NO. 08-440

IN THE

# Supreme Court of the United States

ELEANOR BODKIN, ET AL.,

*Petitioners,*

*v.*

COOK INLET REGION, INC.,

*Respondent.*

On Petition for a Writ of Certiorari to the
Supreme Court of Alaska

## PETITION FOR WRIT OF CERTIORARI

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2 October 2008

## QUESTIONS PRESENTED

Acting under the authority of 43 U.S.C. §1606(r), Cook Inlet Region, Inc. [CIRI], an Alaska Native regional corporation, adopted a distribution program that pays cash distributions only to its *original* senior shareholders but does not pay them to others. When the excluded shareholders challenged this discrimination, the Supreme Court of Alaska held (1) non-original shareholders cannot dispute the constitutionality of §1606(r) under the due process or equal protection provisions of the Fifth Amendment unless they can show *state action* (i.e., government action), and (2) no state action existed when CIRI adopted its program under the authority of §1606(r) even though CIRI's distributions would have been prohibited under Alaska's corporation laws.

The Alaska decision presents these questions:

(1) Whether *state action* is present when a private party (here: CIRI) relies upon a federal statute (43 U.S.C. §1606(r)) to engage in discrimination among its shareholders — by paying corporate distributions only to its original senior shareholders and by excluding other shareholders who own the same class of stock — a discrimination that violates the excluded shareholders' contractual right to equal treatment and that is prohibited by state law.

(2) Whether *impairment of the contract* between a corporation and its shareholders — by discrimination among shares of the same class of stock under the aegis of a federal law (43 U.S.C. §1606(r)) — violates the Fifth Amendment's Due Process Clause, which incorporates the prohibition against impairment of contracts by government.

## LIST OF PARTIES ‡

Petitioners, Shareholder Plaintiffs-Appellants:

ELEANOR V. BODKIN

MARIA D. L. COLEMAN

*Both are shareholders of CIRI and are residents of Alaska.*

Respondent, Corporate Defendant-Appellee:

COOK INLET REGION, INC. [CIRI]

*An Alaska business corporation for profit with its headquarters in Anchorage, Alaska.*

‡ Pursuant to Supreme Court Rule 29.6, petitioners state that Cook Inlet Region, Inc. [CIRI] has no parent company.

Because initial ownership of CIRI's stock was restricted to Alaska Natives and because the stock is subject to alienability restrictions, there is no "publicly held company owning 10% or more of the corporation's stock."

The alienability restrictions are found in the Alaska Native Claims Settlement Act, ANCSA § 7(h)(1)(B) and (C) [43 U.S.C. § 1606(h)(1)(B) and (C)].

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## INTRODUCTION

This is a case about discrimination by a corporation against some of its own shareholders. The corporation pays extra dividends to its *original* shareholders that are not paid to the non-originals – even though they all own the same class of general common stock. Discrimination among shares of the same class is prohibited by state law and also is a violation of the excluded shareholders' contractual right to equal treatment of shares. The corporation defends its discrimination and favoritism by reliance upon a federal law (43 USC §1606(r), ANCSA § 7(r)) that authorizes payment of corporate "benefits" without regard to pro rata ownership of shares.

The corporation's reliance upon a federal law to permit discrimination that is otherwise prohibited by state law presents two questions:

1. *State action* (or here "government action"[1]): Is state action present when the corporation relies upon federal law to permit discrimination that

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[1] Synonyms: "*state action*" and "*government action.*" Both refer to the same constitutional principle. Strictly speaking, this case presents "*government* action" because it is a federal law, not a state law, which purports to authorize the discrimination among shareholders that is prohibited by the shareholders' contract and by state law (*e.g.*, by AS 10.06.305, -.313, -.542; see Appendix at 65a – 70a). *See generally,* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES, §6.4.4.1 at 517 and §6.4.4.3 at 527-38 (3rd ed. 2006).

is prohibited without the federal law's apparent permission? Does a private party become a government actor when the party engages in discriminatory conduct that is authorized by federal law but prohibited by state law and by private contract, i.e., conduct that could not be undertaken without the federal law?

2. *Impairment of contract*: Does the corporation impair its shareholders' contract when, acting under the color of federal law, it discriminates in its payments of distributions and dividends? Does the Fifth Amendment's Due Process Clause subsume the prohibition against impairment of contracts by the reverse incorporation of Article I's Contract Clause? Is federal legislation subject to the prohibition against impairment of contracts?

Cook Inlet Region, Inc. [CIRI] is an Alaska Native regional corporation organized under the Alaska Native Claims Settlement Act [ANCSA], 43 U.S.C. §1601-1629h. In 2000, CIRI initiated an irrevocable elders benefit trust that pays quarterly distributions of $450 for life to its *original* shareholders over the age of sixty-five but withholds these dividends from its non-original shareholders over sixty-five and from all other shareholders.

In *Bodkin v. Cook Inlet Region, Inc.*[2], the Supreme Court of Alaska upheld the decision of the

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[2] 182 P.3d 1072 (Alaska 2008). Appendix A below, 1a-19a.

Alaska Superior Court in three major respects: (1) federal law (43 USC §1606(r)) authorizes Alaska Native corporations like CIRI to distribute corporate assets to certain of its shareholders to the exclusion of its other shareholders who are similarly situated (i.e., who own the same class of general common stock); (2) any aggrieved shareholder must show "state action" before she can challenge the constitutionality of §1606(r) under the due process/equal protection clause of the Fifth Amendment; and (3) the United States Constitution provides no protection for these excluded shareholders because no state action exists when an Alaska Native corporation adopts a program under §1606(r) that pays distributions to its shareholders on the basis of whether or not they were *original* shareholders.

If it is assumed that §1606(r) authorizes CIRI to adopt a benefit plan for its senior shareholders that is open only to a select group of those senior shareholders, it is uncertain whether, under federal law, *state action* must be shown before a CIRI shareholder can bring an as-applied challenge to the constitutionality of §1606(r) under the due process/equal protection provisions of the Fifth Amendment. Can an excluded shareholder, a victim of discrimination, challenge the statute that purports to authorize a payment plan that discriminates between original and non-original senior shareholders?

Nor is it clear, if state action is required, that no state action or government action actually exists, even though §1606(r) was specifically

enacted to preempt Alaska corporation law for some Alaska corporations, to preempt state law that otherwise renders CIRI's payment plan unlawful.[3]

In *Zobel v. Williams,*[4] Chief Justice Burger, in a similar context, called attention to the problem that is created when the government authorizes benefits to only one of two similar groups. The Chief Justice cautioned that when a state apportions benefits based on residency or past contributions, it creates "expanding numbers of permanent classes."[5] Quoting from the *Passenger Cases*[6], he warned that this kind of inequity produces "nothing but discord and mutual irritation".[7]

The decision of the Supreme Court of Alaska has introduced a new rule of law into the federal doctrine of state and government action. If this

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[3] CIRI has pointed out in its Appellee's brief before the Alaska Supreme Court that 43 U.S.C. §1606(r) was enacted as "a direct response to this Court's (the Supreme Court of Alaska's) decision in *Hanson v. Kake Tribal Corp*., 939 P.2d 1320 (Alaska 1977)." App. E, 43a. Kake Tribal held that Alaska Corporation law (AS10.06.305(b), -313, -.542) prohibits the distribution of corporate assets to shareholders on a basis unrelated to the number of shareholder's shares. *Hanson*, 939 P.3d at 1324 (distributions must be pro rata without regard to how long shares have been owned).

[4] 457 U.S. 55 (1982).

[5] Id at 64.

[6] 7 How. 283 (1849).

[7] Zobel, 457 U.S. at 64, n. 12.

rule of law is left standing without clarification or limitation by This Court, Alaska Native shareholders who are excluded from programs like CIRI's can no longer rely upon the Constitution for protection! Moreover, the future of the Alaska Native Claims Settlement Act will become clouded and uncertain. The great danger exists that Alaska Native Corporations will fail, not because of outside economic forces, but because of internal "discord and mutual irritation" brought on by distrust among groups of shareholders who seek to redistribute corporate wealth to privileged subsets without obeying the universal pro rata requirement of corporate law: dividends must be paid uniformly *pro rata* to all shares of the same class of stock, without discrimination.

At a time in our economic history when corporate culture influences corporate officers to make decisions that often are not in their shareholders' best interest, the Supreme Court of Alaska's new rule of law – a rule that effectively denies shareholders the protection of the Constitution – does not prevent discrimination among shareholders, all of whom own the same class of stock.

This Court's review of the Alaska court's decision is urgently needed to protect the future of Alaska's Native corporations, of which there are more than 200 corporate enterprises, with a shareholder enrollment of more than 40,000 Alaska Natives.

## OPINIONS BELOW

The decision of the Alaska Supreme Court (per Fabe, CJ) upholding the superior court was issued on 4 April 2008 and is reprinted at Appendix A, 1a-19a. This decision is published at 182 P.3d 1072 (Alaska 2008). The court's denial of a timely request for rehearing was entered on 20 May 2008; see Appendix B at 20a.

The underlying decision of the Alaska Superior Court (i.e., the trial court) in favor of Cook Inlet Region, Inc. (per Hensley, J.) had been entered on 24 September 2004, and is reprinted at Appendix C. The decision of the trial court was not otherwise published.

## JURISDICTION

The Alaska Supreme Court rendered its decision on 4 April 2008 and denied a rehearing on 20 May 2008.

Petitioners submitted a timely application to extend the time for filing this petition for writ of certiorari (08A-146), and the application was granted by order of Circuit Justice Kennedy on 19 August 2008. That action extended the deadline for filing this petition to and including 2 October 2008, the date upon which it is being filed.

The jurisdiction of the Supreme Court to review the judgment of the Supreme Court of Alaska is invoked under 28 U.S.C. §1257(a).

## STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall …be deprived of life, liberty or property, without due process of law; ….

The statutes principally involved in this case are parts of the Alaska Corporations Code, AS 10.06 [ACC], primarily AS 10.06.305(b) and AS 10.06.408; *and* the Alaska Native Claims Settlement Act [ANCSA]: ANCSA § 7(h)(1)(A), which is codified at 43 U.S.C. § 1606(h)(1)(A); *and* ANCSA § 7(r) [43 U.S.C. § 1606(r)]. These and other relevant provisions of state and federal law are included below in the Appendix at 62a, et seq.

The shareholders relied upon the state law requirement of equal treatment of shares found in AS 10.06.305(b), -.313 ("shares of the same class shall be identical") and -.542 ("all shares of the same class or series shall be treated equally with respect to a distribution of shares, cash, property, rights, or securities. . . .") and the prohibition against setting a retroactive record date, found in AS 10.06.408.

**AS 10.06.305. Creation, classes, and issuance of shares.**

(b) All shares of a class shall have the same voting, conversion, and redemption rights and other rights, preferences, privileges, and restrictions, unless the class is divided into series. If a class is divided into series, all the

shares of a series shall have the same voting, conversion, and redemption rights and other rights, preferences, privileges, and restrictions. (§ 1 ch 166 SLA 1988).

The federal law that is at issue here is ANCSA § 7(r) [43 U.S.C. § 1606(r)], which CIRI argued has preempted the Alaska Corporations Code and which allows CIRI to pay a discriminatory dividend only to its *original* shareholders who are over the age of 65 years:

**ANCSA § 7(r) [43 U.S.C. § 1606(r)]**

(r) BENEFITS FOR SHAREHOLDERS OR IMMEDIATE FAMILIES.

The authority of a Native Corporation to provide benefits to its shareholders who are Natives or descendants of Natives or to its shareholders' immediate family members who are Natives or descendants of Natives to promote the health, education, or welfare of such shareholders or family members is expressly authorized and confirmed. Eligibility for such benefits need not be based on share ownership in the Native Corporation and such benefits may be provided on a basis other than pro rata based on share ownership.

The petitioning shareholders also rely upon ANCSA § 7(h)(1)(A), which says that Alaska Native corporations are chartered and governed according to Alaska law unless state law is *expressly* preempted by a specific provision of federal law:

**ANCSA § 7(h)(1)(A)**

**[43 U.S.C. § 1606(h)(1)(A)]**

RIGHTS AND RESTRICTIONS.—

(A) Except *as otherwise expressly provided* in this Act, Settlement Common Stock of a Regional Corporation shall—

(i) carry a right to vote in elections for the board of directors and on such other questions as properly may be presented to shareholders;

(ii) permit the holder to receive dividends or other distributions from the corporation; and

(iii) *vest in the holder all rights of a shareholder in a business corporation organized under the laws of the State.*

(emphasis added). Statements that these corporations are defined, created, and governed by state law are found elsewhere in ANCSA, such as in ANCSA §§ 3(g), 3(t), and 39.

**ANCSA § 39, [43 U.S.C. § 1629e]**

(a)(1)(A). A Native Corporation may convey assets (including stock or beneficial interests therein) to a Settlement Trust in accordance with the laws of the State (except to the extant that such laws are inconsistent with this section and section 1629b of this title).

…

> (b)(1) The purpose of a Settlement Trust shall be to promote the health, education, and welfare of its beneficiaries and preserve the heritage and culture of Natives. A Settlement Trust shall not—
>
> …
>
> (C) discriminate in favor of a group of individuals composed only or principally of employees, officers, or directors of the settler Native Corporation.

Other relevant provisions of federal and state law are set out in the Appendix at 62a et seq, below.

## STATEMENT OF THE CASE

### A. Factual Background

In 1987, Congress amended ANCSA by adding 43 U.S.C. §1629e. Section 1629e gives each regional corporation the authority to establish a "Settlement Trust" to promote the health, education and welfare of its beneficiaries and preserve the heritage and culture of natives."[8]

In 1997, the Alaska Supreme Court, in *Hanson v. Kake Tribal Corporation*,[9] ruled that nothing in ANCSA authorizes Alaska Native Corporations to distribute corporate assets to a shareholder on a basis unrelated to the shareholder's shareholding and that, under Alaska corporation law (AS 10.06.305(b) et seq.), every Alaska shareholder has

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8 43 U.S.C. §1629e(b)(1).

9 939 P.2d 1320 (Alaska 1997).

"the right to enjoy equal rights, preferences and privileges on his or her shares."[10]

In 1998, at the behest of Alaska Senator Frank Murkowski, and in direct response to the *Kake Tribal* decision[11], Congress amended ANCSA by adding ANCSA § 7(5), codified at 43 U.S.C. §1606(r).[12] Section 1606(r) "authorized and confirmed" the authority of Alaska Native corporations "to provide benefits to its shareholders who are Natives or descendents of Natives or to its shareholders' immediate family members who Natives or descendents of Natives to promote their health, education or welfare…." §1606(r) further provided that these benefits "need not be based on share ownership in the Native Corporation" and "may be provided on a basis other than pro rata based on share ownership."

