

Resolution – HPTE #202

Approving Amendment No. 1 to the Loan Agreement with Banc of America Preferred Funding Corporation and the First Amendment to the HPTE I-70 PPSL Project (Mountain Express Lane Project) Intra-Agency Agreement with CDOT

WHEREAS pursuant to Section 43-4-806, C.R.S., the General Assembly of the State of Colorado (the “State”) created the Colorado High Performance Transportation Enterprise (“HPTE”) as a government-owned business within the Colorado Department of Transportation (“CDOT”) to pursue innovative means of more efficiently financing important surface transportation projects that will improve the safety, capacity, and accessibility of the surface transportation system; and

WHEREAS, such innovative means of financing projects include, but are not limited to, public-private partnerships, operating concession agreements, user fee-based project financing, and availability payment and design-build contracting; and

WHEREAS, HPTE, in partnership with CDOT, completed and is operating the I-70 Mountain Express Lane Project, formerly known as the I-70 Peak Period Shoulder Lane Project (the “Project”) over a 13 mile segment of eastbound I-70 through the I-70 Mountain Corridor; and

WHEREAS, on December 17, 2014, the HPTE Board of Directors (the “Board”) adopted Resolution No. 151 authorizing the execution and delivery of an agreement (the “Loan Agreement”) with Banc of America Preferred Funding Corporation (the “Bank”) for loan financing to support the construction of the Project; and

WHEREAS, in conjunction with its approval of the Loan Agreement, the Board also approved the HPTE I-70 PPSL Project Intra-Agency Agreement (the “Agreement”) between CDOT and HPTE regarding the construction, operation and maintenance of the Project; and

WHEREAS, HPTE and CDOT now desire to further define the allocation of costs and responsibilities for operations and maintenance of the Project, as well as set forth invoicing and payment procedures not described in the original Agreement; and

WHEREAS, HPTE and the Bank also desire to amend certain provisions of the Loan Agreement to clarify the timing for submitting HPTE’s financial statements to the Bank, as well as to make other clarifying changes to the original Loan Agreement;

WHEREAS, the Loan Agreement requires the consent of the Bank to any amendment to the Agreement, which consent has been provided by the Bank as part of the proposed Amendment No. 1 to the Loan Agreement.

NOW THEREFORE BE IT RESOLVED, the Board hereby approves the Amendment No. 1 to the Loan Agreement with Banc of America Preferred Funding Corporation in the form presented and authorizes and directs the HPTE Director to execute and deliver

such amendment on behalf of HPTE, with such revisions or modifications, not inconsistent with this Resolution, as the HPTE Director may determine to be necessary or appropriate.

BE IT FURTHER RESOLVED, the Board hereby also approves the First Amendment to the HPTE I-70 PPSL Project (Mountain Express Lane Project) Intra-Agency Agreement with CDOT in the form presented and authorizes and directs the HPTE Director to execute and deliver such amendment on behalf of HPTE, with such revisions or modifications, not inconsistent with this Resolution, as the HPTE Director may determine to be necessary or appropriate.

Signed as of May 17, 2016

Kari V. Grant
Secretary, HPTE Board



Date: February 17, 2016

To: High Performance Transportation Enterprise Board

From: Nicholas Farber, HPTE Operations Manager; Brent Butzin, HPTE General Counsel

Subject: Amendment No. 1 to HPTE's PPSL Loan Agreement and First Amendment to HPTE I-70 PPSL Project Intra-Agency Agreement

Purpose

The purpose of this memo is to summarize the first amendment to the HPTE's PPSL Loan with Banc of America (BOA) and the First Amendment to HPTE I-70 PPSL Project Intra-Agency Agreement and to recommend their approval.

Action

The Board is asked to consider a resolution that supports the staff recommendation.

