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.: 1S1-18-00212 C1

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

BRIEF OF APPELLEE
STATE OF ALASKA, DEPARTMENT OF FISH AND GAME

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ALASKA CONSTITUION

Art. VIII, § 2. General Authority.

The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people.

Art. 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 STATUTES

Sec. 16.05.050. Powers and duties of commissioner.

(a) The commissioner has, but not by way of limitation, the following powers and duties:

> . . .
>
> (4) to collect, classify, and disseminate statistics, data and information that, in the commissioner's discretion, will tend to promote the purposes of this title except AS 16.51 and AS 16.52;
>
> . . .
>
> (11) to initiate or conduct research necessary or advisable to carry out the purposes of this title except AS 16.51 and AS 16.52;
>
> . . .

REGULATIONS AND COURT RULES

5 AAC 27.195. Sitka Sound commercial sac roe 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.

Civil Rule 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.

. . .

(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.

. . .

PARTIES

The Sitka Tribe of Alaska, whose members harvest herring eggs for subsistence, is the appellant. The State, Department of Fish and Game, which manages the fisheries, and the Southeast Herring Conservation Alliance, which represents commercial fishing, are the appellees. The Tribe dismissed the Board of Fisheries below. [Exc. 172]

ISSUES PRESENTED

The Tribe sued the Department and Board after poor subsistence harvests of herring eggs deposited on hemlock branches, blaming the problem on the commercial sac roe fishery that uses purse seine gear to catch herring before the spawn. The Tribe alleged that the management of the fisheries was failing to prioritize subsistence uses and ensure a sustained yield. The Tribe sought injunctive and declaratory relief.

The trial court denied preliminary injunctive relief, concluding the Tribe had not shown it would suffer irreparable harm to subsistence opportunities in the absence of an injunction requiring the Department to explain how it would implement a regulation. The Tribe's harvests had fallen short for many reasons, including fewer harvesters and recent atypical spawning patterns—none of which the Department could attribute to commercial fishing. And ample evidence supported that the herring stocks were robust. Even if the commercial fishery, which needed to open before the first spawn to avoid taking too many post-spawn herring, caught the maximum allowable amount, there would be more than enough eggs for the later subsistence harvest and to sustain the population. So, the court concluded that any relief could wait for its full consideration of the Tribe's claims.

After discovery, the Tribe dismissed all its claims against the Board and did not

pursue many of its claims against the Department, including that agency actions and regulations favored the commercial fishery in contravention of the statutory priority for subsistence and violated the constitutional mandate for sustained yield.

On cross-motions for summary judgment, the Tribe lost on a remaining constitutional claim and partially prevailed on a regulatory compliance claim. The court rejected that the constitutional mandate to manage for a sustained yield authorized resource users to challenge the information that the Department, using its specialized knowledge and expertise, provides to the Board to evaluate regulatory proposals. The court decided that the Department had no standalone obligation under the constitution to provide so-called "best available information," and if it did, determining the parameters of that obligation was non-justiciable. The court also held that 5 AAC 27.195 required the Department to better document consideration of subsistence opportunity but did not find that the Department violated the regulation. The court declined to award attorney's fees under Rule 82, concluding that neither side wholly prevailed.

The Tribe appeals, raising three issues:

1. *Preliminary injunction.* The Tribe challenges the trial court's ruling that it would not suffer irreparable harm, arguing that review of the now moot issue is in the public interest. But granting a preliminary injunction requires a fact-dependent weighing of harms, the legal standards are already well-defined, and the Tribe had time before the issue became moot to seek this Court's interlocutory review, which was denied. Should the Court nevertheless consider the moot issue now?

2. *Sustained yield clause.* By its plain language, the clause requires the

management of fish and other natural resources to achieve a broad principle—sustained yield—without dictating what Department biologists must tell the Board. Nevertheless, they strive to distill relevant research and give advice well-grounded in science. And an adequate check on their efforts already exists—any lapse that results in the Board failing to take a hard look at the salient problems and genuinely engage in reasoned decision-making is likely to violate the sustained yield principle. Was the trial court correct to reject a standalone duty not evident from the text that would put courts in the untenable position of second-guessing the Department's expertise?

3. *Attorney's fees.* The prevailing party is entitled to attorney's fees, but if the parties win on different "main issues," a trial court may decline to designate an overall victor and award fees. The Tribe's complaint sought relief for a regulation claim it partially won, a constitutional claim it lost, and a number of claims that it abandoned after discovery. Did the trial court abuse its discretion by concluding that no one wholly prevailed and requiring the parties to bear their own fees?

STATEMENT OF THE CASE

I. The Department of Fish and Game and the Board of Fisheries manage the subsistence and commercial fisheries for herring roe in Sitka Sound.

In Sitka Sound, herring return annually to spawn and have done so recently with historic abundance. [Exc. 254; R. 2802, 5275-76, 6182] Two primary fisheries harvest herring spawn: the subsistence fishery, which collects the eggs deposited on hemlock branches, and the commercial fishery, which catches pre-spawn herring using purse seine

gear.[1] [Exc. 254, 352] The subsistence fishery is largely unregulated: Except for herring spawn-on-kelp, no permit is required for or limits imposed on taking herring eggs for subsistence uses in Southeast Alaska.[2] [Exc. 1043] In contrast, to ensure that enough herring survive to sustain the population and for subsistence, the commercial fishery is heavily regulated with restrictions placed on harvest amounts, timing, and location.[3]

The Department and the Board of Fisheries regulate and manage the fisheries—the Department implements the Board's regulations, making in-season decisions about when and where to open the commercial fishery consistent with the regulations.[4] Before opening the commercial fishery, the Department must forecast the abundance of mature herring—the spawning biomass—for that year.[5] To do so, the Department uses an age-structured assessment model, "the preferred statistical tool to combine multiple datasets from surveys, sampling programs, and experiments and produce a trend of population abundance or biomass over time." [Exc. 437-38; *see* Exc. 354, 626-27, 694-95] Only if the spawning biomass is forecast to be at a minimum level specified by regulation—

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1 5 AAC 27.110(b). Contrary to the Tribe's brief [At. Br. 6], the harvest weights for each fishery cannot be directly compared because the commercial harvest is the weight of the herring, and the estimated subsistence harvest is the weight of the eggs, including some branches and needles. [Exc. 258, 352]

2 5 AAC 01.710(c); 5 AAC 01.730(a); 5 AAC 01.745. The Board rejected a permit requirement opposed by the Tribe in 2002. [Exc. 254, R. 797-98]

3 5 AAC 27.110(b); 5 AAC 27.150(7); 5 AAC 27.160(g).

4 5 AAC 27.035; 5 AAC 27.059; 5 AAC 27.110(b); 5 AAC 27.150(7); 5 AAC 27.160(g); 5 AAC 27.190; 5 AAC 27.195.

5 5 AAC 27.160(g); 5 AAC 27.190.

currently 25,000 tons—may the commercial fishery open.[6] The 25,000-ton level is about 37 percent of the "pristine" herring biomass, which is the long-term average without fishing and under average environmental conditions. [Exc. 439] If the 25,000-ton threshold is met, the commercial fishery may open but may not harvest more than the guideline harvest level (GHL).[7] [Exc. 439] The GHL is a percentage of the spawning biomass, ranging from 12 to 20 percent and increasing with the size of the biomass.[8] [Exc. 439] The Board's adoption of a sliding-scale harvest rate went beyond the scientific recommendation of a fixed 20 percent rate as an added "precautionary measure" to avoid depleting the herring stocks. [Exc. 440] The Department forecasts the mature biomass, and calculates and sets the GHL each year. [Exc. 357-58; R. 5791-97, 6183-92]

During the spawning season, the Department opens specific areas to commercial fishing by emergency order and provides information to the public.[9] [Exc. 353] The Department monitors herring distribution and roe quality with aerial, dive, and vessel sonar surveys, and test sets. [Exc. 415, 626-27, 629-30, 490-91] The areas open to fishing

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6 5 AAC 27.160(g).

7 *Id.*

8 *Id.* In 2009, the Board increased the harvest threshold by 5,000 tons to the current 25,000 tons and adjusted the harvest rate from 10 to 20 percent to the current 12 to 20 percent. [Exc. 355] The percentage (12 percent) that may be harvested at a biomass of 25,000 tons remained unchanged; the Board did not adjust the formula. [Exc. 355] When the harvest threshold was lower—20,000 tons—the commercial fishery could harvest 10 percent if the spawning biomass was at that level, but now no harvest occurs if the biomass is only 20,000 tons. *Compare* 5 AAC 27.160(g) (eff. 4/24/2009, Reg. 190) (providing the harvest rate percentage equals 2 + 8(Spawning Biomass (in tons)/20,000)) *with* 5 AAC 27.160(g) (eff. 4/24/2003, Reg. 166) (same formula).

9 5 AAC 27.035; 5 AAC 27.059; 5 AAC 27.110(b).

depend on the distribution of herring, the need to provide for a fishery that will harvest good quality roe, and the need to provide a "reasonable opportunity" for subsistence by avoiding areas where branches are set for the subsistence harvest.[10] [Exc. 492-93] Typically, the commercial fishery is open for a few weeks at most each spring. [Exc. 414] Nearly every day during the season, the Department issues press releases and announces over VHF radio spawning locations, commercial openings, the distribution of predators, and test fishing results. [Exc. 353, 415, 495-96, 574-75; *see* R. 3513-44]

During the off-season, the Board regularly considers changes to the regulations. It holds meetings addressing specific fisheries every three years, deliberating on regulatory proposals from stakeholders and the Department.[11] [R. 6274-77] The Board also holds work sessions every fall to consider requests to hear a regulatory proposal outside of the regular cycle.[12] The Board requires specific grounds to accept an agenda change request (ACR)—(1) there must be a conservation concern unless compelling new information points toward adjusting the harvest allocations within or between competing fisheries; or (2) the request must address an unintended error or an effect on a fishery unforeseen when the original regulation was adopted.[13]

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10 5 AAC 27.195. A "reasonable opportunity" is one that "provides a normally diligent participant with a reasonable expectation of success." AS 16.05.258(f).

11 Alaska Bd. of Fisheries Meeting Information, https://www.adfg.alaska.gov/index.cfm?adfg=fisheriesboard.meetinginfo (last visited May 11, 2022); *see* AS 16.05.300 (requiring at least one Board meeting or hearing per year in each of five different areas).

12 5 AAC 39.999.

13 *Id*.

As part of this process, the Department summarizes the proposals and ACRs, provides background and scientific information, and offers a recommendation on the merits (neutral, support, or oppose).[14] [Exc. 650-52, 662, 973, 982-83] The Department strives to provide relevant information without overwhelming the Board with information that is too technical or detailed. [Exc. 667-69] Multiple Department scientists help draft and review the comments, resulting in a consensus on the scientific validity and position taken in the comments. [Exc. 650-52, 667-69, 972-74, 806] The Department typically does not include preliminary data to ensure "all our numbers [are] exactly right," so that incorrect information does not result in faulty conclusions. [Exc. 711-12; *see* Exc. 660-61, 851-52] Overall, the comments aim to provide the best available information to inform the Board's decision. [Exc. 804, 840-41, 847-48, 974-76, 1017] At meetings, Department scientists are available to answer Board members' questions, and the requester and other stakeholders may address the Board. [Exc. 805-06, 973]

II. Over decades, the Board has adopted many of the Tribe's requested changes to the regulations governing the fisheries.

