as ADDITIONAL INSUREDS on Commercial General Liability and Automobile policies. SRBWC shall provide to COUNTY 30 days' notice of any material change or policy cancellation. SRBWC shall provide COUNTY with a Certificate of Insurance complying with this article upon return of the SRBWC signed agreement to COUNTY.
- v. SRBWC shall require Contractor(s) and Subcontractor(s) to provide COUNTY the same types and limits of insurance; and COUNTY, its elected officials, departments, employees, and agents shall be named as ADDITIONAL INSUREDS on Contractors and Subcontractors Commercial General Liability and Automobile policies. Additionally, SRBWC and Contractor will require at least \$1,000,000 Professional Liability for engineering and design contractors.
- k. Re-Vegetation. SRBWC shall revegetate COUNTY-owned properties within the Project area with bare root native plants following the final inspection of SRBWC's construction work on the PROJECT. Revegetation activities will be at the sole expense of SRBWC and initial planting work shall be completed within 6 months of the completion of the Project.
- l. Long-Term Maintenance of the Project. SRBWC shall provide routine inspection and operation, rehabilitation and maintenance necessary to maintain the continuing viability and function of the PROJECT occurring on County owned

properties consistent with the terms and conditions of any and all grant funding requirements.

- m. Indemnification. SRBWC shall indemnify, defend and hold COUNTY harmless for, from and against any and all claims, demands, damages, losses, liens, judgments, penalties, expenses (including reasonable attorneys and consultants fees), and/or liabilities which, in whole or in part, directly or indirectly, arise out of or relate to SRBWC's performance of this Agreement, injury to any person or loss of or damage to property which occurs on County-owned properties that arises out of SRBWC's, or SRBWC contractors' subcontractors', employees', or agents', negligent actions or willful misconduct taken in relation to this Agreement, the Project, or the Project Site, including, but not limited to, claims (a) related to prevailing wage laws being paid on the Restoration Project and (b) by any person or entity with riparian rights related to the Sandy River and any claims by downstream landowners.

However, neither SRBWC nor any attorney engaged by SRBWC shall defend the claim in the name of County or any department of the County, nor purport to act as legal representative of County or any of its departments, without first receiving from the Clackamas County Counsel's Office authority to act as legal counsel for County, nor shall SRBWC settle any claim on behalf of County without the approval of the Clackamas County Counsel's Office. County may, at its election and expense, assume its own defense and settlement.

- n. Prevailing Wage. SRBWC is aware prevailing wage laws may apply to the Project and SRBWC shall be solely responsible for complying with the requirements of applicable prevailing wage law (ORS 279C.800 to 279C.870). SRBWC shall indemnify, defend and hold COUNTY harmless from any claim or liability arising out of any failure or alleged failure to comply with the prevailing wage laws.

during the term of the Project. In the event of an issue occurring on County owned properties, and if the parties are unable to reach agreement or resolve the issue, they shall follow the dispute resolution provisions set forth in this Agreement.

- c. Final Inspection. COUNTY shall conduct a final inspection of its properties with SRBWC prior to the completed Project. In the event the parties are unable to agree as to the acceptability of the completed Project, they shall follow the dispute resolution provisions set forth below.
- d. Notify in Writing. The parties agree to promptly inform one another in writing if, for any reason, problems arise during the term of this Agreement that may slow or stop progress of the Restoration Project.
- e. Use of Materials. The parties may each publish, reproduce, and use all technical data developed related to the Project or this Agreement in any manner and for any purpose without limitation, and may authorize others to do the same.
- f. Control of the Property. Although implementation of the Project is the responsibility of SRBWC, properties owned by the COUNTY will remain under the jurisdiction of the COUNTY, and COUNTY shall be solely responsible for the administration and management regarding non-PROJECT issues.
- g. Project Officer. SRBWC appoints Steve Wise, as its Project Officer. SRBWC may change the Project Officer at any time and provide the COUNTY with the name of the new Project Officer in writing.
- h. Project Contingent on Grant Funding. Should the Project be terminated prior to commencement of project activities, SRBWC and COUNTY shall each be excused from performance under this Agreement and this Agreement shall automatically terminate. Notwithstanding the foregoing, however, if the Project does commence but is terminated for any reason prior to completion, SRBWC shall return the COUNTY's properties to a stable condition that ensures no further degradation of

the site's natural resources. At the request of COUNTY, the improvements, equipment, and other items shall be removed.