Background

On December 19, 2014 the HPTE borrowed \$25 million from Banc of America to help complete the I-70 East Bound Peak Period Shoulder Lane Project. The Loan Agreement had a reporting requirement that specified that HPTE provide unaudited financial statements 30 days after July 1 and January 1 of each fiscal year. In practice, this is impossible due to the state's accounting system (CORE) and how long it takes to reconcile financial information.

Further, since the lane is now in operation, HPTE and CDOT need to agree on the equitable division of the operations and maintenance costs.

Details

HPTE and BOA agreed that moving financial reporting requirements from 30 to 90 days after July 1 and January 1 was reasonable. The amendment also clarifies the definition on when our interest payment date occurs.

The First Amendment to the IAA:

- Specifies that CDOT will perform operations and maintenance on both the general purpose lanes and the Mountain Express Lane and will seek reimbursement from HPTE for its share of the overall expenses.
- Specifies operations and maintenance costs will be allocated based on a proportion of the total number of vehicles using the Project with HPTE's portion being all vehicles obligated to pay a fee for the use of the Mountain Express Lane. For example, if operations and maintenance expenses is \$500,000 per month and five percent of the vehicles paid a fee, HPTE would be responsible for \$25,000 of the costs.
- Specifies that the pro-rata cost calculation does not include items that result in a *de minimis* impact on overall operations and maintenance expenses. For example, items could include, but are not limited to, repair and replacement of guardrail, light fixtures, or contracts with State Patrol for safety enforcement within the corridor (exclusive of enforcement needs for toll evasion).
- Specifies that HPTE is solely responsible for costs associated with toll processing and collection; level one and level two maintenance of toll equipment; contracts for toll evasion enforcement; daily lane sweeping/cleaning in preparation of opening the lane; CDOT staff time dedicated to monitoring traffic flows, determining opening/closing times, and setting variable toll rates; and, overhead and administrative costs related to the operations and maintenance of the project.
- Specifies that if CDOT or HPTE provides services to the other through a third party contract, the party covering the costs will invoice the other.
- Specifies that CDOT will seek reimbursement from HPTE on or before January 15 and July 15 of each year and if HPTE does not have sufficient funds to pay, HPTE will request a CDOT Backup Loan to fund all or portion of what cannot be covered.

- Recognizes HPTE's \$17.5 million contribution to the Eastbound PPSL Construction Package 3 and that all payment obligations have been satisfied.

Recommendations

The staff recommends that the Board approve a resolution authorizing the execution of these agreements.

Attachment

Amendment No. 1 to Loan Agreement; First Amendment to HPTE I-70 PPSL Project Intra-Agency Agreement

**FIRST AMENDMENT TO
HPTE I-70 PPSL PROJECT
INTRA-AGENCY AGREEMENT**

THIS FIRST AMENDMENT (the "Amendment") is made this _____ day of _____, 2015 by and between the STATE OF COLORADO for the use and benefit of the COLORADO DEPARTMENT OF TRANSPORTATION, hereinafter referred to as "CDOT," and the COLORADO HIGH PERFORMANCE TRANSPORTATION ENTERPRISE, a government-owned business and a division of CDOT, hereinafter referred to as the "Enterprise" or "HPTE."

FACTUAL RECITALS:

A. CDOT is an agency of the State of Colorado authorized pursuant to Section 43-1-105, C.R.S. to plan, develop, construct, coordinate, and promote an integrated transportation system in cooperation with federal, regional, local and other state agencies.

B. The Transportation Commission of Colorado (the "Transportation Commission") is the budgetary and policy making body for CDOT with all powers and duties granted by the Colorado General Assembly pursuant to Section 43-1-106, C.R.S.

C. HPTE was created pursuant to Section 43-4-806(2), C.R.S. as a government-owned business within CDOT to pursue innovative means of completing important surface transportation projects that will improve the safety, capacity, and accessibility of the surface transportation system, can feasibly be commenced in a reasonable amount of time, and will allow more efficient movement of people, goods, and information throughout Colorado.

