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

<b>SITKA TRIBE OF ALASKA</b>	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 1SI-18-00212 CI
	)	
<b>STATE OF ALASKA, ALASKA</b>	)	
<b>DEPARTMENT OF FISH AND GAME,</b>	)	
<b>and ALASKA BOARD OF FISHERIES,</b>	)	
	)	
Defendants,	)	<b>SOUTHEAST HERRING</b>
	)	<b>CONSERVATION ALLIANCE</b>
and	)	<b>REPLY RE MOTION FOR</b>
	)	<b>SUMMARY JUDGMENT</b>
<b>SOUTHEAST HERRING</b>	)	
<b>CONSERVATION ALLIANCE,</b>	)	
	)	
Defendant-Intervenor.	)	
_____	)	

Defendant-Intervenor Southeast Herring Conservation Alliance (the “Alliance”) replies to the opposition to its motion for partial summary judgment filed by plaintiff Sitka Tribe of Alaska (the “Tribe”) in relation to the Tribe’s claims against the State of Alaska (the “State”), Alaska Department of Fish and Game (“ADF&G”).

The Tribe acknowledges that the November 16, 2018, e-mail from Forrest Bowers to Tribal counsel Elizabeth Hensley was the “genesis” of this litigation.<sup>1</sup> As discussed in SHCA’s opposition, the context of the Bowers e-mail was a request by the Tribe that ADF&G implement the Tribe’s proposed subsistence management plan which, among other things, would have required ADF&G to delay opening the commercial fishery until after the first spawn.<sup>2</sup> The Tribe now denies that they interpret 5 AAC 27.195(a)(2) to require delaying the commercial fishery until after herring begin spawning.<sup>3</sup> The Tribe’s shifting theories regarding what they believe ADF&G is obligated to do mirrors the zig-zagging requests for relief they advanced in briefing on their motion for a preliminary injunction.<sup>4</sup>

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<sup>1</sup> See Sitka Tribe of Alaska’s Opposition to State of Alaska’s and SHCA’s Motions for Partial Summary Judgment, dated December 20, 2019 (“STA SJ Opp.”) at 5 and 14. The exchange of e-mails between Mr. Bowers and Ms. Hensley is STA Summary Judgment Exh. 12.

<sup>2</sup> See Southeast Herring Conservation Alliance Opposition to Motion for Summary Judgment by Sitka Tribe of Alaska, dated December 20, 2019 (“SHCA SJ Opp.”) at 8-9, quoting STA Preliminary Injunction Exh. 10.

<sup>3</sup> See STA SJ Opp. at 1-2.

<sup>4</sup> In its opening brief in support of a motion for preliminary injunction, the Tribe made it very clear that the obligations it reads into 5 AAC 27.195(a)(2) and (b) must be fulfilled by ADF&G “prior to opening the commercial fishery” and “can only be accomplished in-season and after a spawn has occurred.” See Plaintiff’s Memorandum in Support of Motion for Preliminary Injunction, dated January 14, 2019, at 25 and 33. In its reply, the Tribe retreated from these demands, asserting that “it is not seeking a preliminary injunction that mandates ADF&G take any specific management action in the 2019 sac roe herring fishery, including delaying the commercial opening until after the first spawn,” and was not “insisting that ADF&G must conduct an in-season survey of the quality and quantity of spawn on branches before it can open the sac roe fishery.” See Sitka Tribe of Alaska’s Reply in Support of Motion for Preliminary Injunction, dated February 11, 2019, at 1. The Tribe concluded its reply by denying that it sought an injunction compelling ADF&G to make specific changes to management of the herring fisheries in Sitka Sound. *Id.* at 19.

But in one respect, the Tribe’s goal is clear: they want the court to declare that ADF&G must consider taking “management action that would fundamentally change the way it has managed the sac roe fishery.”<sup>5</sup> Director Bowers correctly observed that acceding to the Tribe’s demand to delay the commercial fishery until after the first spawn would represent “a fundamental shift in the way sac roe herring fisheries are managed,” concluding that the agency could not undertake such action “without direction from the Board of Fisheries.”<sup>6</sup> Nothing in the record of the Board’s adoption of 5 AAC 27.195 in 2002, nor in its repeated review of the herring fisheries in Sitka Sound since then, supports the proposition that the Board intended ADF&G to completely upend how it manages the commercial sac roe fishery. If the Tribe wants to bring about a fundamental change in how ADF&G manages the commercial fishery, they need to make their case before the Board, not in this court.

The Board well understands the history of the Sitka Sound herring sac roe purse seine fishery and how ADF&G manages the fishery.<sup>7</sup> The commercial sac roe fishery in Southeast Alaska developed in the early 1970s. “The sac roe fishery takes place immediately prior to spawning when egg maturity is highest.”<sup>8</sup> The Southeastern roe herring purse seine fishery was

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<sup>5</sup> STA SJ Opp. at 2.

<sup>6</sup> STA SJ Exh. 12 at 1.

<sup>7</sup> See, e.g., Hebert, *2018 Report to the Alaska Board of Fisheries: Southeast Alaska and Yakutat Herring Fisheries*, ADF&G Fishery Management Report 17-58, December 2017, at BOF 3803-18.

