AMERICAN ARBITRATION ASSOCIATION

Commercial Arbitration Tribunal

In the Matter of the Arbitration Between:	)	
Calista Corporation; Doyon, Limited; Koniag, Incorporated; Bering Straits Native Corporation; Cook Inlet Region, Inc.; Arctic Slope Regional Corporation; The Aleut Corporation; NANA Regional Corporation; and Bristol Bay Native Corporation,	)	**Case No. 01-18-0003-0517**
Claimants,	)	
vs.	)	
Chugach Alaska Corporation; AHTNA, Incorporated; and Sealaska Corporation,	)	
Respondents.	)	

FINAL AWARD

THE UNDERSIGNED ARBITRATORS have been duly sworn and designated by the parties, Claimants Calista Corporation; Doyon, Limited; Koniag, Incorporated; Bering Straits Native Corporation; Cook Inlet Region, Inc.; Arctic Slope Regional Corporation; The Aleut Corporation; NANA Regional Corporation; and Bristol Bay Native Corporation ("Claimants"), and Respondents Chugach Alaska Corporation; AHTNA, Incorporated; and Sealaska Corporation ("Respondents"), pursuant to the arbitration agreement entered into pursuant to Article VI of the Section 7(i) Settlement Agreement, and pursuant to the Commercial Arbitration Rules, as amended and effective October 1, 2013, ("Rules") of the American Arbitration Association ("AAA").

This Arbitration Tribunal, having fully heard, examined and considered all of the submissions, proofs and allegations of the parties, and having previously issued an Interim Award dated March 21, 2022, finds, concludes and issues this Final Award, as follows:

I. Introduction and Procedural Statement.

Parties. This case presents a dispute among the twelve Alaska Native regional corporations ("ANC"s or "Regional Corporation"s) created pursuant to the Alaska Native Claims Settlement Act ("ANCSA"), 43 U.S.C. §§ 1601, *et seq.* Claimants are Calista Corporation, represented by Jeffrey W. Robinson, Ashburn & Mason, P.C., Doyon, Limited, represented by

Michael M. Maya, Covington & Burling, L.L.P., Koniag, Incorporated, represented by Chris Gronning, Bankston, Gronning Brecht, P.C., Bering Straits Native Corporation, represented by Craig Richards, Law Office of Craig Richards, Cook Inlet Region, Inc., represented by William Temko and Lori Lin, Munger Tolles & Olson, LLP, Arctic Slope Regional Corporation, represented by Michael Jungreis, Reeves Amodio LLC, The Aleut Corporation, represented by L. Anmei Goldsmith, Birch Horton Bittner & Cherot, P.C., NANA Regional Corporation, represented by Elena Romerdahl, Perkins Coie, LLP, and Bristol Bay Native Corporation, represented by Jahna Lindemuth, Cashion Gilmore & Lindemuth. Respondents are Chugach Alaska Corporation, represented by Jennifer M. Coughlin, Landye Bennett Blumstein LLP, AHTNA, Incorporated, represented by Jonathan W. Katchen and Bryson C. Smith, Holland & Hart LLP, and Sealaska Corporation, represented by Kristen Miller, Simpson Tillinghast Sheehan, P.C. and Bradley S. Keller and Joshua Selig, Byrnes Keller Cromwell LLP.

Procedural Summary. The initial Preliminary Hearing was held on October 8, 2019. The parties made a number of written submissions to the Tribunal in preparation for and following that conference. Based on the discussion at the hearing, and our review of the parties' related submissions, the following procedural decisions were made at the outset of the arbitration:

- The Tribunal granted a motion by Respondents to bifurcate the sequencing of issues to be presented. Specifically, the Tribunal directed that "the initial Arbitration Hearing, and the discovery and briefing work preceding that hearing, [shall] be limited to the issue of whether revenue from Respondents' carbon credits is 'shareable.' All other issues, including calculation of amounts, if any, that must be shared, are reserved to subsequent proceedings." (Procedural Order No. 1.) The specific issue presented for bifurcated consideration was subsequently determined to be: **Are revenues generated from the sale of carbon offset credits by the Respondents subject to sharing with the other Corporations pursuant to Section 7(i) of ANCSA and the Section 7(i) Settlement Agreement?** ("Bifurcated Issue"; *see* Procedural Order No. 4.)
- At the initial Preliminary Hearing, the parties also agreed and the Tribunal set the dates for the Arbitration Hearing on the Bifurcated Issue, and directed the parties to submit a joint proposal for the prehearing and discovery schedule to be followed in connection with the first phase of the case. (Procedural Order No. 1.)
- The Tribunal subsequently approved a Joint Stipulation submitted by the parties agreeing, among other things, that "Article VI, Section 1 of the Section 7(i) Settlement Agreement provides for arbitration of this dispute," that the Commercial Arbitration Rules ("Rules") of the American Arbitration Association ("AAA")], as amended and effective October 1, 2013, apply, and that "Article VI, Section 2 of the Settlement Agreement provides that the Commercial Rules of the AAA shall govern all aspects of the arbitration, except as the Agreement provides to the contrary." (Procedural Order No. 2.)
- The Tribunal also directed that if any party contended that the procedural or timing requirements of the parties' Arbitration Agreement had not been met prior to this point in the arbitration, the party should submit its position on this

point by a specified deadline. No such submissions were received. Accordingly, all parties were deemed to have agreed that all contractual time limits and prerequisites to arbitration applicable prior to October 18, 2019, had either been satisfied or waived by the parties. (Procedural Order No. 2.)

Subsequently, the parties proposed, and the Tribunal set the detailed pre-hearing schedule (*see* Procedural Order No. 3), and the Tribunal entered a confidentiality/protective order (Procedural Order No. 5). The parties subsequently engaged in discovery and filed various discovery-related and other motions. (*See* Procedural Orders Nos. 6-8, 10, 12-14 and 17).

On April 3, 2020, due to the disruptions caused by the coronavirus pandemic emergency, all counsel requested an order vacating the Arbitration Hearing dates (August 24-28, 2020, and August 31-September 4, 2020) originally set for the Phase I Arbitration Hearing in this matter. That request was granted, and, with the agreement of all parties, the Arbitration Hearing was rescheduled to March 21, 2021-April 2, 2021 (Procedural Order No. 9.)

Unfortunately, as those dates approached, the pandemic had not abated. Although the parties agreed that the pandemic issues would not permit an in-person hearing to go forward in Anchorage on the scheduled (March/April 2021) dates, they disagreed on whether to conduct the hearing on those dates using "virtual hearing" (videoconferencing) techniques or to continue the hearing in hopes that conditions would improve during the delay. Ultimately, the Tribunal decided to reschedule the hearing once again – to December 13-17 and 20-21, 2021, and the pre-hearing schedule was revised accordingly. (Procedural Order No. 11.)

That decision was based in part on agreements made by the parties, as follows: "The Panel's present hope and intention is that the virus issues will have abated sufficiently by December 2021 so that the Phase I Arbitration Hearing can be conducted safely in person. All parties agreed, however, both in their respective written submissions and again at the December 9, 2020, preliminary hearing, that if the pandemic does not permit the hearing to be held safely in person at that time we shall instead conduct the hearing using videographic means, *see* the AAA's Commercial Arbitration Rules, Section R-32(c). All parties have agreed that if the virus issues make it necessary to conduct the hearing by videoconference instead of in person next December no party will seek a further continuance or object to conducting the hearing virtually rather than in person. Based on this record, and exercising our reasonable discretion under Section R-32(c), it [the continuance from the March/April 2021 dates to the December 2021 dates] is so ordered." (*Id.*) The parties were directed to submit their views during October 2021 on whether it would be possible to conduct the Arbitration Hearing in person on the December 2021 dates, in order to afford the parties and the Panel adequate time to make orderly preparations to conduct the hearing virtually if that became necessary. *(Id.)*

The parties timely did so. Based on those submissions, our own view of conditions existing then, and the parties' earlier agreements, the Tribunal decided in early November 2021 that due to pandemic conditions it would not be safe to conduct the December 2021 Arbitration Hearing in person and directed that instead the hearing would be conducted using

videoconferencing. (Procedural Order No. 15.) No party objected to that decision, either when it was communicated to the parties, or subsequently. The parties subsequently submitted a stipulation specifying the particular "virtual hearing" procedures to be followed during the hearing, which the Tribunal approved. (Procedural Order No. 16.)

The parties thereafter submitted pre-hearing briefs on December 6, 2021, addressing the Bifurcated Issue to be heard at the Arbitration Hearing.

The Arbitration Hearing. Pursuant to notice, the Arbitration Hearing on the Bifurcated Issue in this matter was held and completed by video conference on December 13-17 and 20, 2021. The parties engaged Planet Depos, a third-party vendor, to serve as the videoconference host. The parties engaged certified court reporter Charlotte Lacey, RPR, CSR, to transcribe the Arbitration Hearing. The finalized transcripts ("Tr.") prepared by the reporter shall constitute the official record of the proceedings at the Arbitration Hearing, *see* Rules, Section R-28.

At the Arbitration Hearing, Claimants called witnesses Sophie Minich, William Boyd, Daniel Mitchell, Julie Schrecengost, Mark Poplis, Matt Tisher, Margie Brown, Anna Hoffman, Angie Astle, and Avram Tucker. Claimants also presented witnesses Brandon Vickery, Brian Shillinglaw and Daniel J. Rozema by deposition, and also the Rule 30(b)(6) deposition of Respondent Doyon, Limited given by Aaron Schutt. Respondents called witnesses Terry Downes, Anthony Mallott, James Tuttle, Aaron Schutt, Joe Bovee, Brian Shillinglaw and Chris McNeil. Claimants called Mark Kroloff and Robert Denham to testify as rebuttal witnesses. All witnesses testified under oath and were made available for cross-examination and such additional re-direct and other examinations as were desired by counsel. The parties also presented numerous documentary exhibits at the hearing; the specific exhibits admitted into evidence are itemized in the Transcripts.

At the conclusion of the Arbitration Hearing, the Tribunal specifically inquired of the parties whether they had any further proofs to offer or witnesses to be heard on the Bifurcated Issue. *See* Rules, Section R-39(a). All parties gave negative replies to this inquiry. (Tr., 1472.) Based on these responses, the Tribunal determined that all relevant evidence on the Bifurcated Issue had been presented and is contained in the Transcripts and admitted exhibits referenced above ("Record"). The parties agreed and the Tribunal set a schedule for post-hearing briefs on the Bifurcated Issue. The Tribunal directed that, aside from legal authorities, those briefs should cite only to the testimony and exhibits in the Record. In addition, the parties agreed that the form of award to be issued should be a narrative reasoned award, and further agreed that their stipulation as to the agreed form of award supersedes the requirements contained in Article VI of the Section 7(i) Settlement Agreement. The parties also agreed that oral closing arguments, if requested by the Tribunal, would be held on February 24, 2022, that the Interim Award herein would be timely issued if issued on or before March 24, 2022, and that the post-hearing schedule described above was set with the agreement of all parties.

The parties timely filed their post-hearing briefs during February 2022. Closing oral arguments on the Bifurcated Issue were held on February 24, 2022. At the conclusion of those submissions, the Bifurcated Issue addressed in the Interim Award was submitted for decision.

Interim Award. An Interim Award was issued on March 21, 2022, resolving all of the issues in dispute, except those that the parties had agreed would be reserved for the Final Award. The Interim Award is hereby confirmed and incorporated into this Final Award as set forth herein. As agreed by the parties, all claims for attorneys' fees, costs of litigation and for allocation of AAA charges and the arbitrators' compensation were reserved to the Final Award phase of this arbitration. The Interim Award set a schedule for additional submissions by the parties on those reserved issues. The parties subsequently agreed to certain revisions to that schedule, all of which were approved by the Tribunal. The parties' submissions on the reserved issues were timely received in accordance with that revised schedule, and the reserved issues were submitted for decision.

Record Closed. The hearing record was declared closed as of June 20, 2022. The parties' final scheduling agreement referenced above included a stipulation by all parties that the Final Award would be timely issued if issued on or before July 20, 2022. (See Rules, Section R-39.)

II. ARBITRABILITY.

As discussed above, the parties agreed at the initial Preliminary Hearing, that "Article VI, Section 1 of the Section 7(i) Settlement Agreement ("Settlement Agreement" or "Agreement") provides for arbitration of this dispute. . ." (Procedural Order No. 2, quoting the parties' Joint Stipulation referenced therein.) Sections 1 and 2 of Article VI provide in relevant part:

> Section 1. Issues Subject to Arbitration. Except as 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. No arbitration shall be held concerning the Federal or State income tax consequences of revenues, deductions, distributions, or any other income tax issues under Section 7(i) of this Agreement.
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> Section 2. Governing Rules. Except as this Agreement provides to the contrary, the Commercial Arbitration Rules of the American Arbitration Association . . . shall govern all aspects of the arbitration.

(Exs. 192/234, Art. VI, Sections 1 and 2.)

Those Rules provide, in their Section R-7, as follows:

R-7. Jurisdiction

(a) The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim.

(b) The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause.

(c) A party must object to the jurisdiction of the arbitrator or to the arbitrability of a claim or counterclaim no later than the filing of the answering statement to the claim or counterclaim that gives rise to the objection. The arbitrator may rule on such objections as a preliminary matter or as part of the final award.

No such objections were received.

