

MEMORANDUM OF UNDERSTANDING
between the
CITY OF SAN ANTONIO and BEXAR COUNTY
(the SEP-HCP Permittees)
and
EBX-GCW, 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 EBX-GCW, LLC (EBX-GCW) 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. EBX-GCW, in cooperation with USFWS, created the Festina Lente Ranch Conservation Bank (FLRCB) under that certain Festina Lente Ranch Conservation Bank Agreement (FLR CBA) dated effective January 28, 2014, (as may be amended) (the Bank Agreement). Owned, operated, and maintained by EBX-GCW and John and Ann Newman, FLRCB is a USFWS- approved, independent, third-party conservation bank for the golden-cheeked warbler located in Bandera County. FLRCB credits are created from protected habitats occurring within the Plan Area and the Permit Area is located within FLRCB's 13-county service area. The FLR CBA allows for modular, programmatic additions of qualified suitable GCW habitat secured by a perpetual conservation easement and supported by financial assurances provided by EBX-GCW for ongoing monitoring, maintenance, and operation of the protected habitats within FLRCB. At this time, FLRCB currently has approximately 270 GCW credits immediately available from its first phase, for purchase and assignment. Should demand warrant creation of additional credits, FLRCB's second phase, currently has approximately 618 GCW credits staged for release from one additional conservation easement. Additional properties may be added to FLRCB within Bandera County as per the requirements of the FLR 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 FLRCB 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 EBX-GCW entering this MOU, FLRCB 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 FLRCB 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. FLRCB, 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 EBX-GCW, 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 FLRCB to the SEP-HCP Ledger on behalf of the Applicant whom purchased the GCW Preservation Credits from FLRCB.
- (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 EBX-GCW 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 FLRCB on behalf of an Applicant.
- (d) For any GCW Preservation Credits assigned to the SEP-HCP Ledger from FLRCB, Permittees shall have no obligation to provide any future management endowment funds or staffing for the ongoing operations, management, and maintenance of FLRCB preserve properties.

4.2 Responsibilities of EBX-GCW

- (a) In exchange for Preferred Status, EBX-GCW agrees to sell FLRCB credits to Applicants at the per credit price established by the Permittees. EBX-GCW 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, EBX-GCW shall deduct from its total number of credits available any amount of credits for which EBX-GCW has a signed purchase agreement as of the date of inquiry but have yet to be debited from FLRCB's ledger kept by USFWS on the RIBITS website.
 - a. For the purposes of coordinating information regarding available GCW Preservation Credits from FLRCB, the Permittees and EBX-GCW 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, EBX-GCW will assign the corresponding number of GCW Preservation Credits purchased by the Applicant to the Permittees.
- (d) EBX-GCW will provide the USFWS notice of the assignment of GCW Preservation Credits to the Permittees on behalf of the Applicant.
- (e) EBX-GCW shall not be obligated to contribute or assign any of the Applicant's purchase funds for FLRCB credits to the Permittees.
- (f) EBX-GCW 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 will be automatically renewed for up to two (2) additional one (1) year terms unless otherwise terminated by one or more of the parties.
- (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, EBX-GCW 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 EBX-GCW:
EBX-GCW, LLC

5020 Montrose Blvd Suite 650
Houston, Texas 77006
Phone: (281) 254-7178

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

EBX-GCW, LLC

By: _____

Printed Name

Title

Date

DRAFT