

**WYOMING CONSERVATION EXCHANGE AGREEMENT**  
**for**  
**GREATER SAGE-GROUSE**

This Conservation Exchange Agreement (the “Agreement”), dated this \_\_\_\_\_ day of \_\_\_\_\_, 2014, is made by and between \_\_\_\_\_, the Board of Directors for the Wyoming Conservation Exchange (“Board of Directors”) and the U.S. Fish and Wildlife Service (the “Service”), Wyoming Game & Fish Department (WGFD), U.S. Bureau of Land Management (BLM) and [others as appropriate]. The Board of Directors, the Service, WGFD and BLM and [others as appropriate] are hereafter referred to jointly as the “Parties.” This Agreement sets forth the intent of the Parties regarding the establishment, use, funding, operation, and maintenance of the Wyoming Conservation Exchange (the “Exchange”).

**RECITALS**

WHEREAS, the Parties to this Agreement desire to establish the Exchange for the benefit of the Greater Sage-Grouse (*Centrocercus urophasianus*) (“Covered Species”);

WHEREAS, the Parties to this Agreement desire that the Exchange promote and secure conservation benefits in the form of restoration, enhancement, stewardship and management (conservation) of habitat for the Covered Species;

WHEREAS, the U.S. Fish & Wildlife Service has identified the need for mitigation benefits for the conservation of the Covered Species, as detailed in the Service’s Greater Sage-Grouse Range-Wide Mitigation Framework;

WHEREAS, the Parties to this Agreement intend that the Exchange and the conservation activities to be implemented in association with the Exchange provide mitigation benefits for the Covered Species consistent with the principles set forth in the Service’s Greater Sage-Grouse Range-Wide Mitigation Framework;

WHEREAS, the Parties to this Agreement intend that this Exchange Agreement serve as a prelisting mitigation agreement as contemplated under the Service’s Greater Sage-Grouse Range-Wide Mitigation Framework;

WHEREAS, the Parties to this Agreement intend that the habitat conservation program to be established pursuant to the Exchange, and the habitat benefits generated thereby, contribute to the conservation of the Covered Species and Covered Habitat;

WHEREAS, the Parties to this Agreement intend that the program of habitat conservation for the benefit of the Covered Species established by the Exchange be suitable for consideration by the U.S. Fish & Wildlife Service pursuant to the Service’s Policy for Evaluation of Conservation Efforts When Making Listing Decisions, and that said program be considered by the Service in evaluating the eligibility and need for listing of the Covered Species under Section 4(a)(1) of the Endangered Species Act, 16 U.S.C. §1533(a)(1);

WHEREAS, the Parties to this Agreement desire to establish a mechanism to generate habitat conservation Credits (“Credits”) applicable to Covered Habitat;

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WHEREAS, the Parties to this Agreement intend that such habitat conservation Credits be suitable for use in satisfying such Covered Species conservation or mitigation requirements as may be established under federal and state regulatory programs, including for the purposes of Section 4(d), Section 7(a)(2), and Section 10(a)(1)(B) of the Endangered Species Act, 16 U.S.C. §§1533(d), 1536(a)(2), and 1539(a)(1)(B), should the Covered Species become a listed species under the Act;

WHEREAS, in order to accomplish the foregoing objectives, the Parties to this Agreement desire to provide a consistent and standardized means for determining conservation values for Covered Species habitat addressed in this Agreement, combined with market incentives, to establish a process for the creation, transfer and use of such habitat conservation Credits for mitigation purposes;

WHEREAS, the establishment of a habitat conservation value quantification tool, and a centralized management and monitoring capability, which maximizes efficiencies and economies of scale, is essential to achieve the aforementioned objectives;

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

### **AGREEMENT**

#### **Article 1: Definitions and Structure**

Article 1 sets the context for the Exchange by providing key definitions used throughout this Agreement, describing the purpose of the Exchange and this Agreement, outlining key principles of the Exchange, defining the Exchange administrative structure, providing the Exchange establishment date, and describing the relevant geographic scope of the Exchange.

##### **Section 1.01. Definitions.**

- A. “Adaptive Management” means a formal, structured approach to dealing with uncertainty in natural resources management, using the experience of management and the results of research as an ongoing feedback loop for continuous improvement. [See Adaptive Management: The U.S. Department of Interior Technical Guide, 2009 and The U.S. Department of the Interior Applications Guide. Adaptive Management Working Group, 2012.].
- B. “Baseline” (with or without capitalization) means the starting point from which Credits and Debits are calculated.
- C. “Biological Monitoring” means observing, recording, evaluating and reporting the biological response of the Covered Species and the performance of the Covered Habitat.

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- D. “Board of Directors” means the entity composed of stakeholders, including representatives from conservation interests, agriculture, and industry that provides oversight of the Exchange as described in Section 1.04(A)(1).
- E. “Buyer” means a person or entity that purchases Credits.
- F. “Closure” or “Exchange Closure” means termination of the Exchange by all Parties.
- G. “Competing Land Uses” means any use of a Participating Property that may be incompatible with the Credit Project and may reduce the amount of Credits generated on the Property currently or in the future, such as split-estate mineral development.
- H. “Compliance Monitoring” or “monitoring for compliance” means verifying that Participants have met the requirements of the applicable Participant Contract and Management Plan.
- I. “Conservation Easement” means the non-possessory interest of a holder in real property, held by a Service-approved governmental or 501(c)(3) organization that imposes limitations or affirmative obligations designed to retain or protect natural, scenic, or open-space values of real property or assure its availability for use as habitat for Covered Species.
- J. “Contract Performance” means the minimum standards defining the actions and terms to be implemented or completed to achieve compliance with a Participant Contract, which are set forth in the Participant Contract and the Management Plan.
- K. “Covered Habitat” means habitat upon which the Covered Species depends for its continued viability. For the Covered Species in this Agreement, the Covered Habitat is described further in the Habitat Quantification Tool (HQT), a copy of which is attached as Exhibit B.
- L. “Covered Species” (*Centrocercus urophasianus*) means the Greater Sage-Grouse. The Covered Species is further described in the HQT.
- M. “Credits” are units of measure representing the restoration, enhancement, or stewardship of Covered Habitat on a Participating Property, along with all financial assurances and other requirements. One Credit equals one functional acre relative to Baseline as defined in this Agreement, the Exchange Manual, a copy of which is attached as Exhibit A, and as further detailed in the HQT. Credits serve as the currency in the Exchange.
- N. “Credit Project” means a project implemented to generate Credits to be sold under the Exchange.

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- O. “Credit Release” or “Release of Credits” means making specified Credits available for Transfer pursuant to this Agreement.
- P. “Debits” are units of measure representing the loss of Covered Habitat. Debits are measured in units of functional acres as defined in the HQT.
- Q. “Debit Project” means a project that causes a direct or indirect adverse effect to the Covered Species or Covered Habitat within the Exchange Area. The extent of the impact of a Debit Project is measured in Debits.
- R. “Dynamic Permanent Offsets” (with or without capitalization) means mitigation achieved by the use of Credits produced in a series of term agreements such that the duration of the mitigation is Permanent.
- S. “Dynamic Term Offsets” (with or without capitalization) means mitigation achieved by the use of Credits produced in a series of term agreements such that the duration of the mitigation matches the duration of the debit project.
- T. “Exchange Administrator” and “Administrator” means the person hired by the Board of Directors to operate the Wyoming Conservation Exchange.
- U. “Exchange Area” means the portion of Wyoming that contains Covered Habitat. The Exchange Area is composed of Service Areas (definition below).
- V. “Exchange Establishment Date” is the date determined pursuant to Section 1.05, when the Exchange is considered established and Transfers of Credits may begin.
- W. “Force Majeure” shall mean war, insurrection, riot or other civil disorder, flood, earthquake, fire, disease, severe drought, governmental restriction or the failure by any governmental agency to issue any requisite permit or authority, or any injunction or other enforceable order of any court of competent jurisdiction, which has a material and detrimental impact on the Participating Property and over which the Participant has no control; *provided, however*, that (i) a flood shall be considered an event of Force Majeure only if it is greater than a presently projected 100-year flood, where “flood” refers to a runoff event; (ii) an earthquake shall constitute an event of Force Majeure only if the ground motion it generates at the Participating Property is greater than that presently projected from an earthquake with a return period of 475 years; and (iii) governmental restriction or the failure by any governmental agency to issue any requisite permit or authority, or any injunction or other enforceable order of any court of competent jurisdiction shall not constitute an event of Force Majeure unless there is no other feasible means of Remedial Action.
- X. “Fund Manager” means a third-party person or entity selected by the Exchange Administrator and approved by the Board of Directors to manage a Stewardship Fund.