- i. Media and Communications. SRBWC and COUNTY shall coordinate their public statements about the PROJECT. All public statements and media communications by SRBWC concerning the use of the County owned property shall be provided to the COUNTY for review and approval no less than five (5) business days prior to the public statement's release.
5. Term. This Agreement shall become effective as of the last date of signature below, and shall thereafter continue in force through December 31, 2020. The Project must be completed before expiration of the Agreement. Time is of the essence with respect to SRBWC's obligations under this Agreement.
6. Termination. This Contract may be terminated by mutual agreement of the parties or by the County for one of the following reasons: (i) for convenience upon thirty (30) days written notice to Contractor and, upon receipt of the written notice, Contractor shall stop performance, and County shall pay Contractor for the goods or services delivered and accepted; (ii) at any time the County fails to receive funding, appropriations, or other expenditure authority as solely determined by the County; (iii) if Contractor breaches any Contract provision or is declared insolvent, County may terminate after thirty (30) days written notice with an opportunity to cure.
7. Modifications in Writing. This Agreement may be modified only by the mutual prior written agreement of SRBWC and COUNTY.
8. Miscellaneous Provisions.
 - a. No Agency, Joint Venture or Partnership. The parties agree and acknowledge that this Agreement does not create any agency, joint venture or partner relationship between them. No party is authorized to enter into any agreements or

undertakings for or on behalf of the others or to hold themselves out as agents or representatives of the others.

- b. Dispute Resolution. The parties agree that should disagreement arise over the meaning or interpretation of any provision of this Agreement, or performance under this Agreement, the parties shall submit said dispute to mediation in Portland, Oregon, prior to filing suit to enforce the terms of this Agreement. No attorney fees shall be paid for or awarded to either party in the course of any dispute, indemnification, or other recovery. It is the intent of the parties that each shall bear the costs of its own legal counsel.
- c. Capacity to Obligate. The parties hereby represent and warrant that, subject to COUNTY approval for COUNTY's participation, they each have the capacity and corporate authority to obligate and bind their respective corporations and are acting with full and complete knowledge of their respective corporations in signing this Agreement.
- d. Counterparts. This Agreement may be executed in counterparts, each of which shall be an original and all of which, when taken together, shall constitute one and the same agreement.
- e. Waiver. Failure of any party at any time to require performance of any provisions of this Agreement shall not limit the right of such party to enforce the provision, nor shall any waiver by such party of any breach of any provision be a waiver of any succeeding breach of that provision, or a waiver of that provision itself, or any other provisions, including this anti-waiver provision.
- f. Interpretation. This Agreement and the rights and obligations of each of the parties hereunder shall be governed and construed in accordance with the laws of the State of Oregon. In the event any action is brought to enforce this Agreement venue shall be in Clackamas County, Oregon, and each party hereby irrevocably

consents to the jurisdiction of the Oregon state courts. This Agreement has been submitted to the scrutiny of all parties hereto and shall be given a fair and reasonable interpretation in accordance with the words hereof, without consideration or weight being given to its having been drafted by any party hereto or such party's counsel. It is not the intent of the parties hereto to violate any applicable laws. If for any reason any non-material provision of this Agreement does violate any such laws or is not fully enforceable in accordance with the terms and provisions hereof, this Agreement shall nevertheless be limited or construed to comply with such laws and shall be enforced to the fullest extent permitted by such laws, and the validity, legality and enforceability of the remaining provisions shall not in any way be affected or impaired thereby.