D. CDOT and HPTE previously entered into that certain *HPTE I-70 PPSL Project Intra-Agency Agreement*, dated December 19, 2014 (the "Agreement"), regarding the financing, construction, and operations and maintenance of the I-70 Mountain Express Lane Project, formerly known as the I-70 Peak Period Shoulder Lane Project (the "Project").

E. CDOT and HPTE also previously entered into a Letter Agreement, dated March 5, 2015, concerning the invoicing and reimbursement of certain costs paid by CDOT for the construction of the Project, the terms of which are to be incorporated into this Amendment.

F. CDOT and HPTE now desire to amend the Agreement to clarify certain terms and conditions related to the operations and maintenance of the Project.

G. Pursuant to Section 6.13 of the Loan Agreement between HPTE and Banc of America Preferred Funding Corporation (the "Bank"), the Bank's consent to the Amendment is required and, as of the date of this Amendment, such consent has been received.

H. This Amendment is executed by HPTE under the authority of Sections 29-1-203 and 43-4-806(6)(h), C.R.S., and by CDOT under the authority of Sections 43-1-110 and 43-1-116, C.R.S.

NOW, THEREFORE, IN CONSIDERATION OF THE FOREGOING RECITALS, THE PARTIES TO THIS AMENDMENT HEREBY AGREE AS FOLLOWS:

1. Amendment to Operations and Maintenance Provisions. Section I (Operation and Maintenance of the Project) of the Agreement is hereby deleted in its entirety and replaced with the following:

I. OPERATIONS AND MAINTENANCE OF THE PROJECT

A. The I-70 PPSL Project is adjacent to a segment of the I-70 general purpose lanes (“I-70 General Purpose Lanes”) and HPTE and CDOT recognize the need to cooperate in carrying out the related operations and maintenance for the I-70 PPSL Project and the I-70 General Purpose Lanes. To that end, HPTE and CDOT agree to cooperate in ensuring that the operations and maintenance is performed and agree to the division of costs as set forth herein. As a general matter, HPTE shall be responsible for operating and maintaining the I-70 PPSL Project, and agree that CDOT shall be responsible for operating and maintaining the I-70 General Purpose Lanes. It is the intent of the parties that, except as specifically provided otherwise herein, CDOT shall perform such operations and maintenance of both the I-70 General Purpose Lanes and the I-70 PPSL Project, subject to reimbursement from HPTE for HPTE’s proportionate share of the overall operations and maintenance expenses, as further described herein.

B. Except as otherwise provided herein, the CDOT and HPTE agree to allocate costs based on a proportion of the total number of vehicles using I-70 within the Project area during the reference month, with HPTE’s portion being calculated to include all vehicles obligated to pay a fee for use of the I-70 PPSL Project, whether or not such user fee is actually collected, and CDOT’s portion being calculated to include all other vehicles (the “Pro-Rata O&M Cost Calculation”). For illustrative purposes only, if the total cost of operating and maintaining the segment of I-70 including the I-70 PPSL Project is \$500,000 per month, and 5% of the total vehicle count consisted of vehicles obligated to pay a user fee, HPTE would be responsible for \$25,000 of such operations and maintenance costs. The Pro-Rata O&M Cost Calculation shall apply to CDOT’s costs incurred with respect to: (i) snow and ice removal services; (ii) courtesy patrol; (iii) pavement resurfacing, life-cycle and capital maintenance, to the extent such activities reasonably include both the I-70 PPSL Project and the I-70 General Purpose Lanes; (iv) lane striping; and (v) any other operations and maintenance expense CDOT and HPTE agree in good faith is most fairly allocated utilizing the Pro-Rata O&M Cost Calculation method.

