

Soil Excavation/Borrow Material: Federal Appellate Court Addresses Challenge to U.S. Corps of Engineers Mitigation Requirements



Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

07/30/2018

Co-Author: Tyler McKay

The United States Court of Appeals for the Fifth Circuit (“5th Circuit”) addressed in a July 11th opinion a challenge to mitigation requirements imposed by the United States Corps of Engineers (“Corps”) as a condition for permitting a soil excavation project. See *White Oak Realty, L.L.C. v. United States Army Corps of Engineers*, 2016 WL 3409911.

The permit applicant argued that the mitigation requirements were contrary to federal law and unconstitutional.

Congress created the Greater New Orleans Hurricane and Storm Damage Risk Reduction System (“HSDRRS”) in response to Hurricane Rita and Katrina. The Corps was charged with implementing the system. The construction of the various levees, floodwalls, gates, and pumps required 31,000,000 cubic yards of borrow material.

The Corps considered alternative options for obtaining the borrow material. The two relevant options were described as “government-furnished” and “contractor-furnished.”

Government-furnished would allow the Corps to directly obtain property rights from the target property. In contrast, the contractor-furnished method would require contractors to work with the landowner to excavate the borrow material.

The Corps considered acquiring rights to mine government-furnished borrow material on Idlewild. This property is owned by White Oak Realty, L.L.C. (“White Oak”).

White Oak informed the Corps that they were only interested in contractor supply borrow material (as opposed to government supplied). It expressed concern that the Corps would use its eminent domain authority to obtain the material. However, the Corps informed White Oak that it remained “ free to utilize [its] property in any manner” pending further notification on the Corps’s intentions.

White Oak applied for a permit from the Corps to excavate clay on Idlewild in 2009 as contractor-supplied borrow material. The Corps pre-approved the permit on the condition that White Oak purchase mitigation bank credits because of the negative environmental impact on bottomland hardwood forests (“BLH”). However, the bank credits were only needed if the borrow excavated from Idlewild was used in building the HSDRRS.

White Oak argued the mitigation bank credits were too expensive. It instead proposed placing 158.36 acres of wetland and non-wetland forest in a conservation servitude.

The Corps rejected the proposal. It responded that bank credits were preferred and the approval process for a new mitigation plan would be too time consuming.

White Oak eventually filed a suit against the Corps arguing:

1. the Water Resource Development Act (“WRDA”) does not require private parties to pay for mitigation costs;
2. the WRDA does not require the purchase of mitigation bank credits in this particular case; and
3. the mitigation plan would constitute a violation of the Fifth Amendment takings clause.

The United States District Court granted summary judgment in favor of the Corps rejecting the three claims. White Oak appealed.

The 5th Circuit determined that in implementing mitigation requirements, the Corps should be afforded Chevron deference. Chevron deference requires a court to defer to the agency that is in charge of enforcing a statute, so long as those interpretations of the statute are reasonable in scenarios where the intent of Congress is ambiguous or Congress has not directly addressed the issue.

The 5th Circuit determined that mitigation requirements associated with the WRDA were ambiguous and that Congress had not directly addressed the issue. It deferred to the Corps since it had been charged with implementation of the WRDA. The Corps was deemed able to impose mitigation costs as needed. Such costs could be imposed, even if they affected private entities.

White Oak also argued that the Corps could not limit their mitigation options to the purchase of mitigation bank credits. However, the WRDA only requires in-kind mitigation “to the extent possible.”

The Corps was deemed to have demonstrated that White Oak’s conservation lien plan would be less efficient, timely, and effective than purchasing mitigation credits. Therefore, the Court found that the required mitigation credits were appropriate and compliant with the WRDA.

White Oak also argued that the Corps’s mitigation and purchase requirements were an unconstitutional taking under the Fifth Amendment. In order to assert a Fifth Amendment takings claim, there must be a protected property interest. Further there must be a taking of that interest.

The 5th Circuit determined that White Oak had no valid interest because it voluntarily entered into the market of which the Corps had regulatory control. There could be no protected interest in an area that was voluntarily entered. It also held that even if there was a protected interest, White Oak never demonstrated property was taken in this context.

The 5th Circuit affirmed the United States District Court’s summary judgment on all claims.

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