IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

CALISTA CORPORATION; BERING STRAITS NATIVE CORPORATION; NANA REGIONAL CORPORATION; Plaintiffs, v. CHUGACH ALASKA CORPORATION; AHTNA, INCORPORATED; and SEALASKA CORPORATION, Defendants.	Case No. 3AN-22-08565 CI

ADMINISTRATIVE RULE 37.6 REQUEST TO LIMIT ACCESS

Plaintiffs Calista Corporation, Bering Straits Native Corporation, and NANA Regional Corporation ("Plaintiffs") respectfully request pursuant to Administrative Rule 37.6(a)(2) that the Court permit the filing of a redacted complaint for public view and order that the unredacted complaint filed in this matter be sealed.[1]

Plaintiffs make this request at the behest of Chugach Alaska Corporation, AHTNA, Incorporated, and Sealaska Corporation (collectively, "Defendants"), who have asserted that a confidentiality agreement between the parties dating back to the underlying

[1] Pursuant to Supreme Court Order No. 1983, effective October 17, 2022, Administrative Rule 37.6(a) has been divided into two subsections—this request is made pursuant to Administrative Rule 37.6(a)(2) (2022) and seeks only to seal the complaint until the parties resolve their disputes regarding the confidentiality of certain information referenced in the complaint and at-issue in this vacatur action.

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arbitration being addressed in this action prohibits disclosure of the proposed redacted information in the attached version of the complaint.

Plaintiffs respectfully disagree with Defendants that the proposed redacted information is subject to any applicable agreement in this proceeding or that it meets any of the bases for non-disclosure to the public enumerated in Administrative Rule 37.6(b). Further, the proposed redacted information can be gleaned from the arbitral award at issue in this matter which is a matter of public record. Plaintiffs do not concede that the proposed redacted information is confidential and reserve all rights to challenge Defendants' assertions of confidentiality regarding the proposed redacted information as this litigation proceeds.

Nonetheless, in the interest of moving this matter forward without delay, Plaintiffs respectfully request that, for the time being, this Court order that the complaint on file in this matter be placed under seal and that the attached redacted complaint be made available for public inspection until the parties' disagreements regarding confidentiality can be resolved.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 7, 2022, a true and correct copy of the foregoing was served via electronic mail on the following:

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CALISTA CORPORATION; BERING STRAITS NATIVE CORPORATION; NANA REGIONAL CORPORATION; Plaintiffs, v. CHUGACH ALASKA CORPORATION; AHTNA, INCORPORATED; and SEALASKA CORPORATION, Defendants.	Case No. 3AN-22-____ CI **APPLICATION FOR VACATUR OF ARBITRATION AWARD UNDER AS 09.43.500 AND COMPLAINT FOR DECLARATORY JUDGMENT**

Plaintiffs Calista Corporation, Bering Straits Native Corporation, and NANA Regional Corporation, by and through counsel, hereby allege the following:

NATURE OF THE CASE

1. This case involves an arbitration decision that, in clear violation of public policy, eviscerates a key element of the Alaska Native Claims Settlement Act (ANCSA) and that, if it is allowed to stand, will cause severe economic hardship to the Alaska Native people in a significant portion of Alaska.

2. The intent of ANCSA was to promote the development of Alaska's lands and natural resources for the economic benefit of Alaska Natives.[1] Because of the diversity of Alaska's lands and the uneven distribution of Alaska's natural resources,

[1] *E.g.*, S. REP. NO. 91-925, at 46 (1970) (Submitted by the Hon. Henry M. Jackson, Chairman, Committee on Interior and Insular Affairs).

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ANCSA established a sharing mechanism in Section 7(i) that mandates the twelve Regional Corporations to share amongst themselves "70 percent of all revenues received by each Regional Corporation from the timber resources and subsurface estate patented to it." This sharing mechanism leveled the economic playing field and provided Alaska Natives a fair opportunity to benefit from Alaska's natural wealth and improve their economic circumstances.

3. But it was not perfect. In the years following ANCSA's enactment, various uncertainties arose regarding the scope of Regional Corporations' sharing obligations. After extensive litigation, all twelve of the Regional Corporations ultimately agreed in June 1982 to the Section 7(i) Settlement Agreement ("Settlement Agreement"). The Settlement Agreement reflected the parties' understanding of their sharing requirements under Section 7(i) of ANCSA, and made clear:

> Subject to the provisions of Article II, all revenues (including money, benefits and any other thing of value) received by a Corporation that are attributable to, directly related to, or generated from the exploration, development, production, lease, sale or other exploitation of, or the disposition of any interest in, the Corporation's Section 7(i) Resources shall be included in Gross Section 7(i) Revenues.

Over the ensuing decades, Section 7(i) of ANCSA, in tandem with the Settlement Agreement, resulted in the sharing of billions of dollars of revenue. The result has been a vital lifeline for the Regional Corporations that were granted natural resources of lesser value, as well as the Alaska Native Village Corporations and at-large shareholders, who,

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pursuant to Section 7(j) of ANCSA, have received a 50% share of the shared Section 7(i) revenues.[2]

4. Beginning in 2016, three Regional Corporations—AHTNA, Incorporated ("Ahtna"), Sealaska Corporation ("Sealaska"), and Chugach Alaska Corporation ("Chugach") (collectively, "Defendants")—pursued carbon sequestration projects under California's market-based cap-and-trade program. Under that program, one way that a company subject to California's regulatory scheme can secure the right to emit greenhouse gases is by purchasing carbon offset credits. California's Air Resources Board ("CARB") issues such credits to forest owners like Defendants who commit to keep any credited carbon stocks sequestered by leaving their trees standing for at least 100 years, and who, in the process, take on a host of restrictions on their lands and a series of obligations to submit to monitoring and verification of the carbon stocks in their trees.

5. Defendants' projects have generated more than $[redacted]000,000 in gross revenue. These revenues are shareable under the plain language of Section 7(i) and the Settlement Agreement because they are revenues derived directly from Defendants' timber resources. It makes no difference whether Defendants received revenue from cutting their timber or whether the revenue is received from agreeing not to cut the timber. Either way, Defendants receive revenue that is solely attributable to the existence of their

[2] Section 7(j) of ANCSA requires each Regional Corporation to share 50% of funds received under Section 7(i) with the Village Corporations and at-large shareholders in its region.

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timber resources. Yet Defendants refused to share these revenues with the nine other Regional Corporations.

6. In response to Defendants' refusal to abide by the letter and spirit of ANCSA and the Settlement Agreement, the nine "non-receiving" Regionals initiated an arbitration under the Settlement Agreement, asking for a ruling that ANCSA and the Settlement Agreement require the sharing of revenue from the sales of carbon credits. On July 15, 2022, the arbitral panel ("Panel") delivered a final award (the "Arbitration Award" or "Award") siding with Defendants. The Panel concluded that revenues generated from the sale of carbon credits by the Defendants are not subject to sharing under ANCSA or the Settlement Agreement. The Award is irreconcilable with the plain text of both ANCSA Section 7(i) and the Settlement Agreement.

7. It is difficult to overstate the magnitude of the Panel's errors; it is even more difficult to overstate the importance of this issue. This was not some run-of-the-mill commercial arbitration. The question of whether ANCSA and the Settlement Agreement require sharing of revenue streams that exist only because of a Regional Corporation's timber and land is fundamental to achieving the premise and promises of ANCSA and is vital to the economic prospects of the many Native Corporations and at-large shareholders that lack timber- or mineral-rich lands and thus depend on the longstanding sharing mechanisms in ANCSA for their financial viability. The problem is particularly acute given that eco-friendly schemes like cap-and-trade, which allow resource-holders to economically develop their land and natural resources by using them as carbon sinks,

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stand to become increasingly robust and profitable as efforts to combat climate change take on increased political salience.

