
January 10, 2023

U. S. Army Corps of Engineers
ATTN: CESWF-RE-M
P. O. Box 17300
Fort Worth, Texas 76102

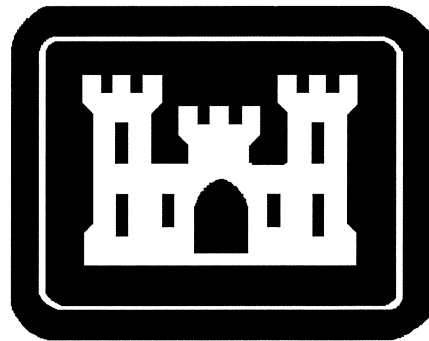
Honorable Rick Bailey
Johnson County Commissioner
Johnson County Precinct 1
3400 West FM 1434
Cleburne, Texas 76033

Dear Mr. Bailey:

Enclosed is a fully executed copy of lease No. DACW63-1-22-0676 for your records. Instrument No. DACW63-1-17-0615 expired on April 12, 2022, and has been terminated. If you have any questions related to your rights or responsibilities as provided for in the lease, please contact me at 817-886-1330 or Clareece.N.Listhrop@usace.army.mil.

Clareece Listhrop
Clareece Listhrop
Realty Specialist
Fort Worth District

Enclosure



LEASE NO. DACW63-1-22-0676
Replaces No. DACW63-1-17-0615

DEPARTMENT OF THE ARMY
LEASE TO NON-STATE GOVERNMENTAL AGENCIES
FOR PUBLIC PARK AND RECREATIONAL PURPOSES
HAMM CREEK PARK
WHITNEY LAKE
JOHNSON COUNTY, TEXAS

THIS LEASE, made on behalf of the United States, between the **SECRETARY OF THE ARMY**, hereinafter referred to as the Secretary, and Johnson County, a political subdivision in the State of Texas, hereinafter referred to as the Lessee.

WITNESSETH:

That the Secretary, by authority of Title 16, United States Code, Section 460d, and for the consideration hereinafter set forth, hereby leases to the Lessee, the property identified in **EXHIBITS A- MAP**, attached hereto and made a part hereof, hereinafter referred to as the Premises, for public park and recreational purposes.

THIS LEASE is granted subject to the following conditions:

1. TERM

Said Premises are hereby leased for a term of **twenty-five (25)** years, beginning **OCTOBER 1, 2022** and ending **SEPTEMBER 30, 2047**.

2. CONSIDERATION

The consideration for this lease is the operation and maintenance of the Premises by the Lessee for the benefit of the United States and the general public in accordance with the conditions herein set forth.

3. NOTICES

All notices and correspondence to be given pursuant to this lease shall be addressed, if to the Lessee, to Hamm Creek Park c/o Johnson County Precinct 1, 3400 FM 1434, Cleburne, Texas 76033 and if to the United States, to the Real Estate Contracting Officer, Attention: Chief, Real Estate Division, ATTN: CESWF-RE-M, Post Office Box 17300, Fort Worth, Texas 76102-0300; or as may from time to time

otherwise be directed by the parties. Notice shall be deemed to have been duly given if and when enclosed in a properly sealed envelope addressed as aforesaid, and deposited, postage prepaid, in a post office regularly maintained by the United States Postal Service.

4. AUTHORIZED REPRESENTATIVES

Except as otherwise specifically provided, any reference herein to "Secretary", "Real Estate Contracting Officer ", or "said officer" shall include their duly authorized representatives. Any reference to "Lessee" shall include any sub-lessees, assignees, transferees, successors and their duly authorized representatives.

5. DEVELOPMENT PLANS

The Lessee shall be guided by an annual Plan of Operation and Maintenance in furtherance of the Lessee's implementing Plan of Recreation Development and Management (Development Plan) attached as **EXHIBIT B** which shows the facilities and services necessary to meet the current and potential public demand and the management and development activities to be undertaken by the Lessee and any sub-lessees. No later than December 15th of each year, the Lessee will submit the annual Plan to be mutually agreed on between the Lessee and the Real Estate Contracting Officer. Such annual Plan shall include but is not limited to the following:

- a. Plans for management, maintenance and development activities to be undertaken by the Lessee and any sub-lessees.
- b. Report of the management, maintenance and development accomplishments of the Lessee for the preceding year.
- c. Report on any significant modification of policies or procedures which are planned for the following year as well as those implemented in the preceding year.
- d. Minor modifications to the Development Plan. Major modifications are to be accomplished by amendment to the Plan before proceeding to implement any changes in the development or management of the leased Premises.
- e. Budget of the Lessee for carrying out all activities for the upcoming year.
- f. Personnel to be used in the management of the leased Premises.
- g. Annual certification that all water and sanitary systems on the Premises have been inspected and comply with Federal, state, and local standards. Lessee will also provide a statement of compliance with the Rehabilitations Act and the Americans with Disabilities Act, as required in the condition on **NON-DISCRIMINATION**, noting any deficiencies and providing a schedule for correction.

b. As of the date of this lease, an inventory and condition report of all personal property and improvements of the United States included in this lease shall be made by the Real Estate Contracting Officer and the Lessee to reflect the condition of said property and improvements. A copy of said report is attached hereto as **Exhibit C** and made a part hereof. Upon the expiration, revocation or termination of this lease, another inventory and condition report shall be similarly prepared. This report shall constitute the basis for settlement for property damaged or destroyed. Any such property must be either replaced or restored to the condition required by the condition on **PROTECTION OF PROPERTY**.

9. FACILITIES AND SERVICES

The Lessee shall provide the facilities and services as agreed upon in the Development Plan referred to in the Condition on **DEVELOPMENT PLANS** either directly or through subleases or concession agreements that have been reviewed and accepted by the Real Estate Contracting Officer. These subleases or agreements shall state: (1) that they are granted subject to the provisions of this lease; and (2) that the agreement will not be effective until the third-party activities have been approved by the Real Estate Contracting Officer. The Lessee will not allow any third-party activities with a rental to the Lessee or prices to the public which would give the third party an undue economic advantage or circumvent the intent of the Development Plan. The rates and prices charged by the Lessee or its sub-lessees or concessionaires shall be reasonable and comparable to rates charged for similar goods and services by others in the area. The use of sublessees and concessionaires will not relieve the Lessee from the primary responsibility for ensuring compliance with all of the terms and conditions of this lease.

10. TRANSFERS, ASSIGNMENTS, SUBLEASES

a. Without prior written approval of the Real Estate Contracting Officer, the Lessee shall neither transfer nor assign this lease nor sublet the Premises or any part thereof, nor grant any interest, privilege, or license whatsoever in connection with this lease.

b. The Lessee will not sponsor or participate in timeshare ownership of any structures, facilities, accommodations, or personal property on the Premises. The Lessee will not subdivide nor develop the Premises into private residential development.

11. FEES

Fees may be charged by the Lessee for the entrance to or use of the Premises or any facilities, however, no user fees may be charged by the Lessee or its sub-lessees for use of facilities developed in whole or part with federal funds if a user charge by the Corps of Engineers for the facility would be prohibited under law.

12. ACCOUNTS, RECORDS AND RECEIPTS

All monies received by the Lessee from operations conducted on the Premises, including, but not limited to, entrance, admission and user fees and rental or other consideration received from its concessionaires, may be utilized by the Lessee for the administration, maintenance, operation and development of the Premises. Beginning 5 years from the date of this lease and continuing at 5-year intervals, any such monies not so utilized or programmed for utilization within a reasonable time shall be paid to the Real Estate Contracting Officer. The Lessee shall establish and maintain accurate records and accounts and provide an annual statement of receipts and expenditures to the Real Estate Contracting Officer. Annual or weekly entrance fees not collected on the Project, which also are honored at other recreational areas operated by the Lessee, are excluded from this requirement. The Real Estate Contracting Officer shall have the right to perform audits or to require the Lessee to audit the records and accounts of the Lessee, third party concessionaires and sub-lessees, in accordance with auditing standards and procedures promulgated by the American Institute of Certified Public Accountants or by the state, and furnish the Real Estate Contracting Officer with the results of such an audit.

13. PROTECTION OF PROPERTY

The Lessee shall be responsible for any damage that may be caused to property of the United States by the activities of the Lessee under this lease and shall exercise due diligence in the protection of all property located on the Premises against fire or damage from any and all other causes. Any property of the United States damaged or destroyed by the Lessee incident to the exercise of the privileges herein granted shall be promptly repaired or replaced by the Lessee to the satisfaction of the Real Estate Contracting Officer, or at the election of the Real Estate Contracting Officer, reimbursement may be made therefore by the Lessee in an amount necessary to restore or replace the property to a condition satisfactory to the Real Estate Contracting Officer.

14. RIGHT TO ENTER AND FLOOD

The right is reserved to the United States, its officers, agents, and employees to enter upon the Premises at any time and for any purpose necessary or convenient in connection with Government purposes; to make inspections; to remove timber or other material, except property of the Lessee; to flood the Premises; to manipulate the level of the lake or pool in any manner whatsoever; and/or to make any other use of the land as may be necessary in connection with project purposes, and the Lessee shall have no claim for damages on account thereof against the United States or any officer, agent, or employee thereof.

15. LIGHTS, SIGNALS AND NAVIGATION

There shall be no unreasonable interference with navigation by the exercise of the privileges granted by this lease. If the display of lights and signals on any work hereby authorized is not otherwise provided for by law, such lights and signals as may be prescribed by the Coast Guard or by the Real Estate Contracting Officer shall be installed and maintained by and at the expense of the Lessee.

16. INSURANCE

a. At the commencement of this lease, the Lessee, unless self-insured, and its sub-lessees and concessionaires at the commencement of operating under the terms of this lease as third parties, shall obtain from a reputable insurance company or companies contracts of liability insurance. The insurance shall provide an amount not less than that which is prudent, reasonable and consistent with sound business practices or a minimum Combined Single Limit of \$250,000, whichever is greater, for any number of persons or claims arising from any one incident with respect to bodily injuries or death resulting therefrom, property damage, or both, suffered or alleged to have been suffered by any person or persons, resulting from the operations of the Lessee, sub-lessees and concessionaires under the terms of this lease. The Lessee shall require its insurance company to furnish to the Real Estate Contracting Officer a copy of the policy or policies, or, if acceptable to the Real Estate Contracting Officer, certificates of insurance evidencing the purchase of such insurance. The Real Estate Contracting Officer shall have the right to review and revise the amount of minimum liability insurance required.

b. The insurance policy or policies shall specifically provide protection appropriate for the types of facilities, services and products involved; and shall provide that the Real Estate Contracting Officer be given thirty (30) days notice of any cancellation or change in such insurance.

c. In the event the Lessee is self-insured, the Lessee shall certify such self-insurance in writing in the minimum amount specified above to the Real Estate Contracting Officer. The Lessee's insurance status shall not eliminate the requirement for its sub-lessees and concessionaires to have insurance from a reputable insurance carrier as set out above.

d. The Real Estate Contracting Officer may require closure of any or all of the Premises during any period for which the Lessee and/or its sub-lessees and concessionaires do not have the required insurance coverage.

17. RESTORATION

On or before the expiration of this lease or its termination by the Lessee, the Lessee shall vacate the Premises, remove the property of the Lessee, and restore the

Premises to a condition satisfactory to the Real Estate Contracting Officer. If, however, this lease is revoked, the Lessee shall vacate the Premises, remove said property therefrom, and restore the Premises to the aforesaid condition within such time as the Real Estate Contracting Officer may designate. In either event, if the Lessee shall fail or neglect to remove said property and restore the Premises, then, at the option of the Real Estate Contracting Officer, said property shall either become the property of the United States without compensation therefor, or the Real Estate Contracting Officer may cause the property to be removed and no claim for damages against the United States or its officers or agents shall be created by or made on account of such removal and restoration work. The Lessee shall also pay the United States on demand any sum which may be expended by the United States after the expiration, revocation, or termination of this lease in restoring the Premises.

