

**COPY**

**FESTINA LENTE RANCH  
CONSERVATION BANK AGREEMENT**

BY AND BETWEEN

**EBX - GCW, LLC**

AND

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

Effective Jan. 28, 2014

# FESTINA LENTE CONSERVATION BANK AGREEMENT

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## **FESTINA LENTE RANCH CONSERVATION BANK AGREEMENT**

THIS FESTINA LENTE RANCH CONSERVATION BANK AGREEMENT ("Agreement") is made and entered into effective as of \_\_\_\_\_, 2013, by and between EBX - GCW, LLC ("EBX" or the "Bank Sponsor"), and the U.S. FISH AND WILDLIFE SERVICE, an agency of the United States Department of Interior (the "Service" or "USFWS"). The purpose of this Agreement is to establish the terms and conditions for a conservation bank on a certain parcel of real property in Bandera County, Texas, owned by John and Ann Newman, known as the Festina Lente Ranch. This Agreement provides for the establishment and operation by the Bank Sponsor of the Festina Lente Ranch conservation bank ("Conservation Bank") for the purposes of protecting and conserving the golden-cheeked warbler and its habitats on one or more parcels of land protected by one or more permanent conservation easements, establishing and managing a bank of mitigation credits, and making such credits available for sale to qualifying persons.

### **RECITALS**

A. John and Ann Newman own a parcel of land in fee simple totaling approximately 1,185 acres located in Bandera County, Texas, as shown on Exhibit A attached hereto (the "Property"). John and Ann Newman are not parties to this Agreement, but have entered into a separate agreement (Exhibit C) with Texas Land Conservancy to grant perpetual conservation easements (defined below) to the Texas Land Conservancy over the Property in phases, in order that this conservation bank may be established on the Property.

B. EBX is a limited liability corporation incorporated in the State of Texas. EBX is a wholly-owned subsidiary of Environmental Banc and Exchange. EBX seeks to establish a conservation bank for the golden-cheeked warbler by obtaining approval of the Agreement. EBX shall be responsible for establishing, operating, and maintaining the Conservation Bank and shall be the holder of record of all Credits (defined below) created pursuant to this Agreement. A summary of Environmental Banc and Exchange's experience with establishing and operating mitigation and conservation banks is attached as Exhibit M to this Agreement.

C. The Service is an agency of the Department of Interior of the United States of America authorized and empowered by Congress to exercise jurisdiction with respect to the conservation, protection, restoration, enhancement, and management of fish, wildlife, native plants, and habitat necessary for biologically sustainable populations of those species pursuant to various federal laws including, but not limited to, the Endangered Species Act, 16 U.S.C. § 1531 et seq. ("ESA"), the Fish and Wildlife Coordination Act, 16

U.S.C. §§ 661-666c, and the Fish and Wildlife Act of 1956, 16 U.S.C. § 742(f) et seq.

D. The golden-cheeked warbler (*Setophaga chrysoparia*) ("GCWA") is a bird species that is listed as endangered under the ESA, whose range includes Central Texas.

E. The Property supports breeding habitat for the GCWA. In addition, significant native vegetation and wildlife communities occur on the Property. A description of the conservation values that occur on the Property is provided in that certain report titled "Baseline Natural Resource Assessment of Festina Lente Ranch, Bandera County, Texas" ("Baseline Report") dated June 22, 2012, prepared by SWCA Environmental Consultants, Inc. and attached as Exhibit B-1. In addition, Loomis Partners prepared an "Endangered Species Habitat Assessment" for the Property January 25, 2010. The Endangered Species Habitat Assessment is attached to this Agreement as Exhibit B-2.

F. Residential and commercial development, construction of transmission lines, roads, and other infrastructure, and similar activities ("Activities") are anticipated to occur within the current range of the GCWA and in the Service Area (defined below) for this Conservation Bank, that will impact the GCWA and its habitat and require implementation of mitigation and compensatory conservation measures pursuant to the ESA.

G. Based upon the "Baseline Report" dated June 22, 2012, prepared by SWCA Environmental Consultants, Inc. and attached as Exhibit B-1 and the "Endangered Species Habitat Assessment for the Property dated January 25, 2010 and attached to this Agreement as Exhibit B-2, the Service has determined that the Property is suitable and desirable to mitigate for impacts to habitat of the GCWA within the Service Area. Use of the Conservation Bank to mitigate for impacts to the GCWA shall be governed by this Agreement. From time to time upon the request of Bank Sponsor, the Service may consider and determine whether and upon what terms listed or rare species in addition to the GCWA can be covered by the Conservation Bank.

H. The Bank Sponsor and the Service desire to enter into this Agreement for the purposes of (i) establishing the Festina Lente Ranch Conservation Bank in order to provide for the permanent conservation of portions of the Property placed under Conservation Easements for the benefit of the GCWA, and to provide mitigation and compensatory conservation for impacts to the GCWA through the sale or conveyance of "Credits" as provided herein; (ii) managing the portions of the Property so conserved; (iii) establishing Credits (defined below), and (iv) regulating the use and sale of the Credits for mitigation and compensatory conservation in the Service Area.

## **AGREEMENT**

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:

### **1. DEFINITIONS**

"Activity" or "activities" means residential and commercial development, construction of transmission lines, roads, and other infrastructure, and similar actions, as well as any related or associated actions within the Conservation Bank's Service Area.

"Adaptive Management" means an approach to natural resource management that incorporates changes to management practices determined to be appropriate by USFWS and agreed upon by EBX based upon monitoring of the Property pursuant to the Conservation Easement and the Management Plan (defined below).

"Agreement" means this Festina Lente Ranch Conservation Bank Agreement and all attached Exhibits.

"Annual Budget" means an annual budget prepared by or on behalf of EBX setting forth expected expenditures for activities to be conducted under the Management Plan for the applicable calendar year.

