

**Johnson County Wetlands Mitigation Bank**

**Mitigation Banking Instrument**

**October 18, 1999**

(Amended 12/30/1999 on noted pages)

**Johnson County Wetlands Mitigation Bank, L. L. C.**

## TABLE OF CONTENTS

<b>I.</b>	<b>Preamble</b> .....	<b>1</b>
	A. Purpose .....	1
	B. Location and Ownership of Parcel .....	1
	C. Project Description .....	1
	D. Baseline Conditions .....	2
	E. Design Rationale .....	2
	F. Establishment and Use of Credits .....	2
	G. Mitigation Bank Review Team .....	3
	H. Disclaimer .....	3
	I. Exhibits .....	3
<b>II.</b>	<b>Authorities</b> .....	<b>4</b>
<b>III.</b>	<b>Establishment of the Bank</b> .....	<b>4</b>
<b>IV.</b>	<b>Operation of the Bank</b> .....	<b>5</b>
	A. Service Area .....	5
	B. Access .....	6
	C. Eligible Projects .....	6
	D. Assessment Methodology .....	6
	E. Success Criteria .....	8
	F. Process/Schedule of Credit Availability .....	8
	G. Conditions on Debiting .....	10
	H. Provisions for Uses of the Mitigation Bank Area .....	11
<b>V.</b>	<b>Maintenance and Monitoring of the Bank</b> .....	<b>11</b>
	A. Maintenance provisions .....	11
	B. Monitoring provisions .....	12
	C. Reports and Record Keeping .....	12
	D. Accounting Procedures .....	13
	E. Contingency Plans/Remedial Actions .....	14
	F. Long-Term Management .....	14
<b>VI.</b>	<b>Responsibilities of the MBRT</b> .....	<b>16</b>
<b>VII.</b>	<b>Other Provisions</b> .....	<b>16</b>
	A. Force Majeure .....	16
	B. Dispute Resolution .....	16
	C. Validity, Modification, and Termination of the Banking Instrument .....	16
	D. Specific Language of Banking Instrument Shall Be Controlling .....	16

**BANKING INSTRUMENT  
JOHNSON COUNTY WETLANDS MITIGATION BANK**

This Banking Instrument regarding the establishment, use, operation, and maintenance of Johnson County Wetlands Mitigation Bank (hereinafter, the Bank) is made and entered into by and among the Johnson County Wetlands Mitigation Bank, L.L.C. (hereinafter, Sponsor), the U.S. Army Corps of Engineers (Corps), the U.S. Environmental Protection Agency - Region VII (EPA), the U.S. Fish and Wildlife Service (FWS), Natural Resources Conservation Service (NRCS), Kansas Department of Health and Environment (KDHE), Kansas Department of Wildlife and Parks, Blue Valley School District and Johnson County Park and Recreation District, with reference to the following:

**I. PREAMBLE**

- A. Purpose:** The purpose of the Bank is to provide quality, ecologically sound wetlands for mitigation compensation. This Bank will provide a source of established and successional forested and emergent wetlands to Johnson County, Kansas. The purpose of this Banking Instrument is to establish guidelines and responsibilities for the establishment, use, operation, and maintenance of the Bank. The Bank will be used for compensatory mitigation for unavoidable impacts to waters of the United States including wetlands which result from activities authorized under Section 404 of the Clean Water Act, provided such use has met all applicable laws, regulations, requirements, this instrument and the associated permit is authorized by the appropriate authority.
- B. Location and Ownership of Parcel:** Whereas, the Bank is owned by Johnson County Wetlands Mitigation Bank, L.L.C. and is located generally east of Nall Avenue and south of 159th Street, in the City of Overland Park, Johnson County, Kansas. The Bank is located in Section 16, Township 14 South, Range 25 East (Exhibit A). The Bank is a multi-construction phase project.
- C. Project Description:** Whereas, under this Banking Instrument, the Sponsor will establish and/or maintain the acreage of aquatic habitat of each successive phase in accordance with the provisions of this Banking Instrument and the Bank Development Plan (Exhibit B), and shall then maintain the Bank in such condition in accordance with the bank closure procedures or until all credits are sold, whichever is later. The Bank area, at the completion of construction of two (2) successive phases, shall consist of a total of 62 acres MOL of quality, ecologically sound wetlands and wildlife habitat. The Phase 1 Development Tract of the Bank refers to the 53.6 acre MOL parcel in the south-west and central portion of the project area. Phase 2 Development Tract references the 8.8 acre MOL parcel located in the eastern portion of the project area.

- D. Baseline Conditions:** Whereas, the Bank is located in Johnson County, Kansas, in the Central Lowland Province of the Interior Plains, an area characterized as gently rolling and undulating uplands. The Generalized Physiographic Map of Kansas includes the county in the Osage Cuestas region of the North Glaciated Till Plains of North America. The Bank is situated on a portion of the floodplain and floodplain terrace of the Blue River. The site has wooded, wooded wetland, and open upland areas. Current land use is agricultural (soybeans and wheat), disturbed open grass fields, wooded areas, and channels. Specific baseline conditions of the Bank are contained in the Delineation Report (Exhibit C).
- E. Design Rationale:** The JCWMB has very specific reasons for how and why the development has been proposed in the manner outlined within this document. This Design Rationale can be summarized as follows.
1. The “strength” of any mitigation stems from the diversity of habitat types. Therefore, it was a significant desire to “intimately intertwine” a diverse palette of habitat types. To accomplish this end, it was determined that a complex consisting of riparian buffers, seasonally moist soil wetlands, consistently moist soil wetlands, emergent wetlands, emergent/floater wetlands, and deep water would provide such incredible diversity as to make this site a extremely unique and valuable resource if developed as proposed.
  2. The site exists in a classic, Blue River floodplain setting and exhibits a number of positive features. Not the least of these is the riparian buffer that exists along the river and north property edges. While it has been noted that no permits would be required if it was a landowners desire to log the area of it’s timber, it was determined that the adjacency of these wooded areas to the proposed wetlands acreage gave the site a “sum greater than its parts”.
  3. Deeper water is extremely desirable in order to accommodate and respond to any sedimentation that occurs from either the local tributaries or the Blue River. These areas are sited to act as sedimentation basins, if required, and to provide some limited fisheries and groundwater recharge functions. Juxtaposed so intimately with a variety of wetland types, this complex can provide greater potential for wading shorebird and other waterfowl habitat.
- F. Establishment and Use of Credits:** Whereas, in accordance with the provisions of this Banking Instrument and upon satisfaction of the success criteria , as determined by the MBRT or the Corps and contained herein, credits will be available to be used as mitigation in accordance with all applicable laws, regulations, requirements, this instrument and associated permit noted in Part IV.

**G. Mitigation Banking Review Team (MBRT)** consists of members of the following agencies:

1. U.S. Army Corps of Engineers, Kansas City District (Corps), Chair
2. U.S. Environmental Protection Agency, Region VII (EPA)
3. U.S. Fish and Wildlife Service (FWS)
4. Natural Resources Conservation Service (NRCS)
5. Kansas Department of Health and Environment
6. Kansas Department of Wildlife and Parks

**H. Disclaimer:** Whereas, this Banking Instrument does not in any manner affect statutory authorities and responsibilities of the signatory parties.

