IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT JUNEAU

SITKA TRIBE OF ALASKA, Plaintiff, vs. STATE OF ALASKA, DEPARTMENT OF FISH AND GAME, and the ALASKA BOARD OF FISHERIES, Defendant, And SOUTHEAST HERRING CONSERVATION ALLIANCE, Defendant-Intervenor.	)	Case No. 1SI-18-212CI **ORDER RE: CROSS-MOTIONS FOR SUMMARY JUDGMENT**[1]

On September 1, 2020, Plaintiff Sitka Tribe of Alaska ("STA") filed a motion for summary judgment on Count II of its complaint regarding constitutional claims. Defendant-intervenor Southeast Herring Conservation Alliance ("SHCA") filed an opposition and cross-motion for summary judgment on October 1, 2020, followed by the Alaska Department of Fish and Game ("ADF&G") filing its own opposition and cross-motion for summary judgment on October 2, 2020. Briefing is complete and oral argument was held on January 14, 2021.

Summary judgment is appropriate if there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law.[2]

[1] Case Motions #30, #31, and #32.

[2] *Mitchell v. Teck Cominco Alaska Inc.*, 193 P.3d 751, 757 (Alaska 2008) (citing *Miller v. Safeway, Inc.*, 170 P.3d 655, 658 (Alaska 2007)).

All factual inferences are drawn in favor of the non-moving party, and the existence of a dispute regarding any material fact precludes summary judgment.[3] Here, all parties agree that there are no material facts in dispute and that summary judgment is appropriate as to the constitutional issues in Count II of STA's complaint.

STA asks the court to hold: (1) that ADF&G has independent duties under the Alaska Constitution, (2) that those duties include an implied requirement to use the best available information ("BAI") under the Common Use and Sustained Yield Clauses of the Alaska Constitution, and (3) that ADF&G failed to use and provide BAI between January 2018 and October 2019 when consulting with the Alaska Board of Fisheries ("BOF") regarding herring roe fisheries. SHCA and ADF&G share similar positions in their opposition and cross-motions and they will be addressed together for the sake of efficiency. They argue that STA's claim is moot, that the Constitution does not expressly or impliedly require BAI, that such a requirement would be non-justiciable, and that STA has failed to show that ADF&G did not use BAI.

A. Mootness

A court should generally refrain from deciding issues where the facts have rendered the legal issues moot.[4] A claim is moot if it has lost its character as a present, live controversy.[5] Because ADF&G has already provided its recommendations and information as to the 2018 and 2019 seasons to the BOF, STA's arguments as to those seasons are moot. Nevertheless, a court may choose to address moot issues if they fall under the public interest

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[3] *Meyer v. State, Dep't of Revenue, Child Support Enforcement Div., ex rel. N.G.T.*, 994 P.2d 365, 367 (Alaska 1999).

[4] *Kodiak Seafood Processors Ass'n v. State*, 900 P.2d 1191, 1195 (Alaska 1995) (citing *Brandon v. Dep't of Corrections*, 865 P.2d 87, 92 n. 6 (Alaska 1993)).

[5] *Id.* (citing *Keven v. Yukon-Koyukuk Sch. Dist.*, 853 P.2d 518, 523 (Alaska 1993)).

exception to the mootness doctrine.[6] In deciding to apply the public interest exception, a court must consider three main factors: (1) whether the disputed issues are capable of repetition; (2) whether the mootness doctrine, if applied, would cause review of the issues to be repeatedly circumvented; and (3) whether the issues presented are so important to the public interest as to justify overriding the doctrine.[7]

Although the 2018 and 2019 herring roe seasons are over, BOF is under statutory obligation to hold meetings at least once a year[8] to discuss the conservation and development of the state's fishery resources,[9] including subsistence use and allocation.[10] In making these determinations, BOF relies on ADF&G to provide recommendations, evaluations, and reports.[11] This relationship is statutorily mandated and therefore will continue into the foreseeable future, thereby making STA's asserted claims capable of repetition, thus satisfying the first element of the public interest exception.