- g. Notice. All notices required to be given hereunder shall be made in writing and shall be deemed to have been duly given, made, and received only (a) upon delivery, if personally delivered to a party; (b) one business day after the date of dispatch, if by facsimile transmission; (c) one business day after deposit, if delivered by a nationally recognized courier service offering guaranteed overnight delivery; or (d) three business days after having been deposited in the United States mail, certified mail, postage prepaid, return receipt requested. The parties' addresses are as follows:

Steve Wise
Sandy River Basin Watershed Council
P.O. Box 868
Sandy, Oregon 97055

Rick Gruen
Clackamas County Parks
150 Beaver Creek Road, Suite 419
Oregon City, Oregon 97045

- h. Third Parties. Nothing contained herein nor the transactions contemplated hereby, express or implied, shall be deemed to inure to the benefit of any person or entity not a party to this Agreement, nor shall it confer upon any such party or entity any right or remedy of any nature whatsoever.

- i. Facsimile and Electronic Signatures. Signatures and/or consents may be evidenced by facsimile, and may be evidenced by E-Mail and/or electronic signatures. Documents with original signatures shall be provided upon request of any party.
- j. Entire Agreement. This Agreement, and the final exhibits and attachments attached hereto, constitute the entire agreement between the parties and any prior agreements, whether oral or written, have been merged and integrated into this Agreement.
- k. Representation. SRBWC and COUNTY have been afforded an opportunity to select and receive counsel with respect to this Agreement from their own attorneys and professional advisors before signing this Agreement.
- l. Successors and Assigns. This Agreement shall bind and inure to the benefit of not only the immediate parties hereto but their respective heirs, executors, administrators, personal representatives, successors in interest and assigns.
- m. Independent Contractor Status. SRBWC shall be an independent contractor for all purposes under this Agreement and under no circumstances shall SRBWC be considered an employee of COUNTY. SRBWC shall be solely responsible for (a) its performance under this Agreement and the quality of its work, (b) obtaining and maintaining all licenses and certifications necessary to carry out this Agreement, (c) payment of any fees, taxes, royalties, or other expenses necessary to complete the work contemplated in this Agreement, and (d) meeting all other requirements of law in carrying out this Agreement.
- n. Governing Law. This Agreement, and all rights, obligations, and disputes arising out of it, shall be governed and construed in accordance with the laws of the State of Oregon and the ordinances of Clackamas County without regard to principles of conflicts of law. Any claim, action, or suit between County and Contractor that

arises out of or relates to the performance of this Contract shall be brought and conducted solely and exclusively within the Circuit Court for Clackamas County, for the State of Oregon. Provided, however, that if any such claim, action, or suit may be brought in a federal forum, it shall be brought and conducted solely and exclusively within the United States District Court for the District of Oregon. In no event shall this section be construed as a waiver by the County of any form of defense or immunity, whether sovereign immunity, governmental immunity, immunity based on the Eleventh Amendment to the Constitution of the United States or otherwise, from any claim or from the jurisdiction of any court. SRBWC, by execution of this contract, hereby consents to the in personam jurisdiction of the courts referenced in this section.

- o. Survival. All rights and obligations shall cease upon termination or expiration of this Agreement, except for the rights and obligations set forth in Paragraphs 2(b), (k), (l), (m), (n), and 8(b), (e), (f), (j), (n), and (q). However, such expiration shall not extinguish or prejudice the County's right to enforce this Agreement with respect to: (a) any breach of a SRBWC warranty; or (b) any default or defect in SRBWC's performance that has not been cured.
- p. Force Majeure. Neither County nor SRBWC shall be held responsible for delay or default caused by events outside the County or SRBWC's reasonable control including, but not limited to, fire, terrorism, riot, acts of God, or war. However, SRBWC shall make all reasonable efforts to remove or eliminate such a cause of delay or default and shall upon the cessation of the cause, diligently pursue performance of its obligations under this Agreement.
- q. Waiver. The failure of County to enforce any provision of this Agreement shall not constitute a waiver by County of that or any other provision.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the last date of signature below.

