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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT SITKA

SITKA TRIBE OF ALASKA, Plaintiff, v. STATE OF ALASKA, DEPARTMENT OF FISH AND GAME, and the ALASKA BOARD OF FISHERIES, Defendants, and SOUTHEAST HERRING CONSERVATION ALLIANCE, Defendant-Intervenor.	)	Case No. 1SI-18-00212CI

SITKA TRIBE OF ALASKA'S MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

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I. INTRODUCTION

Sitka Tribe of Alaska ("STA") filed this lawsuit against the Alaska Department of Fish & Game ("ADF&G") and the Board of Fisheries (the "Board") (collectively the "State") to protect STA tribal citizens' rights to harvest herring roe for subsistence.

In Alaska, the Board makes management policies and promulgates regulations governing fisheries. ADF&G implements the Board's regulations and manages the fishery on a day-to-day basis using its discretion to carry out the Board's policies. This claim challenges ADF&G's interpretation and implementation of regulations promulgated by the Board.

In January 2019, STA moved for a preliminary injunction to compel ADF&G to lawfully implement the Board's regulations prior to the 2019 herring season. The regulation at issue, 5 AAC 27.195, requires ADF&G to "distribute the commercial fishery by *time and area* if [ADF&G] determines that it is necessary to ensure subsistence users have a reasonable opportunity to harvest the amount of herring spawn necessary for subsistence uses."[1] 5 AAC 27.195(b) also requires ADF&G to "consider the *quality and quantity* of herring spawn on branches, kelp, and seaweed,

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[1] 5 AAC 27.195(a)(2) (emphasis added).

and herring sac roe when making management decisions regarding the subsistence herring spawn and commercial sac roe fisheries."[2]

First, ADF&G's interpretation of 5 AAC 27.195(a)—advanced by the Department of Law for the first time in this litigation—is erroneous. The State mistakenly believes that ADF&G has no obligation to consider distributing the commercial fishery "to ensure subsistence users have a reasonable opportunity" because the Board has allegedly already determined the regulations provide a reasonable opportunity. The State's flawed interpretation of 5 AAC 27.195(a)(2) relies on a misunderstanding of *Peninsula Marketing Association v. Rosier*, 890 P.2d 597 (Alaska 1995). This Court should declare that *Rosier* does not limit ADF&G's authority under 5 AAC 27.195(a)(2), and consequently, ADF&G must consider distributing the commercial fishery by "time and area," to ensure a reasonable opportunity for subsistence during the 2020 season.

Second, ADF&G admitted it does not consider "quality" of herring spawn on branches when making management decisions regarding the commercial fishery. ADF&G's admission that it does not consider a required factor in its decision making renders its decision to open the commercial fishery arbitrary and capricious.

The importance of ADF&G correctly and fully implementing the Board's regulations is apparent from the plain language of 5 AAC 27.195. ADF&G is required

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[2] *Id.* at 27.195(b) (emphasis added).

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to make in-season management decisions for the commercial sac roe fishery that "*ensure*" subsistence users have a reasonable opportunity. Yet for 9 of the last 13 years subsistence harvests have been below the bottom end of the amount the BOF has determined is necessary to meet subsistence needs. ADFG 2737. As demonstrated by the numerous affidavits and other evidence presented by STA and *amici* during the preliminary injunction stage of this litigation, the hardships suffered by those who depend on the opportunity to harvest and use herring roe on branches from Sitka Sound in order to sustain their cultural, nutritional and traditional way of life is immeasurable. The loss is felt throughout Southeast Alaska and statewide as the central traditional practice of sharing is constricted and because Sitka Sound remains the last place in Southeast where a viable subsistence fishery is currently possible. Much of this hardship could have been prevented if ADF&G had implemented the regulation consistent with its clear language and the intent and policy expressed by the 2002 Board in promulgating 5 AAC 27.195 – if ADF&G had made management decisions that prioritize the subsistence fishery and ensure reasonable opportunity.

This Court should conclude that ADF&G's current interpretation and implementation of 5 AAC 27.195 is invalid and unlawful, and thus, STA is entitled to partial summary judgment and a declaratory judgment.

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II. FACTS AND PROCEEDINGS

The subsistence harvest of herring sac roe is vital to STA's tribal citizens. "There is an inseparable connection between the herring and the ability to continue to pass on the Tlingit language and culture."[3] "It is critical to our identity as Tlingit people that they have the opportunity to have a successful harvest for use in our potlatches and ceremonies. The herring egg harvest is a big part of our history and tradition and is being lost."[4]

The State's "administrative record" confirms that ADF&G's failure to manage the fishery according to the law is the main reason subsistence herring traditions are suffering and needs are going unmet. The record demonstrates that ADF&G has consistently ignored subsistence harvester concerns in order to maximize the commercial harvest. *See, e.g.,* ADFG 0070 (describing ADF&G's decision to open commercial fishery in subsistence areas over STA's objection). ADF&G's management paradigm is contrary to 5 AAC 27.195.

In 2002, the Board directed ADF&G to determine whether it is necessary to distribute the commercial fishery by "time and area" to ensure a reasonable opportunity for subsistence harvest.[5] ADF&G must also consider the "quality and quantity" of herring roe for subsistence when making management decisions

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3 Ex. 1 at 2 (Affidavit of Roberta Littlefield).

4 Ex. 2 at 5-6 (Affidavit of Aaron Bean).

5 5 AAC 27.195.

regarding the commercial fishery. During the course of this litigation, the State has offered erroneous and implausible interpretations of ADF&G's obligations as *post hoc* rationales for ADF&G's failure to implement 5 AAC 27.195.

A. A Brief History of ADF&G's Management and Subsistence Harvester Concerns

1. The Board adopted 5 AAC 27.195 to address STA's request that ADF&G "disperse" the commercial fishery.

During the 2001 fishing season, subsistence harvesters notified ADF&G that they were not able to meet their subsistence needs because ADF&G had allowed the commercial fleet to concentrate its harvest in the traditional subsistence harvest area. BOF 0178-96. Alaska's subsistence law links subsistence practices with specific geographic areas.[6] Sitka Sound subsistence harvesters return each year to the same traditional areas to harvest herring sac roe. *See* ADFG 2214 ("In terms of where harvesters go to set their branches, year after year, there is a 'core' area around the islands offshore from town. This area has historically been important to the herring egg harvest . . .").

The core area within the traditional subsistence harvest area is essential to many subsistence harvesters who do not have the equipment and means to travel

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[6] *See* AS 16.05.940(7) ("'customary and traditional' means the noncommercial, long-term, and consistent taking of, use of, and *reliance upon fish or game in a specified area* and the use patterns of that fish or game that have been established over a reasonable period of time taking into consideration the availability of the fish or game") (emphasis added).

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farther distances across open waters. The core area includes the islands and road-accessible shorelines within close proximity to Sitka, including "Middle Island, Crow/Gagarin islands, and Kasiana islands." ADFG 2214.

In 2001, ADF&G allowed the extraordinarily powerful, effective, and disruptive commercial fleet to harvest almost the entire allowable harvest, tens of millions of herring that would have otherwise been available to spawn on subsistence users branches within the core area.[7] ADF&G was simply continuing the same management practices that it had allowed in the years prior to 2001—prioritizing the commercial harvest while ignoring effects to subsistence users.

Subsistence harvester Roby Littlefield explained her experience from the 2001 season in an affidavit submitted to the Board in 2002:

> I went to the local Alaska Department of Fish and Game office in Sitka to report my observations and unfilled needs following our subsistence herring egg season. I was told that I should consider traveling to Goddard to get my herring eggs. I responded to them, "Why do I have to go to Goddard, you go to Goddard. I only have a little skiff to feed my family."
>
> Goddard is approximately 30 miles from Sitka and requires getting out into open waters. I only have a 16 foot skiff and I often take my daughter or niece or other young person with me to harvest so that they will learn how to gather our foods. BOF 0115-16.

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[7] *See, e.g.*, "Sitka Herring Fishery," https://www.youtube.com/watch?v=RgmF7v2kIQw (Mar. 13, 2012) (last accessed Nov. 25, 2019).

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ADF&G's response to subsistence harvesters' concerns was that they should go 30 miles away—across dangers waters—to harvest herring sac roe. *See* BOF 0104-136 (affidavits of subsistence harvesters regarding 2001 season). ADF&G took this position while fully understanding that many subsistence users lack the same equipment and economic ability as the commercial fleet to travel to more distant spawning locations. ADF&G explained that it was "not in a position to set aside fishing areas or to tamper with commercial fishing opportunities without direction from the board." BOF 0184-85.

Because of the lack of opportunity for subsistence in July of 2001, STA submitted an emergency petition for regulatory changes to the Board. BOF 0188-189. STA urged the Board to amend the existing regulations "to require a dispersal of the commercial sac roe harvest in Sitka Sound "over a wider area" and to avoid depleting schools of herring that are staging to spawn in customary and traditional use areas." BOF 0188.

ADF&G opposed STA's emergency petition. *See* ADFG 2703-05. In a memorandum to the Board, ADF&G suggested that "non-allocative" measures should be pursued that would not affect the commercial fishery. *See* ADFG 2703. Instead of regulatory changes, ADF&G offered to provide more information to STA during the season and "facilitate a new level of cooperation between the Tribe and commercial fishermen with large vessels to provide transportation assistance during any kind of

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weather to more remote or distant spawning sites to ensure a successful harvest." ADFG2704. But neither of ADF&G's proposed solutions addressed the underlying issue that subsistence harvesters were unable to harvest throughout their traditional areas using their own equipment and traditional harvest practices.[8]

In September 2001, ADF&G Commissioner Frank Rue met with representatives of STA to discuss subsistence harvester concerns. BOF 0216-19; *see also* BOF 0589-90. Commissioner Rue conceded that there were benefits to "distributing the commercial fishery harvest over several areas, both for conservation of the resource and as a tool in providing subsistence harvesters a reasonable opportunity." BOF 0589-90. STA and ADF&G agreed to form a "Sitka Herring Management Task Force" to cooperatively manage the herring fishery, and ADF&G agreed to "attempt to avoid harvesting the entire [commercial] quota out of one area during the 2002 season." BOF 0589-90.