Based on this record, and exercising the authority granted to this Tribunal under Section R-7 of the Rules, we make the following findings as to the arbitrability of the claims and defenses asserted in this case:

All of the claims, defenses, disputes and issues asserted by the parties in this arbitration and addressed in this award constitute "disputes arising under this [Section 7(i) Settlement] Agreement between or among the Corporations. . .," within the meaning of the parties' arbitration agreement referenced above. All parties submitted the claims, defenses, disputes and issues now at issue to this binding arbitration. All parties agreed at the initial Preliminary Hearing that this dispute is arbitrable here and that this arbitration must be conducted in accordance with the Rules. No timely objection, as required under those Rules, has been made to the arbitrability of any claim, defense, dispute or issue addressed in this award.

Based on these findings, we conclude that all of the claims, defenses, disputes and issues asserted herein and adjudicated below are arbitrable in this proceeding.

III. FACTS.

The following is a statement of those facts found by this Tribunal, based on the totality of the evidence presented, to be true and necessary to this award. To the extent that this recitation differs from any party's position, that is the result of determinations as to credibility, relevance, burden of proof considerations, and the weighing of the evidence, both oral and written.

This arbitration requires the interpretation and application of Section 7(i) of the Alaska Native Claims Settlement Act ("ANCSA"), 43 U.S.C. §§1601-1629(f)), to revenues derived from a new type of transaction - sales of "carbon offset credits" - that was not contemplated when ANCSA was first enacted in 1971 or when the parties entered into the Settlement Agreement in 1982.

ANCSA Generally. The early history of ANCSA was summarized as follows by the Court in *Bay View II*:

> ANCSA was enacted into law on December 18, 1971. ANCSA completely extinguished all aboriginal title claims to Alaska land, and transferred to state-chartered private for profit corporations to be formed by Alaska natives (Native Corporations) $962.5 million in state and federal funds and approximately 44 million acres of Alaska land. Congress required all shareholders in the Native Corporations to be Alaska natives.
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> ANCSA created two types of Native Corporations: "Regional Corporations" and "Village Corporations." Twelve Regional Corporations were formed pursuant to section 1606. Approximately 200 Village Corporations were formed pursuant to section 1607. . .
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> The United States allocated among the Village Corporations approximately 22 million acres of surface estate in Alaska land. The underlying subsurface estate of this territory, both the surface and subsurface estate in an additional 16 million acres, were allocated among the Regional Corporations. Each native Alaskan enrolled in one of the twelve regions (pursuant to section 1604) and received stock in the coordinate Regional Corporation (pursuant to section 1606(g)).
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> [Section 7(i) of] ANCSA requires the twelve Regional Corporations to share revenues as follows: "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 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."

Bay View, Inc. v. United States, 46 Fed. Cl. 494, 495-96 (2000)(citations omitted).

Section 7(i). As the above summary noted, Section 7(i) of ANCSA provided 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. . . ." (Emphasis added.) "The almost deceptive simplicity of this section" has caused the present arbitration, as well as many prior disputes. *See Aleut Corp. v. Arctic Slope Regional Corp.*, 484 F.Supp. 482, 483 (D. Alaska 1980).

Initial Uncertainties, Litigation and Early Judicial Decisions. The Regional Corporations (and Village Corporations) perceived many uncertainties concerning the requirements of Section 7(i) in the years immediately following passage of ANCSA. Were the shareable "revenues" to be gross or net revenues? What did "from" mean? Were revenues received from subsurface oil and gas exploration agreements shareable if the exploration effort failed to find commercially developable resources? Could revenue streams attributable at least in part to patented resources be allocated between the portion attributable to the patented resources and in part to other consideration or services provided by the Regional Corporation? Did the statute require Regional Corporations to share revenues attributable to sales of sand and gravel? These and other issues gave rise to numerous lawsuits among the Regional Corporations (and others) in the years immediately following 1971.

A series of decisions were issued by the courts during those years resolving some of these disputes and giving early guidance on some of the most important uncertainties presented by the statute. For present purposes, two of the most important of these early precedents were the decisions of the United States District Court for the District of Alaska in *Aleut Corp. v. Arctic Slope Regional Corp.*, 417 F.Supp. 900 (D. Alaska 1976)(*"Aleut II"*) and *Aleut Corp. v. Arctic Slope Regional Corp.*, 484 F.Supp. 482 (D. Alaska 1980)(*"Aleut V"*). These decisions are discussed in detail in Part IV below. In brief, both of those decisions determined that "revenues received by each Regional Corporation from the timber resources and subsurface estate patented to it" meant "revenues received because of the acquisition of an interest in" the patented resources, *Aleut II*, 417 F.Supp. 900, at 903, and that "the test to be applied in determining whether . . .revenues [are] subject to the sharing requirements of section 7(i)" was "whether the benefits were 'generated because of, and in exchange for, the acquisition of an interest in the timber resources and subsurface estate received by a regional corporation, pursuant to ANCSA,'" *Aleut V*, 484 F.Supp. 482, at 485. The term "acquisition of an interest" does not appear in the spare language of Section 7(i). Both *Aleut II* and *Aleut V* concluded, however, that the statutory language "revenues received by each Regional Corporation from the timber resources and subsurface estate patented to it pursuant to this chapter" was "clear:" Revenues subject to the sharing provisions of section 7(i) were "revenues received by a regional corporation that are attributable to, directly related to, or generated by the acquisition of an interest in the corporation's" patented resources." Although after 1976 Section 7(i) continued to present many other uncertainties and disputes, the meaning of the statute'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 binding judicial interpretation in *Aleut II* and *Aleut V*.

Negotiation and Execution of the Section 7(i) Settlement Agreement in 1982. In one of the other early *Aleut* decisions Judge von der Heydt held that "all revenues" in Section 7(i) meant "net revenues." *Aleut Corp. v. Arctic Slope Regional Corp.*, 421 F.Supp. 862, 867 (D. Alaska 1976) *aff'd in part and rev'd in part sub nom. Chugach Natives, Inc. v. Doyon, Ltd.*, 588 F.2d 723 (9th Cr. 1978) (*"Aleut III"*). Although the decision noted, prophetically, that the "adoption of a net position will increase the litigation . . . in this case and those that may follow on the disbursement of 7(i) funds," the Court concluded that it "could not decide precisely what categories of deductions were permissible without more evidence." *Id.*, 421 F.Supp. 862, at 869. The court therefore ordered the Regional Corporations to "set up some type of arbitration procedures through which disputed claims for deductions can pass." *Id.*, 421 F.Supp. 862, at 869. In response, the companies retained a Special Master to assist with resolution of what they originally envisioned would be a series of adversarial proceedings to establish appropriate deductions for each ANC involved in resource development.[1] By late 1981 these proceedings had evolved, by agreement of the parties, into settlement negotiations in which the Special Master played an active role.[2] These negotiations eventually led to execution of the Section 7(i) Settlement Agreement in June 1982.[3]

The Agreement devoted extensive attention to specifying a uniform system of appropriate deductions to be used in order to arrive at the net value of the severed resources in cases where a Regional Corporation "actively" developed its subsurface resources itself (rather than by selling the rights to discover, develop and produce the resources to third parties). To avoid the possibility that expenses from active development would be overstated (and shareable net revenues thus under-stated) the parties agreed to detailed provisions specifying the particular costs that would be legitimate deductions, and prohibited deductions of other categories of costs that were not expressly permitted in the Agreement.

At the time of contracting, 1982, the parties agreed on a somewhat different approach to calculating shareable revenues attributable to a Regional Corporation's active harvesting of its patented timber resources. Although shareable amounts from active development of subsurface resources would be calculated on the basis of actual costs, accounted for using the deductions approved in the Agreement, revenues from active harvesting of timber resources were originally required to be valued based on valuations, performed "in accordance with timber industry standards," of the timber "prior to severance." Article II, Section 9. This approach was an alternative method for calculating the net revenues attributable to the timber resources that did not involve reporting or calculation of the Regional Corporation's actual costs of harvesting. Rather, the required valuations would calculate the net value a purchaser would pay for the timber resources *in situ* prior to harvesting taking into account the projected expense of cutting and transporting the timber to market, and related costs. This approach proved controversial in the years following 1982. The Agreement was amended in 1990 to discard the valuation approach, and the Agreement thereafter required active harvesting of timber to be accounted

[1] Ex. 193 (Special Master's Report), at 9-11.

[2] *Id., at 11-12.*

[3] Exs. 192/234 ("Settlement Agreement" or "Agreement").

for in a manner analogous to the way the Agreement already treated revenues from active subsurface development. Accordingly, the 1990 amendments added numerous provisions specifying the particular costs that would be permissible deductions for active harvesting of timber resources and mandated a uniform system of appropriate deductions to be used in order to arrive at net shareable revenues in cases where a Regional Corporation actively developed its timber resources.

Assessed from the point of view of forestalling future disputes and litigation, the Settlement Agreement was a spectacular success. The present arbitration is only the third Section 7(i) arbitration to be convened since the Agreement was originally executed in 1982.

Respondents' NOL Transactions. In the 1980's many Regional Corporations found a new way to earn revenues besides subsurface development and timber harvesting. In brief, they would sell patented timber or subsurface resources at prices which, when compared with the favorable tax bases Regional Corporations enjoyed on such resources, would generate a substantial tax loss ("net operating loss" or "NOL"). The selling corporation would then earn additional revenues by entering into an "NOL transaction" with a for-profit corporation wishing to shelter otherwise taxable profits. (This brief summary omits many details; a more detailed explanation is set out below in the discussion of the *Bay View II* case, in Part IV.A below.) Although the proceeds from the predicate sale of the patented resources were unquestionably shareable under Section 7(i), a substantial dispute arose as to whether the revenues earned by the follow-on NOL transactions should also be shareable under Section 7(i). In 1990 ten of the Regional Corporations entered into an agreement not to share NOL revenue,[4] but litigation ensued in which this view was challenged by certain Village Corporations.

Section 7(i)(2) and the *Bay View* Decisions. While that litigation was pending, Congress amended Section 7(i) in 1995 by adding a new Section 7(i)(2) to the statute. That amendment provided as follows:

> For purposes of this subsection, the term "revenues" does not include any benefit received or realized for the use of losses incurred or credits earned by a Regional Corporation.

The *Bay View I* decision, *Bay View, Inc. v. AHTNA, Inc.*, 105 F.3d. 1281, 1284 (9th Cir. 1997), subsequently held that this statute retroactively amended ANCSA Section 7(i) to exclude revenues received from NOL transactions from that section's sharing requirement. Village Corporations then sued the United States alleging, among other claims, that passage of the

[4] *See Bay View, Inc. v. AHTNA, Inc.*, 105 F.3d 1281, 1284 & n.4 (9th Cir. 1997)("ten of the Regional Corporations agreed not to share NOL revenue as part of a Mutual Assistance Agreement... The Regional Corporations contend that NOL revenues were not shareable under Section 7(i) because they were derived from the tax laws, not from resources"); *see also* Tr. 1321-25 (Kroloff) ("And the other two that didn't sign . . . had engaged in similar transactions and not shared the proceeds. So, you know, . . . I think it was unanimous or very close to unanimous.")

statute constituted a "taking" of their vested rights to share in a portion of the revenues generated by the NOL transactions. More specifically, the Village Corporations contended that but for the 1995 statute such revenues would have been shareable under Section 7(i), and that the 1995 amendment's retroactivity feature constituted a "taking" of their already-vested rights under Section 7(j) to share in such revenues. In 2000 this claim was rejected by the Court of Claims in the *Bay View II* decision, which was later affirmed by the Federal Circuit in *Bay View III*. *Bay View II and III* are discussed in detail in Part IV *infra*.

Respondents' Sales of Carbon Offset Credits. In 2006 California enacted that state's Global Warming Solutions Act.[5] In brief, the statute provided for creation of a program intended to reduce greenhouse gas emissions. The statute designated the California Air Resources Board ("CARB") as the agency charged with adopting standards, rules and regulations implementing the statute.[6] In 2012 CARB adopted its "Cap and Trade" program.[7]

Under that program, large California emitters must surrender a "compliance instrument" for each metric ton of carbon dioxide emitted into the atmosphere. The program allows two types of such compliance instruments – "allowances" and "offset credits."[8] An "offset credit" is a voluntary commitment to avoid greenhouse gas emissions given by an entity that is not directly covered by the program which is then used by a covered entity to comply with the cap.[9] Offset allowances and offset credits are tradeable. The program requires that a project generating offset credits use a CARB-approved compliance offset protocol;[10] these are permitted for six specified areas of economic activity, one of which is "U.S. Forests."[11] That type of protocol can cover three different types of forest management activities, one of which is "improved forest management" ("IFM") activities designed to prevent emissions of carbon dioxide by increasing or conserving carbon stocks.[12] The "predominant" management activity in such IFM projects is "refraining from cutting or harvesting trees." The IFM operator must commit to maintaining the promised carbon stocks within the project boundaries for 100 years.[13]

Once implemented, an IFM project does not preclude all commercial timber harvesting in the project area. Rather, it specifies an aggregate level of carbon storage over the entire project area that must be maintained. The applicant/operator is required to monitor, report and verify the greenhouse gas reductions to be achieved. These data are subjected to an independent verification process. CARB also conducts its own independent review of the project

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[5] 2006 Cal. Legis. Serv. Ch. 488 (A.B. 32).

[6] Cal. Health and Safety Code, §§38510, 38560.

[7] Cal. Code Regs. Tit. 17, §95800 *et seq.* The program was described in detail in the testimony of Claimants' expert, Professor William Boyd, which the Tribunal appreciated and found most helpful.

[8] *Id.*, §95802.

[9] *Id.*, §95802(a)(12); *see generally Our Children's Earth Found. v. State Air Res. Bd.*, 234 Cal.App. 4th 870, 876-77 (2015).

