No. 14-376C
(Senior Judge Bruggink)

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

PIONEER RESERVE, LLC,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

DEFENDANT'S MEMORANDUM OF CONTENTIONS OF FACT AND LAW

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

ROBERT E. KIRSCHMAN, JR.
Director

STEVEN J. GILLINGHAM
Assistant Director

GEOFFREY M. LONG
Trial Attorney
Commercial Litigation Branch
Civil Division
U.S. Department of Justice
P.O. Box 480
Ben Franklin Station
Washington D.C. 20044
Tel: (202) 307-0159
Fax: (202) 309-0972
E-Mail: Geoffrey.M.Long@usdoj.gov

OF COUNSEL:

MILTON W. BOYD
Assistant Counsel
Office of the Chief Counsel
United States Army Corps of Engineers

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Attorneys for Defendant

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DEFENDANT'S MEMORANDUM OF CONTENTIONS OF FACT AND LAW

Pursuant to the Court's order dated March 21, 2016, ECF No. 90, and Appendix A, paragraph 14(b), of the Rules of the Court of Federal Claims (RCFC), the Government respectfully submits this memorandum of contentions of fact and law.

STATEMENT OF ISSUES TO BE RESOLVED BY THE COURT

I. Issues Of Fact

1. Whether plaintiff Pioneer Reserve, LLC (Pioneer) had full opportunity, prior to the issuance of the Clean Water Act Section 404 permit to the Alaska Railroad Corporation (ARRC), to convince ARRC to buy its credits, but nonetheless failed to secure any agreement from ARRC.

2. Whether the United States Army Corps of Engineers (Corps) unilaterally modified the umbrella mitigation banking instrument (UMBI) issued to Pioneer, prior to the issuance of a Clean Water Act Section 404 permit to the Alaska Railroad Corporation in relation to the Port MacKenzie Rail Extension (PMRE).

3. Whether Pioneer can show by a preponderance of the evidence that it would have completed a sale of compensatory mitigation credits to ARRC in the absence of any breach of the UMBI, where Pioneer will not argue that ARRC was interested in Pioneer's credits, or that ARRC did not have other options.

4. Whether the facts support Pioneer's claim that it would have sold credits to ARRC for $79,000 per credit, despite that ARRC paid far less than that price for credits to offset PMRE impacts.

II. Issues Of Law

1. Whether the Court's summary judgment opinion fully resolved, in the Government's favor, Pioneer's breach claim as to all but 107.78 credits.

2. Whether the Corps' discretion permitted it to find that, irrespective of the designation of Pioneer's upland credits in the UMBI, those credits were not appropriate to serve as compensatory mitigation for PMRE wetland impacts.

3. Whether, assuming there was some unilateral modification of the UMBI, that unilateral modification breached a contractual duty, despite that the UMBI only states that credits will be available for sale, and does not require the Corps to force any permittee to buy Pioneer's credits.

4. Assuming breach, whether that breach was the proximate cause of Pioneer's alleged damages, where ARRC never proposed to use Pioneer's credits, rejected Pioneer's credits when directed to purchase 16.92 credits from Pioneer, argued to the Corps that Pioneer's credits were inappropriate to serve as mitigation, and secured a permit modification rather than buy Pioneer's credits.

5. Whether Pioneer has proven that it lost profits in the amount of $12,655,800, equaling a price of $79,000 per credit, where ARRC never paid more than $29,084 per credit for PMRE compensatory mitigation, and paid much less for the vast majority of the credits.

STATEMENT OF FACTS THE GOVERNMENT EXPECTS TO PROVE[1]

I. The UMBI

1. Scott Walther and his family owned the land contributed into Pioneer Reserve Mitigation Bank (Bank). Pioneer paid nothing for it. DX117.[2] Prior to creating the Bank, Pioneer did not develop a business plan, budget, or credit pricing for the Bank. Pioneer RCFC 30(b)(6) Depo. 49:14-50:4. Despite not creating a business plan, budget, or pricing, Pioneer predicted significant demand for its credits separately from ARRC's planned Port MacKenzie Rail Extension, equaling to 100 to 750 credits for the Matanuska-Susitna Borough, and 75 to 80 percent of that amount within Pioneer's service area. Pioneer Reserve RCFC 30(b)(6) Depo. 33:16-35:14.

2. The Bank is preservation based, meaning that it preserves existing wetlands, rather than creating new wetlands. DX26. Pioneer has confirmed that the assessed value of the lands included in the bank (Edgerton and Seldon parcels) has not decreased with the recordation of conservation easements. *Compare* DX24 *with* DX25; *see* Pioneer RCFC 30(b)(6) Depo. 63:19-64:25 (confirming assessments). As of the start of 2014, Pioneer reported total assets of $1,186,791. DX114.

3. The UMBI includes two separate parcels – the Edgerton parcel and the Seldon parcel. DX26. The UMBI includes wetland delineation and mapping for both parcels. *Id.*

[1] This case is set against the backdrop of statutes and regulations relating to compensatory mitigation, most importantly the regulations set forth in the Final Rule on Compensatory Mitigation for Losses of Aquatic Resources, 73 Fed. Reg. 19,594 (April 10, 2008) (Final Rule).

[2] "DX__" refers to a document on defendant's exhibit list. "JE__" refers to a document on the parties' joint exhibit list, which Pioneer will file on June 2, 2016. *See* Proc. Stip. ECF No. 92. "PX__" refers to a document on plaintiff's exhibit list. ECF No. 93. We have provided exhibit references for the Court's preliminary reference, and we will provide complete citations in post-trial briefing.

4. When Pioneer's mitigation bank was approved in October 2011, William Keller executed the instrument for the Corps. DX26.[3] Karen Nelson, who was a Corps employee at the time and the project manager for the Bank's instrument, did not have authority to enter into the UMBI.

5. Pioneer Reserve drafted the UMBI. Am. Compl. ¶ 31. The UMBI states that credits will be available to be used as follows:

> In accordance with the provisions of this UMBI and upon satisfaction of the performance standards contained in Exhibit A, Mitigation Plan, and the mitigation credits and schedule determined in Accounting Procedures and Credit Release Sections of this instrument, *credits will be available to be used as mitigation in accordance with all applicable requirements of Section 404 of the Clean Water Act . . . .*

DX26 (emphasis added). Pioneer has admitted that it could have entered into the UMBI without placing conservation easements on its land, and then later put easements in place to have credits released to sell. Pioneer RCFC 30(b)(6) Depo. 148:18-149:3.

6. The UMBI sets forth a description of the habitat types contained in the Edgerton parcel. DX26. The UMBI also sets forth a table of credit calculations for the Edgerton parcel – including calculations for palustrine wetland credits – in "Table A-6" of the UMBI. DX26.[4]

7. Pioneer has in this action alleged a unilateral reduction of only its palustrine

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[3] Pioneer claims that "[t]he EPA and the Corps awarded . . . bank credits to Pioneer." Pl. Facts ¶ 90. That is incorrect. The UMBI was approved by the Corps, not the EPA.

[4] Palustrine wetlands are defined in part as "all nontidal wetlands dominated by trees, shrubs, persistent emergents, emergent mosses or lichens." *See* Classification of Wetlands and Deepwater Habitats of the United States, Palustrine System, https://www.fws.gov/wetlands/Documents/classwet/palustri.htm (last visited Apr. 15, 2016). Palustrine wetlands may be contrasted with riverine wetlands, which generally include all wetlands and deepwater habitats contained within a channel. *See* Classification of Wetlands and Deepwater Habitats of the United States, Riverine System, https://www.fws.gov/wetlands/Documents/classwet/riverine.htm (last visited Apr. 15, 2016).

wetland credits. *See* Am. Compl. ¶ 72. Table A-2 of the UMBI lists the following five palustrine – PUB, PEM, and PFO – wetland types for Edgerton: (1) Palustrine-Unconsolidated Bottom-Mud-Semipermanently Flooded (PUB3F); (2) Palustrine-Emergent-Persistent-Saturated (PEM1B); (3) Palustrine-Emergent-Persistent-Seasonally Flooded (PEM1C); (3) Palustrine-Forested/Shrub-Scrub-Broad Leaved Deciduous Saturated (PFO1/SS1B); (4) Palustrine-Forested-Deciduous/Evergreen-Intermittently Flooded (PFO1/4J); and (5) Palustrine-Forested-Broad Leaved Deciduous-Intermittently Flooded (PFO1J). DX26.

8. The UMBI contains the following language:

> a. "This UMBI constitutes the entire agreement between the parties concerning the subject matter hereof and supersedes all prior agreements or undertakings."
>
> b. "**This UMBI does not in any manner affect statutory authorities and/or responsibilities of the signatory parties.**" (emphasis original)
>
> c. "The responsibility for financial success and risk to the investment initiated by the Sponsor rests solely with the Sponsor. The regulatory agencies that are parties to this UMBI administer their respective regulatory programs and make no guarantee of the financial success of mitigation banks, specific individuals, or entities. Accordingly, there is no guarantee of profitability for any individual mitigation bank. Because the regulatory agencies do not control the number of mitigation banks proposed nor the resulting market impacts upon success or failure of individual banks, *market studies of the potential and future demand for bank credits are the sole responsibility of the Sponsor*." (emphasis added)

DX 26.

9. The UMBI contains no reference to Alaska Railroad Corporation or to ARRC's Port MacKenzie Rail Extension project. The UMBI also nowhere states that it provides Pioneer with an exclusive right to sell credits within a given geographical area.