In February of 2000, Cook Inlet Region, Inc. [CIRI], under the authority of 43 U.S.C. §1606(r) and §1629e(b)(1), which are ANCSA §§7(r) and 39, respectively, adopted an "Elders' Benefit Plan," a revocable trust that made quarterly payments of $450 for life to all *original* CIRI shareholders age 65 or older — but does make these payments to any other shareholders. Even shareholders who are much older are denied these payments if they are not *original* shareholders.

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[10] Id. at 1324 ("The statute thus commands that every share shall have the right to 'the same rights, preferences, and privileges' *of whatever sort*.") (italics in the original).

[11] 144 CONG. REC. S26253-54. App. H, 58a-61a.

[12] The Land Bank Protection Act of 1998 (Public Law No. 105-333, 112 Stat. S-3155, §12 (1999)).

Emil Notti, a CIRI shareholder, challenged CIRI's program in Alaska state court on the grounds that (1) §1606(r) did not preempt the body of Alaska corporation law relied on by the Alaska Supreme Court in the *Kake Tribal* case to the extent that Alaska law requires the equal treatment of shareholders when paying dividends, and (2) that if §1606(r) did preempt state law, then CIRI's Benefit Program is an unlawful taking under the Fifth Amendment's Taking Clause. The case was subsequently removed to federal district court. The federal district court rejected both claims in an unpublished opinion.

On Notti's appeal, the Ninth Circuit held removal to federal court to be valid and upheld the district court's rejection of Notti's argument that there was no preemption as well as his taking claim.[13] In an unpublished opinion, the Ninth Circuit found that the legislative history of §1606(r)[14] "confirms" that Congress intended that Alaska Native Corporations have legal authority to provide benefits (dividends) to its original elder shareholders.[15]

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[13] *Notti v. Cook Inlet Region, Inc.*, 31 Fed. Appx. 586, 2002 WL 464716 (9th Cir. 2002). App. G, 55a-57a. The taking claim was rejected on the ground that it must be raised in the Federal Court of Claims under the Tucker Act.

[14] Id. App. G, 55a.

[15] Two other cases involving an Alaska Native corporations should be noted. *Broad v. Sealaska*, 85 F. 3d 422 (9th Cir. 1996) involved a trust set up for elder shareholders by an Alaska Native corporation. The trust was challenged as a regulatory taking prohibited by the Fifth Amendment's taking clause and as an impairment of contract rights without due process guaranteed by the

Mr. Notti's petition for certiorari lingered for many months, was held over to a later conference, but ultimately was denied.[16]

In April of 2003, CIRI replaced its Elders' Benefit Plan (revocable trust) with an irrevocable trust titled "The Elders' Settlement Trust." Under the terms of the new settlement trust, as was the case with the old revocable trust, only *original shareholders* over the age of 65 years of age are eligible to receive quarterly payments of $450 for the remainder of their lives.

## B. Procedural History

On 8 May 2003, Bodkin, an excluded CIRI shareholder, filed suit in Alaska Superior Court challenging the accuracy of CIRI's proxy materials related to its proposed irrevocable trust. On 26 January 2004, Coleman joined Bodkin in filing an amended complaint. The amended complaint

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Fifth Amendment. The due process claim was not considered by the court because it was raised for the first time on Appeal. See *Broad*, 85 F.3d at 430. There was no Fifth Amendment due process/equal protection issue in this case. A strong dissent disagreed with this result.

*Sierra v. Goldbelt*, 25 P.3d 697 (Alaska 2001) involved the issuance of a special class of stock to original shareholders under 43 U.S.C. 1601(g)(1 by an Alaska Native corporation. The program was challenged on the theory that it was an impairment of contract without due process in violation of the Fifth Amendment. See Sierra, 25 P.3d at 701, note 11 ("Sierra did not preserve this issue in the superior court."). There was no due process/equal protection claim made in the case.

[16] Docket No. 02-392, *Notti v. C.I.R.I.*

repeated the earlier claims concerning the proxy materials and further alleged that CIRI's Elders' Settlement Benefit Trust, if warranted by federal law, unlawfully discriminated among shareholders in violation of the Fifth Amendment.

On 8 March 2004, CIRI moved to dismiss for failure to state a claim upon which relief could be granted, arguing that its Elders' Benefit Trust was lawfully authorized by §1606(r). Bodkin and Coleman responded with a cross-motion for summary judgment arguing, among other things, that if §1606(r) authorizes CIRI's Elders' Settlement Benefit Trust, then §1606(r) is unconstitutional as applied to CIRI's program under the due process clause of the Fifth Amendment, which incorporates the constitutional protection of equal protection and the prohibition against impairment of contract. The impairment argument is based on the shareholders' contractual right to receive equal, pro rata distributions and dividends without regard to their age or duration of share ownership.

The issue of state action[17] was first raised in the trial court by CIRI is its opposition brief to Bodkin and Coleman's motion for summary judgment. CIRI argued that state action was required for the plaintiffs' Fifth Amendment claims and that there was no state action because CIRI was a private party. Bodkin and Coleman, in their reply brief,

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[17] See footnote #1, above, for an explanation that state action and government action are the same concept with different labels that depend on whether it is a state law or a federal law that is being relied upon by the private actor.

countered that CIRI, in adopting its benefit plan, was relying upon federal legislation and was not engaged only in mere private conduct that otherwise would be "immune from the equal protection requirements of the Fifth Amendment." The superior court, in a decision dated 27 September 2004, dismissed Bodkin and Coleman's suit. It held that 43 U.S.C.§1606(r) authorized CIRI's benefit program.[18] The superior court also held that "the plaintiffs' remaining constitutional arguments fail because CIRI is not a governmental agency taking state action" and that "(t)he constitution protects individuals from state action but not from deprivations by private actors."[19]

Bodkin and Coleman appealed the trial court's decision to the Alaska Supreme Court. Among the issues they raised were (1) whether, if 43 U.S.C. §1606(r) authorizes CIRI's benefit program, it violates the equal protection component of the Fifth Amendment and (2) whether CIRI's reliance on federal law for authority to adopt its program constitutes "government action".[20]

The appellants contended that "(w)here an action is taken by a private party in 'reliance' on the authority of a federal law, it 'cannot be viewed as private action outside the reach of the constitution'".[21] CIRI countered and argued that "there is no state action" and that "(a)s a private

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[18] Alaska Superior Court's opinion dated 27 September 2004, see below at App. C, 21a-29a.

[19] Id, App. C, 22a-26a.

[20] Bodkin and Coleman's Appellants' Brief before the Alaska Supreme Court. App. D, 30a-31a and 40a-42a.

[21] Id. App. D, 32a.

corporation, CIRI is not subject to the restrictions that the Fifth Amendment places on government."[22] Bodkin and Coleman argued in their reply brief that the "entanglement exception" to the state action requirement applies in this case.[23]

In an opinion dated 4 April 2008, the Supreme Court of Alaska upheld the judgment of the Alaska superior court. It held that 43 U.S.C. §1606(r) "expressly authorized" CIRI's Elders' Benefit Program.[24] The Court also found that the "United States Constitution does not afford Bodkin and Coleman any relief from this Court." because "Bodkin and Coleman's constitutional claims must fail for lack of state action."[25] Bodkin and Coleman filed a motion for rehearing arguing (1) that state action is unnecessary when a federal statute is directly challenged on constitutional grounds, and (2) that, if state action is required, it is present here under decisions of the U.S. Supreme Court. The motion for rehearing was denied on 20 May 2008. App. B.

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[22] CIRI's Brief of Appellee before the Alaska Supreme Court. App. E, 44a and 51a-52a.

[23] Bodkin and Coleman's Reply Brief before the Alaska Supreme Court. App. F.

[24] Alaska Supreme Court decision dated April 4, 2008. App. A, 12a.

[25] Id. App. A, 15a and 17a.

## REASONS FOR GRANTING THE WRIT

The petitioners are asking this Court to answer the unresolved question of whether state action is required before an aggrieved Native shareholder can mount a Fifth Amendment constitutional challenge to a federal statute that authorizes an Alaska Native corporation to adopt a benefit plan for only some of its shareholders to the exclusion of others who, except for some irrelevant characteristic, stand in the same shoes as the favored group.[26]

The Alaska Supreme Court has decided that "state action" is required before an aggrieved party can mount a Fifth Amendment equal protection action challenge to a federal law that is found to directly authorize a private actor to engage in discriminatory action. By its decision, the Alaska court has introduced a new rule of law into the federal doctrine of state and government action. The question answered by the Alaska Supreme Court is one that has never been settled by a federal court. No federal court has ever held that, before one can mount a constitutional challenge to a federal law that has been found to directly authorize discriminatory action, the aggrieved party must first show state action.

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[26] The petitioners are not asking this court to review the question of whether §1606(r) permits Alaska Native corporations to adopt non-discriminatory benefit plans for its shareholders. This is not at issue. It has been established by court decision that §1606(r) provides Alaska Native corporations with this authority.

Secondly, when the Alaska Supreme Court found that state action does not exist even when the private actor's conduct would have been unlawful under state law absent a federal law that preempted state law and authorized the action, it overlooked this Court's decisions in *Brentwood Academy v. Tennessee SSAA*,[27] *Robinson v. Florida*[28] and *Skinner v. Railway Labor Executives Association, et al.*[29]

As matters stand now, an Alaska Native regional corporation has broad authority to enact almost any kind of discriminatory benefit program it may happen to decide upon, limited only by whatever subset of its shareholders holds corporate power and by the conscience of the dominant or controlling group of shareholders. Without such limits, the controlling group could divert the entire enterprise to themselves.[30]

This Court's review of the petitioners' Questions will clarify this Court's analysis of "state action" and will offer authoritative guidance for avoiding the kind of discord that Chief Justice Burger warned about in *Zobel*.[31]

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27 531 U.S. 288 (2001).

28 378 U.S. 153 (1964).

29 489 U.S. 602 (1989).

30 Victor Brudney, *Equal Treatment of Shareholders in Corporate Distributions and Reorganizations,* 71 CALIF. L.REV. 1072, 1076-78 (1983) (Without the bright line of the Equal Treatment Rule to protect excluded shareholders, "the entire enterprise could be diverted to the others," leaving no assets remaining the excluded shareholders.).

31 Zobel, 457 U.S. at 64.

## I. This court should declare whether state action is present when an aggrieved party challenges the constitutionality of 43 U.S.C. §1606(r) under the Fifth Amendment's due process and equal protection provisions, and where §1606(r) has authorized Alaska Native corporations to adopt discriminatory trusts and other discriminatory programs.

This Court has never passed on the question of whether state action, as this concept is applied to Fourteenth Amendment challenges or Fifth Amendment regulatory takings, must be shown before one can mount a Fifth Amendment challenge to a federal law that directly authorizes a private actor to engage in discriminatory action.

The Alaska Supreme Court's holding that there must be a showing of state action in this case means that even though a federal law warrants arguable unconstitutional discriminatory behavior by a private actor, the constitutionality of the law cannot be challenged directly under the Fifth Amendment unless one can show something *in addition to* the simple fact that the private actor relied on, and acted under, the authority of the federal law that directly warranted his discriminatory action. If the mere fact that the private actor relied on a federal law to specifically warrant his action does not constitute state or government action, then, as a practical

matter, the private actor can operate free from the authority of the Constitution. Given the Alaska court's decision in *Bodkin*, Alaska Native shareholders have no constitutional protection against the discriminatory and inequitable transfer of corporate assets to a favored subgroup of shareholders.

But Alaska Native shareholders are not the only ones who no longer have recourse to the protection of the Constitution under this ruling. If the state action rule announced by the Alaska Supreme Court remains good law, any private actor who engages in an unfair and discriminatory action, and who convinces a court that his action is directly authorized by a federal law, is home free; no person aggrieved by the private actor's action can rely on the Constitution for protection.

This is a case where a private actor engages in discriminatory action and relies on the direct authority of a federal law to do so — or proceeds *under the color of federal law*. The unresolved question presented is whether state action is a necessary condition before an aggrieved party can challenge the constitutionality of the federal law under the due process/equal protection clause of the Fifth Amendment? Now is the time it should be decided by this Court.

## II. This court should clarify whether state action exists when the conduct of a private actor, taken under the authority of a federal law, would otherwise have been unlawful under state law but for the claimed permission supplied by the federal law.

The decision below that there is no state action in this case departs from this Court's well-established principles that govern its analysis of state and government action. When the Alaska Supreme Court ruled that there is no state action, even when a private actor's conduct would have been unlawful under state law absent a federal law that preempted state law and that authorized the action, it overlooked this Court's decision in *Brentwood Academy v. Tennessee SSAA*[32]. The Alaska court failed to give due regard to the principle this Court articulated in *Brentwood* when it held that state action exists "when it can be said that the state is responsible" for the private actor's action and when there is a "close nexus" between the state and the challenged action.[33]

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[32] 531 U.S. 288 (2001).

[33] Id at 295 (citations omitted).

The Alaska Supreme Court also overlooked this Court's decision in *Robinson v. Florida.*[34] In *Robinson*, this Court held that if a state regulation embodies a policy that discourages *non-discriminatory* private behavior, private *discriminatory* behavior "must be held to reflect that state policy."[35] And this is true even though the regulation may not require discriminatory action. The reasoning of *Robinson* would surely apply where the regulation or law actually *encourages* (but does not require) private discriminatory behavior.

And lastly, the Alaska Supreme Court has overlooked this Court's decision in *Skinner v. Railway Labor Executives Association et al.*[36] *Skinner* was brought by a railway labor union to enjoin, on Fourth Amendment grounds, regulations adopted by the Federal Railway Administration (FRA). This Court noted that the regulations at issue "do not require, but do authorize, railroads to administer breath and urine tests to employees who violate certain safety rules."[37] This Court also pointed out that the regulations also pre-empted "state law, rules or regulations covering the same subject matter …

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34 378 U.S. 153 (1964).

35 Id at 156.

36 489 U.S. 602 (1989). Granted that Skinner is a Fourth Amendment case, this Court's analysis of Government action is nonetheless relevant.

37 Id at 489 U.S. at 606.

and are intended to supercede 'any provision or a collective bargaining agreement, or arbitration award construing such an agreement'…".[38] Based on these observations, this Court drew the following conclusion:

> The fact that the Government has not compelled a private party to perform a search does not, by itself, establish that the search is a private one. Here, specific features of the regulations combine to convince us that the Government did more than adopt a passive position toward the underlying private conduct.

*Skinner,* 489 U.S. at 615.

The Court concluded that the Government's action sufficient "to implicate the Fourth Amendment."[39]

The Alaska Supreme Court's decision holding that the federal law that authorized CIRI's Elders' Settlement Benefit Trust can not be subjected to a Fifth Amendment constitutional challenge unless there was "state action", and its holding that there was no state or government action in this matter

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[38] Id at 615, (citations omitted).

[39] Id at 615-16 ("…the Government's encouragement, endorsement, and participation … suffice to implicate the Fourth Amendment.").

provides an answer to an unresolved federal question.

