

W. S. E. I.

AGENDA COVER MEMORANDUM

TO: Board of County Commissioners

DEPARTMENT: Lane County Sheriff's Office

PRESENTED BY: Judy Simpson

SUBJECT: IN THE MATTER OF DELEGATING AUTHORITY TO THE COUNTY ADMINISTRATOR TO EXECUTE EASEMENT AGREEMENT BETWEEN GIUSTINA LAND & TIMBER CO, EUGENE WATER & ELECTRIC BOARD AND LANE COUNTY FOR ROAD ACCESS TO MT HAGAN COMMUNICATION FACILITY

I. MOTION

MOVE THAT THE BOARD OF COUNTY COMMISSIONERS DELEGATE THE AUTHORITY TO THE COUNTY ADMINISTRATOR TO EXECUTE THE EASEMENT AGREEMENT FOR ACCESS TO MT HAGAN

ISSUE/PROBLEM

Lane County needs access to the communication facility at Mt Hagan.

II. DISCUSSION

A. Background

Under Board Order 05-3-9-9, Eugene Water & Electric Board (EWEB) and Lane County entered into an Intergovernmental Agreement (220288) to establish a partnership for the building and operation of a public microwave radio network consisting of microwave and necessary equipment and services to and between: Sheriff's Office, Buck Mountain, Bear Mountain and Mount Hagan.

Pursuant to the partnership Intergovernmental Agreement, EWEB and Lane County lease a communications facility at the top of Mt. Hagan and share the site upgrade costs for the microwave network.

EWEB and Lane County desire access to the Mt. Hagan facility over an existing road located on real property belonging to Giustina Land & Timber Co (Giustina).

Giustina is willing to grant an easement to EWEB and Lane County for an initial term of five (5) years beginning 1 December 2005 and ending 30 November 2010, with an option to renew the Easement Agreement for an additional period of five (5) years.

The fee for the 5-year agreement is \$2,473, to be split equally between EWEB and Lane County.

B. Analysis

Lane County needs the easement for ingress and egress to the Mt. Hagan Communication Facility.

C. Alternatives/Options

1. Adopt the order to approve execution of the Easement Agreement with Giustina Land & Timber Co.
2. Do not approve the order.

D. Recommendations

Recommends Board approval of proposed Board Order.

E. Timing

As indicated above.

III. IMPLEMENTATION/FOLLOW-UP

Easement agreement will be executed.

IV. ATTACHMENTS

1. Proposed Board Order No. _____.
2. Easement Agreement between Giustina, EWEB and Lane County.

IN THE BOARD OF COUNTY COMMISSIONERS OF Lane County, OREGON

**ORDER NO.)IN THE MATTER OF DELEGATING AUTHORITY
)TO THE COUNTY ADMINISTRATOR TO EXECUTE
)EASEMENT AGREEMENT BETWEEN GIUSTINA
)LAND & TIMBER CO, EUGENE WATER &
)ELECTRIC BOARD AND LANE COUNTY FOR
)ROAD ACCESS TO MT HAGAN COMMUNICATION
)FACILITY**

THIS MATTER having come before the Board of County Commissioners for approval of Easement Agreement between Giustina Land & Timber Co Limited Partnership, Eugene Water & Electric Board and Lane County for road access to the leased communication facility at Mt. Hagan.

WHEREAS, Lane Manual 21.145 requires Board of Commissioner approval for execution of contracts exceeding three (3) years in length.

WHEREAS, the Easement Agreement has an initial term of five (5) years beginning 1 December 2005 and ending 30 November 2010.

IT IS HEREBY ORDERED that the Board of County Commissioners delegate authority to the County Administrator to execute Easement Agreement between Giustina Land & Timber Co. Limited Partnership, Eugene Water & Electric Board and Lane County for road access to Mt. Hagan Communication Facility, in substantial conformity with the attached Exhibit "A".