Subsequently, the Board denied STA's petition on the grounds that there was no "emergency." BOF 0192. But the Board invited STA to submit an agenda change request ("ACR") for the Board to take up the proposal at a future meeting. BOF 0192-

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[8] The notion that harvesters should transform their traditional herring fishing way of life and become dependent on commercial fishermen for transportation to distant areas so that so that the sac roe fishery could continue its unrestrained harvest throughout their traditional areas and everywhere else was firmly rejected by STA. *See* BOF 0476-78.

93. STA submitted a proposal at the October 2001 Board work session, designated as "ACR 4," requesting a new regulation that would provide:

> [B]eginning in the year 2002 the Sitka Sound commercial sac roe effort will be dispersed in relation to geographic areas[,] and important areas to subsistence herring egg harvest will be recognized and commercial fishery management will reflect the importance of these areas. BOF 0193-96.

The Board voted to approve ACR 4, and the proposal, re-designated as "Proposal 500" was considered at the Board's January 2002 meeting. BOF 0197-0203. STA submitted comments for the Board record explaining the need for ADF&G to "disperse" the commercial fishery away from subsistence harvesters:

> Current regulations for Sitka Sound do not make any specific provisions to ensure a reasonable opportunity for subsistence use of herring and herring spawn. The management scheme operates under the presumption that a large, healthy biomass of herring will be sufficient to provide for a "reasonable opportunity." This presumption is flawed because it ignores the very real consequences of a large biomass, the resulting large quota, and the subsequent "disproportionate" pattern of the commercial harvest in collecting that quota. . . .
>
> Current regulations allow the commercial fishery to concentrate its harvest so as to cause a localized depletion of herring within areas important to subsistence herring egg use. For this reason, current regulations must be amended to adopt a plan to disperse the impact of the commercial harvest. Treating "dispersal" as an in season management tool for the Department to use at its discretion is not enough to satisfy the law. The Tribe has requested the

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> Board to provide a "reasonable opportunity" in the form of dispersal and the Board should craft a plan that provides the preference and protection required by law. BOF 0301-08.

The Board voted unanimously to adopt a modified version of Proposal 500. *See* BOF 5115. The final regulation, 5 AAC 27.195, provides

> (a) In managing the commercial sac roe fishery in Section 13-B north of the latitude of Aspid Cape (Sitka Sound), the department *shall*
>
> (1) manage the fishery consistent with the applicable provisions of 5 AAC 27.160(g) and 5 AAC 27.190;
>
> (2) distribute the commercial harvest by fishing time and area if the department determines that it is necessary to ensure that subsistence users have a reasonable opportunity to harvest the amount of herring spawn necessary for subsistence uses specified in 5 AAC 01.716(b).
>
> (b) In addition to the provisions of (a) of this section, the department *shall* consider the quality and quantity of herring spawn on branches, kelp, and seaweed, and herring sac roe when making management decisions regarding the subsistence herring spawn and commercial sac roe fisheries in Section 13-B north of the latitude of Aspid Cape. (emphasis added).

The Board made it clear that 5 AAC 27.195 requires ADF&G to consider distributing the commercial fishery by "time and area" to ensure a reasonable opportunity for subsistence. *See* BOF 5111-16. Board Member Coffey explained that

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the Board intended to "leave the determination of reasonable opportunity to the in-season manager." BOF 5115. The manager would have to make "in-season management decisions," addressing specific questions, including: "are the people being afforded a reasonable opportunity or not?" and "Do I have to disperse the fleet or not to afford a reasonable opportunity?" BOF 5115. "These are in-season management decisions which the board need not make." BOF 5115.

The Board intended for ADF&G to implement 5 AAC 27.195 throughout Sitka Sound and not just in the core area. BOF 5115. The traditional subsistence harvest area is larger than the core area and includes much of Sitka Sound.[9] The Board recognized that ensuring a reasonable opportunity for subsistence throughout Sitka Sound is important in years when the duration and density of spawn necessary to produce quality spawn on branches is not present in the core area. BOF 5115; see also BOF 4077.

The Board also voted to enter into a memorandum of agreement ("MOA") with STA and ADF&G to "cooperatively manage" the fishery with subsistence harvesters. BOF 5115; *see* ADFG 2696-2700. The MOA, which effectuated the "Sitka Herring Management Task Force" agreed to in September 2001, required information sharing

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[9] *See generally* Ex. 3 at 3 (Robert F. Schroeder and Matthew Kookesh, *The Subsistence Harvest of Herring Eggs in Sitka Sound, 1989*, at 17, ADF&G Technical Report No. 173 (1990)); Ex. 4 (Robert J. Wolfe, *Local Traditions and Subsistence: A Synopsis from Twenty-Five Years of Research by the State of Alaska*, ADF&G Technical Paper No. 284 (2004)).

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between ADF&G and STA and created a consultation process for in-season management of the commercial fishery. *See* ADFG 2396-2700. ADF&G acknowledged that the MOA was intended to be a way for subsistence users to have input on when and where the commercial fishery would be opened and to "help the department ensure that a reasonable opportunity is provided for subsistence."[10]

The MOA was signed by STA, ADF&G Commissioner Rue, and the Board Chairman. Significantly, the Board adopted the MOA as a Board Finding, which means it is an official Board policy. *See* ADFG 2696 ("#2002-220-FB"). It is clear that both the Board and ADF&G viewed the MOA as an important means for helping ADF&G obtain information necessary to make decisions about the effects of proposed openings on reasonable opportunity. ADFG 2698 ("During in-season meetings to determine fishery openings, the Tribal Liaison and ADF&G will consult regarding whether the proposed opening will affect customary and traditional harvesters.").

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[10] Ex. 5 at 3 (2003 Management Plan) ("*In order to help the department ensure that a reasonable opportunity is provided for subsistence*, a Memorandum of Agreement (MOA) was signed by ADF&G and the Sitka Tribe of Alaska . . . This agreement brings consideration of potential impacts of the commercial sac roe herring fishery on the subsistence fishery in Sitka Sound to the ADF&G fishery manager through an in-season consultation process. An in-season task force will provide recommendations concerning proposed management actions at a minimum prior to each announcement of a commercial opening after considering potential impacts on the subsistence fishery and the commercial fishery.") (emphasis added).

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In the months after the Board promulgated 5 AAC 27.195, ADF&G's Southeast Alaska Sac Roe Herring Fishery 2002 Management Plan ("2002 Management Plan") interpreted 5 AAC 27.195 as requiring ADF&G's in-season manager to make determinations about whether there is a reasonable opportunity for subsistence:

> [5 AAC 27.195(a)(2)] requires that the department distribute the commercial harvest both geographically and temporally, if necessary, so that the subsistence fishery has a reasonable opportunity . . . The 'if necessary' clause [in 5 AAC 27.195(a)(2)] emphasizes that management decisions must be made in-season by the department based on the department manager's best judgment concerning the in-season situation.[11]

ADF&G's management plans between 2002 and 2009 outlined three mechanisms for implementing 5 AAC 27.195: "1) considering recommendations from in-season task force members, 2) choosing dispersal of time and area by selecting appropriate in-season options, and 3) limiting harvest in the highest frequency spawning area along Halibut Point Road in proportion to historical use patterns established by past commercial competitive fisheries (50-55% of the GHL)."[12] In each of the management plans between 2002 and 2009, ADF&G stated that it is

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[11] Ex. 6 at 3 (2002 Management Plan).

[12] Ex. 5 at 3 (2003 Management Plan); *accord* Ex. 7 at 6 (2004 Management Plan); Ex. 8 at 8 (2005 Management Plan); Ex. 9 at 5 (2006 Management Plan); Ex. 10 at 6-7 (2007 Management Plan); Ex. 11 at 8 (2009 Management Plan).

"necessary" for the in-season manager to consider "dispersing the harvest by time and area away from traditional subsistence harvesting areas."[13]

2. The Board adopted the "Closed Areas" regulation to address STA's continued concerns that ADF&G was not implementing 5 AAC 27.195.

Despite the Board's delegation of authority to ADF&G to ensure a reasonable opportunity for subsistence by distributing the commercial fishery, ADF&G continued to allow commercial fishing in the traditional subsistence areas. ADF&G acknowledged that prior to 5 AAC 27.195's promulgation, it opened the commercial fishery in the traditional subsistence area eight times between 1993 and 2001. *See* BOF 0090; ADFG 2680-2688 (commercial openings maps). After the Board promulgated 5 AAC 27.195 in 2002, ADF&G opened the commercial fishery in traditional subsistence areas in 2003 and every year between 2005 and 2015. *See* ADFG 2666-2676, 2677.

Importantly, the record indicates that each time ADF&G heard concerns from subsistence harvesters and STA about commercial fishing times and areas, ADF&G allowed the commercial fishery anyway. *See* ADFG 2709-2710 ("ADF&G has not once acted on STA's input when we have requested the commercial fishery should be distributed to ensure subsistence harvesters have a reasonable opportunity."). For

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[13] *See, e.g.,* Ex. 8 at 8 (2005 Management Plan) ("In order to provide a reasonable opportunity for subsistence, ADF&G must consider whether it is necessary to distribute the harvest time and area in the commercial fishery.").