But the Alaska court's answer has introduced a new rule of law into the federal doctrine of state and governmental action, a rule that is not supported by any decision of this Court. Moreover, its decision effectively deprives Alaska Native shareholders of the protection of the Constitution. Simply put, Alaska Native shareholders have no recourse against the discriminatory and inequitable transfer of corporate assets to favored groups of shareholders. And this is so even though Alaska courts have decided that the legal authority for ANCSA corporations to make such discriminatory transfers rests solely and directly on a federal law that displaces established state law for only a special class of Alaska corporations.[40]

This Court should grant review of the Supreme Court of Alaska's decision that found no state action in CIRI's use of federal law to impair the shareholders' contract — their contractual right to receive equal treatment in the matter of corporate distributions and dividends.

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[40] 43 U.S.C. §1606(r) preempts state law only for a select group of Alaska corporations, Alaska Native corporations organized under ANCSA. See §1606(r).

## III. This court should declare whether federal law can impair a private contract — whether the prohibition against impairment of contracts applies to federal law as it does to state law.

***(A) Equal treatment of shares is part of the shareholders' contract***: No rational person would invest in an incorporated enterprise if there were not such a rule to protect minority shareholders.[41]

This is a contract dispute between Alaska shareholders and their corporation; it is about corporate discrimination in the payment of dividends: CIRI pays extra dividends to some shares but not to others of the same class of stock. Only *original* shareholders *over the age of 65 years* are paid the extra dividend of $450.00 per quarter. CIRI engages in two different types of discrimination, both of which violate the shareholders' contract.

The first discrimination (paid only to *original* shareholders) violates AS 10.06.408 because it sets a retroactive record date and employs "snapshot

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[41] When a corporation makes distributions and pays dividends to shareholders, it must do so on a pro rata basis and without discrimination. Victor Brudney, *Equal Treatment of Shareholders in Corporate Distributions and Reorganizations,* 71 CALIF.L.REV. 1072, 1076-78 (1983) ("Dividends among shareholders of the same class generally must be distributed on a pro rata basis without discrimination or preference.").

eligibility," the forbidden practice of using an old picture of the shareholders to determine present eligibility. CIRI sets a retroactive record date by using a 30 year old list of shareholder to determine eligibility for payment.

The second discrimination (paid only to *older* shareholders) violates AS 10.06.305(b), -.313, and -.542 because CIRI discriminates among holders of the same class.

No court has ever approved a discriminatory dividend. Centuries of corporate law require that a corporation pay its dividends in a uniform and pro rata manner to all shares of the same class of stock.[42]

But the Alaska courts have approved a

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[42] *See generally,* Richard M. Buxbaum, *Preferred Stock — Law and Draftsmanship,* 42 CALIF.L.REV. 243, 247 (1954) ("Dividend rights of shareholders are contractual." "Equal shares receive equal dividends."); FLETCHER, 11 CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS, § 5352 (1995 rev'd. vol.) ("Dividends among shareholders of the same class generally must be distributed on a pro rata basis without discrimination or preference. In other words, the board of directors cannot pay dividends only to certain shareholders to the exclusion of others of the same class"). *See generally,* ROBERT C. CLARK, CORPORATE LAW, §1.2, 13 (1986) (shares of common stock possess rights, including "the right to share pro rata (that is, the same amount for each share) in dividend payments"); HENN AND ALEXANDER, LAWS OF CORPORATIONS, §324 (3d ed. 1983) ("The basic dividend rule is that all shareholders participate ratably in dividends"); 18B AMJUR2D, *Corporations,* §1220 (1985) ("Directors have no authority to declare a dividend on any other principle").

discriminatory dividend—and opened the door to a tidal wave of corporate discrimination—doing so on the most slender reed: an *implied preemption* of a monolithic rule of state law by a weak, amorphous federal statute (§1606(r)).

Other flaws in CIRI's discriminatory dividend are that all of its directors are *original shareholders,* so they voted themselves a special financial benefit that was not approved by disinterested directors and that was not approved by the general rank-and-file shareholder population, as required by AS 10.06.478(a)(1) and (2). The special dividend, which is paid only to original shareholders, was poisoned by the directors' conflict of interest.

***(B) It is "unthinkable" that the Constitution would impose a lesser duty upon the federal government with respect to impairment of contracts than it does upon the states:*** Legal scholars agree that the Due Process Clause protects private contracts from federal legislation. Professor Tribe has explained:

> [T]he Constitution itself dictates some degree of respect for settled economic arrangements by banning legislation that impairs contractual arrangements [4] or takes property without just compensation.
>
> [4] Although the Constitution does not explicitly protect against similar federal legislation, the Due Process Clause of the Fifth Amendment has much the same effect. (Citing *Lynch v. United*

> *States,* 292 U.S. 571, 579 (1934) but see *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717 (1988).)

LAURENCE H. TRIBE, CONSTITUTIONAL CHOICES, 166, 384 & n.4 (1985) (underlining added). Two other leading constitutional scholars are more emphatic in saying that the Fifth Amendment incorporates the Contract Clause:

> Article I, section 10 of the Constitution specifically prohibits a state legislature from impairing the obligation of contracts. The terms of this provision only apply to the actions of a state legislature. The due process clause of the Fifth Amendment, however, would also bar any federal legislation which retroactively impaired the obligations of contract in a similar manner.

JOHN E. NOWAK AND RONALD D. ROTUNDA, CONSTITUTIONAL LAW, § 10.1 at 396 (7th ed. 2004) (footnotes omitted, underlining added).[43] The Framers intended that the Contract Clause would protect private rights. BENJAMIN FLETCHER WRIGHT, THE CONTRACT CLAUSE OF THE CONSTITUTION, 155-60, 243-59 (1938) (the Clause applied to corporations; "The Protection of Vested Rights in a Democracy"). See also, Peter J. Rubin, *Taking its Proper Place in*

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[43] The identically-worded paragraph also appears in 2 RONALD D. ROTUNDA AND JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW–SUBSTANCE AND PROCEDURE, § 14.1 at 518 (3rd ed. 1999) and in more recent editions.

*the Constitutional Canon: Bolling v. Sharpe, Korematsu, And the Equal Protection Component of Fifth Amendment Due Process,* 92 Va. L. Rev. 1879, 1886 & nn. 18 – 20 (2006) (it is "unthinkable" that the federal government has a lesser duty than the states).

***(C) Is there Reverse Incorporation of the Contract Clause?:*** This Court has not yet decided this question. The Fifth Amendment's Due Process Clause incorporates the prohibition against impairment of contract by government. An example of this doctrine is found in the reverse incorporation of the Equal Protection Clause of the Fourteenth Amendment by the Due Process Clause of the Fifth Amendment:

> Even though there is no explicit equal protection clause in the Fifth Amendment, the equal protection guarantee in the Fourteenth Amendment has been read into the Due Process Clause of the Fifth Amendment through the process of reverse incorporation. See *Bolling v. Sharpe*, 347 U.S. 497, 500, 74 S.Ct. 693, 695, 98 L.Ed. 884 (1954); *Vance v. Bradley*, 440 U.S. 93, 94-95 n. 1, 99 S.Ct. 939, 942 n. 1, 59 L.Ed.2d 171 (1979) ("the Due Process Clause of the Fifth Amendment forbids the Federal Government to deny equal protection of the laws").

*Gray v. First Winthrop Corp.*, 989 F.2d 1564, 1573 (9th Cir. 1993) (underlining added).

Other expressions are found in the case law; *see, e.g.:*

- *Lumumba v. Crabtree*, 50 F.3d 15 (Table) (9th Cir. 1995) (underlining added):

"We interpret this claim as an acknowledgment that the equal protection clause applies to the federal government only by reverse incorporation through the Fifth Amendment Due Process Clause."

- *Hudson Valley Black Press v. I.R.S.*, 307 F.Supp.2d 543 (S.D.N.Y.,2004) (underlining added):

"This right, the Court held, was found in the Equal Protection Clause which is incorporated into the Fifth Amendment Due Process Clause through the doctrine of reverse incorporation."

- *Com. of Mass. v. Mosbacher*, 785 F.Supp. 230, 251 n.20 (D.Mass.,1992) (underlining added):

"The suggestion has been made that Justice Black was less than comfortable jurisprudentially with the effective reverse incorporation of the equal protection language of the Fourteenth Amendment in the Fifth Amendment due process clause undertaken by *Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954), in order to reach discrimination by Congress."

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**CODA — The excuse for discrimination ignores This Court's teaching in *Zobel v. Williams* (the Alaska dividend discrimination case):**

The excuse and avowed justification for CIRI's discrimination among its shareholders is to reward the privileged shareholders for past contributions in establishing the corporation (even though some of them were only children or young adults when ANCSA was enacted and CIRI was incorporated).

In the Supreme Court of Alaska, CIRI argued that restricting elders' benefits to original shareholders can be justified because "original shareholders assisted in the establishment of CIRI" and "[s]ome of the original shareholders even worked on the development and passage of ANCSA itself." CIRI Appellee's brief at 38.

CIRI offers the same excuse that the State of Alaska advanced unsuccessfully in *Zobel v. Williams,*[44] an excuse this court expressly rejected:

> The last of the State's objectives – to reward citizens for past contributions – alone was relied upon by the Alaska Supreme Court to support the retrospective application of the law to 1959. However, that objective is not a legitimate state purpose. A similar "past contributions" argument was made and rejected in *Shapiro v.*

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[44] 457 U.S. 55, 63-64 (1982) (footnotes omitted; underlining added). *See* discussion at nn. 7 and 31, supra.

*Thompson* (1969).

> If the states can make the amount of a cash dividend depend on length of residence, what would preclude varying university tuition on a sliding scale based on years of residence-or even limiting access to finite public facilities, eligibility for student loans, for civil service jobs, or for government contracts by length of domicile? Could states impose different taxes based on length of residence? Alaska's reasoning could open the door to state apportionment of other rights, benefits, and services according to length of residency. It would permit the states to divide citizens into expanding numbers of permanent classes. {FN 12: Such a power in the States could produce nothing but discord and mutual irritation, and they very clearly do not possess it.} Such a result would be clearly impermissible.

CIRI's reason for its discrimination fails because its practice of rewarding shareholders for their past contributions diverts corporate equity on the same reasoning that Alaska had advanced to justify its cash payments to older citizens in the *Zobel* case. This Court rejected the rationale because such discrimination does not meet "a legitimate state purpose." Using the *Zobel* reasoning, this court also has struck down a tax exemption scheme that was based on length of service and was available only to persons who were residents before a certain date.[45]

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[45] Hooper v. Bernalillo County Assessor, 472 U.S. 612 (1985).

## CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

This Court should grant review and summarily reverse the decision of the Supreme Court of Alaska under the authority of Supreme Court Rule 16.1 or This Court should set the case on for plenary briefing and argument.

Respectfully submitted this 2nd day of October in 2008 at Petersburg, Alaska.

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**Appendix A**

ALASKA SUPREME COURT'S OPINION

*Bodkin v. Cook Inlet Region, Inc.*, 182 P.3d 1072 (Alaska 2008)

**Supreme Court of Alaska**

Eleanor V. BODKIN and Maria D.L. Coleman, Appellants,

v.

COOK INLET REGION, INC., Appellee.

No. S-11870.

April 4, 2008.

Rehearing Denied May 20, 2008.

***1073** Fred W. Triem, Petersburg, for Appellants.

Bruce E. Gagnon and Jerome H. Juday, Atkinson, Conway & Gagnon, Anchorage, for Appellee.

Before: FABE, Chief Justice, EASTAUGH and CARPENETI, Justices.

**OPINION**

## Appendix A

FABE, Chief Justice.

## I. INTRODUCTION

Eleanor Bodkin and Maria Coleman, shareholders of Cook Inlet Region, Inc. (CIRI), appeal the superior court's dismissal of their challenge to (1) the legality of CIRI's payments to "original" shareholders over the age of sixty-five under the Alaska Native Claims Settlement Act (ANCSA) and Alaska state law, and (2) the constitutionality of ANCSA to the extent that it preempts state law in order to permit these payments. Because the plain language of ANCSA authorizes CIRI's distributions to elder shareholders, and because Bodkin and Coleman's constitutional claims lack a sound legal basis, we uphold the superior court's judgment.

## II. FACTS AND PROCEEDINGS

[1] In 1971 Congress passed the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601 et seq., "to achieve a fair and just settlement of all aboriginal land [in Alaska] ... with maximum participation by Natives in decisions affecting their rights and property." [FN1] Toward that end, the Act established twelve in-state Native regional corporations to hold land and capital on behalf of Alaska Native shareholders.[FN2] "Except as otherwise expressly provided," the Act gives these shareholders "all rights

of a shareholder in a business corporation organized under the ***1074** laws of the State." FN3 In 1987 Congress amended ANCSA to give each regional corporation the authority to establish settlement trusts "to promote the health, education, and welfare of its beneficiaries and preserve the heritage and culture of Natives." FN4 A 1998 amendment "expressly authorized and confirmed" the regional corporations' authority to pursue those objectives.FN5 It further stipulated that "such benefits need not be based on share ownership in the Native Corporation and such benefits may be provided on a basis other than pro rata based on share ownership." FN6

FN1. *Broad v. Sealaska Corp.,* 85 F.3d 422, 425 (9th Cir.1996), *cert. denied,*519 U.S. 1092, 117 S.Ct. 768, 136 L.Ed.2d 714 (1997).

FN2. *See*43 U.S.C. § 1606 (2006).

FN3. *Id.* § 1606(h)(1).

FN4. *Id.* § 1629e(b)(1).

FN5. *Id.* § 1606(r).

FN6. *Id.*

CIRI is an Alaska Native regional corporation organized under ANCSA. In February 2000 the CIRI board of directors passed a resolution creating the "Elders' Benefit Program." The program established a revocable trust that provided quarterly payments of $450 to any shareholder aged sixty-five or older who received shares in CIRI as an original enrollee. The Board determined that the program did not require a shareholder vote. Shortly after the Board established

the program, Emil Notti, a CIRI shareholder who did not qualify for benefits, filed suit. CIRI removed the case from superior court to the United States District Court for the District of Alaska.

The district court granted summary judgment in CIRI's favor. It upheld the validity of the Elders' Benefit Program because "[s]tate law authorizes ANCSA corporations to take any action authorized by ANCSA" and "ANCSA [§ 7(r) ] permits preferential distributions." The Ninth Circuit Court of Appeals affirmed, reasoning that "[t]he plain language of § 7(r) allows CIRI to make the distributions made in this case." FN7 The United States Supreme Court denied certiorari.FN8

> FN7. *Notti v. Cook Inlet Region, Inc.,* 31 Fed.Appx. 586, 2002 WL 464716 (9th Cir.2002).
>
> FN8. *Notti v. Cook Inlet Region, Inc.,* 537 U.S. 1104, 123 S.Ct. 867, 154 L.Ed.2d 773 (2003).

In the meantime, federal tax reforms led CIRI's board of directors to favor replacing the Elders' Benefit Program with an irrevocable trust, titled "The Elders' Settlement Benefit Trust." Pursuant to ANCSA, 43 U.S.C. §§ 1629b(a)(3) & (b)(1), the Board passed a resolution to establish the trust and then sought the approval of a majority of its shareholders. In April 2003 the corporation distributed a Voter's Guide and Supplemental Proxy Statement detailing the proposed trust. These materials explained that the trust would cause "CIRI's assets [to] decline by ...