Signed this day of , 2006

Chair, Lane County Board of Commissioners

APPROVED AS TO FORM

5-26-06

[Handwritten signature]

SECRET

EASEMENT AGREEMENT

RECITALS:

A. GIUSTINA LAND & TIMBER CO. LIMITED PARTNERSHIP (hereinafter "Giustina") is the owner of the real property, described on Exhibit A attached hereto and incorporated herein.

B. EUGENE WATER & ELECTRIC BOARD (hereinafter "EWEB") and Lane County through Lane County Sheriff's Office (hereinafter "LCSO") pursuant to an Intergovernmental Agreement (hereinafter "IGA") own or lease a communications facility at the top of Mt. Hagan located in the NE1/4 NE1/4, Section 35, T16S, R3E, Willamette Meridian, and desire access to this facility over an existing road (hereinafter the "Road") located on Giustina's real property and shown as a bold line on the map marked Exhibit B attached hereto and incorporated herein. The Road is generally reached by traversing other real property owned by Giustina on roads owned or controlled by the U. S. Forest Service.

C. EWEB and LCSO need an easement for ingress and egress to their Mt. Hagan communications facility over the Road and Giustina is willing to grant an easement on the terms and conditions hereinafter set forth.

NOW THEREFORE, in consideration of the foregoing recitals which are hereby made a part of this Easement Agreement (hereinafter "Agreement"), and of the mutual agreements, provisions, and covenants contained herein, Giustina and EWEB and LCSO agree as follows:

AGREEMENT:

1. Grant. Subject to all matters of public record, Giustina hereby grants EWEB and LCSO as parties to the IGA for a term of 5 years commencing December 1, 2005, and expiring November 30, 2010, a nonexclusive right to use the Road for access to their communications facility at the top of Mt. Hagan. The agents and independent contractors of EWEB and LCSO are authorized to use the Road in connection with the exercise of the rights granted to EWEB and LCSO, subject to the terms of this Agreement.

2. Fee. EWEB and LCSO shall pay Giustina \$2,473 coincidentally with the execution of this Agreement, the receipt of which Giustina hereby acknowledges.

3. Road Use.

3.1. EWEB and LCSO, their respective officers, employees, contractors and agents shall cooperate in their use of the Road to minimize interference with other users, shall not start a fire or smoke while using the Road or while on Giustina's real property, and shall not stop on the Road or remain on Giustina's real property except in an emergency.

3.2 Giustina may impose reasonable traffic regulations for the use of the Road, providing they are uniformly applicable.

3.3 Giustina may suspend or make a reduction in the further use of the Road by EWEB and LCSO during a period of danger or potential danger to timber, roads and other property or to persons. Any suspension shall be based upon reasonable grounds which may include but need not be limited to weather conditions resulting in fire closure of an area, extreme fire hazard, road conditions wherein continued use would result in excessive damage to the Road, or traffic conditions where continued use would create extreme danger to lives or property.

3.4 Neither EWEB nor LCSO may sever any tree on Giustina's real property without Giustina's prior written consent.

4. Road Maintenance and Inspection.

4.1. Although it may do so, Giustina is not obligated to maintain the Road. Giustina reserves the right to reconstruct and relocate the Road. In the event Giustina does not elect to maintain the Road, EWEB and LCSO shall have the right to maintain the Road at their expense.

4.2. EWEB or LCSO shall reimburse Giustina upon demand for Giustina's cost in repairing any damage to the Road caused by their respective officers, employees, contractors, or agents. EWEB's and Lane County's liability is subject to the applicable limitations of the Oregon Tort Claims Act and Oregon Constitution. In the event Giustina is not reimbursed in full, this Easement shall immediately terminate.

4.3. Each time Giustina, at either the request of EWEB or LCSO, inspects any portion of the Road, or meets with the representatives of either EWEB or LCSO in connection with this Agreement, then prior to the inspection or meeting EWEB or LCSO shall pay Giustina as an inspection or consultation fee the sum of \$200.00 which shall be in addition to any other amounts required or to be paid Giustina by either EWEB or LCSO under the provisions of this Agreement.

