



PRUNUSKE CHATHAM, INC.

APPENDIX J

MEMO

Date: July 8, 2009. REVISED January 25, 2009

To: San Geronimo Valley Salmon Enhancement Plan

From: Aimee Crawford

Subject: Riparian corridor protection strategies

Introduction

As part of its work developing the San Geronimo Valley Salmon Enhancement Plan (SEP), Marin County Public Works Department (County) is exploring a range of approaches to protecting and improving salmon habitat in the San Geronimo Valley. The SEP's Targets for Recovery and Habitat Rehabilitation (targets) guide these approaches. One approach under discussion is a Riparian Easement Protection Program (Program). This program would protect and improve salmon habitat by providing a method for the County to enter into riparian conservation easements agreements with landowners.

The purpose of this memo is to provide background information for the County's use in evaluating of the feasibility of implementing a Conservation Program by outlining:

1. The steps necessary for the acquisition and stewardship of riparian conservation easements.
2. How the value of easements could be established.
3. Criteria for the acquisition of easements.
4. Riparian conservation easement terms.
5. Alternative approaches for protecting the riparian habitat in San Geronimo, including outright purchase of parcels.

1. Conservation easement acquisition and stewardship

A conservation easement is a legal agreement between a landowner and a qualified easement holder (generally a non-profit land trust or local government)

that permanently¹ restricts the landowners' use of the property in order to protect certain resources on the property (the resources protected by riparian easements would include habitat and soils). Specific easement terms and the cost of the easement are negotiated between the landowner and the easement holder (see sections below for more information on valuation and sample easement terms).

Once acquired, the conservation easement is recorded on the title of the property and "runs with the land", meaning that all future landowners are bound to its terms. The easement holder assumes the responsibility for monitoring the property regularly (generally annually) to ensure that use of the property is in compliance with the terms of the easement. The holder also takes on the responsibility for enforcing the easement terms if they are violated; this can include the costs of legal action and producing proof of the easement violation.

Because the conveyance of an easement is a voluntary action, the success of any easement program depends on how trustworthy and reliable the landowner perceives the easement holder to be. Despite the best efforts of all parties to an easement negotiation, there will always be "gray areas" to discuss when a landowner—perhaps years after the agreement is signed—proposes an activity that is not clearly prohibited or permitted by the terms of the easement. In these cases, the landowner and easement holder need to work constructively together to determine if the activity can go forward in a manner consistent with the easement terms. A landowner considering entering into an easement agreement will want to be confident that the easement holder will be a pragmatic and flexible partner.

Easement Holder

For the Program to go forward, an easement holder would need to be identified. The easement holder needs to have sufficient resources to carry out competent easement stewardship. The Marin Open Space District and other local organizations could be approached² to discuss holding easements. While Marin Agricultural Land Trust is an established easement holder, it specializes in agricultural easements in the agricultural corridor of Marin and may not be interested in assuming responsibility for riparian protection easements. Point Reyes Bird Observatory is another non-profit that could be approached to determine if the Program is consistent with its mission.

¹ There are also non-perpetual easements, known as "term" easements. Because term easements differ from perpetual easements, this memo focuses on perpetual easements only.

² The organizations included here have not been contacted to determine their interest in participating in a Program.

If an existing organization is not willing to be the easement holder, an option would be to establish a community-based organization to hold and steward the easements. This option would require operational funding, an initial fiscal sponsor, administrative resources and staffing.

Stewardship costs

There are many costs inherent in competent easement stewardship, from monitoring personnel to administrative resources (computers, GPS equipment, record storage) to obtaining legal advice. The most expensive, and most important, administrative cost is maintaining positive, open relationships with easement landowners through regular and proactive communication. Easement monitoring can be conducted through volunteer programs, but administration of those programs generally requires professional staff because of the need for consistent (sometimes over the course of years) follow-up on any potential violation.

2. Establishing easement value

In order for the County to acquire easements under the Program, either through purchase or donation, the value of the easement would need to be established. This value would be the amount a landowner is paid or is able to use as a tax deduction³.

Before and after appraisal

Easement value is generally established through an appraisal using a “before and after” approach. This approach first establishes the value of the property “as is” (before the easement restrictions are in place), then establishes the value of the property after the easement restrictions are in place. The difference between the two is the easement value.

Generally, easement value comes from a landowner restricting development on the property. This giving up of “development rights” can be assessed and given a value by a qualified appraiser. Other resource restrictions, such as limiting or prohibiting timber harvest, can also be valued using this approach. Development and timber harvest are existing markets with reliable methods for valuation.

