

**AMENDMENT NO. 2 TO
BURKE RANCH CONSERVATION BANK
AGREEMENT**

THIS AMENDMENT NO. 2 ("Amendment #2") to the Burke Ranch Conservation Bank Agreement is made and entered into as of _____, 2012 ("Effective Date"), by and among Westervelt Ecological Services, LLC, a Delaware limited liability company ("Bank Sponsor" and "Property Owner"), the U.S. Fish and Wildlife Service ("USFWS"), and the California Department of Fish and Game ("CDFG"), Bay Delta Region Office (each a "Party" and, together, the "Parties"), with reference to the following facts:

BACKGROUND

A. The Burke Ranch Conservation Bank Agreement was made and entered into by Bank Sponsor and USFWS as of 27, December 2007, and amended by Amendment #1 on 13 August 2008 (as so amended, the "Agreement"). Initially-capitalized terms used in this Amendment #2 and not otherwise defined herein shall have the meaning set forth in the Agreement.

B. The Burke Ranch Conservation Bank ("Bank") occurs on real property composed of approximately 964.14 acres (the "Property") located in eastern Solano County, south of the city of Dixon, and designated Assessor's Parcel No(s). 042-020-040, 042-020-070, 042-020-120, 042-020-030, 042-020-110, and 042-020-160. The Bank occupies a 962.14-acre portion of the Property (the "Bank Property"). The Bank Property is more particularly described in the Agreement.

C. The purposes of this Amendment #2 are :1) to add CDFG as a signatory to the Agreement and, in connection with that addition, the Credits at the Bank will be eligible to serve as compensation for impacts to California tiger salamander (*Ambystoma californiense*), which is listed as threatened under the state and federal Endangered Species Act, Swainson's hawk (*Buteo swainsoni*), which is listed as threatened under the state Endangered Species Act, and burrowing owl (*Athene cunicularia*) which is considered a species of special concern by the State of California; and 2) obtain formal release of vernal pool preservation credits within the Playa Wetlands based upon the verification jurisdictional delineation by the Army Corps of Engineers (ACOE) and detection of fairy shrimp (*Branchinecta lynchi*) and tadpole shrimp (*Lepidurus packardii*) within these features.

D. USFWS has approved the Center for Natural Lands Management (the "Center") as Endowment Trustee for the Bank. CDFG has not approved an Endowment Trustee (as explained in section 8 below), but will join in this Amendment #2, will approve an Endowment Trustee at a later date, the Bank Sponsor will establish a separate Conservation Easement Reversion Contingency Endowment as provided as Exhibit N, and the Bank Sponsor will secure endowment funds as provided in Exhibit J, in this Amendment #2.

NOW, THEREFORE, in consideration of the foregoing facts and the terms,

covenants and conditions set forth below, the Parties hereby modify the Agreement as follows:

1. The introductory paragraph of the Agreement is hereby modified to add the California Department of Fish and Game (CDFG) as a Party and to add the following new sentence: "USFWS and CDFG are jointly referred to in this Agreement as the Conservation Bank Review Team ("CBRT")."

2. The following definition is hereby inserted as new Recital C, and the subsequent Recitals are correspondingly relettered:

C. CDFG has jurisdiction over the conservation, protection, and management of fish, wildlife, native plants and the habitat necessary for biologically sustainable populations of these species pursuant to California Fish and Game Code § 1802.

3. The first sentence of Recital D, which has been correspondingly relettered to Recital E, is hereby replaced with the following sentence: "Establishment of this Conservation Bank represents an excellent opportunity to conserve highly valuable biological resources, *which when proposed as mitigation and compensation for impacts regulated under the jurisdiction of the Signatory Parties described herein, are protected in perpetuity for the benefit of the people of the United States and the State of California.*

4. A global change is hereby made throughout the Agreement, as follows: the term "USFWS" is replaced with "CBRT", except in the following locations: the opening paragraph, Recital B, Definition #25, Term 5.1.a shall be modified from USFWS to "Permit", Term 10.1 and 12.2 shall be modified from USFWS to "USFWS and/or CDFG", Term 15.1 and Term 18.1, and any sections referring to approval or operations of an Endowment Trustee or how Endowment Deposits and Endowment Funds are held or managed.