<sup>8</sup> *Id.* at 3810.

the first Alaska herring fishery to come under limited entry, in 1977.<sup>9</sup> These limited entry permits were not issued for herring fishing generally, but specifically for roe herring. Total gross earnings from the fishery, also known as the ex-vessel value, have ranged from a high of \$ 12.6 million in 2009 to a low of \$ 1.5 million in 2016, with 5 and 10 year averages of around \$ 6 – 7 million.<sup>10</sup> The harvest of herring in the Sitka Sound commercial sac roe fishery represents a small fraction of the available biomass and harvestable surplus.<sup>11</sup>

The Tribe seeks a ruling that in adopting 5 AAC 27.195, the Board intended to authorize ADF&G to fundamentally change how it manages the commercial sac roe fishery. If that were so, why did the Board, in subsection (a)(1), direct ADF&G to manage the fishery “consistent with” regulations establishing the GHL (5 AAC 27.160) and an area-wide management plan (5 AAC 27.190)? If the Tribe’s thesis is correct, then why has the Board repeatedly rejected the Tribe’s proposals to reduce the harvest rate specified in 5 AAC 27.160? The Tribe in 2015 submitted proposal 118 expressly requesting the Board to revise 5 AAC 27.195(a)(2) to limit the amount of the GHL that could be harvested prior to the first spawn.<sup>12</sup> The Tribe said that the area manager had refused to support such a change and argued that this proposal was intended to “force the distribution of the fishery over time to ensure a more reasonable opportunity exist[s] for subsistence needs to be met.”<sup>13</sup> The proposal concluded that action by the Board “was the

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<sup>9</sup> See 20 AAC 05.662-666 (1977).

<sup>10</sup> See Hebert, *supra* at n. 7, at 24 (Table 9).

<sup>11</sup> See BOF 3850.

<sup>12</sup> BOF 3109-10.

<sup>13</sup> *Id.*

only remedy at this time.” If, as the Tribe now posits, 5 AAC 27.195 already authorizes ADF&G to implement fundamental changes in management of the commercial sac roe fishery, why was it necessary for them to advocate a proposal intended to force ADF&G to do just that?

ADF&G opposed proposal 118 on the ground that it would reduce “management flexibility to provide fishing opportunity based on abundance, distribution and spawn timing.”<sup>14</sup> ADF&G also indicated it was “not clear” if the proposal would increase subsistence opportunity.<sup>15</sup> The Board voted unanimously to reject proposal 118.<sup>16</sup> In other words, the Board expressly refused the Tribe’s request to override ADF&G’s interpretation and application of 5 AAC 27.195(a)(2). The Tribe’s effort to achieve the same result in this lawsuit must suffer the same fate.

The Alliance has not to this point weighed in on the competing arguments between the Tribe and the State regarding the import of the decision in *Peninsula Marketing Association v. Rosier*, 897 P.2d 567 (Alaska 1995). But an assertion by the Tribe in its opposition warrants comment. The Tribe contends that the State’s interpretation of *Rosier* “would undermine the very foundation and stability of fishery management and regulation in Alaska because ADF&G would be prohibited from taking any management action that was merely proposed but not adopted as a requirement in a regulation by the Board.”<sup>17</sup> Leaving aside the hyperbole in this

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<sup>14</sup> See ADF&G Staff Comments, Regional Information Report 1J14-11 (February – March 2015), at BOF 3854-55.

<sup>15</sup> *Id.*

<sup>16</sup> BOF 5131.

<sup>17</sup> STA SJ Opp. at 6.

statement, the core of the Tribe's argument is that ADF&G should be free to implement regulatory proposals that have been rejected by the Board. Under the Tribe's theory, ADF&G was authorized, if not required, to implement the Tribe's 2015 proposal 118 even though the Board voted unanimously against that proposal. Talk about undermining the clear division of authority between the Board and ADF&G! 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 – is entirely consistent with the core lesson from *Rosier*.

The Alliance concludes its reply with observations regarding the Tribe's arguments pertaining to 5 AAC 27.195(b). As an initial matter, the Tribe dismisses the Alliance's argument that this provision was not actually adopted by the Board.<sup>18</sup> The Alliance stands by its analysis.<sup>19</sup>

The Tribe then identifies two ways in which it believes ADF&G could assess the quality of herring roe on branches in-season and use that information in managing the commercial fishery.<sup>20</sup> One is to replicate the in-season task force that existed under the Memorandum of Agreement and thereby gather information on the subsistence harvest, including the quality of the roe on branches. The other is to use existing data on the number of days of spawning as an indicator of the quality of the roe on branches. The problem with both of these ideas is that they could only be implemented after spawning has begun, if not largely concluded – well after the

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<sup>18</sup> *Id.* at 25, footnote 57.

<sup>19</sup> *See* SHCA SJ Opp. at 11-14.

<sup>20</sup> *See* STA SJ Opp. at 30-32.

window of time for a viable commercial harvest.<sup>21</sup> The Tribe's proposals for implementing 5 AAC 27.195(b) are really just another way of advocating that the sac roe fishery be delayed until after the onset on spawning, regardless of the adverse effect on the commercial fishery

In sum, the Tribe has failed to carry their burden of proving their claims against ADF&G, and they are not entitled to judgment as a matter of law. The court should enter judgment in favor of the State and the Alliance on those claims.

Dated this 10<sup>th</sup> day of January, 2020.

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#### **Certificate of Service**

I certify that on January 10, 2020, I electronically served a true and correct copy of the foregoing document on the following:

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<sup>21</sup> See SHCA SJ Opp. at 14-15.