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- Y. “Habitat Performance” means the habitat quality resulting from stewardship, enhancement and restoration of Covered Habitat as indicated by the quantification of the actual conditions of a Participating Property as measured by the HQT.
- Z. “Habitat Quantification Tool” (“HQT”) for the Covered Species means a set of science-based metrics and calculations used to quantify the quality of existing habitat conditions for a species, and quantify changes to these conditions either due to impacts to the Covered Habitat or conservation actions. See Exhibit B.
- AA. “Management Plan” means the document developed for each Participating Property that governs habitat enhancement, restoration, or stewardship activities required or recommended to be conducted and habitat conditions to be maintained in order to generate Credits. An illustrative list of potential requirements for Management Plans is included as Exhibit D.
- BB. “Net Benefit” means the actual benefit or gain in habitat function or value to the Covered Species, after deductions for the impacts of Debit Projects, as measured by the HQT.
- CC. “Operating Account” means the account holding funds collected through the imposition of a Transaction Fee on each Transfer of Credits and other funds collected that may be used by the Exchange Administrator to pay expenditures and costs (including labor, salaries, contracts, verification and monitoring costs, and equipment) of administering and operating the Exchange.
- DD. “Participant” means a person with a fee simple, leasehold, or other property interest (including owners of water or other natural resources), or any other entity that may have a property interest and legal authority sufficient to carry out the proposed management activities, subject to applicable State law, who produces, registers, or sells Credits in the Exchange. A Participant may include a conservation bank or other entity serving as an aggregator or agent for one or more fee simple owners, lessees, or owners of another property interest in the Participating Property. The term Participant is equivalent to “Credit Developer” as used in other documents related to this Agreement, including the HQT and the Exchange Manual.
- EE. “Participant Contract” means the agreement between the Exchange Administrator and Participant(s) by which Participant(s) agree to bind a Participating Property to a Management Plan and other relevant terms and conditions for the generation of Credits. See Exhibit C.
- FF. “Participating Property” means a tract of land that is enrolled in the Exchange.
- GG. “Permanent” means in perpetuity.
- HH. “Permitting Mechanism” means any regulatory mechanism approved by the Service, BLM, or other State or Federal Agency that covers Debit Projects that affect the Covered Species or Covered Habitat. For example, Service-approved

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regulatory mechanisms include Candidate Conservation Agreements with Assurances or Habitat Conservation Plans.

- II. “Registry” means a managed database of information as described by Section 2.03(C), and further detailed in the Exchange Manual.
- JJ. “Remedial Action” means any corrective measure which the Exchange Administrator or a Participant is required to take to ameliorate any injury or adverse impact to a Participating Property as conserved, restored, or enhanced, or as a result of a failure to achieve the Contract Performance or Habitat Performance.
- KK. “Remedial Action Plan” means the document outlining corrective measure(s) which the Exchange Administrator or a Participant is required to take to ameliorate any injury or adverse impact to a Participating Property as conserved, restored, or enhanced, or as a result of a failure to achieve the Contract Performance or Habitat Performance.
- LL. “Reserve Account” means the account of Credits, funded by a percentage of the Credits transferred in each transaction, which is held by the Exchange Administrator for the benefit of the Covered Species and Covered Habitat and described in Section 2.05, which may not be used for mitigation except in situations specifically authorized by this Agreement.
- MM. “Science Advisory Committee” means the group of science and technical experts who provide scientific input and guide monitoring, as described by Section 1.04(A)(3).
- NN. “Service Area” means a defined portion of the Exchange Area within which Credits may be used to offset Debit Projects. Service Areas are described in Section 1.06 and the Exchange Manual.
- OO. “Static Permanent Offsets” (with or without capitalization) means mitigation achieved by the use of Credits from a single, fixed geographic location produced in perpetuity on a Participating Property.
- PP. “Static Term Offsets” (with or without capitalization) means mitigation achieved by the use of Credits from a single, fixed geographic location produced through a limited term agreement on a Participating Property.
- QQ. “Stewardship Fund” means the sum of money, held by a Fund Manager, the purpose of which is to provide income to fund the management, maintenance, monitoring, or other activities on Participating Properties consistent with each property’s Participant Contract (a template example of which is attached as Exhibit C). The term “Stewardship Fund” shall refer to the deposit and all interest, dividends, other earnings, additions, and appreciation thereon.

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- RR. “Stewardship Fund Deposit” means the deposit made or required to be made by the Participant or Buyer as appropriate to fully fund the costs associated with the management, maintenance, and monitoring of Participating Properties; administrative costs related to procuring and administering additional contracts for Dynamic Offsets; and the costs of other activities required by the applicable Participant Contract.
- SS. “Stewardship Fund Principal” means that portion of the Stewardship Fund that is to be maintained and managed to generate earnings and appreciation in value for use in funding management, maintenance, and monitoring of Participating Properties; administrative costs related to procuring and administering additional contracts for Dynamic Offsets; and other activities required by Management Plans. Stewardship Fund Principal shall consist of the sum of all Deposits and any additions to the principal that are made from earnings, appreciation in value or subsequent deposits for the purpose of compensating for inflation and ensuring the real value of the principal does not decline over time.
- TT. “Take” means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect a federally listed species, or to attempt to engage in any such conduct.
- UU. “Transaction Fee” means the fee imposed on each Transfer of Credits that supports the operating expenses of the Exchange.
- VV. “Transfer” (or any form thereof, with or without capitalization) means the sale and conveyance of Credits from one person or entity to another.
- WW. “Verify” (or any form thereof, with or without capitalization) means the Exchange Administrator or its agent verifying that Participants have met all requirements of the applicable Participant Contract and Management Plan. This includes third-party assessment of a Participating Property using the criteria defined by the HQT 1) for the generation of a Credit as defined by a Management Plan or 2) to confirm the assessed impact of a Debit Project.
- XX. “Wyoming Conservation Exchange” or “Exchange” is a pro-active, collaborative approach to conserve, protect, and compensate for impacts to the Covered Species and Covered Habitat within the state of Wyoming. The intent of the Exchange is to combine science-based metrics with market incentives to achieve a net benefit to the species, and to drive conservation efforts that will benefit the Covered Species and Covered Habitat.
- YY. “Wyoming Conservation Exchange Manual” or “Exchange Manual” is the guidance document that contains materials necessary to understand and participate in the Exchange. The Exchange Manual defines consistent direction for specific technical and policy considerations that arise during the generation and sale of Credits, determination of Debits, and management of the Exchange. The Exchange Manual is managed and revised by the Exchange Administrator with approval from the Board of Directors.

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### **Section 1.02. Agreement Purpose.**

- A. This Agreement is intended to establish a program to promote and provide for the conservation of the Covered Species and Covered Habitat;
- B. The Parties agree that habitat conservation Credits created under this Agreement shall be available to serve as prelisting mitigation as contemplated under the Service's Greater Sage-Grouse Range-Wide Mitigation Framework and to satisfy such Covered Species conservation or mitigation requirements as may be established under federal and state regulatory programs, including for the purposes of Section 4(d), Section 7(a)(2), and Section 10(a)(1)(B) of the Endangered Species Act, 16 U.S.C. §§1533(d), 1536(a)(2), and 1539(a)(1)(B), should the Covered Species become a listed species under the Act;
- C. The Parties intend that habitat conservation Credits created under this Agreement for the Covered Species and Covered Habitat may cover any applicable BLM and State compensatory mitigation requirements and associated Permitting Mechanisms; and
- D. To accomplish the foregoing objective, this Agreement is further intended to set forth the terms and conditions relating to the establishment, use, operation, and maintenance of the Exchange and Participating Properties to conserve, protect, and compensate for impacts to the Covered Species and Covered Habitat. The intent of the Exchange is to combine science-based metrics with market incentives to achieve a net benefit to the species, and to drive conservation efforts, including compensatory mitigation, toward the locations and strategies that will best benefit the Covered Species and Covered Habitat, in coordination with avoidance and minimization requirements of the State and BLM.

