

INTERLOCAL CONTRACT NO. 16-XXX-EX  
BETWEEN THE  
EDWARDS AQUIFER AUTHORITY  
AND  
NEW BRAUNFELS UTILITIES  
FOR CONSTRUCTION OF PHASE 1 OF THE COMAL SPRINGS  
CONSERVATION CENTER

This Interlocal Contract ("Contract") is made and entered into under the Interlocal Cooperation Act, Chapter 791, Texas Government Code, by and between the EDWARDS AQUIFER AUTHORITY, ("EAA"), a political subdivision of the State of Texas, with its principal place of business located at 900 E. Quincy Street, San Antonio, Texas 78215, and NEW BRAUNFELS UTILITIES ("NBU"), a municipally-owned utility with responsibility for operating the electric, water, and sewer systems in New Braunfels service area, with its principal offices located at 263 E. Main Plaza, New Braunfels, Texas 78130. Each of these entities is, at times, referred to in this Contract individually as a "Party," and are referred to collectively as "Parties."

RECITALS

WHEREAS, the EAA was created by the Edwards Aquifer Authority Act, Act of May 30, 1993, 73<sup>rd</sup> Leg., R.S., ch. 626, 1993 Tex. Gen. Laws 2350, as amended ("Act"); and

WHEREAS, under Section 1.02 of the Act, the EAA is a conservation and reclamation district created by virtue of Article XVI, Section 59 of the Texas Constitution, and is a governmental agency and body politic and corporate vested with the full authority to exercise the powers and to perform the functions specified in the Act; and

WHEREAS, under Section 1.08(a) of the Act, the EAA has all the powers, rights and privileges necessary to manage, conserve, preserve, and protect the Edwards Aquifer ("Aquifer") and to increase the recharge of, and prevent the waste or pollution of water in, the Aquifer; and

WHEREAS, the United States Fish & Wildlife Service approved a Habitat Conservation Plan on February 5, 2013 ("EAHCP") intended to resolve the conflict between the federal mandate to protect threatened and endangered species associated with the Aquifer and the region's dependence on the Aquifer as its primary water source; and

WHEREAS, under Section 1.11(d)(2) of the Act, and other applicable law, the EAA may enter into contracts; and

WHEREAS, the EAA Board of Directors approved this Contract on July 12, 2016, and authorized the EAA General Manager to execute the Contract; and

WHEREAS, NBU desires to mitigate and minimize the water quality impacts on the Comal Springs and River ecosystem due to diffuse surface water runoff into this ecosystem from its Property located at 347 E. Klingemann Street, New Braunfels, Texas ("Property"); and

WHEREAS, this Contract is intended to satisfy the intent of Resolution and Order No. 12-11-673 of the Edwards Aquifer Authority Board of Directors adopted on December 28, 2011; and

WHEREAS, this Contract is intended to satisfy the intent of the Parties in that certain Memorandum of Understanding last signed on August 29, 2014, wherein the Parties agreed to share in NBU's cost to implement Phase 1 of NBU's construction of the Comal Springs Conservation Center Project ("Project") described herein only, according to the general terms consistent with the MOU, as described in this Contract; and

WHEREAS, it is in the public interest that the Parties enter into this Contract.

## AGREEMENT

NOW THEREFORE, for and in consideration of the mutual promises and agreements set forth in this Contract, the EAA and NBU agree as follows:

### ARTICLE I – TERM; DESCRIPTION OF WORK

Section 1.1. Term. This Contract is effective and commences on July 13, 2016 ("Effective Date"), and terminates on January 31, 2018 ("Expiration Date").

Section 1.2. Services. Subject to the terms and conditions of this Contract, the EAA engages NBU to perform, for the benefit of the EAA and its implementation of the EAHCP, the work set forth and described in this Contract and in the following documents ("Services"), which are attached hereto: (1) the Scope of Work which is attached hereto as Exhibit A ("Scope of Work"); and (2) the Budget Estimate which is attached hereto as Exhibit B ("Budget Estimate"). NBU accepts such engagement and agrees to devote its best efforts and abilities, and furnish, through the use of contractors, all necessary labor, machinery, equipment, tools, and transportation necessary in furtherance of its engagement under this Contract.