10. On April 19, 2012, Scott Walther and Calliandra Donn – another of Pioneer's principals – met with Nicole Hayes, who was at the time a supervisor in the Regulatory Division at the Corps' Alaska District. We expect trial testimony to demonstrate that at that time, Hayes

had no responsibility for the PMRE permit. Hayes's awareness of the permit prior to August 2012 was limited to discussion in supervisor staff meetings. She first reviewed the draft permit and record of decision in August 2012.

11. On May 29, 2012, members of the Corps' Alaska District regulatory program visited the Bank's Edgerton parcel. Hayes was among the attendees. As a result of the visit, Hayes became concerned that certain areas mapped as wetlands in the UMBI were in fact uplands. Hayes expressed her concern in e-mails, for example in a July 2, 2012 e-mail on which Donn of Pioneer Reserve was copied. DX39. In the e-mail, Hayes set forth a number of factors at issue, and asked, "[b]ased off this understanding, what upland areas in the Edgerton Parcel should be eliminated as part of the bank?" DX39. The issue of Pioneer's credits also was discussed at a meeting on August 22, 2012, with the Bank's interagency review team (IRT) and Pioneer. DX41. Pioneer's representative has testified in this action that the scope of discussions about Pioneer's credits was limited to Edgerton parcel "PFO1" credits. Pioneer RCFC 30(b)(6) Depo. 85:9-85:20.

12. On September 7, 2012, Hayes sent an e-mail to Pioneer's principal, Calliandra Donn. DA545, DA552-DA553. Hayes attached to the e-mail a map showing remapping of the Edgerton Parcel then under consideration by the Corps. DX135. On the same date and in response to Hayes's e-mail, Calliandra Donn revised Table A-6 of the UMBI and sent it to Hayes. DX44. The Table A-6 provided by Donn set forth for the Edgerton Parcel 16.92 total PUB, PFO, and PEM credits – *i.e.*, the "palustrine" credit types identified in paragraph 37 of Pioneer's amended complaint. DX44; *see* Am. Compl. ¶ 37. The total number of credits was 140.8, as opposed to the 150.81 listed in the UMBI. *Compare* DX44 *with* DX26.

13. As a result of these recalculations, the revised Table A-6 created by Donn

indicated that the total number of palustrine credits for the Edgerton parcel would be 16.92. DX44. Donn ended her e-mail with the following statement: "If this is what we end up with, can you send me shapefiles for our GIS guys? Thanks!" DX44. ("Shapefiles" are electronic data files used in geographic information system (GIS) mapping applications.)

14. After sending the recalculation of Edgerton credits, also on September 7, 2012, Donn forwarded her e-mail to consultants working with Pioneer Reserve, without indicating any concern about her calculations. DX45.

II. ARRC'S PMRE Project

15. In March 2011, prior to the creation of Pioneer's bank, ARRC submitted an application under Section 404 for a permit to impact waters of the United States as a result of the PMRE project. DX47. On April 20, 2011, this application was determined to be complete, and a public notice was issued May 12, 2011. DX47. Trial testimony is expected to show that Karen Nelson, the former Corps employee, was in no way responsible for or involved in the determination of appropriate compensatory mitigation for the impacts related to the permit.

16. On February 24, 2012, ARRC submitted its mitigation plan in relation to its permit application. ARRC proposed purchasing from Su-Knik Mitigation Bank (Su-Knik) – Pioneer's competitor – the compensatory mitigation credits that would be required as a permit condition. DX31. ARRC did not propose to use Pioneer's credits. And ARRC believed that while either entity could be used for compensatory mitigation, JE5, Su-Knik was ecologically preferable. DX31.

17. Pioneer approached ARRC regarding a potential credit sale prior to the creation of Pioneer's bank or the issuance of the PMRE permit. Pioneer RCFC 30(b)(6) Depo. 42:21-44:12. Calliandra Donn e-mailed and spoke with Brian Lindamood, ARRC's representative for PMRE compensatory mitigation, about ARRC purchasing Pioneer's credits. And Ms. Donn attempted

to discuss pricing with Mr. Lindamood on April 7, 2012. *Id.* Despite its attempts, Pioneer did not secure any agreement from ARRC to purchase Pioneer's credits prior to issuance of the PMRE permit. *See id.*

18. On September 10, 2012, the Corps issued Permit No. POA-2007-1586, Knik Arm, for the PMRE project, pursuant to Section 404 of the Clean Water Act, 33 U.S.C. § 1344. DX46. The permit authorized "the discharge of 1,619,587 cubic yards of fill material into 95.8 acres of waters of the U.S., including wetlands, as part of the construction of a 35.8-mile rail line, [the] Port MacKenzie Rail Extension Project." DX46.

19. The permit includes "Special Condition 13," which sets forth the compensatory mitigation required for the PMRE project. DX46. The mitigation requirements are expressed in ratios, based upon the types of wetlands impacted by the PMRE. DX46. For example, for impacts to "Category I" wetlands, the permit required a mitigation ratio of three compensatory mitigation credits to each acre of impacts, for a total requirement of 1.8 credits for these impacts. DX46. The permit set forth a total requirement of 160.2 compensatory mitigation credits as compensation for impacts from the PMRE project. DX46. Special Condition 13 furthermore directed that "16.92 palustrine credits (*i.e.*, PUB, PEM, PFO) shall be purchased from Pioneer Reserve, LLC, and 143.28 palustrine credits, shall be purchased from the Su-Knik Mitigation Bank." DX46. Thus, despite ARRC's proposal to use only Su-Knik's credits, DX31, the Corps directed ARRC to purchase 16.92 credits from Pioneer Reserve, and the remainder from Su-Knik. DX46.

20. The permit was accompanied by a record of decision (ROD) created pursuant to "the authority delegated to the [Corps'] District Commander by 33 C.F.R. 325.8, pursuant to

Section 404 of the Clean Water [Act.]" DX47.

21. The basis for the compensatory mitigation required for the ARRC PMRE project is set forth in Section 5 of the ROD. DX47. The Corps noted that ARRC proposed Su-Knik, but that the Corps nonetheless considered Pioneer:

> At the time of application, Su-Knik Mitigation was the only available mitigation bank in the Matanuska-Susitna Borough. During evaluation of the DA permit application, Pioneer Reserve was approved. Though the applicant proposed to use Su-Knik for all of their compensatory mitigation requirements, consideration was first given to the mitigation bank with a service area in which the proposed impacts occur. Pioneer Reserve' s Edgerton parcel is located approximately 17 miles from the closest point to the PMRE, however, it is within the same watershed. Pioneer Reserve's Seldon parcel is located approximately 12 miles from the northern most point of the proposed rail line and Su-Knik's Big Lake south parcel is located within 7 miles of the PMRE.

DX47.

22. Based on the factors discussed in the document, the ROD sets forth an ecological preference for PMRE compensatory mitigation as follows:

> Ecologically, the Corps has determined the preference for compensatory mitigation would be as follows:
>
> 1. Pioneer Reserve's Edgerton parcel (**like habitat credits**)
>
> *Rationale: Though this parcel is furthest away in distance from the PMRE, Pioneer Reserve's service area encompasses **some** credits of the same habitat type that support the Little Susitna Watershed (33 C.F.R 332.3(a)-(c)) where the PMRE is located*
>
> 2. Su-Knik's Big Lake South parcel (like habitat credits)
>
> *Rationale: Though this bank's service area does not encompass the location of the PMRE and this parcel is in a different subwatershed (Fish Creek Watershed), **the wetlands in this parcel are the closest in proximity, landscape position, and type, as those being impacted by the PMRE.***
>
> 3. Pioneer Reserve's Seldon Parcel

> *Rationale: While Pioneer Reserve's Seldon parcel contains habitat types and credits sufficient to offset the impacts from PMRE, this parcel is also located within the Fish Creek Watershed, the wetlands are different in landscape position, and they are not as close as Su-Knik's Big Lake South parcel.*

DX47 (bold added).

23. The Corps determined that "unavoidable impacts to [waters of the United States] resulting from the PMRE will require compensation using Pioneer Reserve's Edgerton parcel credits, *where the habitat types are consistent with the type(s) being filled*; and the balance will require compensation using Su-Knik's Big Lake South Parcel credits." DX47 (emphasis added). The Corps included in the ROD a listing of PMRE wetland impacts. DX47. No impacts to "PFO1/4J" or "PFO1J' wetland types were found, and there were 2.3 acres of impacts to "saturated broadleaf forest wetland," including PFO1/SS1B-type wetlands. DX47.

24. ARRC purchased the required 143.28 credits from Su-Knik Mitigation Bank for $10,000 per credit. DX49.

III. Pioneer's Unsuccessful Effort To Sell Credits To ARRC After PMRE Permit Issuance

25. In March 2012, Pioneer Reserve for the first time established credit pricing. Mitigation Solutions USA (MSUSA) provided pricing analysis and other services for Pioneer, for a commission. Pioneer RCFC 30(b)(6) Depo. 27:10-28:21. With MSUSA, Pioneer created a "tiered" pricing schedule, with a base price of $160,000 per credit, and reductions for higher-volume sales. DX36. For example, the schedule indicates that, applying the volume discounts set forth therein, Pioneer would have charged $89,967.54 per credit for a sale of 160.2 credits, or $112,644 per credit for a sale of 124.7 credits (*i.e.*, the number of Edgerton palustrine credits that Pioneer thinks the Corps should have directed ARRC to buy). *Accord* DX36.

26. Great Land Trust is a provider of in-lieu fee advance credits in both Anchorage

and the Matanuska-Susitna Borough, the latter of which is the location of PMRE impacts.[5] DX27. Great Land Trust's Anchorage pricing was a component of Pioneer's selection of pricing for Pioneer's credits. Pioneer RCFC 30(b)(6) Depo. 127:16-19. Pioneer did not learn until January 2013 that GLT maintains separate, higher pricing in Anchorage than in the Matanuska-Susitna Borough, the latter of which is the location of the Pioneer's bank and the PMRE impacts. Pioneer RCFC 30(b)(6) Depo. 129:22-130:8.