8. While each Alaska Native Corporation exists for the benefit and wellbeing of their Native communities and shareholders, not all Regions are created equal. Some are naturally rich in timber; some have vast expanses of oil-rich subsurface; yet others have much less abundance. Moreover, none of the Alaska Native Village Corporations hold mineral resources and only a handful have timber resources. One of the primary purposes of Section 7(i), and the Settlement Agreement, was to ensure that Alaska Natives in less abundant Regions, and the Alaska Native Village Corporations, which received only the surface estates to their lands, have a share of the natural resources that were (unevenly) distributed to the Regional ANCs. The Settlement Agreement has effectuated that promise since 1982. The Award undoes that promise. Worse, the inequities the Award stands to perpetuate among the Native Corporations and their shareholders are anathema to the policies underlying ANCSA and the way of life of large sections of the State. The Award is, therefore, unenforceable as a violation of dominant and well-established public policies under both Alaska and federal law, and it is further subject to vacatur because the arbitrators exceeded their powers by manifestly ignoring the law.

9. The Panel believed that its result was consistent with the terms of the Settlement Agreement. Basic principles of interpretation resoundingly refute that view. Nevertheless, if the Panel's construction is truly what the Settlement Agreement requires, then the Settlement Agreement itself must fall. Because the whole point was to construct

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a lattice to facilitate the smooth functioning of ANCSA's sharing provision by filling gaps in the statute, the Settlement Agreement provides that if a court determines that it is incombatible with ANCSA, then the Settlement Agreement is prospectively void. ANCSA unequivocally requires sharing of "*all revenues* received by each Regional Corporation *from the timber resources ... patented to it pursuant to* [*ANCSA*]." Revenue streams that would not exist but for the timber resources a Regional Corporation received pursuant to ANCSA are inarguably revenues from those resources—and, as a result, the Panel's Award cannot be reconciled with ANCSA. Accordingly, if this Court does not vacate the Award as contrary to public policy or in excess of the Panel's authority, then it should issue a declaratory judgment that the Settlement Agreement is incompatible with ANCSA and prospectively void.

PARTIES

10. Plaintiff Calista Corporation ("Calista") is an Alaska Native Regional Corporation created by ANCSA and organized under the laws of Alaska. It serves more than 35,000 Yup'ik and Athabascan shareholders in the Yukon-Kuskokwim region, including along the Bering Sea coast ("Calista Region"). The Calista Region is home to 56 communities.

11. Plaintiff NANA Regional Corporation, Inc. ("NANA") is an Alaska Native Regional Corporation created by ANCSA and organized under the laws of Alaska. NANA is owned by the more than 15,000 Iñupiaq shareholders who live in or have roots in northwest Alaska. The NANA region is located in northwest Alaska, which is largely

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above the Arctic Circle and encompasses 11 villages. NANA owns 2.2 million acres within the region. In 1976, 10 of the 11 village corporations in the NANA region merged with NANA. Kotzebue has retained its own village corporation, Kikiktagruk Iñupiat Corporation ("KIC").

12. Plaintiff Bering Straits Native Corporation ("BSNC") is an Alaska Native Regional Corporation created by ANCSA and organized under the laws of Alaska. BSNC is the regional corporation for the Bering Strait region, which encompasses the majority of the Seward Peninsula and the coastal lands of eastern Norton Sound. BSNC began with 6,333 original shareholders. Today, BSNC owns and manages nearly two million acres of subsurface land selected by 17 Village Corporations. BSNC is headquartered in Nome, Alaska.

13. Defendant Chugach is an Alaska Native Regional Corporation created by ANCSA and organized under the laws of Alaska. Its region includes more than 5,000 miles of coastline along the southern tip of the Kenai Peninsula, through the Kenai Fjords, Prince William Sound, and the Gulf of Alaska ("Chugach Region") and includes the communities of Eyak (Cordova), Seward, Valdez, Port Graham, Chenega, Nanwalek (English Bay), and Tatitlek.

14. Defendant AHTNA is an Alaska Native Regional Corporation created by ANCSA and organized under the laws of Alaska. Based in Glennallen, Alaska, AHTNA is owned by more than 2,000 shareholders, the majority of whom are of Ahtna Athabascan descent. The AHTNA region encompasses the entire Copper River Basin and is bordered

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by the Alaska Range to the north, the Canadian border to the east, Denali National Park to the west, and the Chugach Mountains to the south ("AHTNA Region"). The AHTNA Region is home to eight villages, and in 1980 seven of the eight Village Corporations within the AHTNA Region merged with AHTNA.

15. Defendant Sealaska is an Alaska Native Regional Corporation created by ANCSA and organized under the laws of Alaska. It is owned by more than 24,000 Tlingit, Haida, and Tsimshian shareholders in Southeast Alaska.

JURISDICTION AND VENUE

16. The Court has subject matter jurisdiction over this matter pursuant to AS 22.10.020(a), (g), and AS 09.43.500(a)(4).

17. Article VI, § 15 of the Settlement Agreement provides that "[p]ost-arbitration proceedings shall be governed by Chapter 09.43 of the Alaska Statutes, except that as a matter of exclusive venue, any such proceedings must be filed in the Superior Court for the Third Judicial District at Anchorage, Alaska."

18. Article VIII, § 3 of the Settlement Agreement provides in relevant part: "[I]n the event that . . . (2) any of the provisions of Articles II or III (except Article II, Sections 7 and 8) are determined by final judgment of a court of competent jurisdiction (not subject to further appeal) to be incompatible with ANCSA, and such determination would materially change the amount of a Corporation's Net Section 7(i) Revenues under this Agreement, . . . the entire Agreement shall be rendered prospectively void and

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unenforceable and [the parties to the Settlement Agreement] will promptly attempt in good faith to negotiate a new Agreement."

19. This Court has personal jurisdiction over the parties pursuant to AS 09.05.015(a)(1)(C) and Article VI, § 15 of the Settlement Agreement.

20. Venue is proper in the Third Judicial District pursuant to Alaska Rule of Civil Procedure 3(e) and AS 22.10.030. Moreover, Article VI, § 15 of the Settlement Agreement mandates that the Third Judicial District at Anchorage shall be the exclusive venue for post-arbitration proceedings under the Settlement Agreement.

FACTS GIVING RISE TO CLAIMS

A. Section 7(i) of ANCSA Requires Certain Revenue Sharing

21. In 1971, Congress extinguished Alaska Natives' longstanding claims to aboriginal title—claims that predated the Organic Act of 1884[3]—by conveying more than 44 million acres and $962.5 million to corporate entities established under ANCSA.[4] ANCSA provided a novel approach to the aboriginal title issue. In most of the United States, Indian Country is a complex patchwork of lands held in trust by the federal

[3] *E.g.*, *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 278 (1955) (discussing that the 1884 Organic Act did not grant Alaska Natives any "permanent rights in the lands of Alaska" and was intended "to retain the status quo until further congressional or judicial action was taken"); *Yellen v. Confederated Tribes of Chehalis Rsrv.*, 141 S. Ct. 2434, 2438–39 (2021) ("[T]he claims of Alaska Natives to Alaskan land remained largely unsettled even following Alaska's admission to the Union as our 49th State in 1959.").

[4] 43 U.S.C. § 1601 *et seq.*; *Sturgeon v. Frost,* 577 U.S. 424, 426 (2016).

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government for Indigenous peoples, state land, and land held in fee by Tribes. ANCSA conveyed lands in fee directly to Alaska Natives by establishing corporate entities wholly owned by Alaska Native shareholders—Regional Corporations and Village Corporations.[5] Congress sought to implement the settlement "rapidly, with certainty, in conformity with the real economic and social needs" of Alaska Natives.[6] These lands are not Indian Country.[7]

22. ANCSA divided Alaska into twelve regions, "with each region composed as far as practicable of Natives having a common heritage and sharing common interests."[8] The bounds of these regions define the geographic areas ("Regions") of the twelve Regional Corporations.[9] Within each Region are Alaska Native villages. Many

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[5] *Chugach Natives v. Doyon*, 588 F.2d 723, 724 (9th Cir. 1979).

[6] 43 U.S.C. § 1601(b).

[7] While there is Indian Country under 18 U.S.C. § 1151 in Alaska, Congress deliberately avoided placing lands claimed by Alaska Natives in trust. 43 U.S.C. § 1601(b) ("[T]he settlement should be accomplished rapidly, with certainty, in conformity with the real economic and social needs of Natives, without litigation, with maximum participation by Natives in decisions affecting their rights and property, without establishing any permanent racially defined institutions, rights, privileges, or obligations, without creating a reservation system or lengthy wardship or trusteeship, and without adding to the categories of property and institutions enjoying special tax privileges or to the legislation establishing special relationships between the United States Government and the State of Alaska.").

