IN THE SUPREME COURT OF THE STATE OF ALASKA

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

Trial Court No. 1SI-18-00212 CI

APPEAL FROM THE SUPERIOR COURT,
FIRST JUDICIAL DISTRICT AT SITKA,
THE HONORABLE DANIEL SCHALLY, PRESIDING

BRIEF OF APPELLEE SOUTHEAST HERRING CONSERVATION ALLIANCE

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Clerk of the Appellate Courts

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CONSTITUTIONAL PROVISIONS

Alaska Constitution, Article VIII, Section 3

Common Use. Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.

Alaska Constitution, Article VIII, Section 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.

STATUTES

AS 16.05.050(a) The commissioner has, but not by way of limitation, the following powers and duties:

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(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

5 AAC 27.160. Quotas and Guideline Harvest Levels for Southeastern Alaska

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(g) The guideline harvest level for the herring sac roe fishery in Sections 13-A and 13-B shall be established by the department and will be a harvest rate percentage that is not less than 12 percent, not more than 20 percent, and within that range shall be determined by the following formula: Harvest Rate Percentage = 2 + 8 [Spawning Biomass (in tons)] /20,000) The fishery will not be conducted if the spawning biomass is less than 25,000 tons.

5 AAC 27.195

(a) In managing the commercial sac roe 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; …

ISSUES PRESENTED FOR REVIEW

1. Did the superior court correctly conclude that the Sustained Yield Clause, Article VIII, Section 4, of the Alaska Constitution does not contain an implied requirement that the Alaska Department of Fish and Game provide the best available information when advising or making recommendations to the Alaska Board of Fisheries, and that even if such a constitutional requirement were implied, it is nonjusticiable?

2. Was it an abuse of discretion for the superior court to deny the Sitka Tribe of Alaska's motion for a preliminary injunction?

3. Was it manifestly unreasonable for the superior court to decline to designate any party as the prevailing party, and on that basis deny all of the parties' motions for attorney's fees?

STATEMENT OF THE CASE

I. BACKGROUND

Each spring, a large biomass of herring of multiple age-classes returns to Sitka Sound to spawn.[1] Spawning occurs throughout Sitka Sound and adjacent areas, and varies by location from year to year.[2] When and where the herring spawn in any particular year is "almost impossible to predict." [Exc. 432; *see also* Exc. 785]

This herring biomass is harvested in two different fisheries. One is the commercial sac roe fishery that takes herring prior to the spawn when egg maturity is at its highest.[3] The commercial fishery is managed pursuant to a regulation that prescribes a minimum

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1 *See*, *e.g.*, R. 6184-85.

2 *See*, Exc. 430-31 (Affidavit of Kyle Hebert at 5-6 (¶¶ 15-16) and R. 4019-73 (Time Series of Spawning Maps, 1964-2018)).

3 *See*, *e.g.*, R. 10086-88.

biomass threshold necessary before commercial fishing may be allowed, and that establishes a formula for determining the annual guideline harvest level (GHL) based on a harvest rate for the harvestable surplus above the threshold.[4] The other is a subsistence fishery that primarily harvests herring roe on hemlock branches. [Exc. 77][5] The Alaska Board of Fisheries (the Board) has determined that 136,000 – 227,000 pounds of herring spawn is the amount reasonably necessary for subsistence,[6] but otherwise the subsistence fishery is unrestricted. There are no permit requirements, no reporting requirements, and no bag limits. Subsistence users can set branches and harvest herring roe wherever they want, whenever they want, and can take as much as they want.

Since the early 2000s, the Sitka Tribe of Alaska (the Tribe) has tried to convince the Board and the Alaska Department of Fish and Game (ADF&G) to restrict or even close the commercial sac roe fishery. The Tribe's central argument has been that regulation and in-season management of the commercial fishery have caused a decline in the subsistence harvest of herring spawn, below the level of ANS, thus denying tribal members a reasonable opportunity for subsistence.[7] The Board has taken some actions in response to the Tribe's concerns. In 2002, the Board adopted a management plan that directs ADF&G

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[4] 5 AAC 27.160(g). This regulation is often referred to as the harvest control rule.

[5] *See also* R. 5927.

[6] 5 AAC 01.716(b). The amount reasonably necessary for subsistence is commonly referred to by the acronym ANS.

[7] AS 16.05.258(f) defines "reasonable opportunity" as one that "allows a subsistence user to participate in a subsistence hunt or fishery that provides a normally diligent participant with a reasonable expectation of success of taking fish or game."

to consider subsistence needs in managing the commercial fishery.[8] In 2009, the Board raised the biomass threshold by 5,000 tons (10,000,000 pounds) as a buffer for subsistence.[9] In 2012, the Board closed a portion of Sitka Sound to commercial fishing, commonly known as the "core area" traditionally favored by subsistence users, and expanded that area in 2018.[10]

Other proposals regularly submitted by the Tribe – proposals that would substantially restructure management of the sac roe fishery – have not been adopted by the Board. For instance, at every regulatory meeting since 2006, the Tribe requested that the Board lower the harvest rate specified in 5 AAC 27.160(g).[11] The Board rejected all of these proposals. The Tribe, through one of its employees, asked the Board to limit the amount of the GHL that could be harvested prior to the first spawn. [Exc. 125-26 (2015 Proposal 118)] ADF&G advised that this proposal likely would result in not harvesting the GHL in some years, thereby reducing the value of the fishery, because it would be "difficult to find quality herring that are of acceptable roe content as the spawned out fish mix with the herring." *Id*. The Board unanimously rejected this proposal.[12] The Tribe

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8 5 AAC 27.195.

9 *See*, *e.g*., R. 7 (n. 14) and R. 10088. *See also* R. 1787-88 and R. 2054.

10 5 AAC 27.150(7).

11 *See* R. 6904 (2006 Proposal 89); R. 7065 (2009 Proposal 203); R. 8304-06 (2012 Proposals 230-32); R. 9391 (2015 Proposal 125); and R. 10018 (2018 Proposal 99).

12 *See* R. 11408. Board Member Jensen echoed ADF&G's concerns in his comments on Proposal 118. Jensen said that limiting the percentage of the harvest prior to the spawn would "pretty much destroy the fishery" [R. 11402], and that the "whole idea" of

also sought to alter how ADF&G conducts test fisheries before commercial openings.[13] Again, the Board declined to accept this idea. The Tribe has even gone so far as to request that the commercial herring fishery be closed for a period of years until spawning biomass reached a certain level or other specific criteria were met.[14]

Unable to persuade the Board of the merits of these proposals, the Tribe tried a new tack in November 2018. It submitted a Subsistence Management Plan for Sitka Sound Herring to ADF&G. [Exc. 146] This plan would have effectively modified 5 AAC 27.195. The Tribe evidently intended that ADF&G implement this plan without any public comment or formal rule-making process under the Administrative Procedures Act. Item 1 in the proposed plan provided that ADF&G "will not open the commercial fishery until 1) the minimum threshold is confirmed by on-the-ground surveys AND 2**)** spawn is observed in Sitka Sound and is verified through aerial and deposition surveys." *Id*. Item 2 limited test fisheries to jigging. An attorney for the Tribe sent an e-mail to ADF&G on November 15, 2018, asking if the agency agreed to this subsistence management plan, "[i]n particular, the Tribe's proposal to delay the commercial fishery until after the first spawn." [Exc. 148] The Director of Commercial Fisheries, Forrest Bowers, responded in an e-mail dated November 16, 2018. [Exc. 147-48] This e-mail speaks for itself, but the gist is that

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the sac roe fishery is to harvest herring before they spawn. [R. 11404] *See also* Exc. 422 (Affidavit of Forrest Bowers at 3 (¶ 8)).

13 *See* R. 7067 (2009 Proposal 204).

14 *See* R. 9384 (2015 Proposal 114) and R. 10945-46 (2018 ACR 10).

delaying the start of the commercial fishery until after spawning began would represent a "fundamental shift" in the way sac roe fisheries are managed. The Tribe characterizes Bowers's e-mail as precluding a fundamental change in ADF&G's management of the sac roe fishery, and admits that it was the "genesis" of this litigation. [Exc. 153]

II. COURSE OF PROCEEDINGS

A. The Tribe's Complaint

On December 11, 2018, the Tribe filed a complaint for declaratory and injunctive relief against the State of Alaska, and its agencies the Board and ADF&G, in relation to management of Sitka Sound herring fisheries. [Exc. 1- 26] The complaint alleged three broad claims for relief: Count I - violation of the subsistence priority statute, AS 16.05.258; Count II – violation of the Common Use and Sustained Yield Clauses, Article VIII, Sections 3 and 4, of the Alaska Constitution; and Count III – violation of the Administrative Procedures Act (APA) and the hard look doctrine. [Exc. 20-25] Each count alleged multiple violations, for a total of 15 sub-claims. [Exc. 1102-03] The Tribe's complaint also listed the relief sought. [Exc. 25]

The Southeast Herring Conservation Alliance (the Alliance) moved to intervene in the lawsuit as a matter of right, to defend the interests of fishermen, processors and others who participate in and depend on the commercial herring sac roe fishery in Sitka Sound. [R. 403-08] The superior court granted this motion on January 23, 2019. [R. 389-90]

On March 18, 2019, the State and the Alliance each filed answers to the Tribe's complaint. [R. 924-37 and 938-50, respectively] They admitted some facts alleged in the complaint, but for the most part denied the Tribe's factual and legal claims.

B. Motion for Preliminary Injunction

On December 19, 2018, the Tribe and the State stipulated to a schedule for briefing the Tribe's motion for preliminary injunction. [Exc. 27-29] The Tribe's motion was due January 14, 2019, and was directed only at ADF&G's management of the Sitka Sound herring fisheries expected to begin mid-March. *Id*.

