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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.

Case No. 1SI-18- 212C1

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

INTRODUCTION

Sitka Tribe of Alaska v. State of Alaska, Dep't of Fish & Game et al.
Complaint for Declaratory and Injunctive Relief
Case No. 1SI-18-_____

Filed in the Trial Courts
STATE OF ALASKA, FIRST DISTRICT
Sitka

DE: 11 2018

By LS Deputy

1. Plaintiff Sitka Tribe of Alaska (“STA”) brings this civil action for declaratory and injunctive relief against Defendants the State of Alaska, Department of Fish and Game (“ADFG”) and the Alaska Board of Fisheries (“BOF”) as a result of their failure to ensure a reasonable opportunity and priority for subsistence uses of Sitka Sound herring roe and to enforce the mandates of Article VIII of the Alaska Constitution that the herring population is managed for sustained yield, common use, and the public trust.

JURISDICTION AND VENUE

2. This Court has subject matter jurisdiction over this case and jurisdiction over the parties pursuant to AS 22.10.020 and AS 44.62.300.

3. Venue is proper in the First Judicial District at Sitka under Alaska Rule of Civil Procedure 3(c) and AS 22.10.030.

PARTIES

A. Plaintiff

4. Plaintiff STA is a federally recognized Alaska Native tribe whose traditional territory includes Sitka Sound in southeast Alaska. STA’s ancestors founded the community of Sitka where Tlingit people from across the region have come to harvest herring and herring roe since time immemorial.

5. STA represents the interests of its tribal citizens. One of STA’s central missions is to protect the social, economic, and cultural well-being of its tribal citizenship, including its tribal citizens’ legally protected rights for the opportunity and priority to continue their subsistence fishing way of life, and to maintain the herring population, other resources and the ecosystem upon which they depend at sustainable, healthy levels.

B. Defendants

6. Defendant ADFG is a department of the state government established by AS 44.17.005(11).

7. Defendant BOF is an agency of the state government established by AS 16.05.221(a). The BOF is authorized to manage the commercial and subsistence herring fisheries in Sitka Sound pursuant to AS 16.05.251 and .258 and other applicable law. References to the "State" in this complaint indicate actions or causes in which both ADFG and the BOF are or may be implicated.

FACTS

A. Sitka Tribe's Customary and Traditional Subsistence Herring Fishery

8. Sitka Sound is a body of water in southeast Alaska bordered by Baranof and Kruzof Islands. It is one of the main entrances to the inland waters of southeast Alaska. For generations, Sitka Sound's diverse marine ecosystem has supported the subsistence way of life of those inhabiting the surrounding communities and Native Villages.

9. Pacific herring (*Clupea pallasii*) are a cornerstone of the subsistence livelihood of the Native peoples of southeast Alaska. For the STA and other tribes in the region, Sitka Sound has always been revered as a special place for herring roe harvest. The historic abundance and length of the spawning period of Sitka Sound herring make it unique and significant among traditional herring roe harvest grounds in southeast Alaska.

10. Herring return from the ocean to spawn in the shallow waters of Sitka Sound each spring. Spawning occurs near the shore in shallow intertidal and subtidal zones. The females are selective in where they choose to spawn and in the placement of their eggs. Fertilized eggs attach to vegetation in the water such as kelp, hair seaweed, rockweed, or bed substrate to incubate.

11. Since time immemorial STA's ancestors have harvested Sitka Sound herring eggs (roe) for nutrition and trade. Herring roe continues to be a vital part of the traditional diet of STA tribal citizens and other subsistence users throughout Alaska. Herring roe is consumed immediately after harvest, fresh from the water, or preserved by drying or salting and frozen for consumption throughout the year.

12. STA subsistence harvesters typically use kelp or hemlock boughs placed in the water to accumulate the roe during spawning. The harvesters remove the kelp and boughs from the water to collect the roe. This is a process that occurs in balance with the ecosystem—subsistence harvesters do not kill the herring to remove the roe, allowing the herring to spawn again in the future. Research has suggested that subsistence harvest practices may in fact “cultivate abundance.” This is in strict contrast to the commercial herring fishery in Sitka Sound where harvested herring are killed for the roe. Research suggests that the commercial fishery may be responsible for up to half the annual mortality in the Sitka Sound herring population. The large mortality in the commercial fisheries prevents those herring from spawning during the year they are harvested and in future years.

13. Herring roe harvest in Sitka Sound is deeply woven into the cultural, nutritional, and economic activity for STA tribal citizens and other tribes and subsistence users residing near Sitka Sound and throughout Alaska. Historically, and continuing in the present, tribes throughout southeast Alaska come to Sitka Sound in the spring to harvest herring roe, in part because because of the quality of the roe. Herring roe collected from the Sitka herring population is preferred by many over other herring roe for its superior taste. “High harvesters” from STA and other southeast tribes come to Sitka Sound in the spring, as they have for many generations, to collect roe which is shared broadly with their family, community and others.