27. On September 11, 2012 – one day after the PMRE permit was issued – Pioneer offered to sell ARRC 17 compensatory mitigation credits for a total cost of $2,496,000. Pioneer RCFC 30(b)(6) Depo. 137:24-138:20. This equates to $146,823.53 per credit. The pricing offered by Pioneer on September 11, 2012 was the same as set forth in its March 28, 2012 pricing schedule. *See* DX36.

28. Subsequent to Pioneer's offer, Pioneer and ARRC engaged in negotiations for the sale of the credits. Pioneer offered to lower its price by 40 percent, equating to a cost of $88,094.12 per credit. Pioneer RCFC 30(b)(6) Depo. 139:23-140:1. ARRC offered $346,000, equating to $20,352.94 per credit. *Id.* Brian Lindamood, ARRC's RCFC 30(b)(6) corporate designee and the person responsible for ARRC's purchase, testified that he found Pioneer's prices to be "shockingly high," based on his knowledge of the railroad's costs for compensatory mitigation in Alaska.

IV. Great Land Trust And Su-Knik Mitigation Bank

29. Su-Knik Mitigation Bank operates in the Matanuska-Susitna Borough, which Pioneer identified as a competitor prior to creating its bank. DX19. GLT is an "in lieu" fee

[5] "Advance credits" means any credits of an approved in-lieu fee program that are available for sale prior to being fulfilled in accordance with an approved mitigation project plan. 33 C.F.R. § 332.2. Once a permittee buys advance credits, the responsibility for completing compensatory mitigation shifts to the in-lieu fee provider.

program approved to sell advance credits in both the Mat-Su Borough and in Anchorage. DX27. GLT has several thousand "slope/flat" advance credits available for sale in the Mat-Su Borough. DX27. As with mitigation banks, in-lieu fee credit pricing is not established by the Corps, but rather by the sponsor of the in-lieu fee program. 33 C.F.R. § 332.8(o)(5)(i). GLT maintains different pricing in Anchorage than in the Mat-Su Borough. *See, e.g.*, DX106 (2014 pricing). GLT's base per-credit price in the Mat-Su Borough is approximately $25,000 per credit. *See* DX106. Trial is expected to show that GLT has never sold credits in the Mat-Su Borough for $167,000.

V. ARRC's Permit Modification Request

30. On November 9, 2012, ARRC submitted to the Corps a request to modify the PMRE permit, to allow ARRC to seek other sources of compensatory mitigation in place of the credits that it had been directed to purchase from Pioneer. DX55. As part of its request for modification, ARRC submitted information to the Corps suggesting that purchase of Pioneer Reserve's credits was not reasonable and justified relative to costs, and not in the public interest. DX55.

31. Included in ARRC's request was an analysis of the suitability of Pioneer's Edgerton credits to serve as mitigation, based on the credits set forth in the UMBI. DX55. This analysis was based on the UMBI as executed, as indicated by the fact that ARRC assumed as true the credit calculations stated in the original UMBI. *Compare* DX26 *with* DX55.

32. ARRC stated that "[i]n almost all cases, the wetland types, functions, hydrologic regimes, and watershed position of Pioneer Reserve's Edgerton Parcel do not match impacts permitted under POA-2007-1586," and that the railroad therefore did not understand the ecological basis for requiring the use of Pioneer's Edgerton credits. DX55. ARRC furthermore set forth an analysis in support of its belief that few of Pioneer's credits – specifically including

the PUB, PEM, and PFO types – were appropriate to compensate for PMRE impacts. DX55. Pioneer has no basis to dispute ARRC's conclusions as to the suitability of Pioneer's credits. Pioneer RCFC 30(b)(6) Depo. 117:9-124:3.

33. On December 21, 2012, the Corps found that ARRC was out of compliance with Special Condition 13, and noted that the Corps could only modify the permit if ARRC could "clearly and convincingly demonstrate the mitigation costs from [Pioneer] are not practicable . . . ." DX58. On January 22, 2013, ARRC provided the Corps with a letter from its management stating that "based upon the number of mitigation bank credits which need to be purchased, and the cost associated with the credits, ARRC cannot purchase these credits directly from Pioneer as specific by the Corps and comply with Procurement Rules." DX69. ARRC also identified to the Corps the laws that it believed precluded use of Pioneer's credits. DX68. Mr. Lindamood stated in an e-mail to Ms. Hayes that ARRC could not pay Pioneer's prices with sole source bidding, because it believed that to do so would not be in ARRC's best interest or the public's best interest. DX68. ARRC believed that to be the case based upon a comparison of Pioneer's pricing to competitors, and noted that "Pioneer only made things more difficult by producing a financial analysis showing a profit margin greater than 300%." DX68

34. On January 22, 2013, Brian Lindamood of ARRC sent a request for quotation for the sale of 16.92 compensatory mitigation credits to the following entities: Pioneer Reserve; Su-Knik Mitigation Bank; Great Land Trust, and The Conservation Fund. DX121. Three entities provided responses:

> a. Su-Knik offered to sell 16.92 palustrine wetland mitigation credits located in the Little Susitna River watershed for $14,500.00 per credit and any additional service fees, for a total cost of $245,340.00, based on a plan to have 16.92 palustrine wetland credits available in the Little Susitna watershed by February 1, 2014. DX121.

b. GLT offered to sell 16.92 palustrine wetland mitigation credits located in the Little Susitna River watershed for $29,084.00 per credit and any additional service fees, for a total cost of $492,101.28, and represented that it had at that time 16.92 palustrine wetland credits available in the Little Susitna watershed. DX121.

c. Pioneer offered to sell 16.92 palustrine wetland mitigation credits located in the Little Susitna River watershed for $122,576.83 per credit and any additional service fees, for a total cost of $2,074,000.00, and represented that it had at that time 16.92 palustrine wetland credits available in the Little Susitna watershed.. DX121.

35. GLT provided Jeff Schively – ARRC's environmental consultant – and the Corps information about the lands that it would potentially preserve if ARRC bought its advance credits, based upon GLT's evaluation of available resources in the Mat-Su Borough. DX66, JE7. GLT created a list of parcels located in the Little Susitna watershed, the area of PMRE impacts and Pioneer's Edgerton credits, based on criteria designed to replicate Pioneer's credits. DX66, JE7. The list included many parcels that GLT indicated might serve as compensatory mitigation for PMRE impacts in place of Pioneer's 16.92 credits. DX66.

36. GLT later provided ARRC and the Corps with three specific site options that potentially could be used as compensatory mitigation if ARRC purchased GLT's advance credits. JE6. ARRC submitted a revised request for permit modification on January 25, 2013. DX80. On January 28, 2013, the Corps approved modification of the permit to allow ARRC to purchase 16.92 credits from GLT. DX138.

37. The Corps' memorandum for record documented that Pioneer and ARRC were unsuccessful in negotiations, and that ARRC had provided documentation from its procurement hierarchy certifying that credits could not be purchased from Pioneer under state law and regulations.

38. In the memorandum for record, the Corps noted that in determining environmentally preferable compensatory mitigation, the Corps "must assess" the "costs of the

compensatory mitigation project," among other things. DX85 (citing 33 C.F.R. § 332.3(a)). The memorandum for record noted the general regulatory preference for mitigation banks over in-lieu fee providers, but also noted that the regulations provide flexibility, and found that in light of the specific circumstances, "[t]he compensatory mitigation that would be provided from the ILF [GLT] would be at least as ecologically beneficial to the Little Susitna Watershed, as the credits provided by [Pioneer] since the ILF would also be preservation." DX85.

39. ARRC purchased the credits from GLT. JE11. GLT has since accomplished the mitigation required as a result of its sale of credits to ARRC. *See* DX118.

VI. Subsequent Modification Of The UMBI

40. After the issuance of the PMRE permit on September 10, 2012, and the modification of that permit on January 28, 2013, the Corps and Pioneer continued to engage in discussions regarding the modification of the UMBI. These discussions resulted in various proposals to modify the UMBI.

41. On September 4, 2013, individuals from the Corps met with Pioneer and members of the IRT. DX96. According to the memorandum for record of the meeting, Nicole Hayes "provided a synopsis of the changes to the instrument involving the credit amounts and mapping in the original instrument and what is currently being proposed to the IRT. She noted the credit amounts are not changing, but the RC4T1, with the PF01J and PF01/4J categories habitat type was changing to Riparian. She provided an example of how palustrine forested wetland impacts could be compensated for with riparian credits if those impacts could be functionally associated with a stream, creek, river, or other water body containing riparian areas." DX96.

42. On September 5, 2013, Calliandra Donn confirmed a Pioneer request that the Corps seek IRT comment on a proposed modification to the UMBI. DX99. Also on September 5, 2013, the IRT was asked to comment on the proposed modification, including a revised Table

A-6. DX100. A subsequent memorandum for record for the modification indicates that the only agency to comment expressed concerns with the process, but it "ha[d] no issues with Pioneer Reserve's modification." JE12.

43. On November 4, 2013, the Corps issued a modification of the UMBI. JE12. The November 4, 2013 modification to the UMBI contains a revised Table A-6 of the UMBI, which lists 0.10 PUB3F credits, 0.19 PEM1B credits, 9.17 PEM1C credits, and 26.90 PFO1/SS1B credits. JE12. These are among the types that Pioneer claims be relevant to the PMRE permit. *See* Am. Compl. ¶ 37. In an e-mail that Scott Walther sent to Lt. Col. Mark DeRocchi of the Corps on November 18, 2013, Walther stated that "as it turned out, the [UMBI] changes were not significant." DX104.

