IN THE SUPREME COURT OF THE STATE OF ALASKA

SITKA TRIBE OF ALASKA, Appellant, v. STATE OF ALASKA, DEPARTMENT OF FISH AND GAME, and SOUTHEAST HERRING CONSERVATION ALLIANCE, Appellees.	Supreme Court No. S-18114

Trial Court Case No. 1SI-18-00212CI

APPEAL FROM THE SUPERIOR COURT
FIRST JUDICIAL DISTRICT AT SITKA
THE HONORABLE DANIEL J. SCHALLY, JUDGE

BRIEF OF APPELLANT SITKA TRIBE OF ALASKA

John M. Sky Starkey, ABA No. 8611141
Jennifer Coughlin, ABA No. 9306015
Andrew Erickson, ABA No. 1605049
LANDYE BENNETT BLUMSTEIN LLP
701 West 8th Avenue, Suite 1100
Anchorage, AK 99501
Phone: 907-276-5152
Email: jskys@lbblawyers.com
jenniferc@lbblawyers.com
andye@lbblawyers.com

Filed in the Supreme Court of the State of Alaska, this 25th day of January 2022.

Clerk of the Appellate Courts

By: Julia A. Kentch
Julie Kentch, Deputy Clerk

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Alaska Cases

Other Cases

Constitutional Provisions

U.S. Statutes

Alaska Statutes

Alaska Regulations

Court Rules

Other Authorities

AUTHORITIES PRINCIPALLY RELIED UPON

Alaska Constitutional Provisions

Alaska Constitution, Article VIII, § 4. Sustained Yield.

Fish, forests, wildlife, grasslands, and all other replenishable resources belonging to the State shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses.

Alaska Regulations

5 AAC 27.195. Sitka Sound Commercial Sac Roe Herring Fishery.

(a) In managing the commercial sac roe herring fishery in Section 13-B north of the latitude of Aspid Cape (Sitka Sound), the department shall

(1) manage the fishery consistent with the applicable provisions of 5 AAC 27.160(g) and 5 AAC 27.190;

(2) distribute the commercial harvest by fishing time and area if the department determines that it is necessary to ensure that subsistence users have a reasonable opportunity to harvest the amount of herring spawn necessary for subsistence uses specified in 5 AAC 01.716(b).

(b) In addition to the provisions of (a) of this section, the department shall consider the quality and quantity of herring spawn on branches, kelp, and seaweed, and herring sac roe when making management decisions regarding the subsistence herring spawn and commercial sac roe fisheries in Section 13-B north of the latitude of Aspid Cape.

Alaska Court Rules

Alaska Rule of Civil Procedure 82. Attorney's Fees.

(a) Allowance to Prevailing Party. Except as otherwise provided by law or agreed to by the parties, the prevailing party in a civil case shall be awarded attorney's fees calculated under this rule.

(b) Amount of Award.

(1) The court shall adhere to the following schedule in fixing the award of attorney's fees to a party recovering a money judgment in a case:

Judgment and, If Awarded, Prejudgment Interest		Contested With Trial	Contested Without Trial	Non-Contested
First	$25,000	20%	18%	10%
Next	$75,000	10%	8%	3%
Next	$400,000	10%	6%	2%
Over	$500,000	10%	2%	1%

(2) In cases in which the prevailing party recovers no money judgment, the court shall award the prevailing party in a case which goes to trial 30 percent of the prevailing party's reasonable actual attorney's fees which were necessarily incurred, and shall award the prevailing party in a case resolved without trial 20 percent of its actual attorney's fees which were necessarily incurred. The actual fees shall include fees for legal work customarily performed by an attorney but which was delegated to and performed by an investigator, paralegal or law clerk.

(3) The court may vary an attorney's fee award calculated under subparagraph (b)(1) or (2) of this rule if, upon consideration of the factors listed below, the court determines a variation is warranted:

(A) the complexity of the litigation;

(B) the length of trial;

(C) the reasonableness of the attorneys' hourly rates and the number of hours expended;

(D) the reasonableness of the number of attorneys used;

(E) the attorneys' efforts to minimize fees;

(F) the reasonableness of the claims and defenses pursued by each side;

(G) vexatious or bad faith conduct;

(H) the relationship between the amount of work performed and the significance of the matters at stake;

(I) the extent to which a given fee award may be so onerous to the non-prevailing party that it would deter similarly situated litigants from the voluntary use of the courts;

(J) the extent to which the fees incurred by the prevailing party suggest that they had been influenced by considerations apart from the case at bar, such as a desire to discourage claims by others against the prevailing party or its insurer; and

(K) other equitable factors deemed relevant.

If the court varies an award, the court shall explain the reasons for the variation.

(4) Upon entry of judgment by default, the plaintiff may recover an award calculated under subparagraph (b)(1) or its reasonable actual fees which were necessarily incurred, whichever is less. Actual fees include fees for legal work performed by an investigator, paralegal, or law clerk, as provided in subparagraph (b)(2).

JURISDICTIONAL STATEMENT

The Sitka Tribe of Alaska ("STA") appeals the final judgment entered by the superior court on May 24, 2021. [Exc. 215-17] This appeal was stayed pending the resolution of attorney's fees motions. On September 17, 2021, the superior court issued its order denying all the parties' cross-motions for attorney's fees. [Exc. 234-37] On October 19, 2021, STA timely amended its points on appeal to include the attorney's fees order. This Court has jurisdiction pursuant to AS 22.05.010.

ISSUES PRESENTED FOR REVIEW

1. Did the superior court err in concluding that the Sustained Yield Clause, Article VIII, section 4 of the Alaska Constitution, does not require the Alaska Department of Fish & Game ("ADF&G") to provide the best available information to the Alaska Board of Fisheries?

2. Did the superior court err in concluding that the injuries STA demonstrated to the subsistence way of life did not constitute irreparable harm?

3. Did the superior court err in denying STA's motion for attorney's fees despite finding that STA had prevailed on the main issues of the litigation, which the court accurately characterized as going "to the very heart of this litigation"?

INTRODUCTION

STA brought this lawsuit to improve and protect subsistence harvests of herring spawn on branches, kelp, and seaweed in Sitka Sound.[1] After production of a voluminous administrative record and limited discovery, the superior court granted STA's motions for

[1] "Herring are the key to the ocean. They are our buffalo." Thomas F. Thornton, *The Distribution of Subsistence Herring Eggs from Sitka Sound, Alaska* at 21 (2019) at 21 (quoting Mike Miller, STA tribal citizen and subsistence harvester).

summary judgment regarding ADF&G's herring management. [Exc. 156-67, 183-201] The superior court agreed with STA that ADF&G unlawfully interpreted and implemented 5 AAC 27.195 ("section 195")—a regulation adopted by the Board of Fisheries requiring ADF&G to distribute the commercial fishery by time and area throughout Sitka Sound to ensure a reasonable opportunity for subsistence. The superior court rejected ADF&G's arguments that it lacked authority to distribute the commercial fishery in time and area, including in areas beyond certain regulatory closed waters, solely to provide increased opportunity for subsistence harvesters. [Exc. 162] And the superior court clarified that ADF&G must consider the quality and quantity of herring spawn on branches when making management decisions regarding the commercial fishery, rejecting ADF&G's arguments that the regulation was merely advisory and unenforceable.[2] [Exc. 193]

On appeal, three issues remain. This Court should reverse the superior court's decisions on all three issues. First, this Court should reverse the superior court's erroneous conclusion that ADF&G does not have a duty to provide the Board with all the relevant scientific information regarding a proposed fisheries regulation. [*See* Exc. 213] The Sustained Yield Clause in Article VIII, section 4 of the Alaska Constitution requires ADF&G to apply "principles of management intended to sustain the yield of the resources being managed."[3] One of the most important "principles of management" is the concept

---

[2] *See* Exc. 193 ("5 AAC 27.195(b) is not a mere [Board] finding, it is a mandatory duty imposed on ADF&G, as is subsection (a)(2).").

[3] *See Native Vill. of Elim v. State*, 990 P.2d 1, 5 (Alaska 1995) (quoting Papers of the Alaska Constitution Convention, 1955-1956, Folder 210, Terms).

that decision-makers must consider all the relevant information regarding the resource. The duty to consider all the relevant scientific information applies to ADF&G when it provides informational reports, scientific data and analyses, and policy recommendations to the Board. The superior court erred when it concluded that ADF&G's compliance with its constitutional duties is non-justiciable and ADF&G is not required to provide the Board with all the relevant information regarding Sitka herring. [Exc. 213]

Second, this Court should reverse the superior court's determination that STA would not suffer irreparable harm if ADF&G's illegal implementation of section 195 was not enjoined prior to the 2019 fishing season. [*See* Exc. 66] Although the legal issue is technically moot, this Court should apply the public interest exception and reverse the meritless and dangerous precedent that subsistence harvesters are not irreparably harmed unless they can demonstrate a "new crisis that warrants an emergency response." [Exc. 66 (citing Exc. 48)] STA was clearly and unequivocally harmed by ADF&G's illegal interpretation and implementation of a regulation designed to effectuate Alaska's subsistence priority.

Third, STA was the prevailing party in this lawsuit and is entitled to attorney's fees under Alaska Rule of Civil Procedure 82. The superior court determined correctly that STA prevailed on its non-constitutional claims against ADF&G, which all the parties agreed were the main issue in this case. [*See* Exc. 235] But the court erred when it determined *sua sponte* that STA's constitutional claim was also a main issue. [*See* Exc. 236] The court misapplied this Court's precedents by subjectively weighing STA's victories, reaching the conclusion that STA had not "bested the others to the degree that it can be accurately

designated as the prevailing party in the case as a whole." [Exc. 237]

STATEMENT OF THE CASE

I. Factual Background

Pacific herring are a keystone species, ecologically and culturally.[4] Each spring, schools of herring return to spawn in Sitka Sound. [*See* Exc. 77] The protected, rocky waters of Sitka Sound provide ideal spawning habitat. [*See* Exc. 79] Adult herring release their eggs ("roe" or "spawn") and milt into the water, where the fertilized eggs attach to aquatic substrates such as eelgrass, kelp, or seaweed. [*See* Exc. 77] Scientists consider herring to be a "forage fish"—adult herring and eggs serve as critical prey for other species, including marine mammals, birds, and other fish, particularly salmon. [*See* Exc. 84]

Herring are equally important to the human environment. STA tribal citizens and Alaska Natives from throughout southeast Alaska have relied on harvesting herring eggs since time before memory.[5] Subsistence harvesters gather herring eggs by placing Western hemlock branches or kelp into the water at carefully selected locations to provide and enhance spawning habitat. [*See* Exc. 40-41, 77] In the water, the herring eggs attach to the branches or kelp, which are then pulled onto shore or boats, allowing the harvesters to gather the eggs. [*See* Exc. 41, 77] "This system was highly developed in Sitka Sound, the mecca of herring spawning and egg gathering for hundreds, if not thousands, of years."[6]

Subsistence herring egg harvesting is an integral part of STA tribal citizens' cultural,

---

4 *See generally* Thornton, *supra* note 1, at 24.

5 *See id*. at 28.

