

FWS Number: 201813K912

## MEMORANDUM OF AGREEMENT

BETWEEN AND AMONG

U.S. FISH AND WILDLIFE SERVICE  
REGION 2  
P.O. BOX 1306  
ALBUQUERQUE, NEW MEXICO 87103-1306

AND

TEXAS PARKS AND WILDLIFE DEPARTMENT, CITY OF AUSTIN, TRAVIS COUNTY,  
LOWER COLORADO RIVER AUTHORITY, AND THE LADY BIRD JOHNSON  
WILDFLOWER CENTER

This MEMORANDUM OF AGREEMENT ("Agreement"), made and entered into as of the \_\_\_\_\_ day of \_\_\_\_\_, 200\_\_, by and between the U.S. Fish and Wildlife Service, Texas Parks and Wildlife Department, City of Austin, Travis County, Lower Colorado River Authority and the Lady Bird Johnson Wildflower Center, hereinafter collectively called the "Parties," defines the Parties' roles and responsibilities and provides a common understanding of actions that will be undertaken to conserve the bracted twistflower and its habitat under this Agreement.

I. INTRODUCTION: Bracted twistflower (*Streptanthus bracteatus*), a beautiful plant endemic to the Edwards Plateau of central Texas (the Texas Hill Country), is a rare member of the Mustard family (*Brassicaceae*). Over the last 150 years, it has been observed in Bandera, Bexar, Comal, Medina, Real, Travis and Uvalde counties. All known bracted twistflower populations are west of Interstate 35. The plant has not been seen for decades in Bandera, Comal and Real Counties. In Bexar and Uvalde counties, only one population is known to exist today in each county. There are approximately 10 known populations in the Austin area, but many of those are threatened by development and by unnaturally large and unmanaged populations of white-tailed deer, which is the main browser of the plants. Currently, small isolated bracted twistflower populations are known to occur on public lands in Travis and Uvalde Counties. These public lands include some tracts of the Balcones Canyonlands Preserves created by the Balcones Canyonlands Conservation Plan (a habitat conservation plan prepared pursuant to the issuance of permit PRT-788841 by the U.S. Fish and Wildlife Service to the City of Austin and Travis County on May 2, 1996 under § 10(a)(1)(B) of the Endangered Species Act, 16 U.S.C. § 1539(a)(1)(B)), the Bright Leaf State Natural Area, and Garner State Park. Other public lands on which the plant has been observed are Eisenhower Park in Bexar County and some county road rights-of-way in Medina County. A few populations still exist on a small number of private tracts within the range of the plant. Although certain parcels of land may be suitable to sustain populations of the bracted twistflower, some of these parcels may not currently contain the plants.

Bracted twistflower was first described by Asa Gray in 1849 from a Lindheimer specimen. It is an annual plant that is conspicuous only while flowering usually from April to May. The stems are smooth. The plants are normally 1 to 3 feet tall but are often much shorter on dry years, or when growing in very deep shade. Under optimal conditions they can reach a height of 5 feet. The leaves on each plant are variable. Lower stem leaves are on long stalks and are often deeply incised, like those of a dandelion. In contrast, leaves on the upper part of the plant are usually smooth-edged and stalkless. The base of the leaf is clasping and wraps around the stem. These upper leaves are usually 1-2 inches long and half as wide or less; like the stems, they are totally hairless. Flowers grow on a spike of variable length, and are supported on a short stalk about 1/4 inch long or less. Unlike other plants in the area in which it occurs, the petal color ranges from lilac to a pinkish-purple color. There are four petals, usually 1/2 to 3/4 inch long, rounded in the terminal half and narrowly tapering to the base. Bracted twistflower is located in a variety of habitats in juniper-oak woodlands on rocky limestone slopes and on terraces between such slopes. These areas are generally characterized by thin clay soils overlying cretaceous limestone. Although the plant is often found within a dense shrub community, this is thought to be an artifact of deer browsing pressure. Plants found in open areas are often subject to severe herbivory by deer. Additionally, plants are injured by insect herbivory.

