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

SITKA TRIBE OF ALASKA,)
)
Plaintiff,)
)
v.)
)
STATE OF ALASKA, DEPARTMENT)
OF FISH AND GAME, and the)
ALASKA BOARD OF FISHERIES,)
)
Defendants,)
)
and)
)
SOUTHEAST HERRING)
CONSERVATION ALLIANCE,)
)
Defendant-Intervenor.)

Case No. 1SI-18-00212 CI

**STATE OF ALASKA’S OPPOSITION TO SITKA TRIBE OF ALASKA’S
MOTION FOR SUMMARY JUDGMENT**

I. INTRODUCTION

The Sitka Tribe of Alaska (“STA” or “Tribe”) asks the court to declare that the Alaska Department of Fish and Game (“ADF&G” or “Department”) has violated 5 AAC 27.195(a)(2) and (b).¹ In a concurrent motion for summary judgment, ADF&G asked the court to find that because no issue of genuine material fact exists with respect

¹ In Count I of its complaint, the Tribe also pled that ADF&G violated AS 16.05.258—the subsistence priority statute. However, in the instant motion it confines its argument to its allegation that ADF&G violated 5 AAC 27.195(a)(2) and (b). Thus, it has abandoned, as to the Department, its claim related to the statute. In any event, as demonstrated in ADF&G’s motion for summary judgment, ADF&G did not, as a matter of law, violate that statute. *See* State’s Brief at p. 32.

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to its faithful interpretation and application of those regulations, it is entitled to summary judgment dismissing the Tribe's claims.²

II. THE COURT SHOULD REJECT STA'S PROPOSED STANDARD OF REVIEW

The Tribe grounds its motion in the erroneous assertion that this court does not owe ADF&G's interpretation of 5 AAC 27.195(a)(2) and (b) any deference.³ Its authority for this argument is easily distinguished. The Alaska Supreme Court has been very clear that courts considering the propriety of an agency's interpretation of the regulations directing its actions should be accorded deference "because the agency, having specialized knowledge in a field, is in a better position than a court to make such determinations."⁴

The Tribe asserts that the Department's interpretation of 5 AAC 27.195 "is not entitled to deference or any weight because the regulation was promulgated by the Board and not ADF&G."⁵ It cites two cases for this proposition: *Rose v. Commercial Fisheries Entry Comm'n*,⁶ and *Tea ex rel. A.T.*⁷ Neither supports its argument.

² Because the competing motions are aimed at the same issue, there necessarily is some overlap in the briefing. ADF&G relies on and incorporates by reference its briefing in support of its motion for summary judgment.

³ See STA brief at 24-28.

⁴ *Weaver Bros. v. Alaska Transp. Comm'n*, 588 P.2d 819, 821 (Alaska 1978). ADF&G elaborated on this standard in its motion. See State's Brief at p. 33 and nn.129-30. It incorporates that discussion and authority by reference.

⁵ STA Brief at p. 25.

⁶ 647 P.2d 154 (Alaska 1982).

⁷ 278 P.3d 1262 (Alaska 2012).

The Tribe relies on *Rose* for the proposition that a deferential standard of review is only appropriate when an agency interprets its own regulation.⁸ In *Rose* the Court noted that an agency's interpretation of its own regulation presents a question of law.⁹ However, it explained that in answering that question:

We have oftentimes noted that the deferential "reasonable basis" standard of review is appropriate *where a question of law implicates the agency's expertise as to complex matters or as to the formulation of fundamental policy.*¹⁰

The Court then wrote that "*in addition*" to situations involving agency expertise involving complex matters or the formulation of fundamental policy, deference is also owed to an agency's interpretation of its "own" regulation.¹¹ The Tribe ignores the first of the two grounds that the Court provided for employing the "reasonable basis" standard of review: situations involving agency expertise as to complex matters.

A. Because ADF&G's interpretation of 5 AAC 27.195 requires the Department's highly specialized expertise, the court should apply the deferential "reasonable basis" standard of review.

First, there can be no argument that the management of the sac roe and subsistence herring egg on branch fisheries is extraordinarily complex and requires a team of biologists and scientists. The Tribe's briefing during the preliminary injunction

⁸ STA brief at p. 25, n.31 (quoting *Rose*, 647 P.2d at 161).

