

AN ORDINANCE 2014 - 10 - 16 - 0 79 6

**AUTHORIZING AN OFF-SITE MITIGATION AGREEMENT WITH MITIGATION SOLUTIONS USA, LLC FOR THE RUNWAY 3/21 (NOW RUNWAY 4/22) EXTENSION PROJECT IN THE AMOUNT OF \$136,125.00 FOR THE SAN ANTONIO AIRPORT SYSTEM.**

\* \* \* \* \*

**WHEREAS**, the Aviation Department in partnership with the Federal Aviation Administration developed a four phase project to extend Runway 3/21 (now Runway 4/22) and Taxiway N by 1,000 feet at the San Antonio International Airport; and

**WHEREAS**, as part of the third phase of the project, two roads were relocated impacting the Salado Creek Waterways and trees, and

**WHEREAS**, the United States Army Corps of Engineers (USACE) issued a National Environmental Policy Act permit requiring the City to minimize the impact on the jurisdictional waters of the United States at Salado Creek by performing enhancements and channel improvements; and

**WHEREAS**, some mitigation work was performed on Salado Creek as part of the project, but there was a remaining impact loss of 3.69 units; and

**WHEREAS**, the USACE and City agreed that City could perform off-site mitigation to compensate for the 3.69 unit deficit; and

**WHEREAS**, pursuant to this agreement, the City will purchase stream mitigation bank credits for the Runway 3/21 extension project valued at \$136,125.00 through Mitigation Solutions USA, LLC at the Straus Medina Mitigation Bank; **NOW THEREFORE:**

**BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF SAN ANTONIO:**

**SECTION 1.** The City Manager or her designee is authorized to execute an Off-Site Mitigation Agreement with Mitigation Solutions USA, LLC in the amount of \$136,125.00 for mitigation credits for the San Antonio Airport System. A copy of the agreement, in substantially final form, is set out in **Exhibit I**.

**SECTION 2.** Payment in the amount of \$136,125.00 in SAP Fund 51099000, Airport Capital Projects, SAP Project Definition 33-00160, Extend Runway 21 & Taxiway N, is authorized to be encumbered and made payable to Mitigation Solutions USA, LLC, for mitigation credits. Payment is limited to the amounts budgeted in the Operating and/or Capital Budget funding sources identified. All expenditures will comply with approved operating and/or capital budgets for current and future fiscal years.

**SECTION 3.** The financial allocations in this Ordinance are subject to approval by the Director of Finance, City of San Antonio. The Director of Finance, may, subject to concurrence by the City Manager or the City Manager's designee, correct allocations to specific SAP Fund Numbers, SAP Project Definitions, SAP WBS Elements, SAP Internal Orders, SAP Fund Centers, SAP Cost Centers, SAP Functional Areas, SAP Funds Reservation Document Numbers, and SAP GL Accounts as necessary to carry out the purpose of this Ordinance.

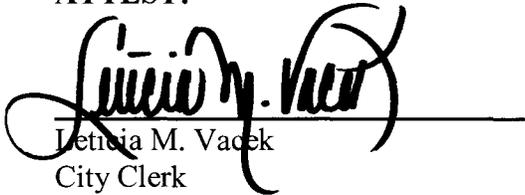
**SECTION 4.** This Ordinance shall be effective immediately upon the receipt of eight affirmative votes; otherwise, it is effective ten days after passage.