18. NON-DISCRIMINATION

a. The Lessee shall not discriminate against any person or persons or exclude them from participation in the Lessee's operations, programs or activities conducted on the leased Premises, because of race, color, religion, sex, age, handicap, or national origin. The Lessee will comply with the Americans with Disabilities Act and attendant Americans with Disabilities Act Accessibility Guidelines (ADAAG) published by the Architectural And Transportation Barriers Compliance Board.

b. The Lessee, by acceptance of this lease, is receiving a type of Federal assistance and, therefore, hereby gives assurance that it will comply with the provisions of Title VI of the Civil Rights Act of 1964, as amended (42 U.S.C. § 2000d); the Age Discrimination Act of 1975 (42 U.S.C. § 6102); the Rehabilitation Act of 1973, as amended (29 U.S.C. § 794); and all requirements imposed by or pursuant to the Directive of the Department of Defense (32 CFR Part 300) issued as Department of Defense Directives 5500.11 and 1020.1, and Army Regulation 600-7. This assurance shall be binding on the Lessee, its agents, successors, transferees, sublessees and assignees.

19. SUBJECT TO EASEMENTS

This lease is subject to all existing easements, easements subsequently granted, and established access routes for roadways and utilities located, or to be located, on the Premises, provided that the proposed grant of any new easement or route will be coordinated with the Lessee, and easements will not be granted which will, in the opinion of the Real Estate Contracting Officer, interfere with developments, present or proposed, by the Lessee. The Lessee will not close any established access routes without written permission of the Real Estate Contracting Officer.

20. SUBJECT TO MINERAL INTERESTS

This lease is subject to all outstanding mineral interests. As to federally owned mineral interests, it is understood that they may be included in present or future mineral leases issued by the Bureau of Land Management (BLM) which has responsibility for mineral development on federal lands. The Secretary will provide lease stipulations to BLM for inclusion in said mineral leases that are designed to protect the Premises from activities that would interfere with the Lessee's operations or would be contrary to local law.

21. COMPLIANCE, CLOSURE, REVOCATION AND RELINQUISHMENT

a. The Lessee and/or any sub-lessees or licensees are charged at all times with full knowledge of all the limitations and requirements of this lease, and the necessity for correction of deficiencies, and with compliance with reasonable requests by the Real Estate Contracting Officer. This lease may be revoked in the event that the Lessee violates any of the terms and conditions and continues and persists in such non-compliance, or fails to obtain correction of deficiencies by sub-lessees or licensees. The Lessee will be notified of any non-compliance, which notice shall be in writing or shall be confirmed in writing, giving a period of time in which to correct the non-compliance. Failure to satisfactorily correct any substantial or persistent non-compliance within the specified time is grounds for closure of all or part of the Premises, temporary suspension of operation, or revocation of the lease, after notice in writing of such intent. Future requests by the Lessee to extend the lease, expand the Premises, modify authorized activities, or assign the lease shall take into consideration the Lessee's past performance and compliance with the lease terms.

b. This lease may be relinquished by the Lessee by giving one (1) year prior written notice to the Real Estate Contracting Officer in the manner prescribed in the Condition on **NOTICES**.

22. HEALTH AND SAFETY

a. The Lessee shall keep the Premises in good order and in a clean, sanitary, and safe condition and shall have the primary responsibility for ensuring that any sub-lessees and concessionaires operate and maintain the Premises in such a manner.

b. In addition to the rights of revocation for non-compliance, the Real Estate Contracting Officer, upon discovery of any hazardous conditions on the Premises that presents an immediate threat to health and/or danger to life or property, will so notify the Lessee and will require that the affected part or all of the Premises be closed to the public until such condition is corrected and the danger to the public eliminated. If the condition is not corrected within the time specified, the Real Estate Contracting Officer will have the option to: (1) correct the hazardous conditions and collect the cost of repairs from the Lessee; or, (2) revoke the lease. The Lessee and its assignees or sub-

lessees shall have no claim for damages against the United States, or any officer, agent, or employee thereof on account of action taken pursuant to this condition.

23. PUBLIC USE

No attempt shall be made by the Lessee, or any of its sub-lessees or concessionaires, to forbid the full use by the public of the Premises and of the water areas of the project, subject, however, to the authority and responsibility of the Lessee to manage the Premises and provide safety and security to the visiting public.

24. PROHIBITED USES

a. The Lessee shall not permit gambling on the Premises or install or operate, or permit to be installed or operated thereon, any device which is illegal, or use the Premises or permit them to be used for any illegal business or purpose. There shall not be conducted on or permitted upon the Premises any activity which would constitute a nuisance.

b. As an exception, some games of chance, such as raffles, games and sporting events, may be conducted by nonprofit organizations under special use permits issued in conjunction with special events, if permissible by state and local law. Any request to conduct such activities must be submitted in writing to the Real Estate Contracting Officer.

c. In accordance with state and local laws and regulations, the Lessee may sell, store, or dispense, or permit the sale, storage, or dispensing of beer, malt beverages, light wines or other intoxicating beverages on the Premises in those facilities where such service is customarily found. Bar facilities will only be permitted if offered in connection with other approved activities. Advertising of such beverages outside of buildings is not permitted. Carry out package sales of hard liquor is prohibited.

25. NATURAL RESOURCES

The Lessee shall cut no timber, conduct no mining operations, remove no sand, gravel, or kindred substances from the ground, commit no waste of any kind, nor in any manner substantially change the contour or condition of the Premises, except as may be authorized under and pursuant to the Development Plan described in the Condition on **DEVELOPMENT PLANS** herein. The Lessee may salvage fallen or dead timber; however, no commercial use shall be made of such timber. Except for timber salvaged by the Lessee when in the way of construction of improvements or other facilities, all sales of forest products will be conducted by the United States and the proceeds therefrom shall not be available to the Lessee under the provisions of this lease.

26. DISPUTES CLAUSE

a. Except as provided in the Contract Disputes Act of 1978 (41 U.S.C. 1701-1709) (the Act), all disputes arising under or relating to this lease shall be resolved under this clause and the provisions of the Act.

b. "Claim", as used in this clause, means a written demand or written assertion by the Lessee seeking, as a matter of right, the payment of money in a sum certain, the adjustment of interpretation of lease terms, or other relief arising under or relating to this lease. A claim arising under this lease, unlike a claim relating to this lease, is a claim that can be resolved under a lease clause that provides for the relief sought by the Lessee. However, a written demand or written assertion by the Lessee seeking the payment of money exceeding \$100,000 is not a claim under the Act until certified as required by subparagraph c.(2) below. The routine request for rental payments that is not in dispute is not a claim under the Act. The request may be converted to a claim under the Act, by this clause, if it is disputed either as a liability or amount or is not acted upon in a reasonable time.

c.

(1) A Claim by the Lessee shall be made in writing and submitted to the Real Estate Contracting Officer for a written decision. A claim by the Government against the Lessee shall be subject to a written decision by the Real Estate Contracting Officer.

(2) For Lessee claims exceeding \$100,000, the Lessee shall submit with the claim a certification that—

(i) the claim is made in good faith; and

(ii) supporting data are accurate and complete to the best of the Lessee's knowledge and belief;

(iii) and the amount requested accurately reflects the lease adjustment for which the Lessee believes the Government is liable.

(3) If the Lessee is an individual, the certificate shall be executed by that individual. If the Lessee is not an individual, the certification shall be executed by –

(i) a senior company official in charge of the Lessee's location involved; or

(ii) an officer or general partner of the Lessee having overall responsibility of the conduct of the Lessee's affairs.

d. For Lessee claims of \$100,000 or less, the Real Estate Contracting Officer must, if requested in writing by the Lessee, render a decision within 60 days of the request. For Lessee-certified claims over \$100,000, the Real Estate Contracting Officer

must, within 60 days, decide the claim or notify the Lessee of the date by which the decision will be made.

e. The Real Estate Contracting Officer's decision shall be final unless the Lessee appeals or files a suit as provided in the Act.

f. At the time a claim by the Lessee is submitted to the Real Estate Contracting Officer or a claim by the Government is presented to the Lessee, the parties, by mutual consent, may agree to use alternative means of dispute resolution. When using alternate dispute resolution procedures, any claim, regardless of amount, shall be accompanied by the certificate described in paragraph c.(2) of this clause, and executed in accordance with paragraph c.(3) of this clause.

g. The Government shall pay interest or the amount found due and unpaid by the Government from (1) the date the Real Estate Contracting Officer received the claim (properly certified if required), or (2) the date payment otherwise would be due, if that date is later, until the date of payment. Simple interest on claims shall be paid at the rate, fixed by the Secretary of the Treasury as provided in the Act, which is applicable to the period during which the Real Estate Contracting Officer receives the claim and then at the rate applicable for each 6-month period as fixed by the Treasury Secretary during the pendency of the claim. Rental amounts due to the Government by the Lessee will have interest and penalties as set out in the condition on **CONSIDERATION**.

h. The Lessee shall proceed diligently with the performance of the lease, pending final resolution of any request for relief, claim, or action arising under the lease, and comply with any decision of the Real Estate Contracting Officer.

27. ENVIRONMENTAL PROTECTION

a. Within the limits of their respective legal powers, the parties to this lease shall protect the project against pollution of its air, ground, and water. The Lessee shall comply promptly with any laws, regulations, conditions or instructions affecting the activity hereby authorized, if and when issued by the Environmental Protection Agency, or any Federal, state, interstate or local governmental agency having jurisdiction to abate or prevent pollution. The disposal of any toxic or hazardous materials within the leased area is specifically prohibited. Such regulations, conditions, or instructions in effect or prescribed by the Environmental Protection Agency, or any Federal, state, interstate or local governmental agency, are hereby made a condition of this lease. The Lessee shall require all sanitation facilities on boats moored at the Lessee's facilities, including rental boats, to be sealed against any discharge into the lake. Services for waste disposal, including sewage pump-out of watercraft, shall be provided by the Lessee as appropriate. The Lessee shall not discharge waste or effluent from the Premises in such a manner that the discharge will contaminate streams or other bodies of water or otherwise become a public nuisance.

b. The Lessee will use all reasonable means available to protect the environment and natural resources, and where damage nonetheless occurs from activities of the Lessee, the Lessee shall be liable to restore the damaged resources.

c. The Lessee must obtain approval in writing from said officer before any pesticides or herbicides are applied to the Premises.

28. PHASE I ENVIRONMENTAL SITE ASSESSMENT

A Phase I Environmental Site Assessment (ESA), documenting the known history of the property with regard to the storage, release or disposal of hazardous substances thereon, is attached hereto and made a part hereof as **EXHIBIT D**. Upon expiration, revocation or relinquishment of this lease another ESA shall be prepared which will document the environmental condition of the property at that time. A comparison of the two assessments will assist the said officer in determining any environmental restoration requirements. Any such requirements will be completed by the Lessee in accordance with the condition on **RESTORATION**.

29. HISTORIC PRESERVATION

The Lessee shall not remove or disturb, or cause or permit to be removed or disturbed, any historical, archeological, architectural or other cultural artifacts, relics, remains or objects of antiquity. In the event such items are discovered on the Premises, the Lessee shall immediately notify said officer and protect the site and the material from further disturbance until said officer gives clearance to proceed.

30. SOIL AND WATER CONSERVATION

The Lessee shall maintain in a manner satisfactory to the Real Estate Contracting Officer, all soil and water conservation structures that may be in existence upon said Premises at the beginning of, or that may be constructed by the Lessee during the term of, this lease, and the Lessee shall take appropriate measures to prevent or control soil erosion within the Premises. Any soil erosion occurring outside the Premises resulting from the activities of the Lessee shall be corrected by the Lessee as directed by the Real Estate Contracting Officer.

31. TRANSIENT USE

a. Camping, including transient trailers or recreational vehicles, at one or more campsites for a period longer than thirty (30) days during any sixty (60) consecutive day period is prohibited. The Lessee will maintain a ledger and reservation system for the use of any such campsites, said system to be acceptable to the Real Estate Contracting Officer.

b. Occupying any lands, buildings, vessels, or other facilities within the Premises for the purpose of maintaining a full- or part-time residence is prohibited, except for employees, residing on the Premises, for security purposes, if authorized by the Real Estate Contracting Officer.

32. COVENANT AGAINST CONTINGENT FEES

The Lessee warrants that no person or selling agency has been employed or retained to solicit or secure this lease upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or established commercial or selling agencies maintained by the Lessee for the purpose of securing business. For breach or violation of this warranty, the United States shall have the right to annul this lease without liability or, in its discretion, to require the Lessee to pay, in addition to the lease rental or consideration, the full amount of such commission, percentage, brokerage, or contingent fee.