⁹ *Rose*, 647 P.2d at 161.

¹⁰ *Id.* (emphasis added).

¹¹ *Id.* (emphasis added).

phase was replete with highly technical analysis from experts.¹² ADF&G similarly submitted the affidavits of three scientists and numerous technical papers, graphs, charts, management plans, subsistence reports, and other materials representing a vast effort to understand and manage an incredibly complex fish stock.¹³ No genuine issue of material fact exists with respect to the complexity involved in, and the expertise required to, manage the Sitka Sound herring roe fisheries.

Second, the Court in *Rose* relied on the *Weaver Bros.* case. That case is instructive. In *Weaver Bros.*, a motor carrier, Weaver Bros., challenged the decision of the Alaska Transportation Commission to permit the transfer of a motor carrier permit from one operator to another.¹⁴ Weaver Bros. objected that portions of the transferring company's (Ness) operating authority were dormant because Ness allegedly had not transported goods between and within certain geographic areas as authorized by his permit.¹⁵ The Court noted that a statute and a Commission regulation provided that "only those operating rights shown to be in regular and active use may be transferred."¹⁶ The Commission found that Ness's operating rights were not dormant and approved the transfer.¹⁷ Weaver Bros. challenged the Commission's findings and argued that because

¹² See, e.g., Affidavit of Greg Ruggerone, filed in support of STA's motion from preliminary injunction.

¹³ See generally the affidavits of Eric Coonradt, Dr. Sherri Dressel, and Kyle Hebert and the ADF&G and BOF administrative records.

¹⁴ *Weaver Bros.* 588 P.2d at 820.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at pp. 820-21.

the dispute involved statutory interpretation, the Court need not treat the Commission's interpretation with deference and should construe the statute and regulation independent of the Commission's interpretation.¹⁸ The Court disagreed. It found that "[t]he agency is better equipped than are we to determine how active and regular use shall be measured, since fundamental policy questions are presented concerning the adequacy of service to various routes and the regulation of competition in those routes."¹⁹

The instant situation is the same. Here, STA asks the court to interpret 5 AAC 27.195 independently from ADF&G's interpretation and implementation of the regulation. But just as agency expertise was necessary to determine how to measure a key requirement of the regulation in *Weaver Bros.*, here agency expertise is necessary to determine key requirements of 5 AAC 27.195. For instance, the court is not in a position to independently determine what is required by subsection (a)(2)'s mandate to the Department to distribute the sac roe fishery by time and area *if* ADF&G managers determine that doing so is necessary to ensure that subsistence users have a reasonable opportunity to harvest an amount necessary for subsistence uses. The court is not in a position to determine whether that regulation requires, for example, delaying the sac roe fishery until after the first spawn, as the Tribe has at various points advocated, or opening the sac roe fishery in any particular area. Those types of assessments require on-the-ground assessments, and as long as the Department's interpretation of what is

¹⁸ *Id.* at p. 821.

¹⁹ *Id.*

required is reasonable, the court should defer to the agency determination. The same analysis applies to subsection (b)'s mandate to consider the quality and quantity of herring spawn on branches when making management decisions. The court is not in a position to second-guess the decisions of ADF&G managers that take into account the quality and quantity of herring spawn on branches.²⁰ Those considerations require the special expertise of the Department, and the court should defer to the agency's interpretation of that regulation's requirements so long as ADF&G's interpretation is reasonable.

The *Rose* Court cited *State, Commercial Fisheries Entry Comm'n v. Templeton*, 598 P.2d 77, 80–81 (Alaska 1979) as an example of where the trial court *could* substitute its judgment for that of an agency.²¹ The basis for the agency's interpretation in that case was very different from that required in this case. In *Templeton*, the agency looked to legislative history to define an essential term:

In a nutshell, the Commission did not use its expertise to define "hardship," but rather made a judgment regarding "(t)he Legislature's concern about relative hardship."²²

²⁰ The Tribe has asserted that ADF&G does not take into account quality of spawn on branches in making management decisions, but that is not true. ADF&G managers are provided with data on the quality of spawn on branches, which may factor into their decisions, although often the data on quality is only available well-after the current season. *See* Sill & Cunningham, Technical Report 435 (December 2017) at BOF 3882. *See also* Sill Dep. at pp. 63-65. Nothing in the regulation requires ADF&G to make in-season assessments of quality, and ADF&G's interpretation of the regulation's requirements must be given the deference due under the reasonable-basis standard of review.

