

MEMORANDUM OF UNDERSTANDING
between the
CITY OF SAN ANTONIO and BEXAR COUNTY
(the SEP-HCP Permittees)
and
BANDERA CONSERVATION CORRIDOR, LLC

BACKGROUND

- A. This Memorandum of Understanding (MOU) establishes the basis for an agreement and understanding between the City of San Antonio (City) and Bexar County (County) (together, the Permittees) and the Bandera Conservation Corridor, LLC (BCC) hereinafter (the Parties).
- B. In January 2016, the U.S. Fish and Wildlife Service (USFWS) approved the Southern Edwards Plateau Habitat Conservation Plan (SEP-HCP) brought forth by the City and County, and issued a 30-year incidental take permit under section 10(a)(1)(B) of the Endangered Species Act (ESA) to the County and City, as co-permittees, under Permit No. TE48571B, dated effective January 18, 2016 (the Permit). Any non-federal entity may apply to participate in the SEP-HCP (an Applicant) and obtain incidental take authorization for the Covered Species that may occur as a result of Covered Activities conducted on Enrolled Properties (as defined by the Permit). The Permittees will assess mitigation needs for the golden-cheeked warbler (GCW) in terms of "Preservation Credits" required to be obtained by an Applicant, where one Preservation Credit is equal to one acre of protected occupied habitat for the affected species.
- C. The Permit authorizes an amount of "incidental take" of the Covered Species within the jurisdictions of the County and the City (the "Permit Area") and through implementation of the SEP-HCP will promote the conservation of the Covered Species and related natural resources in the City of San Antonio, Bexar County, and Bandera, Blanco, Comal, Kendall, Kerr and Medina counties of the Southern Edwards Plateau (the "Plan Area"). Upon full implementation of the SEP-HCP, the Permittees shall cause perpetual protections and management over 23,430 acres of GCW habitat within the Plan Area.
- D. The Permittees will track the addition of Preservation Credits to and the subtraction of Preservation Credits from the SEP-HCP preservation ledger (SEP-HCP Ledger) and will ensure that the ledger does not experience a negative Preservation Credit balance for the GCW. A negative Preservation Credit balance (even if temporary) would be a violation of the Permit.
- E. The SEP-HCP authorizes use of conservation or mitigation credits for the GCW purchased from Service-approved, independent, third-party conservation banks, provided that such credits are created from protected habitats occurring within the

Plan Area and the Permit Area is located within the service area of the conservation bank. Upon assignment of third-party conservation or mitigation credits, these credits will be added to the SEP-HCP Ledger as Preservation Credits at a ratio equivalent to the standards for the creation of new Preservation Credits (i.e., one credit is the equivalent of one acre of suitable habitat permanently protected and managed for the benefit of the species). These added Preservation Credits may be debited to Participants similar to new Preservation Credits created by SEP-HCP preserves. However, the Permittees will not be responsible for the ongoing management or monitoring of lands associated with any Preservation Credits obtained from third-party conservation banks. These responsibilities will have already been negotiated between the USFWS and the third-party bank operator and will remain with the bank operator, as determined by their individual conservation banking agreement.

- F. BCC, in cooperation with USFWS, created the Bandera Corridor Conservation Bank (BCCB) under that certain Bandera Corridor Conservation Bank Agreement (BCCB CBA) dated effective August 11, 2011, (as may be amended) (the Bank Agreement). Owned, operated, and maintained by BCC, BCCB is a USFWS-approved, independent, third-party conservation bank for the golden-cheeked warbler located in western Bandera County. BCCB credits are created from protected habitats occurring within the Plan Area and the Permit Area is located within BCCB's 13-county service area. The BCCB CBA allows for modular, programmatic additions of qualified suitable GCW habitat secured by a perpetual conservation easement and supported by financial assurances provided by BCC for ongoing monitoring, maintenance, and operation of the protected habitats within BCCB. At this time, BCCB currently has approximately 306 GCW credits immediately available from its first phase, Tranche 1, for purchase and assignment. Should demand warrant creation of additional credits, BCCB's second phase, Tranche 2, currently has approximately 1,809 GCW credits staged for release from four additional conservation easements. Additional properties may be added to BCCB within Bandera County as per the requirements of the BCCB CBA.

