

**MEMORANDUM OF AGREEMENT
AND
WETLAND MITIGATION BANK INSTRUMENT
FOR
MID-VALLEY WETLAND MITIGATION BANK**

This Memorandum of Agreement and Wetland Mitigation Bank Instrument (MOA), which describes the establishment, use, operation, and maintenance of the Mid-Valley Wetland Mitigation Bank (Bank) is an agreement made and entered into by and among Marvin and Cindy Gilmour (Sponsor), the U.S. Army Corps of Engineers (Corps), the Oregon Department of State Lands (DSL), the U.S. Environmental Protection Agency (EPA), the U.S. Fish and Wildlife Service (USFWS), the Oregon Department of Environmental Quality (DEQ), and the Oregon Department of Fish and Wildlife (ODFW).

I. PREAMBLE

A. Purpose: Whereas, the purpose of this MOA 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 that result from activities authorized under Section 404 and 401 of the Clean Water Act, Section 10 of the Rivers and Harbors Act and Oregon's Removal-Fill Law [Oregon Revised Statutes (ORS) 196.800-196.990 and Oregon Administrative Rule (OAR) 141-085] provided such activities have met all applicable requirements and are authorized by the appropriate authority.

B. Goals and Objectives: Whereas, the primary goal of the Bank is to restore (11.6 acres) and create (4.78 acres) a seasonally-flooded, saturated, inundated or ponded wetland with only limited topographic relief from 16.38 acres of upland and cropped wetland. This will be accomplished by constructing low wide berms to contain a seasonal high water table and surface water flows during the wet season (November - April). Around the upper elevations of the Bank and part of the perimeter, the restoration target will be palustrine scrub/shrub wetland (1.25 acres) with some palustrine forested wetland (0.75 acres). The remainder will become a system of seasonal surface flows spreading out and passing through a palustrine emergent low marsh area with shallow seasonal open water and interspersed with palustrine emergent marsh (2.73 acres) and wet prairie (11.65 acres). This area will have a hydrogeomorphic classification of slope/flat. This restored area will provide increased functionality in surface water retention and infiltration, purification, vegetation diversity and wildlife habitat similar to those found at the reference sites.

The second goal for the Bank is to enhance 9.69 acres of ash swale and 0.48 acre of scrub/shrub wetland for a total enhancement of 10.17 acres. This will be done through the reduction of invasive plant species and by rerouting channelized surface water flows back into the ash swale creating small pockets of inundation and overland flow. The enhancement portion of the Bank will have a hydrogeomorphic classification of riverine

impounding. A third goal of the Bank is to provide a high quality upland (4.89 acres) and wetland (1.66 acres) buffer to the Bank's wetlands.

C. Location and Ownership of Parcel: (1) Whereas, the Sponsor has provided proof of ownership of the mitigation bank site at the legal description described in Exhibit A of this MOA, and as depicted on a plan prepared by Patrick S. Thompson Consulting, dated 6/20/05, (Exhibit B). Said parcels are hereinafter referred to as the "Property." (2) The Sponsor has not proposed additional phases in the Instrument; therefore, any additional phases of this bank require a modification to the Instrument and a separate MOA. If you sell this property, you must notify the Corps and DSL in writing prior to the sale of your property. (3) The Property is located in Benton County, Township 10 South, Range 4 West, Section 15, Tax Lot 700. The Bank is approximately 33.1 acres of the 130-acre tax lot. The address of the Bank is 6001 Northwest Gilmour Lane, Albany, Oregon.

D. Project Description: Whereas, in accordance with this MOA, the Sponsor will establish and/or maintain aquatic habitats and upland buffers in compliance with the provisions of this MOA and the Final Instrument (Instrument) (Exhibit C), and shall then maintain each phase of the Bank in such condition for five (5) years after the last credit has been sold. The bank sponsor shall be responsible for compliance with this MOA and the Instrument until the Bank is closed in accordance with the Bank closure procedures. The Bank area shall consist of a mixture of creation, enhancement, restoration, and a buffer as described in Exhibit C.

E. Baseline Conditions: Whereas, the restoration/creation portion of the Bank has, until this spring, been used for agricultural purposes for the production of grass seed. For the past 20 years the site has been used for production of ryegrass (12 years), orchard grass (8 years) and wheat (1 year). The ash swale enhancement area has been an ash swale since at least 1936, but has changed in its vegetation composition and aerial extent over the years. The Bank site is surrounded by wetlands, forest, and farmland.

F. Establishment and Use of Credits: Whereas, in accordance with the provisions of this MOA and upon satisfaction of the performance standards contained in the Instrument (Exhibit C), mitigation credits determined in accordance with the Instrument (Exhibit C) will be available to be used as mitigation in accordance with all applicable requirements for permits issued under Section 404 and 401 of the Clean Water Act, Section 10 of the Rivers and Harbors Act and Oregon's Removal-Fill Law [Oregon Revised Statutes (ORS) 196.800-196.990]. The final number of credits will be determined by the MBRT based upon the final approved design and the resulting habitats planned for each phase of the Bank in accordance with the terms and conditions contained herein.