The bracted twistflower was included in a report from the Smithsonian Institution to the Department of Interior made pursuant to § 12 of the Endangered Species Act, 16 U.S.C. § 1541, and entitled, "Report on Endangered and Threatened Plant Species of the United States." 40 Fed. Reg. 27,824 (1975). The U.S. Fish and Wildlife Service considered this report to be a petition to list the plants in it as threatened or endangered. *Ibid.* This report described the status of the bracted twistflower as "threatened." *Ibid.* p. 27,877. The plant was later designated by the U.S. Fish and Wildlife Service as a Category 2 Candidate species. 45 Fed. Reg. 82,539 (1980). In 1996, however, the Service discontinued its use of the Category 2 classification, resulting in the bracted twistflower, along with other species, being dropped from the candidate list. 61 Fed. Reg. 64,481 (1996).

At the time of the preparation of the Balcones Canyonlands Habitat Conservation Plan (BCCP), nine populations of the bracted twistflower were known in the BCCP area in Travis County. Five were in the Bull Creek BCCP macrosite, three in the West Austin BCCP macrosite and one in the Barton Creek BCCP macrosite. Two populations and portions of others were considered to be protected on public lands. Although the Plan describes the bracted twistflower as a "primary species of concern," the plant is not federally listed and the U.S. Fish and Wildlife Service did not include protection of the bracted twistflower in the BCCP permit requirements. To require protection of the plant in the BCCP permit, the U.S. Fish and Wildlife Service would have had to allow "take" of the plant outside of the preserve areas and require mitigation land be protected to guarantee the protection of the plant. Since the U.S. Fish and Wildlife Service did not feel they could allow the "take" of the plant and also could not guarantee protection through mitigation, the plant was not included in the permit and the permit holders were not required to protect this plant.

The Habitat Conservation Plan for the BCCP discusses the plant on pp. 2-18 to 2-19 and 4-38 to 4-39 and states: "Increased protection for the remaining populations through acquisition is advisable but is also precluded by funding limitations." "Given the ephemeral, annual growth habit of this plant coupled with a lack of real knowledge regarding its reproductive requirements, it is unrealistic to assume that the species' population viability could be guaranteed in the permit area based upon

the potential loss of 56% of the known populations in the county as permitted by the BCCP. Without further preserve acquisition targeted at the bracted twistflower or binding landowner cooperative agreements, the species long-term viability will not be guaranteed by the plan." The BCCP did not require the acquisition of additional land to protect the remaining five or six populations, thus these remaining populations have been destroyed or are subject to destruction. Based on new information about the number of populations that could be potentially lost within the BCCP area, the actual percentage lost may be closer to 63.3%. The BCCP city and county permit holders and BCCP managing partner the LCRA are, however, entering into this voluntary Agreement to help ensure the protection of the bracted twistflower populations within the Balcones Canyonlands Preserve tracts.

The Parties to this Agreement are also cooperating with Texas State University's Biology Department to gain an understanding about the genetic potential and population viability of the bracted twistflower. At the time of this Agreement, a graduate student from the University's Biology Department, Carolyn Meredith, working under the supervision of Dr. Paula Williamson, is examining genetic variation between and within bracted twistflower populations using microsatellites. These data may be valuable in predicting the size of population necessary to protect the species from inbreeding depression, population bottlenecks and the effects of genetic drift.

II. PURPOSE: This voluntary Agreement is entered into for the purpose of working cooperatively on the conservation of the bracted twistflower through several protection and enhancement strategies. As detailed below, these strategies include: monitoring existing populations, restoring existing populations, locating new (previously unknown) sites of bracted twistflower, creating new populations in suitable habitat on public lands within the historic range, protecting populations of bracted twistflower from deer whenever possible, educating the general public and volunteers about the plant and the efforts to conserve it and making additional efforts to conserve the bracted twistflower as outlined in the terms of this Agreement.

