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

SITKA TRIBE OF ALASKA)	
)	
Plaintiff,)	
)	
v.)	No. 1SI-18-00212 CI
)	
STATE OF ALASKA, ALASKA)	
DEPARTMENT OF FISH AND GAME,)	
and ALASKA BOARD OF FISHERIES,)	
)	
Defendants,)	SOUTHEAST HERRING
)	CONSERVATION ALLIANCE
and)	MEMORANDUM IN SUPPORT
)	OF MOTION FOR PARTIAL
SOUTHEAST HERRING)	SUMMARY JUDGMENT
CONSERVATION ALLIANCE,)	
)	
Defendant-Intervenor.)	
_____)	

I. INTRODUCTION

The Southeast Herring Conservation Alliance (the “Alliance”) submits this memorandum in support of its motion for partial summary judgment on the claims for relief alleged by the plaintiff Sitka Tribe of Alaska (the “Tribe”) against the defendant State of Alaska (the “State”), Alaska Department of Fish and Game (“ADF&G”), set forth in Count I of the Tribe’s

complaint.¹ The scope of this motion (and the motions for partial summary judgment to be filed by the other parties) is thus the same as the scope of the Tribe’s motion for preliminary injunction, which the court denied in an order dated February 20, 2019.

The instant motion differs from the prior briefing in two respects. First, the State has produced, and will soon file, administrative records (ARs) for its agencies, ADF&G and the Board.² These ARs provide additional information regarding the history of 5 AAC 27.195 and the State’s interpretation and application of that regulation to the Sitka Sound herring fisheries.

Second, the relief requested in the parties’ motions for partial summary judgment is a ruling on the merits of the Tribe’s claims against ADF&G, not just a decision on a motion for preliminary injunction. The Alliance will address the claims against ADF&G in the arguments section of this memorandum. This analysis demonstrates that there are no genuine issues as to any material fact pertaining to the Tribe’s claims against ADF&G, and that the Alliance (and the State) are therefore entitled to judgment as a matter of law under Alaska Rule of Civil Procedure 56. However the court rules, that decision will presumably be incorporated into a final judgment that will be entered by the court once all of the Tribe’s claims have been resolved.³

¹ See Complaint for Declaratory and Injunctive Relief, dated December 11, 2018 (“STA Complaint”) at 20-21 (¶¶ 72-74). As provided in the Joint Motion and Proposed Order to Vacate Trial..., approved by the court in an order dated October 27, 2019, the parties agreed, in paragraph 7, that all of the Tribe’s remaining claims (*i.e.*, against the defendant Alaska Board of Fisheries (“Board”)) will be resolved in subsequent proceedings. The court has tentatively set a trial for the week of July 27, 2020, if necessary, and left it to the parties to work out a schedule for dispositive motions on these remaining claims against the Board.

² Each administrative record (AR) has been separately Bates-stamped and will be referred to herein as BOF [Bates #s] for the Board AR or as ADFG [Bates #s] for the ADF&G AR.

³ See Alaska Rule of Civil Procedure 56(c).

II. BACKGROUND

In its opposition to the Tribe's motion for a preliminary injunction, the Alliance reviewed the background of this case, including facts regarding the Sitka Sound commercial sac roe herring fishery, the subsistence fishery, and restrictions that have been imposed on the commercial fishery intended to promote the subsistence harvest.⁴ The Alliance stands by this statement of facts, and incorporates it by reference, and will not repeat that discussion here. The Alliance will instead confine its review of the background to issues that have been clarified since that time, primarily in the ARs.

A. History of 5 AAC 27.195.

1. 2001 Post-Season.

After the 2001 herring fishing season in Sitka Sound, the Tribe raised concerns regarding a poor subsistence harvest, which it attributed to management of the commercial sac roe fishery, in particular the fact that most of it occurred in the traditional subsistence harvest area near Sitka.⁵ ADF&G responded that the problem appeared to be one of insufficient spawn distribution in traditional locations, and noted that some subsistence harvesters were highly successful while others were not.⁶ The Tribe and ADF&G continued to engage on this subject over the course of the summer, through meetings and correspondence, culminating in an

⁴ See Opposition of the Southeast Herring Conservation Alliance to Plaintiff's Motion for Preliminary Injunction, dated January 29, 2019 (herein "SHCA PI Mem.") at 4-13.

⁵ See Letter to ADF&G Commissioner Frank Rue from Tribal Chairman Lawrence Widmark, dated May 31, 2001. BOF 39-40. See also ADFG 2680 (map of spawn locations and fishery openings in 2001).

⁶ See Letter to Widmark from ADF&G Deputy Commissioner Rob Bosworth, dated June 12, 2001. BOF 42-43.

exchange of letters outlining points of agreement.⁷ These topics included convening a herring workshop; investigating joint research opportunities, including a subsistence harvest survey; management of the commercial fishery; and development of a memorandum of understanding establishing protocols for collaboration between the Tribe and ADF&G. Among other things, ADF&G recognized the benefits of dispersing the fleet over several areas, both for conservation purposes and as a “tool” for providing subsistence harvesters a reasonable opportunity.⁸ ADF&G assured the Tribe that it would avoid harvesting the entire commercial quota from one area during the 2002 season.⁹ The Tribe expressed appreciation for the Commissioner’s letter.¹⁰

2. Board of Fisheries Meeting – January 2002.

The Tribe did not confine their efforts to discussions with ADF&G, but also took their concerns to the Board through filing an agenda change request (ACR).¹¹ The Board approved this ACR and put the matter on the agenda for its meeting in January 2002, where it was identified as Proposal 500.¹² The proposal speaks for itself, but the problem identified by the Tribe was allowing the sac roe fishery in traditional subsistence egg harvest areas. These areas

⁷ See Letter to Widmark from Rue, dated October 17, 2001 (BOF 230-31), and letter to Rue from Widmark, dated November 28, 2001 (BOF 232-33).

