IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

CHUITNA CITIZENS COALITION and COOK INLETKEEPER,

Plaintiffs,

vs.

ALASKA DEPARTMENT OF NATURAL RESOURCES and DANIEL SULLIVAN, COMMISSIONER,

Defendants.

Case No. 3AN-11-12094CI

ORDER REGARDING PENDING MOTIONS AND CROSS-MOTIONS FOR SUMMARY JUDGMENT

In 2009, Chuitna Citizens Coalition applied for three instream flow reservations ("IFR") in Stream 2003 for the protection of fish and wildlife. The Alaska Department of Natural Resources has taken no action to adjudicate Chuitna's IFR applications since accepting them. DNR[1] has never adjudicated an IFR application from a private organization, despite adjudicating IFR applications from government organizations. DNR has also processed temporary water use permit ("TWUP") and appropriation applications from private organizations.

[1] The Court uses "DNR" to refer to the defendants collectively, unless otherwise indicated.

The parties have filed five summary judgment motions. Combined, they present the following issues: whether DNR's failure to adjudicate Chuitna's IFR applications while adjudicating government IFR applications and applications for TWUPs and other appropriations from non-governmental entities (1) violates the Alaska Constitution's protections for prior appropriators of surface and subsurface waters (Count 1); (2) violates the Alaska Constitution's Uniform Application Clause (Count 3); (3) violates statutory and regulatory provisions governing IFR applications (Count 4); (4) amounts to the unlawful or unreasonable withholding of agency action (Count 5); or (5) violates the Alaska Constitution's due process clause (Count 6). The Court hereby grants summary judgment to DNR on Counts 1, 3, and 4, and grants summary judgment to Chuitna on Counts 5 and 6 for the reasons discussed below.

Factual Background

The Alaska Water Use Act, AS 46.15.010-.270, generally governs use and ownership of public waters in Alaska. *See* AS 46.15.030. DNR is responsible for "determin[ing] and adjudicat[ing] rights in the water of the state." AS 46.15.010. The Water Use Act includes several mechanisms by which a private party may use and/or appropriate[2] public waters: TWUPs, appropriations,[3] and IFRs. AS 46.15.

[2] The Water Use Act broadly defines "appropriate" as "to divert, impound, or withdraw a quantity of water from a source of water, for beneficial use or to reserve water under AS 46.15.145." Thus, an IFR is considered an "appropriation" even though no water is physically removed from the stream.

[3] An appropriation, for the purposes of this order, means a water use that requires removing the water from its natural state, also known as an "out-of-stream" use.

I. TWUPs, Appropriations, and IFRs

TWUPs allow a permit holder to use "a significant amount of water"[4] for up to five years.[5] AS 46.15.155(a). TWUPs grant no water rights or priority and the water subject to a TWUP remains available for appropriation. AS 46.15.155(c); 11 AAC 93.210(b). DNR may impose "reasonable conditions or limitations" on a TWUP "to protect fish and wildlife . . ." AS 46.15.155(f). TWUP applications are not subject to public notice, but DNR must request comments from the Alaska Department of Fish and Game ("ADF&G") and the Department of Environmental Conservation. AS 46.15.155(d). A person who uses "a significant amount of water" without first obtaining a TWUP is guilty of a misdemeanor. AS 46.15.180(a)(1), (b).

Appropriations grant a certificate holder a full and permanent property right in a particular amount or flow of water. *Tulkisarmute Native Cmty. Council v. Heinze*, 898 P.2d 935, 942 (Alaska 1995). The party seeking an appropriation must first submit an application. AS 46.15.040(b). Appropriation applications are subject to public notice and comment. AS 46.15.133. If DNR approves the application, it issues a permit to appropriate. *Id.* DNR must consider a variety of

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[4] A "significant amount of water" is:

> (1) the consumptive use of more than 5,000 gallons of water from a single source in a single day; (2) the regularly daily or recurring consumptive use of more than 500 gpd from a single source for more than 10 days per calendar year; (3) the non-consumptive use of more than 30,000 gpd (0.05 cubic feet per second) from a single source; or (4) any water use that may adversely affect the water rights of other appropriators or the public interest.

11 AAC 93.035(a), (b).

[5] This may be extended for a second five-year period. 11 AAC 93.210(c).

criteria before issuing a permit. AS 46.15.080. One of those factors is "the effect on fish and game resources and on public recreational opportunities." AS 46.15.080(b)(3).

The appropriation permit allows the applicant to construct the means to appropriate the water and to begin using the water. 11 AAC 93.120(d). If the applicant does so and satisfies the conditions of the permit, it notifies DNR that it has perfected the appropriation. AS 46.15.120. If DNR confirms that the applicant has perfected the appropriation "in substantial accordance with the permit", DNR issues a certificate of appropriation. *Id.* DNR may place conditions on the certificate in order to protect those with senior rights to the water and the public interest. *Id.*[6] A person who "construct[s] works for an appropriation, or divert[s], impound[s], withdraw[s], or use[s] a significant amount of water . . . without a permit" is guilty of a misdemeanor. AS 46.15.180(a)(1), (b).

DNR also issues certificates of reservation, of which IFRs are one type. AS 46.15.145. IFRs may only be granted for the following reasons: "(1) protection of fish and wildlife habitat, migration, and propagation; (2) recreation and park purposes; (3) navigation and transportation purposes; and (4) sanitary

[6] AS 46.15.120 does not define what it means by the "public interest." However, AS 46.15.080(b), which relates to criteria for issuing a permit, indicates that one of the "public interests" DNR should consider in issuing permits is "the effect on fish and game resources." AS 46.15.080(b)(3). There does not appear to be any reason why DNR could not similarly condition a certificate to prevent adverse effects on fish and game resources under its general authority to place conditions on a certificate that are in the public interest.

and water quality purposes." AS 46.15.145(a)(1)-(a)(4).[7] DNR must find the following to approve the application:

> (1) the rights of prior appropriators will not be affected by the reservation; (2) the applicant has demonstrated that a need exists for the reservation; (3) there is unappropriated water in the stream or body of water sufficient for the reservation; and (4) the proposed reservation is in the public interest.

AS 46.15.145(c). The content of the application and the process it goes through are further defined by regulation. *See* 11 AAC 93.141-.147. This process can take several years. *See* 11 AAC 93.142(b)(4). If granted, the water subject to the IFR is no longer available for an appropriation or a TWUP. AS 46.15.145(d). DNR must review each IFR at least once every ten years after approval. AS 46.15.145(f).

Particularly important to this dispute is the language in AS 46.15.145(b) stating that "[u]pon receiving an application for [an IFR], the commissioner shall proceed in accordance with AS 46.15.133." AS 46.15.133 requires DNR to prepare and publish a notice of the location and extent of the proposed IFR and the name and address of the applicant. The notice must state that persons wishing to make objections have 15 days to do so. AS 46.15.133(a). There are specific notice provisions for other stakeholders who may be affected. AS 46.15.133(b). DNR may also elect to hold hearings regarding the IFR application. AS 46.15.133(c). DNR must make a decision on the IFR application

[7] Each of these is further defined in 11 AAC 93.141.

within 30 days of receiving the last objection or, if DNR holds a hearing, within 180 days of receiving the last objection. *Id.*

II. DNR's History of Processing TWUPs, Appropriations, and IFRs

Hundreds of IFR applications have been filed since the IFR program began.[8] Pls.' Mem. in Opp'n to Defs.' Mot. for Partial Summ. J.,[9] Ex. 1 at 29 (July 23, 2012). DNR has granted 52 of these applications, 51 of which were filed by the Alaska Department of Fish and Game ("ADF&G"). *Id.*[10] Chuitna claims that it takes between 14-15 years for DNR to adjudicate an IFR application. Pls.' Opp'n to Defs.' First Mot. for Summ. J. at 6. DNR has never adjudicated an IFR from a private party. Pl.'s Mem. in Supp. of Mot. for Summ. J, Cross-Mot. on Counts 3 and 4, and Supplemental Resp. to DNR's Mot. for Partial Summ. J.,[11] Ex. 18 (Apr. 10, 2013).

DNR does not currently process IFRs in the order in which they are received. Pl.'s First Cross-Mot. for Summ. J., Ex. 20 at 17. Since at least 2002, DNR and ADF&G have met annually to prioritize IFR applications according to

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[8] The Court is aware that there is currently a bill before the legislature seeking to eliminate the ability of private organizations to obtain IFRs. House Bill 77, § 42; s*ee also* Bill History/Action for 28 Legislature, Bill H.B. 77 *available at* http://www.legis.state.ak.us/basis/get_complete_bill.asp?session=28&bill=HB77 (last visited Sept. 13, 2013). DNR is supporting this legislation and specifically supporting the repeal of private IFRs. Pl.'s First Cross-Mot. for Summ. J., Ex. 22. The bill is pending before the Alaska Senate's Rules Committee. Sen. Journal 1265-66 (Apr. 14, 2013). The presence of this unpassed bill has no impact on the Court's order.

[9] Hereinafter "Pls.' Opp'n to Defs.' First Mot. for Summ. J."

[10] The Bureau of Land Management filed the only other approved IFR. A U.S. Fish and Wildlife Service IFR is in the process of being adjudicated. Sager Dep. 35:14-17 (Feb. 5, 2013)

[11] Hereinafter "Pl.'s First Cross-Mot. for Summ. J."

the terms of a memorandum of understanding between the two agencies. *Id.* at 17-18. The MOU sets forth six criteria that guide this process:

> [1] the order of priority of existing pending reservation of water applications, [2] the existence of water use conflicts with the potential to affect fish and wildlife; [3] waterbodies where likely changes in land use or development have the potential to create these conflicts in the future; [4] the importance of resources at risk; [5] criteria set out in AS 46.15.080; and [6] the availability and adequacy of data.

Pls.' Opp'n to Defs.' First Mot. for Summ. J., Ex. 16 at 2-3. This list is not exclusive. *Id.* at 2 (stating "DNR and ADF&G will take into account *at least* the following . . ." (emphasis added)). No private citizen's IFR application has ever been placed on the priority lists DNR and ADF&G have developed. Pl.'s First Cross-Mot. for Summ. J., Ex. 20 at 15-16.