The relief requested by the Tribe in its motion echoed the demand in its proposed Subsistence Management Plan – that ADF&G delay opening the commercial fishery until after herring had begun spawning. This was reflected in the proposed order the Tribe filed [Exc. 49-50] and in the supporting memorandum. [Exc. 373 (The consideration of quality and quantity of spawn on branches "can only be accomplished in-season and after a spawn has occurred"), and Exc. 375 ("STA's request to delay the commercial fishery until the first spawn is verified fits squarely within the authority the BOF had provided ADF&G…")] The Tribe clearly understood that the commercial harvest would be reduced if "the opportunity to fish before the first spawn is eliminated or reduced." [Exc. 372]

In its opposition to the motion, the Alliance began by discussing the background of the sac roe herring purse seine fishery and its harvesting and processing sectors. [Exc. 383-89]. The Alliance presented information on the number of limited entry permits in the fishery (47); the average earnings per permit (approximately $ 100,000); the average permit price in 2017 ($ 248,000); and the range of total gross earnings from the fishery, also known as the ex-vessel value. [Exc. 385-86 and 399-400] The Alliance estimated that another 150-200 people were directly employed as crew in the fishery, including members of the Tribe. [Exc. 386, 401-02, and 404-06] The Alliance also submitted affidavit testimony

confirming the importance of the timing of the fishery in the early part of the season. [Exc. 403 and 408-09]

Regarding the processing sector, the Alliance provided information on the number of processing companies involved in the fishery, focusing on the experience of one processor in particular. [Exc. 387-89 and 407-12] A key point made was the importance of achieving an average mature roe content of 10 % or greater, and how diluting the harvest with fish that have already spawned can decrease the value of the product and make the pack unmarketable. [Exc. 388 and 411]

In presenting this information on the harvesting and processing sectors, the Alliance intended to demonstrate the economic importance of the commercial sac roe fishery to its participants, and to the economy of Sitka and Southeast Alaska. This evidence illustrated the harm that would incurred by those dependent on the fishery for their livelihood if the fishery were closed or severely restricted as the result of an injunction. [Exc. 395-97]

The Alliance's opposition also discussed aspects of the subsistence fishery. [Exc. 389-92] In particular, the Alliance drew attention to the fact that there had been a pronounced decline in the number of households harvesting herring roe for subsistence in recent years. [Exc. 390 and 271-73][15] The Alliance cited this trend of declining participation in its argument that denial of an injunction would not cause subsistence users

[15] Exc. 271-73 are pages 18-20 of a report by the ADF&G Division of Subsistence, Sill and Cunningham, *The Subsistence Harvest of Pacific Herring Spawn in Sitka Sound, Alaska, 2016*, Technical Paper 435 (December 2017). Exc. 248-281. The Alliance submitted excerpts of this report as Exh. 9 to its opposition to the motion for preliminary injunction. R. 338-46.

irreparable harm. [Exc. 397-98] The Alliance contended (and still does) that the fact that subsistence harvests have been below the ANS in recent years is a largely function of this decreased participation, and is not due to management of the commercial fishery.[16] *Id.*

In addition to addressing the balance of harms, the Alliance also demonstrated that the Tribe was unlikely to prevail on the merits of its claims against ADF&G. [R. 303-11]

The superior court heard oral argument on the Tribe's motion for a preliminary injunction on February 19, 2020. On February 20, the court issued an order denying the motion. [Exc. 65-66] The court's denial of the motion rested on several findings. First, the Tribe had not demonstrated that it faced irreparable harm if relief was not granted against the 2019 commercial fishery. The court said that the Alliance's opposition brief "most succinctly describes" why the Tribe had not met its threshold burden of demonstrating irreparable harm. The Tribe interprets this statement as a reference to a single sentence in the Alliance's opposition, that "[t]he trends in the subsistence fishery described by the Tribe have been underway for many years; there is no new crisis that requires an emergency response." [Exc. 397] The Tribe contends that the court thus adopted a "new crisis" standard, which constituted error as a matter of law. Brief of Appellant Sitka Tribe of Alaska (STA Brf.) at 35-41. As discussed above, however, the Alliance linked the trend of declining harvests in the subsistence fishery to the decrease in

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[16] In deposition testimony, ADF&G personnel confirmed the trend in declining participation in the subsistence fishery and its relation to decreased harvest. Area Management Biologist Eric Coonradt testified that the "one trend that stands out is – is effort compared to harvest" [Exc. 509], and that the "data fit very closely" in comparing the number of harvesters versus harvest. [Exc. 548] Subsistence Resource Specialist Lauren Sill likewise noted a "trend of declining harvesters." [Exc. 938]

participation. The Alliance clearly stated that shortfalls in harvesting the ANS were not the fault of the commercial fishery. [Exc. 398] The court's holding regarding the Tribe's failure to demonstrate irreparable harm was not a "misapplication of well-established law" as the Tribe argues (STA Brf. at 35), but was a determination based on facts presented by the Alliance (and the State).

Second, the court also held that the Tribe had not demonstrated that "the responding (opposing) parties (particularly the Alliance, but also ADF&G) can be adequately protected in the event that the requested preliminary injunction is granted." [Exc. 66] The Alliance presented compelling evidence of the harm participants in the commercial fishery would suffer if an injunction were granted. The Tribe does not challenge this aspect of the court's decision.

Finally, the court held that the Tribe had failed to make a clear showing of probable success on the merits, "as described by the responding parties (particularly ADF&G)." [Exc. 66] The Tribe likewise has not assigned error to that conclusion.

Based on the foregoing discussion, it is clear that the superior court denied the Tribe's motion for preliminary injunction on multiple grounds, not just its assessment of irreparable harm.[17] The court did not adopt a "new crisis" legal standard for assessing irreparable harm to subsistence users, notwithstanding the Tribe's characterization to the contrary.

[17] This court denied the Tribe's petition for review of the denial of their motion for preliminary injunction, in an order dated March 27, 2019, Sup. Ct. No. S-17384. Exc. 67.

C. Motions for Summary Judgment Regarding 5 AAC 27.195

In a status conference on September 13, 2019, the superior court established a briefing schedule for all of the Tribe's claims, with a November 4 deadline for filing dispositive motions. [Exc. 608] The Tribe subsequently asked the State and the Alliance to bifurcate briefing and focus on Count I. The parties agreed to this. [Exc. 607-08] The parties filed cross-motions for summary judgment and completed briefing pursuant to the agreed schedule.[18] The superior court heard oral argument on January 28, 2020.

The legal question raised in the parties' motions concerned ADF&G's interpretation and implementation of 5 AAC 27.195. The superior court issued its initial decision on the motions on March 31, 2020. [Exc. 156-67] The court began by describing the issue as "narrow." [Exc. 156] The court then analyzed the Tribe's argument that ADF&G had failed to properly implement 5 AAC 27.195(b). The Alliance raised a threshold question whether this regulation was enforceable because the language codified was not the same as the provision actually adopted by the Board.[19] Based on the evidence of this discrepancy, the court concluded there was "a genuine issue of material fact as to whether subsection (b) reflects what the BOF originally adopted and is thus enforceable. Summary judgment is accordingly not appropriate as to subsection (b)." [Exc. 158]

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[18] The Alliance's motion for partial summary judgment and supporting memorandum can be found at R. 1334-64. The State's motion for summary judgment and supporting memorandum are at R. 1288-1332.

[19] *See* R. 1343-44 and 1356.

The superior court then turned to the Tribe's claim that ADF&G had failed to properly interpret and implement 5 AAC 27.195(a), in particular subsection (a)(2). [Exc. 158] The court observed that ADF&G "believes it is lawfully implementing subsection (a), but whether ADF&G's implementation can be objectively reviewed is another matter." [Exc. 163] While the record (*e.g.*, ADF&G's news releases), "provide some data to support its in-season determinations of whether to open the commercial fishery," the "record as a whole, fails to clearly reflect – either explicitly or implicitly – the determinations, and reasoning underlying ADF&G's determinations, that ADFG is required to make before opening the commercial fishery under 5 AAC 27.195(a)." [Exc. 166-67] The court concluded that because of this failure to adequately explain its decision-making, "ADF&G's application of its mandates under 5 ACC 27.195(a) is arbitrary, unreasonable, and an abuse of discretion." [Exc. 167] The court did not find that ADF&G had failed to comply with the substantive requirement of 5 AAC 27.195(a)(2) to distribute the commercial harvest, only that ADF&G had "failed to adequately explain its determinations in the record." *Id*.

On May 1, 2020, the State filed a notice of supplement to the administrative record [R. 2554], along with an index [R. 2555-59] and additional documents it had located pertaining to the question whether the language of 5 AAC 27.195(b) was actually adopted by the Board. [R. 2560-96]. Based on this new evidence, the Alliance moved the superior court to renew its review of the parties' cross-motions for summary judgment. [Exc. 1066-68] The parties agreed to a briefing schedule related to 5 AAC 27.195(b) [R. 2542-43],

and briefing was completed according to this schedule. The court did not hold oral argument on the renewed motions.

On November 30, 2020, the superior entered an order granting the Tribe's renewed motion for partial summary judgment regarding 5 AAC 27.195(b). [Exc. 183-201] The court first addressed the question of what language the Board actually adopted when that regulation was approved in 2002. The court agreed with the Alliance, concluding that the evidence "confirms that the language of (3) is what was originally adopted by the BOF." [Exc. 187] But the court also found that the meaning of the provision adopted by the Board was not "materially changed" by the revisions made prior to codification, and that subsection 195(b) was "therefore enforceable." *Id*.

In evaluating the merits of the Tribe's claim, the court said there were two questions: whether ADF&G was required to consider the quality of herring roe in managing the fishery, and how ADF&G did so. [Exc. 190] On the "how" question, the court upheld ADF&G's interpretation "that the regulation *does not* require ADF&G to conduct an in-season assessment of the quantity and quality before making a determination to open and distribute the commercial fishery in a certain way." [Exc. 194 (emphasis in original)] The court thus rejected the central component of the Tribe's thesis that subsection 195(b) requires ADF&G to assess the quality of herring spawn on branches in-season, prior to opening the commercial fishery. The court said it was "undisputed" that ADF&G considered "the distribution and roe quality of the herring *before* spawning occurs..," but that this did not equate to "consideration of quality of 'herring *spawn* on branches, kelp, and seaweed, and herring sac roe.'" [Exc. 197-98 (emphasis in original)] As with its

decision regarding 195(a)(2), the court did not find that ADF&G had failed to comply with the substance of the regulation, only that the agency had failed to adequately explain its decision-making: "*If* ADF&G does consider quality when making their decisions, its consideration is not clearly or adequately reflected in the record," and therefore, "its implementation of 5 AAC 27.195(b) is unreasonable and an abuse of discretion." [Exc. 200 (emphasis added)] The court held that ADF&G must demonstrate "in some meaningful way" how it considers the quality of herring spawn in managing the fishery. *Id.*

D. The Tribe Dismisses All Claims Against the Board of Fisheries

On July 7, 2020, the parties filed a stipulated motion to establish a briefing schedule for a second round of summary judgment motions "related to STA's claims directed at the BOF in Count I and all of its claims set forth in Counts II and III." [Exc. 1069] The superior court approved this schedule in an order dated July 12, 2020. [R. 2400] Less than a week later, the Tribe advised the State and the Alliance that it wanted to dismiss its claims against the Board, a request to which the defending parties agreed in a stipulation of dismissal dated July 28, 2020. [Exc. 169-71] Based on this stipulation, the superior court entered an order dismissing the claims against the Board. [Exc. 172]

Neither the parties' stipulation nor the court's order addressed the status of the Tribe's claims against ADF&G that did not relate to 5 AAC 27.195.[20] The Tribe never pursued these other claims against ADF&G – *e.g.*, its Count III claim that the GHL and harvest rate by which ADF&G manages Sitka Sound herring "is not supported by science

[20] *See* Background Section II.A, *supra*, at 5, and Exc. 1102-03.

and is arbitrary and illegal." [Exc. 23 (¶ 85)] – and those claims should be considered abandoned.

