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

SITKA TRIBE OF ALASKA, Plaintiff, v. STATE OF ALASKA, DEPARTMENT OF FISH AND GAME, and the ALASKA BOARD OF FISHERIES, Defendants, and SOUTHEAST HERRING CONSERVATION ALLIANCE, Defendant-Intervenor.	)	Case No. **1SI-18-00212 CI**

REPLY IN SUPPORT OF STATE OF ALASKA'S MOTION FOR SUMMARY JUDGMENT: COUNT I

I. INTRODUCTION

Between the motion for a preliminary injunction and the instant cross-motions for partial summary judgment, the parties have devoted hundreds of pages—thousands of exhibits and the record are counted—to briefing the issues raised by the Sitka Tribe of Alaska ("STA" or "Tribe") in Count I of its Complaint. And yet, despite that volume of ink and paper, the issues remain simple: (i) is the Alaska Department of Fish and Game ("ADF&G" or "Department") acting reasonably in interpreting and implementing 5 AAC 27.195(a)(2) and (b); and (ii) is the Department owed deference in answering that question. For the reasons stated in the Department's opening brief in support of its

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motion, as well as the reasons stated in its opposition to STA's opening brief, ADF&G's interpretation and implementation of the challenged regulations are reasonable and lawful. No genuine issue of material fact suggests otherwise, and ADF&G is entitled, as a matter of law, to the dismissal of Count I of STA's complaint.

II. DISCUSSION

A. ADF&G is entitled to deference from the court.

Applying the correct standard of review—the deferential "reasonable basis" test—makes resolution of this dispute straightforward. The question under that test asks simply, in matters requiring agency expertise, did the agency act reasonably in interpreting and implementing the regulations directing its actions.[1] This standard is particularly appropriate—and an even greater amount of deference should be given—where an agency's interpretation is "longstanding and continuous."[2]

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1 *Weaver Bros. v. Alaska Transp. Comm'n,* 588 P.2d 819, 821 (Alaska 1978). *See also Handley v. State, Dep't of Revenue*, 838 P.2d 1231, 1233 (Alaska 1992) (when agency interprets its own regulation, court should apply the "the reasonable and not arbitrary test. This standard is not demanding"); *Rose v. Commercial Fisheries Entry Comm'n*, 647 P.2d 154, 161 (Alaska 1982) ("'[W]here an agency interprets its own regulation . . . a deferential standard of review properly recognizes that the agency is best able to discern its intent in promulgating the regulation at issue.'"); *United States v. RCA Alaska Communications, Inc.*, 597 P.2d 489, 498 (Alaska 1978) (interpretation entitled to great weight); *State, Dep't of Highways v. Green*, 586 P.2d 595, 602 n.21 (Alaska 1978) (interpretation given effect unless plainly erroneous).

2 *Marathon Oil Co. v. State, Dep't of Nat. Res.*, 254 P.3d 1078, 1082 (Alaska 2011).

The Tribe argued for a *de novo* standard of review in its opening brief in support of its motion for summary judgment.[3] The Department addressed that argument in detail in its opposition.[4] Notably, the Tribe consigns any mention of its *de novo* review argument in its opposition to the State's motion for summary judgment to a *pro forma* mention in footnote 12, presumably because of the overwhelming authority supporting the application of the deferential "reasonable basis" standard in this case. As discussed in all of the State's briefing, including below, under that standard ADF&G's interpretation and implementation of 5 AAC 27.195 is clearly lawful.

B. ADF&G's interpretation and implementation of 5 AAC 27.195(a)(2) is reasonable.

To assess whether ADF&G's interpretation of 5 AAC 27.195(a)(2) is reasonable, it is essential to describe what that interpretation is. ADF&G interprets 5 AAC 27.195(a)(2) to require it to distribute the commercial fishery by time and area *if* it determines that doing so is necessary to provide a reasonable opportunity to harvest the amount of herring spawn necessary for subsistence uses. The record clearly shows that that is, in fact, what ADF&G does.

1. Mr. Bowers' email.

The Tribe pins its entire argument disputing that that is how ADF&G interprets and implements the regulation on the basis of a single email from Forrest Bowers, the

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3 *See* STA Opening Brief at 24-28.