### **Section 1.03. Key Principles and Regulatory Instruments.**

- A. Key Principles. The Exchange enables the stewardship, enhancement and restoration of ecosystems in a credible and rigorous way. The Exchange constantly strives to meet the following key principles:
  - 1. Produce the highest quality conservation where it makes the greatest ecological difference;
  - 2. Foster transparency, accountability, credibility and continuous improvement; and,
  - 3. Facilitate transactions between Buyers and Participants that put the greatest amount of resources towards measurable conservation outcomes while minimizing transaction costs.
- B. Application of Key Principles. The Exchange is designed to work within existing regulatory structures and operate in conjunction with any Permitting Mechanism relating to the Covered Species. The Exchange Administrator is authorized to transfer Credits to an entity purchasing Credits for use as compensatory



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mitigation. The Exchange Administrator may refuse to transfer Credits to a party that is participating in a program that does not follow the Exchange's principles. In order to ensure high-quality conservation, Participants and Buyers utilizing the Exchange shall follow these guidelines:

1. Credits and Debits shall be measured using the HQT.
  2. Mitigation must be durable and Credits must be in place for a period of time equal to or greater than the duration of the Debit from a Debit Project it is offsetting. The term for which a Buyer is required to mitigate a Debit from a Debit Project includes the length of time needed to return the habitat to baseline habitat quality.
  3. Consistent verification of Credit and Debit values is essential. At a minimum, consistent verification requires verification of the baseline condition of a site prior to the implementation of a Debit Project, verification of the site once the Debit Project is in place, and verification of site conditions after a Debit Project has been removed or reduced.
  4. Compliance Monitoring must be performed periodically, as required by the Exchange and any applicable Permitting Mechanism.
- C. Regulatory Instruments. Participants and Buyers of Credits are responsible for ensuring they are governed or covered by any regulatory instruments required under the Endangered Species Act ("ESA"), or other applicable federal, state, or local laws, rules, or regulations. The Exchange Administrator and Board of Directors are not liable for the failure of any party to comply with regulatory requirements, and neither warrant nor guarantee that participation in a transaction utilizing the Exchange will assure compliance with or issuance of necessary permits or other regulatory requirements.

### **Section 1.04. Structure and Oversight.**

- A. Exchange Administrative Structure and Oversight. The following elements together constitute the administrative structure and oversight of the Exchange:
1. Board of Directors. The Board of Directors oversees the Exchange and is responsible for approving adaptive management decisions to be incorporated into Exchange documents. The composition, responsibilities, decision-making and operating procedures for the Board of Directors are described in the Exchange Manual and Wyoming Conservation Exchange Bylaws (Bylaws), attached as Exhibit G.
  2. Exchange Administrator. The Exchange Administrator manages the operations of the Exchange, and reports directly to the Board of Directors. The responsibilities of the Exchange Administrator and additional detail on procedures are described in the Exchange Manual and Bylaws.

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3. Science Advisory Committee. The Science Advisory Committee develops and manages biological standards for the Covered Species and Covered Habitat within the Exchange, including the HQT. The composition, responsibilities, and procedures for the Science Advisory Committee are described in the Exchange Manual and Bylaws.
- B. Agency Oversight. In addition to the Service, Credit and Debit projects may fall under the jurisdiction of the following agencies:
  1. Wyoming Game and Fish Department (WGFD) [Description to be developed with input from WGFD]
  2. Bureau of Land Management (BLM) [Description to be developed with input from the BLM]
  3. Office of State Lands and Investment (OSLI) [Description to be developed with input from OSLI]
- C. Authorities. The establishment and use of the Exchange for compensatory mitigation or conservation is governed by one or more of the following statutes, regulations, policies, and guidelines:
  1. Endangered Species Act (16 U.S.C. § 1531 et seq.);
  2. Final General Conservation Plan Policy (U.S. Department of Interior Memorandum, dated October 5, 2007);
  3. Habitat Conservation Planning and Incidental Take Permit Processing Handbook (U.S. Department of Interior Fish and Wildlife Service, published November 4, 1996);
  4. Guidance for the Establishment, Use and Operation of Conservation Banks (U.S. Department of Interior Memorandum, dated May 2, 2003);
  5. Guidance on Recovery Crediting for the Conservation of Threatened and Endangered Species (U.S. Department of Interior Fish and Wildlife Service, published July 2008);
  6. Greater Sage-Grouse Range-Wide Mitigation Framework (U.S. Department of Interior Fish and Wildlife Service, published September 3, 2014);
  7. Federal Land Policy and Management Act (43 U.S.C. §§1701-1736, 1737-1782);
  8. Greater Sage-Grouse Core Areas Protection Strategy (State of Wyoming

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Executive Order 2011-5).

- D. Review by Agencies. The Exchange is designed to streamline the process for project design, review and approval. However, the agencies in Section 1.04 B(2) may have jurisdiction over certain Credit and Debit projects as described in Section 1.04 B(1) and B(2) and may provide oversight in addition to the Service. These entities may choose to consult on Credit projects within their jurisdiction. Agency oversight of Debit projects shall be conducted in accordance with the relevant Permitting Mechanism.
- E. Agency Oversight and Disclaimer. Nothing contained in this Agreement shall be deemed to limit or expand the jurisdiction of the Service or any Agency over impacts to and applicable mitigation of endangered, threatened, and candidate species, or to restrict the ability of the Service or any Agency to discharge its responsibilities under applicable law and regulation, including, without limitation, the federal Endangered Species Act.

### **Section 1.05. Exchange Establishment Date and Pilot Transactions.**

- A. Exchange Establishment Date. The Exchange Establishment Date will occur and Transfer of Credits may begin when this Agreement has been fully executed by the Parties. Transfer of Credits may begin after Credits have been released as described in Section 2.03(B).
- B. Delivery of Agreement. Within thirty (30) days after the Exchange Establishment Date, the Board of Directors shall provide to the Parties an original counterpart of the final, signed Agreement, including all exhibits.
- C. Pilot Transactions. Credits generated within any pilot operation prior to the Exchange Establishment Date will remain valid and available for Transfer and use for mitigation after the Exchange Establishment Date, provided those Credits meet all criteria and requirements in this Agreement, and are subject to review by the Parties.

### **Section 1.06. Service Areas.** The Service Areas of the Wyoming Conservation Exchange are based on the locations of populations and subpopulations of the Covered Species in Wyoming and are described in the Exchange Manual. A map of the Service Areas is included in the Exchange Manual.

- A. A Buyer must purchase Credits that are generated in the same Service Area in which a Debit Project is located. An exception may be justified if the Service, and BLM and WGFD as applicable, and the Exchange Administrator agree the purchase of Credits in Service Areas other than the one in which a Debit Project is located produces an equivalent or preferable benefit to the Covered Species.

**Article 2: Creation and Administration of Credits.**

Article 2 describes the process to generate, verify, register and transact Credits. This includes the required financial assurances and other contractual requirements to ensure Credit performance.

**Section 2.01. Qualifying Criteria for Enrollment as Credits.**

- A. Minimum Criteria for Enrollment (Eligibility Criteria). In order to qualify for participation in the Exchange under this Article, a Participant and Participating Property must meet the eligibility criteria listed below and described in detail in the Exchange Manual.
1. Participating Property must be located within a relevant Exchange Service Area;
  2. Participant must attest to ownership and past stewardship of the Participating Property;
  3. Participating Property must meet minimum habitat function standards;
  4. Participant must demonstrate Participating Property's development risk;
  5. Participant must commit to financial assurances defined in a Participant Contract;
  6. Participation must demonstrate documentation of Participating Property protection for full duration of Participant Contract; and
  7. Participant must demonstrate additionality above legal requirements.
- B. Person or Entity Must Be Authorized to Enroll Property. The person or entity seeking to enroll property for participation in the Exchange must meet the following requirements.
1. Be a person or entity who meets the definition of Participant;
  2. Agree to participate in the Exchange;
  3. Grant to the Exchange Administrator, or the Exchange Administrator's agent, access to the property for the purpose of monitoring and verification; and
  4. Be legally authorized to carry out the proposed activities on the Participating Property and sign a Participant Contract for the Participating Property.
- C. Potential Exclusion of Property Due to Other Property Commitments and Uses. Existing easements, property restrictions, and the receipt of any public funds to

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support conservation practices for the Covered Species on the Property may limit or disqualify Participants from receiving Credits for that Property. Where conservation values have already been permanently protected or restored under other federal, state, tribal, or local programs benefitting the Covered Species, the Participant can only receive Credit for conservation if enrollment of the property in the Exchange would create additional conservation benefit above and beyond the terms of the original agreement. Participation in the Exchange does not foreclose the opportunity to participate in other ecosystem service markets (for example, water quantity, water quality, stream, wetland, or greenhouse gas trading programs, or trading programs for other species or their habitat).

**Section 2.02. Credit Calculation and Science-Based Standards.** Credits shall be calculated based on the science-based metrics and calculations used to quantify the quality of habitat conditions for the Covered Species as described in the HQT.