²¹ *Rose*, 647 P.2d at 161.

²² *Templeton*, 598 P.2d at 80-81.

The Court ruled that “[i]nsofar as its interpretation of the regulation is based solely on the interpretation of the Act, no additional deference is due the Commission.” Here, of course, ADF&G is not interpreting a statute to understand what a regulation requires. Rather, it is applying its special expertise to make determinations about distributing the commercial fishery by time and area and to consider the quality and quantity of spawn on branches when that information becomes available. ADF&G’s interpretation of 5 AAC 27.195 clearly falls under the *Weaver Bros.* precedent, not *Templeton*.

B. Because ADF&G is functionally interpreting its “own” regulation insofar as that regulation was promulgated to specifically guide its management decisions, the *Tea* case is easily distinguished.

The Tribe relies on the *Tea* case to argue that the Department’s interpretation of 5 AAC 27.195 does not fall within the second ground for employing the deferential “reasonable basis” standard of review.²³ It makes the odd assertion that ADF&G’s interpretation of the regulations adopted by the Board of Fisheries (“BOF”) *for the purpose of guiding ADF&G’s management of the Sitka Sound herring fishery* is owed no deference because ADF&G and the BOF are not the same agency.²⁴ But that argument places form over substance, and nothing in *Tea* supports doing so.

Tea involved two distinct agencies—the Department of Revenue (“DOR”) and Department of Health and Social Services’ Office of Child Support (“OCS”). The issue

²³ STA Brief at pp. 25-27 and n.31.

²⁴ STA Brief at pp. 26-27.

in that case was whether a mother who had relinquished her parental rights was entitled to her children's PFDs because a formal termination order had not been entered before she applied to receive the dividends.²⁵ The mother and OCS offered competing interpretations of a DOR regulation governing the payment of children's PFDs when children are in OCS custody.²⁶ Of critical importance, DOR was *not* a party in the case, yet it was its regulation that was being interpreted. The Court, considering the proper standard of review wrote:

We typically interpret regulations with some deference to the agency's own interpretation, but the agency that promulgated 15 AAC 23.223(i) is not a party and has not otherwise offered an interpretation. *We therefore interpret the regulation using our independent judgment . . .*²⁷

The Court adopted the independent-judgment standard of review *because* the agency who promulgated the regulation was not a party to the case and had not interpreted the regulation.²⁸

²⁵ *Tea*, 278 P.3d at 1263.

²⁶ *Id.* at 1265.

²⁷ *Id.* at 1263 (emphasis added).

²⁸ The Tribe appears to suggest that the *Tea* Court, in applying its independent judgment, discounted OCS's arguments because the regulations OCS was interpreting were not its own. The Tribe states that the "Court declined to defer to OCS's interpretation of the regulation, even though OCS was the primary agency responsible for complying with the regulation." STA Brief at pp. 26-27. That is not what the Court did. In fact, it adopted OCS's interpretation, finding that "OCS offers a more natural reading of the [DOR] regulation." *Tea*, 278 P.3d at 1265. Nor did the Court find that OCS was the "primary agency responsible for complying with the regulation." The Court noted that it was DOR's decision, presumably after interpreting the regulation, to pay OCS the dividend. *Id.* at 1267. In any event, as discussed in the body of this section,

The instant situation is completely different from *Tea*. First, the entity that promulgated the regulation *is* a party to this case: BOF. Second, the relationship between the BOF and ADF&G is fundamentally different than the relationship between DHSS's OCS and DOR. DOR and DHSS are completely separate agencies and personnel in OCS would have no particular reason to possess special expertise to interpret a DOR regulation. Here, however, ADF&G clearly possesses the expertise to interpret a BOF regulation.

A more apt comparison to the instant situation is the relationship between DHSS and OCS. There, DHSS promulgates regulations that govern OCS's operations and conduct.²⁹ OCS *does* possess the expertise to interpret DHSS regulations that apply to OCS.³⁰ The same is true between the BOF and ADF&G. BOF fashions and adopts regulations after receiving briefings and recommendations from the experts at ADF&G. ADF&G scientists advise the BOF as it considers proposed regulations, and this was true, of course, with respect to the adoption of 5 AAC 27.195. Unlike OCS offering an interpretation of a DOR regulation in *Tea* (which the Court accepted), here ADF&G is interpreting a regulation that it has advised the BOF about prior to its adoption and over the many years that it has been operative. Under the logic of the Court's analysis in

the *Tea* case is fundamentally different from the instant case and the *Tea* Court's decision to apply its independent judgment is simply irrelevant.

