

## EAST PLUM CREEK CONSERVATION BANK

### CONSERVATION BANK AGREEMENT

THIS EAST PLUM CREEK BANK AGREEMENT (the "Agreement") is made and entered into this \_\_\_\_ day of \_\_\_\_\_, 2003 between Colorado Department of Transportation ("CDOT"), the Colorado Division of the Federal Highway Administration ("FHWA"), and the U.S. Fish and Wildlife Service ("USFWS"). CDOT, FHWA, and the USFWS are referred to jointly as the "Parties". The purpose of this Agreement is to establish the terms and conditions for a Conservation Bank on certain real property referred to herein as the East Plum Creek Conservation Bank or the Conservation Bank.

#### R E C I T A L S

A. CDOT is the owner of real property located in the Town of Castle Rock, County of Douglas, Colorado of which 25.30 acres are included within the East Plum Creek Conservation Bank as more completely shown in Exhibit A (general location map) and described and illustrated in Exhibit B (legal description of mitigation areas and legal parcel map) attached hereto ("Property").

B. USFWS has responsibilities related to the conservation, protection, restoration, enhancement and management of native fish, wildlife, plants, and habitat necessary for biologically sustainable populations of those species pursuant to the provisions of various federal laws including the Endangered Species Act, 16 USC §§ 1531 et seq. ("ESA"), the Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661-666c, and the Fish and Wildlife Act of 1956, 16 U.S.C. §§ 742(f) et seq.

C. The Colorado Department of Transportation's mission is to provide the best multi modal transportation system for Colorado that most effectively moves people, goods, and information, while at the same time adhering to CDOT's values, which include working in partnership with all, using resources wisely, and making decisions that are compatible with Colorado's quality of life, including environmental and economic goals.

D. The Colorado Division of the FHWA provides financial assistance to the State of Colorado through the Federal-Aid Highway Program to create the best transportation system in the world for the American people through proactive leadership, innovation, and excellence in service. One of FHWA's strategic goals is to protect and enhance the natural environment and communities affected by highway transportation. FHWA and CDOT are bound under federal environmental regulations such as the ESA (16 U.S.C. §§ 1531 et. seq., as amended), the Clean Water Act, section 404 (33 U.S.C. § 1344), and the National Environmental Policy Act (42 U.S.C. §§ 4321 et. seq.), to evaluate, consider, and mitigate significant environmental impacts of their projects.

E. Establishment of the East Plum Creek Conservation Bank represents an excellent opportunity to support and enhance the ongoing habitat conservation planning efforts in the region by conserving highly valuable resources at the Property. Within its boundaries, the East Plum Creek Conservation Bank will provide for the permanent protection of the Preble's meadow jumping mouse (*Zapus hudsonius preblei*) (PMJM) and the habitat upon which it depends.

F. It is anticipated that CDOT road and highway construction and development activity within the Service Area (as described in Exhibit C), will necessitate the mitigation of temporary and permanent impacts to PMJM habitat through the preservation, restoration, and enhancement of off-site lands that possess comparable or greater habitat values.

G. The Property supports aquatic, riparian, upland and wetland habitat for PMJM. Native vegetation communities occur on the site such as willow shrublands and herbaceous wet meadows. A complete description of the biological resources that occur on the Property is provided in Exhibit D (Baseline Report).

H. USFWS has determined that lands within the East Plum Creek Conservation Bank, as they have been and are being improved and restored through the conservation actions described in Exhibit F (Bank Management Plan), are suitable to mitigate for impacts to habitat for PMJM within the Service Area.

I. On the terms and conditions hereinafter provided, the Parties hereto desire to establish a Conservation Bank with respect to the Property (referred to as the " East Plum Creek Conservation Bank", or, alternatively, the "Conservation Bank") in order to

provide for the permanent conservation of the Property, the use of such land as mitigation as provided in Recitals D, E, F, and G above, and the use of Conservation Credits by CDOT to offset unavoidable temporary and permanent impacts associated with its projects in need of such mitigation.

J. The Parties desire to enter into this Agreement to set forth the terms and conditions pursuant to which the East Plum Creek Conservation Bank will be established and implemented.