6 *Id*. at xvii.

nutritional, and economic well-being. [*See* Exc. 37-39, 44] Herring eggs are presented and shared at *koo-eex* (ceremonies), held for celebrations and memorials. [Exc. 37] The connection between herring and the Tlingit language serves as an important way that traditional ecological knowledge, social practices, and the language itself are passed down to new generations.[7]

Sitka herring were once remarkably abundant. Historical accounts reported that "herring were so numerous around Sitka in February and March that the water became milky from eggs and milt and it was easy to catch herring with a rake." [Exc. 80] However, under intense pressure from the commercial fishing industry, and under ADF&G's mismanagement, herring stocks throughout southeast Alaska systematically collapsed from overfishing.[8] Of the major historic spawning areas in southeast Alaska, only Sitka continues to yield a consistent and commercially viable herring sac roe fishery.[9]

As discussed below, despite Sitka herring's widespread importance to subsistence harvesters, ADF&G has illegally prioritized herring management to achieve maximum commercial harvests. Since 1999, the commercial sac roe herring fishery has been managed under a "threshold" management approach: A commercial fishing season is opened if the

---

7 *See* Exc. 42-43 ("Harvesting eggs is vitally important to the training of our young people to be healthy, contributing members of our community. A big portion of their training is about how we only take what we need from the land and waters, and why we harvest the way we do . . . We will lose these lessons if we aren't able to harvest herring eggs, and our youth will suffer because they will not have this intimate learning experience with their Elders.").

8 *See* Thornton, *supra* note 1, at 48-51.

9 *See generally* Brief of *Amicus Curiae* Sealaska Corporation at 9-14.

annual expected herring biomass exceeds the "threshold," which is "the herring biomass needed to meet the minimum spawning and/or allocation requirements." [Exc. 87; *see* Exc. 85-86] The current threshold is 25,000 tons; thus, in years where the expected biomass exceeds that level, a commercial fishery is authorized with an allowable harvest rate determined by a sliding scale between 12 and 20 percent of the biomass (the "harvest control rule").[10] The harvest rate multiplied by the expected biomass equals the guideline harvest level ("GHL").[11] Although there are no harvest limits or restricted seasons for subsistence users, the commercial fishery is responsible for 99 percent of the herring harvested in Sitka. [*See* Exc. 78, 88] For example, in 2017, the GHL was 29,298,000 pounds and the commercial fishery harvested 27,846,000 pounds; [Exc. 88] comparatively, subsistence users harvested just 65,691 pounds of herring spawn. [*See* Exc. 78]

II. Legal Background

Section 195—the Board's regulation at the heart of this case—directs ADF&G to manage the Sitka herring fishery to ensure a reasonable opportunity for subsistence uses of herring eggs.[12] In 2001, STA raised concerns that subsistence harvesters' needs were subordinated to the commercial fishery's demands for marketable roe. [Exc. 106, 112] That year, ADF&G allowed the commercial fishery to harvest nearly the entire quota from

---

10 *See* 5 AAC 27.160(g).

11 *Id*.

12 *See* 5 AAC 27.195(a) ("In managing the commercial sac roe herring fishery . . . 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 . . . .").

traditional subsistence areas near Sitka known as the "core area," displacing subsistence users.[13] [Exc. 108] In a July 2001 letter to STA, ADF&G opined that it was "not in a position to set aside fishing areas or tamper with commercial fishing opportunities without direction from the board." [Exc. 113] Consequently, STA proposed that the Board adopt new regulations that would provide the preference for subsistence uses required by law.[14]

The Board voted unanimously to adopt a regulation requiring ADF&G's in-season manager to incorporate the subsistence priority into the commercial fishery management. [*See* Exc. 114, 118] Section 195(a)(2) requires ADF&G's in-season manager to ensure a reasonable opportunity for subsistence harvesters by distributing the commercial fishery by "time and area" throughout Sitka Sound.[15] The Board intended "to leave the determination of reasonable opportunity to the in-season manager." [Exc. 118] According to the Board, ADF&G's manager would have to make "in-season management decisions," addressing specific questions: "[A]re the people being afforded a reasonable opportunity or not?" and "Do I have to disperse the fleet or not to afford a reasonable opportunity [for subsistence]?" [Exc. 118] "These are in-season management decisions which the board

---

13 *See* Exc. 111 ("I went to the local Alaska Department of Fish and Game office in Sitka to report my observations and unfilled needs following our subsistence herring egg season. I was told that I should consider traveling to Goddard to get my herring eggs. I responded to them, 'Why do I have to go to Goddard, you go to Goddard. I only have a little skiff to feed my family.' ").

14 *See* Exc. 109-10 ("Current regulations allow the commercial fishery to concentrate its harvest so as to cause a localized depletion of herring within areas important to subsistence herring egg use . . . STA has requested the Board to provide a 'reasonable opportunity' in the form of dispersal and the Board should craft a plan that provides the preference and protection required by law.").

15 5 AAC 27.195(a)(2).

need not make." [Exc. 118]

Section 195(b) also requires ADF&G to consider the "quality and quantity" of herring spawn on branches, kelp, and seaweed available to subsistence harvesters. ADF&G must consider the "quality and quantity" of herring spawn available for subsistence "when making management decisions regarding the subsistence and commercial sac roe fisheries."[16] The Board understood that "[i]n addition to quantity, the quality of subsistence product is also important," [Exc. 115] and the *quality* of herring spawn on branches "is an important consideration in the management of the subsistence and commercial sac roe fisheries." [Exc. 116, *see* Exc. 117] The Board intended for ADF&G to "cooperate in the management of all commercial fisheries" with STA, and adopted a memorandum of agreement ("MOA") between ADF&G and STA as a Board "Finding."[17] [Exc. 119-23]

However, the voluminous administrative record that ADF&G produced in this case demonstrates that ADF&G never made the determinations required by Section 195 regarding whether subsistence harvesters were being provided a reasonable opportunity.[18] ADF&G never considered whether it needed to delay the start of the fishery or otherwise disperse the commercial fishery in time and area to ensure that subsistence harvesters had a reasonable opportunity.[19] ADF&G also never fulfilled its duty to consider the quality and

---

16 5 AAC 27.195(b).

17 According to ADF&G, the MOA was intended to be a way for subsistence users to have input on when and where the commercial fishery would be opened and to "help [ADF&G] ensure that a reasonable opportunity is provided for subsistence." Exc. 145.

18 The State produced two administrative records: "ADFG 0001-3077" is found at R. 3209-6273, 1421-31, 2007; and "BOF 0001-5139" is found at R. 6278-11416.

19 *See* 5 AAC 27.195(a)(2).

quantity of spawn on branches before opening the commercial fishery or making other management decisions.[20] And in an extraordinary demonstration of disregard for the Board's actions and intent, and resistance to changing management to ensure reasonable opportunity, in 2009, ADF&G unilaterally withdrew from the MOA with STA. [Exc. 89]

Thus, in 2003 and every year between 2005 and 2015, ADF&G allowed the commercial fishery to open in the core area, which is where traditional subsistence harvests occur due to a variety of factors, primarily the accessibility by road and skiff from Sitka.[21] ADF&G repeatedly ignored STA's requests to delay commercial openings until herring had a chance to spawn in areas accessible to subsistence harvesters and to direct the commercial fishery away from the traditional subsistence harvesting areas as required by section 195. [*See* Exc. 102]

The subsistence harvest data reflect the fact that subsistence harvesters' needs continued to go unmet in the decades following the Board's adoption of section 195. [*See* Exc. 78] The "amount reasonably necessary for subsistence" ("ANS"), which the Board set at a range between 136,000 and 227,000 pounds of herring spawn per year,[22] was met

---

20 *See* 5 AAC 27.195(b).

21 *See* Exc. 90-101; *see also* Exc. 125 ("Though subsistence harvest of herring eggs occurs over a broad area of Sitka Sound, the department observations and harvest monitoring strategy show that the eggs-on-branches harvest effort is heavily concentrated in an area that includes the shoreline of Kasian Island and South Middle and Crow Islands, a small area relative to the spawn. These areas are considered ideal for setting branches since the subtidal shoreline where herring spawn tends to be rocky, free of sediment and pollution, protected from ocean surge, and is close to town.").

22 5 AAC 01.716(b).

only three times between 2005 and 2018.[23] [Exc. 83]

III. Procedural History

In October 2018, STA representatives met with ADF&G to discuss improved herring management. [*See* Exc. 146-50] STA submitted a proposed subsistence management plan, which would provide guidance for ADF&G's in-season manager to delay the start of the commercial fishery and distribute commercial openings by area, allowing more herring to spawn in traditional subsistence areas. [*See* Exc. 146] However, discussions between ADF&G and STA were unproductive. [*See* Exc. 147] On November 16, ADF&G Acting Director of Commercial Fisheries Forrest Bowers responded to STA by echoing the same position that ADF&G held before the Board adopted section 195.[24] [*See* Exc. 147-48] Director Bowers explained that ADF&G would not take management actions, such as delaying the commercial fishery or moving the commercial openings away from subsistence areas, solely to improve subsistence harvests:

> If beginning the fishery before first spawning presented a known conservation concern the department would be well within our authority to act, and would do so, but we can't undertake this sort of action solely to achieve a fishery resource allocation objective without direction from the Board . . .
>
> [ADF&G] taking action to not allow commercial fishing in areas beyond those already closed, with the intent of providing

---

[23] In 2009, the Board increased the ANS from its original range of 105,000 to 158,000 pounds per year; however, the lower ANS was achieved only in 2003, 2004, 2006, and 2009. Exc. 83.

[24] *Compare* Exc. 147-48 (quoted in text below), *with* Exc. 113 (July 11, 2001 letter from ADF&G Commissioner) ("Subsistence is a priority consumptive use; however, I am not in a position to set aside fishing areas or to *tamper* with commercial fishing opportunities without direction from the board.") (emphasis added).

> increased subsistence fishing opportunity in the absence of a fishery conservation purpose, would represent a direct fishery resource allocation action taken outside the [Board] process. [Exc. 147-48]

Director Bowers' email represented a deeply flawed interpretation of section 195, in which ADF&G disavowed any responsibility or authority to implement the regulation for its intended purpose. [Exc. 147-48]

On December 12, 2018, STA filed a complaint against ADF&G and the Board seeking declaratory and injunctive relief. [Exc. 1-26] Count I alleged that ADF&G's Sitka herring management violated Alaska statutes and regulations, specifically section 195. [Exc. 20] Count I was pleaded as an alternative: If the court concluded that ADF&G was not violating its duties under section 195, then STA claimed that ADF&G and the Board violated their statutory duties to provide a priority for subsistence uses as required by AS 16.05.258. [Exc. 21 at ¶ 75] Count II alleged that ADF&G and the Board violated their constitutional duties under Article VIII of the Alaska Constitution. [Exc. 22-23] Count III consisted of an Administrative Procedure Act claim against the Board. [Exc. 23]

A. STA's Motion for Preliminary Injunction

On January 14, 2019, STA moved for a preliminary injunction to prevent ADF&G from managing the Sitka herring fishery under its flawed interpretation of section 195 during the impending 2019 season. [Exc. 30] STA argued that ADF&G's "in-season management is focused entirely on the commercial harvest," [Exc. 34] its "interpretation of the regulatory framework is at odds with the regulations' plain meaning and the [Board's] purpose and intent," [Exc. 35] and its failure to "make a determination whether

it is necessary to manage the commercial harvest by time and area in order to ensure that subsistence users have a reasonable opportunity to harvest the amount of herring spawn necessary for subsistence uses" was harming subsistence harvesters. [Exc. 36] STA clarified that its proposed order would not direct ADF&G to exercise its discretion in any specific way, but instead enjoin ADF&G from failing to implement section 195, including refusing to make the required determinations, altogether.[25] [*See* Exc. 61-62]

ADF&G's opposition focused on two main arguments. First, ADF&G represented that it was implementing section 195 "and it will be borne out in the administrative record that we are going to produce and assemble later on in this case."[26] [Tr. I 40] Second, ADF&G contended that it lacked authority to fully implement section 195(a)(2), including making determinations regarding whether it was necessary to distribute the commercial fishery by time and area to ensure a reasonable opportunity for subsistence harvesters. [*See* Exc. 52-58] Relying on a misapplication of this Court's decision in *Peninsula Marketing*

---

[25] *See* Exc. 36 (distinguishing *Cook Inlet Fisherman's Fund v. State, Dep't of Fish & Game*, 357 P.3d 789, 803-04 (Alaska 2015)). *See also* Exc. 61-62 ("[STA] is not seeking a preliminary injunction mandating [ADF&G] take any specific management action in the 2019 herring sac roe fishery . . . Instead, STA's requested relief is straightforward—an order enjoining ADF&G from implementing 5 AAC 27.195 under the narrow and clearly illegal interpretation detailed in Acting Director Bowers' email and in ADF&G's opposition.").