"Bank Establishment Date" means the date determined pursuant to Section 3.1 when the Bank is considered established and the transfer of Credits may begin.

"Bank Parcel Manager" means the Texas Land Conservancy or such other legal entity contractually obligated to perform the Bank Sponsor's obligations with respect to management and monitoring of the Bank Parcel(s) as set forth in the Management Plan and this Agreement, which other entity is selected by EBX and approved by USFWS.

"Bank Parcel" means areas within the Property placed under Conservation Easements in accordance with this Agreement.

"Bank Sponsor" means the entity, including its successors and assigns, responsible for establishing, implementing, and operating the Conservation Bank in accordance with this Agreement. EBX - GCW, LLC. is the Bank Sponsor of the Conservation Bank.

"Conservation Bank" means the Festina Lente Ranch Conservation Bank on Festina Lente Ranch in Bandera County, Texas.

"Conservation Banking Guidance" means the *Guidance for the Establishment, Use, and Operation of Conservation Banks* issued by the Service on May 2, 2003.

"Conservation Easement" means a conservation easement granted to a governmental or 501(c)(3) organization acceptable to the Service and that is substantially in the form attached as Exhibit C. Chapter 183 of the Texas Natural Resources Code defines Conservation Easement for purposes of state law.

"Conservation Values" means natural values which serve as habitat (including, without limitation, food, water and proper vegetative mix and canopy cover) necessary to support occupancy, survival and reproduction of the GCWA.

"Consultation" means any conferences or consultations, formal or informal, conducted among one or more federal agencies, the Service, and, if applicable, applicants pursuant to Section 7 of the ESA.

"Covered Species" means the GCWA.

"Credit Purchaser" means any purchaser of one or more Credits.

"Credit Release" means an action by USFWS to make specified Credits available for Transfer (defined below) pursuant to this Agreement.

"Credits" means GCWA credits. Credits available to be conveyed under this Agreement are 1,131.8. One (1) GCWA Credit is equivalent to (i) one (1) acre of GCWA Habitat within a bank parcel or (ii) two (2) acres of buffer areas located within 300 feet of surrounding GCWA habitat within the parcel (buffer habitat may include small gaps between GCWA habitat patches that may be slightly more than 300 feet from a delineated edge but are not practicable to exclude). The portions of the Property that will be placed under conservation easement contain approximately 1,116.7 acres of suitable habitat for the GCWA and approximately 30.2 acres of buffer habitat.

"Easement Property" means, such Bank Parcels approved by USFWS for inclusion in the Conservation Bank, which are protected by being made subject to a Conservation Easement.

"Effective Date" means the latest date on which this Agreement has been executed by the Parties (defined below).

"Endowment Deposit" means a sum of money for each Credit sold to a Credit Purchaser by the Bank Sponsor. The Endowment Deposit shall be \$300/Credit.

"Endowment Fund" means a non-wasting investment fund that consists of the Endowment Deposits received by the Bank Sponsor. The Endowment Fund shall be maintained in trust by the Endowment Fund Manager (defined below), from which a portion of the interest and earnings of the fund shall be used for the implementation of the Management Plan in accordance with this Agreement.

"Endowment Fund Manager" means a qualifying person or entity (either for-profit or non-profit), designated by the Bank Sponsor and the Service, that is responsible for holding, managing, and disbursing the Endowment Fund according to Section 5.3, as well as the other pertinent provisions of this Agreement. Texas Land Conservancy is the Endowment Fund Manager of the Conservation Bank. By accepting the role of Endowment Fund Manager, Texas Land Conservancy does not thereby accept the role of Bank Sponsor.

"ESA" means the federal Endangered Species Act (16 U.S.C. § 1531 et seq.), and all regulations promulgated pursuant to the ESA.

"GCWA" means the golden-cheeked warbler (*Setophaga chrysoparia*), a listed endangered species (55 Fed. Reg. 53,153).

"Habitat Conservation Plan" and "HCP" mean conservation plans and/or individual "take" permits prepared and/or issued pursuant to Section 10(a)(1)(B) of the ESA (16 U.S.C. § 1539(a)(1)(B)).

"Initial Bank Parcel" means the first Bank Parcel to be placed under a conservation easement by the Owners and designated for the Conservation Bank by the Bank Sponsor should the Bank Parcels be established in two phases. In the case of a two-phase establishment of Bank Parcels, the Initial Bank Parcel shall consist of 500 acres of suitable habitat and 27 acres of buffer habitat.. The location of the Initial Bank Parcel is depicted on Exhibit D as Phase 1.

"Management Period" means the period from the Bank Establishment Date and continuing in perpetuity, during which the Bank Parcels are to be managed, monitored, and maintained consistent with the Management Plan.

"Management Plan" means the plan developed by the Bank Sponsor and approved by the Service for the perpetual management of the Bank Parcels for conservation purposes. The Management Plan is attached as Exhibit E.

"Management Security" means the financial assurance to be provided by Bank Sponsor to secure the initial implementation of the Management Plan, in an amount equal to the estimated cost to implement the Management Plan during the first year of the Management Period, as set forth in the initial Annual Budget attached hereto as Exhibit F.

"Owners" means John and Ann Newman, or their successors or assigns.

"Parties" means the Bank Sponsor and the Service, and a "Party" means either one of the Parties.

"Property" is as defined in the Recitals of this Agreement.

"Qualified Easement Holder" means the Texas Land Conservancy or such other legal entity qualified under Chapter 183 of the Texas Natural Resource Code to hold the Conservation Easements, which other entity is selected by EBX and approved by USFWS.

"Service Area" means the "Primary Service Area" and any other area approved by the Service. Within the Primary Service Area impacts to the GCWA and other Covered Species or their habitat may be mitigated through the use of the Credits consistent with this Agreement. "Primary Service Area" means Bandera, Blanco, Kendall, Bexar, Comal, Kerr, Gillespie, Medina, Real, Uvalde, Edwards, Kinney, and Kimble Counties, Texas. The Primary Service Area is shown on Exhibit G.