**PASSED and APPROVED** this 16<sup>th</sup> day of October, 2014.



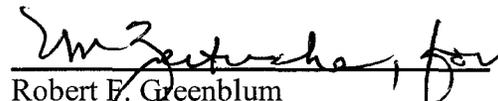
M A Y O R  
for Ivy R. Taylor

**ATTEST:**



Leticia M. Vadek  
City Clerk

**APPROVED AS TO FORM:**



Robert F. Greenblum  
City Attorney

<b>Agenda Item:</b>	13 ( in consent vote: 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22 )						
<b>Date:</b>	10/16/2014						
<b>Time:</b>	11:31:52 AM						
<b>Vote Type:</b>	Motion to Approve						
<b>Description:</b>	An Ordinance authorizing the execution of an Off-Site Mitigation Agreement with Mitigation Solutions USA, LLC for the purchase of mitigation credits in the amount of \$136,125.00 for the Runway 3/21 Extension project at the San Antonio International Airport. [Ed Belmares, Assistant City Manager; Frank Miller, Director, Aviation]						
<b>Result:</b>	Passed						
Voter	Group	Not Present	Yea	Nay	Abstain	Motion	Second
Ivy R. Taylor	Mayor		x				
Diego Bernal	District 1		x				
Keith Toney	District 2		x				
Rebecca Viagran	District 3		x				
Rey Saldaña	District 4		x				
Shirley Gonzales	District 5		x				
Ray Lopez	District 6	x					
Cris Medina	District 7		x				
Ron Nirenberg	District 8		x				x
Joe Krier	District 9		x				
Michael Gallagher	District 10		x			x	

# **Exhibit I**

**PURCHASE AND SALE AGREEMENT FOR RESERVED MITIGATION CREDITS  
(Straus Medina Mitigation Bank)**

This Purchase and Sale Agreement for Reserved Mitigation Credits ("*Agreement*") is entered into this \_\_\_\_ day of \_\_\_\_\_, 2014 ("*Effective Date*"), by and between **TCP III Straus Medina, LLC**, a Texas limited liability company ("*Seller*"), **Mitigation Solutions USA, LLC**, a Texas limited liability company ("*MSUSA*") and \_\_\_\_\_, a Texas Municipal Corporation ("*Purchaser*"), together collectively referred to herein as the "*Parties*."

RECITALS

A. Seller owns or controls the Straus Medina Mitigation Bank ("SMMB") in Bexar County, Texas, (the "Mitigation Property") with stream mitigation credits available (or soon to be available) for transfer and sale under US Army Corps of Engineers Fort Worth District (hereinafter "District") Permit No. SWF-2011-00271;

B. Seller has received (or expects to receive) its initial credit release for SMMB and is anticipating additional future credit releases which will enable it to offer certain categories of Conditional Integrity Units ("*CIUs*") for sale from SMMB as compensation for unavoidable adverse impacts to, or for the loss of, among other things, jurisdictional waters of the United States, jurisdictional waters of the United States and other natural habitats and ecosystems, located within that certain geographical service area more particularly depicted on attached **Exhibit A** (the "*Service Area*") or other areas as may be approved by the USACE in accordance with the MBI;

C. Purchaser is seeking to implement a project, known as the San Antonio International Airport Runway 3/21 Extension Project ("*Purchaser's Project*"), in the Service Area that has unavoidably and adversely impacted jurisdictional waters of the United States ("*Purchaser Impacts*");

D. Purchaser seeks to compensate for the Purchaser Impacts by purchasing 72.6 CIUs in the form of 36.3 Riparian Buffer Credits and 36.3 In-Channel credits from the SMMB (such 72.6CIUs, as broken down into Riparian and In-Channel Stream Credits, referred to herein as the "*Subject Credits*", the same being also set forth on **Exhibit B**);

E. Purchaser will seek all required authorization from the USACE under Permit No. SWF-2004-00252 ("*Purchaser's Permit*") for its purchase of the Subject Credits as mitigation for the Purchaser Impacts; and

F. Purchaser desires to reserve and purchase from Seller, and Seller desires to sell, through its exclusive marketing agent MSUSA, to Purchaser the aforementioned Subject Credits according to the terms and conditions set forth herein:

NOW, THEREFORE, IN CONSIDERATION OF THE RECITALS SET FORTH ABOVE AND THE TERMS, COVENANTS AND CONDITIONS SET FORTH HEREIN THE PARTIES AGREE AS FOLLOWS:

1. **Reservation, Purchase and Payment.**

a. **Purchase Price.** From the SMMB and subject to the terms of this Agreement, Seller agrees to sell to Purchaser, and Purchaser agrees to purchase from Seller, the Subject Credits for the total purchase price (the "***Purchase Price***") of: (i) One Hundred Thirty Six Thousand, One Hundred Twenty Five Dollars (\$136,125.00). Purchaser shall make all payments to Seller under this Agreement in immediately available US funds.

b. **Deposit.** Upon execution of this Agreement, Purchaser shall pay to MSUSA, for immediate credit to Seller, a deposit equal to fifty percent (50%) of the Purchase Price (the "***Deposit***"), Sixty Eight Thousand, Sixty Two Dollars and 50/100 (\$68,062.50). Once the Deposit has been received by MSUSA, MSUSA will notify the USACE (with a copy to Purchaser) that the Subject Credits have been reserved for Purchaser. The Deposit shall be applicable to the Purchase Price and nonrefundable to Purchaser, except as provided in Sections 4 and 8.a. below. Upon payment of the Deposit, Seller shall set aside and reserve the Subject Credits for purchase by Purchaser until \_\_\_\_\_ (9 months), 2014 (the "***Expiration Date***").

c. PURCHASER ACKNOWLEDGES AND AGREES THAT (I) THIS AGREEMENT IS AN ARM'S-LENGTH CONTRACT BETWEEN THE PARTIES; (II) SELLER HAS NO CONTROL OVER THE ACTIONS OR INACTIONS OF THE USACE OR ANY OTHER GOVERNMENTAL AGENCY; AND (III) **EXCEPT AS EXPRESSLY STATED IN THIS AGREEMENT, ALL REPRESENTATIONS, DISCLOSURES AND WARRANTIES, EXPRESS OR IMPLIED, ARE FULLY DISCLAIMED.**

d. **Credits.** This Agreement obligates Seller to convey only the 72.6 CIUs described herein as the Subject Credits. If the number of CIUs required for the Purchaser Impacts increases for any reason, Seller shall not be obligated to convey the same unless and until this Agreement is so amended or another Purchase and Sale Agreement for Mitigation Credits is entered into between Purchaser and Seller.

2. **Deposits Applicable and Non-Refundable.** The Deposit shall be applied, without interest, against the Purchase Price. Purchaser understands that the Deposit shall be paid directly to MSUSA for immediate credit to Seller for use in the construction, operation and maintenance of the SMMB and shall not be refundable or reimbursable to Purchaser, except as provided in Sections 4 and 8.a. below.

3. **Sale of Subject Credits.** The Subject Credits will be transferred by Seller to Purchaser following release of the same by the USACE for sale by Seller and upon MSUSA's receipt of payment of the balance of the Purchase Price, which shall be evidenced with a final invoice marked "PAID IN FULL". Upon availability of CIUs for transfer from the SMMB, MSUSA will notify Purchaser in writing of the same, which notification shall contain an invoice for the balance of the Purchase Price due (the "***Sales Notice***"). Once the balance of the Purchase Price has been received by MSUSA for the Subject Credits, the sale contemplated in this Agreement shall be deemed to have occurred, at which time MSUSA will so notify the USACE with a copy to Purchaser. In the event that, following receipt of the Sales Notice, Purchaser fails to remit payment in full for the Subject Credits prior to the Expiration Date, Seller may terminate this Agreement by written notice of the same to Purchaser, upon which the Seller shall be entitled to retain the Deposit, as liquidated damages and not as a penalty, and neither Purchaser nor Seller shall any further rights or obligations hereunder.