Section 1.3. Commencement and Completion of Services. NBU will commence performing the Services immediately upon the date of receipt of the written notice to proceed issued by the EAA's General Manager. All Services will be completed and delivered to the EAA by the Expiration Date and shall be completed in compliance with the schedules, budgets, descriptions, and specifications contained in the Exhibits attached hereto. It shall be NBU's responsibility to ensure that the completion times for the tasks required under this Contract are met, subject to force majeure. Time is of the essence in the performance of this Contract.

### ARTICLE II – AMENDMENTS

Section 2.1. This Contract may be amended only by written agreement of the Parties.

Section 2.2. Amendments by the General Manager. The Board of Directors of the EAA delegates the authority to the General Manager to enter into amendments to this Contract without further authorization by the Board consistent with the General Manager’s authority to enter into contracts under Section 4.01 of the EAA’s Bylaws.

ARTICLE III – COMPENSATION

Section 3.1. Fees and Expenses. The EAA agrees to pay NBU for the Services rendered under this Contract in accordance with the Scope of Work and Budget Estimate, but in no event shall payments to NBU exceed \$540,000, payable to NBU in equal installments over the three-year period 2016-2018. NBU will be responsible for the payment of all of its other and additional costs and expenses. The EAA will not be held accountable for any unauthorized work performed or funds expended by NBU in providing the Services under this Contract.

Section 3.2. Payment. All invoices from NBU to the EAA for the Services performed under this Contract shall provide an itemization of the Services rendered, costs and expenses incurred. NBU shall submit invoices to the EAA and the EAA shall reimburse NBU according to the following schedule:

Invoice Date (no later than)	Invoice Amount (not to exceed minimal NBU expense)	Payment Date
December 1, 2016	\$180,000	December 31, 2016
March 31, 2017	\$180,000	April 30, 2017
March 31, 2017	\$180,000	January 31, 2018

The EAA reimbursements to NBU shall be based on the completion of the Project Tasks described in the Project Schedule in Exhibit A and with the Project Budget Estimate described in Exhibit B. The terms of each invoice shall be net thirty (30) days upon EAA receipt and approval of that invoice. The terms of the final invoice shall be net thirty (30) days upon EAA receipt and approval of 50% of that invoice. The terms of the remaining 50% of that final invoice will be net thirty (30) days following the beginning of the EAA’s 2018 fiscal year. The Parties acknowledge that the Services may be performed at any time prior to the Expiration Date and that the reimbursements contemplated by this Contract are not dependent on when the Services are performed as long as done prior to the Expiration Date. Thus, if NBU provides reimbursable Services valued in excess of \$540,000.00 by December 1, 2016, the maximum amount it can invoice the EAA on that date is \$180,000.00, with the remaining balance carried over for future invoicing in accordance with this Contract.

Section 3.3 Use of Funds. NBU agrees to utilize the funds provided by the EAA under this Contract only for Phase 1 of the Project to construct the Project.

## ARTICLE IV – INDEPENDENT CONTRACTOR

Section 4.1. No Employment Relationship. The Parties understand and agree that this Contract does not create a fiduciary relationship between them, that they are separate entities, that NBU is an independent contractor with respect to the performance of the Services and is not subject to the direct or continuous control and supervision of the EAA, and that nothing in this Contract is intended to make either Party a subsidiary, joint venturer, partner, employee, agent, servant or representative of the other Party for any purpose whatsoever. NBU shall provide for any and all equipment and materials necessary for the performance of the Services under this Contract. The EAA shall have no right of direction or control of NBU, or its employees and agents, except in the results to be obtained, and in a general right to order the performance of the Services to start or stop as agreed to herein, to inspect the progress of the Services, and to receive reports. NBU shall accommodate reasonable requests from the EAA to allow EAA employees, agents or representatives to accompany and observe City personnel or its contractors in carrying out the Services under this Contract.