[26] That representation turned out to be false, as the superior court recognized in both summary judgment decisions. *See* Exc. 167 ("In short, ADFG's news releases, and indeed the State's record as a whole, fails to clearly reflect—either explicitly or implicitly—the determinations, and reasoning underlying ADFG's determinations, that ADFG is required to make before opening the commercial fishery under 5 AAC 27.195(a)."); Exc. 200 ("The State has not cited to any document in the record, and the court has not located one, that engages in an analysis of the quality of the herring spawn.").

Association v. Rosier,[27] ADF&G's confused argument, which was later rejected by the court, was that certain Board actions in 2018 that had nothing to do with section 195 somehow nullified any responsibility ADF&G had to implement that regulation.[28]

ADF&G and the intervenors, the Southeast Herring Conservation Alliance ("SHCA"), also argued that STA failed to demonstrate irreparable harm. [*See* Exc. 46-47, 49-51] ADF&G claimed that the heightened standard for injunctions applied because granting STA's motion "will prevent the commercial fleet from harvesting some or all of the 2019 guideline harvest level, and thereby irreparably harm the commercial users." [Exc. 50; *see* Exc. 47] SHCA added that STA would not suffer any irreparable harm if ADF&G continued to misinterpret and misapply section 195 during the 2019 season, claiming that "[w]hat they fail to demonstrate, however, is an urgent problem that demands the immediate remedy of an injunction against the 2019 fishery. The trends in the subsistence fishery described by [STA] have been underway for many years; there is no new crisis that warrants an emergency response." [Exc. 48]

On February 20, 2019, the superior court denied STA's motion for preliminary injunction. In a two-page order relying almost entirely on ADF&G's and SHCA's briefs, the superior court concluded that STA had not met the threshold requirement necessary for

---

27 *See*. Exc. 54-55 (citing 890 P.3d 567 (Alaska 1995).

28 *See* Exc. 53 (erroneously arguing that ADF&G 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" because such actions would "effectively veto a decision of the Board").

injunctive relief—irreparable harm. [*See* Exc. 65-66] "As most succinctly described in [SHCA's] opposition brief, [STA] has not met its threshold burden of demonstrating irreparable harm." [Exc. 66 (citing Exc. 48)] When the court failed to find irreparable harm, it applied the heightened standard requiring a clear showing of probable success, concluding that STA had not shown that it was likely to prevail on the merits.[29] [Exc. 66]

B. Summary Judgment Re: Section 195

Following the denial of STA's preliminary injunction motion, ADF&G produced a voluminous administrative record and the parties engaged in limited discovery.[30] STA deposed ADF&G's in-season herring manager, Area Management Biologist Eric Coonradt, who was tasked with section 195's implementation. [*See* Exc. 68] On October 7, 2019, the superior court denied ADF&G's motion to quash STA's deposition notices for three other ADF&G officials.[31] [Exc. 73-74] The court correctly determined that STA's claims "are not purely administrative appeals" but instead "challenge patterns and practices of the agencies' management of the fishery as a whole, and not discrete agency determinations." [Exc. 73] But the court limited discovery in the case to the depositions of the identified ADF&G officials. [Exc. 74]

On November 27, 2019, the parties filed cross-motions for summary judgment

---

[29] On March 27, 2019, this Court denied STA's petition for review of the superior court's order denying the preliminary injunction motion. *See* Order, S-17384 (Mar. 27, 2019). Exc. 67.

[30] *See supra* note 18.

[31] STA deposed ADF&G's chief herring scientist, Dr. Sherri Dressel, R. 2018-2132; ADF&G's herring researcher, Kyle Hebert, R. 1685-1807; and ADF&G subsistence resource specialist, Lauren Sill, R. 1828-1984.

regarding STA's Count I. [Exc. 134, 151-52] The legal issue was identical to that raised by STA's motion for preliminary injunction: whether ADF&G lawfully interpreted and implemented section 195. STA specifically requested an order requiring ADF&G to document its section 195 determinations so they may be reviewed. [*See* Exc. 136-40]

STA also devoted significant attention to ADF&G's flawed *Rosier* argument. [*See* Exc. 140-44] ADF&G's reliance on *Rosier* to justify not implementing section 195(a)(2) was revealed to be simply a post hoc litigation defense. [*See* Exc. 153-55] The record, once produced, demonstrated that ADF&G had never interpreted section 195 as requiring it to determine whether subsistence users had a reasonable opportunity.[32] Consequently, ADF&G had never even considered distributing the commercial fishery by time and area to ensure a reasonable opportunity for subsistence uses. ADF&G in-season manager Eric Coonradt admitted that the one time he moved a commercial fishery opening further away from a subsistence harvest area was based on his judgment of "everything being equal"—there was an equally productive commercial harvest opportunity in another equally accessible area. [Exc. 69] And Coonradt admitted that he never considered the "quality" of herring spawn on branches when making management decisions regarding the commercial fishery. [Exc. 70-71 ("So no, we cannot assess quality, at all.")] Coonradt's understanding of ensuring reasonable opportunity as required by section 195, never corrected by anyone in ADF&G, was to manage first and foremost to facilitate the commercial fleet's ability to

[32] *See* Exc. 59 (Coonradt Aff.) ("[ADF&G] has never interpreted this regulation as requiring the department to make an independent assessment of whether there is a reasonable opportunity for subsistence uses of herring spawn in Sitka Sound.").

harvest the GHL, and whatever was left was good enough for subsistence harvesters.[33]

On March 31, 2020, the superior court granted STA's motion for partial summary judgment with respect to section 195(a)(2) (and denied ADF&G's and SHCA's cross-motions). [Exc. 167] The court rejected ADF&G's "hodge-podge" interpretation of its duties under section 195(a)(2),[34] concluding that ADF&G is required to make determinations regarding whether a reasonable opportunity exists for subsistence harvesters before opening the commercial fishery. [*See* Exc. 162] In its decision, the court specifically rejected the main arguments ADF&G had advanced for failing to implement section 195(a)(2).[35] [*See* Exc. 163-65] The court clarified that ADF&G may not subordinate "its duty to distribute the commercial harvest by time and area to opening the commercial harvest in any way" [Exc. 162] and "5 AAC 27.195(a) determinations are important; they have the potential of directly altering the allocation of the fishery between

---

[33] Coonradt also revealed that he did not consult with STA despite the Board's intention and explicit Findings that ADF&G was expected to cooperate in-season with STA. *See* Exc. 119-23. Instead, Coonradt said he asked his friends how their subsistence harvest was going. Exc. 72 ("**Q**: Do you ever communicate with Sitka Tribe about their knowledge of subsistence uses and opinions about things to check your own thoughts and correlations? **A**: No, I don't—I don't communicate with Sitka Tribe of Alaska on subsistence issues with herring. I—I follow up with actual subsistence harvesters. **Q**: Okay, who do you follow up with? **A**: I have several friends that are—that participate in the fishery and I communicate with them.").

[34] *See* Exc. 159 (noting that ADF&G's "interpretation of 5 AAC 27.195 is a hodgepodge. Discerning exactly what [ADF&G's] interpretation is has proven to be an elusive task.").

[35] *See* Exc. 159 (rejecting ADF&G's argument that the closed area regulation excuses ADF&G from making determinations regarding reasonable opportunity); *id*. (rejecting ADF&G's argument that Rosier prevents ADF&G from determining that a reasonable opportunity for subsistence does not exist in Sitka Sound).

the subsistence and commercial harvests." [Exc. 166] But the court agreed with an argument raised by SHCA that there was a material issue of fact as to whether section 195(b) accurately reflected the regulatory language the Board adopted, thus precluding summary judgment as to that part of the regulation. [Exc. 158]

Subsequently, the parties engaged in further discovery regarding the regulatory history of section 195(b). [*See* Exc. 168] Documents from the Department of Law's regulatory files were produced and added to the administrative record demonstrating that the Board adopted the regulatory language codified in section 195(b). [*See* Exc. 168, 186]

On November 30, 2020, the superior court granted STA's renewed motion for partial summary judgment. [Exc. 201] The court concluded that ADF&G must "in some meaningful way" consider the quality and quantity of herring spawn on branches when making management decisions, [Exc. 200] "including when making required determinations under 5 AAC 27.195(a)(2)." [Exc. 193] "Because [ADF&G's] decision is not clearly or adequately reflected in the record, its implementation of 5 AAC 27.195(b) is unreasonable and an abuse of discretion." [Exc. 201]

After the superior court's rulings regarding section 195, the second half of STA's Count I and Count III became unnecessary. There was no need to challenge the sufficiency of the Board's regulations once the court ruled that ADF&G had failed to implement regulations already on the books. STA filed a stipulated voluntary dismissal of its alternative claims against the Board. [Exc. 169-72] The remaining issue, ADF&G's constitutional duties in its interactions with the Board, was only uncovered through discovery in this case. [*See* Exc. 173-77]

C. Summary Judgment Re: Constitutional Claims

On March 22, 2021, the superior court issued its third summary judgment decision, this time denying STA's Count II claim that ADF&G has a constitutional duty to provide the Board with the best available information. [Exc. 213] First, the court concluded that STA's claim was not moot. The court correctly reasoned that the Board "relies on ADF&G to provide recommendations, evaluations, and reports" and that relationship "will continue into the foreseeable future, thereby making STA's asserted claims capable of repetition." [Exc. 204] Second, the court concluded that there is no "best available information" requirement in the Alaska Constitution, and even if there were, such a standard would be non-justiciable. [Exc. 211-12]

D. Rule 82 Attorney's Fees Motions

All the parties filed cross-motions for Rule 82 attorney's fees, each claiming prevailing party status. [*See* Exc. 218, 220-21] On September 16, 2021, the superior court denied the cross-motions, declining to "designate any party as the prevailing party." [Exc. 237] First, the court rejected ADF&G's and SHCA's arguments that they had prevailed on STA's section 195 claims,[36] which the court re-emphasized as "an important decision insofar as it holds the potential to directly alter the allocation of the resource in issue as between subsistence and commercial users, which goes to the *very heart of this*

[36] Exc. 235 ("Thus, on that first round of summary judgment motions, STA alone prevailed—achieving a grant of partial summary judgment on one of the two issues before the court.").

litigation."[37] But the court then *sua sponte* weighed STA's victories on its section 195 against its constitutional claim loss, concluding that "[n]one of the parties' victories was on peripheral or unimportant issues." [Exc. 237]

STANDARDS OF REVIEW

STA appeals the denial of summary judgment regarding its constitutional claim against ADF&G. Questions of constitutional interpretation are reviewed de novo.[38] In de novo review, this Court applies its "independent judgment and adopt[s] the rule of law that is most persuasive in light of precedent, reason, and policy."[39]

This Court reviews decisions on preliminary injunctions according to three different standards of review.[40] The superior court's conclusions of law are reviewed de novo.[41] "[T]he court makes a legal conclusion when deciding whether a party faces irreparable harm unless an injunction is granted."[42] This Court will reverse a superior court's legal determination if it concludes that "the court misinterpreted, misapplied, or otherwise acted

---

37 Exc. 235 (emphasis added); *see also* Exc. 235 (recognizing STA's victory regarding section 195(b)).

38 *See Markham v. Kodiak Isl. Borough, Bd. of Equalization*, 441 P.3d 943, 949 (Alaska 2019) ("A constitutional issue presents a question of law which we review de novo, and to which we apply our independent judgment.").