Chuitna claims that TWUPs are processed substantially faster than IFRs. Pls.' Opp'n to Defs.' First Mot. for Summ. J. at 7. Chuitna points out that of the 4,349 active TWUP permits; only 1,166 are pending. Id. at 7, nn.20, 21. Chuitna further notes that, of the pending TWUPs, most are only approximately 1 year old. *Id.* Chuitna similarly claims that appropriations are processed much faster than IFRs, taking approximately 2-4 years on average. *Id.* at 5-7; Pl.'s First Cross-Mot. for Summ. J. at 26.

DNR disputes Chuitna's recounting of how long it takes DNR to process appropriations compared to IFRs. DNR's Second Mot. for Summ. J. at 12, n.28. However, the evidence before the Court shows that IFRs have a lower budget priority than appropriations and TWUPs. Pl.'s First Cross-Mot. for Summ. J., Ex.

21 at 15. DNR asserts two reasons for this differing priority. First, if DNR does not issue TWUPs or appropriations, those applicants cannot use the water without being subject to criminal penalties. *Id.* at 15-16. Second, DNR can impose conditions on TWUPs and appropriations to protect public interests, such as preservation of fish and wildlife habitat. *Id.* at 16. This allows DNR to protect the same interests an IFR would serve.

III. Chuitna's IFR Applications

DNR received Chuitna's original application for an IFR in Stream 2003 on June 3, 2009. Defs.' First Mot. for Summ. J., Ex. A at 1. The application required a variety of supporting documentation and a $1,500 non-refundable fee. *Id.* at 2. DNR reviewed the application and discovered a number of problems. Defs.' First Mot. for Summ. J., Ex. B. DNR informed Chuitna that it would need to resubmit its application to address various concerns, break portions of Stream 2003 into discrete "reaches",[12] and submit separate applications for each reach. DNR provided Chuitna with 60 days to comply. Defs.' First Mot. for Summ. J., Ex. C.

Chuitna revised its original application to apply to one particular reach. Chuitna also submitted two new applications for two separate reaches of Stream 2003. Defs.' First Mot. for Summ. J., Ex. E; Pl.'s First Cross-Mot. for Summ. J., Ex. 27. The original application applied to the "main stem reach" and the two new submissions applied to the middle reach and lower reach, respectively. *Id.* Chuitna asked DNR to treat all of these applications as a single application subject to a single filing fee, but paid the $1,500 nonrefundable fee for each

[12] A reach is an identifiable section of a river or stream. *See* 11 AAC 93.120(e)(3).

application in order to "preserve [its] rights on this issue." Defs.' First Mot. for Summ. J., Ex. E at 1.[13] Chuitna paid a total of $4,500 for all three applications. Pl.'s First Cross-Mot. for Summ. J., Exs. 28, 29.

DNR assigned each application a separate case number: LAS 27340 (Main); LAS 27436 (Lower), and LAS 27437 (Middle). Defs.' First Mot. for Summ. J., Ex. F. DNR gave the Main application a June 3, 2009 provisional priority date and the Lower and Middle applications an August 21, 2009 provisional priority date. However, DNR stated that it was "not staffed at this time to further assess the applications." *Id.* It is undisputed that DNR has taken no further action on these three applications.

Despite the inactivity on Chuitna's IFR applications, DNR has granted TWUPs related to the Stream 2003 to PacRim Coal since Chuitna submitted its June 2009 application. Pls.' Opp'n to Defs.' First Mot. for Summ. J., Ex. 9. No appropriation applications relevant to Stream 2003 have been filed since June 2009. ADF&G also has an IFR related to Stream 2003 pending, which it filed in 1996. Pls.' Opp'n to Defs.' First Mot. for Summ. J., Ex. 6. DNR appears to be waiting to receive an appropriation request from PacRim Coal for Stream 2003 before adjudicating ADF&G's application. Once DNR receives PacRim Coal's application, it has stated that it will likely adjudicate the two applications together.

[13] Whether the applications should have used the original June 2009 priority date and should have only needed a single application fee were the subject of an administrative appeal before Judge Spaan. Judge Spaan found that the requirement to have three applications and three application fees was not a final appealable decision. Defs.' First Mot. for Summ. J., Ex. J at 11-13 (Order Denying Appellant's Opening Br., Case No. 3AN-10-04918CI (Mar. 15, 2011)).

Pl.'s First Cross-Mot. for Summ. J., Ex. 20 at 11-15. Chuitna's IFR's will not necessarily be part of that review. *Id.* at 20-21.

Procedural Background

Chuitna and Cook Inletkeeper ("CIK") filed this action on November 10, 2011. Chuitna separately filed an administrative appeal the same day. Notice of Appeal, Case No. 3AN-11-12095CI (Nov. 10, 2011). The administrative appeal sought review of DNR's decision on a TWUP granted to PacRim Coal. *Id.*

Chuitna moved to consolidate the two cases on November 30, 2011. Following a January 23, 2012 status conference, the parties notified the Court that they believed the Court should deny the motion to consolidate. They also asked that the administrative appeal be reassigned from Judge Volland to this Court, which the presiding judge did. This Court later issued an order generally reversing DNR's dismissal of Chuitna's challenge to the PacRim TWUP. *See* Op. and Order on Administrative Appeal, Case No. 3AN-11-12065CI (Feb. 25, 2013). The administrative appeal was sent back to DNR with instructions to consider the effect of the TWUP on Chuitna's potential IFRs.

DNR filed a motion for partial summary judgment in this case on June 11, 2012. Defs.' First Mot. for Summ. J. DNR asked the Court to dismiss CIK and grant summary judgment on Counts 2, 3, and 4. Chuitna and CIK filed their opposition on July 23, 2012. Pls.' Opp'n to Defs.' First Mot. for Summ. J. They also filed a Rule 56(f) motion as to Counts 3 and 4. DNR filed its reply on August 2 along with its opposition to the 56(f) motion. Defs.' Reply Re Defs.' First Mot.

for Summ. J. The plaintiffs filed their reply on the 56(f) motion on August 14, 2012.

The Court dismissed CIK and Count 2 at a hearing on September 6, 2012. The Court also granted the 56(f) motion and stayed summary judgment on Counts 3 and 4. The Court required supplemental briefing from Chuitna by April 1, 2013 and any reply from DNR by May 1, 2013. The Court later extended these deadlines to April 10 and May 10, respectively.

Chuitna filed its supplemental briefing on April 10, 2013. Pl.'s First Cross-Mot. for Summ. J. In that briefing, Chuitna also included a motion for summary judgment on Counts 1 and 5 and a cross-motion for summary judgment on Counts 3 and 4. DNR filed its response and opposition to Chuitna's motions for summary judgment, as well as its own cross-motion on Counts 1 and 5, on May 17, 2013. DNR's Resp. and Opp'n on Cross-Mots. for Summ. J. on Counts 3 and 4 and Opp'n to Pl.'s Mot. for Summ. J. on Counts 1 and 5 and Cross-Mot. and Mem. in Supp. of Cross-Mot. for Summ. J. on Counts 1 and 5 (May 17, 2013) [hereinafter "DNR's Second Mot. for Summ. J."]. Chuitna filed its combined reply and opposition on June 12, 2013 and DNR filed its "Final Response Re Cross Motions for Summary Judgment on All Counts" on June 24, 2012. Pl.'s Mem. in Opp'n to Defs.' Cross-Mot. for Summ. J. and Reply in Supp. of Pl.'s Mot. for Summ. J. (June 12, 2013) [hereinafter "Pl.'s Reply and Opp'n to Defs.' Second Mot. for Summ. J."]; DNR's Final Resp. Re Cross-Mots. for Summ. J. on All Counts (June 24, 2013) [hereinafter "DNR's Final Resp."]. Chuitna filed a sur-reply on August 19, 2013 to which DNR filed a response on August 28, 2013.

Pls.' Surreply to Defs.' Final Resp. Re Cross-Mots. for Summ. J. on All Counts (Aug. 19, 2013) [hereinafter "Pls.' Surreply"]; and DNR's Resp. to Pl.'s Surreply (Aug. 28, 2013) [hereinafter "DNR's Surreply Resp."].

In the interim, and in response to arguments DNR made, Chuitna filed a motion to amend its complaint to add a claim for due process violations. The Court granted the motion on July 31, 2013 over DNR's opposition. DNR filed its answer on August 20, 2013.

On August 9, 2013, DNR filed a motion for summary judgment on Count 6, the newly added due process count. Defs.' Mot. and Mem. in Supp. of Mot. for Summ. J. on Count 6 (Aug. 9, 2013) [hereinafter "Defs.' Third Mot. for Summ. J."]. Chuitna filed an opposition and cross-motion on Count 6 on August 20, 2013. Pl.'s Cross-Mot. and Mem. in Support, and Opp'n to Defs.' Mot. for Summ. J. on Count 6 (Aug. 20, 2013) [hereinafter "Pl.'s Second Mot. for Summ. J."] DNR filed its reply and opposition on August 27, 2013. DNR's Resp. to Pl.'s Surreply (Aug. 28, 2013) [hereinafter "DNR's Surreply Resp."]. Chuitna filed its reply on September 4, 2013. Pls.' Reply to Defs.' Opp'n to Mot. for Summ. J. on Count 6 (Sept. 4, 2013) [hereinafter "Pls.' Reply Re Pls.' Second Mot. for Summ. J."].