33. OFFICIALS NOT TO BENEFIT

No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this lease or to any benefits to arise therefrom. However nothing herein contained shall be construed to extend to any incorporated company if the lease be for the general benefit of such corporation or company.

34. MODIFICATIONS

This lease contains the entire agreement between the parties hereto, and no modification of this agreement, or waiver, or consent hereunder shall be valid unless the same be in writing, signed by the parties to be bound or by a duly authorized representative and this provision shall apply to this condition as well as all other conditions of this lease.

35. DISCLAIMER

This lease is effective only insofar as the rights of the United States in the Premises are concerned; and the Lessee shall obtain such permission as may be required on account of any other existing rights. It is understood that the granting of this lease does not preclude the necessity of obtaining a Department of the Army permit for activities which involve the discharge of dredge or fill material or the placement of fixed structures in the waters of the United States, pursuant to the provisions of Section 10 of the Rivers and Harbors Act of 3 March 1899 (33 USC Section 403), and Section 404 of the Clean Waters Act (33 USC Section 1344), Section 408 (33 U.S.C. § 408) or any other permit or license which may be required by Federal, state, interstate or local laws in connection with the use of the Premises.

36. DETERMINATION REGARDING EXECUTIVE ORDER 13658

Any reference in this section to “prime contractor” or “contractor” shall mean the Lessee and any reference to “contract” shall refer to the Lease.

The parties expressly stipulate this contract is subject to Executive Order 13658, the regulations issued by the Secretary of labor in 29 CFR Part 10 pursuant to the Executive Order, and the following provisions.

a. Minimum Wages.

(1) Each worker (as defined in 29 CFR 10.2) engaged in the performance of this contract by the prime contractor or any subcontractor, regardless of any contractual relationship which may be alleged to exist between the contractor and worker, shall be paid not less than the applicable minimum wage under Executive Order 13658.

(2) The minimum wage required to be paid to each worker performing work on or in connection with this contract between January 1, 2015 and December 31, 2015 shall be \$10.10 per hour. The minimum wage shall be adjusted each time the Secretary of Labor’s annual determination of the applicable minimum wage under section 2(a)(ii) of Executive Order 13658 results in a higher minimum wage. Adjustments to the Executive Order minimum wage under section 2(a)(ii) of Executive Order 13658 will be effective for all workers subject to the Executive Orders beginning January 1 of the following year. If appropriate, the contracting officer, or other agency official overseeing this contract shall ensure the contractor is compensated only for the increase in labor costs resulting from the annual inflation increases in the Executive Order 13658 minimum wage beginning on January 1, 2016. The Secretary of Labor will publish annual determinations in the Federal Register no later than 90 days before such new wage is to take effect. The Secretary will also publish the applicable minimum wage on www.wdol.gov (or any successor Web site). The applicable published minimum wage is incorporated by reference into this contract.

(3) The contractor shall pay unconditionally to each worker all wages due free and clear and without subsequent deduction (except as otherwise provided by 29 CFR 10.23), rebate, or kickback on any account. Such payments shall be made no later than one pay period following the end of the regular pay period in which such wages were earned or accrued. A pay period under this Executive Order may not be of any duration longer than semi-monthly.

(4) The prime contractor and any upper-tier subcontractor shall be responsible for the compliance by any subcontractor or lower-tier subcontractor with the Executive Order minimum wage requirements. In the event of any violation of the minimum wage obligation of this clause, the contractor and any subcontractor(s) responsible therefore shall be liable for the unpaid wages.

(5) If the commensurate wage rate paid to a worker on a covered contract whose wages are calculated pursuant to a special certificate issued under 29 U.S.C. 214(c), whether hourly or piece rate, is less than the Executive Order minimum wage, the contractor must pay the Executive Order minimum wage rate to achieve compliance with the Order. If the commensurate wage due under the certificate is greater than the Executive Order minimum wage, the contractor must pay the 14(c) worker the greater commensurate wage.

b. Withholding. The agency head shall upon its own action or upon written request of an authorized representative of the Department of Labor withhold or cause to be withheld from the prime contractor under this or any other Federal contract with the same prime contractor, so much of the accrued payments or advances as may be considered necessary to pay workers the full amount of wages required by Executive Order 13658.

c. Contract Suspension/Contract Termination/Contractor Debarment. In the event of a failure to pay any worker all or part of the wages due under Executive Order 13658 or 29 CFR Part 10, or a failure to comply with any other term or condition of Executive Order 13658 or 29 CFR Part 10, the contracting agency may on its own action or after authorization or by direction of the Department of Labor and written notification to the contractor, take action to cause suspension of any further payment, advance or guarantee of funds until such violations have ceased. Additionally, any failure to comply with the requirements of this clause may be grounds for termination of the right to proceed with the contract work. In such event, the Government may enter into other contracts or arrangements for completion of the work, charging the contractor in default with any additional cost. A breach of the contract clause may be grounds for debarment as a contractor and subcontractor as provided in 29 CFR 10.52.

d. The contractor may not discharge any part of its minimum wage obligation under Executive Order 13658 by furnishing fringe benefits or, with respect to workers whose wages are governed by the Service Contract Act, the cash equivalent thereof.

e. Nothing herein shall relieve the contractor of any obligation under Federal, State or local law, or under contract, for the payment of a higher wage to any worker, nor shall a lower prevailing wage under any such Federal, State, or local law, or under contract, entitle a contractor to pay less than \$10.10 (or the minimum wage as established each January thereafter) to any worker.

f. Payroll Records.

(1) The contractor shall make and maintain for three years of records containing the information specified in paragraphs f(1)(i) through (vi) of this section for each worker and shall make the records available for inspection and transcription by authorized representative of the Wage and Hour Division of the U.S. Department of Labor:

- (i) Name, address, and social security number.
- (ii) The worker's occupation(s) or classification(s).
- (iii) The rate or rates of wages paid.
- (iv) The number of daily and weekly hours worked by each worker.
- (v) Any deductions made; and
- (vi) Total wages paid.

(2) The contractor shall also make available a copy of the contract, as applicable, for inspection or transcription by authorized representatives of the Wage and Hour Division.

(3) Failure to make and maintain or to make available such records for inspection and transcription shall be a violation of 29 CFR Part 10 and this contract, and in the cause of failure to produce such records, the contracting officer, upon direction of an authorized representative of the Department of Labor, or under its own action, shall take such action as may be necessary to cause suspension of any further payment or advance of funds until such time as the violations are discontinued.

(4) The contractor shall permit authorized representative of the Wage and Hour Division to conduct investigation, including interviewing workers at the worksite during normal working hours.

(5) Nothing in this clause limits or otherwise modifies the contractor's payroll and recordkeeping obligations, if any, under the Davis-Bacon Act, as amended, and its implementing regulation; the Service Contract Act, as amended, and its implementing regulations; the Fair Labor Standards Act, as amended, and its implementing regulations; or any other applicable law.

g. The contractor (as defined in 29 CFR 10.2) shall insert this clause in all of its covered subcontracts and shall require its subcontractors to include this clause in any covered lower-tier subcontracts. The prime contractor and any upper-tier subcontractor shall be responsible for the compliance by any subcontractor or lower-tier subcontractor with this contract clause.

h. Certification of Eligibility.

(1) By entering into this contract, the contractor (an officials thereof) certifies that neither it (nor he or she) nor any person or firm who has an interest in the contractor's firm is a person or firm ineligible to be awarded Government contracts by

virtue of the sanctions imposed pursuant to section 5 of the Service Contract Act, section 3(a) of the Davis-Bacon Act, or 29 CFR 5.12(a)(1).

(2) No part of this contract shall be subcontracted to any person or firm whose name appears on the list of persons or firms ineligible to receive Federal contracts.

(3) The penalty for making false statements is prescribed in the U.S. Criminal Code, 18 U.S.C. 1001.

i. Tipped employees. In paying wages to a tipped employee as defined in section 3(t) of the Fair Labor Standards Act, 29 U.S.C 203(t), the contractor may take a partial credit against the wage payment obligation (tip credit) to the extent permitted under section 3(a) of Executive Order 13658. In order to take such a tip credit, the employee must receive an amount of tips at least equal to the amount of the credit taken; where the tipped employee does not receive sufficient tips to equal the amount of the tip credit the contractor must increase the cash wage paid for the workweek so that the amount of cash wage paid and the tips received by the employee equal the applicable minimum wage under Executive Order 13658. To utilize this proviso:

(1) The employer must inform the tipped employee in advance of the use of the tip credit;

(2) The employer must inform the tipped employee of the amount of cash wage that will be paid and the additional amount by which the employee's wages will be considered increased on account of the tip credit;

(3) The employees must be allowed to retain all tips (individually or through a pooling arrangement and regardless of whether the employer elects to take a credit for tips received); and

(4) The employer must be able to show by records that the tipped employee received at least the applicable Executive Order minimum wage through the combination of direct wages and tip credit.

j. Anti-retaliation. It shall be unlawful for any person to discharge or in any other manner discriminate against any worker because such worker has filed any complaint or instituted or caused to be instituted any proceeding under or related to Executive Order 13658 or 29 CFR Part 10, or has testified or is about to testify in any such proceeding.

k. Disputes concerning labor standards. Disputes related to the application of Executive Order 13658 to this contract shall not be subject to the general disputes clause of the contract. Such disputes shall be resolved in accordance with the procedures of the Department of Labor set forth in 29 CFR Part 10. Disputes within the meaning of this contract clause include disputes between the contractor (or any of its

subcontractors) and the contracting agency, the U.S. Department of Labor, or the workers or their representatives.

l. Notice. The contractor must notify all workers performing work on or in connection with a covered contract of the applicable minimum wage rate under the Executive Order. With respect to service employees on contracts covered by the Service Contract Act and laborers and mechanics on contracts covered by the Davis-Bacon Act, the contractor may meet this requirement by posting, in a prominent and accessible place at the worksite, the applicable wage determination under those statutes. With respect to workers performing work on or in connection with a covered contract whose wages are governed by the FLSA, the contractor must post a notice provided by the Department of Labor in a prominent and accessible place at the worksite so it may be readily seen by workers. Contractors that customarily post notices to workers electronically may post the notice electronically provided such electronic posting is displayed prominently on any Web site that is maintained by the contractor, whether external or internal, and customarily used for notices to workers about terms and conditions of employment.

m. If a duly authorized representative of the United States discovers or determines, whether before or subsequent to executing this contract, that an erroneous determination regarding the applicability of Executive Order 13658 was made, contractor, to the extent permitted by law, agrees to indemnify and hold harmless the United States, its officers, agents, and employees, for and from any and all liabilities, losses, claims, expenses, suits, fines, penalties, judgments, demands or actions, costs, fees, and damages directly or indirectly arising out of, caused by, related to, resulting from or in any way predicated upon, in whole or in part, the erroneous Executive Order 13658 determination. This includes contractor releasing any claim or entitlement it would otherwise have to an equitable adjustment to the contract and indemnifying and holding harmless the United States from the claims of subcontractors and contractor employees.

37. DETERMINATION REGARDING EXECUTIVE ORDER 13706

Any reference in this section to "prime contractor" or "contractor" shall mean the Lessee and any reference to "contract" shall refer to the Lease.

a. Executive Order 13706. This contract is subject to Executive Order 13706, the regulations issued by the Secretary of Labor in 29 CFR part 13 pursuant to the Executive Order, and the following provisions.

b. Paid Sick Leave.

(1) The contractor shall permit each employee (as defined in 29 CFR 13.2) engaged in the performance of this contract by the prime contractor or any subcontractor, regardless of any contractual relationship that may be alleged to exist

between the contractor and employee, to earn not less than 1 hour of paid sick leave for every 30 hours worked. The contractor shall additionally allow accrual and use of paid sick leave as required by Executive Order 13706 and 29 CFR part 13. The contractor shall in particular comply with the accrual, use, and other requirements set forth in 29 CFR 13.5 and 13.6, which are incorporated by reference in this contract.

(2) The contractor shall provide paid sick leave to all employees when due free and clear and without subsequent deduction (except as otherwise provided by 29 CFR 13.24), rebate, or kickback on any account. The contractor shall provide pay and benefits for paid sick leave used no later than one pay period following the end of the regular pay period in which the paid sick leave was taken.