⁸ BOF 230.

⁹ *Id.* ADF&G followed through on this commitment. See ADFG 2681 (map of spawn locations and fishery openings in 2002).

¹⁰ BOF 232-33.

¹¹ See ACR 4, at BOF 4-5. See also BOF 195-96. An ACR is a means for a party to request that the Board take up a proposal outside its normal three-year regulatory cycle. See 5 AAC 39.999.

¹² BOF 62 and 64-66.

were said to be important because they were in proximity to Sitka, in relatively safe inside waters, and thus “provide the opportunity and safety required for skiff harvesters and the necessary conditions for egg-on-branch disposition.”¹³ The Tribe specifically identified traditional subsistence fishing areas of Middle, Crow, and Kasiana Islands, and requested that the commercial fishery be dispersed in relation to these areas.

Proposal 500 was reviewed by a Board committee, which reported the results of its work in a report to the Board.¹⁴ The committee concluded by recommending a draft plan for moving forward, to be codified at 5 AAC 27.195.¹⁵ Board member Umphenour, who had chaired the herring committee, presented the plan to the Board at the beginning of its deliberations on Proposal 500.¹⁶ He first recounted that information before the committee showed that the location of herring spawn was unpredictable, that the spawn was very “fluid,” with “no real consistent pattern.”¹⁷ He noted that “many times” subsistence users had set their branches in the traditional harvest area, but that the herring “just flat did not spawn there.”¹⁸ Umphenour said

¹³ *Id.* That these traditional harvest areas, now commonly referred to as the “core area,” are favorable for gather herring roe is echoed in Sill and Cunningham, *The Subsistence Harvest of Pacific Herring Spawn in Sitka Sound, Alaska, 2016*, ADF&G Technical Paper 435 (December 2017): the area has “dependable spawn, good quality substrate, and somewhat protected waters – all factors that contribute to the area’s importance for the subsistence harvest.” BOF 3881. This technical report also appears at ADFG 2189-2235; the Alliance will use the BOF cite.

¹⁴ See Record Copy (RC) 99, at BOF 475-79.

¹⁵ BOF 478-79.

¹⁶ BOF 5111-12 (Tr. 4-8). The excerpt of proceedings for the January 2002 meeting (BOF 5110-21) is a condensed transcript. References to this transcript will include the Bates number, with an added parenthetical that cites the specific page(s) of the transcript, where appropriate.

¹⁷ BOF 5111 (Tr. 4-5)

¹⁸ *Id.*

that the key to a successful subsistence harvest was coordination and dissemination of information – “especially” from aerial surveys and as gathered from vessels on the water and other subsistence users – so that subsistence harvesters could “react in a very timely manner” and “be ready to move in a very rapid manner,” thus increasing their odds of success in meeting their needs.¹⁹ He also summarized the committee’s discussion about the effect of weather on the subsistence harvest and the quality of herring roe.

The Board next heard from member Coffey, who had also been on the committee. Coffey first discussed the proposed permitting requirement in the draft plan.²⁰ The Tribe vigorously opposed a permit requirement, preferring instead a post-season survey and harvest monitoring program.²¹ A representative of the ADF&G Division of Subsistence, Mike Turek, agreed that a post-season survey might produce better information, but the Director of Commercial Fisheries, Doug Mecum, later clarified that ADF&G wanted to do both, in part because a permit system would “identify the population you’re sampling from.”²² Coffey moved to delete the permitting requirement in favor of the survey methodology favored by the Tribe, a

¹⁹ *Id.* (Tr. 6).

²⁰ BOF 5112-13 (Tr. 9-10).

²¹ *See* RC 131, at BOF 585-87. Board member Coffey referenced this RC in his comments. BOF 5113 (Tr. 10 and 12). The Tribe has continued to oppose implementation of a permit requirement for the subsistence fishery in Sitka Sound. *See, e.g.*, RC 238 (2009), at BOF 1925, commenting on Proposal 235 (BOF 808).

²² BOF 5114 (Tr. 14-15).

motion that was opposed by Board member Miller.²³ This amendment to delete the permit requirement passed on a vote of 5 in favor and 2 against.²⁴

Coffey then turned to language of the draft plan pertaining to dispersal of the fleet away from subsistence harvest areas.²⁵ A concern was expressed whether the language presented was consistent with the subsistence priority. The result was approval of an amendment to substitute the words “if necessary” for “to the extent practicable.”²⁶ The mark-up of the draft plan indicates that this amendment (number C) was “done for clarity.”²⁷

Finally, the Board addressed the question of a memorandum of understanding to formalize procedures for collaborative management.²⁸ Coffey referred to the ongoing discussions between the Tribe and ADF&G on this subject, and said that the question for the Board was whether to incorporate the proposed process into the regulation or leave it to a memorandum of understanding.²⁹ Coffey indicated that the committee preferred the latter, emphasizing that the consultative process did not require in-season action by ADF&G.³⁰ Rather,

²³ BOF 5112-13 (Tr. 11-13).

²⁴ BOF 5114 (Tr. 16).

