IN THE UNITED STATES COURT OF FEDERAL CLAIMS

PIONEER RESERVE, LLC,	)	
Plaintiff,	)	
v.	)	**No. 14-376**
	)	**(Senior Judge Bruggink)**
THE UNITED STATES,	)	
Defendant,	)	

PLAINTIFF'S MEMORANDUM OF CONTENTIONS OF FACT AND LAW

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REGULATIONS

The Plaintiff, Pioneer Reserve, LLC ("Pioneer"), by counsel, offers its following Contentions of Fact and Law:

THE ISSUES OF FACT TO BE RESOLVED BY THE COURT.

Having previously found that Pioneer's Umbrella Mitigation Banking Instrument ("UMBI") was a contract ("the Contract") between it and the United States Army Corps of Engineers ("Corps") (Dkt. No. 13 page 7, 11), the Plaintiff contends the Court needs to resolve the following issues of fact;

1. **Whether the Corps breached the Contract?**
2. **Whether the Corps' breach of the Contract caused Pioneer damages?**
3. **What is the amount of Pioneer's damages?**

THE PLAINTIFF EXPECTS TO PROVE THE FOLLOWING FACTS;

1. Over a period of years, beginning in 1998, Scott Walther ("Walther") bought properties in the Matanuska-Susitna Borough, Alaska for development.

2. Walther's properties are generally referred to as the Edgerton parcel and the Seldon parcel (collectively "the Land").

3. The Land was properly zoned and was developable consistent with Walther's plans to develop the Seldon parcel into a mixed-use commercial, single family, and multi-family project.

4. The Land was also properly zoned and was developable consistent with Walther's plans to develop the Edgerton parcel into a 50 cabin rental project.

5. For two years Leroy Phillips, a member of the Corps' Alaska District's regulatory division at the time ("Phillips"), strongly encouraged Walther to abandon his development plans for the Seldon parcel and instead to encumber it with a perpetual conservation easement and use it as a wetlands mitigation bank.

6. Convinced by Phillips, and after consulting with wetlands experts, Walther decided to preserve the Seldon parcel in perpetuity by contributing it into a new wetlands mitigation bank that he would form, and cause the new mitigation bank to record a conservation easement on this property.

7. During that timeframe, the Alaska Railroad Corporation ("ARRC") proposed a Port McKenzie Rail Extension ("PMRE") project that was going to impact many acres of waters of the United States ("WOUS").

8. The PMRE's impacts to WOUS were located in Walther's proposed new mitigation bank's service area.

9. The location of the PMRE's proposed impacts was a critical factor informing Walther's decision to preserve his Seldon parcel and create a wetlands mitigation bank.

10. Karen Nelson, Pioneer's Project Manager at the time, ("Nelson") became familiar with Walther's Edgerton parcel.

11. Nelson encouraged Walther to encumber his Edgerton parcel with a conservation easement and to contribute it, along with the Seldon parcel, into Walther's mitigation bank to be formed. (When it was later formed it was named the Pioneer Reserve Wetland Mitigation Bank ("Pioneer").)

12. Walther was reluctant to encumber all of the Land with conservation easements.

13. Prior to the formation of Pioneer, Walther and his daughter, Calliandra Donn ("Donn"), met with Nelson approximately fifteen (15) times.

14. During these meetings, Walther, Donn, and Nelson discussed 33 C.F.R. Part 332 ("the Final Rule") and how the Corps had decided it would use Pioneer's bank credits as mitigation for the PMRE project's impacts to WOUS.

15. At that time, the Corps' Alaska District was beginning to implement the Final Rule.

16. Nelson stated that since the ARRC's application for a CWA § 404 permit for the PMRE project reflected impacts to WOUS in Pioneer's service area, the Corps had determined that it would require the ARRC to buy all of its compensatory mitigation needs, to offset these impacts, from Pioneer.

17. Nelson stated that the Corps had completed its discretionary decision-making process.

18. The Final Rule specifies that mitigation banks, whose service areas encompass proposed impacts to WOUS, are to be given first priority consideration as the source for mitigation to offset the impacts.

19. Nelson stated that the Corps had determined that it would comply with the Final Rule's hierarchy and require the ARRC to buy all of its mitigation for the PMRE project's impacts to WOUS from Pioneer.

20. Nelson stated that the Corps had determined that Pioneer would have the only mitigation bank whose service areas encompassed the PMRE's proposed impacts to WOUS.

21. Nelson stated that the Corps had determined that it would not direct the ARRC to buy its mitigation from the existing Su-Knik Mitigation Bank ("Su-Knik"), because Su-Knik's service area did not encompass the PMRE's impacts to WOUS.

22. Nelson stated that the Corps had determined that it would not direct the ARRC to buy advance credits from an in-lieu fee program.

23. Nelson specifically stated that the Corps had decided that it would not allow any § 404 permittees for project impacts in the Mat-Su Borough ("Borough") to use any of the Greatland Trust's advance credits as mitigation until after all mitigation bank credits in the Borough had been fully utilized as mitigation.

24. Pioneer's banks are located in the Borough.

25. The PMRE's project proposed to impact WOUS located in Pioneer's primary service area, requiring 160.2 palustrine type bank credits as mitigation.

26. The Final Rule states that compensatory mitigation requirements for CWA §404 permits must be commensurate with the project's impacts to WOUS.

27. Nelson stated that the Corps had determined that Pioneer's palustrine bank credits represented the only available source of mitigation that would provide mitigation that was commensurate with the PMRE's impacts to WOUS.

28. Nelson stated: (i) that for all of these reasons the Corps had determined that Pioneer's two bank parcels were the preferred source of mitigation for the PMRE's impacts to WOUS; and (ii) that the Corps would require the ARRC to buy all of its mitigation from Pioneer.