In sum, the parties have submitted motions and cross-motions for summary judgment as to each of the remaining counts in the complaint: Counts

1, 3, 4, 5, and 6. The Court held oral argument on September 18, 2013 regarding all of the pending motions.[14]

Standard of Review

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Alaska R. Civ. P. 56. The moving party has the initial burden of offering admissible evidence showing both the absence of any genuine dispute of fact and the legal right to a judgment. *Cikan v. ARCO Alaska, Inc.*, 125 P.3d 335, 339 (Alaska 2005). Once the moving party has made this showing, the burden shifts to the non-moving party to produce admissible evidence reasonably tending to dispute or contradict the moving party's evidence. *Id.*

To defeat a motion for summary judgment, the non-moving party may not rest on its allegations, but must put forth specific facts showing that there is a genuine, material factual dispute. *Id.* A genuine, material factual dispute requires more than a scintilla of contrary evidence. *Id.* In meeting their respective burdens, the parties may use pleadings, affidavits, and any other material that is admissible in evidence. *Miller v. Fairbanks,* 509 P.2d 826, 829 (Alaska 1973). The Court must draw all reasonable inferences in favor of the non-moving party. *Cikan*, 125 P.3d at 339. Reasonable inferences are those inferences that a

[14] The Court granted DNR permission to file complete copies of two depositions Chuitna had taken and cited to in its briefing. DNR confirmed, however, that all of the material DNR wanted the Court to consider was cited in DNR's briefing. Chuitna filed the depositions on September 26, 2013.

reasonable factfinder could draw from the evidence. *Alakayak v. British Columbia Packers, Ltd.*, 48 P.3d 432, 449 (Alaska 2002).

Discussion

I. DNR has not violated the doctrine of first in time, first in right because Chuitna has no vested appropriative rights in Stream 2003.

Chuitna's Count 1 generally alleges that DNR's failure to process and adjudicate Chuitna's IFR applications violates the Alaska Constitution's protections for prior appropriators. First Am. Compl. at ¶ 52 (citing Alaska Const. art. VIII, § 13). The Alaska Constitution provides that "[p]riority of appropriation shall give prior right." Alaska Const. art. VIII, § 13. AS 46.15.050 restates this principle and states that priority dates are based on when an application is filed with DNR; as opposed to when DNR grants the application. AS 46.15.050(a), (b).

Chuitna argues that DNR's processing of applications filed after Chuitna's applications, while not processing Chuitna's applications, violates the prior appropriation doctrine because Chuitna cannot enforce its water rights against subsequent appropriators until DNR grants Chuitna's IFR application. Pl.'s First Cross-Mot. for Summ. J. at 27. Chuitna also argues that DNR's processing methodology allows DNR to adjudicate later-filed applications for the same body of water without respect for earlier-filed applications. Chuitna claims that, in doing so, DNR is ignoring the doctrine of first in time, first in right. Pl.'s Reply and Opp'n to Defs.' Second Mot. for Summ. J. at 28. Chuitna notes that if applications were adjudicated in the order received then DNR would need to protect Chuitna's IFR rights when DNR adjudicates later applications. *Id.*

DNR points out that even Chuitna recognizes that it is only an IFR *applicant* as opposed to an IFR certificate holder. DNR's Second Mot. for Summ. J. at 3 (citing Pls.' Opp'n to Defs.' First Mot. for Summ. J. at 27). DNR also notes that this Court previously held that Chuitna was not a prior appropriator in the context of the administrative appeal. *Id.* at 4 (citing Op. and Order on Admin. Appeal, Case No. 3AN-11-12095CI at 8-10 and n.5). DNR essentially argues that there cannot be a violation of the prior appropriation doctrine because Chuitna has no rights to appropriate water from Stream 2003. *Id.* Moreover, DNR claims that Chuitna has alleged no facts showing that DNR has taken actions that would prejudice Chuitna's water rights if DNR eventually grants its IFR applications. DNR's Final Resp. 4-5.

The Alaska Constitution and AS 46.15.050 are clear: "[p]riority of *appropriation* gives prior right." AS 46.15.050 (emphasis added). Chuitna must be a prior appropriator to have rights under these provisions. This Court previously held that Chuitna is not a prior appropriator. Therefore, it cannot maintain a claim for a violation of rights that a prior appropriator would have.

As the Court previously explained, the Water Use Act "defines 'appropriate' as 'to divert, impound, or withdraw a quantity of water from a source of water, for a beneficial use or to reserve water under AS 46.15.145." Op. and Order on Admin. Appeal at 9 (quoting AS 46.15.260(1)). This Court found that water is not "'withdrawn from appropriation' until 'after the issuance of a certificate.'" *Id.* Until Chuitna has obtained a certificate it "does not have a vested appropriative right." *Id.* at 9-10.

That earlier decision remains consistent with Alaska law and the facts of this case. In *Tulkisarmute Native Cmty. Council*, the Supreme Court of Alaska discussed the process for obtaining a certificate of appropriation. *Tulkisarmute Native Cmty. Council v. Heinze*, 898 P.2d 935, 940-42 (Alaska 1995).[15] The court noted that potential appropriators need to submit applications for a permit. DNR then issues a permit to allow the applicant to construct and perfect the appropriation. Following the applicant's beneficial use of the water, DNR issues a certificate of appropriation. The court's discussion states that it is the *certificate* that provides the holder with "a full and permanent property right in that quantity of water." *Id.* at 942. That right, however, relates back to the date of the application. *Id.* (citing AS 46.15.050).

Chuitna is an IFR applicant. Chuitna has not received an IFR certificate entitling it to a reservation of a specific quantity of water and serving as its de facto appropriation. Without that prior appropriation, Chuitna cannot have a right to the water and there can be no violation of a right that does not exist. The Court grants summary judgment to DNR on Count 1 of Chuitna's First Amended Complaint.

II. DNR has not violated the Uniform Application Clause because TWUP, appropriation, and IFR applicants are not similarly situated and the government is not a "person" under the Uniform Application Clause.

Chuitna's Count 3 alleges that DNR has violated a constitutional duty "to apply the doctrine of prior appropriation uniformly" because IFR applications are

[15] The process for obtaining a certificate of appropriation and an IFR certificate are different, but these differences do not impact the analysis here.

"more expensive, take[] longer, and [are] subject to a heightened level of scrutiny as compared to other water use applications." First Am. Compl. at ¶¶ 60-61 (citing Alaska Const. art. VIII, §§ 13, 17). Chuitna relies on the Alaska Constitution's Uniform Application Clause. The clause states: "[l]aws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation." Alaska Const. art. VIII, §17.

The Supreme Court of Alaska has interpreted the Uniform Application Clause to "require legislation dealing with natural resources to satisfy a heightened level of equal protection scrutiny." *Baxley v. State*, 958 P.2d 422, 429 (Alaska 1998) (citing *Gilbert v. State*, 803 P.2d 391, 398 (Alaska 1990); *Baker v. State*, 878 P.2d 642, 644 (Alaska Ct. App. 1994)). However, the protections of the Uniform Application Clause "extend only to persons similarly situated with respect to the subject matter and purpose of the legislation" in question. *Baxley*, 958 P.2d at 429 (citing *Reichmann v. State*, 917 P.2d 1197, 1200 (Alaska 1996)). "Not all persons in the state with an interest in a resource are similarly situated for the purposes of the Uniform Application Clause." *Id.*

Chuitna argues that any limits on water rights in the state implicate the Uniform Application Clause. Pl.'s First Cross-Mot. for Summ. J. at 23 (citing *Tongass Sport Fishing Ass'n v. State*, 866 P.2d 1314 (Alaska 1994)). Chuitna takes the position that TWUP, appropriation and IFR applicants are all similarly situated because they all seek the same thing: access to water. *Id.* at 24.

Chuitna claims that DNR's failure to process IFR applications "effectively limits access to water resources for the ignored applicants." *Id.* at 25.

Chuitna also claims that DNR's prioritizing of government applicants over private applicants violates the Uniform Application Clause. *Id.* at 23-25; *see also* Pl.'s Reply and Opp'n to Defs.' Second Mot. for Summ. J. at 24. Chuitna points to the fact that DNR has only approved IFRs from government organizations with the vast majority of these, 51 out of 52, being from ADF&G. *Id.* [16]

DNR argues that IFR applicants, such as Chuitna, are not similarly situated as compared to TWUP or appropriation applicants. Defs.' First Mot. for Summ. J. at 13, 15. DNR recounts the legislative history surrounding the creation of TWUPs and the differing purposes behind TWUPs and IFRs. Defs.' Reply Re Defs.' First Mot. for Summ. J. at 10-11.[17]

DNR also argues that private IFR applicants and government IFR applicants are not similarly situated. *Id.* at 9. DNR claims that the Uniform

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[16] In its initial opposition, Chuitna also argued that whether two parties are similarly situated is a question of fact and that Chuitna had presented sufficient evidence to prevent summary judgment. Pls.' Opp'n to Defs.' First Mot. for Summ. J. at 37. DNR notes that the Supreme Court of Alaska has previously upheld determinations that two classes are not similarly situated as a matter of law. Defs.' Reply Re Defs.' First Mot. for Summ. J. at 9 and n.20. The Court agrees that whether claimed classes are similarly situated may be determined as a matter of law in appropriate cases. *See Alaska Civil Liberties Union v. State*, 122 P.3d 781, 787-88 (Alaska 2005); *but see State v. Planned Parenthood of Alaska*, 35 P.3d 30, n.88 (Alaska 2001) ("We note, however, that the question whether these two subsets of pregnant minors are similarly situated may not readily lend itself to disposition as a matter of law.")). The Court finds that it can make the similarly situated determination as a matter of law here given the statutory nature of the rights and penalties involved.

[17] DNR also notes that, to the extent Chuitna alleges it is similarly situated to applicants for appropriations, there are no appropriation applications for the same reaches that are subject to Chuitna's applications. Defs.' Reply Re Defs.' First Mot. for Summ. J. at 13-14. This means Chuitna cannot demonstrate disparate treatment because there are no "similarly situated" appropriation applications.

Application Clause will not support a claim based on different treatment for government agencies. *Id.* at 10. DNR also argues that public agencies have public trust responsibilities that they must acquit when applying for IFRs to which private entities are not subject. *Id.* at 11.