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example, on March 26, 2007, the commercial fleet was prepared to harvest herring within the traditional subsistence area near Sitka. ADFG 0070. That morning, ADF&G "met with an in-season task force to discuss formal objections raised by [STA] to holding fisheries within a large area on the north side of town due to concerns that such openings might have negative consequences upon the subsistence fishery." ADFG 0070. The record indicates that a "consensus" was not reached, and thus ADF&G opened the commercial fishery. ADFG 0070. ADF&G did not explain how it considered subsistence or any other factors besides the quality of the commercial harvest its decision to open the commercial fishery. ADFG 0070 ("Quality from today's [commercial] fishery is reported to be good.").

In May 2009, ADF&G withdrew from the MOA without prior approval from the Board. ADFG 2706. ADF&G explained in a letter to STA that the MOA "has given the perception that your organization has access to information and input into decision making that are not readily available to the general public and other user groups." ADFG 2706. ADF&G's explanation was illogical because the in-season task force created to cooperatively manage the fishery included representatives from the commercial fishing industry.[14] The record contains countless examples of ADF&G seeking input and recommendations from the commercial fishing industry regarding

[14] *See, e.g.*, Ex. 10 at 6 (2007 Management Plan) ("An in-season task force consisting of the Tribe, industry and ADF&G representatives will meet immediately after receiving notification of an objection to a commercial opening.").

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decision making. *See, e.g.*, ADFG 0073 (decision to stand-down 2007 commercial fishery ordered after consultation with commercial processers); ADFG 0333 ("The decision to close the fishery was made in consultation with industry representatives.").

The record contains no indication that the Board was informed prior to ADF&G's withdrawing from the MOA. *See* ADFG 0001-2829; BOF 0001-5139. STA objected to ADF&G's termination of the MOA. *See* ADFG 2709-2710 ("In reviewing the [Board] minutes from January 2002 and the MOA language, it does not appear that ADF&G can unilaterally terminate the agreement without the review and consent of the Board."). Nothing in the record demonstrates that ADF&G initiated any substitute means for gathering in-season information regarding the impact of proposed openings on reasonable opportunity after it unilaterally withdrew from the MOA.

Because ADF&G withdrew from the MOA and was not implementing 5 AAC 27.195, STA requested the Board adopt additional regulations to help ensure the subsistence priority. *See* BOF 2037. In 2011, STA council member Harvey Kitka submitted a proposal to close commercial fishing in the traditional subsistence area. BOF 2036 ("The Sitka commercial herring sac-roe harvest in the core Traditional subsistence herring roe harvesting areas is affecting the quality and quantity of the

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subsistence harvest . . . we ask that the Board designate a Subsistence Fishery Area to allocate a subsistence resource to local subsistence users.") ("Proposal 239").

ADF&G opposed the "closed area" proposal. BOF 2649. According to ADF&G, the effect of the commercial fishery on subsistence harvests was unknown but the "closed area" would likely harm commercial harvesters. BOF 2649-50 ("It would be expected that in some years, closure of the proposed area would significantly affect the ability of the commercial sac roe fishery to achieve harvest of the GHL."); *but see* BOF 5036 (ADF&G staff testimony to the Board) ("This proposed closure encompasses waters that are a primary staging area for pre-spawning herring in Sitka Sound, that in most years a substantial portion and sometimes a majority of the biomass stages in this area prior to disbursing for spawning. Because of this, the area is important for providing commercial fishing opportunity, as well as a subsistence opportunity.").

During deliberations on the "closed area" proposal, Board Member Jeffrey asked ADF&G staff whether a "closed area" was necessary given ADF&G's existing obligation under 5 AAC 27.195 to distribute the commercial fishery to ensure a reasonable opportunity for subsistence. BOF 5051. The ADF&G staff member explained that although ADF&G looks for commercial opportunities in other areas, when there are no other options, ADF&G prioritizes the commercial fishery by allowing commercial openings in traditional subsistence areas. BOF 5051

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("[T]hrough those years we have sometimes taken some fish in there just because there are no other options, especially early in the fishery . . . when they first come into the Sound they will stage in mass in a location before they really begin to disburse to spawn. And so we have taken some fish . . . within that area during some of those times.").

The Board approved an amended version of the proposal after STA conceded to a reduced size of the "closed area." *See* BOF 5051 (Chairman Johnstone: "It seems to me that if we adopt this smaller area that may be a reasonable compromise."); BOF 3019 (letter from STA conceding reduced size of "closed area"). The resulting "closed area" regulation prohibited commercial fishing within a portion of the traditional subsistence area consisting of approximately 10 square miles.[15]

In 2018, the Board expanded the closed area by four square miles. *See* BOF 3713 (approving "Proposal 106").[16] Despite numerous opportunities to do so, the Board has never amended or repealed 5 AAC 27.195.

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[15] 5 AAC 27.150(7).

[16] According to Board Member Payton, expanding the "closed area" was necessary because ADF&G was not implementing 5 AAC 27.195. BOF 5093. "And by my assessment of that map, in most years the commercial harvest and the commercial area is very adjacent to this core area. So I don't believe [ADF&G] is following that mandate that well in the management plan and then this may be appropriate to separate some of the disturbance of herring and then – and allow more of a reasonable opportunity and then to allow the ANS to fall in the mid-range or the higher end." BOF 5093.

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B. Proceedings

STA filed this lawsuit after meeting with State representatives and learning that ADF&G erroneously believed it lacked authority under 5 AAC 27.195 to distribute the commercial fishery by "time and area" to ensure a reasonable opportunity for subsistence. In a December 2018 email, ADF&G's Acting Director of Commercial Fisheries Forrest Bowers explained that ADF&G cannot disburse the commercial fishery by time or area "solely to achieve a fishery resource allocation objective without direction from the Board."

> The department taking action to not allow commercial fishing in areas beyond those already closed, *with the intent of providing increased subsistence fishing opportunity in the absence of a fishery conservation purpose, would represent a direct fishery allocation taken outside the Board of Fisheries process.*[17]

Director Bowers' email confirmed that ADF&G's interpretation of 5 AAC 27.195 is deeply flawed. Contrary to the plain meaning and intent of the regulation, ADF&G effectively disavowed any responsibility under 5 AAC 27.195 to distribute the commercial fishery by "time and area" *solely* to ensure a reasonable

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[17] Ex. 12 at 2 (emphasis added) (Email from Forrest Bowers, ADF&G, to Elizabeth Hensley, Landye Bennett Blumstein LLP (Nov. 16, 2018) (hereinafter "Bowers Email")).

opportunity for subsistence and furthermore claimed that it lacked the power to do so.[18]

In January 2019, STA moved for a preliminary injunction to compel ADF&G to lawfully apply the Board's regulations prior to the 2019 herring season. STA argued that "ADF[&]G's management of the commercial sac roe fishery violates the subsistence law and BOF regulations."[19] STA relied on the argument that ADF&G was not ensuring a reasonable opportunity for subsistence because "ADF[&G]'s interpretation of the regulatory framework is at odds with the regulations' plain meaning and the [Board's] purpose and intent."[20] Thus, ADF&G was not fulfilling its duty to provide a subsistence priority because it was not properly interpreting and implementing the Board's regulations. STA sought an order from this Court requiring ADF&G to implement 5 AAC 27.195 in the 2019 season.[21]

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[18] *Compare* Ex. 6 at 3 (2002 Management Plan) ("The 'if necessary' clause [in 5 AAC 27.195(a)(2)] emphasizes that management decisions must be made in-season by the department based on the department manager's best judgment concerning the in-season situation."), *with* Ex. 12 at 1 (Bowers Email) ("[W]e can't undertake this sort of action solely to achieve a fishery resource allocation objective without direction from the Board of Fisheries.").

[19] STA Preliminary Injunction Br. at 26.

[20] *Id.* at 41.

[21] STA Preliminary Injunction (Proposed) Order at 1 ("Prior to opening the 2019 commercial sac roe herring fishery in Sitka Sound, Defendant [ADF&G] shall implement the requirements of 5 AAC 27.195."). *See also* STA Preliminary Injunction Reply Br. at 14 ("STA is requesting the Court to issue an order enjoining [ADF&G] from implementing the regulation under the narrow interpretation detailed in Acting Director Bower's email.").

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The State's opposition asserted that STA's claims regarding reasonable opportunity should be directed at the Board instead of ADF&G and be decided solely on the basis of the Board's administrative record.[22] The State argued that because the Board allegedly concluded that there was a reasonable opportunity for subsistence, ADF&G lacked authority to take any management action aimed solely at benefiting subsistence harvesters. According to the State, ADF&G's management actions and implementation of 5 AAC 27.195 are unreviewable because the Board already determined a reasonable opportunity exists.

The State relied on *Peninsula Marketing Association v. Rosier*, 890 P.2d 567 (Alaska 1995) to support its position that ADF&G cannot take action solely to ensure a reasonable opportunity for subsistence because the Board already determined a reasonable opportunity exists.

> The regulation at 5 AAC 27.195(a)(2) makes it clear that the Department can use its "time and area" emergency order authority "if necessary" to ensure a reasonable for subsistence uses of herring spawn, but that authority is still limited by *Rosier* such that the Department cannot (for example) fundamentally change the management of the commercial fishery premised on the notion that users lack a reasonable opportunity for subsistence uses of herring spawn on branches, when the Board found the opposite to be true in January 2018.[23]

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22 State Preliminary Injunction Br. at 3.

23 State Preliminary Injunction Sur-Reply Br. at 5 (emphasis added).

STA's reply pointed out that the State's interpretation illegally renders 5 AAC 27.195(a)(2) meaningless and contrary to the Board's intent and the clear regulatory language.[24]

During the preliminary injunction state of this litigation, the State argued that a Court should not reach the merits of the legal issues until there is a "complete administrative record" before the Court.[25] The State has now submitted what it considers to be the complete administrative record. The legal questions related to ADF&G's interpretation and implementation of 5 AAC 27.195 are thus before this Court to decide as a matter of law.

