

**IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FIRST JUDICIAL DISTRICT AT SITKA**

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| 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-18-00212 CI

**CORRECTED MEMORANDUM IN SUPPORT OF STATE OF ALASKA'S
MOTION FOR SUMMARY JUDGMENT: COUNT I**

I. INTRODUCTION

The Sitka Tribe of Alaska (“STA” or “Tribe”) alleges that the Alaska Department of Fish and Game (“ADF&G” or “Department”) and the Alaska Board of Fisheries (“BOF” or “Board”) (collectively the “State”) have violated state statutes and regulations governing the subsistence harvest of herring roe in Sitka Sound.¹ The Tribe further alleges that the State has violated the Sustained Yield and Common Use Clauses of Article VIII, Sections 3 and 4 of the Alaska Constitution in its management of the

¹ See Count I of Complaint.

subsistence fishery.² Finally, the Tribe claims that the Board's regulations governing the management of the subsistence fishery violate the Alaska Administrative Procedures Act.³

As set forth in detail below, the Tribe has long sought to restrict the commercial sac roe herring fishery in Sitka Sound, alleging that the commercial fishery is so disrupting spawning patterns as to deny a reasonable opportunity for subsistence uses. The Board has considered the Tribe's proposed regulations and has enacted some, but not all, of them. In doing so, it has concluded that reasonable opportunities for subsistence are provided for under its regulations even though those regulations do not encompass all of STA's requests.

The Tribe disagrees with the Board's conclusion about reasonable opportunity, of course. But this round of motions is not focused on the correctness of the Board's conclusions and the regulations that have flowed from those conclusions. The parties have agreed that these first cross-motions for summary judgment will be limited to STA's challenge, as set forth in Count I of its complaint, to the actions of the Department in implementing the Board's regulations.⁴ Accordingly, for purposes of this motion, in assessing the merits of the Tribe's claims against the Department the court

² See Count II of Complaint. The Tribe also alleges in this count that the State has violated the public trust doctrine.

³ See Count III of Complaint.

⁴ See Joint Motion and Proposed Order to Vacate Trial, Reschedule Trial, and Establish a Briefing Schedule, dated Oct. 24, 2019 at p. 2, ¶ 4.

must accept as correct the Board's conclusion as recently as January 2018—the last time that the Board expressly considered the question⁵—that the current regulations provide a reasonable opportunity for the subsistence harvest and uses of herring spawn in Sitka Sound.⁶

This motion is directed at the question of whether the Tribe is entitled to a declaratory judgment that ADF&G is violating state subsistence regulations and whether the court should order ADF&G to undertake some set of unspecified management actions to come into compliance with those regulations. Because no genuine issues of material fact exist with respect to those two questions, and because the Department is not, as a matter of law, violating subsistence statutes or regulations, the court should grant the Department summary judgment on Count I of STA's complaint.

⁵ The Board very recently met in a work session on October 23-24, 2019. The Tribe submitted an agenda change request ("ACR") in conjunction with that meeting. [R. ADFG 002830, 002832-2834] Specifically, it asked the Board to amend 5 AAC 27.160 by reducing the guideline harvest level ("GHL") and increasing the biomass threshold for the commercial fishery. [R. ADFG 002832] (These terms are defined below.) The Board denied the ACR by a unanimous vote. [R. ADFG 002947] The ACR and its supporting document, the Department's comments on it, and public comments are included in the ADF&G record at ADFG 002830 - 002972. In doing so, the Board implicitly affirmed the conclusion it explicitly reached during the 2018 meeting: the current regulations, including 5 AAC 27.195, provide a reasonable opportunity for the subsistence harvest and uses of herring roe.

⁶ Indeed, the Tribe pled Count I in the alternative, acknowledging that *either* the Department was violating state law in implementing the Board's regulations, *or* the Board's regulations were themselves illegal. The Tribe will have a chance to challenge the Board's conclusions during the next round of summary judgment briefing. But to answer the question of whether ADF&G's actions are lawful, the court has to assume, for the purposes of this motion, that the regulations under which ADF&G is operating are lawful.

II. PROCEDURAL BACKGROUND

After filing its complaint the Tribe moved for a preliminary injunction, which the parties litigated during January and February 2019.⁷ The court scheduled, and then on the State's motion vacated, an evidentiary hearing set for mid-February in Sitka. Instead, on February 19th it heard oral argument on the preliminary injunction motion and issued an order denying it a day later.⁸

The Tribe was served discovery and sought to depose four ADF&G scientists. The State agreed to make Eric Coonradt, who is the area biologist responsible for managing the Sitka Sound herring fisheries,⁹ available because he is the employee responsible for implementing the Board regulations governing the management of the Sitka Sound herring resource. But because the State believed that the issues in the case should be decided on the basis of the administrative record (with additional light shed on that record from the testimony of Mr. Coonradt), it opposed the depositions of Dr. Sherri Dressel, who is ADF&G's biometrician for the stock,¹⁰ Kyle Hebert who is the

⁷ Despite the accelerated schedule, the parties extensively briefed the issues and submitted numerous affidavits from scientists, managers, community members, and other stakeholders. Much of that record and briefing is relevant to this motion. Rather than burden the court by restating all of its briefing in this motion, the State is reproducing the most relevant material here and incorporates and relies on the remainder by reference.

⁸ See February 20, 2019 Order Re: Motion for Preliminary Injunction.

⁹ See Aff. of E. Coonradt ("Coonradt Aff.") filed in support of the State's Opposition to Motion for Preliminary Injunction ("Opp. PI Motion") at ¶ 2.

¹⁰ See Aff. of S. Dressel filed in support of Opp. PI Motion ("Dressel Aff.") at ¶ 1.

Southeast Region herring research program supervisor,¹¹ and Lauren Sill, who is ADF&G's Subsistence Division employee responsible for studying the Sitka Sound herring roe subsistence harvest.¹² (She performs this job in collaboration with STA.¹³) The court permitted limited discovery outside of the record, including limited depositions of the three ADF&G scientists.¹⁴

The depositions were not completed until the end of October, and given the fast-approaching trial date, the parties agreed to vacate the January 2020 trial.¹⁵ They also agreed to a new dispositive motion briefing schedule. In order to focus on the issues with the greatest time sensitivity—ADF&G's management of the 2020 fisheries—they agreed to direct their first round of briefing to the Tribe's claims, set forth in Count I of its complaint, that ADF&G has violated state subsistence statutes and regulations.¹⁶ The court adopted the stipulation in its order of November 15, 2019.¹⁷

¹¹ See Aff. of K. Hebert filed in support of Opp. PI Motion ("Hebert Aff.") at ¶ 1.

¹² See Oct. 30, 2019 Deposition of Lauren Sill ("Sill Depo.") pp. 4-5.

¹³ *Id.* at p. 10.

¹⁴ See Oct. 7, 2019 Order re: Motion to Quash.

¹⁵ See Stipulated Order dated Oct. 27, 2019.

¹⁶ See Joint Motion and Proposed Order to Vacate Trial, Reschedule Trial, and Establish a Briefing Schedule, dated Oct. 24, 2019 at p. 2 ¶ 4.

¹⁷ As the parties' stipulation and the court's order make clear, this round of summary judgment motions is limited to STA's claims against ADF&G in Count I. STA sets forth additional claims against the Board in Count I, but those are reserved for briefing later in the spring after the court has ruled on the instant cross-motions.

III. FACTUAL BACKGROUND

The Sitka Sound commercial sac roe herring and subsistence roe-on-branch fisheries feature a long and complicated prosecution, regulation, and management history. The State is setting forth that history in detail in order to provide the court with a comprehensive description of the fisheries and the efforts to manage them under past and current regulations. A good portion of the following describes STA proposals submitted to the Board and the ensuing testimony, deliberations, and Board decisions. While the Board's regulations are not the focus of this motion, the State recounts that history here in order to provide the court with a sense of just how thoroughly considered and vetted the Tribe's proposals have been by the Board—and how, in consequence, the Department's management of the herring resource under Board regulations reflects that thorough and comprehensive consideration.