G. Whereas, as of the date of the MOA and subject to execution of the MOA by a duly authorized representative of the respective agencies described below, the Mitigation Banking Review Team (MBRT) consists of:

1. Corps, Co-Chair; and
2. DSL, Co-Chair; and
3. EPA; and

4. USFWS; and
5. DEQ; and
6. ODFW.

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

I. Exhibits: Whereas, the following Exhibits are incorporated by reference to this Banking Instrument:

1. "Exhibit A," Vicinity Map, Legal Property Description
2. "Exhibit B," Mitigation Site Plan;
3. "Exhibit C," Final Instrument;
4. "Exhibit D," Crediting and Debiting Procedure for the Bank;
5. "Exhibit E," Service Area Map;
6. "Exhibit F," Restrictive Covenant; and

NOW, THEREFORE, the parties hereto agree as to the following:

II. DEFINITIONS*

1. **BANK SPONSOR** – A person who is proposing, or has established and/or is maintaining a mitigation bank. The sponsor is the entity that assumes all legal responsibilities for carrying out the terms of the Instrument, unless specified otherwise explicitly in the Instrument.
2. **COMPENSATORY MITIGATION** – Activities conducted by an authorization holder, permittee or third party to create, restore or enhance wetland functional attributes to compensate for the adverse effects of project development.
3. **CREATION** – To convert an area that has never been a wetland to a jurisdictional wetland.
4. **CREDIT** – A unit of measure of the increase in wetland functional attributes achieved at a mitigation bank site. Wetland credits are the unit of exchange for compensatory mitigation. ORS 196.600(2) further defines this term.
5. **DEBIT** – A unit of measure representing the reduction of credits at the mitigation bank corresponding to the impact at the project site.
6. **ENHANCEMENT** – Human activity that increases the function of an existing degraded wetland.

7. **INSTRUMENT** – The legally binding and enforceable agreement between the Director of DSL, the District Engineer of the Corps, and a mitigation bank sponsor that formally establishes the wetland mitigation bank and stipulates the terms and conditions of its construction, operation, and long-term management.
8. **FINANCIAL ASSURANCES** – The money or other form of financial instrument (for example, surety bonds, trust funds, escrow accounts, proof of stable revenue sources for public agencies) required of the sponsor to ensure that the functions of the subject bank are achieved and maintained over the long term, pursuant to the terms and conditions of the Instrument.
9. **FUNCTIONS** – The physical, chemical, and biological ecosystem processes of an aquatic resource without regard to their importance to society.
10. **LEDGER** – An accounting of credits and debits.
11. **MITIGATION** – Sequentially avoiding impacts, minimizing impacts, and compensating for remaining impacts to aquatic resources; the same meaning as DSL’s OAR 141-85-0010 (129).
12. **MITIGATION BANK** – Wetland(s) and any associated buffer(s) restored, enhanced, created, or protected, whose credits may be sold or exchanged to compensate for unavoidable future wetland losses due to removal, fill, or alteration activities.
13. **MITIGATION BANK REVIEW TEAM (MBRT)** – An advisory committee to the DSL and the Corps on wetland mitigation bank projects. An interagency group of federal, state, tribal, and/or local regulatory and resource agency representatives which are signatory to a MOA for a Mitigation Bank Instrument and oversee the establishment, use, and operation of a mitigation bank with the Corps and DSL serving as co-chair’s.
14. **MITIGATION SITE PLAN** – A detailed portion of the bank instrument (Exhibit B) that identifies specifically how aquatic resources and associated upland buffers will be restored, created, enhanced, or preserved on the mitigation bank.
15. **PRESERVATION** – The protection of ecologically important aquatic resources in perpetuity through the implementation of appropriate legal and physical mechanisms. Preservation may include protection of upland areas adjacent to wetlands or other aquatic resources as necessary to ensure protection and/or enhancement of the aquatic ecosystem.
16. **RESTORATION** – Re-establishment of wetland hydrology to a former wetland sufficient to support wetland characteristics.
17. **PERFORMANCE MEASURES/SUCCESS CRITERIA** – The minimum standards required to meet the objectives for which the Bank was established.
18. **SERVICE AREA** – The boundaries set forth in a mitigation bank instrument that include one or more watersheds identified on the United States Geological Survey, Hydrological Unit Map,

1794, State of Oregon, for which a mitigation bank provides credits to compensate for adverse effects from project development. Service areas for mitigation banks are not mutually exclusive.

* Derived from:

Federal Guidance for the Establishment, Use, and Operation of Mitigation Banks (FR V. 60 No. 228, November 28, 1995);

Cowardin, L.M. et al. 1979. Classification of Wetlands and Deepwater Habitats of the United States. U. S. Fish and Wildlife Service, Office of Biological Services. Washington, D.C. FWS/OBS-79/31. 131 pp.

Oregon Administrative Rules 141-085.