5. Insurance. EWEB and LCSO are self-insured public agencies with insurance covering:

Comprehensive general liability insurance for the injury to or the death of persons and for damage to property; and

Comprehensive automobile liability insurance for the injury to or the death of persons and for damage to property covering all motor vehicles utilized.

EWEB's and LCSO's self-insurance is subject to the applicable limitations of Article XI, Section 10 of the Oregon Constitution and the Oregon Tort Claims Act (ORS

30.270) limits presently at \$500,000 per occurrence. Property damage limits are \$50,000.

6. Indemnification. EWEB and LCSO separately hereby covenant and agree to defend, indemnify, save, and hold Giustina, its partners, employees, agents, and property free, clear, and harmless from any and all liability, loss, costs, charges, penalties, obligations, expenses, reasonable attorney fees, litigation, judgments, damages, claims, and demands of any kind whatsoever in connection with or arising out of or by reason of any violation of law, ordinance, or regulation, including those pertaining to hazardous substances, by EWEB or LCSO, their respective officers, employees, contractors, subcontractors, agents, or by reason of any injury or damage however occurring to any person or persons whomsoever or to the property of any kind whatsoever and to whomsoever belonging caused by or arising from the operations of or the use by either EWEB or LCSO of the Road and any road on Giustina's real property, or caused by or arising from the failure of EWEB or LCSO to perform their obligations under this Easement Agreement particularly Section 7, including any damage or liability from fire and all costs and expenses in connection with or on account of the protection of that real property against the spread of fire or the suppression of any fire thereon. EWEB's and LCSO's indemnity and hold harmless obligations are subject to the limitations of the Oregon Tort Claims Act and the Oregon Constitution, as applicable. The indemnity of EWEB and LCSO hereunder shall survive the expiration or termination of this Agreement.

7. Compliance with Law; Fire.

7.1. EWEB and LCSO shall comply with all applicable laws, rules, and regulations of governmental authority relating to its activity, including without limitation, all applicable federal, state, and local laws, regulations, and ordinances pertaining to air and water quality, hazardous materials, and other environmental matters, and those pertaining to the prevention, suppression, and control of fire. Prior to their use of the Road, EWEB and LCSO shall determine whether the State Forester has declared a fire season to exist, and whether forestland is subject to restricted uses. For convenience of the parties hereto, in Exhibit C attached hereto and incorporated herein are some of the state laws pertaining to fire, including ORS 477:.064, .090, .710, .720, .740, .510, and .535-550.

7.2. EWEB and LCSO shall take all reasonable precautions for the prevention and suppression of fire in connection with their use of the Road or the exercise of their rights under this Agreement. EWEB and LCSO shall immediately proceed to use all reasonable efforts to control and extinguish fire existing on or spreading from lands or roads on which they are operating, notwithstanding the origin or subsequent spread of such fire when its existence becomes known to either EWEB or LCSO, and shall immediately notify Giustina, the Oregon Department of Forestry, and, if appropriate, the Forest Protective Association or rural fire department, of the fire's existence, and shall cooperate with and make available to these organizations all personnel and equipment at that party's reasonable disposal (in the vicinity) to combat the fire. The parties hereto agree that "every reasonable effort" is a standard that will differ in each

individual circumstance taking into account among other things, a person's physical capacity and skill and competing law enforcement requirements.

8. Representation. Giustina makes no representation as to the present or future condition of its real property or the character of traffic on the Road. EWEB and LCSO assume all risk of damage to their property or injury to themselves, their employees, contractors, agents and invitees arising out of the condition of Giustina's real property or the type of traffic on the Road except as may be caused by the negligent act or omission of or imposed by law upon Giustina. EWEB and LCSO acknowledge that they must share the use of the Road with heavy industrial log traffic.

9. Termination.

9.1. Although the term of this Agreement is for five years, in the event it is not used by EWEB and LCSO for a period of two years, or if otherwise abandoned by EWEB and LCSO, this Agreement shall automatically expire and EWEB and LCSO shall upon Giustina's request execute a recordable document evidencing such expiration.

