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

REPLY BRIEF OF APPELLANT SITKA TRIBE OF ALASKA

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Clerk of the Appellate Courts

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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).

INTRODUCTION

Herring have been a keystone species for STA's cultural, economic, and nutritional well-being since time before memory.[1] As the State and SHCA recounted in their briefs, STA brought this lawsuit following decades of advocacy for improved Sitka herring management. [State Br. 7; SHCA Br. 2] STA had no illusions that a single lawsuit would be a panacea for this intractable natural resource controversy.[2] STA is not asking this Court to make, or even review, fisheries policy decisions. Instead, the issues STA raised, and which are presented in this appeal, are instrumental for shaping the process by which herring management decisions are made going forward.[3]

The State's and SHCA's main arguments seek any means to avoid a ruling that ADF&G violated the Sustained Yield Clause by withholding from the Board relevant scientific information that ADF&G possessed. That is because they cannot take the constitutional mandate head on. They agree that the Sustained Yield Clause requires the conscious application of "principles of management intended to sustain the yield," and that ADF&G is bound by that provision. [*See* State Br. 33; SHCA Br. 26] They do not dispute

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1 *See* Thomas F. Thornton and Madonna L. Moss, *Herring and People of the North Pacific: Sustaining a Keystone Species* 9 (2021) ("[H]erring have been caught, processed, consumed, and traded for thousands of years as eggs, bait, meat, oil, and mash.").

2 *See id*. at 34 ("In Alaska and British Columbia, despite mechanisms for local advice and input, powerful, largely non-local commercial fishing interests tend to exercise disproportionate influence on fisheries management.").

3 *Cf. Sagoonick v. State*, 503 P.3d 777, 796 (Alaska 2022) ("We recognize that article VIII is not a complete delegation of power to the legislature; we have a duty to ensure compliance with constitutional principles, and we have a duty to redress constitutional rights violations.").

that use of the best available scientific information in fishery management decision is a widely accepted principle of management. They do not dispute that ADF&G did not provide the Martell Report, or even a summary of its findings, during meetings when the Board was considering management policies directly related to the report. And the State does not seriously dispute that the Martell Report was relevant to the Board, which the Legislature has tasked with making fisheries policy.[4] Thus, because ADF&G's withholding of relevant information in its possession was inconsistent with its constitutional duty, the State and SHCA ask this Court to avoid deciding the issue because it is moot or a political question. But the result they ask for would gut the most important constitutional protection for Alaska's fish and wildlife—the requirement that they be managed consistent with recognized principles of management intended to sustain the yield.

ARGUMENT

I. The Sustained Yield Clause's Requirement to Consciously Apply "Principles of Management Intended to Sustain the Yield" Means ADF&G Must Provide All the Relevant Information to the Board.

Remarkably, the State and SHCA attempt to defend ADF&G's ability to cherry-pick information supporting the executive branch's preferred fisheries policies and likewise to shelve other information that would bolster different policy outcomes.[5] Such a

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[4] *See* AS 16.05.251(a); State Br. 43 (arguing the Martell Report was "not particularly relevant" and would "not necessarily" inform the Board's policy-making). The final determination as to the relevancy of the report in shaping the Board's management regulations is necessarily up to the Board.

[5] *See* State Br. 37 (arguing ADF&G has "discretion" to "determine what information the Board *needs*") (emphasis added); SHCA Br. 28.

concept is foreign to Alaska's unique fish and game management framework, which requires conscious application of scientific principles and vests authority in the Boards of Fisheries and Game to weigh all the available information and make policy decisions applying the sustained yield principle. Although ADF&G has discretion to choose which studies to conduct and what data to collect,[6] once it has gathered scientific information, the notion that ADF&G may decide, in its sole discretion, whether the Board may consider or "needs" that information ignores the statutory structure intentionally insulating fisheries policy-making from the executive branch's political whims.[7] The State and SHCA turn the current system on its head under the guise of agency discretion.

A. The Martell Report Was Important to the Board's Consideration of Herring Regulatory Proposals and By Not Disclosing the Martell Report, ADF&G Deprived the Board (and the Public) of the Best Available Scientific Information.