**I. Exhibits:** Whereas, the following Exhibits are incorporated as appendices to this Banking Instrument :

1. Exhibit A: Locational Figures
2. Exhibit B: Bank Development Plan
3. Exhibit C: Delineation Report (determination concurrence letter from NRCS included)
4. Exhibit D: Planting Plan
5. Exhibit E: Bank Management Manual
6. Exhibit F: Water Quality Protection Plan
7. Exhibit G: Declaration of Intent of Gift and Land Exchange Agreement
8. Exhibit H: Water Budget Analysis
9. Exhibit I: Legal Description and Site Map

It should be noted for clarification, that the proposed Phasing of Bank Development are now to be described as Phase 1 and Phase 2. The previously described (in Exhibit C) Phases 1 and 2, will now constitute the proposed Phase 1. The previously described Phase 3 will now constitute the proposed Phase 2. It should also be noted that there are now two Bank recipients which include Johnson County Park and Recreation District and Blue Valley School District. The Land Exchange Agreement for the Blue Valley School District has been added to Exhibit G.

## II. AUTHORITIES

The establishment, use, operation and maintenance of the Bank is carried out in accordance with the following authorities:

1. Clean Water Act (33 USC 1251 et seq.)
2. Rivers and Harbors Act (33 USC 403)
3. Fish and Wildlife Coordination Act (16 USC 661 et seq.)
4. Regulatory Programs of the Corps of Engineers, Final Rule (33 CFR Parts 320-330)
5. Guidelines for Specification of Disposal Sites for Dredged and Fill Material (40 CFR Part 230)
6. Memorandum of Agreement between the Environmental Protection Agency and the Department of the Army concerning the Determination of Mitigation Under the Clean Water Act, Section 404 (b)(1) Guidelines (February 6, 1990)
7. Federal Guidance for the Establishment, Use, and Operation of Mitigation Banks (60 F.R. 58605 et seq.)
8. Kansas Water Quality Regulations (KAR 28-16-28f(c)(1))

**NOW, THEREFORE**, the parties agree to the following:

## III. ESTABLISHMENT OF THE BANK

- A. The Sponsor shall perform all necessary work, in accordance with the provisions of this Banking Instrument, to establish and/or maintain 62 acres of aquatic habitat, as shown in Exhibit B, until it is demonstrated to the satisfaction of the agencies represented on the MBRT (acting through the Chair) that the project complies with all conditions contained herein, or until all credits are sold, whichever is later. Work shall include implementing the Bank Development Plan (Exhibit B).
- B. The Sponsor will obtain all appropriate environmental documentation, permits or other authorizations needed to establish and maintain the Bank. This Banking Instrument does not fulfill or substitute for such authorization.
- C. Establishment of the Bank will be performed in two distinct Phases, as described in the Bank Development Plan (Exhibit B), and the credits will become available in accordance with the schedule specified in Part IV, Sections D through G of this Banking Instrument. In the event the Sponsor determines that modifications must be made in the Bank Development Plan to ensure successful establishment of habitat within the Bank, the Sponsor shall, prior to modification, submit a written request for such

modification to the MBRT, through the Chair, for approval. Documentation of implemented modifications shall, prior to modification, be made consistent with Part III, Section F *infra*.

- D. **Financial Assurance Requirements:** The Sponsor agrees to provide the following financial assurances for the work described in this Banking Instrument. For each successive phase developed in the Bank, the Sponsor shall be responsible for the costs associated with the construction of grading and structures, vegetation establishment, operation and maintenance of the Bank consistent with the Bank Development Plan, the maintenance criteria established in the Bank Management Manual (Exhibit E), and for the monitoring activities described in the Planting Plan (Exhibit D) necessary to demonstrate compliance with the success criteria established in this Banking Instrument, including vegetation surveys, wildlife surveys, and hydrologic monitoring. In addition, the Sponsor shall be responsible for the establishment of a long-term, interest-bearing Bank maintenance account, the funds for which shall be contributed by the Sponsor, to be calculated on a per acre basis following the completion of each credit sale. The ownership of this long-term maintenance account shall be transferred in its entirety to the responsible entity receiving ultimate ownership of the Bank site following Bank closure, for the purpose of maintaining the Bank site in perpetuity as quality, ecologically sound wetlands and wildlife habitat.
- E. **Real Estate Provisions:** The Sponsor shall record a conservation easement on the Bank land prior to certification of any credits in favor of the buyer or its successor. The conservation easement shall preserve the Bank land as wetlands and wildlife habitat in perpetuity. The draft conservation easement documents shall be provided to the Corps for approval prior to its recording and copies of recorded documents shall be provided to the Corps.
- F. The Sponsor shall submit an as-built report for each phase of the Bank 45 days following completion of the establishment of that phase of the Bank. The as-built report will describe in detail any deviation from that described in the Bank Development Plan (Exhibit B), and a plan showing finish grades, and surface and groundwater elevations, as appropriate.

#### IV. OPERATION OF THE BANK

- A. **Service Area:** The Bank is established to provide mitigation to compensate impacts to the Waters of the United States including wetlands within Johnson County, Kansas for the "life of the project". Decisions authorizing use of credits from the Bank will be made by the Corps of Engineers on a case-by-case basis in accordance with applicable laws, regulations, requirements, this instrument and the associated permit.

Use of the Bank for projects outside of the Service Area may be approved on a case-by-case basis, if determined to be practicable and environmentally desirable. Such cases will be reviewed by the Corps of Engineers for their diminishing relevance and will be included in the Process/Schedule for Credit Availability (Section IV.F.) to establish the appropriate credits.

The Service Area includes four Hydrologic Units Code (HUC) 8 watersheds. The Unit Codes for these watershed are 10270104, 10300101, 10290102, and 10290108. The bank site is located in HUC 8 watershed 10300101 (Lower Missouri-Crooked).

- B. Access:** The Sponsor will allow, or otherwise provide for, access to the site by all signatory parties, as determined necessary by the MBRT or the Corps, for the purpose of inspection and compliance monitoring consistent with the terms and conditions of this Banking Instrument. Inspecting parties shall provide reasonable notice, of not less than 24 hours, to the Sponsor, prior to inspection of Bank.
- C. Eligible Projects:** For projects requiring authorization under Section 404 and Section 10, the Corps, in consultation with the other regulatory and resource agencies, will determine the eligibility of projects to use the Bank on a case-by-case basis. In general, it is agreed that the following activities/projects shall typically be eligible to use the Bank:
1. Where no practicable opportunity exists for on-site mitigation,
  2. When use of the Bank is environmentally preferable to on-site mitigation,
  3. Projects having numerous, small impacts associated with linear projects,
  4. Mitigation associated with nationwide permits, and
  5. Use of the bank for projects that are out-of-kind for applicable project impacts may be approved on a case-by-case basis, if determined to be practicable and environmentally desirable.
  6. It is understood that under the existing requirements of section 10 and 404, all appropriate and practicable steps must be taken by the applicant by the applicant to first avoid and then minimize adverse impacts to the aquatic resources, prior to authorization by this bank. Remaining unavoidable impacts must be compensated to the extent appropriate and practicable.
- D. Assessment Methodology:** The Corps will subjectively assess credits and debits by the Sponsor on a case-by-case, per-acre basis. In-kind mitigation will be accomplished, generally, by debiting identified acreage of specific wetland “types” from applicant projects. This same acreage, along with any acreage associated with mitigation ratios, will then be credited with similar wetland “types” in the Bank. The wetland “types” identified as being available in the Bank are, and their anticipated acreage on final bank development are described in Table 1 below.