5. The "Definitions" Section of the Agreement is hereby amended to add the following new numbered definitions:

a. "26. "Adaptive Management" means the approach to natural resource management which incorporates changes to management practices, including corrective actions as determined to be appropriate by the CBRT in discussion with the Bank Sponsor and/or the Property Owner, as appropriate, based upon Bank annual report results and CBRT review of overall Bank performance and compliance."

b. "27. "Bank Closure Plan" means the plan detailing the terms, processes and conditions of Bank closure, attached hereto as Exhibit L

c. "28. "Bank Sponsor" means the Party responsible for establishing and operating the Bank."

d. "29. "CDFG" means the California Department of Fish and Game, a subdivision of the California Natural Resources Agency."

e. "30. "CEQA" means the California Environmental Quality Act (California Public Resources Code § 21000 *et seq.*) and the State CEQA Guidelines (California Code of Regulations, Title 14, § 15000 *et seq.*)."

f. "31. "CESA" means the California Endangered Species Act (California Fish and Game Code § 2050 *et seq.*), including all regulations promulgated pursuant to that Act."

g. "32. "Conservation Easement Reversion" means the reversion included in the Conservation Easement as required pursuant to California Government Code section 65965 (d), which provides in part as follows: "if the interest in real property that is held by the nonprofit organization is not being held, monitored, or managed for conservation purposes in the manner specified" in this Agreement, "the interest in real property shall revert to the state . . . , or to another public agency or nonprofit organization qualified pursuant to" Public Resources Code section 65965 (b), approved by the state . . ."

h. "33 "Conservation Easement Reversion Contingency Endowment" means an endowment to offset the costs of managing, monitoring and enforcing the Conservation Easement absorbed by the CDFG, or its designee in case of Conservation Easement Reversion. "

i. "34. "HCP" means a Habitat Conservation Plan prepared pursuant to § 10(a)(2)(A) of the ESA (16 U.S.C. § 1539(a)(2)(A))."

j. "35. "Endowment Trustee" means a tax-exempt non-profit organization qualified under § 501(c)(3) of the Internal Revenue Code, and authorized by the USFWS to hold and administer endowment funds on behalf of the USFWS.

k. "36. "Long-Term Management Period" means the period beginning upon conclusion of the Interim Management Period and continuing in perpetuity, during which Property Owner is to manage, monitor and maintain the Bank Property pursuant to the Management Plan."

l. "37. "NCCP" is a Natural Community Conservation Plan created pursuant to California Fish and Game Code § 2800 *et seq.*"

m. "38. "Phase I Environmental Assessment" is an assessment of the environmental condition of the Property performed in accordance with the American Society of Testing and Materials (ASTM) Standard E1257-05 "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process," or any successor to such ASTM Standard which is active at the time of the assessment."

n. "39. "Remedial Action" means any corrective measures which the CBRT requires the Bank Sponsor or Property Owner to take to ameliorate any injury or adverse impact to the Bank Property, as provided for in this Amendment and the amended Long-term Management Plan."

o. "40. "Performance Security" means a letter of credit to be provided by the Owner to the CDFG, concurrent with execution of the Amendment #2, to use as a contingency fund for ensuring that the performance standards for full credit release as described in Exhibit E are achieved."

p. "41. "Performance Period" means the period of time during which the performance standards for full credit release as described in Exhibit E have yet to be met, and the Owner is responsible for all costs associated with baseline monitoring for California tiger salamander as described in Exhibit D – Attachment B and predator control of California tiger salamander in breeding pools as described in Exhibit D – Attachment E."

6. Clarification is provided to Section 3.1 that CDFG does not issue or require Credit Sales Approval for project proponents to use Conservation Credits from the Bank.

7. A new subsection 3.7 is hereby added.

3.7. Upon execution of this Amendment #2, the Owner shall provide CDFG the Performance Security in the total of \$33,580, as defined in Exhibit O to this Amendment #2, to secure the annual cost for completion of activities required for the credit release (Exhibit E to this Amendment #2).