²⁹ See, e.g., AS 44.17.030 (principal executive officer of each department, such as DHSS, "may adopt regulations"); 7 ACC 53.370 (defining Office of Children's Services as a division of DHSS).

³⁰ See, e.g., Title 7, Chapter 53 of the Alaska Administrative Code.

Weaver Bros., ADF&G is functionally interpreting its own regulation—or at least one where it is the subject matter expert. *Tea* simply does not apply.³¹

C. The Tribe’s APA arguments are directed at theories not before the court in this round of summary judgment briefing.

The Tribe argues that the BOF has never interpreted 5 AAC 27.195 in a manner that the court could consider and “give deference.”³² It argues that the BOF has never “issued an interpretation” because, it asserts without citation, that the Board has not issued one under the Administrative Procedure Act.³³ While this is factually untrue,³⁴ it is not necessary for the court to even consider the question. For purposes of this motion

³¹ In contrast, the Court routinely directs trial courts to defer to ADF&G’s interpretation of BOF and Board of Game regulations. *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)). The Tribe’s other authority is no more availing. *See Sec’y of Labor, Mine Safety & Health Admin. v. Excel Mining, LLC*, 334 F.3d 1, 7 (D.C. Cir. 2003) (noting that an agency’s interpretation of statutory language is entitled to deference because of the agency’s delegated authority to administer the statute); *Amerada Hess Pipeline Corp. v. F.E.R.C.*, 117 F.3d 596, 601 (D.C. Cir. 1997) (finding agency was owed deference even though it did not promulgate the regulations at issue because it “is entrusted with administering the regulations”). ADF&G is also entrusted with administering the BOF regulations, and under the authority the Tribe itself cites, is owed deference due to its expertise in administering those regulations.

³² STA Brief at p. 26.

³³ *Id.* at 25-26.

³⁴ The Board’s meetings, in which it is presented with the opportunity to revisit and revise 5 AAC 27.195 in light of ADF&G’s interpretation of the regulation, comply with the APA. By leaving the regulation as is, it is affirming the Department’s interpretation.

for summary judgment, the Board's actions and its interpretation of the regulation must be considered correct. Only the Department's compliance with the regulation is under scrutiny in this motion.

D. ADF&G's interpretation of 5 ACC 27.195 has been longstanding, continuous, and repeatedly affirmed by the Board.

The Tribe asserts, without citation to authority, that ADF&G's interpretation of the regulation was first advanced in this litigation, has not been written down, and is not longstanding or continuous.³⁵ None of these allegations are true.

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.³⁶ At the same time, 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 quality or quantity of herring spawn on branches.³⁷ 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

³⁵ STA Brief at p. 27.

³⁶ Coonradt Aff. ¶¶ 10-11.

³⁷ *Id.* ¶¶ 11-15.

before they have spawned).³⁸ The Tribe itself has asked the Board many times to change the regulation so that ADF&G would manage the fisheries in a different manner, but the Board has mostly refused, expressing support for ADF&G's interpretation and implementation of 5 AAC 27.195.

ADF&G's interpretation of the regulation is owed deference because it has been longstanding and continuous, and because the Board has affirmed it multiple times in response to requests from the Tribe and others to change the regulation.³⁹

III. ADF&G HAS NOT VIOLATED 5 AAC 27.195

The Tribe acknowledges that its claims in Count I are not "simply about whether there is—or is not—a reasonable opportunity for subsistence."⁴⁰ That question is one that is entrusted through statute for the Board to answer. Instead, as STA recognizes, Count I is "about whether ADF&G has properly interpreted and implemented Board regulations"⁴¹ As shown in Section II, ADF&G's interpretation of 5 AAC 27.195 is owed a deferential standard of review. This means that so long as ADF&G's

³⁸ Coonrad 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").