4 *See* State's Opp. Brief at 2-12.

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Department's then Director of Commercial Fisheries.[5] At page 5 of its opposition brief it characterizes Mr. Bowers' November 16, 2018 email to STA as the "genesis of this litigation." It reiterates that Mr. Bowers' email was the "genesis of STA's lawsuit" on page 14 of its opposition.

In that email, Mr. Bowers was responding to an STA proposal to delay the opening of the commercial fishery until after the first spawn.[6] As the State and the Southeast Herring Conservation Alliance ("SHCA") have repeatedly pointed out throughout this litigation, delaying the opening of the commercial fishery until after the first spawn would fundamentally change that fishery by rendering it, in most seasons, unviable.[7] With that consequence in mind, Mr. Bowers wrote that the "department taking action to not allow commercial fishing in areas beyond those already closed, with the intent of providing increased subsistence fishing opportunity in the absence of a conservation purpose, would represent a direct fishery allocation action taken outside the Board of Fisheries process."[8] Clearly, Mr. Bowers was addressing the prospect of the commercial fishery losing its viability.[9] Such a fundamental change in the allocation of Sitka Sound herring roe *is* a Board of Fisheries decision because it would amount to

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5 Mr. Bowers' affidavit is attached as Exhibit 12 to STA's opening brief in support of its motion for summary judgment.

6 *Id.* at p. 2.

7 *See, e.g.,* Coonradt Dep. at ¶¶ 14-15.

8 Bowers Dep. at 2.

9 *See* Bowers Aff. at ¶ 8.

an amendment to the management plan—something that the Board has repeatedly rejected.[10]

Nevertheless, the Tribe reads Mr. Bowers' email out of context and artificially narrowly in order to accuse the Department of interpreting subsection (a)(2) of the regulation to prevent it from distributing the commercial fishery "anywhere outside of those areas closed by regulation even if ADF&G determined such an action was necessary to ensure reasonable opportunity."[11] But this straw-man argument is disingenuous. The Tribe itself recognizes that ADF&G does *not* interpret 5 AAC 27.195(a)(2) to mean what it has deployed its straw-man to contend it means. At page 16 of its opposition it writes:

> ADF&G's tacit abandonment of Mr. Bowers' interpretation seems evident through the State's newest arguments. At the very least, ADF&G's position on whether 5 AAC 27.195(a)(2) applies beyond the closed areas has never been made clear. Neither the Court nor STA should have to try and guess how and where ADF&G is interpreting and implementing 5 AAC 27.195(a)(2).

It is true that ADF&G's arguments in its summary judgment briefing dispute the distorted interpretation given to Mr. Bowers' email by STA. But that is not an abandonment of an old position or the advancement of a new argument. ADF&G has *not* interpreted the regulation to be limited to the closed area, and the unrebutted testimony from Mr. Coonradt makes that clear.[12]

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10 *Id.*

11 STA Opp. Brief at pp. 14-15.

12 Coonradt Aff. at ¶ 11.

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The "genesis" of the Tribe's lawsuit against the Department is a chimera. The artificially narrow interpretation it gives to Mr. Bowers' email is a figment. The foundation on which it has constructed its complaint against the Department does not exist.

As discussed below, if the Department determines that doing so is necessary to provide a reasonable opportunity for subsistence, it *does* distribute the commercial harvest by time and area.

2. The Department's distribution of the commercial fishery by area.

At the outset, it is important to correct the Tribe's misimpression that ADF&G interprets 5 AAC 27.195(a)(2) to not, under any circumstance, require the distribution of the commercial fishery outside of the closed core subsistence area if it determines that doing so is necessary to provide a reasonable opportunity for subsistence. The purpose of ADF&G's discussion of the impact of the closure of the core subsistence area should not be startling or difficult to grasp. ADF&G points to the core area for no reason other than to acknowledge that a significant amount—but not necessarily all—of the benefits to subsistence gained by distributing the commercial fishery have *already* been secured through the closure of the historically most-productive roe-on-branch harvest areas in the Sitka Sound. But making that observation does not imply that ADF&G believes that it has no authority to further distribute the commercial fishery by area outside of the closed area *if* it determines that doing so is necessary to provide a