[10] Cal. Code Regs. Tit. 17, §§ 95970-95971.

[11] Ex. 120, Compliance Offset Protocol, at 11.

[12] *Id. See also* Professor Boyd's testimony, *passim.*

[13] Tr. 163-67 (Boyd).

documentation. If the project is approved, following some intermediate procedural steps, CARB issues the operator an offset credit. Each such offset credit is issued a unique identifying number, tracked through a process set up by CARB, and becomes eligible for surrender against emissions by large California emitters.[14] After the credit has been issued, the project measurements and calculations must be verified and repeated periodically – at least every twelve years.[15]

The offset credits include stringent enforcement provisions. If an IFM operator later engages in or permits harvesting that takes the on-site carbon stocks below the level at which credits were awarded the forest owner has "to go out and find replacement credits." Similarly, if the forest owner sells project lands to an entity that chooses not to take over and continue the project's credit commitments, the result may be project 'termination." In that event the forest owner must replace "every credit that [it has] been issued." Depending on the state of the market for credits at any given time, obtaining such replacement credits could prove to be a formidable financial challenge for a terminated IFM operator. If such a termination occurs within the project's first fifty years the number of replacement credits that must be provided is subject to a multiplier that can run up to 1.4. Failure to provide the necessary credits exposes the landowner to "substantial penalties per credit day."[16]

Beginning in 2016 Respondents each developed IFM projects approved by CARB that resulted in the issuance of carbon offset credits by CARB to Respondents. Respondents subsequently earned substantial revenues by selling those credits, directly or indirectly, to large California emitters of greenhouse gases. For example, the first of Sealaska's IFM projects covers approximately 165,000 acres of its forestlands and resulted in issuance of approximately 11 million carbon offset credits to Sealaska, many of which Sealaska then subsequently sold to BP. AHTNA's project resulted in issuance of approximately 14.8 million offset credits, which AHTNA also sold to BP. Chugach's project resulted in issuance of approximately 6.4 million offset credits, which it sold indirectly to emitters by using a middleman, Forest Carbon Partners, for that purpose. Considerable testimony was presented at the Arbitration Hearing concerning the specific details of Respondents' projects and transactions. These facts were largely undisputed, need not be described in greater detail here, and conform to the program parameters described above. To the extent that features of these transactions are disputed, and relevant for the issues raised in this arbitration, the salient features of these transactions are discussed further in Part III.A below.

To date, Respondents have generated more than [redacted] by selling a portion of the carbon offset credits they have received through the CARB program.[17]

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[14] Tr. 147-63 (Boyd); *see also* Compliance Offset Program, California Air Resources Board, https://ww2.arb.ca.gov/our-work/programs/compliance-offset-program .

[15] Ex. 120 §3(b)(1); *id.* App'x A(b)(6).

[16] Tr. 152-65 (Boyd).

[17] Tr. 177 (Boyd). [redacted]

We found persuasive and accepted Professor Boyd's testimony that, based on market conditions prevailing prior to and at the time of the Arbitration Hearing, Respondents' sales of these offset credits could make it extremely expensive for them to terminate their projects in the future. This is because "there just aren't that many offset credits out there", because Respondents would be allowed only six months to provide replacement credits upon receiving notice from CARB that such credits were due, and because, as a practical matter, Respondents might have to purchase allowances in addition to credits in order to satisfy their replacement obligations. Of course, market conditions for carbon offset credits and allowances could change in the future. Nevertheless, based on the evidence presented, we accepted as persuasive Mr. Boyd's opinion that Respondents could face "a very significant financial exposure, if they want to terminate their projects and walk away" - possibly requiring total expenditures of more than $600 million.[18]

We turn next to the two main areas where the parties have factual disputes bearing on the issues raised in the present arbitration. Our findings on those disputed factual matters are set forth in Parts III.A and III.B below.

A. WHETHER THE REVENUES RESPONDENTS RECEIVED FROM SALES OF THEIR CARBON OFFSET CREDITS ARE ATTRIBUTABLE TO TRANSACTIONS THAT INVOLVED "ACQUISITION OF AN INTEREST" IN THE PATENTED TIMBER RESOURCES BY A THIRD PARTY?

As discussed in more detail in Part IV.A below, all of the case law interpreting Section 7(i) to date has consistently limited the statute's sharing obligation to revenues received by a Regional Corporation attributable to transactions in which an interest in patented Section 7(i) resources is transferred to a third party. The parties in this case disagree on whether Respondents' carbon credit transactions "disposed of an interest" in their patented timber resources or not. Insofar as this is a disputed factual issue, our findings on it are as follows. Our conclusions on the legal issues raised by this dispute are set forth in Part IV.A below.

1. Respondents made two broad types of commitments to CARB in order to obtain the carbon offset credits at issue here. First, they committed themselves to maintain the promised carbon stocks within the project boundaries for 100 years (to be accomplished mainly by "refraining from cutting or harvesting trees" to the extent necessary to accomplish that requirement) and otherwise comply with the terms of their IFM projects as approved by CARB. The terms and conditions of Respondents' IFM projects do not require Respondents to harvest any trees, and do not require Respondents to sell severed logs or timberlands to anyone. Second, Respondents 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. Neither of these two types of commitments involved a transfer to CARB of any legal or possessory

[18] Tr. 199-204, 222-224 (Boyd); Ex. 501.

interest in the timber resources originally patented to Respondents that are now covered by their IFM programs. These were contractual or regulatory commitments that Respondents elected to make as part of their ongoing business activities.

2. Respondents made one principal type of commitment to the purchasers of their carbon offset credits (so far, BP and Forest Carbon Partners). In those transactions Respondents agreed to sell an agreed number of their carbon offset credits to each such purchaser in return for an agreed price – the revenues now at issue here. None of these transactions involved a transfer to the purchaser of the credits of any legal or possessory interest in the timber resources originally patented to Respondents that are now covered by their IFM programs. These were contractual commitments that Respondents elected to make as part of their ongoing business activities.

3. Accordingly, neither the State of California, CARB nor the purchasers of the carbon offset credits sold by Respondents acquired any legal interest in, or any rights to own, lease or possess Respondents' land, trees or timber covered by the IFM projects for which Respondents have been issued carbon offset credits to date. No third party has acquired legal title to or any other legal or possessory interest in the Respondents' patented timber resources covered by the Respondents' IFM projects. CARB did not acquire such an interest as part of the transactions pursuant to which it issued the offset credits to Respondents. The purchasers of those credits did not acquire any such interest as part of the purchase transactions that generated the revenues to Respondents that are now at issue in this arbitration.[19]

4. The Respondent IFM operators can choose to terminate their IFM projects at any time, provided that they replace the offset credits that were issued previously.[20]

5. If Respondents fail to maintain the promised level of carbon stocks within the project area during the time period specified in the IMF project documents, CARB's sole remedy under its regulatory program is to demand that Respondents provide compliance instruments, either by returning the credits originally issued to them or, if that is not possible, using credits or allowances Respondents may purchase from third parties.[21]

6. Following the carbon offset transactions at issue here, Respondents continue to hold all of the same legal rights of ownership in the relevant timber resources originally patented to them under ANCSA that they possessed prior to those transactions. They did not transfer or dispose any of those ownership rights to any third party in those transactions.

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[19] *See, e.g.*, Tr. at 218, 225 (Boyd); Tr. 1166 (Shillinglaw).
[20] Cal. Code Regs. Tit. 17, §95983(c).
[21] *Id.; see, e.g.*, Tr. at 1169-71 (Shillinglaw); Ex. 120 at 3839.

B. WHETHER THE PARTIES TO THE 1982 SECTION 7(i) SETTLEMENT AGREEMENT MUTUALLY INTENDED THAT AGREEMENT TO EXTEND SECTION 7(i) REVENUE SHARING BEYOND THE SCOPE OF THE STATUTE AS THEN INTERPRETED BY THE COURTS TO REQUIRE SHARING WHENEVER A PATENTED RESOURCE IS "MONETIZED," REGARDLESS OF WHETHER THE TRANSACTION AT ISSUE INVOLVED TRANSFER OF AN INTEREST IN THE PATENTED RESOURCES TO A THIRD PARTY?

The discussion in Part IV.B below contains our findings and legal conclusions concerning the appropriate interpretation and construction of the Settlement Agreement, insofar as is relevant to the issues presented in this arbitration. As discussed there, the parties presented evidence at the Arbitration Hearing on a factual dispute between them relevant to the appropriate construction of the Agreement. We address that factual dispute here.

Under Alaska law, the goal of contract interpretation "is to give effect to the reasonable expectations of the parties." *Graham v. Municipality of Anchorage*, 446 P.3d 349, 352 (Alaska 2019). In order to ascertain the parties' reasonable expectations, Alaska courts "look to the written agreement and extrinsic evidence regarding the parties' intent at the time the contract was made." 121 *Blair v. Fed. Ins. Co.*, 433 P.3d 1048, 1053 (Alaska 2018). When resolving disputes concerning the meaning of an agreement, Alaska courts "begin by reviewing the contract as a whole and the extrinsic evidence surrounding the disputed terms, in order to determine if those terms are ambiguous—that is, if they are reasonably subject to differing interpretations." The extrinsic evidence that may be considered includes "the language and conduct of the parties, the objects sought to be accomplished and the surrounding circumstances at the time the contract was negotiated, as well as the conduct of the parties after the contract was entered into." *Nautilus Marine Enter. v. Exxon Mobil Corp.*, 305 P.3d 309, 316 (2013).

Based on these authorities, we permitted the parties here to present such extrinsic evidence at the Arbitration Hearing.[22] The evidence they presented was relevant to our assessment of whether the parties to the Settlement Agreement mutually intended that Agreement to extend the scope of Section 7(i) sharing beyond the scope of the statute as interpreted by the courts prior to 1982. More specifically, the evidence submitted is relevant to the second main area of factual dispute in this case: Whether the Settlement Agreement was intended by the parties to require a broader Section 7(i) sharing duty - imposed as a matter of contract, not statutory obligation - whenever a patented resource is "monetized" or "exploited" in some way that generates revenues, regardless of whether an interest in the patented

[22] The Settlement Agreement contains an integration clause, (Article VIII, Section 2). Accordingly, no extrinsic evidence was admitted at the Arbitration Hearing for the purpose of "proving any . . . prior agreements or understandings" reached during the drafting of the Agreement inconsistent with the Agreement's finalized text, as mutually agreed and executed by the parties. (*Id.*) Extrinsic evidence was admitted at the hearing to help us understand "the objects sought to be accomplished," "the surrounding circumstances at the time the contract was negotiated," and the parties' 'reasonable expectations" at the time of contracting, as authorized in Alaska decisions such as *Graham* and *Nautilus Marine*. We gave that extrinsic evidence such weight for these limited purposes as we thought it warranted, but gave it no weight for any of the purposes proscribed by the integration provision.

resources has been transferred to some third party in the transaction at issue? Based on the evidence presented, our findings on this disputed factual issue are as follows:

1. At the time the parties entered into the Settlement Agreement in 1982 they did not mutually intend to abandon the "acquisition of an interest" requirement then mandated by the applicable judicial interpretations of Section 7(i). The evidence did not establish any mutual intent at the time of contracting to redefine or expand the types of transactions that had already been determined, in the applicable judicial decisions prior to 1982, to be subject to sharing duties under Section 7(i), or to abandon or overrule those decisions by contractual agreement.[23]

2. The parties patterned the Agreement's definition (Article I, Section 2(7)), of "Gross Section 7(i) Revenues" on the judicial guidance available to them as of 1982 and, in particular, Judge von der Heydt's decisions in *Aleut II and Aleut V,* on what must be included in such revenues. The Agreement's definitional provisions were intended to follow, adopt, be consistent with, and codify Judge von der Heydt's prior determinations in *Aleut II* and *V*.[24] In making this finding we give great weight to the companion Special Master's Report:

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[23] We did not find the testimony of Mr. Denham, a CIRI attorney and one of the negotiators of the Settlement Agreement, persuasive on this point. He testified that the Agreement was intended to be a flexible living document, capable of evolving to capture unanticipated future novel uses and types of transactions. This testimony did not establish that the parties mutually intended to depart from the requirements of *Aleut II* and *Aleut V*. This testimony was also difficult to reconcile with the fact that the finalized Agreement specifically provided in Article XI for reviews every two years for the purpose of assessing whether periodic modifications to the Agreement are necessary, expressly limited (in Article III) permissible deductions only to those specifically enumerated in the Agreement, and was also at odds with other testimony, including testimony from Mr. Denham, that one of the important goals of the drafters was to promote clarity and predictability so that regional Corporations can make confident judgments in advance about whether to pursue particular transactions or not. Mr. Denham also testified that the parties intended a broad definition of "exploitation" and intended for the Agreement to require sharing even when the resource might be used in ways that would not involve a transfer of title. As discussed above in text, however, he also testified, inconsistently, that the parties intended the Agreement to be consistent with the court rulings that had been made. *See* Tr. 1410-11 (Denham). The totality of the evidence presented did not establish that the other signatories mutually intended either the claimed expansive definition of "exploitation" or to abandon the transfer-of-an-interest requirement mandated by *Aleut II* and *Aleut V*. Mr. Denham's testimony on that specific point was contradicted by other documentary evidence submitted, *see, e.g.,* Ex. 227 at 2-3, and did not even establish that Mr. Denham had shared this view with the other negotiators while the Agreement was being negotiated. *See, e.g.,* Exs. 223, 224 and 225. On balance, we preferred and accepted the contrary evidence presented, in particular the Special Master's statements that the Agreement follows, adopts and codifies the courts' prior interpretation of what constitutes Section 7(i) revenue. *See* Ex. 193, at 22, 40. For these reasons, we decline to base our interpretation of the Settlement Agreement's key provisions at issue in this case on Mr. Denham's subjective understandings of what the parties may have mutually intended. *See, e.g., Dimeff v. Estate of Cowan,* 300 P.3d 1, 11 (Alaska 2013).