(3) The prime contractor and any upper-tier subcontractor shall be responsible for the compliance by any subcontractor or lower-tier subcontractor with the requirements of Executive Order 13706, 29 CFR part 13, and this clause.

c. Withholding. The contracting officer shall, upon its own action or upon written request of an authorized representative of the Department of Labor, withhold or cause to be withheld from the prime contractor under this or any other Federal contract with the same prime contractor, so much of the accrued payments or advances as may be considered necessary to pay employees the full amount owed to compensate for any violation of the requirements of Executive Order 13706, 29 CFR part 13, or this clause, including any and/or benefits denied or lost be reason of the violation; other actual monetary losses sustained as a direct result of the violation, and liquidated damages.

d. Contract Suspension/Contract Termination/Contractor Debarment. In the event of a failure to comply with Executive Order 13706, 29 CFR part 13, or this clause, the contracting agency may on its own action or after authorization or by direction of the Department of Labor and written notification to the contractor, take action to cause suspension of any further payment, advance, or guarantee of funds until such violations have ceased. Additionally, any failure to comply with the requirements of this clause may be grounds for termination of the right to proceed with the contract work. In such event, the Government may enter into other contracts or arrangements for completion of the work, charging the contractor in default with any additional cost. A breach of the contract clause may be grounds for debarment as a contractor and subcontractor as provided in 29 CFR 13.52.

e. The paid sick leave required by Executive Order 13706, 29 CFR part 13, and this clause is in addition to a contractor's obligations under the Service Contract Act and Davis-Bacon Act, and a contractor may not receive credit toward its prevailing wages or fringe benefit obligations under those Acts for any paid sick leave provided in satisfaction of the requirements of Executive Order 13706 and 29 CFR part 13.

f. Nothing in Executive Order 13706 or 29 CFR part 13 shall excuse noncompliance with or supersede any applicable Federal or State law, any applicable

law or municipal ordinance, or a collective bargaining agreement requiring greater paid sick leave or leave rights than those established under Executive Order 13706 and 29 CFR part 13.

g. Recordkeeping.

(1) Any contractor performing work subject to Executive Order 13706 and 29 CFR part 13 must make and maintain, for no less than three (3) years from the completion of the work on the contract, records containing the information specified in paragraphs (i) through (xv) of this section for each employee and shall make them available for inspection, copying, and transcription by authorized representatives of the Wage and Hour Division of the U.S. Department of Labor:

- (i) Name, address, and Social Security number of each employee;
- (ii) The employee's occupation(s) or classifications(s);
- (iii) The rate or rates of wages paid (including all pay and benefits provided);
- (iv) The number of daily and weekly hours worked;
- (v) Any deductions made;
- (vi) The total wages paid (including all pay and benefits provided) each pay period;
- (vii) A copy of notifications to employees of the amount of paid sick leave the employee has accrued, as required under 29 CFR 13.5(a)(2);
- (viii) A copy of employees' requests to use paid sick leave, if in writing, or, if not in writing, any other records reflecting such employee requests;
- (ix) Dates and amounts of paid sick leave taken by employees (unless a contractor's paid time off policy satisfies the requirements of Executive Order 13706 and 29 CFR part 13 as described in §13.5(f)(5), leave must be designated in records as paid sick leave pursuant to Executive Order 13706);
- (x) A copy of any written responses to employees' requests to use paid sick leave, including explanations for any denials of such requests, as required under 29 CFR 13.5(d)(3);
- (xi) Any records reflecting the certification and documentation a contractor may require an employee to provide under 29 CFR 13.5(e), including copies of any certification or documentation provided by an employee;

(xii) Any other records showing any tracking of or calculations related to an employee's accrual or use of paid sick leave;

(xiii) The relevant covered contract;

(xiv) The regular pay and benefits provided to an employee for each use of paid sick leave; and

(xv) Any financial payment made for unused paid sick leave upon a separation from employment intended, pursuant to 29 CFR 13.5(b)(5), to relieve a contractor from the obligation to reinstate such paid sick leave as otherwise required by 29 CFR 13.5(b)(4).

(2)(i) If a contractor wishes to distinguish between an employee's covered and non-covered work, the contractor must keep records or other proof reflecting such distinctions. Only if the contractor adequately segregates the employee's time will time spent on non-covered work be excluded from hours worked counted toward the accrual of paid sick leave. Similarly, only if that contractor adequately segregates the employee's time may a contractor properly refuse an employee's request to use paid sick leave on the ground that the employee was scheduled to perform non-covered work during the time they asked to use paid sick leave.

(ii) If a contractor estimates covered hours worked by an employee who performs work in connection with covered contracts pursuant to 29 CFR 13.5(a)(i) or (iii), the contractor must keep records or other proof of the verifiable information on which such estimates are reasonably based. Only if the contractor relies on an estimate that is reasonable and based on verifiable information will an employee's time spent in connection with non-covered work be excluded from hours worked counted toward the accrual of paid sick leave. If a contractor estimates the amount of time an employee spends performing in connection with covered contracts, the contractor must permit the employee to use their paid sick leave during any work time for the contractor.

(3) In the event a contractor is not obligated by the Service Contract Act, the Davis-Bacon Act, or the Fair Labor Standards Act to keep records of an employee's hours worked, such as because the employee is exempt from the FLSA's minimum wage and overtime requirement, and the contractor chooses to use the assumption permitted by 29 CFR 13.5(a)(1)(iii), the contractor is excused from the requirement in paragraph (1)(d) of this section to keep records of the employee's number of daily and weekly hours worked.

(4)(i) Records relating to medical histories or domestic violence, sexual assault, or stalking, created for purposes of Executive Order 13706, whether of an employee or an employee's child, parent, spouse, domestic partner, or other individual related by blood or affinity whose close association with the employee is the equivalent

of a family relationship, shall be maintained as confidential records in separate files/records from the usual personnel files.

(ii) If the confidentiality requirements of the Genetic Information Nondiscrimination Act of 2008 (GINA), section 503 of the Rehabilitation Act of 1973, and/or the Americans with Disabilities Act (ADA) apply to records or documents created to comply with the recordkeeping requirements in this contract clause, the records and documents must also be maintained in compliance with the confidentiality requirement of the GINA, section 503 of the Rehabilitation Act of 1973, and/or ADA as described in 29 CFR 1635.9, 41 CFR 60-741.23(d), and 29 CFR 1630.14(c)(1), respectively.

(iii) The contractor shall not disclose any documentation used to verify the need to use 3 or more consecutive days of paid sick leave for the purposes listed in 29 CFR 13.5(c)(1)(iv) (as described in 29 CFR 13.5(e)(1)(ii)) and shall maintain confidentiality about any domestic abuse, sexual assault, or stalking, unless the employee consents or when disclosure is required by law.

(5) The contractor shall permit authorized representative of the Wage and Hour Division to conduct interviews with employees at the worksite during normal working hours.

(6) Nothing in this contract clause limits or otherwise modifies the contractor's recordkeeping obligations, if any, under the Davis-Bacon Act, the Service Contract Act, the Fair Labor Standards Act, the Family and Medical Leave Act, Executive Order 13658, their respective implementing regulations, or any other applicable law.

h. The contractor (as defined in 29 CFR 13.2) shall insert this clause in all of its covered subcontracts and shall require its subcontractors to include this clause in any covered lower-tier subcontracts.

i. Certification of Eligibility.

(1) By entering into this contract, the contractor (an officials thereof) certifies that neither it (nor he or she) nor any person of firm who has an interest in the contractor's firm is a person of firm ineligible to be awarded Government contracts by virtue of the sanctions imposed pursuant to section 5 of the Service Contract Act, section 3(a) of the Davis-Bacon Act, or 29 CFR 5.12(a)(1).

(2) No part of this contract shall be subcontracted to any person or firm whose name appears on the list of persons or firms ineligible to received Federal contracts currently maintained on the System for Award Management Web site, <http://www.SAM.gov>.

(3) The penalty for making false statements is prescribed in the U.S. Criminal Code, 18 U.S.C. 1001.

j. Interference/Discrimination.

(1) A contractor may not in any manner interfere with an employee's accrual or use of paid sick leave as required by Executive Order 13706 or 29 CFR part 13. Interference includes, but is not limited to, miscalculating the amount of paid sick leave an employee has accrued, denying or unreasonably delaying a response to a proper request to use paid sick leave, discouraging an employee from using paid sick leave, reducing an employee's accrued paid sick leave by more than the amount of such leave used, transferring an employee to work on non-covered contracts to prevent the accrual or use of paid sick leave, disclosing confidential information contained in certification of other documentation provided to verify the need to use paid sick leave, or making the use of paid sick leave contingent on the employee's finding a replacement worker or the fulfillment of the contractor's operational needs.

(2) A contractor may not discharge or in any other manner discriminate against any employee for:

(i) Using, or attempting to use, paid sick leave as provided for under Executive Order 13706 and 29 CFR part 13;

(ii) Filing any complaint, initiating any proceeding, or otherwise asserting any right or claim under Executive Order 13706 and 29 CFR part 13;

(iii) Cooperating in any investigation or testifying in any proceeding under Executive Order 13706 and 29 CFR part 13;

(iv) Informing any other person about his or her rights under Executive Order 13706 and 29 CFR part 13.

k. Waiver. Employees cannot waive, nor may contractors induce employees to waive, their rights under Executive Order 13706, 29 CFR part 13, or this clause.

l. Notice. The contractor must notify all employees performing work on or in connection with a covered contract of the paid sick leave requirements of Executive Order 13706, 29 CFR part 13, and this clause by posting a notice provided by the Department of Labor in a prominent and accessible place at the worksite so it may be readily seen by employees. Contractors that customarily post notices to employees electronically may post the notice electronically, provided such electronic posting is displayed prominently on any Web site that is maintained by the contractor, whether external or internal, and customarily used for notices to employees about terms and conditions of employment.

m. Disputes concerning labor standards. Disputes related to the application of Executive Order 13706 to this contract shall not be subject to the general disputes clause of the contract. Such disputes shall be resolved in accordance with the procedures of the Department of Labor set forth in 29 CFR part 13. Disputes within the meaning of this contract clause include disputes between the contractor (or any of its subcontractors) and the contracting agency, the U.S. Department of Labor, or the employees or their representatives.

38. ADDED CONDITIONS

a. **BACKGROUND INVESTIGATIONS:** Prior to the assignment of any sublease, the Lessee shall be required to perform background investigations of any prospective sublessees and submit the findings to the U.S. Army Corps of Engineers for approval. Persons who have been convicted of a violent crime, sexual crime, arson, crime with a weapon, sale or intent to distribute illegal drugs, are an organized crime figure, or an undocumented noncitizen may not be approved as a sublessee. The required background investigations (below) must be conducted and the associated results provided with any sublease agreement approval request. A short description of the required background investigations is below:

(1) **Nationwide Background Checks.** There are many private companies that conduct pre-employment criminal background checks for employers. This type of check requires the full name of the applicant and residential address. In some locations a signed release is also required from the applicant.

(2) **U.S. Citizen Verification.** The Department of Homeland Security has a program that employers can participate in, at no cost, which allows them to conduct a social security verification and immigration check on an individual. To register for the program, contact the Department of Homeland Security Systematic Alien Verification for Entitlements Program (SAVE) at <https://www.uscis.gov/save> or call 1-888-464-4210.

b. Time limitations for camping, including but not limited to transient trailers or recreational vehicles, shall follow current policy guidance.

c. Leased area was developed by the U.S. Army Corps of Engineers contingent upon several constraints, including a U.S. Fish and Wildlife Service Biological Opinion (BO) concerning compliance with the Endangered Species Act. The BO assessed the impacts of the proposed park development on the existence and habitat of the golden cheeked warbler. The BO itemized certain terms and conditions, as well as reasonable and prudent measures to which the Corps must adhere to in Hamm Creek Park. Because of these requirements, Lessee will continue not to undertake or perform any construction, new development, vegetative alteration, or maintenance not specifically and previously approved by the Corps. A copy of the Biological Opinion, as published in

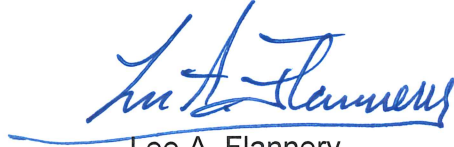
LEASE NO. DACW63-1-22-0676

the Corps Environmental Assessment and Finding of No Significant Impact, is attached hereto as **Exhibit E** and made a part of this lease.