14. Herring roe harvested in Sitka Sound for customary and traditional subsistence uses by STA tribal citizens is traded and shared far and wide, with documented destinations ranging from Utqiagvik and Point Hope, to Bethel to Metlakatla. STA tribal citizens, as their ancestors before them, trade herring roe for a wide variety of subsistence foods, including berries, mountain goat, dried seaweed, whale, caribou, moose, and many other traditionally harvested or crafted foods and materials.

15. STA's ancestors passed on an intimate understanding of the local geography and ecosystem and herring harvest techniques. This traditional knowledge continues to grow among tribal elders, and is passed down from elders to youth. Traditional knowledge and teaching includes the placing of hemlock boughs to capture roe in the water without polluting it with grit and sand from the bottom, timing the harvest to capture the highest quality roe, and selecting the most productive harvest sites. Traditional knowledge of the different substrates, and changes in currents, tides and shorelines, is vital to the Tribe's subsistence harvest.

16. Traditional knowledge also includes the understanding that older, larger herring lead the younger fish to productive spawning locations, and thus, older herring are vital to successful spawns and the continued health and sustainability of the herring stock. Recent scientific studies support this understanding.

17. The older and larger female herring are especially important as producers of high quality roe. The quality of the roe is an essential component of the traditional subsistence fishery of STA and tribes and subsistence users throughout the region and State.

18. STA tribal citizens and subsistence users in other Native Villages and communities throughout southeast Alaska also harvest a wide variety of marine resources that depend on herring as a significant source of nutrition. The dependence on fish and wildlife that are part

of the ecosystem in the tribes' traditional territories goes far deeper than use as nutritional resources. There is a vital, mutually-dependent relationship between the tribal communities and the fish and marine animals that create their common ecosystem, extending to deeply held cultural practices, beliefs and values. This relationship is evident in the tribal songs, dance, stories, and art throughout the region.

B. Commercial Herring Management

19. The State manages fish stocks according to geographical area, dividing regions of the state into "districts" and "sections." Sitka Sound is within District 13, consisting of Sections 13-A and 13-B. 5 A.A.C. 33.200(m). This Complaint refers to Sections 13-A and 13-B as "Sitka Sound."

20. Non-native settlement in southeast Alaska during the late 19th and early 20th Centuries led to a lucrative and productive commercial herring fishing industry. Sitka—the "herring capital" of southeast Alaska—became home to a large commercial fishing fleet. Federal and State herring fishery management focused on providing increased commercial fishing opportunities, often to the detriment of traditional subsistence users.

21. In the early 1900s, Alaska's commercial fishery was mostly unregulated—fishing fleets targeted and exploited herring stocks with impunity. Consequently, herring populations across southeast Alaska declined precipitously. In the 1940s, the federal government established herring catch quotas in an attempt to conserve remaining herring populations. The U.S. Bureau of Fisheries, and later the State, used herring quotas to prevent total collapse of herring stocks but with the goal of maximizing commercial herring harvests. The Bureau of Fisheries and the State used information from the commercial fishery to set the quotas.

22. Since statehood, and under State management, most of the major herring stocks have been depleted and cannot currently sustain a commercial or subsistence fishery. In 2014, the National Marine Fisheries Service (NMFS) identified 9 major herring spawning areas in southeast Alaska that are managed by ADFG: Sitka Sound, Seymour Canal, Craig/Klawock, Hobart Bay/Port Houghton, West Behm Canal, Tenakee Inlet, Hoonah Sound, Ernest Sound and Revilla Channel. According to ADFG, only Sitka Sound continues to provide a consistent sac roe herring fishery.

23. Herring escapement in Hoonah Sound peaked in 2008 at 19,975 tons. The State allowed a spawn-on-kelp pound fishery until 2012. Herring escapement plummeted to 412 tons in 2013. There was no spawn documented in 2017.

24. Hobart-Houghton has had seven sac roe commercial fisheries since 1977, but none since 2010. ADFG documented no spawn in the area in 2016 and “minimal” spawn in 2017. West Behm Canal has had a single commercial fishery, in 2011, and has been closed since. Seymour Canal has declined after commercial harvests in excess of 1,000 tons from 2002-2008 and was last opened in 2014.