[8] 43 U.S.C. § 1606(a).

[9] There was for a time a 13th Regional Corporation whose shares issued to Alaska Natives residing out of state. No land was conveyed to the 13th Regional Corporation, but it was capitalized. The 13th Regional Corporation was involuntarily dissolved on December 31, 2013, by the Division of Corporations, Business and Professional Licensing of the Alaska Department of Commerce, Community and Economic Development.

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of these villages incorporated as for-profit Village Corporations under ANCSA. Typically, Village Corporations own the surface estate of their lands and Regional Corporations hold the subsurface estate. The corporate entities created by ANCSA have a fiduciary obligation to create value and turn a profit for their Alaska Native shareholders. Further, the typical corporate charter of the Regional and Village Corporations includes in its statement of corporate purposes "[t]o promote the economic, social and personal well-being of the natives within the region."[10]

23. When Congress enacted ANCSA, it recognized that Alaska is a large state with diverse lands and that these lands have uneven potential for economic development. A prime driver behind ANCSA was the discovery of oil in Prudhoe Bay in the 1960s.[11] It was apparent to current and future stakeholders in the development of oil production on the North Slope that so long as Alaska Natives' claims to aboriginal title remained unresolved, there would be considerable uncertainty and risks associated with the long-range planning associated with building the infrastructure necessary to the economic

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[10] *E.g.,* Article III of the Amended and Restated Articles of Incorporation of Calista Corporation.

[11] *E.g.*, *Sturgeon v. Frost*, 136 S. Ct. 1066, 1074 (2019) ("But the State's bonanza provoked land claims from Alaska Natives. Their ancestors had lived in the area for thousands of years, and they asserted aboriginal title to much of the property the State was now taking (and more besides). When their demands threatened to impede the trans-Alaska pipeline, Congress stepped in.") (internal citations omitted); *see also* Statement of Hon. Walter J. Hickel, Governor of the State of Alaska, Hearing Before the Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs House of Representatives, Ninetieth Congress, Second Session on H.R. 11213; H.R. 15049; H.R. 17129, July 11, 1968 (referencing the discovery of oil reserves in Prudhoe Bay and the importance of resolving Alaska Natives' land claims to facilitate development).

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development of Alaska's lands. By extinguishing the claims of Alaska Natives to aboriginal title, ANCSA facilitated an influx of investment in Alaska's nascent energy industry and paved the way for Alaska's economic development.

24. However, there was a disconnect between (a) ANCSA's goals of resolving Alaska Natives' claims to aboriginal title and improving the economic circumstances of all Alaska Natives, and (b) the primary method that ANCSA utilized to accomplish those goals: The lands to be conveyed to the corporate entities created by ANCSA would not all have the same economic value, and it would not be possible to know with any precision the economic value of the lands at the time of conveyance, much less what their value would one day be.[12]

25. This was a problem because the asymmetrical land distribution of Alaska's natural resource wealth under ANCSA would not provide an equal opportunity for economic development for all of Alaska's Native people and, in fact, would ensure that

[12] *E.g.*, *Hearing Before the Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs House of Representatives*, Ninetieth Congress, *Second Session on H.R. 11213; H.R. 15049; H.R. 17129*, 90th Cong. (July 11, 1968) (statement of Emil Notti, President, Alaska Federation of Natives) ("But we realize that a realistic value must be placed on the lands. The wealth underneath those lands is not known and may not be known for many years to come. There have been some indications from recent explorations and discoveries of what some of those lands may yield with proper development, but the actual wealth can only be estimated."); statement of Donald R. Wright, First Vice President of Alaska Federation of Natives, July 11, 1968 (discussing heterogenous distribution of economically valuable land, that federal government reserved for itself most of the land with proven economic value prior to Alaska's statehood, and that "[t]he areas of Alaska that the native people reside in, the biggest population concentration, is in relatively poor land.").

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there would be clear winners and losers under the proposed legislation. Certain ANCSA corporate entities would hold lands with mineral or timber reserves with significant economic value. Others would hold vast tracts of mountains or tundra with comparatively minimal economic potential. Without some way to ensure that all Alaska Natives would benefit equitably, the fundamental promise of ANCSA could not be achieved.

26. Section 7(i) of ANCSA—codified as 43 U.S.C. § 1606(i)—was proposed, and ultimately adopted, as a remedy.[13]

27. Section 7(i) is ANCSA's principal sharing mechanism. It lessens the disparities in the value of the natural resources conveyed to the Alaska Native Regional and Village Corporations by requiring that "70 percent of all revenues received by each Regional Corporation *from* the timber resources and subsurface estate patented to it pursuant to this chapter shall be divided annually by the Regional Corporation among all

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[13] There were multiple iterations of ANCSA advanced by both the House and the Senate prior to the version of the bill that was enacted in 1971. Revenue sharing was first proposed in S. 3859, 90th Cong. (1968). The mechanism in S. 3859 required that five percent of shareable revenues be paid to a statewide corporation tasked with the economic development of Alaska Natives. Versions of the single statewide corporation to economically benefit Alaska Natives generally were present in many of the draft bills leading up to ANCSA. Although ANCSA did not ultimately establish such a statewide entity, the principle of using Alaska's resources to benefit all Alaska Natives did in the form of the revenue redistribution mechanism found in Section 7(i). In fact, a key reason that a regional corporation structure was used instead of a statewide development corporation was to avoid the zero-sum game between the Regions within a single statewide corporation and allow each Region to efficiently manage its own affairs. *E.g.*, *Hearing on S. 35 Before the Committee on Interior and Insular Affairs*, 92d Congress, (Feb. 9, 1971) (statement Donald R. Wright, President, Alaska Federation of Natives; accompanied by Edward Weinberg and Kenneth Bass). The equitable allocation of resources between the Regional Corporations was necessary to this aim.

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twelve Regional Corporations organized pursuant to this section according to the number of Natives enrolled in each region pursuant to section 1604 of this title."[14]

28. In addition to Section 7(i), Section 7(j) of ANCSA further requires that Regional Corporations share fifty percent of their received Section 7(i) revenues with their respective Village Corporations "and the class of stockholders who are not residents of those villages."[15]

29. Without Sections 7(i) and 7(j), ANCSA could not have garnered the support of Alaska Native leaders from across the state necessary to avoid protracted litigation regarding the legitimacy of Congress's extinguishment of Alaska Natives' claims to aboriginal title.

30. Since 1971, the Regional Corporations have shared among themselves and with the Village Corporations more than $2.5 billion in revenue from the Regional Corporations' subsurface and timber resources,[16] with the majority of that revenue coming from the mining, oil, and gas projects of resource-rich Arctic Slope Regional

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[14] 43 U.S.C. § 1606(i) (emphasis added).

[15] 43 U.S.C. § 1606(j).

[16] McDowell Group Report *A Summary of the Economic Benefits of ANCSA Section 7(i) and 7(j) Revenue* 2018 (McDowell Report), available at https://www.mcdowellgroup.net/wp-content/uploads/2018/03/7i7j-study-summary_final.pdf.

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Corporation ("ASRC"), Cook Inlet Region, Inc. ("CIRI"), Doyon, and NANA.[17] The distribution of these sums have been very significant, and in some cases essential, to many of the receiving corporations (both regional and village corporations), especially in periods of financial difficulty. And today's receiving corporations may be tomorrow's distributors.

31. Over the course of the nearly forty years in which the Settlement Agreement has been in effect, every Regional Corporation has had periods in which it has received more Section 7(i) revenue than it paid out.[18] At the same time, the Regional Corporations repeatedly have found new ways to monetize their resources through methods that were not explicitly envisioned at the time of the 1982 Settlement Agreement, such as underground gas storage using the pore space in the subsurface estate. These revenues nevertheless have been shared, consistent with the plain text of Sections 7(i) and 7(j).[19]

B. The Settlement Agreement Resolving 7(i) Disputes Among Regional Corporations

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[17] *Id.* at 2 (noting that, between FY1982 and FY2015, total cumulative 7(i) revenue included "$1.4 billion from oil and gas development (largely from ASRC and CIRI lands)," "$826.2 million from mining development (largely from NANA and Doyon lands)," and "$275.4 million from timber sales (largely from Sealaska, Koniag, Chugach, and CIRI lands)").