**Table 1. Wetland Type Acres for Johnson County Wetlands Mitigation Bank. Johnson County, Kansas. Prepared by George Butler Associates, Inc., October, 1999.**

<b>Wetland Areas</b>	<b>Phase 1 (acres)</b>	<b>Phase 2 (acres)</b>	<b>Total Acres</b>	<b>Credit %</b>	<b>Credit Acres - Phase 1</b>	<b>Credit Acres - Phase 2</b>	<b>Total Credit Acres</b>
Preserved Riparian Habitat	8.33	1.67	10.00	25%	2.08	0.42	2.50
Created Riparian Habitat	5.00	0.00	5.00	25%	1.25	0.00	1.25
Created Aquatic/Open Water Habitat	4.60	0.00	4.60	100%	4.60	0.00	4.60
Created Herbaceous Wetlands	22.92	3.73	26.65	100%	22.92	3.73	26.65
Created Wooded Wetlands	12.74	3.40	16.14	100%	12.74	3.40	16.14
<b>Total</b>	<b>53.59</b>	<b>8.80</b>	<b>62.39</b>		<b>43.59</b>	<b>7.55</b>	<b>51.14</b>

Riparian and Aquatic Habitat are presumed as in-kind mitigation for riparian floodplain, open water, and other jurisdictional waters of the U.S. impacts. All other wetland types are considered self-explanatory.

Out-of-kind mitigation will occur on an as needed basis.

The Corps of Engineers, in conjunction with any ratios and comments on wetland types noted in correspondence with MBRT members as outlined in Section G, below, will make the final determination as to the appropriate ratios and mitigation wetland types.

- E. Success Criteria:** Refer to Section 5 and Table 4 of Exhibit D, Planting Plan.
- F. Process/Schedule for Credit Availability:** Table 2 provides a schedule of credit availability as determined by the progress and success of the development. Upon submittal of all appropriate documentation by the Sponsor as described in Part V C, and subsequent approval by the Corps, in consultation with the other members of the MBRT, it is agreed that credits will become available for use by the Sponsor or for transfer to a third party in accordance with the following schedule.

“Preserved Acreage Threshold” - When a conservation easement has been registered, 20% of the available credits will become immediately available.

“Grading Threshold” - When the grading of the various wetland “types” discussed in IV.D. and Exhibit B, Attachment 1 is completed including approval of the “as-built” grading plan, 33% of the available credits for the specific acre and type graded will become immediately available.

“Hydrology Threshold” - When the hydrology criteria for a specific wetland acre or type has been satisfied, 70% of the available credits for that acre or type will become immediately available.

“Planting Threshold” - When the planting of various, wetland “types” discussed in IV. D. and Exhibit D is completed including approval of the “as-built” planting plan, 85% of the available credits for the specific acre and type planted will become immediately available.

“Final Success Threshold” - When the planted areas and aquatic areas are determined to be successful in accordance with IV. D. and Exhibit D, all remaining (100%) available credits will become immediately available.

<b>Table 2. Total Available Wetland Types at each threshold for Johnson County Wetlands Mitigation Bank</b>											
<b>Wetland Areas</b>	<b>Total Credit Acres</b>	<b>Preserved Acreage Threshold</b>		<b>Grading Threshold</b>		<b>Hydrology Threshold</b>		<b>Planting Threshold</b>		<b>Final Success Threshold</b>	
		<b>%</b>	<b>/Acres</b>	<b>%</b>	<b>/Acres</b>	<b>%</b>	<b>/Acres</b>	<b>%</b>	<b>/Acres</b>	<b>%</b>	<b>/Acres</b>
Preserved Riparian Habitat	2.50	20%	0.50	33%	0.83	70%	1.75	85%	2.13	100%	2.50
Created Riparian Habitat	1.25	20%	0.25	33%	0.41	70%	0.88	85%	1.06	100%	1.250
Created Aquatic/ Open Water Habitat	4.60	20%	0.92	33%	1.52	70%	3.22	85%	3.91	100%	4.60
Created Herbaceous Wetlands	26.65	20%	5.33	33%	8.79	70%	18.66	85%	22.65	100%	26.65
Created Wooded Wetlands	16.14	20%	3.23	33%	5.33	70%	11.30	85%	13.72	100%	16.14
<i>Amount of Increase at each threshold</i>			<i>10.23</i>		<i>6.65</i>		<i>18.93</i>		<i>7.66</i>		<i>7.67</i>
<b>Total Acres Available</b>	<b>51.14</b>		<b>10.23</b>		<b>16.88</b>		<b>35.81</b>		<b>43.47</b>		<b>51.14</b>

**G. Conditions on Debiting:** The Bank will be enabled to sell a limited number of pre-establishment credits on execution of this instrument (refer to Part IV, Section F, above). These initial credits will be based on the “Preserved Acreage Threshold”. All additional credits will become available when the appropriate thresholds are achieved as outlined above in Section F. The debiting procedures will be followed:

1. Upon determination by the Corps that a project will require mitigation, a representative of the party(ies) desiring to secure credit in a mitigation Bank will contact the Bank Sponsor.
2. A preliminary determination of credit availability will be made to identify if the project meets the guidelines for project type, is potentially worthy of consideration for special circumstances, if in-kind mitigation credits are generally available and if any credits are available for the debits anticipated.
3. A qualified wetland professional will perform the approved debit determination in a manner consistent with the Bank credit system.
4. The interested party will, in conjunction with the Corps and all other appropriate jurisdictional agencies, determine total type and amount of credits required. This process will consist of:

Step 1 - The Corps of Engineers will send out a fax “Project Mitigation Ratios Required” form. This form will request each member of the MBRT to identify what that representative believes is the appropriate mitigation ratios for a variety of circumstances. These circumstances might include:

Ratio if mitigation is done on-site	_____ to _____
Ratio if mitigation is done in the Bank	_____ to _____
Ratio if mitigation is done on other off-site locations	_____ to _____

Additionally, a comment section should be offered to allow comments, suggested ratio ranges the representative believes is appropriate, etc. This fax form will be a product of the Corps of Engineers-Kansas City District and will incorporate any recommendations made by the remaining members of the MBRT as the Corps deems appropriate.

Step 2 - Each MBRT representative will respond within 12 calendar days with the ratios they consider appropriate for the project in question. The generalized basis of these varying ratios will be the relative “quality” of the wetland to be impacted, the ability of on-site, Bank, or other off-site mitigation to provide essentially representative functions and values, and the context of the impact and the proposed mitigation (watershed proximity, landscape positioning, etc.). No response will be considered as

an abstention in the mitigation ratio development portion of the process and will not be construed by any party as either acceptance or rejection of the proposed project, in part or entirety.