25. Traditional knowledge of the southeast tribes indicates that the Juneau-Lynn Canal herring population was once among the largest in the state. The population crashed in 1982 and has not had a commercial fishery since that time. The Juneau Empire reported the 1982 sac roe fishery was restricted to “fringe areas” due to the “marginal number of herring,” demonstrating that ADFG and the BOF authorized continued fishing even while acknowledging declining abundance in the herring population. Fishery scientists outside of ADFG have taken the position that overfishing over several years may have been instrumental in the stock collapse. A 1985 ADFG memo stated “it is evident the past threshold level did not adequately guard against the failure of many successive year class failures and the subsequent

critical low level of the present population. . . . The present extreme low herring population level in the Juneau area will make it difficult for the population to return to normal levels without extremely strong recruitment. The chance of this happening to a degree that will restore the population to a normal size in the near future is very small.” Memo from Don Ingledue, ADFG Area Management Biologist to Paul Larson, ADFG Finfish Coordinator, April 19, 1985.

26. Traditional knowledge indicates that Kah Shakes was considered one of the largest herring populations in southeast Alaska, perhaps trailing only Sitka Sound. ADFG commercial sac roe fisheries began in 1976 and Kah Shakes closed in 1990. In 1991, in response to the decline of the Kah Shakes herring population, ADFG took the position that the Kah Shakes herring moved toward Cat Island, and ADFG filed an emergency petition with the Board of Fisheries to expand the boundaries of the Kah Shakes gillnet fishery to allow harvest at Cat Island. ADFG’s position was contrary to traditional knowledge which identified two populations in the area: one at Kah Shakes and one at Annette Island. In 1993, the Board of Fisheries rejected conservation proposals from local citizens, made the Kah Shakes fishery boundary expansion permanent, and reclassified the stock as the Revillagigedo Channel stock. Commercial harvests continued between 1991 and 1998, but the fishery has been closed since 1999.

27. In the 1970s, the BOF adopted a “threshold” management approach for southeast Alaska herring stocks. According to the Board’s management model, a threshold is the minimum amount of spawning herring in an area that is necessary to maintain the population into the future. If the projected amount of spawning herring for a stock exceeds the predetermined threshold in a given season, a commercial harvest is allowed at a certain harvest

(exploitation) rate. The harvest rate is a predetermined percentage of the entire forecasted population of herring.

28. In the 1960s and 1970s, the BOF set the initial harvest threshold for Sitka Sound herring at 6,000 tons based on estimates of the stock's biomass during a period when the biomass was far below historically abundant levels and ADFG's opinion that a 6,000-ton threshold could be managed and controlled while providing sufficient opportunity for a commercial harvest. Setting the threshold at 6,000 tons allowed a commercial harvest to begin at a very low population size, thereby inhibiting the ability of the herring population to rebound from low abundance.

29. In 1983, the BOF increased the Sitka Sound herring threshold to 7,500 tons. The increased threshold was intended to build the stock to overall higher levels than in the 1970s and eventually allow a larger commercial harvest.

30. In 1996, STA raised concerns that the 7,500-ton threshold was still too low and allowed too much commercial harvest based on historic population size. According to STA the 7,500-ton threshold maintained the Sitka Sound herring stock at artificially low levels because too much of the population above the minimum 7,500 tons was being harvested. Biologists concluded the historic fishing rates had decreased the Sitka Sound herring stock to levels far below its natural abundance, and the 7,500-ton threshold prevented the stock from recovering.

31. In 1998, in response to STA's and others' concerns, the BOF recalculated the Sitka Sound herring threshold. The BOF relied on a new scientific approach that involved an estimate of average unfished biomass ("AUB") and age-structured analysis ("ASA") to modify the Sitka Sound threshold. The threshold was set near 25 percent of the average unfished biomass, which was estimated by modeling years of data when herring biomass was relatively

low. Estimates of the harvest threshold using data from the period of low herring biomass led to a low harvest threshold that inhibited growth of the herring population. The estimates of low herring biomass used by the State, as a measure of average unfished biomass, are far less than the herring population abundance established through the traditional knowledge of STA and other local Tribes.

32. The State's management of Sitka Sound herring is symptomatic of the "shifting baseline syndrome." According to a 2014 National Marine Fisheries Service assessment of Sitka Sound herring, "methods used to establish thresholds, including the adoption of reference points that stem from an estimated [annual unfished biomass], are most likely examples of a 'shifting baseline syndrome,' whereby more recent data is accepted as a baseline to substitute for a much different baseline that occurred before humans began having major impacts, potentially leading to inappropriate reference." The "shifting baseline syndrome" has led to artificially depressed herring populations in Sitka Sound.

33. The shifting baseline syndrome has also led to the drastic reduction of the herring spawn in terms of both geographic area and the duration of the spawn. STA traditional knowledge holders have documented twice the miles of spawn historically compared to what ADFG surveys show now. There are several locations in Sitka Sound that historically had a great deal of spawn and subsistence harvest but no longer have spawn.

