

# Wetland Mitigation Banks: U.S. Court of Federal Claims Addresses Breach of Contract Claim



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## Arkansas Environmental, Energy, and Water Law Blog

06/23/2016

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The United States Court of Federal Claims ("Court") addressed in a February 16, 2016 opinion whether United States Army Corps of Engineers, Alaska District ("Corps" or "Defendant") breached its contract with Pioneer Reserve Wetland Mitigation Bank ("Pioneer" or "Plaintiff") *See Pioneer Reserve, LLC v. United States, 2016 WL 616376*.

The breach of contract allegedly occurred due to:

- a unilateral reduction of the number of wetland mitigation credits available for sale
- a failure to make use of Pioneer's credits from a wetland mitigation bank on its property in accordance with regulation that was allegedly incorporated in an umbrella mitigation banking instrument ("UMBI") executed by Pioneer and Corps.

A mitigation bank is generally a wetland, stream or other aquatic resource area that has been restored, established, enhanced or (in certain circumstances) preserved for the purpose of providing compensation for unavailable impacts to aquatic resources permitted under Section 404 of the Clean Water Act. The value of a bank is defined in compensation mitigation credits. The bank's instrument identifies the number of credits available for sale and an assessment is typically undertaken to certify that the credits provide the required ecological functions.

In *Pioneer Reserve*, the UMBI, a legally binding document, described the establishment, use, operation, maintenance and long-term management of Pioneer. It established two parcels of land: the Seldon Bank Parcel ("Seldon") and the Edgerton Bank Parcel ("Edgerton"). The Edgerton Bank Parcel was stated to contain 165.8 acres, 134.6 of which were wetlands and 31.2 of which were uplands.

The UMBI certified 151.81 credits in Edgerton and 83.73 in Seldon. Several types of credits were developed: palustrine, riparian, and marine. These credits could be purchased by third parties in order to offset environmental impacts to the same or similar type of habitat.

Palustrine is a wetland system that consists of soggy highly-vegetated non-tidal areas such as marshes, bogs, swamps, bottomland forests, and small ponds. Marine wetlands are saltwater coastal wetlands. Riparian wetlands are those situated between land and a river or stream. In Edgerton, 124.7 of the 151.81 credits were palustrine.

The UMBI was amended in November 2013. Plaintiff contended this resulted in the elimination of all but 16.92 palustrine credits in Edgerton. Further, Plaintiff argued it never consented to the modification of

the UMBI. Therefore, the reduction in palustrine credits was alleged to constitute a breach. Defendant responded that the amendment resulted in nothing more than a change in mapping and classification.

The UMBI stated that it “may only be amended or modified with the written approval of [Pioneer] and the Corps.” Numerous conversations occurred between Calliandra Donn (Pioneer’s Principal) and the Corps regarding the modification to the UMBI.

The Court held that based on the facts provided, there was no clear proof that Pioneer consented to the modification of the UMBI. As a result, defendant’s summary judgment motion was denied.

The Court also addressed whether the Corps breached the UMBI by deciding to direct the Alaska Railroad Corporation to buy only 16.92 credits from Pioneer. It agreed the Corps had discretion and was not contractually bound to a third party (Pioneer) to require the Alaska Railroad Corporation to buy Pioneer’s credits.

The Court held that the Defendant was entitled to partial summary judgment.

Finally, Pioneer argued that but for the breach, the Alaska Railroad Corporation would have purchased all of its credits. Pioneer claimed this lost purchase caused damages.

The Court held that even if there was a breach, there were fact issues. The Court stated that for Pioneer to prevail it must be shown that the alleged breach did in fact cause such damages.

[A copy of the decision can be downloaded here.](#)