29. Benjamin Soiseth ("Soiseth") was the primary project manager for the PMRE project's §404 permit.

30. Soiseth was involved in drafting the Corps' Record of Decision ("ROD") for the PMRE project's CWA § 404 permit.

31. In September 2012, the Corps eliminated all but 16.92 of Pioneer's Edgerton parcel's palustrine bank credits.

32. Soiseth admitted that the Corps directed the ARRC to buy all but 16.92 of the required 160.2 palustrine bank credits from Su-Knik, instead of from Pioneer, "because" the Corps had taken away all but 16.92 of the Edgerton parcel's palustrine bank credits, not because the Corps had exercised discretion in its regulatory permitting process.

33. In September 2012, the Corps believed that the only way it could require the ARRC to buy its PMRE project's mitigation from a source other than Pioneer was by eliminating Pioneer's palustrine credits.

34. Walther relied on Nelson's statements and assurances, and the location and amount of the PMRE's projected impacts to WOUS in Pioneer's proposed service area, when he decided to convey the Land to Pioneer, and to cause Pioneer to record perpetual conservation easements on the Land in order to use it to form a mitigation bank.

35. Walther formed and became the owner of an Alaska limited liability company, Pioneer Reserve, LLC.

36. Walther then caused this company to sign an Umbrella Mitigation Banking Instrument ("UMBI"), creating Pioneer's two mitigation banks on the Edgerton parcel and on the Seldon parcel.

37. The Corps also signed the UMBI.

38. The UMBI is a contract ("the Contract").

39. Walther spent three and a half years and $375,000 out of pocket cash, complying with the Final Rule and the Corps' requirements, in order to establish Pioneer's mitigation banks.

40. Upon full execution of the Contract, the Corps certified a total of 178.82 palustrine (which includes "PFO" type) bank credits to Pioneer; 124.7 for Pioneer's Edgerton parcel, and 54.12 for its Seldon parcel.

41. The Contract authorized Pioneer to sell its bank credits, once awarded, to CWA § 404 permittees as compensatory mitigation to offset impacts to WOUS.

42. Pioneer fully performed its obligations under the Contract.

43. The Corps awarded the 178.82 palustrine credits to Pioneer.

44. The Contract states that Pioneer's two mitigation banks will be used in accordance with the Final Rule.

45. The Final Rule contains non-discretionary provisions.

46. The Final Rules states that the Corps "must" determine compensatory mitigation based on what is practicable and capable. 33 C.F.R. §332.3(a)(1).

47. The Corps determined that Pioneer's mitigation banks were preferred sources of mitigation for the PMRE's impacts to WOUS.

48. In 2012, Pioneer had the only mitigation banks whose service areas included the PMRE's proposed impacts to WOUS.

49. The Contract states that it can only be amended or modified with the mutual written approval of the Corps and Pioneer.

50. Pioneer never agreed to the amendment or modification of its Contract.

51. Pioneer never gave written approval of the amendment or modification of its Contract.

52. The Corps admits that Pioneer objected to any reduction of its palustrine type credits.

53. Following full execution of the Contract, Walther conveyed the Land to Pioneer.

54. Walther then caused Pioneer to record perpetual conservation easements on the Land.

55. On April 19, 2012, Walther and his daughter, Calliandra Donn ("Donn"), one of Pioneer's principals, met with Nicole Hayes ("Hayes") to discuss Pioneer's mitigation banks.

56. Hayes had recently become the Supervisor of the Corps' Matanuska-Susitna Borough's field office.

57. The Corps' interactions with Pioneer had become Hayes' responsibility.

58. The April 19, 2012 meeting with Hayes lasted for approximately two hours, during which the topic of mitigation bank credit pricing was discussed.

59. In this meeting Hayes stated that for large projects such as the ARRC's PMRE project, the environmental mitigation budget typically amounted to approximately 10% of the project's total cost.

60. The ARRC's total budget for its PMRE project was approximately $300 million dollars.

61. Nationally, environmental mitigation costs expressed as a percentage of total project costs for transportation projects, excluding right-of-way costs, range between 2 and 12 percent.

62. During the years leading up to and including 2012, the Corps' Alaska District had a track record of requiring CWA § 404 permittees to buy mitigation that cost as much as $167,000 per mitigation credit.

63. David Olson ("Olson") works in the Corps' regulatory division in its Washington D.C. headquarters.

64. After Pioneer filed its lawsuit in this matter, the Corps brought Olson to Anchorage, Alaska to conduct training sessions.

65. Olson was brought to Anchorage to conduct the training sessions because the Corps had determined that its personnel had breached the Contract.

66. While in Anchorage Olson stated that Pioneer's $79,000 palustrine credit price was "reasonable".

67. The Corps issued a CWA §404 permit to the ARRC for its PMRE project on September 10, 2012 ("ARRC's permit").

68. The PMRE project proposed to impact palustrine wetlands.

69. In the ARRC's permit the Corps required the ARRC to mitigate its PMRE project's impacts to WOUS by purchasing 160.2 palustrine type mitigation bank credits.

70. According to the Contract, as of September 10, 2012, Pioneer had more than 160.2 palustrine credits that were available for sale.

71. Pursuant to the Final Rule, when the Corps evaluates an application for a CWA § 404 permit it must determine which option for compensatory mitigation is environmentally preferred. 33 C.F.R. §332.3(a)(1).

72. As the Corps determined the compensatory mitigation to be used to offset the ARRC's permitted impacts to WOUS, the Corps was required to consider available compensatory mitigation options according to a hierarchy specified by the Final Rule. 33 C.F.R. §332.3(b).

73. The hierarchy specifies that available bank credits from mitigation banks, whose service areas encompass a CWA §404 permittee's impacts to WOUS, are the highest ranked option for mitigation. 33 C.F.R. §332.3(b)

74. In its ROD, the Corps determined that Pioneer's Edgerton bank, and its Seldon bank, were environmentally preferred sources for mitigating the ARRC's PMRE project's permitted impacts to WOUS.

75. The Corps' determination that Pioneer's banks were the environmentally preferred sources for mitigating the ARRC's permitted impacts to WOUS included its consideration of cost.