NOW, THEREFORE, in consideration of the recitals above and mutual covenants contained herein, and for other good and valuable considerations, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

ARTICLE I. AUTHORITIES

1.1 Authority.

- (a) City of San Antonio Ordinance 2017-01-19-0032.
- (b) Bexar County, Texas Commissioners Court Approval of the Interlocal Agreement for the implementation of The Southern Edwards Plateau – Habitat Conservation Plan (SEP-HCP) between the City of San Antonio and Bexar County, considered as Agenda Item No. 5.a of its February 21, 2017 public

meeting.

- (c) SEP-HCP Endangered Species Act Section 10(a)(1)(B) Incidental Take Permit TE48571B.

ARTICLE II. PURPOSE

- 2.1 Purpose.** The purpose of this MOU is to set out the terms governing and the rights and duties respecting the Parties' coordination, administration, implementation, and performance of obligations thereunder and in accordance with the SEP-HCP and Permit.

ARTICLE III. INTENT

- 3.1 Intent.** The Permittees and BCC desire to enter into this MOU to facilitate satisfaction of GCW Preservation Credit needs required of the Permittees for extending coverage to an Applicant under the Permit for Covered Activities. This MOU creates a process between the Parties for streamlined acquisition and assignment of available GCW Preservation Credits by Applicants from a USFWS-approved, third-party, conservation bank.

- a) Preferred Status. By BCC entering this MOU, BCCB shall have the benefit of being designated by the Permittees as a preferred solution for satisfying an Applicant's mitigation requirement for GCW Preservation Credits. This status shall remain in effect so long as BCCB has GCW credits available. Preferred Status shall only be extended to qualified entities entering into a similar MOU with the Permittees and for any residual GCW Preservation Credits remaining on SEP-HCP preservation lands acquired through the land in lieu option.
- b) No Requirement for Preserve Acquisition. This MOU shall not trigger any timelines associated within Texas Parks and Wildlife Code Chapter 83-subsection 83.018 regarding the Permittees' acquisition of identified preserve lands within a specified period of time. BCCB, is a self-identified, independent, third-party conservation bank operating under separate agreement with USFWS.

ARTICLE IV. RESPONSIBILITIES

4.1 Responsibilities of the SEP-HCP Permittees

- (a) The SEP-HCP Permittees will provide Applicants with available options for mitigating impacts of their Covered Activities to the GCW in the form of a Mitigation Determination Letter (MDL). The MDL will include the option of purchasing GCW Preservation Credits from a USFWS-approved, independent, third-party conservation bank having Preferred Status, as defined above in Section 3.1(a). Unless agreed to in writing by BCC, the cost per GCW Preservation Credit indicated by the Permittees on the MDL shall not be less than \$4,000.

- (b) Permittees will designate any GCW Preservation Credits assigned from BCCB to the SEP-HCP Ledger on behalf of the Applicant whom purchased the GCW Preservation Credits from BCCB.
- (c) Funding of the full purchase price for the corresponding number of required GCW Preservation Credits as detailed on the MDL shall be paid directly from the Applicant to BCC prior to assigning the credits to the SEP-HCP Ledger. Unless required otherwise by USFWS, Permittees shall not be obligated to purchase GCW Preservation Credits from BCCB on behalf of an Applicant.
- (d) For any GCW Preservation Credits assigned to the SEP-HCP Ledger from BCCB, Permittees shall have no obligation to provide any future management endowment funds or staffing for the ongoing operations, management, and maintenance of BCCB preserve properties.