$16 million, or about 2.1% of the book value of [2002] assets" and outlined several "risk factors" that could lead a shareholder to vote against the proposal. At the corporation's June 7, 2003 annual meeting, CIRI obtained majority shareholder approval to implement the trust. On September 2, 2003, CIRI registered the trust with the superior court.

On May 8, 2003, Eleanor Bodkin filed this suit in superior court against CIRI. Her complaint purported to state five "major claims," the "most urgent" of which challenged CIRI's proxy materials as "not provid[ing] adequate disclosure to the rank-and-file shareholders." Appellant Maria Coleman joined Bodkin in an amended class action complaint filed on January 26, 2004, after the CIRI shareholders approved the trust. The amended complaint repeated allegations that the CIRI April 2003 proxy "did not provide adequate disclosure" and that the Elders' Benefit Program and the trust illegally discriminated among shareholders. On March 8, 2004, CIRI moved to dismiss for failure to state a claim upon which relief could be granted. The corporation argued that ANCSA expressly permits the benefit programs and that its proxy statement contained no material misstatements or omissions. CIRI also filed a motion for sanctions under Alaska Civil Rules 11 and 95, alleging that Bodkin and Coleman's counsel, who had also represented Emil Notti in his lawsuit regarding the same issues, had "no reasonable excuse for his conduct in signing and submitting a [c]omplaint that is not well-grounded in law or fact."

## Appendix A

***1075** Bodkin and Coleman requested an extension of time to respond to CIRI's motion to dismiss, and the superior court granted that request. Bodkin and Coleman used this time to amass an opposition memorandum of 150 pages, which included a cross-motion for partial summary judgment. The superior court refused to consider the summary judgment motion until after the court resolved CIRI's motion to dismiss. Similarly, it stated its intention to postpone hearing "arguments on the other ripe motions," including Bodkin and Coleman's motion for class certification. Nevertheless, Bodkin and Coleman persisted in filing a "reply" to follow up on their cross-motion for partial summary judgment. CIRI filed a motion challenging Bodkin and Coleman's "reply" as premature since it had yet to file its response to Bodkin and Coleman's motion for summary judgment, and would not need to do so until after the court considered the Civil Rule 12(b)(6) motion.

The superior court eventually heard oral argument on CIRI's motion to dismiss on July 28, 2004, and on September 24, 2004, the lower court issued its decision dismissing Bodkin and Coleman's suit. The superior court's opinion notes that "several courts have rejected [Plaintiffs'] same or similar claims." Specifically, the opinion cites our decision in *Sierra v. Goldbelt, Inc.*[FN9] and the Ninth Circuit's decision in *Broad v. Sealaska Corp.*[FN10] for the proposition that ANCSA allows "distributions to subsets of shareholders." In addition to the case law, the

superior court relied on § 7(r)'s express language, which stipulates that benefits "need not be based on share ownership." FN11

FN9. 25 P.3d 697, 702 (Alaska 2001).

FN10. 85 F.3d 422 (9th Cir.1996).

FN11. 43 U.S.C. § 1606(r).

The superior court further buttressed its decision with evidence from ANCSA's legislative history. The congressional record directly addresses the "benefits" permitted under § 7(r):

> Examples of the type of programs authorized include: scholarships, cultural activities, shareholder employment opportunities and related financial assistance, funeral benefits, meals for the elderly and other elders ['] benefits *including cash payments,* and medical programs.[FN12]
>
> FN12. 144 CONG. REC. S26254 (1998) (emphasis added).

The superior court therefore concluded that "Congress intended to provide for cash distributions" and that "ANCSA authorizes the Elders' Benefit Program and Elders' Settlement Trust."

The superior court refused to exercise jurisdiction over Bodkin and Coleman's constitutional "taking" challenge to CIRI's benefit programs, reasoning that "[i]f the plaintiffs have a claim for taking their

property, they must assert that claim against the U.S. government which authorized the statute." The court went on to reject the rest of Bodkin and Coleman's constitutional claims-including their assertion that CIRI's benefit programs deny them equal protection under the law. The court reasoned that the constitution "protects individuals from state action but not from deprivations by private actors." Because CIRI "is not a governmental agency," the superior court concluded that Bodkin and Coleman could not succeed on these claims.

Finally, the superior court disposed of Bodkin and Coleman's allegations regarding the adequacy and accuracy of CIRI's proxy materials. The court found that "CIRI's proxy materials provided accurate and complete information regarding the impact of the settlement trust on the corporation and the individual shareholder." Addressing Bodkin and Coleman's argument that CIRI should have included estimates of the programs' impact on individual share prices, the superior court pointed out that their objection failed to recognize the complexity of stock price valuation, especially where "shares may not be bought or sold on the open market." Similarly, the court dismissed Bodkin and Coleman's claim that CIRI's "proxy materials are misleading or not useful because the font size is too small," reasoning that "[n]othing about the font size would lead a shareholder to disregard the proxy materials."

***1076** Following the court's ruling, Bodkin and Coleman submitted a motion for reconsideration,

which was denied. Bodkin and Coleman appeal.

## III. STANDARD OF REVIEW

[2][3][4] We review de novo a superior court's dismissal of a complaint pursuant to Alaska Civil Rule 12(b)(6).[FN13] This same review applies to constitutional issues and any other questions of law.[FN14] We review a lower court's discovery rulings and its decision to expressly exclude material beyond Rule 12(b)(6) pleadings for abuse of discretion.[FN15]

FN13. *Carlson v. Renkes,* 113 P.3d 638, 640-41 (Alaska 2005).

FN14. *Evans ex rel. Kutch v. State,* 56 P.3d 1046, 1049 (Alaska 2002).

FN15. *Marron v. Stromstad,* 123 P.3d 992, 998 (Alaska 2005); *see also Martin v. Mears,* 602 P.2d 421, 426-27 (Alaska 1979).

## IV. DISCUSSION

Bodkin and Coleman present three issues for review. First, Bodkin and Coleman argue that the superior court erred in excluding extrinsic evidence that they sought to submit with their opposition to CIRI's motion to dismiss. Second, they claim that ANCSA does not authorize CIRI's benefit program and trust. Finally, they argue that even if ANCSA does authorize the benefit program and trust, the distributions qualify as "government action" giving

rise to constitutional claims.

**A. The Superior Court Did Not Abuse Its Discretion in Declining To Consider Additional Evidence Presented by Bodkin and Coleman Prior to Granting Appellee's Rule 12(b)(6) Motion.**

[5] Bodkin and Coleman argue that the superior court erred in declining to convert CIRI's motion to dismiss to a motion for summary judgment. They contend that the evidence that they sought to submit with their opposition to the motion to dismiss would have entitled them to relief if the superior court had considered the motion as one for summary judgment. This evidence includes CIRI's "admissions" about its elders' benefit programs, as well as proffered expert testimony on the CIRI proxy materials. We must decide whether the lower court abused its discretion in excluding this "material beyond the pleadings ... offered in conjunction with a Rule 12(b)(6) motion." FN16

> FN16. *Martin,* 602 P.2d at 426 (quoting 5 C. WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1366 (1969 & Supp.1979)).

We hold that it did not. Bodkin and Coleman's brief sheds no further light on the importance of their proffered expert testimony and devotes scant attention to the adequacy of CIRI's proxy materials in general. We have held before that "where a point

is given only a cursory statement in the argument portion of a brief, the point will not be considered on appeal." FN17 In their sixty-nine-page brief with its various tables and over fifty footnotes, Bodkin and Coleman limit their analysis of the proxy materials to passing remarks contained within two sentences and a footnote on a single page. Bodkin and Coleman's reply brief ignores the proxy materials issue altogether. Thus, without some elaboration on how their expert testimony bears on the proxy issue in their complaint, Bodkin and Coleman fail to convince us that the superior court abused its discretion in excluding that testimony.

FN17. *Adamson v. Univ. of Alaska,* 819 P.2d 886, 889 n. 3 (Alaska 1991).

[6] Bodkin and Coleman similarly fail to persuade us that the superior court abused its discretion in rejecting such other materials as CIRI's "admissions" about its elders' benefit programs, which they sought to submit with their opposition to CIRI's motion to dismiss.FN18 For the most part, the "factual disputes" that Bodkin and Coleman cite seem neither factual nor disputed. For example, references in CIRI's corporate statements to ***1077** the elders' benefit payments as "distributions" or "dividends" do not alter our analysis of whether CIRI's quarterly cash payments to original stockholders over the age of sixty-five violated ANCSA. Bodkin and Coleman cite other purportedly "disputed issues of fact," including the number of elders receiving benefits, or how much the program costs on a per share basis, but again they fail to explain how these issues relate

to their claims.

FN18. As CIRI points out, the bulk of Bodkin and Coleman's excerpt of record consists of this excluded material. Because we hold that the superior court did not err in excluding these materials, we will not consider them in our review of the lower court's decision to dismiss Bodkin and Coleman's complaint.

**B. The Superior Court Correctly Held that ANCSA Expressly Authorizes CIRI's Elders' Benefit Program and Elders' Settlement Benefit Trust, Thereby Preempting Alaska Law.**

[7] When Congress amended ANCSA in 1998, it "expressly authorized" each regional corporation to distribute "benefits" in order to "promote the health, education, or welfare" of its beneficiaries.[FN19] This amendment, contained in ANCSA § 7(r), further stipulates that "such benefits need not be based on share ownership in the Native Corporation and such benefits may be provided on a basis other than pro rata based on share ownership." [FN20]

FN19. 43 U.S.C. § 1606(r).

FN20. *Id.*

Bodkin and Coleman argue that § 7(r)'s authorization of "benefits" does not extend to the cash distributions that CIRI has paid out in its elders' benefit program and trust. They contend that "[i]n modern parlance, 'benefits' refers to governmental or institutional

grants of charitable aid, assistance, or welfare [and the term] is not used to mean corporate distributions or dividends." When pressed by the superior court to elaborate on the term's meaning, Bodkin and Coleman indicated that "the statute [is] limited to providing benefits by need only.... It means some demonstrable need. That's what the language [used] in 7(r) means."

But the legislative history behind § 7(r) casts doubt upon this characterization. On the floor of the Senate, Senator Frank Murkowski urged passage of the ANCSA amendment. He also noted that "[e]xamples of the type of programs authorized [by § 7(r) ] include: scholarships, cultural activities, shareholder employment opportunities and related financial assistance, funeral benefits, meals for the elderly and other elders[']  benefits *including cash payments,* and medical programs." [FN21] Bodkin and Coleman dismiss that legislative history, however, as containing little more than Senator Murkowski's statement, which they urge us to ignore. Bodkin and Coleman assert that the plain meaning of "benefits" cannot include what CIRI's own promotional literature characterizes as "dividends." According to Bodkin and Coleman, these terms are mutually exclusive. We disagree.

> FN21. 144 CONG. REC. S26254 (1998) (emphasis added).

As the superior court pointed out, we have previously considered an argument closely akin to the one Bodkin and Coleman advance in this appeal. In

*Sierra v. Goldbelt, Inc.*, we considered whether Goldbelt, Inc., another Native regional corporation, could issue shares to original shareholders over the age of sixty-five.[FN22] In upholding Goldbelt's share issuance, we looked to Congress's intent and concluded that "Native corporations must have broad discretion to fashion elder benefit programs that meet the needs of elders." [FN23] We made note of certain restrictions that do apply to Native regional corporation distributions. For example, a Native regional corporation may not define "classes of beneficiaries ... by reference to place of residence, family, or position as an officer, director, or employee of a Native Corporation." [FN24] We clarified, however, that ANCSA permits limiting beneficiaries to "elders who owned original shares of stock." [FN25]

FN22. 25 P.3d 697 (Alaska 2001).

FN23. *Id.* at 702.

FN24. *Id.* (citing 43 U.S.C. § 1606(g)(2)(B)(iii)(IV) (1986 & Supp.2000)).

FN25. *Id.*

Here, Bodkin and Coleman advance no principled basis for distinguishing *Goldbelt*. They emphasize "the qualitative difference between the issuance of corporate stock ... ***1078** and discriminatory cash payments." According to Bodkin and Coleman, the issuance of stock "institutionalizes the ownership interest of original shareholders in the corporation, but cash payments do not." Yet the Goldbelt board agreed to redeem the shares they issued to elders at a fixed price, and elders received the equivalent of

$1,000.[FN26] Thus, for many elders, the Goldbelt program differed only in its form and duration from CIRI's quarterly cash distributions. Bodkin and Coleman fail to assemble any support from the relevant statutory text, legislative history, or case law to distinguish our holding in *Goldbelt* from the case at hand. [FN27]

> FN26. The Goldbelt resolution "approved the issuance of 100 shares to each eligible elder and authorized prompt redemption of those shares at $10 per share." *Id.* at 700.
>
> FN27. In contrast to CIRI's program, the Goldbelt elders program issued shares to all original shareholders, including those who no longer held any stock in the corporation. Bodkin and Coleman do not, however, attach any significance to that difference, perhaps because there is none to be gleaned.

**C. The United States Constitution Does Not Afford Bodkin and Coleman Any Relief from this Court.**

Bodkin and Coleman argue alternatively that if ANCSA's provisions "could be used as CIRI interprets and applies them-these statutes would violate the Fifth Amendment." In addition to claiming an unconstitutional taking of their property, Bodkin and Coleman contend that authorizing CIRI's elders' benefit programs interferes with other constitutional rights, including "equal protection to similarly situated but excluded shareholders" and

"due process," because the programs "impos[e] retroactive liability on the excluded shareholders." Bodkin and Coleman further assert that CIRI's interpretation and application of ANCSA "extinguish the excluded shareholders' vested contractual right to equal distributions."

[8] Bodkin and Coleman must pursue their takings claim against the federal government in the United States Court of Federal Claims. The federal Tucker Act [FN28] vests that court with "jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress." [FN29] Addressing a similar takings claim involving the same benefit programs at issue here, the Ninth Circuit declined to exercise jurisdiction "because appellants must raise that claim under the Tucker Act in the Federal Court of Claims." [FN30] Federal case law makes clear that Bodkin and Coleman's takings claim is premature until they have first presented a claim for compensation pursuant to the Tucker Act.[FN31]The superior court thus correctly ruled that it lacked jurisdiction over those claims.

FN28. 28 U.S.C. § 1491.

FN29. *Id.* § 1491(a)(1).

FN30. *Notti v. Cook Inlet Region Inc.,* 31 Fed.Appx. 586, 587, 2002 WL 464716 (9th Cir.2002).

FN31. *See Bay View, Inc. v. Ahtna, Inc.,* 105 F.3d 1281, 1285 (9th Cir.1997).