**Section 2.03. Credit Verification, Administration and Release.**

A. Credit Verification.

1. Verification of Credits. The purpose of verification is to ensure the quantity of Credits is accurately measured using the HQT, and ensure compliance with the Participant Contract. The Exchange Administrator has responsibility for ensuring that Credits are verified. This includes verification by a qualified third party using the HQT and the Management Plan for the Participating Property, and verification performed by the Exchange Administrator or their agent to ensure a Participant is meeting the terms of his or her Participant Contract. Specific verification procedures are described in the Exchange Manual.
2. Random Verification for Quality Control. At any time, the Exchange Administrator may select a representative sample of Participating Properties for periodic, random verification to ensure consistency of verification of Credits. In conducting periodic, random verifications, the Exchange Administrator or its designee may review a percentage of Participating Properties as detailed in the Exchange Manual.
3. Confidentiality. Information provided for verification or gathered onsite is subject to Section 4.07 (Confidentiality).
4. Conflict of Interest. Verifiers must demonstrate their ability to assess Credit and Debit sites without conflicts of interest. This includes disclosing any pre-existing relationships between the Participant and the verifier to the Exchange Administrator prior to the assessment of a site. The Exchange Administrator and Board of Directors reserve the right to disqualify a verifier with documented rationale.

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5. Verification of Compliance by the Service. The Board of Directors acknowledges that the Service may verify compliance by Participants upon Service request. Verification of compliance may be obtained by various means; physical access to Participating Properties by the Service is governed by Section 2.03(A)(6). In verifying compliance, the Service may inspect Participants' compliance with obligations incurred through Participants' participation in the Exchange only.
  6. Site Access by the Service. The Service reserves the right to visit any Participating Property enrolled under the Exchange provided:
    - a. The Participant and the Exchange Administrator or its agent are given notice not less than 5 business days in advance; and
    - b. Access to the site by the Service is solely for the purpose of verification of compliance with obligations incurred through Participants' participation in the Exchange.
- B. Release of Credits.
1. Credits generated on a Participating Property shall be made available for Transfer according to the schedule outlined in the Exchange Manual which references specific criteria, including:
    - a. Executing the Participant Contract, Management Plan, or land-protection instruction such as a Conservation Easement;
    - b. Securing required financial assurances and performance guarantees;
    - c. Implementing or completing pre-established conservation actions, as described in the applicable Management Plan; and / or
    - d. Achieving and verifying performance criteria such as a portion of expected Habitat Performance, as defined in the Participant Contract and Management Plan and calculated in accordance with the HQT.
  2. The Exchange Administrator will assess and approve Credits for release following a review of relevant documentation, to include:
    - a. The verification report from a third party verifier for the Credits;
    - b. Maps, satellite or aerial images, site photographs or other supporting documentation of the Participating Property;

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- c. Information regarding the establishment of relevant financial assurances; and / or
  - d. Real estate protections (easement documents, etc.) as appropriate.
- 3. Review by the Parties. Credits to be approved for release by the Exchange Administrator shall be made available for review by the Parties. The Exchange Administrator will provide the Parties with relevant documentation as described in Section 2.03 B(2) for review at least 20 business days prior to a Credit release and invite the Parties to raise concerns or request further inquiry. After the review period, if no concerns are raised by the Parties, Credits may be made available for Transfer by the Exchange Administrator. If concerns are raised by the Parties during the review period, the Exchange Administrator will work with the Parties and the Participant to resolve the concerns prior to Credit release.
- C. Credit Registry. The Exchange will use a Registry to manage the accounting and transfer of Credits as described in the Exchange Manual. Credits will be listed, serialized, and tracked on the Registry. Any information from the Registry that is available to external audiences will comply with Section 4.07. The Exchange Administrator shall use the Registry to track the following.
  - 1. The number of Credits generated and used for mitigation offsets;
  - 2. Net Benefit for the Covered Species and Covered Habitat; and
  - 3. Additional information related to Participating Properties and Credits that the Exchange Administrator deems necessary to meet the reporting requirements of Section 4.06 and the Exchange Manual.
- D. Schedule of Payment to Participants. The Exchange Administrator may work with the Participant to determine a schedule to pay Participants for Credits in accordance with the Credit Release schedule, as described in the Exchange Manual, Participant Contract, and Management Plan.

### **Section 2.04. Credit Transaction Procedures.**

- A. Transfer of Credits.
  - 1. When Transfers May Begin. The Transfer of Credits may begin upon the Exchange Establishment Date.
  - 2. Credits Transferred May Not Exceed Credits Available. The number of Credits transferred may not exceed the total number of Credits which have been made available for Transfer or sale.

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3. Purchase Agreement. Each Transfer of Credits shall be made pursuant to a Credit Purchase Agreement, an example of which is attached as Exhibit E.
- B. Retirement of Credits. The Exchange Administrator shall mark a Credit that is transferred and used for mitigation as retired in the Registry. Retired Credits will not be available for resale, Transfer or to satisfy other needs.
- C. Tracking of Credits. The Exchange Administrator is responsible for tracking the generation and use of Credits in the Registry, as described in Section 2.03(C).
- D. Reserve Account Contribution. Before each transfer of Credits is completed, the Exchange Administrator shall deposit the appropriate number of Credits into the Reserve Account as required by Section 2.05.
- E. Terms of Credit Use. Credits may be purchased by any entity that requires compensatory mitigation for a Debit Project. Buyers of a Credit may hold that Credit for up to three years from the date of purchase, providing the need for mitigation Credits is demonstrated. At the end of three years from the date of purchase, or if the Buyer no longer demonstrates a need for compensatory mitigation, the Buyer shall sell or transfer the Credit to a qualifying third party or to the Exchange Administrator within 12 months. The Buyer may secure one three-year extension on the requirement to offer Credits for resale if the Buyer submits a written statement to the Exchange Administrator attesting that the Buyer intends to use the Credits for mitigation not later than six years from the original purchase date.
- F. Conservation Certificates Provided for Non-Mitigation Purposes for Species Benefit. A conservation certificate is a non-regulatory, non-compliance Exchange product that can be acquired by any entity through a donation to the Exchange. The certificate is a record of conservation investment in the Covered Species and Covered Habitat and provides no financial or legal control or authority over the Participant, Exchange Administrator or Oversight Committee.
- G. Transfer of Credits to Third Party. A Buyer may transfer Credits to a qualifying third party at any time, including by private sale or by transfer of assets. The Buyer shall notify the Exchange Administrator of any Transfer of Credits, and shall be responsible for the payment of a transaction fee as established by the Exchange Administrator pursuant to Section 2.04(I).
- H. Aggregation of Credits Permitted. Credit requirements may be fulfilled by using Credits generated at various locations within the Exchange Service Area for each year of mitigation needs. Credits can be aggregated spatially from more than one site in order to meet a mitigation obligation, but the temporal nature of Credits and Debits must be contemporary.



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- I. Transaction Fee. The Exchange Administrator may charge a fee for each Transfer of Credits to pay for the expenses of the Exchange as detailed in Section 3.01(A).

### **Section 2.05. Reserve Account.**

- A. Reserve Account Allocation. The Exchange Administrator shall deposit into the Reserve Account a percentage of all Credits that are purchased and transferred to a Buyer. The amount of contribution to the Reserve Account shall be sufficient to cover the risk of damage or invalidation of Credits that cannot otherwise be covered by financial assurances. The Reserve Account contribution consists of a standard base contribution and a potential modifier based on risk level. Detailed guidance related to Reserve Account contributions and use is included in the Exchange Manual.
- B. Authorized Uses of Reserve Account for Mitigation. Credits in the Reserve Account are to be held by the Exchange Administrator for the benefit of the Covered Species and Covered Habitat and may not be used for mitigation, except in the following circumstances:
  1. To replace Credits that have been transferred to a Buyer and have been subsequently invalidated on a Participating Property otherwise in compliance due to factors out of the direct control of the Participant or landowner (i.e., force majeure, competing land uses, etc.) that have not otherwise been mitigated through participation in the Exchange or another mitigation system determined by the Exchange Administrator to be equivalent.
  2. To cover temporary losses of Credits that have been transferred to a Buyer and have been subsequently invalidated as a result of noncompliance.
  3. To bridge gaps in coverage between subsequent Term Credit contracts under a Dynamic Permanent or Dynamic Term Offset agreement.
- C. Adjustment of the Allocation. The Exchange Administrator may propose adjustments to the required allocation to the Reserve Account detailed in the Exchange Manual, to be considered for approval by the Board of Directors. Notwithstanding any provision of this agreement, the Board of Directors may at any time:
  1. Adjust the required allocation to the Reserve Account;
  2. Adjust the terms of usage for Credits in the Reserve Account under Section 2.05 (B) and in Participant Contracts.

