



# Willamette Falls Locks AUTHORITY

## Authority Meeting

Wednesday, October 25, 2023 – 2:00 to 3:30 PM

Attendee link: <https://us06web.zoom.us/j/89653603970>

## Agenda

### Authority Mission:

- *The mission of the Authority is to establish ownership, oversight, and management of the Willamette Falls Locks project, for the purposes of:*
  - *Enhancing the economic vitality of Oregon through facilitating the resiliency and navigability of the Willamette River; and*
  - *Repairing, maintaining, upgrading, and operating the Willamette Falls Locks project and associated properties and facilities for commercial, transportation, recreational, cultural, historic, heritage and tourism purposes.*

2:00 – 2:15	<b>Welcome, Agenda Overview, Introductions, Minutes Approval, Treasurer’s Report</b> <ul style="list-style-type: none"><li>- Welcome, Introductions, Agenda Review</li><li>- Approval of Minutes from WFLA Meeting (September 27, 2023)<ul style="list-style-type: none"><li>○ Updated August Meetings attached</li></ul></li><li>- Notable transactions from the Treasurer</li></ul>
2:15 – 2:45	<b>WFLA Director’s Report</b> <ul style="list-style-type: none"><li>- Business Item Updates<ul style="list-style-type: none"><li>○ National Waterways Conference</li><li>○ NW Waterways Conference</li></ul></li></ul>
2:45 – 3:30	<b>Introduction of Neil Maunu</b> <ul style="list-style-type: none"><li>- New Executive Director of the Pacific Northwest Waterways Association – Reed Wagner</li></ul> <b>Section 106 of the National Historic Preservation Act</b> <ul style="list-style-type: none"><li>- Review and Discussion – Turner Odell</li></ul>
3:00-3:15	<b>Wrap-up &amp; Adjourn</b> <ul style="list-style-type: none"><li>- November and December meeting dates consideration – Doodle poll to follow</li></ul>

**Board Requested Information:**

The board discussed Section 106 of the National Historic Preservation Act at several meetings (#12, #13, and #14) - but especially at meetings #12 (with guest speaker Tracy Schwartz from the Army Corps of Engineers) and #14 (discussion of the options memo). Please find links to the videos below.

NOTE - these videos are unreviewed and unedited.

Meeting #14 - [https://media.pdx.edu/media/t/1\\_5hecu350](https://media.pdx.edu/media/t/1_5hecu350)

Meeting #13 - [https://media.pdx.edu/media/t/1\\_mszuksqu](https://media.pdx.edu/media/t/1_mszuksqu)

Meeting #12 - [https://media.pdx.edu/media/t/1\\_pc6h4bby](https://media.pdx.edu/media/t/1_pc6h4bby)

WILLAMETTE FALLS LOCKS AUTHORITY

**Authority Meeting**  
**September 27, 2023, 2:00-2:45 PM**  
**Meeting Minutes -- DRAFT**  
(Minutes: Pat Vivian and Sandy Carter)

**Board Members Present:**

Russ Axelrod [*Willamette Falls and Landings Heritage Area Coalition*]  
Mary Baumgartner [*Council President, West Linn*]  
Sandy Carter [*Advocates for Willamette Falls Heritage, formerly Willamette Falls Heritage Foundation*]  
Robert Kentta [*Confederate Tribes of Siletz*]  
Christine Lewis [*Metro Council*]  
Denyse McGriff [*Mayor, Oregon City*]  
Chris Mercier [*Vice Chair, Confederated Tribes of Grand Ronde*]  
David Penilton [*Clackamas County Tourism*]  
Mini Sharma Ogle [*PGE*]  
Tootie Smith [*Chair, Clackamas County Board of Commissioners*]

**Non-Voting Legislators Present:**

State Rep. Jules Walters

**Authority Executive Director:**

Reed Wagner

**Others Present:**

Martha Pellegrino [*Confederated Tribes of Grand Ronde*]  
Pat Vivian [*scribe*]

**1. Welcome, Agenda Review, Minutes Approval and Treasurer's Report**

Chair Christine Lewis called the meeting to order and reviewed the agenda. A quorum was present.

**1a. Approval of August minutes.** There was discussion of updating the reference to "anchors" in the section on Corps construction work near PGE. The anchors being referred to are rock anchors, not gudgeon anchors. Denyse McGriff moved that the notes be approved with that clarification, and the revised version presented as final at the October meeting. Chris Mercier seconded the motion, which was unanimously approved.