**Appendix A**

[9] The superior court concluded that Bodkin and Coleman's other constitutional claims fail for lack of state action. As the superior court noted, the Ninth Circuit rejected similar constitutional claims on this basis in *Broad v. Sealaska.*[FN32] CIRI argues persuasively that we should bypass any consideration of Bodkin and Coleman's constitutional claims on the merits and affirm the superior court on alternative jurisdictional grounds because the ANCSA Amendments of 1987 [FN33] provide that "the United States District Court for the District of Alaska shall have exclusive original jurisdiction" over constitutional challenges to ANCSA.[FN34] Bodkin and Coleman address this argument with a single sentence in their reply. Citing *Louisville & Nash Railroad Co. v. Mottley*[FN35] and *Merrell Dow Pharmaceuticals, Inc. v.* ***1079** *Thompson,*[FN36] they argue that "[t]he federal court does not have jurisdiction of this case because the federal question is brought in by way of defense, not as part of plaintiffs' case in chief." But this argument is not responsive to CIRI's jurisdictional challenge, given that Bodkin and Coleman rely on the Fifth Amendment to challenge the legality of CIRI's elders' benefit programs.

FN32. 85 F.3d 422 (9th Cir.1996).

FN33. Pub.L. No. 100-241, § 16(a)(1), 101 Stat. 1813 (1988), *reprinted in* Historical and Statutory Notes, 1988 Amendments, 43 U.S.C. § 1601.

FN34. *Id.* at § 16(b), 101 Stat. 1813-1814.

FN35. 211 U.S. 149, 29 S.Ct. 42, 53 L.Ed. 126 (1908).

FN36. 478 U.S. 804, 106 S.Ct. 3229, 92 L.Ed.2d 650 (1986).

In any event, we need not decide this jurisdictional question, which was not addressed by the superior court, because it is unnecessary to rely on an alternative ground to affirm the superior court's decision. We see no error in the superior court's ruling on the merits of Bodkin and Coleman's constitutional claims. As the Ninth Circuit concluded in *Broad,* the federal government's mere authorization of a Native corporation to create an elders' benefit trust does not implicate the Fifth Amendment.[FN37] Bodkin and Coleman fail to advance any basis for differentiating between CIRI's distributions and those of the Sealaska Corporation that were at issue in *Broad.*[FN38] Applying the same factors that led the Ninth Circuit to conclude that Sealaska's elders' benefit programs were not state action, we agree that Bodkin and Coleman's constitutional claims must fail for lack of state action.

FN37. 85 F.3d at 431.

FN38. *Id.*

**Appendix A**

**V. CONCLUSION**

For the reasons detailed above, we AFFIRM the judgment of the superior court.

MATTHEWS and BRYNER, Justices, not participating.

*Bodkin v. Cook Inlet Region, Inc.*

182 P.3d 1072 (Alaska, 2008)

(boldface in the original; underlining added).

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**Appendix B**

ALASKA SUPREME COURT'S

DENIAL OF REHEARING

In the Supreme Court of the State of Alaska

| | | |
|---|---|---|
| Eleanor V. Bodkin, et al., | ) | |
| | ) | |
| Appellants, | ) | |
| v. | ) | ORDER |
| | ) | |
| Cook Inlet Region, Inc. (CIRI), | ) | |
| | ) | |
| Appellee. | ) | |

Supreme Court No. S-11870
Trial Court Case # 3AN-03-07389C1
Date of Order: 5/20/08

Before: Fabe, Chief Justice, Eastaugh and Carpeneti, Justices. [Matthews and Winfree, Justices, not participating.]

On consideration of the appellants' 4/16/08 petition for rehearing, and the appellee's opposition filed on 5/5/08,

IT IS ORDERED:

The Petition for Rehearing is DENIED.

Entered at the direction of the court.

Clerk of the Appellate Courts
Marilyn May

**Appendix C**

ALASKA SUPERIOR COURT'S DECISION

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

| | | |
|---|---|---|
| ELEANOR BODKIN,<br>Plaintiff,<br><br>vs.<br><br>COOK INLET REGION, INC.,<br>CIRI Elders' Benefit Program,<br>CIRI Elders' Settlement Trust,<br><br>Defendants. | :<br>:<br>:<br>:<br>:<br>:<br>:<br>:<br>:<br>:<br>: | <br><br><br>Case No. 3AN-03-7389 CI |

DECISION

Summary

Recent amendments to the Alaska Native Claims Settlement Act authorize for-profit Alaska Native Corporations to make special cash and stock distributions to Native elders to further the health, welfare and cultural interests of Alaska Natives. These provisions pre-empt Alaska corporate law which would otherwise prohibit those distributions.

The plaintiffs claim that two elder benefit programs adopted by CIRI run afoul of ANCSA and

violate Alaska state law. But several courts have rejected these same or similar claims. I follow those reasoned holdings and find that CIRI'S programs do not violate federal or state law.

The plaintiffs also argue that the ANCSA amendments, as applied here, are unconstitutional because the elders programs unfairly reduce the value of the plaintiffs' CIRI stock by distributing corporate cash to other shareholders. But, Congress has the authority to deprive citizens of private property for public purposes, if the United States pays just compensation for that deprivation. Even if the plaintiffs are correct on their claims of diminished stock value, settled federal law requires that they seek compensation for that toss from the United States in the Court of Federal Claims. I have no jurisdiction to decide whether a taking occurred. Additionally, the plaintiffs' remaining constitutional arguments fail because CIRI is not a governmental agency taking state action.

Finally, I find no materially misleading statements or omissions in the proxy materials submitted to shareholders for a vote on one of the benefit programs. Most of the plaintiffs' claims have been raised and rejected in similar cases.

The defendant's motion to dismiss is GRANTED.

Discussion

CIRI's Elders' Benefit Program, adopted in 2000, provides for quarterly payments of $450 to all living persons who received shares in CIRI as original enrollees in 1971 at the time of passage of ANCSA, and

who are 65 years old. In 2003 CIRI shareholders approved the Elders' Settlement Trust. The Trust replaces the Elders' Benefit Program and takes advantage of changes in tax law. The program requires transfer of $16 million from CIRI corporate accounts to an irrevocable trust for distribution to the shareholders mentioned above, with the Trust dissolving when the funds are spent.

CIRI adopted the trust under Section 7(r) of ANCSA, which pre-empts Alaska corporate law.[1] Section 7(r) provides in part:

> Benefits for Shareholders or Immediate Families. The authority of a Native Corporation to provide benefits to its shareholders…. to promote the health, education, or welfare of such shareholders ... is … expressly authorized and confirmed.

43 U.S.C. § 1606(r) (1986 & Supp. 2000). The plaintiffs assert that this law authorizes only need-based distributions, not [gen]eral cash distributions to shareholders based on age. This claim is not supported by the plain language of the statute, by the legislative history of the statute, or by the lengthy analysis offered by the plaintiffs.

The Ninth Circuit Court of Appeals rejected this same argument in Broad v. Sealaska Corp.[2] The court

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[1] See Sierra v. Goldbelt, Inc., 25 P.3d 697, 702 (Alaska 2001) (stating "Alaska's corporation code expressly provides for preemption by ANCSA.").

[2] 85 F.3d 422 (9th Cir. 1996)

held that "the text and the legislative history support the contention that Congress intended settlement trusts as flexible instruments" that could be used to make distributions to subsets of shareholders.[3]

The Alaska Supreme Court reached a similar result in Sierra v. Goldbelt, Inc. The court concluded "Congress has expressed its intention that the ANCSA amendments be interpreted to effectuate their purpose in empowering Native corporations to identify and meet the specific needs of particular groups of Natives."[4] Moreover, the court stated "[t]o effectively meet the needs of particular groups of Natives as Congress intended, Native corporations must have broad discretion to fashion elder benefit programs that meet the needs of elders."[5]

The plaintiffs argue that Goldbelt is distinguishable because Goldbelt did not distribute cash under Section 7(r), but instead issued a special class of preferred stock for its elder shareholders under Section 7(g) of ANCSA.[6] But the legislative history[7] of Section

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[3] Id. at 428.

[4] Id. at 701.

[5] Id. at 702.

[6] 43 U.S.C. § 1606(g)(2)(C)(ii) (1986 & Supp. 2000)

[7] Contrary to the Plaintiffs' argument, reliance on legislative opinion offered in the public record is clearly relevant and "is entitled to the same respect that a court would afford to, for example, an opinion of a learned commentator." See, Hillman v. Nationwide Mutual Fire Ins. Co., 758 P.2d 1248, 1253 (Alaska 1988)

7(r) indicates that Congress intended to provide for cash distributions.

> Examples of the type of programs authorized include: scholarships, cultural activities, shareholder employment opportunities and related financial assistance, funeral benefits, meals for the elderly and other elders benefits including cash payments, and medical programs.[8]

Thus, because ANCSA authorizes the Elders' Benefit Program and Elders' Settlement Trust, the programs are permitted under Alaska law.

The plaintiffs argue that the provisions of ANCSA authorizing CIRI's elder benefit programs amount to an unconstitutional taking of property since they allegedly deprive the plaintiffs of a portion of their interest in the corporation to fund the program for other shareholders. The Ninth Circuit has also rejected this claim. If the plaintiffs have a claim for taking their property, they must assert that claim against the U.S. government which authorized the statute. They have no direct action against CIRI. I do not have jurisdiction to decide the takings argument until the Plaintiffs bring suit in the Federal Court of Claims in compliance with the Tucker Act.[9]

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[8] 144 Cong. Rec. S 12589 (daily ed. October 14, 1998) (statement of Sen. Murkowski).

[9] See Bay View, Inc. v. Ahtna, Inc., 105 F.3d 1281, 1285 (9th Cir. 1997) (citations omitted).

**Appendix C**

Finally the plaintiffs mount other constitutional challenges to the benefit programs. But these fail because CIRI is not a governmental agency taking state action against the plaintiffs. The constitution protects individuals from state action but not from deprivations by private actors.[10]

Proxy Statement

CIRI distributed to shareholders a proxy statement regarding the proposed conversion of the Elders' Benefit Program into the Elders' Settlement Trust. The plaintiffs claim that the proxy statement is materially misleading. Their primary complaint is that the materials failed adequately to advise shareholders of the impact of the program on individual shares of CIRI stock.

AS 45.55.160 prohibits misrepresentations of material fact in proxy solicitations. This provision requires courts to determine, first, whether there are misrepresentations, and then whether the misrepresentations are material when considered "in the light of the circumstances under which they were made." Skaflestad v. Huna Totem Corp., 76 P.3d 391, 395 (Alaska 2003) (quoting AS 45.55.160). To qualify as misrepresentations, statements or omissions must be misleading or false[11]; and the statements or omissions are materially misleading or false "if there is a substantial

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[10] Belluomini v. Fred Meyer of Alaska, Inc., 993 P.2d 1009, 1015 (Alaska 1999).

[11] See 3 AAC 08.315(a).

likelihood that a reasonable shareholder would consider it important in deciding how to vote." Brown v. Ward, 593 P.2d 247, 251 (Alaska 1979) (citations omitted).

Typically, as a mixed question of law and fact, materiality is best left to the trier of fact. Meidinger v. Koniag, Inc., 31 P.3d 77, 83 (Alaska 2001) (Citations omitted). But judgment as a matter of law is appropriate when "the total mix of materials submitted to the [shareholders] was essentially accurate." See Skaflestad, 76 P.3d at 397 (Citing the trial court judge's inquiry).

CIRI's proxy materials provided accurate and complete information regarding the impact of the settlement trust on the corporation and the individual shareholder. The materials stated that if the Trust were approved, $16 million of CIRI's assets would be used to fund the Trust, thereby diminishing CIRI's assets by that amount:

> "CIRI's assets will decline by the amount of the contribution to the CIRI Elders' Settlement Trust, $16 million, or about 2.1% of the book value of the assets carried on its financial statements as of December 31, 2002."

The materials stated that the distributions would go only to a specified group of shareholders:

> [t]he assets of CIRI will be reduced by the amount transferred to the CIRI Elders' Settlement Trust, but only qualifying elders will be eligible for distributions."

Finally, CIRI explained that the Trust was intended to reflect shareholders cultural values of demonstrating

respect for elders and thus intended to promote "the health, education and welfare of its beneficiaries and preserv[e] the heritage and culture of Alaska Natives."

The plaintiffs claim that these disclosures did not go far enough and that CIRI should have calculated the value of an individual share of CIRI stock and disclosed the impact of the trust on that individual share value. This argument fails because it rests on a false premise — that CIRI share value can be calculated simply by dividing the corporation's net worth by the number of outstanding shares. But under general principles of corporate law "no one factor governs the valuation of shares; rather all factors, such as market value, asset value, future earnings prospects, etc. should be considered."[12] To complicate matters, CIRI shares may not be bought or sold on the open market. This latter factor likely affects the current stock value, but whether the prohibition on alienation increases or decreases the value of the stock is anybody's guess.

In my mind, had CIRI calculated stock value in the manner suggested by plaintiffs here, without significant qualification and explanation, a disgruntled shareholder might easily challenge that estimate as being unreliable. CIRI's informing shareholders about the Trust's impact on company assets was far more accurate than speculating about the impact on individual share value.[13]

Finally, citing federal securities regulations, the plaintiffs claim that the proxy materials are misleading or not useful because the font size is too small. Federal

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[12] See 3 AAC 08.315(a).

[13] See, Sierra v. Goldbelt, Inc., 25 P.3d at 703 and n.21.

securities laws require certain filings in 10 point type or larger.[14] CIRI's proxy statement was typed primarily in 8 point type.

Although, federal securities laws do not apply to Alaska Native Corporation proxy materials, those laws may be useful for guidance in appropriate cases. 15But this is not the appropriate case. First, it is not clear that the regulation cited by the plaintiff actually applies to federal proxy solicitations. More importantly, I find that no reasonable shareholder would be mislead or confused by the size of the font. Granted it is smaller than ordinary, but it is uniformly small. The statement does not contain important information hidden in fine print, a harm the federal regulation was likely intended to prevent. Nothing about the font size would lead a shareholder to disregard the proxy materials.

Dated at Anchorage, Alaska this 24th day of September 2004.

Dan A. Hensley
Superior Court Judge

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[14] 17 CFR Section 240.12b-12

[15] Brown v. Ward, 593 P.2d 247, 249-50 (Alaska 1979). I reject the plaintiffs' claim that federal securities laws are part of Alaska's "common law."

## Appendix D

BODKIN – APPELLANT'S BRIEF (EXCERPT)

### Statement of the Issues Presented For Review

(1) Does ANCSA authorize CIRI to pay quarterly cash distributions only to *original* shareholders over the age of 65, instead of to all shareholders? If ANCSA does not expressly authorize such discriminatory distributions, does relabeling the payments as "*benefits*" change the answer?

(2) Does Alaska law authorize CIRI to discriminate when paying distributions only to certain older, original shareholders?

(3) Does CIRI's reliance on federal law for its claimed authority constitute *government action* when deciding the constitutionality of CIRI's payment programs?