III. AUTHORITIES

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

A. Federal:

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 Clean Water Act, Section 404 (b)(1) Guidelines (February 6, 1990);
7. Federal Guidance for the Establishment, Use, Operation of Mitigation Banks (60 F.R. 58605 et seq. November 28, 1995); and
8. Regulatory Guidance Letter No. 02-02, U.S. Army Corps of Engineers, December 26, 2002

B. State of Oregon:

1. Oregon Administrative Rules (OAR) 141-85-0010 through 141-85-445; and
2. Oregon Revised Statutes (ORS) 196.600-196.990

IV. ESTABLISHMENT OF THE BANK

A. Scope of Work: The Sponsor agrees to perform all necessary work, in accordance with the provisions of this MOA, to establish and maintain aquatic habitats and upland buffers, as described in Exhibit C, until it is demonstrated to the satisfaction of the agencies represented on the MBRT (acting through the co-chair's) that the project complies with all provisions contained herein, or until all credits are sold, whichever is later. Work as described above shall include implementing the

Instrument (Exhibit C). Prior to any debiting, the Mitigation Site Plan for the phase of the Bank proposed for debiting must be approved by the MBRT, the site for that phase must be secured, and appropriate financial assurances (escrow agreement) for that phase must be established. A copy of the proof of financial assurances must be submitted to the MBRT prior to the release of any credits at the Bank.

B. Permits: The Sponsor will obtain all appropriate permits or other authorizations needed to construct and maintain the Bank, prior to debiting any credits. This MOA does not fulfill or substitute for such authorization.

C. Final Instrument: Upon signing this MOA, the MBRT approves the Instrument dated July 29, 2005 (Exhibit C).

D. Financial Assurance Requirements: The Sponsor agrees to provide a Financial Assurance document, payable to DSL for \$70,000. The Financial Assurance may be released incrementally on the following schedule:

For the initial release of credits (not to exceed 30% of the total number of credits that could be derived from this site) the Sponsor agrees to provide adequate financial assurances to ensure that wetland acreage would be restored on site in the event of a default (see also Part V, F). Release of funds from this financial assurance will be recommended by the MBRT incrementally on the following schedule if, and only if, all performance standards, as described in Section V. E. are being met: 30 percent – one year after the first credit release; 30 percent – two years after first credit release; 30 percent– five years after first credit is released; and 10% or the remainder upon submittal of the final monitoring report at bank closure, 5 years after the last credit sale.

E. Real Estate Provisions: The Sponsor shall record a restrictive covenant on the Bank land and provide a copy to the Corps and DSL prior to the release of any credits. The restrictive covenant is attached as Exhibit F. A copy of the recorded document shall be provided to the Corps and DSL prior to any release of credits.

F. The Sponsor agrees to submit an as-built report to the co-chair's of the MBRT within 60 days following completion of the grading. The as-built report will describe in detail any substantial deviation from the requirements described in the Mitigation Site Plan submitted to the MBRT co-chairs in accordance with the Instrument (Exhibit C), and the as-built report shall contain a survey showing finished grades.

V. OPERATION OF THE BANK

A. Service Area: The Bank is established to provide mitigation to compensate for impacts to waters of the United States and/or state waters, including wetlands, within the service area depicted on the excerpt of the USGS Hydrologic Unit Map as shown in Exhibit E. This service area shall include portions of hydrologic unit 17090003, within Linn, Benton, and Polk Counties.

B. Access: The Sponsor will allow, or otherwise provide for, access to the site by members of the MBRT or their agents or designees, as reasonably necessary, for the purpose of inspection,

compliance monitoring, and remediation consistent with the terms and conditions of this MOA throughout the period of Bank establishment, monitoring, and operation. Inspecting parties shall not unreasonably disrupt or disturb activities on the property.

C. Projects Eligible to Use the Bank: The following types of projects may be eligible to use the Wetland Bank:

1. All activities regulated under Section 10 of the Rivers and Harbors Act, Section 404 of the Clean Water Act and/or the Oregon's Removal-Fill Law [Oregon Revised Statutes (ORS) 196.800-196.990] located within the service area of this Bank may be eligible to use this Bank as compensatory mitigation for unavoidable impacts; credits purchased may only be used in conjunction with a Corps or DSL permit authorization, or to resolve a DSL or Corps violation.
2. Use of credits may only be authorized when adverse impacts are unavoidable; when onsite compensatory mitigation is either not practicable or use of a mitigation bank is environmentally preferable to onsite compensation.
3. For projects in the service area of this Bank that require authorization under Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act, and/or DSL's Removal-Fill Permit, and if said authorizations require compensatory mitigation, credits from this Bank may be permitted to be used to satisfy these compensatory mitigation requirements if the Sponsor and the third party (permittee) reach a mutually acceptable financial agreement and subject to regulatory approval on a case by case basis.

D. Number of Credits: Credits and debits will be assessed using measurements of the area of impacts and the mitigation land area. The number of credits created by development of this Bank is determined by a combination of land area and mitigation ratios provided in the Instrument (Exhibit C) as described in Exhibit D. The amount to be debited for each impact will depend upon the area of wetlands or waters to be impacted as determined during the permitting process.

E. Performance Measures: The following criteria will be used to assess project success:

1. Wetland hydrology, sufficient to meet the criteria defined in the 1987 Corps of Engineers Wetlands Delineation Manual (1987 Wetland Delineation Manual), will be present in three out of five years or less if the weather records are close to normal and no irrigation is supplied.

Water depth and depth of saturation will be indicated throughout the site using a combination of groundwater monitoring tubes as an aid to show how the water level follows the site topography, and paired plots along the site boundary and any high areas to indicate the exact location of the wetland boundary. The paired plots will be done using soil probes or pits. In addition, these areas will be visually documented with photographs to show a dominance of wetland species. The wetland boundary will then be displayed on a site map to confirm acreage achieving the performance standard.