III. STANDARDS OF REVIEW

A. ADF&G's Interpretation of 5 AAC 27.195

The meaning of a regulation promulgated by the Board is a question of law for the Court to decide.[26] "Summary judgment is proper if there is no genuine factual dispute and the moving party is entitled to judgment as a matter of law."[27] Alaska courts adopt the rule of law "most persuasive in light of precedent, reason, and

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[24] STA Preliminary Injunction Reply Br. at 10 ("The Board's record in adopting 5 AAC 27.195 is consistent with the plain language of the regulation, and demonstrates an unmistakable obligation for the ADF[&]G in season manager to make decisions to ensure a reasonable opportunity for subsistence.").

[25] State Preliminary Injunction Reply Br. at 3.

[26] *Tea ex rel. A.T.*, 278 P.3d 1262, 1265 (Alaska 2012) ("When a regulation's interpretation is challenged, we apply the same standards that we apply to statutory interpretation.").

[27] *Devine v. Great Divide Ins. Co.*, 350 P.3d 782, 785-86 (Alaska 2015).

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policy."[28] Interpreting regulations requires the court to apply the same standards as it would for statutory interpretation, beginning with the plain meaning of the words in the regulation.[29] "When construing statutes, we consider three factors: 'the language of the statute, the legislative history, and the legislative purpose behind the statute.'"[30]

ADF&G's interpretation of 5 AAC 27.195 is not entitled to deference or any weight because the regulation was promulgated by the Board and not ADF&G.[31] Although the Alaska Supreme Court "typically interpret[s] regulations with some deference to the agency's *own* interpretation,"[32] the Board has never issued an interpretation of 5 AAC 27.195. When the Board "interprets or makes specific the law enforced or administered," it must comply with the Administrative Procedure Act

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28 *State v. Schmidt*, 323 P.3d 647, 655 (Alaska 2014) (internal citations omitted).

29 *Tea ex rel. A.T.*, 278 P.3d at 1265; 1A N. SINGER, SUTHERLAND ON STATUTES AND STATUTORY CONSTRUCTION § 31.06 (7th ed. Rev. 2018) ("A regulation is a written instrument and the general rules of interpretation apply . . . [I]n accord with the tenants of statutory construction, courts attribute the plain meaning to the words of a regulation.").

30 *Oels v. Anchorage Police Dep't Emps. Ass'n*, 279 P.3d 589, 595 (Alaska 2012) (quoting *Shehata v. Salvation Army*, 225 P.3d 1106, 1114 (Alaska 2010)).

31 *Compare Rose v. Commercial Fisheries Entry Comm'n*, 647 P.2d 154, 161 (Alaska 1982) ("[W]here an agency interprets its *own* regulation . . . a deferential standard of review properly recognizes that the agency is best able to discern its intent in promulgating the regulation at issue") (emphasis added), *with Tea ex. rel. A.T.*, 278 P.3d at 1263 ("[B]ut the agency that promulgated 15 AAC 23.223(i) . . . has not otherwise offered an interpretation. We therefore interpret the regulation using our independent judgment . . .").

32 *Tea ex rel. A.T.*, 278 P.3d at 1263 (emphasis added).

("APA"), otherwise its informal interpretation is invalid.[33] There is no Board interpretation of 5 AAC 27.195 to which the Court could give deference. Thus, interpretation of this regulation is a question for this Court to decide independently.

An agency's interpretation of a different agency's regulation is not entitled to any deference.[34] In *Tea ex rel. A.T.*, the Alaska Supreme Court explained that courts must use their "independent judgment" when an agency offers an interpretation for a regulation that a different agency promulgated. *Tea ex rel. A.T.* involved a dispute between the Office of Children's Services ("OCS") and a mother whose parental rights were terminated—both parties claimed they were entitled to the minors' permanent fund dividends ("PFD"). The legal issue required the Court to interpret a regulation promulgated by the Department of Revenue providing for PFD distributions for minors in OCS custody. The Court declined to defer to OCS's interpretation of the regulation, even though OCS was the primary agency responsible

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[33] *Kenai Peninsula Fisherman's Coop. Ass'n v. State*, 628 P.2d 897, 907 (Alaska 1981) (interpretation or instructions on how to implement an existing regulation is in itself a "regulation" and must be adopted according to the APA); *State v. Tanana Valley Sportsmen's Ass'n*, 583 P.2d 854, 858 (Alaska 1978) (concluding that the Board may not "impose requirements not contained in written regulations by means of oral instructions").

[34] *Tea ex rel. A.T.*, 278 P.3d at 1263; *see also Sec'y of Labor, Mine Safety and Health Admin. V. Excel Mining, LLC*, 334 F.3d 1, 7 (D.C. Cir. 2003) ("It is true that we do not generally accord deference to one agency's interpretation of a regulation issued and administered by another agency."); *Amerada Hess Pipeline Corp v. Fed. Energy Regulatory Comm'n*, 117 F.3d 596, 600 (D.C. Cir. 1997) ("We generally do not accord deference to an agency's interpretation of regulations promulgated by another agency . . .").

for complying with the regulation. The Court reasoned that when the agency that promulgated the regulation has not offered an interpretation, courts must "interpret the regulation using our independent judgment 'seeking to adopt the rule of law that is most persuasive in light of precedent, reason, and policy.'"[35]

There is no reason to defer to ADF&G's interpretation of 5 AAC 27.195, which was offered for the first time in this litigation.[36] ADF&G's interpretation of 5 AAC 27.195 advanced in this litigation has never been put in writing and is not longstanding or continuous.[37] ADF&G's Sitka Sound area fisheries manager explained that he has never been given guidance or direction interpreting 5 AAC 27.195.[38] Instead, his interpretation of the regulation is based on his own

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[35] *Id.* at 1263 (quoting *Harrod v. State, Dep't of Revenue*, 255 P.3d 991, 995 (Alaska 2011)).

[36] *Cf. Bullock v. State, Dep't of Cmty. & Reg'l Affairs*, 19 P.3d 1209, 1218 (Alaska 2001) ("Thus, the Department has consistently interpreted subsection .080(c) since 1978, and that interpretation does not conflict with legislative intentions. We therefore conclude that the Department's pro-rata interpretation . . . is entitled to deference.").

[37] *Cf. Marathon Oil Co. v. State, Dep't of Natural Res.*, 254 P.3d 1078, 1082 (Alaska 2011) ("We give more deference to agency interpretations that are 'longstanding and continuous.' ") (quoting *Premera Blue Cross v. State, Dep't of Commerce, Cmty. & Econ. Dev., Div. of Ins.*, 171 P.3d 1110, 1119 (Alaska 2007)).

[38] Ex. 13 at 4 (Eric Coonradt Depo.) ("**Q**: Have you ever received any guidance or direction in interpreting the regulation from anyone else at ADF&G? **Mr. Coonradt**: Not that I can think of.").

reading of the regulation and personal experience with the fishery.[39] It is abundantly clear that ADF&G's interpretation of 5 AAC 27.195 is merely an *ad hoc* "litigating position" advanced by the Department of Law, and it would be "entirely inappropriate" to apply a deferential standard of review.[40]

B. ADF&G's Implementation of 5 AAC 27.195

Courts "independently review the merits of an administrative determination."[41] Judicial review of an agency's implementation of a regulation is focused on "whether the agency's decision was arbitrary, unreasonable, or an abuse of discretion."[42] "An administrative agency is generally required to follow its own regulations."[43] A decision is arbitrary and capricious when the agency failed to consider factors that it is by law required to consider.[44]

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39 *Id.* ("**Q**: So your understanding of the regulations is based on your reading of the regulations and just your experience in how they have been applied before? **Mr. Coonradt**: Yes.").

40 *See Hendricks-Pearce v. State, Dep't of Corr.*, 323 P.3d 30, 46 n. 38 (Alaska 2014) (Fabe, C.J. dissenting) ("Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate." (citing *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988))).

41 *Hadley v. State, Dep't of Revenue*, 838 P.2d 1231, 1233 (Alaska 1992).

42 *Hodges v. Alaska Constructors, Inc.*, 957 P.2d 957, 960 (Alaska 1998).

43 *Stosh's I/M v. Fairbanks N. Star Borough*, 12 P.2d 1180, 1185 (Alaska 2000).

44 *Alaska Survival v. State, Dep't of Natural Res.*, 723 P.2d 1281, 1287 (Alaska 1986).

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IV. ARGUMENT

This claim is not simply about whether there is—or is not—a reasonable opportunity for subsistence. Instead, it is about whether ADF&G has properly interpreted and implemented Board regulations that were intended to ensure a reasonable opportunity for subsistence.

In Alaska, subsistence is the "highest" priority consumptive use of fish and game.[45] The Board's task is to promulgate regulations "that provide a reasonable opportunity for subsistence uses."[46] Whether the Board has promulgated regulations that provide a reasonable opportunity for subsistence (if implemented properly) is not at issue here.[47] This claim is not against the Board.

What is at issue is ADF&G's interpretation and implementation of the Board's regulations. ADF&G is a management agency that is "empowered to effectuate" the policies adopted by the Board.[48] ADF&G's authority must "be interpreted in light of the overall purpose of the constitutional and legislative scheme of management of state resources."[49] No Alaska court has ever held that ADF&G may ignore its clear

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[45] Ch. 1, § 1(c)(1), SSSLA 1992 ("[S]ubsistence uses of Alaska's fish and game resources are given the highest preference, in order to accommodate and perpetuate those uses.").

