IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

CHUITNA CITIZENS COALITION and COOK INLETKEEPER, Plaintiffs, v. ALASKA DEPARTMENT OF NATURAL RESOURCES and DANIEL SULLIVAN, COMMISSIONER Defendants.	)	Case No. 3AN-11-12094 CI

DEFENDANTS' MOTION AND MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendants, State of Alaska, Department of Natural Resources and Daniel Sullivan, Commissioner ("DNR"), hereby move for partial summary judgment on plaintiffs' claims. By this motion, defendants seek to dismiss Cook Inletkeeper for lack of standing and for summary judgment in their favor dismissing Counts 2, 3, and 4 of plaintiffs' Complaint for Declaratory and Injunctive Relief ("Complaint"). This motion is supported by the points and authorities that follow.

I. INTRODUCTION

Chuitna Citizens Coalition ("CCC") submitted an application for an instream flow reservation ("IFR") in June 2009 and then, after communications with

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DNR, re-submitted it along with two other applications in August 2009.[1] It has been litigating over its IFR applications ever since. In October 2009, CCC administratively appealed DNR's treatment of its applications to the commissioner, and in February 2010 it appealed the commissioner's decision to the superior court ("IFR appeal").[2] After the superior court ordered the IFR appeal dismissed on March 15, 2011, CCC appealed to the supreme court. By stipulation, the supreme court matter was dismissed on August 18, 2011, and then this action was filed on or about November 10, 2011, simultaneously with a related administrative appeal from DNR's issuance of a temporary water use permit for water from the same stream included in the IFR applications ("TWUP appeal").[3] This court has the TWUP appeal before it as well.

Count 1 of this original action overlaps with the TWUP appeal by claiming that issuing the TWUPs without adjudicating the IFR applications is unconstitutional. Count 5 of this original action seeks to have the court order DNR to begin adjudicating CCC's IFR applications. Those two counts are not the subject of this motion. Rather,

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[1] Chuitna Citizens NO-COALition was the actual applicant for the IFRs in this case. According to the public records located on the Alaska Department of Commerce, Division of Corporations, Business and Professional Licensing website, Chuitna Citizens NO-COALition, Inc. was originally incorporated as Chuitna Citizens Coalition on March 10, 2008, but changed its name to Chuitna Citizens NO-COALition shortly thereafter and made its IFT applications under that name. It was not until January 10, 2010, after it filed the IFR applications at issue, that Chuitna Citizens NO-COALition went back to its original name. Because it is the current name of the entity, the applicant/plaintiff will be referred to herein as "Chuitna Citizens Coalition" or "CCC."

[2] *Chuitna Citizens Coalition v. DNR,* Case No. 3AN-10-04918.

[3] *Chuitna Citizens Coalition v. DNR*, Case No. 3AN-11-12095. Where necessary to distinguish the instant case from the TWUP appeal, the instant matter will be referred to as "this original action."

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this motion first seeks dismissal of Cook Inletkeeper because it is not the applicant and it lacks standing to bring any of the claims raised in this action. Second, this motion seeks dismissal of Counts 2, 3, and 4.

In Count 2 of the Complaint, CCC challenges DNR's failure to adjudicate the Alaska Department of Fish and Game's ("ADF&G's") application for an IFR on a different water source. However, just as Cook Inletkeeper does not have standing to require DNR to adjudicate CCC's IFR applications, CCC does not have standing to require DNR to adjudicate ADF&G's IFR application. Count 2 should be dismissed.

Count 3 of plaintiffs' Complaint alleges that DNR's processing of IFR applications violates the uniform application clause of the Alaska Constitution. As a matter of law, because applicants for IFRs such as CCC are not similarly situated to applicants for temporary water use permits, there can be no uniform application clause violation. Count 3 should be dismissed.

Count 4 of the Complaint alleges that DNR's failure to adjudicate CCC's IFR applications violates statutes and regulations governing water use. However, there are no statutes or regulations that require DNR to begin adjudicating an application for an IFR at any particular time. Therefore, as a matter of law, no statutory or regulatory violation has occurred, and Count 4 should be dismissed.