4.2 Responsibilities of BCC

- (a) In exchange for Preferred Status, BCC agrees to sell BCCB credits to Applicants at the per credit price established by the Permittees. BCC will offer SEP-HCP Applicants purchase of available GCW Preservation Credits at the cost per credit rate as specified by the Permittees on the Applicant's MDL.
- (b) Upon inquiry from SEP-HCP personnel for the purposes of completing credit calculations on an Applicant's MDL, BCC shall deduct from its total number of credits available any amount of credits for which BCC has a signed purchase agreement as of the date of inquiry but have yet to be debited from BCCB's ledger kept by USFWS on the RIBITS website.
 - a. For the purposes of coordinating information regarding available GCW Preservation Credits from BCCB, the Permittees and BCC shall be able to exchange information via email and phone on an as-needed basis. Such communication between the Parties for the purposes of drafting an Applicant's MDL shall not require formal written notice as described in Section 5.3.
- (c) Upon receipt of full payment from a SEP-HCP Applicant for GCW Preservation Credits, BCC will assign the corresponding number of GCW Preservation Credits purchased by the Applicant to the Permittees.
- (d) BCC will provide the USFWS notice of the assignment of GCW Preservation Credits to the Permittees on behalf of the Applicant.
- (e) BCC shall not be obligated to contribute or assign any of the Applicant's purchase funds for BCCB credits to the Permittees.
- (f) BCC and Applicant shall utilize the form of Purchase Agreement and Credit Assignment attached hereto as "Exhibit A".

ARTICLE V. GENERAL PROVISIONS

5.1 Term and Termination.

- (a) The term of this MOU shall run for an initial term of one (1) year (the "Term"), commencing on the Effective Date, being the date of the last signature hereto, and may be renewed for an additional of one (1) year term by the written agreement of the Parties prior to the Expiration Date, being one year from the Effective Date.
- (b) Notwithstanding anything to the contrary within this MOU, if at any time during the Term of this MOU, a Party, separately, may elect to terminate this MOU with 30 days written notice to the other Parties.
- (c) If a Party defaults in the performance of any of the terms or conditions of this MOU, the defaulting Party shall have 30 days after receipt of written notice of such default within which to cure the default. If the default is not cured within such period of time, then the non-defaulting Parties shall have the right to terminate this MOU upon written notice thereof to the other Parties.

5.2 Amendment of this Agreement. The City Manager, the County Manager, BCC or their respective designees may propose an amendment to this MOU. An amendment to this MOU is adopted upon mutual written agreement of the Parties.

5.3 Notices. To be effective, notices provided under this MOU must be in writing, and shall be deemed to have been received for all purposes upon the earlier to occur of actual receipt, or three (3) days after the same are mailed by U.S. Postal Service certified or registered mail, return receipt requested, and addressed as follows:

If to the County:
Bexar County Engineer
233 N. Pecos, Suite 420
San Antonio, Texas 78207
Phone: (210) 335-6487
Fax: (210) 335-6713

If to the City:
Development Services Department
Attn: Director
City of San Antonio
P. O. Box 83966
San Antonio, Texas 78283-3966
Phone: (210) 207-7950
Fax: (210) 207-7897

If to BCC:
Bandera Conservation Corridor, LLC

2800 Post Oak Blvd Suite 5850
Houston, Texas 77056
Phone: (713) 629-9172
Fax: (713) 629-9936

or addressed to such other address as is provided by written notice from one Party to the other.

5.4 Governing Law. This MOU shall be governed by, and construed in accordance with, the laws of the State of Texas.

5.5 Formal Matters. This MOU sets out the entire agreement of the Parties in connection with the subject matter addressed herein, and may be modified or amended only in accordance with Section 5.2. In performing the vision and objectives under this MOU, the relationship between the Parties is that of independent contractors, and not that of partners, joint ventures, or any other relationship. The Parties shall exercise independent judgment in performing the vision and objectives and are solely responsible for setting their own working hours, scheduling or prioritizing the vision and objectives and determining the means and methods of obtaining the vision and objectives, subject only to the requirements of this MOU. No term or provision of this MOU shall be construed as making the Parties' agents, servants, or employees of the other, or making the Parties or any of the Parties' employees, agents, or servants eligible for the fringe benefits from the other party such as retirement, insurance and worker's compensation, which either party provides to its own employees.

5.6 Prior Agreements Superseded. This MOU constitutes the entire agreement between the Parties regarding the subject matter of this MOU and supersedes all previous agreements and understandings, whether written or oral, relating to such subject matter.

5.7 Assignment or Transfer of Interest. No Party may assign its rights, privileges and obligations under this MOU in whole, or in part, without the prior written consent of the other Parties. Any attempt to assign without such approval shall be void.