VII. Pioneer's Later Credit Sales

44. On or about July 25, 2013, Pioneer sold "4.4 riparian functional credit units" to ADOT for $347,000, or $79,000 per credit. PX52. Pioneer also later sold 0.28 Seldon parcel credit to ADOT at a prorated price of $79,000 per credit. PX60. Pioneer's representative testified that Pioneer was not told why ADOT was willing to pay this amount for the credits. Pioneer Reserve RCFC 30(b)(6) Depo. 161:25-162:6 and 162:25-163:7. In 2015, ADOT chose to undertake permittee-responsible mitigation for the "Zak Lake" permit, despite the permit impacts taking place in Pioneer's service area.

45. Pioneer continues to market its credits for sale, and has identified potential opportunities for future sales. *See, e.g.*, DX109. In one instance, it apparently offered its credits for $62,000 per credit, but did not accomplish a sale. DX107. It has sold no additional credits at $79,000 per credit, or at any other price.

VIII. Expert Opinions To Be Offered By The Parties

46. Pioneer and the Government have each disclosed a testifying expert in this matter.

The Government's expert, Dr. Ben Guillon, used two methods to attempt to develop a fair market value for Pioneer's credits. The first method is a comparable value approach, by which Dr. Guillon attempted to value a hypothetical sale of credits by Pioneer to ARRC based upon other sales in the Matanuska-Susitna Borough. Dr. Guillon found most compelling the sales of credits by Great Land Trust to ARRC. Dr. Guillon has opined that based on that comparable approach, Pioneer's credits would be worth no more than $29,084 per credit, which is the price at which GLT sold credits to ARRC.

47. In addition to the comparative approach, Dr. Guillon also used a discounted cash flow valuation. This approach is an attempt to compute the amount that an investor would have been willing to pay for Pioneer Reserve's mitigation bank credits at the time the ARRC PMRE permit was issued, which provides a barometer of their market value. Dr. Guillon looked at the costs to establish Pioneer's bank, and risks faced by Pioneer. Based upon those costs and risks, Dr. Guillon has opined a per-credit price of $12,217.

48. Using the two approaches, Dr. Guillon has opined that Pioneer's credits had a fair market value at the time of the PMRE permit of between $12,217 and $29,084. Mr. Guillon further opined that the credits retain a value of $5,865, which reflects the remaining inflation-adjusted value of Pioneer's credits. Pioneer's proffered expert is Charles Thompson. Mr. Thompson has opined that Pioneer's credits are worth $89,000 each, and he makes no reduction for residual value.

CONTENTIONS OF LAW

I. Pioneer's Burden To Prove Its Breach Of Contract Claim

1. This is a claim for breach of express contract. Am. Compl. ¶ 3; *see* Pl. Memo. of Contentions of Fact and Law (Pl. CFL) at 23, ECF No. 95. Nothing more. Pioneer must establish that (1) a contract existed, (2) an obligation or duty arose out of that contract, (3) the

Corps breached that duty or obligation, and (4) Pioneer was damaged as a result of the breach. *See San Carlos Irr. & Drainage Dist. v. United States*, 877 F.2d 957, 959 (Fed. Cir. 1989 (*San Carlos*). Pioneer's contentions of fact and law demonstrate that Pioneer cannot meet its burden.

II. The Scope Of The Government's Duty

A. This Court Has Held That The UMBI Does Not Incorporate The Final Rule

2. Pioneer must show that the Corps assumed some duty to Pioneer that was breached by the claimed conduct. *See San Carlos*, 877 F.2d at 959. The scope of duty is a legal question of contract interpretation. *San Carlos*, 877 F.2d at 959. Where this Court engages in contract interpretation, the inquiry begins "with the language of the written agreement." *NVT Technologies, Inc. v. United States*, 370 F.3d 1153, 1159 (Fed. Cir. 2004).

3. In our motion for summary judgment, we demonstrated that the Corps accepted no duty to Pioneer concerning the exercise of the Corps' regulatory responsibility to determine appropriate compensatory mitigation for the PMRE project. The Court granted that motion as pertains to the duties created by the UMBI. MSJ Decision, ECF No. 82. The Court held that "[t]o the extent that plaintiff argues that the Final Rule was incorporated into the UMBI and thus that the UMBI was breached through the Corps' decision to direct ARRC to buy only 16.92 credits from Pioneer and the rest from Su-Knik, we disagree." *Id.* at 8. The Court found that the UMBI language referencing the Final Rule "does not explicitly indicate that the parties intended to incorporate the Final Rule as an enforceable term of the contract. A contract must always be carried out in accordance with applicable law; this reference does no more than point out the Final Rule as relevant background law." *Id.* at 8-9.

4. The Court also held in the alternative that "the regulations afford the Corps some level of discretion, which insulates its PMRE permit decision from collateral scrutiny in an action here for damages." *Id.* at 9. The Court held that "[t]he Corps has discretion in

determining appropriate compensatory mitigation methods associated with a specific [Department of Army] permit." *Id.* As an example, the Court held that the preference for "in kind" mitigation – codified at 33 C.F.R. § 332.3(e)(1) – is only a preference, and also held there is only a preference, not a requirement, that the Corps consider use of a bank with a service area encompassing the impacts for which mitigation is sought. MSJ Decision at 9, n.3.

5. As we demonstrated in our motion *in limine* on the issue, Pioneer may not now offer evidence of breach in relation to the Seldon parcel, non-palustrine Edgerton credits, or the 16.92 credits that ARRC was initially directed to purchase from Pioneer. *See* Def. Mot. *In Limine* at 5-8, ECF No. 105. The alleged unilateral modification of the UMBI cannot exceed 107.78 credits, rather than the 160.2 claimed by Pioneer, due to the lack of regulatory duty incorporated into the UMBI.

6. There is no allegation that the credits in the Seldon parcel were ever reduced. *See* Am. Compl. ¶ 47. Thus, these credits can form no portion of the alleged breach leading to loss of a 160.2 credit sale to ARRC. Pioneer also has not stated a claim of a breached contractual duty with respect to Edgerton credits not described as "palustrine." Pioneer's allegation of a unilateral reduction is limited to the Edgerton parcel palustrine credits set forth in the UMBI. DX117; *see also* Am. Compl. ¶ 72 (alleging lost opportunity to sell "palustrine wetland banking credits"). This excludes from the alleged reduction the 27.11 Edgerton credits of types other than PUB, PEM, and PFO, *i.e.*, those designated as "RB4-R3UBI," "RC4-R3UBI," "Stream Buffer," "Wetland Buffer," and "Outer Buffer." *See* DX26.

7. With these credits excluded, only the 124.7 Edgerton PUB, PEM, and PFO credits remain for the Court's consideration. However, Pioneer in its amended complaint alleges that the balance of Edgerton credits was reduced *to* 16.92 credits. *See* Am. Compl. ¶ 51. Thus,

Pioneer does not claim that these 16.92 credits were unilaterally reduced. This is also evidenced by paragraph 71 of the amended complaint, which, with respect to these credits and unlike paragraph 70, makes no reference to unilateral reduction. For these reasons, Pioneer's claim cannot exceed 107.78 Edgerton palustrine credits. In its response to the Government's motion i*n limine* on the issue, Pioneer only argued that its claim as to all 160.2 credits survives due to the deposition testimony of Lt. Col. Mark DeRocchi. Pl. Resp. to Def. Mot. *In Limine* at 6, ECF No. 113. This is plainly insufficient, and Pioneer has essentially conceded the issue.

8. Perhaps in recognition of the Court's holding regarding the lack of incorporation of regulations into the UMBI, Pioneer in its pretrial filing relies on a "regulatory guidance letter," which Pioneer alleges creates "non-discretionary" obligations. *See, e.g.*, CFL at 27. Under this new theory, Pioneer argues that "Pioneer's bank credits were the PMRE project's only available compensatory mitigation option that complied with the Corps' written guidance and the Final Rule." CFL at 26-27.

9. Pioneer has already conceded that the regulatory guidance letter does not limit the Corps' discretion, because in its response to our motion *in limine*, filed after Pioneer's contentions of fact and law, Pioneer stated that it "will not argue that the Corps 'could not' have decided that Su-Knik's credits, or GLT's advance credits would be required as compensatory mitigation for the PMRE project." Pl. MIL Resp. at 4-5, ECF No. 113. By implication, this resolves Pioneer's argument that the guidance letter is "non-discretionary." Pioneer is right to withdraw this argument. The RGL is not incorporated into the UMBI just as the Final Rule is not incorporated into the UMBI. *See* MSJ Decision at 8-9, ECF No. 82. Moreover, regulatory guidance letters "are not binding." *Nw. Bypass Grp. v. United States Army Corps of Engineers*, 470 F. Supp. 2d 30, 51 (D.N.H. 2007).

10. Thus, any argument that the Corps "could not" find that Su-Knik or Great Land Trust could serve as compensatory mitigation must fail, as Pioneer concedes. Factual allegations purporting to demonstrate the inappropriateness of those credits should be rejected. To the extent they are heard by the Court, we will offer evidence on the issue at trial.