The State and SHCA erroneously contend that the Martell Report was "too technical" for the Board to understand and not relevant to the Board's consideration of herring proposals. [State Br. 7; SHCA Br. 36] But those arguments distort the Board's well-established decision-making process. As ADF&G's chief herring scientist explained, Board meetings function as a public "peer-review" process in which the available scientific information is presented and discussed in a public forum. [Exc. 75; *see* State Br. 7] The

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6 *See* AS 16.05.050(a)(4), (11).

7 *See* AS 16.05.251(a), (d); *Peninsula Mktg. Ass'n v. Rosier*, 890 P.2d 567, 572 (Alaska 1995) ("The statutory structure of the Department reflects a legislative objective: (1) to divide rule-making and administrative authority, (2) to insure that fish and game decisions are made by knowledgeable persons, and (3) *to limit the direct influence of the Governor on daily fish and game management issues*.") (emphasis added).

Board is thus not left on its own to understand complex scientific information—the public and outside scientific experts help interpret information and provide recommendations. Importantly, the Board (*and not ADF&G*) is charged with making independent decisions as to the significance and relative weight it affords information regarding any given regulatory proposal.[8] SHCA's contention that ADF&G may decide what information "the Board would want to receive" eviscerates the Board's independent authority to weigh available scientific information when making fisheries policy.[9] [*See* SHCA Br. 36]

Much of the information ADF&G includes in its Board reports is highly technical and requires further explanation for a layperson to understand. [*See, e.g.*, Exc. 259-60, R. 10195-97] The Martell Report was no different. The Martell Report was an independent study commissioned by ADF&G to review the herring forecasting model that ADF&G uses each year to forecast the annual herring biomass. [*See* Exc. 178-81] In his report dated December 16, 2016, Dr. Martell made scientific recommendations and provided computer code to improve the forecasting model. [*See* Exc. 179] The Martell Report provided ADF&G with the tools to produce more accurate herring forecasts by taking into account statistical uncertainties. [*See* Exc. 180-81]

The forecasting model is a critical component of ADF&G's implementation of the Board's regulation, 5 AAC 27.160(g) (the "harvest control rule"). [*See* State Br. 43] Thus,

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8 *See Native Vill. of Elim v. State*, 990 P.2d 1, 12 (Alaska 1999) ("The Board, which has fisheries expertise, thus has discretion to analyze and weigh available scientific information.").

9 *See* AS 16.05.251(a).

the Martell Report was directly relevant to proposals seeking to amend 5 AAC 27.160(g). [*See* Exc. 133, R. 10538] In January 2018, STA pointed out that the forecasting "model has had uneven results in its history," resulting in high "uncertainty for herring biomass estimates."[10] [R. 10934] STA urged the Board to adopt a more conservative regulation to account for the fact that the forecasting "model is vulnerable to 'Black Swan' events, phenomena with low frequency but extremely high impact on the population."[11] [R. 10934]

Yet, at the January 2018 and October 2018 Board meetings, ADF&G never made the Martell Report public or even provided a summary to the Board. Instead, ADF&G simply, and incorrectly, assured the Board that the current management strategy was "based on the best scientific information available." [Exc. 286] In its brief, the State erroneously asserts that ADF&G "told the Board it was updating the ASA model" in 2018 and 2019. [State Br. 43] In fact, ADF&G never informed the Board that it was "in the process of upgrading the model used to estimate and forecast herring biomass" until October 2019,[12] [Exc. 1083] more than twenty months after the Board rejected the proposals to amend 5 AAC 27.160(g). Even in October 2019, ADF&G's comments

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[10] STA specifically noted that "[t]here are no publicly available data on the model's precision, making it difficult to evaluate the efficacy of the model." R. 10934. As it turns out, ADF&G had such data (the Martell Report), but it was not shared with the Board.

[11] The State acknowledges that the current model under-forecasts and over-forecasts herring biomass, [State Br. 43] but overlooks the fact that a single over-forecast can have devasting effects on the herring population for many seasons thereafter. [*See* R. 10934]

[12] The State incorrectly maintains that ADF&G informed the Board that "the model needed updating 'to better avoid states of low biomass,' " in October 2018. [State Br. 43 (citing Exc. 285)] ADF&G's comment was referring to the model used to estimate pristine biomass, or the "threshold," which is different than annual forecasting. *See* Exc. 285.

misleadingly stated that "the model and analysis are currently in development and review and results are not yet available," when in fact, ADF&G had the Martell Report all along. [*See* Exc. 178]

The bottom line is the Martell Report was relevant to the regulatory proposals and important to the Board's process because it identified uncertainties in ADF&G's forecasting model—information that may have been helpful to the Board in considering whether to adopt a more conservative management approach.[13] By not providing the report (let alone a summary or reference), ADF&G ensured that the Board would not have the opportunity to ask for an explanation or decide for itself whether Dr. Martell's conclusions and recommendations justified a more conservative harvest control rule in regulation.