4. **Acknowledgement of the Parties; Current Unavailability of CIUs.** Seller and Purchaser acknowledge that there are currently no CIUs available for transfer from SMMB. Seller is awaiting a release of CIUs that will enable Seller to transfer the Subject Credits to Purchaser (the "***Expected***")

*Release*”). Notwithstanding anything to the contrary contained herein, if the Expected Release has not occurred by \_\_\_\_\_ (6 months), 2014, Purchaser may elect to terminate this Agreement by written notice to Seller (the “*Termination Notice*”) and upon receipt or transmission of such Termination Notice this Agreement shall terminate and Seller shall refund the Deposit to Purchaser and none of the Parties shall have any further rights or obligations hereunder. Except as otherwise set forth in Section 8a. below, in no event shall Seller incur, and Purchaser hereby releases Seller from, any liability to Purchaser under the terms of this Agreement resulting from a failure of the Expected Release.

5. **No Property Interest or Special Relationship.** The sale of Subject Credits as described herein is not intended as a sale to Purchaser of a security, license, lease, easement or possessory or non-possessory interest in real property, nor the granting of any interest in the foregoing. The relationships between the Parties are ordinary commercial relationships; the Parties do not intend to create any other kind of relationship, such as principal and agent, a partnership, a joint venture or any other special relationship.

6. **Mitigation Bank Maintenance.** Notwithstanding the sale of the Subject Credits to Purchaser, Seller shall remain responsible for performing all of the obligations of “Bank Sponsor” under the MBI with respect to the SMMB, including any maintenance, monitoring and reporting obligations, and Purchaser shall have no responsibility therefore; however, Purchaser covenants and agrees that it shall not violate, or otherwise commit any acts or omissions in contravention of, the MBI. In addition, Purchaser will be solely responsible for making all required applications and seeking all required permits and authorizations from the USACE or any other governmental entity, as applicable, regarding its use and application of the Subject Credits.

7. **No Other Brokers.** Seller and Purchaser each represent and warrant to the other that they have not had any dealings with any brokers, finders or agents, and no commissions or fees are payable, in connection with this Agreement, other than to MSUSA, whose commission is paid by a third party pursuant to a separate agreement. The obligations of the Parties under this provision will survive the expiration or termination of this Agreement and the purchase of the Subject Credits.

8. **Default and Remedies.**

a. **Seller's Default; Purchaser's Remedies.** If the purchase and sale of the Subject Credits contemplated hereby is not consummated because of a default by Seller, then Purchaser may, as Purchaser’s sole and exclusive remedy hereunder on account of any default by Seller, terminate this Agreement by written notice to Seller and MSUSA, upon which notice Seller shall return the Deposit to Purchaser, **IT BEING AGREED BETWEEN PURCHASER AND SELLER THAT SUCH SUM SHALL BE PURCHASER'S SOLE AND LIQUIDATED DAMAGES (AND NOT A PENALTY) FOR SUCH DEFAULT OF SELLER HEREUNDER BECAUSE OF THE DIFFICULTY, INCONVENIENCE AND UNCERTAINTY OF ASCERTAINING ACTUAL DAMAGES FOR SUCH DEFAULT**, and the Parties shall have no further rights or obligations hereunder.

b. **Purchaser's Default; Seller's Remedies.** If the purchase and sale of the Subject Credits contemplated hereby is not consummated because of a default by Purchaser, Seller may, as Seller’s sole and exclusive remedy hereunder on account of a default by Purchaser, terminate this Agreement by written notice to Purchaser and MSUSA, upon which notice Seller shall be entitled to retain the Deposit, **IT BEING AGREED BETWEEN PURCHASER AND SELLER THAT SUCH SUM SHALL BE SELLER'S SOLE AND LIQUIDATED DAMAGES (AND NOT A PENALTY) FOR SUCH DEFAULT OF PURCHASER HEREUNDER BECAUSE OF THE DIFFICULTY, INCONVENIENCE AND UNCERTAINTY OF ASCERTAINING ACTUAL DAMAGES FOR SUCH DEFAULT**, and the Parties shall have no further rights or obligations hereunder.