[24] *See, e.g.,* Ex. 227, at 3.

> The Agreement's provisions for revenue accounting follow the extensive 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. . .
>
> The Agreement adopts and codifies the Court's broad interpretation of what constitutes §7(i) revenues. . .
>
> Accordingly, the Special Master respectfully recommends that the Court approve this Settlement Agreement. . . .

(Special Master's Report, Ex. 193, at pp. 22 and 40 of the exhibit, pp. 19 and 37 of the Report.)

3. The parties intended their Settlement Agreement to be an agreed "accounting charter." *See* Ex. 193, Special Master's Report, at 4-5, 16-17. The "surrounding circumstances at the time the contract was negotiated" principally involved numerous disputes between the Regional Corporations concerning how best to settle those disputes and implement the recent direction given in *Aleut III* that "all revenues" in Section 7(i) meant "net revenues." The "objects sought to be accomplished" principally involved fashioning agreed approaches to the deductions to be allowed in the accounting calculations of such net revenues. Their "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. No persuasive evidence was presented establishing that the parties' "intent at the time the contract was made" was instead to broaden or expand the types of transactions subject to Section 7(i) sharing as the statute had been interpreted in *Aleut II* and *Aleut V* prior to 1982.

Additional factual determinations on these and other points are contained below in Part IV, in our discussion of the legal issues raised by the Bifurcated Issue.

IV. ANALYSIS.

A. WHETHER REVENUES FROM THE SALE OF CARBON OFFSET CREDITS ARE SHAREABLE UNDER SECTION 7(i) OF ANCSA, AS CONSTRUED TO DATE BY THE COURTS?

Section 7(i) of ANCSA provides: "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. . .." (Emphasis added.)

Insofar as relevant to the present arbitration, all of the case law cited to us by the parties has construed this language consistently: Only revenues received by a Regional Corporation "from" the timber resources or subsurface patented to it are shareable. Revenues are "from" the patented timber or subsurface resources if received from another party that "acquires an

interest" in the timber or subsurface resources that were patented to the Regional Corporation. Other revenues are not shareable under Section 7(i).

These requirements were settled and subsequently reaffirmed in all of the four leading cases interpreting Section 7(i) of ANCSA that have been decided to date – *Aleut Corp. v. Arctic Slope Regional Corp.*, 417 F.Supp. 900 (D. Alaska 1976)(*"Aleut II"*); *Aleut Corp. v. Arctic Slope Regional Corp.*, 484 F.Supp. 482 (D. Alaska 1980)(*"Aleut V"*); *Bay View, Inc. v. United States,* 46 Fed. Cl. 494 (2000)(*"Bay View II"*); and *Bay View, Inc. v. United States,* 278 F.3d 1259 (Fed. Cir. 2001)*"Bay View III"*).

Aleut II. Two of the three issues Judge von der Heydt decided in the *Aleut II* case are relevant for present purposes. First, the Court considered whether consideration paid to explore, lease, or acquire an interest in a patented subsurface estate constituted "revenues" under Section 7(i) if the exploration efforts failed to find commercially productive resources. The Court held that it did, explaining as follows:

> The crucial language is "All revenues . . . from the . . . subsurface estate . . .." The statutory language is clear and is in no way conflicting with either other sections of the Act or the legislative history thereof. . . "From the . . . subsurface estate," given a reasonable reading in the context of section 7(i), must mean revenues received because of the acquisition of an interest in the subsurface estate.

In addition, the Court also decided that the term "all revenues" in Section 7(i) included in-kind and other forms of non-monetary consideration, explaining:

> Turning to the second issue unique to the Aleut case, the non-monetary benefits question, it appears that all of the parties agree that as a general principle 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 received by a regional corporation pursuant to ANCSA. Judge Gasch has also reached this conclusion. The disagreement appears to be over how such non-monetary benefits are to be valued, problems of proof, and the question of whether a non-monetary benefit can be said to be received because of an acquisition of an interest in the subsurface estate . . . The court agrees that non-monetary benefits received in exchange for the acquisition of an interest in the timber resources or subsurface estate of a regional corporation are indistinguishable from monetary benefits, and fall within the terminology "all revenues" as used in section 7(i). Therefore, the court finds that they are subject to distribution. Additionally, it is of no

> consequence, for the purposes of section 7(i), that the benefits are paid to third parties so long as they are generated because of, and in exchange for, the acquisition of an interest in the timber resources and subsurface estate received by a regional corporation, pursuant to ANCSA.

Aleut Corp. v. Arctic Slope Regional Corp., 417 F.Supp. 900-03 (D. Alaska 1976) (citations omitted).

Aleut V. In *Aleut V* the Court considered whether revenues derived from a subsurface transaction were subject to Section 7(i) sharing obligations. Arctic Slope Regional Corporation ("ASRC") had entered into agreements granting five oil companies the right to extract oil and gas from the subsurface estate that had been patented to ASRC under ANCSA. In return, ASRC received revenues totaling approximately $30 million. ASRC contended that almost $14 million of this amount was not shareable under Section 7(i), however, because those revenues were not paid for oil and gas, and thus did not constitute "revenues from the . . . subsurface estate patented to it" under the statute, but instead were attributable to other services and property interests independent of the subsurface estate. The Court held that all of the revenues at issue were shareable, explaining as follows:

> . . . In [*Aleut II*] the court stated that the test to be applied in determining whether benefits paid to third parties were revenues subject to the sharing requirements of section 7(i) was whether the benefits were "generated because of, and in exchange for, the acquisition of an interest in the timber resources and subsurface estate received by a regional corporation, pursuant to ANCSA." [Citation omitted.] . . .
>
> In applying these general principles to the revenues received under the agreements before the court, it is necessary to develop additional specific rules for determining what revenues received by a regional corporation must be shared with the other regional corporations. . . The purpose of these rules is to reduce the need for future litigation by providing guidance to the regional corporations.
>
> First, revenues received by a regional corporation that are attributable to, directly related 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).
>
> Second, revenues received under an agreement, or a group of agreements that are regarded as one transaction, which has its ultimate object the acquisition of an interest in the subsurface

> estate, will be presumed to be attributable to, directly related to and generated by the acquisition of an interest in the corporation's subsurface estate. The contracting corporation has the burden to rebut this presumption. It can do so by proving by a preponderance of the evidence that the revenues received by it under such an agreement are for elements of consideration that are owned by the corporation, that the consideration has actual value, and that this value is not attributable to, directly related to, nor generated by the acquisition of an interest in the corporation's subsurface estate. . .
>
> There is no genuine issue of material fact that these agreements convey to the oil companies an ultimate right to acquire an interest in the subsurface estate.

Aleut Corp. v. Arctic Slope Regional Corp., 484 F.Supp. 482, 485-86 (D. Alaska 1980).

Bay View II. In *Bay View II*, decided in 2000, the Court of Claims considered, in part, whether enactment of an amendment to Section 7(i) in 1995 constituted an actionable "taking" of vested rights held by Village Corporations to a share of revenues received by Regional Corporations that were derived from sales of net operating loss ("NOL") deductions to for-profit corporations.[25] In holding that no such taking had been established, the Court explained as follows:

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[25] The Court's detailed statement of the issue presented was as follows:

> From 1984 until 1988, Congress, under the Internal Revenue Code, allowed Native Corporations to sell net operating loss (NOL) deductions to for-profit corporations. The tax basis of a Native Corporation's lands is equal to the fair market value of the land at the time of transfer. When transfer occurred in the late 1970s, commodity prices were at all-time highs, so the lands carried "artificially high tax bases and thus generated huge tax losses when sold in the mid–1980s." For example, a Native Corporation might sell timber resources for $10 million, whereas its basis, calculated according to value at the time of transfer, might be $110 million, $100 million more than the sale price. The latter amount could be claimed as an NOL deduction. The tax program allowed an Alaska Native Corporation to affiliate with a profitable corporation and apply its NOL against the affiliated corporation's taxable income. "If the [profitable] corporation was in the 34% tax bracket, it would save $34 in taxes for each $100 loss it bought. The profitable corporation [then might] pay [approximately] $30 to the Native corporation for the $100 tax loss. In this fashion, Alaska Native Corporations sold approximately $1.5 billion in NOL deductions, and generated for themselves about $425 million in NOL revenue. In 1990, ten Regional Corporations entered into a mutual assistance agreement not to share their NOL revenues, and to seek an amendment to ANCSA that would exempt the NOL revenues from section 1606(i)'s sharing requirement. Plaintiff [a Village Corporation] sued in Federal District Court for a share of the unshared NOL revenues. . . On November 2, 1995, while the case

> The court concludes, on the basis of section 1606(i)'s plain language, that NOL revenues were not shareable revenues under section 1606(i) as enacted. Legislative history and prior judicial interpretations of shareable revenues confirm this interpretation. Accordingly, plaintiff had no property interest in the NOL revenues, and Congress took nothing when it enacted the 1995 amendment clarifying that NOL revenues were not shareable revenues. Thus, plaintiff fails to state a claim upon which relief can be granted. The reasoning behind this conclusion follows.
>
> Under ANCSA, a Regional Corporation's revenue is shareable if "received ... from the timber resources and subsurface estate patented to it pursuant to this chapter." §1606(i). By its plain language, only revenues received by a Regional Corporation "from" the timber resources and subsurface estate are shareable. As a corollary, revenues received by a Regional Corporation that are not "from" the timber resources and subsurface estate patented to it are not shareable.
>
> The legislative history of the section 1606(i) sharing requirement confirms this interpretation. Congress included section 1606(i) "to distribute more evenly among all Natives the benefits of" the disparate land grants made to each Village and Regional Corporation. However, the legislative history makes clear that the sharing provision does "not apply to revenues received by the Regional Corporations from their investment in business activities." Conf. Rep. No. 92–746, 92th Cong., 1st Sess. (1971), reprinted in 1971 U.S.C.C.A.N. 2247, 2249. Therefore, once timber resources or subsurface estate were sold and the revenues shared, Congress did

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was on appeal to the Ninth Circuit, an amendment to [Section 7(i)] was signed into law, adding paragraph (2) [codified at 43 U.S.C., § 1606(i)(2)], which provides:

> For purposes of this subsection, the term "revenues" does not include any benefit received or realized for the use of losses incurred or credits earned by a Regional Corporation.

The Ninth Circuit [subsequently held, in *Bay View, Inc. v. AHTNA, Inc.*, 105 F.3d. 1281 (9th Cir. 1997)] that Congress had taken away whatever rights plaintiff might have had to share in the NOL revenues [but reserved to the Court of Claims the issue of whether the plaintiff Village corporation] 'had a property right that was destroyed by Congress. . .'

Bay View, Inc. v. United States, 46 Fed. Cl. 494, 496 (2000)(citations omitted).

not intend that revenues received by a Regional Corporation from subsequent business activities be shared.

This interpretation is consistent with other judicial interpretations of shareable revenue under section 1606(i). [R]evenues received by a Regional corporation that are attributable to, directly related to, or generated by the acquisition of an interest in the corporation's subsurface estate are revenues subject to the sharing provisions of section 1606(i). [citing to *Aleut V,* at 484 F.Supp 482, 485.] Revenues are shareable if they are received by a Regional Corporation from another that acquires an interest in the Regional Corporation's subsurface estate (or timber resources). Other revenues are not shareable under section 1606(i).

. . . The "complicated [NOL] transaction[s] . . . which turned the NOLs into revenue sources, conveyed no interest in the Regional Corporation's timber resources or subsurface estate. They are separate transactions. Again, the revenue generated is not "from" conveyance of an interest in the Regional Corporation's timber resources or subsurface estate, but, rather, the result of the Regional Corporation's investment in business activities with a profitable corporation. Because NOL proceeds are not revenues "from" conveyance of an interest in timber resources or subsurface estate, they never were subject to section 1606(i)'s sharing requirement. Accordingly, (1) plaintiff had no property interest pursuant to section 1606(i) in the NOL proceeds of the Regional Corporations; (2) Congress took nothing by enacting the 1995 clarifying amendment adding section 1060(i)(2); and (3) plaintiff's taking claim based on sections 1606(i) and 1606(j) fails to state a claim upon which relief can be granted.

Bay View, Inc. v. United States, 46 Fed. Cl. 494, 497-98 (2000).

Bay View III. In *Bay View III* the Federal Circuit affirmed *Bay View II,* explaining as follows:

Under ANCSA, a Regional Corporation must share revenue ``received . . . *from* the timber resources and subsurface estate patented to it pursuant to this act." 43 U.S.C. § 1606(i)(1994 & Supp. III 1997)(emphasis added). Thus, Bay View's entitlement to compensatory property in this case depends on whether the money received by Regional Corporations from NOL sales was ``from" the underlying timber resources within the meaning of the statute.

In a distant sense, the NOL proceeds have some connection to the timber resources. Specifically, the sale of the resources generated NOLs; the subsequent sale of NOLs produced these proceeds. The sale of the NOLs themselves, however, is a separate business transaction without any direct relationship to the tangible resources patented to the Regional Corporations. The Regional Corporation realized revenue from sale of NOLs because they found buyers and successfully negotiated sales of these intangible financial interests. The NOLs only existed in the first place because the Regional Corporations enjoyed a favorable tax status. Accurately characterized, the NOL proceeds are a product of the tax status of the Regional Corporations, not the product of timber resources. Thus, applying the terms of ANCSA, the NOL sales generated revenues from sales of financial interests related to tax status, not from tangible timber or mineral estates.