A. The subsistence herring spawn fishery in Sitka Sound.

The spawn of Pacific herring, also known as “herring eggs,” is a traditional food of great cultural importance for indigenous coastal communities throughout the Pacific Northwest and Southeast Alaska.¹⁸ In Sitka Sound, herring return annually in numbers

¹⁸ R. ADFG 002197 (Lauren A. Sill and Margaret Cunningham, *The Subsistence Harvest of Pacific Herring Spawn in Sitka Sound, Alaska, 2016*, Alaska Department of Fish and Game, Division of Subsistence, Technical Paper No. 435, at 1 (Dec. 2017)). The Department is relying on Ms. Sill's 2016 report because the 2017 report was not published until October of 2019, and it was the data in the 2016 report that was available to the BOF when it reaffirmed that the existing regulations, including 5 AAC 27.195, provide a reasonable opportunity for subsistence uses.

not seen elsewhere in Southeast Alaska.¹⁹ At a February 1989 meeting, the Board found that herring spawn in Sitka Sound are customarily and traditionally used and recognized subsistence uses of that resource.²⁰

The primary way herring eggs are harvested for subsistence in Sitka Sound is to submerge branches of the Western hemlock in salt waters just outside the intertidal zone before spawning takes place.²¹ Each spring, usually in mid-March, herring in Sitka Sound spawn and deposit eggs on the branches of the hemlock which are then removed from the water for subsistence use of the eggs.²² Except for herring spawn-on-kelp, herring (including eggs) may be taken for subsistence uses at any time and any place in Southeast Alaska; there are no harvest limits; and no permit is required.²³

In September 2001, the Tribe met with representatives from the Department to discuss tribal members' professed difficulty in meeting their subsistence needs for herring spawn in Sitka Sound, allegedly due to intensive commercial harvest of herring.²⁴ A Tribe proposal to the Board that year requested that commercial fishing be

¹⁹ *Id.*

²⁰ *Id.*; see also 5 AAC 01.716(a)(11)(D).

²¹ R. ADFG 002197.

²² *Id.*

²³ 5 AAC 01.710(c); 5 AAC 01.725; 5 AAC 01.730; 5 AAC 01.745.

²⁴ R. ADFG 002197.

closed in the areas geographically and historically important for the subsistence herring spawn harvest.²⁵ The Board rejected that proposal at its January 2002 Board meeting.²⁶

In response to the concerns of subsistence users, the Board requested that the Department's Division of Subsistence work with the Tribe to develop a harvest monitoring program based on in-person harvest surveys.²⁷ The Board considered, but did not adopt, a permit program for the subsistence fishery that would have also provided harvest data.²⁸ Under the harvest survey program, the Tribe conducts a post-season survey whereby all known participants in the subsistence fishery are contacted to determine the results of the subsistence harvest.²⁹ The survey information is used by the Division of Subsistence to determine the quality and quantity of the subsistence harvest and whether the amount reasonably necessary for subsistence has been successfully harvested.³⁰

At the January 2002 meeting, the Board established that the amount of herring spawn reasonably necessary for subsistence uses ("ANS") in Sitka Sound was between

²⁵ *Id.*

²⁶ *Id.*

²⁷ R. ADFG 002195 & 002197.

²⁸ R. ADFG 002197.

²⁹ R. ADFG 001940 (Troy Thynes, et al., *2018 Southeast Alaska Sac Roe Herring Fishery Management Plan*, Alaska Department of Fish and Game, Division of Commercial Fisheries, at 7 (Mar. 2018)).

³⁰ *Id.*

105,000 and 158,000 pounds.³¹ This finding was based upon the best harvest estimates of the Department, including results from a 1996 household harvest survey and a 1989 harvest estimate.³²

At the same meeting the Board adopted an amended version of proposal 500, submitted by the Tribe, which resulted in regulatory language codified at 5 AAC 27.195, *Sitka Sound commercial sac roe herring fishery*. That regulation is discussed in detail in Section V, below. The Board also voted to support a memorandum of agreement (MOA) between the Tribe, the Department, and the Board, regarding collaboration between the tribe and Department in the management of Sitka Sound herring fisheries. That MOA was executed by the Tribe, Department, and Board later in 2002.³³

At a February 2009 meeting, the Board revised the ANS and increased it to between 136,000 and 227,000 pounds of herring spawn, based on the mean estimated harvest from 2002–2008, determined through the annual herring spawn harvest survey conducted by the Department and the Tribe.³⁴ The Department's survey, and therefore

³¹ R. ADFG 002197-002198.

³² R. ADFG 002198.

³³ R. BOF 000591-595.

³⁴ R. ADFG 002198.

the ANS, includes the weight of the eggs and some of the hemlock branches on which they are deposited.³⁵

In 2011, the Tribe submitted a proposal to close commercial fishing in the area of Sitka Sound that has historically been used for the subsistence harvest of herring spawn.³⁶ A compromise version of the proposal was adopted by the Board at the February/March 2012 meeting, resulting in approximately ten square miles of Sitka Sound being closed to the commercial herring sac roe fishery.³⁷

In 2017, the Tribe submitted three proposals to the Board concerning Sitka Sound herring fisheries. Proposal 99 would have established a maximum harvest rate for the commercial herring sac roe fishery of ten percent, a reduction from the regulatory maximum of twenty percent.³⁸ Proposal 105 would have increased the commercial fishing closure area in Sitka Sound by approximately fourteen square miles, on top of the ten square miles closed under state law and the two square miles closed under federal law.³⁹ Proposal 106 sought to increase the commercial fishing closure area

³⁵ R. ADFG 002201 (describing methods for weighing subsistence harvest, which includes the weight of some branches and needles).

³⁶ R. ADFG 002198.

³⁷ R. ADFG 002225-002226. In 2015, the Federal Subsistence Board approved a proposal by the Tribe to close commercial herring fishing in an additional two square miles of waters around Makhnati Island that are under federal jurisdiction.

³⁸ R. BOF 003741 (Proposal 99). *See also* 5 AAC 27.160(g) (establishing a sliding scale harvest rate for the commercial sac roe herring fishery in Sitka Sound of between twelve and twenty percent).

³⁹ R. BOF 003745-003746 (Proposal 105).

by approximately four square miles.⁴⁰ In support of each proposal the Tribe alleged that the commercial fishery was “disturb[ing] prespawning and spawning herring in this area, thus negatively affecting the subsistence fishery,” and that the proposal was needed to “to allow for a more reasonable opportunity for subsistence needs to be met.”⁴¹

The Board adopted Proposal 106 and rejected Proposals 99 and 105.⁴² During the Board deliberations on Proposal 99, which failed by a vote of two in favor and five against, two of the Board members that voted against (John Jensen and Israel Payton) stated on the record that they believed the Board’s regulations already provided a reasonable opportunity for subsistence uses of herring spawn in Sitka Sound:

CHAIRMAN JENSEN: Do the regulations provide op – a reasonable opportunity for subsistence uses? In my opinion, it does and it has. Is it necessary to reduce or eliminate other uses to provide reasonable opportunity for subsistence uses? This is a Board determination and that’s the process we’re going through now I think we are providing reasonable opportunity.

* * *

MR. PAYTON: And the success rate of basically making the ANS and some years are 100 percent and the lowest year in recent history since 2002 is 88 percent and it bounces between in the mid-90s. So yeah, some years it doesn’t make it, some years it does, but I think when it goes to reasonable opportunity at this point for this

⁴⁰ R. BOF 003746-003747 (Proposal 106).