Hydrology monitoring data shall be collected several times after the start of the growing season to demonstrate sufficient duration of wetness to meet the 1987 Wetland Delineation Manual. The monitoring report will also include precipitation data for the monitoring period from the nearest recording station.

2. Vegetation:

Emergent Herbaceous

1. A minimum of 55% of the relative plant cover (including bare soil) is comprised of native species.
2. No more than 15% of the relative plant cover is comprised of non-native invasive species as define below.
3. The wetland's moisture index is less than 3.0.

*Non-native invasive species to be included: reed canary grass (*Phalaris arundinacea*), purple loosestrife (*Lythrum salicaria*), Himalayan blackberry (*Rubus discolor*), Japanese knotweed (*Polygonum cuspidatum*), Eurasian water milfoil (*Myriophyllum spicatum*), climbing nightshade (*Solanum dulcamara*) (and yellow-flag iris (*Iris pseudacorus*), Anne's lace (*Daucus carota*), Canadian thistle (*Cirsium arvense*), bull thistle (*Cirsium vulgare*), orchard grass (*Dactylis glomerata*) and annual ryegrass (*Lolium multiflorum*) or others as determined by the MBRT.

Wetgrass Prairie

The above performance standards along with the following:

1. At least 10 wetgrass prairie species are present as listed in "Species Composition for Willamette Valley Vegetation Types" by Kathy Pendergrass, August 2003, (cited as Appendix II of the Instrument) by John Marshall (USFWS), December 19, 2004 author of "Draft Guidance on Vegetation Planning and Monitoring in Western Oregon Wetlands and Riparian Areas (See Attachment 4a).
2. Tufted hairgrass (*Deschampsia cespitosa*) is represented by 25% or greater relative plant cover.
3. At least 50% of the relative plant cover (including bare soil) is comprised of native species.
4. No more than 15% of the relative plant cover is comprised of non-native invasive species as defined above.
5. The prairie's moisture index is between 2.0 and 3.0.
6. No more than 5% relative plant cover is composed of shrubs or trees.

Shrub and Forest - Created

By the end of the second growing season, the newly planted shrub and forest component of the wetland will meet or exceed 75% of the species richness of the reference site (excluding non-native invasive species). The plant density in forested wetlands will be at least 50 living stems per acre and shrub/scrub wetlands at least 200 living woody stem per acre, of species that are rated FAC or wetter, excluding FAC- species. This must be achieved by the end of the second growing season following planting and maintained through the end of the monitoring period until

canopy coverage is greater than 30%. There will be no more than 15% aerial coverage of non-native invasive species*. These densities will be a combination of planted individuals and natural recruitment.

Oregon ash will not be planted but will be allowed to colonize a narrow border on the berm between the existing forested wetland on the west side of the Bank and the emergent portion of the Bank. A line will be delineated and field staked that will be the forested component boundary. Volunteer ash trees will be removed by hand beyond this line. The only new tree species that will be planted is Pacific crabapple (*Malus fusca*) unless further reference site sampling indicates additional species are needed.

In addition the herbaceous layer in the forest and shrub areas will meet or exceed the performance standards for emergent herbaceous wetlands as stated above.

Forest - Enhanced

Year five performance standard for the enhanced forested wetland will be maintaining the existing wetland forest and shrub layers while managing for no more than 15% of non-native invasive species*.

Buffer Areas - Upland Forest and pond

Year five performance standards for the upland forest buffer will be to maintain the forest cover with 20% or less of non-native invasives*. The five year performance standard for the existing pond will be to maintain it as a pond/wetland area and maintain 20% or less of non-native invasives*.

3. Methodology

Restoration and Creation Portion - The methodology for sampling this portion of the Bank will be a modified version of the monitoring protocols suggested in the December 19, 2004 "*Draft Guidance for Vegetation Planning and Monitoring in Western Oregon Wetlands and Riparian Areas*". Modifications to these protocols have been made based upon field experience of the authors and uniqueness of the site. The existing monitoring data from the *Mud Slough Wetland Mitigation Bank* and *Knaupp WRP Wetland* will be used and no new data taken (see Section 10.2).

Monitoring within the herbaceous portions will be conducted using a stratified systematic plot method for the sampling points (see Figure 10). The transects will be laid out in a stratified arrangement along one baseline with equal distance between each transect (approximately 250'). The transects will cross the entire wetland, including enhancement and buffer areas. The sampling plots will be predetermined and

systematically plotted on the transects at 100-foot intervals from each other. The herbaceous sample plots will be one meter quadrants, located at the northwest corner of each point nested within a ten-foot square shrub sampling plot starting at the same point. When needed, a 30-foot diameter forest sample plot will be placed with its center at the plot center point encompassing both the herbaceous and shrub sampling plots. The starting point of the sample plots on each transect line will be staggered in order to cover a broader area. The sampling points will be evaluated and if needed additional points placed to make sure that a sufficient number of plots are taken in each of the wetland types. The sample plots will be permanently identified in the field and will be plotted on a site map.

The relative plant cover for each plot will be determined for each herbaceous species. If a plot includes bare soil, the reason for the bare soil will be noted and the percent it covers of each plot included. The number of stems for each shrub and tree species will also be determined. The sample plot data will then be assessed according to the performance standards for diversity, percent cover of each species present, native/non-native and invasive status, and moisture index via the indicator status. If applicable, further calculations will be completed using supplied pre-formatted spread sheets as referred to in the "*Draft Guidance for Vegetation Planning and Monitoring in Western Oregon Wetlands and Riparian Areas*".