"Transfer" means the use, sale, or conveyance of Credits by EBX.

## **2. BANK EVALUATION AND ACCEPTANCE**

USFWS has reviewed information provided to the Service by the Bank Sponsor (including, but not limited to, the Baseline Report and Endangered Species Habitat Assessment) for purposes of determining the Property's conservation values in connection with the establishment of the Conservation Bank and the creation, use, and sale of Credits. Based on its evaluation, USFWS acknowledges and agrees that the Property possesses conservation values that support the issuance of Credits. The Service shall accept Credits for mitigation of adverse impacts to the GCWA and its habitats within the Service Area upon the establishment of the Conservation Bank and dedication of one or more Bank Parcels in accordance with this Agreement. The Service may, on a case-by-case basis, approve the use of Credits to mitigate impacts occurring outside of the Service Area.

The Service Area is the designated area wherein a bank can reasonably be expected to provide appropriate compensation for GCWA impacts. Where impacts occur outside of the recovery region from where the banking property occurs, the Service may recommend that the project proponent provide some or all of the mitigation within the same recovery region as the impact to ensure the recovery criteria goals are achieved. The mitigation will be equivalent to the substantive and procedural elements required for a conservation bank. The specific mitigation requirements will be outlined in the project proponent's permit and are part of the Service's existing permit approval process.



Habitat Damage. Notwithstanding anything to the contrary in this Agreement, in the event that any phase of the Property is evaluated and the Service reasonably determines that portions of the Property have been damaged subsequent to the effective date of this Agreement and (1) the effect of such damage has been to impair the conservation values within the phase so that they are no longer of conservation benefit to the covered species, and (2) the Bank Sponsor has neither restored such resources and values nor provided the Service with evidence that such will be restored, the Service may, at its discretion, reduce the number of unsold credits allocated to the phase in proportion to the damaged area. If the Service determines, however, that the conservation values within the phase have been impaired as to render the phase unsuitable for use as a Conservation Bank, the Service may terminate this Agreement as to such phase.

### **3. FESTINA LENTE RANCH CONSERVATION BANK**

3.1 Establishment. The Bank Sponsor, at its discretion, may establish the Conservation Bank over time, in phases. The Conservation Bank will be established through the granting of Conservation Easements by the Owners on successive Bank Parcels. No portion of the Property, including without limitation the Initial Bank Parcel (if applicable), shall be considered bound to the terms of the Agreement unless and until that portion has been established as a Bank Parcel through the recordation of a Conservation Easement. Similarly, no portion of the Property shall be granted any Credits unless and until that portion has been established as a Bank Parcel by the dedication of a Conservation Easement. Bank Parcels will be considered to be covered by this Agreement, and Credits will be approved by the Service, after (1) this Agreement has been signed by all of the Parties; (2) one or more Conservation Easements encumbering a minimum of 500 contiguous acres have been accepted by the Qualified Easement Holder and recorded in the official records of Bandera County; (3) Management Security has been provided for the Endowment Fund; and (4) a copy of the Conservation Easement and a map of the area covered by the Conservation Easement have been delivered to the Service.

3.2 Additional Bank Parcels. The Bank Sponsor, in its sole discretion, may establish additional Bank Parcels by having the Owners grant Conservation Easements in any order, provided that if any proposed additional Bank Parcel is smaller than 500 acres, such additional Bank Parcel must be adjacent to an existing Bank Parcel or other permanently conserved area such that the total contiguous protected area is at least 500 acres for the GCWA. The Bank Sponsor shall deliver copies of each executed and recorded Conservation Easement to the Service on or before 30 days after that recorded Conservation Easement is returned to the Owner or Bank Sponsor by the county clerk. The Bank Sponsor shall comply with the provisions of Section 5 herein ("Financial Assurances") with respect to each additional Bank Parcel.

Any additional bank parcels outside the 1,185 acre boundary of Festina Lente Ranch received after July 1, 2013, will receive a Service Area that corresponds to the recovery region where the banking property exists.

3.3 Title Exceptions/Third Party Impacts. Notwithstanding anything contained herein to the contrary, any Conservation Easement shall be subject to any and all existing rights of way, mineral rights, easements, encumbrances, liens, and other matters reflected in Exhibit H (Title Exceptions) to the extent that any of the Title Exceptions are covering and affecting the relevant Bank Parcel (collectively the "Third Party Interests"). At the time of dedication, a Bank Parcel will be free and clear of all mortgage liens or the Owner will obtain an agreement of the holders of any such liens to subordinate such liens to the Conservation Easement. To the extent any consent of the Owner is required for any person operating under a Third Party Interest to enter upon and affect a Bank Parcel, the Owner will, to the extent permitted by law, condition that consent on such person obtaining the prior approval of the Service. If the Owner becomes aware of any third party intending to enter upon and affect a Bank Parcel in a manner inconsistent with this Agreement, the Owner shall immediately notify the Service. In the event any third party causes damage to the Conservation Values associated with unsold Credits within a Bank Parcel and such damage is not fully mitigated through appropriate conservation actions, then the affected Credits may, at the discretion of the Service, be suspended, at a ratio of one Conservation Credit for each acre of such damage, until such time as Conservation Values have been re-established, whereupon the affected Credits will be reinstated. In the event the Owner receives any compensation (such as a payment in lieu of condemnation or a condemnation award) from such third party causing damage to the Conservation Values associated with unsold or sold Credits, then the Owner and/or the Grantee shall utilize such compensation to provide for the adequate mitigation of such damage. Except as provided in the preceding sentence, if a third party damages Conservation Values associated with sold Credits, then the Owner will have no further obligation to seek to mitigate such damage and the sold Credits shall be unaffected.