[18] *Id.* at 4.

[19] *See City of Kenai v. Cook Inlet Nat. Gas Storage Alaska, LLC*, 373 P.3d 473, 483 (Alaska 2016) (finding underground pore space used for gas storage to be part of subsurface mineral estate).

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32. Although Section 7(i) is simple on its face—70 percent of all revenues "from" the timber and subsurface estates patented to the Regional Corporations must be shared—many questions arose surrounding its implementation. These questions resulted in a decade of litigation over what types of proceeds were subject to revenue sharing, under what conditions, and how "revenues" should be calculated. To minimize their sharing obligations, some of the Regional Corporations advanced narrow interpretations of Section 7(i).[20] Other Regional Corporations advanced broader interpretations that favored sharing.[21]

33. The latter view prevailed, as the cases interpreting Section 7(i) made clear: The statute's revenue sharing provision is extremely broad with respect to the revenues required to be shared. Court decisions held, for instance, that "the term 'all revenues' should include benefits of every sort so long as such are received by a regional corporation or third persons in exchange for rights granted in the timber resources and subsurface estate."[22] The case law likewise made clear that, in addition to revenues directly linked to 7(i) resources, the phrase "revenues . . . from the timber resources and subsurface estate" includes any revenues "that are attributable to, directly related to, or generated by

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[20] Report of the Special Master at 4 (Mar. 28, 1983). *Aleut Corp. v. Arctic Slope Regional Corp.*, No. A75-53 CV (D. Alaska) ("Report of the Special Master").

[21] Report of the Special Master at 4; *Aleut Corp. v. Arctic Slope Regional Corp.*, No. A75-53 CV (D.Alaska).

[22] *Aleut Corp. v. Arctic Slope Regional Corp.*, 417 F.Supp. 900, 903 (D.Alaska 1976) ("*Aleut II*").

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the acquisition of an interest in" a Regional Corporation's timber or subsurface resources, including, for example, revenues derived from third parties' exploration for 7(i) resources, even if no such resources are found or developed.[23]

34. Given the large number of sharing disputes that arose and the concern that the disputes would continue indefinitely, the Regional Corporations eventually agreed to resolve disputes surrounding sharing obligations in a comprehensive document that was intended to minimize if not completely avoid future disputes and litigation. This process culminated with the Section 7(i) Settlement Agreement. The Settlement Agreement memorializes the Regional Corporations' negotiated resolution of how to share revenues "from" the subsurface and timber estates patented to ANCSA corporations under Section 7(i) of ANCSA.

35. The Special Master charged with evaluating the Settlement Agreement emphasized the breadth of the definitions of Section 7(i) Resources and Gross Section 7(i) Revenue, as well as the parties' intent that, in applying those definitions, the substance and not the form of a transaction should govern:

> The Agreement's provisions for revenue accounting follow the expansive definition of § 7(i) Revenue previously expressed by the Court. With minor exceptions, any consideration received by a Regional Corporation attributable to the sale or disposition of any interest in its § 7(i) resources must be included in distributable revenues. Compliance rules were written with a view towards assuring that the substance and not the form of a

[23] *Aleut Corp. v. Arctic Slope Regional Corp.*, 484 F.Supp. 482, 485 (D.Alaska 1980) ("*Aleut V*")..

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transaction would govern the determination and characterization of revenues.[24]

36. The Special Master further observed that "[t]o prevent the manipulation of shareable and non-shareable revenues received in a common transaction, the Agreement adopts a rebuttable presumption that any revenues connected with any disposition of subsurface or timber resources are shareable."[25]

C. The Carbon Credit Program Giving Rise to the Present Dispute

37. The scientific consensus is that the world's climate is changing and that the primary driver of this change is the emission of greenhouse gases such as methane and carbon dioxide from human economic activities.[26] The agriculture, energy, and transportation sectors account for most greenhouse gas emissions.[27] Although there is a scientific consensus that the climate is changing, *i.e.*, getting warmer, and that this change is brought about by human activities, the question of what policies governments should implement to address this issue is the subject of robust debate.[28]

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[24] Report of the Special Master at 19.

[25] *Id.* at 20.

[26] *See, e.g.*, *Sagoonick v. State*, 503 P.3d 777, 789 (Alaska 2022), *reh'g denied* (Feb. 25, 2022).

[27] EPA, Sources of Greenhouse Gas Emissions, available at: epa.gov/ghgemissions/sources-greenhouse-gas-emissions.

[28] *E.g.*, *Sagoonick*, 503 P.3d at 790 (stating that the Alaska Department of Environmental Conservation "advised [youth plaintiffs involved in climate litigation] that resource development and environmental policy questions are 'best addressed in partnership with the Legislature' and encouraged them 'to continue to engage' with the executive and legislative branches 'in seeking creative solutions to addressing climate change in Alaska.'").

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38. One policy that has gained some traction globally is known as cap-and-trade. In essence, cap-and-trade systems work by establishing a ceiling of greenhouse gas emissions within the jurisdiction of the government enacting the scheme. Emitters of greenhouse gases within the regulatory structure of a cap-and-trade system are constrained by allowances, which grant them a legal right to emit a certain amount of greenhouse gases. Sometimes the total amount of allowances under the cap are distributed for free. Sometimes the allowances are auctioned. Regardless, the allowances typically become tradeable, which theoretically incentivizes reduced emissions by allowing emitters to financially benefit from reducing their emissions by selling allowances that are no longer needed on the open market, as well as increasing the costs associated with exceeding the emissions permitted by allowances over time.

39. California has adopted a cap-and-trade program that is managed by CARB. A component of California's regulatory scheme is the Compliance Offset Program ("COP"). Entities regulated under California's Cap-and-Trade Program ("Program") may offset a small percentage of their emissions by purchasing carbon credits issued pursuant to the COP. These credits are derived from carbon sequestration projects ("Offset Projects") managed by CARB.

40. In essence, owners of forest lands that meet certain criteria ("Offset Project Operators") may operate an Offset Project by agreeing to sequester a baseline amount of carbon in their timber estates for a period of 100 years. In exchange for the sequestration of carbon, Offset Project Operators receive carbon credits issued by CARB in proportion

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to the baseline amount of sequestered carbon in the project. Owners may then sell their carbon credits on the open market to entities regulated under California's Cap-and-Trade Program that need to offset carbon production and that have not maxed out the amount of carbon that may be offset via carbon credits under the COP parameters.

D. Defendants' Participation in the Carbon Credit Program Has Yielded Lucrative Returns; Defendants Have Not Shared These Revenues with Plaintiffs.

41. Beginning in 2016, each Defendant developed Improved Forest Management ("IFM") Offset Projects approved by CARB that resulted in the issuance of carbon offset credits by CARB to Defendants. Defendants subsequently earned substantial revenues by selling those credits, directly or indirectly, to large California emitters of greenhouse gases. To date, Defendants have generated more than $[redacted] million by selling a portion of the carbon offset credits they have received through the CARB program.

42. The revenues Defendants have received from their receipts and sale of the carbon credits are plainly shareable under the language of ANCSA Section 7(i) and the Settlement Agreement. Defendants are using a key ANCSA resource–their timber–and monetizing it by agreeing to let this timber stand in exchange for payment from the carbon credit program.

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43. Nevertheless, to avoid sharing [redacted] Defendants have taken the illogical and untenable position that the carbon credit revenues from their timber are attributable to an "other natural deposit" or a "mineral right," as opposed to a "block of timber."

E. The Carbon Credits Arbitration

44. On June 20, 2018, Calista filed a *Notice of Demand for Arbitration* pursuant to the Settlement Agreement's arbitration clause.[30] The question submitted to arbitration was: "Whether revenues generated from the sale of carbon credits by a [Regional] Corporation in the CARB carbon offset market attributable to the development or non-development of timber resources are subject to sharing with the other Corporations pursuant to Section 7(i) and the Settlement Agreement." Eight additional Regional Corporations joined Calista's arbitration claim against Defendants.