The issue is not whether many of ADF&G staff and scientists attempt to provide the Board with the best available scientific information. Instead, the legal question is whether ADF&G is required to do so. Here, ADF&G's failure to provide the Martell Report to the Board demonstrates that there must be legal guardrails on how ADF&G implements its Sustained Yield Clause duties. In particular, when ADF&G possesses relevant information,

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[13] The State refers to dicta in the superior court's decision in which the court concluded that ADF&G had not violated the "hard look" doctrine because "[t]here is no evidence in the present case that ADF&G acted arbitrarily when it chose what information to provide to [the Board]" and "ADF&G's reason for not supplying certain reports—because they had not been completed in time for the meetings—is plausible." Exc. 213, *cited in* State Br. 41. That factual conclusion was unsupported, and in fact, contradicted by the record. *See* Exc. 178. STA disputed that the Martell Report was a "draft," *see* Exc. 175; thus, if this Court concludes that the question of whether ADF&G had the Martell Report is material and cannot be determined from the record, summary judgment should be reversed. *See Christensen v. Alaska Sales & Serv., Inc.*, 335 P.3d 514, 517 (Alaska 2014) ("Alaska Civil Rule 56 provides for judgment to be granted to a party where 'there is no genuine issue as to any material fact' . . .").

ADF&G must provide that information in its reports, recommendations, and advice to the Board. It is particularly vital that ADF&G provide the Board with information that is in its possession and not otherwise available to the public, and even more important when the relevant information or research, as in this case, was commissioned by ADF&G. That is the only way that the public "peer-review" process can possibly work. [*See* Exc. 75]

Finally, the fact that Sitka herring may be abundant currently does not absolve ADF&G of its Sustained Yield Clause duties. [*See* State Br. 34] Just as the proverbial broken clock is right twice a day, ADF&G's procedural missteps might not immediately affect the population. Nature is complex and resilient. But the Framers of the Alaska Constitution understood that the decision-making process is just as important as the end results, which is why there is an explicit duty to consciously apply "principles of management intended to sustain the yield." Resource management best practices recognize that using the best available scientific information is a core "principle of management."[14]

B. The "Hard Look" Doctrine is the Appropriate Standard for Reviewing STA's Sustained Yield Clause Claim.

This Court issued its decision in *Sagoonick v. State, Department of Natural Resources* after STA filed its appellant brief in this appeal.[15] *Sagoonick* confirms that the familiar judicial standard known as the "hard look" doctrine applies to claims under the Sustained Yield Clause: "When an executive agency decision about natural resources is

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[14] *See, e.g.*, 5 AAC 39.222(c)(3)(N) (requiring salmon management decisions to "take into account the best available information").

[15] 503 P.3d 777 (Alaska 2022).

challenged under article VIII, our role thus is limited to ensuring that the agency has taken a 'hard look' at all factors material and relevant to the public interest."[16]

The "hard look" doctrine is identical to STA's formulation of the standard this Court should use to review ADF&G's constitutional duties with respect to providing information to the Board: "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." [STA Br. 33] STA's proposed standard encompasses the essence of this Court's "hard look" doctrine, which requires agencies to consider "all relevant facts."[17]

The State and SHCA fundamentally misunderstand the "hard look" doctrine. [*See* State Br. 29-39; SHCA Br. 26-34] First, under the "hard look" doctrine, courts are not tasked with "second-guessing," "assessing," or "refereeing" scientific information, or making "highly technical judgment calls." [State Br. 29, 39; SHCA Br. 33] "The role of the court is to 'ensure that the agency has given reasoned discretion to all the material facts and issues.' "[18] An agency is fully empowered to discredit or disagree with scientific information, as long as it does not ignore it.[19]

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16 *Id*. at 788 (quoting *Sullivan v. REDOIL*, 311 P.3d 625, 635 (Alaska 2013)) (internal quotation marks omitted).