39 *Metcalfe v. State*, 484 P.3d 93, 97 (Alaska 2021) (quoting *Ebli v. State, Dep't of Corr.*, 451 P.3d 382, 387 (Alaska 2019) (internal quotation marks omitted)).

40 *See State v. Galvin*, 491 P.3d 325, 332 (Alaska 2021).

41 *Id*. (citing *Alsworth v. Seybert*, 323 P.3d 47, 54 (Alaska 2014)).

42 *Id*.

contrary to the law."[43] Factual findings are reviewed for clear error.[44] And "once a party establishes the required elements for a preliminary injunctive relief, the court exercises its discretionary authority when it ultimately grants some or all requested relief or declines to grant any requested relief; thus [this Court] review[s] that decision for abuse of discretion."[45]

STA also appeals the denial of its motion for attorney's fees. Attorney's fees awards are ordinarily reviewed for abuse of discretion;[46] however, this Court will "review de novo whether the trial court applied the law correctly in awarding attorney's fees."[47]

ARGUMENT

I. The Sustained Yield Clause Requires ADF&G to Provide All the Relevant Information to the Board.

STA's first issue on appeal concerns its constitutional claim. No one disputes that ADF&G is bound by the Sustained Yield Clause. [Exc. 205] This clause is unique to Alaska and reflects the high value Alaskans ascribe to the perpetuation of healthy and abundant

---

43 *Id*.

44 *Id*. ("We deferentially review a court's factual findings for clear error, reversing if, after reviewing the entire record, we are left with a firm and definite conviction that a mistake was made.").

45 *Id*.

46 *See Alliance of Concerned Taxpayers v. Kenai Peninsula Borough*, 273 P.3d 1123, 1126 (Alaska 2012) ("We review a trial court's determination of the prevailing party for purposes of awarding attorney's fees and costs for abuse of discretion. We will overturn prevailing party determinations 'only if they are manifestly unreasonable.' " (quoting *Progressive Corp. v. Peter ex rel. Peter*, 195 P.3d 1083, 1092 (Alaska 2008)).

47 *Manning v. State, Dep't of Fish & Game*, 355 P.3d 530, 535 (Alaska 2015) (quoting *Lake & Peninsula Borough Assembly v. Oberlatz*, 329 P.3d 214, 221 (Alaska 2014)).

fish stocks and wildlife populations. It is not a preamble or some vague policy objective. It is a mandate. It requires the "conscious application insofar as practicable of principles of management intended to sustain the yield of the resource being managed."[48] The constitutional duty does not require legislative action before it must be adhered to and can be enforced by Alaska courts. The Board has recognized that the use of "the best available information" is a required principle for sustained yield fisheries management, and it applies that principle in its decision-making.[49] The Board clearly expects ADF&G to provide it with "the best available information," as well as unbiased recommendations based on all the relevant information.[50]

Consequently, STA's argument follows a simple syllogism: The Sustained Yield Clause requires ADF&G to manage natural resources according to "principles of management intended to sustain the yield of the resource";[51] one of the most important and universally recognized "principles of management" is using all the relevant information in the decision-making process; therefore, ADF&G must provide the Board with all the

---

48 *Native Vill. of Elim,* 990 P.2d at 7 (quoting Papers of the Alaska Constitutional Convention, 1955-1956, Folder 210, Terms).

49 *See, e.g.*, 5 AAC 39.222(d) (the "Sustainable Salmon Policy") ("The principles and criteria for sustainable salmon fisheries shall be applied, by the department and the board using *the best available information* . . . .") (emphasis added).

50 *Id*. at 39.222(c)(3)(N) ("[C]onservation and management decisions for salmon fisheries should take into account the best available information on biological, environmental, economic, social, and resource factors . . . ."); *id*. at 39.222(c)(3)(P) ("[T]he best available scientific information on the status of salmon populations and the condition of the salmon's habitat should be routinely updated and subject to peer review . . . .").

51 Papers of the Alaska Constitution Convention, 1955-1956, Folder 210, Terms.

relevant information regarding a fish stock under consideration. Alaska's unique system of divided fisheries management cannot meet the Sustained Yield Clause's goal without that judicially enforceable standard.

A. Consciously Applying "Principles of Management Intended to Sustain the Resource" Requires Using All the Relevant Information in the Decision-Making Process.

The Sustained Yield Clause of the Alaska Constitution provides,

> Fish, forests, wildlife, grasslands, and all other replenishable resources belonging to the State shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses.[52]

This Court has explained that the Sustained Yield Clause "is a broad principle of management."[53] It guides the process for how the state reaches management decisions, but it does not require predetermined formulas or the identification of specific levels of yield.[54] Instead, it requires "a rational approach to developing and implementing" management goals.[55] Its "primary purpose is to balance maximum use of natural resources with their continued availability to future generations."[56] Importantly, the Sustained Yield Clause

---

52 Alaska Const. art. VIII, § 4.

53 *Native Vill. of Elim*, 990 P.2d at 6.

54 *See id*. at 7-8 (recognizing the Framers' intent that the sustained yield requirement is "a guiding principle rather than a concrete, predefined process").

55 *Id*. at 8.

56 *West v. State, Bd. of Game*, 248 P.3d 689, 696 (Alaska 2010) (quoting The Alaska Constitutional Convention, Proposed Constitution for the State of Alaska: A Report to the People of Alaska (1956)).

was intended "to play a meaningful role in resource management."[57]

The Sustained Yield Clause evinces the Framers' intent that natural resources should be managed according to scientific principles to ensure that resources are available into the future.[58] The Framers explained that the "term 'sustained yield principle' is used in connection with management of such resources. When so used it denotes conscious application insofar as practicable of *principles of management* intended to sustain the yield of the resources being managed."[59] Thus, "the *sustained yield principle*, not sustained yield by any limited usage or application of sustained yield but the *sustained yield principle* will be followed and will be the policy of the state as to all replenishable resources."[60] The Sustained Yield Clause took into consideration "the conservation of fisheries" and the fact that "biological studies" would be central to fisheries management.[61]

In *Native Village of Elim v. State*, this Court articulated the "principles of management" that the Sustained Yield Clause requires.[62] In rejecting a constitutional challenge brought by subsistence salmon users who argued that a commercial fishery intercepted salmon bound for their subsistence fishing areas, this Court concluded that the

---

57 *Native Vill. of Elim*, 990 P.2d at 7 (citing Proceedings of the Alaska Constitution Convention ("PACC") 2456-57 (Jan. 17, 1956)).

58 *See Forrer v. State*, 471 P.3d 569, 583 (Alaska 2020) ("[W]hen we interpret the constitution, we first 'look to the plain meaning and purpose of the provision and the intent of the framers.' ") (quoting *Wielechowski v. State*, 403 P.3d 1141, 1146 (Alaska 2017)).

59 *Native Vill. of Elim*, 990 P.2d at 7 (quoting Papers of the Alaska Constitution Convention, 1955-1956, Folder 210, Terms) (emphasis added).

60 PACC at 1106 (emphasis added).

61 PACC at 1108.

62 *Native Vill. of Elim*, 990 P.2d at 7-9.

Sustained Yield Clause does not require the Board to identify a numerical yield of salmon to be sustained. Instead, the constitutional requirement was satisfied because the Board had considered all the available information, including commissioning and reviewing scientific studies prior to adopting sustainable salmon policies.[63] In fulfilling its Sustained Yield Clause duties, the "Board must balance the economic, ecological, cultural, international, and other policy concerns when it makes decisions about Alaska's fisheries. It must accommodate all of these legitimate interests in the face of substantial uncertainty."[64] Thus, in its own words, this Court expressed the widely recognized scientific concept of using all of the relevant information in natural resource decision-making.

Whether it is called the "best available information," "best available scientific information," or "all the relevant information," the concept embodied in those phrases is the same universal scientific principle that guides all informed decision-making. It requires decision-makers to consider all the currently available information.[65] The concept is a fundamental "principle of management" that is widely recognized in natural resource management fields. "The purpose of the best available science standard is to prevent an agency from basing its action on speculation and surmise."[66] The concept's origins trace

---

63 *See id*.

64 *Id*. at 8.

65 *See Ctr. for Biological Diversity v. Zinke*, 900 F.3d 1053, 1068-69 (9th Cir. 2018) (concluding agency violated best available information standard by "ignoring available data"); *San Luis & Delta-Mendota Water Auth. v. Locke,* 776 F.3d 971, 995 (9th Cir. 2014) ("An agency complies with the best available science standard as long as it does not ignore available studies, even if it disagrees with or discredits them.").

66 *San Luis & Delta-Mendota Water Auth.* 971 F.3d at 995.

back to the Progressive Era at the turn of the 20th Century, when scientific management and "sustained-yield" forestry gained a foothold in American natural resource governance.[67] Although references to the concept—like all science—evolved and became explicitly incorporated into federal environmental statutes beginning in the 1970s,[68] the underlying scientific principle that requires decision makers to use all the relevant information was one of the main "principles of management" the Framers mandated. In other words, the sustained yield principle requires state agencies to apply scientific management principles to resources, and not make management decisions arbitrarily or based purely on political whims.[69]

Here, the superior court located the appropriate texts and constitutional history, [Exc. 207-08] but narrowed its review to a key-word search, not finding "best available

---

67 *See* C.M. Ryan et al., *Implementing the 2012 Forest Planning Rule: Best Available Scientific Information in Forest Planning Assessments*, 64 Forest Science 159, 160 (2018) (available at https://www.fs.fed.us/pnw/pubs/journals/pnw_2018_ryan001.pdf) (last accessed Jan. 13, 2022) ("Historically, natural resource management in the United States was guided by the idea of scientific management and Progressive-era approaches. . . . The thought was to avoid conflict via a scientific approach to social and economic issues.").

68 *See* 16 U.S.C. § 1536(a)(2) (Endangered Species Act) ("[E]ach agency shall use the best scientific and commercial data available."); 16 U.S.C. § 1371 (Marine Mammal Protection Act) (requiring decisions on the basis of the "best scientific evidence available"); *see generally* Holly Doremus, *The Purposes, Effects, and Future of the Endangered Species Act's Best Available Science Mandate*, 34 Envtl. L. 397, 418 (2004) (noting four policy purposes behind the best available information standard: promoting more accurate decisions, increasing public trust and political credibility, aiding judicial review, and affecting the substance of ultimate decisions).