[46] AS 16.05.258(b)(1)(A).

[47] *Interior Alaska Airport Ass'n v. State, Board of Game*, 18 P.3d 686, 689-90 (Alaska 2001) (regulations promulgated by boards are presumptively valid).

[48] *See Peninsula Marketing Ass'n v. Rosier*, 890 P.2d 567, 572 n.8 (Alaska 1995).

[49] *Kenai Peninsula Fisherman's Co-op. Ass'n*, 628 P.2d at 907.

obligations under Board regulations or interpret those regulations to defeat the Board's policies. "This would be contrary to the statutory structure and purpose of the Department."[50]

ADF&G is tasked with managing commercial and subsistence herring fisheries in Sitka Sound according to the Board's regulations. The Board adopted a "threshold" management approach for the commercial fishery. A commercial fishery is allowed when the annual expected returning herring biomass exceeds 25,000 tons.[51] The commercial harvest rate is calculated using a sliding scale between 12 and 20 percent of the biomass.[52]

The Board also identified the Sitka Sound herring fishery as a stock that is customarily and traditionally used for subsistence. *See* ADFG 2197 ("At its February 1989 meeting, the [Board] made a positive customary and traditional use determination for the harvest of herring spawn in Sitka Sound."). The amount necessary for subsistence ("ANS") is a range between 136,000 and 227,000 pounds per year.[53] There are no other regulatory limits on when and where subsistence harvesters may collect herring roe on branches.

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50 *Rosier*, 890 P.2d at 572 n.8.

51 5 AAC 27.160(g).

52 *Id.*

53 5 AAC 01.716(b).

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Importantly, the Board required ADF&G to integrate the protection of subsistence uses into commercial fishery management. ADF&G must make management decisions, including in-season decisions, regarding the commercial fishery to ensure a reasonable opportunity for subsistence.[54]

5 AAC 27.195(a)(2) requires ADF&G to consider distributing the commercial fishery by "time and area" to ensure a reasonable opportunity for subsistence. ADF&G's in-season managers must use their "best judgment" to "consider" the effects of the commercial fishery on subsistence before making a decision to open the commercial fishery.[55] *See* BOF 5115. The Board understood that providing reasonable opportunity required delegating authority to ADF&G to make "in-season" determinations about the commercial and subsistence fisheries with the goal of disbursing the commercial fishery to ensure a reasonable opportunity for subsistence. BOF 5115 (Board Member Coffey: "[Y]ou couldn't plan ahead as to where people might be given their subsistence priority to harvest the roe because you never knew where the fish were going to spawn. So that then what we talked about was this dispersal idea. And that would be something that would be a *consideration* during the conduct and prosecution of the harvest." (emphasis added)). "Consideration" requires

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54 5 AAC 27.195.

55 *See* Ex. 6 at 3 (2002 Management Plan).

ADF&G to take a "hard look" at the potential effects of the timing and location of each commercial fishery opening on subsistence.[56]

5 AAC 27.195(b) requires ADF&G to "consider the quality and quantity" of herring spawn on branches when making decisions to open the commercial fishery. The regulation's meaning is plain and unambiguous.[57] ADF&G must consider both "quality and quantity" of herring spawn on branches in each of its management decisions opening the commercial fishery.

This Court should conclude that ADF&G's interpretation and implementation of 5 AAC 27.195 are invalid and unlawful, and clarify that the regulation means precisely what it says: providing ADF&G with a correct interpretation of the regulation is a vital first step in having managers make legally appropriate decisions.

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[56] *See Sullivan v. Resisting Environmental Destruction on Indigenous Lands (REDOIL)* 311 P.3d 625, 635 (Alaska 2013) ("The constitution entrusts the legislature with the discretion to determine how to ensure that use of these natural resources are 'for the maximum benefit of its people.' We have said that to ensure these principles are followed, it is necessary for the State to take a 'hard look' at all factors material and relevant to the public interest."); *Greenpeace, Inc. v. State, Office of Mgmt. & Budget*, 79 P.3d 591, 593 (Alaska 2003); *Kachemak Bay Conservation Soc. v. State, Dep't of Natural Res.*, 6 P.3d 270, 279 (Alaska 2000).

[57] *Cf. RBG Bush Planes LLC v. Alaska Public Offices Comm'n*, 361 P.3d 886, 892 (Alaska 2015) ("A regulation is ambiguous when '[it] is capable of two or more equally logical interpretations.'" (quoting *State v. Bernard*, 625 P.2d 311, 3123 (Alaska 1981))).

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A. ADF&G's Interpretation of 5 AAC 27.195 is Unlawful Because *Rosier* Does Not Limit ADF&G's Authority to Distribute the Commercial Fishery by Time and Area to Ensure a Reasonable Opportunity for Subsistence

ADF&G's interpretation of 5 AAC 27.195(a)(2) is legally flawed because *Rosier* does not limit ADF&G's authority to manage the Sitka Sound herring fishery. The Board has delegated authority to ADF&G to make in-season management decisions that ensure a reasonable opportunity for subsistence.

Throughout this litigation, the State has claimed that *Rosier* limits ADF&G's authority to implement 5 AAC 27.195(a)(2).[58] For example, the State argued that ADF&G's "authority is still limited by *Rosier* such that the Department cannot (for example) fundamentally change the management of the commercial fishery premised on the notion that users lack a reasonable opportunity for subsistence."[59] According to the State, ADF&G cannot limit commercial fishing "in areas beyond those already

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[58] *See, e.g.*, Ex. 14 at 2 (State Response to Petition for Review, S-17384 at 13 n.52 (Mar. 13, 2019)) ("[T]he Department could not without new information take action to restrict the commercial fishery, on the basis of a lack of reasonable opportunity for subsistence uses, because that would essentially veto the Board's January 2018 finding that there was a reasonable opportunity for subsistence." (citing *Rosier*, 890 P.2d)).

[59] State Preliminary Injunction Sur-Reply Br. at 5 (emphasis added); *see also* State Preliminary Injunction Br. at 33 (Feb. 4, 2019) ("[T]he Board's actions at the January 2018 meeting necessarily included a finding that the Board's regulations provide a reasonable opportunity for subsistence uses of herring spawn in Sitka Sound. Given that finding, the law is clear: the Department may not take action that contradicts the Board's finding absent new information developed after the Board meeting.").

closed" by the "closed area" regulation or delay the commercial fishery solely to ensure enough spawning herring are available for subsistence harvesters.[60] The State's interpretation of 5 AAC 27.195 in light of *Rosier* is erroneous. The Board has not enacted a specific management plan provision or made a decision that would limit ADF&G's authority under 5 AAC 27.195.

Rosier involved another of Alaska's highly contentious fisheries.[61] In the early 1990s, chum salmon in Arctic-Yukon-Kuskokwim ("AYK") area streams experienced drastic and widespread declines. At the Board's direction, ADF&G proposed additional conservation measures for the 1994 season, including lowering the overall harvest cap from 700,000 to 400,000 salmon. The Board, however, rejected ADF&G's proposal, voting against an amendment that would have added the reduced harvest cap to the 1994 management plan. Instead, the Board approved the 1994 management plan with the 700,000 chum cap.[62]

Governor Hickel disagreed with the Board's decision and ordered the ADF&G to use its emergency authority to increase chum escapement into AYK streams during the 1994 season. Hickel's order would have implemented the lower harvest cap that was explicitly rejected by the Board. The commercial fishing industry sued to prevent ADF&G from issuing the proposed emergency order. The superior court granted

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60 Ex. 12 at 2 (Bowers Email).

61 890 P.2d at 568.

62 *Id.* at 568-69.

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declaratory relief to the commercial fishers, ruling that "the Commissioner is prohibited from taking an action" that contradicts a Board decision "based upon the information already presented" to the Board.

The Alaska Supreme Court affirmed the superior court's decision, concluding that the statutory structure establishing the Board and ADF&G did not permit ADF&G to "effectively veto" Board decisions.[63] The Court explained that ADF&G has two kinds of independent authority to manage fisheries through emergency orders: 1) "field orders," which implement Board regulations and 2) "true emergency orders," which address urgent conservation concerns and may contravene Board regulations. But ADF&G cannot issue emergency orders implementing a policy that was considered and rejected by the Board, unless ADF&G possesses new information that had not been available to the Board.

In *Rosier*, the Court determined that the Board explicitly voted to reject the lower harvest cap. A full Board majority of four votes is "required to carry all motions, regulations, and resolutions."[64] The Board voted three to two to reject the lower harvest cap but five to zero to approve the management plan without the lower cap. Under ROBERT'S RULES, "where an amendment is offered and it does not receive the required number of votes, and then the proposal as a whole is voted on and is

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63 *Id.* at 574.

64 *Id.* at 574 (citing AS 16.05.320).

approved by the requisite majority, a decision has been made to reject the amendment."[65] Thus, when the Board rejected the amendment containing the lower harvest cap and then approved the management plan, it was a decision to reject ADF&G's proposal and ADF&G could not overrule the Board's decision by implementing the lower harvest cap.

Importantly, in *Cook Inlet Fisherman's Fund v. State ("CIFF")*, 357 P.3d 789 (Alaska 2015), the Court explained that *Rosier* only applies where the Board has made a "specific" policy decision. *CIFF* involved the Upper Cook Inlet salmon fishery and the Board's management plan for the fishery, which directed ADF&G to achieve escapement goals through modifying opening and closing fishing times among different fishing types. For example, the management plan provided that ADF&G "may, by emergency order, allow extra fishing periods of no more than 51 hours per week."[66] In 2013, ADF&G closed the set net fishery to protect weak king salmon returns, and a group of set-netters sued, arguing that ADF&G's discretionary determination was contrary to the Board's intent and prohibited by *Rosier*.