9. **Notice.** Any notice or demand permitted or required by this Agreement shall be made in writing and shall be delivered by hand delivery, which shall include delivery by reputable national overnight courier service, such as Federal Express, or by electronic transmission (including electronic mail or facsimile, as may be set forth below) with confirmation of transmission followed by hand delivery of a copy of such notice or demand. Any such notice or demand shall be effective and deemed received on the date delivered to the address of the addressee, as indicated on the receipt confirmation if delivered by hand, or if delivered by electronic transmission, on the date of such transmission, as indicated on the receipt confirmation. Rejection or other refusal to accept or the inability to deliver because of changed address of which no notice was given shall be deemed receipt of the notice, demand or request sent. For the purposes of this Section, notices shall be directed as follows:

If to Seller: TCP III Straus Medina, LLC  
3715 Northside Parkway  
Suite 2-500  
Atlanta, GA 30327  
Attn: Crossover Portfolio Manager  
Facsimile: 404-848-7501

With a copy to: Mettauer Shires & Adams  
403 Nacogdoches Street, Suite 1  
Center, TX 75935  
Attn: Matthew D. Mettauer  
Phone: (936) 598-9400  
Email: [matthew@mettauerlaw.com](mailto:matthew@mettauerlaw.com)

If to Purchaser: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

If to MSUSA: Mitigation Solutions USA, LLC  
2040 North Loop West, Suite 15  
Houston, TX 77018  
Attn: Terry McKenzie, President  
Phone: (713) 812-9000  
Email: [terry@msusa.com](mailto:terry@msusa.com)

10. **Restrictions on Assignment.** No party will be entitled to assign this Agreement to any person without the prior written consent of all of the Parties hereto. Purchaser covenants not to re-sell or transfer any Credits without the prior written consent of Seller, in each instance, which consent may be withheld in Seller's sole discretion; provided, however, that Purchaser may transfer the Credits purchased by Purchaser without Seller's further consent to (i) an entity controlled by, or under common control with, Purchaser or (ii) a third party which has acquired both Purchaser's Project and Purchaser's Permit, as long as Purchaser promptly notifies Seller of each such transfer. The obligations of the Purchaser under this provision will survive termination of this Agreement and the purchase of the Credits. Any attempted assignment of this Agreement or transfer of any of the Credits which does not comply with the conditions of this section shall be null and void ab initio.

11. **Confidentiality.**

If any Party is requested or required (by oral question or request for information or documents in any legal proceeding, interrogatory, subpoena, civil investigative demand or similar process) to disclose the business or financial affairs of the other Parties to which it has been or shall become privy by reason of this Agreement (“**Confidential Information**”), such Party shall promptly so notify the other Parties to allow such other Parties sufficient time to seek an appropriate protective order, or other appropriate action, to prevent disclosure of Confidential Information. This provision shall survive the expiration or earlier termination of this Agreement for a period of one (1) year. Notwithstanding the foregoing, Seller acknowledges and agrees that any and all requests for information, data and results in the possession of Purchase are subject to the Texas Public Information Act under chapter 552 of the Texas Government Code, and shall be handled in accordance with the provisions of that act.

12. **Miscellaneous.**

a. The section headings in this Agreement are for convenience of reference only and are not intended, to any extent and for any purposes, to limit or define text of any section of subsection thereof. If any provision of this Agreement is determined by a court of competent jurisdiction to be invalid or unenforceable, the remainder of this Agreement will nonetheless remain in full force and effect.

b. This Agreement and all rights, duties and responsibilities hereunder shall be interpreted and construed in accordance with the laws of the State of Texas, without regard to choice-of-law rules of any jurisdiction. Venue shall be in Shelby County, Texas, except as otherwise provided by applicable law.

c. NO INDIVIDUAL MEMBER, PARTNER, MANAGER, OFFICER, DIRECTOR, SHAREHOLDER, EMPLOYEE, CONTRACTOR OR AGENT OF ANY PARTY SHALL BE PERSONALLY LIABLE HEREUNDER.