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reasonable opportunity to harvest the amount of herring spawn necessary for subsistence uses.[13]

In fact, it is undisputed that ADF&G does consider whether distributing the commercial harvest by area outside of the closed area is necessary to provide a reasonable opportunity for subsistence. Mr. Coonradt offered unrebutted testimony during his July 30, 2019 deposition that he considers distributing—and has distributed—the commercial harvest away from the core area, or other subsistence areas, when he deems it necessary to provide for a reasonable opportunity for subsistence harvest.[14] During his deposition, counsel for the Tribe asked Mr. Coonradt whether he would open an area to commercial fishing if he had data suggesting a trend that he thought justified not opening the area in order to provide reasonable opportunity for subsistence. Mr. Coonradt replied that he would "likely look elsewhere" for a different place to open the commercial fishery.[15] Similarly, in his affidavit filed in support of the State's opposition to the Tribe's motion for preliminary injunction, Mr. Coonradt testified that:

> The department continues to implement 5 AAC 27.195(a)(2) by distributing commercial fishery openings throughout the

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13 Coonradt Dep. at p. 134.

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

15 Coonradt Dep. at p. 134.

> management area and away from the closed area whenever possible.[16]

Asked during his deposition to explain that statement, Mr. Coonradt replied:

> We try to have openings away from the commercial closed area whenever we possibly can. . . . So if we have – if we have opportunities close to the closed area or let's say we have an opportunity right on the border of the closed area and we also have an opportunity a mile away. We would, everything being equal, we would choose the opportunity further away.[17]

Mr. Coonradt then gave a recent occasion when he made such a decision to distribute the commercial opening by area in order to ensure the subsistence harvest.[18]

Because there is no genuine issue of material fact that the Department actually does distribute the commercial harvest by area *if* it determines that doing so is necessary to provide a reasonable opportunity for subsistence, all of the Tribe's arguments directed at the 5 AAC 27.195(a)(2)'s distribution-by-area provision are without merit.

3. The Department's distribution of the commercial fishery by time.

The Tribe asserts that ADF&G does not distribute the commercial fishery by time in order to provide a reasonable opportunity for subsistence.[19] That is simply not true. First, Mr. Coonradt very clearly testified that he *does* consider whether delaying a

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16 Coonradt Aff. at ¶ 11.

17 Coonradt Dep. at p. 51.

18 *Id.* at pp. 51-53.

19 STA Opp. Brief at p. 24.

commercial opening will achieve a "gain" with respect to the subsistence harvest.[20] It is not unreasonable—and here the court must defer to Mr. Coonradt's judgment—that he has on most occasions concluded that delaying an opening would not assist in providing a reasonable opportunity for subsistence.[21]

Just as with the distribution-by-area requirement, the distribution-by-time mandate is conditional. An equivalent way to state the mandate in 5 AAC 27.195(a)(2) is this: If the Department determines that distributing the commercial harvest by time is necessary to provide a reasonable opportunity to harvest the amount of herring spawn necessary for subsistence uses, it shall do so. Here, Mr. Coonradt's unrebutted testimony is that he in fact does consider whether delaying or distributing the commercial fishery by time would assist in providing a reasonable opportunity for subsistence, and he has nearly always concluded that it would not.[22] Thus, the condition mandating the action is not met in the first instance, and Mr. Coonradt's ensuing decision not to delay the opening of the commercial fishery is reasonable and owed deference on review.

Moreover, the Tribe's suggestion that Mr. Coonradt *never* distributes the commercial fishery by time in order to provide a reasonable opportunity for subsistence—and that the Department must therefore be interpreting the regulation to not require distribution by time if it determines that doing so is necessary to provide a

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20 Coonradt Dep. At pp. 32-33.

21 *Id.*

22 *Id.*

reasonable opportunity for subsistence—is simply not true. Mr. Coonradt testified—and the Tribe has offered no contrary evidence—that the Department's decision not to open the commercial fishery in 2019 was in part an adjustment made to help subsistence users achieve success.[23]

The uncontroverted evidence is that ADF&G in fact *does* consider distributing the commercial fishery by time, but most often reaches the determination that doing so will not assist in providing a reasonable opportunity for subsistence. There is no evidence to suggest that Mr. Coonradt's determinations on that question have been unreasonable, and the court owes those management decisions deference.