⁴¹ *Id.*

⁴² R. BOF 003713 (Alaska Board of Fisheries, Southeast & Yakutat Shellfish and Finfish, January 11-23, 2018, Sitka, Preliminary Summary of Actions, at 14).

proposal the reasonable opportunity is still there for a diligent person.⁴³

Mr. Payton cited evidence in the record that showed that the households that attempted to harvest herring spawn for subsistence uses from 2003-2016 had a success rate of between 88-100 percent, and that over the same time frame the number of households attempting to harvest decreased from 117 to 38 households, suggesting that the failure to harvest ANS was likely due to declining participation.⁴⁴ That same document shows that the average subsistence harvest of herring spawn from 2003-2011 was 174,374 pounds, within the ANS, and the average harvest from 2012-2016 was 107,374 pounds, about 79 percent of the lower bound of the revised ANS.⁴⁵ The average number of households participating in the subsistence fishery from that first time period to the second declined by 40 percent (from 87 households to 52 households).⁴⁶ Most of the subsistence harvest is taken by a few community harvester boats, including approximately 82 percent of the harvest taken that way in 2016.⁴⁷ The most common

⁴³ R. BOF 005076-005077 (Alaska Board of Fisheries, Southeast and Yakutat Shellfish and Finfish, January 11-23, 2018, Sitka, Excerpt of Proceedings, at 84-85).

⁴⁴ R. BOF 005077. *See also* R. BOF 003785 (RC 2 Alaska Department of Fish and Game, Staff Comments On Regulatory Proposals Committee of the Whole—Groups 1–8 for the Southeast and Yakutat Finfish and Shellfish Alaska Board of Fisheries Meeting Sitka, Alaska, January 11–January 23, 2018, at 308 (“RC 2”).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ R. ADFG 002205.

reasons for not participating in the harvest were “working during the harvest/no time” or that eggs were “received from others.”⁴⁸

At the same meeting a third Board member (Alan Cain) stated that with the increased commercial closure area provided by the Board’s adoption of Proposal 106 he also agreed that there was a reasonable opportunity for subsistence uses.⁴⁹

The record for the Board’s January 2018 meeting contains other evidence showing that the failure of subsistence users to harvest the ANS has been caused by declining participation in the fishery.⁵⁰ ~~Since the Board’s determination in January 2018 that reasonable opportunity exists is not at issue for purposes of this motion, the State has not attempted to compile for the Court the administrative record which contains all of the evidence supporting the Board’s conclusion (and there was not nearly enough time to do so). That effort can wait until later in this case.~~

B. The commercial herring sac roe fishery in Sitka Sound.

The Sitka Sound commercial herring sac roe fishery dates to the 1970s. Herring are commercially harvested in Sitka Sound with purse seine gear by up to forty-seven

⁴⁸ *Id.*

⁴⁹ R. BOF 005094-005095 (Mr. Cain: “My first one is we were -- voted to protect industry’s harvest rates in proposal 99 and I think we need to be equally diligent in ensuring that the subsistence harvesters have a reasonable opportunity and I think this does it.”).

⁵⁰ *See, e.g.*, R. ADFG 002215-002216 (Sill et al., at 18-19) (noting that “Harvester numbers likely influence total harvest, but other factors also affect the harvest amount.”; also noting that the 2016 total subsistence harvest was “low,” the number of harvesters was the lowest on record, yet the total nautical miles of spawn was average).

limited entry permit holders.⁵¹ The herring are then processed and the roe extracted. Fishery openings and closures are implemented by Department emergency order pursuant to Board management plans and regulations.⁵² Before allowing commercial fishing to occur the Department is required to assess the abundance of mature herring for each stock.⁵³ The Sitka Sound commercial sac roe herring fishery may only occur if the Department concludes that the spawning biomass of the herring stock is at least 25,000 tons.⁵⁴ If this threshold is reached, the guideline harvest level (“GHL”) for the fishery ranges from twelve to twenty percent of the spawning biomass, with the percentage increasing as the biomass increases.⁵⁵

The Department monitors herring distribution and roe quality prior to and during the fishing periods.⁵⁶ Monitoring methods include aerial surveys, vessel sonar surveys, and test fishing.⁵⁷ The Department coordinates with industry vessels to conduct test fishing as necessary to determine roe quality.⁵⁸ The test fishing vessels will contact Department biologists on the grounds to monitor fishing locations and plan for transport

⁵¹ 20 AAC 05.320(b)(1); Alaska Commercial Fisheries Entry Commission (“CFEC”) Limited Fisheries Status Report, https://www.cfec.state.ak.us/astatus/B6410P_C.HTM.

⁵² 5 AAC 27.110(b)(1)(D) & (E).

⁵³ 5 AAC 27.190(3).

⁵⁴ 5 AAC 27.160(g).

⁵⁵ *Id.*

⁵⁶ R. ADFG 001940 (Thynes, et al., at 7).

⁵⁷ *Id.*; Coonradt Aff. ¶¶ 7-8.

⁵⁸ R. ADFG 001940 (Thynes, et al., at 7); Coonradt Aff. ¶ 7.

of herring samples to a central location for analysis by industry technicians.⁵⁹ The areas open to fishing will depend on the distribution of herring, the need to provide for a fishery that will harvest good quality herring, and the need to provide a reasonable opportunity for subsistence.⁶⁰ As noted, two Board actions in 2012 and 2018 together closed an approximately fourteen square mile area to commercial fishing; this area was considered to include the traditional area where subsistence herring spawn harvest has been concentrated.⁶¹ Otherwise, the Southeastern Alaska Area is closed to commercial fishing for herring except when specific areas are opened by emergency order.⁶²

Department emergency orders opening and closing areas to commercial fishing are announced over the VHF radio.⁶³ Commercial fishermen receive short notification of opening and closing times--as little as 1-2 hours; short notification is necessary to provide fishing opportunities prior to major spawning and to maintain the harvest at desired levels.⁶⁴

Limitations on processing capacity often require multiple openings to harvest the GHF for the commercial fishery, and depending on the amount of harvest on any given day, it may be necessary to provide one or more days between harvesting opportunities

59 *Id.*

60 *Id.*

61 R. ADFG 002215 (Sill, et al., at 18).

62 5 AAC 27.110(a).

63 R. ADFG 001935 (Thynes, et al., at 2).

64 *Id.*

to ensure processing capacity is available.⁶⁵ The Department must remain flexible and adapt specific opening target harvest levels in consideration of in-season assessment of herring distribution and quality, progress of the spawn, changes in available processing and tendering capacity, and input from industry representatives.⁶⁶

To forecast the Sitka Sound herring biomass, the Department uses an age-structured assessment model with a long time series of egg abundance, and age composition data from Department surveys conducted during and following the spring fishery.⁶⁷ Herring egg abundance is estimated using aerial surveys, designed to map the length of shoreline receiving spawn, and dive surveys, which are used to estimate the density of eggs and average width of the spawn.⁶⁸ Based on the Department's sophisticated data collection and modeling, the Department's fishery scientists believe that the Sitka Sound herring stock is at an intermediate level compared to estimates of biomass dating back to 1926.⁶⁹ The Department manages the Sitka Sound herring stock conservatively and for sustained yield.⁷⁰

C. Board regulations for the management of the Sitka Sound commercial sac roe herring fishery.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Dressel Aff. ¶¶ 8-10; Hebert Aff. ¶¶ 9-14.

⁶⁸ Dressel Aff. ¶ 9; Hebert Aff. ¶¶ 8-14.

⁶⁹ Dressell Aff. ¶ 26.

⁷⁰ *Id.* ¶ 29.

The Board has adopted numerous regulations to govern the management of the Sitka Sound commercial sac roe herring fishery. Some regulations apply to herring fisheries generally. For example, 5 AAC 27.035, *Closure of registration areas*, directs the Department to monitor herring stocks and provides factors the Department may consider in closing entire registration areas or a portion thereof to commercial fishing. In 5 AAC 27.059, *Management guidelines for commercial herring sac roe fisheries*, the Board has authorized the Department to manage the commercial herring fisheries so as to enhance the value of the landed product. This regulation allows the Department to manage herring sac roe fisheries so that fishing occurs in areas and at times when sampling and other factors show that the herring roe content of the catch is likely to be highest and the catch will be composed of the largest herring.⁷¹

Other regulations apply only to the Southeastern Alaska Area, which includes Sitka Sound. For example, 5 AAC 27.190, *Herring Management Plan for Southeastern Alaska Area*, lists a series of steps for the Department to take in managing commercial herring fisheries in the Southeastern Alaska Area, some mandatory, such as the requirement to assess the abundance of mature herring for each stock, and some discretionary.