8. Section 4.0 of the Agreement is hereby modified to include the following language:

The Endowment Fund was funded with CNLM as Endowment Trustee on 8/28/2008 in the amount of \$1,040,491 as approved by the USFWS. California Government Code Section 65967 currently requires the State to exercise due diligence in reviewing the qualifications of a non-profit organization to effectively manage and steward land, water, or natural resources, as well as the accompanying funds. As the CDFG has not established guidelines to assist in the review process, CDFG is currently not able to identify an Endowment Trustee at the time of execution of this Amendment #2. Therefore, the Bank Sponsor is required to post a security for the long term management costs until such time as CDFG approves an Endowment Trustee per the requirements of California Government Code. Should CDFG determine that CNLM is not qualified to hold the Endowment Fund, or the qualification process has not been completed prior to or concurrent with the final credit release, the Bank Sponsor shall deposit an amount, equal to the security as adjusted for inflation, with CDFG or a non-profit organization CDFG has determined is qualified to manage the funds. Should part or all of California Government Code relating to the due diligence process for the non-profit organization be revised during the period in which this security for the Endowment Fund remains in place, those provisions shall apply to this Amendment #2. The amount and form of the security are provided in Exhibit J to this Amendment #2.

a. A new subsection 4.10 is hereby added.

4.10. Any Endowment Fund revenues (including earnings and interest) remaining after the Endowment Principal is adjusted for inflation that exceed the anticipated annual management expenses of the Bank Property shall be retained in the Endowment Fund and may be made available to fund unexpected expenses and

Adaptive Management needs.

- b. A new subsection 4.11 is hereby added.

4.11. Conservation Easement Reversion Contingency Endowment

i. Upon execution of this Amendment, Bank Sponsor shall furnish a Conservation Easement Reversion Contingency Endowment ("CERCE") in the amount of \$52,875.18 for the benefit of the CDFG. The amount of the CERCE has been established based upon the CERCE cost analysis attached as Exhibit N.

ii. Bank Sponsor shall deposit the CERCE into a trust fund with a trustee designated by the CDFG ("Trustee") in accordance with written instructions of CDFG.

iii. The Trustee shall hold the CERCE in a CDFG-authorized trust fund in accordance with written instructions of the CDFG. All interest and earnings on the deposited funds shall be added to and become a part of the CERCE until such time as the CERCE is called upon and funds authorized by CDFG, or its designee, to be disbursed pursuant to subparagraph d of this section.

iv. Funds from the CERCE, except those listed as administrative fees in Exhibit N, may not be disbursed, expended or transferred unless the Conservation Easement reverts to the CDFG or its designee pursuant to California Government Code section 65965 or its successor. The purpose of the CERCE is to provide funding to continue monitoring and management of the Conservation Easement in perpetuity and to be available in the event the Conservation Easement reverts to the CDFG or its designee. In that event, the CDFG, or its designee with the written consent of the CDFG, may direct the Trustee to disburse, expend or transfer the CERCE for such purposes associated with monitoring and management of the Conservation Easement as described in Exhibit N.

v. With written consent of the CDFG or its designee, the CERCE may be combined with any funds that have been set aside for Conservation Easement Monitoring and management that have been dedicated to run with the Conservation Easement in Perpetuity.

vi. The Bank Sponsor shall, in addition to the \$52,875.18 for the CERCE, pay any fees associated with establishing the CERCE trust fund with the Trustee.

9. Section 6.2, describing the Management Plan, is hereby modified to add requirement:

(d) description of adaptive management and remediation measures.

10. Section 13.1 is hereby modified to add CDFG as a party entitled to receive notices, and to insert the following contact information:

California Department of Fish and Game
Bay Delta Region
7329 Silverado Trail

Napa, Ca 94558
Attn: Regional Manager
Telephone: 707-944-5500
Fax: 707-944-5563

California Department of Fish and Game
Habitat Conservation Planning Branch
1416 Ninth Street, 12th Floor
Sacramento, CA 95814
Attn: Statewide Banking Coordinator
Telephone: 916-653-4875
Fax: 916-653-2588

11. Section 15.1 is hereby modified to change the reference of the USFWS to the CBRT, and the second sentence is revised to read: "Nothing in this Agreement may be construed to require the obligation, appropriation, or expenditure of any money from the United States Treasury *or the California State Treasury.*"

12. A new Section 20.0 is hereby added to the Agreement as follows:

"Force Majeure" shall mean war, insurrection, riot or other civil disorder, flood, earthquake, fire, disease, 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 Bank or the Bank Property and over which neither the Bank Sponsor nor the Property Owner has control; *provided, however,* that (i) a riot or other civil disorder shall constitute an event of Force Majeure only if the event has broad regional impacts and is not endemic to the Bank Property and its immediate locale; (ii) 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; (iii) an earthquake shall constitute an event of Force Majeure only if the ground motion it generates at the Bank Property is greater than that presently projected from an earthquake with a return period of 475 years; (iv) disease shall constitute an event of Force Majeure only if such event has broad regional impact and is not endemic to the Bank Property and its immediate locale; and (v) 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.