Prior to concluding monitoring, the number of sample plots will be evaluated to determine if this number of plots is sufficient, using a species area curve. The data will be taken and the species-area curve developed. After the curve flattens out it will be deemed a sufficient number of plots when there are three plots in a row with one or fewer new species. If the species area curve indicates that more sampling plots are needed, they will be added. However, no fewer than 25 references site sample plots will be examined in the Bank.

Established site photo stations will be used in each of the monitoring years to provide a visual record of the overall health and diversity of the wetland vegetation. Six photo station locations will be included on the Site Plan.

Gilmour Reference Site - The Gilmour forested/shrub on-site reference will be analyzed using two, 50- foot diameter areas within the scrub/shrub over story wetland and identifying all tree and shrub species and the relative abundance of each species within this area. This will then be used to guide the forest and shrub performance standards.

Enhanced Forested Wetland - Four, 50-foot diameter plots will be permanently marked within the enhanced forested wetland. These will be examined and the percent cover of non-native invasive species will be determined and compared to the performance standards.

Buffer Area - Pictures will be taken at three locations in the upland forest buffer and at one location in the wetland/pond buffer area to indicate the sites still exist in the same approximate state as when the Bank was established and per the performance standards. Buffer area was walked in year one to evaluate the non-native invasive species* present which was less than 20%. The same trail will be walked in year five to assure that less than 20% of non-native invasive* species exist.

F. Schedule of Credit Release: Upon submittal of all appropriate documentation by the Sponsor, and subsequent approval by the MBRT, the MBRT co-chair's will provide in writing the release of credits for use by the Sponsor or for transfer to a third party in accordance with the following schedule:

Release 1 (Summer 2005): Up to 30 percent upon submission of the grading as-built, conduct initial planting of the Bank, submission of a copy of the Letter of Credit, Restrictive Covenant, and MBRT conducts a field inspection.

Release 2 (Spring-Summer 2006): Up to 30 percent upon demonstration of plant establishment, prevalence of wetland species, and delineation of acreage meeting the 1987 Wetland Delineation Manual hydrology as outlined in performance standards in section V E. of this Agreement.

Release 3 (Fall 2006): Up to 20 percent upon demonstration of plant establishment, desired diversity, prevalence of wetland species, and maximum tolerance of non-native species and meeting the 1987 Wetland Delineation Manual hydrology as outlined in performance standards in Section V. E. 3.

Release 4 (Fall 2007): Up to 15 percent upon demonstration of plant establishment, desired diversity, prevalence of wetland species, and maximum tolerance of non-native species and meeting the 1987 Wetland Delineation Manual hydrology as outlined in performance standards in Section V. E. 3.

Release 5 (end of the 5th year monitoring or 5 years after replanting for those areas replanted): All remaining credits including buffer and enhanced wetland forest credits.

G. Conditions on Debiting: Any credits debited before achieving the performance measures (e.g. the 30% advance release of Credits), shall require conformance with the financial assurance requirements described in Section IV.D. Aside from the advance release of credits, if the number of credits debited exceeds the number created, then no further credit sales shall be permitted by the Corps and DSL until the Sponsor has implemented corrective actions and achieved the performance measures so as to provide for the number of credits to be greater than or equal to the number of credits debited to cover permitted impacts with this Bank.

H. Provisions For Uses of the Mitigation Bank Area: The Sponsor shall not use or authorize the use of areas within the Bank for any purpose that interferes with its conservation purposes other than those specified below:

- a) Monitoring of vegetation, soils and water;
- b) Maintenance of wetlands, trails, bridges, berms, dams, outlet and spillway structures, and other appurtenant facilities;
- c) Hunting and fishing and other recreational uses such as hiking and bird watching;
- d) Ecological education; and
- e) Compliance with state or federal regulations or appropriate court orders.

VI. MAINTENANCE AND MONITORING OF THE BANK

A. Maintenance Provisions: The Sponsor agrees to perform all necessary work to maintain the Bank consistent with the maintenance criteria established in the Instrument. The Sponsor shall continue with such maintenance activities until completion of the monitoring period described in Section VI.B. Deviation from the approved Instrument is subject to review and written approval by MBRT, acting through the co-chairs.

B. Monitoring Provisions: The Sponsor agrees to perform all necessary work to monitor the Bank to demonstrate compliance with the performance measures established in this MOA.

The monitoring program shall follow the guidelines established below:

1. An as-built survey will be submitted to DSL and the Corps within sixty days of final grading to verify topography and water sources. Photos will be taken throughout the spring at the designated photo stations to verify that the hydrology will be adequate to assure success of this plan. An initial vegetation survival survey will be completed in the spring either in May or June, following planting and again the following October to document planting success and to initiate any remedial action that might be required to meet the applicable performance standards.
2. Two reference sites have been identified to establish target conditions, and for background monitoring purposes. One reference site, located on the Gilmour property adjacent to the Bank, will be used for the over story and scrub/shrub wetland areas. The second reference site is off site and is located at the Mud Slough Wetland Mitigation Bank and Knaupp Wetland Reserve Program (WRP) wetland. The Mud Slough and Knaupp wetlands are located approximately 18 miles north of the Bank. The off site reference site will be used as a reference for wetland prairie and emergent wetland and is an excellent example of a slope/flat HGM wetland. The Knaupp WRP site was chosen for several reasons including its proven record as a restoration site, exceptional plant diversity, similar soils (Dayton silt loam in common), elevation, and topographic position, and we have been provided assured access. The existing

monitoring data from the Mud Slough Wetland Mitigation Bank and Knaupp WRP Wetland will be used to guide the planting plan at the Mid-Valley Wetland Mitigation Bank. The Gilmour reference site will be surveyed to establish the species present and assure compatibility with the planting plan and similar diversity of the scrub/shrub and over story species.