THE REMAINDER OF THIS PAGE IS LEFT INTENTIONALLY BLANK

LEASE NO. DACW63-1-22-0676

IN WITNESS WHEREOF, I have hereunto set my hand by authority of the Secretary of the Army this 15 day of December, 2022.



Lee A. Flannery
Deputy Chief, Real Estate Division
Real Estate Contracting Officer

THIS LEASE is also executed by the Lessee this 28 day of November, 2022.

Johnson County



Name

County Judge

Title

CERTIFICATE OF AUTHORITY

I, Becky Ivey (Name), certify that I am the County Clerk (Title) of **Johnson County**, named as the Grantee herein; and that Roger Harmon (signator of outgrant), who signed the foregoing instrument on behalf of the Grantee, was then County Judge (title of signator of outgrant) of **Johnson County**. I further certify that the said officer was acting within the scope of powers delegated to this governing body of the Grantee in executing said instrument.

Johnson County

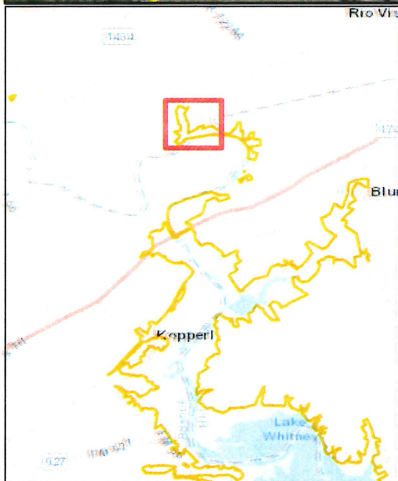
11-28-22
Date

Becky Ivey
Authorized Representative
County Clerk
Title



AFFIX COMPANY SEAL

NOTE: This form certifies that the person signing the attached instrument has the authority to do so. The signature of the Secretary/Attesting Officer and the individual signing the attached instrument cannot be the same person.



Author: Joshua G. Brown
 Natural Resource Specialist
 Whitney & Aquilla Lakes



Date: 03/06/2017

-  Roads
-  Hamm Creek Park
-  Fee
-  Easement

Hamm Creek Park Lease - Johnson County

Hamm Creek Park
 Johnson County



The U.S. Army Corps of Engineers has depicted this spatial data as a representation of the various geographic information gathered from multiple sources. This data should be viewed only as a representation of the data and should not be used for any other purpose. No guarantee is made by the U.S. Army Corps of Engineers regarding the accuracy or completeness of the data or their suitability for a particular use.

HAMM CREEK PARK
M & O PLAN

Year #1-2:

1. Check and replace faded and/or damaged signs as needed
2. Elevate and improve sections of entrance road to the office/gate house to mitigate flood waters
3. Restripe parking areas

Year#2-5

1. Repair and paint weather-damaged table coverings, fire rings, restrooms
2. Maintain signs, gates, roads, boat ramp and dock, dead trees, debris
3. Continue maintenance and repairs of grounds and facilities as needed

JOINT SURVEY AND INSPECTION OF CONDITION OF GOVERNMENT LEASED PROPERTY

(ER 405-1-12)

INSTRUCTIONS

1. If considered necessary, use a separate ENG Form 3143a for each room surveyed.
2. Additional sheets may be attached for physical characteristics of land and buildings: exterior

and interior details of buildings; service facilities; inventory of machinery and equipment; miscellaneous items and general remarks not otherwise covered in section II of this form or on ENG Form 3143a.

ADDED INSTRUCTIONS *(Overprint, if desired)*

Johnson County
Hamm Creek Park

SECTION I - PROPERTY DATA AND CONDITION AGREEMENT

DATE OF SURVEY 2017-02-23	LEASE NO. DACW63-1-17-0615	LEASE COMMENCEMENT DATE 2017-04-13	DATE POSSESSION TAKEN
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ACTIVITY Park and Recreation Lease	TOTAL LEASED BUILDING AREA <i>(Square feet)</i>
---------------------------------------	---


DESCRIPTION AND LOCATION OF PROPERTY 58062 - Entrance Sign (Ham Creek Boat Ramp) 65792 - Entrance Station Road 65812 - Gatehouse 26643 - Paved Roads (0.323 mile) 28014 - Parking Area (17,305 Sq Ft) 28015 - Parking Area (5,844 Sq Ft) 27987 - Boat Ramp 70455 - Water Booster Station Pump Building 70318 - Waterline 27990 - Well House 27989 - Toilet Vault 76235 - Equestrian Stalls 69615 - Restroom #1 Equestrian Area 69575 - Restroom #4 Camping Area 64432 - Pavilion #2 East Parking Lot 69595 - Restroom #3 Camping Area 69576 - Restroom #2 Day Use Area 67993 - Pavilion #1 58722 - Boat Ramp 64431 - Parking Lot for Pavilion #1	65972 - Guard Post and Cable 42802 - Vault Restroom 64351 - Day Use Roads 64352 - Restroom 58042 - Area Access Gate Entrance/Exit 58702 - Parking Lots 58703 - Entrance Road 67994 - Pavilion #2 27988 - Toilet Vault 58011 - Boat Ramp #2 70156 - Paved Roads 72055 - Parking for Equestrian Area 43864 - Playground #1 43865 - Playground #2 104642 - Fence Chain Link(6'X210') at Water Booster Station 76939 - Navigational Lighting 76798 - Helipad - Rotary Wing Runway, Paved 76938 - Wind Direction Indicator
--	--

****ALL PROPERTY IS MAINTAINED IN GOOD WORKING CONDITION.**

JOINT AGREEMENT ON THE CONDITION OF THE PROPERTY

We, the undersigned, jointly made a survey and inspection of the condition of the property mentioned above. We agree that as of the date of survey, the condition of the property is as described herein.

THE CONDITION OF THE EXTERIOR OF THE PROPERTY IS INDICATED ON THE REVERSE SIDE OF THIS FORM. ROOM CONDITIONS ARE INDICATED ON ATTACHED ENG FORM 3143A.	NO. OF ATTACHMENTS
--	--------------------

NAME AND SIGNATURE OF <input type="checkbox"/> OWNER <input checked="" type="checkbox"/> LESSOR/LESSEE <input type="checkbox"/> AGENT  Roger Harmon County Judge	NAME, TITLE, AND SIGNATURE OF U.S. GOVERNMENT REPRESENTATIVE Abraham Phillips Whitney Lake Manager PHILLIPS.ABRAHA M.B.1286442990 <small>Digitally signed by PHILLIPS.ABRAHAM.B.1286442990 DN: cn=US, o=U.S. Government, ou=DoD, oil=PKI, ou=USA, cn=PHILLIPS.ABRAHAM.B.1286442990 Date: 2017.11.22 12:53:24 -06'00'</small>
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ADDRESS 2 Main St. Cleburne, TX 76033	ORGANIZATION CESWF-OD-WH
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SECTION II - EXTERIOR CONDITION OF THE PROPERTY *(Attach sheet for added items.)*

ROOF, EAVES, DOWNSPOUTS, ETC.

WALLS

WINDOWS AND DOORS *(Include storm windows and doors)*

FENCING

LAWN, SHRUBBERY, TREES AND PERENNIALS

WALKS AND DRIVEWAYS

GARAGE AND OUT BUILDINGS

ENTRANCES, ELEVATORS AND PATIOS

SEWAGE

REMARKS *(Include questioned or disputed items, repairs to be made, etc. Attach sheet, if necessary.)*

(Reverse of ENG FORM 3143)

PHASE I ENVIRONMENTAL SITE ASSESSMENT (ESA)

1. REAL PROPERTY TRANSACTION: The U.S. Army Corps of Engineers proposes to issue Lease No. DACW63-1-22-0676, which will allow Johnson County continued use of approximately 191 acres of land for a public park and recreational purposes, Whitney Lake, Texas. The new lease will become effective on October 1, 2022 and expires on September 30, 2047.

a. A COMPREHENSIVE RECORDS SEARCH was conducted which included a review of the following areas:

- 1) Real Estate Division files;
- 2) Real Estate Division maps;
- 3) Whitney Master plan;
- 4) Operations Division files;
- 5) Environmental Review Guide for Operations (ERGO).

b. INTERVIEWS WERE CONDUCTED with the following: N/A

c. A SITE INVESTIGATION was performed on 28 March 2022, Ms. Jennifer Linde, Operations Division, Mr. Bryan Berry, Real Estate Division, Ms. Jennifer Sleezer, and Ms. Shauna Sadoski, Three Rivers Region, which consisted of a visual inspection of the area.

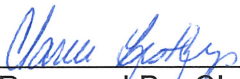
2. STATEMENT OF FINDINGS

a. COMPREHENSIVE RECORDS SEARCH SUMMARY

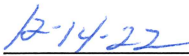
A complete search of the District files which pertain to the proposed lease area was made as stated in 1.a. above. The records search revealed no other evidence of any hazardous substance being stored, released or disposed of on the property involved. The operating plans and historical records also showed no other evidence of any activity which would have contaminated the property with hazardous substances.

b. SITE INVESTIGATION SUMMARY

A site investigation of the proposed lease area was made as stated in 1.c. above. This visual inspection revealed no unusual odors, stained soils, stressed vegetation, suspicious seepage, manmade land features, unnatural surface features or other evidence that would indicate the presence of hazardous wastes. Based on this inspection it was determined no hazardous substance has been stored, released or disposed of on the property involved. Project personnel have no other knowledge of past activities which might have created a hazardous situation.



Prepared By: CLAREECE LISTHROP
Realty Specialist
Management and Disposal Branch



Date

Approved By: LEE A. FLANNERY
Deputy Chief, Real Estate Division
Real Estate Contracting Officer

Date



United States Department of the Interior

FISH AND WILDLIFE SERVICE

Ecological Services
WmSystems Center Building
711 Stadium Drive, Suite 252
Arlington, Texas 76011

21420-2006-F-0055

February 14, 2006

Ronald L. Bruggman
Department of the Army
Fort Worth District, Corps of Engineers
Whitney/Aquilla Lakes
285 CR 3602
Clifton, Texas 76634

Dear Mr. Bruggman:

This document transmits the U.S. Fish and Wildlife Service's (Service) biological opinion based on our review of the U.S. Army Corps of Engineers (USACE) proposed development of Ham Creek Park for future recreational use and its effects on the federally listed golden-cheeked warbler (*Dendroica chrysoparia*) (GCWA). The park encompasses approximately 191 acres and is located in Johnson County, Texas on the northern portion of Whitney Lake.

This biological opinion has been prepared in accordance with section 7 of the Endangered Species Act (Act) of 1973, as amended (16 U.S.C. 1531 et seq.) The biological opinion is based on the Biological Assessment included with your letter initiating consultation, information provided by USACE staff, and other sources of information. A complete administrative record of this consultation is on file at the Service's Arlington, Texas, Ecological Services Field Office.

Consultation History

August 4, 2005: Initial meeting and site visit hosted by members of Whitney Lake USACE staff to discuss proposed development of Ham Creek Park for future recreational use. Whitney Lake USACE personnel provided information on the presence of listed species on the park property. Service representatives identified habitat indicators found on the property and discussed the consultation process, including timelines and biological assessment content, provided a copy of the Consultation Handbook, and provided guidelines on minimization measures.

- August 12, 2005: E-mailed additional information to Whitney Lake USACE staff regarding assembly of a Biological Assessment (BA) and invited them to share any draft copies as they became available.
- September 9, 2005: Received telephone request from Ernest Eberly of the Whitney Lake USACE for additional information regarding the BA. Mr. Eberly was advised that the Service would be responsible for evaluating the estimated effects of the action to listed species and that the USACE should provide an account of all planned actions, project timeframes, and details of park usage after completion.
- November 7, 2005: Arlington Field Office received written request from USACE initiating formal consultation on the proposed action. Written acknowledgement of the initiation package was sent to USACE on November 21, 2005.
- December 21, 2005: Second site visit conducted at Ham Creek Park property. Service personnel and Ronald Bruggman and Sam Masters of Whitney Lake USACE clarified the dimensions of GCWA habitat within and beyond USACE property boundaries potentially impacted by the proposed project. Current account of project plans also disclosed and minimization measures discussed.