As noted by STA, were the court to apply the mootness doctrine here, the issue would likely be repeatedly circumvented, as a challenger could only raise concern after ADF&G has provided its information to BOF.[12] Also, any challenger would not know what, if any, other information ADF&G chose to withhold, thereby preventing the challenger from knowing whether BAI was used. Because challengers would not be able to bring suit challenging purported violations until after the fact, the mootness doctrine would

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[6] *Id.* at 1196.
[7] *Id.* (citing *Peloza v. Freas*, 871 P.2d 687, 688 (Alaska 1994)).
[8] AS 16.05.300.
[9] AS 16.05.221.
[10] AS 16.05.258.
[11] *See, e.g., id.*; AS 16.05.094.
[12] STA's Opposition to the State's & SHCA's Cross-Motions for Summary Judgment & Reply in Support of STA's Cross-Motion for Summary Judgment Re: Constitutional Claims, October 26, 2020, at 28.

repeatedly apply thereby allowing the issue to circumvent judicial review—satisfying the second element of the public interest exception.

Lastly, the issue before the court could have wide ranging effects, not only on the specific herring roe fishery that the current litigation focuses on, but on all fisheries around the State. Similarly, the constitutional duty STA asks the court to find would presumably apply to any Alaska state agency action that involves the Common Use or Sustained Yield clauses. Such constitutional interpretation would certainly affect not only tribal uses of the State's resources, but the State's commercial economy as well. This is of sufficient public interest to satisfy the third element of the exception. Therefore, the court applies the public interest doctrine exception to STA's claim rather than dismiss it as moot.

B. Constitutional Requirements

1. The Constitution Applies to ADF&G.

Neither the State nor SHCA make specific arguments against the idea that ADF&G is subject to constitutional provisions, so the court will treat STA's first argument as admitted.[13] The next question is what duties those constitutional provisions place upon ADF&G.

2. The Court Finds No BAI Requirement In the Common Use and Sustained Yield Clauses of the Alaska Constitution.

The crux of STA's argument is that the Common Use and Sustained Yield Clauses of "the Alaska Constitution requires ADF&G to use the best available information when providing reports, recommendations, and advice to [BOF]."[14] When interpreting the Constitution, we first "look to the plain

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[13] *See also O'Leary v. Superior Court, Third Judicial Dist.*, 816 P.2d 163, 173 (Alaska 1991) (citing *Malone v. Meekins*, 650 P.2d 351, 356 (Alaska 1982)) ("The courts of the state of Alaska have the constitutional duty to review actions by agencies of the state in order to ensure compliance with all provisions of the Alaska Constitution.")).

[14] *Sitka Tribe of Alaska's Motion and Memorandum in Support of Summary Judgment Re: Constitutional Claims*, September 1, 2020, at 6.

meaning and purpose of the provision and the intent of the framers."[15] Absent an indication that the term or provision at issue has acquired a particular meaning by statutory definition or judicial construction, the court defers to the meaning the drafters placed on the provision without adding missing terms or interpreting existing language more broadly than intended by the voters.[16] The terms and phrases chosen by the framers are given their ordinary meaning as they were understood at the time of drafting,[17] and should be read in conjunction with Constitution's other provisions.[18] The court has no power to rewrite constitutional provisions, no matter how clearly advantageous and publicly supported a policy may appear to be.[19]

It is clear that the Constitution does not explicitly require the use of BAI, as no such language—or even similar language—is found in its text. Nor could the court find any Alaska case law that has recognized such an implied constitutional duty. As such, the court must look to the framers to see whether they intended to create such a duty.