Some of the Board's regulations apply only to Sitka Sound. In 5 AAC 27.160(g), the Board has determined that the threshold harvest level for the Sitka Sound commercial sac roe herring fishery is 25,000 tons, and provided a sliding scale harvest

⁷¹ 5 AAC 27.059(a)(1) & (2).

rate of between twelve and twenty percent. In 5 AAC 27.150(7), the Board has directed the Department to keep commercial fishing closed in a large area considered to be the traditional subsistence harvest areas. And, in 2002, the Board adopted Proposal 500 which resulted in regulatory language codified at 5 AAC 27.195, *Sitka Sound commercial sac roe herring fishery*. This is the regulation the Tribe believes requires the Department to both delay the commercial fishery at least until herring spawn is present on branches, and assess and consider the quality and quantity of that spawn and all other relevant information before deciding how to manage and restrict the commercial fishery in order to provide a reasonable opportunity for subsistence uses.

D. Proposal 500 and 5 AAC 27.195.

Proposal 500 was submitted by the Tribe and sought to require the Department to “disperse [the commercial sac roe herring fishery] in relation to geographic areas” and to have “commercial fishery management ... reflect” the “important areas to subsistence herring egg harvest.”⁷² In support of the proposal the Tribe noted that in 2001 the entire commercial harvest was taken from an area immediately adjacent to the core subsistence area which the Tribe alleged had greatly reduced the subsistence harvest.⁷³

At the January 2002 meeting, the Board approved substitute language for Proposal 500: the substitute language included the dispersal concept (the substituted language used the term “distribute”), called for the Department to “recognize that

⁷² Affidavit of Glenn Haight filed in support of State’s Opp. to PI Motion (“Haight Aff.”) at ¶ 2, Ex. 1, at 5.

⁷³ *Id.*

quality and quantity of herring roe on branches and herring sac roe is an important consideration in the management of the subsistence and commercial sac roe fisheries,” and would have required a permit with a harvest reporting requirement to participate in the fishery.⁷⁴ The Board subsequently amended the proposal to remove the permit requirement in favor of a harvest survey program.⁷⁵

During deliberations on the proposal, Board member Virgil Umphenour, who chaired a committee of the Board that considered the proposal, acknowledged that the subsistence fishery can be challenging because herring do not always spawn in the areas where spawn has been traditionally taken for subsistence, and there is no way to predict whether that will happen:

MR. UMPHENOUR: ... And the thing that was interesting about this was that there is no way to predict where the herring are going to -- where they're going to deposit their spawn on the beaches. The traditional area where the people around Sitka like to put their branches in to get the herring roe on them, that there's been many times that the herring just flat did not spawn there.⁷⁶

Mr. Umphenour also acknowledged other challenges, including that “the timeframe [of the subsistence fishery] can be extremely short at times,” that users have to be “ready to move in a very rapid manner with the necessary equipment that they’re going to need [to have] the odds of having a successful subsistence fishery,” and that it

⁷⁴ *Id.* at 12-13; R. BOF 000054-000598 (Alaska Board of Fisheries, Kodiak and Chignik Finfish, Anchorage, Alaska, Jan. 7-14, 2002, Excerpt of Proceedings, at 4).

⁷⁵ *Id.*

⁷⁶ *Id.* at 4-5.

takes “a lot of planning to do that [and] the important thing is the coordination of all the information on where the herring actually are, because it changes from day to day.”⁷⁷

He noted ongoing discussions between the Department, commercial industry, and subsistence users about information sharing.⁷⁸

After discussing these concerns, Mr. Umphenour stated his intent for Proposal 500 was to “come up with something that both sides would be -- would be acceptable to both sides on how to disperse the herring fishery, the commercial fishery, so as if it’s practical to do that so that it would not conflict with the subsistence fishery.”⁷⁹ Later, another Board member (Dan Coffey) made it clear that the intent of the dispersal concept in the proposal was to account for the fact that it is impossible to know where herring are going to spawn:

MR. COFFEY ... He talked about RC-121 that showed the -- where the spawn was and the difficulty in measuring where the spawn -- or determining in advance where the spawn would occur and then what those maps show with the red highlights of spawn is that spawn 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. 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.⁸⁰

⁷⁷ *Id.* at 6.

⁷⁸ *Id.* at 7.

⁷⁹ *Id.* at 8.

⁸⁰ *Id.* at 17-18.

Mr. Coffey asserted that the proposal would leave it up to the in-season manager to decide whether to disperse the commercial harvest:

MR. COFFEY ... [The proposal] does leave the determination of reasonable opportunity to the in-season manager. Is it -- are the people being afforded a reasonable opportunity or not? Do I have to disperse the fleet or not to afford a reasonable opportunity? These are in-season management decisions which the Board need not make.⁸¹

Nowhere in the record for Proposal 500 is there any evidence that the Board intended the Department to delay the commercial fishery until after the first spawn, nor is there any evidence that the Board intended the Department to assess the spawn on branches in-season in order to manage the commercial fishery. The original purpose of the proposal, and the Board's intent as reflected in the record, was simply to provide a tool for the Department to disperse the commercial harvest, especially to protect the core subsistence harvest areas.

That original interpretation of 5 AAC 27.195 has been confirmed more recently. At the January 2018 meeting, during the deliberations on Proposal 99, Board member Fritz Johnson asked the Department how it implements 5 AAC 27.195, and specifically asked whether the Department assesses the quality of the "egg deposition" in managing the commercial fishery. Then-Director of the Division of Commercial Fisheries, Scott Kelley, responded that the Department interprets that regulation as direction to avoid taking a large amount of herring near the areas closed to commercial fishing "should they present themselves there":

⁸¹ *Id.* at 19-20.

MR. JOHNSON: Thank you. So I assume whatever is available for subsistence, egg deposits would come from the reigning 80 percent of the biomass that's left over after -- you know, assuming a perfect 20 percent exploitation. It's assumed that that will provide enough for subsistence.

DR. DRESSEL: Yes, that is correct.

MR. JOHNSON: ... And it makes me wonder if there's a mechanism in the way that the fishery -- the sac roe fishery is prosecuted that would take, you know, that -- those subsistence needs into account, not just, you know, for volume of egg deposition, but for quality and is that -- I'm getting the sense that that's not part of the Department's mandate in the prosecution of this -- of the sac roe fishery certainly, *but I'm wondering if there is attention given to that or if it could be incorporated into the management plan or if there's any language in there that suggests that it already is.* So that's kind of a broad question, but I'd appreciate your thoughts on that.

VICE CHAIR MORISKY: Director Kelley.

DIRECTOR KELLEY: Yes, Mr. Chairman. And, you know, I sat here three Board meetings ago and had a -- there was a similar conversation and the eventual outcome from that discussion was that 5 AAC 27.195, which is the Sitka Sound commercial sac roe herring fishery management plan. And part of it and one of the very important parts of that management plan is to 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 the subsistence uses specified. That's the ANS that is in a different chapter. So that regulation came from that type of discussion. Mr. Chair.

MR. JOHNSON: And if I could follow up, how is that manifest in the way the fishery is managed?

DIRECTOR KELLEY: Mr. -- through the Chair, Mr. Johnson. What we do -- and I think the best way to characterize that as far as visual -- things that you have seen is the spawn maps with the herring fishery areas that Mr. Hebert had in his oral report. And what we do, you know, we -- on a daily basis we -- the area management biologist flies the area, identifies spawn first as our top and then also aerial pockets of fish. I mean you can see the herring on the beach. You've seen them in Togiak. So that's like

the first of the day of trying to figure out where the fish are and how we're going to fish -- perhaps fish them. And then the vessel, the research vessel's out doing sonar surveys for fishable herring and the third part of whether we fish or not is the test fisheries that you've heard quite a bit about.