(4) Do CIRI's payments of these distributions under the color of federal law violate the Fifth Amendment because CIRI's actions:

- deny equal protection to similarly situated but excluded shareholders?
- take private property ($23 million) from the excluded shareholders for a private purpose without just compensation?
- violate due process by retroactively modifying the 1971 ANCSA Settlement contract and the corporate contract that was made at incorporation in 1972?

- impair the excluded shareholders' vested contractual right to equal distributions?

(5) Did the superior court err in refusing to consider the plaintiff-shareholders' exhibits, documents, affidavits and expert reports before granting CIRI's Rule 12(b)(6) motion? Should the shareholders have been allowed to take discovery before the court dismissed their entire lawsuit?

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**III. Because CIRI is acting under color or apparent authority of federal law in adopting the EBP and EST and in paying these dividends, CIRI's actions constitute *government action:***

The superior court avoided the Fifth Amendment issues (due process, equal protection, discrimination, takings, retroactivity, and impairment of contract) by making this mistaken conclusion of law:

> Additionally, the plaintiffs' remaining constitutional arguments fail because CIRI is not a governmental agency taking state action.

DECISION of 24 September 2004, at 2nd page.[Exc. 275]

***(A) A private party engages in* government action *when its conduct is authorized by federal law:*** If a private citizen takes money from another without permission, there is no government action; it is simply a crime and/or a

tort. There is no constitutional violation because the government did not do the taking. But if a federal law authorizes a private person to take money from another, there can be *government action.*

Where an action is taken by a private party in "reliance" on the authority of a federal law, it "cannot be viewed as private action outside the reach" of the constitution. *Skinner v. Railway Labor Executive Assn.*, 489 U.S. 602, 633, 103 L. Ed. 2d 639, 670, 109 S.Ct. 1402 (1988) (the action was requiring drug tests that were authorized by federal regulations). Although *Skinner* involved the Fourth Amendment, its reasoning is applicable here where CIRI claims its "private action" is outside of the protection of the Fifth Amendment.[16] *See also, Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 621, 114 L. Ed. 2d 660, 674, 111 S.Ct. 2077 (1991) (government action found when private parties exercise peremptory challenges in civil jury trial in a racially discriminatory manner – could not be done without rule of court that authorizes the practice[17]). *See generally,* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES, §6.4.4.3 at 403-13 (1997);

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[16] *Skinner* says the degree of government involvement for a Fifth Amendment equal protection claim that is required to place limitations on "private action" need not be as "intrusive" as that required for a taking claim; the former requires only "reliance" on a federal law.

[17] "Without this authorization, granted by an Act of Congress itself, Leesville would not have been able to engage in the alleged discriminatory acts." 500 U.S. at 621 (underlining added).

*id.* at 395: explaining the "entanglement exception" to the state action doctrine: "private conduct must comply with the constitution if the government has authorized, encouraged, or facilitated the unconstitutional conduct."

***(B) CIRI's programs constitute government action for a second reason – because CIRI is performing a* public function *in implementing a federally authorized program of social welfare benefits:*** In providing charitable or welfare benefits to Alaska Natives, some of whom no longer are shareholders, CIRI is performing a social welfare mission under authority of a federal law: "The authority of a Native corporation to provide benefits . . . to promote the health, education, or welfare of such shareholders or family members is expressly authorized and confirmed." ANCSA § 7(r).

When a private party performs a public function, it can become a government actor and therefore it must comply with the Constitution. CHEMERINSKY, CONSTITUTIONAL LAW, §6.4.4.2 at 396-403 (1997); *id.* at 397 (when performing "a task that has usually been done by the government, or even often done by the government, even if it has not been exclusively done by the government"). Courts have identified a public function where the private actor was managing private property, such as a "company town," park, golf course, and shopping malls. This rule can be extrapolated to control over other forms of private property, such as a corporation (whose shareholders are tenants in common, co-owners of an incorporated business enterprise).

When an Alaska Native corporation performed

a public function under the authority of ANCSA, "it became an instrument of the federal government." *Ogle v. Salamatof Native Association, Inc.,* 906 F.Supp. 1321, 1330 (D.Ak. 1995) (Singleton, J.) (Native corporation had initial role in resolving ANCSA § 14(c) land claims).

***(C) CIRI's resort to a federal statute constitutes "government action" because its authority for the EBP and EST devolve from federal law — because CIRI is clothed in governmental power:*** CIRI could not have adopted these programs without claiming the authority of federal law granting it the right to do so.[18] In adopting its discriminatory programs, it is not engaging in private conduct that is immune from the equal protection requirements of the Fifth Amendment. CIRI's resort to and reliance upon ANCSA §§ 7(r) and 39 constitutes *governmental action* for purpose of applying the Fifth Amendment:

> We have held once, *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), and said many times, that actions of private entities can sometimes

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[18] It is no defense for CIRI to argue that it was not compelled by federal law to set up its discriminatory programs. *Skinner* involved federal regulations that authorized, but did not compel, private railroads to require its employees to submit to breath or urine tests under certain circumstances. *Id.*, 103 L. Ed. 2d at 655-6. In spite of this, the Court held that the railroad's actions "cannot be viewed as private action." *Id.*, 103 L.Ed.2d at 670.

> be regarded as governmental action for constitutional purposes. *See, e.g.*, *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 546 (1987); *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982); *Moose Lodge No. 107 v. Irvis,* 407 U.S. 163, 172 (1972).

*Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 378, 130 L.Ed.2d 902, 909, 115 S.Ct. 961 (1995) (underlining added) (although not a government agency, Amtrak a government actor because it is *a corporation that was created by the government by a special law for the furtherance of governmental objectives* – thus is subject to First Amendment).

***(D) Interference with settled property rights under the aegis of a statute is an unconstitutional "government action":*** Courts have found government action (and an impermissible interference in private contractual arrangements) when Congress adopts legislation that has the ultimate effect of changing the ownership of private property.[19]

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[19] In *Preseault v. United States*, 100 F.3d 1525, 1551 (Fed.Cir. 1996) (en banc), the Federal Circuit found government action when a municipality converted a former right-of-way to a trail in defeasance of the reversionary interests of the neighboring property owners. The action was taken under the authority of an order from the Interstate Commerce Commission, which in turn was authorized by a federal statute allowing conversion of railroad right-of-ways to scenic easements (the "Rails to Trails Act"). This federal authorization constituted a

**Appendix D**

***(E) Government action is found where a private party has "been aided in some way by the government's thumb on the scales":*** *International Association of Machinists v. Sandsberry*, 277 S.W.2d 776, 780 (Tex.Civ.App. 1954) (internal quotes omitted) (violation of Fifth Amendment by a federal statute, finding "government action").

***(F) Under CIRI's misapplication, federal law purports to authorize the taking of shareholders' equity and the impairment of their contract rights, so there is federal involvement — a sufficient nexus to federal statutory law:*** Federal law does not compel CIRI to set up a benefit program. Neither §7 (r) nor § 39 requires a Native Corporation to set up a benefit program. These two statutes are merely permissive,

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sufficient nexus to the government to make it a responsible actor. *Id.,* 100 F.3d at 1551 ("it acted under the aegis of the United States * * * when the Federal Government puts into play a series of events which result in a taking of private property, the fact that the Government acts through a state agent does not absolve it from the responsibility, and the consequences, of its actions").

In *Hendler v. United States*, 952 F.2d 1364, 1378-79 (Fed.Cir. 1991), local officials enforced EPA regulations that were authorized by CERCLA, a federal statute. The court found government action because it was the federal law that had authorized the disputed conduct. *Id.,* 952 F.2d at 1378 ("such authority flows from CERCLA, and it was under the authority of that federal statute that the EPA Order was issued").

advisory, or hortatory, but not mandatory. Nonetheless, CIRI did rely upon federal law for its authority to adopt discriminatory programs that extinguish substantive contract rights of its shareholders. This is what constitutes *government action*.

## IV. If CIRI's programs were authorized by ANCSA §§ 7(r) and 39 — if these statutes could be used as CIRI interprets and applies them — these statutes would violate the Fifth Amendment:

As interpreted by CIRI and applied in its EBP and EST, these statutes violate the Fifth Amendment because they:

- *Equal Protection* — deny equal protection to similarly situated but excluded shareholders;
- *Taking* — take private property ($23^{+}$ million) from the excluded shareholders for a private purpose without just compensation, without *any* compensation;
- *Due Process* — violate due process by imposing retroactive liability on the excluded shareholders to pay for the social welfare "benefits" that are being given to the privileged shareholders; and
- *Impairment of Contract* — extinguish the excluded shareholders' vested contractual[20] right

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[20] There are two contracts at issue: (1) the 1971 ANCSA Settlement contract,† which settled *State of*

to equal distributions, their vested property right to equality within the corporation.

***(A) If it is correct that ANCSA § 7(r) and ANCSA § 39 do authorize CIRI's two discriminatory "benefits" programs (the EBP and the EST), then both of these statutes, as applied, violate the Equal Protection guarantees of the Fifth Amendment:*** While the Fifth Amendment has a due process clause, it does not have an equal protection clause. Nonetheless, it has long been established that "the concepts of equal protection and due process … are not mutually exclusive" and that "discrimination may be so unjustified as to be violative of due process." *Bolling v. Sharpe*, 347 U.S. 497, 499, 98 L.Ed. 884, 886 (1954) (applying the Equal Protection Clause of the 14th Amendment to outlaw school segregation in the District of Columbia, where the discrimination was authorized by federal law). By now it is well-settled that "equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment." *Buckley v. Valeo*, 424 U.S. 1, 93, 46 L.Ed.2d 659, 730 (1976).

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*Alaska v. Udall,* 420 F.2d 938 (9th Cir. 1969), the lawsuit about Native land claims, and (2) the corporate contract that was made at incorporation in 1972, which includes the contractual right to equal treatment of shares.

† ANCSA § 4(c), 43 U.S.C. § 1603(c) ("any such claims that are pending before any Federal or state court . . . are hereby extinguished"). A settlement agreement to end a lawsuit is a *contract* that is enforceable just like any other contractual agreement.

**Appendix D**

Both of CIRI's elders' plans create discriminatory classifications, so it follows that they also create an equal protection problem: Can the discriminatory treatment of non-original shareholders be justified? Another way of putting this is to ask what level of judicial scrutiny should be applied to the classification created by the EBP and the EST, CIRI's payments programs?

The appropriate level of scrutiny is the reasonable basis test. This test has two parts: (1) the law in question must be related to a legitimate government purpose or end, and (2) the means authorized by the law to achieve this end must be reasonable, i.e., the means must be rationally related to accomplishing the purpose or end of the law. *See Pennell v. City of San Jose*, 485 U.S. 1, 14, 99 L.Ed.2d 1, 10 (1988); *U.S. Railroad Retirement Board v. Fritz*, 449 U.S. 166, 175, 177, 66 L.Ed.2d 368, 377, 101 S.Ct. 453 (1980); and *Allied Stores v. Bowers*, 358 U.S. 522, 527, 3 L.Ed.2d 480, 485 (1959).

***(1) CIRI lacks a rational basis for favoring some 65 year old shareholders while excluding others, all of whom are equally in need of "benefits":*** CIRI fails the reasonable basis test because it cannot adequately respond to this question: What legitimate attribute does a Native shareholder – who is not an original shareholder – have that makes her less deserving of CIRI's benefit plan when she reaches 65 years of age?

*Analysis of ANCSA § 7(r):* The governmental purpose declared in ANCSA § 7(r) is to authorize an Alaska Native Corporation to set up a benefit program to "promote the health, education, or

welfare" of its shareholders "who are Alaska Natives or descendants of Alaska Natives" or to promote the same for such shareholders' immediate family members "who are Alaska Natives or descendants of Natives."

*Analysis of ANCSA § 39:* The governmental purpose behind ANCSA § 39 is to allow an Alaska Native Corporation to set up a trust "to promote the health, education and welfare" of the trust's beneficiaries [21] and to "preserve the heritage and culture of Natives," quoting ANCSA § 39(b)(1) [43 USC §1629e(b)(1)].

For the purpose of equal protection analysis it will be assumed that these ends are legitimate governmental purposes.[22]

A problem immediately arises with the means used by CIRI to achieve these purposes. If, as CIRI maintains, ANCSA § 7(r) or ANCSA § 39 authorize the means that CIRI used in its two benefit programs to accomplish the goals of these provisions, then

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[21] A Settlement Trust set up under ANCSA § 39 [43 USC §1629e] must be operated for "the sole benefit of the holders of the corporation's Settlement Common Stock in accordance with section 39 and the laws of the State of Alaska," who are Natives or who are descendants of Natives. *See* ANCSA § 3(t)(2) [43 USC §1602 (t)(2)].

[22] Sub-section IV(B) at pgs. 44-47, below, explains that, as applied by CIRI, both of these statutes would violate the Takings Clause of the Fifth Amendment. Under a Takings Clause analysis neither of these provisions has a legitimate government purpose.

there is no rational relationship between this goal and the means used. What is there about the fact that a Native shareholder is not an original shareholder that makes him or her less entitled or deserving of CIRI's benefit plan when he or she reaches 65 years? Why does the attribute of being an original Native shareholder make that shareholder more deserving of receiving an elder's benefit when he or she turns 65 than a Native shareholder who is not an original shareholder?

An open plan to grant legitimate benefits to all of CIRI's Native shareholders could be rationally related to the purposes of ANCSA § 7(r) and ANCSA § 39 (i.e. "to promote the health, education and welfare" of Native shareholders and to "preserve the heritage and culture of Natives"). But a restricted benefit plan that is offered only to some of CIRI's older Native shareholders is not a rational way to achieve these purposes.

***(2) A correct reading of ANCSA § 7(r) and § 39 is that neither authorizes CIRI's discriminatory benefits programs:*** In light of the analysis set out in sub-section (1), above, a more sensible reading of ANCSA § 7(r) and ANCSA § 39 is that, although they allow a Native Corporation to set up a benefit program for all Native shareholders who turn 65, neither can be understood as authorizing a benefit program that is restricted to a particular class of 65 year-old Native shareholders who are original shareholders, but is not open to 65 year-old Native shareholders who are not original shareholders. To insist that these two statutes authorize such discrimination is to concede that both are

unconstitutional as applied by CIRI in its EBP and EST.

It is more reasonable to hold that neither ANCSA § 7(r) nor ANCSA § 39 authorizes CIRI to adopt an elders benefit program that is grounded on an irrational classification – a bad classification that results in only some of CIRI's 65 year old shareholders being eligible for health, education and welfare benefits, and that results in an irrational discrimination against the others who are excluded.

***(3) Conclusion – the means used are not sufficiently related to the goal:*** No rational relationship exists between the means and the end. There are needy shareholders who are not original and also some who are not yet 65 years old. They should not be denied charitable "benefits" nor be excluded from dividends.