Stated in other words, private corporations that purchased NOLs from the Regional Corporations did not acquire any interest in timber or subsurface estates. Rather, these private corporations paid for the right to consolidate their tax returns with the Regional Corporations to reduce their own tax liability. Thus, the Court of Federal Claims determined correctly that NOL proceeds do not constitute "revenues . . . from the timber resources and subsurface estate."

Some forms of legislative history supply insights into the meaning of enactments. While statements of a single legislator rarely reflect the will of the entire Congress, a joint statement of a conference committee more often reflects the joint will of each house of Congress. In this case, the Joint Statement of the Committee of Conference for ANCSA discusses the sharing of revenues between the Regional Corporations and the Village Corporations: "This provision does not apply to revenues received by the Regional Corporations from their investment in *business* activities." Conf. Rep. No. 92±746, 92nd Cong. 1st Sess. (1971), 1971 U.S.C.C.A.N. 2247, 2249 (emphasis added). This language suggests that the preposition "from" in § 1606(i) does not embrace financial and business revenues beyond those received directly from natural resources.

This statement in the Joint Statement refers to § 1606(j), not § 1606(i). However, § 1606(j) expressly applies to income received "under subsection (i) (revenues *from* the timber resources and

> subsurface estate patented to it pursuant to this Act)." (Emphasis added.) In this case, the NOL generated revenue for the Regional Corporations based on business dealings with profitable corporations, not directly from the sale of natural resources. Thus, the NOL revenue is not ``from'' the timber resources and subsurface estates within the meaning of § 1606(i)-(j). Consequently, ANCSA does not support an expansive meaning of ``all revenues from'' to comprehend ``all economic benefit derived'' from the natural resources. . ..

Bay View, Inc. v. United States, 278 F.3d 1259, 1263-64 (Fed. Cir. 2001).

Insofar as relevant to the present arbitration, the requirements mandated by these decisions are clear and consistent. Although Section 7(i) created many other uncertainties, the fact that shareability under Section 7(i) requires "acquisition of an interest" in the patented resources was not one of them. By 1976 it was settled, under both *Aleut II* and *Aleut V,* that "the statutory language is clear. . . [that] 'From the . . . subsurface estate'. . . must mean revenues received because of the acquisition of an interest in the subsurface estate" (*Aleut II*). Both decisions made it clear that "the test to be applied in determining whether . . .revenues [are] subject to the sharing requirements of section 7(i) was whether the benefits were 'generated because of, and in exchange for, the acquisition of an interest in the timber resources and subsurface estate received by a regional corporation, pursuant to ANCSA.'" "Specific rules" were announced in *Aleut V* "to reduce the need for future litigation by providing guidance to the regional corporations." The "first" of those rules was that "revenues received by a regional corporation that are attributable to, directly related 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)."

Twenty-five years later these same standards were re-examined and reaffirmed in their entirety in *Bay View II* and *Bay View III.* As discussed above, *Bay View II* confirmed that "[b]y its plain language, only revenues received by a Regional Corporation 'from' the timber resources and subsurface estate are shareable. As a corollary, revenues received by a Regional Corporation that are not 'from' the timber resources and subsurface estate patented to it are not shareable . . . Revenues are shareable if they are received by a Regional Corporation from another that acquires an interest in the Regional Corporation's subsurface estate (or timber resources). Other revenues are not shareable under section 1606(i)." *Bay View III* similarly found that "the preposition 'from' in § 1606(i) does not embrace financial and business revenues beyond those received directly from natural resources."

Both *Bay View* decisions also determined that these conclusions were consistent with ANCSA's legislative history, which the decisions summarized as instructing that "the sharing provision does 'not apply to revenues received by the Regional Corporations from their investment in business activities'" (*Bay View II)* and that Section 7(i) sharing "does not apply to

revenues received by the Regional Corporations from their investment in *business* activities" (*Bay View III*; emphasis added by the *Bay View III* court).

Both *Bay View* decisions also held that the revenues derived from the NOL transactions were not "from" conveyance of an interest in the Regional Corporation's patented resources because the NOL transactions "conveyed no interest in the Regional Corporation's timber resources or subsurface estate. They are separate transactions. Again, the revenue generated is, the result of the Regional Corporation's investment in business activities with a profitable corporation" (*Bay View II*), and because the sales of these "intangible financial interests" took place in "a separate business transaction without any direct relationship to the tangible resources patented to the Regional Corporations," where the "private corporations that purchased NOLs from the Regional Corporations did not acquire any interest in timber or subsurface estates" and "the NOL generated revenue for the Regional Corporations based on business dealings with profitable corporations, not directly from the sale of natural resources." (*Bay View III*).

Summary. Claimants did not establish that the revenues received by Respondents from the sale of carbon offset credits satisfy these requirements. As found above (*see* Part III.A above), neither CARB (the grantor of the carbon offset credits) nor the private companies that purchased those credits from Respondents "acquired an interest" in Respondents' patented timber resources, and Respondents did not "dispose of an interest" in those resources. No ownership, lease or similar legal interests in Respondents' patented timber resources were transferred to any third party when Respondents obtained and then later sold their carbon offset credits. Rather, Respondents found a way to earn revenues from "intangible financial interests" - commitments to acquire and then sell carbon offset credits - while maintaining all of their original ownership interests in the patented timber resources covered by the IFM programs The revenues so earned were derived from "business activities" and "intangible financial interests" that both *Bay View II and Bay View III,* and ANCSA's legislative history as construed in those decisions, teach do not give rise to revenues shareable under Section 7(i). Although these business commitments may prove to be formidable to Respondents in the future, Respondents can control whether the enforcement features of the CARB program are ever imposed by continuing to own their timberlands and managing them as promised in their IFM programs, and in any event none of the CARB credit-replacement or financial penalties involve seizing or acquiring an interest in Respondents' patented timber resources.

The analogy presented between the revenues at issue here derived from carbon offset credits and the revenues derived from the NOL transactions discussed in *Bay View II and III* is strong and compelling:[26] As was also true of the NOL transactions, the transactions that generated Respondents' carbon offset credits were "separate transactions" in which the "private corporations that purchased [the carbon offset credits] from the Regional Corporations

[26] [redacted]

did not acquire any interest in timber or subsurface estates" and "the [sales of the carbon offset credits] generated revenue for the Regional Corporations based on business dealings with profitable corporations, not directly from the sale of natural resources." Although those revenues could not have been earned but for the Respondents' ownership of their patented timber resources, the revenues at issue derive from contractual, business commitments entered into by the Respondents that did not involve acquisition by or disposition to any third party of any of Respondents' original ownership interest in the patented timber resources. As a result, the revenues earned from the sales of the carbon offset credits are not "from" the timber resources patented to Respondents, as that requirement of Section 7(i) of ANCSA has been consistently construed by the courts in all of the judicial decisions available for guidance to date.

B. WHETHER REVENUES FROM THE SALE OF CARBON OFFSET CREDITS ARE SHAREABLE UNDER THE SECTION 7(i) SETTLEMENT AGREEMENT?

Claimants contend that the 1982 Section 7(i) Settlement Agreement (Exs. 192/234) was mutually intended by the parties to that agreement to constitute a contractual expansion of the grounds requiring Section 7(i) revenue sharing beyond the statutory standard as construed by the courts. In particular, Claimants contend that the Settlement Agreement mandates sharing of Section 7(i) resources whenever a Regional Corporation "exploits" the timber and subsurface resources patented to it under Section 7(i), whether or not the Regional Corporation has "disposed of an interest" in those resources.[27] In support of this argument, Claimants rely in particular on the Settlement Agreement's definitions of "Section 7(i) Resources" (Art. I, §2(5) and "Gross Section 7(i) Revenues" (Art. I, §2(7)).

Article I, Section 2(5) of the Section 7(i) Settlement Agreement defines "Section 7(i) Resources" as:

> The timber resources (other than timber acquired by merger with a Village Corporation) and resources from the subsurface estate in ANCSA lands. Timber resources include both standing timber and future growth.

Article I, Section 2(7) of the Agreement defines "Gross Section 7(i) Revenues" as follows:

> Subject to the provisions of Article II, all revenues (including money, benefits and any other thing of value) received by a

[27] Claimants contend both that Respondents have "disposed of an interest" in and also that Respondents have "exploited" their patented timber resources. As discussed in Parts III.A and IV.A above, however, we have determined that the revenues at issue in this arbitration were not obtained in return for "disposition of an interest" in the Respondents' timber resources. The discussion that follows addresses Claimants' remaining, contract-based, claim that the carbon offset credits are nonetheless shareable under the Section 7(i) Settlement Agreement because those revenues are attributable to "exploitation" of Respondents' timber resources.

> 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.

Based on these provisions, Claimants contend that Respondents' revenues from their sales of the carbon offset credits "are attributable to, directly related to, or generated from the . . . exploitation of . . ." Respondents' "standing timber and future growth. . .." Claimants further contend that such "exploitation" suffices, as a matter of contractual agreement between the parties to the Settlement Agreement, to make the revenues at issue here shareable, whether or not Respondents also "disposed of an interest" in the Respondents' timber resources, because the parties agreed in their Settlement Agreement that all revenues attributable either to such exploitation "*or* the disposition any interest in" ANCSA timber resources must be included in Gross Section 7(i) Revenues. (Art. I, §2(7); emphasis added).

Claimants' contention that the Settlement Agreement created a contractual duty to share revenues "attributable to" the "exploitation" of a Regional Corporation's timber resources, whether or not the "exploitation" involved the "acquisition of an interest in" the patented timber resources, was not established, for four main reasons.

First, the text of Article I, Section 2(7) expressly includes the same transfer-of-an-interest requirement mandated by the judicial interpretations of Section 7(i) extant at the time of contracting (1982). The text of Article I, Section 2(7) expressly references the "disposition of an interest" requirement and does so with companion language that is similar – almost word-for-word similar – to the "first rule" mandated by *Aleut V*.[28] The text of Section 2(7) contains no suggestion that the parties to the Settlement Agreement had mutually agreed to abandon the *Aleut II* and *Aleut V* requirements. Instead, the similar language used suggests that the text of Section 2(7) was patterned after and intended to incorporate the *Aleut II* and *V* standards. As discussed above, that was the Special Master's reading of the Agreement when he recommended it for Court approval:

> The Agreement's provisions for revenue accounting *follow the extensive 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. . .

[28] For example, Section 2(7) references "all revenues . . . received by a Corporation that are attributable to, directly related to, or generated from" patented resources. *Compare* the "first rule" set forth in *Aleut V*: ". . . revenues received by a regional corporation that are attributable to, directly related to, or generated by" patented resources.

> The Agreement *adopts and codifies* the Court's broad interpretation of what constitutes §7(i) revenues. . .
>
> Accordingly, the Special Master respectfully recommends that the Court approve this Settlement Agreement. . . .

(Special Master's Report, Ex. 193, at pp. 22 and 40 of the exhibit, pp. 19 and 37 of the Report; emphasis added.)

Claimants rely on dictionary definitions of "exploitation" (*see Claimants Post-Hearing Br., App. B.*, defining "exploit" or "exploitation" variously as "to get value from or use (something)" or "to make full use of or derive benefit from (a resource)"), together with the conjunction "or," to urge an expansive suggested interpretation of the Settlement Agreement. Specifically, Claimants argue that the phrase "or other exploitation of" that appears in Section 2(7), a definitional provision, requires the entire Section 7(i) Settlement Agreement to be construed as erecting a contractual extension of the statutory scope of Section 7(i) that would require sharing in circumstances not encompassed by the statutory language as construed by the courts prior to 1982. Based on this language in Section 2(7), Claimants contend that Section 7(i) sharing is now required - contractually - whenever a Regional Corporation earns revenues that result from some productive use of, "monetization" of, or that bear a "but for" or similar causal connection or derivation tracing back to the patented timber resources that the corporation initially received pursuant to ANCSA.

As applied to timber resources, it is far from clear that the texts of Sections 2(5) and 2(7) bear the meanings now ascribed to them by Claimants. Section 2(7)'s phrase "other exploitation of . . ." refers to "Section 7(i) Resources". For the purposes relevant in this arbitration, the phrase thus refers to "exploitation" of "timber resources" as defined in Section 2(5). As Claimants' own sample of dictionary definitions (*id.*) make clear, however, the terms "exploit" or "exploitation" traditionally mean, when applied to natural resources, to use or develop such resources, as in the phrases "no minerals have yet been exploited in Antarctica" or "countries exploiting the rainforests for hardwood." Both Alaska's courts and scholars discussing "exploitation" of timber resources commonly use the term as connoting severance or depletion of timber.[29] In common parlance, "exploitation" of natural resources can refer to transactions in which an interest in the resources is transferred to some third party.[30] Used in this sense, "other exploitation" simply connotes other transactions, in addition to sales or leases, listed

[29] *See, e.g., Sagoonick v. State of Alaska,* Op. No. 7583 at *7, n. 14 January 28, 2022 ("'Conserving' implies controlled utilization of a resource to prevent its exploitation, destruction or neglect.")(*quoting Kenai Peninsula Fisherman's Coop. Ass'n v. State,* 628 P. 2d 897, 903 (Alaska 1981); 5 Treatise on Environmental Law §12.03 (2021)(using "exploitation of timber resources" to mean "an actual logging operation"); Jedediah Purdy, *The Politics of Nature: Climate Change, Environmental law, and Democracy,* 119 Yale L.J. 1122, 1152-1153 (2010)(". . . unregulated timber exploitation could cause erosion, downstream flooding, siltation, and forest collapse.")