So knowing -- of course, we -- as you well know, we have commercial closed waters that the Board adopted some -- a couple of cycles ago. *So as we are looking around open commercial closed waters, we're trying to make sure that we try and -- we don't want to take all the herring -- we deliberately do not take all of the herring should they present themselves there.* Of course it's totally up to them, but the herring in waters directly adjacent all around that area. That's one of the reasons we jump -- we fished in the Hayward Strait area, you know, as you saw from the maps a fair distance away from Sitka and the commercial closed waters area. But again, we're very cognitive of implementing that part of the regulation, but again, it's also totally predicated on where the herring go and present themselves in commercially fishable congregations for quality.

So that maybe is a little bit round about, but you can see from where we distributed the fishery that we're trying to adopt that -- manage around that regulation. I hope that helps. Mr. Chair.⁸²

The Tribe's view, that the regulations require the Department to delay opening the commercial fishery until after herring spawn, has been specifically rejected by the Board. In 2014, Jeff Feldpausch submitted Proposal 118 to the Board, which would have required the Department to allow only fifty percent of the guideline harvest level to be taken in the commercial fishery, after which the Department would have to allow "twenty-five [] percent of the anticipated nautical miles of spawn to occur prior to harvest of the remaining [guideline harvest level]."⁸³ In other words, Proposal 118

⁸² R. BOF 004354-004660 (emphasis added).

⁸³ R. BOF 003107-003116 (Proposal 118).

sought to amend the regulations to require a delay in the commercial fishery that would have been similar to the delay the Tribe alleges *is already required under 5 AAC 27.195*.

The Board unanimously rejected Proposal 118.⁸⁴ In deliberating the proposal, Vice Chair John Jensen explained that the “whole idea” of the commercial fishery is to harvest prior to the spawn:

VICE CHAIR JENSEN: I’ll talk again if it’s my turn. No, I’m just worried about this proposal because the *whole idea is to get on the fish before they start spawning and harvest some of the really good quality larger fish*. And then after that you’re -- you run a risk of catching spawn outs in your fishing. So it’s always a risk after the first fishery that you’re going to end up getting spawn out fish and - - which don’t have very much value and lowers the price of the -- of course it lowers the price of the product.⁸⁵

Even though Mr. Coffey explained that his intent concerning Proposal 500 was to leave it up to the in-season manager whether to disperse the commercial fleet, the current in-season manager for the Sitka Sound for the Department implements 5 AAC 27.195 by distributing commercial fishery openings throughout the management area regardless of whether it is necessary to do so.⁸⁶ The in-season manager also attempts to keep commercial fishery openings away even from the now-closed core

⁸⁴ R. BOF 003081-003092 (Alaska Board of Fisheries, February 23-March 3, 2015, Board of Fisheries Southeast and Yakutat Finfish, Sitka, AK Preliminary Summary of Actions, at 1).

⁸⁵ R. BOF 003473-003699 (Alaska Board of Fisheries, Southeast and Yakutat Finfish, Feb. 23-Mar. 3, 2015 Sitka, Alaska Excerpt of Proceedings, at 60 (emphasis added)).

⁸⁶ Coonradt Aff. ¶ 11.

subsistence areas.⁸⁷ The original intent of Proposal 500 was to protect those areas, but the Board subsequently closed those areas by regulation. In other words, the Department implements 5 AAC 27.195 in a way that is even more protective of the subsistence fishery than what the Board probably intended.

E. Post-January 2018 events relevant to this case.

1. Results of the 2018 Sitka Sound herring fisheries.

The Department calculated the guideline harvest level for the 2018 Sitka Sound commercial sac roe herring fishery to be 11,128 tons based on a 20 percent harvest rate.⁸⁸ The actual harvest was only 2,926 tons.⁸⁹ Among the reasons for the failure to meet the guideline harvest level in 2018 were that the processors required larger herring than were forecast to return in significant quantity, and the fishery did not open unless these larger herring were present in sufficient quantity.⁹⁰ Also, the herring stayed in deep waters making them at times inaccessible to test fishing prior to spawning.⁹¹ Once

⁸⁷ *Id.*

⁸⁸ Alaska Department of Fish and Game, Division of Commercial Fisheries, News Release, *Sitka Sound Herring Fishery Announcement*, (Dec. 15, 2017) (available at <http://www.adfg.alaska.gov/static/applications/dcfnewsrelease/883084385.pdf>).

⁸⁹ Alaska Department of Fish and Game, Division of Commercial Fisheries, News Release, *Sitka Sound Sac Roe Herring Fishery Announcement*, (April 27, 2018) (available at <http://www.adfg.alaska.gov/static/applications/dcfnewsrelease/903692282.pdf>).

⁹⁰ Coonradt Aff. ¶ 12.

⁹¹ *Id.*

the herring spawned, the commercial fishery did not open because herring of sufficient quality were not found to fulfill market requirements.⁹²

Harvest data was only very recently published for the 2017 subsistence herring spawn fishery. The 2018 data has not been published, but the draft report indicates that, like 2017, the subsistent harvest was poor. The reasons for the poor subsistence harvests appear to include the facts that much of the spawn occurred outside of the core area, and many harvesters set gear long before the first spawn occurred.⁹³ It has become common for subsistence users to set branches where herring have frequently spawned in the past with the hope that the herring will spawn there again, but that does not always happen.⁹⁴ A better approach is to wait until the spawn starts, then set branches where spawn is occurring.⁹⁵ One subsistence user who followed this latter approach had one of his best harvest years ever in 2018.⁹⁶

Between 1964 through 2018, nearly all of Sitka Sound's shoreline has at times been used by herring for spawning habitat.⁹⁷ The shoreline around Sitka and the surrounding islands forms a focal point around which herring spawn is distributed in

92 *Id.*

93 *Id.*

94 *Id.*

95 *Id.*

96 *Id.* ¶ 19.

97 Hebert Aff. ¶¶ 16-17.

many years, but not always.⁹⁸ The spawning pattern in 2018, which was outside the traditional subsistence harvest areas, also occurred in 1966 and 1967.⁹⁹ The reasons why herring spawned outside the traditional subsistence harvest area in 2018 are unclear, but the Department's fishery scientists are not able to conclude that the commercial fishery was to blame.¹⁰⁰

Although spawn mileage observed in 2018 was lower than typically seen, this was offset by the width of the spawn being much wider than typically seen, resulting in a spawn area size that was typical.¹⁰¹ Egg density in 2018 was the highest observed over the last five years and above average over the last 30 years, and the number of days of spawn, the overall duration, and the timing of the spawn was typical of what has been observed since the 1980s.¹⁰²

The Department estimates that approximately 12,250,000 pounds of herring eggs were deposited in Sitka Sound in 2018.¹⁰³ This exceeds by at least 54 times the upper limit of the amount of the range that the Board of Fisheries has determined is necessary for subsistence (136,000 – 227,000 pounds of herring spawn on branches).¹⁰⁴ As with

98 *Id.* ¶ 16.

99 *Id.*

100 *Id.* ¶ 18.

101 *Id.* ¶ 21.

102 *Id.*

103 *Id.* ¶ 20.