45. Respondents later submitted their own formulation, which the Panel adopted: "Are revenues generated from the sale of carbon offset credits by the

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[29] [redacted]

[30] Settlement Agreement, Article VI, Section I, which provides in relevant part:

Except as otherwise provided in this Section, any disputes arising under this Agreement between or among the Corporations may be submitted to arbitration in the manner provided for in this article. Arbitration under this Article shall be the exclusive means of resolving such disputes.

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Respondents subject to sharing with the other Corporations pursuant to Section 7(i) of ANCSA and the Section 7(i) Settlement Agreement?"

46. The Panel bifurcated the question of shareability from the accounting issues that would need to be resolved if the carbon credits were found to be shareable. After several pandemic-related delays, the arbitration hearing on shareability was held and completed by video conference on December 13-17 and 20, 2021. Closing oral arguments occurred on February 24, 2022 in person in Seattle, Washington.

F. Arbitration Panel Award

47. The Panel delivered its Arbitration Award to the parties on July 15, 2022. The Panel concluded that the revenues Defendants derived from the sale of carbon credits obtained by their agreement to leave their timber resources in place are not subject to sharing under either ANCSA Section 7(i) or the Settlement Agreement because the Regional Corporations participating in Offset Projects did not dispose of any interest in their timber resources—despite the fact that each respondent Corporation encumbered significant portions of their timber resources for 100 years.

48. The Panel decided that two district court decisions from the 1970s were binding precedent that decided the issue. According to the Panel, "the meaning of [ANCSA's] phrase 'revenues received by each Regional Corporation from the timber resources and subsurface estate patented to it pursuant to this chapter' had been settled by

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binding judicial interpretation in *Aleut II* and *Aleut V*."[31] The Panel read these district court decisions as requiring that, for any timber or subsurface revenue to be shareable, the revenues must be "received because of the acquisition of an interest in" the timber or subsurface resources, even though "[t]he term 'acquisition of an interest' does not appear in the spare language of Section 7(i)."[32]

49. The Panel also relied on a Federal Circuit decision, *Bay View, Inc. v. United States* ("*Bay View III*"), which held that sales of Net Operating Loss ("NOL") credits were not subject to sharing under Section 7(i) because they were not sales of timber or subsurface resources, but rather were "revenues received from . . . investments in business activities."[33] In reaching that conclusion, the court in *Bay View III* observed that "[i]n a distant sense, the NOL proceeds have some connection to the timber resources."[34] But because the NOLs at issue in that case only happened to be related to timber, and could have been derived from any business losses, they were not Section 7(i) shareable.[35] The

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[31] Arbitration Award at 8.

[32] *Id.*

[33] *Bay View, Inc. v. United States*, 278 F.3d 1259, 1264 (Fed. Cir. 2001) ("*Bay View III*"). The question before the court there was whether Congress's enactment of an amendment to ANCSA that precluded revenue sharing for tax credits was a constitutional taking insofar as it deprived downstream beneficiaries of Section 7(j) revenues. The court did not address that question, because it concluded that the NOL revenues were not Section 7(i) shareable from the outset. To illustrate the point, the court commented that "private corporations that purchased NOLs from the Regional Corporations did not acquire any interest in timber or subsurface estates." *Id.*

[34] *Id.*

[35] *Id.*

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Panel here read this decision as confirming its view that an "interest" needed to be conveyed before revenues received from timber or subsurface resources were subject to sharing under Section 7(i) and the Settlement Agreement—even though carbon credits, unlike ordinary NOLs, do not just happen to derive from timber; without timber, there would be no carbon credits to speak of.[36]

50. The Panel then concluded that Defendants did not transfer an "interest" in their timber resources by participating in the carbon credit program. The Panel found that Defendants made two commitments to obtain carbon credits under the COP program: "First, they committed themselves to maintain the promised carbon stocks within the project boundaries for 100 years . . . and otherwise comply with the terms of their IFM projects as approved by CARB; [and] . . . [s]econd, [Defendants] committed themselves to comply with CARB's enforcement regime, including CARB's credit-replacement and penalties provisions, if they failed to comply with their IFM program commitments or their participation in those programs is terminated in the future."[37] The Panel concluded that neither commitment "involved a transfer to CARB of any legal or possessory interest in the timber resources originally patented to [Defendants] that are now covered by their IFM programs."[38] Notably, the Panel ignored the fact that Defendants' agreement to comply with CARB's enforcement regime involved the disposition of their right to

[36] Arbitration Award at 22–25.

[37] *Id.* at 13.

[38] *Id.* at 13–14.

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exclude inspectors from their timber estates: Defendants' IFMs mandate periodic third-party physical inspection of their timber reserves for the life of the projects.[39]

51. After deciding that the carbon credit revenues Defendants Received from their timber resources were not shareable under ANCSA Section 7(i), the Panel turned to the Settlement Agreement and concluded that it too did not require that revenues received from the sale of carbon credits be shared.

52. The Panel first concluded that, in entering into the Settlement Agreement, the Regional Corporations did not intend to overrule the *Aleut* district court decisions, which read an "acquisition of an interest" requirement into ANCSA that is not there. From that faulty starting point, the Panel moved on to wholly reject the evidence that the Regional Corporations (the parties to the Settlement Agreement) intentionally used the broadest possible language in defining shareable revenues so as to encompass future types of transactions not specifically contemplated at the time of contracting in order to prevent

[39] *E.g.*, *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021) (holding that a state law that periodically allowed union organizers onto private farmland for short windows of time imposed an easement in gross without compensating the landowners and was a taking because it interfered with landowners' right to exclude and stating "[t]he right to exclude is one of the most treasured rights of property ownership. According to Blackstone, the very idea of property entails that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe. In less exuberant terms, we have stated that the right to exclude is universally held to be a fundamental element of the property right, and is one of the most essential sticks in the bundle of rights that are commonly characterized as property.") (citations and internal quotation marks omitted)).

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the gamesmanship that had resulted in the litigation necessitating the Settlement Agreement, as well as future litigation.[40]

53. Despite this evidence, the Panel concluded that the Settlement Agreement was only meant to be an accounting charter for known 7(i) revenue streams. In the Panel's telling, the Settlement Agreement merely codified existing 7(i) case law and nothing more, despite the Settlement Agreement's use of "other exploitation" language that was not present in any of the case law predating it. Driven by that aberrant understanding, the Panel also proceeded to misinterpret that case law consistent with its narrow and formalistic view of the 7(i) sharing provision in ANCSA itself. The Panel said the parties' "reasonable expectations" and "intent at the time the contract was made" were to establish a uniform set of accounting rules to govern the calculation of shareable net revenues.[41]

G. The Panel Decision Misread ANCSA and the Settlement Agreement.

54. The supposed requirement the Panel imposed—that, for revenue to be shareable, there must first be an "acquisition of an interest" in the subsurface or timber resources by a third party—is found nowhere in the statute or the Settlement Agreement. To the contrary, as noted above, Section 7(i) and the Settlement Agreement speak in incredibly broad terms regarding what revenues are shareable. The Panel created this supposed "rule" out of whole cloth, and in doing so, ignored the plain text and purpose behind ANCSA Section 7(i) and the Settlement Agreement.

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[40] Arbitration Award at 16 n.23.

[41] *Id.* at 17.

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55. As noted above, Section 7(i) provides in relevant part:

> 70 percent of all revenues received by each Regional Corporation from the timber resources and subsurface estates . . . shall be divided annually by the Regional Corporation among all twelve Regional Corporations . . . according to the number of Natives enrolled in the region.[42]

The Settlement Agreement, which reflects all the Regional Corporations' mutual understanding of Section 7(i), provides in Article I, Section 2(7)—Gross Section 7(i) Revenues:

> Subject to the provisions of Article II, all revenues (including money, benefits and any other thing of value) received by a Corporation that are attributable to, directly related to, or generated from the exploration, development, production, lease, sale or other exploitation of, or the disposition of any interest in, the Corporation's Section 7(i) Resources shall be included in Gross Section 7(i) Revenues.