The Tribe has sought changes to the fisheries for decades, many of which the Board has adopted. In 2001, the Tribe submitted an ACR seeking the closure of commercial fishing in the areas of Sitka Sound where the subsistence harvest had traditionally occurred, as well as other changes. [Exc. 254; R. 6281-83, 6472-73] Although the Board did not permanently close any area to commercial fishing, it required the Department to "distribute the commercial harvest by fishing time and area if the

[14] AS 16.05.050(4), (11), (19); AS 16.05.094(6).

department determines that it is necessary to ensure that subsistence users have a reasonable opportunity" to harvest spawn and to "consider the quality and quantity of herring spawn on branches, kelp, and seaweed, and herring sac roe when making management decisions" about the two fisheries.[15] [*See* R. 6341]

At the same time, the Board also set the amount of spawn reasonably necessary for subsistence (ANS) as between 105,000 and 158,000 pounds, and required an annual harvest survey in part to evaluate whether the ANS was met.[16] [Exc. 252-55, R. 6341] A permit requirement, with an obligation to report on one's harvest, also would have provided the necessary data, but the Tribe preferred—and the Board decided to require—a voluntary post-harvest survey instead.[17] [Exc. 254, 358, R. 796-98] For the survey, the Tribe interviews subsistence harvesters, and the Department's subsistence division analyzes the responses and provides a report for the Board.[18] [Exc. 358, 897-98, 909-10, 1016-17, 1021] The Department incorporates considerations about the subsistence harvest in management plans for the commercial fishery. [Exc. 358] In five of the first

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15 5 AAC 27.195.

16 5 AAC 01.716(b) (eff. 4/14/2002, Reg. 162).

17 For several years beginning in 2002, a memorandum of agreement (MOA) was in place between the Tribe and Department about the data collection effort and other communications, but even without the MOA, the annual post-harvest survey continues. [Exc. 119-23, 252] The Department withdrew from the MOA in 2009 because "implementation of the agreement has given the perception that [the Tribe] has access to information and input into decision making that are not readily available to the general public and other user groups." [Exc. 89] The Department stated it would still closely communicate with all user groups and provide for the subsistence priority. [Exc. 89]

18 Before the Department issues the annual report on the subsistence harvest, it sends the report to the Tribe and Conservation Alliance for review and comments. [Exc. 938]

eight years of the surveys, the subsistence harvest met or exceeded the ANS. [Exc. 273]

Over the ensuing years, the Tribe continued to request restrictions on the commercial fishery, and the Board responded to the concerns. In 2009, the Board increased the ANS to between 136,000 and 227,000 pounds based on the average subsistence harvest from the previous seven years of survey results.[19] [Exc. 255] That same year, the Board increased by 5,000 tons the level that the spawning biomass must reach before any commercial opening to create more of a buffer for the subsistence fishery.[20] [Exc. 713-14, 729-31, 791-92] In 2012, the Board adopted the Tribe's proposal to permanently close commercial fishing in 10 square miles that subsistence harvesters had historically used.[21] [Exc. 255, 791] The goal was again to help protect and ensure an adequate subsistence harvest, even though the commercial fishery's effects, if any, on the harvest were uncertain.[22] [Exc. 715-16, 791; *see* Exc. 288] In 2015, the Board considered delaying the start of the commercial fishery until after spawning but rejected the Tribe's proposal. [Exc. 238-47] One Board member explained that the "whole idea" of the commercial fishery is to "get on the fish before they start spawning." [Exc. 243]

In January 2018, the Board considered multiple and competing proposals. The

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19 5 AAC 01.716(b) (eff. 4/24/09, Register 190).

20 *Compare* 5 AAC 27.160(g) (eff. 4/24/03, Register 166) ("The fishery will not be conducted if the spawning biomass is less than 20,000 tons.") *with* 5 AAC 27.160(g) (eff. 4/24/2009, Register 190) ("The fishery will not be conducted if the spawning biomass is less than 25,000 tons.").

21 5 AAC 27.150(7) (eff. 7/13/12, Register 203). [R. 5433-34]

22 In fact, the subsistence harvest met the amount reasonably necessary for subsistence more often in the years *before* the closure area went into effect. [Exc. 273]

Tribe asked for expansion of the commercial closure area and reduction of the commercial harvest rate, while the Southeast Herring Conservation Alliance proposed re-opening the entire closure area to commercial fishing. [Exc. 282-96] The Department summarized the history of the harvest rate strategy for the commercial fishery and closure areas to provide background, and explained that the method used to set the threshold and determine the spawning biomass "may need to be reevaluated to better avoid states of low biomass" and "to allow populations to recover" by accounting for changes in growth and survival. [Exc. 285, *see* Exc. 284-96] The Department was "neutral" on all the proposals, noting that the current harvest rate strategy was "based on the best scientific information available for Alaska" and advising the Board to consider impacts on a reasonable opportunity for subsistence harvesters. [Exc. 286, 289, 293, 296]

The Board ultimately declined to reduce the commercial harvest rate and decided to expand the closure area by an additional four square miles.[23] [Exc. 298, 318-20, 324-26, 344-45, 358] The Board concluded that with an expanded closure area, the regulations provided a reasonable opportunity for subsistence harvesters.[24] [Exc. 315-17, 330-31] Although recent harvests were less than the amount reasonably necessary for subsistence,[25] the Board accepted that one explanation for this was declining participation

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[23] The Conservation Alliance withdrew the proposal to reopen the closure area to commercial fishing, so the Board took no action on it. [Exc. 288, 320]

[24] Two Board members found that the current regulations provided a reasonable opportunity for subsistence uses while deliberating (and ultimately rejecting) the decrease in the harvest rate for the commercial fishery, and a third member agreed there was a reasonable opportunity with the expansion of the closed area. [Exc. 315-17, 330-31]

[25] In the seven years (2010-16) since the ANS was increased, subsistence users had

in the subsistence fishery. [Exc. 288-89, 317] The record showed that the households that tried to harvest spawn for subsistence uses from 2003-2016 had a success rate between 86 and 100 percent, and that over the same period, the number of households trying to harvest dropped by roughly two-thirds.[26] [Exc. 289] By 2016, a few community boats were taking and sharing most of the harvest—about 82 percent that year. [Exc. 261]

Despite the newly expanded commercial closure area, the subsistence harvest was a record low in 2018. [Exc. 82-83, 418, 431, 568-69] The main reason seemed to be that herring did not spawn in the traditional area. [Exc. 418, 431-32] Subsistence users often set branches where herring have frequently spawned with the hope that they will spawn there again, but that did not happen in 2018. [Exc. 418-19] The Department's scientists attributed the change in the spawning pattern to many potential factors, including natural variability, predators, water temperature, and plankton distribution; they were not able to identify the commercial fishery as a primary causal factor. [Exc. 431-32, 565-66, 696-99] Further, variables other than the atypical spawning pattern also may have contributed to the poor harvest, including weather and a further decline in the number of subsistence harvesters. [Exc. 479, 509, 560-61; *see* Exc. 707-09]

The commercial harvest was also poor that year—more than 8,000 tons short of the year's guideline harvest level. [Exc. 359] The herring stayed in deep waters making them at times inaccessible to test fishing. [Exc. 418] And the test fishing did not locate

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harvested at least that amount only twice. [Exc. 273]

[26] The 2016 subsistence report was the most recent data; the report on the 2017 harvest was not finalized by the January 2018 meeting. [Exc. 358; *see* Exc. 415-16]

herring of sufficient quality to fulfill market requirements, so the fishery opened only twice over two days. [Exc. 359, 418, 488-90; R. 3527, 3531]

Nevertheless, the Department's fishery scientists described the Sitka Sound herring stock as "robust" at the end of the 2018 season, and they believed that the commercial harvest rates remained conservative enough to ensure ongoing abundance of herring in Sitka Sound. [Exc. 285, 442-43, 858-59] The herring biomass had "stabilized at a moderate level"—lower than a peak about ten years ago but higher than the 1970s and comparable to estimates of amounts dating back to decades before statehood. [Exc. 434, 442, 707-10; *see* Exc. 654, 858-59; R. 5275-76] Although the herring eggs were apparently not left where many subsistence users placed branches in 2018, the Department estimated that more than 12 million pounds of eggs were deposited in Sitka Sound that year—more than 54 times the amount determined to be reasonably necessary for subsistence—and egg density was the highest observed in the last five years and above average for the last thirty years. [Exc. 432] These estimates were based on aerial surveys mapping the length of the shoreline receiving spawn and dive surveys used to estimate the density of eggs. [Exc. 626, *see* Exc. 90-101; R. 4019-73, 4652]

As a result of the poor harvest, however, the Tribe supported subsistence users asking for a complete closure of the commercial fishery for at least three years, which the Board denied that fall. [Exc. 363-64, 369-70; R. 10945-46; 10965; 11112-15] The Tribe and requesters did not want commercial fishing to resume until herring stocks showed signs of rebound, research was done on the impacts of commercial fishing on the spawning patterns, and subsistence users harvested the ANS for three consecutive years.

[Exc. 363] The Department explained that the herring biomass did not appear to have changed appreciably since the Board last considered the fisheries earlier that year, and the subsistence fishery likely did not harvest the ANS in 2018 because nearly all spawning occurred outside the traditional area, which had happened in the past. [Exc. 363-64] The Department advised the Board that the criteria for considering an agenda change request—a conservation concern or compelling new information about the allocation of the resource among users—were not met.[27] [Exc. 363, 368] The Board agreed and voted six to one to not consider the request on the merits. [Exc. 370]

III. The Tribe sues after the Department rejects changing management practices, and the trial court declines to enter a preliminary injunction.

Around the same time, the Tribe proposed changes to the management of the 2019 commercial fishery, which the Department largely rejected. [Exc. 146, 421-22] The Tribe wanted the Department to wait until after the first spawn before opening the commercial fishery and to collect information on the success of the subsistence harvest during the season. [Exc. 146, 421-22] The Department declined to do this because the Board did not require either action by regulation and had expressly rejected a permit/reporting requirement or waiting until after the first spawn before the first commercial opening. [Exc. 147-48, 254, 358, 421-22; R. 796-98] The Department could not wait for the first spawn and in-season data on the subsistence harvest without reducing the commercial harvest; the commercial fishery typically needed to harvest before the first spawn (and so before the subsistence harvest) to avoid capturing too many post-spawn herring. [Exc.

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[27] *See* 5 AAC 39.999 (providing criteria for granting an ACR).