17 *Mortvedt v. State, Dep't of Natural Res.*, 941 P.2d 126, 131 (Alaska 1997).

18 *Trustees for Alaska v. State, Dep't of Natural Res.,* 795 P.2d 805, 809 (Alaska 1990) (quoting Harold Leventhal, *Environmental Decision Making and the Role of the Courts,* 122 U. Pa. L. Rev. 509, 511 (1974) (internal quotation marks omitted)); *see also Greenpeace, Inc. v. State, Office of Mgmt. & Budget*, 79 P.3d 591, 593 (Alaska 2003) (noting that "hard look" review is a "highly deferential standard").

19 *See Alaska Ctr. for the Envt. v. Rue*, 95 P.3d 924, 932 (Alaska 2004) ("While we must ordinarily give broad deference to agency's discretionary decisions, such deference

Second, the "hard look" doctrine does not require agencies to conduct new studies, replicate existing studies, or copy word-for-word the text of publicly available information that an agency cites in its own reports. [*See* State Br. 38-39; SHCA Br. 28-29, 32, 34] "[C]omplete certainty is not required."[20] An agency "need only assess *available* information" to satisfy the "hard look" requirement.[21] ADF&G is not required—and it would be absurd—to "provide the Board with all of the referenced reports," amounting to a "mountain of paperwork." [SHCA Br. 33-34] The Board is able to read ADF&G's reports (and public comments) and access publicly available science referenced in those materials.[22] But here, the Martell Report was not part of the Board's administrative record and was never mentioned in ADF&G's reports. The Martell Report was an internal ADF&G document that no one other than ADF&G had access to or the ability to independently submit to the Board.

Third, the "hard look" doctrine does not provide for judicial review of an agency's discretionary decisions regarding what scientific studies it conducts. [*See* State Br. 39;

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is warranted only when the agency utilizes, rather than ignores, the analysis of its experts . . . The commissioner's refusal here to consider any scientific information except taxonomic classification in the 'technical sense' amounted to an abuse of discretion.") (quoting *Ctr. for Biological Diversity v. Lohn*, 296 F.Supp.2d 1223, 1239 (W.D. Wash. 2003); *Garner v. State*, 63 P.3d 264, 239 n.22 (Alaska 2003) (internal quotation marks omitted)).

[20] *Hammond v. N. Slope Borough*, 645 P.2d 750, 759 (Alaska 1982); *see Stepovak-Shumagin Set Net Ass'n v. State, Bd. of Fisheries*, 886 P.2d 632, 640 (Alaska 1994).

[21] *Greenpeace*, 79 P.3d at 596 (emphasis added).

[22] *See* SHCA Br. 33 ("ADF&G reports to the Board almost always refer to studies reviewed by the author.").

SHCA Br. 32] The State and SHCA are correct that the Legislature has delegated administrative authority to the Commissioner of ADF&G to decide which information to collect and what research to conduct. However, once ADF&G has obtained information, it may not ignore it.[23] Information that is available to ADF&G must be made available to the Board, otherwise the Board's policy-making function will be undermined.

The State concedes that the Sustained Yield Clause requires reasoned decision-making, which is reviewed under the "hard look" doctrine.[24] [State Br. 33] But the State's attempt to insulate ADF&G's role in the decision-making process is nothing more than legal sleight of hand. According to the State, "[i]f the Department's scientific summaries, research, and advice to the Board falls so short that the Board does not take a 'hard look' and adopts arbitrary regulations, the agencies may violate the sustained yield clause." [State Br. 34] That argument presupposes that the Board adopted a regulatory change, and it makes any Sustained Yield Clause violation wholly dependent on a simultaneous Administrative Procedure Act ("APA") violation by the Board. But where, as here, the Board does not adopt regulatory changes (and there is no APA violation by the Board because the Board considered all the information that was available to it) ADF&G's failure to meet the "hard look" standard is an independent Sustained Yield Clause violation. It is ADF&G, not the Board, that has failed to consciously apply "principles of management

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23 *See Alaska Ctr. for the Envt.*, 95 P.3d at 932.