56. Here, there is no question Defendants are receiving "revenues from" their "timber resources," and are "exploiting" these resources by binding themselves to keep the timber in place for 100 years. It makes no difference whether Defendants are receiving revenue from cutting and selling the timber as opposed to identifying their timber as commercially viable but accepting payment to instead let their timber stand.

57. The Panel's conclusion that both ANCSA and the Settlement Agreement have a hidden mandate that only revenues from the "acquisition of an interest" in timber or subsurface resources are shareable traces solely to an outright misreading of the *Aleut* decisions noted above. Putting aside that these decisions are not actually binding

[42] 43 U.S.C. § 1606(i).

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"precedent," they do not stand for the proposition that the *only* revenue that is shareable is revenue derived from the "acquisition of an interest" in the resource. Rather, the decisions merely concluded that whenever revenue is received from an acquisition of an interest in the resource, that revenue is shareable. Nowhere in the decisions did the district court say *that in every circumstance there must be a transfer of an interest in the resource for it to be sharable.* The court in the *Aleut* decisions was not creating a threshold requirement; it was making clear that any time there is a transfer of an interest in the resource, the resulting revenue is shareable, no matter how the revenue is classified.

58. Specifically, in *Aleut II*, the district court addressed an argument advanced by ASRC that revenue realized from leasing its subsurface resource was not shareable under Section 7(i) when no actual oil and gas resources were located. The court summarily rejected that position. The court observed that the statutory phrase "all revenues is a broad term," and that Section 7(i)'s sharing obligations accordingly must include "revenues received because of an acquisition of an interest in the subsurface estate."[43] The court then held that "the sharing requirements of section 7(i) do not depend on whether a subsurface resource is discovered, produced, or marketed."[44] In context, it is clear that the court's reference to "acquisition of an interest in the subsurface estate" was meant to convey that revenue is shareable any time there is such a transfer. Nothing

[43] *Aleut II*, 417 F.Supp. at 904.

[44] *Id.*

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in the *Aleut II* decision states that the "acquisition of an interest" is a mandatory threshold requirement for any revenue to be shareable.[45]

59. Subsequently, in *Aleut V*, the same district court was again tasked with deciding if revenue ASRC generated from its subsurface estate was subject to Section 7(i) sharing. There, ASRC leased rights to Marathon Oil Company but claimed the resulting revenues "were not paid for oil and gas but were consideration for a variety of other services and property interests independent of the subsurface estate."[46] The court rejected this argument and stated "no matter how each agreement was structured and no matter how the payments were allocated by the language of the agreement, the ultimate object . . . was to give the oil companies the right to explore for and develop oil and gas resources on Arctic Slope land conveyed under ANCSA."[47] The court not only concluded that Section 7(i) must be interpreted broadly so as to further its "obvious egalitarian purpose," but also reiterated its statement from *Aleut II* that courts and Corporations alike must avoid "interpretations which would 'encourage the resource controlling corporation to

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[45] By contrast, the court did conclude that for *nonmonetary* benefits, these revenues are sharable "so long as such are received by a regional corporation or third parties in exchange for rights granted in the timber resources and subsurface estate." *Aleut II*, 417 F.Supp. at 904.

[46] *Aleut V*, 484 F.Supp. at 484.

[47] *Id.*

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devise all sorts of contractual schemes for maximizing its present revenues at the expense of its sister corporations.'"[48]

60. It was in this context that the court issued its guidance for when revenues are subject to sharing and stated "revenues received by a regional corporation that are attributable to, or generated by the acquisition of an interest in the corporation's subsurface estate are revenues subject to the sharing provisions of section 7(i)."[49] Again, the court was making clear that when there is a transfer of an interest, the revenue is shareable. It never said there must *always* be an "acquisition of an interest" for revenue to be shareable; nor do the facts of either *Aleut II or Aleut V* support this interpretation.

61. The Federal Circuit's decision in *Bay View III* likewise does not support the Panel's manufactured "acquisition of an interest" rule. There, the issue was whether NOL credits were subject to revenue sharing such that a Congressional enactment rendering them not shareable gave rise to a potential takings claim. The Court of Federal Claims concluded that revenue realized from the sale of NOL credits was not shareable, and the Federal Circuit affirmed.[50] These decisions were primarily based on legislative history from ANCSA that Section 7(i) "does not apply to revenues received by the Regional

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[48] *Id.* (quoting *Aleut v. Arctic Slope Regional Corp.*, 410 F.Supp. 1196, 1200 (D. Alaska 1976) ("*Aleut I*")).

[49] *Aleut V*, 484 F.Supp. at 485.

[50] *Bay View, Inc. v. United States*, 278 F.3d 1259, 1264 (Fed. Cir. 2001) ("*Bay View III*") (quoting Conf. Rep. No. 92-746, 92d Cong. 1st Sess. (1971) (emphasis in original)).

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Corporations from their investment in *business* activities."[51] The Federal Circuit further stated that while the NOL credits had a connection to the timber resource because the timber sales generated the NOLs, the sale of the NOL credits was "a separate business transaction without any direct relationship to the tangible resources patented to the Regional Corporations." [52] Nowhere in any of the *Bay View* decisions did a court say there must always be a transfer of an interest for revenue to be shareable.

62. Stripped of its misreading of the *Aleut* and *Bay View* decisions, the Panel's reading of ANCSA cannot stand. The broad language of Section 7(i), coupled with ANCSA's "obvious egalitarian purpose" must mean that any revenue received "from" an agreement to not harvest timber resources should be treated the same as revenue received from an agreement to harvest the resource. Claiming the former transaction is a "credit" derived from a "separate financial transaction" is no better than the arguments the court rejected in *Aleut V* as "contractual schemes for maximizing [] present revenues at the expense of [] sister corporations."[53]

63. Although the Panel relied heavily on federal case law that it shortsightedly misinterpreted, its fundamental task was to interpret the Settlement Agreement itself and

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[51] *Id.* at 1264.

[52] *Id.*

[53] *Aleut V*, 484 F.Supp at 485. By contrast, the court did conclude that for *nonmonetary* benefits, these revenues are sharable "so long as such are received by a regional corporation or third parties in exchange for rights granted in the timber resources and subsurface estate." *Aleut II*, 417 F.Supp. at 904.

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decide whether carbon credit revenues are shareable under the Settlement Agreement. Under the Settlement Agreement, revenues from the "disposition of any interest" in Section 7(i) resources are unquestionably shareable. But the Settlement Agreement also provides that revenues from "other exploitation[s]" of Section 7(i) resources are shareable. Although the parties to the Settlement Agreement contractually agreed that revenues from the disposition of any interest *or* other exploitation of Section 7(i) resources are shareable, the Panel concluded that the parties intended "other exploitation" to also mean the disposition of any interest. The Panel said "the most natural reading of that definition's reference to 'other exploitation' is as a reference to other timber transfer or harvesting activities not already captured by the terms 'development, production, lease, [or] sale' of timber resources, and as a term expressly made subject to the requirements of Article II, Section 9 of the Settlement Agreement concerning how shareable revenues derived from a Corporation's timber harvesting for its own account would be calculated."[54] The Panel's reasoning essentially reads the phrase "or other exploitation" in the Settlement Agreement as a nullity with no separate or independent effect.

64. The Panel also misread the Settlement Agreement when it stated that nowhere in the Settlement Agreement did the parties agree to "amend the then-applicable judicial interpretation of the language of Section 7(i) by abandoning the requirement of those authorities that only revenues derived from the 'acquisition of an interest' in the

[54] Arbitration Award at 29.

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patented resources were subject to the sharing obligation."[55] As described above, there was never any such rule, so therefore there was no need to overrule it.

65. Further, the Panel disregarded that by entering into the Settlement Agreement, the parties were resolving the very litigation that gave rise to the alleged "rule" and that the parties were clearly setting forth amongst themselves their understanding of ANCSA's clear directives on revenue sharing. First, the parties' addition of the "other exploitation" language to the "disposition of an interest" language from Judge von der Heydt's opinions in the *Aleut* cases in no way overrules those opinions; it harmonizes with the court's understanding of the "obvious egalitarian purpose" of Section 7(i), as well as the substance of Judge von der Heydt's opinions, which interpreted Section 7(i) as broadly as possible, each time holding that all of the at-issue revenues from the disputed transactions were 7(i) shareable.