[30] [redacted]

immediately previously in Section 2(7), in which a legal interest in the patented resources has been transferred to a third party. In normal usage, "exploitation" of timber resources can also refer to a severance of harvestable trees. Used in this sense, insofar as Section 2(7) applies to timber resources, the most natural reading of that provision's reference to "other exploitation" is that the term connoted the contracting parties' expectation that revenues attributable to the development, production, lease, sale or other transfer or harvesting of patented timber resources must be included in "Gross Section 7(i) Revenues."

The likelihood that this is what the parties did intend is enhanced by the provision's introductory phrase – "Subject to the provisions of Article II. . . ." The plain meaning of this provision is that in 1982, when the Agreement was signed, the parties intended that the balance of Section 2(7) could not be assigned a construction or interpretation that overrode the specific provisions of Article II. At that time Article II specifically provided, in its Section 9, that "[w]here a Corporation harvests timber resources on ANCSA Lands in whole or in part for its own account, revenues derived from the sale of such timber resources shall be included in Gross Passive Section 7(i) Revenues and shall be limited to the Fair Market Value of the severed timber resources as they existed in their nature state prior to severance."[31] CIRI's counsel construed these provisions in September 1982 as providing [redacted]. Reading Article I, Sections 2(5), 2(7) and Article II, Section 9 together, the only revenue sources from timber resources recognized in those provisions as a possible basis for revenue sharing were development, production, sales, leases and other transfer or harvesting of timber resources – all uses that involved acquisition of an interest in the patented timber resources by some third party. As applied to timber resources, the introductory "Subject to the provisions of Article II" language in Article I, Section 2(7) thus corroborates the conclusion that 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 Agreement concerning how shareable revenues derived from a Corporation's timber harvesting for its own account would be calculated.

So construed, Section 2(7) first lists a series of familiar types of activities and transactions that the parties agreed were all subject Section 7(i) sharing obligations, all of which involve

[31] In 1990 the parties agreed to amend the Agreement to treat active timber harvesting (harvesting by a Corporation for its own account) in a manner analogous to active subsurface development. The amendments adopted then deleted Article II, Section 9, which had provided for a different method of valuing timber resources severed during active harvesting, but replaced it with a host of specific deduction provisions, all aimed at accurately computing shareable net revenues resulting from active harvesting of timber resources. The text of Article 2(7) was not changed at the time of these amendments. Nothing in the 1990 amendments indicates that the parties intended a broader interpretation of "other exploitation" - as connoting anything other than transfer or harvesting of timber resources – after 1990 than had been the case in 1982.

transfer of an interest in the patented resources. The definition then adds "or other exploitation" at the end of that list, which we construe as adding other transfers and harvesting of timber resources, both of which also involve the disposition of an interest in those resources, to the list. The provision concludes with "or disposition of any interest in," which we construe as a general catch-all intended to make clear that all transactions attributable to transfer of such an interest, whether or not specifically set forth in the preceding list, are subject to Section 7(i) sharing.[32]

Finally, we note that nothing in the text of Article I, Section 2(7) indicates any clear affirmative agreement by the contracting parties 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 patented resources were subject to the sharing obligation.

Second, the Section 7(i) Settlement Agreement, construed as a whole,[33] does not support the conclusion that the parties mutually agreed in 1982 to abandon the "acquisition of an interest" requirement then mandated by the applicable judicial interpretations of Section 7(i). Sections 2(5) and 2(7) of Article I of the Agreement, discussed and construed above, must also be construed together with other important provisions in the Agreement. In addition to Article II, Section 9, discussed above, these include in particular Articles II, III, IV and VIII of the Agreement. Those provisions, construed together with the Agreement as a whole, establish that the overriding goal of the Settlement Agreement was to implement Section 7(i) of ANCSA by adopting an agreed uniform system of accounting for and reporting revenues derived from transactions subject to Section 7(i). To this end, Articles II, III and IV in particular make clear that the principal purpose of the Agreement was to establish a uniform set of accounting rules to govern the calculation of shareable net revenue. With regard to revenues derived from timber resources, the only allowable deductions permitted under Article III of the Agreement were for timber harvesting, operation or production costs. *See, e.g.,* Tr. 1235-37, 1258 (McNeil); 751-752 (Tucker); Ex. 234, at 54-55. Article VIII, Section 3 of the Agreement provides "that the revenues and deductions provisions of Articles II and III . . . and the provisions for calculating distributable revenues set forth in Article IV are of the essence of this Agreement," and further provides, in substance, that the entire Agreement would be rendered void if the revenue, deductions, or calculation provisions of the contract were ever determined to be incompatible with ANCSA.

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[32] The text of Section 2(7) references the "disposition of any interest in" patented resources as a basis for shareability. Although this language is not the same as the "acquisition of an interest" language used in *Aleut II and Aleut V*, we can discern no substantive difference between these two textual formulations. Both phrases reference transactions that involve a transfer of an interest in patented resources. Both phrases require revenues to be shared "so long as [they] are received by a regional corporation . . . in exchange for rights granted in the timber resources and subsurface estate received by a regional corporation pursuant to ANCSA." *See* the discussion of *Aleut II, supra.*

[33] *See Tesoro Alaska Co. v. Union Oil Co. of Cal.*, 305 P.3d 329, 333 (Alaska 2013); *Matanuska Elec. Ass'n, Inc. v. Chugach Elec. Ass'n, Inc.*, 99 P.3d 553, 562 (Alaska 2004) (courts attempt to give effect to all of an agreement's terms and give consideration to disputed language within the context of the whole contract and its purpose, and the circumstances surrounding its formation).

In addition to the provisions discussed above, Article II, Section 7 of the Settlement Agreement, dealing with sand and gravel, is also useful in assessing whether the Settlement Agreement, construed as a whole, evidences a mutual intention of the contracting parties to overrule by contractual agreement judicial decisions that had already construed Section 7(i) as of the time of contracting. Prior to execution of the Settlement Agreement the United States Court of Appeals for the Ninth Circuit had held that sand and gravel were included in the patented Section 7(i) Resources. In Article II, Section 7 all of the signatory Regional Corporations recited their agreement that, for various pragmatic reasons, it would be better for everyone if sand and gravel were excluded from Section 7(i) sharing duties. Notwithstanding that agreement, however, the parties did not attempt to contract around the Ninth Circuit's judicial interpretation of the statute in their Settlement Agreement. Rather, they used Article II, Section 7 to recite their agreement together with their further agreement to seek a legislative, rather than a contractual, solution to the sand and gravel problem.

> The parties to the Agreement recognize that the ruling of the United States Court of Appeal for the Ninth Circuit that sand and gravel are Section 7(i) Resources has made it disproportionately difficult in relation to the benefits to the Corporations to determine their Section 7(i) obligations with regard to these resources, because . . . The parties further agree to use their best efforts to cause Congress to amend ANCSA to exclude sand, stone, gravel, pumicite, and cinders from the sharing requirements of Section 7(i). . ..

(Settlement Agreement, Ex. 192/234, Art. II, Section 7.) The parties' treatment of the sand and gravel problem is not completely analogous to the argument Claimants make in the present arbitration: The Regional Corporations agreed they wished to exclude sand and gravel from Section 7(i) Resources while Claimants here argue that the Regional Corporations agreed to expand the types of transactions subject to Section 7(i) sharing. Even allowing for that difference, however, we conclude that Article II, Section 7 evidences the intention of the parties to respect and defer to a legal precedent that had already interpreted Section 7(i) in one important respect as of the time of contracting. The provision further demonstrates that the contracting parties intended their Agreement to implement and be consistent with at least one important aspect of ANCSA that had already been settled by prior judicial decision, and shows that they elected not to attempt to displace or overrule that decision by contrary contractual agreement.

Our review of the Settlement Agreement as a whole also compels one final observation - concerning an important provision that does *not* appear anywhere in the Agreement. If these sophisticated parties had actually agreed in 1982 to overrule Judge von der Heydt's decisions in the two most important judicial decisions then extant concerning the types of transactions that are subject to Section 7(i)'s sharing duties, we would have expected to find language confirming such an agreement front and center in the text of their contract rather than buried in three words ("or other exploitation") contained in one brief definitional provision. Except for the two

short definitional provisions relied upon by Claimants, however, no other provisions of the Settlement Agreement even arguably evidence any mutual intention of the contracting parties to abandon or rewrite the statute's requirement, as construed by the courts at the time of contracting, that only revenues derived from transfer or disposition of an interest in patented Section 7(i) resources must be shared under the statute. Unlike the express acknowledgment of the Ninth Circuit's decision on the and sand and gravel issue, set out in Article II, Section 7, those two definitional provisions do not reference either of Judge von der Heydt's prior decisions, and do not recite any agreement to expand, amend or overrule them by contract.

We draw several conclusions from this review: The Settlement Agreement, construed as a whole, implements ANCSA, principally through adoption of an agreed and uniform "accounting charter" for calculating net shareable revenues, but does not rewrite or amend the settled requirements for determining which transactions are subject to Section 7(i) sharing that had been decided by the courts at the time of contracting. Reading the agreement as a whole, we cannot find in it a clear mutual agreement to overrule Judge von der Heydt's prior decisions, or expand the scope of the statute by contractual agreement to require sharing in transactions not involving the transfer or disposition of an interest in patented resources. The fact that the Agreement limits timber-related deductions to harvesting and operations-related expenses corroborates the conclusion, reached above, that the term "other exploitation" as used in Article I, Section 2(7) refers to other timber harvesting activities, and cannot be construed as an open-ended synonym for all forms of "monetization" or "productive use." Claimants' expansive interpretation of that term to the contrary would lead to a result fundamentally at odds with the purpose and structure of the Settlement Agreement as a whole: It would require sharing of unanticipated, additional Section 7(i) gross revenue streams without any corresponding allowances for deductions required to reach net revenues. The detailed language of Articles II, III and IV cannot be reconciled with such an interpretation. Rather, the types of deductions permitted in Article III shed important light on how the drafters of the Settlement Agreement were using "exploitation" in the definitional provision relied upon by Claimants. For these reasons, we conclude that review and construction of the Settlement Agreement as a whole requires the conclusion that neither the two definitional provisions relied upon by Claimants, Article I, Sections 2(5) and 2(7), nor the Settlement Agreement as a whole, abandoned the requirement of ANCSA, Section 7(i), as determined by the courts prior to 1982 - that Section 7(i) sharing is required only for revenues derived from transactions that involve transfer or disposition of an interest in patented resources.

Third, the extrinsic evidence presented concerning the parties' reasonable expectations at the time of contracting did not establish that the parties mutually intended in 1982 to abandon the "acquisition of an interest" requirement then mandated by the applicable judicial interpretations of Section 7(i). As found and discussed more fully in Part III.A above, the evidence presented in this arbitration established rather that the parties intended their Settlement Agreement to be an agreed "accounting charter." They intended the Agreement to guide implementation of Section 7(i) in the future by adopting uniform and agreed solutions to numerous then-unsettled issues related to accounting for and reporting revenues derived from transactions subject to Section 7(i). In particular, they intended the Agreement to establish a

uniform set of accounting rules to govern the calculation of shareable net revenue. The evidence did not establish any mutual agreement at the time of contracting to redefine or expand the types of transactions that had already been determined, in applicable judicial decisions prior to 1982, to be subject to sharing duties under Section 7(i), or to abandon or overrule those decisions by contractual agreement. Perhaps the best neutral source in a position to assess the parties' intent at the time of contracting was the Special Master. As discussed above, he reported that the Agreement's provisions for revenue accounting "follow" and "adopt and codify" the definition of §7(i) Revenue previously expressed by the Court. (Special Master's Report, Ex. 193, at 22, 40.)

Fourth, *Bay View II and Bay View III,* decided (in 2000 and 2001, respectively) long after the parties' entry into the Section 7(i) Settlement Agreement in 1982 and also well after the parties' amendments to that Agreement in 1990, confirmed that the settled requirements for shareability under Section 7(i) continue to mandate the "disposition of an interest" in patented resources. Claimants offer a number of possible grounds on which those decisions might be distinguished – including the facts that none of the Regional Corporations were parties in those cases and that neither decision specifically discussed the Settlement Agreement – but did not offer a persuasive reason for disregarding the guidance given in those decisions. Both decisions reached exactly the same conclusions, long after execution of the Settlement Agreement in 1982, as had Judge von der Heydt in *Aleut II* and *Aleut V.* In summary, we are not prepared to conclude either that those decisions were wrongly decided or that they are inapplicable to the present dispute.[34]

Article VI, Section 13 of the Settlement Agreement provides that "the arbitrators shall consider, but not be bound by, the results of prior arbitrations." In that regard, the first of the two arbitrations conducted previously pursuant to the Settlement Agreement, *The Aleut Corporation v. Sealaska Corporation,* AAA No. 75 199 0023 86 (1988), considered several disputes that arose concerning the operation of the Agreement's original, pre-1990, approach to valuing revenues attributable to active harvesting of timber resources. As discussed above, prior to 1990 the Agreement required valuation of timber severed during active harvesting based on a valuation of the severed timber "prior to severance." Article II, Section 9. One of the issues addressed in the *Sealaska* arbitration was whether the claimants were entitled to share in the value of severed timber even if the timber was not sold. The arbitrators denied that claim, holding that an actual sale of the severed timber was necessary in order to trigger

[34] [redacted]. This evidence indicates that at least one of the Claimants regarded *Bay View II* as correctly decided and relevant to analysis of Section 7(i) sharing duties under both the statute and the Settlement Agreement in 2017, long after execution of the Settlement Agreement in 1982.

applicability of the Section 7(i) sharing obligation.[35] The panel's decision was based on its interpretation of Article II, Section 9 of the Agreement, rather than Article I, Section 2(7), and, as noted in Article VI, Section 13, is not binding on us. Nevertheless, we consider the result reached on this disputed point an additional precedent further confirming, along with *Bay View II* and *III*, that transfer of an interest in the patented resources continued to be an essential requirement for Section 7(i) sharing in the years following execution of the Settlement Agreement.