²⁵ BOF 5115.

²⁶ *Id.*

²⁷ BOF 70-71.

²⁸ BOF 5115-16 (Tr. 21-23).

²⁹ *Id.* In his remarks, Coffey referenced a letter from ADF&G, but gave two different dates, September 17 and October 17, 2001. The latter date is clearly correct. *See* BOF 230-31.

³⁰ *Id.*

the Board’s intent was to “formalize the consultative – a pre-season relationship between the department and the tribe;” it is a process “which allows for public input early in the season;” but “they’re not under the gun in-season;” “[n]othing in this is intended to, in any manner, diminish the authority of the department to manage in-season.”³¹ Coffey also expressed that the collaborative relationship should include representatives of the commercial fishery and be open to non-tribal subsistence users.³²

The plan as adopted by the Board included the following subsection (3):

In managing the Sitka Sound commercial sac roe herring fishery the department shall

(3) recognize that quality and quantity of herring roe on branches and herring sac roe is an important consideration in the management of the subsistence and commercial sac roe fisheries.³³

The post-meeting summary of the Board’s action on Proposal 500 reflected this concept of recognizing that quality and quantity of herring roe is “an important consideration.”³⁴ As such, this language was in effect a finding or statement of purpose and did not create an affirmative obligation for ADF&G. When 5 AAC 27.195 was codified, however, this language was revised and renumbered to read:

(b) In addition the provisions of (a) of this section, the department shall consider the quality and quantity of herring spawn on branches, kelp, and seaweed, and herring sac roe when making management decisions regarding the subsistence herring spawn and commercial sac roe fisheries in Section 13-B north of the latitude of Aspid Cape.

³¹ *Id.*

³² *Id.* (Tr. 22).

³³ BOF 70.

³⁴ BOF 64.

The ARs do not indicate when this revision was made, or who made it, but it is reasonable to assume that it was done either by the ADF&G regulations specialist or a regulations attorney in the Department of Law, both of whom likely would have reviewed the proposed regulation before it was published, and whose job it was to assure that regulations are in proper language and form, in compliance with the drafting manual for administrative regulations.³⁵ The Tribe has argued that 5 AAC 27.195(b) “creates a mandatory command,” and that the Board intended for quality and quantity to be a factor “that ADFG *must* consider” when making management decisions.³⁶ The language actually adopted by the Board does not support that interpretation.

3. Memorandum of Agreement.

After the Board meeting, ADF&G and the Tribe worked to develop the memorandum of understanding envisioned by the Board. The result was a Memorandum of Agreement between the Sitka Tribe of Alaska and the State of Alaska Department of Fish and Game (the “MOA”).³⁷ This MOA was signed by ADF&G Commissioner Rue and a Tribal vice chairman on November 4, 2002, and endorsed by Board chair Ed Dersham on December 17, 2002.³⁸

³⁵ See AS 44.62.060 and .125. 5 AAC 27.195 was published in Register 162 (2002) with an effective date of April 14, 2002, only three months after the Board adopted the plan. See Attachment 1 hereto. As codified, the language of 5 AAC 27.195(a)(1) and (2) was also slightly modified from what the Board actually adopted.

³⁶ See Sitka Tribe of Alaska’s Reply in Support of Motion for Preliminary Injunction, dated February 11, 2019, at 4-5 (emphasis in original).

³⁷ ADFG 2696-2700. The MOA was assigned Board finding number 2002-220-FB.

³⁸ ADFG 2700.

The MOA speaks for itself, but some portions warrant comment as they bear on the interpretation of 5 AAC 27.195. First, the MOA reflects the management plan language as adopted by the Board regarding distribution of the commercial harvest and recognizing that quality and quantity of herring roe is an important consideration.³⁹ Nowhere in the MOA is there any provision for ADF&G to assess the quantity and quality of subsistence herring roe and then use that information during the season. Second, the MOA establishes a process for consultation between ADF&G and the Tribe both preseason and in-season.⁴⁰ A central aspect of this process was making sure that the Tribe was provided timely information regarding commercial fishing, including the times and locations of test fisheries and when the commercial fleet was placed on two-hour notice.⁴¹ Third, the MOA provided the Tribe an opportunity to voice concerns if they believed that an opening might negatively affect subsistence harvesters, but did not otherwise discuss how ADF&G would distribute the commercial harvest by time and area. Finally, the MOA addressed data gathering and implementation of a traditional harvest monitoring program.⁴² These provisions make it clear that harvest monitoring was primarily a post-season process, consistent with the Board's understanding.

One thing the MOA failed to do was incorporate the Board's intent that representatives from the commercial fishery and non-tribal subsistence users be included in the collaborative process. In 2009, ADF&G recognized that the MOA had created a perception that the Tribe

³⁹ ADFG 2696.

⁴⁰ ADFG 2697-98.

⁴¹ *Id.*

⁴² ADFG 2698-99.