69 *See Metlakatla Indian Community, Annette Island Reserve v. Egan*, 362 P.2d 901, 915 (Alaska 1961), *judgment vacated on other grounds*, 369 U.S. 45 (1962) (recognizing the state's "obligation and authority to equitably and wisely regulate the harvest" of fisheries).

information" explicitly mentioned within the Sustained Yield Clause.[70] Although this Court has been "hesitant to find implied concepts in the constitution,"[71] the superior court neglected an even more important canon—courts must interpret the constitution "in light of precedent, reason, and policy."[72] This Court has found implied concepts in the constitution where it is necessary to give meaning to the Framers' intent,[73] but there is no need to *find* an *implied* concept in the Sustained Yield Cause. The constitutional mandate is clear. It requires "the conscious application" of "principles of management."[74] Reason and policy dictate that it would be folly, and impossible, for the Framers to have known or predicted 50 years ago all the "principles of management" that are applicable today or may be applicable 50 years from now.

The relevant and primary question is whether using the best available information is a recognized "principle of management" for achieving sustained yield. The answer, which no party has or can dispute, is definitively yes.[75] The superior court's myopic focus on finding the exact phrase "best available information" failed to recognize the important

---

70 Exc. 208 ("[N]othing in the clause's language or in the discussions held at the Constitutional Convention indicates any intent to require the use of BAI or its equivalent.").

71 Exc. 208 (citing *Abood v. League of Women Voters of Alaska*, 743 P.2d 333, 334 (Alaska 1987)).

72 *Metcalfe*, 484 P.3d at 97.

73 *See, e.g.*, *Ravin v. State*, 537 P.2d 494, 503-04 (Alaska 1975) ("The privacy amendment to the Alaska Constitution was intended to give recognition and protection to the home. Such a reading is consonant with the character of life in Alaska.").

74 Papers of the Alaska Constitution Convention, 1955-1956, Folder 210, Terms.

75 *See* 5 AAC 39.222(c)(3)(N) ("[C]onservation and management decisions . . . should take into account the best available information on biological, environmental, economic, social, and resource factors . . . .").

concept at issue and stopped short of reaching the logical conclusion that the Board cannot possibly meet its constitutional and statutory obligations unless ADF&G is required to provide the Board with all the relevant information.

Alaska is unique in that fisheries governance is divided between two agencies: the Board of Fisheries and ADF&G.[76] The Board is tasked with adopting "regulations establishing open and closed seasons and areas for the taking of fish," and making allocation decisions among competing fisheries user groups (commercial, sport, and subsistence). [77] The Board adopts regulations at public meetings after receiving proposals, comments, and testimony.[78] But the Board does not have any independent authority to commission studies or collect scientific information; it relies almost entirely on ADF&G for scientific information, research, and recommendations.[79]

ADF&G implements the Board's regulations and carries out day-to-day fisheries management consistent with its regulatory, statutory, and constitutional duties.[80] ADF&G's statutory responsibilities "mirror the constitutional mandates," in Article VIII

---

76 *See Rosier*, 890 P.2d at 572 ("Responsibility for fisheries management is divided between the [ADF&G] Commissioner and the Board").

77 *Id*. (citing AS 16.05.251(a)(1), (3)); *see Kenai Peninsula Fisherman's Co-Op Ass'n, Inc. v. State*, 628 P.2d 897, 904 (Alaska 1981) (concluding the Board has authority to provide "differential treatment of such diverse user groups as commercial, sports, and subsistence fishermen.").

78 AS 16.05.251(a) ("The Board of Fisheries may adopt regulations it considers advisable in accordance with AS 44.62 (Administrative Procedure Act) . . .").

79 *See* AS 16.05.241 ("The boards have regulation-making powers as set out in this chapter, but do not have administrative, budgeting, or fiscal powers.").

80 *See* AS 16.05.020(2) ("The commissioner of [ADF&G] shall . . . manage, protect, maintain, improve, and extend the fish . . . resources of the state.").

of the Alaska Constitution.[81] Importantly, ADF&G staff also serve as the principal advisors to the Board. ADF&G submits staff comments on regulatory proposals, fisheries status reports, scientific research and data, and expert advice to the Board.[82] ADF&G's Subsistence Division is specifically tasked with making "recommendations to the [Board] regarding adoption, amendment, and repeal of regulations affecting subsistence hunting and fishing."[83] The Board values the advice and recommendations provided by ADF&G above all other input.[84] ADF&G is allowed unlimited access to the Board while written and oral testimony from private individuals and groups is strictly limited.[85]

It is undisputed that the Board must consider the best available information when adopting fisheries regulations. According to the State, "[o]ne function of the Board is to evaluate the best information that is currently available."[86] The Board is repeatedly assured by ADF&G that its reports, recommendations, and advice are based on "the best available

---

81 *Mesiar v. Heckman*, 964 P.2d 445, 449 (Alaska 1998) (citing AS 16.05.092(1)).

82 *See, e.g.*, AS 16.05.050(a)(11) (directing ADF&G to "initiate or conduct research necessary or advisable to carry out the purpose of this title").

83 AS 16.05.094(6).

84 *See* Meagan Boltwood Krupa et al., *Resurrecting the Public Record: Assessing Stakeholder Participation in Alaska's Fisheries*, 96 Marine Policy 36, 41 (2018) (noting that the Board is far more likely to adopt proposals from ADF&G than from groups or individuals).

85 *See* Alaska Board of Fisheries, Operating Procedures, Policy for Written Public Comment, 2012-268-FB (available at https://www.adfg.alaska.gov/static/regulations/regprocess/-fisheriesboard/pdfs/findings/2012-268-fb.pdf) (limiting written public comments to "no more than 100 single sided" pages) (last accessed Jan. 14, 2022).

86 Brief of State of Alaska, *Stepovak-Shumagin Set Net Ass'n v. State, Bd. of Fisheries*, S-5679, 1994 WL 16483119 at * 6 (Alaska, Jan. 26, 1994); *see id*. at i ("The Board must base its decision on the best information available . . . .").

data."[87] For example, in *Stepovak-Shumagin Set Net Association v. State, Board of Fisheries*, this Court relied on the fact that the Board had considered "the best available scientific evidence" provided by ADF&G and the public when adopting a regulation delaying commercial fishery openings.[88] This Court recognized that Board members "relied" on "information presented by ADF&G to assist them in formulating their own conclusions regarding proposals."[89] But here, ADF&G has argued there is no legal requirement for it to provide the Board with the "best available information,"[90] and ADF&G has no policies or procedures in place to ensure that it is fulfilling that role.[91]

---

87 Exc. 124 ("The department presents the board with the best available data so that it may act appropriately to provide a reasonable opportunity for subsistence and so it may allocate to subsistence and other uses…"); *accord* Exc. 126 ("[T]he department recommends making ANS findings on the best available data . . . .").

88 886 P.2d 632, 640 n.14 (Alaska 1994); Brief of State of Alaska, *Stepovak-Shumagin Set Net Ass'n v. State, Bd. of Fisheries*, S-5679, 1994 WL 16483119 at * 6 (Alaska, Jan. 26, 1994) ("Because the Board was created for purposes of conservation and development, and because it serves as a manager of the resource, it must consider the best information available from the Department…").

89 *Stepovak-Shumagin Set Net Ass'n*, 886 P.2d at 641. "The Board juggled these complex and inter-related issues, and considered the best available information from ADF&G, from the public, and from Board members themselves, in making a reasoned decision to achieve these goals." Brief of State of Alaska, *Stepovak-Shumagin Set Net Ass'n v. State, Bd. of Fisheries*, S-5679, 1994 WL 16483119 at * 18 (Alaska, Jan. 26, 1994)

90 Exc. 182 ("[T]here is no constitutional mandate in the Sustained Yield and Common Use clauses that extend to the information ADF&G presents, exercising its expertise and professional judgment, to the Board.").

91 *See* Exc. 75 (Dressel Dep.) ("**Q**: [D]o you believe that one of your responsibilities at the Board of Fisheries is for the department to present the best available information on the proposals that are before them? **A**: Yes. **Q**: And are there any—how was that ensured? Are there any written standards or procedures or policies within the department that guide and ensure that the best available information will be there? **A**: A lot of times the—it's the other people that are at the Board of Fish . . . it's like a peer-review check, essentially having the people there.").

The facts of this case illustrate how ADF&G, unchecked with a clear requirement to present the Board with all the relevant information, can unfairly tip of the scales in the Board's decision-making. In 2018 and 2019, STA supported several proposals to amend the Sitka herring harvest control rule by reducing the commercial harvest rate. [*See* Exc. 103, 128, 131] The 2018 herring season was a watershed year for subsistence harvesters. It was among the worst ever reported subsistence harvests, marking "a record low in total harvest." [Exc. 82] STA submitted evidence that the commercial fishery's intensity and targeting of older, larger herring resulted in spatial and temporal changes in herring spawning events that negatively affected subsistence harvests. [*See* Exc. 104-05, 130] STA urged the Board to reexamine the prevailing presumption that a large, healthy biomass of herring will be sufficient to provide a reasonable opportunity for subsistence harvesters and to adopt a more conservative commercial harvest strategy. [*See* Exc. 132-33]

But ADF&G defended the status quo in its reports and recommendations to the Board during the 2018 and 2019 meetings. ADF&G argued that reducing the commercial harvest rate "would directly reduce commercial harvest opportunity for herring fisheries" and "the current harvest rate strategy is based on the *best scientific information available* for Alaska." [Exc. 127 (emphasis added)] Importantly, STA discovered, in this case, that ADF&G had not informed the Board (or the public) that since 2016 ADF&G knew that a critical component of the harvest rate strategy was flawed. [*See* Exc. 176-77]

In December 2016, ADF&G received an independent analysis of its herring forecasting model, which it uses to determine the amount of herring the commercial fishery may harvest each year. [*See* Exc. 178] Dr. Steve Martell, an expert from the University of

British Columbia, [*see* Exc. 76] analyzed ADF&G's current model and recommended improvements, including "a technical description of the proposed model changes, [and] both the equations and the AD Model Builder template code to document how the equations are actually implemented in the code." [Exc. 179; *see* Exc. 76] The Martell Report focused on the failure of ADF&G's current model to account for uncertainties and made specific recommendations to improve the forecasts. [*See* Exc. 179-81] Thus, ADF&G had updated scientific information and the tools necessary to improve the harvest rate strategy, but ADF&G never informed the Board (or the public) about that fact.