DNR finally argues that Chuitna is essentially making a claim of "selective enforcement" and that Chuitna cannot show a "deliberate and intentional plan to discriminate based on an arbitrary or unjustifiable classification." *Id.* at 12 (quoting *Gates v. City of Tenakee Springs*, 822 P.2d 455, 461 (Alaska 1991)). DNR then discusses the backlog in IFR applications, staffing and budget shortages, and the need to prioritize TWUPs and appropriations because those applicants make beneficial use of resources and DNR can impose conditions on them to protect fish and wildlife habitats. *Id.* at 13-19.

A. IFR applicants are not similarly situated when compared to TWUP or appropriation applicants.

Chuitna's broad claim that IFR, TWUP, and appropriation applicants are similarly situated because they all seek access to water is insufficient under Alaska law. Our Supreme Court has held in other contexts that the fact that several classes of people seeking access to the same resource are treated differently is insufficient to implicate the Uniform Application Clause. *See, e.g., State, Dep't of Natural Resources v. Alaska Riverways, Inc.*, 232 P.3d 1203, 1219 (Alaska 2010) ("We have already held in various contexts that people using state land and resources for different purposes are not 'similarly situated' for

purposes of constitutional analysis, . . ."). The Uniform Application Clause analysis requires a narrower focus than Chuitna endorses.

In a clear case, the finding that the classes the Court compares are not similarly situated "necessarily implies that the different legal treatment of the two classes is justified by the differences between the two classes." *Shepherd v. State*, 897 P.2d 33, 44, n.12 (Alaska 1995). In viewing the three applicable classes more narrowly, it is clear that IFR applicants are not similarly situated when compared to TWUP and appropriation applicants.

1. The different rights conveyed

The rights a TWUP, appropriation, or IFR conveys are significantly different. A TWUP conveys the right to use water, but does not convey any right to that water and the water remains available for appropriation or reservation. A TWUP may also be revoked when "necessary to protect the water rights of other persons or the public interest." AS 46.15.155.

An appropriation conveys a full and permanent right to use a specified amount of water. The appropriation may be revoked only if DNR finds that the appropriation has been abandoned. However, if the appropriator does not use the full volume of their appropriation, then DNR may reduce the amount of water that can be appropriated. AS 46.15.140.

An IFR conveys a limited right to exclude others from using a specified volume of water. It does not convey a right to use the water reserved, but removes that water from the total volume that could be appropriated or could be

used in a TWUP. The water reserved must serve one of four specific purposes. DNR must review each IFR at least once every ten years. AS 46.15.145(f).

2. The different consequences for not obtaining a TWUP, appropriation, and IFR

TWUP and appropriation applicants seek to use a "significant amount of water" for some particular purpose. If TWUP and appropriation applicants attempt to use the water they request without authorization, they are subject to criminal penalties. The only way for TWUP and appropriation applicants to achieve their goal is to obtain a TWUP or appropriation.

IFR applicants, on the other hand, seek to preserve a certain status quo by keeping a specific flow volume in a designated stream. They claim their applications are justified by a need for: "(1) protection of fish and wildlife habitat, migration, and propagation; (2) recreation and park purposes; (3) navigation and transportation purposes; [or] (4) sanitary and water quality purposes." *See* AS 46.15.145(a). IFR applicants are not seeking to use the water and they do not face criminal penalties. However, if an IFR applicant does not receive its IFR certificate, its ability to prevent others from using the water requested is limited.[18]

The different rights conveyed and the different consequences of not obtaining a TWUP, appropriation, or IFR show that applicants for IFRs, TWUPs, and appropriations are not similarly situated. The Uniform Application Clause

[18] In the case of appropriations, limited is not equal to non-existent. Appropriations are subject to public notice and comment. Moreover, AS 46.15.133(e) gives "a person aggrieved" by DNR's decision on an appropriation the right to appeal that decision to the superior court. However, an IFR applicant clearly has substantially limited rights, compared to an IFR certificate holder. *See* Prokosch Dep. 35-36, Feb. 5, 2013 (discussing different remedies available to certificate holders versus applicants).

does not apply where the claimed classes are not similarly situated.[19] The Uniform Application Clause does not support Chuitna's Count 3 to the extent it is based on different treatment of IFR applicants compared to TWUP and appropriation applicants.

B. Differing treatment of government and non-government entities does not support a claim under the Uniform Application Clause.

The Uniform Application Clause is essentially a specialized equal protection guarantee related to natural resources. *See* Alaska Const. art. VIII, § 17; *see also Baxley*, 958 P.2d at 429 (Uniform Application Clause interpreted to "require legislation dealing with natural resources to satisfy a heightened level of *equal protection scrutiny*." (emphasis added)). DNR recognizes this comparison and asks the Court to follow *Kenai Peninsula Borough v. State*, 751 P.2d 14 (Alaska 1988), which found that a borough was not a "person" for the purposes of equal protection. DNR's Second Mot. for Summ. J. at 10 (citing *Kenai Peninsula Borough*, 751 P.2d at 18-19). Chuitna argues that *Kenai Peninsula Borough* is not applicable. Pl.'s Reply and Opp'n to Defs.' Second Mot. for Summ. J. at 23-24.

The Court agrees that *Kenai Peninsula Borough* is inapplicable here because that case involved a borough attempting to assert an equal protection claim against the State of Alaska. *See Matanuska-Susitna Borough School Dist. v. State*, 931 P.2d 391, 394 (Alaska 1997) (quoting *Kenai Peninsula Borough*,

[19] DNR has challenged Chuitna's assertion regarding processing times and exactly how much variation exists. The Court does not need to reach this issue based on its finding that the classes are not similarly situated.

751 P.2d at 18-19) (interpreting *Kenai Peninsula Borough* to stand for the proposition that "[t]he purpose of the Alaska due process and equal protection clauses is to protect people from abuses of government, not to protect political subdivisions of the state from the actions of other units of state government.") *Kenai Peninsula Borough*, however, does not end the Court's inquiry.

Other Alaska equal protection cases have found that "[e]qual protection does not . . . require the State to treat all individuals the same as it treats itself." *Weidner v. State, Dep't of Transp. and Public Facilities*, 860 P.2d 1205, 1212 (Alaska 1993). In *Weidner*, the Supreme Court of Alaska considered whether it violated equal protection for the State to be able to obtain ownership of private land through adverse possession while private owners could not adversely possess State land. *Id.* at 1211-12. The court found no violation and held that "[e]qual protection ensures that the State will not treat an *individual or group of individuals* differently from all other *individuals*." *Id.* at 1211 (emphasis added).

The Supreme Court affirmed *Weidner* in *State v. Murtagh*, 169 P.3d 602 (Alaska 2007). That case involved a challenge to the Alaska Victim's Rights Act of 1991 brought by defense attorneys for themselves and on behalf of their clients. *Murtagh*, 169 P.3d at 604. The plaintiffs claimed the VRA violated equal protection by imposing burdens on criminal defense attorneys that did not apply to prosecutors. The trial court allowed that claim to go forward. Order in Case 3AN-97-649CI at 13 (Aug. 18, 1999) (citing *People v. Taubert*, 608 P.2d 342 (Colo. 1980); *State v. Armstrong*, 616 P.2d 341 (Mont. 1980); *Walters v. State*, 394 N.E.2d 154 (Ind. 1979)). The State appealed this question to the Supreme

Court on the basis that the State is not a "person" for the purposes of determining whether a law violates equal protection. Br. of Appellant at 22-27, Case No. S-11988/12007 (Jan. 13, 2006).

The Supreme Court reversed the trial court's determination with little discussion. *Murtagh*, 169 P.3d at 607. The court noted that the state argued that "the State itself is not a 'person' within the meaning of [the equal protection] clause." *Id.* The court then cited to *Weidner* and found that "[t]his argument is supported by our case law." *Id.* The court concluded that "[g]iven *Weidner* and the absence of any persuasive contrary authority from other jurisdictions, we agree that the Victim's Rights Act is not vulnerable to a constitutional attack under the equal protection clause." *Id.*

Weidner and *Murtagh* control the outcome here because the equal protection clause and the Uniform Application Clause are nearly identical guarantees. There is no reason to think that our Supreme Court would not apply the *Weidner* and *Murtagh* rule here. Therefore, differences in how DNR treats ADF&G applications as compared to those from private organizations are not actionable under the Uniform Application Clause. ADF&G is not a person for the purposes of the Uniform Application Clause. The Court therefore dismisses Chuitna's Count 3 because neither basis for the count has merit.

III. DNR has not violated any of AS 45.15.133's deadlines.

Chuitna's Count 4 claims DNR has violated a statutory duty to publish notice of Chuitna's IFR applications and make a determination regarding those applications in a timely fashion. First Am. Compl. at ¶¶ 65-66 (citing AS

46.15.145, AS 46.15.133, and 11 AAC 93.141-.146). AS 46.15.145(b) states that DNR shall proceed in accordance with AS 46.15.133 "upon receiving an application for a reservation under this section." AS 46.15.133 states that DNR "shall prepare a notice" if DNR "receives an application for appropriation or removal." AS 46.15.133(a). The statutes and regulations do not give a specific timeframe in which DNR is supposed to begin preparing the notice and adjudicating the application. *See* 11 AAC 93.141-.146.

DNR argues that Chuitna's Count 4 must be dismissed because no statute or regulation sets out a time frame by which DNR must adjudicate an application. Defs.' First Mot. for Summ. J. at 16-17. DNR notes that the timing of an adjudication depends on "many factors," including "agency funding, staff availability, state resource allocation priorities, and data acquisition necessary to justify the application." *Id.*[20] DNR notes that Chuitna has presented an unreasonable delay claim in Count 5 of its complaint and objects to unreasonable delay also serving as a basis for Count 4. Defs.' Reply Re Defs.' First Mot. for Summ. J. at 15.

Chuitna argues that an explicit timeframe for processing IFR applications is not necessary to its claim. Pls.' Opp'n to Defs.' First Mot. for Summ. J. at 27. Citing federal law, Chuitna claims that a court "can compel non-discretionary agency action that is delayed to the point of being unlawfully withheld." *Id.* at 28

[20] DNR also argued that Chuitna has a specific, and exclusive, cause of action against DNR if it believes DNR has "unreasonably delayed" processing Chuitna's application. Defs.' First Mot. for Summ. J. at 17-18 (citing AS 44.62.305). DNR has since repudiated the idea that AS 44.62.305 applies here. DNR's Second Mot. for Summ. J. at 26.