³⁹ *Marathon Oil Co. v. State, Dep't of Natural Res.*, 254 P.3d 1078, 1082 (Alaska 2011) ("We give more deference to agency interpretations that are 'longstanding and continuous.' ") (quoting *Premera Blue Cross v. State, Dep't of Commerce, Cmty. & Econ. Dev., Div. of Ins.*, 171 P.3d 1110, 1119 (Alaska 2007)).

⁴⁰ STA Brief at p. 29.

⁴¹ STA Brief at p. 29.

interpretation of the regulation has a “reasonable basis in law and fact,”⁴² the court must find that the Department has not, as a matter of law, violated 5 AAC 27.195. Nothing in the record or in STA’s briefing suggests that ADF&G has acted unreasonably in its interpretation and implementation of 5 AAC 27.195.

A. The Court must treat as correct the Board’s determination in January of 2018 that there is a reasonable opportunity for subsistence uses of herring spawn in Sitka Sound.

In 2017, the Tribe submitted three proposals to the Board of Fisheries seeking restrictions on the commercial sac roe herring fishery in Sitka Sound, the continuation of a long effort by the Tribe to convince the Board to restrict or close the commercial fishery. In each proposal, the Tribe alleged that the commercial fishery was so disrupting spawning patterns of herring in Sitka Sound as to deny a reasonable opportunity for subsistence uses. At a meeting in January 2018, the Board adopted one of the Tribe’s proposals, increasing the area closed to commercial fishing, and rejected the other two. The Board’s action on these proposals necessarily includes a finding that the Board’s regulations, as amended, provide a reasonable opportunity for subsistence uses of herring spawn in Sitka Sound—and three Board members explicitly so found on the record. Under state law it is the Board’s responsibility to determine whether its regulations provide a reasonable opportunity for subsistence uses. As noted above, the parties have agreed that this first round of motion for partial summary judgment are only focused on the lawfulness of ADF&G’s interpretation and implementation of 5

⁴² *Weaver Bros.* 588 P.2d at 821 (citations omitted).

AAC 27.195, and therefore, the Board's conclusion that there is a reasonable opportunity for subsistence is not open to challenge here. So long as the Department's interpretation and implementation of 5 AAC 27.195 is reasonable, the Tribe is not entitled to partial summary judgment.

B. ADF&G has complied with 5 AAC 27.195(a)(2).

1. ADF&G distributes the commercial harvest by time and area.

5 AAC 27.195(a)(2) provides:

(a) In managing the commercial sac roe herring fishery [in 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 herring spawn necessary for subsistence uses

The facts contained in the administrative record and the deposition of the ADF&G area manager for the fisheries, as well as the depositions of ADF&G scientists, clearly establish that ADF&G in fact *does* distribute the commercial harvest by time and area when it determines that it is necessary to ensure a reasonable opportunity for subsistence. Nowhere does the Tribe dispute those facts.

As discussed in the State's motion for summary judgment, subsection (a)(2) was born out of a desire to disperse, or distribute, the commercial harvest away from the "core" areas where subsistence harvests had historically—and successfully—occurred.⁴³

⁴³ See State's opening brief at pp. 18-25 (discussing in detail STA's Proposal 500, submitted in 2001, which the Board considered and adapted to become 5 AAC 27.195).

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. While the Tribe argues that closure of the core area to the commercial sac roe fishery is not, in its view, sufficient,⁴⁴ there can be no argument that the closure is a method of distributing the commercial harvest by area.

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, thus satisfying the requirement that the Department distribute the commercial fishery by time and area.⁴⁵ 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.⁴⁶ 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

⁴⁴ See STA Brief at pp. 37-43.

⁴⁵ See, e.g., Coonradt Aff. at pp. 46-47 (describing management decision to open commercial fishery "far—it was a ways away from the—from where the vast majority – well, all the [subsistence] branches were being set").

⁴⁶ Coonradt Dep. at p. 134.

management area and away from the closed area whenever possible.⁴⁷

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 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.⁴⁸

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.⁴⁹

The Department also distributes the commercial sac roe harvest by time. The most obvious example of this occurred in 2019 when the Department did not open the commercial fishery.⁵⁰ And while the Tribe likely views that decision as unrelated to subsistence concerns, that is not the testimony provided by Mr. Coonradt.⁵¹ Moreover, Mr. Coonradt explicitly testified that he *has* considered delaying the commercial fishery

⁴⁷ 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.