Step 3 - The Corps of Engineers will compile the responses and will develop a ratio that they believe either most fully represents the total responses or is the most appropriate ratio for the project. The Corps of Engineers will then communicate the defined ratio options to the proposed project applicant. The applicant will then have the right to choose the mitigation option that best suits their needs. If the applicant chooses to utilize the Bank for mitigation, the process will continue. If the applicant chooses, at this point or at anytime prior to credit purchase, to not utilize the Bank for mitigation needs, the mitigation bank process, as it applies to that specific process, will cease.

5. The interested party will negotiate the financial aspects of credit purchase in Bank.
6. Upon successful resolution of financial interests, the Bank will communicate with the Corps of Engineers its ability, willingness, and the existence of a contractual arrangement having been completed to all parties satisfaction. This written letter will also include the current accounting of Bank credits.
7. Upon Corps approval of the applicability and proposed use of the Bank for the project in question, the final signed contract can be executed.
8. If no contract can be finalized, the Bank will notify the Corps of such and that the project in question no longer has available credits in the Bank.

**H. Provisions for Uses of the Mitigation Bank Area:** The Sponsor shall **NOT**:

1. Grant additional easements, right of way, or any other property interest in or to the project areas without the written consent of the Corps, in consultation with the MBRT.
2. Use or authorize the areas within the Bank for any purpose which interferes with its conservation purposes other than those specified in the Bank Development Plan.

**V. MAINTENANCE AND MONITORING OF THE BANK**

- A. Maintenance Provisions:** Maintenance will be performed in two stages: (1) the credit stage, and (2) the perpetual stage. The credit stage will be that period of time from ground breaking, through Bank construction and establishment, to and including sale of all Bank credits. Maintenance during the credit stage will be

performed by the Sponsor. The perpetual stage will be that period of time following the date when title to the land is transferred for in perpetuity to the Johnson County Park and Recreation District and Blue Valley School District. Copies of the Declaration of Intent of Gift (Park District) and Land Exchange Agreement (School District) are included as Exhibit G. The Sponsor agrees to perform all necessary work to maintain the Bank consistent with the maintenance criteria established herein, including the Bank Development Plan, the Planting Plan, and the Bank Management Manual. The Sponsor shall continue with such maintenance activities until closure of each phase of the Bank. Upon closure of the Bank, the Sponsor shall implement the management requirements established in Part V, Section F. Deviation from the approved Bank Development Plan is subject to review and written approval by MBRT, acting through the Chair.

**B. Monitoring Provisions:** The Sponsor shall perform all necessary work to monitor the Bank to demonstrate compliance with the success criteria established and described within this Banking Instrument at Exhibit D, Table 4 and implementation of the Water Quality Protection Plan, Exhibit F. Annual Monitoring Reports will be sent to each member of the MBRT, to be included in the Annual Status Report described below. The Monitoring Report shall contain, at a minimum, the following information:

1. Name of Bank,
2. Date of Report,
3. Date of Monitoring,
4. Name of Monitoring Professional,
5. Estimated plant species diversity,
6. Estimated plant areal coverage,
7. Any noted plant community changes,
8. Any noted wildlife activity on date of monitoring site,
9. Any noted human impacts such as dumping or vandalism,
10. Any noted alterations, impacts, surface water quality changes, apparent new attributes or indicators (positive or negative) which suggest significant change has occurred or might occur in the future, and
11. Estimation if site continues to meet success criteria.
12. Any water pollution events such as reported spills and cleanup activities.
13. Cowardin et al based habitat types, when provided by others.

Information contained within the Annual Monitoring Reports will also be incorporated into the Total Bank Credit Assessments.

**C. Reports and Record Keeping:** The Sponsor shall submit to the Corps, for distribution to the other members of the MBRT, an Annual Status Report describing the conditions of Bank and relating those conditions to the success

criteria and shall include the Annual Monitoring Report. The Annual Status Reports will be performed only on those phases of development which are still active. As the parcels are turned over to the Johnson County Park and Recreational District and Blue Valley School District (final recipients) which will hold the property in perpetuity, Annual Status Reports will no longer be required. Reports will be submitted by the end of each calendar year and contain the following:

1. USGS Topographical Map showing location of the Bank;
2. Detailed narrative summarizing the condition of the Bank and all regular maintenance activities;
3. Appropriate topographic maps showing location of sampling plots, permanent photo points, location of transects, etc.;
4. Results of hydrology survey including hydroperiod, extent of inundation and depth, groundwater monitoring data, precipitation, etc.;
5. Results of vegetation survey including visual estimates of % overall cover and % cover by vegetation survey layer, species diversity, % exotic vegetation in each vegetation layer, survival rate of planted vegetation, an estimate of natural revegetation, a measure of the relative percentages of indicator status species groupings, and plant vigor as measured by evidence of reproduction;
6. Status of success criteria as noted in Section 5 and Table 4 of Exhibit D, Planting Plan, and
7. Results of other surveys such as bird, macroinvertebrate, fish surveys, etc. that may be done incidentally or by others (when results are provided).

As-built reports will be generated at the conclusion of the construction of each phase of the development as shown in the exhibits. These reports will confirm any changes that were required as a result of construction needs. Final site credits will take into account the "as constructed" acreage.

**D. Accounting Procedures:** The Sponsor shall submit a statement to the Corps each time credits are debited or additional credits are approved. If requested, the Corps will distribute the statement to other members of the MBRT. At a minimum, the Sponsor shall submit an annual ledger to the Corps for distribution to all members of the MBRT, showing all transactions at the Bank for the previous year. The Bank will establish and maintain an annual accounting system to record:

1. Initial Bank credits,
2. Used credits as of a specific date,
3. Credit account holders and the applicable Corps Permit Numbers (or Corps Authorization Numbers),
4. Total credits per holder,

5. Any known changes to credit holders in the past year (resulting from third and fourth party sales), and
6. Unused credits as of a specific date.

Financial statements and accounting for the Bank are requested to be treated as “Confidential Business Information” (CBI) and will be handled in accordance with applicable agency regulations. If the agency has no CBI regulations, the signatories agree that when such data is provided to them the information will not be made available to any parties except at the discretion of the Sponsor through written authorization by the Sponsor.

- E. Contingency Plans/Remedial Actions:** In the event the Bank, or specific phase of the Bank, fails to achieve the success criteria specified in Exhibit D, Section 5 of this Banking Instrument, the Sponsor shall develop necessary contingency plans and implement appropriate remedial actions for the Bank, or specific phase, in coordination with the MBRT. In the event the Sponsor fails to implement necessary remedial actions within 45 calendar days after notification by the Corps of necessary remedial action to address any failure in meeting the success criteria, the MBRT, acting through the Chair, will notify the Sponsor and the appropriate authorizing agency(ies) and recommend appropriate remedial actions.

If the authorizing agency(ies) determines the Bank is operating at a deficit, debiting of credits will immediately cease, and the authorizing agency(ies), in consultation with the MBRT and the Sponsor, will determine what remedial actions are necessary to correct the situation. As determined by the Chair in coordination with the MBRT and the Sponsor, if conditions at the Bank site do not improve or continue to deteriorate within a reasonable time frame from the date that the need for remediation was first identified in writing to the Sponsor by the Chair of the MBRT, the operation and maintenance funds shall be utilized to effect corrective measures. At the request of the Sponsor, the MBRT will perform a final compliance visit to determine whether all success criteria have been satisfied.