B. Pioneer's References To Alleged Statements By Karen Nelson Are Irrelevant And Hearsay

11. Pioneer alleges various statements by Karen Nelson, a former Corps employee. *See* CFL at 2-5. Pioneer has clarified that it is not alleging that Ms. Nelson had any authority to contractually bind the Government through her supposed statements. Pl. MIL Resp. at 3, ECF No. 113. Pioneer does argue, however, that her statements regarding the status of the PMRE project are relevant and not hearsay. *See id.* It plainly is untrue that the Corps' decision-making for the PMRE project compensatory mitigation was completed by the time Pioneer's bank was created in 2011, since ARRC submitted its mitigation plan on February 24, 2012, and the permit was not issued until September 10, 2012.

12. The statements are not hearsay, Pioneer argues, because Ms. Nelson had authority to communicate with Pioneer about the UMBI. *Id.* at 4. This argument fails because Pioneer is not attempting to show that Ms. Nelson made the statements, but rather that the content of the statements regarding PMRE status are true. Because Pioneer has not proven (and cannot prove) that Ms. Nelson had any authority with respect to the PMRE project, *see* Def. Facts ¶ 15, the statements are hearsay when offered against the Corps. *See* Fed. R. Evid. 801(d)(2)(D).

C. With Respect To The 107.78 Credits, The Only Arguable Duty Is That They Would Be Available To Sell In Accordance With Law, Not That They Would Be Chosen

13. Pioneer's only breach claim, other than the rejected regulatory argument, arises from the number of Edgerton parcel palustrine credits. Pioneer does not allege that the terms of

the UMBI are ambiguous or otherwise require interpretation by the Court. Extrinsic evidence may not be introduced to dispute the terms of a contract that is clear on its face. *See McAbee Const. Inc. v. United States*, 97 F.3d 1431, 1435 (Fed. Cir. 1996). Thus, only the instrument itself is relevant to establishing the terms of the UMBI.

14. But the Corps' duty in this regard goes no further than allowing Pioneer to market its credits to find a purchaser. The UMBI says that "credits will be available to use as mitigation in accordance with all applicable requirements of Section 404 . . . ." DX26. The general availability of credits is restricted by the requirement that they be available to be used "in accordance with all applicable requirements of Section 404." Because the availability is set within the context of Clean Water Act § 404, the language cannot be construed as an obligation to force any Section 404 permittee, ARRC or otherwise, to buy Pioneer's credits. The Corps is free to decide whether a given set of credits is appropriate for given impacts, no matter how described in a bank's instrument. *See* MSJ Decision at 8-9.

III. Pioneer Cannot Prove Breach

A. Pioneer Had Full Opportunity To Convince ARRC To Buy Its Credits Prior To Permit Issuance, And Could Not Do So

15. Because the only even arguable duty is that Pioneer's credits be available to use, rather than be used, Pioneer must thread a needle by showing that the Corps' actions deprived Pioneer of the *opportunity* to sell its credits. But Pioneer never was deprived of any opportunity to convince ARRC to buy its credits prior to the issuance of the PMRE permit. Pioneer claims that "Pioneer was not allowed the opportunity to sell 160.2 of its palustrine bank credits to the ARRC in September 2012." Pl. CFL at 9. In fact, however, Pioneer had full opportunity prior to the issuance of the PMRE permit to attempt to convince ARRC to purchase its credits. It attempted to do so on several occasions, including in face-to-face meetings with ARRC's

representative. Pioneer's corporate deponent has admitted that it did not secure ARRC's agreement. Def. Facts ¶ 17. And Pioneer never claims that the Corps impeded Pioneer's efforts. To the contrary, when the Corps directed ARRC to buy Pioneer's credits, it was despite ARRC's proposal to buy only Su-Knik's credits. *See* Def. Facts ¶¶ 16, 20.

16. ARRC's documents submitted in connection with its permit application and later modification request underscore the point that the discussions between Pioneer and the Corps had no effect on Pioneer's ability to convince ARRC to buy its credits. Specifically, a document sent to the Corps on September 4, 2012 indicates that ARRC considered Pioneer's credits as set forth in the UMBI. *See* DX43. And when ARRC sought modification on November 9, 2012, ARRC challenged the suitability of the credits contained in Pioneer's UMBI. *See* DX55.

17. The Section 404 permit applicant is responsible for proposing an appropriate compensatory mitigation option. 33 C.F.R. § 332.3(a)(1). And a permittee is not required to mitigate impacts by purchasing credits from a mitigation bank or an in-lieu fee program. Alternatively, a permit applicant may use permittee-responsible mitigation by directly implementing compensatory measures at the impact site. *See* 33 C.F.R. § 332.3(b)(4); *see also Walther v. United States*, No. 3:15-CV-0021-HRH, 2015 WL 6872437, *5 (D. Alaska Nov. 9, 2015) (holding that a permittee may propose, and the Corps may allow, the permittee to conduct its own mitigation). The question for the Corps is simply whether the option presented by the permittee is acceptable, based on what is practicable and capable of compensating for the aquatic resource functions that will be lost as a result of the permitted activity. 33 C.F.R. § 332.3(a)(1). There is no evidence that the discussion regarding modifying Pioneer's instrument affected its ability to sell credits to ARRC. Thus, no opportunity was lost.

B. <u>There Was No Unilateral Reduction In Credits</u>

18. Though Pioneer's contentions of fact and law are unclear on the issue, Pioneer's

allegation that the number of credits under the UMBI was reduced prior to PMRE issuance is based on its claim that Nicole Hayes reduced the number of Edgerton parcel palustrine credits in the UMBI via e-mail on September 7, 2012. *See* DX115. Due to the lack of duty discussed above, the exchange of e-mails between Calliandra Donn and Nicole Hayes on that date is irrelevant, because the exchange never affected Pioneer's opportunity to sell credits to ARRC prior to issuance of the PMRE permit.

19. But, to the extent the Court does look to the events of September 7, 2012, the factual question for the Court on breach, as posed by Pioneer, is whether Nicole Hayes's e-mail on September 7, 2012 constituted some modification of the UMBI.

20. There was no unilateral modification of the UMBI by Ms. Hayes, because Pioneer itself recalculated the credits that Pioneer would have. Table A-6 of the UMBI, containing credit calculations for Edgerton, was revised by Pioneer's principal, Calliandra Donn, not by Nicole Hayes. Def. Facts ¶¶ 12-13. Donn created the table and sent it to Hayes, ending her e-mail with a request that Hayes provide her with electronic data files "[i]f this is what we end up with," DX44, and she then forwarded it to others and noted that she revised the table. DX45.[6] There was only a limited change to the acreages set forth – from 165.8 to 165.83 – and to the total number of credits – from 151.81 to 140.80. *Compare* DX26 *with* DX44

[6] Pioneer has previously relied on our response to plaintiff's interrogatory number 8. The interrogatory sought the basis for the Government's denial, in its answer to the original complaint, to the allegation that (in short) Pioneer objected to an alleged unilateral modification. *See* Am. Compl. ¶ 52. Our response stated that "Pioneer objected to any reduction of wetland credits." In context, Pioneer's complaint allegation is limited to events after the issuance of the PMRE permit on September 10, 2012. *See* Am. Compl. ¶¶ 49-52. And, at various time after PMRE issuance, Pioneer did object to modification proposals (though Scott Walther found the ultimate modification to be "not significant"). DX104. Thus, as far as the statement goes, it is true (though irrelevant to the breach claim). But since that response it also has been established that Pioneer indicated agreement to modification when Donn sent her revised Table A-6 to Hayes prior to the issuance of the PMRE permit.

21. Pioneer claims that Nicole Hayes, unknown to Pioneer, had "decided to eliminate most of Pioneer's wetland bank credits." Pl. CFL at 9. Pioneer further claims that it did not learn of any supposed elimination prior to October 10, 2012. Pl. CFL at 10. This is factually not credible. *See* Def. Facts ¶¶ 11-12. In any event, what Ms. Hayes (or anyone else at the Corps) did or did not decide to do is totally irrelevant to this Court's breach inquiry, because "the subjective intent of the parties is immaterial to whether a contract has been breached." *Tamerlane, Ltd. v. United States*, 550 F.3d 1135, 1144 n.15 (Fed. Cir. 2008). And again, this is simply a breach of contract claim.

22. Similarly, while Pioneer argues that Ms. Donn, Pioneer's principal, did not understand what she was doing when she recalculated Pioneer's credits, CFL at 28-29, that is not relevant to whether the Corps breached the UMBI. The issue is whether the action of Ms. Hayes, *i.e.*, sending Ms. Donn an e-mail listing changes under consideration, was a unilateral modification of the UMBI. *See* DX115. It was not, and any decision-making by the Corps as to whether credits were appropriate is insulated from collateral attack here.

C. The Record Of Decision Establishes The Corps' Discretionary Determination That Only 16.92 Of Pioneer's Credits Were Appropriate To Serve As Mitigation For PMRE Impacts

23. Even if there were some unilateral reduction, which there was not, it would not affect the Corps' independent right and duty to appropriately determine the proper compensatory mitigation for PMRE impacts, as required by 33 C.F.R. § 332.3(a)(1). The pertinent regulations recognize that each permit will have unique impacts and mitigation needs, and that compensatory mitigation should be selected accordingly. *See id.* The alleged unilateral reduction has no relevance to whether a given credit was appropriate.

24. The relevant facts relating to the PMRE permit are documented in the permit and record of decision. The Court has asked whether, as to causation, Pioneer's credits were

rendered inappropriate due to their misclassification under the UMBI. MSJ Decision at 11. Even as described in the UMBI, these credits were not characterized as identical to the PMRE impacts. Pioneer's wetland credits in the UMBI are primarily of the types PFO1/4J and PFO1J, DX26, neither of which are listed as impact types for the PMRE. *See* DX47 at 55 (ROD description of acres of PMRE impacts by mapped wetland type).