“had access to information and input into the decision-making process that are not readily available to the general public and other user groups,” and on that basis, terminated the MOA.⁴³ ADF&G stated that it intended to continue managing commercial and subsistence herring fisheries in Sitka Sound “in close communication with all user groups and provide for the subsistence priority” pursuant to Board regulations, and reiterated the importance of cooperative efforts by the Tribe and ADF&G to implement an effective harvest monitoring program.⁴⁴

4. Closure of the Core Area.

As discussed above, the Tribe’s Proposal 500 (2002) sought to disperse commercial effort away from areas where herring eggs had traditionally been harvested. This focus on traditional harvest areas, also called the “core area,” is significant in relation to Board actions in 2012 and 2018 which closed this area to commercial fishing.⁴⁵ In 2012, the Board closed an approximately 10-square mile area to the commercial sac roe fishery, and in January 2018 the Board expanded this closure by an additional 4 square miles.⁴⁶ The latter decision was made during the Board’s deliberations on three proposals, numbers 104-106, that were submitted by the Alliance and the Tribe.⁴⁷ This closure was in addition to a closure to commercial fishing in

⁴³ See Letter to Tribal Chair Lawrence Widmark from ADF&G Commissioner Denby Lloyd, dated May 7, 2009. ADFG 2706.

⁴⁴ *Id.*

⁴⁵ See RC 2 (2018), ADF&G Staff Comments, Regional Information Report 1J17-12, at BOF 3784-90.

⁴⁶ *Id.*

⁴⁷ *Id.* The location of these closed areas is depicted in Figures 104-1 (BOF 3786) and 105-1 (BOF 3790). Figure 104-1 shows the extent of the 2012 closure; Figure 105-1 indicates the areas that were covered by the Tribe’s proposals 105 and 106. The Board adopted the latter proposal (see BOF 3713), and thus the depiction of “Proposal 106 herring closed waters” on Figure 105-1

Federal waters around Makhnati Island that was promulgated in 2015.⁴⁸ The combined effect of these closures is that the traditional subsistence harvest areas for which the Tribe sought protection in 2002, including the waters around Middle, Crow, and Kasiana Islands, are now closed to commercial fishing for herring. The operative effect of the language in 5 AAC 27.195(a)(2) – that ADF&G distribute the commercial harvest by fishing time and area if it determines that such action is necessary to ensure a reasonable opportunity for subsistence harvesters – has been substantially narrowed by the Board’s subsequent action in closing the core area.⁴⁹

B. Implementation of 5 AAC 27.195.

1. Distribution of the Commercial Harvest – 5 AAC 27.195(a)2).

Since 2002, ADF&G has regularly presented information to the Board regarding its efforts to distribute the commercial harvest away from traditional subsistence fishing areas. In 2012, for instance, in its comments on Proposals 238 and 239, which sought to close the core area to commercial fishing, ADF&G stated:

Since implementation of 5 AAC 27.195 in 2002, the department has made a concerted effort to disperse commercial herring sac roe harvesting opportunities away from the high-use subsistence areas. Prior to 2002, approximately 60 % of the total sac roe harvest occurred in the proposed closure area. Since 2002, commercial sac roe openings have

represents the waters currently closed to commercial fishing for herring under state regulations. Both figures also represent the number of households that reported harvesting subsistence herring spawn by general location, almost all of which are within the core area closure.

⁴⁸ See 50 C.F.R. 100.3(b)(5) and 100.27(e)(13)(xxi) (80 Fed. Reg. 28187 (May 2015)).

⁴⁹ The Alliance offers this limited discussion of the closure of the core area as it relates to ADF&G’s implementation of 5 AAC 27.195(a)(2). The Alliance will have more to say about these closures when it addresses the Tribe’s claim that the Board has failed to provide a reasonable opportunity for subsistence harvest of herring roe in Sitka Sound.

occurred in the proposed closure area in five of the last 10 years, accounting for approximately 20 % of the total sac roe harvest during this period.⁵⁰

This comment was reiterated by an ADF&G representative during Board deliberations on these proposals.⁵¹ Board member Jeffrey asked if the staff “purposely steer[ed]” the fleet away from the core area, referring to RC 14, which consisted of a series of maps depicting spawn locations and commercial openings.⁵² The ADF&G representative responded that ADF&G had “done its best,” and “certainly diligently look[s] for” opportunities outside the core area.⁵³

This topic came up again in 2018, in the context of proposals to reduce the harvest rate to 10 % (Proposals 98 and 99) and to expand the core area closure (Proposals 105 and 106).⁵⁴ Commercial Fisheries Director Scott Kelley addressed 5 AAC 27.195 and the requirement to distribute the commercial harvest by fishing time and area if ADF&G determined it was necessary to provide a reasonable opportunity for subsistence.⁵⁵ Board member Johnson asked how this was “manifest in the way the fishery was managed.”⁵⁶ Kelley referenced maps of spawn locations and commercial fishery openings that had been presented in an oral report by Kyle Herbert, ADF&G Regional Herring Supervisor, and said that ADF&G “deliberately” does

⁵⁰ See RC 2 (2012), ADF&G Staff Comments, Regional Information Report 1J12-01, at BOF 2049.

⁵¹ BOF 5036.

⁵² BOF 5051. RC 14 is at BOF 2893 – 2903.

⁵³ *Id.*

⁵⁴ See BOF 3741 and 3745-46.

⁵⁵ BOF at 5062-63.