76. Pioneer was not allowed the opportunity to sell 160.2 of its palustrine bank credits to the ARRC in September 2012.

77. In September, 2012 the Corps directed the ARRC to buy all but 16.92 of its 160.2 needed palustrine mitigation bank credits from Su-Knik.

78. Property known as the Fish Creek parcel is the only land that comprised the Su-Knik bank.

79. At all times relevant, the Fish Creel parcel was public land.

80. Regulatory Guidance Letter 09-01 ("RGL 09-01") requires that credits for compensatory mitigation projects on public land "must be based solely" on an uplift in aquatic resource functions provided.

81. There was no uplift in the aquatic resource functions provided by the Fish Creek parcel over and above those already being performed before it was contributed into Su-Knik.

82. Su-Knik's palustrine credits were not awarded in compliance with the non-discretionary requirements of RGL 09-01.

83. The Corps admits that in September 2012 it believed that the only way it could comply with the Final Rule, and direct the ARRC to buy mitigation from Su-Knik, was by eliminating Pioneer's bank credits, by claiming a "mapping error".

84. During at least the August through October 2012 timeframe, Hayes was the Field Office Supervisor for the Corps' Alaska District's regulatory division.

85. Unknown to Pioneer at the time, by August 2012, Hayes had decided to eliminate most of Pioneer's wetland bank credits.

86. On September 7, 2012 Hayes stated to Pioneer that the Corps was "considering" a minor, technical "map revision".

87. At all times relevant, the Corps consistently reassured Pioneer that its proposed minor technical map revisions to its Edgerton bank that would have no effect on the value, type or quantity of Pioneer's credits that it could sell.

88. Pioneer's palustrine bank credits were calculated and awarded based on functions performed by its various land areas, not based on the Cowardin map classification of its land types.

89. The Final Rule states that upland areas can be used as compensatory mitigation when they are "essential to maintaining the ecological viability of adjoining aquatic resources". 33 C.F.R. §332.8(o)(7).

90. The EPA and the Corps awarded all of the palustrine type bank credits to Pioneer based on; (i) Pioneer's wetlands, and (ii) Pioneer's uplands that the EPA and the Corps had determined were essential to maintaining the ecological viability of adjoining aquatic resources.

91. Pioneer did not learn that the Corps had eliminated most of its palustrine credits until October 10, 2012.

92. On October 10, 2012, Hayes advised Pioneer that the Corps had eliminated all but 16.92 of its Edgerton parcel's palustrine credits.

93. Pioneer objected to any reclassification or elimination of any of its bank credits.

94. In May 2013, the Corps threatened to suspend Pioneer's right to sell its bank credits altogether if it did not sign a written amendment to the Contract.

95. Lt. Col. Mark DeRocchi ("DeRocchi") began working at the Corps' Alaska District's Command Level before this lawsuit was filed.

96. DeRocchi was in command of the Corp's Alaska District's regulatory division.

97. Walther met with DeRocchi before Pioneer filed this lawsuit.

98. Walther told DeRocchi about the Corps' elimination of most of Pioneer's palustrine bank credits without Pioneer's consent, said that he did not want to file a lawsuit against the Corps, and asked DeRocchi to investigate.

99. DeRocchi stated that he would conduct an investigation and report back to Walther.

100. DeRocchi conducted a thorough investigation into; (i) the facts surrounding the issuance of Pioneer's UMBI and the award of its credits, (ii) the elimination of Pioneer's palustrine bank credits, and (iii) the facts surrounding the issuance of the ARRC's PMRE project's §404 permit.

101. DeRocchi interviewed the Corps' regulatory division's personnel involved in the administration and use of Pioneer's mitigation banks. ("Personnel").

102. The Personnel had worked on Pioneer's UMBI and/or on the ARRC's PMRE project's §404 permit.

103. Some of the Personnel admitted that the Corps made a mistake when it stated that Pioneer's palustrine type credits needed to be reclassified due to a mapping error in Pioneer's UMBI.

104. Some of the Personnel admitted that they didn't understand, or had forgotten, that Pioneer's palustrine credits had been calculated and awarded based on functions performed, not on Cowardin map labels.

105. The Personnel admitted that they had unilaterally eliminated most of the palustrine type credits that Pioneer could sell to the ARRC.

106. The Personnel admitted that they made mistakes when they unilaterally reduced the number of palustrine credits that Pioneer could sell to the ARRC.

107. Some of the Personnel admitted that they made mistakes when they allowed the ARRC to buy mitigation from Su-Knik, because Su-Knik's bank credits were not awarded in compliance with RGL 09-01.

108. Some of the Personnel admitted that they made mistakes when they allowed the ARRC to buy mitigation from the Greatland Trust.

109. The Personnel admitted that but for the Corps' actions, including eliminating most of Pioneer's palustrine type credits, Pioneer would have sold 160.2 palustrine credits to the ARRC.

110. Some of the Personnel admitted that the Corps should never have gotten involved in pricing the PMRE project's mitigation.

111. The Corps Personnel admitted that the Corps had "screwed" Pioneer by causing Pioneer to lose the opportunity to sell 160.2 palustrine type credits to the ARRC.

112. During his thorough investigation, DeRocchi interviewed the Corps' primary project manager ("Manager") in charge of issuing the ARRC's PMRE project's §404 permit.

113. The Manager admitted that the only reason the Corps directed the ARRC to buy mitigation from Su-Knik, and not to buy all of its mitigation from Pioneer, was "because" the Corps had eliminated most of Pioneer's palustrine type credits in September 2012.

114. DeRocchi inspected Su-Knik's Fish Creek parcel.

115. As part of his thorough investigation, DeRocchi carefully reviewed; (i) RGL 09-01, (ii) Pioneer's UMBI, (iii) Su-Knik's MBI, (iii) the Corp's files relating to issuance of the ARRC's PMRE project's §404 permit including the Record of Decision, (iv) Pioneer's credit pricing and history of credit sales, and (v) mitigation costs in the Corps' Alaska District ("the Documents").

116. The Corp's National Headquarters admitted that the Corps should not have re-classified any of Pioneer's bank credits, or made any other unilateral changes to Pioneer's UMBI.