The Common Use Clause states: "Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use."[20] At the 1955 Constitutional Convention there was only limited discussion regarding common use, focusing on forbidding exclusive rights and special privileges to fisheries, hunting, and prospecting.[21] This intent has been recognized by both academics as well as Alaska courts who have analyzed the

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[15] *Wielechowski v. State*, 403 P.3d 1141, 1146 (Alaska 2017) (quoting *Hickel v. Cowper*, 874 P.2d 922, 926 (Alaska 1994)).
[16] *Wielechowski v. State*, 403 P.3d 1141, 1146–47 (Alaska 2017) quoting *Hickel v. Cowper*, 874 P.2d 922, 926–27 (Alaska 1994)).
[17] *Forrer v. State*, 471 P.3d 569, 585 (Alaska 2020) (citing *Hickel v. Cowper*, 874 P.2d 922, 926 (Alaska 1994)).
[18] *Forrer v. State*, 471 P.3d 569, 585 (Alaska 2020) (citing *Rydwell v. Anchorage Sch. Dist.*, 864 P.2d 526, 528 (Alaska 1993)).
[19] *Forrer v. State*, 741 P.3d 569, 590 (Alaska 2020).
[20] Alaska Const. art. VIII, § 3.
[21] *See* Constitutional Convention, at 2453–563.

Common Use Clause—in conjunction with section 15, "No Exclusive Right of Fishery," and section 17, "Uniform Application" of Article VIII—and it has been determined that it acts as the equal access clause of the constitution and works to prohibit the State from granting any person or group any privileged or monopolistic access to the wild fish, game, waters, or lands of Alaska.[22]

STA does not argue that they are being denied equal access or that the State has attempted to establish exclusive privileges in Alaska's herring roe fishery, rather they are concerned about what information ADF&G provides to BOF. Neither its plain language, the apparent intent of the drafters, nor any reasonable interpretation of the Common Use Clause provide for a requirement to use BAI under this section of the constitution. As such, the court declines to find support for STA's arguments as to the Common Use Clause.

The Sustained Yield Clause states: "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."[23] Much like the Common Use Clause, discussion of Sustained Yield Clause was relatively brief at the Constitutional Convention. One of the first concerns raised was to ensure that the clause would apply to the State's fisheries.[24] The discussion continued, noting that it would be up to the legislature "to set up an administrative agency which in turn would conduct biological studies and meet with the fishermen in the establishment of regulations, seasons, and that sort of thing[,]"[25] and

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[22] *Alaska Fish & Wildlife Conservation Fund v. State*, 347 P.3d 97, 102 (Alaska 2015); *see also* Gerald A. McBeath, *The Alaska State Constitution: A Reference Guide* 150 (G. Alan Tarr 1997); Gordon Harrison, *Alaska's Constitution: A Citizen's Guide* 132 (Alaska Legislative Affairs Agency, 5th ed. 2018).
[23] Alaska Const. art. VIII, § 4.
[24] Constitutional Convention, at 1108.
[25] Constitutional Convention, at 1108.

recognizing that a more strict application of the doctrine may be applied to forestry, while fisheries would use less specific "principles of management."[26] The drafters also chose to include the final phrase relating to beneficial uses, finding that it had "particular application to the sustained yield principle" and that without it, the clause would be "somewhat meaningless and ineffective."[27]

This clause has generally been interpreted to ensure that the harvesting of renewable resources, such as fisheries, does not endanger resources' survival,[28] i.e. that the annual harvest "should not exceed the annual regeneration of that resource."[29] Its "primary purpose is to balance maximum use of natural resources with their continued availability to future generations."[30] It should be consciously applied "insofar as practicable" as a "principle of management intended to sustain the yield of the resources being managed"[31] while recognizing the "considerable discretion" available to agencies in developing policies that comply with the clause.[32] However, nothing in the clause's language or in the discussions held at the Constitutional Convention indicates any intent to require the use of BAI or its equivalent.