(citing *Fanin v. U.S. Dep't of Veterans Affairs*, 572 F.3d 868, 875 (11th Cir. 2009). Chuitna asks the Court to determine whether DNR's delay has been unreasonable by applying a six-factor test, the *TRAC* factors, from *Ensco Offshore Co. v. Salazar*, 781 F. Supp.2d 332, 337 (E.D. La. 2011) (citing *Telecomms. Research & Actions Ctr. v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984) [hereinafter "*TRAC*"]). Chuitna also points to other timeframes in the Water Use Act that measure deadlines in days and months as evidence that DNR's years-long delay is unreasonable. *Id.* at 33. Finally, Chuitna argues that proceeding under AS 44.62.560(e), instead of AS 44.62.305, is appropriate here. *Id.* at 35-36.

The Court cannot find that DNR has violated the statute under these facts without a specific deadline that DNR has missed. To the extent that Chuitna argues that DNR has unreasonably or unlawfully delayed taking mandatory action and asks the Court to look to factors similar to the *TRAC* factors to make that determination, that claim sounds, if at all, under the Alaska Administrative Procedures Act. It does not represent a violation of AS 46.15.133.[21]

Chuitna later argues that the Water Use Act "expressly provides for a 'failure to act' cause of action for those aggrieved by the commissioner's failure to act upon their water right applications." Pl.'s Surreply at 2. Chuitna cites to

[21] Chuitna appears to recognize this. Chuitna states in its later briefing that "Count 4 is the statutory basis for its claim that DNR has unlawfully and unreasonably delayed in carrying out a mandatory agency action . . . and Count 5 is the Alaska APA provision that provides a cause of action for the unreasonable delay of the statute." Pl.'s Reply and Opp'n to Defs.' Second Mot. for Summ. J. at 12, n.50. If it is the APA that provides a cause of action for the unreasonable delay, then there is no reason to treat Count 4 separate from Count 5 and the Court will combine the two.

AS 46.15.133(e), which states that "[a] person aggrieved by the action of the commissioner or by the failure of the commissioner to grant, deny, or condition a proposed sale or an application for appropriation or removal in accordance [with AS 46.15.133(c)] may appeal to the superior court."

AS 46.15.133(e) does not support Chuitna's Count 4. AS 46.15.133 differentiates between pre- and post-publication deadlines. Prior to publication, the statute does not set any deadlines. Post-publication, however, there are specific deadlines to which DNR must adhere. These are the deadlines listed in AS 46.15.133(c).[22]

AS 46.15.133(e) specifically refers to acts or failures to act "in accordance with [AS 46.15.133(c)]." The Court interprets this language to mean that AS 46.15.133(e) is the method for enforcing the specific deadlines in AS 46.15.133(c) or challenging DNR's decision to grant, deny, or condition an application under AS 46.15.133(c). In the context of unreasonable delay, AS 46.15.133(e) may be a way of prompting agency action *post-publication*, but not pre-publication.

Chuitna's Count 4, indeed all of its claims, relates only to pre-publication delay. It does not allege a violation of AS 46.15.133(c). AS 46.15.133(e) does

[22] AS 46.15.133(c) states "[w]ithin 15 days of publication or service of notice, an interested person may file an objection. The commissioner may hold hearings upon giving due notice and shall grant, deny, or condition the proposed sale or application for appropriation or removal in whole or in part within 30 days of receipt of the last objection or, if the commissioner elects to hold hearings, within 180 days of receipt of the last objection. Notice of the order or decision shall be served personally or mailed to any person who has filed an objection."

not apply. Therefore, the Court dismisses Chuitna's Count 4 as duplicative of Count 5 and unsupported by AS 46.15.133(e).

IV. DNR has unreasonably withheld agency action on Chuitna's IFR applications.

Chuitna's Count 5 argues that "DNR has unlawfully and unreasonably withheld action on [Chuitna's IFR applications]." Count 5 requests an order under the Alaska Administrative Procedure Act ("APA"), specifically AS 44.62.560(e), compelling DNR to begin adjudicating Chuitna's IFR applications. First Am. Compl. at ¶¶ 69-70. The Court believes it can only require DNR to act if DNR has a non-discretionary duty.

AS 46.15.145(b) states that "[u]pon receiving an application for a reservation under this section, the commissioner shall proceed in accordance with AS 46.15.133." "Unless the context otherwise indicates, the use of the word 'shall' denotes a mandatory intent." *Fowler v. City of Anchorage*, 583 P.2d 817, 820 (Alaska 1978). There is nothing in AS 46.15.145 that indicates the use of "shall" creates a discretionary duty. Therefore, the Court finds that DNR has a non-discretionary duty to process the IFR application under AS 46.15.133.

Similarly, AS 46.15.133(a) states "[i]f the commissioner proposes a sale of water or receives an application for appropriation or removal, the commissioner *shall* prepare a notice . . . [and] (b) . . .*shall* publish the notice . . ." AS 46.15.133(a), (b) (emphasis added). The commissioner "*shall* [also] grant, deny, or condition . . . the application for appropriation or removal in whole or in part within 30 days of receipt of the last objection or, if the commissioner elects to

hold hearings, within 180 days of receipt of the last objection." AS 46.15.133(c) (emphasis added). Again, the continued use of "shall", without any indication that the language is permissive, creates non-discretionary duties. Having found a non-discretionary duty to act, the next question is whether AS 44.62.560(e) applies at all.

A. AS 44.62.560(e) applies because the language of the statute incorporating AS 44.62.560 into the Water Use Act is not limited to formal administrative appeals.

The APA does not apply to the Department of Natural Resources with respect to the Water Use Act unless specifically incorporated by statute or regulation. *See* AS 44.62.330(b).[23] AS 46.15.185, titled "Appeals," incorporates two APA sections into the Water Use Act. AS 46.15.185 states, in full, that "[a]ppeals to the superior court under this chapter are subject to AS 44.62.560-44.62.570 (Administrative Procedures Act)." AS 46.15.185.

DNR argues that AS 44.62.560 does not apply because the incorporation of AS 44.62.560 into the Water Use Act extends only to "[a]ppeals to the superior court" and this case is not an "appeal," but an original action. DNR's Second Mot. for Summ. J. at 26 (citing Defs.' First Mot. for Summ. J. at 17); DNR's Final Resp. at 11 (citing AS 46.15.185); Defs.' Third Mot. for Summ. J. at 5-7. DNR argues that the Court's authority to order DNR to act is instead in the nature of mandamus. DNR's Second Mot. for Summ. J. at 26.[24] DNR contends that

[23] AS 44.62.330(a)(34) makes the APA applicable to DNR "concerning the Alaska grain reserve program under former AS 03.12." That provision does not apply here.
[24] The parties later dispute the applicability of federal law to this case. Early cases under the federal Administrative Procedure Act, some of which Chuitna cites for support, were

Chuitna cannot meet the standards for a mandamus action. *Id.* at 26-28; DNR's Final Resp. at 12.

Chuitna counters that "appeal" should be interpreted broadly. Pl.'s Reply and Opp'n to Defs.' Second Mot. for Summ. J. at 11. Chuitna also notes that the Supreme Court of Alaska tends to evaluate whether a case is an appeal using a functional test, rather than a formalistic one. Pl.'s Surreply at 4-5. That more pragmatic test, Chuitna argues, indicates that this case is an "appeal to the superior court" such that AS 46.15.185 incorporates AS 44.62.560(e).

The brief Alaska case law regarding AS 44.62.560(e) indicates that the second sentence of that statutory section creates an independent action, separate from a typical administrative appeal. *Schnabel v. State*, 663 P.2d 960, 966 (Alaska Ct. App. 1983) (cited without approval or disapproval in *State, Dep't of Fish & Game v. Meyer*, 906 P.2d 1365, n.5 (Alaska 1995), *superseded by statute on grounds not relevant here*, 2006 SLA, ch. 63 §4 (codified at AS 18.80.112), *as recognized in Toliver v. Alaska State Comm'n for Human Rights*, 279 P.3d 619, n.3 (Alaska 2012)).[25] Whether AS 46.15.185 includes the independent action authorized by AS 44.62.560(e) is a question of statutory

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based on both the federal APA and the All Writs Act, which permits writs of mandamus. *See, e.g., TRAC*, 750 F.2d at 75. The Court does not read the federal case law to require a writ of mandamus under the All Writs Act in order to enforce the federal APA's "unreasonably withheld" language. *See Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 61-62 (2004) (stating "[t]he APA provides relief for a failure to act in § 706(1) . . .").

[25] The Court recognizes that *Schnabel*'s interpretation of AS 44.62.560(e) is dicta and has never been approved by the Alaska Supreme Court. However, it is the only interpretation of the second sentence of AS 44.62.560(e) on this issue in Alaska law. That interpretation is also consistent with the approach used in the federal system. *See Independence Mining Co., Inc. v. Babbitt*, 105 F.3d 502 (9th Cir. 1997)

interpretation. "Statutory interpretation in Alaska begins with the plain meaning of the statute's text." *Ward v. State, Dep't of Public Safety*, 288 P.3d 94, 98 (Alaska 2012). The court must adopt the rule of law that is most persuasive in light of precedent, reason, and policy. *Roberson v. Southwood Manor Assocs., LLC*, 249 P.3d 1059, 1060 (Alaska 2011) (citing *W. Star Trucks, Inc. v. Big Iron Equip. Serv., Inc.*, 101 P.3d 1047, 1048 (Alaska 2004)).[26] The Court is also charged with interpreting "each part or section of a statute with every other part or section, so as to create a harmonious whole." *Kodiak Island Borough v. Exxon Corp.*, 991 P.2d 757, 761 (Alaska 1999) (quoting *Rydwell v. Anchorage Sch. Dist.*, 864 P.2d 526, 528 (Alaska 1993)). The Court will "presume 'that the legislature intended every word, sentence, or provision of a statute to have some purpose, force, and effect, and that no words or provisions are superfluous.'" *Id.* (quoting *Rydwell*, 864 P.2d at 530-31).