DNR is entitled to partial summary judgment, dismissing Cook Inletkeeper for lack of standing and dismissing Counts 2, 3, and 4, as a matter of law.

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II. BACKGROUND FACTS

The facts provided here are not disputed, and are provided primarily for the court's information and to put this matter in context.

On June 3, 2009, the Alaska Department of Natural Resources, Water Resources Section ("DNR" or "state") received an application from Trustees for Alaska, on behalf of CCC, for an IFR in Stream 2003.[4] DNR sent CCC a letter on June 4, 2009, acknowledging receipt of the application and indicating that DNR anticipated that its hydrologists would review the hydrology and staff would review the application for completeness within thirty days.[5] On June 10, 2009, DNR hydrologist Roy Ireland sent a memo to the chief of the Water Resources Section, Gary Prokosch, indicating that the application did not contain enough information to be acceptable.[6]

Among other things, Mr. Ireland noted that a "different, and greatly extended, view of the [hydrologic] data" was required, as was "[m]ore detailed, informative and legible mapping."[7] He also noted that the stream needed "to be subdivided into discrete, measured reaches to which hydrologic data are attached."[8] He explained that the data presented was insufficient to cover the entire length of the requested reservation (which covered virtually the entire length of the stream) because single data points can account for hydrological factors such as channel morphology, relative gradients, bed materials, and the contribution of tributary streams and adjacent

4 Exh. A, attached (application, without attachments).
5 Exh. B, attached.
6 Exh. C, attached.
7 *Id.*
8 *Id.*

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wetlands for only a limited distance upstream and downstream of the data point.[9] As described by the hydrologist: "It is incumbent on the applicant to identify and document that a particular flow value is valid over a particular, described (river miles, etc) reach of the stream. Where the flow value is no longer valid, a new reach must be developed and similarly documented, and this would result in a second application for a reservation of water, for which the same process would apply."[10] He concluded that "[t]his application has no reach information and is unacceptable for the purposes of instream reservation of water."[11]

On June 15, 2009, DNR sent a letter to CCC, indicating that the departmental review of the application "found numerous issues that need to be resolved before the Section can consider accepting this one application."[12] The letter explained that the extent of the requested reservation could not be covered under one reach, that the request would need to be broken down into a minimum of two reaches, with a likelihood of more than two reaches, and that each reach must have data to justify a reservation. It also described what additional information was needed to make the application acceptable, and gave the applicant 60 days to re-submit the corrected application.[13] In the alternative, the letter indicated that the application and fee could be returned, and CCC

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[9] *Id.* CCC's application indicated that its data was obtained from only two continuous flow gauging stations on Stream 2003, one near the mouth of the stream, and one at the other end of the stream, in the "upper reaches" of the stream.

[10] Exh. C. A "reach" is an identifiable section of a river or stream. *See City of Aurora ex rel. Its Utility Enterprise v. Northern Colorado Water Conservancy Dist.*, 236 P.3d 1222, 1224 (Colo. 2010).

[11] *Id.*

[12] Exh. D, attached.

[13] *Id.*

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could have unlimited time to correct the application and re-apply. If CCC chose to re-submit the original application along with additional applications, it would need to submit additional fees as well. [14]

On August 21, 2009, Trustees for Alaska, again on behalf of CCC, resubmitted the original application, but limited its scope to the "main stem reach" of Stream 2003. It also submitted two other applications and the corresponding application fees, for the "lower" and "middle" reaches of Stream 2003.[15] On September 24, 2009, DNR sent a letter to CCC verifying receipt of "your revised and additional applications for Reservation of Water on August 21, 2009 for Stream 2003."[16] The letter indicated that the two new applications had new DNR file numbers ("LAS" numbers) and were given a provisional priority date as of the date the applications were received, August 21, 2009. It also indicated that the department was "not staffed at this time to further assess the applications."[17]

On October 14, 2009, Trustees for Alaska, on behalf of CCC, filed the administrative IFR appeal from "the September 24, 2009 decisions . . . to require subdivided applications and separate application fees for an instream flow reservation, and to not extend the original application's priority date of June 3, 2009 to the subdivided applications."[18] The commissioner issued his decision on CCC's IFR appeal on January

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14 *Id.*
15 Exh. E, attached.
16 Exh. F, attached.
17 *Id.*
18 Exh. G, attached.