147, 422, 520-21] The Tribe also wanted more communication before and during the season—suggestions the Department largely accepted. [Exc. 146-50]

As a result of the disagreements, the Tribe sued the Department and the Board in December 2018, seeking declaratory and injunctive relief to change the way the fisheries were managed. [Exc. 1-26]

The Tribe sought a preliminary injunction to delay the opening of the 2019 commercial fishery until after the first spawn, contending that such a delay was required under the subsistence-opportunity regulation.[28] [Exc. 30, 371-74; R. 49-50] After the Department and intervening Conservation Alliance opposed, the Tribe abandoned this specific request. [Exc. 61, R. 389-90] Instead, it asked for "an order enjoining the management of the commercial fishery" until the Department explained in its management plan how it would implement the regulation and to confirm the extent of the Department's authority to close the commercial fishery. [Exc. 61-62; R. 962-63, 1045]

The Tribe alleged that the management of the fisheries was causing it to suffer irreparable harm due to reduced subsistence opportunity, but the Department and the Conservation Alliance disputed the causes of the Tribe's harm, presented evidence of the harm to the State and commercial fishery if an injunction was granted, and challenged the Tribe's likelihood of success on the merits. [Exc. 30-36, 395-98; R. 483-98] The

[28] 5 AAC 27.195 (requiring distribution of "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 . . . spawn" and consideration of "the quality and quantity of herring spawn on branches . . . when making management decisions").

Department argued that an injunction would infringe on its management of the herring consistent with fishery management principles, regulations, and the constitution.[29] [R. 483, Exc. 417] The Department and Alliance also provided evidence that an injunction would harm commercial fishers and processors by making it more difficult to harvest the guideline harvest level. [Exc. 402-03, 410-11, 417; *see* Exc. 395-97, R. 484]

The court declined to enter a preliminary injunction because the Tribe had not established (1) irreparable harm to the Tribe if the injunction was denied; (2) adequate protection for the Department and Conservation Alliance if it was granted; and (3) probable success on the merits. [Exc. 65-66] The Tribe petitioned for review, and this Court declined to review the order in March 2019. [Exc. 67]

The harvests were nonexistent or poor in 2019, but the mature biomass set a record for the past forty years at 130,738 tons. [Exc. 1083; R. 2802, 5868, 5275-76, 6182] The commercial fishery never opened due to failures to find enough fish meeting market requirements for size; much of the population was young and thus too small.[30] [Exc. 1083, R. 5868] The herring spawned largely outside the traditional subsistence areas again, and although the subsistence harvest was better than 2018, it was still the second

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[29] *See State, Div. of Elections v. Metcalfe*, 110 P.3d 976, 978-79 (Alaska 2005) (holding that regardless of the requesting party's irreparable harm, an injury to the opposing State was not "slight," where an injunction, if granted, would prevent it "from administering an election pursuant to its own election laws," and so the requesting party had to show "probable success on the merits" to obtain an injunction).

[30] The same was true in 2020—there were no commercial openings. [*See* R. 2986] Kyle Hebert, *Southeast Alaska-Yakutat Mgmt. Area Herring Fisheries Mgmt. Report, 2017-2020*, Alaska Dep't of Fish & Game, Fishery Mgmt. Report No. 21-23 at 11, 13 (Sept. 2021), http://www.adfg.alaska.gov/FedAidPDFs/FMR21-23.pdf.

lowest on record.[31] [Exc. 1083, R. 5868]

In October 2019, the Tribe asked the Board for an increased minimum threshold for the commercial fishery and for a reduction in the guideline harvest level. [Exc. 1083; R. 6040-42, 6166-80] The Department's comments on the agenda change request explained that the level of herring stock did not present a conservation concern. [Exc. 1083] The spawning biomass increased in 2018, due to the large amount of newly mature age-3 fish. [Exc. 1083] The Department also stated that it was updating the model used to forecast the spawning biomass but conservation concerns did not require immediate regulatory changes. [Exc. 1083-84] Over nearly 40 years, the model under-forecast the size of the mature biomass "in considerably more years" than it had over-forecast. [Exc. 445] The Board unanimously declined to consider the merits of the request. [R. 6155]

IV. The trial court faults the Department for failing to document its consideration of a regulation, rejects the Tribe's constitutional claim, and declines to award attorney's fees.

Meanwhile, the Tribe's lawsuit proceeded. In three counts of the complaint, the Tribe challenged (1) the Department's and Board's compliance with the subsistence priority statute and regulations, contending subsistence harvesters were being denied a reasonable harvest opportunity; (2) the constitutionality of the Board's regulations and

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[31] Lauren A. Sill & Terrie Lemons, *The Subsistence Harvest of Pacific Herring Spawn in Sitka Sound, Alaska, 2019*, Alaska Dep't of Fish & Game, Technical Paper No. 474 at 21-22 (Jan. 2021), http://www.adfg.alaska.gov/techpap/TP474.pdf.

In 2020, the subsistence harvest dropped to a new record low, partially due to the pandemic. The pandemic precluded participation from community harvester boats not from Sitka. Lauren A. Sill & Margaret Cunningham, *The Subsistence Harvest of Pacific Herring Spawn in Sitka Sound, Alaska, 2020*, Alaska Dep't of Fish & Game, Technical Paper No. 480 at iv, 20-23 (Oct. 2021), http://www.adfg.alaska.gov/techpap/TP480.pdf.

Department's management, particularly to manage the herring to ensure a sustainable population; and (3) the validity of the Board's regulations under the Administrative Procedure Act. [Exc. 20-25] The Tribe eventually dismissed all the claims against the Board, including the entire third count, and remaining portions of the other two counts against the Department were resolved on summary judgment. [Exc. 156-69, 183-214]

After the Conservation Alliance's intervention, the parties engaged in discovery in 2019, including production of the agency records and depositions of four Department scientists. [Exc. 446-606, 610-1065; R. 3202-08, 6274-77] The parties agreed to address the claims in separate rounds of cross-motions for summary judgment. [Exc. 606-07]

In 2020, the court ruled partially in the Tribe's favor in two orders on regulatory compliance claims. [Exc. 167, 194, 201] In March, the court decided that the Department failed to establish that it considered whether to distribute the commercial fishery to provide subsistence harvesters a reasonable opportunity under 5 AAC 27.195(a) and thus its implementation of the regulation was an abuse of its discretion. [Exc. 167] The Tribe also contended that 5 AAC 27.195(b) required an in-season assessment of the spawn on branches, but the court concluded that a disputed issue of fact about the regulation's validity precluded summary judgment for any party. [Exc. 157-58, 167] After the Department provided additional evidence resolving the factual issue, the court decided in November that the Department must consider the quality of spawn on branches in making management decisions and failed to demonstrate that it had done so. [Exc. 168, 189, 198-201] But the court held that the Department did not have to consider the quality *in season*—the Tribe's preferred interpretation of 5 AAC 27.195(b). [Exc. 139, 157, 194]

Meanwhile, in July 2020, the Tribe agreed to a briefing schedule on all its remaining claims but voluntarily dismissed the claims against the Board shortly before its motion for summary judgment was due. [Exc. 169-72, 1069-70] This left only constitutional claims against the Department for briefing and decision. [Exc. 170]

In March 2021, the Department and Conservation Alliance wholly prevailed on the remaining constitutional claims. [Exc. 213-14] The Tribe argued that the common use and sustained yield clauses of the Alaska Constitution required the Department to provide what it termed "the best available information" to the Board and that the Department had not done so for meetings in 2018 and 2019. [Exc. 203] Although the Board decisions had been made and the fishing seasons were over for those years, the court considered the claims under the public interest exception to mootness. [Exc. 203-05] The court rejected that the Constitution imposed a duty on the Department to provide "the best available information" to the Board and decided that even if it did, evaluating the Department's compliance with such a duty was non-justiciable. [Exc. 205-14]

A couple of months later, the court entered final judgment, and the parties cross-moved for attorney's fees. [Exc. 215-21] The court decided that the parties "all prevailed on main issues" and none "bested the others to the degree that it can be accurately designated as the prevailing party in the case as a whole." [Exc. 237] The court therefore ordered the parties to bear their own attorney's fees and costs. [Exc. 237]

The Tribe appeals the denials of the preliminary injunction and attorney's fees, and the summary judgment ruling on the constitutional claim. [At. Br. 1]

STANDARDS OF REVIEW

The Tribe's challenge to the order denying preliminary injunctive relief presents a mixed question of law and fact.[32] The Court deferentially reviews the trial court's factual findings about the nature and extent of the harm for clear error, reversing if a review of the entire record leaves the Court with "a firm and definite conviction that a mistake was made."[33] The Court reviews de novo the legal conclusion that the Tribe did not face irreparable harm if an injunction was denied, reversing if the trial court "misinterpreted, misapplied, or otherwise acted contrary to the law."[34]

Constitutional challenges and decisions on summary judgment are subject to de novo review.[35] The Court interprets the constitution "according to reason, practicality, and common sense," considering the plain meaning, purpose, and framers' intent.[36]

The Court reviews for an abuse of discretion the prevailing party determination for the purposes of awarding attorney's fees.[37] The Court will overturn prevailing party determinations "only if they are manifestly unreasonable," placing a "heavy burden of persuasion" on the party challenging the determination.[38]

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32 *State, Div. of Elections v. Galvin*, 491 P.3d 325, 332 (Alaska 2021).

33 *Id.*

34 *Id.* A third standard is inapplicable because the Tribe did not establish irreparable harm and two other required elements. [Exc. 66] If it had, the Court would consider whether the trial court's ultimate denial of injunctive relief was an abuse of discretion. *Id*.

35 *Native Vill. of Elim v. State*, 990 P.2d 1, 5 (Alaska 1999).

36 *Id.*

37 *Schultz v. Wells Fargo Bank, N.A.*, 301 P.3d 1237, 1241 (Alaska 2013).

38 *Id.*

ARGUMENT

I. The denial of the preliminary injunction is moot but even if the Court considers it, the trial court did not err.

A. The Tribe has not established that this Court should consider the moot ruling under the public interest exception to mootness.

The Court should decline to consider the denial of the preliminary injunction because the ruling is moot. As the Tribe concedes, it "would not be entitled to any relief even if it prevails."[39] [At. Br. 39] The Tribe received the relief it apparently wanted from an injunction—the Department must better document its consideration of the subsistence-opportunity regulation—and the Department began doing so with the 2021 season.[40] [Exc. 61-62, 167, 200-01, 228-29] Even if this Court decides an injunction was warranted, it cannot now grant any relief to the Tribe for the two fishing seasons that elapsed while the suit was pending. Also, ensuing events made the lack of an injunction irrelevant. The Tribe wanted the commercial fishery managed differently, but the Department's management over those two seasons had no adverse effect on the subsistence harvests because no commercial fishing occurred.[41] [Exc. 1083, R. 2986]

The Court should reject the Tribe's "naked desire for vindication" in an otherwise

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39 *Jennifer L. v. State, Dep't of Health & Soc. Servs., Off. of Child.'s Servs.*, 357 P.3d 110, 114 (Alaska 2015) (noting that a claim is moot when a "party bringing the action would not be entitled to any relief even if it prevails").