III. AUTHORITY:

A. Federal Statutory Authority

The U.S. Fish and Wildlife Service enters into this Agreement under the authority of the Endangered Species Act, 16 U.S.C. §§1531, 1535 and 1536. Under §1531, the U.S. Fish and Wildlife Service encourages states and other interested parties, through Federal financial assistance and a system of incentives to develop and maintain conservation programs to safeguard the nation's heritage in fish, wildlife and plants. Section 1535 allows the Service to cooperate with states in programs for the conservation of resident species of fish, wildlife and plants. Section 1536 requires the Service to review the programs it administers and utilize them in furtherance of the Act.

The U.S. Fish and Wildlife Service (the Service) is a federal agency under the United States Department of the Interior. Its mission is to work with others to conserve, protect, and enhance, fish, wildlife and plants and their habitats for the continuing benefit of the American people.

B. State of Texas Statutory Authority

The Texas Parks and Wildlife Department enters into this Agreement under the authority of Texas Parks and Wildlife Code, Ch. 13 which places all state parks and state natural areas under the control of the Texas Parks and Wildlife Department, gives the state authority to determine sound biological management practices for the lands under its control and allows the state to conduct habitat restoration projects.

The Texas Parks and Wildlife Department (the Department) is an agency of the State of Texas. Its mission is to manage and conserve the natural and cultural resources of Texas and to provide hunting, fishing and outdoor recreation opportunities for the use and enjoyment of present and future generations. The Department owns and manages the state parks and state natural areas. The bracted twistflower presently occurs in Garner State Park and the Bright Leaf State Natural Area. The Department also has received funds under § 6 of the Endangered Species Act, 16 U.S.C § 1535, to monitor populations of the bracted twistflower in several locations on public lands.

C. City of Austin, Travis County

The City of Austin is a co-permit holder for the BCCP establishing the Balcones Canyonlands Preserve system of parks and preserve lands that it manages within the City. The bracted twistflower is presently known to occur on a few sites within the City's parks, preserves and water utility lands. These sites include Covert Park at Mt. Bonnell, owned and managed by the city's Parks and Recreation Department; the Barton Creek Greenbelt, owned and managed by the city's Parks and Recreation Department and also managed by Water and Wastewater Department's Wildlands Division; and the Bee Creek site located within a 17-acre portion of the Ullrich Water Treatment Plant, owned and managed by the city's Water and Wastewater Department. All of these sites are included in the BCCP.

Travis County is also a co-permit holder for the BCCP establishing the Balcones Canyonlands Preserve system of parks and preserve lands that it manages within Travis County. At the time of the signing of this Agreement, there are no known sites on Travis County parks or preserve lands.

D. Lower Colorado River Authority

Lower Colorado River Authority (LCRA) is a conservation and reclamation district created by the Texas Legislature in 1934 to improve the quality of life in the Central Texas area through public services and natural resources protection. It operates on revenues from wholesale electric and water sales and other services. In addition to supplying electricity and water and other services to customers in Texas, the LCRA also manages approximately 2,700 acres of land under the BCCP. LCRA's three preserves (Wheless, McGregor and Westcave) are not currently known to harbor this rare plant, however suitable habitat for the plant may exist in these preserves.

E. The Lady Bird Johnson Wildflower Center

The Lady Bird Johnson Wildflower Center (the Center) is a private non-profit educational organization established in 1982 to educate people about the environmental necessity, economic value, and natural beauty of native plants.

IV. STATEMENT OF MUTUAL BENEFIT: The Parties to this Agreement agree that it is entered into voluntarily by the Parties and is mutually beneficial to them in their efforts to conserve the bracted twistflower. It is anticipated that the actions set forth in this Agreement, if fully carried out, will contribute to the conservation of the plant species.