5.8 Legal Construction. In case any one or more of the provisions contained in this MOU shall for any reason be held to be invalid, illegal, or unenforceable in any respect, the invalid, illegal, or unenforceable provision shall not affect any other provision hereof; and this MOU shall be construed as if the invalid, illegal, or unenforceable provision had never been contained herein. This MOU shall not be construed for or against any Party by reason of the authorship or alleged authorship of any provision, or by reason of the status of the respective Parties.

5.9 Compliance With Laws and Ordinances. All Parties shall comply with all applicable federal, state, and local laws and ordinances related to the work and services performed under this MOU.

5.10 _ Force Majeure. No Party shall be responsible for delays or lack of performance by such entity or its officials, agents or employees that result from acts beyond that Party's reasonable control, including acts of God, strikes or other labor disturbances, or delays by federal or state officials in issuing necessary regulatory approvals and/or licenses. In the event of any delay or failure excused by this Section, the time of delivery or of performance shall be extended for a reasonable time period to compensate for delay.

5.11 _ Multiple Counterparts. This MOU may be executed in separate identical counterparts by the Parties and each counterpart, when so executed and delivered, will constitute an original instrument, and all such separate identical counterparts will constitute but one and the same instrument.

5.12 _ No Third Party Beneficiary. The terms and provisions of this MOA are intended solely for the benefit of each Party hereto, and it is not the intention of the Parties to confer third-party beneficiary rights upon any other person or entity.

[Signature Page Follows]

EXECUTED to be effective on the latest date indicated below (the “Effective Date”).

CITY OF SAN ANTONIO
A Texas Municipal Corporation

COUNTY OF BEXAR, TEXAS

By: _____

By: _____

Date

Date

ATTEST:

ATTEST:

By: _____

By: _____

APPROVED AS TO LEGAL FORM:

APPROVED AS TO LEGAL FORM:

By: _____
Andrew Segovia
City Attorney

By: _____
Katherine Ramos
Assistant Criminal District Attorney
Civil Section

**APPROVED AS TO FINANCIAL
CONTENT:**

By: _____
Susan Yeatts
Bexar County Auditor

By: _____
David Smith
Bexar County Manager

BANDERA CONSERVATION CORRIDOR, LLC

By: _____

Printed Name

Title

Date

DRAFT

Exhibit A**GOLDEN-CHEEKED WARBLER****CONSERVATION CREDIT PURCHASE AGREEMENT**

THIS GOLDEN-CHEEKED WARBLER CONSERVATION CREDIT PURCHASE AGREEMENT (this “*Agreement*”) is made by Bandera Conservation Corridor, LLC, a Texas limited liability company (“*BCC*”), and _____, a _____ (“*Purchaser*”).

BACKGROUND

A. BCC, in cooperation with the United States Fish and Wildlife Service (“*USFWS*”), has established the Bandera Corridor Conservation Bank (the “*Conservation Bank*”) for the preservation and protection of the Golden-cheeked Warbler (“*GCW*”) in accordance with the Guidance for the Establishment, Use and Operation of Conservation Banks dated May 2, 2003 (68 Fed. Reg. 24753).

B. In connection therewith, BCC and USFWS entered into that certain Bandera Corridor Conservation Bank Agreement dated effective August 11, 2011, (as may be amended, the “*Bank Agreement*”) and governing the Conservation Bank.

C. The Bank Agreement provides for the creation of mitigation credits in connection with habitat for the Golden-cheeked Warbler (“*GCW Credits*”) that BCC may sell to public or private parties seeking to mitigate the effects of their proposed project on GCWs. Each GCW Credit shall be equivalent to one acre of GCW habitat that is acceptable by the USFWS for GCW mitigation.

D. Purchaser has indicated its desire to purchase _____ GCW Credits from the Conservation Bank as part of its efforts to satisfy the Purchaser’s Mitigation Determination Letter under the terms of Purchaser’s participation in the Southern Edwards Plateau Habitat Conservation Plan (“*SEP-HCP*”).

AGREEMENT

IN CONSIDERATION of the premises above and other good and valuable consideration, BCC and Purchaser agree as follows:

1. MITIGATION TRANSACTION.

1.1 Sale/Purchase of GCW Credits. BCC shall sell to Purchaser and Purchaser shall purchase from BCC _____ (###.##) GCW Credits upon the terms and conditions below:

(a) Purchase Price. The purchase price of the _____ GCW Credits shall be \$4,000.00 per GCW Credit, totaling \$_____ (the “*Purchase Price*”).