**1b. Treasurer's update.** The available balance is \$183,388, with only two transactions this month, Sandy Carter reported. We now have D&O insurance. Another \$120,000 is expected from Mt. Hood Territory and a \$30,000 pledge from Marion County. Chair Smith made a motion to approve the treasurer's update, seconded by Russ Axelrod. The treasurer's report was unanimously approved.

## **2. Executive Director's Report**

Reed Wagner gave business item updates.

**2a. Draft budget and end of year financial report.** The version of the draft budget Reed sent out prior to today's meeting is still current with one change: Marion County has requested that their invoice be moved from the 2022-23 budget to the 2023-24 budget.

Reed also sent board members an end of year financial report for 2022-23. With these two items in hand, the Authority is ready to hire an accounting firm that will compile monthly reports for the Authority's Treasurer.

**2b. Networking opportunities.** Reed plans to attend the National Waterways Association Conference in Sacramento and the Pacific Northwest Waterways Association conference in Vancouver, WA next month. He asked board members to let him know if they would like to attend the PNWA conference in Vancouver.

Chair Lewis will join Reed and Jeff Hicks of the Corps of Engineers in giving a presentation next Monday at a North Clackamas Chamber of Commerce meeting. They will describe the Corps construction work and the Locks restoration effort. She invited board members to join them.

**2c. VIP tour of the Locks.** There will be a VIP tour of the Locks on October 23 with the intention of involving participants who are not currently Authority partners. Reed encouraged board members to let him know if they know anyone who should be invited. Chair Lewis described it as an exciting opportunity for coalition-building.

Sandy Carter suggested requesting access to the Corps office building in case it rains. Russ Axelrod asked whether the tour will include the falls. Mini Sharma Ogle said that would depend on the access agreement between the Corps and PGE. She advocated limiting the tour to the Locks due to safety concerns.

Christine Lewis proposed inviting 30-35 people on the tour and said she would compile a list of interested people who couldn't make it on that date, if needed.

## **3. WFLA Discussion and Decision Items**

The board had two financial documents to review.

**3a. End of year financial report.** Reed explained that this initial report is very basic and that once an accounting firm is under contract the Authority's future year-end reports will look quite different, as we move into business / quasi-governmental accounting.

**ACTION:** Sandy Carter made a motion to approve the end of year financial report, seconded by Robert Kentta. The report was unanimously approved.

**3b. 2023-24 budget approval.** Reed reported. Lacking an officially appointed Authority Budget Advisory Committee, the proposed 2023-24 budget was approved last week by the Executive Committee, which made the adjustment requested by Marion County (section 2a) and added a line item for travel and conference expenses.

**ACTION:** Russ Axelrod made a motion to approve the 2023-24 budget, seconded by Chair Smith. The budget was unanimously approved.

#### **4. Wrap Up and Adjourn**

In response to a press release, Pamplin newspapers plan to publish an article on the Locks. The release announced the hiring of Reed as Executive Director and the work the Corps is doing to restore the Locks. Chair Lewis will keep the board informed when she finds out more about the press coverage.

Sandy raised the issue of board terms expiring. Christine plans to discuss this with the Governor's staff. Her recommendation is that any board member who's willing to continue serving should do so. Perhaps the board could write a letter asking that people continue for a second term if they're willing. Sandy said she's willing to continue as Secretary but she wants to pass off the role of Treasurer, enlarging the Executive Committee.

Chair Smith recommended that officers be elected in January; Chair Lewis agreed that's a good plan. Reed has been working with Turner Odell to step into the role of liaison with the Governor's office re: board member terms.

The next Authority monthly meeting on October 25 will be a hybrid meeting. The physical location will be the West Linn Adult Community Center, with a Zoom option for those who don't attend in person. The meeting will conclude with a celebration of the work Turner Odell and his Oregon Solutions team has done over the years to make the Locks restoration effort a reality.

Chair Lewis asked that board members review the videos on Section 106 of the National Historic Preservation Act attached to today's agenda and come to the October meeting prepared to discuss the options.