Further, the Sponsor reserves the right to begin construction on the proposed additional phases on an “as needed” basis. The Sponsor will inform all members of the MBRT of its intention to begin any phases after Phase 1 at least 90 days prior to initiation of construction. Such notification will include a letter of notification and preliminary engineering plans.

- F. Long-Term Management:** At the end of the active monitoring period, the Sponsor shall transfer the entire long-term management funds and the title to the Bank land to Johnson County Park and Recreation District and Blue Valley School District, who will maintain the site as quality, ecologically sound wetlands

and wildlife habitat. At that time, Johnson County Park and Recreation District and Blue Valley School District shall be responsible to manage the Bank in perpetuity in accordance with the terms of the long-term management plans and real estate provisions. Upon signing of this Banking Instrument the Johnson County Park and Recreation District and Blue Valley School District concurs and they shall use the long-term management funds specified in Part III, Section D.2 to be used for this purpose only. Long-term management will begin as soon as title to each parcel is turned over to such an entity by the Sponsor. It will be the intention of Johnson County Park and Recreation District and Blue Valley School District to maintain the parcels as wetlands. In this capacity, allowable uses for the area include:

1. outdoor educational laboratory,
2. ecological experiment plot(s),
3. water quality monitoring “facility,”
4. ecological monitoring “facility,”
5. educational entertainment “facility,”
6. marketing, promotional or demonstration example, and
7. limited plant materials harvesting location.

In any of these uses, public pedestrian (including that to accommodate the Americans with Disabilities Act or ADA) access will be allowed.

Although a wide variety of unallowable uses might be developed, the following list is provided to give a sense of what uses are to be considered undesirable.

1. Motorized vehicle use (except for designated maintenance vehicles),
2. Vegetation genetic experimentation that would degrade the site genomes,
3. Point source water treatment,
4. Landfill or refuse dump,
5. Permanent Buildings (not to include interpretive signage structures, etc),
6. Roadway, and
7. Commercial or retail “facilities”.

As the science of wetlands and the maintenance of wetland areas continues to evolve, alterations in the long-term management plans may be anticipated. It will be the responsibility of Johnson County Park and Recreation District or Blue Valley School District, as appropriate, to make any alterations, as the timing of such alterations will be after the parcel(s) have been turned over to them. It should be noted that, at that time, the MBRT will no longer exercise review of these areas.

## VI. RESPONSIBILITIES OF THE MBRT

- A. The agencies represented on the MBRT agree to provide appropriate oversight in carrying out provisions of this Banking Instrument.
- B. The agencies represented on the MBRT agree to review and provide comments on all project plans, monitoring reports, credit review reports, contingency plans, and necessary permits for the Bank in a timely manner. Comments on the monitoring reports and credit review reports will be reviewed within 45 calendar days from the date of complete submittal, except for good cause.
- C. The Agencies represented on the MBRT agree to review and confirm reports on evaluation of success criteria prior to approving credits within each phase of the Bank.
- D. The agencies represented on the MBRT shall conduct compliance inspections, as necessary, as determined by the Corps in consultation with the Sponsor, to verify credits available in the mitigation Bank, recommend corrective measures (if any), until the terms and conditions of the Bank Development Plan have been determined to be fully satisfied or until all credits have been sold, whichever is later.

## VII. OTHER PROVISIONS

- A. **Force Majeure:** The Sponsor will not be responsible for Bank failure that is attributed to natural catastrophes such as flood, drought, disease, regional pest infestation, etc., that the MBRT, acting through the Chair, determine is beyond the control of the Sponsor to prevent or mitigate.
- B. **Dispute Resolution:** Resolution of disputes about application of this Banking Instrument shall be in accordance with those stated in the Federal Guidance for the Establishment, Use and Operation of Mitigation Banks (60 F.R. 58605 et seq., November 28, 1995).
- C. **Validity, Modification, and Termination of the Banking Instrument:** This Banking Instrument will become valid on the date of the last signatory's signature. This Banking Instrument may be amended or modified with the written approval of all signatory parties. Any of the MBRT members may terminate their participation upon written notification to all signatory parties. Participation of the MBRT members will terminate 60 days following written notification.
- D. **Specific Language of Banking Instrument Shall Be Controlling:** To the extent that specific language in this document changes, modifies, or deletes terms and

conditions contained in those documents that are incorporated into the Banking Instrument by reference, and that are not legally binding, the specific language within the Banking Instrument shall be controlling.

## VIII. DEFINITIONS

**Agriculture** - Activities include cattle grazing, haying, row crop, orchard, and related activities.

**Appropriate Plant Species** - Plant species which are appropriate for a given community type.

**Baseline Condition** - The condition of the wetland assuming a reasonably expected “without Bank” condition.

**Canopy** - The plant stem composed of all woody plants with a trunk four inches or greater in diameter at breast height (4.5'), except vines.

**Decreased Hydroperiod** - A decrease in the period of inundation, resulting in a change in the plant community composition and structure. The effect is an increase of transitional and upland plant species.

**Desirable Plant Species** - Native plant species that are appropriate in a regional biological sense and provide benefits to wildlife in the form of food, cover, and nesting potential.

**Direct Impacts** - A physical act such as dredging, filling, or petroleum or chemical spill in wetlands.

**Dry Detention** - Impoundments in which stormwater is temporarily stored. They are designed so that no standing water remains in the basin after the bleed down period.

**Exotic Plant Species** - Plant species that are non-native, purposefully or accidentally introduced to a geographic area, invasive in nature and disrupt native plant communities.

**Extensively Maintained** - Mowed, disced or impacted on more than a semi-annual basis.

**Grass Swales** - A linear depression, that is usually designed to capture, store, and convey stormwater runoff.

**Ground Cover** - The plant stratum composed of all plants not found in the canopy or subcanopy.

**Heavily Impacted** - Impacted in such a degree as to significantly reduce system functionality.

**High Intensity Commercial** - Land use consisting of commercial with high levels of traffic volume with traffic constantly moving in the area; these include downtown areas, commercial office sites and regional malls.

**High Intensity Land Use** - A land-use or zoning which includes intensive agricultural operations such as dairy farming (including feedlots) and high-intensity commercial projects. These surrounding land uses are significantly disruptive to wetland systems through direct and indirect impacts.

**Hydroperiod** - The period of continuous inundation, but without regard to depth.

**Hydrological Indicators** - Indicators that may be used as evidence of inundation or saturation when evaluated with meteorological information, surrounding topography, and reliable hydrological data. Indicators include algal mats, aquatic mosses, aquatic plants, drift lines, elevated lichen lines, evidence of aquatic fauna, morphological plant adaptation, secondary flow channels, sediment deposition, vegetated tussocks and water marks.

**Hydrology** - Water depth, flow patterns and duration and frequency of inundation as influenced by precipitation, surface runoff and groundwater inputs and outputs.

**Impervious Surface** - Surfaces which do not allow for the percolation of water (e.g. - asphalt parking lots, roads or rooftops of buildings).