13. The Service Area Maps and Narrative, included as Exhibit C to the Agreement, have been modified to add Swainson's hawk and burrowing owl (Exhibit C to this Amendment #2).

14. The Management Plan, included as Exhibit D to the Agreement, has been modified (Exhibit D to this Amendment #2) to include updates to Biological Monitoring Methodologies (Attachment B to the Management Plan), including the CTS survey methodology (Appendix A to Attachment B to the Management Plan), and Predation Management Measures for the Burke Ranch CTS Breeding Ponds (Attachment E to the Management Plan).

15. The Credit Evaluation, included as Exhibit E to the Agreement, has been modified as follows (Exhibit E to this Amendment #2).

- a. Credits have been adjusted to correspond to the acreages in the ACOE verified wetlands delineation, dated September 21, 2010. The delineation documented increased wetlands acreage on the property, and a corresponding decrease in upland acreage.
- b. Swainson's hawk and burrowing owl are added as covered species to Upland Credits.
- c. A credit release for CDFG only was added use of Upland Credits for California tiger salamander impacts regulated by CDFG.
- d. The CBA and Amendment #1 only had a single category of credits for upland habitat: Upland Credits. This category will be subdivided into Uplands within 0.7 mile of Playa Pool wetlands, and Uplands outside of 0.7 mile of Playa Pool wetlands; this distinction is critical as only acreage within 0.7 mile of the Playa Pools is approved as credits for California tiger salamander and burrowing owl. A sale of Uplands Credits was made on 7/20/2011 for California Environmental Quality Act impacts to general avian foraging; as this category is now being subdivided, the sale is being allocated to the Uplands outside of the 0.7 mile Playa Pool wetlands as there was no compensation requirement for California tiger salamander or burrowing owl.

16. The perpetual conservation easement, included as Exhibit F to the Agreement, has been modified to include provisions required by CDFG (Exhibit F to this Amendment #2).

17. New Exhibits J-1 and J-2 to this Amendment #2 are hereby added to the Agreement for the purpose of calculating and providing security to CDFG with each CDFG credit release until CDFG approves an Endowment Trustee. Additionally, the Endowment Calculation, included as Exhibit J to the Agreement, has been modified to reflect management expense changes for the reduced number of management actions associated with the Bank, including removal of prescribed burning and elimination of construction of management facilities (Exhibit J-3 to this Amendment #2). Based on this calculation, the value of the Endowment Fund would be adjusted downward from \$1,040,491 to \$976,661. However, an Endowment Deposit for \$1,040,491 was made on August 21, 2008; the Endowment Management Agreement (Exhibit K to the Agreement) requires this amount to be maintained as permanently restricted in perpetuity. Therefore, the Endowment Fund will be considered \$1,040,491 for the purposes of this Amendment #2.

18. The Declaration of Trust, titled the "Agreement By and Between Westervelt Ecological Services and Center for Natural Lands Management for the Management of the Habitat Stewardship Endowment Account", included as Exhibit K to the Agreement is not made a part of this Amendment #2. If CDFG subsequently identifies CNLM as the Endowment Trustee, Exhibit K to the Agreement will be revised and approved as-to-form by the CBRT and executed by both the Bank Sponsor and Endowment Trustee and shall become Exhibit K to this Amendment #2. Should CDFG determine that CNLM is not qualified to hold the Endowment Fund, a separate agreement will be developed with CDFG or qualified non-profit organization for additional endowment funds as described in section 8 above.

19. A new exhibit, Exhibit L to this Amendment #2, is hereby added to the Agreement, documenting the Bank closure plan.

20. A new exhibit, Exhibit M to this Amendment #2, is hereby added to the Agreement, documenting cultural resources surveys and record searches were conducted for the Property.

21. A new exhibit, Exhibit N to this Amendment #2 is hereby added to the Agreement, documenting the cost analysis of the CERCE.

22. Except as specifically modified by this Amendment #2, all of the provisions of the Agreement are unchanged and shall remain in full force and effect.