24 *See Sagoonick*, 503 P.3d at 788; *Native Vill. of Elim*, 990 P.2d at 7 ("We acknowledge that the framers of Alaska's constitution intended the sustained yield clause to play a meaningful role in resource management.").

intended to sustain the yield." The first question for this Court is whether ADF&G has a legal duty to provide the best available information in its possession to the Board. Once the constitutional duty has been established, review of ADF&G's compliance with the duty is subject to the "hard look" standard.[25]

Under the "hard look" doctrine, there are no political questions that would impede judicial review of ADF&G's advice, recommendations, and reports to the Board. "Hard look" review is a clear and familiar standard to the courts. Although the Legislature delegated administrative authority to ADF&G to decide which studies to conduct and what information to gather, the Legislature delegated ultimate policy-making authority to the Board.[26] When ADF&G provides information and reports to the Board, it is performing a supporting role—there is no need for ADF&G's discretion in deciding what information the Board may consider relevant. Thus, the Court's review of ADF&G's reports to the Board ensures "compliance with constitutional principles"[27]—here, the duty to consciously apply "principles of management intended to sustain the yield."[28]

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25 *See Sagoonick*, 503 P.3d at 788. SHCA urges this Court to apply the canon of constitutional avoidance because, it argues, STA could have raised an APA claim against the Board and ADF&G. See SHCA Br. 30. But the Board never knew about the Martell Report; thus, an APA claim against the Board for not considering information that it never knew about would not be viable. If ADF&G violates the APA when it does not present the Board with all the available information, this Court should explicitly say so to allow STA or other litigants to bring APA claims despite the apparent absence of a "regulation" that is normally required for APA review. *See Kachemak Bay Watch v. Noah*, 935 P.2d 816, 924-25 (Alaska 1997).

26 *Compare* AS 16.05.050(a), *with* AS 16.05.251(a).

27 *Sagoonick*, 503 P.3d at 788.

28 *Native Vill. of Elim*, 990 P.2d at 7 (quoting Papers of the Alaska Constitution

C. STA's Sustained Yield Clause Claim Is Not Moot.

"A claim is moot if it has lost its character as a present, live controversy."[29] Here, there is very much a present, live controversy regarding the scope of ADF&G's constitutional duties to provide available scientific information to the Board. Although the superior court and SHCA focused on the fact that ADF&G's specific conduct in question relates to 2018 and 2019 Board meetings, [Exc. 204; SHCA Br. 22] ADF&G has not changed its legal position since then, and this Court is not tasked with reviewing regulations that are no longer in effect. The live constitutional question presented is more than an academic exercise; it will clarify ADF&G's duties going forward at future Board meetings.

If this Court concludes that the claim is moot, it should apply the public interest exception to the mootness doctrine.[30] The superior court correctly determined that the constitutional question was capable of repetition, likely to evade review, and important to the public interest. [Exc. 204-05] It is undisputed that the issue is capable of repetition and important to the public interest. [*See* SHCA Br. 22-23] The issue is also likely to evade review because STA only discovered the Martell Report's existence through discovery in this case—discovery that the State and SHCA vigorously opposed. It is highly unlikely that future plaintiffs would have knowledge of the information that ADF&G withheld until after

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Convention, 1955-1956, Folder 210, Terms).

29 *Ahtna Tene Nene v. State, Dep't of Fish & Game*, 288 P.3d 452, 457 (Alaska 2012) (quoting *Ulmer v. Alaska Rest. & Beverage Ass'n*, 33 P.3d 773, 776 (Alaska 2001)).

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

the fact.[31] [Exc. 204] STA's claim involves information that ADF&G knows, which no one else knows—that makes the issue presented likely to evade review. Guidance from this Court regarding ADF&G's duties to inform the Board going forward remains highly important to the protection of constitutional rights, even if the violations of that duty that occurred in connection with past meetings may not be cured.

II. The Superior Court Misapplied the Legal Standard for Irreparable Harm and Did Not Make Any Factual Findings Supporting Its Decision.