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5, 2010.[19] The commissioner denied the appeal for the reason that the September 24, 2009, letter from which CCC purported to appeal was "not a department decision that is subject to appeal."[20] In deciding that there was not yet an appealable decision, the commissioner correctly noted that "MLW's Water Resources Section has not made a decision on the applications in LAS 27340, LAS 27346 and LAS 27347. . . . Accordingly, and until such time as MLW makes their decision regarding Trustees' [sic] applications for a reservation of water within Stream 2003 (tributary of the Chuitna River), an administrative appeal would be premature and must be denied."[21]

CCC appealed the commissioner's decision to the superior court. As part of that IFR appeal, CCC made many arguments that are similar to those raised in this case. Among other things, it argued that DNR's process violated the uniform application clause of the Alaska Constitution, that DNR failed to allocate water rights in accordance with a priority of appropriation, and that DNR failed to provide meaningful review of its applications.[22] In opposition, DNR argued that the matter was not ripe for appeal. The superior court agreed with DNR and dismissed the IFR appeal.[23] CCC appealed the superior court decision to the supreme court, but subsequently agreed by stipulation to dismiss it. It then brought this original action along with the TWUP appeal.

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19 Exh. H, attached.

20 *Id.* at p. 1.

21 *Id.* at p. 4.

22 Notice of Appeal/Statement of Points on Appeal, Case No. 3AN-10-04918, attached as Exhibit I.

23 Decision dated 3/15/11, Judge Spaan, Case No. 3AN-10-04918, attached as Exhibit J.

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III. ARGUMENT

The party moving for summary judgment has the burden of making a prima facie showing that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law.[24] Upon this initial showing, the burden shifts to the non-moving party, who then must identify specific facts showing genuine issues; they cannot rest on mere allegations.[25] The parties can submit affidavits based upon personal knowledge supporting or opposing a motion for summary judgment.[26] In this case, DNR is entitled to judgment as a matter of law on plaintiff CIK's lack of standing and on Counts 2, 3, and 4 of the Complaint.

A. Cook Inletkeeper must be dismissed because it has no connection to the IFR applications at issue in this case and has no standing to participate.

Standing to sue is a question of law.[27] "Whether a party has standing to obtain judicial resolution of a controversy depends on whether the party has a sufficient personal stake in the outcome of the controversy."[28] A person must have suffered some "injury-in-fact" that can be remedied by the action; in other words, they must have a direct stake in the outcome of the litigation, *as opposed to a mere interest in the problem*.[29] Under Alaska law, general standing is a judicial rule of self-restraint. "We adhere to this rule because the very nature of our judicial system renders it incapable of

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[24] *Hoendermis v. Advanced Physical Therapy, Inc.*, 251 P.3d 346, 352 (Alaska 2011).
[25] *Id.*
[26] *Id.*
[27] *Keller v. French*, 205 P.3d 299, 302 (Alaska 2009).
[28] *Moore v. State*, 553 P.2d 8, 23 (Alaska 1976).
[29] *Wagstaff v. Superior Court*, 535 P.2d 1220, 1225 (Alaska 1975).

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resolving abstract questions or of issuing advisory opinions which can be of any genuine value. The adversity requirement ensures that a question presented for our review is one that is appropriate for judicial determination."[30] In order to establish standing in Alaska, the burden of proving standing is on the party bringing the action: "[A] party must demonstrate that he has or will suffer some 'injury in fact' from the contested action or proceeding."[31] While Alaska liberally construes the judicial limitation of standing, it nevertheless requires that standing be proven by the plaintiff and will dismiss an action where no standing exists.[32]

This case presents a specific challenge to DNR's treatment of three IFR applications filed only by Chuitna Citizens Coalition. It is a challenge based on DNR's issuance of TWUPs for the same stream on which CCC applied for the IFRs, before the IFR applications were adjudicated; it is an action intended to force DNR to adjudicate CCC's IFR applications. CIK is not an applicant on those IFR applications and does not have any personal stake in the outcome of this particular litigation. CIK has no right to require that the application be adjudicated at all, much less in any particular time frame.[33]

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[30] *Moore*, 553 P.2d at 23 n.25.