⁵⁶ *Id.*

not take all of the herring in areas adjacent to the core area.⁵⁷ Kelley specifically referred to a commercial opening in Hayward Strait, “a fair distance away from Sitka and the commercial closed waters area.”⁵⁸

ADF&G Area Management Biologist Eric Coonradt, who is responsible for managing the Sitka Sound herring fisheries in-season and deciding when and where to open the commercial fishery (among other duties), provided further explanation during his deposition regarding implementation of 5 AAC 27.195(a)(2).⁵⁹ He said that he takes into account reasonable opportunity for subsistence by examining data to see if there is any correlation between the time and area of commercial openings and additional opportunity for subsistence users, but has generally concluded there is “little gain” to be had from delaying the commercial fishery.”⁶⁰ Coonradt said his strategy is to open the commercial fishery away from the closed core area “whenever we possibly can,” and specifically identified the 2017 opening in Hayward Strait rather than near Bieli Rock that was mentioned by Director Kelley in his remarks to the Board.⁶¹ Coonradt further testified that in 2018, he took into consideration where the majority of

⁵⁷ *Id.* The maps Kelley cited were in Mr. Hebert’s oral report, RC 3, Tab 22, at BOF 3852-53. These maps cover the years 2008 – 2017. A longer time series of similar charts, covering the years 1986 – 2017, appears at ADFG 2662-95.

⁵⁸ *Id.*

⁵⁹ *See* Deposition of Eric Coonradt, July 30, 2019 (“Coonradt Dep.”) at 30 – 33.

⁶⁰ *Id.*

⁶¹ *Id.* at 50 – 53.

subsistence branches were set, and said they looked to open the commercial fishery away from that area.⁶²

2. Consideration of Quality and Quantity of Herring Spawn and Herring Sac Roe – 5 AAC 27.195(b).

ADF&G's implementation of 5 AAC 27.195(b) has two basic components. First, is dissemination of timely information regarding the status of the herring stock as spawning nears, including information derived from aerial surveys, test fisheries, dive surveys, conversations with participants, and other sources.⁶³ Board member Umphenour emphasized, when he introduced the proposed 5 AAC 27.195, that the odds of a successful subsistence harvest would be improved if information on where herring were spawning was coordinated.⁶⁴

The second component is a post-season survey, which gathers data on a variety of aspects of the subsistence harvest, including the quantity and quality of herring roe harvested in the subsistence fishery.⁶⁵ The Tribe and ADF&G collaborate on the annual survey.⁶⁶ ADF&G is involved in design of the survey and provides technical assistance in data collection, and the Tribe conducts the majority of the household surveys.⁶⁷ Once ADF&G receives the raw data from the Tribe, its Division of Subsistence generates a report of the annual survey, a complex

⁶² *Id.* at 46-47.

⁶³ *See, e.g.*, Coonradt Dep. at 44-45, 90-91, and 127-130. *See also* ADFG 002-363 (ADF&G News Releases for the years 2004 – 2018).

⁶⁴ BOF 5115 (Tr. 6).

⁶⁵ *See* Sill and Cunningham (2017), at BOF 3865-70 and 3894 – 3902.

⁶⁶ *Id.* at 3865-66.

⁶⁷ *Id.*

process that can take more than a year to complete.⁶⁸ These reports are provided to the fishery managers, who review them to see if any trends can be detected that might assist them in managing for a successful subsistence harvest.⁶⁹

III. ARGUMENTS

Under Alaska Rule of Civil Procedure 56(c), summary judgment must be granted if a party can show “that there is no genuine issue as to any material fact and that [the] party is entitled to judgment as a matter of law.” The Alliance satisfies this test.

The Tribe asserts two claims against ADF&G in Count I of its complaint.⁷⁰ First, the Tribe alleges that ADF&G has failed to manage the Sitka Sound commercial and subsistence herring fisheries consistent with mandatory obligations under 5 AAC 27.195.⁷¹ The Tribe quotes subsection (a)(2) regarding the requirement to distribute the commercial harvest by fishing time and area if ADF&G determines this is necessary to ensure a reasonable opportunity for subsistence, but does not expressly identify subsection (b), which provides that ADF&G consider the quality and quantity of herring spawn on branches and herring sac roe when making management decisions. The Alliance will assume that this latter provision of the regulation is included in the Tribe’s allegation. The Tribe’s claim under 5 AAC 27.195 is based on an incorrect interpretation of that regulation, and also fails on the facts.

⁶⁸ See BOF at 3866-67; Deposition of Lauren Sill (“Sill Dep.”) at 49-51. Sill and Cunningham’s report on the 2016 subsistence survey was released in December 2017. BOF 3856. Their report on the 2017 subsistence survey was published in October 2019. ADFG 2711.

⁶⁹ Coodradt Dep. at 87 and 100-05.

⁷⁰ See STA Complaint, at 20-21 (¶¶ 72-74).

⁷¹ *Id.* (¶ 72).

Second, the Tribe alleges a more general claim that ADF&G has violated the subsistence priority statute, AS 16.05.258, because the agency has made the commercial harvest of herring sac roe the priority use of that resource.⁷² The Tribe alleges that ADF&G has ignored its legal responsibility to ensure that the commercial fishery does not interfere with or disrupt the arrival of spawning herring in sufficient numbers to meet their subsistence needs, and instead forces the Tribe to compete with the commercial fishery.⁷³ This claim fails both as a matter of law and factually.

A. 5 AAC 27.195.

The tribe's claims under 5 AAC 27.195 involve questions of interpretation. An agency's interpretation of its own regulations is reviewed under the reasonable basis standard and is entitled to deference unless plainly erroneous and inconsistent with the regulation.⁷⁴ Deference is particularly due for an agency's longstanding interpretation of a regulation.⁷⁵

1. Distribution of the Commercial Harvest – 5 AAC 27.195(a)(2).

The background discussion in section II.B.1 above demonstrates that ADF&G has diligently complied with 5 AAC 27.195(a)(2). It has moved commercial harvest opportunities away from the core area where the majority of subsistence users set their branches and where most of their harvest comes from. Prior to closure of the core area in 2012, the percentage of the

⁷² *Id.* (¶ 73).