34. Based on this low-biased unfished biomass, the BOF set the new Sitka Sound herring harvest threshold at 20,000 tons, with a variable harvest rate of 10 to 20 percent, depending on the forecasted biomass above 20,000 tons.

35. In 2009, the BOF increased the Sitka Sound herring threshold to 25,000 tons. However, to accommodate the commercial fishery and offset the increased threshold, the BOF increased

the minimum harvest rate from 10 to 12 percent, a minimum harvest rate that is the highest rate in Alaska. The maximum harvest rate of 20 percent is permitted when the estimated biomass reaches 45,000 tons (1.8 times the threshold).

36. ADFG and the BOF have managed Sitka Sound herring differently and more in favor of aggressive commercial harvests than other herring stocks in southeast Alaska. The harvest rates are significantly higher for Sitka Sound herring than any other herring stock in southeast Alaska. In other regions of southeast Alaska, the maximum 20 percent exploitation rate is achieved when the total biomass is 6 times the threshold level versus the much more aggressive 1.8 times the threshold level authorized for the Sitka Sound commercial fishery. If the more conservative harvest control rule for other areas of Alaska is applied to Sitka Sound herring and its harvest threshold (25,000 tons), then the maximum harvest rate of 20 percent would not be reached in Sitka Sound until biomass was more than 90,000 tons instead of the 45,000 tons set under current BOF regulations.

37. Herring stocks in British Columbia, Canada, which are similar to the Sitka Sound stock, are managed at a lower initial harvest rate to maintain sustainable populations. In British Columbia, the thresholds that must be reached before commercial fishing may begin have been raised to 30 percent of the estimated unfished biomass to protect the herring population from overfishing at low population levels. That management approach is more conservative, precautionary, and appropriate than the State's Sitka Sound herring management.

38. Each year, pursuant to BOF regulations, ADFG relies upon the same low-biased harvest threshold and aggressive harvest control rule to set the harvest guideline threshold – the “Guideline Harvest Level” (“GHL”). ASA analysis is used to forecast herring biomass in the upcoming season, based on data from the previous year. The harvest rate is set within the

range of 12 to 20 percent of the total biomass. The GHL is determined from the forecasted total biomass and the predetermined rule.

39. ADFG's primary management objective is to enable the commercial fishery to harvest the full GHL. ADFG works closely with the commercial fleet to achieve this goal. The commercial fleet participates in test fisheries to assess the timing and progress of roe maturity and to determine when the commercial fleet's target—older, larger females with prime quantity and quality of roe content—are present in sufficient numbers to make the fishery profitable.

40. The Sitka Sound commercial fishing fleet operates with advanced technology and methods that effectively target larger, older female herring with exacting efficiency. Consequently, the highest quality and largest herring have been selectively harvested. These are the same larger, older herring that STA tribal citizens depend upon for the quality and quantity of roe necessary to meet their customary and traditional subsistence uses. They are also the same fish that STA traditional knowledge holds are the leaders of the spawn. Traditional knowledge from First Nations Peoples in British Columbia confirms STA's understandings and observations. Recent scientific information supports the observation that the older herring are needed to guide the younger fish to the best spawning grounds.

41. Because older herring are targeted by the commercial fishery, the commercial harvest rate for larger, older, and more fecund herring is greater than the rate set by the BOF's harvest control rule. ADFG's estimated GHL assumes a random harvest and does not consider the size-selective nature of the commercial fishery. Larger, older female herring have more numerous and healthier eggs. The targeted commercial harvest of large older herring reduces the amount of roe compared with the amount roe produced if herring were randomly harvested. The consequence is less roe for subsistence users and for herring reproduction.

42. The consequence is also that there are fewer and fewer larger, older females in the Sitka Sound herring stock. In 2018, ADFG closed the commercial fishery because the older, larger herring sought by the commercial fishery could not be found in sufficient quantities. ADFG forecasted that in 2019 large herring – those 6-8 years old – are projected to represent only 24 percent of the biomass.

43. The GHL for 2019 is set at 20 percent of the total biomass. The larger herring preferred by the commercial fishery represents only about 24 percent of the forecasted total biomass. Under the current harvest control rules and ADFG management practices, the 24 percent of 6-8 year olds will suffer a harvest rate significantly greater than the authorized 20 percent GHL if the fishery is allowed to harvest 20 percent of the entire population.

