

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

CHUITNA CITIZENS COALITION, et al,

Plaintiff,

vs.

ALASKA DEPARTMENT OF NATURAL
RESOURCES, et al,

Defendant.

Case No. 3AN-11-12094 CI

ORDER DIRECTING COMMISSIONER TO FINALIZE ADJUDICATIONS

In 2009 Chuitna Citizens Coalition ("Chuitna") applied for three instream flow reservations in stream 2003 for the protection of fish and wildlife. When DNR failed to adjudicate those applications, Chuitna filed this lawsuit in 2011. Eventually, on October 14, 2013 this court issued an Order Regarding Pending Motions and Cross-motions for Summary Judgment requiring DNR to begin adjudicating Chuitna's applications. The nature of Chuitna's applications and the history of this case to that point are set forth in this court's October 14, 2013 order.

Four and a half years later and nearly nine years after its first application was filed Chuitna still does not have final adjudications of its three applications. On November 3, 2017 Chuitna filed a Motion for Order Directing Commissioner to Finalize Adjudication. The relevant history of this case since the court issued its October 14, 2013 hearing is set forth in that motion, the pleadings related to

that motion and the exhibits attached thereto. The motion is now before the court.

On February 7, 2018 the court heard oral argument on the motion. Chuitna asked the court to require DNR to issue a final decision in 90 days. DNR, while arguing that the court did not have authority to require DNR to issue a final decision, indicated that if the court did require DNR to issue a decision by a specific date, DNR could do so by early June. On February 7, 2018¹ this court issued a short order deferring ruling on Chuitna's motion in light of the Commission's remand to the Division for further review and consideration dated December 4, 2017. In that order this court made clear that it was "operating on the representation of counsel for the State that if ordered to do so the Commissioner could issue a final decision in June 2018." The court also indicated that while the court then was not requiring the commissioner to issue a final decision by that date, the Department should not view the fact that the court had deferred ruling on Chuitna's motion as a basis for delaying prompt resolution of this matter. A status conference was scheduled for May 9, 2018 at which time the court expected to be informed on what progress had been made on the remand and when the commissioner expected to issue a final decision on Chuitna's application. In essence the court allowed DNR to proceed on its own, expecting that DNR would proceed in good faith to issue final adjudications.

¹ The Order is misdated as having been issued on January 7, 2018.
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Unfortunately, the court's trust in DNR appears to have been misplaced. At the May 9, 2018 hearing, counsel for DNR, would not specify what progress had been made in adjudicating Chuitna's applications. DNR was unable or unwilling to say when the adjudication would be finalized indicating "it could be tomorrow" but also indicating it might be as long as five years. DNR's position, as it has been since the case began, is that DNR alone will choose what application it processes and that this court has no authority to order it to process Chuitna's applications in a timely fashion. This attitude has resulted in applications that were filed in 2009 still not having been finally adjudicated and with no assurance when or if that will occur.

The court finds the delay in finally adjudicating Chuitna's applications to be unreasonable. And when faced with such unreasonable delay courts have the authority to order an agency to act and to set a deadline for doing so. *See e.g. Brandal v. State, Commercial Fisheries Entry Comm'n*, 128 P.3d 732, 739-40 (Alaska 2006). This can include an order for a decision by a date certain. *Id.* at 749 (citing *Cutler v. Hayes*, 818 F.2d 879, 985-96 n. 137 (D.C. Cir. 1987) (providing a list of cases in which courts have "intervened to compel an agency unreasonably delaying to speed up its activities" and imposing 30 and 60 day deadlines). *See also In Re: A Community Voice*, 878 F.3d 779 (9th Cir. 2017).

As stated in its October 13, 2013 order at 46, Chuitna has a due process right in having its applications promptly and fairly adjudicated. DNR's unreasonable delay in issuing final adjudications has violated that right without

any sufficient justification. And as demonstrated in its briefing, Chuitna is prejudiced by this delay. Without court intervention it is unclear that Chuitna's applications will ever be finally adjudicated.

The Department and the Commissioner are ordered to issue final adjudications of Chuitna's applications by June 30, 2018. A status conference is scheduled in this matter for July 11, 2018 at 3:30 p.m.

DATED at Anchorage, Alaska, this 10th day of May 2018.



MARK RINDNER
Superior Court Judge

*I certify that on May 10, 2018 a copy
was mailed to:*

Strong/Brown

AGO-Moore

Administrative Assistant