104 *Id.*

the biomass, the amount of herring spawn deposited in Sitka Sound changes over time but appears to be stable.¹⁰⁵

2. The Tribe's request to change the Board's agenda for the 2018-19 meeting cycle.

The Board meets on a three-year cycle, such that it accepts proposals for specific fisheries once every three years. The Sitka Sound herring fishery is next scheduled to be considered by the Board during its 2020-21 meeting cycle.¹⁰⁶ In August 2018, a tribal member submitted, pursuant to 5 AAC 39.999, a request that the Board change its agenda for the 2018-19 meeting cycle and once again consider changes in the regulations for Sitka Sound herring fisheries.¹⁰⁷ The request asked the Board to consider closing the Sitka Sound commercial sac roe herring fishery for at least three years because of concerns about the subsistence fishery.¹⁰⁸

The Board considered the Tribe's request at its October 2018 work session. At the meeting, the Board heard testimony from the Department that the subsistence fishery likely did not harvest the ANS in 2018 because "[n]early all spawning activity

¹⁰⁵ *Id.*

¹⁰⁶ See Alaska Board of Fisheries, 2020/2021 Tentative Meeting Schedule (available at http://www.adfg.alaska.gov/static/regulations/regprocess/fisheriesBoard/pdfs/2020-2021/2020-2021_schedule.pdf).

¹⁰⁷ R. BOF 004668-004669 (ACR 10). ACR 10 was submitted by Louise Brady and Peter Bradley; Ms. Brady is a tribal member. *Id.*

¹⁰⁸ *Id.*

took place outside” the core subsistence harvest area.¹⁰⁹ The Department testified that the spawning pattern in 2018 had occurred before and it was “not unusual for major spawning to occur in areas where it was observed in 2018.”¹¹⁰ The Department further testified that the “preliminary results indicat[ed] herring population size did not change appreciably between 2017 and 2018.”¹¹¹ Board members noted that the Board had deliberated this fishery extensively the previous winter, found that the Tribe’s request did not meet the regulatory criteria, and denied the request on procedural grounds.¹¹²

IV. ARGUMENT

A. Summary Judgment Standard

Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.¹¹³ Once the moving party offers admissible evidence showing both the absence of any genuine factual dispute and the legal right to a judgment, the opposing party must produce admissible

¹⁰⁹ R. BOF 004839-004893 (Alaska Board of Fisheries, Work Session, Oct. 15-16, 2018 Anchorage, Alaska Excerpt of Proceedings, at 4).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 5.

¹¹³ Alaska R. Civ. P. 56 (c); *Joseph M. Jackovich Revocable Trust v. DOT*, 54 P.3d 294, 297 (Alaska 2002); *French v. Jadon, Inc.*, 911 P.2d 20, 23 (Alaska 1996); *Broderick v. King's Way Assembly of God Church*, 808 P.2d 1211, 1215 (Alaska 1991); *Concerned Citizens of South Kenai Peninsula v. Kenai Peninsula Borough*, 527 P.2d 447, 450 (Alaska 1974).

evidence “reasonably tending to dispute or contradict the movant’s evidence.”¹¹⁴ To defeat summary judgment, a party must put forth admissible evidence of specific facts showing a genuine, material factual dispute.¹¹⁵ This requires more than a scintilla of contrary evidence.¹¹⁶ “Mere assertions of fact in pleadings and memoranda are insufficient for denial of a motion for summary judgment.”¹¹⁷ The Alaska Supreme Court has affirmed summary judgment where a party has provided only “naked assertions” or “meager statements unsupported by other evidence.”¹¹⁸ Similarly, conclusory statements in opposing affidavits are not sufficient to avoid summary judgment.¹¹⁹ And claims must be based on more than “unsupported assumptions and speculation.”¹²⁰

¹¹⁴ *Chikan v. ARCO Alaska, Inc.*, 125 P.3d 335, 339 (Alaska 2005); *French*, 911 P.2d at 23; *Yurioff v. American Honda Motor Co.*, 803 P.2d 386, 389 (Alaska 1990); *Wassink v. Hawkins*, 763 P.2d 971, 973 (Alaska 1988); *Gregor v. City of Fairbanks*, 599 P.2d 743, 746 (Alaska 1979); *State, Dept. of Highways v. Green*, 586 P.2d 595, 606 n. 32 (Alaska 1978).

¹¹⁵ *Chikan*, 125 P.3d at 339.

¹¹⁶ *Chikan*, 125 P.3d at 339. A factual dispute will not prevent summary judgment unless the fact at issue is material. A fact is not material if, as a matter of law, the fact would make no difference in the outcome of the case. *Whaley v. State*, 438 P.2d 718, 720 (Alaska 1968).

¹¹⁷ *Green*, 586 P.2d at 606 n. 32 (internal citations omitted).

¹¹⁸ *Meyer v. State*, 994 P.2d 365, 370 (Alaska 1999) (Fabe, J., dissenting); *see also*, *Yurioff*, 803 P.2d at 389; *Martech Construction Co. v. Ogden Environmental Services, Inc.*, 852 P.2d 1146, 1149-50 (Alaska 1993).

¹¹⁹ *West v. City of St. Paul*, 936 P.2d 136, 140 (Alaska 1997); *Ratcliff v. Security National Bank*, 670 P.2d 1139, 1142 n. 6 (Alaska 1983).

¹²⁰ *Mahan v. Arctic Catering, Inc.*, 133 P.3d 655, 661 (Alaska 2006); *French*, 911 P.2d at 25.

B. The State is entitled to summary judgment on the claims STA makes against ADF&G in Count I of its complaint.

The Tribe devotes three paragraphs in Count I to its allegation that the Department has violated Alaskan subsistence statutes and regulations. While it alleges that the Department has violated AS 16.05.258, its real complaint is that ADF&G has not complied with the requirements of 5 AAC 27.195(a)(2) and (b).¹²¹ Specifically, it alleges that:

- Subsistence users have failed to harvest “the amount necessary for subsistence”¹²² for most of the past decade;¹²³
- ADF&G has “failed to implement changes” that provide a “reasonable opportunity and priority for subsistent harvest;”¹²⁴
- ADF&G prioritizes meeting the “guideline harvest level”¹²⁵ in its management of the commercial fishery and in doing so prevents spawning herring from making it to the “subsistence harvest area” in sufficient numbers to provide the “quality and quantity” of herring roe to meet ANS;¹²⁶ and
- ADF&G’s management practices “force STA subsistence users to compete with the commercial fishery for the opportunity necessary to meet their subsistence needs.”¹²⁷

¹²¹ See Complaint at ¶ 72.

¹²² The “amount necessary for subsistence,” or “ANS,” is a term of art. It is discussed in more detail below.

¹²³ Complaint at ¶ 72.

¹²⁴ *Id.*

¹²⁵ “Guideline harvest level,” or “GHL” is a term of art. It is discussed in more detail below.

¹²⁶ Complaint at ¶ 73.

¹²⁷ Complaint at ¶ 74.

1. The Department has not, as a matter of law, violated AS 16.05.258.

The Tribe alleges that the Department violated AS 16.05.258—often referred to as the subsistence priority statute. The Tribe’s allegation notwithstanding, the Department could not—and therefore did not—violate that statute. AS 16.05.258 directs the Board to make, in the course of adopting regulations, determinations about the viability of fish stocks, assess the extent to which different user groups can utilize the resource and still provide for sustainable yield, and grant subsistence users a priority. The statute does not impose on the Department *any* responsibility for making these judgments and allocations. Rather, the only requirement the Legislature imposes on the Commissioner of ADF&G in that statute is to provide the BOF with information that will allow it to determine whether a stock is “customarily and traditionally taken or used for subsistence.” That question is not at issue here. Everyone agrees that herring roe are harvested and extensively used for subsistence. The court should find, as a matter of law, that the Department has not violated AS 16.05.258.