The State correctly points out that there is already a clear legal standard for determining irreparable harm;[32] [*see* State Br. 23] however, the superior court's preliminary injunction decision ignored the overwhelming weight of authorities by concluding as a matter of law that the harms to STA's subsistence way of life did not constitute irreparable harm because STA had not shown a "new crisis."[33] That was legal error. Contrary to the State's and SHCA's arguments, the superior court did not make any factual findings in its decision. [*See* State Br. 25-29; SHCA Br. 37-41] The superior court's irreparable harm analysis provides, in relevant part:

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[31] Because ADF&G has never acknowledged its constitutional duty to provide the Board with all relevant information within its possession, ADF&G has never adopted regulations that ensure a process through which such information is identified and provided to the Board and public. Thus, there is no publicly available administrative record that identifies what information ADF&G has, which information it has decided to release or withhold, and the basis for that decision.

[32] *See State v. Kluti Kaah Native Vill. of Copper Ctr.*, 831 P.2d 1270, 1273 n.5 (Alaska 1992) ("Irreparable harm" is an "injury, whether great or small, which ought not to be submitted to" and cannot be adequately compensated by monetary damages).

[33] *See Native Vill. of Quinhagak v. United States*, 35 F.3d 388, 394 (9th Cir. 1994); *State v. United Cook Inlet Drift Ass'n*, 815 P.2d 378, 379 (Alaska 1991).

> No party disputes the importance to the Tribe, and arguably also to similarly situated entities and individuals, of the subsistence fishery in issue. But the Tribe has not demonstrated that it faces irreparable harm if the requested relief is not granted, as it requests, in the brief and dwindling period of time between now and the beginning of the 2019 commercial and subsistence fisheries in issue, or during these fisheries. As most succinctly described the Alliance's opposition brief, [at page 25] the Tribe has not met its threshold burden of demonstrating irreparable harm. [Exc. 66 (citing Exc. 48)]

The cross-referenced portion of SHCA's opposition brief provides, in relevant part:

> The Tribe offers a lengthy narrative of the harm that its members are suffering because their recent harvests have been below the ANS and their ability to participate in the subsistence fishery in recent years has not been what they believe it should be. [n.88] *What they fail to demonstrate, however, is an urgent problem that demands the immediate remedy of an injunction against the 2019 commercial fishery*. The trends in the subsistence fishery described by the Tribe have been underway for many years*; there is no new crisis that warrants an emergency response*. [Exc. 48 (emphasis added)]

There were no factual findings in the superior court's decision—and not even any supported factual allegations in the referenced SHCA brief. In their briefs, the State and SHCA provide lengthy defenses of various factual claims they contend the superior court agreed with. [*See* State Br. 24-29; SHCA Br. 37-41] STA disputes each of those factual allegations. [*See* R. 1031-50] Specifically, STA disputes the State's primary factual contention that the harm STA alleged was not causally linked to ADF&G's illegal interpretation and implementation of Section 195 [*see* State Br. 26-27]—STA noted that the regulation was adopted by the Board to ensure a reasonable opportunity for subsistence users. [*See* R. 1039-40, 1049] But importantly, there is no way to know which, if any,

disputed factual claims the superior court decided. Thus, there is no way to apply the "clearly erroneous" standard of review to the superior court's decision.[34]

If the superior court intended to make factual findings, it could have done so explicitly, relying on specific factual contentions in the record.[35] Instead, the superior court reached a legal conclusion, relying on SHCA's false legal premise that irreparable harm requires "an urgent problem" or "new crisis." [Exc. 48] This Court must correct that error.[36]

Finally, none of the reasons offered by the State and SHCA against applying the public interest exception to the irreparable harm prong of the preliminary injunction decision have merit. [*See* State Br. 21-24; SHCA Br. 42-43] First, the State and SCHA erroneously assume that the issues are not likely capable of repetition because the superior court's decision "was based on a unique set of disputed facts." [SHCA Br. 42; *see* State Br. 21] But, as explained above, the superior court did not make any factual determinations. Instead, it ruled incorrectly as a matter of law that STA had not shown a "new crisis" or "urgent problem." That legal issue is likely to recur in any future subsistence case where a preliminary injunction is sought, and the superior court's incorrect legal analysis about the appropriate standard would presumably be used by the State to support defeating STA's ability to obtain injunctive relief against ADF&G in the future.

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34 *See State v. Galvin*, 491 P.3d 325, 334 (Alaska 2021).

35 The superior court denied STA the opportunity to present additional evidence of irreparable harm when it vacated a previously stipulated evidentiary hearing over STA's objection. *See* Exc. 63-64.