117. As a result of his thorough investigation, DeRocchi found that; (i) the Corps had breached the Contract, (ii) Pioneer never consented to a reduction or reclassification of its palustrine type bank credits, (iii) but for the Corps' actions, unilaterally eliminating most of Pioneer's palustrine type credits, Pioneer would have sold 160.2 palustrine type credits to the ARRC in September 2012 at $79,000 each, (iv) Pioneer's palustrine type credits had been properly calculated when the Corps signed Pioneer's Contract, (v) the Corps' breach of the Contract caused direct damages to Pioneer in the amount of $12.6 million dollars, and (vi) Su-Knik's credits were not awarded in compliance with RGL 09-01.

118. Following the conclusion of his thorough investigation, DeRocchi gave a detailed, accurate, and complete debriefing Col. Christopher D. Lestocchi ("Lestocchi").

119. At that time Lestocchi was the Commander of the Corps' Alaska District.

120. DeRocchi fully, accurately and completely debriefed Lestocchi with respect to; (i) the statements made by the Personnel and the Manager, (ii) the statements made by Olson and the Corps' National Headquarters, (iii) the information contained in the Documents, and (iv) his findings.

121. Lestocchi admitted that the Corps had breached its Contract with Pioneer.

122. Lestocchi admitted that but for the Corps' elimination of most of Pioneer's palustrine type bank credits in September 2012, Pioneer would have sold 160.2 palustrine type credits to the ARRC at $79,000 each.

123. Lestocchi admitted that the Corps' breach of the Contract caused Pioneer damages in the amount of $12.6 million dollars.

124. DeRocchi reported back to Walther as to the results of his investigation.

125. DeRocchi told Walther that he was unable to do anything administratively to change Pioneer's situation, and that unfortunately Pioneer would need to file a lawsuit if he objected to the Corps' actions.

126. DeRocchi later reviewed Pioneer's Complaint and Amended Complaint and admitted that their allegations of causation, and the amount of its damages, are correct.

127. When the ARRC objected to the mitigation cost required in the ROD, Corps' policy required the Corps to have withheld issuance of its PMRE project's §404 permit.

128. Corps' policy does not allow it to get involved in pricing mitigation.

129. The Corps' policy is not to facilitate cheap mitigation to offset a 404 permittee's permanent destruction of WOUS

130. The ARRC's PMRE project's CWA §404 permit mitigation requirements represented the opportunity for Pioneer to sell 160.2 of its palustrine credits at $79,000 each for a total of $12,655,800.

131. Pioneer would have incurred no additional costs in order to sell 160.2 of its palustrine credits to the ARRC in September 2012.

132. The Corps directed the ARRC to buy most of its palustrine mitigation credits from Su-Knik, and not from Pioneer, *because* the Corps had eliminated most of Pioneer's palustrine credits in September 2012.

133. Pursuant to its Contract, Pioneer was awarded more than 160.2 palustrine type credits that it could sell.

134. According to its Contract, Pioneer still had more than 160.2 palustrine credits available for sale in September 2102.

135. "But for" the Corps taking away Pioneer's bank credits in September of 2012, Pioneer would have sold 160.2 palustrine credits to the ARRC at $79,000 each.

136. The Corps breached the Contract.

137. The Corps' breach of contract caused damages to Pioneer in the amount of $12,655,800.

138. The Corps, and not a CWA §404 permittee, such as the ARRC, determines the compensatory mitigation to be required in a CWA §404 permit.

139. Su-Knik's credits were not awarded in compliance with the non-discretionary requirements of RGL 09-01.

140. All of the members of the IRT, other than the Corps, opposed the Corps' decision to eliminate or reclassify any of Pioneer's palustrine bank credits.

141. There was never any error made in connection with the calculation and award of Pioneer's palustrine type credits.

142. Pursuant to the Final Rule, mitigation bank credits are awarded based on the function performed by the bank's resources, including its uplands, not based on the Cowardin type label assigned to the resource.

143. A number of Pioneer's upland areas supported the award of palustrine type bank credits because they were essential to maintaining the ecological viability of adjoining aquatic resources.

144. The ARRC satisfied most of its mitigation needs for its PMRE project on a sole source basis, without competitive bidding.

145. The ARRC could have purchased Pioneer's palustrine credits on a sole source basis, without competitive bidding.

146. The ARRC and the Alaska Department of Transportation ("ADOT") are both state funded operations, with similar procurement regulations.

147. Pioneer sold credits to the ADOT at $79,000 each on two separate occasions, on a sole source basis, in order to serve as compensatory mitigation to offset the ADOT's projects' permitted impacts to WOUS.

148. The ADOT's impacts to WOUS primarily involved the permanent destruction of palustrine wetlands.

149. The Corps determined Pioneer's credits were the preferred mitigation for the ADOT's projects' permanent destruction of palustrine wetlands.

150. The PMRE project's impacts to WOUS primarily involved the permanent destruction of palustrine wetlands.

151. The Corps determined Pioneer's banks were the preferred source of mitigation for the PMRE project's permanent destruction of palustrine wetlands.

152. The Corps determined Pioneer's palustrine bank credits provided mitigation that was commensurate with the ADOT's and the PMRE projects' impacts to WOUS.

153. The ARRC's PMRE project's budget was increased each time as additional costs were identified.

154. The fair market value of Pioneer's palustrine type bank credits in September 2012 was at least $79,000 each.

155. Twelve Million Six Hundred Fifty Five Thousand Eight Hundred Dollars ($12,655,800) represented the profits Pioneer would have earned from its sale of 160.2 palustrine type credits to the ARRC in September 2012.

THE PLAINTIFF'S POSITION WITH RESPECT TO THE FACTS UPON WHICH THE DEFENDANT IS EXPECTED TO RELY.

