

WHITE WATER SPRINGS HABITAT CONSERVATION PLAN  
AGREEMENT OF INCLUSION

COUNTY OF BURNET     §  
                                  §  
STATE OF TEXAS       §

**RECITALS**

The Burnet County region of Central Texas is home to the golden-cheeked warbler listed as endangered under the federal Endangered Species Act of 1973, as amended, 16 U.S.C. § 1531, et seq. ("**ESA**").

In order to obtain authorization for potential impacts to listed golden-cheeked warbler in connection with development, construction and operation of the Whitewater Springs subdivision in Burnet County, Texas, White Water Springs, LLC, ("**WWS**") applied for a permit under section 10(a)(1)(B) of the ESA. The United States Fish and Wildlife Service ("**FWS**") issued Permit Number TE-110131-0 (the "**Permit**"), to WWS on October 12, 2006.

In exchange for committing to the implementation of various conservation measures described in the Permit and the associated White Water Springs Environmental Assessment/Habitat Conservation Plan (the "**HCP**"), WWS is authorized to assign certain Permit inclusion rights (hereinafter referred to as "**Inclusion Rights**") to purchasers of land within the area covered by the Permit ("**Participants**"). Through inclusion in the HCP, Participants are considered covered by the Permit to the extent and as provided in the HCP.

**AGREEMENT**

This White Water Springs Habitat Conservation Plan Agreement of Inclusion (this "**Agreement**") is entered into this 15 day of June, 2007, by and between Edwin S. Metzler and Linda Metzler (hereinafter referred to as "**Participant**") and WWS.

For and in consideration of the mutual covenants and considerations set forth herein, WWS and Participant hereby agree with respect to the assignment of certain Inclusion Rights as provided by the Permit and the HCP as follows:

**ARTICLE I.**  
**PARTICIPANT'S PROPERTY**

Participant is the owner of a tract or tracts of land consisting of approximately 1.83 acres situated within the property covered by the Permit in Burnet County, Texas, and more fully described and depicted in **Attachment A** (the "**Participant's Property**").

**ARTICLE II.**  
**ASSIGNMENT OF INCLUSION RIGHTS**

WWS hereby assigns unto Participant certain Inclusion Rights for the exclusive use and benefit of the Participant's Property. These Inclusion Rights are assigned to the Participant for their use and benefit only with respect to the Participant's Property and in connection with the issuance of the Permit for the HCP pursuant to section 10(a)(1)(B) of the Endangered Species Act, 16 U.S.C. § 1531, et seq. The term "***Inclusion Rights***" shall mean and refer to any and all authorizations, benefits, rights, credits, offsets, or other privileges or entitlements that may be utilized by Participants in conjunction with the HCP and the Permit relating to the existence, dedication, conservation, maintenance, or preservation of the golden-cheeked warbler covered by the Permit.

This assignment is expressly made subject to the provisions and requirements of the Endangered Species Act of 1973, as amended, 16 U.S.C. § 1531, et seq.; Title 50 of the Code of Federal Regulations, including Parts 13, 17, and 21; the Permit; and the HCP as provided by the Permit and including the conditions and requirements provided in the HCP and the HCP.

**ARTICLE III.**  
**CONSIDERATION**

For and in consideration of its assignment of these Inclusion Rights, the Participant has paid to WWS \$10.00 and given other good and valuable consideration.

**ARTICLE IV.**  
**ADDITIONAL RESPONSIBILITIES OF PARTICIPANT;**  
**SPECIAL TERMS**

For and in consideration of the assignment of Inclusion Rights, the Participant agrees that it shall comply with the terms and conditions of this Agreement and those special conditions approved by the FWS and set forth in **Attachment B**, attached hereto and incorporated herein for all purposes. Participant shall provide any assistance to WWS necessary or appropriate to allow WWS to comply with the Permit, such as providing information relative to the Property that may be required for any reports to the FWS.

**ARTICLE V.**  
**BREACH BY PARTICIPANT**

In the event of any breach by Participant, and Participant fails to cure such breach or mitigate the effects thereof within ten (10) calendar days after delivery of notice of such breach to Participant, WWS shall have the right (but not the obligation) to pursue any and all remedies that may be available to WWS at law, in equity, or both, which remedies shall, in the case of a material breach of this Agreement by Participant, include the right to terminate this Agreement.

**ARTICLE VI.**  
**OBLIGATIONS OF WWS**

WWS shall comply with the terms of the Permit and take such actions as are necessary to maintain the effectiveness of the Permit.