d. This Agreement may be executed in any number of counterparts, each of which shall be considered an original, but such counterparts together shall constitute one and the same instrument. The signature pages may be detached from one counterpart and reattached to another counterpart in order to form a fully-executed original instrument. Signatures to this Agreement transmitted by facsimile or electronic mail will be valid and effective to bind the party so signing. Each party agrees to promptly deliver any execution original to this Agreement with its actual signature to the other Parties, but a failure to do so will not affect the enforceability of this Agreement.

e. This Agreement shall be binding upon and inure to the benefit of the Parties’ respective successors, successors-in-title and assigns, subject to the limitation of Section 10 above. There are no third-party beneficiaries of this Agreement.

f. Each party shall be responsible for its own attorneys’ fees in connection with the subject matter of this Agreement. The rule of construction that ambiguities in a document will be construed against the drafting party will not be applied in interpreting this Agreement. If either party retains an attorney to enforce this Agreement, the party prevailing in litigation is entitled to recover reasonable and actual attorney’s fees and court and other costs.

g. Each party agrees that it will, at any time and from time to time after the execution of this Agreement, upon request of the other party, do, execute, acknowledge and deliver, or will cause to be done, executed, acknowledged or delivered, all such further acts, deeds, assignments, conveyances and assurances as may reasonably be required to carry out the intended purposes of this Agreement.

h. This Agreement, together with its exhibits, constitutes the entire agreement of the Parties concerning the sale of the Subject Credits to Purchaser. There are no oral representations, warranties, agreements or promises pertaining to such sale not incorporated in writing in this Agreement.

i. This Agreement may be amended only by an instrument in writing signed by the Parties. No term or condition of this Agreement will be deemed to have been waived or amended unless expressed in writing, and the waiver of any condition or the breach of any term will not be a waiver of any subsequent breach of the same or any other term or condition.

j. The obligations of this Agreement that cannot be performed before termination of this Agreement or before closing of the sale of the Subject Credits will survive termination of this Agreement or such closing, and the legal doctrine of merger will not apply to these matters.

k. Time is of the essence of this Agreement and each provision hereof. If the last day upon which performance would otherwise be required or permitted is a Saturday, Sunday or holiday, then the time for performance shall be extended to the next day which is not a Saturday, Sunday or holiday. The term "holiday" shall mean all and only mandatory federal holidays including which deliveries by the United States Postal Services are suspended.

*Signatures commence on following page*

IN WITNESS WHEREOF, the parties have executed this Agreement the day and year first above written.

**SELLER:**

**TCP III Straus Medina, LLC**, a Texas  
limited liability company

By: TCP III Holdings, LLC, its Manager

By: Timbervest Crossover Partners III, L.P., its Manager

By: Timbervest, LLC, as Manager

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_, 2014

*Signatures continue on the following page*

*Purchaser Signature Page to  
Purchase and Sale Agreement for Mitigation Credits*