66. Second, the Panel placed great weight on the fact that the parties did not address in finite detail in the mechanical sections of the Settlement Agreement how revenues from transactions that at the time of contracting were unknown would be shareable. That was, in fact, the point of including the "other exploitation" language front and center in the definitional section of the Settlement Agreement – to allow for the flexibility necessary to withstand change over time by incorporating transactions that were, at the time, unknown into those later mechanical sections by reference to "other

[55] *Id.* at 30.

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exploitations" that were necessarily not specifically defined at the time of contracting. Because the Panel unimaginatively and paternalistically concluded that the parties did not anticipate that the economy would change, it has placed the enforceability of the entire Agreement at risk.

67. In short, the Panel's decision is contrary to ANCSA, undermines the parties' Settlement Agreement, and renders the Agreement inconsistent with ANCSA.

H. The Panel's Decision Will Have Serious Collateral Consequences.

68. The Panel's decision to destabilize Section 7(i) disrupts ANCSA's center of gravity and will have profound negative consequences for Regional Corporations, Village Corporations, and ANC shareholders.

69. *First*, despite the strong public policy in favor of sharing codified as 43 U.S.C. § 1606(i)-(j), the reality is that there are already wealth disparities between the Regional and Village Corporations and their Alaska Native shareholders in Alaska's twelve ANCSA regions; the Arbitration Award will exacerbate those disparities by providing the few Regional Corporations with timber holdings eligible for carbon credits programs with a substantial economic windfall that will inure exclusively to their own benefit. This windfall undoubtedly comes at the expense of Regional Corporations lacking in commercially viable timber estates, as well as at the expense of all Village Corporations and at-large shareholders, which and who will be deprived of any share of the value realized by the Defendants from their timber resources.

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70. *Second*, those conflicts will inevitably and perversely include the types of gamesmanship that the Settlement Agreement was designed to prevent. With the Panel's formalistic "disposition of an interest" test in place as the exclusive definition of shareable 7(i) revenues, the Regional Corporations will be incentivized to devise ever-more-complicated schemes to extract revenues from their 7(i) resources in ways that do not involve the acquisition of a property interest. This result will create financial friction and result in a substantial increase in transactional costs as attorneys and financiers scheme to structure means to monetize 7(i) resources that, as a technical matter, allow Regional Corporations to exploit or encumbering their 7(i) resources without having to share the revenues from such exploitation.

71. *Third*, the Panel's decision fosters and encourages a zero-sum game that discourages productive business relationships among Regional and Village Corporations, as those with lands with significant economic value will necessarily continue to try and prevent sharing with those who are not so fortunate.

72. *Finally*, the Arbitration Award guarantees a race to the bottom. Even those entities and persons who initially benefit from the windfall provided by carbon credit revenues will ultimately suffer due to the long-term damage to relationships between other ANCSA corporations and their shareholders. Fundamentally, the foundation of the public policies codified in Sections 7(i) and 7(j) are fairness and sharing. The Arbitration Award is contrary to these explicit and broadly accepted policies. Plaintiffs accordingly

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bring this vacatur action in order to preserve the integrity of the Settlement Agreement and give effect to Congress's intent in enacting ANCSA.

COUNT I

Vacatur of the Carbon Credits Arbitration Award Under Public Policy Exception to the Enforcement of Arbitration Decisions

73. All foregoing allegations are incorporated into this count.

74. Alaska law recognizes a public policy exception to the enforcement of arbitration awards "where doing so would violate an explicit, well defined, and dominant public policy."[56] "The public policy exception . . . requires a reviewing court to assess the contract as interpreted by the arbitrator in determining whether the court should refrain from enforcing the arbitration award."[57] "[T]he public policy exception to the enforcement of arbitration awards must be narrow and that the public policy at issue 'must be explicit, well defined, and dominant . . . [and] [i]t must be ascertained by reference to the laws and legal precedents and *not from general considerations of supposed public interests*.'"[58] The Alaska Supreme Court applied this exception in

[56] *State v. Pub. Safety Emps. Ass'n*, 257 P.3d 151, 158 (Alaska 2011) (internal quotation marks and citation omitted).

[57] *McAlpine v. Priddle*, 321 P.3d 345, 351 (Alaska 2014) (holding that an arbitral award was not unenforceable as contrary to public policy because the arbitral panel read out of the applicable contract language that was contrary to public policy).

[58] *State v. Pub. Safety Emps. Ass'n*, 323 P.3d 670, 677 (Alaska 2014) (quoting *E. Associated Coal Corp. v. United Mine Workers of Am., Dist. 17,* 531 U.S. 57, 62 (2000) (alterations and emphasis in original)).

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concluding that a judgment based on a fee arbitration award was invalid because the underlying fee agreement violated ANCSA.[59]

75. Here, the Arbitration Panel issued a decision that is directly contrary to ANCSA and the Settlement Agreement and does serious violence to the intent behind both, which is to provide for broad egalitarian sharing of revenues to ameliorate the fact that economic value of the lands and resources conveyed under ANSCA were widely disparate. The Panel has placed an artificial limitation on Section 7(i) and the Settlement Agreement by limiting sharable revenues to those resulting only from the "acquisition of an interest" in the subsurface or timber resources by third parties and by espousing an overly-restrictive and incorrect rule of what constitutes the acquisition of an interest in the property interests subject to Section 7(i) sharing. These incorrectly derived limitations allow significant revenues received as a direct result of the ownership and exploitation of the subsurface and timber resources (like the sale of carbon credits at issue here) to escape revenue sharing, and they will invite future malfeasance by incentivizing contracts that work to evade the "acquisition of an interest" in the resource subject to the contract.

76. Plaintiffs are entitled to an order vacating the Arbitration Award as the Panel's interpretation of the Settlement Agreement is clearly contrary to the explicit, well-established and dominant public policy—as established by ANCSA and affirmed by case law interpreting ANCSA and Section 7(i)—requiring that 70 percent of revenues from

[59] *Leisnoi, Inc. v. Merdes & Merdes*, P.C., 307 P.3d 879, 888 (Alaska 2013).

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timber estates held by Regional Corporations must be shared with other Regional Corporations, Village Corporations, and at-large shareholders.[60]

COUNT II

Vacatur of the Carbon Credits Arbitration Award Because the Panel Exceeded Its Powers

77. All foregoing allegations are incorporated into this count.

78. Under Alaska's Arbitration Act, "[c]laims that the arbitrator construed the contract in a manner exceeding his or her powers are reviewable" and must "be reversed if all fair and reasonable minds would agree that the construction of the contract made by the arbitrators(s) was not possible under a fair interpretation of the contract."[61]

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[60] *E.g.*, *Oliver v. Sealaska Corp.*, 192 F.3d 1220, 1223 (9th Cir. 1999) ("Because of the disparity in natural wealth among the twelve regions, § 7(i) provides for revenue sharing . . . ."); *Old Harbor Native Corp. v. Comm'r*, 104 T.C. 191, 193–94 (1995) ("Congress included a revenue-sharing system within ANCSA to achieve a rough equality in assets among all Alaskan natives covered by ANCSA."); *Koniag, Inc. v. Koncor Forest Res.*, 39 F.3d 991, 996–97 (9th Cir. 1994) (discussing that Congress's intent in granting land pursuant to ANCSA was to facilitate economic develop benefiting Alaska Natives); *Aleut Corp. v. Arctic Slope Reg'l Corp.*, 484 F.Supp. 482, 484–85 (D. Alaska 1980) (recognizing that section 7(i) is to be interpreted broadly so as to further the section's "obvious egalitarian purpose.").