[31] *Sisters of Providence in Washington, Inc. v. Department of Health and Social Services*, 648 P.2d 970, 974 (Alaska 1982) (quoting *Wagstaff v. Superior Court*, 535 P.2d 1220, 1225 (Alaska 1975)).

[32] *Fuhs v. Gilbertson*, 186 P.3d 551 (Alaska 2008); *Sisters of Providence in Washington, Inc.*, 648 P.2d at 974; *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992) ("Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element [of standing] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof . . ..").

[33] This is most easily shown by the fact that if CCC chose to withdraw or modify its IFR applications, CIK would have absolutely no recourse. CIK cannot force CCC to

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While CIK may be interested in the problem, it does not have any "injury-in-fact" that can be remedied by an adjudication of CCC's IFR application; it does not have standing to participate in this case.[34] Cook Inletkeeper should be dismissed from this case for lack of standing.

CIK alleges generally in paragraph 8 of the Complaint that it has "citizen-taxpayer" standing. CIK never even alleges that it actually is a taxpaying entity.[35] However, even assuming it can establish its taxpayer status, CIK cannot meet the standard for citizen-taxpayer standing in this case. In order to establish citizen-taxpayer status, three factors must be proven: the case must be one of great public significance, the plaintiff must be appropriate, and the plaintiff must be capable of competently

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maintain its applications, and it cannot force DNR to adjudicate CCC's applications. If CIK wanted an interest, it should have applied for the IFRs itself.

[34] Allegations of CIK's standing are found in paragraphs 5-10 of the Complaint. None of CIK's allegations concerning its members' use of the waters and area are relevant to this action because CIK is not the applicant for the IFR. The only allegation that could be relevant is the last sentence of paragraph 5, in which CIK alleges that it "has sought to establish an instream flow reservation for the protection of fish and wildlife since 2009." Notably, CIK does not allege, nor could it, that it has a pending IFR application on the same waterbody that CCC has applied for, Stream 2003. Nor has it alleged that DNR has issued TWUPs on any stream for which it may have a pending IFR application, such that it would have similar interests as CCC. Certainly, nothing within the Complaint is a claim that DNR is not properly handling any IFR application that CIK may have pending. In fact, there are no factual allegations about CIK at all, beyond paragraphs 5-10.

[35] Without actually proving its status as a citizen-taxpayer, CIK cannot claim standing on this basis. *See Greater Anchorage Area Borough v. Porter & Jefferson,* 469 P.2d 360 (Alaska 1970) (holding that partnership that paid no taxes and did not appear on assessment rolls of borough had no standing to bring an action challenging the existence of the borough). Regardless, this issue probably does not have to be decided because CIK is not a proper plaintiff in this action under the standard for citizen-taxpayer standing.

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representing the position.[36] First, this case is not one of great public significance. It is a dispute over the appropriate handling of Chuitna Citizens Coalition's applications for instream flow reservations on a stream where there are also applications for TWUPs. While this may be important to CCC, it is not a matter of great public significance and it is not the type of case where citizen-taxpayer standing generally has been granted, especially since CCC is pursuing the case.[37]

Further, under the second factor, CIK is not an appropriate plaintiff. CCC is the applicant, who has a direct interest in how and when its applications are adjudicated.[38] On the other hand, CIK does not have any legally protectable interest in CCC's applications and is not affected by the status of CCC's applications. CIK's participation is not only unnecessary, it is inappropriate. Even if CIK had some remote interest in CCC's applications, where one party is more directly affected by the outcome of a particular case, and is actually pursuing the case, then a less affected plaintiff should

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36 *Fannon v. Matanuska-Susitna Borough*, 192 P.3d 982, 985 (Alaska 2008).