44. The Sitka Sound herring stock is being negatively affected by climate change. The science and information regarding the effect of climate change has significantly advanced in the past decade. Alaska’s climate and ocean environment have experienced significant change over the last decade, including the highly unusual conditions associated with “the Blob,” but the BOF has not revised its management plan for the commercial fishery and conservation of the Sitka Sound herring stock during that time period. The unfished biomass analysis used by ADFG is several decades old. It is based on historical data and does not consider changing ocean conditions. ADFG and BOF management is set with data and a management regime based on the past despite the fact that the North Pacific Ocean is quickly transforming.

45. The Sitka Sound herring stock is a “forage” fish. Forage fishes are key to marine food web dynamics because they transfer production from zooplankton to larger piscivorous species that feed on forage fishes. Herring provide valuable prey for marine birds, marine mammals such as humpback whales and piscivorous fishes, including Chinook and coho salmon, Pacific

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cod, and Pacific halibut. The BOF does not manage the Sitka Sound herring stock as a forage fish. Despite proposals by STA and others, the BOF refuses to define Sitka Sound herring as a “forage fish” and manage accordingly.

C. Subsistence Herring Management

46. The State’s management for the commercial fishery is by law subject to the priority for subsistence uses. Under Alaska’s subsistence law, AS 16.05.258, subsistence uses are the priority use of the Sitka Sound herring stock. Consumptive uses of the herring stock, such as the commercial fishery, may only be allowed only if the harvestable portion of the stock is sufficient to provide for all subsistence uses and, consistent with sustainable yield management, there is a surplus amount available for commercial harvest.

47. AS 16.05.258 also requires ADFG to provide a “reasonable opportunity” for subsistence harvest. A “reasonable opportunity” means “an opportunity, as determined by the [BOF], that allows a subsistence user to participate in a subsistence . . . fishery that provides a normally diligent participant with a reasonable expectation of success of taking of fish.” AS 16.05.258(f).

48. Once the BOF has made a customary and traditional use determination for a fish stock, it must determine the amount of harvest reasonably necessary for subsistence uses. The BOF must then adopt regulations that provide a reasonable opportunity for subsistence uses before providing for other uses of any harvestable surplus of a fish stock. AS 16.05.258(f).

49. In 1989, the BOF issued findings that there was a traditional and customary use of Sitka Sound herring.

50. The BOF also promulgated regulations establishing the amount necessary for subsistence (“ANS”) harvest of herring roe in management sections 13-A and 13-B, Sitka Sound. The BOF originally set the ANS at 105,000 to 136,000 pounds annually.

51. In 2002, the BOF requested the ADFG Division of Subsistence collaborate with STA to develop a monitoring program for Sitka Sound herring roe on substrate subsistence harvest. A subsequent subsistence use survey showed that actual use was significantly higher than the ANS set by the BOF and was not sufficient to meet the needs of STA, let alone other local subsistence users. The inadequate ANS set by the BOF did not include amounts harvested in Sitka Sound by other tribes who also rely on herring roe. The ANS also did not include the amount necessary for customary and traditional sharing. STA reached out to tribes throughout Alaska where there was subsistence use of Sitka Sound herring in an attempt to find out the amount needed to meet all subsistence uses. That survey demonstrated that 700,000 pounds would satisfy subsistence needs throughout the state.

52. In 2009, the BOF increased the ANS to 136,000 to 227,000 pounds.

53. The Sitka Sound commercial and subsistence fishery is managed solely by the commercial fishery division within ADFG. The subsistence division has no active part in the season-to-season or day-to-day management of the Sitka Sound herring fishery.

54. BOF regulations for the herring fisheries, 5 A.A.C. 27.195, mandate: “In managing the commercial sac roe herring fishery [for Sitka Sound] the department shall: . . . (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.”

55. ADFG bases its management of the commercial fishery on a forecast of total biomass. The commercial fishery is allowed to proceed before there is formal survey or any reliable data of actual returning biomass. The commercial fishery is therefore allowed to proceed before ADFG knows there is an amount of herring present that will meet the ANS.

56. The ANS has only been met in three years since 2005. ADFG reports demonstrate that the ANS has not been met in 9 out of 12 seasons for which data are available. Although ADFG subsistence harvest data are not available for 2017 and 2018, it is clear that ANS was not met for either year. STA has repeatedly raised concerns with ADFG that its management of the Sitka Sound commercial herring fishery has affected STA's ability to successfully harvest the amount of herring spawn on hemlock branches necessary to meet their tribal citizens' needs.

57. Simply measuring the "amount" of roe harvested does not account for the declining quality of roe that is available to subsistence users. In recent years, subsistence harvesters have consistently reported that available Sitka Sound herring roe is of insufficient quality to meet their needs. STA has repeatedly expressed its concerns to the State about the selective harvest of the older, larger females in the commercial fishery and the effect of the commercial harvest on the quality and quantity of roe available to subsistence harvesters.