BIOLOGICAL OPINION

I. Description of Proposed Action

The USACE in conjunction with Johnson County proposes to develop Ham Creek Park at Whitney Lake for future recreational opportunities. The property proposed for development is approximately 191 acres and is located in Johnson County on the northern portion of Whitney Lake. The park is divided east and west by Ham Creek and its riparian corridor and is further designated into sections A, B, and C, each differing in topography, vegetation, and proposed development.

General: Park development would include facilities for day-users and campers. Existing facilities and roadways would be utilized to the maximum extent possible. Park development would be contained within the footprint of existing park facilities as much as possible. Trails may extend outside the described footprint. Figure 1 details the proposed park development.

Barbed-wire fence and/or pipe fence would be installed along the perimeter of the entire park to prevent ATV access. Vehicle barriers in the form of pipe fence would be placed along roadways and parking areas to restrict vehicle access to road surfaces only. Security lights would be installed at the boat ramp, restrooms, and gatehouse complex for security and safety purposes. Refuse receptacles would be utilized throughout the recreation area.

It is anticipated that initial construction would occur between March and September 2006. Construction would occur in phases over several years as funding is received. Phase I includes renovating existing roadways and constructing a boat ramp with parking lot and courtesy dock. Phase II would involve the renovation of an existing restroom, construction of a new gatehouse entrance complex, new restroom and installing utility lines. Campsites, group shelters, and trails would be constructed in Phase III.

The action area for the proposed project includes the anticipated extent of the direct and indirect effects. The Service has determined the action area to include the proposed 191 acre property and an approximately 51.4 acre area immediately adjacent to the property for reasons that are discussed in the "Effects of the Action" section of this opinion.

Park Sections:

Section A (56 acres) is approximately 4200 feet in length and begins at FM 916, extending to confluence with the Brazos River and varying in width from 153-1,080 feet (Figure 1). The canyon slope along this section is vegetated with mature juniper/oak woodlands. Ashe juniper (*Juniperus ashei*) and plateau live oak (*Quercus fusiformis*) are the dominant tree species in the overstory. Other species occurring less frequently include Texas red oak (*Quercus buckleyi*), white shin oak (*Quercus sinuata* var. *breviloba*), American sycamore (*Platanus occidentalis*), netleaf hackberry (*Celtis reticulata*), cedar elm (*Ulmus crassifolia*), and Texas ash (*Fraxinus texensis*). The canopy cover of the wooded upland areas ranges from 75-90%.

A gate entrance complex would be installed along the access road. The specific location is not yet determined, but would either be placed in Section A or B, with Section A being the preferred alternative (Ronald Bruggman, pers. comm. 2005). The complex would include one-way entrance and exit lanes, gatehouse, parking lot, pull-off lanes, and two gate attendant pads. The complex would be comprised of approximately 4 acres. Section A is a long wooded corridor paralleling the east side of the creek bed, which would serve as the main access road for the park.

Section B (58 acres) is comprised of relatively flat, grassy lowlands situated along the flood plain of the Brazos River that would serve as the camping and day use area. The area is generally vegetated with herbaceous species including Johnsongrass (*Sorghum halapense*), silver bluestem (*Bothriochloa laguroides*), giant ragweed (*Ambrosia trifida*), Texas bluebonnet (*Lupinus texensis*) and goldenrod (*Solidago* sp.) Low shrubs, Virginia creeper (*Parthenocissus quinquefolia*), wild grape and green briar vines, along with small clusters of young elm, hackberry, and oak trees, are scattered throughout. A mature juniper-oak complex occupies the fence line along northwestern boundary of this section, while a mix of mature pecan, oak and elm trees line the river bank on the southern edge.

This area would include most of the park facilities. A two-lane boat ramp with a parking lot containing approximately 50 parking spaces to accommodate vehicles with boat trailers would be constructed adjacent to Ham Creek just upstream of the lake. A courtesy dock for boat loading and unloading would also be placed adjacent to the boat ramp. An existing waterborne restroom with showers may be renovated and an additional waterborne restroom would be constructed. It is anticipated that the existing county water system may provide water services. Thirty-five campsites with electricity and water hook-ups would be constructed along the upper portion of the section and twenty picnic sites would be placed near the lakeshore. Additional amenities would include a playground, dump station, group shelters, a hiking/equestrian trail and other various amenities. Trails in Section B may extend beyond the park footprint.

Section C (46 acres) is located on the west side of Ham Creek and appears to contain no suitable GCWA habitat (Anjna O'Connor, pers. comm. 2005). Ashe juniper and plateau live oak are the dominant tree species in the overstory, although few mature ashe junipers are present. Other species occurring less frequently include Texas red oak, white shin oak, American sycamore, netleaf hackberry, cedar elm, and Texas ash. The canopy cover of the wooded upland areas ranges from 75-90%. The area is generally vegetated with herbaceous species including Johnsongrass, silver bluestem, giant ragweed, Texas bluebonnet, and goldenrod. Low shrubs, Virginia creeper, wild grape and green briar vines, along with small clusters of young elm, hackberry, and oak trees are scattered throughout the interior.

The trail in Section C would be for hiking-only and would have an unimproved surface 8 feet wide. Like the other hiking and equestrian trails, it would be routed to minimize woody vegetation removal and no trees would be removed. A shelter may be placed adjacent to the road near the middle of Section C. The existing boat ramp within the section would be closed. The road below the hiking trail and group shelter may be closed preventing vehicle access.

Minimization Measures: The proposed action also includes several minimization measures in the form of preservation of existing GCWA habitat on the property and efforts to minimize the impacts of human disturbance before and after the park becomes operational. In order to protect and minimize impacts to existing habitat while allowing for the development of the park, perpetual No-Build Zones would be established to preserve GCWA habitat. No-Build Zones would include portions of Sections A and C (Figure 2) after completion of (and outside of) the proposed roadway widening, entrance complex, group shelters, perimeter fencing, and trails. The remaining portion of Section A not included within the No-Build Zone is privately owned, but USACE retains an easement.

Vehicle barriers would also be placed along all roadways and parking areas to prevent vehicular access within GCWA habitat and barbed-wire and/or pipe fence installed along park perimeter to prevent illegal ATV access. Construction would only be permitted outside of the No-Build Zones. Previously disturbed areas would be utilized whenever possible when establishing specific locations for facilities. Whenever possible, facilities would be located as far away as possible from GCWA habitat.

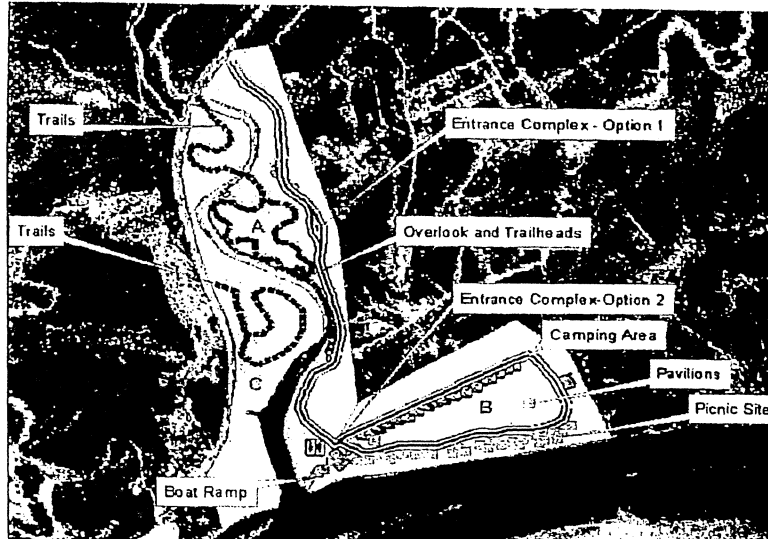


Figure 1. Proposed Park Development

Existing roadway surfaces are 20 feet wide and are mostly gravel overgrown with grass and forbs, with the exception of asphalt roadways located on the west side of the park. The tree canopy overhanging the road surface would be trimmed to a height of 15 feet. All roadway surfaces would remain 20 feet wide. Gravel roadway surfaces would be improved to an asphalt surface and existing asphalt surfaces would have new asphalt surfacing applied. Road shoulders and adjacent drainage ditches would be widened. Existing shoulders and drainage ditches vary up to 5 feet from the edge of the roadway. New road shoulders would be up to 2 feet on both sides of the road. New drainage ditches, with culverts under the roadway as necessary to allow for adequate drainage, would be up to 6 feet wide. Utility lines, including electric, water, sewer and telephone, would be placed within the road shoulders. Road surfaces and corresponding rights-of-way (ROW) would total a width of 36 feet throughout their lengths.

The trails would support hiking, biking and equestrian use. Trail size would average 11 feet wide and would consist of an unimproved surface. Trails situated within woody vegetation would be designed to minimize vegetation removal and no trees would be removed. Tree limbs overhanging the trail at a height less than 16 feet would be trimmed to allow for horse and rider clearance. Specific trail length is not yet determined, but it is estimated approximately 1.5 miles of trail may extend through GCWA habitat within Ham Creek Park. Barriers would be placed at trail entrances to prevent vehicular access, and trails would only be available during daylight hours. Trail entrances would also have signs noting restrictions in order to minimize potential impacts to GCWAs.

Figure 2: No-Build Zones. Ham Creek Park. Johnson County, Texas



It is anticipated the park would operate under Title 36 Rules and Regulations and any additional restrictions placed by the Corps of Engineers and Johnson County. Park gates would be open from 6 am to 10 pm and quiet hours would be in effect from 10 pm to 6 am. All pets would be required to remain restrained at all times. Campfires would be permitted in accordance with local county authority. Gathering firewood would be permitted; however, gathering firewood within GCWA habitat would not be permitted and signs would be installed adjacent to GCWA habitat to that effect.

Construction activities would take place outside of the GCWA nesting season, March through end of July, as much as possible. Due to the fiscal year budgeting process, road construction activities will be necessary during the nesting season. Construction of the remaining facilities adjacent to and within GCWA habitat would occur outside of the GCWA nesting season, with timely funding of project appropriations.

Trees would remain undisturbed to every extent possible. Specific facility locations would be determined by the location of trees and the location for which the least tree disturbance would occur. Tree canopies over roadways would remain intact as much as possible.

Potential impacts of lighting generated by the park development would be minimized through the use of directional lighting. The lighting would be directed away from GCWA habitat as much as possible.

Monitoring of GCWAs would be performed to aid in preservation of habitat within Ham Creek Park. Potential disturbances would be reduced as much as possible following Service recommendations. In addition, as funding allows, wildlife and plant communities would be monitored and appropriate management measures taken as recommended by the Service. This includes the monitoring of oak wilt fungus which if detected, would be controlled to reduce and prevent its spread, depending on availability of funding.

II. Status of the Species

The current list of federally threatened (T), endangered (E), and candidate (C) species that are known to occur, or have been documented in Johnson County consists of the following:

bald eagle (*Haliaeetus leucocephalus*) T
black-capped vireo (*Vireo atricapilla*) E
golden-cheeked warbler (*Dendroica chrysoparia*) - E
whooping crane (*Grus americana*) E

The black-capped vireo and whooping crane are known to occur in Johnson County, but are not expected to occur in the action area due to the lack of habitat. For this reason, USACE has determined that the proposed action would have no effect on the black-capped vireo and whooping crane. Therefore, these species will not be discussed further in this biological opinion, and no take of these species is authorized.

The bald eagle has been reported at various locations at Whitney Lake, but none within or

adjacent to Ham Creek Park have been reported. Habitat within the park and along the shoreline is not considered preferred habitat; however, it is possible that bald eagles could potentially utilize trees along the shoreline for perching. For these reasons, the proposed action is not likely to adversely affect bald eagles. Therefore, this species will not be discussed further in this biological opinion, and no take of this species is authorized.

The federally listed endangered species that does occur in the action area and that may be affected by the proposed action is the GCWA. The Service emergency listed the GCWA on May 4, 1990 (55 FR 18844) and published a final rule on December 27, 1990 (55 FR 53160). The recovery plan for the GCWA was finalized on September 30, 1992. Critical habitat has not been designated for this species.

The GCWA is a small, insectivorous songbird, 4.5 to 5 inches long, with a wingspan of about 7.9 inches. The male has a black back, throat, and cap, and yellow cheeks with a black stripe through the eye. Females are similar, but less colorful. The lower breast and belly of both sexes are white with black streaks on the flanks (USFWS 1992).