V. RESPONSIBILITIES:

A. U.S. Fish and Wildlife Service (the Service). The Service will:

1. appoint an individual, the Project Officer, who will represent the Service in carrying out its responsibilities under this Agreement;
2. provide information, technical advice and assistance in obtaining funds under the Service's various grant and funding programs for items such as fencing for purposes of creating deer exclosures to protect populations of the bracted twistflower on public lands owned and managed by the City, the County and LCRA;
3. provide information and advice concerning programs and/or approaches for the conservation of the bracted twistflower to all parties on and ongoing basis throughout the term of this Agreement; and
4. provide information, technical advice and assistance to private landowners seeking such information to assist in voluntary management and/or introduction of new populations of bracted twistflower on their private lands.

B. Texas Parks and Wildlife Department (TPWD). TPWD will:

1. monitor known populations of the bracted twistflower consistent with site specific Resources Management Plans for state parks and state natural areas;
2. search for new (previously unknown) sites of bracted twistflower on state parks where the plant is likely to occur and the Bright Leaf State Natural Area in accordance with the site specific Resources Management Plan;
3. conserve existing populations and restore populations in suitable habitat on state parks where the plant is likely to occur and the Bright Leaf State Natural Area as consistent with the site specific Resources Management Plan,

including working with the Lady Bird Johnson Wildflower Center for this purpose;

4. protect bracted twistflower populations from deer herbivory in state parks and the Bright Leaf State Natural area consistent with the site specific Resources Management Plan;
5. provide educational information to volunteers and the general public interested in protecting populations of the bracted twistflower and serve as a resource to these individuals; and
6. maintain, in its usual course of business, the element occurrence records and field data concerning the bracted twistflower.

C. The City of Austin (the City). The City will:

1. monitor known populations of the bracted twistflower on tracts of land included in the City's Balcones Canyonlands Preserve system consistent with the Balcones Canyonlands Preserve Management Handbook and submit this monitoring information annually to the Texas Parks and Wildlife Department and the Service;
2. search for new (previously unknown) sites of bracted twistflower on tracts of land included in the City's Balcones Canyonlands preserve system and report the new sites to TPWD and the Service;
3. conserve existing populations and restore populations in suitable habitat on tracts of land included in the city's Balcones Canyonlands Preserve system including working with the Lady Bird Johnson Wildflower Center for this purpose;
4. protect bracted twistflower populations on lands included in the Balcones Canyonlands Preserve system from deer herbivory including:
  - a. if needed, will apply for the Service's Partners for Fish and Wildlife Cost-Share Program for funding of deer exclosures of the bracted twistflower and construct such exclosures for populations within the City's Balcones Canyonlands Preserve system unless it is not currently reasonably feasible to place such exclosures due to the historic and current public use of a particular area as parkland or a greenbelt or for an unforeseen reason;
  - b. for the Ullrich Water Treatment Plant, it is understood that the City's Water and Wastewater Utility Department will use that department's funds to purchase and install deer exclosure fencing to protect the currently known population of the bracted twistflower located within the 17-acre tract that is part of the City's Balcones Canyonlands

Preserve system. The installation of this fencing will be carried out under the direction of the City's Balcones Canyonlands Preserve professional staff;