**MEMORANDUM**

PRIVILEGED & CONFIDENTIAL  
ATTORNEY WORK PRODUCT

**TO:** Board of Directors  
Willamette Falls Locks Authority

**FROM:** Clark Balfour, Legal Counsel

**DATE:** October 18, 2023

**SUBJECT:** Historic Preservation Act Section 106  
Transfer by USACE to Willamette Falls Locks Authority

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**BACKGROUND**

The Board is vested with authority under ORS 196.205(3) to establish ownership, oversight and management of the Willamette Falls Locks Project (Project) which includes any Federal land owned by the United States as of June 11, 2021 and any improvements. The Board has discretion to determine the best methods to promote and carry out the interests of WFLA and enter into any agreements to establish ownership and to repair, maintain, upgrade and operate the Project. ORS 196.205(4).

To achieve these purposes, at a minimum, the Board will need to develop a series of agreements with these parties: the United States Army Corps of Engineers (USACE) as owner of the Project; the State of Oregon as the owner of submerged and submersible lands in navigable waterways; and PGE as the upland owner of land and hydroelectric operator under Federal Energy Regulatory Commission (FERC) licenses.

The purpose of this memo is to begin analysis of the potential methods to obtain transfer from USACE in compliance with Section 106 of the Historic Preservation Act (Section 106). Attached is an earlier Staff memo regarding options available to the Board. In brief, the Project carries historic designation. When an historic property interest is transferred from federal ownership to non-federal ownership, it is a federal action subject to Section 106. The transfer is considered a potential “adverse effect” that requires mitigation, typically through a protective agreement of some sort.

**KEY ISSUE**

Identification of what USACE has authority over (owns) and the terms of that authority will be key and needs further analysis. In our view, the Board should seek a conveyance/transfer from USACE that provides the most complete vesting of title and authority without time limitation. USACE cannot transfer an interest beyond what it has (equal dignity). For example, if USACE has an easement, it cannot grant a deed; it can only transfer the easement, license, or lease or grant an interest within the confines of that document. Further investigation into the nature of the USACE interest will need to be conducted.

## OPTIONS

### A. Deed

A deed transferring title to the underlying lands and improvements of the Project affixed to those lands would be the most secure and permanent method. Upon statehood, title to navigable waterways vested in the State (managed by the State Land Board through the Division of State Lands). We will check legislative history to see if state title was transferred by the State Legislative grant to the Project in approximately 1910, but that is unlikely. If the Project was granted title, then USACE could give WFLA a deed and that conveyance could include the necessary covenants to mitigate the Section 106 adverse effects. But in the absence of an earlier conveyance to USACE, it would be a heavy lift to convince the State Land Board to grant title to the submerged and submersible lands under and around the Project. Most likely, USACE has a license, lease or easement from the State for placement of the Project. We will probably need to obtain assignment of that instrument. WFLA can explore that with Division of State Lands staff.

### B. Easement

The most desirable trait of an easement is that it can be granted in perpetuity. If USACE has the power to transfer or assign an existing perpetual easement, along with additional provisions to satisfy Section 106, WFLA should carefully consider.

The “cons” of an easement are not fatal, just obstacles. For example, if USACE is present on site through an easement, lease or license granted by the State, then State consent to assignment and inclusion of additional terms for Section 106 purposes may be required prior to transfer or assignment by USACE. Also, the grant of easement (or license or lease) may be limited to a term of years requiring periodic review and renewal.

As to other considerations, most examples of historic preservation easements are those granted to another party by a private party grantor who will remain in possession subject to the easement grantee’s rights. The restrictions imposed on the grantor and grantee are significant in the historic preservation arena to achieve preservation purposes as well as to provide tax advantages to the grantor. Tax advantages are not at play in a conveyance from a government agency to a public corporation like WFLA. Often these easements are written with preservation language or limited to building facades. We would need to write broad easement language that achieves the purposes of ORS 196.205(3) and (4) not only for ownership but to repair, maintain, upgrade and operate the Project. That would have to include building interiors. In our view, an easement can work so long as the recorded instrument includes all authorized purposes and adverse effects found to be mitigated by the agreed conditions in the federal permit approval process.

### C. Covenants

Generally, a covenant is a binding promise recorded in the real estate records. It is often included in deeds so that the restriction or right is placed in the conveyancing document (deed restriction). A covenant can be perpetual and run with the land, binding all successors in title, or it can be for a term of years or occurrence of a specified event. A covenant running with the land can also be a separate document that is not a deed so long as it is signed by the owner. Ownership is the key.

In the Section 106 context, covenants are often used and can be more flexible in allowed activities such as rehabilitation projects, upgrades, etc. The term (perpetual or for a term of years), authorized purposes, requirements, enforceability and other matters to satisfy Section 106 can be negotiated to obtain section 106 approval for USACE to transfer.