25. The Corps' regulatory determination of the appropriate credits to serve as PMRE mitigation was that Pioneer's Edgerton credits were only partially appropriate to serve as compensatory mitigation for the PMRE impacts. Def. Facts ¶¶ 18-23. Pioneer misstates a relevant fact when it claims that "[t]he Corps determined that Pioneer's mitigation banks were preferred sources of mitigation for the PMRE's impacts to [waters of the United States]." *See* Pl. CFL at 6, 8. As stated above, the Corps determined that "like habitat credits" from Pioneer's Edgerton parcel were preferable, followed by Su-Knik's credits, and then Seldon parcel credits. DX47. In other words, and as explained in the permit and ROD, the preference was limited to credits found appropriate by the Corps.

26. Faced with the lack of contractual duty as to the PMRE permit itself, Pioneer has sought to link the UMBI mapping and the PMRE permit using the deposition testimony of Benjamin Soiseth, the Corps' project manager for the permit. Contrary to Pioneer's mischaracterizations, Soiseth's deposition testimony was consistent with the PMRE permit and the accompanying ROD. The ROD states that Edgerton parcel credits had ecological preference only as to "like habitat credits." DX47. The ROD then notes that "the PMRE will require compensation using Pioneer Reserve's Edgerton parcel credits, *where the habitat types are consistent with the type(s) being filled*." DX47 (emphasis added). While Pioneer's service area included the locations of PMRE impacts, Su-Knik's credits were "the closest in proximity,

landscape position, and type, as those being impacted by the PMRE." DX47.

27. The ROD thus states the conclusion that the Corps found that – despite ARRC's proposal to use Su-Knik's credits – 16.92 of Pioneer's credits could serve as compensatory mitigation. The Corps exercised its discretion in making this determination. It was free to decide that Su-Knik's credits were in some ways preferable to Pioneer's credits.

28. Thus, Pioneer misses the point when it argues that unnamed "Corps' Personnel has repeatedly admitted that it directed the ARRC to buy mitigation from a source other than Pioneer 'because' it had eliminated most of Pioneer's palustrine credits in September 2012, not because it was exercising any discretionary decision." Pl. CFL at 28. That argument simply ignores that the decision of whether to use Pioneer's credit for PMRE impacts is inherently discretionary. The Corps made a decision, explained in the permit and ROD, based on the Corps' evaluation of the suitability of Pioneer's credits for PMRE impacts.

29. Similarly, whether there was a "mapping error" in the UMBI is of no importance. *See* Pl. CFL at 17-18. Pioneer makes repeated references to "Cowardian" map classifications, claiming for example that "Pioneer's palustrine bank credits were calculated and awarded based on functions awarded by its various land areas, not based on the Cowardian map classification of its land types." Pl. CFL at 10. The factual claim is not supported by the UMBI. Table A-6, containing the credit calculations for the Edgerton parcel, expresses the credits as "Mat-Su Types -Cowardian Subtypes," and the number of acres for each subtype is expressed as the number of acres mapped for that subtype multiplied by the "functional capacity index." DX26. Thus, both the "Cowardian subtype" *and* the functional capacity of a given portion of the Edgerton parcel were considered in calculating credits. *See also* DX102 (Ms. Donn explains that "The wetland habitat types in the Bank . . . are classified according to the Mat-Su Borough Wetlands

classification system. In addition, subclasses of the Mat-Su Borough Wetlands system were assigned using the Cowardin wetland classification system"). But that does not matter, because whether or not the credits were "properly awarded," ARRC was free not to use them for PMRE impacts, subject to the Corps' approval of the plan offered by ARRC.

30. The anticipated testimony of Matt LaCroix that is referenced by Pioneer, CFL at 18, does not change the equation. The interagency review team did not award credits – only the Corps could do that, with the IRT's input. And whether the Corps followed the Final Rule when it created Pioneer's instrument is not relevant to the breach of contract claim. Finally, testimony about the drafting of the UMBI is unnecessary, because it speaks for itself.

D. Events After September 7, 2012 Are Irrelevant To Breach

31. In its contentions of fact, Pioneer refers to a supposed Corps "threat" in May 2013 to suspend Pioneer's credits. Pl. Facts ¶ 94. Pioneer cannot show the relevance of the alleged information. May 2013 is after the UMBI was allegedly breached in September 2012, after Pioneer failed to complete a sale to ARRC subsequent to permit issuance, and after ARRC found better options, in January 2013. The alleged breach and Pioneer's alleged damages were set by that point, since the PMRE compensatory mitigation was selected and ARRC's responsibilities discharged. Thus, the letter is totally irrelevant to breach or to causation, and should be ignored.

32. Pioneer also claims that "[a]ll of the members of the IRT, other than the Corps, opposed the Corps decision to eliminate or reclassify any of Pioneer's credits." Pl. CFL at 15. This apparently is a reference to some correspondence listed on Pioneer's exhibit list, all of which post-dates the alleged breach. *See, e.g.*, PX51. Pioneer again cannot show relevance. Either the UMBI was breached on September 7, 2012, as alleged by Pioneer, or it was not. The IRT's alleged later opinions regarding whether the UMBI should or should not be modified does not make any fact that is of consequence in determining the action more or less probable. Thus,

they are irrelevant. *See* Fed. R. Evid. 401.

33. Just as the IRT's general opinions are irrelevant, so too are the opinions of EPA employee Matthew LaCroix that Pioneer will apparently seek to elicit at trial. For example, Pioneer indicates that Mr. LaCroix will testify regarding "[t]he EPA's objections to the Corps' proposed and actual amendments to the UMBI." Pl. Witness List at 9, ECF No. 94. But EPA's opinion, as stated by Mr. LaCroix, does not affect the breach of contract claim or the question of what mitigation was appropriate for PMRE impacts.

IV. Pioneer Cannot Prove Damages

A. Pioneer's Burden In Proving Lost Profits Damages

34. Even if Pioneer could show breach, it cannot prove damages. Pioneer's damages claim, now reduced by summary judgment, is based on alleged lost profits resulting from Pioneer's failure to complete a sale to ARRC for PRME impacts.[7] Am. Compl. ¶ 72. To recover lost profits for breach of contract, the plaintiff must establish by a preponderance of the evidence that: (1) the loss was the proximate result of the breach; (2) the loss of profits caused by the breach was within the contemplation of the parties because the loss was foreseeable or because the defaulting party had knowledge of special circumstances at the time of contracting; and (3) a sufficient basis exists for estimating the amount of lost profits with reasonable certainty. *Energy Capital Corp. v. United States*, 302 F.3d 1314, 1324-25 (Fed. Cir. 2002). Lost profits claims are presumptively difficult to establish for new ventures. *See id.* at 1327. Pioneer has sold only 4.68 credits during its almost five years of existence, and its operational experience thus is akin to a new venture.

[7] Pioneer seeks only lost profits, alleging that Scott Walther, not Pioneer, paid for the bank's startup costs, CFL at 39, and the land included in the Bank was contributed without cost to Pioneer. Def. Facts ¶ 1.

35. With respect to the foreseeability of damages, the UMBI states that "once a credit is awarded, [Pioneer] may sell, use, or otherwise transfer credit at any time" DX26. As we have demonstrated above, however, the UMBI qualifies this right, permitting credits to be used only "in accordance with all applicable requirements of Section 404." Def. Facts ¶ 5. Because of the lack of duty under the UMBI, it was not foreseeable by the Government that its exercise of regulatory discretion would allegedly cause more than $12 million in lost profits. But, of course, if the Court finds no duty, there will be no reason for it to reach this step of the damages analysis.

B. Pioneer's Own Actions Precluded It From Selling To ARRC

1. Pioneer Must Show That ARRC Would Have Chosen Pioneer's Credits In The Non-Breach World.

36. With respect to the causation prong, the basic principles that apply in a lost-profits case are well settled. *Nycal Offshore Dev. Corp. v. United States*, 743 F.3d 837, 843 (Fed. Cir. 2014). The showing of causation requires comparison between the breach and non-breach worlds. *Id*. It is the plaintiff's burden to prove causation. *Id.* To satisfy that burden, the plaintiff must show, by a preponderance of the evidence, that the plaintiff's alleged loss was "the proximate result of the breach." *Id.* (quotation omitted).

37. The Federal Circuit has accepted that the trial court may use its discretion to select between two different standards in deciding causation. *Nycal Offshore Dev. Corp. v. United States*, 106 Fed. Cl. 222, 226-27 (2012) (Bruggink, J.), *aff'd* 743 F.3d 837 (Fed. Cir. 2014). The seemingly "lighter" of the two standards requires that plaintiff show that the breach was "a substantial factor in the damages." *Id.* at 226-227 (quoting *Indiana Michigan Power Co. v. United States*, 422 F.3d 1369, 1373 (Fed. Cir. 2005)). While accepted, the substantial factor test is "not preferred." *Yankee Atomic Elec. Co. v. United States*, 536 F.3d 1268, 1272 (Fed. Cir. 2008)). The other approach asks whether, "but for the breach," plaintiff would have suffered

damages. *Nycal*, 106 Fed. Cl. at 227 (citing *California Fed. Bank v. United States*, 395 F.3d 1263, 1268 (Fed. Cir. 2005)). Under this but-for test, the plaintiff must show that damages flow "inevitably and naturally" from the breach. *See Citizens Fed. Bank v. United States*, 474 F.3d 1314, 1318 (Fed. Cir. 2007)..

