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

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[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.

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[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.");