But WFLA still faces the same fundamental question discussed above: what does USACE have to convey and are other approvals from DSL or PGE necessary? As stated above, USACE is probably not an owner in fee title so it cannot grant a deed to WFLA that includes restrictions or covenants nor a grant a separate covenant instrument to make a binding commitment. The answers to those questions will determine the terms and binding nature of the Covenant. It may very well be that the commitments will be limited in time to the term of whatever underlying agreements are in place with USACE, DSL and PGE.

D. Preservation Agreement or Programmatic Agreement

In the absence of title that prevents deeds and covenants, WFLA can negotiate a preservation agreement or programmatic agreement to achieve the Section 106 mitigation. That could be done in conjunction with a term of years easement, license or lease. It is a recordable document. The preservation agreement could provide the protections for Section 106 and include WFLA authorizations under ORS 196.205 (3) and (4). There is an opportunity to negotiate flexible terms such as when SHPO must consult and approve vs. WFLA authority to act. Enforcement mechanisms can be included although WFLA probably wants to limit those exposures.

E. Licenses and Leases

We have already peppered this memo with references to licenses and leases depending on the type of underlying interest held by USACE. They are time limited interests in land that authorize use of property for particular purposes. They can be used by WFLA if that is the type of interest USACE holds. The key is that these are time limited and subject to renewal or renegotiation with USACE and others such as DSL or PGE. The issue will be additional conditions that may be imposed as part of renewal or renegotiation. The same considerations as an easement for a term of years will apply. Most likely a Programmatic Agreement or Preservation Agreement will be negotiated along side the lease or license.

### **NEXT STEPS**

1. Confirm the property interests held by USACE.
2. Confirm if other interests or consents from 3rd parties such as DSL or PGE are necessary.
3. Seek transfer of the most permanent interest available. Supplement with Programmatic Agreements or covenants as available.
4. Ask USACE if it has preferred methods/agreements to achieve Section 106 compliance.
5. Confirm Section 106 scope and process with USACE and SHPO.
6. Confirm that all WFLA purposes can be achieved under any transfer document or companion document.
7. Report back to Board in November for final recommendation.



**DRAFT**  
**OPTIONS FOR COMPLIANCE WITH SECTION 106 OF THE HISTORIC PRESERVATION ACT**  
**UPON THE TRANSFER OF THE WILLAMETTE FALLS LOCKS**  
**FROM USACE TO THE WILLAMETTE FALLS LOCKS AUTHORITY**

**BACKGROUND**

Section 106 of the Historic Preservation Act requires federal agencies to consider the effects of actions they carry out, approve, or fund on historic properties. Section 106 review encourages, but does not mandate, preservation. Sometimes there is no way for a needed action to proceed without harming historic properties. Section 106 review ensures that preservation values are factored into federal agency planning and decisions. Because of Section 106, federal agencies must assume responsibility for the consequences of the projects they carry out, approve, or fund on historic properties and be publicly accountable for their decisions.

Compliance with Federal Section 106 is required of the U.S. Army Corps of Engineers (USACE). A transfer of ownership of a property from federal ownership to non-federal ownership is an agency action subject to Section 106. When an historic property transfers out of Federal ownership it transfers away from the Section 106 protections required of the federal agency owner, constituting a potential “adverse effect” under the Act. Adverse effects must be mitigated – usually through some kind of protective agreement or instrument.

USACE has indicated to the Willamette Falls Locks Authority (Authority) that the proposed transfer of ownership of the Willamette Falls Locks and Navigation Canal from USACE to the Authority is a federal action subject to Section 106 and will consequently require mitigation.

**OPTIONS**

There are several potential options for providing adequate mitigation for the transfer (and providing historic preservation protections to the Locks). Different options each have their own benefits and challenges (pros and cons). Several options are listed below, along with some of the Locks-relevant pros and cons associated with each. This information was provided by the Oregon State Historic Preservation Office (SHPO) and is largely quoted from their materials.

Easement

An easement is property right granted to a third-party organization to enforce restrictions on another person’s land. It runs with the deed of the property, for a prescribed number of years, or in perpetuity.

*Pros:*

- Easements are generally accorded greater deference by courts in the event of a dispute than other deed restrictions, including covenants.

- They usually involve tax incentives for the donor. (Perhaps not applicable to the Locks or the Authority)
- They are traditionally based on preservation versus rehabilitation, so they afford a high level of protection and preservation, if that is the desired result.