37 *See State v. Lewis*, 559 P.2d 630, 633-634 (Alaska 1977) (citizen-taxpayer standing granted regarding land exchange involving the state relinquishing thousands of acres of selected lands, including mineral interests, in exchange for other lands and concessions, all in order to augment CIRI's ability to select its lands under ANCSA).

38 CCC has standing to seek a finding that DNR has unreasonably failed to act on its IFR applications; CIK does not. It is not clear (and DNR does not admit) that CCC has standing to challenge DNR's issuance of a TWUP on the same stream as its IFR applications (the TWUPs appeal) or, as it is characterized in Count 1 of this original action, to challenge DNR's failure to adjudicate its IFR applications before it issues a TWUP on the same stream. That issue is not adressed by this motion. However, whether or not CCC has standing on that issue, CIK has less of an interest than CCC and, therefore, CIK does not have standing.

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be denied citizen-taxpayer standing.[39] Allowing CIK citizen-taxpayer standing in this case would be improper where it is not a matter of great public significance and where CCC already is pursuing it as the actual applicant on the IFR applications.

CIK does not have either interest-injury standing or citizen-taxpayer standing. CIK should be dismissed from this action.

B. Count 2 must be dismissed because Chuitna Citizens Coalition does not have standing with respect to any IFR application filed by another entity.

Count 2 of the Complaint is based on the existence of an IFR application filed by ADF&G on the Chuitna River, to which Stream 2003 is a tributary.[40] CCC alleges that DNR's failure to adjudicate ADF&G's IFR application on the Chuitna River somehow harms it and asks this court to find that DNR has "unreasonably delayed adjudication of . . . ADF&G's instream flow reservation application[]" and to "[e]nter an order requiring DNR to publish notice of ADF&G's application . . . within 30 days."[41]

This presents the same situation discussed in Section A, above, where one party (in Section A it was CIK) is seeking to have another party's (in Section A it was CCC's) applications adjudicated. For the same reasons that CIK does not have standing to have CCC's applications adjudicated, CCC does not have standing to have ADF&G's application adjudicated. CCC simply cannot show that it has any personal stake in whether or not an IFR application by ADF&G gets adjudicated by DNR or not; it does

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39 *Fannon*, 192 P.3d at 986; *North Kenai Peninsula Road Maintenance Service Area v. Kenai*, 850 P.2d 636, 640 (Alaska 1993).

40 *See* Complaint, ¶¶ 24-27, 54-58.

41 Complaint, ¶ 58; Complaint, Request for Relief, ¶¶ 3, 6.

not have any "injury-in-fact" that can be remedied by an adjudication of ADF&G's IFR application. If ADF&G sought to modify its application or concluded that it no longer required the IFR at all, CCC would have no basis to force ADF&G to maintain its application.[42] CCC simply has no standing to ask this court to force DNR to adjudicate ADF&G's application for an IFR. Count 2 should be dismissed as a matter of law.

C. Count 3 must be dismissed because CCC is not similarly situated to applicants for TWUPs or other water rights, and the uniform application clause of the Alaska Constitution does not apply to this matter.

Article VIII, section 17, of the Alaska Constitution states that "[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." The Alaska Supreme Court has explained how to interpret this constitutional provision:

> In recognition of the importance of citizens' equal access to natural resources, we interpret the Uniform Application Clause to require legislation dealing with natural resources to satisfy a heightened level of equal protection scrutiny. . . . The protections of the Uniform Application Clause, however, extend only to persons similarly situated with respect to the subject matter and purpose of the legislation. . . . *"Concluding that two classes are not similarly situated necessarily implies that the different legal treatment of the two classes is justified by the differences between the two classes."* . . .Not all persons in the state with an interest in a resource are similarly situated for purposes of the Uniform Application Clause.[43]

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[42] Requiring DNR to adjudicate ADF&G's application may also require ADF&G to take actions and present data that it may not be in a position to take or present. CCC simply cannot interfere in ADF&G's application process.

[43] *Baxley v. State*, 958 P.2d 422, 429 (quoting *Shepherd v. State*, 897 P.2d 33, 44 n.12 (Alaska 1995) (emphasis added)).