Notwithstanding anything to the contrary herein, WWS shall not be responsible to, nor liable to, Participant for any damages resulting from any rules, regulations, action(s), or inaction(s) by the U.S. Department of the Interior and/or FWS promulgated, vacated, modified, or taken that would in any way impair or render ineffective, either partially or in its entirety, any or all benefits to the Participant's Property that accompany the assignment of the Inclusion Rights herein, except to the extent such damages result from a breach by WWS in connection with its obligations under the Permit.

**ARTICLE VII.**  
**RIGHTS OF FWS**

Nothing in this Agreement limits the authority of the FWS to seek penalties or otherwise fulfill its responsibilities under the Endangered Species Act. Moreover, nothing in this Agreement limits or diminishes the legal obligations and responsibilities of the FWS as an agency of the Federal government.

**ARTICLE VIII.**  
**COVENANTS RUN WITH THE LAND; RECORDATION**

Participant agrees that promises and covenants provided herein, including, without limitation, the Special Conditions attached hereto, as amended from time to time, are intended to be binding upon any heirs, successors, and assigns in interest to the Participant's Property. Upon any transfer of any ownership rights to all or part of the Participant's Property, this Agreement shall not terminate as to the particular property transferred, but rather shall continue in full force and effect and shall be fully binding upon any heirs, successors, and assigns in interest to the Participant's Property, or any portion thereof. Upon execution of this Agreement by WWS and Participant, this Agreement shall be acknowledged and recorded in the Real Property Records of Burnet County, Texas.

**ARTICLE IX.**  
**VENUE AND CHOICE OF LAW**

The obligations and undertakings of each of the parties to this Agreement shall be performable in Burnet County, Texas, and this Agreement shall be governed by and construed in accordance with the laws of the State of Texas.

**ARTICLE X.  
MODIFICATION**

Any oral representations or modifications concerning this Agreement shall be of no force or effect, excepting subsequent amendments or modifications from time to time in writing signed by the parties hereto, or their respective successors and assigns. Any such written amendments or modifications to this Agreement, including any amendment to the Special Conditions, shall amend the terms and conditions of this Agreement, including the terms and conditions of the Special Conditions herein, as set forth in any such amendment.

**ARTICLE XI.  
SUCCESSORS AND ASSIGNS**

This Agreement, as amended from time to time, shall be binding upon and inure to the benefit of the successors and assigns of the respective parties hereto, where authorized pursuant to this Agreement.

**ARTICLE XII.  
NOTICE**

Any notice to be given hereunder by either party to the other shall be in writing and may be effected by personal delivery in writing, or registered or certified mail, return receipt requested, when mailed to the proper party, at the following addresses:

**PARTICIPANT:**

Edwin S. Metzler and Linda Metzler  
35 Big Rock Ranch Rd.  
Fredricksburg, TX 78624

**WWS:**

White Water Springs, LLC  
c/o Merchants Mortgage and Trust  
Corp., LLC  
Attn: Gary D. Levine, Manager  
7400 E. Crestline Circle,  
Suite 250  
Greenwood Village, CO 80111  
FAX: 303-773-2501

with a copy to:

Jerry Webberman  
Jackson Walker L.L.P.  
100 Congress Avenue, Suite 1100  
Austin, Texas 78701  
FAX: 512-391-2155

Each party may change the address for notice to it by giving notice of such change in accordance with the provisions of this paragraph.

(002.00016762.7)

**ARTICLE XIII.**  
**TERM OF AGREEMENT**

This Agreement shall terminate upon the expiration or termination of the Permit, whichever is sooner.

**ARTICLE XIV.**  
**HEADINGS**

The headings at the beginning of the various provisions of this Agreement have been included only in order to make it easier to locate the subject covered by each provision and are not to be used in construing this Agreement.

**ARTICLE XV.**  
**NUMBER AND GENDER DEFINED**

As used in this Agreement, whenever the context so indicates, the masculine, feminine, or neutral gender and the singular or plural number shall each be deemed to include the others.

**ARTICLE XVI.**  
**MULTIPLE COUNTERPARTS**

This Agreement may be executed in multiple counterparts, each of which shall constitute a duplicate original hereof, but all of which together shall constitute one and the same instrument.

**ARTICLE XVII.**  
**TIME OF ESSENCE**

Time is of the essence in this Agreement.

[SIGNATURES ON FOLLOWING PAGE]

EXECUTED AS OF THE LAST DAY SET FORTH BELOW.