The GCWA nests in the juniper-oak woodlands of the Texas Hill Country and winters in the pine-oak woodlands of southern Mexico, Guatemala, Honduras, and Nicaragua. Its entire nesting range is confined to 33 counties in central Texas. Typical nesting habitat is found in tall, dense, mature stands of Ashe juniper mixed with deciduous trees such as Texas red oak, Lacey oak (*Quercus glaucooides*), white shin oak, plateau live oak, post oak (*Quercus stellata*), Texas ash, cedar elm, hackberry (*Celtis occidentalis*), bigtooth maple (*Acer grandidentatum*), American sycamore, Arizona walnut (*Juglans major*), escarpment cherry (*Prunus serotina*), and pecan (*Carya illinoensis*). This type of woodland is often found in relatively moist areas such as steep-sided canyons and slopes. GCWAs are also occasionally found in drier, upland juniper-oak, i.e., live oak, post oak, blackjack oak (*Quercus marilandica*) woodlands over flat topography. Although the composition of woody vegetation may vary from place to place, Ashe juniper, which is necessary for nest construction, is always present.

The males arrive in central Texas in early March and begin to establish breeding territories, which they defend against other males by singing from visible perches within their territories. The females arrive a few days later but are more difficult to detect in the dense woodland habitat. Usually three or four eggs are laid. The average nest height is 16.4 feet above ground. Eggs are generally incubated in April and, unless there is a second nesting attempt, nestlings fledge in May to early June. By early August, GCWAs begin their migration south.

Most studies report GCWA territory sizes ranging from 0.09 to 0.21 pairs per acre (Ladd 1985). Wahl et al. (1990) reported that density estimates ranged from zero to 0.26 pairs per acre with a median of 0.06 pairs per acre among several sites throughout the GCWA's range. Pulich (1976) classified warbler habitat into excellent, average, and marginal corresponding to 0.05, 0.02, and 0.01 pairs per acre.

The primary threats to the GCWA are habitat loss and urban encroachment. Other factors include the loss of deciduous oaks (used for foraging) to oak wilt, nest parasitism by brown-headed cowbirds (*Molothrus ater*), and predation and competition by blue jays (*Cyanocitta cristata*) and other urban-tolerant birds (USFWS 1992).

III. Environmental Baseline

a. Status of the species within the action area.

Ham Creek Park encompasses approximately 191 acres at the confluence of Ham Creek and the Brazos River (Whitney Lake). It is located at the northern portion of the approximately 20,000 acre *in fee* property surrounding Whitney Lake owned by USACE which lies across portions of Bosque, Hill, and Johnson Counties in northern central Texas (DLS Assoc. 1996). This area lies within the Lampasas Cut Plain subregion of Texas. This subregion is typically vegetated with oaks such as Texas red oak, plateau live oak, and white shin oak on the rocky Edwards limestone summits of small divides (Diggs et al. 1999). On large divides, areas of deeper soil typically support the westward extension of the Washita Prairie (Hayward et al. 1992). On the chalky thin soiled slopes derived from the underlying Comanche Peak limestone, white shin oak, sumac species, and Ashe juniper may be seen; these dry rocky areas have a distinctly desert-like microclimate (Hayward et al. 1992) and thus support plants with xerophytic adaptations. Below these slopes, on benches in valleys or on the summits of uplands lacking caprock, extensive areas of prairie can be found on the clay soils derived from the Walnut formation where it is exposed (Diggs et al. 1999). The basal Trinity Group sands (Paluxy, Antlers, Twin Mountains-Travis Peak) underlying the Walnut formation developed typical Cross Timbers vegetation such as post oak and blackjack oak (Hill 1901).

The topographic diversity and deeply cut streams found in various parts of the Lampasas Cut Plain provide important microhabitat variation. In particular, the diverse microhabitats allow the northward extension of many species otherwise found primarily on the Edwards Plateau. Some plants that were traditionally considered Edwards Plateau endemics can be found in the Lampasas Cut Plain. These include big-tooth maple, plateau gerardia (*Agalinis edwardsiana*), wild mercury (*Argythamnia aphoroides*), Wright's milk-vetch (*Astragalus wrightii*), plateau false nightshade (*Chamaesaracha edwardsiana*), scarlet clematis (*Clematis texensis*), Lindheimer's silk-tassel (*Garrya ovata* var. *lindheimeri*), plateau milkvine (*Matelea edwardsensis*), Lindheimer's muhly (*Muhlenbergia lindheimeri*), devil's-shoestring (*Nolina lindheimeriana*), Heller's marbleseed (*Onosmodium helleri*), Lindheimer's rock daisy (*Perityle lindheimeri*), escarpment cherry, turnip-root scurfpea (*Pediomelum cyphocalyx*), plateau spiderwort (*Tradescantia edwardsiana*), Colorado Venus'-looking-glass (*Triodanis coloradoensis*), Lindheimer's crownbeard (*Verbesina lindheimeri*), and twisted-leaf yucca (*Yucca rupicola*). When considering vegetation, soils, geologic layers, and general aspects of the landscape, some parts of the Lampasas Cut Plain are remarkably similar to the Edwards Plateau (Diggs et al. 1999).

Whitney Lake is located within Bosque, Hill, and Johnson Counties, Texas, all of which are located in GCWA Recovery Unit 2. Our current information indicates that potential suitable

habitat in these counties is estimated at 4,147 acres in Bosque, 566 acres in Hill, and 4,197 acres in Johnson. DLS Associates (1996) determined that approximately 2,800± acres, or 14 per cent. of the estimated 20,000± acres of *in fee*, USACE-owned land in the Whitey Lake Project is suitable habitat for the GCWA. USACE has determined that potential suitable habitat for GCWA within the Ham Creek Park property to be 66 acres (Anjna O'Connor, pers. comm. 2005).

Monitoring and research activities for the GCWA within the vicinity of Whitney Lake have been sparsely documented beginning with the 1878 collection of the second GCWA specimen in the United States by G. H. Ragsdale (USFWS 1992). The most recent and thorough accounts of GCWA status at Whitney Lake have come from the USACE-sponsored 1996 study conducted by DLS Associates and follow-up reports conducted by Espy, Houston & Associates, Inc. (1997, 1998).

DLS Associates (1996) observed a minimum of seven and a maximum of nine male GCWAs holding territories at Whitney Lake within three of the five vegetation areas surveyed which did not include Ham Creek Park. Two of four vegetation areas surveyed during the 1997 breeding season revealed two singing males each (Espy, Houston & Associates, Inc. 1997), also not including Ham Creek Park. The subsequent survey (Espy, Houston & Associates, Inc. 1998) yielded observations of 26 GCWAs including one at Ham Creek Park and 23 within close proximity clustered at the apex of Kimball Bend ranging from approximately 0.5 to 1.8 miles from the park property.

Recent GCWA sightings specific to Johnson County include nine individuals near the intersection of Buck Creek and CR 1234, approximately 8.3 miles from Ham Creek Park (Hicks & Company 1999). Information obtained from USACE indicates that on April 24, 2004, Dr. Guilfoyle and Ranger Sam Masters saw one bird and heard at least two others on the Ham Creek Park property. Service records also indicate the documented presence of GCWAs on privately owned land adjacent to the western portion of Ham Creek Park including three individuals in 2001 and nine individuals in 2005. During this same 2005 survey, an additional male was captured and banded on the Ham Creek Park property.

b. Factors affecting species environment within the action area

Ham Creek Park was constructed in the late 1950's and remained fully operational until the early 1980's when the east side of the park was closed due to budget limitations. The west side of the park (Section C) contains a one-lane boat ramp which has remained open and is functional when lake levels are adequate for boat launching.

Factors affecting the species environment include vehicular traffic disturbances from FM 916 on the park's northern and western boundaries and a residential development (Fisherman's Paradise) on the northeastern side. Unauthorized use of off-road recreational vehicles is also known to occur within the action area.

IV. Effects of the Action

The proposed action consists of the development of Ham Creek Park for future recreational use. It is anticipated that direct and indirect effects to the GCWA would result from the action as discussed below. Quantitative measurements of length and area of proposed actions, property perimeters, and on and off-property habitats were calculated using shapefiles provided by USACE and utilizing ArcGIS 9.0.

The direct effects consist of the subsequent construction, operation, and maintenance of a recreational facility for public use. The widening of road ROW to a total width of 36 feet in Section A would remove GCWA habitat averaging approximately 16 feet wide and 5,111 feet in length. An 8 foot wide, 2,799 foot long section of habitat would be eliminated along the northern and eastern portions of the existing roadway in Section B. Maximum total habitat removed by widening the road ROW would be 2.5 acres. Construction of the entrance complex may take place along the roadway in Section A and would directly impact up to 4 acres of GCWA habitat. An additional 2 acres of GCWA habitat could be removed dependant upon the placement of other recreational facilities to be located at unspecified locations in Section B. The regular maintenance of these facilities would also contribute to the disturbance effects discussed further in this section. Construction of the 7,159 foot barbed-wire or pipe perimeter fence and its corresponding 8 foot wide ROW would remove a maximum of 1.3 acres of GCWA habitat in Sections A and B; but, it is anticipated that this ROW would not impact GCWAs if it is constructed outside of the breeding season (Campbell 1995, Horne 2000). However, the regular maintenance of the fence and its ROW could contribute to the disturbance effects discussed further in this section. The construction of these facilities (not including the perimeter fence) is expected to directly remove a total of approximately 8.5 acres of GCWA habitat. The conversion of GCWA habitat into these facilities makes it no longer suitable for GCWAs, thus harming the birds that may utilize the habitat during the breeding season.

The effects of human disturbance related to the construction, operation, and maintenance of the recreational facilities include, but are not limited to, elevated noise levels, presence of humans and machinery, lighting, and increased predation. The adverse effects of human activities on avian communities have been well documented (e.g., Blair 1996, Friesen, et al. 1995, Gutzwiller et al. 1998, Riffell et al. 1996, Wilcove 1988). Additional widening of the road ROW to 36 feet in width could negatively affect GCWAs, since clearing of corridors as narrow as 33 feet have been known to negatively affect GCWA breeding habitat through fragmentation (Horne 2000). Coldren (1998) determined territory selection from habitat edges by GCWAs as related to reproductive success and suggested 492 feet as the point at which GCWA territories are affected by edge habitat.

The proposed hiking/equestrian trails may also negatively affect GCWAs. Miller et al. (1998) demonstrated that composition and abundance of birds can be altered adjacent to recreational trails in forest ecosystems. In particular, some species do not occur, or occur in lower densities, near recreational trails than at greater distances, whereas some species, mainly generalists, were more abundant near trails. Species sensitive to disturbance by humans may avoid areas where human activity is common, or may occur in reduced abundance. GCWAs are especially

sensitive to these effects and are not usually found in close proximity to human developments (e.g., Benson 1990, Engels and Sexton, 1994, Sexton 1987).

Dependant upon the unspecified placement of the hiking/equestrian trails, all GCWA habitat on the property could potentially be subject to the disturbance effects resulting from the construction of these trails, road ROW, and other facilities located within or adjacent to defined GCWA habitat. The design of the park restoration would incorporate No-Build Zones to preserve the remaining GCWA habitat on the property. However, the remaining 57.5 acres of total "on-property" GCWA habitat in Sections A and C (which contains no habitat) less all habitat directly removed, would likely be rendered unsuitable for use by the birds and constitute harassment.

Effects related to harassment are expected to extend outside the boundaries of Ham Creek Park to the point at which they deter GCWAs from utilizing adjacent habitat or affect the reproductive success of birds using the adjacent habitat. Because the property is bound by roadways on the north and west, and the Brazos River to the south, the disturbance effects would only be expected to extend to the adjacent private property east of Section A and north of Section B, and to the USACE-owned property east of Section B.