## ARTICLE V – CONTRACTOR PERSONNEL AND SUBCONTRACTORS

Section 5.1. Personnel. NBU will provide any and all personnel necessary for its performance of the Services. NBU will be responsible for its employees and agents in all respects, including, without limitation, their compliance with applicable laws and their safety, including without limitation, all Occupational Safety and Health Administration (OSHA) standards, requirements, and regulations. To the extent authorized by law, NBU indemnifies and holds harmless the EAA, its officers, employees and directors, from and against any claims bought by any employee, subcontractor or other agent of NBU relating in any way to the Services performed under this Contract.

Section 5.2. Subcontractors. In performing the Services under this Contract, NBU may retain and utilize as its subcontractors, to the extent that they are not already employees of NBU, those individuals who in the sole judgment of NBU are necessary and qualified to perform the Services. NBU will be solely responsible for its subcontractors in all respects including their compliance with applicable laws and their safety, including without limitation, all OSHA standards, requirements, and regulations.

## ARTICLE VI – TERMINATION

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## ARTICLE VII – OWNERSHIP OF MATERIALS

Section 7.1. Ownership. All information, documents, property, or materials produced, created, or supplied under this Contract by NBU, its employees, agents or subcontractors or anyone else, and whether finished or unfinished or in draft or final form, will be the property of NBU.

Section 7.2. Disclosure of Documents. The information, documents, property, or materials produced, created or supplied under this Contract by NBU, including preliminary technical reports and studies, may be disclosed by NBU to any third-party without the prior written consent of the EAA.

Section 7.3. Record Copies. NBU shall retain a record copy of all information, documents, property, or materials developed in the course of performing the Services. Upon request of the EAA, such information, documents, property, or materials will be promptly supplied to the EAA, including after the Expiration Date or the termination of this Contract under Section 6.1.

#### ARTICLE VIII – NON-PERFORMANCE

Section 8.1. NBU warrants that it will perform all Services in a good and workmanlike manner, strictly in accordance with the standards of NBU’s profession, the Scope of Work, and as otherwise provided in this Contract and the Exhibits hereto. NBU’s failure to timely perform the Services as warranted and agreed shall constitute a breach of this Contract and shall be subject to all applicable remedies at law or equity. Before declaring a breach of this Contract by NBU, the EAA must first give NBU written notice, specifying the alleged default and giving NBU a reasonable opportunity (not less than 30 days) to cure the alleged default.

#### ARTICLE IX – LIQUIDATED DAMAGES

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#### ARTICLE X – BOND COVERAGE

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#### ARTICLE XI – INSURANCE

Section 11.1. Insurance Coverages. During the term of this Contract, NBU shall obtain and maintain in effect, at NBU’s expense, appropriate insurance policies protecting NBU and the EAA, and their respective officers, directors and employees, against any loss, liability, personal injury, death, property damage or any expense arising out of the performance of the Services under this Contract, including, without limitation: (1) worker’s compensation insurance in compliance with applicable state law; (2) comprehensive general liability insurance, insuring against property damage, personal injury and death, in an amount of no less than \$1,000,000.00 per occurrence; (3) automobile liability insurance in an amount no less than \$1,000,000.00; (4) umbrella liability insurance in an amount of no less than \$1,000,000.00. Said insurance policies shall be with insurance carriers licensed to do business in Texas. NBU shall be responsible for requiring that its subcontractors carry and maintain adequate insurance coverage.