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{The foregoing excerpts appear at pages 2, 36-39, and 40-43 of the Appellants' Opening Brief in *Bodkin and Coleman v. CIRI*. Footnotes have been renumbered. The full text is available on Westlaw.}

## Appendix E

### CIRI APPELLEE BRIEF EXCERPT

Senator Frank Murkowski urged passage of the 1998 ANCSA amendment on the floor of the Senate. His comments verified that the 1998 amendment was meant to "confirm the original intent of ANCSA in 1971: that ANCSA corporations could provide health, education and welfare benefits for Alaska Natives, including those persons who were their shareholders." 144 Cong. Rec. S12589 (daily ed. Oct. 14, 1998).

Senator Murkowski also explained that the 1998 ANCSA amendment was a direct response to this Court's decision in Hanson v. Kake Tribal Corp., 939 P.2d 1320 (Alaska 1997). In Hanson, this Court ruled that an ANCSA Village Corporation's programs that used life insurance proceeds and cash to pay varying amounts to some, but not all, shareholders violated the requirement of Alaska law that all shareholders of a corporation are entitled to "equal rights, preferences and privileges" on account of their shares. 939 P.2d at 1324. Senator Murkowski stated that some of the language used in the Hanson decision was "inconsistent with the intent behind ANCSA" and "goes too far." 144 Cong. Rec. S12589 (daily ed. Oct. 14, 1998). Senator Murkowski explained that the 1998 amendment was meant to affirm an ANCSA corporation's authority under federal law to provide benefits that were not tied to the proportionate ownership of shares:

[CIRI's quotation from the Congressional Record is omitted; the entire statement appears in Appendix H ].

## Appendix E

2. **CIRI IS A PRIVATE PARTY NOT SUBJECT TO CONSTITUTIONAL CLAIMS.**

Bodkin and Coleman argue that, regardless of § 7(r) and § 39 of ANCSA, they have a legitimate claim against CIRI because CIRI's actions violated the Fifth Amendment to the U. S. Constitution. This claim is without merit. As a private corporation, CIRI is not subject to the restrictions that the Fifth Amendment places on the government.

"[S]tate and federal courts have historically recognized that the constitution protects individuals from state action but not from similar deprivations by private actors." Belluomini v. Fred Meyer of Alaska. Inc., 993 P.2d 1009, 1015 (Alaska 1999). "It is a basic tenant of due process that its prerequisites are **state action** and the deprivation of an individual interest of sufficient importance to warrant constitutional protection." Estate of Miner v. Commercial Fisheries Entry Comm'n, 635 P.2d 827, 829 (Alaska 1981) (emphasis added). Thus, when a plaintiff claims that a privately owned and operated corporation has taken some action contrary to the plaintiff's constitutional rights, the claim cannot be sustained, even when the private corporation is subject to extensive government regulation. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 350-58 (1974). The Constitution creates an "essential dichotomy" between deprivation by the government, which is subject to constitutional scrutiny, and "private conduct, 'however discriminatory or wrongful," against which the Constitution "offers no

shield." 419 U.S. at 349. Accord Miller v. Safeway, Inc., 102 P.3d 282, 288-90 (Alaska 2004) (state action required to show violation of right to privacy under Alaska Constitution).

Because Native corporations are not government agencies, the Ninth Circuit rejected a Fifth Amendment challenge to Sealaska Corporation's elders settlement trust. In Broad v. Sealaska Corp., 85 F.3d 422 **(9th** Cir. 1996), cert. denied, 519 U.S. 1092 (1997), the Ninth Circuit stated:

> In this case, Sealaska was not in any way compelled by the federal government to create the EST [elders settlement trust]. The settlement trust option is just that — an option. **That Sealaska's action was authorized by federal law does not transmute it into government action sufficient for the Fifth Amendment. Without governmental encouragement or coercion[1] actions taken by private corporations pursuant to federal law do not transmute into government action under the Fifth Amendment. . . .**
>
> In this case, Sealaska is a private corporation that established the EST using private funds. The operation of the trust is not subject to governmental oversight. Furthermore, Sealaska was neither encouraged nor coerced into creating the EST by the federal government. It merely exercised its option under ANCSA to transfer its assets to a settlement trust. We therefore affirm the grant of summary judgment

in favor of Sealaska. . . .

85 F.3d at 431 (emphasis added).

For purposes of Bodkin and Coleman's constitutional claims, CIRI's Program and Trust are equivalent to Sealaska's EST at issue in Broad. CIRI is a private corporation, like Sealaska, and CIRI established the Program and Trust with private funds, just as Sealaska did. No government monies were used to create any of these benefit programs. CIRI's Program and Trust are subject to private control and operation, just as Sealaska's EST was. The government neither encouraged nor coerced CIRI to establish either the Program or the Trust. Instead, GIRT merely exercised its option under ANCSA to create them, just as Sealaska did. Indeed, the government had no role at all in the critical aspect of CIRI's Program and the Trust that Bodkin and Coleman are actually complaining of here. The government did nothing to create, or encourage the creation of, the requirements that beneficiaries under the Program or the Trust must be 65 years of age or older and hold GIRT stock. Only CIRI, acting as a private entity, established those aspects of the Program and Trust. As such, CIRI's private actions "do not transmute into government action under the Fifth Amendment." Broad, 85 F.3d at 431.

The authorities Bodkin and Coleman cite do not support a contrary conclusion. In Edmonson v. Leesville Concrete Co., 500 U.s. 614 (1991) the Court determined that a private litigant exercising a peremptory challenge to exclude black jurors in a civil court proceeding constituted state action that

was prohibited by the Constitution. The Court noted that the claimed constitutional deprivation resulted from "the exercise of a right or privilege having its source in state authority" because "peremptory challenges have no significance outside of a court of law," which the government alone controls. 500 U.S. at 620. The Court also stated that the selection of jurors "represents a unique governmental function delegated to private litigants by the government and attributable to the government." 500 U.S. at 627.

CIRI's Program and Trust are completely unlike the exercise of a peremptory challenge in a government-controlled court of law. A private corporation's distribution of money among its shareholders has an independent significance outside of any government-controlled arena. In fact, a private corporation's payment of funds to its shareholders is an entirely private function, controlled only by the corporation's board of directors. Also, the payment of money to shareholders is decidedly not a "unique governmental function" that the government has somehow delegated to CIRI.

Bodkin and Coleman's reliance on Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989) is similarly misplaced. In Skinner, the plaintiffs sued the U.S. Secretary of Transportation to obtain an injunction against regulations that provided for alcohol and drug testing of railroad employees. 489 U.S. at 612. The plaintiffs challenged the testing regulations as being in violation of the Fourth Amendment's prohibition against unreasonable searches and seizures. 489 U.S. at 612-13. The regulations contained a mandatory testing

component when railroad employees were involved in a major accident and a permissive testing component the railroad could implement when lesser accidents or minor rule violations occurred. 489 U.S. at 609-11. The permissive testing component of the regulations, however, went beyond simply authorizing the testing to occur. The permissive testing regulations overrode any contrary collective bargaining agreements or arbitration awards affecting the railroads and those regulations affirmatively prohibited a railroad from contracting away or divesting itself of the right to conduct the testing. 489 U.S. at 615. The regulations also provided that the government had the right to obtain samples and test results obtained from employees as a result of permissive testing and they obligated the railroad employees to submit to the testing or lose their positions. Id. In light of these provisions, the Court said that the government "did more than adopt a passive position toward the underlying private conduct." Id.

> The Government has removed all legal barriers to the testing authorized by Subpart D [the permissive testing portion of the regulations], and indeed has made plain not only its strong preference for testing, but also its desire to share the fruits of such intrusions. In addition, it has mandated that the railroads not bargain away the authority to perform tests granted by Subpart D. **These are clear indices of the Government's encouragement, endorsement, and participation,** and suffice to implicate the Fourth Amendment.

489 U.S. at 615-16.

Unlike the situation in Skinner, the lawsuit here is not one against federal officials for injunctive relief to prevent the implementation of government regulations. Rather, it is a suit for money damages against a private party for privately created trusts and trust benefits. More importantly, the conduct Bodkin and Coleman are challenging is not something that has any "indices of the Government's encouragement, endorsement, and participation." The federal government here did not indicate a preference for either the Program or the Trust that CIRI adopted, and the government did not arrange to share in the fruits of either the Program or the Trust in any way. The government also did not require CIRI or its shareholders to go along with the Trust, but left CIRI's board of directors and its shareholders free to vote for or against the establishment of the Trust as they saw fit. In addition, the government did not prohibit CIRI from divesting itself of the right to adopt a settlement trust or other benefit program, if that was a course of action CIRI wanted to take. In short, the government in this case was neutral as to whether or not CIRI ever adopted the Program or the Trust and it had no role in setting the terms for either of them. Unlike Skinner, the federal government here maintained "an entirely passive position toward the underlying private conduct." 489 U.S. at 615.[8]

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8 Bodkin and Coleman's citation to Lebron v. National Railroad Passenger Corp., 513 U.S. 374 (1995) is far off base. In Lebron, the Supreme Court found that Amtrak was an "agency or

> instrumentality" of the United States since the federal government itself created the corporation and controlled it through the permanent authority to appoint a majority of the directors. 513 U.S. at 384-400. CIRI was not created by the government, nor is it controlled by it. In fact, ANCSA intended that Native corporations "not be subject to Federal supervision." H.R. Report No. 92-523, reprinted in 1971 U.S.C.C.A.N. 2192, 2199. ANCSA "adopted a policy of self-determination on the part of the Alaska Native people." Conf. Rep. No. 92-746, reprinted in 1971 U.S.C.C.A.N. 2247, 2250. Congress designed ANCSA to achieve its purposes "without creating a reservation system or lengthy wardship or trusteeship." 43 U.S.C. § 1601(b).

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The reality of this case is that the only government involvement is the statutory franchise ANCSA set up for creating and operating Native corporations generally, including the authority for establishing a settlement trust. This statutory franchise and authority are not sufficient to show "state action" so as to implicate the Fifth Amendment. Government licensing or regulating of a private business entity has never been sufficient for the Constitution to apply to private conduct. Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 175 (1972) (state grant of liquor license to a private lodge not sufficient to make lodge's membership rules and guest policies subject to Constitution); Columbia Broadcasting System v. Democratic National Committee, 412 U.S. 94, 114-21 (1973) (television station licensed by the government not subject to Constitution in the acceptance of proposed advertising); Jackson v. Metropolitan

**Appendix E**

Edison Co., 419 U.S. 345, 350-58 (1974) (service termination process used by licensed and regulated public utility not subject to due process requirements).

The law could hardly be otherwise. If Bodkin and Coleman's argument -- that "reliance" on a federal law is sufficient to constitute state action -- were accepted, then virtually every act of every ANCSA corporation would be subject to the Constitution. As creatures of ANCSA and the Alaska Corporations Code, ANCSA corporations are always acting in "reliance" of some federal or state statute in conducting their business affairs. But the law on state action does not go so far. Reliance on the corporate franchise and general authority to conduct business within statutory parameters does not convert purely private action into government action.

Because there is no state action in this instance, Bodkin and Coleman's constitutional arguments based on the Fifth Amendment — taking of private property, equal protection, substantive due process and impairment of contracts — must all be rejected.

## Appendix E

### 4. BODKIN AND COLEMAN'S EQUAL PROTECTION, SUBSTANTIVE DUE PROCESS AND IMPAIRMENT OF CONTRACT CLAIMS HAVE NO POSSIBLE VALIDITY.

Bodkin and Coleman have also alleged that the ANCSA provisions are unconstitutional under the Fifth Amendment because they violate equal protection, substantive due process, and the prohibition against the impairment of contracts. All of these constitutional challenges must fail as against CIRI since it is a private corporation and there is no "state action." Furthermore, all of these constitutional claims lack any substantive merit whatsoever.

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{The foregoing excerpts appear at pages 5, 26-32, and 37 of CIRI's Appellee's Brief in *Bodkin and Coleman v. CIRI*. The full text is available on Westlaw.}

## Appendix F

BODKIN – APPELLANT'S REPLY BRIEF
(EXCERPT)

**VI. There <u>is</u> *government action* because "ANCSA specifically authorized CIRI to create the Elders' Benefit Program and Trust,"[5] thus CIRI is an instrument of the federal government, and could not do this without the claimed grant of statutory authority upon which it relies, § 7(r) & § 39:**

CIRI argues that it is a private party and there is no state action; it is not a government agency and thus is not liable for any violation of constitutional protections such as due process, equal protection and impairment of contract. Appellee's brief at 26-32.

***(A) CIRI is an extension and instrumentality of the federal government:*** Because it administers and distributes the assets that were conveyed to it pursuant to ANCSA. *Ogle v. Salamatof Native Ass'n, Inc.*, 906 F.Supp. 1321 (D.Ak 1995):

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[5] ***CIRI's admission:*** Appellee's brief at 17: CIRI's argument V(B): "ANCSA specifically authorized CIRI to create the Elders' Benefit Program and Trust and supersedes any countervailing principle of Alaska corporate law" (all bold face, all caps in the original).

## Appendix F

> The administration of Native land claims is a power traditionally exclusively reserved to the government. When Congress and the Secretary [of Interior] delegated to Salamatof [village corporation] initial responsibility to resolve ANCSA section 14(c) claims, it became an instrument of the federal government, obligated under the Fifth Amendment to give adequate notice before depriving anyone of his or her property rights. (underlining added)

*Id.,* at 1330 (Native corporation authorized to process individual reconveyance claims under ANCSA; *held* corporation subject to Fifth Amendment due process restrictions).

***(B) The "entanglement exception" to state action doctrine applies:*** CIRI received federal grants of money, land and legal authority under ANCSA §§ 6, 7(h)(4), 9, 12-14. The corporation could not have implemented its discriminatory program without the authorization to do so that it claims from the federal statutes, ANCSA § 7(r) and § 39. "Private conduct must comply with the Constitution if the government has authorized, encouraged, or facilitated" it. CHEMERINSKY, CONSTITUTIONAL LAW, § 6.4.4.1 (1997).

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{The foregoing excerpt appears at page 18 of the Appellants' Reply Brief in *Bodkin and Coleman v. CIRI*. The full text is available on Westlaw.}

**Appendix G**

Ninth Circuit's opinion in *Notti v. CIRI,*
31 Fed.Appx. 586, 2002 WL 464716 (9th Cir. 2002)
*cert. denied,* 537 U.S. 1104 (2003).

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Nos. 01-35521, 01-35569

EMIL NOTTI, *et al.,* PLAINTIFFS - APPELLANTS

*v.*

COOK INLET REGION, INC. , DEFENDANT - APPELLEE

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Decided March 22, 2002.

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**MEMORANDUM**

Appeal from the United States District Court for the District of Alaska, John W. Sedwick, District Judge, Presiding.

Before ALARCÓN, SILVERMAN, Circuit Judges and BREWSTER, District Judge[23].

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[23] The Honorable Rudi M. Brewster, Senior United States District

## Appendix G

MEMORANDUM[24]

Appellants are shareholders of Cook Inlet Region, Inc. (CIRI), a Regional Corporation established pursuant to the Alaska Native Claims Settlement Act, 43 U.S.C. § § 1601 *et seq* (ANCSA). They appeal the district court's denial of their motion to remand this action to state court, grant of summary judgment in favor of CIRI, and denial of their motion for reconsideration.