**Section 2.06. Requirements for Credits.** Participants and Participating Properties must execute and provide proof of the following: sign a Participant Contract; have a Management Plan; meet all Qualifying Criteria (Section 2.01); provide Financial

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Assurances (Section 2.07, 2.08, 2.09, 2.10) to ensure resources are available for the appropriate duration to ensure protection and maintenance of Covered Habitat; and meet Credit Release (Section 2.03(B)) and other requirements of the Exchange to generate Credits as detailed in this Agreement.

- A. Additional Financial Assurances. In addition to contract requirements, the Exchange Administrator may require an acceptable guarantee of performance for Credits to ensure compliance with this Agreement and Participant Contracts in accordance with Section 3.02 (D) and the Exchange Manual.
- B. Conservation Easements Required for Static Permanent Offsets. Participating Properties and Credits used for Static Permanent Offsets are governed by the Guidance for the Establishment, Use and Operation of Conservation Banks (U.S. Department of Interior Memorandum, dated May 2, 2003). In addition to the requirements stated above, Static Permanent Offsets must be protected by a Conservation Easement, satisfactory to the Exchange Administrator. To be approved by the Exchange Administrator, the Conservation Easement must protect the conservation values sought to be obtained on the Participating Property in question, and must be held by a qualified third-party land trust or other entity eligible to be a holder of conservation easements under appropriate state law. A copy of the Conservation Easement demonstrating that it has been properly recorded under appropriate state law must be furnished to the Exchange Administrator prior to release of Credits.
- C. Credit Offset Types and Requirements for Offsetting. Buyers may purchase Permanent Credits that ensure the perpetual protection of Covered Habitat to offset a Debit Project of permanent duration. Buyers may purchase Permanent or Term Credits to offset a Debit Project of temporary duration. Offsets should be in place to cover the total duration of the Debit Project.
  1. Static Offsets. Static Offsets (whether Static Permanent Offsets or Static Term Offsets) are mitigation achieved by the use of Credits from a single, fixed Participating Property for a set duration.
  2. Dynamic Offsets. The dynamic nature of the Covered Habitat, naturally occurring climate change, and legal rights to mineral interests and other encumbrances on the land all present challenges to Static Offsets, as described in Appendix C of the Exchange Manual – *Dynamic Offset Considerations*. Dynamic Permanent Offsets (whether Dynamic Term Offsets or Dynamic Permanent Offsets) allow mitigation to be located in places of high value Covered Habitat in order to address issues caused by changes to the range of the Covered Species and competing land uses. As Term Credit contracts expire, new Term Credit contracts must be procured to provide the mitigation necessary to mitigate a Debit Project for its full duration.

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3. Aggregation Permitted. Credits needed to mitigate for a Debit Project may be accounted for by aggregating the required number of Credits from various Participating Property locations within the Service Area.

**Section 2.07. Financial Assurance Requirements for Static Permanent Offsets.** Financial assurances for Static Permanent Offsets are intended to provide resources and assurances similar to those used in conservation banking. Financial assurances for Static Permanent Offsets, if arranged by the Exchange Administrator, shall be managed by a Fund Manager in accordance with Section 3.02. Financial assurances may also be fulfilled by a third party, such as a conservation bank or land trust. The Exchange Administrator shall require third parties to present documentation that the requirements of this section are fulfilled.

- A. Stewardship Fund for Management and Monitoring. For all Static Permanent Offsets, a Stewardship Fund shall be established in an amount sufficient to provide for the financial requirements of the management and monitoring of each Participating Property in perpetuity in accordance with the properties' Participant Contract.

**Section 2.08. Financial Assurance Requirements for Dynamic Permanent Offsets.** Financial assurances for Dynamic Permanent Offsets are intended to provide resources and assurances consistent with those used in conservation banking. Financial assurances for Dynamic Permanent Offsets may be arranged by the Exchange Administrator and managed by a Fund Manager in accordance with Section 3.02 or may be fulfilled by an agreement with a third party, such as a conservation bank or land trust. The Exchange Administrator shall require the third party to present documentation that the requirements of this section are fulfilled.

- A. Stewardship Fund for Management and Monitoring. Credit sites under a Dynamic Permanent Offset require a stewardship fund to provide for the financial requirements of the management and monitoring of each Participating Property for the duration of each property's Participant Contract.
- B. Stewardship Fund for Acquisition of New Contracts. For Dynamic Permanent Offsets, the Exchange Administrator shall ensure that a stewardship fund is in place before Credits are released. Principal shall be invested with the objective that the principal not decrease in value over time, and that funds are sufficient to cover the costs of acquiring subsequent term contracts to provide for Dynamic Permanent Offsets and ongoing administrative expenses into perpetuity.

**Section 2.09. Financial Assurance Requirements for Static Term Offsets.** Financial assurances for Static Term Offsets may be arranged by the Exchange Administrator and managed by a Fund Manager in accordance with Section 3.02 or may be fulfilled by an agreement with a third party, such as a conservation bank or land trust. The Exchange Administrator shall require the third party to present documentation that the requirements of this section are fulfilled.

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- A. Stewardship Fund for Management and Maintenance. Term Credit sites under Static Term Offsets require a stewardship fund to provide for the financial requirements of the management and monitoring of the Participating Property for the duration of the term contract, managed such that no funds remain at the end of the Participant Contract.

**Section 2.10. Financial Assurance Requirements for Dynamic Term Offsets.** Financial assurances for Dynamic Term Offsets may be arranged by the Exchange Administrator and managed by a Fund Manager in accordance with Section 3.02 or may be fulfilled by an agreement with a third party, such as a conservation bank or land trust. The Exchange Administrator shall require the third party to present documentation that the requirements of this section are fulfilled.

- A. Stewardship Fund for Management and Maintenance. Term Credit sites under a Dynamic Term Offset require a stewardship fund to provide for the financial requirements of the management and monitoring of the Participating Property, managed such that no funds remain at the end of each Participant Contract.
- B. Stewardship Fund for Acquisition of New Contracts. For Dynamic Term Offsets, the Exchange Administrator shall ensure that a stewardship fund is in place before credits are released. Principal shall be invested with the objective that sufficient funds are maintained to (1) cover the costs over time of acquiring subsequent Term contracts to provide for Dynamic Term Offsets and (2) cover administrative expenses for the full duration of the Debit Project.

### **Article 3: Financial Operations of the Exchange**

Article 3 describes the Financial Operations of the Exchange, including the processes for maintaining and using the Operating Account, maintaining financial records and performing auditing, and the requirements for the Exchange Administrator to ensure that financial assurances are in place as required of Participants as described in Section 2.07, 2.08, 2.09 and 2.10.

#### **Section 3.01 Exchange Financial Operations.**

- A. Transaction Fee. A fee may be imposed on each Transfer of Credits in the Credit generation and transaction process. Fees shall be used to pay for the administration of the Exchange. The amount of the fee and exact fee schedule shall be determined by the Board of Directors.
- B. Participant Payments. The Exchange Administrator may pay Participants directly in accordance with Participant Contracts and Management Plans, or payments may be directed or arranged through other entities. The cost of payments to individual Participants will be built into the sale price of Credits, along with any applicable transaction fees, at the time of Transfer.
- C. Operating Funds for Administering the Exchange.

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1. Operating Account. Funds collected under Section 2.04(I) and any other administrative funds collected shall be deposited to the Operating Account.
  2. Use of Operating Account Funds. Funds in the Operating Account may be used by the Exchange Administrator and Board of Directors to pay expenditures and costs (including labor, salaries, contracts, verification and monitoring costs, and equipment) of administering and operating the Exchange.
- D. Financial Records and Auditing.
1. Complete Records Required. The Exchange Administrator and Board of Directors shall maintain complete and accurate records of all financial transactions and all information relating to the financial operations of the Exchange using generally accepted accounting methods, principles, and practices consistently applied. The financial operations of the Exchange include all financial assurances received or expended during the establishment and operation of the Exchange.
  2. Audit Schedule. No more frequently than annually, the Board of Directors shall have records relating to the financial operations of the Exchange audited by an independent, licensed certified public accountant and shall submit the auditor's report to the Parties upon completion.
  3. Access to Financial Records. The Parties shall have the right to review any financial records and supporting documentation pertaining to the performance of this Agreement. Exchange Administrator and Board of Directors agree to maintain such records for possible audit for a minimum of three (3) years after Exchange Closure. Exchange Administrator and Board of Directors agree to allow the auditor(s) access to such records during normal business hours and to allow interviews of any employees or representatives who might reasonably have information related to such records. Exchange Administrator and Board of Directors further agree to include a similar right of State and federal auditors to audit records and interview employees and representatives in any contract related to the performance of this Agreement.
- E. Exchange Administrator Projects a Potential Deficit in Operating Account. If, through the yearly budgeting process or as a result of ongoing monitoring of the Operating Account, the Exchange Administrator foresees a potential future Operating Account deficit, then the Exchange Administrator shall coordinate with the Board of Directors to proactively address this potential deficit by implementing one of both of the following procedures:
1. Increase transaction fees; or

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2. Reduce or suspend funding for non-essential aspects of the Exchange and use funds for the implementation of essential activities.