Section 11.2. Additional Insureds. NBU shall name the EAA, and its directors, employees, and agents as “additional insureds” on all of the insurance policies specified in Subsection 11.1 above, or with respect to the worker’s compensation insurance, contain waivers

of subrogation by NBU and the insurance carrier in favor of the EAA. Not later than the date of receipt of the written notice to proceed under Section 1.3, NBU must provide the EAA with certificates of insurance to be issued directly to the EAA by NBU's insurance agent, identifying the specified coverage. NBU, through its agent of record, shall notify the EAA of any changes in coverages within thirty (30) days prior to any effective date of change.

Section 11.3. No limitations. NBU's obligation to obtain and maintain the foregoing policy or policies in the amounts specified shall not be limited in any way by reason of any insurance which may be maintained by the EAA, nor shall NBU's performance of this obligation relieve it of liability under the indemnity provisions set forth in Section 12.2.

Section 11.4. Texas Municipal League Insurance. The EAA acknowledges that NBU's insurance coverage is through the Texas Municipal League ("TML"). NBU agrees to provide the insurance requirements of this Contract to TML and request that the EAA be named as an additional insured when required hereunder. The EAA further acknowledges that NBU will have no obligation to seek insurance coverage from any provider other than TML, even if TML is unable to provide the types or amounts of coverage required under this Contract or include the EAA as an additional insured. The provisions of this Section 11.4 will control over any contrary provisions of this Contract.

#### ARTICLE XII – ASSUMPTION OF RISK AND INDEMNIFICATION

Section 12.1. Risk. NBU shall assume all risks associated with NBU's or its subcontractors' performance under this Contract and shall waive any claim against the EAA and other participants for damages arising out of the performance of the Services under this Contract.

Section 12.2. Indemnification. To the extent authorized by law, NBU shall defend, indemnify and hold harmless the EAA, its directors, employees and agents from any and all damages, loss, or liability of any kind whatsoever, including the costs of litigation and attorneys' fees arising from (a) contracts or arrangements between NBU and any third parties entered into in performing this Contract, (b) any claims brought by any person relating to this Contract or the Services provided hereunder, or (c) the quality of the Services or the performance of the Services covered by this Contract.

#### ARTICLE XIII – NOTICES

Section 13.1. Notices to the EAA. All notices or communications under this Contract to be mailed or delivered to the EAA shall be in writing and shall be sent to the EAA's principal place of business as follows, unless and until NBU is otherwise notified:

EDWARDS AQUIFER AUTHORITY  
900 E. Quincy Street  
San Antonio, Texas 78215  
ATTENTION: ROLAND RUIZ, GENERAL MANAGER

Section 13.2. Notices to NBU. All notices or communications under this Contract to be mailed or delivered to NBU shall be in writing and shall be sent to the address of NBU as follows, unless and until the EAA is otherwise notified:

NEW BRAUNFELS UTILITIES  
263 E. Main Plaza  
New Braunfels, Texas 78130  
ATTENTION: ROGER BIGGERS, EXECUTIVE DIRECTOR OF EXTERNAL AFFAIRS

Section 13.3 Effective Date of Notice. Any notices or communications required to be given in writing by one Party to the other shall be considered as having been given to the addressee on the date the notice of communication is posted by the sending Party.

#### ARTICLE XIV – MISCELLANEOUS

Section 14.1. Entire Agreement. This Contract and the attached Exhibits constitute the entire agreement between the Parties regarding the Services to be performed by NBU and there are no representations, warranties, agreements or commitments between the Parties except as set forth herein. Unless otherwise authorized herein, no amendments or additions to this Contract shall be binding on the Parties unless in writing and signed by the Parties.

Section 14.2. Non-Waiver. No delay or failure by either Party to exercise any right under this Contract, nor any partial or single exercise of that right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

Section 14.3. Headings. Headings in this Contract are for convenience only and shall not be used to interpret or construe its provisions.

Section 14.4. Governing Law. This Contract shall be deemed to have been executed and performed in the State of Texas and shall be construed in accordance with and governed by the laws of the State of Texas. Venue for any disputes or claims arising from this Contract shall be exclusively in the proper courts in Comal County, Texas.