For these reasons, we hold that the Section 7(i) Settlement Agreement does not require sharing of revenues Respondents receive in return for sales of their carbon offset credits.[36]

C. WHETHER SECTION 7(i)(2) OF ANCSA, ADDED BY AMENDMENT IN 1995, PROVIDES THAT REVENUES FROM SALES OF CARBON OFFSET CREDITS ARE NOT SHAREABLE?

Section 7(i)(2), added to the statute by amendment in 1995, provides:

> For purposes of this subsection, the term "revenues" does not include any benefit received or realized for the use of losses incurred or credits earned by a Regional Corporation.

Respondents contend that the plain meaning of the term "credits earned" bars Claimants' claims in this arbitration. Claimants respond that the legislative history of the provision (*see* Exs. 194 and 370) establishes that its legislative purpose was to exclude revenues from NOL transactions from Section 7(i)'s sharing requirement.[37] Claimants also contend that the statute's term "credits earned" is a term of art used by the IRS to refer to tax credits (*see* Claimants' Post-Hearing Brief, App. C, attaching an IRS letter ruling from 1987 that Claimants contend uses the term in this sense). In that regard, Claimants also contend that this term was included in the 1995 amendment because the same term had recently been used by Congress in both the Tax Reform Act of 1984 and in the Tax Reform Act of 1986 to deal with similar tax-related subject matter, and was intended by Congress in all three of these statutes to refer only

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[35] Ex. 229, Preliminary Opinion of Arbitrators, at 20-21 (". . . it is the sale of the timber that triggers the obligation to distribute revenues . . .").

[36] Based on the conclusions reached above, we do not reach or decide whether the Regional Corporations are subject to statutory or other legal duties, *e.g.*, duties to Village Corporations and/or shareholders under ANCSA, that may deny them the freedom to contract for an expansion of the types of transactions subject to sharing under Section 7(i) as determined by the courts. The conclusions reached above make it unnecessary to reach or decide this point in the present arbitration. In addition, the parties did not pursue such an argument before us. As a result, the record presented would not allow us to analyze this point comprehensively even if we were inclined to address it. Accordingly, nothing in this award expresses any view on whether Regional Corporations have the freedom to expand by contract settled judicial interpretations of the types of transactions subject to sharing under Section 7(i).

[37] *Bay View I* described the 1995 statute as follows: "In 1995 Congress amended ANCSA section 7(i) to exclude NOL revenue from that section's sharing requirement." *Bay View, Inc. v. AHTNA, Inc.*, 105 F.3d. 1281, 1284 (9th Cir. 1997).

to tax credits such as research and development tax credits, renewable energy tax credits, and the like.

We do not reach or decide this interesting issue, for three reasons. First, in view of the conclusions reached above, it is unnecessary for us to resolve the parties' disagreement concerning the appropriate construction and effect of Section 7(i)(2) on Claimants' claims, which we deny for the other reasons discussed above. Second, the parties' arbitration agreement (Settlement Agreement, Article VI, Section 1, "Issues Subject to Arbitration") specifically provides that "No arbitration shall be held concerning the Federal or State income tax consequences of revenues, deductions, distributions, or any other income tax issues under Section 7(i) of this Agreement." We recognize that the parties disagree as to whether the term "credits earned" refers exclusively to tax credits, or not, but wish to steer clear of the agreement's broad prohibition of arbitration of "any other income tax issues. . .." Third, especially since it is not necessary for us to reach this issue in order to adjudicate the particular claims presented in this arbitration, we think it best, on prudential grounds, to abstain from construing the 1995 statute and instead leave any such interpretation of Congress's language to courts in the future.

V. RESPONDENTS' APPLICATION FOR AN AWARD OF THEIR ATTORNEYS' FEES AND EXPENSES.

Part VI.A of the Interim Award provided that "Respondents may file an application for an award of their attorneys' fees, expenses, and costs of litigation, and for an allocation in their favor of AAA charges and the arbitrators' compensation. . .." By motion (Respondents' Motion to Recover Costs and Fees), filed April 29, 2022 ("Motion"), and in a reply in support of that motion filed on June 20, 2022 ("Reply"), Respondents timely did so. As supplemented in the Reply, the Motion seeks an award of attorneys' fees of $1,040,550 to Respondent AHTNA, $659,213.25 to Respondent Chugach and $756,389.78 to Respondent Sealaska, and expenses totaling $505,790.73, exclusive of AAA charges and arbitrator compensation, which are discussed separately below. Claimants opposed the Motion in an opposition submission made on June 6, 2022 ("Opposition").

A. RESPONDENTS' CLAIMS FOR FEES AND EXPENSES EXCLUSIVE OF AAA CHARGES AND ARBITRATOR COMPENSATION.

Section R-47 of the arbitral Rules applicable here provides:

> (a) The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract. . .
>
> (d) The award of the arbitrator(s) may include: . . . ii. an award of attorneys' fees if all parties have requested such an award or it is authorized by law or their arbitration agreement.

In the present case, such an award is authorized by the parties' arbitration agreement. Article VI, Section 14(a) of the Settlement Agreement provides: "Unless otherwise agreed to by the parties, the prevailing party in an arbitration or appeal therefrom shall be entitled to reimbursement of the costs of the arbitration or appeal, including attorneys' fees, determined by the arbitrators. . . in accordance with Rule 82 of the Alaska Rules of Civil Procedure."

Applying those provisions here, we find that Respondents are "the prevailing part[ies]" in this arbitration,[38] and that Article VI, Section 14(a) therefore requires an award to Respondents of their attorneys' fees and expenses reasonably incurred in the case. Although such an award is required by the Settlement Agreement, the above-quoted provisions, and Alaska law generally, *see* Alaska R. Civ. P. 82(b)(2)(permitting partial recovery "of the prevailing party's reasonable actual attorney's fees, which were necessarily incurred. . .") and *Adkins v. Collens,* 44 P. 3d 187, 199 (Alaska 2019), require the quantum of any such award to be reasonable.

In general, and subject to the discussion that follows, we find that the Motion was carefully and conscientiously prepared, well-documented and reasonable in amounts sought, that this matter was efficiently staffed for Respondents by experienced and competent counsel, that the total numbers of hours incurred, the hourly rates charged and the expenses incurred were reasonable, and that the Motion meets the standards for assessing reasonableness set out in Rule 82, and the authorities construing that Rule cited to us by the parties.

Claimants' opposition to the Motion raises several specific objections to Respondents' requested award of fees and costs. We have resolved these as follows:

"Baseline" Fees. Before applying a percentage reduction under Rule 82, we must first determine the "baseline" amount of fees actually, reasonably, and necessarily incurred.[39] Based on the record presented, we find that Respondents' actual attorneys' fees incurred on this matter totaled $3,196,286.20 through March 31, 2022, (Motion at 3; Opposition at 6,), and that including additional fees incurred during April, May and June 2022, Respondents' actual attorneys' fees incurred on this matter totaled $3,274,870.71. (Reply, at 25, and Katchen, Coughlin and Selig Affidavits referenced there.). Claimants take no issue with the hourly rates charged by Respondents' attorneys and paralegals. (Opposition, at 6.) Claimants contend, however, that the total number of hours incurred were unreasonable in two respects. Specifically, Claimants object that $61,781 should be deducted from the total fees incurred because these charges relate to settlement discussions, and thus seek recovery for work that was "not directly related to the arbitration." (Opposition, at 6-7.) Claimants also contend that an additional $355,474 should be deducted from Respondents' total fees due to "excessive

[38] *See Alaska Ctr. For the Env't v. State*, 940 P.2d 916, 921 (Alaska 1997). Claimants do not contest this finding. Opposition, at 2.

[39] *See* Alaska R. Civ. P. 82(b)(2)(permitting partial recovery "of the prevailing party's reasonable actual attorney's fees, which were necessarily incurred. . ."); *Adkins v. Collens,* 44 P. 3d 187, 199 (Alaska 2019).

charges" by Respondent AHTNA's counsel, when compared to the lower fee totals incurred by counsel for Respondents Chugach and Sealaska. (*Id.*) Based on these two objections, Claimants contend that Respondents' "baseline" of fees reasonably and necessarily incurred should be set at $2,750,960.38, approximately 15% below the $3,196,286.20 claimed by Respondents in the Motion as originally filed (*i.e.,* prior to addition of the additional time reported in the Reply submissions). (Opposition, at 7.)

We deny both of these requested deductions. The $61,781 deduction sought by Claimants covers work done after the Demand for Arbitration was filed and the arbitration process had begun. *Matanuska Elec. Ass'n v. Rewire the Board,* 36 P.3d 685 (Alaska 2001), the authority principally relied on by Claimants for this requested deduction, addressed whether a "zone of litigation" exception should be recognized to the usual rule excluding fees incurred prior to filing. *See Martens v. State Dep't. of Highways,* 623 P.2d 331, 335 (Alaska 1981)(fees incurred prior to filing of the action normally excluded from fee awards). Once a case is under way, as was the situation here, we find efforts to settle it both reasonable and well within the "zone" of active litigation. Moreover, the purposes of Rule 82, which include encouraging settlement of disputes, would be undermined if the rule was applied in a manner that deterred parties from engaging in settlement efforts after a case was initiated. *See* Matthew Naiman, *The Plaintiff's Plight: Altering Alaska's Rule 82 to Better Compensate Plaintiffs,* 39 Duke-Alaska Law Rev. 139, 159 (2022).

We disallow the requested $355,474 deduction for two main reasons: First, much of the requested deduction is due to the higher rates charged by AHTNA's counsel, which Claimants do not challenge as unreasonable. (See Opposition, at 6.) Second, we accepted Respondents' explanation that AHTNA's counsel handled a large portion of the pre-hearing work and that it is therefore reasonable that its total hours came in a little higher. In that regard, we did not find persuasive specific examples of allegedly wasted time by AHTNA's counsel either in the Opposition submission or in our own review of AHTNA's time sheets.

Based on these conclusions, we find that a "baseline" total of $3,274,870.71 in attorneys' fees were reasonably and necessarily incurred by Respondents during their work on this matter.

Application of Rule 82. As discussed above, Article VI, Section 14(a) of the Settlement Agreement provides: "Unless otherwise agreed to by the parties, the prevailing party in an arbitration or appeal therefrom shall be entitled to reimbursement of the costs of the arbitration or appeal, including attorneys' fees, determined by the arbitrators. . . in accordance with Rule 82 of the Alaska Rules of Civil Procedure." The parties agree that the version of Rule 82 in effect when the Settlement Agreement was executed in 1982 provided that "[s]hould no recovery be had, attorney's fees may be fixed by the court in its discretion in a reasonable amount." (Opposition, at 3; Reply, at 3.) Despite this open-ended language, Rule 82 has always been interpreted to provide for partial reimbursement to the prevailing party and require fee awards falling somewhat below 100% of the "baseline" of fees reasonably and necessarily incurred. *See* Note, *Rule 82 Revisited: Attorney Fee Shifting in Alaska,* 10 Alaska Law Review 429, 432-33, 437 (awards of up to 80% of actual baseline fees were commonly made to prevailing defendants in

fee awards made under the Rule prior to the 1993 amendment); Motion, at 10-11 & n. 27 (collecting specific pre-1993 examples of Alaska cases approving Rule 82 awards to successful defendants of 50%, 60%, 61%, 68%, 74%, and 75% of baseline). Rule 82 was amended in July 1993. The parties also agree that the 1993 amendment adopted a starting point of 30% of the reasonable actual fees for a prevailing party that obtained a defense verdict, subject to possible discretionary modifications based on a list of specific factors that could change that percentage in appropriate cases. (*Compare* Motion, at 5, *with* Opposition, at 3.)

Claimants argue that Article VI, Section 14's reference to "Rule 82 of the Alaska Rules of Civil Procedure" should be construed as a reference to that Rule in its current form, rather than to the form of the Rule in existence when the Settlement Agreement was executed in 1982. The financial consequence of this issue is substantial. Respondents seek a fee award totaling $2,456,153.03, which represents 75% of the $3,274,870.71 in fees they actually incurred. (Motion, at 5, 18-19.) Claimants contend that any fee award to Respondents should not exceed $825,288.11, which represents 30% of the "baseline" amount urged by Claimants. (Opposition, at 16.).

We construe Article VI, Section 14 of the Settlement Agreement as expressing a mutual intention that the arbitrators would have discretion to award fees to a successful Respondent "in [their] discretion in a reasonable amount," which was what the referenced Rule 82 authorized at the time the Settlement Agreement was executed, and that this discretion would be exercised in a manner consistent with the courts' general approach to fee awards under that Rule as of the time of contracting. We reach this conclusion for two main reasons.