#### DEFINITIONS

1. "Agreement" means this document.
2. "CDOT" means the Colorado Department of Transportation..
3. "Conservation Credit" means a mitigation/compensation credit (one unit of credit as defined by USFWS).
4. "Covered Species" means PMJM within the Service Area.
5. "ESA" means the federal Endangered Species Act (16 U.S.C. §§ 1531 et seq.), including all regulations promulgated pursuant to that Act.
6. "FHWA" means the Colorado Division of the Federal Highway Administration.
7. "Management Plan" means the management plan that has been prepared for the Conservation Bank lands.
8. "Mitigation" means those measures determined through the consultation process provided under Section 7 of the ESA (16 U.S.C. § 1536 (a)(2)) to be necessary to offset project impacts.
9. "PMJM" means the Preble's meadow jumping mouse (*Zapus hudsonius preblei*), a federally listed species under the Endangered Species Act.

10. "Service Area" means the geographic areas within which temporary and permanent impacts that occur to PMJM habitat in association with CDOT projects may be mitigated through use of Conservation Credits at the East Plum Creek Conservation Bank consistent with the Agreement.

11. "USFWS" means the United States Fish and Wildlife Service, an agency of the United States Department of the Interior.

## EXHIBITS

Whereas, the following Exhibits are incorporated as appendices to this Agreement:

"Exhibit A"	General location map
"Exhibit B"	Legal descriptions of Mitigation Areas and Parcel Maps
"Exhibit C"	Service Area
"Exhibit D"	Baseline Report
"Exhibit E"	Title Report
"Exhibit F"	Bank Management Plan Outline and all subsequent revisions and addenda thereto
"Exhibit G"	Table of Credits (Ledger)
"Exhibit H"	Conservation Credit Allocation and Success Criteria for Conservation Credit Release

## AGREEMENT

NOW, THEREFORE, in consideration of the foregoing recitals and other good and valuable consideration, the receipt and sufficiency of which is acknowledged, the Parties hereby agree as follows:

1. The Recitals and Definitions set forth above are incorporated by this reference.
2. The East Plum Creek Conservation Bank includes 25.30 acres of land adjacent to East Plum Creek containing habitat suitable for the PMJM. See Exhibits A & B. The lands are

located within the limits of the Town of Castle Rock, Douglas County, Colorado and are included within the right-of-way for Interstate 25, owned by CDOT.

3. Conservation Bank Evaluation and Acceptance

(a) Representatives of the USFWS have inspected and generally evaluated the Property for purposes of determining its biological values in connection with the use of Conservation Credits. As a result of benefits described in Exhibit F accruing to the PMJM, a federally listed threatened species, and its habitat, and upon the establishment of the Conservation Bank for conservation purposes, the USFWS acknowledges and agrees that, as described in Recitals D, E, F, and G, and subject to the limitations provided in this Section and Section 5(c) below, the Property possesses biological values that support the Conservation Credits acknowledged in Section 5 below.

(b) Conservation Credits may serve as mitigation for adverse temporary and permanent biological impacts to PMJM habitat resulting from CDOT projects, including those funded under the Title 23 Federal-Aid Highway Program, within the Service Area or other areas approved by USFWS.

(c) Once the Conservation Bank has been established in accordance with the procedures set forth in Section 4, the USFWS shall review and approve each credit allocation through the ESA Section 7 consultation process for each project as a prerequisite to CDOT's use of the Conservation Credits in the manner provided by this Agreement.

4. Establishment of the Conservation Bank

(a) The East Plum Creek Conservation Bank shall be deemed established when this Agreement has been signed and accepted by the Parties. Upon establishment of the Conservation Bank and in exchange for CDOT/FHWA's commitment to ensure permanent management of the Bank for conservation purposes, CDOT shall be entitled to use Conservation Credits as provided in Section 5 below.

(b) Concurrent with the execution of this Agreement, CDOT shall deliver to USFWS a current title report to be attached hereto as Exhibit E.

(c) Within six months from execution of this Agreement, CDOT/FHWA shall deliver to USFWS a final Bank Management Plan. No additional Conservation Credits, beyond those established at execution of this Agreement, shall be available for CDOT's use until USFWS has received an acceptable final Bank Management Plan.