We have jurisdiction pursuant to 28 U.S.C. § 1291. We lack jurisdiction to consider appellants' taking claim, raised to the district court on reconsideration, because appellants must raise that claim under the Tucker Act in the Federal Court of Claims. *Bay View, Inc. ex rel. AK Native Vill. Corps. v. AHTNA, Inc.,* 105 F.3d 1281, 1284-85 (9th Cir.1997).

Appellants argue that the district court lacked removal federal question jurisdiction over this action and therefore, that the case was improperly removed to federal court. We review the issue de novo. *Prize Frize, Inc. v. Matrix (U.S.) Inc.,* 167 F.3d 1261, 1265 (9th Cir.1999). We also review de novo the district court's denial of the motion to remand. *ARCO Env't Remediation, L.L.C. v. Dept. of Health and Env't Quality,* 213 F.3d 1108, 1111 (9th Cir.2000). The district court had subject matter jurisdiction because

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Judge for the Southern District of California, sitting by designation.

[24] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

the complaint raises a substantial federal question of whether Section 7(r) of ANCSA, 43 U.S.C. § 1606(r), authorizes CIRI to pay dividends to Native leaders who were original CIRI shareholders.

Appellants argue that the district court erred in holding that ANCSA preempts the Alaska corporations statute. We review the district court's decision regarding preemption de novo. *Williamson v. General Dynamics Corp.,* 208 F.3d 1144, 1149 (9th Cir.2000). The plain language of § 7(r) allows CIRI to make the distributions made in this case. 43 U.S.C. § 1606(r). ANCSA expressly preempts Alaska law. 43 U.S.C. § 1606(p). Moreover, legislative history of § 7(r) confirms that Congress intended that ANCSA corporations provide the type of benefits provided by CIRI in this case. 144 Cong. Rec. 12589-01 (1998) (daily ed. October 14, 1998) (statement of Sen. Murkowski). Thus, the district court did not err in granting summary judgment.

AFFIRMED.

## Appendix H

Sen. Murkowski's statement in Congressional Record

CONGRESSIONAL RECORD

Senate Proceedings and Debates of the
105th Congress, Second Session —
Wednesday, October 14, 1998

***S12589** ALASKA NATIVE CLAIMS SETTLEMENT ACT AMENDMENTS

Mr. MURKOWSKI.

I rise to speak in support of the passage of H.R. 2000, a bill to amend the Alaska Native Claims Settlement Act to make certain clarifications to the land bank protection provisions, and for other purposes, and I hope it will be sent on its way to the President for his signature.

A measure similar to H.R. 2000 was passed by the Senate Energy and Natural Resources Committee on September 24, of last year. S. 967 contained the majority of the provisions in H.R. 2000.

One of the most important provisions in H.R. 2000 is section 6 which implements a land exchange with the Calista Corporation, an Alaska Native regional corporation organized under the authority of the Alaska Native Claims Settlement Act. This exchange, originally authorized in 1991, by P.L. 102-172, would provide for the United States to acquire more than 200,000 acres of Calista and village corporation lands

and interests in lands within the Yukon Delta National Wildlife Refuge in southwestern Alaska.

The Refuge serves as an important habitat and as a breeding and nesting ground for a variety of fish and wildlife, including numerous species of migratory birds and waterfowl. As a result, the Calista exchange will enhance the conservation and protection of these vital habitats and thereby further the purpose of ANCSA and the Alaska National Interest Lands Conservation Act.

In addition to conservation benefits, this exchange will also render much needed economic benefit to the Yupik Eskimo people of southwestern Alaska. The Calista region is burdened by some of the harshest economic and social conditions in the Nation. As a result of this exchange, the Calista Corporation will be better able to make the kind of investments that will improve the region's economy and the lives of the Yupik people. In this regard, this provision furthers and carries out the underlying purposes of ANCSA.

This provision is, in part, the result of discussions by the various interested parties. As a result of those discussions, a number of modifications were made to the original package of lands offered for exchange.

Mr. President, it is past time to move forward with this exchange.

Another section of this bill I wanted to comment on is a provision that was not included in the technical amendments I introduced but that was added in the

House.

Section 12 of this bill expressly authorizes and confirms the original intent of ANCSA in 1971: that ANCSA corporations could provide health, education and welfare benefits for Alaska Natives, including those persons who were their shareholders.

This provision is necessary because one recent Alaska Supreme Court case has concluded that an ANCSA corporation had liability to its shareholders under Alaska state law for a cash payment benefits program. The program at issue in that case was limited to the persons reached a certain age. Given the narrowness of this program, it was not consistent with the intent of ANCSA. Section 12 of this bill is not intended to alter the result in that case, or otherwise, with regard to that specific benefit program.

However, in reaching its decision under Alaska state law, the court used language which suggests that any ANCSA corporate benefits program which does not provide equal pro rata benefits to all shareholders simultaneously is invalid. Such a conclusion goes too far and is inconsistent with the intent behind ANCSA.

Thus, section 12 of this bill is intended to make clear that in evaluating the legality of health, education and welfare programs maintained by ANCSA corporations, federal law (ANCSA) is to preempt Alaska state law. Such programs have been

established in good faith to provide health, education and/or welfare benefits for the ANCSA corporations' shareholders or their family members.

To be valid under ANCSA, it is not necessary that benefits be provided on an equal pro rata basis simultaneously to all shareholders, or even that the program recipients be shareholders as long as they are family members of shareholders.

Examples of the type of programs authorized include: scholarships, cultural activities, shareholder employment opportunities and related financial assistance, funeral benefits, meals for the elderly and other elders benefits including cash payments, and medical programs.

I believe these programs represent an important part of the ANCSA corporations, and I hope they will continue long into the future.

144 CONG. REC. S12589-01,
1998 WL 716290(Cong.Rec.)

**Constitutional Provisions and Statutes**

U.S. CONSTITUTION – CONTRACT CLAUSE AND AMENDMENT V

**The Contract Clause of Article I:**

**Article I, § 10, cl. 1**

> No State shall . . . pass any bill of attainder, ex post facto law or law impairing the obligation of contracts . . . .

**The Fifth Amendment**

> No person shall . . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

(underlining added)

**Constitutional Provisions and Statutes**

FEDERAL STATUTES — ANCSA (43 U.S.C.)

**U.S. Code, Title 43, Public Lands, Chapter 33,**

**Alaska Native Claims Settlement Act [ANCSA]**

(underlining added)

**ANCSA § 2(f) [43 U.S.C. § 1601(f)] — Declaration of Policy.**

Congress finds and declares that —

. . . .

(f) no provision of this Act shall be construed to constitute a jurisdictional act, to confer jurisdiction to sue, nor to grant implied consent to Natives to sue the United States or any of its officers with respect to claims extinguished by the operation of this Act; and . . . .

**ANCSA § 3 [43 U.S.C. § 1602] — Definitions.**

. . . .

(g) "Regional Corporation" means an Alaska Native Regional Corporation established under the laws of the State of Alaska in accordance with the provisions of this Act;

. . . .

(t) "Settlement Trust" means a trust —

(1) established and registered by a Native Corporation under the laws of the State of Alaska pursuant to a resolution of its shareholders, and

(2) operated for the sole benefit of the holders of the corporation's Settlement Common

Stock in accordance with section 39 [ANCSA § 39, 43 U.S.C. § 1629e] and the laws of the State of Alaska.

**ANCSA § 7(d) [43 U.S.C. § 1606(d)] — Procedures for incorporation.**

(d) Five incorporators within each region, named by the Native association in the region, shall incorporate under the laws of Alaska a Regional Corporation to conduct business for profit, which shall be eligible for the benefits of this Act so long as it is organized and functions in accordance with this Act. The articles of incorporation shall include provisions necessary to carry out the terms of this Act.

**ANCSA § 7(h)(1)(A)**
**[43 U.S.C. § 1606(h)(1)(A)]**

REGIONAL CORPORATIONS—SETTLEMENT STOCK—
7(h)(1) RIGHTS AND RESTRICTIONS.—

(A) Except as otherwise expressly provided in this Act, Settlement Common Stock of a Regional Corporation shall—

(i) carry a right to vote in elections for the board of directors and on such other questions as properly may be presented to shareholders;

(ii) permit the holder to receive dividends or other distributions from the corporation; and

(iii) vest in the holder all rights of a shareholder in a business corporation organized under the laws of the State.

**ANCSA § 7(p) [43 U.S.C. § 1606(p)]**

(p) FEDERAL-STATE LAWS, CONFLICTS.

In the event of any conflict between the provisions of this section and the laws of the State of Alaska, the provision of this section shall prevail.

**ANCSA § 7(r) [43 U.S.C. § 1606(r)]**

(r) BENEFITS FOR SHAREHOLDERS OR IMMEDIATE FAMILIES.

The authority of a Native Corporation to provide benefits to its shareholders who are Natives or descendants of Natives or to its shareholders' immediate family members who are Natives or descendants of Natives to promote the health, education, or welfare of such shareholders or family members is expressly authorized and confirmed. Eligibility for such benefits need not be based on share ownership in the Native Corporation and such benefits may be provided on a basis other than pro rata based on share ownership.

## ALASKA STATUTES — ALASKA CORPORATIONS CODE (AS 10.06)

TITLE 10 — Corporations and Associations
Chapter 06. Alaska Corporations Code
(underlining added)

**AS 10.06.305. Creation, classes, and issuance of shares.**

(a) Subject to the provisions of this chapter, a corporation may issue one or more classes or series of shares or both, with full, limited, or no voting

rights and with other rights, preferences, privileged, and restrictions as are stated or authorized in its articles of incorporation. A denial or limitation of voting rights is not effective unless at the time one or more classes or series of outstanding shares or debt securities, singly or in the aggregate, are entitled to full voting rights. A denial or limitation of dividend or liquidation rights is not effective unless at the time one or more classes or series of outstanding shares, singly or in the aggregate, are entitled to unlimited dividend or liquidation rights.

(b) All shares of a class shall have the same voting, conversion, and redemption rights and other rights, preferences, privileges, and restrictions, unless the class is divided into series. If a class is divided into series, all the shares of a series shall have the same voting, conversion, and redemption rights and other rights, preferences, privileges, and restrictions. (§ 1 ch 166 SLA 1988).

**AS 10.06.313. Variation in rights and preferences of shares.** Any or all of the rights and preferences of a series of a preferred or special class of shares and the variations in the relative right and preferences between different series may be fixed and determined by the articles of incorporation, but shares of the same class shall be identical except of the following relative rights and preferences as to which there may be variations between series:

(1) the rate of dividend

(2) the price and the terms and conditions on which shares may be redeemed;

(3) the amount payable upon shares in the even of involuntary liquidation;

(4) the amount payable upon shares in the even of voluntary liquidation;

(5) sinking fund provisions for the redemption or purchase of shares;

(6) the terms and conditions on which shares may be converted, if the shares of a series are issued with the privilege of conversion;

(7) voting rights, if any. (§ 1 ch 166 SLA 1988)

**Sec. 10.06.408. Closing of transfer books and fixing record date.**

(a) To determine the shareholders entitled to notice of or to vote at a meeting of shareholders or an adjournment of a meeting, or to determine the shareholders entitled to receive payment of a dividend, or to determine the shareholders for any other proper purpose, the board of a corporation may provide that the stock transfer books shall be closed for a stated period not exceeding 70 days. If the stock transfer books are closed to determine shareholders entitled to notice of or to vote at a meeting of shareholders, they shall be closed for at least 20 days immediately preceding the meeting.

(b) Instead of closing the stock transfer books, the bylaws or, in the absence of an applicable bylaw, the board may fix a date as the record date for the determination of shareholders. This record date may not be more than 60 days and, in case of a meeting of shareholders, not less than 20 days before the date on which the particular action requiring the determination of shareholders is to be taken. If the stock transfer books are not closed and a record date is not fixed for the determination of shareholders entitled to notice of or to vote at a meeting of

shareholders or for the determination of shareholders entitled to receive payment of a dividend, the date on which notice of the meeting is mailed or the date on which the resolution of the board declaring the dividend is adopted, is the record date for the determination of shareholders. When a determination of shareholders entitled to vote at a meeting of shareholders has been made as provided in this section, the determination applies to an adjournment of the meeting of shareholders.

**AS 10.06.542. Disparate treatment of shares of the same class or series prohibited; exceptions.**

(a) Except as provided in (b) of this section all shares of the same class or series shall be treated equally with respect to a distribution of shares, cash, property, rights, or securities in any plan of merger, consolidation, or share exchange.

(b) Disparate treatment of shares of the same class or series may be proposed in a plan of merger, consolidation, or share exchange if

(1) disparate treatment is necessary to preserve a subchapter S election under the Internal Revenue Code of 1954;

(2) there is a sound business reason for disparate treatment and proponents of the plan prove it is consistent with fiduciary duties owed to all shareholders; or

(3) there is unanimous consent of all shareholders. ( § 1 ch 166 SLA 1988).

## Constitutional Provisions and Statutes

**AS 10.06.960. Corporations organized under ANCSA.**

(a) A corporation organized under 43 U.S.C. 1601 - 1629e as amended (Alaska Native Claims Settlement Act) shall be incorporated under and is subject to this chapter except

(1) each corporation shall issue without further consideration the number of shares of common stock that may be necessary to comply with the requirements of the act and all stock so issued is considered fully paid and nonassessable when issued;

(2) unless otherwise provided in the articles of incorporation, the capital

(A) is considered the consideration for the initial issuance of shares; and

(B) of a corporation organized under the act includes the

(i) land or interests in it conveyed to the corporation by the United States under the act, except that which is required to be conveyed under 43 U.S.C. 1613(c)(1), (3), and (4), entered at its fair value to the corporation upon receiving the conveyance of it; and

(ii) money, when received under 43 U.S.C. 1605 and 43 U.S.C. 1608, that is retained by the corporation and that is not immediately distributed or required to be distributed under 43 U.S.C. 1606(j).

. . . .

(f) Notwithstanding the other provisions of this chapter, a corporation organized under the act is governed by the act to the extent the act is inconsistent with this chapter, and the corporation

may take any action, including amendment of its articles, authorized by the act, and the action is considered to be approved and adopted if approved under the act. An amendment approved under the act and delivered to the commissioner under AS 10.06.512 shall be filed by the commissioner under AS 10.06.910, and a certificate of amendment shall be issued.

**AS 10.06.990. Definitions.**

In this chapter, unless the context otherwise requires,

. . . .

(17) "distribution to its shareholders" means the transfer of cash or property by a corporation or its subsidiary to its shareholders without consideration, whether by way of dividend or otherwise, except a dividend in shares of the corporation, or the purchase or redemption of its shares for cash or property; the time of a distribution of a dividend is the date of the declaration of the dividend and the time of a distribution by purchase or redemption of shares is the date cash or property is transferred by the corporation, whether or not under a contract of an earlier date; . . . .

+++++