The Tribe asserts that it stipulated to dismissal of its "alternative claims" against the Board "after the superior court's rulings regarding section 195" and those claims "became unnecessary." STA Brf. at 17. This is an attempt to re-write the history of this case. The court did not rule on the Tribe's claim related to 5 AAC 27.195(b) until November 30, 2020 [Exc. 183], four months after the order of dismissal was entered. [Exc. 172] The Tribe did not request dismissal of its claims against the Board until approximately a year and half into this case, and just over two weeks before opening briefs were due. The State and the Alliance had expended a significant amount of time prior to that preparing to defend against the Tribe's claims directed at the Board, including compiling and analyzing a large administrative record of Board meetings and actions taken; appearing for depositions of State scientists and fishery managers; and outlining and beginning briefing on those claims. The Alliance consistently argued that the Tribe's claims against the Board were unlikely to succeed.[21] The Tribe's dismissal of its claims against the Board was a bow to the inevitable, in the face of a vigorous defense by the State and the Alliance and an administrative record that overwhelmingly supported the defending parties' position that the Tribe's claims against the Board were without merit.

[21] *See, e.g.*, Southeast Herring Conservation Alliance Memorandum Supporting State of Alaska Motion to Quash Depositions, dated August 28, 2019 [R. 884-91], and oral argument by counsel for the Alliance on January 28, 2020, regarding the parties' cross-motions for summary judgment.

E. Motions for Summary Judgment Regarding Sustained Yield

The parties' stipulated dismissal of the claims against the Board, dated July 28, 2020, also included an agreed briefing schedule for the Tribe's "sole remaining claim" related to Count II of its complaint, alleging that ADF&G had violated its duties under the Alaska Constitution. [Exc. 170] The court approved the stipulation [R. 2394] and briefing was completed pursuant to the agreed schedule.[22]

The Tribe claimed that ADF&G had violated its duties under the Common Use and Sustained Yield Clauses, Article VIII, Sections 3 and 4, of the Alaska Constitution. [Exc. 1071] They requested a declaratory judgment that the "Alaska Constitution requires ADF&G to use the best available information when providing reports, recommendations, and advice to the Board." [Exc. 1072] The Tribe thus sought to graft onto Article VIII jurisprudence an independent constitutional cause of action by which a party could challenge action by ADF&G or the Board – or any Alaska natural resources agency, for that matter – on the ground that the agency had failed to use the best available information (BAI) in its decision-making.

The Alliance opposed the Tribe's motion on multiple grounds: (1) that the claim was moot; (2) that neither the Common Use or Sustained Yield Clauses explicitly or

[22] The Tribe's motion and memorandum of support of its constitutional claim were filed on September 1, 2020. R. 2343-81. The State and the Alliance filed their oppositions to the Tribe's motion and cross-motions for summary judgment on October 1. R. 2801-42 and R. 2313-42, respectively. The Tribe filed its reply/opposition on October 23. R. 2717-46. The State and the Alliance filed replies in support of their cross-motions on November 6. R. 2677-95 and R. 2696-2716, respectively.

impliedly mandate that ADF&G use BAI; (3) that even if such a requirement were recognized, it was nonjusticiable due to the lack of discoverable or judicially manageable standards for resolving such a claim, and because the question of what data and information ADF&G collects, classifies and disseminates is expressly committed to the discretion of ADF&G under AS 16.05.050(a)(4); and (4) that the Tribe failed to prove the factual predicate for its constitutional argument, leaving its claim under Count II as nothing more than a request for an advisory opinion. [Exc. 1077-80]

The superior court issued its decision on the cross-motions for summary judgment on March 22, 2021. [Exc. 202-214] The court denied the Tribe's motion for summary judgment and granted the cross-motions of the State and the Alliance. [Exc. 213-14]

The court began its opinion by agreeing that the Tribe's claim was moot, but decided to apply the public interest exception to the mootness doctrine. [Exc. 203-05] The court then turned to the Tribe's constitutional arguments. The court first held that the Alaska Constitution "does not explicitly require the use of BAI, as no such language – or even similar language – is found in its text." [Exc. 206] The question was whether such a duty should be implied. *Id*. The court did not find any support for implying such a duty in the Common Use Clause, which is primarily concerned with assuring equal access to the state's resources. [Exc. 206-07] The court then reviewed the history of and case law pertaining to the Sustained Yield Clause, concluding that a requirement to use BAI was not intended by the framers. [Exc. 207-11] Lastly, the court addressed the issue of nonjusticiability, also known as the political question doctrine. [Exc. 211-13] The court held that two of the six elements for finding a nonjusticiable political question were

present: (1) delegation to a political department, and (2) a lack of judicially discoverable and manageable standards. *Id*.

The superior court also addressed the Tribe's effort to "maneuver around" the nonjusticiability problem by arguing that the question was really just relevant information, not BAI. [Exc. 212-13] The court reasoned that this was the standard associated with the hard look doctrine under the Administrative Procedures Act, which already requires an agency to act reasonably. *Id*. The court held that it "should refrain from ruling on constitutional grounds when narrower grounds are available." [Exc. 213] The court also indicated there was "no evidence in the present case that ADF&G acted arbitrarily when it chose what information to provide to BOF. To the contrary, ADF&G's reasons for not supplying certain reports – because they had not been completed in time for the meetings – is plausible." *Id*.

F. Motions for Attorney's Fees

After the superior court's ruling on the Tribe's constitutional claim, the parties jointly moved for entry of final judgment. [R. 2632-34] The court entered final judgment on March 24, 2021. [Exc. 215-17] The court also approved the parties' agreed schedule for briefing the question of attorney's fees. [R. 2631] Pursuant to this schedule, the parties filed opening briefs regarding attorney's fees on June 25, 2021; oppositions were filed on July 23; and replies were filed on August 11.[23]

[23] The Alliance's motion and supporting documents are at R. 3175-200. The State's motion and supporting documents are at 3125-73. The Tribe's motion and supporting documents are at R. 3017-3124. The Alliance's opposition to the Tribe's motion is at R. 3001-16. The State's opposition is at R. 2978-94. The Tribe's opposition to the motions

The Alliance's motion was predicated on its success in defending against the claims for relief alleged by the Tribe, including Counts I – III and the 15 sub-claims under those counts. [Exc. 1102-03] The Alliance also argued that it successfully defended against the Tribe's primary litigation goal of forcing a fundamental change in ADF&G's management of the commercial sac roe fishery in Sitka Sound. [Exc. 1104-05] The Alliance expanded on this point in its reply. [Exc. 1116-18] The Tribe repeatedly argued that 5 AAC 27.195 required ADF&G to delay opening the commercial fishery until the herring spawn had begun, a position the superior court soundly rejected. [Exc. 194] The Tribe nevertheless claimed that the summary judgment decisions in its favor had a "significant effect" on management of the fishery in 2021, resulting in a "different management approach" and a "better subsistence harvest." [Exc. 1098-99] The only support for this assertion cited by the Tribe was a Sitka Sound Herring Fishery Announcement dated March 30, 2021. [Exc. 1100-01] This announcement included a discussion of ADF&G's assessment of the impact of the opening on subsistence opportunity – a good faith effort by the agency to comply with the court's summary judgment orders regarding implementation of 5 AAC 27.195, even though those orders had not yet been incorporated into a final judgment. Other than that, the 2021 announcement was nearly identical to a fishery announcement for the 2018 fishery, before this lawsuit was filed, which opened the fishery in a manner the Tribe had previously criticized. [Exc. 1086-87 (citing R. 3527-28, Sitka Sound Herring Fishery

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by the State the Alliance is at R. 2964-74. The Alliance's reply is at R. 2957-63. The State's reply is at R. 2916-32. The Tribe's reply is at R. 2933-48.

Opening Announcement, March 28, 2018)] And to the extent there was an improvement in the subsistence harvest in 2021, this was not a function of the court's summary judgment decisions but was attributable to a historically large biomass, a result the Alliance had previously predicted. [Exc. 1093-94]

The Alliance also discussed the court's discretion to decide that no party prevailed in the case and decline to award attorney's fees to any party. [Exc. 1111-12] Neither the State nor the Tribe identified this option in their motions.[24]

The superior court issued its decision on the competing motions for attorney's fees on September 17, 2021. [Exc. 234-37] The court held that both parties had prevailed on main issues in the case and that none of their victories were "on peripheral or unimportant issues." [Exc. 237] The court said it could not conclude that either side "bested the others to the degree that it can be accurately designated as a prevailing party in the case as a whole." *Id*. The court therefore declined to designate any party as prevailing, and ordered that the parties "shall bear their own attorney's fees and costs." *Id*.

STANDARD OF REVIEW

The Alliance agrees with the Tribe regarding the standard of review that this court should apply in reviewing its constitutional claim. STA Brf. at 19.

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[24] The State and the Alliance also argued that the Tribe's dismissal of its claims against the Board should be considered in the prevailing party analysis. *See* R. 3134-35 and R. 3181 (citing *State v. Johnson*, 958 P.2d 440, 444 (Alaska 1998) and *Hart v. Wolff,* 489 P.2d 114, 119 (Alaska 1971)). The superior court did not address this argument in its decision on the parties' motions for attorney's fees.

The Alliance agrees that this court employs three different standards of review for decisions on motions for preliminary injunctions, but disagrees with the Tribe on which of these standards applies in this case. STA Brf. at 19-20. The case on which the Tribe relies distinguishes between "pure questions of law based on undisputed facts or may involve mixed questions of fact and law."[25] If the facts underlying a legal conclusion are in dispute, "the court must first make factual findings to establish the nature and extent of the harm."[26] The question in this case concerns the superior court's conclusion that the Tribe had not demonstrated it faced irreparable harm. Exc. 66. The superior court referenced the Alliance's brief, which the Tribe interprets as embracing a "new crisis" legal standard for assessing irreparable harm to subsistence users.[27] The Tribe insists that this constituted error as a matter of law. The Alliance disagrees. The facts underlying the Tribe's claim of irreparable harm were disputed, and the court's conclusion that the Tribe failed to meet its burden was not a pure question of law. The court's denial of the Tribe's motion for preliminary injunction was an exercise of its discretionary authority, which this court reviews for an abuse of discretion.[28]

The Alliance also disagrees with the Tribe concerning the standard of review for the court's denial of its motion for attorney's fees. The Tribe recognizes that attorney's fees

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

26 *Id*.