First, the parties included express "as amended" language in several other provisions in the Settlement Agreement but did not do so in the Article VI, Section 14(a) reference to Rule 82. For example, Article I, Section 2(1) of the Settlement Agreement defined "ANCSA" as the "Alaska Native Claims Settlement Act, Public law 92-203, 43 U.S.C. §§1601-31, as amended and supplemented from time to time." Similarly, Article I, Section 2(38) referenced "Section 21(c) of ANCSA as amended. . ." and also referenced certain IRS Income Tax Regulations "as such regulations may be amended from time to time." Article VI, Section 2 provided that "[e]xcept as this Agreement provides to the contrary, the Commercial Arbitration Rules of the American Arbitration association, as amended and in effect (hereinafter referred to as the "Rules"), shall govern all aspects of the arbitration." By contrast, the language used in Article VI, Section 14(a) contains no such express indication that the contracting parties intended to include future amendments in the reference to Rule 82. No such intent is expressed in Article VI, Section 14(a). The use of such language elsewhere, but not in Article VI, Section 14(a), indicates that the parties did not intend post-contractual amendments to the Rule to be automatically incorporated into the procedure required by that provision.

Second, we found persuasive the legal authorities cited by Respondents for the proposition that contractual references to a statute should not be construed as encompassing post-contractual changes to the statute unless the contract clearly expresses that this is what the parties intended. *See, e.g., Kia Motors Am., Inc. v. Glassman Oldsmobile Saab Hyundai,*

Inc., 706 F.3d 733, 738 (6th Cir. 2013)("Contracting parties are free to agree that their rights and duties will track the law as it changes, but because the terms of their bargain could be significantly altered, they must make their intent to do so clear"); *Peterson v. D.C. Lottery & Charitable Games Control Bd.*, 673 A.2d 664, 667 (D.C. 1996)(same; citing cases and 3 CORBIN ON CONTRACTS); *Mayor of Salem v. Warner Amex Cable Comm's, Inc.*, 392 Mass. 663, 666-67, 467 N.E.2d 208, 210 (1984)("Amendments enacted after execution are not incorporated into an agreement unless the contract provisions 'clearly establish that the parties intended to incorporate subsequent enactments into their agreement'")(citations omitted). *See generally*, 11 Williston on Contracts, §30.23 (4th ed.)("Thus, as a rule of construction, changes in the law subsequent to execution of a contract are not deemed to become part of agreement unless its language clearly indicates such to have been intention of the parties"). Although the authorities cited on this point were not from Alaska, we found their reasoning cogent and persuasive. No Alaska authorities favoring a different approach to this construction issue were cited to us.

Application of Rule 82 in its pre-1993 form requires us to award fees to these successful Respondents "in [our] discretion in a reasonable amount. . .." Respondents seek 75% of the "baseline" fees reasonably incurred. We find this application reasonable and grant it, for three main reasons. First, this is what was done in the only prior arbitrations conducted pursuant to Article VI, Section 14(a). In each of those cases the Panels awarded fees at approximately 75% of the total actually incurred because they concluded that this was a "reasonable" amount to award. (See Motion, at 9-11; Reply, at 8-9). Article VI, Section 13 of the Settlement Agreement provides that "[t]he arbitrators shall consider, but not be bound by, the results of prior arbitrations." Although we are not "bound by" the earlier decisions, we do find that they provide useful and persuasive guidance on how the pre-1993 version of Rule 82 should be applied in a Section 7(i) arbitration conducted pursuant to the Settlement Agreement. Indeed, they are the only prior authorities extant on that type of proceeding available to us to study. Second, for the reasons discussed above we find that an award of 75% of the "baseline" fees is consistent with the courts' practice generally in applying Rule 82 in other cases involving successful defendants at the time the Settlement Agreement was executed. We believe such a result is most consistent with the reasonable expectations of the parties at the time they executed their Settlement Agreement. *See, e.g., Peterson v. Wirum*, 625 P.2d 866, 872 n. 10 (Alaska 1981), *citing cases.* Third, based on our own independent review of the record presented on this Motion, we find that an award of 75% of Respondents' "baseline" fees is "a reasonable amount," taking into account the complexity of the issues raised, the amounts in controversy, and all of the various other factors deemed relevant to determinations of reasonableness discussed in the authorities cited to us by the parties.

Even if the post-1993 version of Rule 82 were applied, the amended Rule authorizes a starting point of 30% of the reasonable actual fees for a prevailing party that obtained a defense verdict, but also expressly authorizes possible discretionary modifications upward from that percentage based on a list of specific factors that can change that percentage in appropriate cases. Claimants acknowledge that "the Panel has discretion to vary the presumptive 30 percent award up or down based on its application of the factors set forth in Rule 82(b)(3)." (Opposition, at 8.) Exercising that discretion here, and as an alternative ground of decision, we also find that

even if the post-1993 version of Rule 82 were applied, the reasonable and appropriate fee award is 75% of the "baseline" amount incurred.

We wish to be clear that we do not find vexatious or bad faith conduct on the part of any party. *See* Rule 82(b)(3)(G). Although Respondents prevailed, Claimants presented their arguments in good faith, professionally, competently, and efficiently at every phase of this case.

Nevertheless, we find that an upward modification to 75% of the "baseline" fees is warranted by other departure factors listed in Rule 82(b)(3). *See, e.g., Keenan v. Meyer,* 424 P.3d 351, 359 (Alaska 2018)(upwards modification to 75% warranted without consideration of vexatious conduct). In particular, we find that the complexity of the litigation, the amounts in controversy and the importance of the issues raised to the parties, the conceded reasonableness of the rates charged, the relatively minor challenges raised to the total hours incurred (approximately 85% of which were not challenged and all of which were found by us to have been reasonably incurred), the reasonableness of the number of attorneys used, the reasonableness of the claims and defenses presented, the significance of the issues to the parties, the relationship of the amount of work performed and the significance of the matters at stake, the absence of any showing that a fee award at the 75% level would discourage Regional Corporations from voluntary use of the Settlement Agreement's arbitration provision in the future, and the overall equities of this case warrant an award at 75% of the 'baseline" fees incurred.

For these reasons, exercising our discretion under Section R-47(d) of the Rules and Article VI, Section 14(a) of the Settlement Agreement, we award Respondents $2,456,153.03 in recoverable attorneys' fees. Based on the record presented as to the amounts incurred by each Respondent, $1,040,550 of this amount shall be paid to Respondent AHTNA (Katchen Affidavits), $659,213.25 to Respondent Chugach (Coughlin Affidavits) and $756,389.78 to Respondent Sealaska (Selig Affidavits).

Expenses Exclusive of AAA Charges and Arbitrator Compensation. As supplemented in the Reply, the Motion seeks an award of expenses totaling $505,790.73, exclusive of AAA charges and arbitrator compensation, which are discussed separately below. Claimants contend that the non-AAA-related costs sought by Respondents should be reduced by $46,548, on the ground that Alaska Civil Rule 79(f) does not permit the requested awards of $15,843 for KPMG counsel fees, $20,705 for Dr. Andrea Tuttle's witness fees, and $10,000 for Key Bank escrow services. Claimants do not oppose an award of the other $724,452.73 sought by Respondents, (Opposition, at 14-16); this figure includes both the AAA charges and arbitrator compensation discussed separately below, and the remaining non-AAA-related costs sought by the Motion.

As discussed above, Article VI, Section 2 of the Settlement Agreement provides that "[e]xcept as this Agreement provides to the contrary, the Commercial Arbitration Rules of the American Arbitration association, as amended and in effect (hereinafter referred to as the "Rules"), shall govern all aspects of the arbitration." Accordingly, we conclude that the applicable arbitral Rules, not Alaska Civil Rule 79(f), govern these expense-related disputes.

The Rules, Section R-47(c), provide that "[i]n the final award, the arbitrator shall assess the . . . expenses . . . provided in Sections R-53, R-54 and R-55. The arbitrator may apportion such . . . expenses . . . among the parties in such amounts as the arbitrator determines is appropriate." Exercising that discretion here, we agree with Claimants that Respondents' recoverable costs should not include the $15,843 amount requested for KPMG counsel fees paid by Chugach, or the $20,705 in witness fees for Dr. Andrea Tuttle, a potential witness who was not called to testify, $4,583 of which was paid by Sealaska and the balance by Chugach. (Coughlin Aff., ¶21.) We deny the requested deduction of $10,000 for Key Bank escrow services, on the ground that this expense was reasonably necessitated by the filing of the arbitration and borne for the benefit of all parties.

For these reasons, we award Respondents $469,242.73 in recoverable expenses exclusive of AAA charges and arbitrator compensation. Based on the record presented, $52,519.22 of this amount shall be paid to Respondent AHTNA, $309,157.63 to Respondent Chugach and $107,565.88 to Respondent Sealaska.

B. AAA CHARGES AND ARBITRATOR COMPENSATION.

The Rules, Section R-47(c), provide that "[i]n the final award, the arbitrator shall assess the fees, expenses, and compensation provided in Sections R-53, R-54 and R-55. The arbitrator may apportion such fees, expenses and compensation among the parties in such amounts as the arbitrator determines is appropriate." Claimants do not oppose an award of these charges and expenses to Respondents. (Opposition, at 15-16.)

Exercising the discretion granted under these Sections of the Rules, and applying the guidance given in Article VI, Section 14 of the Settlement Agreement, we have determined that all of the AAA charges and arbitrator compensation incurred by Respondents should be borne by Claimants.

Accordingly, we award Respondents a total of $258,828.43for recoverable arbitrator compensation. $86,274.30 of this amount shall be paid to Respondent AHTNA, $86,279.84 to Respondent Chugach and $86,274.29 to Respondent Sealaska.

C. SATISFACTION OF THE AWARD.

This Final Award makes an award of attorneys' fees and expenses in favor of three Respondents against nine Claimants. Article VI, Section 14(c) of the Settlement Agreement provides that "[i]n any case where costs are to be awarded to a party and to be paid by several parties, costs shall be shared equally among the Corporations participating on the non-prevailing side." We construe this provision's reference to "costs" as a reference to the same "costs of arbitration" referenced in Article VI, Section 14(a), which "include[e] attorneys' fees. . .." Accordingly, this award provides that it shall be satisfied by each Claimant paying an equal one-

ninth share of the amounts awarded to each Respondent. These amounts differ slightly, since each Respondent incurred differing amounts of recoverable fees and costs.

Article VI, Section 14(d) of the Settlement Agreement provides that "[a]n award for costs shall be paid within thirty (30) days of the award becoming final and, if not paid, shall bear interest at the rate specified in Article V, Section 2." Accordingly, this award so provides.

VI. RELIEF AWARDED.

A. The Bifurcated Issue to be decided in this award is: **Are revenues generated from the sale of carbon offset credits by the Respondents subject to sharing with the other Corporations pursuant to Section 7(i) of ANCSA and the Section 7(i) Settlement Agreement?** This arbitration tribunal's answer to that question is: No. Accordingly, the parties are hereby granted the following declaratory relief: **Revenues generated from the sale of carbon offset credits by the Respondents are not subject to sharing with the other Corporations pursuant to Section 7(i) of ANCSA and the Section 7(i) Settlement Agreement.**

B. All of the claims for relief asserted in this arbitration by Claimants Calista Corporation, Doyon, Limited, Koniag, Incorporated, Bering Straits Native Corporation, Cook Inlet Region, Inc., Arctic Slope Regional Corporation, The Aleut Corporation, NANA Regional Corporation, and Bristol Bay Native Corporation, are denied and are hereby dismissed with prejudice.

C. Respondents are hereby awarded $2,456,153.03 for their attorneys' fees reasonably incurred in this arbitration. $1,040,550 of this amount shall be paid to Respondent AHTNA, $659,213.25 to Respondent Chugach and $756,389.78 to Respondent Sealaska. Respondents are hereby awarded $469,242.73 for their expenses (exclusive of AAA charges and arbitrator compensation, which are addressed separately below) reasonably incurred in this arbitration. $52,519.22 of this amount shall be paid to Respondent AHTNA, $309,157.63 to Respondent Chugach and $107,565.88 to Respondent Sealaska. Claimants shall pay these amounts to Respondents as directed below.

D. The administrative fees of the American Arbitration Association totaling $50,625 (previously incurred solely by Claimants) shall be borne by Claimants, and the compensation of the arbitrators totaling $613,203.02 also shall be borne by Claimants. Therefore, Claimants shall pay $86,274.30 to Respondent AHTNA, $86,279.84 to Respondent Chugach and $86,274.29 to Respondent Sealaska (representing the portion of the arbitrators' compensation previously incurred by Respondents) as directed below.

E. The amounts awarded to Respondents under Paragraphs VI.C and VI.D above total $3,184,224.19. Claimants shall satisfy this Final Award as follows: Each Claimant shall pay Respondent AHTNA the sum of $131,038.17. Each Claimant shall pay Respondent Chugach the sum of $117,183.41. Each claimant shall pay Respondent Sealaska the sum of $105,581.11. Each

Claimant shall pay the amounts so awarded within thirty (30) days of the date of issuance of this Final Award ("the Due Date").

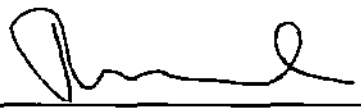
F. Any amounts awarded above that remain unpaid after the Due Date shall bear interest at the rate prescribed in the Settlement Agreement, Article VI, Section 14(d).

VII. MISCELLANEOUS PROVISIONS.

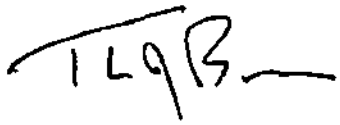
A. This Final Award is in full and final satisfaction of all claims, defenses and requests for relief submitted in this arbitration. All other claims and requests for relief, not specifically addressed and granted herein, are denied.

DATED this 14th day of July, 2022.

Jeffrey M. Feldman
Arbitrator



Richard Chernick
Arbitrator



Thomas J. Brewer
Arbitrator and Tribunal Chair