3.4 Owner's Retained Rights. This Agreement does not affect the Owners' rights accruing by virtue of owning the Property and any portion of the Property containing a Bank Parcel. The Owners' retained rights are described in the Conservation Easements used to establish each Bank Parcel. The Conservation Easement form is attached as Exhibit C.

3.5 Bank Sponsor's Discretion. Notwithstanding anything in this Agreement to the contrary, the Bank Sponsor shall be under no obligation to work with the Owners to place any Bank Parcels under a Conservation Easement, and this Agreement shall not be construed to burden or affect in any way any of the Property unless and until the Owner has executed and recorded a Conservation Easement specifically covering and describing a particular Bank Parcel, in which event only that Bank Parcel shall become subject to the

Agreement.

3.6 Sale of Property. Notwithstanding anything in this Agreement to the contrary, the Owner retains the right at any time and from time to time to convey, transfer, encumber, or lease all or any of the Bank Parcels and any other portion of the Property; provided, however, that any such action will be made subject and subordinate to this Agreement and the Conservation Easement with respect to any Bank Parcels. In the Conservation Easement, the Owner has agreed not to subdivide the land upon which Bank Parcels have been established. The Bank Sponsor shall notify the Service in writing of any pending transfer of any interest in the Property at least 30 days in advance of any such transfer; however, the Bank Sponsor's failure to give such notice shall not in any way invalidate, affect, or impair such transfer.

#### 4. CREDITS

4.1 General. The Bank Sponsor shall own the Credits (as calculated below) in the Conservation Bank and may sell the Credits to Credit Purchasers. Based on the Baseline Report, Endangered Species Habitat Assessment, and the quality of the habitat of the Property, the Service agrees to accept each Credit as the functional equivalent of 1 acre of off-site mitigation for adverse biological impacts to the GCWA and their habitat caused by Activities within the Service Area.

4.2 Calculation of Conservation Credits. The Conservation Bank shall be allotted Credits in accordance with the following:

A. Suitable Habitat. The Baseline Report, attached as Exhibit B-1, describes the habitat on the Property and contains maps and aerial photographs depicting the location of the habitat. Most of the total acreage of the Property is classified as habitat for the GCWA according to the Baseline Report. The Loomis model identified 1,160 acres of suitable habitat in the Endangered Species Habitat Assessment, attached as Exhibit B-2. For every acre of suitable GCWA habitat on the Property placed under Conservation Easement as part of a Bank Parcel, the Bank Sponsor shall be entitled to one Credit. Credits will also be created for the protection of "buffer habitats" within the Easement Property. For the Bank, buffer habitats will extend 300 feet from the edge of delineated suitable GCWA habitat, and may include small gaps between GCWA habitat patches that may be slightly more than 300 feet from a delineated edge but are not practicable to exclude. Buffer habitats will also be permanently protected by the Conservation Easements that encumber the Easement Property. One-half GCWA Credit will be created for each acre of dedicated buffer habitat within the Easement Property.

The calculation of Credits for purposes of this Agreement is based on 1,116.7 acres of suitable habitat and 30.2 acres of buffer habitat, which will be subject to conservation

easements.. If the Bank Parcels are established in two separate phases, the Initial Bank Parcel, which consists of 500 acres of suitable habitat and 27 acres of buffer habitat, shall be awarded 513.5 credits. Phase II of the property contains 616.7 acres of suitable habitat and 3.2 acres of buffer habitat. Phase II of the property shall be awarded 618.3 credits.

Credits to be awarded upon recording of Conservation Easement (single and two-phase scenarios)				
	Easement Size (acres)	Acres of GCWA Habitat (x1 factor)	Acres of GCWA Buffer (x0.5 factor)	GCWA Credits to be Awarded
Initial Bank Parcel	527	500	27	513.5
Phase II	619.9	616.7	3.2	618.3
Single Transaction	1146.9	1116.7	30.2	1,131.8

B. Sale of Credits. The Credits allocated to the Conservation Bank shall be decreased by the number of Credits sold to a Credit Purchaser on the closing date of the sale.

#### 4.3 Sales of Credits.

A. By Bank Sponsor. The Bank Sponsor shall have the exclusive right to determine the price and other terms for any and all Credits offered for sale or conveyance. An "Assignment of Credits" shall be completed for each sale and a copy shall be provided to the Service upon closing each sale transaction. Credits shall be numbered sequentially and the Credit numbers noted in any Assignment of Credits.

B. Resale by Credit Purchaser. A Credit Purchaser may resell to another purchaser any Credits purchased from the Bank Sponsor and not used for mitigation ("Resale Credits"). The Assignment of Credits shall obligate a Credit Purchaser to notify the Bank Sponsor and the Service of any subsequent assignments of the Credits held by that purchaser.

C. Fractional Acres and Credits. The minimum Credit unit that may be sold is .25 Credit, unless otherwise approved by USFWS.

D. Limit. In no case shall the Credits sold or used exceed the total number of Credits established for the Conservation Bank under Section 4.2. above.

4.4 Database for Conservation Bank Transactions. A database (the "Ledger") shall be established by EBX in the following manner for purposes of tracking the use and

sale of Credits.

A. Information Maintained in Ledger. Until such time as the Service has been notified in writing that all Credits have been used and the final annual report has been received by the Service, the Bank Sponsor shall be responsible for maintaining the Ledger which shall include the following:

(1) A numerical accounting of all Credits sold or used, and the balance of Credits remaining, and

(2) For each individual sale and resale (to the extent the Bank Sponsor has received notice of such resale) of a Credit(s), the Ledger shall state the number of Credits sold or resold, the Credit numbers assigned to those Credits, the name, address, and telephone number of the entity purchasing the Credits, if available, the project name for which the Credits were sold or used, the jurisdiction in which the impacting project occurs, and the amount of the Endowment Deposit. The Ledger that the Bank Sponsor will use to track this information is attached as Exhibit I.