27 *See* Background Section II.B, *supra* at 5-9.

28 *Galvin*, at 332.

awards are usually reviewed for an abuse of discretion, but argues that de novo review is warranted if the question is whether the trial court applied the law correctly. STA Brf. at 20. The superior court in this case denied all of the parties' motions for attorney's fees based on its decision not to designate any party as prevailing.[29] Prevailing party determinations are reviewed for abuse of discretion, and will be overturned "only if they are manifestly unreasonable."[30]

ARGUMENTS

I. The Tribe's Sustained Yield Claim

Count II of the Tribe's Complaint alleged that the Board and ADF&G had violated the Sustained Yield Clause, Article VIII, Section 4 of the Alaska Constitution in managing the commercial herring sac roe fishery in Sitka Sound.[31] [Exc. 22-23] After the Tribe dismissed all of their claims against the Board (*see* Background Section II.D, *supra*, at 13-14), they maintained there was only one claim remaining – an allegation that ADF&G had "violated its constitutional duties to use the best available information in its report, recommendations, and advice to the Board regarding Sitka Sound herring management." [R. 2345]

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[29] *See* Background Section II.F, *supra*, at 17-18, and Exc. 66.

[30] *Alliance of Concerned Taxpayers, Inc. v. Kenai Peninsula Borough*, 273 P.3d 1123, 1126 (Alaska 2012) (cites omitted).

[31] The Tribe also alleged that management of the herring fishery violated the Common Use Clause, Article VIII, Section 3. [Exc. 23 (¶ 82)] The superior court found no support for that claim in its decision regarding Count II [Exc. 206-07], and the Tribe has not pursued this argument in its appeal.

A. This Claim is Moot and the Court Should Decline to Apply the Public Interest Exception to the Mootness Doctrine.

The superior court found that the Tribe's constitutional claim was moot, but nevertheless elected to review the claim under the public interest exception to the mootness doctrine. [Exc. 203-05] This court is not bound by the superior court's decision to apply the exception to the Tribe's claim.

As the Tribe notes, its constitutional claim relates to proposals that were under consideration at Board meetings in 2018 and 2019, in particular proposals to amend the harvest control rule.[32] STA Brf. at 30-31. The Tribe's claim that ADF&G failed to provide the Board with BAI at these meetings is moot. The Tribe has withdrawn all of its claims against the Board, and the 2018-19 and 2019-20 regulatory meeting cycles have concluded. There is thus no live case or controversy concerning the information that was (or was not) provided to the Board at these meetings, and how that may have affected Board decisions.

The question, then, is whether the exception to the mootness doctrine should be invoked. The superior court identified the three factors that should be considered. [Exc. 204] First, are the disputed issues capable of repetition? The Alliance agrees that an allegation that ADF&G failed to provide BAI to the Board is capable of repetition. *Id.*

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[32] The harvest control rule refers to the formula for determining the GHL based on the estimate of spawning biomass and the sliding harvest rate scale prescribed in 5 AAC 27.160(g). The Tribe has repeatedly requested the Board to amend this regulation to reduce the harvest rate (*supra* at 3, n. 11), including by filing Agenda Change Request (ACR) 4 for the Board's October 2019 work session. R. 6040-42.

Second, would application of the mootness doctrine allow issues to circumvent review? *Id.* The superior court held that this element of the test was satisfied because a person challenging a decision could only raise a concern after ADF&G has provided information to the Board, thus circumventing review. [Exc. 204-05] Yet that is precisely the time for a party to seek "a judicial declaration on the validity of a regulation," which a court may grant for failure to comply with the rulemaking procedures of the APA or on "any other ground."[33] Review necessarily comes after the decision at issue has been made. This is so even if the court were to endorse the Tribe's thesis that the Alaska Constitution implies an independent constitutional duty on the part of ADF&G to provide BAI to the Board at every turn. There is no impediment to a prospective plaintiff raising the same arguments as the Tribe does here. This is not an issue that will circumvent review.

Finally, are the issues presented "so important to the public interest as to justify overriding the mootness doctrine"?[34] The superior court answered this question in the affirmative because the issue "could have wide ranging effects …on all fisheries around the State," and "would presumably apply to any Alaska state agency action that involves the Common Use or Sustained Yield clauses." The Alliance agrees that were this court to embrace the Tribe' theory, that decision would have far-reaching and long-lasting implications. The question is whether the issue needs to be resolved now, in this case, in relation to herring fisheries that, while important to their participants, involve a relatively

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[33] AS 44.62.300(a).

[34] *Hayes v. Charney*, 693 P.2d 831, 834 (Alaska 1985).

small number of people in comparison to the population of Southeast Alaska or the state as a whole, and that take place in only one district, in one region, of a state that has many hundreds of fisheries.[35]

In *Peninsula Marketing Association v. State*, the court confronted a very similar situation.[36] That case concerned a challenge to a regulation that placed a cap on the amount of chum salmon that could be harvested in the South Peninsula and Shumagin Islands (False Pass) June salmon fishery.[37] Among other claims, plaintiffs alleged that this cap violated the "maximum use" and "maximum benefit" provisions of Section 1 and 2, Article VIII, of the Alaska Constitution. The trial court granted summary judgement for the state on all of the plaintiffs' claims, including this constitutional challenge, which the court held was not justiciable.[38] On review, this court found that the case was moot because the chum cap regulation had since been revised and there was thus "no live controversy for this court to decide."[39] Despite this, the court invoked the public interest exception to the mootness doctrine to address application of AS 16.05.251(e).[40] Regarding the "maximum use" and

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35 *See, e.g.*, *Ahtna Tene Nene v. State, ADF&G*, 288 P.3d 452, 459-60 (Alaska 2012) ("We decline to make broad declarations of law that ignore the facts of the case in front of us…Ahtna and AFWCF seek review of issues that are germane to the public interest, but those issues are simply not ripe for adjudication in this case.")

36 817 P.2d 917 (Alaska 1991).

37 *Id*. at 918.

38 *See* 3AN-88-12324 (June 9, 1989).

39 817 P.2d at 919-20.

40 *Id*.

"maximum benefit" issues, however, the court declined to "evaluate the merits of the trial court's conclusion that those standards are not justiciable."[41]

Peninsula Marketing is directly on point. The Tribe's claim that Sections 3 and 4 of Article VIII contain a distinct constitutional requirement that ADF&G use BAI in advising the Board, is moot. The Board meetings at which ADF&G allegedly failed to fullfil the constitutional duty posited by the Tribe, are history. There is no live case or controversy for the court here to decide.

B. The Sustained Yield Clause Does Not Contain an Implied Requirement that ADF&G Provide the Board of Fisheries with the Best Available Information.

The superior court recognized that the Alaska Constitution does not explicitly require the use of BAI. [Exc. 206] If such a duty exists, it must be implied, which depends on discerning the intent of the framers.[42]

The superior court, correctly, dismissed the Tribe's reliance on the Common Use Clause, Section 3, Article VIII, of the Constitution. That Section, along with Sections 15 and 17, assure equal access to the state's resources, which is not at issue in this case. [Exc. 207] The focus instead is on the Sustained Yield Clause, Section 4, Article VIII, which states:

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41 *Id*. at 920, note 9.

42 *See Abood v. League of Women Voters*, 743 P.2d 333, 341 (Alaska 1987).

> **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.

On this question, the intent of the framers is most clearly evidenced by the constitutional glossary they prepared, which defines the "sustained yield principle" as

> conscious application insofar as practicable of principles of management intended to sustain the yield of the resource being managed. That broad meaning is the meaning of the term as used in the Article.[43]

In *Native Village of Elim v. State,* the court analyzed this definition and articulated a number guidelines to its interpretation and application.[44] None of these support a finding that the framers impliedly intended to create an actionable constitutional duty to use BAI in fisheries management and decision-making. For instance, the court explained that sustained yield "does not mandate the use of a predetermined formula, quantitative or qualitative" because it would "consume an amount of time, money, and energy wholly disproportionate to potential benefits."[45] A rigid requirement to always develop and apply BAI is inconsistent with this understanding. The court also indicated that the phrase "insofar as practicable" could not be construed to support a "mechanical application of the sustained yield principle."[46] The court instead emphasized "the flexibility of the sustained

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[43] *See Native Village of Elim v. State,* 990 P.2d 1, 7-9 (Alaska 1999) (quoting *Papers of the Constitutional Convention*, 1955-56, Folder 210, Terms).

[44] *Id*.

[45] *Id.* at 7.

[46] *Id*. at 7-8

yield requirement and its status as a guiding principle rather than a concrete, predefined process."[47] The flexibility of the sustained yield principle, and its status as a guiding principle, likewise do not suggest that the framers impliedly intended to mandate a constitutional duty that ADF&G and the Board use BAI in fisheries management and decision-making. The court further said that sustained yield does not require a "mathematically precise calculation of sustained yield" because "much scientific uncertainty exists in fisheries management."[48] An implied constitutional mandate to use BAI at all times is antithetical to the court's recognition that agencies have "considerable discretion in developing a sustained yield policy."[49]

A recent decision by this court emphasized that under Article VIII, Section 2, the legislature is directed to implement Alaska's resource development policy expressed in Section 1 and other specific sections, including Sections 3 and 4.[50]

> Article VIII was, when approved, the most comprehensive state constitution provision addressing natural resources policies and principles, and it reflects careful consideration of each government branch's role in managing

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47 *Id*. at 8-9.

48 *Id*. at 8.

49 *Id*. at 9. The Tribe insists "it would be folly, and impossible, for the Framers to have known or predicted 50 years ago all the 'principles of management' that are applicable today or may be applicable 50 years from now." STA Brf. at 26. Precisely! The Tribe's recognition that the Framers did not intend to dictate which principles of management could or should be applied in the future flatly contradicts its thesis that one particular principle – use of BAI – is mandatory and must be applied at all times.

50 *Sagoonick v. State*, ___ P. 3d ___ (Alaska 2022) (Slip Op. 7583 at 6-9).

> Alaska's resources and textually establishes the legislature's importance in this policy making area.[51]

The First Session of the Alaska Legislature in 1959 enacted the Alaska Fish and Game Code, AS 16, Ch. 05.[52] Among other things, the code prescribed the powers and duties of the commissioner of ADF&G.[53] One of the duties defined by the legislature in 1959 now appears in AS 16.05.050(a)(4), which provides that the commissioner has a duty 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.[54]

This provision explicitly provides that collection, classification and dissemination of statistics, data and information is within the discretion of the commissioner of ADF&G. If the Alaska Legislature had intended to require ADF&G to use BAI in carrying out its mission under the Fish and Game Code, it could have adopted such a standard, then or since. It did not.[55] AS 16.05.050(4) cuts against sharply against the Tribe's thesis that the

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51 *Id*. at 9-10.