9.2. EWEB and LCSO may separately terminate their rights and obligations under this Agreement at any time by providing notice in accordance with paragraph 15. However, if one party separately terminates first, the remaining party and Giustina will execute a new agreement. Such new agreement will relieve the remaining party from any future liability or obligation of the terminating party. Upon termination by both EWEB and LCSO, the fee shall then be prorated to the first day of the month nearest the effective date of termination and Giustina shall return to EWEB or LCSO the prorated amount representing the remaining portion of the 5 year term, providing that Giustina shall not be obligated to return more than \$1000. Giustina shall have no obligation to return any portion of the fee if either EWEB or LCSO is in default at any time prior to the effective date of the termination, or if the easement is terminated under the provisions of Section 4.2 or Section 9.3

9.3 In the event Giustina sustains any loss because of the limits of liability contained in the provisions of Sections 4.2, 5 or 6, or because of a default by EWEB or LCSO in their obligations under Section 7, this Easement shall immediately terminate.

10. Option to Renew. Providing neither EWEB nor LCSO is in default and further providing that this Easement has not been earlier terminated under the provisions of Section 4.2 or Section 9, EWEB and LCSO may elect to renew the term of this Agreement for an additional period of 5 years by notifying Giustina not earlier than 180 days and not later than 60 days before the expiration of the original term. The parties shall meet within 30 days of notification to agree upon the fair market value of the fee for the renewal term. If the parties fail to agree by 30 days before the expiration of the original term, the fee shall be set by arbitration as herein provided. In no event shall the fee for the renewal term under this Agreement be less than \$2,473 plus 4% compounded annually nor shall it be greater than \$2,473 plus 10% compounded annually from December 1, 2005.

11. Transfer of Interests; Binding Effect.

11.1. Giustina shall give its consent to an assignment or transfer of this Agreement by EWEB and LCSO providing the assignee or transferee is capable, especially financially, of performing all of the obligations of EWEB and LCSO in this Agreement and enters into an agreement assuming these obligations in a form acceptable to Giustina. If the assignee or transferee is not subject to the Oregon Tort Claims Act or the Oregon Constitution as applicable, then the consent shall include revisions satisfactory to Giustina of Sections 4, 5, and 6 and any other provisions whereby liability is so limited. In the event of an assignment or transfer, EWEB and LCSO shall not be released from their obligations in this Agreement unless this release is given in writing by Giustina.

11.2. Neither EWEB nor LCSO may grant licenses of their rights under this Agreement. Users of the communication facilities at the top of Mt. Hagan other than EWEB and LCSO shall have no right to use the Road unless they have entered into a separate agreement with Giustina.

11.3. This Agreement shall inure to the benefit of and shall be binding upon not only the parties hereto but also upon their respective heirs, successors, representatives and assigns in accordance with the terms hereof. Provided, however, that nothing contained in this paragraph shall alter the restrictions above relating to assignment.

12. Default. Time and specific performance are the essence of this Agreement. EWEB and LCSO shall be in default of this Agreement if:

(1) Either party fails to comply with any obligation under Section 7; or

(2) Either fails to pay any sum of money required to be paid within twenty (20) days after it is due; or

(3) Either fails to comply with any term or fulfill any obligation under this Agreement, other than an obligation under Section 7, and other than the payment of money, within thirty (30) days after written notice by Giustina. If such default is of a nature that cannot be completely remedied within a thirty (30) day period, this provision shall be complied with if either EWEB or LCSO begins correction of the default within the thirty (30) day period and thereafter proceeds with reasonable diligence and in good faith to effect the remedy as soon as practicable.

No notice of default is required in provisions (1) or (2) above.

13. Remedies. If EWEB or LCSO is in default, Giustina may terminate this Agreement by notice and may recover damages, whether or not this Agreement is terminated. Such remedies shall be in addition to any other remedies afforded under applicable law.