[61] *Kinn v. Alaska Sales & Service, Inc.*, 144 P.3d 474, 487 (Alaska 2006); AS § 09.43.120(a)(3). Other jurisdictions likewise recognize that arbitral decisions that manifestly disregard the law or that are completely irrational are unenforceable but consider these bases for vacatur extra-statutory. *See, e.g.*, *Hoffman v. Cargill Inc.*, 236 F.3d 458, 461–62 (8th Cir. 2001); *Nappa Construction Management, LLC v. Flynn*, 152 A.3d 1128, 1132 (R.I. 2017) ("It is well settled that an arbitrator exceeds his or her powers . . . if the arbitration award fails to draw its essence from the agreement, if it was not based upon a passably plausible interpretation thereof, if it manifestly disregarded a contractual provision, or if it reached an irrational result." (internal quotations omitted)) (vacating arbitrator interpretation of a construction contract).

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79. The Award here fails that standard.

80. The whole point of the Settlement Agreement was to ensure a broad and equitable sharing mechanism so that Alaska Natives in temporarily or permanently resource-poor Regions would not be left behind. Consistent with that intention, the parties to the Settlement Agreement deliberately adopted broad language: revenues "from" 7(i) resources must be shareable or the Settlement Agreement would be unenforceable as contrary to federal law. This broad language ensures, among other things, that all revenues related to leasing and exploration of lands that may hold 7(i) resources are shareable, even when no such resources are ever found.

81. This breadth was not an accident. It was meant to mirror and implement the broad language in ANCSA that makes all revenues "from" 7(i) resources shareable under Section 7(i) and 7(j). It was part and parcel with the entire endeavor, starting with ANCSA and moving forward, to ensure the wellbeing of all Alaska Natives.

82. The Settlement Agreement recognized that the validity and enforceability of the Settlement Agreement is wholly dependent on its compatibility with ANCSA, as evidenced by the Settlement Agreement's Severability Clause, which provides that the Settlement Agreement is void if certain material provisions are held to be incompatible with ANCSA.[62] ANCSA was revolutionary not only in the corporate entities it created and the way it resolved aboriginal land title claims, but in the way it ensured and sought

[62] Settlement Agreement, Article VIII, § 3.

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to solidify equitable treatment and distribution of resources among Alaska's Native peoples, just as Alaska Natives had shared resources amongst themselves since time immemorial. If the Settlement Agreement is construed in a manner inconsistent with ANCSA, then, under the Severability Clause, it must fall.

83. As a result, no reasonable person would construe the Settlement Agreement to be at war with ANCSA. Yet this is exactly what the Award does. Section 7(i) of ANCSA unequivocally requires sharing of "*all revenues* received by each Regional Corporation *from the timber resources ... patented to it pursuant to* [*ANCSA*]." Revenue streams that would not exist but for the timber resources a Regional Corporation received pursuant to ANCSA are inarguably revenues *from* those resources. The Panel's contrary conclusion, relying on district court decisions that failed to grapple with text, structure, and purpose, and that were neither binding on nor top of mind for the Regional Corporations who entered into the Settlement Agreement, is beyond the pale.

84. The Award must therefore be reversed under AS § 09.43.120(a)(3).

85. The same result would obtain under Ninth Circuit precedent interpreting the analogous section of the FAA and the law of other jurisdictions. The Ninth Circuit held that under the FAA, "vacatur is appropriate where it is evident that the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite

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award upon the subject matter submitted was not made."[63] "Arbitrators exceed their powers . . . when the award is completely irrational, or exhibits a manifest disregard of law."[64] "To vacate an arbitration award [for manifest disregard of the law], it must be clear from the record that the arbitrators recognized the applicable law and then ignored it."[65] The Award here fails that standard as well, for the reasons explained above.[66]

86. Vacatur of the Arbitration Award is appropriate because the Panel exceeded its powers by manifestly disregarding the law and issuing a completely irrational decision.

COUNT III

Declaratory Judgment that the Section 7(i) Settlement Agreement Is Incompatible with ANCSA

87. All foregoing allegations are incorporated into this count.

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[63] *Biller v. Toyota Motor Corp.*, 668 F.3d 655, 665 (9th Cir. 2012) (internal quotation marks omitted) (citing 9 U.S.C. § 10(a)); *see also Comedy Club, Inc. v. Improv W. Assocs.*, 553 F.3d 1277, 1290 (9th Cir. 2009) (explaining that the "manifest disregard for the law" standard is "shorthand" for statutory basis for vacatur in § 10 of the FAA that allows for vacatur where arbitrators exceed their powers); *Dunham v. Lithia Motors Support Servs., Inc.*, No. S-15068, 2014 WL 1421780 (Alaska Apr. 9, 2014).

[64] *Id.* (citing *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 997 (9th Cir. 2003) (discussing that vacatur for an arbitral panel's "manifest disregard of the law" is a statutory basis for vacatur under § 10 of the FAA, which allows for vacatur where an arbitral panel exceeds its powers)).

[65] *Sanchez v. Elizondo*, 878 F.3d 1216, 1223 (9th Cir. 2018).

[66] Vacatur is likewise appropriate under Ninth Circuit law for arbitration awards that are completely irrational. *E.g.*, *Aspic Eng'g and Constr, Co. v. ECC Centcom Constructors LLC*, 913 F.3d 1162, 1166 (9th Cir. 2019). An arbitration is completely irrational "where [the arbitration decision] fails to draw its essence from the agreement." *Comedy Club, Inc. v. Improv W. Assocs.*, 553 F.3d 1277, 1288 (9th Cir. 2009) (alteration in original) (quoting *Hoffman v. Cargill Inc.*, 236 F.3d 458, 461–62 (8th Cir. 2001)). The Award here is anathema to the essence of the Settlement Agreement.

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88. The Settlement Agreement's severability clause in Article VIII, § 3 provides in relevant part: "[I]n the event that . . . (2) any of the provisions of Articles II or III (except Article II, Sections 7 and 8) are determined by final judgment of a court of competent jurisdiction (not subject to further appeal) to be incompatible with ANCSA, and such determination would materially change the amount of a Corporation's Net Section 7(i) Revenues under this Agreement, . . . the entire Agreement shall be rendered prospectively void and unenforceable and [the parties to the Settlement Agreement] will promptly attempt in good faith to negotiate a new Agreement."

89. This "Severability Clause" grants this Court jurisdiction to determine if the Settlement Agreement, as interpreted by the Panel, is inconsistent with ANCSA. To make this determination, the court must independently interpret ANCSA and then evaluate whether the Panel's Decision interpreting the Settlement Agreement renders it inconsistent with ANCSA.

90. The Severability Clause applies here if the Court concludes that the Arbitration Award cannot be vacated. Article II, Section 1 of the Settlement Agreement incorporates the definition of Gross Section 7(i) Revenues found in Article I, Section 2(7) by reference. Under Article I, Section 2(7), carbon credit revenues are Section 7(i) shareable. Under ANCSA, carbon credit revenues are Section 7(i) shareable. Under the Arbitration Award, carbon credit revenues are not Section 7(i) shareable. Thus, the Settlement Agreement, as interpreted, is incompatible with ANCSA.

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91. If the Court concludes that the Arbitration Award cannot be vacated, Plaintiffs are entitled to an order declaring and adjudging that the Settlement Agreement, as interpreted by the Arbitration Award, is incompatible with ANCSA; the Settlement Agreement will become prospectively void by its own terms upon a final judgment that it is incompatible with ANCSA.

PRAYER FOR RELIEF

Based on the foregoing, Plaintiffs pray for the following relief:

A. For an order vacating the Arbitration Award as contrary to the dominant, well-established public policy codified in 43 U.S.C. § 1606(i)–(j) requiring that 70 percent of revenues "from" timber estates held by Regional Corporations must be shared with other Regional Corporations, Village Corporations, and at-large shareholders.

B. For an order vacating the Arbitration Award because the Panel exceeded its powers by manifestly disregarding the law and issuing a completely irrational decision that ignores the plain language of Section 7(i) requiring that 70 percent of revenues "from" timber estates held by Regional Corporations must be shared with other Regional Corporations, Village Corporations, and at-large shareholders.

C. For an order declaring and adjudging that the Settlement Agreement, as interpreted by the Panel, is inconsistent with Section 7(i) of ANCSA and is prospectively void and unenforceable if the Court concludes that the Arbitration Award cannot be vacated.

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D. For costs and reasonable attorney's fees under the Alaska Rules of Civil Procedure; and

E. For such other relief deemed just and equitable.

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