1. **The Defendant is expected to rely on the ARRC's granted request, to amend its §404 permit to buy cheaper mitigation, to assert there was no market for Pioneer's palustrine bank credits at $79,000.**

The Plaintiff's position: The evidence will be that; (1) Pioneer twice sold palustrine bank credits to the ADOT at $79,000 each, (2) the ADOT's impacts to WOUS were similar to the PMRE project's impacts, (3) the Corps' Alaska District had a track record of requiring mitigation that cost $167,000 per credit, (4) the ARRC's cost of mitigation from Pioneer would be approximately 50% of what the Corps stated to be the typical cost of mitigation for large projects such as the PMRE project, (5) the Corps admitted that $79,000 was a "reasonable" price for mitigation, (6) the fair market value of Pioneer's credits in September 2012 was at least $79,000 per credit, and (7) the Corps and not the permittee designates the required mitigation.

2. **The Defendant is expected to assert there was a "mapping error" in Pioneer's MBI that justified the Defendant's reclassification of Pioneer's bank credits.**

The Plaintiff's position: There was no mapping error in Pioneer's MBI that supported a reclassification of any of its palustrine type credits. The palustrine credits that were awarded to Pioneer's banks were based on the function being performed by the various resources located in their land, not based on the Cowardin type classification of its resources. There was no error in the number of palustrine credits awarded to Pioneer in its MBI. All of the palustrine credits awarded to Pioneer were properly awarded, based on functions performed by its wetland and upland resources.

The evidence is that the Corps subsequently admitted that back in 2012, when it eliminated most of Pioneer's palustrine credits due to a supposed mapping error, its personnel had forgotten,

or misunderstood, the fact that Pioneer's palustrine credits that were awarded to certain of its uplands areas were based on the Corps' determination that these upland areas were essential to maintaining the ecological viability of adjoining aquatic resources.

The EPA representative involved in the calculation and award of Pioneer's credits, Mr. Matt LeCroix ("LaCroix"), will testify that the IRT (which included the EPA and the Corps) followed the Final Rule (33 C.F.R. §332.8(o)(7)) when it awarded palustrine type wetland credits based on Pioneer's non-jurisdictional upland areas that were found to be "essential to maintaining the ecological viability of adjoining aquatic resources". LeCroix will testify that the Final Rule expressly allows upland areas to serve as mitigation if they are essential to maintaining the ecological viability of adjoining aquatic resources. Such was the case with substantial upland areas in Pioneer's banks. LeCroix will testify that when Pioneer's UMBI was drafted, the use of the palustrine subtype was caveated to explain that much of this area was non-jurisdictional**.** LeCroix ghost wrote an EPA letter explaining this to the Corps in July 2013.

3. **The Defendant is expected to assert that the Corps exercised its regulatory discretion when it amended the ARRC's permit to allow it to buy cheaper mitigation. Accordingly, it is expected to assert that Pioneer would have suffered the same financial result even if the Corps had not eliminated most of Pioneer's palustrine type credits.**

Plaintiff's position: The evidence is that the Corps admits that Pioneer would have sold 160.2 palustrine type credits to the ARRC in 2012 at $79,000 each, but for the Corps' elimination of most of its palustrine type credits. The Corps admits it made multiple mistakes, including when; (1) its personnel unilaterally eliminated most of Pioneer's palustrine type credits-because it breached the Contract, (2) it allowed the ARRC to buy out-of-service area bank credits-because the Corps had determined Pioneer's in-service area credits were the preferred source of mitigation,

(3) it directed the ARRC to buy cheaper mitigation from a mitigation bank (Su-Knik) formed on public land without satisfying the non-discretionary requirements of RGL 09-01, and (4) it amended ARRC's permit to allow it to buy cheaper Great Land Trust ("GLT") in-lieu advance fee credits-because Pioneer's banks were the identified preferred source of mitigation. The evidence is also that the Corps' policy is not to arrange cheap mitigation when a CWA §404 permittee proposes to permanently destroy wetlands.

The evidence is that the Corps will admit that Pioneer would not have suffered damages but for the Corps' mistake, breaching of the Contract by unilaterally eliminating most of Pioneer's palustrine credits. The Corps will admit that if that mistake had not been made, then none of the other mistakes would have followed, and Pioneer would have sold 160.2 palustrine bank credits to the ARRC at $79,000 each in September 2012.

The Corps will further admit that it directed the ARRC to buy its mitigation from another source "because" the Corps had taken away most of Pioneer's credits, not because the Corps was exercising its regulatory permitting discretion.

4. **The Defendant is expected to argue that the ARRC could not sole source purchase mitigation from Pioneer without competitive bids.**

Plaintiff's position: On a sole source basis, without competitive bidding, the ARRC bought palustrine bank credits from Su-Knik as mitigation for its PMRE project's §404 permit. The ARRC's procurement regulations do not prohibit sole source purchasing. The ARRC and ADOT are both state funded organizations. The ADOT bought bank credits from Pioneer on a sole source basis, without competitive bidding, on two occasions.

5. **The Defendant is expected to argue that the ARRC did not have enough in its budget to pay $79,000 per credit.**

The Plaintiffs position: The evidence will be that; (1) the amount shown for mitigation on the ARRC's budget was a mere "placeholder" until actual costs were known, (2) the ARRC's budget was always increased when actual costs became known, (3) according to the Corps a budget of approximately $30 million dollars would have been typical for a project such as the PMRE project, (4) the fair market value of bank credits in the general area covering the ARRC's impacts to WOUS in September 2012 was at least $79,000, and (5) the Corps admits that Pioneer's $79,000 price per credit was a reasonable price.

6. **The Corps is expected to rely on its listing of Pioneer's Seldon's parcel as the #3 preferred source of mitigation in the ARRC's ROD meant it came after Su-Knik in terms of preference.**

The Plaintiff's position: The Corps will admit that Su-Knik should not have been listed as a preferred source of mitigation in the ROD. In fact, the Corps will admit that no mitigation bank credits should have been awarded to Su-Knik because its Fish Creek parcel is publicly owned lands and there was no uplift in its functions as required by the non-discretionary directives of RGL 09-01. Therefore, Pioneer's banks were the only identified preferred source of mitigation to offset the PMRE project's impacts to WOUS that complied with Corps' written, non-discretionary directives.

