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

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OCT 16 2013

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

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[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; *see 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.

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[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.