ADF&G's representations that it provides "the best scientific information available" are critical to the Board's consideration of proposed regulatory changes. [Exc. 127] Without a clear standard requiring ADF&G to provide all the relevant information, ADF&G may select which information it wants the Board to consider. Consequently, the Board is unable to fulfill its own Sustained Yield Clause obligations unless it receives all the relevant information from ADF&G.[92] If the Board had known that ADF&G's harvest control rule relied on an outdated forecasting model, the Board would have considered that information and may have reached a different conclusion regarding the proposals to amend the harvest control rule because the Martell Report was clearly relevant to the proposed regulatory changes under consideration. Instead, the Board relied on ADF&G's misrepresentation that the harvest control rule was the "best scientific information available." [Exc. 127] It is essential to note that no one, not STA, the Board, or the public

[92] *See Native Vill. of Elim*, 990 P.2d at 8; *Stepovak-Shumagin Set Net Ass'n*, 886 P.2d at 641.

had any way of knowing about the withheld information. STA would not have uncovered the withholding of the Martell Report except for the discovery process of this litigation—discovery that ADF&G vigorously fought, and STA had to win. [*See* Exc. 74]

B. ADF&G's Duty to Present the Board with All the Relevant Information Is a Justiciable Standard.

The requirement to use all the relevant information in decision-making involves an objective standard of review—a standard that state and federal courts routinely apply in reviewing agency action.[93] "An agency complies with the best available information standard as long as it does not ignore available studies, even if it disagrees with or discredits them."[94] When applying that objective standard, the court's task is only to determine whether ADF&G failed to provide all the relevant information to the Board.[95] The court can accomplish that task by simply searching the administrative record and determining if relevant scientific information was excluded from the Board's consideration.[96]

Here, the superior court misunderstood the concept of best available information, concluding erroneously that the standard presents a non-justiciable political question. [Exc. 211-13] The court assumed incorrectly that it would be faced with the impossible judicial task of "discovering and managing [best available information]." [Exc. 212] But that is not the proper standard. Under the objective standard for reviewing agency records, there is no

---

93 *See, e.g.,* William F. Funk et al., Administrative Procedure & Practice at 164 (4th ed. 2010) (explaining the "arbitrary and capricious" standard of review) ("[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action…").

94 *San Luis & Delta-Mendota Water Auth.*, 776 F.3d at 995.

95 *See Native Vill. of Elim*, 990 P.2d at 8.

96 *See San Luis & Delta-Mendota Water Auth*., 776 F.3d at 995.

need for courts to "commission scientific studies, convene groups of experts for advice, or issue rules under notice-and-comment procedures." [Exc. 212] Similarly, there is no need for courts to subjectively weigh scientific information or final policy determinations.[97]

The objective standard simply requires a review of the administrative record to determine if relevant information, known to ADF&G, was withheld from the Board.[98] The proper remedy for ADF&G's failure to provide the Board with all the relevant information is declaratory judgment,[99] and there is no need for courts to determine substantive policy outcomes, such as how the Board should weigh the best available information that it receives from ADF&G or what policies the Board should ultimately decide to adopt based on that information. Unlike the plaintiffs in *Kanuk*,[100] STA does not contend that "the best available science" dictates any specific policy outcome, only that the best available information, in the possession of ADF&G, must be made available to the Board.[101]

The objective standard for "best available information" is not new to Alaska law.

---

97 *See Kanuk ex rel. Kanuk v. State, Dep't of Natural Res*., 335 P.3d 1088, 1099 (Alaska 2014).

98 *See San Luis & Delta-Mendota Water Auth*., 776 F.3d at 995.

99 *See* AS 22.10.020(g); *Nunamta Aulukestai v. State, Dep't of Natural Res*., 351 P.3d 1041, 1050 (Alaska 2015) ("The State must know how it should act before it acts.").

100 *See Kanuk ex rel. Kanuk*, 335 P.3d at 1091 ("The plaintiffs . . . asked the court to declare that the parameters of the State's duty to protect the atmosphere are (4) dictated by the best available science…").

101 *Compare Alaska Ctr. for the Envt. v. Rue*, 95 P.3d 924, 933 (Alaska 2004) ("[W]e reconfirm our prior decisions holding that agencies making regulatory decisions need only consider information that is submitted or is otherwise readily available."), *with Kanuk ex rel. Kanuk*, 335 P.3d at 1098 ("The underlying policy choices are not ours to make in the first instance.").

This Court has previously adopted a nearly identical standard for reviewing certain agency decisions.[102] The "hard look" doctrine requires agencies to take a "hard look at all relevant scientific information submitted or available" at the time of the decision.[103] For example, in *Alaska Center for the Environment v. Rue*, ADF&G's decision not to list Cook Inlet belugas as an endangered species was set aside because the Commissioner ignored "abundant data" that was relevant to the decision.[104] And, here, the superior court noted that other statutes and regulations contain versions of the best available information standard, without suggesting that those requirements present nonjusticiable questions. [*See* Exc. 209]

Finally, the fact that the legislature *could* adopt a statutory requirement for ADF&G to provide the Board with all the relevant information does not mean that the Sustained Yield Clause's requirement for agencies to apply "principles of management" is meaningless or non-justiciable.[105] The legislature has codified other fundamental rights, including the procedures for how those rights may be exercised,[106] but it is not obligated to do so before constitutional mandates may be enforced.[107]

---

102 *See Alaska Ctr. for the Env't,* 95 P.3d at 932.

103 *Id*. at 933.

104 *Id*. at 932-33.

105 *See Native Vill. of Elim*, 990 P.2d at 5-8 (addressing merits of Sustained Yield Clause claim).

106 *See, e.g., City of Kenai v. Kenai Peninsula Newspapers, Inc*., 642 P.2d 1316, 1319 (Alaska 1982) (noting that prior version of Alaska Public Records Act codified "the common law view that municipalities are required to make their records available to the public").

107 *See Native Vill. of Elim*, 990 P.2d at 5-8.

II. The Superior Court Erred in Concluding that STA Had Not Demonstrated Irreparable Harm.

STA's second issue on appeal concerns the superior court's decision to deny STA's preliminary injunction motion prior to the 2019 season. The superior court misapplied well-established law governing injunctions when it concluded that STA "has not met its threshold burden of demonstrating irreparable harm" [Exc. 66] because, citing SHCA's arguments, STA failed to demonstrate "an urgent problem that demands the immediate remedy of an injunction" and "there is no new crisis that warrants an emergency response." [Exc. 48] That conclusion was erroneous because STA's showing of harm to subsistence users constitutes irreparable harm as a matter of law,[108] and STA acted with urgency once it learned that ADF&G's interpretation of section 195 was unlawful. Although the ruling is now technically moot, this Court should apply the public interest exception to the mootness doctrine and reverse the superior court's lingering error.

---

[108] *See State v. United Cook Inlet Drift Ass'n*, 815 P.2d 378, 379 (Alaska 1991) ("Subsistence users are given statutory priority over commercial users, AS 16.05.258(c), and the injury which they would suffer as a result of the injunctive relief is as irreparable as the injury which commercial fishermen might suffer if injunctive relief were not granted."); *see also Native Vill. of Quinhagak v. United States*, 35 F.3d 388, 394 (9th Cir. 1994) (reversing district court's conclusion that Alaska Native villages failed to demonstrate irreparable harm caused by regulations interfering with subsistence) ("The Villages also presented evidence that the federal and state regulations interfere with their way of life and cultural identity. . . . They needed to prove nothing more in light of the clear congressional directive to protect the cultural aspects of subsistence living." (citing 16 U.S.C. § 3111(1)). *Compare* 16 U.S.C. § 3111(1) ("[T]he continuation of the opportunity for subsistence uses by rural residents of Alaska . . . is essential to Native physical, economic, traditional, and cultural existence…"), *with* Ch. 1, § 1(a)(3), SSSLA 1992 ("[C]ustomary and traditional uses of Alaska's fish and game originated with Alaska Natives, and have been adopted and supplemented by many non-Native Alaskans as well; these uses, among others, are culturally, spiritually, and nutritionally important and provide a sense of identity for many subsistence users…").

Under the balance of hardships standard, "irreparable harm" is a threshold requirement for a preliminary injunction.[109] "Irreparable harm" is an "injury, whether great or small, which ought not to be submitted to" and cannot be adequately compensated by monetary damages.[110] The court is to "assume the plaintiff ultimately will prevail when assessing the irreparable harm to the plaintiff absent an injunction."[111] Contrary to the superior court's decision, there has never been a requirement for movants to demonstrate a "new crisis" or an "emergency."[112] [*See* Exc. 48]

STA demonstrated irreparable harm by presenting unrefuted evidence that subsistence harvesters were harmed by ADF&G's unlawful interpretation and implementation of section 195.[113] [*See* Exc. 45] STA submitted facts showing that subsistence harvesters "have been setting 2-3 times as many hemlock branches as they

---

109 *See Alsworth,* 323 P.3d at 54 ("A preliminary injunction is warranted under [the balance of hardships standard] when three factors are present: (1) the plaintiff must be faced with irreparable harm; (2) the opposing party must be adequately protected; and (3) the plaintiff must raise serious and substantial questions going to the merits of the case . . .").

110 *State v. Kluti Kaah Native Vill. of Copper Ctr*., 831 P.2d 1270, 1273 n.5 (Alaska 1992) (quoting Black's Law Dictionary 786 (6th Ed. 1990)).

111 *Alsworth*, 323 P.3d at 54 (citing *A.J. Indus. Inc. v. Alaska Pub. Serv. Comm'n*, 470 P.2d 537, 540 (Alaska 1970), *modified in other respects*, 483 P.2d 198 (Alaska 1971)).

112 *Cf.* 11A Wright et al., Federal Practice and Procedure Civil § 2951 (3d ed.) ("The issuance of an *ex parte temporary restraining order is an emergency procedure* and is appropriate only when the applicant is in need of immediate relief.") (emphasis added).

113 On February 14, 2019, the superior court vacated an evidentiary hearing on the preliminary injunction motion that had been scheduled by stipulation of the parties, over STA's objections. *See* Exc. 63-64. According to ADF&G, the "only issue the Court might want to hear evidence about is the irreparable harm that will be suffered by each party, but the Court can easily resolve those issues on the basis of the arguments and affidavits that have been filed with the Court." Exc. 60.

typically set, yet they are getting little to no spawn on branches"; [Exc. 31] the commercial fleet disrupts herring with roe of the quality desired by subsistence harvesters; [Exc. 32] and "[w]ithout an opportunity to participate in the process of the harvest, STA is losing the traditions connected to the harvest and the traditional knowledge that accompanies that, and both individuals and the community as a whole are suffering." [Exc. 33]

STA's showing of harm to subsistence opportunity, culture, and tradition constitutes irreparable harm as a matter of law.[114] It is harm that is quintessentially *irreparable*;[115] there is no amount of money damages that can compensate for the loss.[116] The harm to subsistence, culture, and tradition also compounds with each passing season. As one subsistence harvester submitted, STA's "[c]ulture and tradition is being lost, and as the loss continues it is becoming harder and harder to recover." [Exc. 33]

Importantly, the superior court's subsequent analysis of section 195 vindicates STA's showing of irreparable harm.[117] [*See* Exc. 156-67, 183-201] According to the court, "5 AAC 27.195 determinations are important; they have the potential of directly altering

---

114 *See United Cook Inlet Drift Ass'n*, 815 P.2d at 379; *Native Vill. of Quinhagak*, 35 F.3d at 394-95.

115 *See Galvin*, 491 P.3d at 333 (concluding political candidate faced irreparable harm from inadequate and misleading ballots); *Bradley v. Klaes*, 181 P.3d 169, 173 (Alaska 2008) (affirming preliminary injunction based on conclusion that interference with easement rights constituted irreparable harm).

116 *See Native Vill. of Quinhagak*, 35 F.3d at 394 ("If their right to fish is destroyed, so too is their traditional way of life." (quoting *U.S. v. Alexander*, 938 F.2d 942, 945 (9th Cir. 1991)).