Section 14.5. Counterparts. This Contract may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

Section 14.6. Binding Effect. The provisions of this Contract shall be binding upon and inure to the benefit of the Parties and their respective successors and assigns; provided, however, that NBU may not assign any of its rights nor delegate any of its duties hereunder without the EAA's prior written consent.

Section 14.7. Validity. The invalidity of any provision or provisions of this Contract shall not affect any other provision of this Contract, which shall remain in full force and effect, nor shall the invalidity of a portion of any provision of this Contract affect the balance of such provision.

Section 14.8. Non-Waiver of Immunity. Nothing in this Contract is intended as any waiver by any of the Parties of any immunity from liability or suit to which they may be entitled under Texas law.

Section 14.9. Survival. Termination of this Contract for breach shall not constitute a waiver of any rights or remedies available at law or in equity to a Party to redress such breach. All remedies, either under this Contract or at law or in equity or otherwise available to a Party, are cumulative and not alternative and may be exercised or pursued separately or collectively in any order, sequence or combination. In addition, to these provisions, applicable provisions of this Contract shall survive any termination of this Contract.

Section 14.10. Attachments. The Exhibits, schedules and/or other documents attached hereto or referred to herein are incorporated herein and made a part hereof for all purposes. As used herein, the expression "Contract" means the body of this Contract and such attachments, Exhibits, schedules and/or other documents, and the expressions "herein," "hereof," and "hereunder" and other words of similar import refer to this Contract and such attachments, exhibits, schedules and/or other documents as a whole and not to any particular part or subdivision thereof.

Section 14.11. Costs. If any legal action, arbitration, or other proceeding is brought by a Party for the enforcement of this Contract or because of an alleged breach or default of this Contract, the prevailing Party shall be entitled to recover reasonable costs incurred, in such action or proceeding in addition to any other relief to which it or they may be entitled.

Section 14.12. Authority to Contract. Each Party represents and warrants for the benefit of the other Party that: (1) it has the legal authority to enter into this Contract; (2) this Contract has been duly approved and executed; (3) no other authorizations or approvals are or will be necessary in order to approve this Contract and to enable that Party to enter into and comply with the terms and conditions of this Contract; (4) the person executing this Contract on behalf of each Party has the authority to bind that Party; and (5) the Party is empowered by law to execute any other agreement or documents and to give such other approvals, in writing or otherwise, as are or may hereafter be required to implement and comply with this Contract.

Section 14.13. Officers or Agents. No officer or agent of the Parties is authorized to waive or modify any provision of this Contract. No amendment to or rescission of this Contract may be made except by a written document signed by the Parties' authorized representatives.

Section 14.14. Payment from Current Revenues. The Parties acknowledge that pursuant to Subsection 791.011(d)(3), Texas Government Code, the EAA, which is paying for the performance of governmental functions or services under this Contract, must make such payments from current revenues available to EAA.



IN WITNESS WHEREOF, this Contract is executed as of the day and date first written above.

**EDWARDS AQUIFER AUTHORITY**

\_\_\_\_\_  
Roland Ruiz  
General Manager

Attest:

\_\_\_\_\_  
Jenifer Wong-Esparza  
Assistant to the Secretary

**NEW BRAUNFELS UTILITIES**

\_\_\_\_\_  
Paula DiFonzo  
CEO

Attest:

\_\_\_\_\_  
Laura Rivers  
Executive Assistant

\_\_\_\_\_  
Date

Approved as to form:

\_\_\_\_\_  
Darcy Alan Frownfelter  
General Counsel

\_\_\_\_\_  
Date

Approved as to form:

\_\_\_\_\_  
John Dierksen  
General Counsel

**EXHIBIT A  
SCOPE OF WORK**

**I. BACKGROUND**

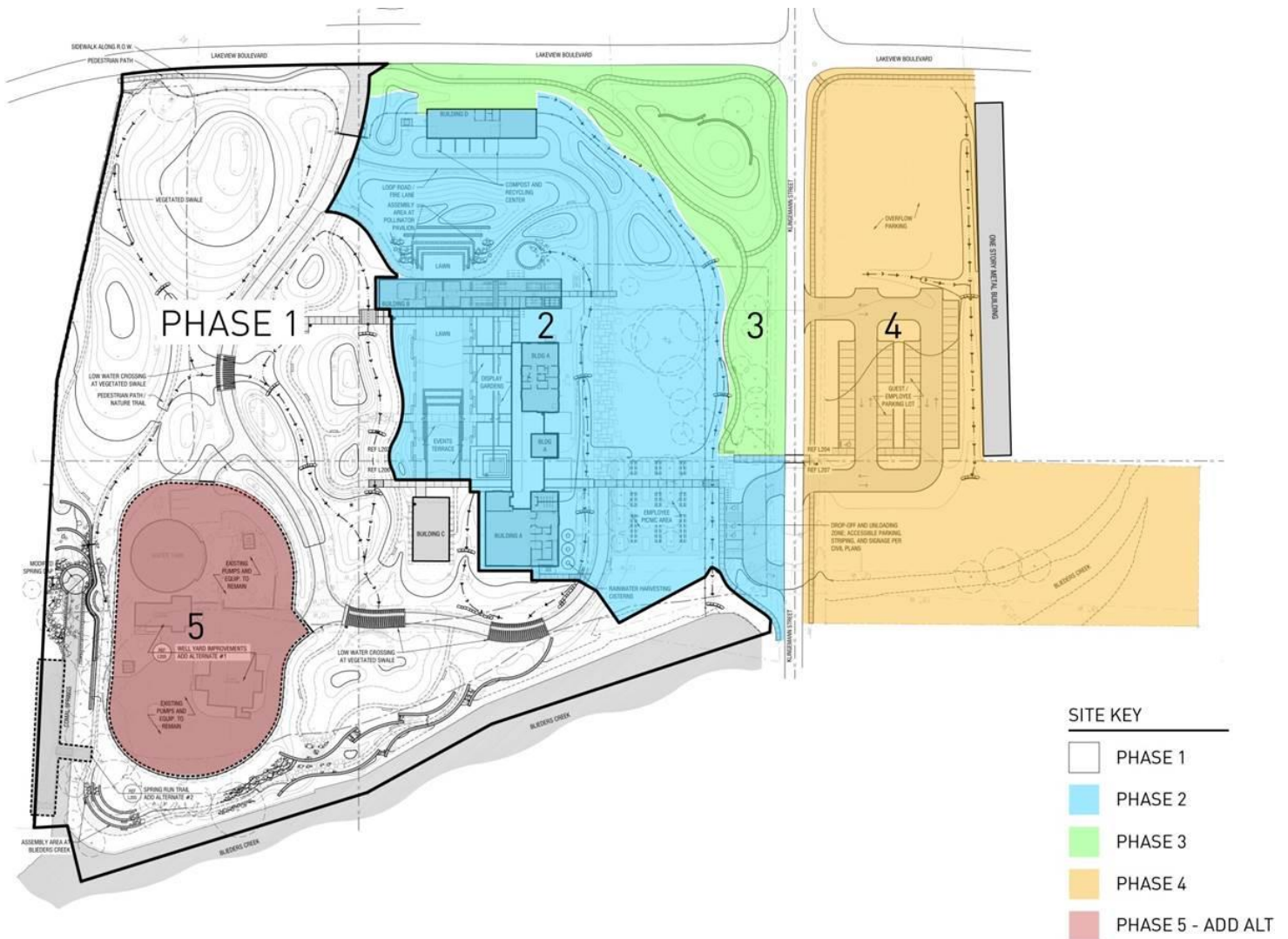
The NBU-owned Klingemann Property ("Property"), consisting of approximately 13 acres in New Braunfels, Texas, contains a portion of the headwaters of the Comal Springs, the original water source for the community, and a unique riparian habitat related to the Comal Springs and River ecosystem. From 1940 until 2004, NBU used this property as a warehouse, a fleet and facilities yard, and an office.