B. Reporting Requirements. The Bank Sponsor shall make the Ledger available to the Service upon request. By December 31 of each year, the Bank Sponsor shall deliver to the Service an updated accounting of all Credits sold as of the date of the most recent conveyance of Credits. In addition, the Bank Sponsor shall, on or before December 31 of each year, deliver to the Service a report covering the prior calendar year that contains all of the information described above (the "Annual Report"). After all Credits have been sold, the Bank Sponsor shall notify the Service of that fact and file the final Annual Report ("Final Annual Report") by December 31 of that year with the Service. The Bank Sponsor's reporting obligations cease after all Conservation Credits have been sold. Reporting required under the Management Plan shall continue, as provided in Exhibit E.

## **5. FINANCIAL ASSURANCES**

5.1 General. The Bank Sponsor is responsible for providing financial assurances for the performance of its obligations under this Agreement and the Management Plan, which includes (a) the Management Security as set forth in Section 5.2, and (b) the Endowment Fund as set forth in Sections 5.3 and 5.4. Such financial assurances shall be held in accordance with Sections 5.3 and 5.4. EBX shall notify USFWS within 30 days after furnishing each of the following financial assurances.

5.2 Management Security. Concurrent with the Transfer of the first Credit, Bank Sponsor shall deliver the Management Security to the Endowment Fund Manager and, promptly thereafter, provide notice of such delivery to USFWS. The Management Security will be in the form of a cash deposit held by the Endowment Fund Manager. If additional

Bank Parcels are established by the Bank Sponsor, the Bank Sponsor shall deliver Management Security to the Endowment Fund Manager concurrent with the Transfer of the first Credit from the additional Bank Parcel and promptly provide notice of such delivery to USFWS.

EBX shall ensure that the Endowment Fund is established as provided in Section 5.3 below.

5.3 Endowment Fund. The Endowment Fund shall be in an amount sufficient to provide for the financial requirements of the management of the Bank consistent with the Management Plan. The amount of the Endowment Fund is not required to exceed \$225,000, as set forth in the Endowment Fund Analysis attached as Exhibit J.

A. EBX shall fund the Endowment Fund through endowment deposits in the manner described in 5.3(B) and 5.3(C) below; however, the Endowment Fund shall be fully funded no later than four (4) years after the Bank Establishment Date.

B. Until the Endowment Fund is fully funded as otherwise required herein, EBX shall deposit with the Endowment Fund Manager annually an amount equal to the greater of (i) \$300.00 for each Credit sold in that calendar year or (ii) an amount equal to two (2) times the budgeted expenditure (Exhibit J) for the next year. Such payments shall be made no later than January 31 of the following year.

C. Until the Endowment Fund is fully funded, the amount of the applicable endowment principal shall be adjusted by EBX annually, on January 2<sup>nd</sup> of each year following the Bank Establishment Date (each such date is referred to as an "Adjustment Date"), by a percentage equal to the percentage increase, if any, in the CPI. Adjustment of such endowment 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 Bank Establishment Date or the date a particular additional parcel is included in the Conservation Bank, as applicable. The adjustment shall be applied to the amount of the applicable endowment principal. As used herein "CPI" means the All Items, U.S. City Average, Not Seasonally Adjusted, Base: 1982-84=100%, All Urban Consumers (CPI-U) Consumer Price Index as reported by the U.S. Bureau of Labor Statistics (the "Index"). If the Index is changed so that the base year differs from that in effect on the date hereof, the Index shall be converted in accordance with the conversion factor published with the United States Department of Labor, Bureau of Labor Statistics. If the Index is discontinued or revised during the term of this Agreement, such other government index or computation with which it is replaced shall be used in order to obtain substantially the same result as would be obtained if the Index had not been discontinued or revised. If the Index is not replaced with any other government index or computation, then the Parties shall, in good faith, agree on a suitable substitute.

D. EBX shall notify USFWS of each Endowment Deposit made within 30 days after making such deposit.

E. After the entire Endowment Fund has been deposited with the Endowment Fund Manager, no additional monies will be required from EBX.

5.4 Endowment Fund Manager. The Endowment Fund Manager shall hold, invest, and disburse the Endowment Fund according to this Agreement.

- A. Removal. The Bank Sponsor shall have the right to remove and replace the Endowment Fund Manager for any or no reason. If the Endowment Fund Manager is removed, then its replacement shall be selected by the Bank Sponsor subject to the approval of the Service, not to be unreasonably withheld, delayed or denied.
- B. Qualifications. The Endowment Fund Manager may be a person or entity (either for-profit or non-profit) with a track record of investment responsibility including for-profit entities such as banks, trust companies, or investment companies, or non-profit entities such as the Texas Land Conservancy.
- C. Investment of the Endowment Fund. The Endowment Fund Manager, in its sole discretion and without the approval of any Party, but with the Owners' and Bank Sponsor's consultation, shall invest and manage the Endowment Fund for the maintenance, monitoring, and management of the Bank Parcels. The Endowment Fund Manager is authorized to invest in mutual funds or similar investments that may contain common and preferred stock; taxable and tax-free bonds, notes, or other similar fixed income investments; REITS; and/or money market funds.
- D. Endowment Fund Management. The endowment principal amount should not decrease in value through expenditure or investment strategy. The endowment principal amount is intended to increase in value to keep up with inflation. Therefore, a portion of the interest and earnings on the endowment principal balance shall be reinvested into the Endowment Fund as required to adjust the endowment principal using the same CPI adjustment formula as set forth in Section 5.3. After the endowment principal is fully funded, even if interest earnings are insufficient to increase the endowment principal to keep up with inflation, no additional monies will be required from EBX. Interest earnings beyond those necessary to provide for endowment principal growth commensurate with inflation will be made available to fund annual management of the Bank Parcels in accordance with the terms of this Agreement and the Management Plan. Any Endowment Fund revenues remaining after the endowment principal is adjusted for inflation that exceed the anticipated annual management expenses of the Bank

Parcels shall be retained in the Endowment Fund and may be made available to fund unexpected expenses and adaptive management needs.