Indirect effects are those project related effects which are reasonably certain to occur, but later in time. Increases in predator presence could result from increasing the width of the road ROW. Rich et al. (1994) found that corridors as narrow as 26.3 feet may attract cowbirds and nest predators to corridors and adjacent forest interiors. Maintenance and use of these ROWs may also attract cowbirds which forage in mowed areas within ROWs and to powerline poles on which males display (Rich et al. 1994). Although GCWAs prefer nesting in the interior forest (Coldren 1998), they are often observed at forest edges (Sexton 1991). Avian predators (e.g., American crow [*Corvus brachyrhynchos*], blue jay, grackle [*Quiscalus sp.*]) are more abundant in GCWA habitat within 328 feet from edges (Arnold et al. 1996) which may affect GCWA use and/or reproductive success (Coldren 1998, Fink 1996). Further indirect effects in the form of increased predator presence could result from the installation of the hiking/equestrian trails. Miller et al. (1998) indicated that habitat edge species, such as blue jays, which have been shown to be incompatible with GCWA's (Engels 1995, Engels and Sexton 1994), were more abundant on sites with recreational trails than on sites without trails. Additional indirect effects include the potential import and spread of noxious vegetation within the action area. Noxious plants have the ability to displace native vegetation, thereby reducing habitat quality.

The extent of the direct and indirect effects of the action may occur outside the boundaries of Ham Creek Park. Currently, there are no specific guidelines on the distance from commercial/urban land use that would not be expected to affect GCWAs; however, it is believed that large habitat patch size and/or connectivity to larger blocks of habitat reduce the effects (Arnold et al. 1996, Coldren 1998, Sexton 1991). GCWA habitat located east of Section A and north of Section B does not benefit from connectivity to larger blocks of habitat due to encroachment from Fisherman's Paradise residential development. This habitat, located off the park, is also noncontiguous and is made up of five peninsular parcels east of Section A and one narrow linear strip north of section B totaling 32.2 acres ranging in area from 0.4 acres to 11.5 acres. GCWA habitat east of Section B is contiguous and is currently not bound by development

or natural features and is known to support GCWA territories (Espy, Houston & Associates, Inc. 1998).

Based on Coldren's (1998) work, it is anticipated that the effects regarding the construction, operation, and maintenance of the park and the use of the unspecified hiking/equestrian trails could extend from the boundary of the property to a maximum distance of 492 feet onto adjacent off-property habitat totaling 28.9 acres of affected habitat east of Section A and north of Section B (Figure 3). Unaffected habitat remaining beyond this 492 foot point would consist of two small, disconnected fragments totaling 3.3 acres unsuitable to support a GCWA territory and therefore would be included in the action area. East of Section B effects of the action would be expected to impact habitat 492 feet beyond the park boundary totaling an additional 19.2 acres to be included in the action area.

It is expected that harassment of GCWAs related to the effects of the development of the property would potentially reduce suitability of the adjacent off-property habitat a total of approximately 51.4 acres outside the park property. Therefore, the action area includes the approximately 191 acre Ham Creek Park property and up to 51.4 acres immediately adjacent to the eastern side of the property.

IV. Cumulative Effects

Cumulative effects include the effects of future State, tribal, local or private actions that are reasonably certain to occur in the action area considered in this biological opinion. Future Federal actions that are unrelated to the proposed action are not considered in this section because they require separate consultation pursuant to section 7 of the Act.

At this time, no future state, tribal, local or private actions are known to be planned within the action area. Site visits, as well as discussions with USACE staff, indicate that most all developable space between USACE property and Fisherman's Paradise has presently been converted to residential properties. Future actions occurring within the action area on adjacent USACE property, including planned expansion of the hiking/equestrian trails east of Section B, would require a separate consultation.

V. Conclusion

Possible harm and/or harassment to GCWAs would only occur on a small portion of the total nesting habitat in Texas. Habitat within the action area is not representative of that which would be considered most critical to GCWA recovery because it is bound by fragmenting obstacles on three sides, comprised of varied vegetative quality, and has been the source of only three confirmed sightings in recent years. Larger contiguous blocks of habitat occur within the vicinity of the action area providing possible relocation opportunities for potentially displaced GCWAs. After reviewing the current status of the GCWA, the environmental baseline for the action area, the effects of the proposed action, and the cumulative effects, it is the Service's biological opinion that the development of Ham Creek Park for future recreational use, as

Figure 3: GCWA off-property affected habitat, Ham Creek Park, Johnson County, Texas.

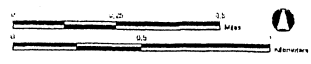


Exhibit E Page 14 of 21



U.S. Fish & Wildlife Service
 Arlington, Texas, Ecological Services Field Office
 Projection: UTM Zone 14N, NAD 1983, GRS 1980
 Production Date: 12/29/2005

Off-property GCWA Habitat
 Section A
 Section B
 Section C
 Sections A & B 150m Buffer



proposed, is not likely to jeopardize the continued existence of the GCWA. No critical habitat has been designated for these species, therefore, none will be affected.

INCIDENTAL TAKE STATEMENT

Section 9 of the Act and Federal regulations pursuant to section 4(d) of the Act prohibit the take of endangered and threatened species, respectively, without special exemption. Take is defined as to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in any such conduct. Harm is further defined by the Service to include significant habitat modification or degradation that results in death or injury to listed species by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering. Harass is defined by the Service as intentional or negligent actions that create the likelihood of injury to listed species to such an extent as to significantly disrupt normal behavior patterns which include, but are not limited to, breeding, feeding or sheltering. Incidental take is defined as take that is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity. Under the terms of section 7(b)(4) and section 7(o)(2), taking that is incidental to and not intended as part of the agency action is not considered to be prohibited under the Act provided that such taking is in compliance with the terms and conditions of this incidental take statement.

The measures described below are non-discretionary, and must be undertaken by USACE so that they become binding conditions for any action, grant, or permit issued, as appropriate, for the exemption in section 7(o)(2) to apply. USACE has a continuing duty to regulate the activity covered by this incidental take statement. If USACE (1) fails to assume and implement the terms and conditions or (2) fails to adhere to the terms and conditions of the incidental take statement through enforceable terms that are added to the permit or grant document, the protective coverage of section 7(o)(2) may lapse. In order to monitor the impact of incidental take, USACE must report the progress of the action and its impact on the species to the Service as specified in the incidental take statement (50 CFR §402.14(i)(3)).

Amount or Extent of Take Anticipated

The Service anticipates that the proposed action could result in the incidental take of GCWAs. Take would be in the form of harm and harassment. Harm to the GCWA would occur from the direct conversion of approximately 8.5 acres of GCWA habitat on the property proposed for development. Take in the form of harassment would occur on approximately 109 acres of GCWA habitat resulting from the maintenance and future use of project facilities.

Take, in the form of harm and/or harassment, is difficult to quantify and usually cannot be estimated in terms of numbers of individuals. Population densities of GCWAs have been shown to be proportional to habitat quality (Pulich 1976). Habitat quality of Ham Creek Park is perceived to be of varied quality due to vegetation composition; encroachment from residential development to the east and the effects of fragmentation brought about by the residential development, the Brazos River to the south; and FM 916 to the north and west. Estimates of average GCWA territory size within suitable habitat found on USACE property at Whitney Lake are not currently available.

Population estimates for GCWAs are quantified in terms of total estimated area of potential suitable habitat divided by the estimated average area of breeding territories. Because of the difficulty in determining territory size due to varied habitat quality, and because harm to GCWAs will be from actions taken which reduce habitat area, the maximum amount of incidental take allowed under this BO is prescribed in terms of area.

Based upon estimates by USACE detailed in the Biological Assessment, two site visits conducted by USFWS, and a review of publicly available information and scientific literature, it is anticipated that 117.5 acres of suitable habitat for GCWAs could be taken.

Effect of the take

In the accompanying biological opinion, the Service determined that the level of anticipated habitat take is not likely to result in jeopardy to the GCWA.

Reasonable and Prudent Measures

The Service believes the following reasonable and prudent measures are necessary and appropriate to minimize impacts of incidental take of the GCWA:

- 1) Clearing of GCWA habitat to construct the barbed-wire and/or pipe perimeter fence will be scheduled outside (September through February) of GCWA breeding and nesting season. The resulting ROW will be no wider than 8 feet and will also be maintained outside of the breeding and nesting season. All vegetation clearing will be consistent with the current practices recommended by the Texas Forest Service to prevent the spread of oak wilt.
- 2) The No-Build Zones will be clearly marked prior to construction, vegetation removal, or other earth-disturbing activities to prevent accidental clearing by work crews. The No-Build Zones will be managed as GCWA habitat as appropriate. Buffer areas between the proposed facilities and the No-Build Zones will be planted and/or maintained as native vegetation to create a transitional area between these facilities and remaining habitat.
- 3) Hiking/equestrian trails developed within No-Build Zones will be designed as 'nature trails' with no hard surfaces, minimal vegetation removal, and will be constructed and maintained outside (September through February) of GCWA breeding and nesting season.
- 4) Impacts related to lighting generated by the facilities will be minimized by the use of directional lighting and buffers around GCWA habitat. Available lighting designs and methods will be investigated and used as appropriate to reduce impacts to birds.

Terms and conditions

In order to be exempt from the prohibitions of section 9 of the Act, USACE must comply with the following terms and conditions, which implement the reasonable and prudent measures described above and outline required reporting/monitoring requirements. These terms and conditions are non-discretionary.

- 1) USACE will develop and implement an appropriate monitoring plan for reporting progress in development of the property and implementation of the reasonable and prudent measures. Breeding season surveys will be conducted until construction of all facilities is completed and results reported to the Service. The content, schedule, and format of the monitoring plan will be at the discretion of the USACE.
- 2) USACE must provide sufficient guidance to its employees and contracted employees to ensure compliance with the reasonable and prudent measures of this biological opinion before the proposed actions may be covered by the incidental take allowed by this opinion.

The Service anticipates that no more than 117.5 acres of GCWA habitat would be taken as a result of the proposed action (max. of 8.5 acres directly removed and max. of 109 acres reduced in habitat suitability). Reasonable and prudent measures, with their implementing terms and conditions, are designed to minimize the impact of incidental take that might otherwise result from the proposed action. If, during the course of the action, this level of incidental take is exceeded, reinitiation of consultation will be required. USACE must immediately provide an explanation of the causes of the taking and review with the Service the need for possible modification of the reasonable and prudent measures.

The Service will not refer the incidental take of any migratory bird for prosecution under the Migratory Bird Treaty Act of 1918, as amended (16 U.S.C. §§ 703-712), if such take is in compliance with the terms and conditions (including amount and/or number) specified herein.

Conservation Recommendations

Section 7(a)(1) of the Act directs Federal agencies to utilize their authorities to further the purposes of the Act by carrying out conservation programs for the benefit of endangered and threatened species. Conservation recommendations are discretionary agency activities to minimize or avoid adverse effects of a proposed action on listed species or critical habitat, to help implement recovery plans, or to develop information. The following recommendation is provided for consideration by USACE.

Whitney Lake currently operates under a Master Plan revised in June 1972 prior to the listing of the GCWA and the black-capped vireo. USACE is encouraged to partner with the Service in the development and implementation of supplements to this Master Plan regarding resident threatened and endangered species as originally suggested by this office in a letter dated October 16, 2001.

The most recent partial survey of USACE property at Whitney Lake for federally-listed species was conducted in 1998 and was the last in a series of three limited surveys initiated in 1996. Updated surveys to quantify listed species habitat and subsequent designations of environmentally sensitive areas (ESAs) could prove useful to USACE and the Service with respect to future development pressure at Whitney Lake by preventing the need for (or streamlining the process of) future consultations. Such information would also be very beneficial to USACE in fulfilling its section 7(a)(1) duties.

In light of the increased and anticipated urban growth around Whitney Lake, we suggest that a proactive approach to conservation through supplementing or revising the current Master Plan could save time and money by identifying areas with specific management needs, expediting future section 7 consultations, and allowing for continued management of USACE property for its intended purposes. In addition to these benefits, further knowledge of the little-known GCWA populations at Whitney Lake and vicinity could prove invaluable to the recovery of the species. Whitney Lake lies entirely within Recovery Unit 2 for the GCWA, which currently has a known population of less than 50 birds. Criterion 1 of the GCWA Recovery Plan requires the protection of enough habitat to support a viable population within each of the eight Recovery Units. Current information indicates that a viable population could range from 1,000 to 3,000 pairs of GCWAs. The large amount of habitat identified on USACE property could further the recovery goal in this unit. The Service would be happy to assist in future habitat surveys and the designation of ESAs as our resources allow.

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PERSONAL COMMUNICATIONS

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O'Connor, Anjna. 2005. Whitney Lake USACE, Clifton, Texas.