The Water Use Act does not define the terms "[a]ppeal" or "[a]ppeals to the superior court". *See* AS 46.15.260. However, an "appeal" is generally "a proceeding undertaken to have a decision reconsidered by bringing it to a higher authority; esp., the submission of a lower court's or agency's decision to a higher court for review and possible reversal." Black's Law Dictionary 94 (7th ed. 1999).

The Court finds no persuasive reason why it should interpret the generic language in AS 46.15.185 as strictly as DNR requests and prohibit Chuitna's Count 5 from proceeding. The legislature did not specify that AS 46.15.185

[26] Legislative history may also play a role in statutory interpretation. *Ward*, 288 P.3d at 98 (quoting *Bartley v. State, Dep't of Admin.*, 110 P.3d 1254, 1258 (Alaska 2005)). The Court's research has uncovered no relevant history regarding AS 46.15.185.

applied only to administrative appeals from a final agency decision to the superior court. For example, the legislature could have phrased AS 46.15.185 to incorporate only AS 44.62.560(a)-(d) and to exclude AS 44.62.560(e). It did not do so.

Moreover, the Court reads the overarching purpose behind AS 46.15.185 as providing a mechanism for the courts to review DNR's actions under the Water Use Act. To decide that AS 44.62.560(e) does not apply would create an entire category of "action", namely *inaction*, that would be statutorily unreviewable. The Court finds that this would be inconsistent with AS 46.15.185's purpose and would run afoul of the Court's obligation to adopt the rule of law that is most persuasive in light of precedent, reason, and policy.

The Court recognizes there is some tension between this interpretation and the statement that "appeals . . . are subject to . . . AS 44.62.570." AS 44.62.570 appears to assume there will be an agency order or decision with factual findings the court could review. *See* AS 44.62.570(d) (referencing an agency record), AS 44.62.570(e) (the court's judgment will affect "the order or decision"), AS 44.62.570(f) ("The Court in which proceedings under this section are started may stay the operation of *the administrative order or decision* . . ." (emphasis added)). The reference to AS 44.62.570 could be interpreted to mean that "appeals" in AS 46.15.185 relates only to formal administrative appeals, as opposed to the independent action AS 44.62.560(e) authorizes, because there will rarely, if ever, be an agency order or decision or findings for a court to review in an unreasonable or unlawful withholding action.

So finding would be inconsistent with the goals of statutory interpretation. AS 46.15.185 did not incorporate AS 44.62.560 except for AS 44.62.560(e). Rather, AS 46.15.185 incorporates AS 44.62.560 without exception. Excluding section (e) would not "create a harmonious whole". The Court believes the better rule is that AS 46.15.185 incorporates all of AS 44.62.560 and AS 44.62.570, but that the rules of AS 44.62.570 only apply in a formal administrative appeal; as opposed to an original action under AS 44.62.560(e). This interpretation gives effect to all of AS 46.15.185's language and retains the legislature's apparent intent to permit courts to review DNR's implementation of the Water Use Act. Therefore, the Court will permit Chuitna's Count 5 to move forward under AS 44.62.560(e). [27]

B. The Court will apply a totality of the circumstances test to determine whether DNR has unreasonably withheld agency action on Chuitna's applications.

The exact meaning of AS 44.62.560(e)'s grant of authority to compel agency action has not been discussed in Alaska's courts. Our Supreme Court has not set out what the Court must find to invoke that authority or what standards apply to determine if an agency is unreasonably withholding action. The statutory language, however, suggests that the Court should look at the totality of the circumstances to determine whether DNR has unreasonably withheld agency action.

[27] DNR argues at one point that Chuitna should be estopped from claiming that this action is functionally an administrative appeal. DNR's Surreply Resp. at 2-4. As AS 44.62.560(e) permits an independent action, the Court finds DNR's estoppel arguments without merit.

The parties' briefing looks at this issue through the lens of the *TRAC* factors.[28] The Court recognizes that these factors could provide some structure to the Court's analysis, but will not adopt them here. The *TRAC* factors are a creation of the federal courts and the Court is not bound to follow them. The Court believes that the *TRAC* factors unnecessarily limit what courts can examine in determining agency reasonableness. Although the Court's analysis below parallels the *TRAC* factors in many respects, the Court is not persuaded that the *TRAC* factors are so helpful that it should limit its analysis to what *TRAC* would require it to examine. The Court also notes that even the *TRAC* Court recognized that its test was "hardly ironclad, and sometimes suffers from vagueness." *TRAC*, 750 F.2d at 80. A totality of the circumstances test is in keeping with the idea that the agency must act reasonably[29] and allows the Court

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[28] The *TRAC* factors are:

> (1) the time agencies take to make decisions must be governed by a "rule of reason"[;] (2) where Congress have provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason[;] (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake[;] (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority[;] (5) the court should also take into account the nature and extent of the interest prejudiced by the delay[;] and (6) the court need not 'find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.

Independence Mining Co., 105 F.3d at n.7 (quoting *TRAC*, 750 F.2d at 80 (edits as in *Independence Mining Co.*).

[29] *See Tara U. v. State, Dep't of Health & Social Services*, 239 P.3d 701, 705 (Alaska 2010) (stating, "we . . . remand for reconsideration of whether OCS made reasonable efforts. In doing so, the superior court must consider the totality of the circumstances.");

to examine any relevant information regarding the reasonableness of the agency's action without trying to force that material into the *TRAC* test.

C. DNR has unreasonably withheld agency action on Chuitna's IFR applications.

A review of the facts in this case shows a clear tension between Chuitna's statutory right to apply for an IFR and the many competing priorities facing DNR. The Court is sympathetic to the budgetary restraints facing DNR and its need to allocate its resources thoughtfully. However, the Court finds that DNR has unreasonably withheld agency action here in light of the totality of the circumstances.

1. Relevant statutory and regulatory deadlines

The legislature included several deadlines in the Water Use Act which provide a sense of the speed with which the legislature believed adjudications should occur.[30] For example, after DNR publishes notice of an IFR application, it must make a decision on the application within either 45 days of publication[31] or

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see also Hartman v. State, Dep't of Admin., 152 P.3d 1118, 1122 (Alaska 2007) ("Reasonable suspicion exists where the totality of the circumstances indicates . . .").

[30] DNR argues that there is no way to craft a rule of reason regarding when DNR must publish notice of the application because "there is no legislative indication of when water rights adjudications should begin." DNR's Second Mot. for Summ. J. at 32. Although the Court is not using the "rule of reason" factor, the Court notes that it believes it can look to the deadlines surrounding the adjudication of the application for guidance as to the "speed with which [the legislature] expects the agency to proceed." *TRAC*, 750 F.2d at 80.

[31] The 45-day deadline applies where DNR chooses not to have hearings. Without hearings, there are 15 days during which objections may be filed and DNR must decide the matter within 30 days of receiving the last objection. AS 46.15.133(c).

180 days of receiving the last objection.[32] DNR must also review each IFR at least once every ten years. AS 46.15.145(f).

The Court also notes DNR's own regulations have several relevant deadlines in them. For example, if DNR decides an IFR application needs to be supplemented, the applicant has 60 days in which to supplement the application; unless DNR agrees to a longer deadline. 11 AAC 93.143(b). Also, an IFR applicant has 3 years from the day its application is accepted for filing to quantify the proposed reservation, if necessary. 11 AAC 93.142(b)(4). DNR may permit an extension of that time period by two years. 11 AAC 93.142(d). Finally, the IFR application DNR publishes states that the $1,500 application fee is "for up to 40 hours of staff time." Pls.' Opp'n to Defs.' First Mot. for Summ. J., Ex. 8 at 3 (Chuitna's Main Stem Application).

The Court also notes that it appears possible for DNR to complete an adjudication in under a year. Ms. Sager, a 30(b)(6) representative for DNR, participated in the following exchange:

> Q: . . . So you have a list of instream flow reservations that [DNR and ADF&G] have agreed DNR will process for the coming year?
> A: Yes.
> Q: And have you ever completed the list that you set at a meeting within that annual year, or do you generally set the goals – they're higher than what you're able to achieve in a year?
> A: Correct. We do tend to set the list a bit longer, in case some – some case files go shorter, some case files go longer, so we try to make the list as long

[32] The 180-day timeline applies only if DNR chooses to hold hearings on the application. AS 46.15.133(c).

> as we can, within reason, so that there's always a continuous file.

Sager Dep. 13:21-14:8, Feb. 5, 2013. DNR's actual ability to process the IFR applications it chooses to prioritize in a year weighs against the reasonableness of a years-long delay. Obviously, however, if the applicant still needs to quantify the reservation, it may be several years before DNR can adjudicate the application. That delay, however, is attributable to the applicant; not DNR. Similarly, if DNR discovers it needs additional information, additional delays may be involved. There is no evidence here that Chuitna's IFR applications have been delayed because they require additional quantification or information.