**PURCHASER**

\_\_\_\_\_, Date: \_\_\_\_\_  
a \_\_\_\_\_

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

*Signatures continue on following page*

*Agent Signature Page to  
Purchase and Sale Agreement for Mitigation Credits*

**AGENT:**

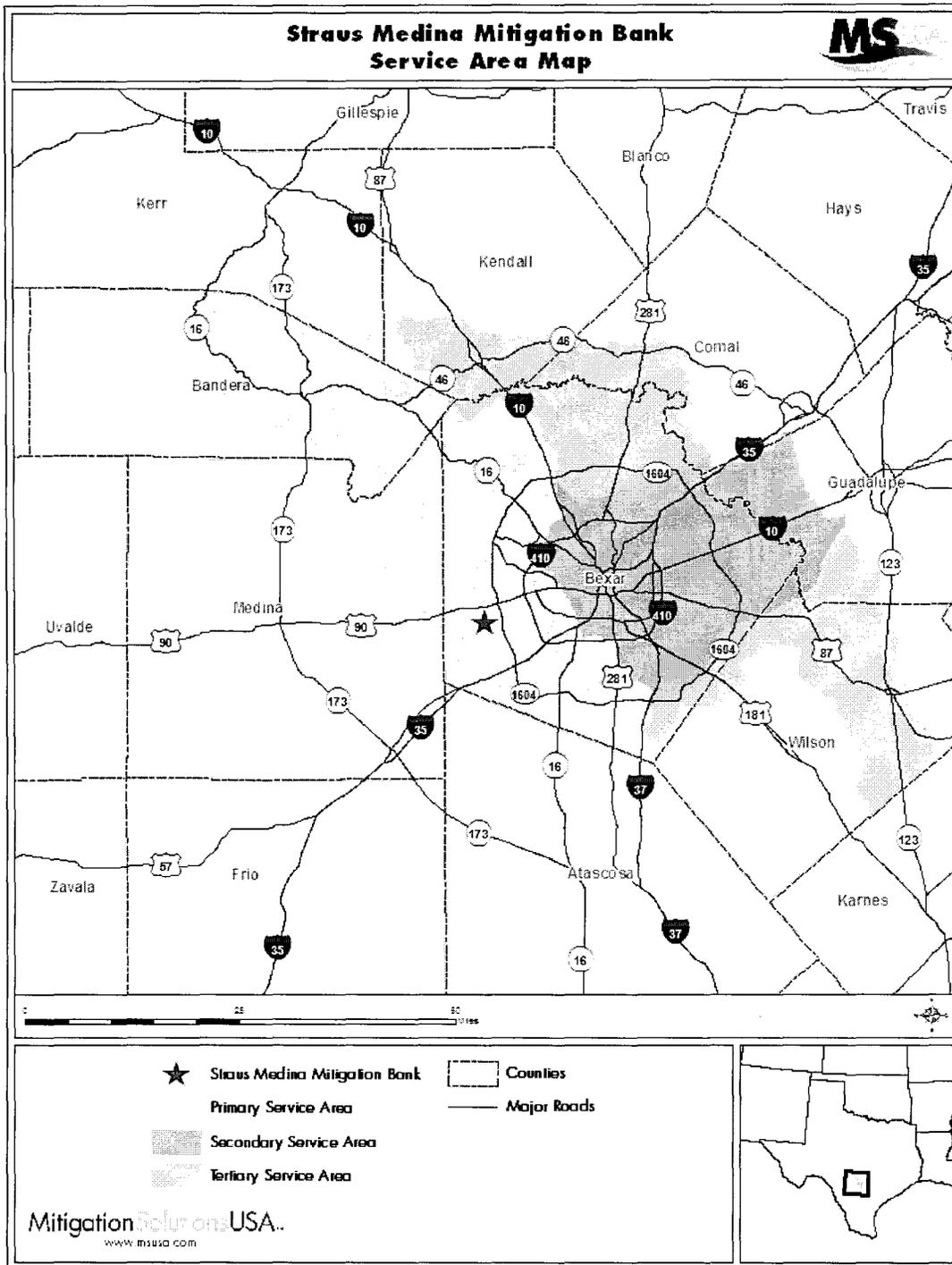
**MITIGATION SOLUTIONS USA, LLC**

\_\_\_\_\_  
By: Terry McKenzie  
Its: President

Date: \_\_\_\_\_

*End of Signatures*

**EXHIBIT A**



**EXHIBIT B**

**Purchase of Wetland Credits**

Purchaser will purchase 36.3 Riparian Conditional Integrity Units and 36.3 In-Channel Conditional Integrity Units from Straus Medina Mitigation Bank. These credits will be sold as follows:

In-Channel, Intermittent	<u>36.3</u> credits
Riparian, Ephemeral	<u>36.3</u> credits
<b>Total Purchase Price:</b>	<b>\$ 136,125.00</b>
<b>50% Deposit due upon Execution:</b>	<b>\$ 68,062.50</b>

\*\*\*\*\*