SANDY RIVER BASIN WATERSHED COUNCIL

By: Steve Wise
Printed Name: Steve Wise
Title: Executive Director
Date: 6/5/2019

COUNTY

By: _____
Printed Name: _____
Title: _____
Date: _____

EXHIBIT "A" - Project Site

This PROPERTY USE Agreement is for the use, access, development, and construction of the Sandy/Salmon River Confluence Restoration Project (the "Project") on or along certain County owned properties as follows:

- MAP & TL: 26E23 00300
- MAP & TL: 26E23 00600
- MAP & TL: 26E23DC00300

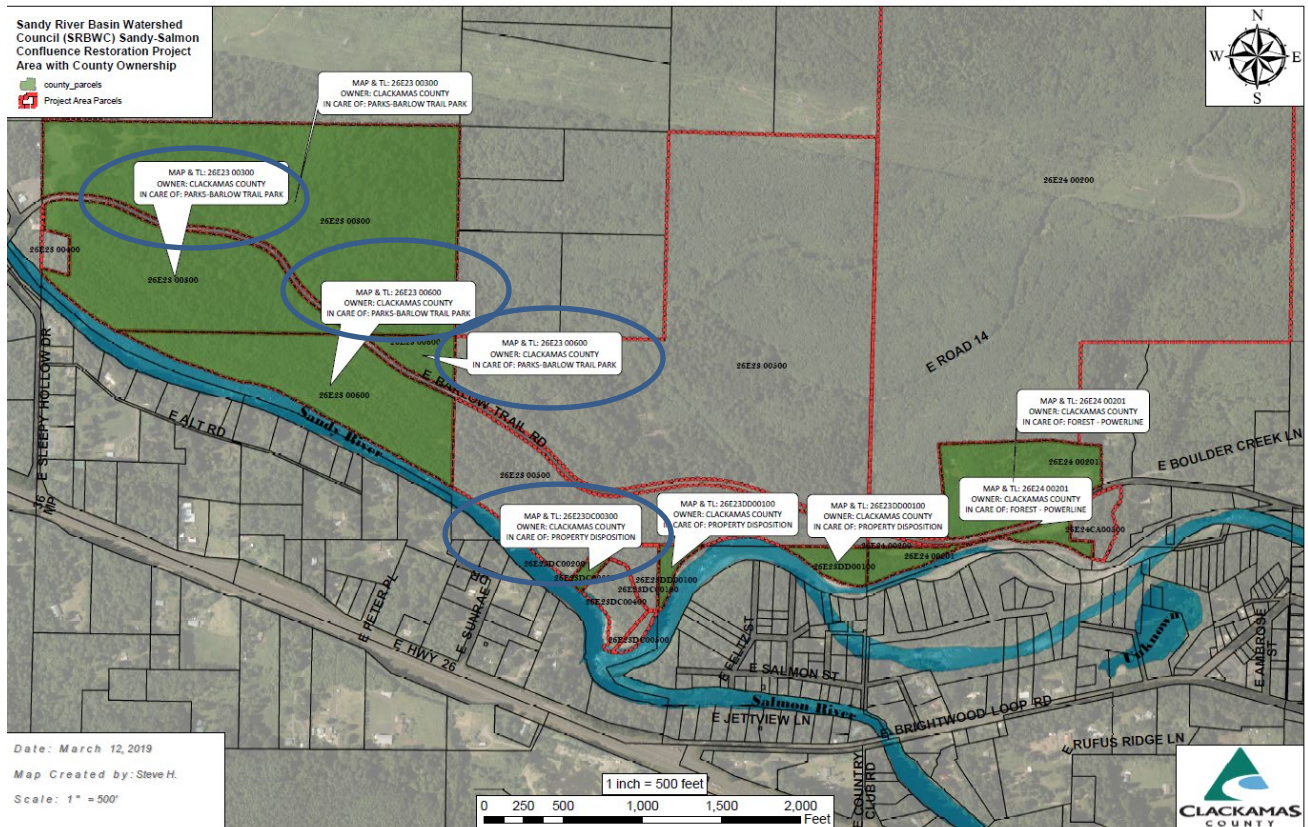


EXHIBIT “B” - Project Area