40 *See Fairbanks Fire Fighters Ass'n, Loc. 1324 v. City of Fairbanks*, 48 P.3d 1165, 1168 (Alaska 2002) (stating case was moot because union had already been given the remedy it sought and was asking Court "to resolve an intermediate legal question").

41 Kyle Hebert, *Southeast Alaska-Yakutat Mgmt. Area Herring Fisheries Mgmt. Report, 2017-2020*, Alaska Dep't of Fish & Game, Fishery Mgmt. Report No. 21-23 at 11 (Sept. 2021), http://www.adfg.alaska.gov/FedAidPDFs/FMR21-23.pdf.

dead controversy and not address the denial of the injunction under the public interest exception to mootness.[42] The Tribe has not established any of the factors—at least one of which must support that review is in the public interest.[43] [*See* At. Br. 39-41, Amicus Br. 25-28] First, the disputed issue is not "capable of repetition"; second, mootness will not repeatedly result in the issue not being reviewed if it recurs; and third, the issue is not "so important to the public interest as to justify overriding the mootness doctrine."[44]

The first factor—whether the disputed issues are capable of repetition—does not support review here.[45] The Tribe's identified issue, whether a showing of irreparable harm must be "an urgent problem that demands an immediate remedy" or a "new crisis," is not a question the Court needs to address in a moot controversy. [At. Br. 35, 39-40; *see* Amicus Br. 2-3] The Court has already articulated the legal standards for preliminary injunctions.[46] Whether to grant a preliminary injunction in a particular case is dependent on the fact-specific nature of the problem or crisis, including how the requested relief would prevent or ameliorate the harm.[47] A trial court must decide whether the "plaintiff

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42 *Jennifer L.*, 357 P.3d at 114.

43 *Young v. State, Div. of Elections*, 502 P.3d 964, 970 (Alaska 2022).

44 *Id.*; *see In re Hospitalization of Reid K.*, 357 P.3d 776, 783 (Alaska 2015) (placing the burden on the party seeking to establish the public interest exception to mootness).

45 *Young*, 502 P.3d at 970.

46 *State, Div. of Elections v. Galvin*, 491 P.3d 325, 332-33 (Alaska 2021) (laying out the standards); *see Ulmer v. Alaska Rest. & Beverage Ass'n*, 33 P.3d 773, 778-79 (Alaska 2001) (declining to address a moot issue where other cases stated the applicable tests).

47 *See Galvin*, 491 P.3d at 332 (stating the nature and extent of a party's harm, if disputed, is a factual question for the trial court to decide).

faces the danger of irreparable harm if the relief is denied" and whether "the opposing party is adequately protected from harm if the relief is granted."[48] How this weighing plays out dictates the standard for the next step: A showing of "probable success on the merits" is necessary to grant an injunction if the harm to the opposing party is not "relatively slight" compared to the requesting party's harm, as was the case here.[49] Because the legal test is clear and the application fact specific, the moot issue is unlikely to repeat itself in the same way, and a ruling would offer little guidance for future cases.[50]

The second factor—whether applying the mootness doctrine may repeatedly circumvent review of the issues—is also absent in this case.[51] The Tribe argues that decisions about preliminary injunctive relief are prone to evading review since they become moot after a final decision. [At. Br. 40, *see* Amicus Br. 26-27] But it overlooks that avoiding mootness falls squarely within the rationale for granting interlocutory review[52] and that there is often enough time to review orders addressing preliminary

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48 *Id.* at 332-33 (cleaned up); *see State, Dep't of Fish & Game v. Kluti Kaah Native Vill.*, 831 P.2d 1270, 1272-73 (Alaska 1992).

49 *Kluti Kaah*, 831 P.2d at 1273. The Tribe does not argue that the irreparable harm finding resulted in the court using the wrong test to evaluate its likelihood of success. [At. Br. 35-39] *See Galvin*, 491 P.3d at 333 ("[I]f the party requesting preliminary injunctive relief does not face irreparable harm or if the opposing party cannot be adequately protected against injury threatened by the requested relief, then the standard of probable success on the merits applies.").

50 *Compare Ulmer*, 33 P.3d at 778-79 (concluding that fact-dependent issues were not capable of repetition), *with State v. United Cook Inlet Drift Ass'n*, 815 P.2d 378, 379 (Alaska 1991) (reviewing a moot temporary restraining order that applied the wrong legal test to assess the probability of success on the merits).

51 *Young*, 502 P.3d at 970.

52 Alaska R. App. P. 402(b)(4) (providing for interlocutory review when the "issue is

injunctions before they become moot.[53] In fact, this Court has at least twice reviewed and vacated preliminary injunctions in fish-and-game cases.[54] And the Court could have timely reviewed the order in this case but declined to do so. [Exc. 67] The order in this case and others are not moot so often that the issues repeatedly circumvent review.

Under the third factor, the issues here are not "so important to the public interest as to justify overriding the mootness doctrine."[55] If the Court believed resolution of this issue was important to the public interest, it would have accepted the Tribe's petition for review and decided the issue when it still presented a live controversy.[56] [*See* Exc. 67] And the Tribe's and amicus's arguments about the public interest in resolving the issue now are unconvincing. [At. Br. 40-41, Amicus Br. 27-28] Existing precedent is clear that subsistence users may "establish irreparable harm by showing injuries to their subsistence opportunity, way of life, and cultural identity" in the absence of an injunction.[57] [At. Br.

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one that might otherwise evade review, and an immediate decision by the appellate court is needed for guidance or is otherwise in the public interest").

53 *Copeland v. Ballard*, 210 P.3d 1197, 1202 (Alaska 2009) (noting issues do not evade review if similar appeals may be resolved before the issues become moot (citing *Ulmer*, 33 P.3d at 778)).

54 *Kluti Kaah*, 831 P.2d at 1271 (vacating a preliminary injunction that required a longer subsistence moose hunt); *Dep't of Fish & Game v. Pinnell*, 461 P.2d 429, 432 (Alaska 1969) (vacating an injunction that invalidated rules for bear hunting guides).

55 *Young*, 502 P.3d at 970-71.

56 Alaska R. App. P. 402(b)(4) (stating interlocutory review is warranted when an immediate decision on an issue "that might otherwise evade review" is "in the public interest"). The Tribe made the same irreparable harm argument in its petition for review. [Tribe Pet. for Review, Supreme Court Case No. S-17384, at 8-10]

57 *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

40] And one trial court's order does not bind other courts even in the same judicial district, so the ruling in this case will not control future requests for preliminary relief.[58] [*See* At. Br. 40; Amicus Br. 2, 27-28] Plus, the terse order was unpublished and unlikely to appear in an electronic case service; the lack of easy access and detailed reasoning limit its persuasive value. [Exc. 65-66]

Review of the moot issue is not in the public interest, so this Court should decline to consider it.

B. The trial court did not err by deciding that the Tribe would not suffer irreparable harm in the absence of an injunction.

The trial court correctly concluded that the Tribe would not suffer irreparable harm if an injunction was denied. [Exc. 66] The Department agrees that threats to subsistence opportunities, culture, and tradition that the Tribe and amicus describe may constitute "irreparable harm."[59] [At. Br. 36-37, Amicus Br. 21-23] But the Tribe must show that the management of the fisheries was resulting in harm that could not wait for a full decision on the merits and that the requested relief would help.[60] Irreparable harm is "an injury which should not be inflicted."[61] A preliminary injunction should "prevent

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as the injury which commercial fishermen might suffer if injunctive relief were not granted."); *see Native Vill. of Quinhagak v. United States*, 35 F.3d 388, 394 (9th Cir. 1994).

58 *Alaska Pub. Int. Rsch. Grp. v. State*, 167 P.3d 27, 45 (Alaska 2007).

59 *United Cook Inlet Drift Ass'n*, 815 P.2d at 379; *Quinhagak*, 35 F.3d at 394.

60 *See State, Div. of Elections v. Galvin*, 491 P.3d 325, 339 n.61 (Alaska 2021).

61 *Id.* at 333 (citing *State, Dep't of Fish and Game v. Kluti Kaah Native Vill.*, 831 P.2d 1270, 1273 n.5 (Alaska 1992)).

irreparable harm pending a full decision on the merits of a dispute,"[62] and so requires showing harm "absent an injunction."[63] The court did not err by deciding that the Tribe failed to meet this burden. [Exc. 66]

The Conservation Alliance did not misstate the standard for granting a preliminary injunction below, causing the trial court to rely on a faulty basis, as the Tribe contends. [At. Br. 35-36; Exc. 66, 397] The Alliance argued that the Tribe did not describe "an urgent problem that demands the immediate remedy of an injunction against the 2019 commercial fishery" or a "new crisis that warrants an emergency response"; instead, the Tribe's claims could wait for "a thorough review of the complete administrative record."[64] [Exc. 397] Relying on this argument, the court determined that the Tribe had not shown it faced irreparable harm if the requested relief was denied for the upcoming fisheries.[65] [Exc. 66] This comports with the law—if a party does not require an injunction to prevent harm that will occur while waiting for a final judgment, then no

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62 *Galvin*, 491 P.3d at 339 n.61 (citing *Martin v. Coastal Villages Region Fund*, 156 P.3d 1121, 1126 n.4 (Alaska 2007) ("The purpose of a preliminary injunction is to maintain the status quo." (citing *United States v. Guess*, 390 F.Supp.2d 979, 984 (S.D. Cal. 2005) ("A preliminary injunction is 'a device for preserving the status quo and preventing the irreparable loss of rights before judgment.'")))).

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

64 The Alliance also argued that whether the conditions affecting the 2018 harvests for both fisheries would repeat was "speculative at best," and the Tribe had not shown that the commercial fishery was to blame for the poor subsistence harvest. [Exc. 398]

65 The trial court did not find a lack of harm to the Tribe due to a delay in seeking the preliminary injunction. [Exc. 65-66] Thus, the Department does not address the Tribe's and amicus's arguments about the reasons the Tribe sued and sought an injunction when it did. [At. Br. 38-39, Amicus Br. 24-25]

preliminary injunction should issue.[66] The Tribe did not establish that the relief it requested—an explanation by the Department before opening the commercial fishery—would have helped increase the subsistence harvest.[67] [Exc. 61-62; R. 962-63, 1045] The trial court's decision not to invoke the "harsh remedy" of a mandatory injunction that is warranted "only in extreme or exceptional cases" was not erroneous.[68] [Exc. 66]

In addition, the record leaves no "firm and definite conviction" that the trial court clearly erred in its assessment of the nature and extent of the harm.[69] Although the Tribe presented unrefuted evidence that the poor subsistence harvests were harming Tribal members, the Department and the Conservation Alliance contested whether that harm could be blamed on the Department's management of the fisheries (or remedied by the

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66 *Galvin*, 491 P.3d at 339 n.61 ("The purpose of preliminary injunctive relief is preventative—to prevent irreparable harm pending a full decision on the merits of a dispute."). *See Alaska Pub. Utilities Comm'n v. Greater Anchorage Area Borough*, 534 P.2d 549, 559 (Alaska 1975) (stating a party seeking to enjoin an interim rate order must show that "these interim rates are likely to remain in effect for an unreasonable period pending final determination"); *Boehl v. Sabre Jet Room, Inc.*, 349 P.2d 585, 587 (Alaska 1960) (stating affidavits in support of request for preliminary injunction demonstrated "no substantial adverse effect, either present or imminent" from nearly all of the challenged regulations in the absence of an injunction).