2. The Department has not, as a matter of law, violated 5 AAC 27.195(a)(2) or (b).

All of the four claims directed at ADF&G set forth in Count I of the Tribe’s complaint and excerpted above are necessarily grounded in the Tribe’s allegation that the Department has failed to manage the Sitka Sound herring fisheries according to the requirements of 5 AAC 27.195. That regulation is comprised of two subsections relevant to the Tribe’s claims. The first, 5 AAC 27.195(a)(2), provides that the

Department shall:

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).¹²⁸

The second, 5 AAC 27.195(b) provides that the Department:

shall consider the quality and quantity of herring spawn on branches . . . and herring sac roe when making management decisions regarding the subsistence herring spawn and commercial sac roe fisheries”

As an initial matter, when interpreting Board regulations the Court should consider the interpretations of the regulations by the Board and the Department, including the original intent of the regulation. The Court should give great weight to the Board’s and Department’s interpretation of the regulations and uphold their interpretation if reasonable.¹²⁹ The Court should give even more deference to an agency’s interpretation that is “longstanding and continuous.”¹³⁰

¹²⁸ 5 AAC 27.195(a)(2) (emphasis added).

¹²⁹ *Handley v. State, Dep’t of Revenue*, 838 P.2d 1231, 1233 (Alaska 1992) (when agency interprets its own regulation, court should apply the “the reasonable and not arbitrary test. This standard is not demanding”); *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.”); *United States v. RCA Alaska Communications, Inc.*, 597 P.2d 489, 498 (Alaska 1978) (interpretation entitled to great weight); *State, Dep’t of Highways v. Green*, 586 P.2d 595, 602 n.21 (Alaska 1978) (interpretation given effect unless plainly erroneous).

¹³⁰ *Marathon Oil Co. v. State, Dep’t of Nat. Res.*, 254 P.3d 1078, 1082 (Alaska 2011).

The Board's and the Department's interpretation of 5 AAC 27.195 has remained the same since it was adopted: the regulation, particularly subsection (a)(2), allows the Department to distribute the commercial harvest throughout the management area if necessary as a way of protecting the areas where herring spawn on branches are traditionally taken for subsistence.¹³¹

Neither the Board nor the Department has ever interpreted any part of 5 AAC 27.195 as requiring the Department to delay the commercial fishery or make an in-season assessment of the herring spawn on branches.¹³² Such an interpretation would fundamentally change the commercial fishery, and would conflict with numerous other regulations, including those that establish the guideline harvest level and allow the Department to manage the fishery to take herring with the highest roe content (i.e., to take herring before they have spawned).¹³³ As Board member Jensen put it in 2015, when the Board rejected a proposal to delay the commercial fishery until after some spawning had taken place, the "whole idea" of the commercial fishery is to harvest prior to the spawn.

The genesis of 5 AAC 27.195(a)(2) is discussed at length, above. In summary, subsection (a)(2) was born out of a desire to disperse, or distribute, the commercial

¹³¹ Coonradt Aff. ¶¶ 10-11.

¹³² *Id.* ¶¶ 11-15.

¹³³ Coonradt Aff ¶¶ 14-15, 18 (Tribe's interpretation of regulation would fundamentally change the fishery, make achieving the guideline harvest level difficult or impossible); 5 AAC 27.059(1) (Department may manage sac roe herring fisheries so that the "herring roe content of the catch is likely to be highest").

harvest away from the “core” areas where subsistence harvests had historically—and successfully—occurred. This aim was substantially achieved when the Board went beyond granting the area manager the discretion to distribute the commercial harvest away from the core area and actually closed the core area (by regulation in 2012 and 2018) to *any* commercial harvest at *any* time.

Moreover, there is *no* factual dispute that Mr. Coonradt, the Department’s area manager, continues to distribute the commercial harvest away from the core area, or other subsistence areas, when he deems it necessary to ensure subsistence harvest. In his deposition of July 30, 2019, counsel for the Tribe asked him whether he would open an area to commercial fishing if he had data suggesting a trend that he thought justified not opening the area in order to provide reasonable opportunity for subsistence. Mr. Coonradt replied that he would “likely look elsewhere” for a different place to open the commercial fishery.¹³⁴ Similarly, in his affidavit filed in support of the State’s opposition to the Tribe’s motion for preliminary injunction, Mr. Coonradt testified that:

The department continues to implement 5 AAC 27.195(a)(2) by distributing commercial fishery openings throughout the management area and away from the closed area whenever possible.¹³⁵

Asked during his deposition to explain that statement, Mr. Coonradt replied:

We try to have openings away from the commercial closed area whenever we possibly can. . . . So if we have – if we have

¹³⁴ Coonradt Dep. at p. 134.

¹³⁵ Affidavit of Eric Coonradt filed in support of the State’s opposition to the Tribe’s motion for a preliminary injunction (“Coonradt Aff.”) at ¶ 11.

opportunities close to the closed area or let's say we have an opportunity right on the border of the closed area and we also have an opportunity a mile away. We would, everything being equal, we would choose the opportunity further away.¹³⁶

Mr. Coonradt then gave an example of one recent occasion when he made such a decision to distribute the commercial opening by area in order to ensure the subsistence harvest.¹³⁷

Thus, there is absolutely *no* factual dispute that the commercial harvest is being distributed by location (away from the core area both because the area is closed and because Mr. Coonradt makes additional distribution decisions to benefit subsistence) and by the timing of openings.¹³⁸ There simply can be no dispute that the Department is interpreting 5 AAC 27.195(a)(2) in a manner commensurate with the Board's intent *and* it is complying with the requirements.

The Tribe's claim that 5 AAC 27.195(b) requires the Department to make an in-season assessment of the quality and quantity of the spawn on branches is meritless. That regulation on its face does not require an in-season assessment, and the Department has never interpreted that regulation to require an in-season assessment and

¹³⁶ Coonradt Dep. at p. 51.

¹³⁷ *Id.* at pp. 51-53.

¹³⁸ It is important to note that just because Mr. Coonradt and the Department have never interpreted the regulation to require commercial openings to be delayed until after the first spawn (as the Tribe has requested the Board to require) does not mean that the Department is failing to distribute the commercial harvest by time. It just has not distributed the harvest on that *particular* schedule because doing so would fundamentally alter the commercial fishery—and potentially render it non-viable. Coonradt Aff. at ¶ 14-15.

has never performed that kind of assessment.¹³⁹ Instead, the Department collects data regarding the quality and quantity of herring spawn on branches through a collaborative effort with the Tribe, consisting of a post-season survey of subsistence users.¹⁴⁰ The Department has collected this data the same way since 5 AAC 27.195 was adopted.¹⁴¹ Indeed, at the 2002 meeting when 5 AAC 27.195 was adopted, the Board specifically approved of the Department's plan to monitor the quality and quantity of herring spawn on branches through a post-season survey, and rejected an alternative plan to acquire that data through a permit requirement.¹⁴²

Any suggestion that the regulation requires the Department to assess a subsistence fishery in-season in order to manage and restrict a commercial fishery using the same stock is inconsistent with the Board's general practice of managing fisheries.¹⁴³ The Board's general practice for such fisheries has been to provide a reasonable opportunity for subsistence uses by adopting few if any restrictions on the subsistence fishery, and providing for and restricting commercial uses so that enough of the surplus is available for subsistence uses and so that the stock is managed for

¹³⁹ Coonrad Aff. ¶¶ 9, 12.

¹⁴⁰ *Id.* ¶ 9.

¹⁴¹ Sill, et al., at 2 (annual subsistence harvest monitoring surveys began in 2002).

¹⁴² R. BOF 000071.

¹⁴³ Bowers Aff. ¶ 12 (filed in support of State's Opp. Motion for PI).

sustained yield.¹⁴⁴ The Sitka Sound herring fisheries follow this general practice.¹⁴⁵ The Board will then periodically review subsistence fisheries to ensure that reasonable opportunity is still being provided, as the Board did in January 2018 for the Sitka Sound fishery. When on rare occasions the Board wishes the Department to monitor a subsistence fishery in-season and make in-season adjustments, it will clearly specify that in regulation.¹⁴⁶ Whether a subsistence harvest is within the ANS is one factor used to determine whether reasonable opportunity is being provided, but the Department does not manage fisheries to achieve ANS; it manages to ensure that the Board's regulations providing reasonable opportunity are implemented.