F. Changing Funding Circumstances. In the event that circumstances change with respect to anticipated costs, available revenue, or changes in inflation such that funding levels occur that substantially affect the operation of the Exchange, the Exchange Administrator will notify the Parties of the changes immediately after the Exchange Administrator determines that operation of the Exchange is affected. The Exchange Administrator shall coordinate with the Parties to implement one or more of the following procedures:

1. Suspend Credit Transfers. If Operating Account levels are not adequate to allow the Exchange's operations to continue at full operating capacity by the 30th day after the Parties are notified of the inadequate funding, the Exchange Administrator shall notify the Parties and affected Buyers and Participants that Credit Transfers will be suspended effective immediately until such time as funding levels are restored. A lack of adequate funding for a specific Credit Project that does not affect the Exchange's ability to operate generally does not require the suspension of all Credit Transfers.
2. Develop Plan to Restore Funding Levels. In conjunction with the Parties, the Exchange Administrator shall develop a plan to restore funding levels to the extent that Credit Transfers can be resumed. The Exchange Administrator shall also, working with the Board of Directors, review the cause of the funding shortfall and adjust the operating budget and transaction fees as necessary to correct the issue during the next budget cycle.
3. Criteria for Nonessential Exchange Features. Aspects of the Exchange deemed "non-essential" and appropriate for reduction or suspension under Section 3.01(E)(2) must be approved by the Parties.

**Section 3.02. Management of Financial Assurances for Participating Properties.** The Exchange Administrator is responsible for ensuring that financial assurances are in place to provide for the performance of obligations of Participating Properties under this Agreement and Participant Contracts, as specified in Sections 2.07, 2.08, 2.09 and 2.10.

- A. Adequate Funding Intended. The funding provisions described in this Agreement are intended to meet the Exchange Administrator's and Board of Director's obligations to ensure that funding will be adequate throughout the duration of the Exchange including for all Participating Properties. This includes the provision of financial assurances sufficient to remediate or replace Credits in the event that a Participant in the Exchange does not fulfill the Participant's obligations to the Exchange.

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- B. Audit Rights. In overseeing the financial assurances underlying Credits transferred through the Exchange, the Board of Directors has the right to audit the use and maintenance of funding received through the Exchange for all Participants.
- C. Financial Assurances. The Exchange Administrator may require financial assurances in addition to those specifically required by this Agreement to ensure compliance with this Agreement and Participant Contracts for any Credit type. The Exchange Administrator may require financial assurances to be presented in various forms including, but not limited to, a surety with a bonding company, collateral assignment of a certificate of deposit, certified or cashier's check, letter of credit, cash, participation in an insurance pool, or other option approved by the Service.
- D. Management of Funds. Stewardship Funds are managed by designated Fund Managers, providing appropriate access to the Exchange Administrator and other parties.
  - 1. Fund Manager Selection and Removal. A Fund Manager will be hired to manage any Stewardship Funds if the Fund is not managed directly by another third party.
    - a. Qualifications. A Fund Manager is required to be a person or entity with a sound track record of investment responsibilities.
    - b. Fund Manager Removal. The Exchange Administrator shall have the right to remove and replace a Fund Manager for any reason.
  - 2. Deposits. The Fund Manager shall direct Stewardship Fund Deposits to be held, invested, managed, and disbursed as further provided herein.
  - 3. Investment of a Stewardship Fund. The Fund Managers, in their sole discretion, and without the approval of any party, shall invest and manage Stewardship Funds for the benefit of Participating Properties under the Exchange, subject to the terms of this Agreement.
  - 4. Fund Principal Not to Decrease. For Permanent Offsets, the Stewardship Fund Principal amount should not decrease in value through expenditure or investment strategy. The Principal amount is intended to increase in value to keep up with inflation. Therefore, a portion of the interest and earnings on the Principal balance shall be reinvested into Stewardship Funds as required to adjust the Principal using the CPI adjustment formula set forth below. The adjustment shall occur annually until Stewardship Funds are fully funded.
  - 5. Adjustment of the Stewardship Fund Principal. Stewardship Fund Principal shall be adjusted by the Fund Manager annually, on January 2 of

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each year following the Exchange Establishment Date (each such date is referred to as an “Adjustment Date”), by a percentage equal to the percentage increase, if any, in the Consumer Price Index, All Items (1982-1984 = 100), as published from time to time by the U.S. Bureau of Labor Statistics. Adjustment of the Principal is the percentage increase of the CPI published most immediately preceding the Adjustment Date, as compared to the CPI published most immediately preceding the date of this Agreement. The adjustment shall be applied to the amount of the initial Principal.

6. Interest Earnings Above Inflation. Interest earnings beyond those necessary to provide for growth of the Principal commensurate with inflation will be made available to fund annual management of Participating Properties and associated administrative fees in accordance with the terms of this Agreement and the Participant Contracts.
7. Revenue in Excess of Expenses. Any Stewardship Fund revenues (including earnings and interest) remaining after the Stewardship Fund Principal is adjusted for inflation that exceeded the anticipated annual management expenses of the Participating Properties shall be retained in the Stewardship Fund and may be made available to fund unexpected expenses.
8. Disbursement from a Stewardship Fund. If applicable, the Fund Manager shall only make a disbursement from a Stewardship Fund upon approval from the Exchange Administrator or Board of Directors. Disbursement requests should not impair the viability of a Stewardship Fund and its ability to provide funding for activities to be conducted for the duration of a Participant Contract.

### **Article 4: Administration of the Exchange**

Article 4 describes specific processes and requirements of the Exchange Administrator and Board of Directors to manage and administer the Exchange. This includes how to develop Remedial Action Plans, perform adaptive management and reporting, meet requirements in the event of Credit deficits, uphold terms of Participant confidentiality, and resolve disputes.

**Section 4.01. Reversals Due to Noncompliance.** A party is responsible for failure to perform obligations if such failure is a result of noncompliance with the Participant Contract and the Management Plan. Specific processes including use of the reserve account and financial assurances, along with any associated administrative fees, following noncompliance are described in the Participant Contract and the Exchange Manual.

**Section 4.02. Reversals of Credit Projects Not Due to Noncompliance.** A party is not responsible for failure to perform obligations if such failure is a result of events that are not the responsibility of the Participant, such as a Force Majeure event or



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competing land uses over which the Participant has no control, as described in the Participant Contract and the Exchange Manual. If a party asserts a reversal for a Credit Project otherwise in compliance with obligations under a Participant Contract and Management Plan, the nonperforming party must demonstrate that the party took reasonable steps to minimize delay or damages caused by foreseeable events, that the party substantially fulfilled all non-excused obligations, and that the Exchange Administrator was timely notified of the likelihood or actual occurrence of an event described in this section. Specific processes including use of the reserve account and financial assurances following a reversal not due to noncompliance are described in the template Participant Contract and Exchange Manual.

**Section 4.03 Remedial Action Plans.** Remedial Action Plan requirements, as described further in the Exchange Manual, apply in situations in which the Exchange Administrator discovers any failure by a Participant to achieve compliance with a Contract or Management Plan, including not achieving the required Habitat Performance resulting from management actions implemented. This includes Contract Performance or any consequential injury or adverse impact to a Participating Property as conserved, restored, or enhanced, including reversals of Credit Projects otherwise in compliance. Contract Performance will be specified in the Participant Contract and corresponding Management Plan.