⁷³ *Id.* (¶¶ 73-74).

⁷⁴ *See Simpson v. State, Commercial Fisheries Entry Commission*, 101 P.3d 605, 609 (Alaska 2004).

⁷⁵ *See Marathon Oil Co. v. State, DNR*, 254 P.3d 1078, 1085-86 (Alaska 2011).

commercial harvest taken in that area dropped substantially, from approximately 60 % to 20 %.⁷⁶ The Board clearly intended ADF&G to use its judgment in-season in determining if distribution of the commercial harvest by time and area was necessary to provide a reasonable opportunity for subsistence.⁷⁷ ADF&G has done so in good faith.

ADF&G's exercise of its judgment and discretion in 5 AAC 27.195(a)(2) should not be viewed in isolation, but must be examined in the context of its broader mandate for managing both the commercial and subsistence fisheries. A major element of this mandate is managing the commercial sac roe fishery to achieve the guideline harvest level (GHL). 5 AAC 27.195(a)(1) states that ADF&G shall "manage the fishery consistent with the applicable provisions of 5 AAC 27.160(g) and 5 AAC 27.190." The former of these regulations establishes the formula for setting the GHL; the latter specifies various management steps ADF&G should take in managing herring fisheries in Southeast Alaska. Nothing in 5 AAC 27.195(a)(2) suggests that the Board intended to override the directive in subsection (a)(1) that ADF&G manage the commercial fishery "consistent with" the regulations cited therein. The sac roe fishery is very important to the hundreds of people who participate in the fishery as vessel owners and crew, spotter pilots, tender operators, and processing workers, and provides substantial benefits to the economies of Sitka and Southeast Alaska.⁷⁸ The ARs provide no support for the proposition that the Board intended 5 AAC 27.195(a)(2) to fundamentally alter ADF&G's management of the commercial fishery.

⁷⁶ See notes 49 and 50, *supra* at 12-13, and accompanying text.

⁷⁷ BOF 5115 (Tr. 19-20).

⁷⁸ See SHCA PI Mem. at 4-8.

The central premise of the Tribe's allegation that ADF&G has failed to comply with 5 AAC 27.192(a)(2) is that "subsistence users have failed to harvest the amount necessary for subsistence uses [ANS] for most years over the past decade."⁷⁹ That may be so, but there is no evidence that this is a result of ADF&G's management of the commercial fishery. The GHL for the sac roe fishery is based on a harvest rate of 20 % (or less) of the harvestable surplus (the estimated biomass above the 25,000 ton threshold), which means that at least 80 % of that surplus is available for subsistence. This is in addition to the 5000 ton (10,000,000 lb.) increase to the threshold adopted by the Board in 2009, which the Tribe acknowledges was intended as a buffer for subsistence.⁸⁰ The ANS is only 1.36 – 2.27 % of this increase.

Other factors also inform ADF&G's exercise of its judgment and discretion in determining if distribution of the commercial fishery is necessary to ensure that subsistence users have a reasonable opportunity to harvest herring roe. First, ADF&G has not discerned any link between the timing and location the commercial fishery, or the amount of sac roe harvested, and the subsistence harvest.⁸¹ The only detectable trend is between declining participation and decreased harvest in the subsistence fishery.⁸² Second, many factors affect success in the subsistence fishery, including location, duration, and mileage of the spawn and weather.⁸³ Third,

⁷⁹ STA Complaint at 20 (¶ 72).

⁸⁰ See Plaintiff's Memorandum in Support of Motion for Preliminary Injunction, dated January 14, 2019, at 4, n. 14. See also Deposition of Sherri Dressel ("Dressel Dep.") at 37-39.

⁸¹ Coonradt Dep. at 32-33 and 119; Deposition of Kyle Hebert ("Hebert Dep.") at 87.

⁸² See Sill and Cunningham, ADF&G Tech Paper 435, at BOF 3881-83 (Discussion and Figure 6); Coonradt Dep. at 63 and 100-02.

⁸³ Sill, *id.*, at 3882 (discussing a study by Shewmake).

the fishery manager has observed a change in the way some subsistence users are operating.⁸⁴ Rather than waiting to see where herring actually spawn and heading to those areas, some harvesters are setting their branches in the traditional (core) area hoping that herring will spawn there, which they have not done recently. Subsistence users' preference for the core area is understandable, given that it has favorable conditions and is close to town, and because most of the subsistence harvest came from that area historically.⁸⁵ But if herring do not spawn in the core area, it is not surprising that the subsistence harvest has fallen short of the ANS. ADF&G's annual subsistence reports have stated that "a harvester's assessment of the length of the spawn and the quality of the season is more likely localized to areas accessible to that harvester and therefore may not be the same as the documented duration or total coverage of the spawn."⁸⁶ Mr. Coonradt testified that a better approach is to wait until spawning starts and then set branches where the spawn is occurring.⁸⁷ He has used this strategy for his personal subsistence fishing, and has had no problems harvesting herring roe in sufficient quantity and of good quality.⁸⁸ Finally, in the last few years, over 80 % of subsistence roe on branches has been harvested by a small number of community harvester boats.⁸⁹

⁸⁴ Coonradt Dep. at 112-13.

⁸⁵ Sill, *id.*, at BOF 3881-82.

⁸⁶ BOF 3882.

⁸⁷ Coonradt Dep. at 112-13 and 121.

⁸⁸ *Id.* at 111-12 and 118-19.