58. STA has also expressed to the State knowledge about the importance of older herring in leading the spawn. STA has explained how the depletion of older herring is negatively affecting productivity, as well as subsistence harvests.

59. ADFG's management authorizes and encourages the commercial fishery to conduct test fisheries. STA has also expressed its concerns, based on observation and traditional knowledge, that the significant test fishery condoned by ADFG disrupts herring reproductive

behavior and causes herring to spawn in suboptimal habitat, affecting both herring reproductive success and subsistence herring roe quality.

60. STA has over many years made numerous proposals to the BOF expressing these concerns and others about the health of the herring population and the failure to provide for subsistence uses. In 2012, STA submitted a proposal to protect its subsistence way of life and the herring stock by closing portions of Sitka Sound to commercial fishing. The BOF rejected STA's proposal and instead closed approximately 10 square miles of historically important subsistence areas in Sitka Sound to commercial herring harvest. In 2018, the BOF rejected STA's proposal to add 14 square miles to the area closed by the State and instead narrowed the proposal to add only an additional 4 square miles to the 10 square mile area previously closed to commercial fishing. In 2015, the Federal Subsistence Board also closed approximately 2 square miles of federal waters in Sitka Sound to commercial herring harvest.

61. The State's closure of specific areas in Sitka Sound to commercial fishing is, by itself, insufficient to provide a reasonable opportunity for subsistence harvest of herring roe.

62. ADFG's management of the commercial fishery demonstrates that it believes the mandate of the BOF regulation and the state subsistence laws are satisfied if it merely does not restrict where and when subsistence harvests occur throughout Sitka Sound.

63. ADFG management demonstrates that it does not believe that it has a legal responsibility to manage to ensure that the amount of quality spawning biomass necessary to meet subsistence needs makes it through the test nets and commercial fishery to subsistence harvesters.

64. ADFG management demonstrates its belief that it has fulfilled its legal responsibilities so long as the minimum harvest threshold is met or exceeded. So long as the forecasted biomass

meets the threshold, there is no conservation concern and no concern about overharvesting the older age class. If the biomass meets the threshold, STA subsistence harvesters need to find it, go wherever it is, and compete with the commercial harvesters for it.

65. Subsistence harvesters simply do not have the money and equipment necessary to compete with the commercial fleet. The BOF has acknowledged the displacement of subsistence harvesters from traditional areas by the commercial fleet and how subsistence harvesters are being forced to more dangerous areas to harvest.

66. In contrast, the commercial fleet is dynamic and efficient. It can harvest large amounts of herring in short periods. Under ADFG management, the commercial fishery has the first chance at harvesting the largest, oldest and most productive spawning herring, leaving the smaller, less productive herring for subsistence harvesters, assuming that the smaller fish find their way to the subsistence harvest areas after making it past the disruption of the commercial fishery and suffering the loss of leadership provided by the older fish. It is not sufficient for ADFG to manage for the return of a biomass of smaller, younger fish. Simply leaving some number of smaller, less fecund herring in the water does not ensure that an amount of quality roe will be available in sufficient quantity to meet subsistence needs.

67. In advance of the BOF's October 2018 work session in Anchorage, an Agenda Change Request ("ACR") was submitted, requesting the BOF close the Sitka Sound commercial sac roe herring fishery until additional scientific research is done and ANS is met for three consecutive years. STA submitted comments supporting the ACR, pointing out that the "most recent harvest reports continue to demonstrate an exigent need to address the regulatory failure to ensure adequate subsistence harvests" and expressing STA's view that the herring stock was

not be managed sustainably. STA provided a detailed summary of its concerns and an analysis by a fisheries expert that supported its concerns.

68. ADFG advised the BOF that the ACR (a) did not address a fishery conservation purpose, (b) did not seek to correct an error in regulation, and (c) did not address an effect of a regulation that was unforeseen at the time the regulation was adopted. Consequently, the BOF rejected the ACR at its October 2018 meeting.

69. Following the BOF's rejection of the ACR, STA entered discussions with ADFG to establish a plan for subsistence management of Sitka Sound herring. STA proposed a management plan that included reasonable measures to ensure subsistence harvesters would receive their statutorily obligated subsistence priority. The essence of the plan called for ADFG to (1) allow no commercial herring fishing until the first spawn was observed and verified; and (2) eliminate the use of test fishery set nets and use a jig fishery instead if testing was determined to be necessary. After a meeting with ADFG officials, ADFG made clear that it had no intention of adopting STA's proposed plan or any other measures that would fulfill the subsistence priority. ADFG indicated it would continue to manage the Sitka Sound sac roe herring fishery primarily for commercial users, and that BOF regulations mandated that it do so.