7. **The Corps is expected to rely on the fact that it has regulatory discretion in order to argue that the Corps' elimination of Pioneer's palustrine type credits in September 2012 did not cause Pioneer's damages.**

1. **The Plaintiff's position**: The Corps did not have discretion to breach the Contract. Pioneer's Contract with the Corps created bank credits that Pioneer could then sell as mitigation. The only source of mitigation for the ARRC's impacts, that had been awarded in compliance with RGL 09-01 and identified by the Corps as a preferred source were Pioneer's two bank. The fair market value of Pioneer's credits in September 2012 was at least $79,000 each. The Corps admits

that the only reason it directed the ARRC to buy mitigation from a source other than Pioneer was "because" the Corps had eliminated most of Pioneer's palustrine type credits. The Corps repeatedly admitted that "but for" the Corps' elimination of most of Pioneer's palustrine type credits in September 2012, Pioneer would have sold 160.2 palustrine type credits to the ARRC at $79,000 each, causing Pioneer damages of $12.6 million dollars.

As discussed below, according to *Anchor Sav. Bank, FSB v. United States*, 597 F.3d 1356, 1366 (Fed. Cir. 2010), while there must be a causal connection between the breach of a contract and the damages, the breach need not be the sole factor or the sole cause of the plaintiff's loss. The existence of other factors operating in confluence with the breach will not preclude recovery based on the breach. In Pioneer's case, the Corps admits that Pioneer lost the opportunity to sell 160.2 of its palustrine credits to the ARRC in September 2012 because it had eliminated most of these credits. The Corps admits that "but for" this September 2012 elimination of Pioneer's credits, Pioneer would have sold 160.2 palustrine credits to the ARRC at $79,000 each. The evidence is that the Corps' discretionary authority as it issued the ARRC's permit was not the cause of Pioneer's damages.

THE PLAINTIFF'S CONTENTIONS OF LAW.

The Plaintiff contends the following law applies;

1. Whether a contract has been breached is a question of fact. (See *Casey v. Semco Energy, Inc.*, 92 P 3d. 379, 383 (Alaska 2004).)

2. "A party which presumes to alter unilaterally a contract is in breach." *SMS Data Products Group, Inc. v. United States*, 17 Cl. Ct. 1, 9, (Cl. Ct. 1989).

3. "[T]he Government cannot terminate or change one of its contracts in whole or in part without consent of the other contracting party, without being held liable in damages for breach of contract". *Alaska Pulp Corp. v. United States*, 48 Fed. Cl. 655, 659 (2001).

4. Liability for a breach does not turn on "intervening post-breach events." *Alaska Pulp Corp. at* 660 (2001).

5. "[T]he criteria that must be established in order to recover for breach of contract [are] (1) a valid contract between the parties, (2) an obligation or duty arising out of a contract, (3) a breach of that duty, and (4) damages caused by breach." *Kentucky, Natural Resources & Envtl. Protection Cabinet v. United States*, 27 Fed. Cl. 173, 178 (Cl. Ct. 1992), citing *San Carlos Irr. & Drainage Dist. v. United States*, 877 F.2d 957, 959 (Fed. Cir.1989).

6. Causation of damages is a "quintessential issue of fact". (See *Northwest Sav. v. United States*, 72 Fed. Cl. 173, 180 (2006). (See also *Chevron U.S.A., Inc. v. U.S.*, 71 Fed. Cl. 236, 278 (2006).) "Causation is an intensely factual determination. While a causal connection between the breach and the loss of profits must be definitely established the breach need not be the sole factor or the sole cause of the plaintiff's loss. Although a plaintiff may recover only for those losses that would not have occurred but for the breach, the existence of other factors operating in confluence with the breach will not necessarily preclude recovery based on the breach." *Anchor Sav. Bank, FSB v. United States*, 597 F.3d 1356, 1366 (Fed. Cir. 2010) (Internal citations and quotes omitted.)

7. "[T]he proper measure of damages involves only a question of fact". (*Gasperini v. Ctr. for Humanities*, 518 U.S. 415, 453 (1996). See also *Peterson v. Ek*, 93 P. 3d. 458, 463 (Alaska 2004), "A trial court's determination of damages is a question of fact".

8. "In order to prove that losses were proximately caused by defendant's breach, plaintiffs need not show that they might have avoided or minimized such losses or that defendant's conduct was the sole cause of their damages. Rather, they must only show that the breach was a substantial factor and that the damages flowed inevitably and naturally therefrom. *Franconia Assocs. v. United States*, 61 Fed. Cl. 718, 750 (2004)(Internal citations and quotations omitted.)

THE PLAINTIFF'S DISCUSSION OF THE LEGAL PRINCIPLES.

This is a breach of contract action. In its Brief in Support of Motion for Summary Judgment, (Dkt. No. 68, page 20) the Defendant correctly stated that in order for the Plaintiff to prove its contract claim, Pioneer must establish that; (1) a contract existed, (2) an obligation or duty arose out of that contract, (3) the Corps breached that obligation or duty, and (4) Pioneer was damages as a result of the breach. (See *San Carlos Irr. & Drainage Dist. V. United States*, 877 F.2d 957,959 (Fed. Cir. 1989). The Plaintiff's evidence satisfies its burden as follows;

1. **A contract existed.**

This Court has already found that Pioneer's UMBI was a contract with the Corps ("the Contract") (See Dkt. No. 13 page 7, 11.)

2. **The Contract imposed a duty on the Corps.**

The Contract "establishes the parties' respective roles, benefits, and *obligations* concerning the mitigation bank." (Dkt. No.: 13, page 11 – Emphasis added.) The Contract awarded a specified number of palustrine type bank credits to Pioneer and stated that it cannot be amended or modified without the written consent of Pioneer. This imposed the obligation of the Corps not to amend or modify the Contract without Pioneer's written approval. The overwhelming evidence, including the Defendant's responses to written discovery, and the Defendant's officer's testimony, is that

Pioneer never consented to its Contract being amended to reduce the number of its palustrine type credits.