52 *See* Art. I, Ch 94 SLA 1959.

53 *Id*., § 11. *See* 16.05.050.

54 *Id*., § 11(f).

55 Nine members of the First Session of the Alaska Legislature had also served as delegates to the Alaska Constitutional Convention – Sens. Coghill, McNabb, McNealy, McNees, Metcalf, Peratrovich, and Smith, and Reps. Fishcher (Helen), Hellenthal, and Sweeney. *See* Appendix A and B. It is reasonable to assume that these members' understanding of the legislature's policy making role in implementing Article VIII of the Alaska Constitution, including the Sustained Yield Clause in Section 4, informed the legislature's decision that collection, classification, and dissemination of statistics, data and information should be committed to the discretion of the commissioner of ADF&G.

Sustained Yield Clause contains a separate, stand-alone mandate that ADF&G must use BAI in its reports, recommendations, and advice to the Board.[56] As this court said in *Sagoonick*, granting the relief the plaintiffs sought in that case –

> …would impose a court-made policy judgment on the other political branches that no competing interest is more important than implementing the best available science…this is beyond the "limited institutional role of the judiciary" because it requires a legislative policy judgment."[57]

AS 16.05.050(a)(4) reflects a legislative policy judgment that collection, classification and dissemination of fisheries data and information is expressly "in the commissioner's discretion." This court should not interpret the Sustained Clause to impose on ADF&G a mandatory, actionable requirement to use BAI at all times.

The Alliance does not suggest that BAI has no place in the process of ADF&G providing reports, recommendations, and advice to the Board. ADF&G consistently strives to meet that standard.[58] The question is whether use of BAI should be enshrined in a new, actionable constitutional mandate. The Tribe contends that this court has adopted a "nearly identical standard" for reviewing agency decisions under the hard look doctrine. STA Brf. at 34. This acknowledgment that the standard the Tribe seeks to graft onto Article VIII jurisprudence is "nearly identical" to the hard look doctrine, is fatal to its constitutional

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[56] Nowhere in the Tribe's brief is there any mention, let alone a discussion, of AS 16.05.050(a)(4).

[57] *Sagoonick*, Slip Op. 7583 at 38.

[58] *See, e.g.*, Exc. 127 ("The current harvest management strategy is based on the best available scientific information available for Alaska and contains conservation provisions that are beneficial to herring and the ecosystem."). *See also* Exc. 804 and Exc. 1017.

claim. If the question of whether ADF&G has failed to provide BAI or relevant information to the Board can be reviewed under an existing cause of action, within an established analytical framework, there is no reason for this court to embrace the Tribe's request to declare a separate, stand-alone constitutional duty. The superior court correctly ruled that it "should refrain from ruling on constitutional grounds when narrower grounds are available." [Exc. 213]

The court should also consider the implications of the Tribe's thesis in light of AS 09.60.010(c). Under that statute, a party in a civil action "concerning establishment, protection, or enforcement of a right under… the Constitution of the State of Alaska," is entitled to an award of "full reasonable attorney fees" if they prevail, but are exempt from an adverse award of attorney's fees if they do not (unless they have sufficient economic incentive to bring the action). Parties looking to challenge action by ADF&G and/or the Board on the ground that the agencies failed to comply with a constitutional duty to use BAI, would have a risk-free shot at ADF&G and/or the Board, with the potential of an award of full attorney's fees if they managed to convince a court that BAI had not been provided or used concerning the issue at hand. The Alliance has little doubt that, were the court to endorse the Tribe's thesis, every future judicial challenge to actions by ADF&G and the Board (or any other Alaska natural resources agency) would include a sustained yield claim for relief premised on an alleged failure to use BAI, motivated in part by an expectation that if the complainant were able sustain such a claim, an award of full attorney's fees would ensue.

C. An Implied Requirement that ADF&G Provide the Board With The Best Available Information Would Be Nonjusticiable.

The superior court held that if there were a BAI requirement in the Alaska Constitution, it would be nonjusticiable. [Exc. 211-13] The Alliance agrees.

> There are certain questions involving coordinate branches of government, sometimes unhelpfully call political questions, that the judiciary will decline to adjudicate.[59]

In *State of Alaska, DNR v. Tongass Conservation Society*, the court reviewed its justiciability jurisprudence, including *Abood*, acknowledging that "it is sometimes difficult to define what is, and what is not, justiciable."[60] The court said that it employs the approach adopted by the U.S. Supreme Court in *Baker v. Carr*, which identified various elements that may characterize a political question.[61] The superior court found that two of these elements were present in this case: (1) delegation to a political department, and (2) a lack of judicially discoverable and manageable standards for resolving the issue in question. [Exc. 211]

The Alliance has already addressed the delegation element in relation to AS 16.05.050(a)(4) (*supra*, at 28-30) and will not expand on that discussion here. The analysis in this section focuses on the second element identified by the superior court: the lack of

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[59] *Abood v. Gorsuch*, 703 P.2d 1158, 1160 (Alaska 1985) (citing *Malone v. Meekins*, 650 P.2d 352, 357 (Alaska 1982) and *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962)).

[60] 931 P.2d 1016, 1018 (Alaska 1997).

[61] *Id*. (citing *Baker*, 369 U.S. at 217; *Abood v. League of Women Voters*, 743 P.2d 333, 336 (Alaska 1987); and *Malone*, 650 P.2d at 357)).

judicially discoverable and manageable standards. This is precisely the problem with the Tribe's effort to have the court declare a constitutional duty on the part of ADF&G to use BAI in preparing reports and making recommendations to the Board – by what discoverable and measurable standards can a court adjudicate a claim that ADF&G has failed to fulfill this duty? As the superior court observed "'the limited institutional role of the judiciary supports a conclusion that the science- and policy-based inquiry here is better reserved for executive branch agencies or the legislature.'" [Exc. 212 (quoting *Kanuk ex rel. Kanuk v. State, DNR*, 335 P.3d 1088, 1099 (Alaska 2014))]

The definition of sustained yield includes the qualifier "insofar as practicable." How is a court to determine whether it is practicable for ADF&G to develop and disseminate information relating to fisheries management? The court in *Native Village of Elim* identified "time, money, and energy" as a consideration in applying sustained yield principles.[62] ADF&G personnel whom the Tribe deposed described funding limitations related to research projects.[63] How will a court factor in funding and budgetary issues in assessing whether ADF&G has reported BAI to the Board?

Similarly, the term "best" is highly subjective. What standards will a court employ to ensure that ADF&G has fulfilled such a requirement? Interest groups and members of the public routinely cite or provide the Board with scientific reports prepared by outside

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62 990 P.2d at 7.

63 *See, e.g.*, Exc. 758-59.

parties.[64] By what measurable standards can a court adjudicate whether any of these outside studies and information are better than ADF&G's work or determine which is the best available? The Tribe's proposed constitutional duty on the part of ADF&G to provide the Board with BAI in its reports and recommendations would cast the courts into the role of referee between dueling scientists, a task for which courts simply are not suited.

As the superior court indicated, the Tribe tried to "maneuver around" the justiciability flaw in its argument by suggesting that the standard should be all relevant information. [Exc. 212] The Tribe asserts that this standard is "objective" and "simply requires a review of the administrative record to determine if relevant information, known to ADF&G, was withheld from the Board." STA Brf. at 33. The Alliance disputes that the Tribe's reformulation of the standard is objective and not subjective. A claim that ADF&G unconstitutionally withheld a particular report or set of data from the Board would still require a determination by a court as to whether the report or set of data was relevant or not. ADF&G reports to the Board almost always refer to studies reviewed by the author.[65] All of the references cited by ADF&G in its reports are presumably relevant to the topic of the report. If the Tribe's thesis were endorsed by this court, would ADF&G be obliged to provide the Board with all of the referenced reports because they are relevant? The mountain of paperwork presented at Board meetings would become staggering and

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64 *See, e.g.*, R. 6085-86 (SHCA PC 32 (2019)) and R. 6179-80 (STA RC 11 (2019)).

65 *See, e.g.*, Exc. 1081-82 ("References Cited" in Hebert, *Southeast Alaska 2017 Herring Stock Assessment Surveys*, ADF&G Fishery Data Series 17-49 (December 2017)).

completely unmanageable. And if ADF&G chose instead to select which reports to provide the Board from among those referenced, the agency would run the risk of a party filing a judicial challenge on the ground that the agency left out a particular report or set of reports. The Tribe's ratcheting down of its theory, from BAI to information that is merely relevant, does not save its claim from application of nonjusticiability principles.

D. The Factual Premise of the Tribe's Claim Fails.

Having concluded that the Sustained Yield Clause did not contain an implied requirement to use BAI, and that even if it did, that requirement would be nonjusticiable, the superior court did not fully analyze another major flaw in the Tribe's thesis – failure to prove the factual predicate of its constitutional claim. The Tribe's allegation that ADF&G violated a constitutional duty to provide BAI to the Board fails on the facts, which renders its appeal nothing more than a request for an advisory opinion.

The Tribe focuses on a report by a Canadian scientist, Dr. Steven Martell, as the factual basis for its claim that ADF&G failed to provide BAI (or even just relevant information) to the Board. STA Brf. at 30-32. The Tribe's reliance on the Martell report is misplaced, for several reasons.

First, the Tribe attempts to link the Martell report to its requests for a revision of the harvest control rule set out in 5 AAC 27.160(g). STA Brf. at 30-31. But this report does not recommend changes to the harvest control rule. The Martell report instead concerns the age-structured assessment (ASA) model that ADF&G uses to calculate the annual GHL

for the commercial sac roe fishery. [Exc. 437-38 (Affidvit of Dr. Dressel)][66] This model, and how ADF&G calculates the annual GHL, is not a regulatory issue but concerns scientific research, which is within the province of ADF&G.[67] Review of the ASA model is not the same as reevaluating the overall harvest rate strategy. [Exc. 816-17] ADF&G is working on a review of its estimate of pristine biomass and the harvest rate strategy, but "that is a much bigger undertaking" and is a "multi-year process." *Id*. ADF&G has kept the Board informed of the status of this larger project. [Exc. 1083-84]

Second, as explained by Dr. Dressel, ADF&G has already made changes to the ASA model based on the work by outside contractors, one of whom was Dr. Martell.

> Two contactors that have worked on our model have come up with reports. And I am trying to reformat them so the public has access to these reports *so that they can see the changes we've made to the model and the things the contractors have recommended*. [Exc. 840 (emphasis added)]

Third, reports that ADF&G provides the Board generally are published as Fishery Management Reports, as Technical Papers, or come from its Fishery Data Series, and are authored by ADF&G managers and scientists themselves.[68] ADF&G uses its judgment regarding what information to provide to the Board, but also listens to feedback from the Board regarding what they want to hear and how to focus ADF&G's presentations.[69] The

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66 *See also* R. 10090-91. An in-depth explanation of how ADF&G uses the ASA and other models in calculating the GHL, prepared by Dr. Dressel, the ADF&G Statewide Herring Fisheries Scientist, can be found at R. 6184-95.