*Cons:*

- Easements are more complex and formal than other kinds of deed restrictions. They have tax implications and often require an easement endowment fee from the easement donor.
- Easements have to be “held” by someone.
- Whoever holds the easement has to have sufficient resources to conduct property inspections and work with owners to protect the property’s significant features, even through litigation if necessary.
- Easements are often limited to a building’s facade and immediate setting, which is a problem if the interior is what is significant about the property.
- Easement language tends to be based on preservation rather than rehabilitation and so may not be a good fit with adaptive use strategies.
- Easements may result in a significant reduction in the value of the land because of the potential restriction on development
- Easement laws vary from state to state – in some cases, they may be subject to “sunset” laws.

Covenant

A covenant is promise made in a deed. Covenants run with the land, owner to owner and can be positive (allowing something) or restrictive (not allowing something – often called deed restrictions).

*Pros:*

- Covenants are far less complicated than easements; as such, they can be negotiated without expert advice within tight compliance timeframes.
- They are flexible documents, as restrictive or lenient as required.
- Because they are flexible, they may be appropriate to use for a rehabilitation project, which makes this tool more useful for mitigation than an easement.

*Cons:*

- Covenants are generally less protected by law than easements. They must be written so they are legally enforceable.
- To be most effective, covenants should be enforced in some way. Parties may choose to avoid the issue of enforcement in covenant language (covenant “light”), but if an issue arises, the restrictions can become legally vulnerable.

- Covenant laws vary from state to state – in some states they may be subject to “sunset” laws.

### Preservation Agreement

A preservation agreement is a covenant-type restriction, typically for properties without deeds. The agreement is not recorded with the deed and therefore is not directly enforceable on future owners.

#### *Pros:*

- Preservation agreements are also less complicated than easements or covenants; as such, they can be negotiated without expert advice within tight compliance timeframes.
- May be helpful given the reported complexity and uncertainty surrounding the deed/title for the Locks property.
- They are flexible documents, as restrictive or lenient as required.

#### *Cons:*

- Preservation agreements must be written so they are legally enforceable.

### Other Considerations

A covenant or a preservation agreement can mirror the Section 106 process, whereby the owner of the property has to consult with the SHPO and if the SHPO determines there will be an adverse effect then the owner has to mitigate.

A covenant might also include a “programmatic agreement” with SHPO. Such agreements outline what property management actions are and are not permissible without SHPO consultation – functioning like an operations manual. This would reduce the need for SHPO consultations and increase operational certainty for the owner.

Covenants and preservation agreements may or may not explicitly address enforcement mechanisms.

### **OUTSTANDING QUESTIONS**

The following questions merit attention prior to agreement upon an approach to Section 106 compliance:

- What aspects of the Locks and Canal Property are subject to Section 106 protection? (E.g., building facades, building interiors, mechanical components, archeological sites?)

- What sort of restrictions would need to be applied to the property to fulfill Section 106 mitigation requirements?
- How would those restrictions affect restoration, renovation, operations and maintenance of the facility and what additional costs might be associated with such restrictions?
- Could a programmatic agreement (operations manual) be developed that describes reasonable conditions for conducting restoration, renovation, operations and maintenance activities and identifying circumstances that would require consultation with SHPO or other mitigation measures.

## **RECOMMENDATIONS AND NEXT STEPS**

It is recommended that the Authority and USACE investigate the possibility of establishing a preservation covenant to be associated with the transfer of title (deed), or, if more suitable, a preservation agreement, to satisfy the requirements of Section 106.

As part of that investigation, it is recommended that USACE propose an initial draft programmatic agreement (operations manual), for review by the Authority for potential incorporation into the covenant or preservation agreement. Such programmatic agreement should articulate reasonable conditions for conducting anticipated restoration, renovation, operations and maintenance activities and identify circumstances that would require consultation with SHPO or other mitigation measures.

Other recommended next steps for the Authority:

- Obtain legal advice to confirm the suitability of this approach.
- Request that USACE provide examples of other programmatic agreements for comparable or similar properties.
- Request that USACE confirm approach with relevant internal departments/authorities.
- Confirm the approach with SHPO.
- Obtain expert advice to ensure that terms of a proposed programmatic agreement will allow anticipated restoration, renovation, operations and maintenance activities on the Locks to proceed without unnecessary or excessive delay, impediment, or expense.