38. In its summary judgment opinion, the Court framed Pioneer's causation burden as follows: "For plaintiff to prevail and show that the alleged breach did in fact cause Pioneer's damages, it would need to provide more information regarding other available compensatory mitigation options for the PMRE project and facts indicating that Pioneer's credits were the most likely option – notably, a showing that the improper classification of the Edgerton Parcel's uplands areas as wetlands did not render Pioneer's credits unsuitable to mitigate the impacts of the PMRE." MSJ Decision at 11. Pioneer cannot make this showing for the reasons set forth below, *i.e.*, because ARRC demonstrated that Pioneer's credits were not desirable.

2. Pioneer Is Collaterally Estopped From Establishing Causation By The District Court's Dismissal Of *Walther*

39. Whether this Court chooses the but-for test or the substantial factor test, Pioneer cannot prove by a preponderance of the evidence that ARRC would have purchased its credits in a non-breach world. This outcome is compelled by the November 9, 2015 dismissal of Pioneer's claim in *Walther v. United States*, No. 3:15-CV-0021-HRH, 2015 WL 6872437 (D. Alaska Nov. 9, 2015) (*Walther*).[8] In its decision, the district court held that it was "speculative" that any permittee would buy Pioneer's credits, even if the Corps were found to have violated regulations by allowing permittees to purchase credits from Su-Knik.

40. The Government and Su-Knik had moved to dismiss on the grounds that Pioneer

[8] In its summary judgment decision, the Court noted our collateral estoppel argument, but declined to rule on it. MSJ Decision at 6-7. We raise it again in this memorandum because we continue to believe that it precludes Pioneer from proving causation.

could not meet the Article III standing requirement that its alleged injuries were likely to be redressed by an outcome favorable to Pioneer. The Government argued that it was speculative, at best, to assert that preventing the use of mitigation credits related to Su-Knik Mitigation Bank would redress Plaintiffs' alleged economic injury by increasing the purchase of mitigation bank credits from Pioneer Reserve.

41. The Alaska district court dismissed the complaint due to the lack of redressability. The court held that even if it found Su-Knik's credits invalid, "it is not likely that a favorable decision will redress plaintiffs' alleged economic injuries because a Section 404 permittee may propose, and the district engineer may approve, a compensatory mitigation plan that does not include the use of mitigation banking credits." *Walther*, 2015 WL 6872437 at *5. The district court relied on Walther's concession that that even if Su-Knik's credits could not be used, "'there is no guarantee Pioneer Reserve's bank credits will be selected.'" *Id.* at *5; *see* DX116.

42. The Alaska holding conclusively establishes that Section 404 permittees considering Pioneer's credits have options, and that the Corps had discretion to approve ARRC's modification. Pioneer is now collaterally estopped from arguing otherwise. For collateral estoppel to apply, the following must be true: (1) the issue presented in the second action must be identical to one decided in the first action; (2) the issue must have been actually litigated in the first action; (3) resolution of the issue was essential to a final judgment in the first action; and (4) the party against whom estoppel is invoked had a full and fair opportunity to litigate the issue in the first action. *Shell Petroleum, Inc. v. United States*, 319 F.3d 1334, 1338 (Fed. Cir. 2003) .

43. Here, all of the requirements were met: The issue presented in the first action was whether, if the court were to find that the Su-Knik's credits were invalid because the Corps did not comply with regulations, Pioneer's alleged economic injuries were likely to be redressed.

Walther, 2015 WL 6872437, at *5. In this action, the issue is whether Pioneer can prove, by a preponderance of the evidence, that in a non-breach world, ARRC would have bought Pioneer's credits. The Alaska court's holding, and Pioneer's concessions in that action, demonstrate conclusively that it is at best speculative that ARRC would have done so.

44. The issue was actually litigated, because Pioneer put the PMRE permit at issue, the Government (and Su-Knik) raised the likelihood that a permittee would choose Pioneer's credits, given ARRC's rejection of those credits and the Corps' discretion, and Pioneer had ample opportunity to respond. The district court's determination it was speculative that any permittee would buy Pioneer's credits was essential to the final judgment in *Walther*. Finally, Pioneer had a full and fair opportunity to litigate both the ARRC's refusal to buy its credits, and the larger issue of whether any permittee was likely to buy its credits.

3. Pioneer Cannot Prove It Could Complete A Sale To ARRC

45. In any event, Pioneer cannot demonstrate that the Corps caused it to lose a sale to ARRC. Pioneer must at least show that any breach was a substantial factor in its failure to sell to ARRC, by showing by a preponderance of the evidence that it would have completed a sale in the non-breach world. This is a difficult hurdle for any plaintiff alleging lost profits. Here it is impossible, because we know exactly how Pioneer proceeded in the non-breach world, and ARRC's reaction: When ARRC was directed to purchase 16.92 of Pioneer's credits, Pioneer attempted to charge exorbitant prices, and ARRC refused to pay, even after Pioneer lowered its price to nearly that which it now claims would have led to a sale to ARRC. Instead, ARRC bought credits from Great Land Trust, as allowed by the Corps.

46. When ARRC was directed to purchase 16.92 credits from Pioneer, Pioneer approached it with an offer far higher than what ARRC paid for the vast majority of its compensatory mitigation. *See* Def. Facts. ¶ 27. After negotiation, Pioneer offered its credits for

$88,094.12 per credit. *See* Def. Facts ¶ 28. ARRC countered at $20,352.94. *See* Def. Facts at ¶ 28. ARRC refused to pay what it viewed as "shockingly high" prices and sought a permit modification. In support of its request, ARRC demonstrated that GLT offered practicable options at less than half the cost of Pioneer's credits. *See* Def. Facts ¶¶ 35-36.

47. By regulation, the Corps had discretion to determine that the advance credits offered by GLT were appropriate compensatory mitigation. *See* MSJ Decision at 8-9; *see also* 33 C.F.R. § 332.3(b)(2). Pioneer now concedes this discretion. Pl. Resp. to Def. Mot. *In Limine* at 4-5, ECF No. 113. Pioneer does not suggest that ARRC could not have proposed permittee-responsible mitigation, which the Corps also may allow. *See* 33 C.F.R. § 332.3(b).

48. Pioneer cannot prove that the outcome would have been any different if ARRC had been directed to buy 160.2 (or 107.78) credits from Pioneer, instead of 16.92. Pioneer has staked out $79,000 as the price it would have offered ARRC for such a sale. That amount is inconsistent with Pioneer's own pricing, and is within 12 percent of the reduced $88,094.12 per-credit price that Pioneer offered without success.

49. Pioneer essentially ignores Great Land Trust, despite it being found to be an acceptable alternative to Pioneer. Deposition testimony from GLT has shown that GLT has over 1,000 advance credits available for sale in the Mat-Su Borough, and we expect to elicit similar testimony at trial. *See also* DX27 (GLT instrument). GLT offered credits to offset PMRE impacts for $29,084. Def. Facts ¶ 34. GLT offered a ranked list of many parcels specifically located in the watershed of PMRE impacts. Def. Facts ¶ 35.

50. ARRC was free to pursue other options, and would have been free to do so in a non-breach world. The existence of clear evidence that Pioneer would never have completed a sale to ARRC makes this situation unlike *Nycal*, where the trial court held that the plaintiff

should not be prejudiced by its inability to prove that well production would have gone forward, since the defendant's breach precluded that. *See Nycal*, 106 Fed. Cl. at 243. Here, in contrast, *Pioneer had full opportunity to prove the non-breach world*, by completing a sale of 16.92 credits to ARRC at $79,000 per credit. But it could not complete the sale at a similar price.

4. Pioneer's Arguments Regarding Causation Are Irrelevant To The Conclusive Points That ARRC Had Other Options, And That The Corps Could Approve Those Options

51. For the above reasons, Pioneer cannot prove causation, and none of its arguments for why ARRC would have paid $79,000 can save it. Pioneer suggests that we will argue that there was no "market" for Pioneer's credits. CFL at 17. In fact, the point is simpler than that: Pioneer could not convince ARRC to buy its credits, either before the permit was issued or after. Def. Facts ¶¶ 17, 28, 30, 39. Pioneer never claims that ARRC wanted Pioneer's credits. Pioneer will not argue that GLT did not offer options for a large number of credits in the Mat-Su Borough. And Pioneer does not seriously address, much less dispute, ARRC's concerns about Pioneer's credits, ARRC's work to secure alternative mitigation, and the Corps' resolution of ARRC's modification request.

52. Many of the arguments that Pioneer claims establish causation are nothing more than attacks on the Corps' discretion. *See, e.g*, Pl. CFL at 25 (arguing that "there was no other available mitigation for the PMRE project without descending the hierarchy of mitigation in the Final Rule" and that "the Corps admits that Pioneer's palustrine credits were the only available mitigation for the PMRE's impacts that comply with Corps' written guidance, RGL 09-01, and the Final Rule"); Pl. CFL at 29-30 (same). The discretion is established, and Pioneer must prove causation in light of that discretion and the Corps' actual decision-making. Pioneer's claim that "if [ARRC] refused to buy the mitigation required by the Corps then its § 404 permit would have been denied," Pl. CFL at 29, is emblematic of the problem with Pioneer's arguments – the facts

show that the Corps found no reason to deny ARRC's permit, because ARRC found permissible compensatory mitigation.[9] Similarly, allegations of admissions of Corps "mistakes" are just a repackaged challenge to the Corps' decision-making, and are not relevant here.[10]

53. Pioneer argues that ARRC and ADOT are both state-funded. Pl. CFL at 16, 19, 29. But that does nothing to establish how either's funding operates, or why it is relevant to determining compensatory mitigation for a given permit, given the many factors that may apply. The fact that ADOT was willing to pay $79,000 for a small number of impacts at a totally separate location does nothing to establish what ARRC would pay. Pioneer's arguments for similarity are superficial. ADOT might have been comfortable paying a high price for a small number of credits. But that does not mean that ARRC needed to do so or would do so, as evidenced by the far lower prices that ARRC actually paid. Def. Facts ¶¶ 24, 34, 39.