67 *See* AS 16.05.050(a)(11).

68 *See, e.g.*, R. 10080-95; R. 10133-69, and R. 10180-209.

69 *See* Exc. 668-69 (Deposition of Kyle Hebert).

Martell report is a highly technical report by an outside party, consisting mostly of equations, charts, and graphs. [R. 2749-96] It is not the type of report that ADF&G provides to the Board or that the Board would want to receive.

Finally, the Board meetings in October 2018 and October 2019 were not regulatory meetings, but were work sessions that the Board convenes each fall at the beginning of its meeting cycle.[70] Recognizing that some issues may warrant consideration outside the regular meeting cycle, the Board has adopted a regulation allowing a party to submit an agenda change request (ACR) pursuant to specified criteria.[71] ADF&G provides the Board with staff comments addressing the criteria for granting an ACR, but generally does not submit management or technical reports on the issues raised.[72] Under this standard practice, the Martell report would not have been provided to the Board at these work sessions, even if it were relevant to issues the Board was considering.

In short, the Tribe's reliance on the Martell report fails to provide the necessary factual predicate for considering its constitutional claim that the Sustained Yield Clause requires ADF&G to provide BAI to the Board in advising or making recommendations concerning Sitka Sound herring management. This court should decline the Tribe's invitation to issue an advisory opinion.

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70 *See, e.g.*, R. 10943-44 (Tentative Agenda, September 2018).

71 5 AAC 39.999.

72 Public comments are also accepted. *See, e.g.,* R. 10954 – 11170 (October 2018) and R. 6043-6154 (October 2019). Of the 17 on-time public comments received by the Board concerning the Tribe's ACR 4, only one favored granting it. R. 6066.

II. The Superior Court's Denial of the Tribe's Motion for a Preliminary Injunction Was Not An Abuse of Discretion.

The Tribe assigns error to the superior court's conclusion that it had not demonstrated irreparable harm. STA Brf. at 35-41. But the court's denial of the Tribe's motion for preliminary injunction did not rest on that conclusion alone. The court also found that the Tribe had failed to demonstrate that the opposing parties, in particular, the Alliance, could be adequately protected in the event an injunction were to issue, and that the it had also failed to make a clear showing of probable success on the merits. [Exc. 66] Any one of these three conclusions would have warranted denial of the Tribe's motion. The court did not abuse its discretion in doing so.

A. Irreparable Harm

The Tribe faults the superior court for purportedly adopting a "new crisis" legal standard for assessing irreparable harm to subsistence users. *See* Background Section II.B, *supra*, at 5-9. This is not a correct interpretation of the court's decision, or the context of that decision, for several reasons.

First, the Tribe asserts that it demonstrated irreparable harm by "presenting unrefuted evidence that subsistence harvesters were harmed by ADF&G's unlawful interpretation and implementation of section 195."[73] STA Brf. at 36 (citing Exc. 31-33,

[73] The Tribe claims it only "learned of ADF&G's unlawful interpretation of section 195 on November 16, 2018." STA Brf. 38 (citing Exc. 147, the Bowers e-mail). This assertion flatly contradicts the Tribe's earlier statement that "ADF&G repeatedly ignored STA's requests to delay commercial openings until herring had a chance to spawn in areas accessible to subsistence harvesters and to direct the commercial fishery away from the traditional subsistence harvesting areas as required by section 195. [Exc. 102]." STA Brf. at 9 (referring to a letter to ADF&G dated June 3, 2009). The Tribe's statement that

pages from the Tribe's memorandum). That is not correct; the Tribe's hypothesis that management of the commercial fishery harmed subsistence users was very much disputed.

For instance, the Tribe says it submitted facts showing that subsistence harvesters had been setting branches but getting little to no spawn. STA Brf. at 36-37. The Alliance countered with evidence that the decline in the amount of the subsistence harvest in recent years was primarily a function of a decrease in participation, and was not due to ADF&G's management of the commercial fishery. [Exc. 390 and Exc. 271-73] The Alliance submitted excerpts of an ADF&G report that identified the many reasons why potential subsistence harvesters did not participate in the fishery. [Exc. 272] This report also noted that while most subsistence harvesters set branches in the core area, herring actually spawn throughout Sitka Sound in different locations each year. [Exc. 271; *see also* R. 3542 and 5868, and R. 4019-73] This led the author to observe that "a harvester's assessment of the length of the spawn and quality of the season is more likely localized to areas that are accessible to that harvester and therefore may not be the same as the documented duration and total coverage of the spawn." [Exc. 272; *see also* Exc. 1030] This is consistent with the observations of then-Area Management Biologist Eric Coonradt, who testified in his affidavit regarding the "common practice" of branches being set in the core area "in the hope that herring will spawn there again, which doesn't always happen." [Exc. 418] Mr. Coonradt elaborated on this testimony in his deposition, saying that this practice was "just

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the e-mail from then-Director Bowers was the first time they understood how ADF&G interpreted 5 AAC 27.195, is fiction.

not a very successful way of doing things." [Exc. 559] "We can't adjust for the fact that people are setting in one place and the – and herring are spawning in another place." [Exc. 567] Mr. Coonradt also noted that fewer elders with experience and knowledge harvesting herring for subsistence were participating in the fishery. [Exc. 561; *see also* R. 5378 and Exc. 1038-41] One of the Alliance's affiants testified that he bought his seiner from the estate of a tribal member who had used it as a community harvester. [R. 347-48]

The Tribe also contends that it submitted evidence showing that the "commercial fleet disrupts herring with roe of the quality desired by subsistence harvesters." STA Brf. at 37. The Alliance disputed this proposition, demonstrating that the subsistence fishery is unrestricted and that subsistence herring harvesters have a reasonable opportunity for subsistence. [Exc. 392 and 398] An affiant for the Alliance testified that in his experience, "there is very little interaction between commercial fishing vessels and subsistence operations." [Exc. 403] The commercial fishery generally occurs before spawning, when estimated mature roe content is at its highest. The subsistence fishery occurs later in time, after the herring have spawned. Moreover, the quality of spawn desired by subsistence users is often a function of the number of days of spawning and multiple depositions of roe on branches. [Exc. 272; *see also* Exc. 952 and 963] By the time quality roe is available on branches, the commercial fishery has largely concluded. The disruption hypothesis does not jibe with the sequence of the two fisheries.[74] The Alliance also drew attention to the small amount of time that commercial fishing actually occurs. In 2017, for example, the

[74] *See also* Exc. 697-98.

total elapsed time of competitive openings was about seven hours. [Exc. 378-79, citing R. 10092] Mr. Coonradt testified that in conducting aerial surveys of herring distribution during the 2018 season, he saw where the "vast majority" of branches had been set and was looking to open the commercial fishery away from those areas. [Exc. 492-93]

Finally, the Tribe contends that because of the lack of opportunity to harvest herring for subsistence, they risk losing traditions and knowledge, and that "both individuals and the community as a whole are suffering." STA Brf. at 37. The Alliance has consistently expressed its respect for the culture, traditions, and well-being of tribal members. [*E.g.*, Exc. 389] Toward that end, the Alliance for many years sponsored a community harvester boat to assist in gathering herring roe on branches. [Exc. 261 and Exc. 391] These are larger vessels, usually commercial seiners, that can account for as much as 80 % of the harvest in many years. *Id.* *See also* R. 347-49 (Affidavit of Steven Demmert). The Alliance has also promoted plans for collaboration with the Tribe to enhance subsistence opportunity. [*E.g.*, R. 10916-17 (2018 RC 379)] The Tribe's concerns regarding ANS shortfalls are understandable. Blaming the commercial fishery is not.

In sum, the facts alleged by the Tribe were not unrefuted. The superior court's conclusion that the Tribe had not demonstrated irreparable harm was not an abuse of discretion, but was supported by facts presented by the Alliance (and the State).

B. Harm to the Commercial Sector and Inadequate Protection

The second basis for the superior court's denial of the motion for preliminary injunction is that the Tribe had not demonstrated that the interests of the opposing parties, in particular, the Alliance, could be protected if an injunction were to issue. The Alliance

presented considerable evidence regarding the harm that would be suffered by those who participate in or depend on the commercial fishery. *See* Background Section II.B., *supra*, at 5-9. The court correctly concluded that their interests could not be protected. The court said that the Tribe's characterization of harm to commercial users as "'relatively slight'…. is inaccurate." [Exc. 66, n. 3] The Tribe does not contest this finding in its appeal.

C. Likelihood of Success on the Merits

Finally, the court determined that STA had not demonstrated that it was likely to prevail on the merits, "as described by the responding parties (particularly, ADF&G)."[75] *Id*. The Tribe contends that the court's summary judgment decisions regarding 195 vindicate its showing of irreparable harm. STA Brf. at 37. But the court rejected the Tribe's theory that 5 AAC 27.195(b) required ADF&G to delay the commercial fishery until after spawning began [Exc. 194], which was the central component in its effort to force a fundamental change in management of the commercial sac roe fishery, as reflected in the Subsistence Management Plan the Tribe submitted to ADF&G in November 2018. [Exc. 146] ADF&G declined to implement this proposed management plan [Exc. 147-48], which the Tribe admits was the "genesis" of this litigation. [Exc. 153] The court's summary judgment decisions were not premised on any finding that ADF&G had failed to comply with the substantive requirements of 5 AAC 27.195(a)(2) and (b), only that the agency had not provided an adequate explanation of its decision-making regarding those sections. *See* Background Section II.C, *supra*, at 10-13.

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[75] ADF&G's merits summary is at R. 486-88. SHCA's argument is at 303-11.

D. The Preliminary Injunction Issue Is Moot.

The Tribe admits that the preliminary injunction decision is moot, but encourages the court to apply the public interest exception and reverse the superior court's irreparable harm conclusion. STA Brf. at 39. The Alliance disagrees. The elements of the test for applying the public interest exception are not met in this case, and the court should refrain from wading into the issue.