PARTICIPANT:

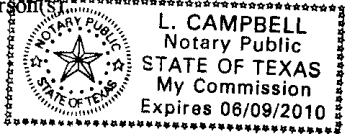
Elmer Merkel  
Print Name: ELMER J. MERKEL  
Title: \_\_\_\_\_  
Entity Name: \_\_\_\_\_  
Date: \_\_\_\_\_

Carol M. Merkel  
Print Name: Carol M. Merkel  
Title: \_\_\_\_\_  
Entity Name: \_\_\_\_\_  
Date: 5-24-07

ACKNOWLEDGEMENTS

STATE OF TEXAS §  
COUNTY OF BURNET §

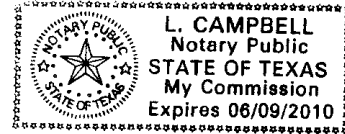
This instrument was acknowledged before me on this 24<sup>th</sup> day of MAY, 2007  
by Elmer Merkel, of \_\_\_\_\_, on behalf of said  
person(s).



L. Campbell  
NOTARY PUBLIC

STATE OF TEXAS §  
COUNTY OF BURNET §

This instrument was acknowledged before me on this 24<sup>th</sup> day of MAY, 2007  
by Carol Merkel, of \_\_\_\_\_, on behalf of said  
person(s).



L. Campbell  
NOTARY PUBLIC



**Attachment A to this Agreement of Inclusion  
(Legal Description of Participant's Property and Map)**

Lot No. 18, WHITEWATER SPRINGS SECTION ONE, as recorded in Cabinet 2, Slides  
108B-111A, Plat Records of Burnet County, Texas.



**Attachment B to this Agreement of Inclusion  
(Special Conditions)**

The following Special Conditions are taken from permit # TE-110131-0. For a full and accurate understanding of the meaning of these Special Conditions, reference should be made to the applicable provisions of the HCP and the figures included therewith.

1. Participant shall not initiate clearing of vegetation in or within 300 feet (91 meters) of GCWA habitat from March 1 through August 1 of any year unless breeding season surveys performed by a FWS -permitted biologist indicate that no GCWAs are present within 300 feet of the desired activity.

2. Native vegetation will be preserved in a corridor along Cow Creek and in drainage easements located between sets of lots.

3. Building, utility infrastructure, and street construction may be conducted year round as long as the construction activities promptly follow the clearing activities and/or were initiated before March 1, thereby being a continuous activity.

4. Clearing and construction by Participant within proposed development areas shall be consistent with the current practices recommended by the Texas Forest Service to prevent the spread of oak wilt.

5. The use of deer feeders and bird feeders other than thistle seed or hummingbird feeders on the Participant's Property is prohibited.

6. Dumping of material (including pool water), pesticides, herbicides, fertilizers, clearing of vegetation, or anything else that is not consistent with management for the golden-cheeked warbler is prohibited within the Preserve.

7. Upon locating a dead, injured, or sick GCWA or any other endangered or threatened species, the Permittee is required to contact the FWS's Law Enforcement Office in Austin, Texas, at (512) 490-0948 or in San Antonio, Texas, at (210) 681-8419 for care and disposition instructions. Extreme care should be taken in handling sick or injured individuals to ensure effective and proper treatment. Care should also be taken in handling dead specimens to preserve biological materials in the best possible state for analysis of cause of death. In conjunction with the care of sick or injured endangered/threatened species, or preservation of biological materials from a dead specimen, Participant and its contractor/subcontractor have the responsibility to ensure that evidence intrinsic to the specimen is not unnecessarily disturbed.

8. Acceptance of this Agreement serves as evidence that Participant understands and agrees to abide by the terms of the permit and all applicable Sections of Title 50 Code of Federal Regulations Parts 13 and 17, pertinent to issued permits.

9. Conditions of the Permit shall be binding on, and for the benefit of, the Permittee and its respective successors and assigns.

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FILED

2007 JUN 29 PM 3:40

JANET PARKER  
COUNTY CLERK  
BURNET COUNTY, TEXAS

STATE OF TEXAS  
COUNTY OF BURNET

I hereby certify that this instrument was FILED on this date  
and at the time stamped hereon by me and was duly  
RECORDED in the OFFICIAL PUBLIC RECORDS  
OF BURNET COUNTY, TEXAS.



Janet Parker  
County Clerk  
Burnet County, Texas  
By *[Signature]*  
DEPUTY

SCANNED