54. Pioneer also claims that David Olson at "Corps Headquarters" admits that $79,000 is a reasonable price. *See* Pl. CFL at 17, 29. Pioneer does not explain how this is not either lay opinion testimony or undisclosed expert testimony, as well as hearsay. But more importantly, the opinion is totally irrelevant, first because Pioneer will not claim that the Corps "could not" approve ARRC's permit modification request. Pl. MIL Resp. at 4-5, ECF No. 113. And, again, the question is what ARRC needed to pay to accomplish PMRE compensatory mitigation. The facts are clear that far less than $79,000 per credit was necessary.

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[9] Pioneer similarly claims that "[w]hen ARRC objected to the mitigation cost required in the ROD, Corps' policy required the Corps to have withheld issuance of its PMRE projects § 404 permit." Pl. CFL at 14. To the contrary, the regulations require an assessment of cost. 33 C.F.R. § 332.3(a). And there was no reason for the Corps to withhold the permit, where ARRC could demonstrate a supportable alternative form of mitigation.

[10] Pioneer's claim that "the Corps, not the permittee designates the required cost of mitigation," Pl. CFL at 29, is a misstatement of the law that reflects Pioneer's refusal to confront the facts. The permittee is responsible for proposing mitigation, and the Corps can approve any number of options, depending on the specific context. *See* 33 C.F.R. § 332.3(a)(1).

55. Pioneer's references to ARRC's budget similarly are not persuasive. Pl. CFL at 7, 16, 20, 28, 29. Pioneer claims, in essence, that ARRC could have found funds to pay Pioneer's high prices. For example, Pioneer argues that "the amount shown on PMRE's budget was merely a placeholder," and that "PMRE's budget was always increased as actual facts became known." Pl. CFL at 29. Modifications to ARRC's budgeting in other areas, even if proven by ARRC, do not demonstrate that it would buy Pioneer's credits. A rich person might decline to pay $4 for a bottle of water, and instead buy it for a dollar down the street.

56. Pioneer makes arguments that ARRC could undertake sole source procurement. Pl. CFL at 15, 16, 19, 29, 30. But Pioneer has phrased the issue in a manner that misstates ARRC's position. In the correspondence related to the permit modification request, ARRC did not state that it could never undertake a sole-source procurement, but rather that it could not pay Pioneer's prices because it would not be in ARRC's best interest or in the public's best interest to pay costs that were "an order of magnitude greater than the other options available." DX68. ARRC also noted that "Pioneer only made things more difficult by producing a financial analysis showing a profit margin greater than 300%." DX68.

57. Pioneer is incorrect that $79,000 is less than other costs of mitigation in the Alaska District. CFL at 29. ARRC paid far less than that for actual PMRE compensatory mitigation. Def. Facts at ¶¶ 24, 34, 39. There was no "track record" of "requiring" permittees to pay $167,000 per credit. Pl. CFL at 7, 17, 25, 28, 30. Pioneer relies on GLT's separate Anchorage pricing, when trial will show that GLT has never sold a credit in the Matanuska-Susitna Borough for $167,000. Def. Facts ¶ 29. Pioneer erred as a business matter when it used GLT's Anchorage pricing to set its own pricing, Def. Facts ¶ 26, but that is not the Corps' or ARRC's concern. And, in any event, there is no regulatory mechanism for the Corps to

"require" a permittee to pay any price. If the Corps believes that, in its evaluation of the discretionary factors, a cheaper option is acceptable, then it may approve that option. *See* 33 C.F.R. § 332.3(a)(1).

58. Pioneer attempts to attribute to Nicole Hayes a statement that compensatory mitigation should be about 10 percent of project budget, and makes repeated arguments about what it claims to be "typical" mitigation costs. CFL at 7, 17, 20, 25, 30. Pioneer fails, however, to explain how typical prices are at all indicative of the price that a specific purchaser would pay for specific impacts. And, as a logical matter, there is no reason why mitigation cost should be required to be a specific percentage of project cost, based upon supposed national costs.

59. The question is whether the mitigation was acceptable, in light of the factors set forth in 33 C.F.R. § 332.3(a)(1). Relative cost for projects is nowhere addressed in the regulations. Pioneer argues that "according to the Corps," a budget of $30 million for PMRE compensatory mitigation would have been appropriate. CFL at 20. But that opinion, even if admissible, simply does not suffice to counter what ARRC actually did pay and the Corps approved. Finally, the large variation between even the Matanuska-Susitna Borough and Anchorage suggests that national costs – which presumably include many areas very different from Alaska – are of no value in understanding at what price ARRC might have purchased credits.[11] In sum, nothing offered by Pioneer on causation contradicts the clear facts that demonstrate that ARRC had no interest in buying Pioneer's credits.

C. Pioneer Also Fails To Prove Damages To A Reasonable Certainty

60. The third element of damages requires Pioneer "to establish that there would have

[11] Logically, mitigation costs could be radically different depending on whether the entity performing the mitigation was, for example, building or restoring wetlands versus simply preserving wetlands already in existence.

been profits absent the breach and that 'a sufficient basis exists for estimating the amount of lost profits with reasonable certainty.'" *Nycal*, 106 Fed. Cl. at 227 (quoting *Energy Capital Corp*, 302 F.3d at 1325). "This can often prove to be a difficult and sometimes insurmountable obstacle in expectancy damages cases." *Nycal*, 106 Fed. Cl. at 227 (citing *Glendale Fed. Bank, FSB v. United States*, 378 F.3d 1308, 1313 (Fed. Cir. 2004)). Uncertainty as to the amount of damages will not preclude recovery, but the Court must be able to make a fair and reasonable approximation of damages. *See Nycal*, 106 Fed. Cl. at 227 (citing *Bluebonnet Sav. Bank, F.S.B. v. United States*, 266 F.3d 1348, 1356-57 (Fed. Cir. 2001)).

61. ARRC's actual purchases for the permit at issue from Pioneer's two competitors – Su-Knik Mitigation Bank and GLT – provide strong, clear evidence of credit value. These credits were purchased for at $10,000 per credit for 143.28 credits, and $29,084 per credit for 16.92 credits, respectively. Moreover, ARRC rejected an offer of $88,000 per credit. Def. Facts ¶ 28. Despite this, Pioneer claims that it would have sold credits for $79,000. The actual compensatory mitigation for the PMRE permit itself shows that Pioneer's claimed damages number is not reasonably certain.

62. Pioneer primarily relies on the sale to ADOT as evidence of the quantum of damages. *See* Pl. CFL at 26. But the two separate sales of 4.4 credits and 0.28 credits, respectively, to ADOT at $79,000 per credit do not demonstrate that ARRC would have paid that price. The pertinent regulations recognize that each permit will have unique impacts and mitigation needs, and that compensatory mitigation should be selected accordingly. *See* 33 C.F.R. § 332.3(a)(1). Yet Pioneer provides little to demonstrate how the PMRE impacts compare to ADOT's impacts. Pioneer does not know why ADOT was willing to pay $79,000 per credit. Def. Facts ¶ 44. And Pioneer does not sufficiently show similarity between the sales.

No other permittee has bought its credits. Def. Facts ¶ 45.

63. The multiple factors that go into a credit purchase, and Pioneer's failure to establish similarity between the sales to ADOT and the sale to ARRC, render the ADOT sales of little value compared to the open competition to sell credits for PMRE impacts – which Pioneer lost.[12]

64. At trial, we will offer the expert opinion of Dr. Benjamin Guillon, who will testify as to valuation based upon comparable credit sales and reasonable revenue expectations for Pioneer's bank.

V. Pioneer's Request For Declaratory Relief

65. In its amended complaint, Pioneer sought a finding that "the quantity and type of wetland credits that were awarded to Plaintiff, and certified as being available for sale on September 9, 2011, remain as set forth in the Contract, reduced only by the number of credits subsequently sold to third parties." Am. Compl. at 12. The claim is not raised in Pioneer's contentions of fact and law. In any event, this Court's jurisdiction is limited to monetary claims against the Government, and the Court "cannot grant non-monetary relief unless it is tied and subordinate to a monetary award." *Ford v. United States*, 899 F.2d 1228 (Fed. Cir. 1990) (quotation and citation omitted). Here, there should be no monetary award, because there has been no breach, and thus the sought-after declaratory relief should not be awarded. *See, e.g.*, *Solaria Corp. v. United States,* 123 Fed. Cl. 105, 125 (2015) (dismissing declaratory judgment claim pursuant to RCFC 12(b)(1), partly because plaintiff failed to state claim for breach).

[12] Pioneer claims that ARRC and ADOT have "similar procurement regulations." CFL at 16. We are not aware of any evidence showing that ARRC and ADOT function under identical rules and laws, and ARRC refers to its own procurement rules. *See* DX68.

Respectfully submitted,

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

ROBERT E. KIRSCHMAN, JR.
Director

s/Steven J. Gillingham
STEVEN J. GILLINGHAM
Assistant Director

OF COUNSEL:

MILTON W. BOYD
Assistant Counsel
Office of the Chief Counsel
United States Army Corps of Engineers

s/Geoffrey M. Long
GEOFFREY M. LONG
Trial Attorney
Commercial Litigation Branch
Civil Division
Department of Justice
P.O. Box 480
Ben Franklin Station
Washington D.C. 20044
Telephone: (202) 307-0159
Fax: (202) 309-0972
E-Mail: Geoffrey.M.Long@usdoj.gov

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Attorneys for Defendant