(b) Closing. The closing of this transaction (the “*Closing*”) shall be conducted as follows:

Exhibit A

(i) Closing Date. The date of Closing (the “*Closing Date*”) shall be on or before _____, 201__.

(ii) Items Delivered. On or before the Closing Date, Purchaser shall deliver, or cause to be delivered, to BCC the Purchase Price in immediately available funds by wire transfer or other form acceptable to BCC. Upon the Purchaser’s funding of the Purchase Price, BCC shall deliver to Purchaser an Assignment of GCW Credits substantially in the form attached hereto as Attachment 1 (the “*Assignment*”).

(iii) Notice. Upon funding of the Purchase Price and delivery to Purchaser of the Assignment, BCC shall notify USFWS as to the number of GCW Credits assigned to the SEP-HCP Permittees for the benefit of Purchaser and shall instruct USFWS to debit that number of GCW Credits from the Conservation Bank’s ledger.

2. **REPRESENTATIONS AND WARRANTIES.**

The following representations and warranties are made as of the effective date of this Agreement and the Closing Date and shall survive Closing:

2.1 BCC’s Representations and Warranties. BCC represents and warrants that (a) BCC has full authority to enter into this Agreement without the joinder or consent of any other party; (b) the Bank Agreement is in full force and effect; (c) each GCW Credit shall be the equivalent of one acre of GCW habitat that is acceptable by the USFWS for GCW mitigation in the SEP-HCP Permit Area; and (d) BCC currently holds or has the ability to create by the Closing Date the number of GCW Credits desired by Purchaser.

2.2 Purchaser’s Representations and Warranties. Purchaser represents and warrants to BCC that Purchaser has full requisite power and authority to both enter into this Agreement and perform all of its obligations under this Agreement, all without the joinder or consent of any other party.

3. **GENERAL.**

3.1 Notice. Any notice or other communication given under this Agreement shall be in writing and shall be deemed to have been given (a) when delivered by hand with receipt acknowledged, (b) on the next business day following confirmation of a fax transmission, or (C) on the 5th day after deposit in the United States mail, registered or certified with postage prepaid, return receipt requested. Each notice shall be delivered using the following:

To BCC: Bandera Conservation Corridor, LLC
2800 Post Oak Blvd, Suite 5850
Houston, TX 77056
Phone: (713) 629-9172
Fax: (713) 629-9936

Exhibit A

To Purchaser: _____

3.2 **Parties Bound.** The terms and provisions of this Agreement shall be binding upon the parties, their heirs, personal representatives, successors, and assigns.

3.3 **Entire Agreement.** This Agreement contains the entire agreement of the parties with respect to the sale and purchase of GCW Credits and no other agreement, statement, or promise made by any party, or to any employee, officer, partner or agent of any party, which is not contained in this Agreement, shall be binding or valid. This Agreement is not subject to modification except by written instrument signed by all parties and any attempted modification not in compliance with this requirement is void.

3.4 **Further Assurances.** BCC and Purchaser shall cooperate to take and complete any other reasonable or necessary actions to fulfill the parties' intent as expressed by this Agreement.

3.5 **Interpretation.** All titles, headings, and captions used in this Agreement have been inserted for reference purposes only and shall not in any way affect the meaning and interpretation of its provisions. Pronouns, nouns, and terms used in this Agreement shall include the masculine, feminine, neuter, singular and plural forms wherever appropriate to the context. "Including" is used to list examples and is not used by way of limitation. Each party acknowledges that it has had an opportunity to have this Agreement reviewed by legal counsel and this Agreement shall be deemed to be drafted equally by both parties.

3.6 **Attorney's Fees .** If any action at law or in equity is brought to enforce or interpret the provisions of this Agreement, the prevailing party shall be awarded attorney's fees and costs.

3.7 **Multiple Originals.** This Agreement is being executed as two original documents so that each party may have an original. Both documents shall be considered original and shall be interpreted as one and the same document.

3.8 **Applicable Law.** This Agreement shall be governed by Texas law.

[Signatures on following page.]

Exhibit A

EXECUTED to be effective as of the last date indicated below.