⁸⁹ See ADFG 2204 (2016), ADFG 2726 (2017), and ADFG 2775 (2018). The Alliance previously discussed the role of community harvester boats in the subsistence fishery. SHCA PI Mem. at 10. See also Sill Dep. at 147-53.

In short, whether distribution of the commercial fishery by fishing time and area is necessary to ensure a reasonable opportunity for subsistence is a question that presents a complex matrix of data and factors that ADF&G considers. ADF&G has fulfilled its responsibilities under 5 AAC 27.195(a)(2), and there is no evidence that the Board has expressed concern for or disagreement with the manner in which ADF&G has implemented this provision.

2. Consideration of Quantity and Quality of Herring Spawn and Herring Sac Roe – 5 AAC 27.195(b).

5 AAC 27.195(b) provides –

In addition to the provisions of (a) of this section, the department shall consider the quality and quantity of herring spawn on branches, kelp, and seaweed, and herring sac roe when making management decisions regarding the subsistence herring spawn and commercial sac roe fisheries in Section 13-B north of the latitude of Aspid Cape.

The Tribe has argued that this provision “creates a mandatory command” and that the Board intended for quality and quantity to be factors “that ADFG *must* consider” when making management decisions, including in-season.⁹⁰ Before turning to the merits of this argument, two threshold issues need to be addressed.

First, as discussed in section II.A.2, *supra* at 8-9, the language codified at 5 AAC 27.195(b) is not what the Board actually adopted. The Board intended instead that ADF&G “recognize that quality and quantity of herring roe on branches and herring sac roe is an important consideration in the management of the subsistence and commercial sac roe fisheries.” The provision adopted by the Board undercuts the Tribe’s contention that ADF&G must consider quantity and quality of herring roe on branches during the season.

⁹⁰ See Sitka Tribe of Alaska’s Reply in Support of Motion for Preliminary Injunction, dated February 11, 2019, at 4-5 (emphasis in original).

Second, this lawsuit is the first time the Tribe has advocated this interpretation of 5 AAC 27.195(b). The regulation was not mentioned in the Tribe’s written comments to the Board of Fisheries in January 2018.⁹¹ It was not discussed in the Tribe’s comments to the Board in October 2018 in support of ACR 10.⁹² The Tribe’s interpretation of 5 AAC 27.195 as creating a duty to assess the quality of herring spawn on branches in-season has surfaced for the first time in this litigation and should be accorded little weight.

Turning to the merits, the background discussion in section II.B.2, *supra*, at 15-16, shows that ADF&G’s implementation of 5 AAC 27.195(b) has two elements. One is an in-season process for gathering data on the impending herring spawn, which information is then disseminated to all interested parties, including subsistence harvesters. The Board specifically recognized that getting timely information to subsistence harvesters – particularly on the location of the spawn – would allow them to react quickly and thereby increase their chances of a successful harvest. The data gathered by ADF&G includes the movement of herring, the size of schools, the location of the spawn, and the quality of mature herring roe, among other things. The ADF&G fishery manager considers this information “pertinent to both fisheries.”⁹³

⁹¹ See Public Comment 147 (2018), at BOF 4254 – 66. The Tribe’s comments in prior years likewise do not assert the interpretation of 5 AAC 27.195(b) they advocate here. See, e.g., RC 118 (2009), at BOF 1569-70; RC 121 (2009), at BOF 1581-90; and RC 29 (2015), at BOF 3603-06.

⁹² See Public Comment 183 (2018), at BOF 4835 – 38. ACR 10 is at BOF 4668 – 69. This ACR was submitted by Louise Brady, one of the Tribe’s affiants at the preliminary injunction stage. The ACR sought to completely close the commercial sac roe fishery in Sitka Sound until the ANS was achieved for three consecutive years.

⁹³ Coonradt Dep. at 19 and 44-45.

The second element is the post-season survey. This survey is a joint effort between the Tribe and ADF&G, and clearly includes collecting information on the quantity and quality of herring roe on branches harvested by subsistence users.⁹⁴ ADF&G prepares annual reports of each annual survey, which are then provided to both the fishery managers and to the Board.⁹⁵ The Board has never expressed any concern that this post-season survey in any way fails to implement its intent that the quantity and quality of herring roe be considered in the management process.

The crux of the Tribe's complaint under 5 AAC 27.195(b) appears to be that ADF&G does not collect data in-season regarding the quality of herring roe on branches and then immediately incorporate that information into its management decisions.⁹⁶ There are a number of reasons for this.

One is the timing of the two fisheries. The commercial sac roe fishery, by its very nature, primarily occurs before the herring spawn. The harvest of roe on branches obviously takes place after the herring have begun spawning. Even if ADF&G had some mechanism for assessing the quality of roe on branches – which it does not – that information would not be available until after the commercial fishery has largely concluded.

Another is that ADF&G does not have the tools it would need to make the assessments the Tribe contends are necessary. The Tribe has vigorously resisted implementation of a permit requirement, and thus ADF&G does not know who is participating in the subsistence fishery in

⁹⁴ See note 65, *supra*, at 15.

⁹⁵ See note 69, *supra*, at 16. See also BOF 2781-97 (Holen, et al., (2011)); BOF 3414-57 (Sill and Lemons (2015)); BOF 3856-91 (Sill and Cunningham (2017)).