- E. Reports. The Endowment Fund Manager shall provide an Annual Report to the Service and the Bank Sponsor showing all deposits, disbursements, investment income, and purchases and sales off investments, and a list of all the currently owned assets in the Endowment Fund.
- F. Financial Records and Auditing. Bank Sponsor shall maintain complete and accurate records relating to the Financial Operation of the Bank using generally accepted accounting methods, principles and practices consistently applied. The Financial Operation of the Bank shall be defined to include only those matters relating to the Endowment Fund. Only upon a written request signed by the Region 2 Assistant Regional Director for Ecological Services, submitted to the Bank Sponsor no more than annually, Bank Sponsor shall have records relating to the Financial Operation of the Bank audited by an independent, licensed Certified Public Accountant and shall submit the auditor's report to USFWS upon completion. USFWS shall also have the right, at any time as reasonably deemed necessary, to review and copy any records and supporting documentation pertaining to Bank Sponsor's compliance with this Agreement. Bank Sponsor agrees to maintain such records for possible audit for a minimum of three (3) years after Bank closure, or three (3) years after the Effective Date, whichever is later. Bank Sponsor agrees to allow the auditor(s) access to such records during normal business hours and to allow interviews of any employee or representative who might reasonably have information related to such records, provided such audit and interviews are conducted at a mutually convenient time and do not unreasonably interfere with Bank Sponsor's business operations.

5.5 Duties Subject to Available Funds. Notwithstanding anything in this Agreement to the contrary, the obligation to implement the Management Plan shall be subject to the availability of funding from the Endowment Fund.

## **6. MANAGEMENT OF THE BANK PARCELS**

6.1 General. The Bank Parcels will be overseen, managed, and maintained to preserve their habitat and conservation values according to the terms of this Agreement and the Management Plan. The management obligations shall include using reasonable efforts to prevent third-party use of the Bank Parcels in a manner not contemplated under this Agreement.

6.2 Management Responsibilities. The Bank Sponsor shall have the right to assign all maintenance, management, and monitoring obligations under this Agreement to



a party acceptable to the Service (a "Bank Parcel Manager"). The Service agrees that Texas Land Conservancy is an acceptable party to assume maintenance, management, and monitoring obligations of this Agreement. By accepting the role of Bank Parcel Manager, Texas Land Conservancy does not accept the role of Bank Sponsor. The Service will be named as a third party beneficiary with rights of enforcement in any assignment and assumption of the obligations for maintenance, management and monitoring under this Agreement. Upon execution of an agreement between EBX and the Bank Manager, pursuant to which the Bank Parcel Manager assumes any of EBX's obligations hereunder (including, without limitation, EBX's management, monitoring and reporting obligations), EBX shall be released from and shall have no further responsibility of liability for any such assumed obligations. EBX agrees to provide to the Service a copy of any such agreement transferring EBX's obligations hereunder to the Bank Parcel Manager, together with contact information for the Bank Parcel Manager.

6.3 Management Plan. The Bank Parcels will be managed in accordance with the Management Plan attached as Exhibit E to this Agreement. EBX shall implement, or cause to be implemented, management and monitoring of the Bank Parcels consistent with the Management Plan and Annual Budget. EBX shall be obligated to provide for the management and monitoring of the Easement Property in perpetuity to preserve its habitat and conservation values in accordance with this Agreement, the Conservation Easements, the Management Plan, and the Annual Budget. Such activities shall be funded through the Endowment Fund and the Management Security.

During the first ten(10) years of the management period, EBX and USFWS shall meet and confer upon the reasonable request of either one of them to the other to consider revisions to the Management Plan and Annual Budget as may be necessary or appropriate to better conserve the habitat and conservation values of the Easement Property; provided, however, no such revisions to the Management Plan shall require expenditure of funds beyond those otherwise available under the Endowment Fund.

6.4 Annual Budget. EBX shall submit the Annual Budget to the Service on or before January 1 of each year, commencing in the year following the year of the Bank Establishment Date. The Annual Budget shall set forth expected expenditures for activities to be conducted under the Management Plan during the next calendar year (January 1 to December 31). The initial Annual Budget is attached as Exhibit F and shall apply to the period commencing on the Bank Establishment Date through December 31 of the next year.

6.5 Right of Entry. Representatives of the Service shall have a right to enter the Bank Parcels for purposes of inspection for compliance with 72 hours prior notice to the Owners and Bank Sponsor. In cases of emergency, such as a wildfire, the Service may enter the Bank Parcels without prior notice; provided, however, that the Service shall,

within 48 hours of any emergency entry, notify the Owners and Bank Sponsor of the nature of the emergency that justified entry and all actions taken and events observed during that emergency entry.

6.6 Records. The Endowment Fund Manager shall maintain accounts of all funds received and expended for the management of the Bank Parcels using accepted accounting methods. The accounting records shall be made available to the Service upon request. EBX shall provide to the Service on December 31 of each year an annual accounting and property management report, which shall include the following:

- A. A statement of funds received and expended in the management of the Bank Parcels during the previous year;
- B. A summary of the easement properties and habitats included in the Conservation Bank, including total acres of habitat protected and managed for the GCWA;
- C. The results of any biological monitoring or studies conducted on the Bank Parcels;
- D. A description of all management actions taken on the Bank Parcels;
- E. A description of any problems encountered in managing the Bank Parcels.
- F. An explanation as to the reasons any management tasks contemplated by the Management Plan and Annual Budget were not implemented.
- G. An updated Credit Transfer Ledger, substantially in the form attached as Exhibit I showing all Credits transferred since the Bank Establishment Date and an accounting of remaining Credits.
- H. An itemized account of any and all activity of GCWA regarding the Management Security and the Endowment Fund.
- I. General description of the status of the biological resources on the Bank Parcels.
- J. An inventory of threats or impacts to the banked resources, the status of the threat or impact (i.e., cured, ongoing, or uncured), and a summary of actions taken to reduce such threats or impacts on the banked resources, as applicable.
- K. Copy of the annual monitoring report prepared for each Easement

Property by the Qualified Easement Holder, as available

L. Itemized account of the management tasks conducted during the reporting period in accordance with the Management Plan, including the following:

- (1) Time period covered;
- (2) Description of each significant management task conducted, approximate dollar amount expended and time required;
- (3) For any tasks contemplated by the Management Plan that were not implemented, an explanation of why they were not carried out; and
- (4) Recommended modifications to the Management Plan via the adaptive management process.