The Court rejected the set-netters' *Rosier* argument. "Unlike in *Rosier*, where the Commissioner clearly contravened the Board's decision, nothing in this case indicates that the Commissioner's discretionary in-season management decisions

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[65] *Id.* (citing ROBERT'S RULES OF ORDER NEWLY REVISED § 12 (9th ed. 1990)).

[66] *CIFF*, 357 P.3d at 799.

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conflicted with the Board's management plans."[67] According to the Court, merely asserting that ADF&G's actions would be in conflict with the Board's policies is insufficient to implicate *Rosier*. There must be a "specific management plan provision"[68] adopted by the Board that would be violated in order for ADF&G's authority to be limited under the *Rosier* doctrine.

Like the plaintiffs in *CIFF*, the State "fails to cite any specific management plan provision" that ADF&G would allegedly be violating if it simply followed the existing regulations.[69] The State's reliance on three Board decisions for the proposition that *Rosier* is controlling is erroneous. In fact, the Board has never adopted a management plan provision that "limit[s]" ADF&G's authority to distribute the commercial fishery by time and area to ensure a reasonable opportunity for subsistence. The State's reliance on *Rosier* is thus misplaced.[70]

1. The Board's adoption of the "closed area" does not limit ADF&G's authority under 5 AAC 27.195(a)(2).

The Board's decision to adopt the "closed area" regulation, 5 AAC 27.150(7), does not relieve ADF&G's of its obligation, or limit its authority, to distribute the commercial fishery by time and area to ensure a reasonable opportunity for subsistence. In 2012, the Board promulgated the "closed area" regulation to protect

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67 *Id.*

68 *Id.*

69 *See id.*

70 *Id.*

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part of the traditional subsistence area. BOF 2036 ("Proposals 238 and 239"); *see also* BOF 5036.[71] The commercial fishery was prohibited in the "closed area," originally consisting of approximately 10 square miles and expanded to 14 square miles in 2018.[72]

Nothing in the Board's record indicates that the "closed area" was intended to limit ADF&G's authority or responsibility to take management actions outside of the closed area if necessary to provide a reasonable opportunity for subsistence. At the 2012 Board meeting, ADF&G represented that it had the authority to "distribute the [commercial] harvest by time and area, if [ADF&G] determines that it is necessary to ensure subsistence harvesters have a reasonable opportunity to harvest the amount necessary for subsistence." BOF 5036. ADF&G testified that it "implements" 5 AAC 27.195 through "a concerted effort to disburse the commercial openings away from the high use subsistence areas." BOF 5036.

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[71] *See* BOF 2035 ("The core subsistence area has historically been the source of the highest quality and quantity subsistence roe. This area is close to town and safely accessible to small boats, so that many people can fully participate in harvesting there.").

[72] 5 AAC 27.150(7).

Importantly, the Board did not amend or repeal 5 AAC 27.195 when it promulgated the "closed area" regulation. The "closed area" provided additional protection for subsistence harvesters. BOF 5052.[73]

In 2018, years after the Board promulgated the "closed area" regulation, ADF&G acknowledged that in addition to the "closed area," it "is *also* directed" pursuant to 5 AAC 27.1951 to "distribute the commercial harvest, by time and area." BOF 3788 (ADF&G staff comments on 2018 proposals to expand the "closed area"). ADF&G's 2018 staff comments demonstrate that it understood that 5 AAC 27.195 required ADF&G to continue to take management actions beyond the "closed area" when necessary to ensure a reasonable opportunity for subsistence.

The State's presumption that concerns about commercial fishing in traditional subsistence areas have "been mostly addressed with the core areas having been subsequently closed by regulation" is contrary to the Board's policies.[74] The Board explained that the "closed area" was meant to provide a "little bit more" opportunity than only disbursing the commercial fishery in time and area under 5 AAC 27.195. BOF 5052. The Board understood when it promulgated 5 AAC 27.195 that it must protect reasonable opportunity in more than just the "closed area." *See* BOF 5115

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[73] *See also* BOF 5052 ("[T]here's a reasonable opportunity right now . . . there's a barebones standard and there's no reason we can't—in such a large area with so much abundance we can't extend *a little bit more opportunity*." (emphasis added)).

[74] State Preliminary Injunction Br. at 38.

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("[S]pawn occurs anywhere and everywhere in this area, and you never know ahead of time where it's going to be. And that, therefore, you couldn't plan ahead as to where people might be given their subsistence priority to harvest the roe because you never knew where the fish were going to spawn.").[75] ADFG 2214-15. Thus, it is simply incorrect for the State to assert that the "closed area" regulation "mostly addressed" concerns regarding commercial fishing in subsistence areas. *See* ADFG 2214-15 ("2016 Subsistence Report"), ADFG 2736-38 ("2017 Subsistence Report"), ADFG 2783-85 ("2018 Subsistence Report").

Similarly, the State's argument that the "closed area" regulation limits ADF&G's authority to implement 5 AAC 27.195 based on *Rosier* is flawed.[76] The Board did not limit ADF&G's authority to continue distributing the commercial fishery throughout the areas in Sitka Sound that remained open to commercial fishing. The Board did not adopt any "specific management plan provision"[77] that would be contradicted if ADF&G continued to implement 5 AAC 27.195(a)(2) by disbursing

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75 *See also* Ex. 3 at 3 (Schroeder & Kookesh, 1990).

76 *See* Ex. 12 at 2 (Bowers Email) ("The department taking action to not allow commercial fishing in areas beyond those already closed, with the intent of providing increased subsistence fishing opportunity . . . would represent a direct fishery resource allocation action taken outside the Board of Fisheries process.").

77 *CIFF*, 357 P.3d at 799.

the commercial fishery by "time and area" outside of the "closed area" solely to ensure a reasonable opportunity for subsistence.[78] Thus, *Rosier* is inapplicable.

Acting Director Bowers' email confirms that the State's erroneous interpretation of 5 AAC 27.195 has unlawfully constrained ADF&G's management of the commercial fishery. It is necessary for this Court to declare that ADF&G does have authority and is required to take "action to not allow commercial fishing in areas beyond those already closed" if it determines that action is necessary to ensure a reasonable opportunity for subsistence. Moreover, ADF&G has an affirmative obligation to "consider" whether such action is necessary and explain the rationale for its decisions.[79]

The Board also did not implicitly repeal 5 AAC 27.195(a)(2), as suggested by the State and the Intervenors.[80] An implied repeal of a statute by the legislature is rare enough, but the Alaska Supreme Court has never held that a board regulation may impliedly repealed by a subsequent regulation. To be an implied repeal, a latter

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78 *Id.* ("[N]othing in this case indicates that the Commissioner's discretionary in-season management decisions conflicted with the Board's management plans.").

79 *See infra*. Part IV.C.

80 *See* Ex. 15 at 3 (Transcript of Preliminary Injunction Oral Argument) ("The Tribe's Proposal 500 was expressly premised on distributing the commercial fleet away from the core area, the traditional subsistence areas, and the fact that the Board has completely closed those areas has largely accomplished that purpose. You can't disburse the fleet away any better than completely closing the area to them.").

enactment must "completely occup[y] the field of a previous statute."[81] "Legislative intent is the key and if the inconsistency between the two enactments is not fatal to the operation of either, the two may stand together and there will be no implied repeal."[82] If the two enactments are not totally irreconcilable, there will be no implied repeal, and instead the subsequent enactment will exist as an exception to the latter enactment.[83]

Here, 5 AAC 27.150(7) is not irreconcilable with 5 AAC 27.195(a)(2). Although 5 AAC 27.150(7) removed ADF&G's discretion to distribute the commercial fishery in the closed area near Sitka, ADF&G retained complete discretion in fixing opening and closing times, as provided in 5 AAC 27.195(a)(2), and in distributing the commercial fishery throughout waters outside of the closed area. Nothing in the Board's record indicates that the Board intended to repeal 5 AAC 27.195(a)(2), and such an interpretation of the closed area's effect on 5 AAC 27.195(a)(2) was never mentioned by the Department of Law or ADF&G in their comments to the Board. STA requests that this Court correct ADF&G's erroneous

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81 *Allen v. Alaska Oil & Gas Conserv. Comm'n*, 147 P.3d 664, 668 (Alaska 2006).

82 *Hafling v. Inland Boatmen's Union of the Pacific*, 584 P.2d 870, 872 (Alaska 1978).

83 *Matanuska-Susistna Borough v. Lum*, 538 P.2d 994, 1000 (Alaska 1975) (quoting *Anderson v. Heltzel*, 251 P.2d 482, 483-84 (Or. 1952)).

belief that 5 AAC 27.195 is a nullity that it can ignore, as opposed to a regulation that ADF&G is obligated to follow.

2. The Board's rejection of proposals to apply a formula to determine commercial fishery openings does not limit ADF&G's authority under 5 AAC 27.195(a)(2).

Contrary to ADF&G's interpretation of 5 AAC 27.195, the Board's rejection of a proposal to apply a formula to commercial fishery openings does not implicate *Rosier* or change ADF&G's authority to distribute the commercial fishery by time and area. In 2015, the Board considered a proposal from STA's cultural resource director to require ADF&G to allow only 50 percent of the guideline harvest level ("GHL") to be harvested by the commercial fishery until 25 percent of the anticipated nautical miles of spawning was observed. BOF 3354 ("Proposal 118") The Board rejected the proposal. BOF 3081.

The State erroneously suggests that the Board's of Proposal 118 limited ADF&G's authority to consider delaying the commercial fishery to ensure a reasonable opportunity for subsistence. "Delaying the start of the fishery until after spawning begins represents a fundamental shift in the way sac roe herring fisheries are managed . . . we can't undertake this sort of action solely to achieve a fishery resource allocation objective without direction from the Board of Fisheries."[84]

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[84] Ex. 12 at 1 (Bowers Email).