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In Count 3 of the Complaint, CCC claims that DNR violated the uniform application clause because "DNR's processing of applications for instream flow reservations is more expensive, takes longer, and is subject to a heightened level of scrutiny as compared to applications for out-of-stream uses."[44] CCC's concern appears to be that applications for temporary water uses are processed fairly quickly, while applications for IFRs take much longer. However, applicants for IFRs (or other appropriations) are not, as a matter of law, similarly situated to applicants for TWUPs.

In 2001, the legislature specifically recognized the need for DNR to be able to authorize the temporary uses of water without the need to grant a more permanent right to appropriate water.[45] In enacting laws providing for the temporary use of Alaska's water, the legislature specifically recognized the difference between temporary users and permanent appropriators. It specifically found that "many construction, development, commercial, and private activities require an authorization for the temporary use of state's water without the need to acquire a permanent right to appropriate water" and confirmed the authority of DNR to issue authorizations for the temporary use of water.[46] Different treatment of different types of water users reflects a legislative decision regarding allocation and resource management that is specifically committed to the legislature to prescribe.[47]

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[44] Complaint, ¶ 61.

[45] Ch. 100, sec. 2, SLA 2001.

[46] Ch. 100, secs. 2 and 6, SLA 2001; AS 46.15.155.

[47] "Except for public water supply, an appropriation of water shall be limited to stated purposes and subject to preferences among beneficial uses, concurrent or

CCC is an applicant for an IFR. If CCC's application is granted, it will be entitled to receive a certificate of reservation giving it a permanent limited property right in the appropriation.[48] It will have a priority date that entitles it to seniority over more junior water rights holders. On the other hand, applicants for TWUPs never receive a permanent property right. Statutorily, TWUPs holders do not obtain a right to appropriate water and the water they use remains subject to appropriation by others.[49] This difference in the interest sought establishes, as a matter of law, that applicants for IFRs are not similarly situated to applicants for TWUPs. Therefore, there can be no violation of the uniform application clause as a result of different treatment of applications for these different rights.[50] CCC, as an applicant for an IFR, is not similarly situated to an applicant for a TWUP on the same stream and, as a matter of law, there can be no violation of the uniform application clause. Count 3 must be dismissed.[51]

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otherwise, *as prescribed by law*, and to the general reservation of fish and wildlife." Alaska Constitution, art. VIII, sec. 13 (emphasis added).

[48] Certificates of reservation are "permanent" in the sense that they are a limited property right subject to due process. They can, however, be revoked or modified if circumstances warrant. AS 46.15.145(f).

[49] AS 46.15.155(c).

[50] In its decision in the IFR appeal, the superior court, Judge Spaan, recognized that IFR applicants and TWUP applicants were not similarly situated: "The fact that a different type of permit, a TWUP, was issued for a different purpose does not, in the view of this Court, violate the 'first in time first in right' statutory scheme." Exh. J, p. 10; *see also* Exh. J, p. 12 (TWUPs and IFRs "are different permits with different purposes and requirements . . .."). The superior court also recognized that "the statutory scheme keeps those who apply for water rights first at the front of the line" and that CCC's priority for its water right, if issued, had not been violated by the fact that a TWUP had been issued for a purpose different from the IFR application. Exh. J, p. 10.

[51] CCC may be arguing that the different fees charged for an IFR application and a TWUP application violate the uniform application clause. Again, the difference in what is being applied for, a temporary water use versus a permanent water right, establishes

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D. Count 4 must be dismissed because there is no statutory or regulatory violation.

In Count 4 of its Complaint, CCC alleges that DNR's failure to adjudicate its IFR applications "violates the provisions of AS 45.15.145, 45.15.133 and 11 AAC 93.141-.146."[52] However, nothing in the statutes cited by CCC requires DNR to adjudicate applications within a particular time. Only after DNR publishes notice under AS 46.15.133(a), are there statutory deadlines that apply to its adjudication.[53] DNR does not contend that it can simply refuse to adjudicate water rights applications because the statutes do not set a deadline for its adjudication. However, there are many factors that can affect the timing of adjudication of a water rights application, including agency funding, staff availability, state resource allocation priorities, and data acquisition necessary to justify the application. [54]

In fact, the regulations specifically contemplate that an IFR application may not be adjudicated immediately. 11 AAC 93.142 (b)(4) allows an applicant to "specify

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that the applicants are not similarly situated and the difference in fees does not violate the uniform application clause. Further, the legislature specifically found that fees for different water uses "should reflect the reasonable direct cost of providing the service." Ch. 100, sec. 1, SLA 2001. There is substantially less agency time necessary to adjudicate a temporary use of the state's water than is necessary to determine whether or not an IFR is needed or is in the public interest. A difference in fees cannot be a basis for a violation of the uniform application clause.