- c. for areas within the City's Balcones Canyonlands Preserve system where it is not currently reasonably feasible to place deer exclosures to protect populations of the bracted twistflower due to the historic and current public use of a particular area as parkland or a greenbelt or due to the unavailability of adequate funds, the City will ensure that no operation and maintenance, utility construction or repair or other work by City employees or volunteers in these areas will damage or destroy the bracted twistflowers or their habitat and will provide and maintain brush or other protective materials as may be appropriate around the plants to protect them from deer herbivory;
  - d. otherwise manage deer populations in the vicinity of currently known or newly located or established populations of the bracted twistflower in the City's preserves using methods that the City and the Service deem appropriate; and
  - e. monitor the entire plant community within deer exclosures to detect any change in community composition that does not favor the bracted twistflower and to determine whether any habitat management actions may be needed.
- 5. direct public trails away from any and all bracted twistflower populations;
  - 6. provide training and descriptive literature to city employees working in areas with existing populations and instruct city employees working in Balcones Canyonlands Preserve tracts to actively look for and report any new populations of the bracted twistflower to the BCP supervisor; and
  - 7. facilitate and coordinate efforts of staff and volunteers in locating new populations within City's Balcones Canyonlands Preserves and suitable areas in the Preserves for the establishment of new populations in a manner that does not conflict with the City's Endangered Species Act § 10(a)(1)(B) permit responsibilities;
  - 8. provide educational information to volunteers, City employees and the general public (including, where appropriate, to Homeowner Associations adjacent to preserves) interested in protecting populations of the bracted twistflower and serve as a resource to these individuals; and
  - 9. for the Ullrich Water Treatment Plant, it is understood that access for locating, monitoring, inventorying or collecting the bracted twistflower or for any other work related to the bracted twistflower in that portion of the Ullrich Water Treatment Plant that is within the City's Balcones Canyonlands Preserve and to which this MOA applies will be limited to professional staff and volunteers under the direct supervision of this professional staff and it is further

understood that The Ullrich Water Treatment Plant will provide access to this professional staff and the volunteers under the direct supervision of the professional staff to the portion of the Ullrich Water Treatment Plant within the Balcones Canyonlands Preserve.

D. Travis County. Travis County will:

1. monitor known populations of the bracted twistflower on tracts of land included in the County's Balcones Canyonlands Preserve system consistent with the Balcones Canyonlands Preserve Management Handbook and submit this monitoring information annually to the Texas Parks and Wildlife Department and the Service;
2. search for new populations of bracted twistflower land included in the County's Balcones Canyonlands Preserve system and report the new findings to the Texas Parks and Wildlife Department and the Service;
3. conserve existing populations and restore populations in suitable habitat on tracts of land included in the County's Balcones Canyonlands preserve system including working with the Lady Bird Johnson Wildflower Center for this purpose;
4. protect populations of the bracted twistflower on lands included in the Balcones Canyonlands Preserve system from deer herbivory including:
  - a. if needed, will apply for the Service's Partners for Fish and Wildlife Cost-Share Program for funding of deer exclosures of the bracted twistflower and construct such exclosures for populations within the County's Balcones Canyonlands Preserve system unless it is not currently reasonably feasible to place such exclosures due to the historic and current public use of a particular area as parkland or a greenbelt or for an unforeseen reason;
  - b. for areas within the County's Balcones Canyonlands Preserve system where it is not currently reasonably feasible to place deer exclosures to protect populations of the bracted twistflower due to the historic and current public use of a particular area as parkland or a greenbelt or due to the unavailability of adequate funds, the County will ensure that no operation and maintenance, utility construction or repair or other work by County employees in these areas will damage or destroy the bracted twistflowers or their habitat and will provide and maintain brush or other protective materials as may be appropriate around the plants to protect them from deer herbivory;
  - c. otherwise manage deer populations in the vicinity of currently known or newly located or established populations of the bracted twistflower in the County's Balcones Canyonlands Preserves using methods that the County and the Service deem appropriate; and