The reference sites will also be used to compare seasonal water level fluctuations. In the event that there is a problem with the hydrology of the Bank, the reference site will be used to determine if the hydrological problem is site-specific or a widespread occurrence such as drought conditions or possible outside hydrologic interference due to changes in surrounding land use.

3. Annual reports for the Bank will be filed with the DSL and the Corps each November, for five years after the last credit is generated in the Bank, five of which will be full monitoring reports. These reports will specifically address progress towards the performance standards and any remedial action taken to correct deficiencies that might have occurred in meeting the standards. A detailed narrative summarizing the condition of the Bank and all regular maintenance activities will be included in the reports. Particular attention will be given to monitoring the status of the wetland species (FAC, FACW, and OBL) to insure that they are becoming stable at the levels necessary to meet the hydrophytic vegetation criteria of the 1987 Wetland Delineation Manual. Yearly photographs will be taken from established photo points providing representative perspectives of the mitigation area. These photo points will be set, surveyed, and shown on the as built survey. Photos from each photo point will be included in each annual report. A summary of credits sold by the bank will be included in the monitoring reports.

4. The planting of the Bank will be supervised by a wetland specialist, horticulturalist or biologist. The monitoring program will be conducted either by the owner under the direction of a wetland delineator or a wetland delineator hired and paid for by the Bank sponsors.

5. The Bank's annual review by the MBRT will be conducted each spring, beginning in 2006. This will allow time for the annual monitoring report (due each November) to be prepared and disseminated prior to the MBRT meeting. Any remediation measures that might become necessary will be reviewed with the MBRT as they become necessary and will be summarized at the annual review meeting.

C. Accounting Procedure: The Sponsor shall submit a statement to the Corps and DSL each time credits are debited. If requested, the Corps and/or DSL will distribute the statement to other members of the MBRT. In addition, the Sponsor shall submit an annual ledger to the Corps and DSL for distribution to all members of the MBRT, showing all transactions at the Bank for the previous reporting period and a cumulative tabulation of all transactions to date. At a minimum, each ledger must include the

following information: permittee, Corps and DSL permit number, type of permit, locality, amount of impacts, and amount of credits debited from the Bank and the date of transaction). The MBRT will review the annual report to assure no net loss of wetlands acreage. Annual ledgers and transaction reports shall be submitted to the MBRT as long as credits remain in the Bank and the Bank remains operational.

E. Contingency Plans/Remedial Actions: In the event the Bank or a specific phase of the Bank fails to achieve the performance standards specified in Part V, Section E of this MOA, the Sponsor shall develop necessary contingency plans and implement appropriate remedial actions for the Bank or that phase of the bank in coordination with the MBRT. In the event the Sponsor fails to implement necessary remedial actions within one growing season (November 1 of the following year) after notification by the Corps and/or DSL of necessary remedial action to address any failure in meeting the performance standards, the MBRT (acting through the co-chairs) will notify the Sponsor and the appropriate authorizing agency(ies) and recommend appropriate remedial actions including suspension/revocation of available mitigation credits.

If the co-chair(s) determines that the Bank is operating at a deficit, debiting by the Sponsor of credits shall immediately cease, and the co-chair(s), in consultation with the MBRT and the Sponsor, will determine what remedial actions are necessary to correct the situation. As determined by the co-chair's in coordination with the MBRT and the Sponsor, if conditions at the Bank site do not improve or continue to deteriorate within one growing season from the date that the need for remediation was first identified in writing to the Sponsor by the co-chair's of the MBRT, the MBRT, (acting through the co-chair's) shall request the escrow agent to transfer the amount necessary to correct the deficiency from the Financial Assurances to a party acceptable to the Corps and DSL, to undertake corrective measures. The Corps and DSL may also choose to suspend credit transactions until the deficiency(ies) is (are) corrected.

At the written request of the Sponsor, the MBRT will perform a compliance visit to determine whether all Performance Measures have been satisfied.

F. Default: Should the MBRT determine that the Sponsor is in material default of any provision of this MOA, the MBRT, acting through the co-chairs may notify the Sponsor that the sale or transfer of any credits will be suspended until the appropriate deficiencies have been remedied. Upon notice of such suspension, the Sponsor agrees to immediately cease all sales or transfers of mitigation credits until the Corps and DSL inform the Sponsor that sales or transfers may be resumed. Should the Sponsor remain in default, the MBRT, acting through the Corps and DSL, may terminate the MOA and any subsequent Bank operations. Upon termination, the Sponsor agrees to perform and fulfill all obligations under this Agreement relating to credits that were sold or transferred prior to termination.