- A. Remedial Action Plan Development. Following a reversal, the Participant and Exchange Administrator will determine if a Remedial Action Plan can be developed to recover the site, or if credits must be replaced off-site, as described in the Exchange Manual. Remedial Action Plans must identify and describe proposed actions to achieve Contract Performance or ameliorate injury or adverse impact to Participating Properties and set forth an estimated schedule within which the actions will be implemented, along with funding necessary to implement Remedial Actions. In the event that the Exchange Administrator fails to submit a Remedial Action Plan to the Parties in accordance with this section within 120 days of a reversal on a Participating Property, if applicable, the Parties will notify the Exchange Administrator that the Exchange Administrator is in default and may identify Remedial Actions that the Parties deem necessary.
- B. Notification of Participant. If, at any time for which a Participating Property is enrolled in the Exchange, the Exchange Administrator discovers any failure of a Participant to achieve Contract Performance or any consequential injury or adverse impact to a Participating Property, including not achieving the required Habitat Performance resulting from management actions implemented or an injury caused by Force Majeure, the Exchange Administrator shall, not later than 30 days after the Exchange Administrator becomes aware of the failure to comply, notify the Participant of the observed failure and begin working with the Participant on the development of a Remedial Action Plan for the Participating Property, if deemed appropriate.

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- C. Contracting for Remedial Services. Should the Participant fail or choose not to directly implement the actions specified in the individual Remedial Action Plan, the Exchange Administrator may contract with a third party for any Remedial Actions required by the Remedial Action Plan.
- D. Implementation. The Participant or designated contractor shall implement the necessary and appropriate Remedial Actions in accordance with the Remedial Action Plan using financial assurances for the Participating Property to pay for activities included in the Remedial Action Plan.
- E. Reporting. The annual report described by Section 4.06 shall identify and describe any Remedial Actions performed on Participating Properties and, if the Remedial Actions have been completed, include an evaluation of the effectiveness of the actions. The report must also include accounting and information regarding the use of any Credits from the Reserve Account after a reversal.

**Section 4.04. Credit Deficit.** If the Exchange Administrator determines that the Exchange is operating at a Credit deficit (i.e. that Credit Transfers made exceed the Credits authorized for release, as adjusted in accordance with this Agreement), then the Exchange Administrator shall immediately notify the Parties and immediately cease Transfers of Credits. The Parties together shall determine what action is necessary to correct the Credit deficit, and the Exchange Administrator shall implement such actions.

**Section 4.05. Implementation and Adaptive Management.** Adaptive Management is a dynamic process that helps reduce uncertainty in natural resource management by incorporating new information as it becomes available. An annual Adaptive Management process is described below. Further detail is provided in the Exchange Manual.

- A. Rationale. Adaptive Management strategies allow for changes, agreed upon by the Parties, to the Exchange Manual, HQT, and other documents to occur in response to changing conditions or new information, including those identified during monitoring. Ongoing Adaptive Management of the Exchange Manual and HQT is expected and will not require the Parties to revisit this Agreement.
- B. Adaptive Management Process.
  - 1. At least annually, the Exchange Administrator will recommend to the Board of Directors whether any modifications to the Exchange Manual or HQT are necessary and where such modifications should be incorporated. The Board of Directors shall then confer with the other Parties to this Agreement about the Exchange Administrator's findings and recommendations. The Board of Directors will then work with the Exchange Administrator to make any necessary changes to the Exchange Manual or HQT.

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2. At least annually, the Board of Directors will convene the Science Advisory Committee to review all available science and monitoring results. The Science Advisory Committee shall make a recommendation regarding any necessary modifications to the Exchange Manual or HQT to the Board of Directors and Exchange Administrator. The Parties will confer about the Science Advisory Committee's findings and recommendations. The Board of Directors will then work with the Science Advisory Committee and the Exchange Administrator to make any necessary changes to the Exchange Manual or HQT.
  3. At any time, the Parties may request that the Exchange Administrator review the Exchange operations and determine whether modifications are needed. The Parties may also make a request at any time to the Board of Directors that the Science Advisory Committee be convened to review the available science and monitoring results and to determine whether modifications are needed.
- C. Modification and Adaptive Management of the HQT. Any modified versions of the HQT shall apply only to a Participating Property that enrolls or renews enrollment in the Exchange on or after the date the modified HQT is approved. A Participant whose enrollment agreement is not up for renewal may choose to have the modified HQT apply to a Participating Property for future Credit releases by consenting to the modified HQT in writing. The modified HQT will not be applied retroactively without written Participant consent.
- D. Biological Monitoring. The Exchange Administrator and Board of Directors shall ensure that adequate biological monitoring is completed to observe the biological response of the Covered Species and the Habitat Performance of the Covered Habitat, as described in the Exchange Manual.

**Section 4.06. Annual Reporting Requirements.** The Exchange Administrator shall file a report with the Parties, in portable document format (PDF) and hard copy, on or before December 1 of each year following the Exchange Establishment Date. Each annual report shall cover the most recently completed year. The Board of Directors and Exchange Administrator shall be responsible for the reporting tasks described below.

- A. Annual Report Content. Annual Reports submitted to the Parties may include information related to Registry outputs such as Credits Transferred, Credits in the Reserve Account, volume of Participating Properties, Biological Monitoring and Verification activities, results and reports, adaptive management changes, financial operations and other information deemed necessary by the Parties as detailed in the Manual.

**Section 4.07. Confidentiality.** Except as provided by this Agreement, the Exchange Administrator, Board of Directors or any officers, agents, representatives or other persons or entities associated with the Exchange Administrator or Board of

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Directors may not divulge information obtained by the Exchange Administrator from a Participant or Buyer in the Exchange. Additional guidelines on confidentiality may be found in the Exchange Manual.

- A. The Exchange Administrator shall provide sufficient information to the Parties to enable the Parties to monitor compliance under this Agreement. The Exchange Administrator will do so by providing the Parties, including the Service, aggregated descriptions of properties and actions sufficient to confirm Exchange compliance and habitat performance. The Exchange Administrator will protect against disclosure all other information obtained from participants and buyers to the maximum extent possible under federal, state, and local law.
1. In the course of interactions with the Exchange, a Participant may provide the Exchange confidential information, including the name or names of Participant(s), contact information, general and legal description of the enrolled property, grazing practices, land use practices, commercial activities on the land, recreational activities on the land, site-specific species sightings, site-specific species habitat condition, and other information designated by the Participant and agreed to in a Participant Contract.
  2. Participants shall clearly mark as confidential any and all information provided to the Exchange that is intended by Participant to be kept confidential and subject to the provisions of Section 4.07. The Exchange Administrator shall keep such information confidential as provided for in this Section.
  3. Information that (a) is or becomes generally available to the public, other than as a result of an act or omissions by the Exchange Administrator or any other person under a duty to keep the information confidential, (b) was actually known by the Exchange Administrator prior to disclosure by Participant, (c) is developed or discovered by the Exchange Administrator independent of its provision by Participant, or (d) was received by the Exchange Administrator without an obligation of confidence, from a third party having a legal right to disclose the same without restriction and without breach of this Agreement or a Participant Contract, shall not be deemed “confidential information” subject to the provisions of this Section.
  4. The Exchange Administrator may divulge confidential information relating as necessary to a Participant and Participating Property to a third-party contractor in the course of carrying on the business of the Exchange, provided that the third-party contractor has signed a confidentiality agreement provided by the Exchange Administrator, an example of which is included as Exhibit F.

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- B. In the event that disclosure of confidential information is required by law, rule, regulation or order of a court or government authority, including service of process upon the Exchange Administrator, which would result in the disclosure of information intended to be kept confidential pursuant to the provisions of this Section and any Participant Contract, the Exchange Administrator shall promptly notify all affected Participants of the requirement or request prior to compliance so that the Participant(s) may seek an appropriate protective action or waive the restriction of disclosure.
- C. With respect to information provided by the Exchange Administrator to the Parties, and with respect to information relating to the Exchange which is otherwise in the possession of the Parties, the Parties will provide the Exchange Administrator written notice when request for records concerning the Exchange is made pursuant to the Freedom of Information Act, 5 U.S.C. § 552.
- D. Information establishing a violation of any law is not subject to the confidentiality provisions of this Agreement.

**Section 4.08. Dispute Resolution.** The Parties and the Exchange Administrator agree to work together in good faith to resolve disputes concerning this Agreement.

- A. Dispute Resolution Process. Any party may elect to employ a dispute resolution process whereby:
  - 1. The aggrieved party shall notify the other party(ies) of the dispute, the position of the aggrieved party (including, if applicable, the basis for contending that a violation has occurred), and the remedies the aggrieved party proposes;
  - 2. The notified party(ies) shall have 30 days (or such other time as the parties may mutually agree) after receiving notice to respond, during which time the notified party(ies) may seek clarification of the initial notice;
  - 3. Within 30 days after the response from the notified party(ies) response was provided or due, whichever is later, the parties shall confer and negotiate in good faith toward a mutually satisfactory resolution, or shall establish a specific process and timetable to seek such resolution; and
  - 4. If at the end of 30 days the parties have not reached resolution, any party upon written notice to all other parties may request that the dispute proceed to formal mediation.
- B. Process Must Provide for Transfer of Management Responsibilities. If there is a dispute regarding the performance of the Exchange Administrator's or Board of Director's responsibilities for management of the Exchange, dispute resolution processes shall provide a method whereby such management responsibilities can be transferred to a third party that is capable of continuing to implement this Agreement. Transfer of the management responsibilities to the third party shall

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include a transfer of the right to use Operating Funds in order to carry out all management responsibilities.