First, is the superior court's irreparable harm conclusion capable of repetition? The answer is no. That decision was based on a unique set of disputed facts unlikely to be repeated in a subsequent case. The court's reference to the brief of the Alliance as "succinctly describ[ing]" the Tribe's failure to meet their threshold burden of proving irreparable harm, does not establish any precedent for future court decisions. The Tribe says that future defendants in subsistence cases "will rely on the superior court's erroneous decision in this case to argue that longstanding harms to subsistence users are not 'irreparable harm' in the absence of a 'new crisis.'" STA Brf. at 40. As discussed above, however, the superior court did not adopt a "new crisis" standard as a matter of law, but simply signaled its agreement with the Alliance that the trend of declining subsistence harvests was not the result of a lack of reasonable opportunity or how the commercial fishery is managed, but instead correlated with a documented decrease in participation by subsistence users. Other than simply declaring it so, the Tribe offers no legal basis for assuming that the court's conclusion regarding irreparable harm would carry any weight in future litigation.

Is the superior court's irreparable harm determination likely to evade review? STA Brf. at 40. Again, the answer is no, as demonstrated by the Tribe's own petition for review of the superior court's decision. *See* S-17384. The Tribe filed their petition and could have obtained a timely decision prior to the start of the 2019 commercial fishery, if the court had agreed the petition had merit. A disappointed subsistence plaintiff in a future case could invoke this same procedure, in an effort to reverse a trial court's denial of a motion for preliminary injunction, with the potential of a different outcome.

Finally, is the issue raised by the Tribe so important to the public interest as to justify overriding the mootness doctrine? STA Brf. at 40-41. The Alliance agrees that subsistence opportunity is important, but disagrees that the superior court's decision erects any hurdle to the ability of future plaintiffs to obtain an injunction to protect that opportunity. The superior court's decision was made in the context of disputed facts and does not establish any precedent that needs to be corrected in this case. The Tribe's thesis relies on a single sentence in the court's decision that referenced the Alliance's opposition brief. This is a slender thread on which to posit that the superior court rendered a consequential legal decision with potential to adversely affect future subsistence litigants. This court has already rejected the Tribe's challenge to the superior court's decision [Exc. 67], and should do so again in this appeal.

III. The Superior Court's Conclusion Not to Designate a Prevailing Party Was Not Manifestly Unreasonable or an Abuse of Discretion.

The superior court concluded that "the parties in this case have all prevailed on main issues" and that [n]one of these parties' victories was on peripheral or unimportant issues." [Exc. 237] Accordingly, the court declined to designate any party as the prevailing party, and ordered that all parties "shall bear their own costs on attorney's fees." The Tribe applauds the court for finding that it prevailed on the claim pertaining 5 AAC 27.195, but condemns the court's decision on its sustained yield claim and the corollary finding that the State and the Alliance also prevailed on a main issue. STA Brf. at 42. The Tribe's challenge to the court's decision suffers from multiple flaws.

First, the Tribe points to a single sentence from the Alliance's reply for the proposition that "all parties agree that the main issue in this case was STA's non-constitutional claim challenging ADF&G's management under section 195." STA Brf. at 42. This misrepresents the Alliance's position. The statement to which the Tribe refers clearly identified the "Tribe's desire to fundamentally change management of the sac roe fishery" as the main issue in the case, a goal the Tribe failed to achieve. [Exc. 232] The Alliance consistently argued that the Tribe's sub-claim relating to 5 AAC 27.195 was "not the main issue in the Tribe's case." [*E.g.*, Exc. 1103]

Second, the Tribe reviews case law for the proposition that a prevailing party is one who prevails on the main issue in a case, not necessarily on all issues raised, and who obtained the relief sought. STA Brf. at 42-44. This argument might make sense if the Tribe were appealing a decision declining to designate it as a prevailing party, but the

superior court found that it was, albeit, not the only one. Much of the Tribe's analysis is thus beside the point, but three aspects warrant mention. The Tribe refers to the court's statement that the rulings concerning 5 AAC 27.195(a)(2) and (b) "hold[] the potential to alter the allocation of the resource." [Exc. 235] The Alliance is unsure what the court meant. Allocations to the two fisheries are established in regulation.[76] The requirement that ADF&G "shall" manage the commercial fishery "consistent with the applicable provisions of 5 AAC 27.160(g) and 5 AAC 27.190," remains in place.[77] The court held that ADF&G needed to better explain its decision-making, but otherwise did not order the agency to manage the commercial fishery any differently.[78] It is far from clear what mechanism the court had in mind in remarking on this potential allocation effect.

The Tribe cites decisions supporting its argument that a party need only prevail on a main issue in a case, not necessarily all claims made, to be designated a prevailing party.[79] Those cases are distinguishable. In both, the complaint grew out of a single event – an insurance company's refusal to pay policy benefits after an automobile accident, and a prison disciplinary hearing. The claims were interrelated and overlapping. Here, in

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[76] *See* 5 AAC 01.716(b), which prescribes the ANS, and 5 AAC 27.160(g), which defines the formula for calculating the GHL.

[77] 5 AAC 27.195(a)(1).

[78] *See* Background Section II.C, *supra*, at 10-13.

[79] STA Brf. at 42, n. 133 and 134, citing *Progressive Corp*. v. *Peter ex rel. Peter,* 195 P.3d 1083, 1092 (Alaska 2008) and *State, Dep't. of Corrections v. Anthoney*, 229 P.2d 164, 167 (Alaska 2010).

contrast, the various claims alleged by the Tribe arise under multiple legal theories – the subsistence priority statute, AS 16.05.258; the Common Use and Sustained Yield Clauses of the Alaska Constitution; and the APA. [Exc. 20-25] These claims were aimed not only at ADF&G's in-season management of the herring fisheries in Sitka Sound, but also targeted Board decision-making over the course of several meetings and ADF&G's role in providing advice and making recommendations to the Board. Where multiple issues are decided on "distinct legal grounds," there may be more than one "main issue."[80]

As for the Tribe's claim that it obtained the relief it sought, the Alliance simply disagrees. The Alliance (and the State) consistently argued that the Tribe failed to achieve its primary litigation goal of forcing a fundamental change in management of the fishery. The Tribe overstates the significance of the summary judgment rulings in its favor.[81]

Third, the Tribe attempts to downplay the significance of the grant of summary judgment in favor of the State and the Alliance on the Tribe's constitutional claim, and assigns error to the court's conclusion that the defendants were also prevailing parties.

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[80] *See, e.g., Alliance for Concerned Taxpayers, Inc. v. Kenai Peninsula Borough*, 273 P.3d 1123, 1126-27 (Alaska 2012).

[81] The Tribe points to the 22 months spent litigating section 195, including time "refuting ADF&G's and SHCA's meritless arguments, particularly their argument that *Rosier* prohibited ADF&G from complying with the regulation…" STA Brf. at 44-45 (referring to *Peninsula Marketing Association v. Rosier*, 897 P.2d 567 (Alaska 1995)). This is incorrect. The Alliance never endorsed or joined in the State's argument premised on *Rosier*. The only mention of that case by the Alliance was the observation that "ADF&G's position that it cannot fundamentally modify management of the sac roe fishery in the absence of Board direction – and especially in the face of the Board's explicit rejection of such modifications [*i.e.*., the unanimous vote against the Tribe's 2015 proposal 118] – is entirely consistent with the core lesson of *Rosier*." R. 1554-55.

STA Brf. at 45-48. The court noted that the question whether the Sustained Yield Clause contained a mandate that ADF&G use BAI in advising or providing recommendations to the Board was of "substantial importance not only in the context of the instant case but also in the broader context of natural resources in Alaska." [Exc. 236] The Tribe's attack on the court's reasoning is flawed.

To begin with, the Tribe contends that the constitutional claim was not a main issue in the case and "no party argued that it was." That is false. The Alliance clearly stated its position that the constitutional claim was co-equal with the Tribe's sub-claim under Count I, pertaining to 5 AAC 27.195 [R. 3007-09], and that "both can fairly be considered main issues." [R. 3011] The Alliance also explained the full ramifications of the Tribe's theory, in light of its insistence that its claims against the Board remain open to future litigation, and the implication that an alleged failure by ADF&G to provide the Board with BAI somehow taints Board decision-making. [Exc. 1117-18 (quoting from R. 2347 and 2363)]

The Tribe also contends that attorneys for the State and the Alliance "devoted the vast majority of their time in this case to STA's section 195 claim." STA Brf. at 45. With respect to the Alliance, the Tribe refers to a page from the memorandum supporting the Alliance's motion for attorney's fees. [Exc. 219] This is highly misleading. That page compared the number of hours spent on the Alliance's successful defense of the constitutional claim to all other time spent in the case, on all issues. *Id*. The correct comparison is the amount of time counsel for the Alliance devoted to the summary judgment motions for the respective issues, as outlined in his declaration: 94.4 hours relating to 5 AAC 27.195 and 70.9 hours on the constitutional claim. [Exc. 1107] Other

services performed by counsel for the Alliance – a motion to intervene and answer; the preliminary injunction; discovery and administrative record review; and the claims against the Board – were not limited to the issue of 5 AAC 27.195. *Id.*

Finally, the Tribe contends that the simple question to be asked is whether it obtained the relief sought. STA Brf. at 49 (citing *Schultz v. Wells Fargo Bank, NA*, 301 P.2d 1237, 1243 (Alaska 2013)). The State very ably demonstrated that the Tribe had not achieved any of the relief demanded in its complaint, an argument in which the Alliance concurred. [Exc. 1113-15 and R. 2960]

The superior court cited *Alliance for Concerned Taxpayers, Inc., v. Kenai Peninsula Borough* as one of the cases providing authority for its decision not to designate any party as prevailing.[82] [Exc. 237] That case is remarkably similar to the instant case. It involved election challenges to local initiatives and whether they applied to particular candidates for the borough assembly and school board. As here, three issues were in dispute, including one arising under the Alaska Constitution.[83] The court reasoned that the three issues "can all be fairly considered main issues in this case" and "were decided on distinct legal grounds."[84] "[W]hen both parties prevail on main issues, the superior court may opt not to designate a prevailing party."[85] This court affirmed the superior court's decision not to

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82 273 P.3d 1123 (Alaska 2012).

83 *Id*. at 1126.

84 *Id*. at 1127.

85 *Id*. at 1126 (citing *Fernandes* v. *Portwine*, 56 P.3d 1, 7-8 (Alaska 2002)). *See also Miller v. Clough,* 165 P.3d 594, 605 (Alaska 2007) ("Given that each party prevailed on

designate a prevailing party, concluding that it was not an abuse of discretion.[86] The same conclusion is warranted here.

CONCLUSION

The Tribe for over two decades has endeavored to convince the Board and ADF&G to radically restructure and restrict the commercial sac roe herring fishery in Sitka Sound. Toward that end, the Tribe has constructed a narrative of harm to subsistence harvesters, and an accompanying loss of culture and tradition, premised on several theories regarding how the commercial fishery was responsible for that harm. These included assertions that the Board and ADF&G illegally prioritized the commercial harvest over subsistence opportunity; that the harvest control rule in AS 16.05.160(g) is insufficiently precautionary; that the commercial fishery disrupts the arrival of spawning herring; that the commercial fishery targets older and larger herring; and others. The Board and ADF&G did not give credence to the Tribe's hypotheses concerning the impacts of management of the sac roe fishery on the subsistence harvest, consistently declining to adopt the Tribe's repeated proposals to fundamentally alter how management was conducted.