67 The Tribe's requested injunction also suffered from another fatal flaw—"an injunction simply requiring [the Department] 'to obey the law' lacks the specificity required to convey what management actions it could take without risking contempt." [*See* Exc. 61-62] *Cook Inlet Fisherman's Fund v. State, Dep't of Fish & Game*, 357 P.3d 789, 804 (Alaska 2015) (also warning vague injunctions "would potentially put Alaska's court system in the untenable position of managing . . . contentious fisheries, despite [the Court's] long-standing policy of not second-guessing the Department's management decisions based on its specialized knowledge and expertise").

68 *Martin*, 156 P.3d at 1126; *Kluti Kaah*, 831 P.2d at 1274 n.9.

69 *Galvin*, 491 P.3d at 332.

injunctive relief the Tribe sought). [At. Br. 36-37; *see* R. 51-244, 316-52, 501-831] The Department provided ample evidence that the Sitka Sound herring stock was stable and capable of sustaining a commercial harvest in 2019 at the level set by the Board while still providing a reasonable opportunity for subsistence. [Exc. 432-34, 441-45] More than 54 times the amount of eggs reasonably necessary for subsistence were deposited in Sitka Sound in 2018, and egg density was above average. [Exc. 432] And a "reasonable opportunity" is not a guaranteed harvest.[70] The Department pointed to fewer subsistence harvesters as another reason for the smaller harvests. [Exc. 288-89, 380]

The Tribe's conflicting evidence is insufficient to overturn the trial court's finding because the record provides clear support for the irreparable harm finding.[71] [*See* At. Br. 36-37; Exc. 66] The Tribe contended that the commercial fishery was disrupting the spawning locations. [Exc. 32, 42, 377-79; R. 70-71] But the Department pointed to multiple other causes for the atypical spawning pattern in 2018, including predators, natural variability, water temperature, and plankton distribution, and scientists could not blame the commercial fishery as a primary causal factor. [Exc. 431-32] In terms of natural variability, the herring had spawned in varied locations, using virtually all the shoreline of the Sound at one time or another, over more than 50 years. [Exc. 90-101, 431-32; R. 4019-73, 4652] And the herring had spawned in the traditional area in the past

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70 AS 16.05.258(f) (stating that a "reasonable opportunity" is one "that provides a normally diligent participant with a reasonable expectation of success").

71 *See, e.g.*, *Tessa M. v. State, Dep't of Health & Soc. Servs., Off. of Child.'s Servs.*, 182 P.3d 1110, 1114 (Alaska 2008) ("[I]t is the function of the trial court, not of this court, to judge witnesses' credibility and to weigh conflicting evidence.").

even when the spawning biomass was predominantly newly mature fish, refuting the Tribe's contention that old fish, which were purportedly overharvested by the commercial fishery, must lead younger ones to the traditional area. [Exc. 32, 377-78, 434]

The Department's evidence also undermined the Tribe's contention that the commercial fishery was depleting the stock by targeting older fish prized for their better quality roe. [Exc. 32, 443-44] A "large majority of all ages" were left in the stock each year, and there were more age-8 and older fish in the last twenty years than before. [Exc. 444] The commercial fishery's actual ability to target was limited by mixed-age herring schools and the use of purse seine gear. [Exc. 444]

Finally, the Tribe's partial and narrow win on just one of its more than 15 claims does not "vindicate" its earlier showing of irreparable harm. [At. Br. 37-38, Exc. 20-25] "A preliminary injunction, of course, is not a preliminary adjudication on the merits but rather a device for preserving the status quo and preventing the irreparable loss of rights before judgment."[72] To ultimately prevail on its claims for declaratory judgment, the Tribe had to prove its interpretation of law was correct, rather than show irreparable harm, adequate protection for the opposing parties, and probable success on the merits, as it had to do to obtain a preliminary injunction.[73] The court's discussion of its decision's impact had nothing to do with the ruling on the merits, but was instead to assess whether the narrow and partial win was a "main issue" for the purposes of designating a

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72 *Sierra On-Line, Inc. v. Phx. Software, Inc.*, 739 F.2d 1415, 1422 (9th Cir. 1984).

73 *See Galvin*, 491 P.3d at 332-33; AS 22.10.020(g).

prevailing party for an attorney fee award.[74] [Exc. 234-37] And the court recognized that the order's substantive effect was uncertain. [Exc. 235] The order "holds the potential to alter the allocation of the resource"—but it was unclear whether it would.[75] [Exc. 235]

For all these reasons, the trial court did not clearly err in assessing the Tribe's harm and the need for preliminary injunctive relief. [*See* Exc. 66] If this Court addresses the moot order, it should affirm.

II. The trial court properly rejected second-guessing the Department's expertise through a newly created constitutional cause of action.

The Tribe wants to interject a new constitutional cause of action into the often contentious management of the State's fish and game, inviting courts to second-guess the scientific summaries, research, and recommendations the Department's experts provide to the regulating boards. [At. Br. 22-34] The Tribe asks this Court to hold that the sustained yield clause requires trial courts to assess the Department's information by a standard that it interchangeably calls the best available or all relevant information.[76] [At.

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74 *Schultz v. Wells Fargo Bank, N.A.*, 301 P.3d 1237, 1242 (Alaska 2013) (stating that the prevailing party for an award of Rule 82 fees is "the one who is successful on the main issue of the action and in whose favor the decision or verdict is rendered").

75 By "allocation," the court apparently meant the Department's discretion to distribute the commercial fishery by time and area if necessary to provide a reasonable subsistence opportunity under 5 AAC 27.195(a); other unchallenged regulations allocate the resource, restricting commercial fishing to the guideline harvest level and setting the amounts reasonably necessary for subsistence. 5 AAC 27.160(g); 5 AAC 01.716(b).

76 Below, the Tribe argued (and the court rejected) that this duty was also found in the common use clause in Article VIII, section 3. [Exc. 206-07] The Tribe has abandoned this issue on appeal by not briefing it, and it cannot resurrect the issue in its reply brief. *Lewis v. State, Dep't of Corr.*, 139 P.3d 1266, 1272 n.27 (Alaska 2006); *Union Oil Co. of Cal. v. State, Dep't of Revenue*, 677 P.2d 1256, 1259 n.6 (Alaska 1984).

Br. 24, 32] But as the trial court decided, no such duty—independent of the agencies' already existing obligation to take a "hard look" and "genuinely engage[] in reasoned decision making"[77]—is found in the text or purpose of the provision. [Exc. 207-13] And an interpretation creating this duty would defy "reason, practicality, and common sense."[78] Defining the contours of this new duty is a non-justiciable political question.[79] [*See* Exc. 211-13] This Court should reject the existence of such a duty.

A. The sustained yield clause does not impose a duty on the Department to provide the best available or all relevant information to the Board.

As the trial court properly found, the sustained yield clause does not dictate the information provided to the Board. [Exc. 207-11] Analyzing a "constitutional provision begins with, and remains grounded in, the words of the provision itself."[80] The sustained yield clause requires the State's replenishable resources, including fish, "to be utilized, developed, and maintained on the sustained yield principle."[81] To interpret this text, the Court looks to the "plain meaning and purpose of the provision" to follow the framers' intent and the probable meaning the voters placed on the provision.[82] Legislative history

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77 *Sagoonick v. State*, 503 P.3d 777, 788 (Alaska 2022) ("When an executive agency decision about natural resources is challenged under article VIII, our role . . . is limited to ensuring that the agency has taken a hard look at all factors material and relevant.").

78 *Native Vill. of Elim v. State*, 990 P.2d 1, 5 (Alaska 1999).

79 *Sagoonick*, 503 P.3d at 793 (identifying non-justiciable political questions by applying the test in *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

80 *Dunleavy v. Alaska Legislative Council*, 498 P.3d 608, 613 (Alaska 2021) (quoting *Wielechowski v. State*, 403 P.3d 1141, 1146 (Alaska 2017)).

81 Alaska Const. art. VIII, § 4.

82 *Dunleavy*, 498 P.3d at 613; *Wielechowski*, 403 P.3d at 1146.

and the historical context also help inform this inquiry.[83] Ultimately, the Court's interpretation should comport with "reason, practicality, and common sense."[84] Here, consideration of all these factors support that the Department has no standalone constitutional duty to provide the best available or all relevant information to the Board.

The sustained yield clause "is a broad principle of management" that leaves the details up to the legislature.[85] It is "a guiding principle rather than a concrete, predefined process,"[86] and requires careful balancing of objectives that are in tension—allowing for the use of a resource while guarding against its exploitation or destruction.[87] Absent from the constitutional text is any qualification on the information germane to determining the

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83 *Dunleavy*, 498 P.3d at 614; *Wielechowski*, 403 P.3d at 1147.

84 *Elim*, 990 P.2d at 5; *see Wielechowski*, 403 P.3d at 1146 ("Constitutional provisions should be given a reasonable and practical interpretation in accordance with common sense.").

85 *Elim*, 990 P.2d at 5; *see* Alaska Const. art. VIII, § 2 ("The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State . . . for the maximum benefit of its people."); Papers of Alaska Constitutional Convention, 1955-56, Folder 210, Statement Regarding Fish and Wildlife Resources (stating that the aim of the natural resources article was "to avoid legislative matter, and leave this to the discretion of future legislatures"); *West v. State, Bd. of Game*, 248 P.3d 689, 696-97 (Alaska 2010) (holding that the constitution gives "the legislature and the Board some discretion to establish management priorities for Alaska's wildlife," including selecting between predator and prey populations).

86 *Elim*, 990 P.2d at 7-8 (holding that the sustained yield principle did not require the Board to determine a numerical yield for chum stock and describing the Board's task as accommodating legitimate interests, including economic, ecological, cultural, and international ones, "in the face of substantial scientific uncertainty").