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But the Board's rejection of Proposal 118 does not implicate *Rosier* because there was no affirmative action by the Board. The *Rosier* Court relied on the fact that the Board rejected ADF&G's proposal for a chum harvest cap and instead, adopted a management plan containing a different chum harvest cap that was directly incompatible with ADF&G's proposal.[85] Here, the Board rejected Proposal 118's call for a percentage based limitation that would automatically apply in all cases; it did not adopt a specific management plan directing ADF&G to allow the commercial fishery before the first spawn.

Importantly, the Board's failure to adopt a management proposal does not affect ADF&G's discretionary regulatory authority to implement a management action that the Board declined to require. The Board does not make policy by rejecting proposals.[86]

The State's main argument appears to be that it cannot delay the commercial fishery in order to ensure a reasonable opportunity for subsistence because delaying the commercial fishery would mean a reduced commercial harvest. According to the State, delaying the commercial fishery "would fundamentally change the commercial fishery, and would conflict with numerous other regulations, including those that

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85 *See Rosier*, 890 P.2d at 574.

86 *See* AS 16.05.320.

establish the guideline harvest level and allow the Department to manage the fishery to take the highest roe content (i.e., to take herring before they have spawned)."[87]

That argument directly conflicts with the statutory subsistence priority and the plan language of 5 AAC 27.195.[88] The State's defense of ADF&G's apparent decision to prioritize the commercial fishery's opportunity to achieve the full GHL over ensuring a reasonable opportunity for subsistence is unsupportable. The Board did not—and legally could not—prioritize the commercial fishery over the subsistence harvest.[89] Thus ADF&G's refusal to even consider delaying the commercial fishery in order to ensure a reasonable opportunity for subsistence is illegal and based on a misinterpretation of the relevant law (which STA now asks this Court to correct).

3. The Board's 2018 alleged determination that a reasonable opportunity for subsistence exists does not limit ADF&G's authority under 5 AAC 27.195(a)(2).

The State also argued during the preliminary injunction stage that because the Board allegedly determined there was a reasonable opportunity for subsistence in

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87 State Preliminary Injunction Br. at 40.

88 *See* Ch. 1, § 1(c)(1), SSSLA 1992 ("[S]ubsistence uses of Alaska's fish and game resources are given the highest preference, in order to accommodate and perpetuate those uses.").

89 In fact, the Board explicitly rejected proposed regulatory language that would have allowed ADF&G to balance the needs of the commercial fishery when considering management actions necessary to ensure reasonable opportunity. BOF 5115 (including "practicality" in the proposed regulatory language "is inappropriate because it makes the subsistence priority subordinate to the practicality of the commercial fishery – which it is not.").

January 2018, ADF&G may not take any action solely to benefit subsistence harvesters. That *post hoc* rationale and litigating position attempts to excuse ADF&G's failure to implement 5 AAC 27.195. But the State's interpretation ignores the plain language of 5 AAC 27.195 and the Board's intent when it adopted the regulation. ADF&G is not relieved of its obligation to implement 5 AAC 27.195 merely because three Board members affirmed that "the regulations"—including 5 AAC 27.195, if implemented—provide a reasonable opportunity for subsistence.

At the January 2018 meeting, the Board considered several proposals to modify the Sitka herring fishery. *See generally* BOF 3712-3714. STA submitted three proposals: Proposal 99 would have reduced the maximum harvest rate from 20 to 10 percent of the annual spawning biomass. BOF 3713. Proposal 105 would have expanded the "closed area" by 14 square miles. BOF 3713. Proposal 106 would have expanded the "closed area" by 4 square miles. BOF 3713.

During deliberations on the proposals, ADF&G represented that 5 AAC 27.195 was an important part of the commercial fishery management. BOF 5062. According to ADF&G, "one of the very important parts of that management plan is to distribute the commercial harvest by fishing time and area if [ADF&G] determines that it is necessary to ensure that subsistence users have a reasonable opportunity to harvest the amount of herring spawn necessary for subsistence uses." BOF 5062. The Commercial Fisheries Division Director testified that ADF&G is "cognitive of

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implementing that part of the regulation [5 AAC 27.195(a)(2)]." BOF 5063. Thus, ADF&G told the Board that 5 AAC 27.195 is an "important" part of providing a reasonable opportunity for subsistence, and the Board was aware of the mandates in 5 AAC 27.195 and was informed by ADF&G that it was implementing the regulation. BOF 5062-63.

The Board did not make explicit findings that a reasonable opportunity existed. Instead, the Board simply voted to reject Proposals 99 and 105, and adopt Proposal 106. Three Board members opined that existing "regulations," taken as a whole, provided a reasonable opportunity. *See* BOF 5076, 5077, 5094-95. Importantly, the Board did not repeal 5 AAC 27.195. Nothing in the record provides a clear statement that the Board intended to "limit" ADF&G's authority or responsibility under 5 AAC 27.195.

The State's argument that ADF&G's "authority is still limited by *Rosier*"[90] is baseless. *Rosier* does not apply in this case because the Board has not adopted a "specific management plan provision" that would conflict with ADF&G's management responsibilities under 5 AAC 27.195.[91] *Rosier*'s holding prohibits ADF&G from "violat[ing]" specific provisions adopted by the Board.[92] Three Board members' conclusions that "the regulations" as a whole provide a reasonable

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90 State Preliminary Injunction Sur-Reply Br. at 5.

91 *See CIFF*, 357 P.3d at 799.

92 *Id.*

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opportunity for subsistence was not a rejection of any specific management action.[93] Nor can ADF&G cite a specific management plan provision that was adopted by the Board that would be violated if ADF&G fully implemented 5 AAC 27.195.[94]

The State's argument renders 5 AAC 27.195(a)(2) meaningless because under the State's interpretation, ADF&G would never be permitted to distribute the commercial harvest by fishing time and area solely to benefit subsistence harvesters. "[T]he Board's actions at the January 2018 meeting necessarily included a finding that the Board's regulation provide a reasonable opportunity for subsistence uses of herring spawn in Sitka Sound. Given that finding the law is clear: [ADF&G] *may not take action* that contradicts the Board's finding absent new information developed after the Board meeting."[95] Under the State's interpretation, ADF&G has no responsibilities to implement 5 AAC 27.195, except if "new information" becomes available. But that is not how ADF&G described its obligations under 5 AAC 27.195 to the Board in January 2018. *See* BOF 5062-63. If ADF&G's legal obligations changed as a result of the Board's January 2018 decision, no one informed ADF&G's Sitka Area Manager.[96]

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93 *See Rosier*, 890 P.2d at 574.

94 *See CIFF*, 357 P.3d at 799.

95 State Preliminary Injunction Br. at 33 (emphasis added).

96 Ex. 13 at 5 (Eric Coonradt Depo.) ("**Q:** And you said that no one in ADF&G has advised you of the regulations' meaning or its application. Is that right? **Mr. Coonradt:** Correct.").

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It is apparent that there is a disconnect between the Department of Law's litigating position and ADF&G's previous interpretations of its duties under 5 AAC 27.195. In 2002, ADF&G acknowledged that 5 AAC 27.195(a)(2) "requires that the department distribute the commercial harvest both geographically and temporally" and that those decisions "must be made in-season by [ADF&G] based on the department manager's best judgement concerning the in-season situation."[97] If that authority changed after the January 2018 Board meeting, the Board was never informed, by either the Department of Law or ADF&G, that it's authority was "limited" by the Board's January 2018 determination. *See* BOF 4675 (ADF&G staff comments regarding STA's proposal for regulatory changes at the Board's October 2018 work session) ("5 AAC 27.195 Sitka Sound commercial sac roe herring fishery directs the department to distribute commercial herring harvest using time and area if the department determines that it is necessary to ensure subsistence users have a reasonable opportunity.").

This Court should conclude that the Board's findings, policies, and regulations do not conflict with ADF&G's in-season management duties.[98] Thus, this Court should declare that ADF&G's authority under 5 AAC 27.195 is not "limited by *Rosier*."

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97 Ex. 6 at 3 (2002 Management Plan).

98 *See CIFF*, 357 P.3d at 799.

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B. ADF&G Failed to Implement 5 AAC 27.195(b) in 2017 and 2018 By Not Considering Quality of Herring Spawn on Branches When Making Management Decisions Regarding the Commercial Fishery

ADF&G's decisions to open the commercial fishery during the 2017 and 2018 seasons were illegal because ADF&G failed to comply with 5 AAC 27.195(b)'s requirement to consider the "quality and quantity of herring spawn on branches, kelp, and seaweed, and herring sac roe when making management decisions regarding the subsistence herring spawn and commercial sac roe fisheries." ADF&G admitted that it does not collect or consider information about the "quality" of herring spawn on branches "at all."[99]

5 AAC 27.195(b) contains an unambiguous regulatory command: ADF&G "*shall* consider the quality and quantity of herring spawn on branches." When a regulation contains the term "shall" it creates a mandatory duty.[100] The record demonstrates that the Board considered "quality" an important factor for the subsistence harvest and specifically required ADF&G to consider "quality" of spawn on branches in its decisions to open the commercial fishery. BOF 5112 ("Another big, important thing that was discussed was the quality of the product that the harvesters

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99 Exc. 13 at 8 (Eric Coonradt Depo.).