5. Conservation Credits

(a) As a result of the benefits accruing to the PMJM and its habitat through the substantial CDOT program of restoration and enhancement actions as described in Exhibit F, the Management Plan, and CDOT/FHWA's commitment to ensure the management of the land for conservation purposes, the East Plum Creek Conservation Bank shall have a total of 25.30 Conservation Credits potentially available from the Bank to be used for offsite mitigation of temporary and permanent impacts to PMJM habitat associated with CDOT projects in accordance with Exhibit H. In no case shall the credits expended exceed the total number of Conservation Credits allocated to the Conservation Bank and authorized by USFWS to be used. The credits shall be established as provided in Exhibit H.

(b) Nothing contained in this Agreement shall be deemed to limit the USFWS jurisdiction concerning impacts and applicable mitigation of endangered, threatened, and sensitive species and biological resources, or to restrict the ability of the USFWS to fully discharge its responsibilities under applicable law; provided, however, that subject to Section 3, the USFWS will not object to the use of Conservation Credits for mitigation on the basis established under this Agreement.

(c) The conveyance of Conservation Credits shall be accounted for in accordance with Section 7 below. Once all Conservation Credits have been conveyed, no further Conservation Credits shall be acknowledged by the USFWS.

(d) The Parties acknowledge that this Agreement may be amended in the future to incorporate the addition of land to the Conservation Bank, or to reflect a mutually agreeable procedure to further enhance or restore the Property in a manner that warrants additional Conservation Credits. In such event the amended Agreement will separately describe the manner in which additional Conservation Credits, if any, will be determined.

6. Property Owner's Covenants

Subject to Section 15 below, CDOT as Property owner hereby agrees and covenants for so long as this Agreement is in effect and has not been terminated pursuant to Section 9 below, that CDOT:

- (a) Shall not discharge or release on the Property, or permit others to discharge or release on the Property, any material or substance deemed "hazardous" or "toxic" under any applicable federal, state, or local environmental laws.
- (b) Shall not create any encumbrances to the title of the Property other than those set forth in Exhibit E attached hereto, or execute, renew, or extend any liens, licenses or similar interests if the proposed encumbrance, lien, license or similar interest will adversely affect the biological values of the Property as determined by the USFWS, or execute, renew, or extend any leases, licenses or similar interests covering any lands within the East Plum Creek Conservation Bank without the prior written consent of the USFWS and FHWA.
- (c) Shall not, unless otherwise agreed to in writing by FHWA and USFWS, construct any structures or engage in any development activities on or uses of the Property that degrade biological values.
- (d) Shall maintain the biological value of the lands to insure their suitability as habitat for the PMJM in the manner described in the Management Plan.

7. Database for Conservation Bank Transactions

A database shall be established by CDOT for purposes of tracking the conveyance of Conservation Credits. Until such time as the USFWS has been notified in writing that all Conservation Credits have been conveyed and the last annual report has been received by the USFWS, CDOT shall be responsible for maintaining a database (Exhibit G) (hereafter the "Ledger") which shall include a numerical accounting of all Conservation Credits used and the balance of Conservation Credits remaining and, for each individual use of a Conservation Credit, shall state the date of the transaction, the number of Conservation Credits used, the project name for which the Conservation Credits were used, whether the Conservation Credits are being used for temporary or for permanent impacts, and the jurisdiction in which the impacting project occurs. CDOT shall make the Ledger available to the USFWS upon request. Upon each use of Conservation Credits in accordance with Section 5 above, CDOT shall deliver to the USFWS an

updated accounting of all Conservation Credits used as of the date of the most recent conveyance of Conservation Credits. This information shall be sent to the USFWS within thirty (30) days of each use of Conservation Credits. CDOT shall, on or before February 15th of each year, deliver to the USFWS a report covering the prior calendar year that contains all of the information described above. Until such time as the USFWS has been notified in writing that all Conservation Credits have been conveyed and the final annual report has been received by the USFWS, CDOT shall be responsible for maintaining a numerical accounting of Conservation Credits used and the Conservation Credit balance remaining.

