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

I certify that on 10/15/13
the above was mailed to each of the follow
their addresses of record:
Brown
Hare

RDS
Administrati

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