The Department is clearly assessing the quality and quantity of herring roe when making management decisions regarding the Sitka Sound herring fisheries; it just is not necessarily making those assessments in season, and it is not required to do so. No issues of material fact exist with respect to the Department's compliance with the requirements of 5 ACC 27.195, and the court should grant the State summary judgment.

¹⁴⁴ *Id.* ¶ 10. The Tribe's claim that the subsistence fishery does not enjoy a preference because the commercial fishery is the first to harvest is meritless. Tribe Br. at 26. The commercial fishery harvests first because of the way the fisheries are conducted, the subsistence fishery being conducted closer to shore and after spawning. Many fisheries work that way, including the fisheries at issue in *Rosier*, where the commercial fishery took chum salmon long before they reached the places where they were harvested for subsistence.

¹⁴⁵ *Id.* ¶ 11.

¹⁴⁶ *See, e.g.*, 5 AAC 01.244(b)(2)(G)(ii) (“[I]f the subsistence harvest reports indicate that 1,500 or more northern pike have been harvested during the period from January 1 until these waters are free of ice, the commissioner shall close, by emergency order, these waters [in the Yukon Area] to [subsistence] fishing for northern pike through the ice.”).

3. The Tribe's allegations that ADF&G has violated state law by failing to implement changes that provide a reasonable opportunity and priority for subsistent harvest and that it prioritizes the commercial fishery, including meeting the GHL, at the expense of subsistence are legally insufficient.

As noted above, the Tribe cannot show, as a matter of law, that ADF&G has violated any state statute or regulation. But its allegations in Count I also state a more general complaint: that the totality of ADF&G's management violates some other, unspecified law. That claim is legally insufficient to state a claim, and the court should dismiss Count I as to ADF&G for that reason, as well.

The 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. The Tribe has not pointed to any such newly developed information, and the Department is not aware of any. The Department simply may not take action to increase opportunity for subsistence uses at the expense of commercial uses premised on the notion (rejected by the Board) that further commercial restrictions are needed to ensure a reasonable opportunity for subsistence uses.

The rule that the Department may not take actions that effectively veto a decision of the Board comes from the Alaska Supreme Court's decision in *Peninsula Marketing Ass'n v. Rosier*, which also involved a conflict between commercial and subsistence

users.¹⁴⁷ This case is very much like *Rosier*. In *Rosier*, just like here, subsistence and commercial users were harvesting from the same stock of fish, the commercial users had the first harvest opportunity, and the subsistence users alleged not enough fish were left over for subsistence.¹⁴⁸ In *Rosier*, like here, the Board considered a proposal to further restrict the commercial fishery and the Board adopted some restrictions but rejected others.¹⁴⁹ And, in *Rosier*, like here, after the Board acted another party tried to circumvent the Board and compel the Department to implement further restrictions on the commercial fishery in order to benefit subsistence users (in *Rosier*, that other party was the Governor; here, that other party is the Tribe).¹⁵⁰

The Supreme Court began its analysis by noting that “[r]esponsibility for fisheries management is divided between the Commissioner and the Board.”¹⁵¹ The commissioner’s powers primarily relate to administration and budgeting, while the Board is given broad authority to manage fisheries.¹⁵² The Supreme Court concluded based on the Board’s statutory structure that the legislature intended to “ensure that

¹⁴⁷ 890 P.2d 567 (Alaska 1995).

¹⁴⁸ *Id.* at 568.

¹⁴⁹ *Id.* at 569 (“At this meeting the Board implemented other conservation measures to preserve AYK chum stocks.”).

¹⁵⁰ *Id.* (“Governor Walter J. Hickel then directed the Commissioner to use his emergency powers to increase the chum escapement into various river systems, notwithstanding the Board’s failure to adopt the Commissioner’s proposal to lower the chum cap.”).

¹⁵¹ *Id.* at 572.

¹⁵² *Id.*

fisheries decisions are made by knowledgeable persons based on their independent judgment, rather than immediate political pressure.”¹⁵³ In other words, fisheries decisions should be made by the Board. The Supreme Court agreed that the commissioner’s emergency order authority could be used to (1) implement but not contradict Board regulations; and (2) contravene Board regulations for biological concerns.¹⁵⁴ The Supreme Court was clear in holding that the commissioner may contravene a Board decision only if he relies on “newly developed information or events occurring after the Board’s decision.”¹⁵⁵

Here, the Board necessarily determined in January 2018 that the regulations provide a reasonable opportunity for subsistence uses of herring spawn—indeed, three Board members explicitly so stated on the record. All of the Tribe’s allegations and testimony developed during the preliminary injunction litigation about lack-of-reasonable opportunity, relating to times prior to 2018, are therefore irrelevant. None of that evidence could possibly be “new information” that would allow the Department to take action that would contravene the Board’s finding in January 2018 that there was reasonable opportunity for subsistence uses of herring spawn in Sitka Sound.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 573.

¹⁵⁵ *Id.* at 574 (“We AFFIRM the superior court’s decision and hold that the Commissioner may not use his emergency powers to implement a fisheries management program already considered and rejected by the Board, in the absence of newly developed information or events occurring after the Board’s decision.”).

Nor does anything that has happened since January 2018 qualify as new information. The herring stock is stable.¹⁵⁶ The amount and duration of the spawn in 2018 was typical.¹⁵⁷ The spawning pattern in 2018 was unusual, but not unprecedented.¹⁵⁸ The reasons for the 2018 spawning pattern are not clear, but the Department is not able to conclude that the commercial fishery was to blame.¹⁵⁹ For all of these reasons, the Department's fishery scientists do not believe that the result of 2018 Sitka Sound herring fishery qualifies as new information that would allow the Department to fundamentally change how the fishery is managed.¹⁶⁰ The Court should not second-guess the Department's fishery scientists.¹⁶¹

In recent years, including in 2018, the Board has explicitly found that there is a reasonable opportunity for subsistence uses of herring spawn in Sitka Sound, and has consistently agreed that the determination of reasonable opportunity is a "Board

¹⁵⁶ Dressel Aff. at ¶ 26; Hebert Aff. at ¶ 20.

¹⁵⁷ Hebert Aff. ¶ 21.

¹⁵⁸ *Id.* ¶ 16.

¹⁵⁹ *Id.* ¶ 18.

¹⁶⁰ Coonradt Aff. ¶ 18; Hebert Aff. ¶¶ 18-19.

¹⁶¹ *See, e.g., Cook Inlet Fisherman's Fund v. State, Dep't of Fish & Game*, 357 P.3d 789, 804 (Alaska 2015) (recognizing the Supreme Court's "long-standing policy of not second-guessing the Department's management decisions based on its specialized knowledge and expertise"); *Gilbert v. State, Dep't of Fish & Game, Bd. of Fisheries*, 803 P.2d 391, 397 (Alaska 1990) ("We have no authority to substitute our own judgment for the Board of Fisheries' particularly since highly specialized agency expertise is involved.") (quoting *Meier v. State, Bd. of Fisheries*, 739 P.2d 172, 174 (Alaska 1987)).

determination” (which is consistent with the subsistence statute, AS 16.05.258).¹⁶² The Tribe’s allegations in Count I suggesting that ADF&G has some type of independent obligation to make a determination regarding reasonable opportunity, and adjust its management practices to reflect that independent assessment, fail as a matter of law.

V. Conclusion

For the reasons discussed above, no issues of material fact exist with respect to the question of whether ADF&G has violated 5 AAC 27.195(a)(2) and (b) or any other subsistence law; and the relief it asks for from the court is so vague that it would be a meaningless exercise to order it. The Court, therefore, should grant the State partial summary judgment dismissing the claims STA asserts against the Department in Count I.

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¹⁶² AS 16.05.258(f) (“For purposes of this section, ‘reasonable opportunity’ means an opportunity, *as determined by the appropriate board*, that allows a subsistence user to participate in a subsistence hunt or fishery that provides a normally diligent participant with a reasonable expectation of success of taking of fish or game.”) (emphasis added).