IRREPARABLE HARM

70. STA is suffering significant and irreparable harm as a result of the State's failure to manage the Sitka Sound commercial herring sac roe fishery and subsistence harvest consistent with constitutional and statutory mandates to protect harvesters' subsistence opportunity and way of life, and the health of the herring and other fish and wildlife resources STA tribal citizens depend on for their nutritional, economic, cultural and spiritual well-being. The

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hardship already suffered by STA is compounded with each new fishing season. As the commercial fishery removes spawning herring from the ecosystem, the herring population is prevented from returning to sustainable abundance and tribal citizens cannot harvest the amount and quality of herring roe necessary for their subsistence needs. The upcoming 2019 commercial herring sac roe fishing season poses imminent irreparable harm to STA. STA has exhausted all administrative and rule-making remedies and has no other remedy at law available other than this civil action. There are no administrative or rule-making remedies available to STA that have not been diligently and thoroughly exhausted or rendered futile.

CLAIMS FOR RELIEF

Count I

Violations of Alaska's Subsistence Laws and Regulations

71. STA restates and incorporates herein by reference each and every allegation contained in the preceding paragraphs.

72. ADFG's management of the Sitka Sound herring sac roe fishery is in violation of the Alaska subsistence statute, AS 16.05.258 and BOF regulations. ADFG has failed to manage the Sitka Sound commercial and subsistence herring fisheries consistent with mandatory obligations under 5 A.A.C. 27.195: "In managing the commercial sac roe herring fishery [for Sitka Sound] the department shall: . . . (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." Despite the fact that subsistence users have failed to harvest the amount necessary for subsistence uses for most years over the past decade, ADFG has failed to implement changes

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to provide a reasonable opportunity and priority for subsistence harvest consistent with the statutory and regulatory requirements.

73. ADFG's violation of law includes making management for the commercial fishery at a full harvest established by the GHL in Sitka Sound the priority use. In doing so, ADFG has ignored its legal responsibility to ensure that the commercial fishery, including the test fisheries, do not interfere with or disrupt the arrival of spawning herring in the subsistence harvest area in sufficient numbers to meet STA subsistence needs, including sufficient numbers of the larger, older females with superior quantity and quality of roe.

74. ADFG's violation of law also includes its management practices that force STA subsistence users to compete with the commercial fishery for the opportunity necessary to meet their subsistence needs.

75. In the alternative, if ADFG is required by BOF regulations to prioritize management of the commercial fishery to reach the GHL and is therefore not in violation of the regulation, the BOF regulation is a violation of the state subsistence laws for failing to provide for a reasonable opportunity and priority for subsistence uses.

76. The BOF's failure to require ADFG to determine there are sufficient herring to meet the ANS present in Sitka Sound within the core subsistence harvest area prior to opening the commercial fishery is a violation of the State subsistence laws.

77. The BOF's regulations authorizing the commercial herring fishery in Sitka Sound fail to manage for the herring population for a healthy and abundant older age classes of herring in violation of STA's rights under the state subsistence laws. The older age classes provide a quality of roe that is an essential part of the traditional subsistence harvest. The subsistence law protects the customary and traditional uses of the Sitka Sound herring stock, including the

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quality of food necessary to provide for those uses and the fish that provide this quality of food. The State's failure to manage for the quality and quantity of roe necessary to meet STA subsistence needs is illegal.

Count II

Violations of the Sustained Yield Clause, Common Use Clause and Public Trust Doctrine Mandated by Article VIII of the Alaska Constitution

78. STA restates and incorporates herein by reference each and every allegation contained in the preceding paragraphs.

79. BOF management of the Sitka Sound herring sac roe fishery is in violation of the Sustained Yield Clause, Article VIII, Section 4 of the Alaska Constitution. The BOF has failed to manage the Sitka Sound herring population in a sustainable manner by allowing commercial harvests rates that are inconsistent with sustaining the Sitka Sound herring stock at historically abundant levels. BOF management is illegally based on sustaining the herring stock at historically depleted population levels and pursuant to the "shifting baseline syndrome."

80. BOF management based on biomass, thresholds and GHs is to the detriment of critical age and size components of the herring population and a violation of its constitutional duty to manage for sustained yield. Older and larger herring, which are targeted by the commercial fishery, are being harvested at a rate that threatens their sustainability as a vital component of the herring population. The State's failure to manage herring to ensure the healthy returns for the larger, older herring is a violation of the constitutional sustained yield mandate.

81. The BOF and ADFG's current regulations, management plans, and implementation authorizing the current commercial harvest rate is inconsistent with sustaining the Sitka Sound herring population at levels satisfying the sustained yield mandate of the constitution.