**Inappropriate Plant Species** - Plant species which are not usually considered nuisance species, however may be indicative of other problems (e.g - improper hydrology) and may dominate a particular stratum. These plant species are not considered appropriate for a particular habitat.

**Increased Hydroperiod** - An increase in the annual period of inundation, resulting in a change in the plant community composition and structure. Can include an increase in the duration and magnitude of inundation.

**Indirect Impacts** - Impacts to wetlands such as increased nutrient loading, altered hydrology, impacts to wetland buffer, development of adjacent areas of disturbances by sound, air, light or noise pollution.

**Industrial** - A land-use or zoning which includes manufacturing, shipping and transportation operations, sewage treatment plant facilities, water supply plants and solid waste disposal.

**Infiltration Trench** - Impoundments in which incoming runoff is temporarily stored until it gradually leaves the basin by infiltrating into the soils.

**Institutional** - A land-use or zoning which includes schools, churches, libraries, etc. These areas have similar runoff concentrations to low-intensity commercial.

**Landscape Setting** - The type of land use that surrounds a wetland (i.e. - agriculture, residential, commercial/industrial, undeveloped).

**Life of the Project** - The period of time beginning with the banking instrument approval by the Corps of Engineers until such time as the parcel in question is deeded over to the final recipient. On those occasions when only a portion of the entire acreage is deeded to the final recipient, the life of the project is ended only on the portion deeded over and does not extend to the entire acreage that remains in the hands of the bank and/or its successors.

**Low Density Residential** - A land-use or zoning (generally rural) with lot sizes greater than 1 acre or less than one dwelling unit per acre.

**Low Intensity Commercial** - A land-use or zoning area that receives a moderate amount of traffic volume and are parked for only a portion of the day. These areas include universities, schools, churches, professional office sites and small shopping centers.

**Low Intensity Land Use** - Uses such as low density residential and low intensity commercial

**Low Plant Biomass Density** - Little accumulation of plant biomass due to numerous factors including mowing, grazing, recent vegetation installation, inappropriateness of planted species, improper hydrology (including drought) and other human perturbations such as disturbances by off-road vehicles.

**Moderately Intensive Land Use** - A land-use or zoning which includes single-family residential, multi-family residential, golf courses and golf course residential communities, industrial projects, highways and agricultural activities such as pasture and row crops.

**Multi-family Residential** - A land-use or zoning which includes residential land use consisting primarily of apartments, condominiums and cluster homes.

**Pretreatment or MSSW System** - Constructed systems designed to pretreat water (i.e. - removal of suspended solids and degrees of nutrient removal) prior to discharge. Systems can range in simplicity from grass swales, dry retention to secondary treatment and polishing ponds.

**Routinely Maintained** - Mowed or impacted on less than an annual basis.

**Secondary Productivity** - Macroinvertebrates, fishes and wildlife.

**Show of Green** - The point at which site seeding has germinated and grown to a point of being distinctly visible.

**Single-family Residential** - A land-use or zoning which includes typical detached homes with lot sizes less than 1 acre and dwelling densities greater than 1 dwelling per acre; duplexes constructed on one-third to one-half acre also included.

**Subcanopy** - The plant stratum composed of all woody plants and palms, exclusive of the canopy, with a trunk or main stem with a diameter breast height (4.5') between one and four inches, except vines.

**Undesirable Plant Species** - Exotic, nuisance or inappropriate plant species for a given habitat.

**Wet Detention** - Impoundments in which stormwater runoff is temporarily stored until it gradually leaves the basin through an outflow control structure. They are designed so that a pool of standing water remains in the basin after the bleed-down period.

## **IX. SIGNATURE PAGE**

A separate signature page is provided for each of the following signatures:

### **SPONSOR**

Johnson County Wetlands Mitigation Bank, L. L. C.

### **MBRT**

U. S. Department of the Army, Corps of Engineers, Kansas City District  
U. S. Environmental Protection Agency, Region VII  
U. S. Department of the Interior, Fish and Wildlife Service  
U. S. Department of Agriculture, Natural Resources Conservation Service  
Kansas Department of Health and Environment  
Kansas Department of Wildlife and Parks

### **FINAL RECIPIENT**

Johnson County Park and Recreation District  
Blue Valley School District

Johnson County Wetlands Mitigation Bank, L.L.C.

Name Here, Clay Blair III (signature) 10-18-99 (date)  
MANAGER  
Clay Blair III, Manager

Name Here Clay Blair III (signature) 1-19-00 (date)

U.S. Department of the Army, Corps of Engineers, Kansas City District

Name Here, \_\_\_\_\_ (signature) 4/28/2007 (date)  
Colonel George H. Hazel, District Engineer

U. S. Environmental Protection Agency, Region VII

Name Here,  (signature) 3-9-00 (date)  
U. Gale Hutton, Director, Water, Wetlands, and Pesticides Division

U.S. Department of the Interior. Fish and Wildlife Service

Name Here. William H. Gill (signature) 1-10-2000 (date)  
William H. Gill, Field Supervisor

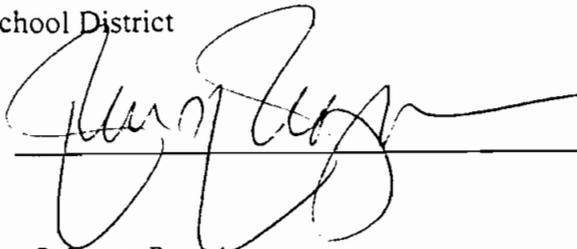
U.S. Department of Agriculture, Natural Resources Conservation Service

Name Here,  (signature) 1-28-00 (date)  
TOMAS M. DOMINGUEZ **ACTING FOR**  
State Conservationist



Blue Valley School District

Name Here.