3. **The Corps breached its contractual obligation.**

As stated above, a unilateral modification to a contract is a breach. (See *SMS Data Products Group, Inc. v. United States*, 17 Cl. Ct. 1, 9, (Cl. Ct. 1989). Despite the Contract's statement that it could not be unilaterally amended, the consistent, overwhelming evidence, including sworn testimony from Corps' personnel, is that in September 2012, the Corps unilaterally eliminated most of Pioneer's palustrine type bank credits, and that Pioneer always objected to any reduction in the number of its bank credits.

4. **The Corps' breach of the Contract caused damages to Pioneer**.

The evidence is that Corps' personnel admit that the Corps' elimination of Pioneer's credits in September 2012 caused Pioneer to lose the opportunity to sell 160.2 palustrine type credits to the ARRC at $79,000 each. Corps' personnel admit that the only reason that the Corps directed the ARRC to buy mitigation from another source was "because" the Corps had unilaterally eliminated most of Pioneer's palustrine type credits in September 2012, *not* because the Corps had exercised its regulatory discretion. Corps' personnel admit that they made a mistake, forgetting that Pioneer's palustrine credits had been awarded based on functions performed, *not* based on Cowardin map labels, when they reclassified most of Pioneer's palustrine type credits. Corps' personnel also admit that "but for" the Corps' elimination of Pioneer's credits, Pioneer *would have sold* 160.2 palustrine type credits to the ARRC in September 2012 at $79,000 each.

5. **The Corps admits to the measure of Pioneer's damages.**

As stated above, the measure of damages is a question of fact. (See *Gasperini v. Ctr. for Humanities*, 518 U.S. 415, 453 (1996). Consistent with this, Lt. Col. DeRocchi, the Corps'

Commander in charge of its Alaska District's regulatory division, and Col. Lestocchi, the Commander of the Corps' Alaska District, following a thorough investigation into the facts surrounding this lawsuit, admit that the Corps' breach of the Contract, unilaterally eliminating Pioneer's palustrine type credits, caused Pioneer to lose the opportunity to sell 160.2 palustrine type credits to the ARRC at $79,000 each, causing damages in the amount of $12,655,800. These admissions are consistent with Pioneer's expert witness' opinion that Pioneer's palustrine type credits' fair market value in September 2012 was in excess of $79,000 each. The Corps' admissions are also consistent with the Corp's Alaska District established track record of requiring compensatory mitigation that cost $167,000 per credit. It is also relevant that David Olson, from the Corps' National Headquarters, admits Pioneer's $79,000 price was reasonable, and that the $12,655,800 total cost of the mitigation to the ARRC is approximately 50% of what the Corps stated as typical mitigation cost for large projects such as the ARRC's PMRE project.

6. **Pioneer's palustrine credits were not improperly classified.**

In its ruling on the parties' Motions for Summary Judgement, (Dkt. No. 82) this Court identified issues that Pioneer must address in order to prevail at trial. The Court phrased one issue as the need to show that "the improper classification of the Edgerton Parcel's upland areas as wetlands did not render Pioneer's credits unsuitable to mitigate the impacts of the PMRE." (Dkt. No. 82, page 11). The evidence is that all of Pioneer's palustrine bank credits were properly calculated and awarded. The Cowardin map label assigned to an upland has no effect on its ability to be used as mitigation. Rather, as the EPA explained to the Corps, and as Corps' Personnel acknowledge, pursuant to 33 C.F.R. §332.8(o)(7) mitigation can be awarded to upland areas if they are "essential to maintaining the ecological viability of adjoining aquatic resources." LaCroix, of the EPA, will testify that when the Corps and the EPA calculated and awarded palustrine credits

to a portion of Pioneer's upland areas it was because the Corps and the EPA had correctly determined that these upland areas were essential to maintaining the ecological viability of adjoining aquatic resources.

Accordingly, the proper question is whether Pioneer's palustrine credits were properly awarded to certain of its upland areas? The Court will hear testimony from the EPA and Corps' Personnel that all of Pioneer's palustrine type credits were properly calculated and awarded, and that the Corps admits that its earlier determination that a "technical mapping error" justified its elimination of most of Pioneer's palustrine credits was a mistake.

7. **The PMRE's project's impacts to WOUS were similar to the ADOT's impacts that were mitigated with its purchase of Pioneer's credits at $79,000 each.**

The Court also asked whether there was "evidence that the ADOT impacts are similar to the PMRE impacts such that they warrant similar credit types and prices"? (Dkt. No. 82, at page 11). The evidence is that the ADOT's and PMRE's impacts to WOUS were similar--their projects involved the permanent destruction of palustrine wetlands. In the Corps' ROD for the PMRE project, the Corps stated that Pioneer's banks possessed "like habitat credits" to the PMRE's impacted areas, and that Pioneer's credits were appropriate to offset PMRE's impacts. Similarly, the evidence is that on two occasions the ADOT proposed to impact palustrine wetlands, and that the Corps required the ADOT to buy bank credits from Pioneer, for which ADOT paid $79,000 each.

8. **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.**

The Court stated that Pioneer needed to provide more information regarding "other available mitigation for the PMRE project and facts indicating that Pioneer's credits were the most likely option". (Dkt. No. 82, at page 11.)

The evidence is that Pioneer's Edgerton and Seldon mitigation banks were two of the three identified preferred sources of mitigation in the Corps' ROD generated in connection with the PMRE. The Corps admits that Pioneer's palustrine credits were the *only available mitigation* for the PMRE project's impacts that comply with Corps' written guidance, RGL 09-01, and the Final Rule. The evidence, from Corps' Personnel, is that the bank credits belonging to the Su-Knik were not awarded in compliance with written Corps' guidance, RGL 09-01. Corps' Personnel admit that they made mistakes when they allowed the ARRC to buy mitigation from Su-Knik because Su-Knik's bank credits were not awarded in compliance with non-discretionary requirements of RGL 09-01.