C. The Pro-Rata O&M Cost Calculation shall not apply to those operations and maintenance costs existing and regularly funded by CDOT prior to the

implementation of the I-70 PPSL Project, and for which the addition of the I-70 PPSL Project results in a *de minimus* impact on overall operations and maintenance expenses for I-70. Such costs include, but are not limited to, CDOT's costs incurred with respect to: (i) repair and replacement of guardrail; (ii) repair and replacement of lighting fixtures; and (iii) contracts with the State Patrol for safety enforcement within the corridor (but exclusive of additional enforcement contracted by HPTE for toll evasion enforcement, if any).

D. HPTE shall be solely responsible for costs incurred with respect to: (i) toll processing and collection; (ii) Level I and Level II maintenance of toll equipment; (iii) contracts for toll evasion enforcement with the State Patrol or other law enforcement entity, if any; (iv) daily lane sweeping/cleaning in preparation for opening the I-70 PPSL Project; and (v) CDOT staff time dedicated to monitoring traffic flows and determining opening/closing times and variable toll rates for the I-70 PPSL Project, in accordance with guidance set forth and approved by HPTE; and (vi) HPTE overhead and administrative costs related to the operations and maintenance of the I-70 PPSL Project. Such costs, together with those costs attributable to HPTE under the Pro-Rata O&M Cost Calculation, shall constitute the "HPTE O&M Project Expenses."

E. To the extent either CDOT or HPTE provides services to the other (either through a third party or directly) that results in one party covering the costs that is agreed to be the responsibility of the other, the party covering such costs will invoice the other and such invoice shall include a reasonably detailed breakdown of the costs for which the invoicing party is seeking reimbursement.

F. CDOT shall submit to HPTE on or before January 15 and July 15 of each year an invoice describing the HPTE O&M Project Expenses due to CDOT with respect to the I-70 PPSL Project for the prior six month period. To the extent the user fee revenues generated from the I-70 PPSL Project as they are required to be applied are, or are estimated to be, inadequate to cover the HPTE O&M Project Expenses, HPTE can request a CDOT Backup Loan to fund all or a portion of the HPTE O&M Project Expenses pursuant to Section II below. Before HPTE submits to CDOT the written notification described in Section II.B below, CDOT and HPTE agree to cooperate in estimating the expected cost of operating the I-70 PPSL Project for the upcoming fiscal year. This estimate, and the expected available revenue from the I-70 PPSL Project for the HPTE O&M Project Expenses shall serve as a basis for submitting the notification described in Section II.B.

G. In consideration of the various terms, covenants, and conditions set forth herein (including the benefits that CDOT will receive as a result of the Project, CDOT hereby provides to a non-exclusive license over, under, upon and in the site of the Project ("License") for HPTE to operate the I-70 PPSL Project. CDOT acknowledges and agrees that HPTE may sublicense the License as needed to operate and maintain the Project. Subject to the License, CDOT reserves the right of use, occupancy and ownership over, under, upon and in the lands comprised of the I-70 PPSL Project.

2. Eastbound PPSL Construction Package 3. On December 18, 2014, the Transportation Commission approved a budget action of \$20.85 million to pay for the Eastbound PPSL Construction Package 3, of which \$17.5 million was available to HPTE to pay for the construction of ITS infrastructure, interchange improvements at mile marker 241 East Idaho Springs, asphalt overlay, and fiber installation for the Project. In a Letter Agreement dated March 5, 2015, CDOT and HPTE agreed that CDOT shall invoice HPTE, and HPTE shall remit payment to CDOT, for those aforementioned elements of the Eastbound PPSL Construction Package 3. CDOT and HPTE agree that all invoicing and payment obligations with respect to the Eastbound PPSL Construction Package 3 have been satisfied in their entirety.

3. General Provisions. With the exception of those terms and conditions specifically modified herein, the Agreement shall remain in full force and effect in accordance with all of its terms and provisions. In the event of any conflict between the terms and provisions of the Agreement and the term and provisions of this Amendment, the terms and provisions of this Amendment shall control. This Amendment may be executed in any number of counterparts, each of which shall be deemed an original, and all of such counterparts shall constitute one agreement.

[Signature page follows.]