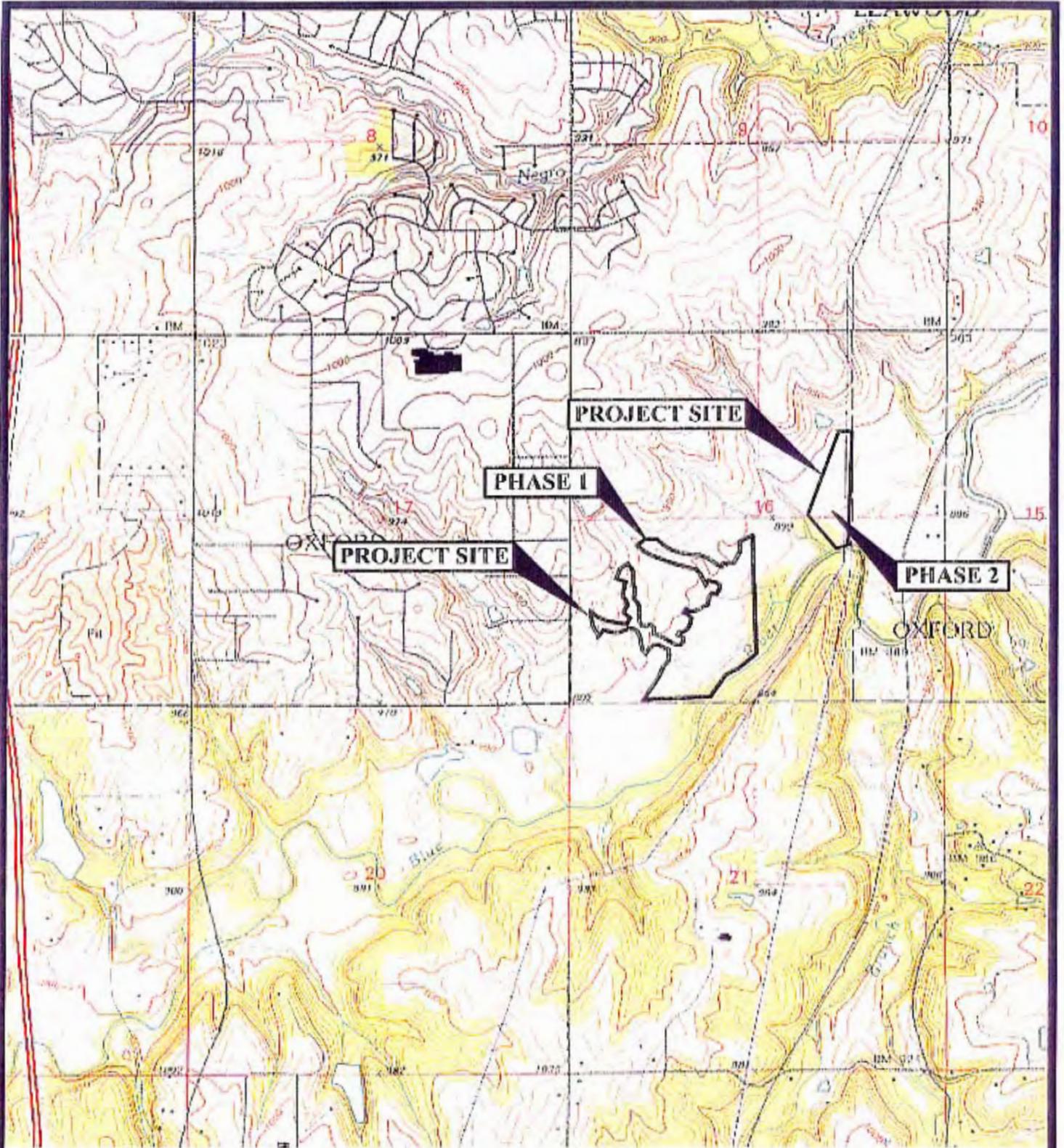
(signature)

1-19-00

(date)

Robert Regnier  
President, Board of Directors

**EXHIBIT A**  
**LOCATIONAL FIGURES**



Site is Section 16, T14S, R25E



**NORTH**

SCALE: 1" = 2000'

SOURCE: USGS QUAD STILWELL, KANSAS 1991

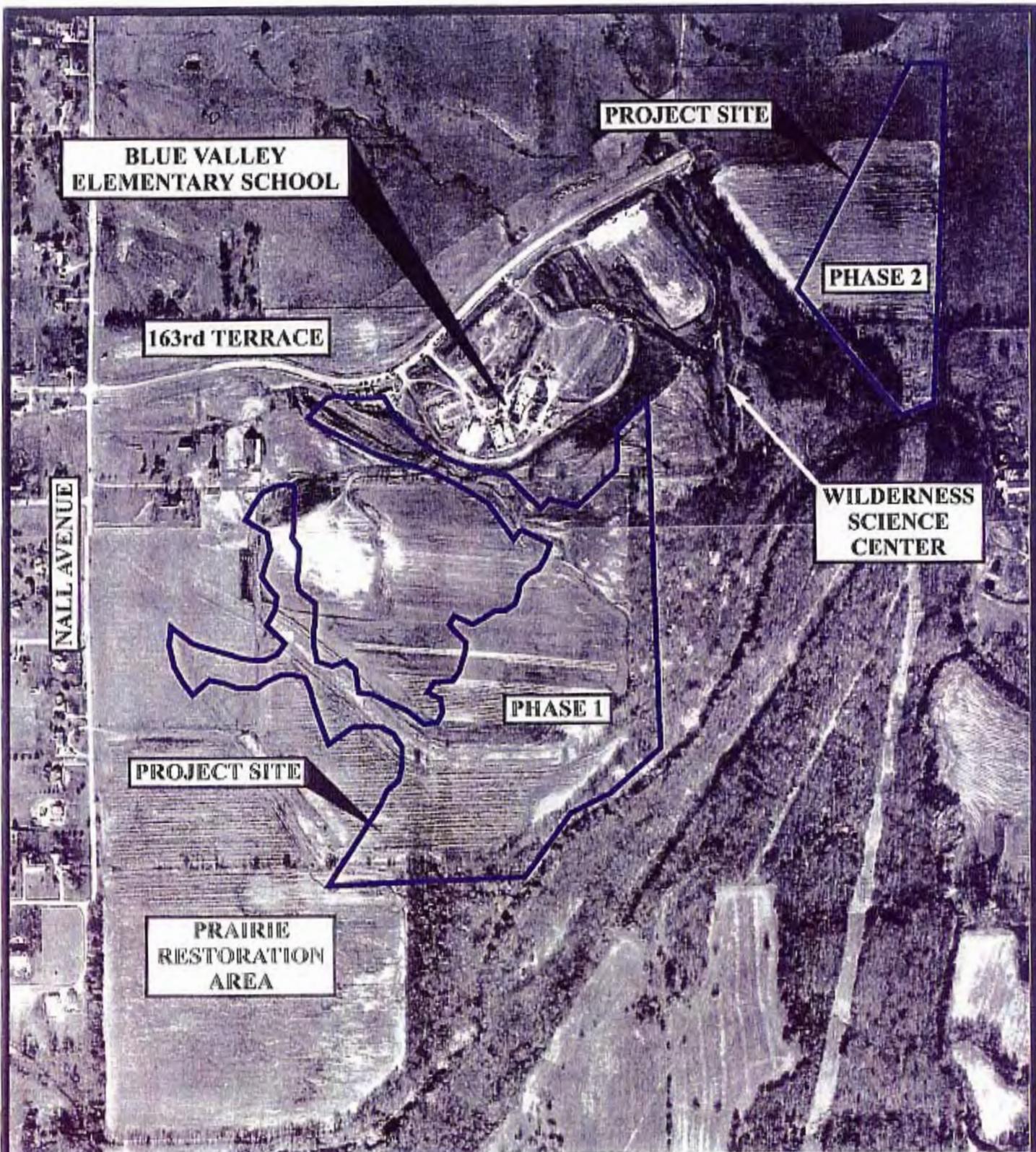
**GBA** GEORGE BULLER ASSOCIATES, INC.  
 Engineers/Architects/Landscape Architects/Planners