#### 6.7 Bank Closure Plan.

A. Upon Bank closure, no further transfer of Credits shall occur.

B. The Bank closure shall be deemed to take place upon occurrence of all of the following:

- (1) Either:
  - a. The last authorized Credit has been transferred; or
  - b. EBX requests Bank closure by written notice to USFWS, and USFWS approves of the closure in writing; and
- (2) All financial responsibilities of EBX have been met, including 100% funding of the Endowment Fund for not less than one (1) year.

C. Notwithstanding the closure of the Bank, the Bank Parcels shall remain encumbered by the Conservation Easements and protected and managed in perpetuity in accordance with the terms thereof.

### **7. RESPONSIBILITIES OF THE SERVICE**

In addition to the rights and duties found elsewhere in this Agreement, the Service shall have the following responsibilities:

7.1 Compliance With Laws. Nothing contained in this Agreement shall be deemed to limit the USFWS's jurisdiction over impacts and applicable mitigation of endangered, threatened, and sensitive species and biological resources, or to restrict the ability of the USFWS to fully discharge its responsibilities under applicable law, including, without limitation, the ESA.

7.2 Breach by Bank Sponsor. The Service may elect to terminate this Agreement on the condition that each of the following has occurred: (i) Bank Sponsor has breached one or more material covenants set forth herein; (ii) the Bank Sponsor has received written notice of such breach from the Service; and (iii) the Bank Sponsor has failed to cure such breach within 30 days after such notice; provided, however, in the event such breach is curable, in the reasonable judgment of the Service, but cannot reasonably be cured within the 30 day period, the Service shall not have the right to terminate this Agreement so long as the Bank Sponsor has commenced the cure of the breach and is diligently pursuing a cure to completion. Nothing in this subsection is intended or shall be construed to limit the legal or equitable remedies (including specific performance and injunctive relief) available to the Service in the event of a threatened or actual material breach of this Agreement by the Bank Sponsor; provided, however, that no Party shall be liable in damages to another Party for breach of this Agreement. Notwithstanding anything contained in this Agreement to the contrary, in no event shall the breach of this Agreement by the Bank Sponsor affect in any way Credits sold by the Bank Sponsor prior to the occurrence of such breach. Upon reasonable request from EBX, USFWS shall notify EBX, its lender, prospective assignees and parties acquiring Credits, whether or not any letter or other written communication has been sent by USFWS indicating a breach by EBX or the Bank Parcel Manager of any obligations under the Agreement and provide such parties with a copy of any such written communication.

7.3 USFWS Guidance. USFWS agrees to cooperate with Bank Sponsor in good faith in the timely implementation of this Agreement and, in connection therewith, agrees to provide guidance in carrying out the terms of this Agreement.

7.4 USFWS Acknowledgment of Credits. The Service shall, from time to time, upon reasonable request by the Bank Sponsor, provide the Bank Sponsor with a written certification specifying the number of Credits released and available for transfer. The Service further agrees to provide information to all third parties requesting or otherwise requiring mitigation that would be satisfied by Credits held by the Conservation Bank as to whether such Credits are available and may be purchased from the Conservation Bank. In the event such third parties, or project proponents, require mitigation that falls within the Service Areas of more than one bank, USFWS further agrees to abide by its "Guidance for the Establishment, Use, and Operation of Conservation Banks." The relevant language reads: "In the event that the proposed projects fall with the Service Area of more than one conservation bank, then the project proponents would have the option of using any of the banks or perhaps even more than one bank."

7.5 USFWS Review. USFWS will make a good faith effort to provide comments on the Annual Reports within 60 days from the date of complete submittal.

7.6 Compliance Inspections. USFWs shall conduct compliance inspections as

necessary:

- A. To verify the Credits currently available in the Conservation Bank; and
- B. For any other purpose reasonably determined by the Service as necessary to assess compliance with this Agreement.

## **8. GENERAL PROVISIONS**

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

8.2 Force Majeure. EBX shall be responsible for managing the Bank Parcels consistent with the terms of the Management Plan, except to the extent such management activities are made impractical or unnecessary due to damage or non-compliance caused by events of force majeure. In order for such exception to apply, EBX shall bear the burden of demonstrating that:

- A. the damage or non-compliance was caused by circumstances beyond the reasonable control of EBX or any person or entity under the direction or control of EBX, including its employees, agents, contractors and consultants;
- B. that the period of damage or non-compliance was a direct result of such circumstances.

EBX shall notify USFWS within 10 business days after EBX becomes actually aware of the occurrence of an event of force majeure, and as promptly as reasonably possible thereafter, EBX and USFWS shall meet to discuss the course of action in response to such occurrence. In the meantime, EBX shall continue to manage and maintain the Bank Parcels in accordance with this Agreement to the fullest extent practicable.