There was no other available mitigation for the PMRE project without descending the hierarchy of mitigation contained in the Final Rule. The evidence is that prior to the issuance of the PMRE project's permit, the Corps had determined that it would require the ARRC to buy all of its mitigation from Pioneer because it was "like habitat" mitigation and because Pioneer was the only mitigation bank whose service area encompassed the PMRE project's impacts. Prior to issuance of the PMRE permit, the Corps had determined that it could not and would not use any of the GLT's advance credits as mitigation for impacts in the Borough until all mitigation bank credits were used. Corps' Personnel admit they made a mistake when they allowed the ARRC to buy advance in lieu fee credits from GLT instead of requiring it to buy Pioneer's palustrine type credits.

As to the $79,000 price of Pioneer's palustrine bank credits, the evidence is that the Corps' National Headquarters admitted this price was "reasonable". Pioneer's expert will opine that the fair market value of Pioneer's palustrine credits in September 2012 was at least $79,000 each. Corps' Personnel admit that they made mistakes when they allowed the PMRE to buy mitigation

from the GLT. And the evidence is that the Corps' Alaska District has a track record of requiring mitigation that costs $167,000 per credit. The evidence will establish that; (i) the fact that the PMRE budget did not initially cover the cost of Pioneer's palustrine credits is irrelevant because the initial budgeted cost of mitigation was only a "placeholder" until actual costs became known, and (ii) the PMRE's budget was always increased as actual costs became known.

THE PLAINTIFF'S RESPONSE TO THE DEFENDANT'S ANTICIPATED LEGAL POSITIONS.

1. **The Defendant is expected to contend that its unilateral elimination of Pioneer's palustrine credits in September, 2012 did not cause Pioneer any damages.**

The Defendant is expected to contend that its unilateral elimination of Pioneer's palustrine credits in September 2012 did not cause Pioneer any damages because the Corps could have exercised its regulatory discretion and allowed the ARRC to buy all of its mitigation from another source, without having eliminated any of Pioneer's credits, leaving Pioneer in the same position. The main fallacy in this argument is that 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. Further, the evidence is that the Corps admitted that it had made the decision to require the PMRE to buy all of its mitigation from Pioneer if its impacts were in Pioneer's service area, which they were.

2. **The Defendant is expected to contend that Pioneer agreed to the reclassification of its palustrine bank credits.**

The Defendant is expected to argue that Pioneer agreed to the reclassification of its palustrine bank credits, focusing on a September email from one of Pioneer's representatives, Calli Donn. However, the evidence is that Ms. Donn initially, mistakenly believed the Corps'

assurances that the Corps was only addressing purported minor technical mapping errors that would "not result in a change in quantity or value of credit types". The evidence is that as soon as Ms. Donn realized that the Corps had eliminated most of Pioneer's palustrine bank credits, she protested, stating the Corps was effectively putting Pioneer out of business. The evidence is that Pioneer never consented to an amendment to the Contract. Further, in fact, in written discovery responses the Corps admits that Pioneer always *objected* to the reduction of any of its bank credits

3. <u>The Defendant is expected to contend that the ARRC would not have paid Pioneer $79,000 for its palustrine credits</u>.

The Defendant is expected to focus on; (i) the PMRE's budget which showed approximately $2 million dollars budgeted for mitigation, (ii) the ARRC's claim that it was required to obtain mitigation in a bidding process, not by sole source, and (iii) the ARRC's granted request to be able to buy cheaper mitigation from other sources, to support its argument that the ARRC would not have bought its mitigation from Pioneer at $79,000 per credit.

However, the Plaintiff will present evidence is that; (i) on two occasions Pioneer sold palustrine credits to another state-funded entity, the ADOT, for $79,000 each, (ii) Corps' Headquarters admits $79,000 is a "reasonable" price, (iii) the $79,000 price is significantly less than other costs of mitigation in the Alaska District, (iv) the Corps, not the permittee, designates the required mitigation, (v) the Corps admits that its personnel made a mistake in allowing the PMRE to buy mitigation from sources other than Pioneer, (vi) the amount shown on PMRE's budget was merely a placeholder until actual costs became known, (vii) PMRE's budget was always increased as actual costs became known, (viii) if the PMRE refused to buy the mitigation required by the Corps then its §404 permit would have been denied, (ix) Pioneer's banks were the only preferred source of mitigation identified by the Corps that was awarded in compliance with

the non-discretionary requirements of RGL 09-01, (x) the ARRC bought mitigation for its PMRE project on a sole source basis, without seeking competing bids.

4. <u>The Defendant is expected to argue that Pioneer's palustrine bank credits were not worth $79,000.</u>

The Defendant's expert is expected to testify that the fair market value of Pioneer's palustrine credits in 2012 was substantially less than $79,000 despite; (i) Pioneer's sales of palustrine credits to the ADOT at $79,000, (ii) Corp's Headquarters' admission that $79,000 was a "reasonable" price, (iii) Corps' admissions that typical mitigation costs for projects similar to the PMRE project would generate a higher cost, (iv) the Corps' Alaska District's track record of requiring mitigation that cost $167,000 per credit.

The Plaintiff will further observe that it is filing a Daubert motion ("Motion"), seeking to exclude the Defendant's expert's opinions. This Motion will illustrate in detail how the Defendant's expert's opinions, regarding the fair market value of Pioneer's palustrine credits are not supported by any facts, data, or analysis. Rather, all of his data and analysis relate to factors, discount rates, and elements that an investor would require as a condition of investing in a mitigation bank. As discussed in the Motion, the Defendant's expert's analysis may support an opinion of the fair market value of a mitigation bank, not an opinion of the fair market value of its bank credits. As the Plaintiff argues in its Motion, an expert's analysis that may support an opinion of the fair market value of a pizza shop does nothing to establish the fair market value of a slice of one of its peperoni pizzas.

PIONEER RESERVE, LLC

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 18th day of April, 2016, a copy of the foregoing Plaintiff's Memorandum of Contentions of Fact and Law was filed electronically with the Court. I understand that notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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