In the case of the Program, depending on the easement restrictions the County would propose, it may be challenging for an appraiser to establish the “after” value. For example, if the easement terms allow the landowner to use the full development potential of the property but only restrict certain uses along the

³ There are a number of requirements that must be fulfilled before a landowner is eligible to take a federal tax deduction for a conservation easement deduction (see Internal Revenue Code Section 170 (h)).

riparian corridor, an appraiser may not have a defensible method for saying what those restrictions are worth.

Whether or not to use this valuation approach for the Program requires careful consideration and discussion with experienced easement appraisers. The appraisals expense would need to be met by either the Program, the landowner, or through a cost-share.

Flat rate

Another approach would be to use a flat rate to establish value. The Virginia Department of Forestry offers flat rate incentive payment for establishing permanent riparian easements⁴.

The County would need to determine if a flat fee approach would be a legal and practicable approach for establishing the value of conservation easements.

3. Criteria for easement acquisition

- **SEP Targets.** The County would determine that acquisition of the easement supports the achievement of the SEP's Targets for Recovery and Habitat Rehabilitation.
- **Easement terms.** The landowner agrees to the easement terms (see below).
- **Payment.** The landowner agrees to the payment amount and terms offered by the County.
- **Title.** The landowner has clear title to the property and the right to convey the easement. There are no pre-existing encumbrances on the title (such as road easements, reservation of mineral or water rights, etc.) that conflict with the proposed terms of the easement.
 - Note: Subordination agreements with any lenders must be executed prior to the easement acquisition.
- **Hazardous materials.** The landowner has stated in writing that there are no hazardous materials or conditions on the easement lands. If hazardous materials are present, an agreement can be reached with the landowner for removing the materials prior to conveyance of the easement.
- **Survey and mapping.** The parcel has been surveyed and a legal description prepared delineating the easement-protected area. Alternatively, the County may determine that a survey is not necessary to delineate the area and use GPS data to delineate the easement area.

⁴ <http://www.dof.virginia.gov/mgt/cip-fact-crep.shtml>

- **Relocation of structures.** The landowner has agreed to relocate any structures in the easement area that conflict with the proposed terms of the easement.
- **Priority** would be given to acquiring easements which:
 - 1) Are likely to become unavailable for protection due to impending transfer of the property to an unwilling easement seller or other factors; and/or
 - 2) Are contiguous with other protected lands.

4. Riparian conservation easement terms

The County would need to adopt a model riparian easement template for SCA parcels. There are other riparian easement programs in the country and the easements used by those programs should be reviewed in developing this model⁵. The easement terms would need to address, at a minimum:

- 1) Dumping of hazardous materials and other waste.
- 2) Preservation of riparian vegetation. Note that enhancement of the riparian corridor should be addressed through an incentives program as easements are generally impose restrictions, but no affirmative obligations, on a landowner.
- 3) Whether a natural change in the shape of the waterway does or does not affect the original established easement area.
- 4) Whether changes to the natural flow of the creek are or are not allowed (diversion, impoundment). Given the objectives of the SEP, it would seem that they would not be allowed, but pre-existing rights and uses need to be considered in drafting the easement terms.
- 5) Any restrictions on changes in topography.
- 6) Allowance for the landowner to remove vegetation if necessary to prevent hazardous condition, as well as notice requirements for such removal to easement holder.
- 7) If no structures are to be allowed, as clear a definition as possible of "structure" needs to be developed (i.e., is a bench a structure? Is a trellis a structure?).

5. Alternative riparian zone protection approaches

Management Agreements

To meet the SEP Riparian Targets, long term (15 or 20 year) contractual management agreements could be used by the County instead of conservation easements. The criteria and terms of these management agreements could be similar to those detailed above. An advantage of this approach would be

⁵ See Pennsylvania Land Trust Association materials on their website.

securing landowner involvement in managing their land in a manner that enhances riparian habitat without taking on the responsibilities of easement stewardship.

This approach could also be a first step in developing the Program. It would be a cost-effective way to start developing relationships with landowners that could eventually lead to an easement agreements and it would allow time for the County to explore the most efficient manner to establish a riparian easement program.

Fee purchase

Outright purchase of land could be considered for certain parcels. Land ownership brings with it management responsibility and liability, so candidate parcels would need to be evaluated carefully. It would likely be most efficient if the same organization held any Program easements and related fee properties. If the Program is not established, the County would need to identify an owner for the fee parcels.

Parcels that could be considered for fee purchase are those that are wholly within the SCA, have significant natural resources that have been identified for protection in the SEP or the Countywide Plan, and/or are contiguous with other protected lands.