



DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

MEMORANDUM

DATE: July 30, 2018

TO: Oregon Ocean Science Trust

FROM: Matt DeVore, Assistant Attorney General, Natural Resources Section

SUBJECT: Proposal to Establish Oregon Community Foundation Account

Question presented:

May the Oregon Ocean Science Trust execute the draft agreement with the Oregon Community Foundation to establish a charitable fund to accept donations into a fund and make charitable contributions from the fund in consultation with OOST?

Short answer:

Yes, provided that the agreement is clarified to ensure that, first, it is clear that donations made to OCF are not intended to be donations to the State for deposit into the Oregon Ocean Science Fund, and second, that OOST's role is purely consultative and that the agreement does not impose any enforceable responsibilities or obligation on OOST. We note that the draft agreement could be construed as inconsistent with the Oregon Ocean Science Trust statutory authority to the extent that these points remain ambiguous. The Oregon Ocean Science Trust could also consider a legislative amendment to allow it to enter into a binding agreement to establish a foundation to raise funds directly for the Oregon Ocean Science Fund.

Discussion:

The Oregon Ocean Science Trust's (OOST) authority is expressed in ORS 196.565 to 569. The OOST's duties are to promote ocean science and research, including operating a grant program for that purpose.¹ In those authorizing statutes, the legislature also set up the Oregon Ocean Science Fund (the "OOS Fund") in the State Treasury to consist of grants, donations, contributions, gifts, legislative appropriations, interest earned by the OOS Fund, and moneys received as the state's distributive share of the Outer Continental Shelf Lands Act.² The OOS Fund is to be used to establish and execute a competitive grant program to conduct research and

¹ ORS 196.566.

² ORS 196.567(3).

monitoring related to Oregon's ocean and coastal resources; reimburse agencies for administering or supporting the program; and allocate the state's distributive share of money collected under the Outer Continental Shelf Lands Act.³ Statute further provides that any donations collected on behalf of any state entity, including the OOST, must be turned over to the state, either within one business day after receipt of the money, or a longer reasonable period if certain criteria are met and safeguards are in place.⁴

None of these statutes provide the OOST with general authority to enter into contracts to establish a fundraising relationship with a charitable foundation, but authority to enter contracts may be implied in some specific situations.⁵ An agency may also have implied authority to collaborate with a private entity in order to carry out its other statutory obligations.⁶

The relevant provisions of the draft agreement proposed by the Oregon Community Foundation (OCF) are as follows:

- Preamble. The draft agreement would establish a charitable fund and names OOST as the "donor" to the fund.
- Section 1. Any funds transferred to OCF under the Agreement shall be designated as the "Oregon Ocean Science Trust Fund of the Oregon Community Foundation." (The OCF Fund.").
- Section 3. The money would be "held and owned by OCF" as a component of the OCF's funds, and not held by OCF on behalf of the OOST.
- Section 4. The money held by OCF would be expected to generate income that would become available for distribution.
- Section 5. The agreement would provide OCF with authority to manage the charitable fund and its distributions, with consultation by the Executive Director of OOST or any single voting member of the OOST if that person is willing and able to consult and advise. However, even if the OOST Director or voting member provides its consultation and advice, the OCF retains discretion to decide whether to follow the OOST recommendation. Though not explicitly stated, the agreement suggests that either OCF would solicit funds on behalf of OOST, or that OOST would direct donors to the OCF, or most likely both.

³ ORS 196.566(4), 196.567(5) and 196.568(1).

⁴ ORS 293.265(1).

⁵ For example, under ORS 196.566(4), there is an argument that OOST has implied authority to enter into a contract as part of the OOST's competitive grant program; or under ORS 196.568(1)(c) there is an argument that OOST has implied authority to enter into interagency agreements with other state agencies that provide support to OOST.

⁶ *Springfield Education Assn. v. Springfield School Dist.*, 290 Or 217 (1980).

- Section 8. If the value of the OCF fund failed to reach \$25,000 in five years, the agreement would allow OCF to distribute the money to either the OCF's The Oregon Fund or the Oregon Scholarship Fund.

In sum, the proposed agreement neither provides the OOST with much authority or control over the funds held by OCF, nor does it obligate OOST to undertake any action at all. OOST's only responsibility is to act as a consultant regarding distributions from the OCF Fund. OCF retains ultimate authority to make distribution decisions.

The purpose of the OCF Fund is to accept donations that could be used to promote ocean research and science in Oregon. That purpose is consistent with the OOST's statutory duties. We therefore conclude that the OOST has implied authority to enter into an agreement with OCF, particularly since the agreement does not obligate OOST to undertake any actions—OOST's actions are entirely voluntary under the agreement.

Several of the provisions of the OCF agreement summarized above could be misconstrued as inconsistent with OOST's statutes, in particular the statutory obligation that donations to the State must be deposited into the Oregon Ocean Science Fund, a state account. The preamble identifies the OOST as a "donor" and Section 1 references funds that are "transferred to OCF under this Agreement", though it is not clear that OOST intends to (and we do not believe it has the authority to) transfer state funds into the OCF Fund. We recommend that the agreement be clarified to reflect that OOST will not be donating or transferring state funds into the OCF Fund.

The fact that the proposed OCF Fund has such a similar name as the OOS fund, with the only difference being the word "trust" used in the OCF Fund, raises the potential for donor confusion to whether a donation was to the OOS Fund or to the OCF Fund, and donor expectations as to the use of such funds. We therefore recommend that the agreement with OCF be clarified to minimize any such confusion, including renaming the OCF Fund to clearly distinguish it from the OOS Fund and including a statement in any publication that clarifies OCF is not acting as an agent of the OOST.

We also recommend the addition of a hold-harmless clause to help protect the state and OOST from liability for any acts of the OCF that may arise out of this agreement. If the OOST is interested in proposing changes to the draft agreement, we can provide proposed language.

Alternatively, the OOST may wish to explore a legislative change. Legislation could provide authority to establish a relationship with a foundation that is established to raise funds for deposit into the OOS Fund. This would allow OOST to have more control over the use of donations. The Oregon Parks and Recreation Department (OPRD) has a relationship with a private, nonprofit named the "Oregon State Parks Foundation", which may offer a helpful comparison. The relevant statute is at ORS 390.141.