⁴⁸ Coonradt Dep. at p. 51.

⁴⁹ *Id.* at pp. 51-53.

⁵⁰ *See, e.g.*, Coonradt Dep. at p. 95 (answering a question about what adjustments the Department makes to help subsistence users achieve success by noting the Department’s decision not to open the commercial fishery in 2019).

⁵¹ *Id.*

in order to achieve “a gain” with respect to the subsistence harvest, but has concluded that doing so would not result in an improvement.⁵²

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.⁵³ There simply can be no dispute that the Department is interpreting and implementing 5 AAC 27.195(a)(2) in a manner commensurate with the Board’s intent.

2. STA misunderstands ADF&G’s *Rosier* arguments.

The Tribe asserts that the State’s arguments in earlier motion practice concerning the *Rosier*⁵⁴ case somehow demonstrate that ADF&G is violating 5 AAC 27.195(a)(2).⁵⁵ The Tribe misunderstands the Department’s reliance on *Rosier*.

ADF&G has relied—and continues to rely—on *Rosier* for the proposition that it cannot overturn the Board’s decision that management of the fisheries pursuant to 5 AAC 27.195 provides a reasonable opportunity for subsistence harvest of herring

⁵² *Id.* at pp. 32-33.

⁵³ 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.

⁵⁴ *Peninsula Marketing Ass’n v. Rosier*, 890 P.2d 567 (Alaska 1995).

⁵⁵ *See* STA Brief at pp. 33-37 and 45-49.

spawn in Sitka Sound.⁵⁶ But saying that is not, as the Tribe believes, the same as saying that *Rosier* nullifies subsection (a)(2).⁵⁷ In fact, for the Board to conclude that management pursuant to 5 AAC 27.195(a)(2) provides a reasonable opportunity for subsistence, as it did during the January 2018 BOF meeting, it necessarily factored in the requirement that the Department distribute the commercial fishery by time and area *if* the ADF&G manager determines that doing so is necessary to ensure that subsistence users have a reasonable opportunity to harvest the amount herring spawn necessary for subsistence uses.

Throughout its briefing the State has stressed that subsection (a)(2) cannot be used to *fundamentally* alter the resource allocation decisions that the Board has made,⁵⁸ but not that the Department's fishery manager is powerless to implement the requirements of (a)(2). And in fact, as demonstrated in the preceding section, Mr. Coonradt utilizes the authority granted to him under subsection (a)(2) to distribute the commercial fishery away from the core area in order to take into account opportunity for subsistence harvest and to, where necessary, restrict the times when the fishery is open (or to prevent it from opening at all). The State has *never* argued that *Rosier* prevented Mr. Coonradt from making those decisions on the basis of his assessment of the impact of an opening on the opportunity for subsistence harvest.

⁵⁶ See State Motion for Summary Judgment Brief at pp. 39-43. The Department relies on and incorporates by reference those arguments here.

⁵⁷ The Tribe makes this assertion several times. See, e.g., STA Brief at p. 48.

⁵⁸ See, e.g., STA Brief at p. 33 (quoting the State's Response to Petition for Review at p. 13, n. 52).

Nothing in the State's past reliance on *Rosier* suggests or requires the conclusion that the Department is violating 5 AAC 27.195(a)(2). The undisputed facts show that the Department's fisheries manager does, in fact, distribute the commercial fishery by time and area when he determines that doing so will help to ensure a reasonable opportunity for the subsistence harvest.

3. STA's discussion of the relationship between the "closed areas" and 5 AAC 27.195(a)(2) does not demonstrate that ADF&G is failing to follow the regulation.

The Tribe devotes six pages of its brief to a discussion of the relationship between the closing of the "core area" to commercial fishing that occurred in 2012 and 2018 and 5 AAC 27.195(a)(2)'s directive to distribute the commercial fishery by time and area.⁵⁹ The thrust of the Tribe's discussion is that the closing of the core area does not absolve the Department from the responsibility for considering whether to distribute the commercial fishery by time and area outside of the closed waters in order to ensure a reasonable opportunity for subsistence. Once again, as shown in Section III.B.1, the Department actually *does* distribute the commercial fishery by time and area outside of the closed waters pursuant to 5 AAC 27.195(a)(2). The Tribe has not shown the absence of a genuine issue of material fact entitling it to judgment as a matter of law that ADF&G is violating 5 AAC 27.195(a)(2).