8.3 Dispute Resolution. USFWS and EBX agree to work together in good faith to resolve disputes concerning this Agreement. Any Party may elect to employ an informal dispute resolution process whereby:

- A. the electing Party shall notify the other Party of the dispute, the position of the aggrieved Party, and the remedies the electing Party proposes;
- B. The notified Party shall have 30 days after receiving notice to respond,

during which time the Party may seek clarification of the initial notice;

C. Within 30 days after such notified Party's 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

D. The dispute resolution process may be terminated by any Party upon written notice to the other Party.

In addition, if there is a dispute regarding the performance of EBX's responsibilities for management of the Easement Property as required herein, such informal dispute resolution process shall also provide a method whereby such management responsibilities can be transferred to a third-party capable of continuing the management of the Easement Property, together with transfer of the rights to use proceeds from the Endowment Fund in order to carry out such management responsibilities.

8.4 Interpretation and Headings. The language in all parts of this Agreement shall in all cases be construed according to its fair meaning and not strictly for or against any Party. Headings of the paragraphs of this Agreement are for the purposes of convenience only and the words contained in such headings shall in no way be held to explain, modify, amplify, or aid in the interpretation, construction, or meaning of the provisions of this Agreement. The use of "including" in this Agreement is used by way of example and not by way of limitation. The use of "may" means that the action or item is permissible but not required. Pronouns, nouns, and terms used in this Agreement shall include the masculine, feminine, neuter, singular and plural forms wherever appropriate to the context.

8.5 Modification. This Agreement is not subject to modification except in a writing signed by all Parties and any attempted modification not in compliance with this requirement shall be void. The Parties acknowledge that this Agreement may be amended in the future by a written instrument signed by both Parties.

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

Bank Sponsor: Thomas L. Rinker  
EBX - GCW, LLC  
10055 Red Run Blvd., Suite 130  
Owings Mills, MD 21117

U.S. Fish & Wildlife Service: Field Supervisor  
10711 Burnet Rd., Suite 200  
Austin, Texas 78758

8.7 Successors and Assigns. This Agreement and each of its covenants and conditions shall be binding on and only shall inure to the benefit of the Parties and their respective successors and assigns and to no one else. Bank Sponsor shall give prior notice to the Service of any transfer or assignment of its rights under this Agreement.

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

8.9 Accuracy of Recitals. The Parties hereby affirm the accuracy of the Recitals above.

8.10 Attorneys' 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.

8.11 No Partnerships. This Agreement shall not make or be deemed to make any Party to this Agreement an agent for or the partner of any other Party.

8.12 Governing Law. This Agreement shall be governed by and construed according to the laws of the State of Texas and applicable federal law and regulations.

8.13 No Public Access. Notwithstanding anything to the contrary, "dedication" of a Bank Parcel (or similar language) only means that a conservation easement has been placed upon that Bank Parcel according to this Agreement and does not mean that the Bank Parcel is "dedicated" to the public. The public at large has no right to enter on or use any of the Property and, in fact, is specifically prohibited from entering or using the Property or any Bank Parcel in any way.

8.14 Counterparts. This Agreement may be executed in any number of counterparts, each of which may be executed by any one or more of the parties, but all of which shall constitute one instrument, and shall be binding and effective when all parties have executed at least one counterpart.


8.15 Notwithstanding section 8.10 above, the Bank Sponsor shall indemnify and defend the Texas Land Conservancy for losses incurred by the Conservancy related to the Conservation Bank, including but not limited to, attorney's fees and costs of suit, other than for matters related to Texas Land Conservancy's acts or omissions as Endowment Fund Manager, Bank Parcel Manager, or holder of the Conservation Easements, and acts or omissions resulting from the negligence, gross negligence, or intentional misconduct of Texas Land Conservancy. The Texas Land Conservancy shall indemnify and defend the Bank Sponsor, including but not limited to, attorney's fees and costs of suit, for losses incurred by the Bank Sponsor resulting from Texas Land Conservancy's negligence, gross negligence, or intentional misconduct.

8.16. Availability of Funds. Implementation of this Agreement by USFWS 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 United States Treasury. USFWS is not required under this Agreement to expend any appropriated funds unless and until an authorized official affirmatively acts to commit to such expenditures as evidenced in writing.

8.17. Partial Invalidity. If a court of competent jurisdiction holds any term or provision of this Agreement to be invalid or unenforceable, in whole or in part, for any reason, the validity and enforceability of the remaining terms and provisions, or portions of them, shall not be affected unless an essential purpose of this Agreement would be defeated by loss of the invalid or unenforceable provision.

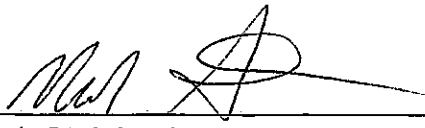
8.18. Controlling Language. The Parties intend the provisions of this Agreement and each of the documents incorporated by reference in it to be consistent with each other, and for each document to be binding in accordance with its terms. To the fullest extent possible, these documents shall be interpreted 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 be controlling. The captions and headings of this Agreement are for reference only and shall not define or limit any of its terms or provisions.

Executed to be effective as of Jan. 28, 2014

  
Thomas L. Rinker  
EBX – GCW, LLC

  
U.S. Fish and Wildlife Service





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Mark Steinbach  
Texas Land Conservancy

## **LIST OF EXHIBITS**

Exhibit A	Location of Festina Lente Ranch
Exhibit B-1	Baseline Report
Exhibit B-2	Endangered Species Habitat Assessment
Exhibit C	Conservation Easement
Exhibit D	Bank Parcels
Exhibit E	Management Plan
Exhibit F	Annual Budget
Exhibit G	Primary Service Area
Exhibit H	Title Exceptions/Metes and Bounds Description
Exhibit I	Ledger
Exhibit J	Endowment Fund Analysis
Exhibit K	GWCA Occurrences on Festina Lente Ranch
Exhibit L	2004-2012 EDF/Plateau Breeding Bird Survey Results
Exhibit M	Summary of Environmental Banc & Exchange's Experience and Qualifications
Exhibit N	Description of Mineral Rights and Water Rights on Festina Lente
Exhibit O	Phase I Environmental Site Assessment