**TOPOGRAPHIC MAP**  
**JOHNSON COUNTY WETLANDS**  
**MITIGATION BANK**  
**OVERLAND PARK, JOHNSON COUNTY, KANSAS**

DATE: 9/19/98

FIGURE:  
**1**

7908.04



PROJECT SITE

BLUE VALLEY  
ELEMENTARY SCHOOL

163rd TERRACE

PHASE 2

WILDERNESS  
SCIENCE  
CENTER

WALL AVENUE

PHASE 1

PROJECT SITE

PRAIRIE  
RESTORATION  
AREA

Site is Section 16, T14S, R25E



NORTH

NOT TO SCALE

SOURCE: WESTERN AIR MAPS

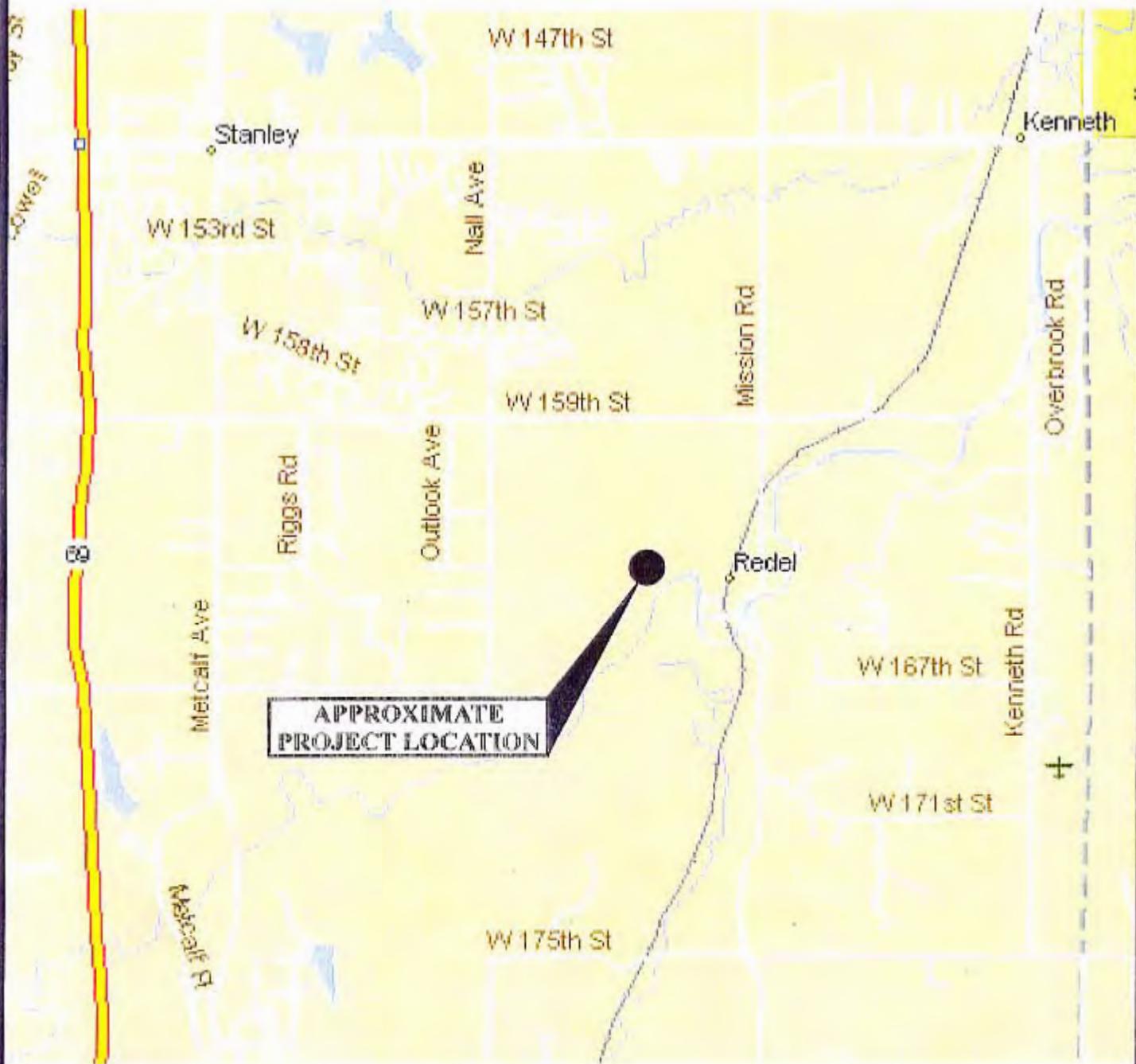
**GBA** GEORGE BUTLER ASSOCIATES, INC.  
Engineers/Architects/Landscape Architects/Planners

7908.04

1996 AERIAL PHOTOGRAPH  
JOHNSON COUNTY WETLANDS  
MITIGATION BANK  
OVERLAND PARK, JOHNSON COUNTY, KANSAS

DATE: 8/19/99

FIGURE:  
**2**



  
**NORTH**  
 NOT TO SCALE

SOURCE: MICROSOFT EXPEDIA STREETS '98

**GBA** GEORGE BITTNER ASSOCIATES, P.C.  
 Engineers/Architects/Landscape Architects/Planners

7908.04

**LOCATION MAP**  
**JOHNSON COUNTY WETLANDS**  
**MITIGATION BANK**  
**OVERLAND PARK, JOHNSON COUNTY, KANSAS**

DATE: 9/10/98

FIGURE:  
**3**

**EXHIBIT B**  
**BANK DEVELOPMENT PLAN**

## **BANK DEVELOPMENT PLAN**

The schedule of Bank establishment will proceed based on the phases of development as shown in the exhibits. Projected times may be adjusted for each phase pursuant to Bank approval and construction schedules.

### Phase 1 Development Tract - 53.59 Acres

Summer/Fall 1999 - Clear only as necessary; grade site to accommodate utility and functional needs; construct all necessary berms, water control structures, and other necessary appurtenances for the Bank. A grading plan and dam spillway structure detail and view for Phase 1 are in Attachment 1 of this Exhibit.

Fall 1999/Spring 2000 - Plant Phase 1 Area as detailed in the Planting Plan (Exhibit D). Begin selling initial credits as opportunities are presented and manage Bank in accordance with the Management Manual (Exhibit E).

1999-2000 - Complete any remaining Phase 1 grading and perform planting and replanting as needed, sell credits as opportunities are presented and manage Bank in accordance with the Management Manual (Exhibit E).

2004-2007 - Determine final success of Phase 1 development.

2004-2009 - Transfer to Final Recipient that portion that is determined to pass the final success, release/sell remaining credits, and manage in accordance with the Management Manual (Exhibit E).

### Phase 2 Development Tract - 8.8 Acres

Spring 2009 - Clear only as necessary; grade site to accommodate utility and functional needs; construct all necessary berms, water control structures, and other necessary appurtenances for the Bank.

Spring/Summer 2009 - Plant Phase 2 Area as detailed in the Planting Plan (Exhibit D), beginning selling of initial credits as opportunities are presented and manage Bank in accordance with the Management Manual (Exhibit E).

2010-2014 - Plant Phase 2 Area as detailed in the Planting Plan (Exhibit D), beginning selling of initial credits as opportunities are presented and manage Bank in accordance with the Management Manual (Exhibit E).

2015-2018 - Plant Phase 2 Area as detailed in the Planting Plan (Exhibit D), beginning selling of initial credits as opportunities are presented and manage Bank in accordance with the Management Manual (Exhibit E).

2019-2020 - Plant Phase 2 Area as detailed in the Planting Plan (Exhibit D), beginning selling of initial credits as opportunities are presented and manage Bank in accordance with the Management Manual (Exhibit E).