BCC:

BANDERA CONSERVATION CORRIDOR, LLC,
a Texas limited liability company

By: _____

Name: _____

Title: _____

Date: _____

PURCHASER:

_____,

a _____

By: _____

Name: _____

Title: _____

Date: _____

Exhibit AAttachment 1

**BANDERA CORRIDOR CONSERVATION BANK
ASSIGNMENT OF GOLDEN-CHEEKED WARBLER CONSERVATION CREDITS**

THIS ASSIGNMENT OF GOLDEN-CHEEKED WARBLER CONSERVATION CREDITS (this “*Assignment*”) is made by Bandera Conservation Corridor, LLC, a Texas limited liability company (“*BCC*”), to the Southern Edwards Plateau Habitat Conservation Plan Permittees (“*Assignee*”) for the benefit of _____, a _____ (“*Purchaser*”).

BACKGROUND

A. BCC entered into that certain Bandera Corridor Conservation Bank Agreement (the “*Bank Agreement*”), dated effective as of August 11, 2011, by and between BCC and U.S. Fish and Wildlife Service (“*USFWS*”), in accordance with the Guidance for the Establishment, Use and Operation of Conservation Banks dated May 2, 2003 (68 Fed. Reg. 24753).

B. The Bank Agreement provides for the Bandera Corridor Conservation Bank and the creation and use of Credits (as defined in the Bank Agreement) for mitigation by third party purchasers.

C. The Bank Agreement also provides that USFWS will accept a Credit purchased by third party purchasers as the functional equivalent of one (1) acre of off-site mitigation for adverse biological impacts to the Golden-cheeked Warbler (“*GCW*”) and its habitat caused by development in identified Texas counties including the SEP-HCP Permit Area (each a “*GCW Credit*”).

D. BCC and Purchaser have entered into that certain Purchase Agreement dated _____, 201____, providing for the assignment of _____ GCW Credits to Assignee to satisfy Purchaser’s Mitigation Determination Letter under the terms of Purchaser’s participation in the Southern Edwards Plateau Habitat Conservation Plan (“*SEP-HCP*”).

E. BCC desires to convey and Assignee desires to accept GCW Credits for the purposes set forth in the Bank Agreement and the SEP-HCP.

ASSIGNMENT

IN CONSIDERATION OF Ten Dollars (\$10.00) and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, BCC, Purchaser and Assignee by its acceptance hereof agree as follows:

1. Number of Credits. BCC hereby transfers and assigns to Assignee for the benefit of Purchaser _____ (###.##) GCW Credits.

Exhibit A
Attachment 1

2. Contact Information.

- (a) Name, address, and telephone number for Assignee is as follows:

Southern Edwards Plateau Habitat Conservation Plan
Attn: Plan Administrator
233 N. Pecos, Suite 420
San Antonio, TX 78207
Phone: 210-335-6700
Fax: 210-335-6713

- (b) Name, address, and telephone number for Purchaser is as follows:

1. Project Name and Location. The GCW Credits shall be used by Assignee as GCW Preservation Credits for Purchaser's participation under the SEP-HCP Incidental Take Permit (TE#48571B-0) for the _____ property/project (Application # _____) or such other project and location which the Purchaser, or its assigns, may designate in writing.

2. Representations and Warranties. BCC represents and warrants that (a) BCC is owner of record of the GCW Credits being assigned herein, free and clear of all liens and encumbrances; (b) the Bank Agreement is in full force and effect; (c) each GCW Credit shall be the equivalent of one acre of GCW habitat that is acceptable by the USFWS for GCW mitigation in the SEP-HCP Permit Area; (d) this Assignment is valid and enforceable according to its terms and is effective to convey to Assignee the GCW Credits hereby assigned; and (e) the GCW Credits are fully transferable by Purchaser subject, however, to the terms and limitations contained in the Bank Agreement.

3. Third-party Beneficiary. Purchaser shall be a third-party beneficiary of this Assignment, with full rights to enforce the terms hereof.

[Signatures on following page.]

Exhibit A
Attachment 1

EXECUTED to be effective as of the date indicated below.

BCC:

BANDERA CONSERVATION CORRIDOR, LLC,
a Texas limited liability company

By: _____

Name: _____

Title: _____

Date: _____

DRAFT