- d. monitor the entire plant community within the deer exclosures to detect any change in community composition that does not favor the bracted twistflower and to determine whether any habitat management actions may be needed.
  5. direct public trails away from any and all bracted twistflower populations;
  6. provide training and descriptive literature to County employees working in areas with existing populations and instruct County employees working in Balcones Canyonlands Preserve tracts to actively look for and report any new populations of the bracted twistflower to the County's BCP supervisor; and
  7. facilitate and coordinate efforts of staff and volunteers in locating new populations within County Balcones Canyonlands Preserves and suitable areas in the preserves for the establishment of new populations in a manner that does not conflict with the County's Endangered Species Act § 10(a)(1)(B) permit responsibilities; and
  8. provide educational information to volunteers, County employees and the general public (including, where appropriate, to Homeowner Associations adjacent to preserves) interested in protecting bracted twistflower populations and serve as a resource to these individuals.
- E. The Lower Colorado River Authority (the LCRA). The LCRA will:
1. provide access to and facilitate efforts of qualified volunteer monitors on three preserve tracts (Wheless, McGregor and Westcave) in order to locate known and new populations of the bracted twistflower;
  2. work with biologists, organizations, and agencies named in this Agreement to identify suitable habitat for a potential restoration project on the Wheless, McGregor and Westcave Preserve tracts as funds are available;
  3. as resources are available, protect populations of the bracted twistflower in the Wheless, McGregor and Westcave Preserve tracts from deer herbivory including:
    - a. within three years of detection by qualified volunteers, will apply for the Service's Partners for Fish and Wildlife Cost-Share Program for funding of deer exclosures of bracted twistflower populations or portions thereof and construct exclosures unless it is not currently reasonably feasible to place such exclosures due to use, topographic, or policy limitations;
    - b. for areas within the Wheless, McGregor and Westcave Preserve tracts where it is not currently reasonably feasible to place deer exclosures to protect populations of the bracted twistflower, the LCRA will ensure

that no operation and maintenance, utility construction or repair or other work by LCRA employees in these areas will damage or destroy the bracted twistflowers or their habitat without consultation with the Service. Within three years of detection and with available funding, will provide and maintain brush or other protective materials as may be appropriate, around the plants to protect them from deer herbivory;

- c. manage white-tailed deer population in accordance with preserve management plans under the BCCP Managing Partner Agreement using methods that the LCRA, TPWD, and the Service deem appropriate;
4. provide educational information to volunteers, LCRA employees and the general public interested in protecting populations of the bracted twistflower and serve as a resource to these individuals.
5. Notwithstanding anything herein to the contrary, LCRA shall be obligated to perform hereunder only to the extent performance does not interfere with the rights of any lessee or easement holder.

F. The Lady Bird Johnson Wildflower Center (the Center). The Center will:

1. establish and appropriately maintain a seed bank that will be used to store genetically representative samples of all known and newly discovered populations;
2. propagate the plant using collected and stored seed for restoration projects when appropriate (a nominal fee may be charged to cover the cost of supplies and material);
3. design and produce a slide show to be used to recruit volunteer members interested in the conservation of this plant for the "*Streptanthus* Conservation Corps;"
4. coordinate the creation and implementation of a training course and materials to train members of the *Streptanthus* Conservation Corps;
5. coordinate the *Streptanthus* Conservation Corps to work with various organizations to monitor known populations of the plant, search for previously unknown populations of the plant, collect seeds from targeted populations, prepare collected seeds for storage in the seed bank, and work with Wildflower Center horticultural staff to propagate the plants for restoration projects;
6. coordinate efforts to provide educational information to volunteers, Wildflower Center employees and the general public interested in protecting

populations of the bracted twistflower and serve as a resource to these individuals.

G. All signatory Parties will:

1. share among the Parties any non-confidential information collected, developed and/or maintained by that Party or volunteers concerning the bracted twistflower findings, monitoring, research, introduction, and outreach and, in particular, will ensure that the Party upon whose land the information was collected receives a copy of all information collected, documented, distributed or published;
2. prior to any publication referencing any Party to this Agreement, all affected Parties have review privilege and right of refusal to participate;
3. work with the other Parties to identify additional sources of potential funding for deer exclosures for populations of the plant or portions thereof located on a Party's land; and
4. meet at least annually from the date of the execution of this Agreement to share information concerning the status of the bracted twistflower, to assess the progress towards implementing the goals and actions identified in this Agreement, to identify further opportunities to conserve the plant species, to determine whether it may be appropriate to modify parties to the Agreement and to determine whether changes need to be made to this Agreement and/or the actions for conserving the plant species that are outlined in the Agreement;
5. evaluate research needs concerning the population status, genetic background work, reproductive biology, site characterization studies, management needs and augmentation protocols for the bracted twistflower and work cooperatively to obtain funding for this research.