36 *See Galvin*, 491 P.3d at 332 ("[T]he court makes a legal conclusion when deciding whether a party faces irreparable harm unless an injunction is granted.").

Second, the State and SHCA argue that the issue will not escape review because STA could have had timely review of the preliminary injunction decision if this Court had granted the petition for review. [State Br. 22; SHCA B. 43] But granting a petition for review is discretionary. This Court may consider factors other than the merits of the question presented in declining interlocutory review.

Third, the importance of the issue to subsistence users appears lost on the State and SHCA.[37] [See State Br. 23-24; SHCA Br. 43] The State's contention that an unpublished order is unlikely to be cited as authority ignores the fact that ADF&G is the likely defendant in future subsistence cases. STA's request for this Court to correct the superior court's legal error is not a request for "naked vindication." On the contrary, even "a single sentence in the court's decision" can have great consequences, as it does here. [SHCA Br. 43]

III. STA Is Entitled to Attorney's Fees Because it Prevailed on the Main Issue in this Case.

[37] The opportunity to continue the subsistence way of life is firmly established as an important if not compelling interest for Alaskans. *See State, Dep't of Fish & Game v. Manning*, 161 P.3d 1215, 1220-22, (Alaska 2007). Alaska's subsistence law is based on the finding that "customary and traditional uses of Alaska's fish and game . . . are culturally, socially, spiritually, and nutritionally important and provide a sense of identity for many subsistence users." Ch. 1, § 1(a)(3), SSSLA 1992; *see also* 16 U.S.C. § 3111(1) ("[T]he continuation of the opportunity for subsistence uses . . . is essential to Native physical, economic, traditional, and cultural existence and to non-Native physical, economic, traditional, and social existence."); *Quinhagak*, 35 F.3d 388 at 394 (regulations that interfere with ability to practice subsistence way of life is irreparable harm). Yet, the superior court discounted the irreparable harm STA demonstrated through the numerous affidavits of subsistence users and experts without making any findings supporting the decision, and instead required some additional "crisis" as though years of lost subsistence opportunity was not of sufficient importance. It is clearly in the public interest to review a ruling that has important consequences for so many Alaskans.

The superior court concluded correctly that STA prevailed on the claims which were "the very heart of this litigation." [Exc. 235] The superior court's analysis should have ended there, resulting in attorney's fees to STA. But the superior court erred by subjectively weighing the speculative impact of STA's successful litigation against its loss on an ancillary constitutional claim. [*See* Exc. 237] The decision misapplied this Court's legal standard for determining prevailing parties under Rule 82 and was an abuse of discretion.[38]

Neither the State nor SHCA address the legal standard for attorney's fees outlined in *Alaska Center for the Environment v. State*.[39] This Court explained that courts must ask the "simple and objective question of whether [the plaintiff] obtained the relief it sought."[40] "With few exceptions, the party who obtains an affirmative recovery is considered prevailing."[41] This Court does "not require a party to prevail on all the issues in the case to be a prevailing party," and this Court has cautioned against in engaging in "highly

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[38] The superior court's initial conclusion that STA prevailed was not an abuse of discretion. *See* Exc. 235. But the superior court's ultimate decision denying STA attorney's fees because the "court cannot fairly conclude that any party, or that either side, bested the others to the degree that it can be accurately designated as the prevailing party in the case as a whole," Exc. 235, misapplied the law and should be reviewed de novo. Regardless, the ruling was also "manifestly unreasonable" and may be reversed under the abuse of discretion standard of review.

[39] 940 P.2d 916 (Alaska 1997).

[40] *Id*. at 922.

[41] *Id*. at 921 (citing *Hillman v. Nationwide Mut. Fire Ins. Co.*, 855 P.2d 1321, 1327-28 (Alaska 1993)).

subjective" attempts to discern the relative importance of the outcome of claims when deciding Rule 82 motions.[42]

The State concedes that STA achieved the relief it sought on its non-constitutional claims—relief that the superior court characterized as "important." [State Br. 20; Exc. 235] After nearly twenty years of ADF&G failing to demonstrate any compliance with regulations intended to ensure a reasonable opportunity for subsistence use of Sitka herring, ADF&G finally, pursuant to the court's orders, began making required determinations and documenting how it considers ensuring subsistence uses as part of its herring management decisions. [*See* State Br. 20] Requiring ADF&G to create a record of decision-making is essential because it is the means to ensure that ADF&G is following the law.