8. Management and Monitoring of Conservation Bank Property

CDOT shall manage the Property as provided in this Section:

(a) CDOT shall oversee, manage, and maintain the Conservation Bank lands in perpetuity to preserve their habitat and conservation values in accordance with the terms of this Agreement and the prescriptions identified in Management Plan (Exhibit F). CDOT's management obligations shall include using reasonable efforts to prevent third party use of the Property in a manner not permitted under this Agreement. No later than six (6) months from the effective date of this Agreement, CDOT shall, in consultation with the USFWS, prepare a detailed site-specific Bank Management Plan for the Property. The Management Plan shall describe restoration actions already implemented and provide for the implementation of the additional management, monitoring, and maintenance measures and tasks identified in Exhibit F. The Management Plan shall be subject to the approval of the USFWS, which approval shall not be withheld unreasonably. Once the Management Plan has been approved by the USFWS, CDOT shall implement the Plan in accordance with the terms of this Agreement. CDOT, FHWA, and USFWS shall meet and confer from time to time, upon the request of any one of them, to revise the Management Plan to better preserve the habitat and conservation values of the Property. During the development of the Management Plan, CDOT shall manage the property consistent with the purposes of this Agreement to preserve the habitat and conservation values of the Property.

(b) CDOT shall provide to the USFWS an annual Property Management Report. The Management Report shall include the following:

- (i) A general description of the status of the biological resources on the Property;



- (ii) The results of any biological or other monitoring or studies conducted on the Property;
- (iii) A description of all management actions taken on the Property;
- (iv) A description of any problems encountered in managing the Property; and
- (v) A description of anticipated management actions that CDOT will undertake, in accordance with the Management Plan, in the coming year.

(c) CDOT shall be responsible for implementing any corrective actions determined to be necessary to achieve the success criteria and the associated Conservation Credits identified in Exhibit H. In the event of damages to the Conservation Bank caused by a natural catastrophe such as a major flood, prolonged drought, disease, or regional pest infestation, CDOT, FHWA, and the USFWS shall confer in a timely manner to determine what actions, if any, should be taken to protect the PMJM. During such time Conservation Credits still available in the Bank shall be withheld from use.

9. Term of Agreement; Termination Rights

(a) No conveyance or assignment of any portion of, or interest in, the Property shall be made without the prior written concurrence of the FHWA and USFWS, which concurrence shall require that the successor or assign assume all of CDOT's management and other obligations under this Agreement arising after such conveyance or assignment and have sufficient financial capacity to carry out any unfunded obligations under Section 8 of this document, in which event, such concurrence shall not be unreasonably withheld or delayed.

(b) The USFWS may elect to terminate this Agreement on the condition that each of the following has occurred: (i) CDOT has breached one or more of the covenants set forth in Section 6 above; (ii) CDOT has received written notice of such breach from the USFWS; and (iii) CDOT has failed to cure such breach within 90 days after such notice; provided, however, in the event such breach is curable, in the judgment of the USFWS, but cannot reasonably be cured within such 90 day period, the USFWS shall not have the right to terminate this Agreement so long as CDOT has commenced the cure of such breach and is diligently pursuing such cure to completion. Nothing in this Subsection (b) is intended or shall be construed to limit the legal or equitable remedies (including specific performance and injunctive relief) available to the

USFWS in the event of a threatened or actual breach of this Agreement by CDOT, except that no party shall be liable in damages to another party for breach of this Agreement.

(c) Notwithstanding anything to the contrary contained in this Agreement, once the Conservation Bank has been established, CDOT/FHWA shall be entitled to the USFWS' acknowledgment and acceptance of the Conservation Credits created thereby in accordance with Section 5 of this document.

(d) This Agreement shall end upon the filing of the final annual report to the USFWS described in Section 7 of this document (filed after all Conservation Credits have been applied to CDOT projects), provided that the management obligations described in this Agreement shall continue so long as the PMJM remains a listed species under the ESA. Should special management of the Property be determined to be necessary for delisting of the PMJM, the Parties to this Agreement shall develop and implement a revised Management Plan.