87 *Kenai Peninsula Fisherman's Coop. Ass'n v. State,* 628 P.2d 897, 903 (Alaska 1981) ("The terms 'conserving' and 'developing' both embody concepts of utilization of resources. 'Conserving' implies controlled utilization of a resource to prevent its exploitation, destruction or neglect. 'Developing' connotes management of a resource to make it available for use.").

sustained yield for any particular natural resource.[88] To the contrary, the framers explicitly acknowledged the difficulty of determining sustained yield and so left it up to the legislature and the agencies it would create by statute.[89] [*See* At. Br. 22-23] As the secretary to the constitutional Committee on Resources explained, "[T]he legislature would have to set up an administrative agency which in turn would conduct biological studies and meet with the fishermen in the establishment of regulations."[90]

The historical context reinforces this understanding of the text and purpose.[91] Months after the constitution took effect, the legislature created the Department and the Board by statute,[92] and tasked the Department with providing research and information that, "in the commissioner's discretion, will tend to promote the purposes" of the new Fish and Game Code.[93] If the constitutional provisions already required a particular body of information—"the best available" or "all relevant"—then logically the First State

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88 Alaska Const. art. VIII, § 4.

89 *See Elim*, 990 P.2d at 7 ("For fish, . . . it is difficult or even impossible to measure accurately the factors by which a calculated sustained yield could be determined." (quoting Papers of Alaska Constitutional Convention, 1955-56, Folder 210, Terms)).

90 Proceedings of the Alaska Constitutional Convention Day 42 at 1106, 1108 (Dec. 19, 1955); *see* Alaska Const. art. VIII, § 2; Proceedings Day 56 at 2456-57 (Jan. 17, 1956) (stating that applying the sustained yield principle to the fisheries would be left to the legislature and "probably by the legislature delegated to the fisheries agency").

91 *Dunleavy*, 498 P.3d at 614; *Wielechowski*, 403 P.3d at 1147.

92 Secs. 2, 17, ch. 64, SLA 1959; art. I, ch. 94, SLA 1959.

93 Sec. 11(c), art. I, ch. 94, SLA 1959 (as codified in AS 16.05.050(4)). *See* AS 16.05.050(11) (stating that the Department should "initiate or conduct research necessary or advisable to carry out the purposes" of the code) (enacted decades later in sec 2, ch. 132, SLA 1984).

Legislature, almost one-quarter of whose members were constitutional delegates,[94] did not need to give the commissioner discretion to determine what information to provide.[95]

This is not to say, however, that the constitutional mandate of sustained yield does not require reasoned decision-making—it does. As the framers stated in a glossary used during the constitutional convention, "sustained yield" "denotes conscious application insofar as practicable of principles of management intended to sustain yield."[96] Courts review an agency's compliance with the sustained yield principle and other Article VIII provisions by evaluating whether the agency has "taken a '*hard look*' at the salient problems" and "genuinely engaged in reasoned decision making."[97] Certainly, a record showing the Board relied on all relevant or the best available evidence supports that it took a hard look, but reliance on such evidence should not be constitutionally required.[98]

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94 Thirteen legislators of the 60-member body were delegates and twelve voted in favor of passing the bill. Alliance App. A-B; 1959 House J. 830, 873; 1959 Senate J. 903-04. They included the constitutional delegate, Sen. Peratrovich, who asked about the inclusion of fish in sustained yield, which prompted the explanation about setting up an administrative agency. Proceedings Day 42 at 1108, Proceedings Day 56 at 2456-57.

95 *See Basey v. Dep't of Pub. Safety, Div. of Alaska State Troopers, Bureau of Investigations*, 462 P.3d 529, 536 (Alaska 2020) (relying on legislature's later action—singling out one particular disciplinary record as an exception to a non-disclosure rule for personnel records—to support that the non-disclosure rule as originally enacted shielded all disciplinary records from disclosure).

96 Papers of Alaska Constitutional Convention, 1955-56, Folder 210, Terms.

97 *Sagoonick*, 503 P.3d at 788 (quoting *Se. Alaska Conservation Council, Inc. v. State*, 665 P.2d 544, 549 (Alaska 1983) (emphasis in original)); *see Elim*, 990 P.2d at 5 (stating the Court reviews the Board's application of the law to a particular set of facts for "reasonableness" and does not "substitute its judgment for the Board's or alter the Board's policy choice when the Board's decision is based on its expertise").

98 *See Stepovak-Shumagin Set Net Ass'n v. State, Bd. of Fisheries*, 886 P.2d 632, 640-42 (Alaska 1994) (holding that judging the adequacy of the data on one fishery's

The Tribe stretches the concepts of conscious application and hard look review too far in reading a different duty—providing best available or all relevant information—into the constitutional text. [At. Br. 23-26] These concepts do not imply a standalone constitutional cause of action to challenge the Department's expert guidance in order to give meaning to the sustained yield clause, nor do they need to. If 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.[99] This remedy for arbitrary decisions is in harmony with the text and purpose of the clause unlike the Tribe's new duty.

The Tribe asks for a remedy divorced from any violation of the sustained yield mandate. It is undisputed that the herring are returning in historic abundance. [R. 2802, 5275-76, 6182] The Tribe conceded that the Board's decisions were constitutionally sound by abandoning its challenge to the regulations after discovery; yet without any alleged sustained yield violation, it still asks this Court to declare that the Department has and may violate an intermediate, newly created constitutional duty. [Exc. 22-23, 169-72] This contravenes "reason, practicality, and common sense."[100] Such a result would generate endless litigation by resource users frustrated over decisions that harm them but benefit others.[101] The framers intended to ensure management for sustained yield but did

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impact on other fisheries and the conservation concerns was within the scope of Board's discretion and expertise—and its decision was not arbitrary in spite of a lack of data).

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

100 *Elim*, 990 P.2d at 5; *see Wielechowski*, 403 P.3d at 1146.

101 *Mesiar v. Heckman*, 964 P.2d 445, 450 (Alaska 1998) (counseling caution before

not dictate how. They certainly did not dictate how to manage fisheries wholly apart from complying with the sustained yield principle.

For all the above reasons, this Court should affirm the lack of a constitutional duty on the Department to provide a particular body of information to the Board.

B. The Court should find no standalone constitutional duty extending to the Department's guidance to the Board because defining the contours of such a duty would be a non-justiciable political question.

In the alternative, the trial court also correctly declined to consider whether a duty of providing the best available information existed because defining the duty's contours and identifying violations would be non-justiciable political questions.[102] [Exc. 211-13] The court found that the constitution delegated application of sustained yield to the legislature to create executive-branch agencies. [Exc. 212] The court also recognized the limits of judicial authority and its lack of technical expertise, determining that "the science- and policy-based inquiry" required to discern whether the Department presented the best available or all relevant information was "better reserved for executive-branch agencies or the legislature." [Exc. 212 (quoting *Kanuk*, 335 P.3d at 1099)] The trial court was right. The constitutional delegation to "a coordinate political department" and the "lack of judicially discoverable and manageable standards"—two hallmarks of a political question—support this Court rejecting the Tribe's assertion of a constitutional duty on

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creating new causes of action that would result in endless litigation—a likely result in a fisheries regulatory scheme where the interests of some resource users will clash with others; "a management decision that benefits some inevitably will harm others").

[102] *See, e.g.*, *Sagoonick*, 503 P.3d at 793; *Kanuk ex rel. Kanuk v. State, Dep't of Nat. Res.*, 335 P.3d 1088, 1097-1103 (Alaska 2014).

prudential grounds.[103]

The concept of political questions is rooted in the separation of powers doctrine and allows the judiciary to decline to answer questions that "are better directed to the legislative or executive branches of government."[104] To identify political questions, the Court follows *Baker v. Carr*, which lists six characteristics.[105] The presence of just one *Baker* factor indicates a non-justiciable political question, and two are present here—(1) "a textually demonstrable constitutional commitment of the issue to a coordinate political department"; and (2) a "lack of judicially discoverable and manageable standards."[106]

The constitution's explicit commitment of natural resources management, including application of the sustained yield clause to the legislature, which would then create executive-branch agencies, satisfies the first *Baker* factor.[107] [*See* Exc. 212] Section 2 of Article VIII states, "The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State." The framers understood that the legislature would "set up an administrative agency" to take the necessary steps to implement the sustained yield clause.[108] As this Court recently

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103 *Sagoonick*, 503 P.3d at 793 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)) & at 800 ("Prudential concerns often caution against issuing declaratory relief.").

104 *Kanuk*, 335 P.3d at 1096.

105 *Id.* at 1096 (quoting Baker, 369 U.S. at 217); *Sagoonick*, 503 P.3d at 793 (same).

106 *Kanuk*, 335 P.3d at 1097 (stating that a political question exists if "one of these formulations is inextricable from the case at bar") (quoting *Baker*, 369 U.S. at 217).

107 Alaska Const. art. VIII, § 2; *Baker*, 369 U.S. at 217.

108 Proceedings of the Alaska Constitutional Convention Day 42 at 1108 (Dec. 19, 1955) (stating that "the legislature would have to set up an administrative agency which in turn would conduct biological studies and meet with the fishermen in the establishment

explained, Article VIII's delegation of natural resources policies to a coordinate political department "effectively limits the judiciary's role" in implementing those policies.[109] Contrary to the Tribe's position, this broad delegation gives discretion to the legislature and the Department to determine what information the Board needs. [At. Br. 32-34]

The presence of a second *Baker* factor—a lack of judicially discoverable and manageable standards—further weighs against the Court concluding that the constitution imposes a duty on the Department to furnish the best available or all relevant information.[110] The Tribe's reliance on cases interpreting statutes that have explicit rules that specify the information agencies must use misses the point. [At. Br. 24-25, 32] Rules that arise out of statutes provide clear authority and guidance with definitions and a governing framework for courts to evaluate compliance with the statute at issue.[111] Here, the Tribe ignores that the constitution committed natural resources policy to the legislature and the legislature gave the Department discretion "to collect, classify, and disseminate statistics, data and information" for management of fish and game.[112] If the legislature wanted a best available or all relevant standard, it would have limited the

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of regulations, seasons, and that sort of thing"); Proceedings Day 56 at 2457 (Jan. 17, 1956) (stating that applying the sustained yield principle to the fisheries would be left to the legislature and "probably by the legislature delegated to the fisheries agency").

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

110 *Baker*, 369 U.S. at 217.

111 *See San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 995 (9th Cir. 2014) (stating that the Endangered Species Act requires a federal agency to use the "best scientific and commercial data available" when formulating a biological opinion).

112 AS 16.05.050(4); *see* AS 16.05.050(11) (stating that the Department should "initiate or conduct research necessary or advisable to carry out" the code's purposes).

Department's discretion accordingly, but it did not do so.[113] And if the Court decides such a duty exists in spite of the lack of statutory authority, the judiciary would exceed its limited constitutional role in implementing natural resources policy and struggle to develop judicially manageable standards in a complex scientific area.[114]

The task of assessing the best available or all relevant information is not as simple as the Tribe would like the Court to believe. The Tribe grounds its argument on assertions that its standard is objective and anyone could make the assessment "by simply searching the administrative record and determining if relevant scientific information was excluded from the Board's consideration." [At. Br. 32] But even the Tribe is uncertain on what the standard should entail, asking for tests that on their face are not necessarily the same—"the best available information" may not be "all the relevant information." [At. Br. 32; Exc. 212-13] And a court would confront challenges in assessing what information, among a vast trove, is all the relevant or the best information to consider in managing a particular resource. The agencies' record here is more than 8,000 pages, and it does not include every report referenced by another report. [R. 3202-11416; *see* Exc. 1081-82]

A trial court tasked with determining the best available or all relevant information must make judgment calls about management goals, policies, and practices. Courts would

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113 *See Sagoonick*, 503 P.3d at 798 (noting that separation of powers concerns are "less salient" where the legislature has authorized a requested remedy).