G. Bank Closure: At the end of the monitoring period, upon satisfaction of the performance measures, the Corps and DSL shall issue a written certification of satisfaction to the Sponsor and the escrow agent, and thereafter any remaining financial assurances will be released to the Sponsor. The Sponsor may be allowed to utilize that portion of the Bank lands that have not had compensation credits debited from it (i.e. Restoration, Creation, Enhancement, or Preservation lands) provided the

utilization does not adversely impact the areas from which compensatory mitigation credit has been debited.

VII. RESPONSIBILITIES OF THE MITIGATION BANK REVIEW TEAM

A. The agencies represented on the MBRT agree to provide appropriate oversight in carrying out provisions of this MOA.

B. The agencies represented on the MBRT agree to review and provide comments on all project plans, proposed additions of land to the Bank, annual monitoring reports, credit review reports, contingency plans, and necessary permits for the Bank. Comments, if any, on the final construction documents for each phase as described in Exhibit C, additions of land to the Bank, monitoring reports, credit review reports, contingency plans, and permits for Bank construction and operation will be reviewed within ninety (90) calendar days from the date of complete submittal. The co-chair's of the MBRT shall coordinate such review with members of the MBRT so that comments can be provided within the ninety (90) calendar day comment period.

C. The agencies represented on the MBRT agree to review and confirm reports on evaluation of performance measures prior to approving credits within each phase of the Bank.

D. The agencies represented on the MBRT shall conduct compliance inspections, as necessary to verify credits available at the Bank, annual inspections, and recommend corrective measures (if any) to the Sponsor, until the terms and conditions of the Instrument have been determined to be fully satisfied or until all credits have been sold, whichever is later.

VIII. 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 co-chair's, determine is beyond the reasonable control of the Sponsor to prevent or mitigate.

B. Dispute Resolution: Resolution of disputes about application of this MOA 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). Disputes related to satisfaction of performance measures may be subject to independent review from government agencies or academia that are not part of the MBRT. The MBRT will evaluate this input and determine whether the success criteria are met. Appeals of any DSL decisions shall be processed according to OAR 141-85-0075.

C. Validity, Modification, and Termination of the MOA: This MOA will become valid on the latter date of either the Sponsor's signature or the signature of the representative of the Corps or DSL. This MOA may only 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 without invalidating this MOA. Participation of the MBRT member seeking termination will end 30 days after written notification.

D. Specific Language of MOA 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 MOA by reference, and that are not legally binding, the specific language within the MOA shall be controlling.

E. Notice: Any notice required or permitted hereunder shall be deemed to have been given either (i) when delivered by hand, or (ii) three (3) days following the date deposited in the United States mail, postage prepaid, by registered or certified mail, return receipt requested, or (iii) sent by Federal Express or similar next day nationwide delivery system, addressed as follows (or addressed in such other manner as the party being notified shall have requested by written notice to the other party):

Marvin and Cindy Gilmour
6001 NW Gilmour Lane
Albany, Oregon

U.S. Army Corps of Engineers
CENWP-OP-G- Policy Specialist
P.O. Box 2946
Portland Oregon 97208-2946

Oregon Department of State Lands
775 Summer Street NE, Suite 100
Salem, Oregon 97301-1279

U.S. Environmental Protection Agency
Oregon Operations Office
811 SW Sixth Avenue
Portland, Oregon 97204-1395

U.S. Fish and Wildlife Service
Portland Field Station
2600 SE 98th Avenue, Suite 100
Portland, Oregon 97266

Oregon Department of Environmental Quality
Quality Executive Building
811 SW 6th Avenue
Portland, Oregon 97204

Oregon Department of Fish and Wildlife
3406 Cherry Avenue NE
Salem, Oregon 97303

F. Entire MOA: This MOA constitutes the entire agreement between the parties concerning the subject matter hereof and supersedes all prior agreements or undertakings.

G. Modification: This MOA may not be modified except by the written agreement of the signatory parties. In the event the Sponsor determines that modifications must be made in the Instrument to ensure successful establishment of habitat within the Bank, the Sponsor shall submit a written request for such modification to the MBRT, through the co-chair's, for approval. The MBRT, through the co-chairs, agree to not unreasonably withhold or delay such approval. Documentation of implemented modifications shall be made consistent with this MOA.

H. Invalid Provisions: In the event any one or more of the provisions contained in this MOA are held to be invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability will not affect any other provisions hereof, and this MOA shall be construed as if such invalid, illegal or unenforceable provision had not been contained herein.

I. Headings and Captions: Any paragraph heading or captions contained in this MOA shall be for convenience of reference only and shall not affect the construction or interpretation of any provisions of this MOA.

J. Counterparts: This MOA may be executed by the parties in any combination, in one or more counterparts, all of which together shall constitute but one and the same instrument.

K. Binding: This MOA shall be immediately, automatically, and irrevocably binding upon the Sponsor and its heirs, successors, assigns and legal representatives upon execution by the Sponsor, the Corps, and DSL even though it may not, at that time or in the future, be executed by the other potential parties to this MOA. The execution of this MOA by EPA, DEQ, ODFW, or the USFWS, or other agency, city or county shall cause the executing agency to become a party to this MOA upon execution, even though all or any of the other potential parties have not signed the MOA. Execution does not signify the agencies' agreement with the use of Credits in the Mid-Valley Wetland Mitigation Bank in connection with any specific permit or project.