At the preliminary injunction stage, the State was faced with defending against the allegation that the Tribe was in danger of suffering irreparable harm and therefore

⁵⁹ See STA Brief at 37-43.

entitled to a mandatory injunction in February of 2019.⁶⁰ The arguments made by the State in that briefing, and in the subsequent petition-for-review challenge to the court's denial of the motion for preliminary injunction, were focused on demonstrating that the opportunity for subsistence was being addressed in a multitude of ways, including closing areas traditionally used for subsistence to commercial fishing.⁶¹ But those arguments never foreclosed the Department from opposing a motion asking the court to find, as a matter of law, that it was violating the regulation on the grounds that the undisputed facts show that it actually *is* following the requirements of subsection (a)(2). The Tribe's discussion of the relationship between the closing of the core area and 5 AAC 27.195(a)(2)'s directive to distribute the commercial harvest by time and area if necessary to ensure subsistence uses does not demonstrate that ADF&G has violated the regulation.

4. STA's discussion of the Board's rejection of Proposal 118 does not demonstrate that ADF&G is failing to follow 5 AAC 27.195(a)(2).

The Tribe is under the impression that because the Board rejected a 2015 STA proposal to significantly change the management of the sac roe fishery pursuant to a new formula involving the GHL and measurements of nautical miles of spawn, ADF&G is violating the law.⁶² This makes no sense.

⁶⁰ See generally STA Motion for Preliminary Injunction.

⁶¹ See State's opposition to motion for preliminary injunction at

⁶² See STA Brief at pp. 43-45.

The problem with the Tribe's argument, and the same problem attends most of its arguments concerning the Department's alleged violation of 5 AAC 27.195(a)(2), is that its true concern is with the Board's action or inaction. In the example involving Proposal 118, it was the Board that rejected the Tribe's suggested changes to the regulation, not the Department. And while it is true that three years later Forrest Bowers, ADF&G's Deputy Director for the Division of Commercial Fisheries, made the observation in an email that delaying the start of the commercial fishery until after spawning has commenced would fundamentally change the manner in which the sac roe herring fishery is managed—something which, in his view, would result in a fishery resource allocation decision that is reserved for the Board⁶³—his email does not mean that the Department has taken any action that violates 5 AAC 27.195(a)(2). The Tribe has not pointed to a single decision of the Department in managing the sac roe fishery that violates BOF regulations.

It is worth recalling that in Count I the Tribe alleged that ADF&G has violated state statute (a claim which it appears to have abandoned since it did not raise it in this motion for summary judgment) and BOF regulations. The Tribe carries the burden of proving its allegations. Mr. Bowers' email is not, as a matter of law, sufficient to establish that the Department has, or is, violating 5 AAC 27.195(a)(2). To the contrary, the Tribe's deposition of the ADF&G Sitka Sound herring fisheries manager, Eric Coonradt, established that he, in fact, follows that regulation in making management

⁶³ The email is quoted in STA's Brief at p. 43.

decisions.⁶⁴ The Tribe may not like all of Mr. Coonradt's decisions, but so long as they are reasonable, the court should defer to his judgment.

C. ADF&G has complied with 5 AAC 27.195(b)

The Tribe asserts that the Department is violating 5 AAC 27.195(b) because it “does not collect or consider information about the ‘quality’ of herring spawn on branches ‘at all.’”⁶⁵ For this proposition it selectively quotes one colloquy from Mr. Coonradt's deposition regarding whether the Department assesses quality of spawn *in season*.⁶⁶ Mr. Coonradt acknowledges that the Department simply does not have information regarding the quality of spawn available to it in season. But nothing in 5 AAC 27.195(b) requires the Department to consider the quality of spawn in season, and the Department *does* consider the quality of spawn after it reviews data gathered through post-season subsistence surveys conducted by the Tribe and ADF&G's subsistence division.⁶⁷

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

⁶⁴ See Section III.B.1.

⁶⁵ STA Brief at p. 50.

⁶⁶ *Id.* at pp. 51-52.