⁹⁶ See Coonradt Dep. at 88-90.

any given season.⁹⁷ Nor does the harvest survey systematically document subsistence harvest by location, which means that ADF&G does not know where the most productive harvest per unit effort occurs.⁹⁸ The Tribe has resisted providing data on specific harvest locations to ADF&G.⁹⁹

Most importantly, ADF&G does not attempt to assess the quality of herring roe on branches in-season because this is not something the Board directed it to do. As discussed in background section II.A.2, *supra* at 4-9, the Board intended that ADF&G recognize that quality and quantity of herring roe on branches and herring sac roe is an important consideration in management of the fisheries, but that this did not put ADF&G “under the gun in-season.”¹⁰⁰ ADF&G has faithfully interpreted and implemented 5 AAC 27.195(b) consistent with the Board’s intent.

B. The Subsistence Priority – A.S. 16.05.258.

The subsistence priority is prescribed in AS 16.05.258. This statute is directed at the Board of Fisheries and the Board of Game, and is primarily implemented through rule-making by the respective boards. The Tribe claims that the Board of Fisheries has violated this statute in several respects, but that question is reserved for subsequent briefing and is not at issue here. The only question at this point in the case is whether ADF&G has violated the statute.

⁹⁷ See notes 20-23, *supra*, at 6-7, and accompanying text.

⁹⁸ See Sill and Cunningham (2017), at BOF 3881. The only report ADF&G gets on the amount of harvest by location is from the Alliance’s community harvester boat. *Id.* See also Sill and Lemons (2015), at BOF 3441, discussing the difficulties in using catch per unit effort (CPUE) as a metric in the subsistence fishery.

⁹⁹ See Holen, et al., *The Subsistence Harvest of Herring Spawn in Sitka, Alaska, 2002-2010*, ADF&G Technical Paper 343 (November 2011), at 2755. This report also appears at ADFG 2083-2144.

¹⁰⁰ BOF at 5116 (Tr. 23).

The commissioner of ADF&G is required, in AS 16.05.258(a), to provide recommendations to the boards concerning identification of fish stocks and game populations, but otherwise has no direct responsibilities under this statute. The commissioner of ADF&G is vested with a broad spectrum of powers and duties in AS 16.05.050. The subsistence priority is not mentioned anywhere in this section. ADF&G has no independent statutory authority to implement the subsistence priority separate from that of the Board. The Board is required to adopt regulations that “provide a reasonable opportunity for subsistence uses,” AS 16.05.258(b)(1)(A). Board regulations are presumed to be valid.¹⁰¹ If, as demonstrated in the preceding section, ADF&G has complied with Board regulations intended to provide a reasonable opportunity for subsistence uses of herring in Sitka Sound, including 5 AAC 27.195, then *a fortiori*, ADF&G has fulfilled that obligation, too. The Tribe’s general claim that ADF&G has violated AS 16.05.258 fails as a matter of law.

The Tribe alleges that ADF&G has a “legal responsibility” to ensure that the commercial fishery, including test fisheries, “do not interfere or disrupt the arrival of spawning herring in the subsistence harvest area in sufficient numbers to meet STA subsistence needs, including sufficient numbers of the larger, older females with superior quantity and quality of roe.”¹⁰² The Tribe thus posits a duty on the part of ADF&G to guarantee that ANS is met and that the herring roe harvested for subsistence meet their standards of quality. No such legal obligations exist, either in statute or in regulations promulgated by the Board. AS 16.05.258(f) defines

¹⁰¹ AS 44.62.100. *See Native Village of Elim v. State*, 990 P.2d 1, 14 (Alaska 1999); *Koyukuk River Basin Moose Co-Management Team v. Board of Game*, 76 P.3d 383, 386-87 (Alaska 2003).

¹⁰² STA Complaint at 21 (¶ 73).

“reasonable opportunity” as an opportunity “that provides a normally diligent participant with a reasonable expectation of success of taking fish and game.” The statute does not guarantee that ANS will be achieved. The subsistence herring fishery is unrestricted, and there are no regulatory impediments to participation in the fishery. The decrease in the amount of herring harvested for subsistence is primarily a function of a decline in participation, not lack of reasonable opportunity. Nor does the statute say anything about assuring subsistence users that the fish they harvest will meet their standards of quality. The Tribe argued in its opening preliminary injunction brief that the herring eggs its members have been able to harvest in recent years are of poor quality.¹⁰³ The Tribe said that the “essence” of its case is that there is “not enough quality herring roe to provide for ANS and to meet the GHL.”¹⁰⁴ This is a question for the Board to address, not this court.

The Tribe’s general claim against ADF&G also fails factually. ADF&G has not made harvesting the GHL in the sac roe fishery the priority use of the herring resource, but has acted in good faith to implement the subsistence priority as embodied in regulations adopted by the Board, including 5 AAC 27.195. Nor has ADF&G forced subsistence users to compete with the commercial fishery for opportunity to harvest herring. The two fisheries are for the most part separated in time and area. The GHL for the commercial fishery is set based on a harvest rate of 20 % or less of the harvestable surplus, which means the 80 % or more of the harvestable surplus is available to subsistence harvesters. The theory of forced competition is an illusion.

¹⁰³ See Plaintiff’s Memorandum in Support of Motion for Preliminary Injunction, dated January 14, 2019, at 15-17.

¹⁰⁴ *Id.* at 43.

IV. CONCLUSION

For the reasons set forth above, the Alliance requests that the court grant the Alliance's motion and enter summary judgment denying the Tribe's claims that ADF&G has violated AS 16.05.258 and 5 AAC 27.195.

Dated this 27th day of November, 2019.

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