117 There is no need to apply the assumption that the plaintiff will ultimately prevail on the merits when assessing the irreparable harm because STA already prevailed. *See Galvin*, 491 P.3d at 333; *Alsworth*, 323 P.3d at 54.

the allocation of the fishery between the subsistence and commercial harvests." [Exc. 166] Thus, ADF&G's failure to determine whether subsistence harvesters have a reasonable opportunity and distribute the commercial fishery appropriately,[118] in fact deprived subsistence harvesters of an "important" allocation requirement meant to provide the subsistence preference mandated by the Alaska Legislature.[119] [*See* Exc. 166]

To the extent that SCHA implied—and the superior court adopted—the argument that longstanding harms to subsistence harvesters or a delay in seeking judicial relief, "weighs against irreparable harm,"[120] that contention is meritless. [*See* Exc. 66 (citing Exc. 48)] STA learned about ADF&G's unlawful interpretation of section 195 on November 16, 2018, [Exc. 147] filed its complaint on December 11, [Exc. 1] and entered into a stipulated briefing schedule for its motion for preliminary injunction on December 19.[121] [Exc. 27]

---

118 *See* Exc. 59 (Coonradt Aff.) ("[ADF&G] has never interpreted this regulation as requiring the department to make an independent assessment of whether there is a reasonable opportunity for subsistence uses of herring spawn in Sitka Sound.").

119 *See* Petition for Review, S-17394 at 5-6 (Feb. 28, 2019) ("STA could not have put forward more compelling evidence to establish irreparable harm to its culture and traditional way of life."). *See also* Ch. 1, § 1(b), SSSLA 1992 ("It is the purpose of this Act (1) to develop and maintain healthy fish stocks and game populations through management based on the sustained yield principle; and (2) to provide for a preference for subsistence uses over other consumptive uses of fish and game resources."); *id*. at § 1(c) ("It is the intent of the legislature that (1) subsistence uses of Alaska's fish and game resources are given the highest preference, in order to accommodate and perpetuate those uses…").

120 *Arc of California v. Douglas*, 757 F.3d 975, 990 (9th Cir. 2014) (reversing district court's conclusion that plaintiffs failed to show irreparable harm because of long delay before seeking injunctive relief); *see also* Brief of *Amicus Curiae* Sealaska Corporation at 23-25.

121 "The intent of the Stipulation is to establish a mutually agreeable process, briefing schedule and hearing date that provides the parties sufficient time to present their cases, and for the Court to issue an order before the beginning of the March herring fishery and in time for [ADF&G] to implement any relief the Court may grant." Exc. 27-28.

There was no delay. And the fact that subsistence harvesters have been long suffering cannot be taken as an indication that the future harm is not serious enough to warrant equitable relief.[122] Injunctive relief is forward-looking; it is meant to prevent future violations and not punish past wrongs.[123] The prospective harm to subsistence harvesters from ADF&G's unlawful implementation of section 195 during the upcoming 2019 season was "urgent" and cumulative of the harms that subsistence harvesters had suffered up to that point. [*See* Exc. 33, 45] Thus, the superior court committed reversible error in concluding that STA had not met its threshold burden of showing irreparable harm.

Finally, although the superior court's preliminary injunction decision is moot, this Court should apply the public interest exception and reverse the conclusion that STA had not demonstrated irreparable harm. "The public interest exception requires considering and weighing three factors: (1) whether the disputed issues are capable of repetition, (2) whether the mootness doctrine, if applied, may cause review of the issues to be repeatedly circumvented, and (3) whether the issues presented are so important to the public interest as to justify overriding the mootness doctrine."[124]

First, the question of whether subsistence users can establish irreparable harm by

---

122 *See Kluti Kaah Native Village of Copper Ctr*., 831 P.2d at 1273 n.5 (noting that injuries "of such constant and frequent occurrence" may constitute irreparable harm).

123 *See generally City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983) (requiring showing of "real or imminent threat" for injunctive relief); 11A C. Wright, et al., Federal Practice and Procedure Civil § 2948.1 n.12 (3d ed.) ("The purpose of an injunction is to prevent future violations and, of course, it can be utilized even without a showing of past wrongs." (quoting *U.S. v. W.T. Grant Co*., 345 U.S. 629, 633 (1953)).

124 *Copeland v. Ballard*, 210 P.3d 1197, 1202 (Alaska 2009).

showing injuries to their subsistence opportunity, way of life, and cultural identity is highly likely to be raised again. Preliminary injunctions are a ubiquitous legal tool in Alaska fish and wildlife law.[125] With ever-increasing competition for limited resources, it is all but certain that subsistence users in Alaska will seek to defend their rights through injunctive relief in future cases. Future subsistence plaintiffs will be faced with same threshold requirement of establishing irreparable harm, except the future defendants will rely on the superior court's erroneous decision in this case to argue that longstanding harms to subsistence uses are not "irreparable harm" in the absence of a "new crisis." [*See* Exc. 48]

Second, as a component of non-final, preliminary relief, irreparable harm determinations are inherently prone to evading review.[126] In *Cook Inlet Drift Association*, this Court acknowledged that preliminary relief aimed at fisheries management is likely to "evade review" absent discretionary review from this Court.[127]

Third, the question of whether subsistence users can establish irreparable harm by showing injuries to their subsistence opportunity, way of life, and cultural identity is "so important to the public interest as to justify overriding the mootness doctrine."[128] The

---

125 *See, e.g.*, *Native Village of Quinhagak*, 35 F.3d at 394; *Dep't of Fish & Game v. Fed. Subsistence Bd.*, No. 3:20-cv-00195-SLG, 2020 WL 5625897 (D. Alaska Sept. 18, 2020) (denying ADF&G's motion for preliminary injunction regarding federal subsistence hunting regulations); *Kluti Kaah Native Village of Copper Ctr.*, 831 P.2d at 1273.

126 *See, e.g.*, Order, S-17384 (Mar. 27, 2019); *City of N. Pole v. Zabek*, 934 P.2d 1292, 1296 (Alaska 1997) (granting a petition for review is "rare").

127 *United Cook Inlet Drift Ass'n*, 815 P.2d at 379.

128 *Copeland*, 210 P.3d at 1203-4; *see id.* at 1203 ("We have found this prong met when the case involved concepts of fairness underlying the right to procedural due process, the preservation of clean water, or situations otherwise moot, where the legal power of public officials was in question." (internal quotation marks and citations omitted)).

superior court's decision explicitly elevated the commercial fishing industry's potential financial losses over the concrete harms faced by STA subsistence harvesters.[129] The implication of the court's mistaken ruling is that the erosion of the subsistence way of life through years of lost harvest opportunity as demonstrated by STA is not in itself a sufficient "crisis." Subsistence users should not have to show extreme hardship, like hunger, to meet the threshold of demonstrating irreparable harm. The decision belittles subsistence users' and Alaska Natives' concerns.[130] It cannot stand as the law of this case. This Court "must do more to change this reality."[131]

III. The Superior Court Determined Correctly that STA Prevailed on its Non-Constitutional Claim But Erred in Denying STA Attorney's Fees.

Finally, STA was entitled to attorney's fees as the prevailing party in this case. All the parties agreed that the main issue in this case was STA's non-constitutional claim

---

[129] Exc. 66 ("Any threatened harm demonstrated by the Tribe is less than irreparable, and it has not been demonstrated that the responding (opposing) parties (particularly the Alliance, but also ADF&G) can be adequately protected in the event that the requested preliminary injunction is granted.").

[130] *See* Petition for Review, S-17394 at 6 ("In the superior court's view, irreparable harm demands more, a crisis, or an emergency. The effect of the superior court's decision is to sanction continued harm to a subsistence way of life until the judicial proceedings have run their course and while the commercial fishery has another year or more to maximize profits.").

[131] Statement from the Alaska Supreme Court (June 5, 2020) ("We recognize that too often African-Americans, Alaska Natives, and other people of color are not treated with the same dignity and respect as white members of our community.") (available at https://courts.alaska.gov/media/docs/sc-2020-stmt.pdf).

challenging ADF&G's management under section 195.[132] The superior court correctly concluded that STA was "the prevailing party" on that claim, which was "the very heart of this litigation." [Exc. 235] But the court erred in denying STA's attorney's fees motion because it incorrectly elevated STA's constitutional claim to the same level as the section 195 claim, although it was not the "heart" or center of STA's litigation. [*See* Exc. 236] The court then misapplied Rule 82 by subjectively weighing the potential effects of STA's two non-constitutional claim victories against its constitutional claim loss. [*See* Exc. 237] This Court should reverse that decision because STA was the prevailing party in this case.

Under Rule 82, "[t]he prevailing party to a suit is the one who successfully prosecutes the action or successfully defends against it, prevailing on the *main issue*, even though not to the extent of the original contention."[133] It is well-settled that a party does not need to prevail on all the issues, only the "main issue," in the case to be considered the prevailing party.[134] The main issue is the claim that goes to "the heart of the parties'

---

[132] Exc. 230-31 (ADF&G) ("The 'main issue' in this case was, and remains, whether ADF&G was required to make substantive changes to its herring fisheries management plan and then implement those changes."); Exc. 232 (SHCA) ("[STA's] desire to fundamentally change management of the commercial sac roe fishery was the main issue in this case."); Exc. 224 (STA) ("Here, the 'main issue' actually litigated, and the relief this Court granted, focused on ADF&G's improper interpretation and unlawful implementation of 5 AAC 27.195.").

[133] *Alaskan Crude Corp. v. State, Alaska Oil & Gas Conservation Comm'n*, 309 P.3d 1249, 1257 (Alaska 2013) (emphasis added) (quoting *Carr-Gottstein Props. v. State*, 899 P.2d 136, 148 (Alaska 1995)). *See also Progressive Corp.*, 195 P.3d at 1092 ("A plaintiff may prevail even if he or she fails to recover all the relief prayed for.").

[134] *See State, Dep't of Corr. v. Anthoney*, 229 P.3d 164, 167 (Alaska 2010) ("We have consistently held that to be designated a prevailing party, a party need only prevail on the main legal issues in the case. *Even a plaintiff who recovers on only one claim may be designated the prevailing party*." (emphasis added)).

dispute."[135] This Court has cautioned that trial courts "should not count claims to determine prevailing party status."[136] That is, prevailing party status does not hinge on which party won more claims. Although there may be cases where each side prevails on a main issue and the court decides not to characterize any party as the prevailing party, such instances are the exception, and not the rule.[137] Importantly, courts must not engage in "highly subjective" attempts to discern the relative importance of the outcome of claims when deciding Rule 82 motions.[138] This Court explained that Rule 82 requires the trial court to ask "the simple and more objective question of whether [the party bringing the claim] obtained the relief it sought."[139]

Here, the superior court determined correctly that STA prevailed on both rounds of summary judgment regarding its section 195 claim. [Exc. 235] STA achieved all of the relief that it sought, including an order declaring that (1) ADF&G "must determine whether it is necessary to distribute the commercial fishery by time and area to ensure subsistence harvesters have a reasonable opportunity for subsistence" and "ADF&G's authority to

---

135 *Keenan v. Wade*, 182 P.3d 1099, 1110 (Alaska 2008).

136 *Anthoney*, 229 P.3d at 168.