82. The State's management of the Sitka Sound herring stock violates Article VIII of Alaska's Constitution which mandates management for sustained yield and for common use and the public trust. The BOF is focused on management for the amount of commercial harvest that can be sustained. Herring are a forage fish. Many other fish and marine mammals and parts of the ecosystem within STA's traditional waters depend on herring for nutrition. The BOF is not managing the herring stock to ensure a sustainable population that is abundant enough to provide for other fish and wildlife in the ecosystem. Accordingly, the BOF is in violation of the mandates of Article VIII.

Count III

The Board's Management of Sitka Sound Herring Violates the Alaska Administrative Procedure Act, AS 44.62

83. STA restates and incorporates herein by reference each and every allegation contained in the preceding paragraphs.

84. The adoption of the Herring Management Plan for Southeast Alaska, 5 A.A.C. 27.160(g) is arbitrary and unreasonable, and invalid under the Alaska Administrative Procedure Act, AS 44.62 ("APA"). The BOF failed to take a hard look at the relevant factors when setting the harvest threshold for Sitka Sound herring. The BOF failed to engage in reasoned decision-making when establishing the Management Plan, and the BOF has failed to act on or carefully consider new information regarding the Sitka Sound herring population.

85. ADFG and the BOF management of Sitka Sound herring for a GHF and harvest rate that are significantly higher than any other herring stock in southeast Alaska, and higher than is allowed for neighboring Canadian stocks, is not supported by science and is arbitrary and illegal.

86. The failure of the BOF and ADFG to revise the decades-old analysis of the Sitka Sound herring stock using more recent data and historical data to determine historical biomass is arbitrary and illegal. The BOF's failure to reexamine its threshold, GH, harvest rate and other aspects of its herring management for Sitka Sound in light of significant new information is arbitrary and capricious and a violation of law.

87. The BOF's shifting baseline in establishing the harvest regime for the Sitka Sound commercial herring fishery is arbitrary and illegal.

88. The BOF's failure to take a hard look at the negative effects of its regulations and the management of the commercial herring fishery in Sitka Sound on the older and larger herring is arbitrary and illegal.

89. The BOF's failure to define the Sitka Sound herring stock as a "forage fish" and to manage the stock as a "forage fish" is arbitrary and illegal.

90. The BOF's management of the Sitka Sound herring population has largely ignored the undeniable impacts of climate change and natural population variations related to environmental effects in the Pacific Ocean. The BOF has instead plowed ahead with an outdated management regime, targeted at maximizing commercial harvest opportunities, despite changing conditions in the North Pacific Ocean, and, contrary to best management practices and best available science, has failed to implement a precautionary management approach to guard against the risks posed by changing conditions. The State's failure to take a hard look at the effects of climate change or large-scale environmental influences on the herring stock is arbitrary and capricious and illegal.

91. The BOF's failure to take the required look at the traditional knowledge presented by STA and others is arbitrary and capricious and a violation of law

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92. ADFG has failed to incorporate the traditional knowledge and understanding of STA tribal citizens into Sitka Sound herring management. Ignoring this valuable source of understanding and observation is arbitrary and illegal. The failure of the BOF to require ADFG to incorporate the STA's traditional knowledge, and the traditional knowledge of others in the area, into its management practices for the Sitka Sound herring fisheries is arbitrary and illegal.

RELIEF SOUGHT

WHEREFORE PLAINTIFF respectfully prays that this Court:

1. Enter a preliminary injunction requiring ADFG to develop a fishery management plan prior to the opening of the commercial herring sac roe fishery in Sitka Sound during the 2019 season that is consistent with ADFG's responsibilities under subsistence laws and regulations and such other relief as the Court deems just and proper;
2. Enter a judgment finding and declaring that the regulations adopted by the BOF for the Sitka Sound herring fisheries are invalid and illegal as violations of the state subsistence law, the APA, and Alaska's Constitution;
3. Enter a judgment finding and declaring that ADFG management of the Sitka Sound herring fisheries violates the state subsistence law, Alaska's Constitution and BOF regulations;
4. Enter an order requiring ADFG to develop a management plan for the Sitka Sound herring fisheries that is consistent with the law and regulations and the Court's order and retaining jurisdiction to ensure ADFG has complied with the Court's order;
5. Enter an order remanding to the BOF to take action consistent with the Court's order and retaining jurisdiction to ensure the BOF has complied with the Court's order;
6. Enter a judgment awarding Plaintiff costs and attorney's fees; and
7. Such other and further relief as the Court deems just and proper.

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RESPECTFULLY SUBMITTED this 11 day of December 2018 at Anchorage, Alaska.

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Certificate of Service

On _____ a true and correct
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s/John M. Starkey
John M. Starkey