The Tribe has now turned to the courts for the relief it was unable to obtain from the Board or ADF&G. The same theories woven into the Tribe's narrative of harm were

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non-overlapping claims, it was not manifestly unreasonable for the superior court to determine that neither party was the prevailing party for purposes of awarding fees under Rule 82").

86 *Id*. at 1128.

incorporated into its complaint and claims for relief. [Exc. 20-25] [87] None of these theories were proven in this case, and in fact were abandoned when the Tribe dismissed all of its claims against the Board shortly before having to brief them. The Tribe nevertheless persists in advancing its narrative of harm to subsistence users in this appeal. STA Brf. at 5-6 and 30-31.

This should be an easy case to decide. The Tribe's constitutional claim is moot. If the court decides to review it under the public interest exception to the mootness doctrine, the court should deny the claim and affirm the well-reasoned decision of the superior court.

The Tribe's challenge to the denial of its motion for preliminary injunction is likewise moot. If the public interest exception is applied, the court should find that the superior court did not declare a new legal standard for reviewing claims of irreparable harm by subsistence users, and instead hold that the superior court did not abuse its discretion in resolving that issue in favor of the defending parties, based on disputed facts.

Finally, the court should rule that it was not manifestly unreasonable, and thus not an abuse of discretion, for the superior court to decline to designate a prevailing party in this case, and thereby deny the parties' respective motions for attorney's fees.

Dated this 2nd day of May, 2022.

Michael A. D. Stanley
Attorney for Southeast Herring Conservation Alliance
Alaska Bar No. 8006047

[87] *See* Paragraphs 72-75 (illegally prioritizing the commercial fishery); 84-85 (5 AAC 27.160(g) is arbitrary and unreasonable); 77, 80, and 88 (failure to protect older herring); and 73 (disruption of the herring spawn).

State of Alaska

SESSION LAWS

Resolutions and Memorials

1959

PASSED BY THE FIRST SESSION
OF THE FIRST STATE
LEGISLATURE

CONVENED AT JUNEAU, THE CAPITAL, ON THE
TWENTY-SIXTH DAY OF JANUARY, 1959,
AND ADJOURNED THE SIXTEENTH
DAY OF APRIL, 1959

SHCA Appendix A

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Gruening, Ernest	Washington, D. C.

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William A. Egan	Governor	Juneau, Alaska
Hugh J. Wade	Secretary of State	Juneau, Alaska

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of the

First Session

of the

First State Legislature

SENATE

PRESIDENT — Wm. E. Beltz
SECRETARY OF THE SENATE — Katherine Alexander

Name			District
Beltz, Wm. E.	(D)	Unalakleet	N
Bradshaw, Howard C.	(D)	Sitka	C
Bronson, Lester	(D)	Nome	N
Cooper, J. Earl	(D)	Anchorage	G
Coghill, John B.	(R)	Nenana	L
Gilbert, Hubert A.	(D)	Fairbanks	M
Hopson, Eben	(D)	Barrow	O
Logan, B. J.	(D)	Cordova	F
McNabb, Geo. B. Jr.	(D)	Fairbanks	J
McNealy, Robert J.	(D)	Fairbanks	J
McNees, John A.	(D)	Nome	P
Metcalf, Irwin L.	(D)	Seward	H
Moody, Ralph E.	(D)	Anchorage	E
Nolan, James	(D)	Wrangell	A
Owen, Alfred A.	(D)	Uganik Bay	I
Peratrovich, Frank	(D)	Klawock	A
Ryan, Irene E.	(D)	Anchorage	E
Smith, W. O.	(D)	Ketchikan	B
Stewart, Thomas B.	(D)	Juneau	D
Weise, Jack E.	(R)	Bethel	K

HOUSE OF REPRESENTATIVES

SPEAKER — Warren A. Taylor
CHIEF CLERK — Esther Reed

Name			District
Blodgett, Robert R.	(D)	Nome	23
Cashel, Frank E.	(D)	Sitka	4
Chapados, Frank X.	(D)	Fairbanks	19
Curtis, John E.	(R)	Kotzebue	22
Deveau, Peter M.	(D)	Kodiak	13
Erwin, William M.	(D)	Seward	11
Fagerstrom, Charles E.	(D)	Nome	23
Fischer, Helen M.	(D)	Anchorage	10
Fisher, James E.	(D)	Anchorage	10
Franz, Charles J.	(D)	Port Moller	14
Freeman, Oral E.	(D)	Ketchikan	2
Giersdorf, Bob	(D)	Fairbanks	19
Gray, Douglas	(D)	Douglas	5
Greuel, Richard J.	(D)	Fairbanks	19
Haag, Henry L.	(D)	Kodiak	13
Hammond, Jay S.	(I)	Naknek	15
Hansen, Harold Z.	(I)	Cordova	7
Harris, Donald	(R)	McGrath	17
Hellenthal, John S.	(D)	Anchorage	10
Hillstrand, Earl D.	(D)	Anchorage	10
Hoffman, James	(R)	Bethel	16
Hope, Andrew	(D)	Sitka	4
Hurley, James J.	(D)	Palmer	9
Johnson, Axel C.	(D)	Kwiguk	24
Jones, Charles M.	(D)	Craig	1
Kendall, Bruce	(R)	Valdez	8
Kalamarides, Peter J.	(D)	Anchorage	10
Longworth, John E.	(R)	Petersburg	3
McCombe, R. S.	(D)	Chicken	20
Meekins, E. Russ	(D)	Anchorage	10
Norene, James E.	(D)	Anchorage	10
Nusunginya, John	(D)	Point Barrow	21
Pearson, Grant H.	(D)	McKinley Park	18
Peterson, Allen L.	(D)	Kenai	12
Rader, John L.	(D)	Anchorage	10
Reed, Morgan W.	(D)	Skagway	6
Roady, J. Ray	(D)	Ketchikan	2
Sheldon, Robert E.	(D)	Fairbanks	19
Sweeney, Dora M.	(D)	Juneau	5
Taylor, Warren A.	(D)	Fairbanks	19

MINUTES

OF THE

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ALASKA CONSTITUTIONAL CONVENTION

University of Alaska
1955-56

College, Alaska

OFFICIAL

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March 1965

SHCA Appendix B

ALASKA CONSTITUTIONAL CONVENTION

University of Alaska

1955

DELEGATES AND OFFICERS

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FRANK PERATROVICH - First Vice President

RALPH J. RIVERS - Second Vice President

Mildred R. Hermann - Temporary President

Thomas B. Stewart - Secretary

Katherine T. Alexander - Chief Clerk

Delegate	Home	Alaska Resident Since	Place of Birth	Date of Birth
Armstrong, R. Rolland	Juneau	1940	Pennsylvania	1910
Awes, Dorothy J.	Anchorage	1945	Minnesota	1918
Barr, Frank	Fairbanks	1932	Illinois	1903
Boswell, John C.	Fairbanks	1926	Oregon	1905
Buckalew, Seaborn J.	Anchorage	1950	Texas	1920
Coghill, John B.	Nenana	1925	Alaska	1925
Collins, E. B.	Fairbanks	1904	Indiana	1873
Cooper, George D.	Fairbanks	1949	Colorado	1923
Cross, John M.	Kotzebue	1934	Kansas	1895
Davis, Edward V.	Anchorage	1939	Idaho	1910
Doogan, James P.	Fairbanks	1914	Alaska	1914
Egan, William A.	Valdez	1914	Alaska	1914
Emberg, Truman C.	Dillingham	1935	Minnesota	1909
Fischer, Mrs. E. A. (Helen)	Anchorage	1905	Washington	1905

Delegate	Home	Alaska Resident Since	Place of Birth	Date of Birth
Fischer, Victor	Anchorage	1950	Germany	1924
Gray, Douglas	Douglas	1912	Montana	1908
Harris, Thomas C.	Valdez	1950	Oklahoma	1926
Hellenthal, John S.	Anchorage	1915	Alaska	1915
Hermann, Mildred R.	Juneau	1919	Indiana	1891
Hilscher, Herb	Anchorage	1906	Washington	1902
Hinckel, Jack	Kodiak	1922	Massachusetts	1901
Hurley, James	Palmer	1933	California	1915
Johnson, Maurice T.	Fairbanks	1937	Minnesota	1901
Kilcher, Yule F.	Homer	1936	Switzerland	1913
King, Leonard H.	Haines	1920	Michigan	1901
Knight, William W.	Sitka	1919	England	1889
Laws, W. W.	Nome	1935	Washington	1884
Lee, Eldor R.	Petersburg	1920	Alaska	1920
Londborg, Maynard D.	Unalakleet	1946	Nebraska	1921
McCutcheon, Steve	Anchorage	1911	Alaska	1911
McLaughlin, George W.	Anchorage	1949	New York	1914
McNealy, Robert J.	Fairbanks	1940	Nebraska	1907
McNees, John A.	Nome	1942	Idaho	1917
Marston, M. R.	Anchorage	1941	Washington	1900
Metcalf, Irwin L.	Seward	1927	Washington	1908
Nerland, Leslie	Fairbanks	1930	Yukon Territory	1902
Nolan, James	Wrangell	1920	Massachusetts	1901

Delegate	Home	Alaska Resident Since	Place of Birth	Date of Birth
Nordale, Katherine D.	Juneau	1925	Washington	1902
Peratrovich, Frank	Klawock	1895	Alaska	1895
Poulsen, Chris	Anchorage	1933	Denmark	1904
Reader, Peter L.	Nome	1934	North Dakota	1913
Riley, Burke	Haines	1938	Montana	1914
Rivers, Ralph J.	Fairbanks	1906	Washington	1903
Rivers, Victor C.	Anchorage	1906	Washington	1905
Robertson, R. E.	Juneau	1906	Iowa	1885
Rosswog, John H.	Cordova	1905	Washington	1904
Smith, W. O.	Ketchikan	1932	New Mexico	1907
Stewart, B. D.	Sitka	1910	Montana	1878
Sundborg, George	Juneau	1938	California	1913
Sweeney, Dora M.	Juneau	1907	Minnesota	1907
Taylor, Warren A.	Fairbanks	1909	Washington	1891
VanderLeest, H. R.	Juneau	1908	Michigan	1882
Walsh, M. J.	Nome	1905	Ireland	1882
White, Barrie M.	Anchorage	1947	New York	1923
Wien, Ada B.	Fairbanks	1907	Alaska	1907