L. Liability of Regulatory Agencies: The responsibility for financial success and risk to the investment initiated by the Sponsor rests solely with the Sponsor. The Regulatory Agencies (Agencies) that are parties to this MOA administer their regulatory programs to best protect and serve the public's interest in its wetlands and waterways, and not to guarantee the financial success of mitigation banks, specific individuals, or entities. Accordingly, there is no guarantee of profitability for any individual mitigation bank. Bank sponsors should not construe this MOA as a guarantee in any way that the Agencies will ensure sale of credits from this Bank or that the Agencies will forgo other mitigation options that may also serve the public interest. Since the Agencies do not control the number of mitigation banks proposed or the resulting market impacts upon success or failure of individual banks, in depth market studies of the potential and future demand for bank credits are the sole responsibility of the mitigation bank proponent.

M. Grant Program Participation: According to the Federal Guidance for the Establishment, Use, and Operation of Mitigation Banks (Guidance) published in the Federal Register on November 28, 1995 by the Corps, EPA, the Natural Resource Conservation Service, USFWS, and the National Marine Fisheries Service, wetlands restored through the Conservation Reserve Program or similar programs cannot be used to generate credits from a mitigation bank. In accordance with the Guidance,

Federally-funded wetland restoration projects cannot be used to generate credits within this mitigation bank.

N. Suspension of Credits: The co-chairs, acting on behalf of the MBRT may suspend the sale of credits if new information received by the MBRT indicates information in this MOA was falsely presented or due to a breach of this MOA.

IN WITNESS WHEREOF, the parties hereto have executed this MOA on the date herein below last written by the Co-Chairs.

Marvin Gilmour

Date

Cindy Gilmour

Date

MITIGATION BANK REVIEW TEAM

By the MBRT Co-Chairs:

Thomas E. O'Donovan
Colonel, Corps of Engineers
District Engineer

Date

Ann Hanus, Director
Oregon Department of State Lands

Date

By the MBRT Members of the Mid Valley Wetland Mitigation Bank:

Michelle Pirzadeh, Director
Office of Ecosystems, Tribal, and Public Affairs
Environmental Protection Agency, Region 10

Date

By the MBRT Members of the Mid Valley Wetland Mitigation Bank:

Kemper M. McMaster, Director
Oregon State Office
U.S. Fish and Wildlife Service

Date

By the MBRT Members of the Mid Valley Wetland Mitigation Bank:

Holly Schroeder, Water Quality Administrator
Oregon Department of Environmental Quality

Date

By the MBRT Members of the Mid Valley Wetland Mitigation Bank:

David M. Anderson, Regional Supervisor
Oregon Department of Fish and Wildlife

Date

"Exhibit A," Vicinity Map, Legal Property Description

“Exhibit B,” Mitigation Site Plan;

Exhibit C

INSERT **FINAL BANK INSTRUMENT**

Exhibit D

Crediting and Debiting Procedure for the Bank

I. Impact Debit Values

The U.S. Army Corps of Engineers (Corps) and the Department of State Lands (DSL) shall determine the appropriate and specific number of mitigation credits necessary to be debited against the Mid Valley Wetland Mitigation Bank (Bank) to achieve no net loss of functions and values during the permit process based upon their use of methods determined to be appropriate by said agencies, of the impact areas and the status of this Bank.

II. Mitigation Credit Creation

A. Pre- Construction

Mitigation credits shall be created by development of a wetland mitigation area with upland buffers in substantial conformance with the Instrument described in Exhibit C of the MOA. The number of credits created by this Bank shall initially be based upon the Instrument. Credits may then be adjusted by the Mitigation Bank Review Team (MBRT) based upon the results of the monitoring program described in Section V of the MOA, if and only if, as-built conditions differ substantially from those anticipated in the Instrument. Adjustments may include changes in the number of available credits or minimum credit ratios associated with use of the Bank. Each acre of land area within the property described in Exhibit B shall be designated by the Instrument as to which types of wetlands, as classified by the Cowardin classification, shall be enhanced, restored, or created by grading and/or water impoundment. The number of credits created by this plan shall be determined by community and/or cover type.

The exact number of credits created is estimated by the Instrument and will be adjusted, if necessary, based upon final as-built conditions. The number of credits for the Mid-Valley Wetland Mitigation Bank is estimated to be: 16.8.

B. Post-Construction

The Corps and DSL, acting in consultation with the MBRT, may assess the functions and values of this ecological system if part or all of the site fails to meet the Performance Standards listed in the Instrument (or when requested to do so by the Sponsor). The Corps and DSL may issue a written determination to the Sponsor that due to the demonstration of successful/unsuccessful performance, the number of credits attributable to this Bank are increased or decreased to reflect the functions and values provided.

III. Accounting Procedures

A. The Sponsor shall comply with the accounting procedures described in Section V of the MOA and the quantitative assessment of credits and debits for permitted impacts as described herein.

B. In no event shall the cumulative total area of impacts to waters of the U.S. permitted to use credits from the Bank exceed the total area of waters of the U.S. created by this Bank.

“Exhibit E,” Service Area Map

Exhibit F

INSERT: RESTRICTIVE COVENANT