IN WITNESS WHEREOF, the parties hereto have executed this Amendment as of the day and year first above written.

STATE OF COLORADO
JOHN HICKENLOOPER, Governor

COLORADO HIGH PERFORMANCE
TRANSPORTATION ENTERPRISE

By: _____
SHAILEN P. BHATT
Executive Director
DEPARTMENT OF TRANSPORTATION

By: _____
DAVID I. SPECTOR
HPTE Director

APPROVED:

CYNTHIA COFFMAN
Attorney General

By: _____
Assistant Attorney General

AMENDMENT NO. 1 TO LOAN AGREEMENT

This Amendment No. 1 (the "*Amendment*") dated as of _____, 2016, is between Banc of America Preferred Funding Corporation (the "*Lender*") and the Colorado High Performance Transportation Enterprise (the "*Borrower*").

RECITALS

WHEREAS, the Lender and the Borrower entered into a certain Loan Agreement dated as of December 19, 2014 (as amended, the "*Loan Agreement*");

WHEREAS, the Borrower has requested that the Lender amend certain provisions of the Loan Agreement; and

WHEREAS, the Lender is willing to make such amendments to the Loan Agreement, in accordance with and subject to the terms and conditions set forth herein.

NOW, THEREFORE, in consideration of the agreements hereinafter set forth, and for other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, the parties hereto agree as follows:

AGREEMENT

SECTION 1. DEFINITIONS.

Capitalized terms used but not defined in this Amendment shall have the meaning given to them in the Loan Agreement.

SECTION 2. AMENDMENTS.

(a) Section 3.02(a) of the Agreement is hereby amended and restated in its entirety and as so amended and restated shall read as follows:

(a) From and including the Closing Date to but excluding the Interest Rate Reset Date, interest shall accrue at the rate of 2.79% (the "*Initial Rate*"), computed on the basis of a 360-day year of twelve 30-day months, and shall be paid on each December 15 (each an "*Interest Payment Date*"), subject to the other provisions of this Article III.

(b) Section 6.05(c) is hereby amended and restated in its entirety and as so amended and restated shall read as follows:

(c) *Unaudited Semi-Annual Financials.* As soon as available, and in any event within ninety (90) days after each

July 1 and January 1 of each Fiscal Year, a report of Gross Revenue collections during such semi-annual period, the balances in the accounts of the Transportation Special Fund established pursuant to Article IV hereof and the balance in the I-70 PPSL Operating Fund as of the last day of such semi-annual period and the deposits to and withdrawals from such accounts during such semi-annual period and projections of Gross Revenues for the following Fiscal Year.

SECTION 3. CONSENT OF THE BANK.

3.1 The Borrower and CDOT desire to amend the Intra-Agency Agreement in the form attached hereto as Exhibit A and the Bank hereby consents thereto.

SECTION 4. CONDITIONS.

4.1 This Amendment will be effective upon the date upon which this Agreement has been approved and signed by the parties and the Colorado State Controller or designee (the "*Amendment Effective Date*").

4.2 The Lender's counsel shall have received, after delivering an invoice for the same, from the Borrower payment of its fees and expenses incurred in connection with this Amendment in the amount of \$5,000.

4.3 All other documents and legal matters in connection with the transactions contemplated by this Amendment shall be reasonably satisfactory in form and substance to the Lender and its counsel.

SECTION 5. MISCELLANEOUS.

5.1 On and after the Amendment Effective Date, all references to the Loan Agreement in each of the Related Documents shall hereafter mean the Loan Agreement as amended by this Amendment. Except as specifically amended hereby or otherwise agreed, the Loan Agreement is hereby ratified and confirmed and shall remain in full force and effect according to its terms.

5.2 The Borrower represents and warrants as follows:

(a) It has taken all necessary action to authorize the execution, delivery and performance of this Amendment.