100 *In re Reinstatement of Wiederholt*, 24 P.3d 1219, 1233 (Alaska 2001).

harvest."). An agency's decision will be regarded as arbitrary where it fails to consider an important factor."[101]

ADF&G's decisions to open the commercial fishery in 2017 and 2018 contain no indication that ADF&G considered "quality" of spawn on branches. The lack of information regarding quality in record is consistent with ADF&G Sitka Area Manager Eric Coonradt's testimony that ADF&G does not "have any information on quality. So no, we cannot assess quality, at all."[102] Mr. Coonradt, who is in charge of managing the commercial and subsistence fisheries, explained that ADF&G does not collect or consider information about the "quality" of herring spawn available for subsistence:

> **Mr. Starkey**: So there are many factors considered in terms of getting good quality eggs?
>
> **Mr. Coonradt**: Yes.
>
> **Mr. Starkey**: How do you consider those factors when determining your management of the commercial fishery? Do you factor in those subsistence needs for quality when you are managing a commercial fishery?
>
> **Mr. Coonradt**: No, we don't because we don't get any information on quality. It's not collected, it's not in any of the documents. We just don't have it.
>
> **Mr. Starkey**: So when you – pointing you back to the regulation . . .
>
> **Mr. Coonradt**: Uh huh (affirmative).

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101 *Ellingson v. Lloyd*, 342 P.3d 825, 831 (Alaska 2014).

102 Ex. 13 at 8 (Eric Coonradt Depo).

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> **Mr. Starkey**: . . . I want you to, if you don't mind looking at it again. It's 25 – if you don't mind looking at this copy right here. So section B of that requires the department to consider the quality and quantity of herring roe on branches when making management decisions about the commercial and subsistence fishery. Are you able to do that?
>
> **Mr. Coonradt**: So you said it requires us, but it says "shall". So it does require us, but it is – we don't have any information on quality. So no, we cannot assess quality, at all.[103]

ADF&G's admission that it does not consider "quality" of spawn on branches "at all" renders the decisions to open the commercial fishery arbitrary and illegal. It does not matter that "[i]nformation regarding the quality and quantity of herring spawn on branches is typically not available until years after a particular fishing season has concluded."[104] The Board's regulation requires ADF&G to consider "quality." ADF&G, and not the Board, has "administrative, budgeting and fiscal powers."[105] Thus, ADF&G must decide how it will allocate the administrative resources necessary to comply with the Board's regulation. *See* BOF 0065 ("[Q]uality as well as the quantity of herring roe on branches . . . is an important consideration in the management of the subsistence and commercial sac roe fisheries."). This Court should not allow ADF&G to continue ignoring its legal mandate to consider the

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103 *Id.* at 7-8.

104 Ex. 16 at 4-5 (Eric Coonradt Aff.).

105 *Kenai Peninsula Fisherman's Co-op. Ass'n*, 628 P.2d at 901-02.

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"quality and quantity" of herring spawn on branches when making management decisions regarding the commercial fishery.

C. ADF&G Must Explain How It Implements 5 AAC 27.195 So That Its Management Decisions Can Be Reviewed

Once this Court clarifies the meaning of 5 AAC 27.195 and ADF&G's obligations in implementation going forward, questions concerning whether ADF&G's management decisions comply with the regulations will still arise. As has been demonstrated in the present lawsuit, ADF&G's management decisions to open the commercial fishery are inadequately documented thereby precluding effective judicial review. The record offers no explanation of the factors ADF&G considered when opening the commercial fishery besides the quality of the commercial harvest. *See* ADFG 0001-0336. Meaningful judicial review requires ADF&G to explain how it implements 5 AAC 27.195 when making management decisions regarding the commercial fishery, including explaining how it considered whether to distribute the commercial fishery by time and area to ensure a reasonable opportunity for subsistence, and how it considered "quality and quantity" of spawn on branches. This Court should require ADF&G to produce a record of its decisions that is adequate for judicial review beginning with the 2020 season.[106]

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[106] Failure to create an adequate administrative record is inherently an issue that is capable of repetition and will evade judicial review. *See Legislative Council v. Knowles*, 998 P.2d 604, 606 (Alaska 1999).

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It is fundamental that agencies must explain their administrative actions.[107] "[E]xplanations of administrative action have 'intrinsic' as well as 'instrumental' value."[108] Administrative action without an adequate explanation is "the very essence of arbitrariness."[109]

In *Ship Creek Hydraulic*, the Alaska Supreme Court concluded that Alaska administrative agencies must explain their actions in "decisional documents" unless expressly excepted from that requirement by statute. "[I]f a statute requires reasoned decisions, and the legislature has not expressly or by implication limited judicial authority to decide how to review administrative action, *courts may and should require agencies to explain their decisions*."[110]

A "decisional document" reflects "the facts and premises on which the decision" is based.[111] The purpose of a "decisional document" is to allow the public and reviewing courts to determine whether the agency has complied with its legal

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107 WILLIAM F. FUNK *ET AL.*, ADMINISTRATIVE PROCEDURE AND PRACTICE 163 (4th ed. 2010) ("When an agency lacks 'adequate reasons,' its action is 'arbitrary and capricious.'").

108 *Ship Creek Hydraulic Syndicate v. State, Dep't of Transp. & Pub. Facilities*, 685 P.2d 715, 717 (Alaska 1984) (quoting L. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 10-7 at 502-03 (1978)).

109 *Id.*

110 *Id.* at 718 (emphasis added) (citing *Dunlop v. Bachowski*, 421 U.S. 560 (1975)).

111 *Southeast Alaska Conservation Council v. State*, 665 P.2d 544, 549 (Alaska 1983).

obligations.[112] Producing decisional documents is not an onerous requirement. "The precise form a decisional document takes depends on how the document is used."[113]

There is no statute or regulation exempting ADF&G from explaining its decision in an administrative record.[114] ADF&G has authority to issue field orders opening and closing the commercial fishery.[115] ADF&G announces its decisions in the form of news releases and fishery announcements. *See* ADFG 0001-0336.

Although ADF&G provides notice of its decisions to open the commercial fishery through news releases, there is no indication in those news releases of how ADF&G considered the factors required by 5 AAC 27.195. *See* ADFG 0001-0336. The news releases for the 2004 to 2018 seasons[116] document various factors ADF&G considered, including weather (ADFG 0141), results from test sets (ADFG 0015), predator observations (ADFG 0029), spawning events (ADFG 0053), and market prices for herring roe (ADFG 0068, 0123). None of the news releases demonstrate that ADF&G considered "quality and quantity of herring spawn on branches" or whether subsistence harvesters have a reasonable opportunity for subsistence as required by 5 AAC 27.195. There is simply nothing *anywhere* in the record produced

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112 *Ship Creek Hydraulic*, 685 P.2d at 719.

113 *Id.* at 717 n. 3.

114 *See id.* at 718.

115 *See Rosier*, 890 P.2d at 573 (citing AS 16.05.060(a)).

116 ADF&G's record does not include news releases from the 2011 season. *See* ADFG 0135-136.

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in this case that could be used to understand how ADF&G implemented 5 AAC 27.195. Thus, the record does not adequately explain ADF&G's implementation of 5 AAC 27.195.[117]

The critical need for an adequate record is demonstrated by ADF&G's inability to explain its procedures and rationales when making decisions about where and when to open the fishery. During the preliminary injunction litigation the State represented to this Court that the record would show how ADF&G considered subsistence: "[ADF&G] does consider that and it will be borne out in the administrative record."[118] The record has now been produced but it does not shed light on how ADF&G considers subsistence when making management decisions regarding the commercial fishery.

Evidence produced through discovery in this case shows ADF&G's arbitrary and haphazard approach to subsistence management. ADF&G's Sitka Area Manager testified that he distributes the commercial fishery based on his "personal preference."[119] An adequate administrative record is necessary to ensure that decisions are made in the 2020 season that reflect thoughtful consideration and implementation of 5 AAC 27.195.

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117 If ADF&G implements 5 AAC 27.195 at all.

118 Ex. 15 at 2 (Transcript of Preliminary Injunction Oral Argument).

119 Ex. 13 at 6 (Eric Coonradt Depo.).

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D. STA Is Entitled to a Declaratory Judgment.

This Court should conclude and declare that ADF&G has failed to lawfully interpret and implement 5 AAC 27.195. A declaratory judgment is the appropriate remedy for determining the scope of ADF&G's authority and the validity of ADF&G's actions.[120] Alaska Statute 22.10.020 authorizes this Court to "decide the rights and legal relations of an interested party seeking the declaration, whether or not further relief is or could be sought." Declaratory relief will settle an important part of STA's lawsuit by clarifying ADF&G's regulatory obligations in managing the Sitka Sound herring fishery. The State's opposition to the motion for preliminary injunction suggested declaratory relief was the more appropriate form of relief.[121] STA is entitled to that relief now—with sufficient time for ADF&G to comply with 5 AAC 27.195 before the 2020 season.

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[120] *See Jefferson v. Asplund*, 458 P.2d 995, 999 (Alaska 1969) ("[D]eclaratory relief may be sought to determine the validity and construction of statutes and public acts."); *see also Lowell v. Hayes*, 117 P.3d 745, 755-56 (Alaska 2005) ("[D]eclaratory judgments are rendered to clarify and settle legal relations, and to terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding." (internal quotation marks omitted)); *Johnson v. State, Dep't of Fish & Game*, 836 P.2d 836, 905 (Alaska 1991).

[121] State Preliminary Injunction Sur-Reply Br. at 4 ("[T]he Tribe states that it wants 'an order that confirms ADFG has the authority to close the [commercial] fishery until after the beginning of the first spawn and outside of areas closed to the commercial fishery.' Such an order would be a declaratory judgment that might issue at the end of this case (if merited).").

V. CONCLUSION

For the foregoing reasons this Court should grant partial summary judgment to STA on its claims that ADF&G's interpretation and implementation of 5 AAC 27.195 are illegal.

Dated this 27th day of November 2019, at Anchorage, Alaska.

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