⁶⁷ See Coonradt Dep. at p. 87 (acknowledging reviewing the Division of Subsistence reports which include descriptions of quality of spawn). See also Sill & Cunningham, Technical Report 435 (December 2017) at BOF 3882; Sill Dep. at pp. 63-65.

Department has never interpreted that regulation to require an in-season assessment and has never performed that kind of assessment.⁶⁸ 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.⁶⁹ The Department has collected this data the same way since 5 AAC 27.195 was adopted.⁷⁰ 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.⁷¹

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.⁷² 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 sustained yield.⁷³

⁶⁸ Coonrad Aff. ¶¶ 9, 12.

⁶⁹ *Id.* ¶ 9.

⁷⁰ Sill, et al., at 2 (annual subsistence harvest monitoring surveys began in 2002).

⁷¹ R. BOF 000088-000588 (at p. 16).

⁷² Bowers Aff. ¶ 12 (filed in support of State's Opp. Motion for PI).

⁷³ *Id.* ¶ 10. Any claim that the subsistence fishery does not enjoy a preference because the commercial fishery is the first to harvest is meritless. The commercial fishery harvests first because of the way the fisheries are conducted, the subsistence

The Sitka Sound herring fisheries follow this general practice.⁷⁴ 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.⁷⁵

Through its review of the Division of Subsistence’s post-season subsistence harvest reports, the Department is able to—and does—consider the quality and quantity of herring roe. While that information is often of limited value because it is not available until after the fishery closes, the Department still considers it. By its terms, the regulation does not require more.

D. ADF&G already explains how it implements 5 AAC 27.195.

The Tribe asserts that ADF&G’s explanations for its management decisions are not adequately recorded in a “decisional document.”⁷⁶ But the Tribe acknowledges that ADF&G in fact provides detailed descriptions of its management decisions.⁷⁷ The Tribe

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.

⁷⁴ *Id.* ¶ 11.

⁷⁵ *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.”).

⁷⁶ STA Brief at pp. 53-56.

⁷⁷ *Id.* at p. 55 (noting ADF&G’s news releases).

notes that the Department's news releases document the factors it uses in determining where and when to open the commercial sac roe fishery, including weather, test set results, predator observations, spawning events, and market prices.⁷⁸ The Tribe's complaint is that, in its view, this information is not enough to determine how ADF&G factored subsistence concerns into its decisions.⁷⁹

As an initial matter, it is worth noting that with this request the Tribe is, in the context of a motion for summary judgment, asking not for judgment as a matter of law but rather some kind of directive from the court to bulk up the information contained in the Department's communications with stakeholders in the Sitka Sound herring fisheries. In other words, the Tribe is not alleging that the supposed inadequacy of the Department's news releases violates 5 AAC 27.195. Thus, the court could—and should—refuse to grant summary judgment to the Tribe on the basis of the contents of ADF&G's news releases.

The Tribe cites *Ship Creek Hydraulic Syndicate v. State, Dep't of Transp. & Pub. Facilities*,⁸⁰ in support of its request, but nothing in that case suggests that the Department's news releases fail as decisional documents. *Ship Creek* involved “quick-take” condemnation proceedings and the explanations behind the decisions to condemn property.⁸¹ The Court recognized that the “precise form a decisional document takes

⁷⁸ *Id.*

⁷⁹ *Id.* at pp. 55-56.

⁸⁰ 685 P.2d 715 (Alaska 1984).

⁸¹ *Id.* at pp. 716-19.

depends on how the document is used.”⁸² Here, the news releases are an effective mechanism to provide people participating in the commercial and subsistence fisheries with up-to-date, immediate information concerning the herring spawn, weather, and other factors relevant to determining when and where to open a commercial set, as well as when and where herring are spawning relative to the subsistence harvest. The news releases provide the court (and the public) with a wealth of data that adequately explains ADF&G’s decision making process with respect to opening the commercial fishery. The Tribe is not entitled to summary judgment on this issue.

E. STA is not entitled to a declaratory judgment.

Because the Tribe has not shown that ADF&G has, as a matter of law, violated either AS 16.05.258 or 5 AAC 27.195, it is not entitled to the declaratory relief it seeks.

IV. CONCLUSION

The Tribe has not shown that it is entitled to summary judgment on any of its claims in Count I of its complaint. Thus, the State respectfully asks the court to deny the Tribe’s motion.

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⁸² *Id.* at 717 n.3.