114 *See Granato v. Occhipinti*, 602 P.2d 442, 443-44 (Alaska 1979) (holding that under the separation of powers doctrine, the trial court could not prescribe an executive-branch agency's duties and order the agency to complete a home study in a private custody dispute in the absence of explicit statutory authorization).

ultimately be required to substitute their judgment, which this Court has repeatedly cautioned the judiciary not to do, for the Department's scientific expertise about what information is relevant and most helpful to the Board.[115] The Department's scientists distill highly technical information into summaries, reports, tables, and graphs for the Board, often referencing other technical reports and data sets. [*E.g.*, Exc. 248-96, 346-58, 360-64, 1081-84] For regulatory proposals, multiple Department scientists help draft and review the comments to ensure a consensus on their scientific validity and the position taken, if any, on the proposal. [Exc. 650-52, 667-69, 972-74, 806] This type of highly technical analysis is precisely why the constitutional framers assigned natural resources policies to the legislative and executive branches to implement.[116]

The judiciary is simply not in a position—nor should it be under our coordinate system of government—to make these highly technical judgment calls. In *Kanuk*, this Court affirmed the denial of a request to declare that State's obligation to protect the atmosphere against climate change be "dictated by the best available science" as a non-justiciable political question under multiple *Baker* factors.[117] Contrary to the Tribe's

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115 *Cook Inlet Fisherman's Fund v. State, Dep't of Fish & Game*, 357 P.3d 789, 801 (Alaska 2015) ("Recognizing the complexity of Alaska's fisheries, we repeatedly have refrained from substituting our judgment for that of the trained biologists and other scientists hired to manage Alaska's fisheries.").

116 Alaska Const. art. VIII, § 2; *see* Proceedings Day 42 at 1108, Proceedings Day 56 at 2456-57.

117 *Kanuk*, 335 P.3d at 1097-99. Declaring the existence of a constitutional duty to protect the atmosphere was *not* a political question, but the Court still did not decide whether there was a duty because the duty would have no remedy for violations; determining its parameters was a non-justiciable political question. *Id.* at 1100-03; *see Sagoonick*, 503 P.3d at 799-802 (discussing *Kanuk*, 335 P.3d at 1100-03).

contention, courts would have to "subjectively weigh scientific information" to determine its relevance and its value. [At. Br. 33] And courts lack "the scientific, economic, and technological resources" of an agency, "are confined by the record, and may not commission scientific studies or convene groups of experts for advice."[118] As in *Kanuk*, this supports a conclusion that the science- and policy-based inquiry required to discern whether the Department presented the best available or all relevant information was "better reserved for executive-branch agencies or the legislature."[119] To raise a scientist's failure to accurately anticipate what information a judge thinks is best or relevant to the level of a constitutional violation would be a radical departure from the separation of powers so fundamental to our system of government.[120]

The Court should not find that the Department has a constitutional duty to provide the best available or all relevant information to the Board based on prudential concerns of "practicality and wise judicial administration."[121] The Court should not declare a new constitutional duty that has no meaningful remedy because defining the contours of the duty and identifying violations are non-justiciable political questions.[122]

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118 *Kanuk*, 335 P.3d at 1099 (cleaned up).

119 *Id*.

120 *See Alaska Pub. Int. Rsch. Grp. v. State*, 167 P.3d 27, 35 (Alaska 2007) ("The separation of powers doctrine limits the authority of each branch to interfere in the powers that have been delegated to the other branches . . . to preclude the exercise of arbitrary power and to safeguard the independence of each branch of government.").

121 *Kanuk*, 335 P.3d at 1101 (stating that for declaratory judgments, "the normal principle that … courts should adjudicate claims within their jurisdiction yields to considerations of practicality and wise judicial administration").

122 *See id.* at 1096-97 (citing factors in *Baker*, 369 U.S. at 217).

C. The Department strives to provide the Board with relevant scientific information and did not withhold a report in 2018 and 2019.

The Tribe is wrong on the facts when it contends that the Department withheld information from the Board at meetings in 2018 and 2019. [At. Br. 30-31] Although the trial court did not find a constitutional duty to provide particular information, it found "no evidence in the present case that [the Department] acted arbitrarily when it chose what information to provide to the [Board]." [Exc. 213] The agencies' process is designed to ensure well-reasoned decision-making. There is no problem that requires implying a duty on the Department to provide the best available or all relevant information.

Department biologists strive to inform the Board about relevant research that is the best available and to offer recommendations well-grounded in science. [Exc. 804, 840, 847-48, 851-53, 1017] This is why multiple Department scientists draft and review comments on regulatory proposals to ensure consensus on scientific validity. [Exc. 650-52, 667-69, 972-74, 806] A biologist explained that dissenting views, if any, were heard and management did not require changes to persuade the Board to take actions contrary to the facts or science. [Exc. 718-21] The Court should presume that these dedicated public servants "discharge their duties correctly, lawfully, and in good faith."[123] The biologists also try to streamline the comments to avoid overwhelming the Board with too

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123 *See, e.g.*, *White Buffalo Const., Inc. v. United States*, 546 F. App'x 952, 956 (Fed. Cir. 2013) (noting that "there is a presumption that government officials act in good faith, but this presumption can be overcome by evidence of a specific intent to injure"); *Coburn v. McHugh*, 679 F.3d 924, 929 (D.C. Cir. 2012) (noting that the court is "guided by the strong but rebuttable presumption that administrators of the military, like other public officers, discharge their duties correctly, lawfully, and in good faith" (cleaned up)).

much technical, extraneous, or unclear information. [Exc. 667-69, 720]

The Tribe's proposed duty could worsen, rather than help, the Board's decision-making. Providing *all* relevant information, which may include lengthy and highly technical scientific reports and raw data, instead of a summary in easily understandable terms, tables, and maps, could prove daunting for the Board to evaluate, particularly given the sheer number of regulatory proposals it receives. [*See, e.g.*, R. 9977-99]

A further check on the quality of the Department's information is the participation of the public—"experts in the audience . . . it's like a peer-review check, essentially, having the people there." [Exc. 804] Members of the public may participate as advisers to Board committees, which provide additional review of proposals. [R. 9998-99] Also, they may submit written and oral comments addressing regulatory proposals at the full Board meetings.[124] [Exc. 128-33, 805-06] The Board logs and considers these comments as it deliberates on the proposals. [*E.g.,* Exc. 297-345; R. 10327-43, 10954-65]

The Tribe contends that the Department withheld information in 2018-19 about an outside contractor's report, the Martell report, but this is contrary to the record. [At. Br. 30-31, R. 2749-96] The Department solicited Dr. Steve Martell's report to improve the

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[124] The Tribe misrepresents written public comment as "strictly limited." [At. Br. 28] In fact, any group or individual may submit written comments as long as 100 single-sided pages with no restrictions on typeface size or line spacing. Alaska Bd. of Fisheries, Operating Procedures, Policy for Written Public Comment, No. 2012-268-FB, https://www.adfg.alaska.gov/static/regulations/regprocess/fisheriesboard/pdfs/findings/2012-268-fb.pdf. The Department's comments on proposals, in contrast, are typically four or five pages per proposal at most, including charts, tables, and maps. [*E.g.*, Exc. 284-96, 362-64,1083-84] And the Department's comments are made available to the public before the meeting so that the public may respond. [*See* Exc. 282-83, 360-61, 973]

age-structured assessment (ASA) model used for forecasting the mature biomass, the size of which determines whether the commercial fishery can open and how much it may harvest under 5 AAC 27.160(g). [Exc. 628, 839-41; R. 2749] The Department told the Board it was updating the ASA model in 5 AAC 27.160(g) comments in 2018 and 2019. [Exc. 285, 1083-84] At the regular meeting, the Department was neutral on all proposals, explained that the model needed updating "to better avoid states of low biomass," and summarized that the current harvest rate strategy had seen periods of herring stability, increase, and decrease. [Exc. 285, 289, 293, 296] At the 2019 work session, the Department explained that it was updating the model. [Exc. 1083-84] At work sessions in both years, the Department stated that no conservation concerns required immediate action—the stock was moderate in 2018 and increasing a year later. [Exc. 363, 1083] This was accurate. Over nearly 40 years, the current model had under-forecast the biomass size more frequently than it had over-forecast it, and a record number of herring returned to spawn in 2019. [Exc. 445, 1083; R. 2802, 5275-76, 6182]

In addition, the highly technical Martell report was not particularly relevant and helpful for the Board. [*See* R. 2749-96] Dr. Martell's 48-page report was mostly detailed formulas and programming code, and included an example that was "not intended to be used for any decision making purposes." [R. 2749-96, 2771] The report was not particularly relevant to the Board's considerations of changes to 5 AAC 27.160(g)—a more accurately forecasted biomass would inform the Department's implementation of the regulation, but not necessarily what the rule itself should be. [*See* R. 2749-52]

The Department routinely provides accurate scientific information to the Board. If

the Board nevertheless reaches a decision contrary to the facts and science, resource users may challenge its regulations as arbitrary and unreasonable, or inconsistent with statutes or the constitutional mandate for sustained yield.[125] The Court should "decline to make broad declarations of law that ignore the facts of the case in front of [it]," and should not impose a new constitutional duty on the Department.[126]

III. The trial court did not abuse its discretion by declining to designate a prevailing party for the purposes of awarding attorney's fees.

Civil Rule 82 provides for awards of attorney's fees to the prevailing party. The prevailing party is not necessarily the one who succeeded on the most issues,[127] but rather "the one who is successful on the *main* issue of the action and in whose favor the decision or verdict is rendered and the judgment entered."[128] When there is more than one main issue and different parties prevail on those issues, the trial court may choose to characterize no one as prevailing and require the parties to bear their own fees.[129] Here, the court determined that no party won the case as a whole because it entered final judgment for the Tribe on a regulation claim and for the Department and Conservation

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125 *Sagoonick v. State*, 503 P.3d 777, 788 (Alaska 2022); *Native Vill. of Elim v. State*, 990 P.2d 1, 5 (Alaska 1999); *Kenai Peninsula Fisherman's Co-op. Ass'n, Inc. v. State*, 628 P.2d 897, 906-07 (Alaska 1981).

126 *Ahtna Tene Nene v. State, Dep't of Fish & Game*, 288 P.3d 452, 460 (Alaska 2012).

127 *State, Dep't of Corr. v. Anthoney*, 229 P.3d 164, 167-68 (Alaska 2010).