137 *See Schultz v. Wells Fargo Bank NA*, 301 P.3d 1237, 1243 (Alaska 2013) (reversing superior court's decision declining to award attorney's fees) ("When a court has determined that a party did not prevail despite obtaining substantial affirmative relief, we have concluded that there was an abuse of discretion."); *Shepard v. State, Dep't of Fish & Game*, 897 P.2d 33, 44 (Alaska 1995) (holding trial court's characterization of main issue manifestly unreasonable and reversing decision awarding neither party attorney's fees); *but see Alliance for Concerned Taxpayers, Inc.*, 273 P.3d at 1126 ("[W]hen both parties prevail on main issues, the superior court may also opt not to designate a prevailing party.").

138 *Alaska Ctr. for the Env't*, 940 P.2d at 921.

139 *Id*. at 922.

distribute the commercial fishery by time and area, throughout the Sitka Sound management area, has not been limited by the Board"; (2) "ADF&G must consider the quality and quantity of herring spawn on branches when making management decisions regarding the commercial sac roe fishery"; and (3) "[i]n all future management decisions, ADF&G must produce a record demonstrating how it implemented 5 AAC 27.195." [*See* Exc. 225-26[140]] The court's decisions rejecting ADF&G's interpretation of section 195 were "important" and hold "the potential to directly alter the allocation of the resource in issue as between subsistence and commercial users." [Exc. 235] As a direct consequence of the court's decisions, ADF&G made changes to the annual herring management plan and documented how it considered the subsistence harvest during the 2021 season. [*See* Exc. 228-29] In essence, STA "won the ruling they sought."[141] [*See* Exc. 225-26]

STA's section 195 claim was the "very heart of this litigation." [Exc. 235] STA filed its complaint after learning that ADF&G's interpretation of section 195 was illegal and immediately moved for a preliminary injunction to correct ADF&G's management going forward. [*See* Exc. 135] STA spent more than 22 months litigating the issue of ADF&G's interpretation and implementation of section 195, including refuting ADF&G's and

---

[140] *Compare* Exc. 225-26 (describing STA's proposed order), *with* Exc. 156-67, 183-201. STA has filed a motion to supplement the record to include its November 27, 2019 proposed order, which STA relied on for its motion for attorney's fees but which was not included in the Record.

[141] *Alaska Ctr. for the Env't.*, 940 P.2d at 922. *See also* Exc. 227 ("STA focused its complaint on what mattered most in the case: its contention that ADF&G was violating the subsistence priority statute and the consequent necessity that the court order fundamental changes to ADF&G's management decisions.").

SHCA's meritless arguments, particularly their argument that *Rosier* prohibited ADF&G from complying with the regulation by determining whether subsistence harvesters had a reasonable opportunity—an argument the court subsequently dismantled. [*See* Exc. 164] Both ADF&G and SHCA reported that their attorneys devoted the vast majority of their time in this case to STA's section 195 claim, which is in line with the proportion of time STA's attorneys spent on the section 195 claim compared to the constitutional claim.[142] The facts support the superior court's assessment that the section 195 issue "goes to the very heart of this litigation" and the court's analysis should have ended after determining that STA "prevailed" on that undisputed main issue.[143] [*See* Exc. 235]

The court erred when it assumed that STA's constitutional claim was also a main issue, focusing on the constitutional question as a matter of important public policy instead of the issue's centrality to the case. [*See* Exc. 236] Every constitutional claim presents issues that "are of substantial importance not only in the context of the instant case but also in the broader context," [Exc. 236] but that is not the appropriate standard for determining

---

142 SHCA and ADF&G devoted just 20 percent and 10 percent, respectively, of the total hours worked in this case to the constitutional claim. [*See* Exc. 219, 222-23] *See also* Exc. 233 ("STA's and SHCA's own motions confirm that the constitutional issues consumed a minor portion of the total effort required by this case.").

143 *See Progressive Corp*., 195 P.3d at 1093 ("Even if a party prevails on only one of the main issues, it is not necessarily ineligible for being considered the prevailing party."); *Blumenshine v. Baptiste*, 869 P.2d 470, 474 (Alaska 1994) ("We have consistently held that the prevailing party is the one who prevailed on the main issues."); *Day v. Moore*, 771 P.2d 436, 437 (Alaska 1989) (concluding that plaintiff who succeeded in one of three claims and defeated counterclaim was prevailing party) ("However, a party does not have to prevail on all the issues in the case to be a 'prevailing party.' ").

prevailing party status.[144] In *State, Department of Corrections v. Anthoney*, this Court rejected the State's arguments that because a claimant did not prevail on his constitutional claims (despite prevailing on administrative claims), the State was the "overall" prevailing party.[145] Undoubtedly, the constitutional issues in *Anthoney* were "of substantial importance" beyond that case, too, but this Court emphasized that "plaintiffs should not be penalized for recovering less than what they originally sought."[146] Simply bringing an unsuccessful constitutional claim is not a basis for denying Rule 82 attorney's fees, but that is the effect of the superior court's ruling.[147]

Here, STA's constitutional claim was not a main issue in the case and no party argued that it was. After prevailing on the section 195 claim, STA voluntarily dismissed its claims against the Board. As STA explained, pursuing its claims against the Board were no longer necessary once the court clarified ADF&G's duties under section 195. [*See* Exc. 233] But during discovery, STA learned that ADF&G had relevant information regarding Sitka herring biological models that the agency failed to provide to the Board. [*See* Exc. 76, 178] STA decided to press ahead with its constitutional claim against ADF&G as a matter of public interest, given the continuing importance of the Board receiving the best available information from ADF&G. STA understood that prevailing on the constitutional

---

144 *See Schultz*, 301 P.3d at 1242 ("[D]etermination of prevailing party status has therefore traditionally focused on the litigation itself." (quoting *City of Kenai v. Friends of the Recreation Ctr., Inc*., 129 P.3d 452, 460 (Alaska 2006))).

145 229 P.3d at 167-68.

146 *Id*. at 168.

147 *See id*. ("[P]laintiffs should not be penalized for recovering less than what they originally sought." (quoting *Progressive Corp*., 195 P.3d at 1093)).

claim would not result in any immediate change or practical relief from the current regulations governing Sitka herring management. STA did not seek any immediate relief targeted at the regulations. Instead, it sought a declaratory judgment that would confirm that ADF&G was constitutionally obligated to provide the Board with the best available information, which would apply to future Board meetings. Thus, STA's constitutional claim was "important" but still "peripheral" to the heart of the litigation.[148] [*See* Exc. 237]

Finally, there is no requirement that a litigant "best[] the others to the degree that it can be accurately designated as the prevailing party in the case as a whole." [Exc. 237] To paraphrase *Alaska Center for the Environment*, the question the superior court should have asked was simply "whether [STA] achieved the relief it sought."[149] The court misapplied Rule 82 when it discounted STA's non-constitutional victories, opining that "it is impossible to determine exactly how the decision may ultimately affect the resource in issue in this case."[150] [Exc. 235] Putting aside the fact that STA submitted evidence that

---

[148] It is ironic, and inconsistent with Alaska's attorney's fees laws, that STA's public interest constitutional claim was used by the court to deny fees for the section 195 claims that had consumed so much of the parties' efforts. Pursuant to AS 09.60.010, the Legislature recognized the value of bringing public interest constitutional claims, and non-frivolous constitutional claims are encouraged. However, here, STA has been denied attorney's fees for prevailing on "main issues" because it also raised an unsuccessful constitutional claim. If STA had not pursued its constitutional claim, it would clearly be entitled to attorney's fees for the section 195 litigation. STA is penalized as if there were no exception for constitutional claims. It does not make sense.

[149] 940 P.2d at 922; *see Schultz*, 301 P.3d at 1242 ("When considering prevailing party status the trial court should ask the objective question . . . whether [the party] obtained the relief it sought." (internal quotation marks omitted)).

[150] *See also* Exc. 73-74 (recognizing STA's section 195 claim "challenge[d] patterns and practices of the agencies' management of the fishery as a whole, and not discrete agency determinations").

ADF&G, for the first time, documented how it considered subsistence harvesters when managing the commercial fishery, [*see* Exc. 229] which consequently had the potential to directly alter "the allocation of the resource in issue as between subsistence and commercial users," [*see* Exc. 238] this Court has never required litigants to demonstrate how the relief sought and achieved would affect the underlying issues between the parties outside of the case, only that the party achieved "substantial affirmative relief."[151]

The superior court's "highly subjective" approach resulted in speculating about the potential effects of STA's constitutional claim loss and non-constitutional claim victories. If this Court affirms the order denying STA's summary judgment motion regarding the constitutional claim, then the superior court's "manifestly unreasonable" attorney's fees decision should be reversed.

CONCLUSION

Unless this Court reverses the superior court's decision that ADF&G has no enforceable obligation to provide the Board with the best available information to make management decisions, ADF&G may continue to operate in a black box in terms of the information it chooses to share with the Board. Under the superior court's decision, the Board, the public, and the courts are, for all practical purposes, powerless to guard against misinformation, bias, and the "direct influence of the Governor on daily fish and game

---

151 *See Schultz*, 301 P.3d at 1243 (reversing trial court's determination that neither party could be characterized as prevailing party); *see also* AS 09.60.010(b) ("[A] court in this state may not discriminate in the award of attorney's fees and costs to or against a party in a civil action or appeal based on the nature of the policy or interest advocated by the party . . . .").

management issues."[152] If the Sustained Yield Clause's unique protection for Alaska's fish and wildlife is to be more than an empty promise, if it is to "play a meaningful role in resource management,"[153] then this Court must reverse the superior court's ruling that ADF&G lacks any obligation to provide the Board with the best available information.

Second, this Court should reverse the superior court's erroneous determination that STA had not demonstrated irreparable harm in its motion for preliminary injunction. [*See* Exc. 66] STA's subsistence way of life—indeed the way of life of all Alaska tribes—is built on countless generations of customary and traditional practices. There is no "crisis" more severe than the long continuing loss of subsistence opportunity. Requiring more to meet the threshold showing of irreparable harm, such as evidence that people will imminently go hungry, simply cannot be the law. This Court should conclude that STA's showing of irreparable harm was enough and the superior court erred as a matter of law.

Finally, STA was the prevailing party in this lawsuit and is entitled to attorney's fees under Rule 82. The superior court determined correctly that STA prevailed on its section 195 claims against ADF&G, [Exc. 235] which all the parties agreed were the main issues in this case. [*See* Exc. 235, 230-32, 224] But the court erred when it determined that STA's constitutional claim was also a main issue. [Exc. 236] The court misapplied this Court's precedents by subjectively weighing STA's victories, reaching the conclusion that STA had not "bested the others to the degree that it can be accurately designated as the

---

152 *Rosier*, 890 P.2d at 572.

153 *Native Vill. of Elim*, 990 P.2d at 7.

prevailing party in the case as a whole." [Exc. 237]

For the foregoing reasons, this Court should reverse the superior court's three erroneous decisions. First, the Sustained Yield Clause requires ADF&G to provide the Board with all the relevant information regarding fish stocks. Second, the superior court erred in determining that STA had not demonstrated irreparable harm in its preliminary injunction motion. And third, if this Court does not reverse the superior court's decision on STA's constitutional claim, this Court should conclude that STA was the prevailing party and is entitled to attorney's fees, and remand for a calculation of the appropriate fees.

Dated this 18th day of January, 2022, at Anchorage, Alaska.

LANDYE BENNETT BLUMSTEIN LLP
Attorneys for Sitka Tribe of Alaska

/s/ John M. Sky Starkey
John M. Sky Starkey, Alaska Bar No. 8611141
Jennifer Coughlin, Alaska Bar No. 9306015
Andrew Erickson, Alaska Bar No. 1605049