14. Arbitration. In the event the parties fail to agree on the fee for the renewal term by the time required herein they shall immediately consult and attempt to agree

upon a mutually acceptable single arbitrator who is an independent real estate appraiser having knowledge of valuation of easements or leases relating to communication or broadcasting facilities. If the parties fail to agree by the expiration of the original term, either party may apply to the Senior Circuit Judge of the State of Oregon for Lane County for appointment of a single arbitrator. When an arbitrator has been appointed, the arbitration shall proceed according to Oregon Statutes governing arbitration except as herein provided to the contrary. The arbitrator shall set the fee for the renewal term based upon the fair market value of the use and the rights granted herein, but this fee shall not be less than the amount set forth in Section 10. All decisions of the arbitrator shall be in writing and be served upon the parties. The parties shall share equally the expense of the arbitration filing costs and any arbitrator's fees. Each party shall bear its own costs (except arbitration filing costs), witness fees, and attorney fees.

15. **Notice.** Any notice permitted or required under the provisions of this Agreement that is to be given shall be in writing and shall be deemed to have been duly made or given when personally delivered, or when transmitted by facsimile, or two (2) days after depositing in the United States mail with postage prepaid a certified or registered letter containing such notice addressed as follows: Giustina Land & Timber Co. Limited Partnership, if by mail, P. O. Box 989, Eugene, Oregon 97440; if personally delivered, to 1991 West Second Avenue, Eugene, Oregon 97402; if transmitted by facsimile, (541) 345-2305. Eugene Water & Electric Board, if by mail, P.O. Box 10148, Eugene, Oregon 97440; if personally delivered, 500 East 4th Avenue, Eugene, Oregon 97401; if transmitted by facsimile, (541) 484-3762. Lane County Sheriff's Office, Attn: David Kemp, 125 E. 8th Avenue, Eugene, OR 97401; if transmitted by facsimile, (541) 682-8596.

16. **Waiver.** No waiver by a party hereto of any violation, default or breach of this Agreement or any provision thereof shall operate as a waiver of any subsequent violation, default or breach or the right to require specific performance or obtain injunctive relief.

17. **Severability.** If any provision of this Agreement shall be held unenforceable or invalid, such unenforceability or invalidity shall not affect the enforceability or validity of any other provision of this Agreement.

18. **Choice of Law.** The validity, meaning, enforceability and effect of this entire Agreement and the rights and liabilities of the parties hereto shall be determined in accordance with the laws of the State of Oregon without regard to Oregon law with respect to conflict of laws.

19. **Higher Standards.** In the event any provision of this Agreement imposes a higher standard or duty of performance on a party than is required by any applicable federal, state or local law, lawful rule or regulation now or hereafter in effect during the term of this Agreement, the provisions of this Agreement shall prevail and every party shall conform therewith.

In the event any applicable federal, state or local law, lawful rule or regulation now or hereafter in effect during the term of this Agreement imposes a higher standard or duty of performance on a party than is required under the provisions of this

Agreement, then the law, rule or regulation shall prevail and every party shall conform therewith.

20. Attorney Fees. If any suit, action or other proceeding shall be instituted relating to any term, provision, covenant or condition of this Agreement or relating to any of the rights, duties or obligations arising under it, the prevailing party shall be entitled to recover from the other party and other party agrees to pay to the prevailing party, whether or not the matter proceeds to final judgment or decree, in addition to costs and disbursements allowed by law, such sum as the trial and each appellate court may adjudge reasonable as attorney's fees in such suit, action or other proceeding and in any appeal thereof.

21. Entire Agreement. This Agreement constitutes the entire agreement between the parties with respect to the subject matter hereof, and all prior agreements, representations or understandings, written or oral, with respect to the subject matter hereof are superseded.

DATED effective December 1, 2005.

GIUSTINA LAND & TIMBER CO.
LIMITED PARTNERSHIP
AN OREGON LIMITED PARTNERSHIP
BY LMG, LLC, A GENERAL PARTNER

EUGENE WATER & ELECTRIC BOARD

By _____
L. M. Giustina, Member Manager

By 
Michael McElroy,
Senior Electrical Engineer, P.E.

LANE COUNTY

By _____
William A. Van Vactor
County Administrator

Date _____

By _____
Russel E. Burger
Sheriff

Date _____