2. Human Health and Welfare and Subsistence Use

Chuitna argues that its application impacts human welfare because the reservation seeks to protect fish and wildlife habitat that some of its members rely on for subsistence use. Pls.' Opp'n to Defs.' First Mot. for Summ. J., Ex. 14 at ¶¶ 5, 9-10. DNR argues that similar interests are shared by every IFR applicant and do not justify prioritizing Chuitna's application over other IFR applications. DNR's Second Mot. for Summ. J. at 33. DNR also concludes that Chuitna's proposed reservation represents an economic, and not health or welfare, interest. *Id.*

The Court disagrees that the reservation of a certain flow of water to preserve fish and wildlife that support a subsistence lifestyle is a purely economic interest. "Subsistence use" has both non-economic and economic components. *See* AS 16.05.940. Our Supreme Court has recognized the significant

importance of subsistence use both "in furnishing the bare necessities of life" and because "subsistence hunting is at the core of the cultural tradition of many [Alaska Natives and non-Natives who have adopted a subsistence lifestyle]." *State v. Tanana Valley Sportsmen's Ass'n, Inc.*, 583 P.2d 854, n.18 (Alaska 1978). Given the importance of subsistence use in the history of this state, the Court finds that this issue weighs in favor of requiring faster adjudication of IFR applications.[33]

3. The Nature and Extent of the Interests Prejudiced by Delay

Chuitna argues that it is prejudiced because it does not have rights as a prior appropriator and cannot protect its interests as such. Pl.'s First Cross-Mot. for Summ. J. at 18. Chuitna also argues that it has spent a significant amount of money to hire a lawfirm and hydrologist to assist in compiling its application and that these people may not be available in the future depending on how long it takes DNR to adjudicate Chuitna's applications. *Id.*

The Court gives little weight to the first concern because Chuitna's argument assumes that Chuitna's applications will be approved. The Court cannot and will not make that assumption here. The agency's eventual determination of Chuitna's application is not before the Court.

However, Chuitna raises valid concerns regarding its interests in the prompt adjudication of its applications. Our Supreme Court has recognized that

[33] The Court is not basing its conclusion here on the assumption that Chuitna will receive the IFRs it has requested. Much like the *TRAC* Court, this Court is only finding that the importance of human health and welfare and subsistence use makes delays in adjudicating rights that affect those issues less reasonable than if DNR was adjudicating a purely economic right. *Cf. TRAC*, 750 F.2d at 80.

parties appearing before an agency have an interest in fair and prompt agency action. *Brandal v. State, Commercial Fisheries Entry Comm'n*, 128 P.3d 732 (Alaska 2006). This is an interest grounded in the Alaska Constitution's due process clause. *Id.* at 738. This basis weighs strongly in favor of intervention.

Chuitna's claim of prejudice is also not illusory here. Although DNR claimed that a longer period of time would give it better data with which to adjudicate Chuitna's application, Chuitna is faced with the prospect of needing to update the data it submitted, hire more experts to gather and analyze that data, and spend additional time updating its application. This factor weighs in favor of finding DNR's delay unreasonable.[34]

4. Agency Budget Constraints and Prioritization

It is unquestionable that forcing DNR to process Chuitna's IFR applications will mean that there are appropriation, TWUP, and, potentially, other IFR applications that do not get processed. This is inherent in any action to force an agency to move forward because the distribution of agency resources is a zero-sum proposition. DNR argues strongly that compelling it to process Chuitna's applications over other applications lets Chuitna cut in line and impermissibly violates the separation of powers. DNR's Second Mot. for Summ. J. at 21-23.

The Court does not give any weight to the argument that Chuitna would be allowed to "jump" the line. Chuitna is the party suing for relief. Other parties,

[34] The Court also incorporates by reference its more lengthy discussion of delay and prejudice as its relates to Count 6. Section VI, *infra*.

who have had applications pending for 20 years or more, are apparently content with DNR choosing when their applications will be processed. Any impact on those entities is a result of their acquiescence to DNR's prioritization system. The Court will not hold Chuitna hostage to the decision of other applicants not to challenge this system.

The Court does, however, consider the impact on DNR and separation of powers an important factor weighing against intervention here. DNR is generally allowed to set its priorities and decide how it wants to spend its budget. The legislature has chosen to fund DNR's Water Use Section at a level where DNR cannot keep up with the applications it receives. In commanding DNR to act, the Court will affect how DNR is choosing to spend the resources it receives from the legislature.[35]

However, the prioritization argument loses weight as time passes. The longer DNR waits to place an application on its priority list and begin adjudicating it, the less compelling DNR's need to prioritize becomes. To do otherwise would be to allow DNR to "prioritize" an application into a black hole of agency inaction without any reduction in the importance of this factor. At some point, "prioritizing" becomes a failure to act that is not reasonable. It is the Court's job to provide a remedy when that occurs. *See* AS 44.62.560(e).

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[35] These concerns are similar to those expressed in *In re Barr Labs., Inc.*, 930 F.2d 72 (D.C. Cir. 1991). The Court notes its agreement with the critique in *Forest Guardians v. Babbitt*, 174 F.3d 1178 (10th Cir. 1999), of *In re Barr*'s failure to follow the mandatory nature of the federal APA. *Forest Guardians*, 174 F.3d 1178, 1190-91. However, AS 44.62.560(e) gives the Court discretion in its decision to compel the agency to initiate action; unlike 5 U.S.C. § 706(1), which commands federal courts to act. As such, the Court finds *In re Barr* presents a strong argument in favor of the Court taking no action here.

5. Competing applications

Stream 2003 has been the subject of a number of TWUP and IFR applications. The evidence before the Court further indicates that DNR believes an appropriation application will be submitted. The presence of these applications weighs in favor of adjudicating Chuitna's IFR applications. Priority is based on the date of an application. If Chuitna receives its IFRs, then applicants with a later priority date may not receive the appropriations or TWUPs they request. On the other hand, if Chuitna's applications remain pending when a later application is granted, that later applicant must worry about whether Chuitna's IFRs could nullify the later-granted certificate. Denying Chuitna's applications, however, would remove that uncertainty.

The history of multiple applications, thus, weighs in favor of prompt adjudication. Chuitna is not left in limbo regarding the status of its application nor are other applicants whose rights may be affected by Chuitna's application. Prompt adjudication when many claims are pending or expected reduces uncertainty and promotes confidence that the rights DNR grants will not be taken away.

6. DNR's Ability to Protect the Same Interests

DNR is able to impose conditions on appropriations and TWUPs. Arguably, DNR can protect the very same interests that Chuitna is attempting to protect by doing so. This would tend to argue in favor of finding DNR's delay reasonable.

However, the Court does not believe that Chuitna should be required to rely on DNR to enforce the interest Chuitna seeks to acquire. The legislature gave private persons the ability to obtain IFRs and those private persons can then enforce their IFR's against more junior appropriators. The fact that DNR can impose and enforce conditions similar to an IFR on appropriators or TWUP-holders, if DNR wants to do so, provides only slight justification for failing to adjudicate IFRs in a timely manner.

7. Lack of Impropriety

Chuitna asks the Court to draw an inference that DNR has improperly delayed this action based on DNR's support for certain legislation and comments regarding private IFRs. Pl.'s First Cross-Mot. for Summ. J. at 18-19. DNR strongly disagrees with this characterization. DNR's Second Mot. for Summ. J. at 31-32.

The Court cannot find any impropriety here. At best, there is a factual dispute about the "true motivations" behind DNR's delay in processing private IFR applications. The delay behind DNR's actions are just as easily explained by the fact that DNR has limited resources and that the only person adjudicating IFR applications is funded, in part, by ADF&G. Sager Dep. at 8:20-24, 12:23-13:13. For the reasons discussed below, however, the Court does not find that this factual issue prevents summary judgment here.

8. The Court will compel DNR to begin adjudicating Chuitna's IFR applications.

The Court will compel DNR to begin adjudicating Chuitna's application. The deadlines related to processing IFR applications are all relatively short assuming the data does not need to be supplemented, as discussed above. Chuitna's IFR applications affect human health and welfare and subsistence use. Chuitna's IFR applications may also affect the ability of future TWUP, IFR, and appropriation applicants to obtain the water they request. Adjudicating Chuitna's applications will remove the uncertainty now present in DNR's process. Finally, Chuitna has a constitutional right to prompt and fair adjudication and is prejudiced by the ongoing delay.

The only explanations for why DNR's delay is reasonable here is that DNR is faced with budget shortfalls and must prioritize IFR applications, and could protect many of the same interests as IFR holders by imposing conditions on other applicants. These explanations are insufficient to render a four-year delay to even *begin* processing Chuitna's IFR applications reasonable. The countervailing factors are simply too strong for DNR to be able to interpose its lack of resources as a way to never act on Chuitna's applications.

The Court recognizes and respects DNR's right to create agency priorities, but not at the expense of taking away a person's right to obtain a statutorily created interest. The legislature has charged DNR with the responsibility of determining who should receive IFRs. The Court is doing nothing here other than forcing DNR to adjudicate these legislatively bestowed rights in a

reasonable fashion. Letting three applications languish over the course of four years with no action is not reasonable. Therefore, the Court finds that DNR has unreasonably withheld agency action on Chuitna's applications. The Court hereby orders DNR to begin adjudicating Chuitna's three IFR applications[36] within thirty days of the date of this order.[37]

V. DNR has violated Chuitna's right to due process[38]

Chuitna's Count 6 alleges that DNR's failure to process Chuitna's IFR applications within a reasonable time violates Due Process under the Alaska Constitution. First Am. Compl. at ¶¶ 73, 76. DNR claims (1) that Chuitna does not have a protected property interest in its IFR applications; (2) that the process

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[36] The Court takes no position on what the outcome of those adjudications should be, as stated before.

[37] The Court's decision on Count 6, that DNR has violated Chuitna's right to due process, is a separate basis for finding relief under AS 44.62.560(e). DNR has "unlawfully withheld" agency action in delaying its adjudication of Chuitna's claims in violation of the Alaska Constitution. *See* Section V, *infra*. With respect to the relief granted, DNR argues that even if Chuitna prevails on any of its counts, the Court cannot order it to prioritize Chuitna's application because such an order would violate the separation of powers. Defs.' Reply Re Defs.' First Mot. for Summ. J. at 21-24. The Court disagrees. The superior court has jurisdiction to declare the rights of parties and then provide such "further necessary and proper relief based on a declaratory judgment . . . after reasonable notice and hearing . . ." AS 22.10.020(g). DNR's reliance on *Public Defender Agency v. Superior Court Third Judicial Dist.*, 534 P.2d 947 (Alaska 1975), is not persuasive. That case was strongly influenced by the common law history of the powers held by an attorney general. *See Public Defender Agency*, 534 P.2d at 950-51. Moreover, AS 44.62.560(e) specifically confers authority on the Court to compel the agency to act. *Johns v. Commercial Fisheries Entry Com'n*, 699 P.2d 334, 339 (Alaska 1985), supports the entry of an order compelling the agency to act if a due process violation has occurred.