In keeping with a longstanding commitment to the environment and to the community, NBU plans to restore and develop the Property into the multi-use Comal Springs Conservation Center facility to enhance the community's relationship with nature ("Project"), and specifically the Comal Springs. The development will be a teaching tool that honors the cultural and environmental history of the Property and surrounding area, while encouraging future stewardship of the environment, water and community. One of the primary objectives of the Project is to restore the Property's natural environment to minimize adverse water quality impacts to habitats in the Comal Springs and River ecosystem and the federally protected endangered and threatened species that live therein due to diffuse surface water runoff from the Property into this ecosystem.

NBU has developed a multi-phase approach to complete the Project:

<b>Phase</b>	<b>Description</b>	<b>Total Estimated Cost</b>	<b>NBU Fiscal Year</b>
Due Diligence, Planning & Design	Master plan development; project design; design development drawings; environmental assessments; archeological surveys; apply for USACE and USFWS permits	\$2 million	FY 11-15
Phase 1	Spring & landscape restoration; Run site utilities; Spring run observation areas; construct outdoor classroom	\$6 million	FY 2016 FY 2017
Phase 2	Building Construction	\$13.45 million	FY 18-20
Phase 3	Monument signage; way finding signs; additional trails, landscaping and parking	\$1.45 million	FY 21
<b>TOTAL</b>		<b>\$22.9 million</b>	

The various phases of the Project are depicted in the following graphic. Please note, Phases 1 and 5 on the map have been combined into Phase 1 in the table above. Likewise, Phases 3 and 4 on the map have been combined into Phase 3 in the table above.



Phase I of the Project, as listed above and described in more detail below, is the focus of this contract.

**II. DESCRIPTION AND SPECIFICATIONS OF SERVICES, INCLUDING COSTS:**

Phase 1 of the Project will entail primarily asphalt removal, contouring the site to add swales and berms to redirect stormwater runoff from the spring run and filter the stormwater through native landscaping. Phase 1 will also entail bank stabilization and renovation along the spring run. More specifically, Phase 1 construction will:

- Remove impervious cover, approximately 85% of the existing asphalt (roughly 8.5 acres) on the Property, and restore 90% of the Property back to its native state by reintroducing upland and riparian flora. Removal of impervious cover will allow

infiltration of water back into soil, improving the overall health of the Property and the Comal Springs and River ecosystem.

- Amend existing soils to support healthy, diverse plant communities that are suited to local conditions, and will drive ecosystem function such as carbon sequestration, cleansing of runoff from adjacent streets, etc.
- Restore Spring Run No. 4 by rehabilitating the spring source to allow for restoration of quality habitat for Covered Species identified in Table 1-3 of the Edwards Aquifer Habitat Conservation Plan at p. 1-10 (Nov. 2012) that are known to live in the Comal Springs and River ecosystem associated with Spring Run No. 4. Restoration and conservation efforts will focus on maximizing the habitat requirements of these Covered Species, optimizing ecosystem function of Spring Run No. 4, and minimizing and mitigating the negative water quality effects of the diffuse surface water runoff from the Property into the Comal Springs and River ecosystem.

### III. PROJECT RESPONSIBILITIES:

NBU agrees to construct Phase 1 of the Project as provided for in this Exhibit.

### IV. PROJECT COMPLETION SCHEDULE:

Construction that is the subject of this Contract is anticipated to begin August 1, 2016 and to be completed by March 31, 2017.

**EXHIBIT B  
BUDGET ESTIMATE**

The EAA will fund a portion of the cost of the Project, in a total amount not to exceed \$540,000.

Over the term of this Contract, the EAA will reimburse eligible expenses in an amount not to exceed \$180,000, annually. To be eligible for reimbursement, expenses must have been incurred during the term of this Contract.

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