[52] Complaint, ¶ 66.

[53] *E.g.*, persons may file written objections within 15 days of publication; the application must be ruled on within 30 days of receipt of the last objection if no discretionary hearing is held or within 180 days of receipt of the last objection if a discretionary hearing is held. AS 46.15.133.

[54] In the IFR appeal, the superior court recognized that agency funding and staff availability issues could affect the adjudication of an IFR application. The court stated that it "has no authority over the hiring budget and work allocation at DNR, nor can it force DNR employees to work faster than they do." Exh. J, p. 10.

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the time period required to fully quantify the proposed reservation, which may be no longer than three years after the date the application is accepted by the department for filing." (Emphasis added.) 11 AAC 93.142(d) also provides for an extension of this time period, up to another two years for good cause. Under these provisions, it could be five years before an adjudication really would be started, assuming that other considerations then did not prevent it. As a matter of law, DNR's treatment of CCC's IFR applications does not violate any existing state water use statute or regulation, and Count 4 must be dismissed.

Furthermore, CCC has a statutory cause of action for testing whether or not DNR has unreasonably delayed adjudication of its applications, and it has attempted to assert it in this case. Although CCC has relied on the wrong statutory provision, CCC brought a cause of action asking this court to determine that "DNR has unlawfully and unreasonably withheld action on Chuitna Citizens and ADF&G's instream flow reservation applications."[55] While CCC relies on AS 44.62 560(e) for this claim, that reliance is misplaced.[56]

Instead, AS 44.62.305 provides that "a person may obtain judicial relief in an administrative matter from the superior court before the state agency handling the administrative proceeding on the matter issues a final administrative decision if" four criteria are met, one of which is that "the state agency has unreasonably delayed the

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[55] Complaint, Count 5, ¶70, relying on 44.62.560(e).

[56] *McCarrey v. Comm'r of Nat. Resources*, 526 P.2d 1353 (Alaska 1974) (the adjudicatory provisions of the Alaska Administrative Procedure Act found in AS 44.62.330-44.62.630 do not apply to DNR's decisions unless adopted by the agency).

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progress of the administrative proceeding." If the statutory criteria are met, the court may, among other remedies, "establish a deadline for the state agency to issue a final administrative decision."[57] The question of whether or not CCC has satisfied the four statutory criteria or is entitled to any relief under the statute is not at issue in this motion.[58] What is important to this motion is that AS 44.62.305 provides the exclusive basis for CCC's challenge to the reasonableness of DNR's processing of its IFR applications. CCC does not have a cause of action for statutory violations under the Water Use Act because there are no provisions in those statutes that require DNR to adjudicate the applications within a particular time. DNR is entitled to have Count 4 of the Complaint dismissed.

IV. CONCLUSION

For the reasons stated above, DNR asks the court to dismiss Cook Inletkeeper from this action because it does not have standing, to dismiss Count 2 because Chuitna Citizens Coalition does not have standing to bring it, and to dismiss

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[57] AS 44.62.305(c)(3).

[58] Similarly, whether or not CCC has satisfied the requirement of giving DNR written notice at least 30 days prior to filing this action is not at issue in this motion. *See* AS 44.62.305(b). What is relevant is that, if the facts warrant it, CCC has a statutory cause of action to determine whether or not DNR is acting reasonably in connection with processing its IFR applications. The court should not condone a fictitious cause of action based on non-existent statutory deadlines.

Counts 3 and 4 as a matter of law on the undisputed facts.

Respectfully submitted on this 11th day of June, 2012.

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