Alaska courts have been hesitant to find implied concepts in the constitution and have regularly declined to do so.[33] Although STA cites to

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[26] Constitutional Convention, at 2456–57.
[27] Constitutional Convention, at 3054.
[28] Gerald A. McBeath, *The Alaska State Constitution: A Reference Guide* 153 (G. Alan Tarr 1997).
[29] Gordon Harrison, *Alaska's Constitution: A Citizen's Guide* 134 (Alaska Legislative Affairs Agency, 5th ed. 2018).
[30] *West v. State, Bd. of Game*, 248 P.3d 689, 696 (Alaska 2010) (quoting The Alaska Constitutional Convention, Proposed Constitution for the State of Alaska: A Report to the People of Alaska (1956)).
[31] *Native Vill. of Elim v. State*, 990 P.2d 1, 7 (Alaska 1999) (quoting *Papers of Alaska Constitutional Convention, 1955–1956*, Folder 210, Terms).
[32] *Id.* at 9.
[33] *See, e.g.*, *Abood v. League of Women Voters of Alaska*, 743 P.2d 333, 334 (Alaska 1987) (no implied right of public access to legislative committee or caucus meetings under the Alaska Constitution); *Larson v. Cooper*, 90 P.3d 125, 133 (Alaska 2004) (no implied right to extend contact visits for maximum security prisoners or to preclude prisons from putting reasonable limits on contact visitation of maximum security prisons); *City of Douglas v. City & Borough of Juneau*, 484 P.2d 1040, 1044–45 (Alaska

multiple cases that address the use of BAI, none of them support the idea that its use is required under our Constitution. For example, many of the cited cases relate to federal law which specifically mandates the use of "best available science" or "best available scientific studies" under various federal acts.[34] Other cited cases do not even mention or address the concept of "best available information," focusing instead on agency decisions being "reasonable but not arbitrary," i.e. the hard look doctrine.[35]

Although there have been some Alaska court cases that use the language "best available," it is never in relation to the Constitution, let alone the Common Use or Sustained Yield Clauses. For example, in *Lakosh v. Alaska Department of Environmental Conservation* the Court discussed the use of "best available technology" in relation to explicit statutory and regulatory oil pollution control requirements.[36] In *Tulkisarmute Native Community Council v. Heinze*, the Court discusses the use of "best available data" as required by a water management regulation.[37] And in *Elsberry v. Elsberry*, the court cites a proposed order by the Child Support Enforcement Division that used the "best available information" to determine a parent's ability to pay child support.[38]

1971) (no implied requirement that cities not be dissolved in favor of boroughs); *Sampson v. State*, 31 P.3d 88, 98 (Alaska 2001) (no implied right to physician-assisted suicide).

[34] *See, e.g., San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971 (9th Cir. 2014) (challenge to the National Marine Fisheries Service's biological opinion under the ESA); *Lee v. U.S. Air Force*, 687 F.3d 1229 (10th Cir. 2004) (environmental impact statement challenge under the NEPA); Robert L. Glicksman, *Briding Data Gaps Through Modeling and Evaluation of Surrogates: Use of the Best Available Science to Protect Biological Diversity Under the National Forest Management Act*, 83 Ind. L.J. 465 (2008).

[35] *Alaska Ctr. for Env't v. Rue*, 95 P.3d 924, 926 (Alaska 2004); *Interior Alaska Airboat Ass'n, Inc. v. State, Bd. of Game*, 18 P.3d 686, 690 (Alaska 2001); *Native Vill. of Elim v. State*, 990 P.2d 1, 5 n. 15 (Alaska 1999) (briefly mentions "best available information" in a footnote citing a regulation which has since been amended to not use that language).

[36] *Lakosh v. Alaska Dep't of Envtl. Conservation*, 49 P.3d 1111 (Alaska 2002), *overturned on other grounds.*

[37] *Tulkisarmute Native Cmty. Council v. Heinze*, 898 P.2d 935, 939 (Alaska 1995).

[38] *Elsberry v. Elsberry*, 967 P.2d 1004, 1005 (Alaska 1998).