### **Article 5: Miscellaneous Provisions**

Article 5 contains miscellaneous provisions related to managing this Agreement, such as processes for modifying or terminating the agreement, and causes for default.

#### **Section 5.01. Modification and Termination of the Agreement.**

- A. Modification. This Agreement may be amended or modified only with the written approval of the Parties. All amendments and modifications shall be fully set forth in a separate document signed by all Parties that shall be appended to this Agreement. Exhibits or documents incorporated by reference, including the Exchange Manual and HQT, are not included in this restriction, and can be amended or modified by the Exchange Administrator or Board of Directors as outlined in Section 4.05, Adaptive Management, and in the documents.
- B. Termination.
  - 1. The Board of Directors will develop language to be approved by the Parties that describes the terms under which the Board of Directors may terminate this Agreement. Included will be requirements that the Board of Directors arrange for assignment of all contracts and fiduciary responsibilities. Specifically, the Board of Directors should ensure that all financial assurances are met or that the obligations to meet them are transferred to a successor party, which must be approved by all the Parties. The Board of Directors must provide sufficient notice of intent to terminate such that these requirements will be met. The Board of Directors shall not be authorized to terminate this Agreement prior to approval by the Parties of language that describes the terms under which the Board of Directors may terminate this Agreement.
  - 2. Any Party may terminate its participation in this Agreement by giving the Board of Directors 60 days' notice in writing if (i) Board of Directors or Exchange Administrator has breached one or more covenants, terms, or conditions set forth in this Agreement; and (ii) the Board of Directors fails to cure such breach within 30 days after the Party receives notice of the breach. In the event such breach is curable in the judgment of the Party, but cannot reasonably be cured within the 30 day period, the Party shall not terminate this Agreement so long as the Board of Directors has commenced the cure of such breach and is diligently pursuing such cure to completion.
  - 3. In the event this Agreement is terminated or the Exchange is closed prior to the transfer of all authorized Credits, any remaining Credits that have not been transferred to a Buyer shall no longer be available for transfer

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through this Agreement. Participants in the Exchange will still be required to meet the obligations of their contract with the Exchange Administrator.

4. In the event that the Board of Directors determines that the Exchange Administrator has breached its fiduciary obligations or otherwise committed financial malfeasance, the Parties may together take immediate action to relieve the Exchange Administrator of its duties, implement steps necessary to protect the assets of the Exchange, and appoint a replacement Administrator to operate the Exchange. If necessary, an interim Administrator shall be tasked with operating the Exchange.
5. Nothing in this Section 5.01(B) is intended or shall be construed to limit the legal or equitable remedies (including specific performance and injunctive relief) available to the Parties in the event of a threatened or actual breach of this Agreement.

**Section 5.02. Default.** The Board of Directors shall be in default if it fails to observe or perform any obligation or responsibility required of it by this Agreement. In the event the Board of Directors realizes it is in default, it shall promptly notify the other Parties. Once the Parties receive notification or otherwise becomes aware that the Board of Directors is in default, the Parties may elect to either pursue dispute resolution consistent with Section 4.08 or cause the holder to draw upon and expend the appropriate financial security as necessary to continue Exchange development, management, or operation. In the event the dispute resolution process is invoked, the Parties shall not draw upon financial securities until such time as the dispute resolution process has been terminated. This Section 5.02 shall not be construed to modify or limit any specific right, remedy, or procedure in any section of this Agreement or any remedy available under applicable state or federal law.

**Section 5.03. Controlling Language.** The Parties intend the provisions of this Agreement and each of the implementing documents referenced in the Agreement, examples of which are attached hereto, to be consistent with each other, and for each document to be binding in accordance with its terms. To the fullest extent possible, these documents shall be interpreted in a manner that avoids or limits any conflict between or among them. However, if and to the extent that specific language in this Agreement conflicts with specific language in any document that is incorporated into this Agreement by reference, the specific language within this Agreement shall control. The captions and headings of this Agreement are for convenience only and shall not define or limit any of the terms or provisions of this Agreement.

**Section 5.04. Entire Agreement.** This Agreement constitutes the entire agreement between the Parties with respect to its subject matter and supersedes all prior and contemporaneous discussions, negotiations, agreements, representations, and understandings of the Parties, written or oral.

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- Section 5.05. Reasonableness and Good Faith.** Except as specifically limited elsewhere in this Agreement, whenever the Agreement requires the Parties to give its consent or approval to any action on the part of the other, such consent or approval shall not be unreasonably withheld or delayed. If the Parties disagree with any determination covered by this provision and reasonably requests the reasons for that determination, the determining Party shall furnish its reasons in writing and in reasonable detail within 30 days following the request.
- Section 5.06. Assignment.** This Agreement may not be assigned by any Party without prior written approval from each of the other Parties.
- Section 5.07. Partial Invalidity or Severability.** If any phrase, clause, sentence, paragraph, section or other portion of this Agreement shall become illegal, null, or void, for any reason, or shall be held by any court of competent jurisdiction to be illegal, null, or void, the remaining portions of this Agreement shall not be affected thereby and shall remain in force and effect to the fullest extent permissible by law.
- Section 5.08. No Third Party Beneficiaries.** This Agreement shall not create any third party beneficiary hereto, nor shall it authorize anyone not a Party hereto to maintain any action, suit or other proceeding, including without limitation, for personal injuries, property damage or enforcement pursuant to the provisions of this Agreement. The duties, obligations and responsibilities of the Parties to this Agreement with respect to third parties shall remain as otherwise provided by law in the event this Agreement had never been executed.
- Section 5.09. Availability of Funds.** Implementation of this Agreement by the Service and BLM is subject to the requirements of the Anti-Deficiency Act, 31 U.S.C. § 1341, and the availability of appropriated funds. Nothing in this Agreement may be construed to require the obligation, appropriation, or expenditure of any money from the U.S. Treasury.
- Section 5.10. No Partnerships.** This Agreement shall not make or be deemed to make any Party to this Agreement an agent for or the partner or joint venturer of any other Party.
- Section 5.11. Notices.** Any notice or communication required or permitted under this Agreement shall be deemed to be delivered and received when actually received by the intended recipient, or whether actually received or not, when deposited in the United States mail, postage fully prepaid, registered or certified mail, return receipt requested, addressed to the intended recipient at the address shown below.

If to Board of Directors:

[Contact Name]

President of Board of Directors of Wyoming Conservation Exchange

[Address]



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[City] [State] [Zip]

If to U.S. Fish and Wildlife Service:

[Contact Name]

U.S. Fish & Wildlife Service

Wyoming Ecological Services Field Office

[Address]

[City] [State] [Zip]

If to Wyoming Game & Fish Department:

[Contact Name]

Wyoming Game & Fish Department

[Address]

[City] [State] [Zip]

If to Bureau of Land Management:

[Contact Name]

Bureau of Land Management

Wyoming State Office

[Address]

[City] [State] [Zip]

**Section 5.12. Counterparts.** This Agreement may be executed in multiple counterparts, each of which shall be deemed an original, and all of which together shall constitute one and the same instrument. Furthermore, facsimile signatures shall be binding for all purposes of this Agreement.

**Section 5.13. Governing Law.** This Agreement shall be governed by and interpreted and construed under the laws of the State of Wyoming.

**Section 5.14. Attorney's Fees.** If any action at law or in equity, including any action for declaratory relief, is brought to enforce or interpret the provisions of this Agreement, then each Party shall pay its own attorney's fees and costs.

**Section 5.15. Authorized Signature.** Each of the undersigned certifies that he or she has full authority to bind the Party that he or she represents for purposes of entering into this Agreement. This Agreement shall be deemed executed on the date of the last signature by the Parties.

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**Draft Habitat Exchange Agreement**

*December 29, 2014*

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement to be effective as of the \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

**Board of Directors**

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: President of the Board of Directors of  
the Wyoming Conservation Exchange

\_\_\_\_\_  
Date of Execution

**U.S. Fish and Wildlife Service**

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

\_\_\_\_\_  
Date of Execution

**Wyoming Game & Fish Department**

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

\_\_\_\_\_  
Date of Execution

**Bureau of Land Management**

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

\_\_\_\_\_  
Date of Execution