4. *Peninsula Marketing Assoc. v. Rosier.*

The Tribe simply misunderstands the Department's reliance on *Rosier.* As noted in its opening brief, ADF&G has relied—and continues to rely—on *Rosier* for the proposition that it cannot overturn the Board's decision that management of the fisheries pursuant to 5 AAC 27.195 provides a reasonable opportunity for subsistence harvest of herring spawn in Sitka Sound.[24] Part and parcel of the Department's management under 5 AAC 27.195(a)(2) is the conditional requirement that it distribute the commercial fishery by time and area *if* it determines that doing so will provide a reasonable opportunity for subsistence. The Tribe's misunderstanding of the Department's reliance

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

24 *See* State Motion for Summary Judgment Brief at pp. 39-43.

on *Rosier* derives, here again, from its erroneous, artificially narrow reading of Mr. Bower's email. Contrary to the Tribe's contention, the Department is not arguing that it does not have discretion to determine if distributing the commercial fishery by time or area will provide a reasonable opportunity for subsistence. The Department cites *Rosier* for the proposition that the Board has made an assessment of reasonable opportunity and found that it is provided for *within the regulatory regime that it has promulgated*. And as noted above, the Department complies with the regulation, including distributing the commercial fishery by time and area if it determines doing so is necessary to provide a reasonable opportunity for subsistence.

C. The Department's interpretation and implementation of 5 AAC 27.195(b) is reasonable.

Subsection (b) of the regulation does not, as the Tribe contends, require in-season assessment of the quantity and quality of spawn on branches, and the Department is not misrepresenting the assessment it is making regarding the quantity and quality of herring roe. On page 26 of its opposition brief, the Tribe selectively quotes one colloquy from Mr. Coonradt's deposition regarding whether the Department assesses quality of spawn *in season.* Mr. Coonradt acknowledges that the Department simply does not have information regarding the quality of spawn available to it in season. But nothing in 5 AAC 27.195(b) requires the Department to consider the quality of spawn in season, and the Department *does* consider the quality of spawn after it reviews data gathered through post-season subsistence surveys conducted by the Tribe and ADF&G's subsistence division.

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The Tribe's contention that ADF&G could, in the exercise of its discretion, adopt other procedures to assess the quality and quantity of spawn in season points out the importance of a deferential standard of review. It would be extraordinarily difficult for the court to determine whether those proposals are realistic or would be effective. So long as the Department is complying with the regulation, and as the Department has demonstrated in its opening brief and in its opposition to STA's motion for summary judgment, it is, the court must defer to the Department's judgment on the most effective manner in which to carry out the regulation's mandates.

Through its review of the Division of Subsistence's post-season subsistence harvest reports, the Department is able to—and does—consider the quality and quantity of herring roe.[25] While that information is often of limited value because it is not available until after the fishery closes, the Department still considers it. By its terms, the regulation does not require more, STA's arguments notwithstanding.

III. CONCLUSION

Managing the Sitka Sound commercial sac roe and roe-on-branch herring fisheries pursuant to Board of Fisheries regulations is an incredibly complex, data and science driven endeavor. Agency expertise is essential, and ADF&G's interpretation and implementation of 5 AAC 27.195(a)(2) and (b) has been long-standing. Under these circumstances, the Alaska Supreme Court has repeatedly said that courts owe agencies deference and should analyze agency decisions under the reasonable basis standard.

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Here, there is no genuine issue of material fact that ADF&G has interpreted and implemented 5 AAC 27.195(a)(2) and (b) reasonably. The Department is entitled to judgment as a matter of law that its management of the fisheries is lawful, and respectfully asks the court to dismiss the claims set forth in Count I of STA's complaint.

DATED January 10, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on this date, true and correct copies of the **Reply in Support of State of Alaska's Motion for Summary Judgment: Count I** and this **Certificate of Service** were served via electronic mail on the following:

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