The only Alaska case that comes close to finding a BAI requirement in the Constitution is *Kanuk ex. Rel. Kanuk v. State, Department of Natural Resources.*[39] There, the Alaska Supreme Court considered an argument by a group of minors from communities across Alaska that the State was violating Article VIII of the Alaska Constitution by not using the "best available science" to mitigate climate change.[40] Noting that it lacked "the scientific, economic, and technological resources [that] an agency can utilize[,]" the Court held that the executive and legislative branches were the proper parties to determine what the "best available science" was and that such a claim was non-justiciable.[41]

The legislature has the knowledge and ability to draft statutes that would require the use of BAI, as evidenced by some of the cases cited above. The legislature has done so in the fields of oil pollution control,[42] power cost equalization,[43] educational technology regarding alcohol and drug related disability training,[44] and adoption of forest land use plans.[45] Similarly, Alaska agencies have created regulations requiring the use of BAI for oil discharge prevention,[46] to determine population criteria,[47] in regard to salmon fisheries,[48] for trout management,[49] in coal licensing,[50] and in water right applications.[51] The court must presume that the legislature intended every word, sentence, and provision of a statute to have some purpose, force, and effect, and that no

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[39] *Kanuk ex rel. Kanuk v. State, Dep't of Nat. Res.*, 335 P.3d 1088 (Alaska 2014).
[40] *Id.*
[41] *Id.* at 1098–99 (quoting *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410 (2011).
[42] AS 46.04.030.
[43] AS 42.45.130.
[44] AS 14.20.680.
[45] AS 38.05.112.
[46] 18 AAC 75.445.
[47] 3 AAC 304.905.
[48] 5 AAC 39.222.
[49] 5 AAC 75.222.
[50] 11 AAC 85.200.
[51] 11 AAC 93.040.

words or provisions are superfluous.[52] Statutes and regulations concerning renewable resources (i.e. forest land use, salmon fisheries, trout management, coal licensing, and water rights) would be unnecessary and redundant if BAI was already required by the Constitution, indicating an ongoing understanding of the absence of such a constitutional duty.

Neither its plain language, the apparent intent of the drafters, nor any reasonable interpretation of the Sustained Yield Clause provide for a requirement to use BAI under this section of the constitution. As such, the court declines to find support for STA's arguments as to the Sustained Yield Clause.

3. Even If There Were a BAI Requirement in the Constitution, It Would Be Non-justiciable.

Alaska has adopted the test for justiciability established by the United States Supreme Court in *Baker v. Carr*.[53] The test considers whether a case involves a political question by evaluating whether there are one or more elements "prominent on the surface."[54] Of the six elements listed, two are of particular relevance to the claims before the court: (1) delegation to a political department and (2) a lack of judicially discoverable and manageable standards. Satisfaction of either of these elements is enough to make the BAI issue a non-justiciable political question.

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[52] *Johnson v. State*, 380 P.3d 653, 656 (Alaska 2016) (quoting *Nelson v. Municipality of Anchorage*, 267 P.3d 636, 642 (Alaska 2011)).

[53] *Kanuk ex rel. Kanuk v. State, Dep't of Nat. Res.*, 335 P.3d 1088, 1096–97 (Alaska 2014) (citing *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

[54] *Kanuk ex rel. Kanuk v. State, Dep't of Nat. Res.*, 335 P.3d 1088, 1096–97 (Alaska 2014) (citing *Baker v. Carr*, 369 U.S. 186, 217 (1962)) ("(1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; or (2) a lack of judicially discoverable and manageable standards for resolving it; or (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or (4) the impossibility of a court undertaking an independent resolution without expressing lack of the respected due coordinate branches of government; or (5) an unusual need for unquestioning adherence to a political decision already made; or (6) the potential of embarrassment from multifarious pronouncements by various departments on one question.").

As noted above, the framers of the Alaska Constitution intended for the legislature to create executive agencies that would apply the sustained yield principles to fisheries, conduct biological studies, and establish regulations.[55] The legislature decided to give the ADF&G Commissioner the power and duty to "collect, classify, and disseminate statistics, data and information that, in the commissioner's discretion, will tend to promote the purposes of [the Fish & Game statutes.]"[56] Both the drafters and legislators understood this to be a delegation of fishery management to executive agencies who would be responsible for the interpretation and application of the sustained yield clause.