VI. AGREEMENT TERM: This Agreement shall become effective immediately upon being executed by the Parties hereto and will be reviewed by the Parties on a regular basis. This Agreement shall remain in effect, except as modified or terminated, at which time the Agreement may be renewed, modified, or terminated according to the interest of the Parties to the Agreement.

VII. AMENDMENT AND TERMINATION: Amendments to this Agreement may be proposed by any Party to it in writing to all other Parties to this Agreement and will become effective upon being reduced to a written instrument and being signed by the duly authorized representatives of each of the Parties.

A Party's participation in this Agreement may be terminated by the Party upon 30 days advance written notice to the other Parties. Termination of participation by one Party to this

Agreement does not automatically terminate the participation of the other Parties, however, all Parties may mutually agree to terminate this Agreement upon 30 days written notice to the Service.

VIII. WILLING PRIVATE LANDOWNERS: Willing private landowners who wish to participate in conserving the bracted twistflower are invited to seek technical assistance from the Parties to this Agreement or to enter into separate voluntary agreements. Such agreements may be appended to this document with the private landowner's consent.

IX. MISCELLANEOUS PROVISIONS

A. No Partnership:

This Agreement shall not make or be deemed to make any Party to this Agreement the agent for or the partner of any other Party.

B. Successors and Assigns:

The Agreement and each of its covenants and conditions shall be binding on and shall inure to the benefit of the Parties hereto, and their respective successors and assigns in conformance with the provisions on 50 C.F.R. §13.25 (1994, as amended).

C. Unilateral Termination:

Any Party can unilaterally terminate its participation in this Agreement. This is consistent with the non-binding, non-obligating nature of this Agreement. It is, however, appropriate that termination of participation in the Agreement be done by providing written notice to all other Parties.

D. Non-Exclusivity:

This Agreement does not create an exclusive arrangement or relationship with or between the federal Parties and any other Party, federal or non-federal.

E. Entire Agreement:

This fully executed document, including any and all attached exhibits and documents incorporated by reference, constitutes the entire Agreement between the Parties. Each Party acknowledges that no representation, inducement, promise or Agreement, oral or otherwise, has been made by any other Party or anyone acting on behalf of any other Party that is not embodied herein.

F. Elected Officials Not to Benefit:

No member of or delegate to Congress shall be entitled to any share or part of this Agreement, or to any benefit that may arise from it.

G. Availability of Funds:

Implementation of this Agreement by the Service is subject to the requirements of the Anti-Deficiency Act and the availability of appropriated funds. Nothing in this Agreement will be construed by the Parties to require the obligation, appropriation, or expenditure of any money from the U.S. Treasury. The Parties acknowledge that the Service will not be required under this Agreement to expend any Federal Agency's appropriated funds unless and until an authorized official of that agency affirmatively acts to commit to such expenditures as evidenced in writing.

H. Third-Party Beneficiaries:

Without limiting the applicability of the rights granted to the public pursuant to the provision of 16 U.S.C. § 1540(g), this Agreement shall not create any right or interest in the public, or any member thereof, as a third-party beneficiary hereof, nor shall it authorize anyone not a Party to this Agreement to maintain a suit for personal injuries or property damages pursuant to the provisions of this Agreement. The duties, obligations, and responsibilities of the Parties to this Agreement with respect to third-parties shall remain as imposed under existing Federal or State law.

I. Relationship to the ESA and Other Authorities:

The terms of this Agreement shall be governed by and construed in accordance with the ESA and other applicable laws. In particular, nothing in the Agreement is intended to limit the authority of the Service to seek penalties in federal court or otherwise fulfill its responsibilities under the ESA. Moreover, nothing in this Agreement is intended to limit or diminish the legal obligations and responsibilities of the Service as an agency of the Federal Government.

J. References to Regulations:

Any reference in this Agreement to any regulation or rules of the Service shall be deemed to be a reference to such a regulation or rule in existence at the time an action is taken.