10. Cooperation

All Parties agree to reasonably cooperate in the implementation of this Agreement. Such cooperation by the USFWS shall include, without limitation:

(a) Certifying to CDOT/FHWA that Conservation Credits are available to offset PMJM mitigation requirements for CDOT projects as provided in Sections 3 and 5 above.

(b) Acknowledging, to the extent applicable, that this Agreement remains in full force and effect.

(c) Acknowledging that the East Plum Creek Conservation Bank is a Conservation Bank "approved" by the USFWS.

(d) Agreement to meet with CDOT and FHWA, if requested, as reasonably necessary to implement this Agreement.

Such cooperation by CDOT/FHWA shall include, without limitation:

(a) providing USFWS with full access to the Bank Property as reasonably necessary;

(b) working with USFWS to resolve any differences regarding implementation of this Agreement so that the Property's conservation values are protected.

11. Entire Agreement

This Agreement and its related Exhibits contain the entire agreement of the Parties with respect to the matters covered by this Agreement, and no other agreement, statement, or promise made by any Party, or to any employee, officer, or agent of any Party, which is not contained in this Agreement shall be binding or valid.

12. Interpretation and Headings

The language in all parts of this Agreement shall in all cases be simply construed according to its fair meaning and not strictly for or against any Party. Headings of the paragraphs of this Agreement are for the purposes of convenience only and the words contained in such headings shall in no way be held to explain, modify, amplify, or aid in the interpretation, construction, or meaning of the provisions of this Agreement.

13. Modification

This Agreement is not subject to modification except in a writing signed by all Parties, and any attempted modification not in compliance with this requirement shall be void. The Parties shall use their good faith efforts to complete such modifications within ninety (90) days after the initial request is made for a modification by the requesting Party.

14. Notices

All notices, demands, or requests from one Party to another may be personally delivered, sent by facsimile, sent by recognized overnight delivery service, or sent by mail, certified or registered, postage prepaid, to the persons set forth below or shall be deemed given five (5) days after deposit in the United States mail, certified and postage prepaid, return receipt requested and addressed as follows or at such other address as any Party may from time to time specify to the other Parties in writing and shall be effective at the time of personal delivery, facsimile transmission, or mailing:

Colorado Department of Transportation:

Roland Wostl, Manager, Environmental Planning and Policy Unit  
4201 E. Arkansas Avenue  
Denver, Colorado 80222

Federal Highway Administration:

Edrie Vinson, Environmental Program Manager  
Colorado Division, Federal Highway Administration  
555 Zang Street, Suite 250  
Lakewood, CO 80232

U.S. Fish and Wildlife Service:

Mary Henry, Assistant Regional Director, Ecological Services  
134 Union Boulevard  
Lakewood, CO 80228

15. Successors and Assigns

This Agreement and each of its covenants and conditions shall be binding on and shall inure to the benefit of the Parties and their respective successors and assigns consistent with Section 9(a). CDOT/FHWA may only assign its rights and obligations under this Agreement with the prior written approval of USFWS, which approval shall not be unreasonably withheld.

16. Exhibits

All Exhibits referred to in this Agreement are attached to this Agreement and are incorporated herein by this reference.

17. Attorneys' Fees

If any action at law or equity including any action for declaratory relief is brought to enforce or interpret the provisions of this Agreement, each Party to the litigation shall bear its own attorneys' fees and costs.

18. No Partnerships

This Agreement shall not make or be deemed to make any Party to this Agreement an agent for or the partner of any other Party.

19. Federal Appropriations

The duty of the USFWS to carry out its obligations under this Agreement shall be subject to the availability of federal appropriated funds.

This Agreement shall be governed by and construed in accordance with the laws of the State of Colorado.

Executed this 17 day of April, 2003.

IN WITNESS HEREOF, the Parties hereto have executed and delivered this Conservation Bank Agreement as of the date first set forth above.

COLORADO DEPARTMENT OF TRANSPORTATION

By: Thomas E. Norton

Thomas E. Norton, Executive Director

COLORADO DIVISION, FEDERAL HIGHWAY ADMINISTRATION

By: William C. Jones

William C. Jones, Division Administrator

U.S. FISH AND WILDLIFE SERVICE

By: Mary Henry

Mary Henry, Assistant Regional Director, Ecological Services