[38] The Court would not normally address constitutional questions after deciding a matter on statutory grounds. The Court recognizes and appreciates the judicial policy against doing so. However, the Court believes that it is a better use of judicial resources to decide whether the Court will grant summary judgment on Count 6. That way, should the parties appeal to the Supreme Court and the Supreme Court take a different approach on Count 5, the parties will not be forced to engage in additional briefing on Count 6 before this Court, which may lead to a second appeal.

for adjudicating IFR applications will not deprive Chuitna of an important property interests; and (3) that Chuitna is receiving the same process as everyone else and has not shown prejudice. Defs.' Reply Re Defs.' Third Mot. for Summ. J. at 2. Chuitna responds that (1) it has due process rights as an applicant; (2) it has been prejudiced; and (3) that DNR's justification for the delay is insufficient. Pl.'s Second Mot. for Summ. J. at 3, 7, 11.

In *Brandal v. State, Commercial Fisheries Entry Comm'n*, 128 P.3d 732 (Alaska 2006), the Supreme Court of Alaska considered the propriety of a twenty-two year delay in finally adjudicating an application for a fisheries entry permit. *Brandal*, 128 P.3d at 734-35. Brandal had originally applied in 1977 and the CFEC denied his application in 1978. However, Brandal received an interim permit that allowed him to fish while the case went through two subsequent hearings: one in 1979 and another in 1982. The hearing officer eventually recommended Brandal's application be denied. *Id.* Twenty-two years later, the CFEC issued a final decision denying Brandal's application. Brandal appealed; claiming, in part, that the delay violated his due process rights. *Id.* at 734.

The *Brandal* Court first explained that Alaska has adopted the federal *Mathews v. Eldridge* test which "takes into account: '[f]irst, the private interest that will be affected by the official action; second the risk of an erroneous deprivation of such interest through the procedures used, and the probative value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement

would entail." *Id.* at 738 (quoting *State, Dep't of Health & Social Servs. v. Valley Hosp. Ass'n, Inc.*, 116 P.3d 580, 583 (Alaska 2005)).

The *Brandal* Court also discussed a separate U.S. Supreme Court case *Federal Deposit Insurance Corp. v. Mallen*, 486 U.S. 230 (1988), which dealt specifically with unreasonable delay. That case stated the relevant factors as: "the importance of the private interest and the harm to this interest occasioned by delay[,] the justification offered by the Government for delay and its relation to the underlying governmental interest[,] and the likelihood that the interim decision may have been mistaken." *Id.* at 738 (citing *Mallen*, 486 U.S. at 242). The *Mallen* test, used in *Brandal*, is the one the Court will apply here given its specific focus on unreasonable delay; albeit without the interim decision component because none exists here.

A. Private Interest

Brandal explicitly recognizes that an applicant has a due process interest in the processing of its application. *Id.* at 739. (stating, "all applicants – including those whose permit applications are ultimately denied – have a procedural interest in the prompt and fair adjudication of their claims."). There is no reason to think this case calls for a different conclusion. The Alaska legislature has given any person in the state the right to apply for an IFR and the people of the State of Alaska have an interest in having their applications promptly and fairly adjudicated.

Additionally, Chuitna paid $4,500 in support of its applications and collected substantial documentation in support of its application. The payment of

the fee and preparation and submission of materials strengthens Chuitna's interest in having DNR adjudicate its application promptly, whatever the outcome. Chuitna certainly has a strong interest in having its fee payment and other resource expenditures lead to the timely adjudication of its claim.

B. Harm to the interest occasioned by delay

The harm to Chuitna's interest in a prompt and fair adjudication is that Chuitna's application has been pending for four years with no action, no IFR certificates, and no application denials that could be challenged in court. DNR has not given any indication that Chuitna's application will be considered in the near, or even the distant, future. In fact, DNR represented during oral argument that it has no due process obligation to *ever* adjudicate Chuitna's applications under the present circumstances and budgetary restraints. Oral Arg. 3:11:43-3:12:27 (Sept. 18, 2013).[39] Instead of proceeding to a final adjudication and either receiving an IFR or challenging a denial in the courts, Chuitna must wait for DNR and ADF&G to determine that Chuitna's application is worthy of consideration.

Chuitna is stuck in limbo while waiting on DNR. It has a limited ability to challenge the rights of others who receive appropriations from Stream 2003. With respect to TWUPs, DNR must only "consider" Chuitna's pending applications. With respect to appropriations, Chuitna could challenge them under

[39] The Court understands DNR's position to be that DNR does have to adjudicate the applications it receives, but that the process currently being provided is all the process that is due; even though that process is lengthy. Oral Arg. 3:14:15-3:14:28 (Sept. 18, 2013).

AS 46.15.133(e). If Chuitna received the IFRs it asked for it could challenge these applications as a prior appropriator, which grants it substantially stronger rights. If Chuitna's IFR applications are denied and the denial is affirmed on review, then Chuitna no longer needs to spend resources attempting to protect its IFR interests by way of administrative appeals or other actions.

Chuitna is further prejudiced by its payment of three application fees, which DNR has accepted. Chuitna paid these fees in order for its applications to be processed. The earlier administrative case before Judge Spaan makes very clear that Chuitna would not have paid these fees unless they were a required part of the application.

Chuitna is now at least $4,500 poorer with nothing to show for it because DNR refuses to adjudicate Chuitna's applications. In the event DNR grants Chuitna's applications, the $4,500 secures Chuitna's priority date. However, until DNR adjudicates the applications that tentative priority date provides no benefit to Chuitna. In fact, the priority date may *never* provide a benefit to Chuitna if DNR rejects Chuitna's applications.

The Court also takes note of the fact that the $1,500 application fee is "for up to 40 hours of staff time." Pl.'s Reply and Opp'n to Defs.' Second Mot. for Summ. J., Ex. 8 at 3. Apparently, DNR believes that it can charge for this time years in advance with no guarantee that its staff will ever be able to review the application. Having paid the fee for DNR's staff to evaluate its application, Chuitna has clearly suffered prejudice from DNR's lack of action.

C. The Government's justification for the delay and its relationship to the underlying government interest

DNR alleges that it does not have enough resources to adjudicate Chuitna's application in light of all of the other IFR applications it has received. *See, e.g.*, DNR's Final Resp. at 2-3. DNR claims that it has a system in place to prioritize IFR applications and Chuitna's application has not made it onto that list based on the application of six criteria, which apply equally to all applications. DNR's Second Mot. for Summ. J. at 34. DNR has provided no timeframe in which Chuitna's claim may be adjudicated.

DNR further alleges that TWUPs and appropriations have a higher budget priority because DNR must process TWUPs and appropriations or those applicants cannot do anything. DNR, on the other hand, can serve the same role as an IFR holder by conditioning TWUPs and appropriations to protect fish and wildlife habitats. Prokosch Dep. 54:16-55:19 (Feb. 5, 2013). Therefore, DNR has decided to prioritize TWUP and appropriation applications over IFR applications.

D. DNR has violated Chuitna's right to due process

DNR's justifications are unreasonable here and DNR has violated Chuitna's due process rights. Lack of resources might justify a short delay of weeks or months, but cannot excuse DNR's four-year delay. The Water Use Act contemplates the adjudication of IFRs following notice in a fairly short time frame: approximately 45 days from publication of the notice (no hearing) or slightly more than 6 months (with a hearing). *See* AS 46.15.133(c).

It is true that the regulations indicate that it may take several years to obtain the data necessary to adjudicate an application. 11 AAC 93.142(b)(4). An applicant can have between three and five years in which to quantify the reservation of water necessary to support their application. 11 AAC 93.142(b)(4), (d). Here, however, DNR is not waiting on Chuitna to quantify its reservations. DNR has decided not to act on Chuitna's application.

DNR presents a sympathetic argument for why it has chosen to prioritize TWUPs and appropriations. However, DNR's prioritization cannot justify years-long delays in examining the IFR applications it receives. A lack of resources cannot excuse four years of complete inaction, other than litigation. The lack of resources for IFRs is only occasioned by DNR's decision that TWUPs and appropriations are more important than IFRs and DNR's belief that it can do just as good a job protecting fish and wildlife habitat as an IFR holder. The Court understands DNR's rationale and recognizes that the legislature may be responsible for the position in which DNR now finds itself. However, that does not justify essentially ignoring Chuitna's IFR applications.

DNR's argument also fails to justify charging IFR applicants a fee and then taking no action on their application. Were DNR requiring payment once it was going to take action on the application, the circumstances might be different. However, DNR charged Chuitna a $4,500 nonrefundable fee as part of its application and that fee, along with Chuitna's application, has disappeared into DNR's files and the State's treasury. There is no excuse for DNR's charging an application fee and then take no action on the applications.

In sum, DNR's justifications for its delay are insufficient to support its decision to take no action on Chuitna's application. Chuitna has a due process right to a prompt and fair adjudication of its applications. Chuitna is prejudiced by DNR's continuing failure to act, and DNR's justifications are insufficient to support the lengthy delay in this case. Therefore, the Court grants Chuitna's motion for summary judgment on Count 6 and hereby orders DNR to begin adjudicating Chuitna's IFR applications within thirty days of the date of this order.[40]

Conclusion

The Court hereby grants DNR's motion for summary judgment as to Counts 1, 3, and 4 for the reasons discussed above and dismisses those counts. The Court grants Chuitna's motions for summary judgment as to Counts 5 and 6 for the reasons discussed above. Therefore, the Court orders DNR to begin adjudicating Chuitna's applications (LAS 27340, LAS 27436, and LAS 27437) within thirty days of the date of this order.

DATED at Anchorage, Alaska, this 14th day of October 2013.

Mark Rindner
MARK RINDNER
Superior Court Judge

...y that on 10/15/13
...he above was mailed to each of the follo...
...ir addresses of record:
Brown
Kerr

...Administrati...

[40] The Court takes no position on what the outcome of those adjudications should be, as stated before.