K. Applicable Laws:

The Parties shall comply with all applicable federal, state and local laws, rules, regulations, standards and executive orders, without limitation to those designated within this Agreement.

L. Dispute Resolution:

The Parties will cooperate in good faith to achieve the objectives of this Agreement and to avoid disputes. The Parties will exert their best efforts to resolve

disputes at the lowest organizational level before elevating the dispute to the appropriate officials within their respective organizations.

M. Indemnification:

To the fullest extent permitted by law, the Parties shall indemnify, defend and hold the other Party, its governing board or body, officers, departments, employees and agents harmless from and against any and all suits, actions, legal or administrative proceedings, claims, demands, liens, losses, fines or penalties, damages, liability, interest, attorney's consultant's and accountant's fees of cost and expenses of whatsoever kind and nature, resulting from or arising out of any act of omission of the indemnifying party, its agents, employees or anyone acting under its direction or control, whether intentional, negligent, grossly negligent, or amounting to a breach of contract, in connection with or incident to the performance of this Agreement.

Texas Parks and Wildlife Department, City of Austin, Travis County, Lower Colorado River Authority and the Lady Bird Johnson Wildflower Center shall hold harmless the Service, its agents and employees against all liability, claims, demands, damages, or cost for (a) death or bodily injury to persons including without limitation, the employees of the Parties hereto; (b) injury to property including without limitation, the property of the Parties hereto; (c) design defects; (d) any other loss, damage or expense arising under either (a), (b), (c) and all fines or penalties imposed upon or assessed or lawsuits or claims brought against the Service, and all expenses of investigating and defending against same, arising in any manner out of the performance or failure to perform by the parties named above, its contractors, subcontractors, or agents, its work or any obligation under this Agreement. Nothing contained in this provision is intended to, nor shall be deemed or construed to indemnify the Service from its sole negligence or willful misconduct, or that its agents, servants or independent contractors who are directly responsible to it.

N. Waiver:

Waiver by any Party of any breach of any term, covenant or condition herein contained shall not be deemed a waiver of any other term, covenant or condition or any subsequent breach of the same or any other term, covenant, or condition herein contained.

O. Force Majeure:

A Party shall not be in default under this Agreement if it does not fulfill any of its obligations under this Agreement because it is prevented or delayed in doing so by reason of uncontrollable forces. The term "uncontrollable forces" shall mean, for the purpose of this Agreement, any cause beyond the control of the Party affected, including but not limited to failure of facilities, breakage or accident to machinery or transmission facilities, weather conditions, flood, earthquake, lightening, fires, epidemic, war riot, civil disturbance, sabotage, strike, lockout, labor dispute, boycott, material or energy shortage, casualty loss, acts of God, or action or non-action of governmental bodies, other than

action or non-action by governmental bodies which are a Party to this Agreement, in approving or failing to act upon applications for approvals or permits which are not due to the negligence or willful action of the Parties, order of any government officer or court, excluding orders promulgated by the Parties themselves, and declared local, state or national emergency, which by exercise of due diligence and foresight, such Party could not reasonably have expected to avoid. Any Party rendered unable to fulfill any obligations by reason of uncontrollable forces shall exercise due diligence to remove such inability with all reasonable dispatch.

AGREED AND ACCEPTED AS OF THE DATES SET FORTH BELOW:

U.S. Fish and Wildlife Service

By: Gaffney Haskell  
Title: Acting Regional Director  
Date: 12/18/03

Texas Parks and Wildlife Department

By: [Signature]  
Title: Executive Director  
Date: 2/9/04

City of Austin

By: Will Wynn  
Title: MAYOR  
Date: 1/14/04

Travis County

By: James Funghearty  
Title: Commissioner Pct. 3 Travis County  
Date: Sept. 25, 2003

Lower Colorado River Authority

By:

John G. Bell

Title:

General Manager

Date:

9 Feb 04



Lady Bird Johnson Wildflower Center

By:

Rosa J. Arce

Title:

Executive Director

Date:

Sept. 26, 03