(b) This Amendment has been duly executed and delivered by one or more duly authorized officers of the Borrower and, when executed and delivered by the Borrower will be a legal, valid and binding obligation of the Borrower, enforceable in accordance with its terms, except as such enforceability may be subject to (i) bankruptcy,

insolvency, reorganization, fraudulent conveyance or transfer, moratorium or similar laws affecting creditors' rights generally and (ii) general principles of equity (regardless of whether such enforceability is considered in a proceeding at law or in equity).

(c) No consent, approval, authorization or order of, or filing, registration or qualification with, any court, other governmental authority or third party is required in connection with the execution, delivery or performance by Borrower of this Amendment.

(d) The representations and warranties set forth in Article V of the Loan Agreement are true and correct as of the date hereof (except for those which expressly relate to an earlier date).

5.3 The Borrower hereby ratifies the Loan Agreement and acknowledges and reaffirms (a) that it is bound by all terms of the Loan Agreement applicable to it and (b) that it is responsible for the observation and full performance of its respective Obligations.

5.4 This Amendment shall constitute a Related Document under the terms of the Loan Agreement.

5.5 Each party agrees to pay its own costs and expenses in connection with the preparation, execution and delivery of this Amendment.

5.6 The Borrower agrees to promptly take such action, upon the request of the Lender, as is necessary to carry out the intent of this Amendment.

5.7 This Amendment and the other Related Documents embody the entire agreement among the parties hereto and supersede all prior agreements and understandings, oral or written, if any, relating to the subject matter hereof.

5.8 This Amendment may be executed in any number of counterparts, each of which when so executed and delivered shall be an original, but all of which shall constitute one and the same instrument. Delivery of an executed counterpart of a signature page of this Amendment or any other document required to be delivered hereunder, by fax transmission or e-mail transmission (e.g. "pdf" or "tif") shall be effective as delivery of a manually executed counterpart of this Agreement. Without limiting the foregoing, upon the request of any party, such fax transmission or e-mail transmission shall be promptly followed by such manually executed counterpart.

5.9 As of the date hereof, the Borrower hereby acknowledges and confirms that it has no knowledge of any actions, causes of action, claims, demands, damages and liabilities of whatever kind or nature, in law or in equity, against the Lender or the Lender's officers, employees, representatives, agents, counsel or directors arising from any action by such persons, or failure of such persons to act under the Loan Agreement on or prior to the date hereof.

5.10 THIS AMENDMENT, THE LOAN AGREEMENT AND THE OTHER RELATED DOCUMENTS AND ANY CLAIMS, CONTROVERSY, DISPUTE OR CAUSE OF ACTION (WHETHER IN CONTRACT OR TORT

OR OTHERWISE) BASED UPON, ARISING OUT OF OR RELATING TO THIS AMENDMENT, THE LOAN AGREEMENT OR ANY OTHER RELATED DOCUMENT (EXCEPTS, AS TO ANY OTHER RELATED DOCUMENT, AS EXPRESSLY SET FORTH THEREIN) AND THE TRANSACTIONS CONTEMPLATED HEREBY AND THEREBY SHALL BE GOVERNED BY, AND CONSTRUED IN ACCORDANCE WITH THE LAW OF THE STATE OF COLORADO.

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This Amendment is executed as of the date stated as the beginning of this Amendment.

LENDER:

BANC OF AMERICA PREFERRED FUNDING
CORPORATION

By _____
Name _____
Title _____

BORROWER:

COLORADO HIGH PERFORMANCE
TRANSPORTATION ENTERPRISE

By _____
Name _____
Title _____

ALL AGREEMENTS REQUIRE APPROVAL BY THE STATE CONTROLLER

Section 24-30-202, C.R.S. requires that the State Controller to approve all agreements. This Amendment is not valid until the State Controller, or such assistant as he may delegate, has signed it.

STATE CONTROLLER
Robert Jaros, CPA, MBA, JD

By: _____

Date: _____

EXHIBIT A

[Exhibit A to Loan Agreement]