The State and SHCA rely primarily on *Alliance of Concerned Taxpayers, Inc. v. Kenai Peninsula Borough*.[43] [State Br. 46-47; SHCA Br. 48] But *Alliance of Concerned Taxpayers* involved a significantly different fact-pattern. Unlike the appeal here, which involved successive rounds of briefing on different legal issues and fact patterns, the superior court in *Alliance of Concerned Taxpayers* issued a single opinion disposing of the entire case.[44] The court granted partial summary to the borough, determining that state law does not permit term limits for school board members, but granted partial summary

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42 *Id*. (citing *Day v. Moore*, 771 P.2d 436, 437 (Alaska 1989) (holding that plaintiff who succeeded in one of three claims and defeated a counterclaim was prevailing party)); *see also Keenan v. Wade*, 182 P.3d 1099, 1110 (Alaska 2008) (the main issue is the claim that goes to "the heart of the parties' dispute").

43 273 P.3d 1123, 1124 (Alaska 2012).

44 *Id*. at 1125.

judgment to the group, concluding that term limits for borough assembly members was constitutional and would apply only to future elections. The court declined to name a prevailing party because "each party prevailed on some issues and lost on others."[45] This Court affirmed, concluding that it was proper to characterize the central "issue as a dispute regarding the legality of both initiatives" and all the issues "can fairly be considered main issues in this case."[46]

In contrast to *Alliance of Concerned Taxpayers*, there were two distinct aspects of this case, only one of which was the "main" issue. STA's claims regarding ADF&G's interpretation and implementation of Section 195 were central to the litigation. [Exc. 235] STA's constitutional claim was always ancillary to the main issue and consumed a small proportion of the parties' time. [*See* STA Br. 45] The issues were not overlapping and involved distinct facts and origins.

Importantly, the State and SHCA fail to distinguish the most analogous case to this appeal—*State, Department of Corrections v. Anthoney*.[47] In *Anthoney*, this Court affirmed a ruling that a prisoner who prevailed on a single regulatory claim but lost on his constitutional claims was the prevailing party.[48] This Court concluded that the prisoner's regulatory claim was the main issue, entitling the prisoner to attorney's fees even though the prisoner lost on his constitutional claims.

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45 *Id*. at 1126.

46 *Id*. at 1127.

47 229 P.3d 164 (Alaska 2010).

48 *Id*. at 168.

Here, as in *Anthoney*, STA's constitutional claim was ancillary to the main issue in the case—whether ADF&G's interpretation and implementation of Section 195 was lawful.[49] STA achieved the relief it sought on the issue that was "the very heart of this litigation." [Exc. 235] STA needed to do nothing more to demonstrate that it "bested the others to the degree that it can be accurately designated as the prevailing party in the case as a whole."[50] [Exc. 237]

CONCLUSION

This Court should reverse the superior court's decisions on three issues. First, this Court should conclude that the Sustained Yield Clause, Article VIII, Section 4 of the Alaska Constitution requires ADF&G to provide the Board with all the relevant scientific information regarding a proposed fisheries regulation. Second, this Court should reverse the superior court's erroneous legal conclusion that STA had not suffered irreparable harm. And third, regardless of whether this Court affirms the superior court's decision on the constitutional claim, it should reverse the attorney's fees award because STA was the prevailing party on the main issue in this case.

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[49] STA did not abandon any claims in this case, *see* SHCA Br. 14, it voluntarily dismissed *without prejudice* an alternative claim against the Board after the superior court rejected ADF&G's interpretation of Section 195(a). Exc. 169-71. It would not have made sense for STA to attack the validity of the regulation that the court just interpreted in favor of STA. SHCA did not file any dispositive motions regarding STA's claims against the Board or request attorney's fees as a condition of dismissal. Although the State (and SHCA) insisted on producing the entire administrative record to resolve STA's Section 195 claim before any of the parties turned to the APA claim against the Board, the entire administrative record was ultimately useful to resolving the Section 195 issues.

[50] *Alaska Ctr. for the Envt.*, 940 P.2d at 922 ("[T]he superior court should have asked the simpler and more objective question of whether [STA] obtained the relief it sought.").