"We cannot say that an executive or legislative body that weighs the benefits and detriments to the public and then opts for an approach that differs from [a] plaintiffs' proposed 'best available science' would be wrong as a matter of law[.]"[57] The court may not commission scientific studies, convene groups of experts for advice, or issues rules under notice-and-comment procedures.[58] Rather, "[t]he 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[.]"[59] This prevents the court from discovering and managing BAI in a workable manner, thereby precluding the issue from judicial review.

STA tries to maneuver around the lack of judicially discoverable and manageable standards by defining BAI as simply "all of the relevant

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[55] Constitutional Convention, at 1108 and 2456–57.

[56] AS 16.05.050(a)(4); *cf. Lakosh v. Dep't of Envtl. Conservation*, 49 P.3d 1111, 1116 (Alaska 2002), *overturned due to legislative action* ("DEC's selection of a specific definition from among the many potentially encompassed within the general directive requiring 'best available technology' certainly involved the kind of technical expertise and experience that courts are ill-equipped to second guess. To the extent that DEC's definition of best available technology lies within the broad contours contemplated by the legislature, then, the agency's judgment deserves considerable deference.").

[57] *Kanuk ex rel. Kanuk v. State, Dep't of Nat. Res.*, 335 P.3d 1088, 1098 (Alaska 2014).

[58] *Kanuk ex rel. Kanuk v. State, Dep't of Nat. Res.*, 335 P.3d 1088, 1098–99 (Alaska 2014) (quoting *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 428 (2011)).

[59] *Kanuk ex rel. Kanuk v. State, Dep't of Nat. Res.*, 335 P.3d 1088, 1099 (Alaska 2014).

information."[60] However, this concept is associated with the hard look doctrine and is used to make sure agency action is not unreasonable or arbitrary.[61] There is 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 reason for not supplying certain reports—because they had not been completed in time for the meetings—is plausible.[62] Further, agencies are already under an obligation to act reasonably[63] and the court should refrain from ruling on constitutional grounds when narrower grounds are available.[64] Even if the court had found the Constitution's Sustained Yield or Common Use Clauses to have a BAI requirement, it is non-justiciable.

C. Conclusion

Much like the court's November 30, 2020 order on ADF&G's statutory obligation to consider herring roe quality on branches, kelp, and seaweed, the court finds that ADF&G has a constitutional duty to act in accordance with the Common Use and Sustained Yield Clauses. However, there is no explicit or implicit requirement that ADF&G use BAI to comply with these constitutional provisions. The methods by which ADF&G satisfies its constitutional mandates are within its discretion and are non-justiciable.

The constitutional issues raised in Count II of STA's complaint fall within the public interest exception to the mootness doctrine. But for the reasons set forth above, STA's motion for summary judgment is **DENIED**,[65]

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[60] Sitka Tribe of Alaska's Motion and Memorandum in Support of Summary Judgment Re: Constitutional Claims, September 1, 2020, at 27.
[61] *See Alaska Ctr. for the Env't v. Rue*, 95 P.3d 924 (Alaska 2004); *Interior Alaska Airboat Ass'n, Inc. v. State, Bd. of Game*, 18 P.3d 686 (Alaska 2001); *Tongass Sport Fishing Ass'n v. State*, 866 P.2d 1314 (Alaska 1994).
[62] *See, e.g.*, State of Alaska's Opposition to Motion for Summary Judgment Re: Constitutional Claims and Cross Motion for Summary Judgment, October 2, 2020, at 30–33.
[63] Alaska Administrative Procedure Act, AS 44.62.010 et seq.
[64] *Alaska Fish & Wildlife Conservation Fund v. State*, 347 P.3d 97, 102 (Alaska 2015).
[65] Case Motion #30.

and SHCA's and ADF&G's cross-motions for summary judgment are **GRANTED**.[66]

DATED this 19th day of March 2021 at Juneau, Alaska.

Daniel Schally
Superior Court Judge

[66] Case Motions #31 and #32.