128 *Schultz v. Wells Fargo Bank, N.A.*, 301 P.3d 1237, 1242 (Alaska 2013) (quoting *Taylor v. Moutrie-Pelham*, 246 P.3d 927, 929 (Alaska 2011) (emphasis added)).

129 *All. of Concerned Taxpayers, Inc. v. Kenai Peninsula Borough*, 273 P.3d 1123, 1126 (Alaska 2012).

Alliance on a constitutional claim. [Exc. 215-16, 234-37] The Tribe disagrees with the ruling but it was well within the court's "broad discretion" to designate a victor for the purposes of awarding fees and not "manifestly unreasonable."[130]

The court decided that none of the parties' victories "was on peripheral and unimportant issues," thus, accurately applying caselaw that identifies the main issues as ones that go to the "heart of the parties' dispute."[131] [Exc. 237] The court decided that the Tribe prevailed on a main issue, one of the regulation claims, and the other parties won on another main issue—the sole constitutional claim the Tribe pursued. [Exc. 235-36]

While it is true that a constitutional claim may fall on the periphery as it did in *State, Dep't of Corrections v. Anthoney*, where the State's success on such a claim did not make it a prevailing party, that is not the case here.[132] [*See* At. Br. 45-46] In *Anthoney*, the heart of the dispute was a prisoner's claim that he was charged with the wrong offense and he was the prevailing party against the State on this main issue, albeit failing to prove many peripheral issues, including that the same events violated procedural due process.[133] Here, in contrast, the Tribe did not sue over one alleged wrong that could be identified as the sole main issue, but instead pled more than 15 claims in three counts, relying on different facts and legal grounds.[134] [Exc. 20-25] Of the two claims that the

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130 *Progressive Corp. v. Peter ex rel. Peter*, 195 P.3d 1083, 1092 (Alaska 2008).

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

132 229 P.3d at 167-68.

133 *Id*.

134 *All. of Concerned Taxpayers, Inc.*, 273 P.3d at 1127-28 (deciding three issues were all reasonably characterized as main issues because they "were decided on distinct

Tribe pursued after discovery, the State wholly prevailed on one, and the Tribe achieved a narrow and incomplete victory on the other. [Exc. 169, 172, 194, 201, 213-14, 235-36]

It is well settled that a trial court may view distinct claims asserted in the complaint and litigated by the parties as "main issues."[135] For example, in *Alliance of Concerned Taxpayers, Inc. v. Kenai Peninsula Borough*, the parties "both prevailed on distinct issues central to the case," and the trial court's decision not to designate a prevailing party was not manifestly unreasonable.[136] Addressing recently enacted ballot initiatives, the trial court in that case upheld the validity of term limits for assembly members as the plaintiff wanted, and struck down term limits for school board members and as applied to officials elected simultaneously with the initiatives' passage as the defendant requested.[137] In affirming the reasonableness of not designating a prevailing party, this Court observed that the complaint indicated that the legality of the term limits for school board members, the issue the plaintiff lost on, "was as significant an issue" as the term limits for assembly members, the issue the plaintiff partially prevailed on.[138]

The same is true here. The Tribe's complaint made the regulatory compliance count it partially won "as significant an issue" as the constitutional count it entirely lost

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legal grounds").

135 *E.g.*, *Taylor*, 246 P.3d at 929; *All. of Concerned Taxpayers, Inc.*, 273 P.3d at 1126-27; *Fernandes v. Portwine*, 56 P.3d 1, 7-8 (Alaska 2002).

136 273 P.3d at 1124, 1126.

137 *Id.* at 1126-28. *See Fernandes*, 56 P.3d at 7-8 (holding that not designating a prevailing party was within the trial court's discretion where landowners who sued each other for public nuisance and defamation "prevailed on some issues and lost on others").

138 *All. of Concerned Taxpayers, Inc.*, 273 P.3d at 1127.

and the other count it abandoned.[139] [Exc. 20-25] And the trial court could properly view the two issues it ruled on as distinct *main* issues, rather than subparts or steps addressing the same main issue.[140] The two issues were distinct—relating to resource allocation (subsistence priority) or conservation (sustained yield). [Exc. 20-23] They relied on different facts and law—made particularly evident by the ease with which they could be efficiently decided in separate rounds of summary judgment briefing. [Exc. 156, 167, 200-03] And decisions in the Tribe's favor on each issue would result in different changes to the Department's management, documentation, or advice to the Board. [Exc. 156, 167, 194, 200-03, 213-14] Thus, the court did not abuse its discretion in deciding that "all prevailed on main issues," and not designating a prevailing party. [Exc. 237]

The Tribe contends that its constitutional claim was "peripheral" to the heart of the litigation, but its arguments do not meet its "heavy burden of persuasion" to establish that the ruling to the contrary was manifestly unreasonable.[141] The Tribe argues it pursued the constitutional claim in the public interest even though its own interest in the matter was weak because it would not receive any immediate relief if it prevailed.[142] [At. Br. 46-47]

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139 *Id*. The Tribe's constitutional claims in its complaint included far more issues than the narrow one it argued (and lost) on summary judgment. [Exc. 22-23, 203]

140 *See Shepherd v. State, Dep't of Fish & Game*, 897 P.2d 33, 44-45 (Alaska 1995) (reversing the trial court's failure to designate the State as the prevailing party because the issue the State lost was "only peripheral to the central issue litigated by the parties"—the State successfully defended the constitutionality of permanent regulations favoring resident hunters, but early on in the case unsuccessfully argued that proper notice was provided for similar emergency regulations that were struck down).

141 *Schultz v. Wells Fargo Bank, N.A.*, 301 P.3d 1237, 1241 (Alaska 2013).

142 The Tribe analogizes to the fee statute for constitutional claims, but requiring it to cover its own fees due to its failure to wholly prevail on the main issues is not

But the trial court—best-positioned to understand the claims and defenses it had addressed[143]—recognized the constitutional issue was "of substantial importance" not only for other users of natural resources but also *for the Tribe*. [Exc. 236] That was with good reason. The loss on the constitutional claim is important enough to the Tribe that it appealed it. [At. Br. 1] And the similar potential impact for both claims belies the Tribe's argument that one was unimportant compared with the other. The constitutional and regulatory compliance claims had in common that success may or may not result in immediate substantive changes to the fisheries management but would lay the groundwork for the Tribe's future challenges to decisions. The trial court's rejection of the Tribe's devaluing of its constitutional claim was not an abuse of discretion.

The Tribe also faults the trial court for disregarding the "objective question of whether [it] obtained the relief it sought" and for minimizing the Tribe's regulatory

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inconsistent with this statute. [At. Br. 47 n.148] By its plain terms, AS 09.60.010(c)(2), which shields public interest litigants from paying the State's attorney's fees when they lose non-frivolous constitutional claims, is limited. It applies solely to bar awarding to the State fees "devoted to claims concerning constitutional rights," not fees devoted to other claims—and does not provide for an award to public interest litigants of their own fees when they lose a constitutional claim. The Legislature could have concluded that AS 09.60.010(c)(1)'s provision of full reasonable fees for winning constitutional claims, rather than the usual partial fees available under Rule 82, provided incentive enough to bring these claims, without also needing an exclusion of a public interest litigant's losing constitutional claims from the tally of "main issues."

143 *Progressive Corp.*, 195 P.3d at 1091 (stating that the trial court was "in the best position" to determine the implications of the plaintiffs' non-judgment financial recovery for the purposes of designating the prevailing party for a fee award); *see State, Com. Fisheries Entry Comm'n v. Carlson*, 270 P.3d 755, 766 (Alaska 2012) (stating that the trial court "is usually in the best position to determine the nature of the proceeding before it" in order to decide which Rule 82 formula applies to set fees).

compliance victory, but that is not what the trial court did. [At. Br. 42, 47-48] Unlike the case the Tribe relies on, the court did not erroneously assess whether the parties' efforts resulted in the outcome,[144] but instead focused on the meaningfulness of the relief to determine whether the win or loss was a "main issue" in the case, i.e. whether it constituted "substantial affirmative relief."[145] Although the court acknowledged its uncertainty about how much its rulings would substantively alter the fisheries management, the court fully accounted for the Tribe's success, concluding that the regulatory rulings were "important" and went to "the very heart of this litigation." [Exc. 235] Ultimately, though, the court decided that the other parties had success on another main issue, making the case a "wash."[146] [Exc. 237] Appropriately assessing the litigation in its entirety,[147] the court determined that no party "bested the others to the degree that it can be accurately designated as the prevailing party in the case as a whole." [Exc. 237]

Finally, the Tribe makes too much of the parties' purported concessions that the sole "main issue" was its regulatory compliance claim on which it prevailed.[148] [At. Br.

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144 *Alaska Ctr. for the Env't v. State*, 940 P.2d 916, 921-22 (Alaska 1997) (holding that an intervenor prevailed because it obtained the relief it sought and the trial court should not have considered whether its arguments were key to the result).

145 *Schultz*, 301 P.3d at 1243.

146 *Id.* at 1242 ("We have found no abuse of discretion in the superior court declaring a case a 'wash' and ordering each party to bear its own costs and fees.") (cleaned up).

147 *Chambers v. Scofield*, 247 P.3d 982, 989 (Alaska 2011).

148 The Tribe is also wrong that the Department and Conservation Alliance "devoted the vast majority of their time in this case to [the] section 195 claim," supporting this by noting the time they spent on the constitutional claim. [At. Br. 45 & n.142] There were more issues than these two: The State spent most of its hours on *all* the non-constitutional claims, including the 5 AAC 27.195 claim *and* multiple claims that the Tribe abandoned

41-42, 46] The Tribe takes the Department's argument in the cross-motions for attorney's fees out of context. In its motion for fees below, the Department argued it was the prevailing party by characterizing the main issue as "whether [the Department] was required to make *substantive changes* to its herring fisheries management plan," and contending that the Tribe's narrow victory, which required the Department to better document its consideration of subsistence opportunities, was not a win on this "main issue." [Exc. 230-31] But the trial court rejected the Department's arguments and the court's ultimate determination that "all prevailed on main issues" was not an abuse of its discretion for all the reasons explained above. [Exc. 237]

At bottom, the trial court's decision to view this case as a "wash" and decline to award Rule 82 fees was far from "manifestly unreasonable."[149] The narrowness of the Tribe's regulatory compliance victory and its failure to prove any substantive violation of the subsistence priority law and sustained yield mandate gave the court a sufficient basis to order the Tribe to pay the other side's attorneys' fees, but it did not do so. The order—a less adverse result for the Tribe by declining to award fees to any party—was not manifestly unreasonable. [*See* Exc. 234-37] The Court should affirm the fee order.

CONCLUSION

The Court should decline to consider the denial of the preliminary injunction as moot and should affirm the orders on the constitutional claim and attorney's fees.

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or dismissed after discovery. [Exc. 20-25, 169-72; R. 3140-73; *see* R. 2928-30]

149 *Schultz*, 301 P.3d at 1241-42.