



In Reply Refer to: HCR-20
DOT# 2020-0214

September 23, 2022

(b) (6)
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Ryan Anderson
Commissioner
Alaska Department of Transportation & Public Facilities
P.O. Box 112500
3132 Channel Drive
Juneau, AK 99811-2500

Subject: Dismissal of Complaint DOT# 2020-0214

Dear (b) (6) and Mr. Anderson,

This letter is to inform you that the Federal Highway Administration (FHWA) Office of Civil Rights has determined that it will dismiss the above complaint, which alleges violations that may be related to Title VI of the Civil Rights Act of 1964, the U.S. Department of Transportation (USDOT) Title VI implementation regulations at 49 C.F.R. Part 21 and/or FHWA's Title VI regulations at 23 C.F.R. Part 200 (hereinafter Title VI). Title VI prohibits discrimination on the basis of race, color, or national origin in programs and activities receiving Federal financial assistance.

You allege that Alaska Department of Transportation and Public Facilities (ADOT&PF) violated Title VI of the Civil Rights Act of 1964 by failing to engage the local Alaskan Native population in planning the Kake Access Project on Kupreanof Island. You allege that the project resulted in various adverse impacts to the local Alaskan Native population.

FHWA accepted the complaint for investigation on June 23, 2021. During the course of its investigation, FHWA reviewed pertinent Project documents provided by the (b) (6) and by ADOT P&F.

FHWA's investigation focused on the following issues:

1. Whether ADOT&PF's Kake Access Project creates disproportionate impacts to the local Alaskan Native population by harming native cultural and historical sites.

2. Whether the ADOT&PF's Kake Access Project creates disproportionate impacts to the local Alaskan Native population by harming the Kupreanof Island ecosystem that Alaskan Native residents rely on for their subsistence lifestyle.
3. Whether ADOT&PF violated Title VI for inadequate public outreach and community engagement related to the Kake Access Project.

After careful consideration, FHWA has determined the allegations and facts in your complaint do not meet the minimum criteria under which FHWA could establish a case of disparate impact under Title VI. The available information is insufficient to show that populations in the Project vicinity, distinguishable by race, color, or national origin, have been disparately impacted by the Project.

Procedural Background

ADOT&PF is a recipient of continuing Federal financial assistance from FHWA. As a recipient, ADOT&PF is prohibited by Title VI from discriminating on the basis of race, color, or national origin in all of its programs and activities.¹

The U.S. Department of Justice (USDOJ), as the Federal government's coordinating agency for Title VI, implemented its Title VI program in 28 C.F.R. Part 42, which provides that the responsibility for enforcing Title VI rests with the federal agencies which extend financial assistance, such as the FHWA. The USDOT issued its implementing Title VI regulations at 49 C.F.R. Part 21, and FHWA's regulations are found at 23 C.F.R. Part 200.

Any person who believes they or any specific class of persons have been subjected to discrimination prohibited by Title VI may file a written complaint with FHWA.² In July 2017, FHWA issued Guidance for recipients and the public regarding its process for processing and investigating Title VI complaints.³ FHWA's guidance provides that FHWA is responsible for all decisions regarding whether a complaint should be accepted, dismissed, or referred to another agency.⁴ FHWA is also responsible for conducting all investigations of State DOTs and other primary Recipients.⁵

The (b) (6) filed its original complaint with the FHWA Office of Civil Rights on August 24, 2020. In that complaint, the (b) (6) alleged that ADOT&PF failed to consider Disadvantaged Business Enterprise (DBE) participation on the Kake Access

¹ The Civil Rights Restoration Act of 1987 amended Title VI to clarify Congress' intended definition of a covered program or activity under Title VI. Under the amended language, "program or activity" means all of the operations of a department, agency, special purpose district, or other instrumentality of a State or of a local government, any part of which is extended Federal financial assistance. *See* Civil Rights Restoration Act of 1987, Pub. L. No. 100-259.

² 49 C.F.R. § 21.11(b).

³ *Questions and Answers for Complaints Alleging Violations of Title VI of the Civil Rights Act of 1964*, FHWA – Office of Civil Rights website, https://www.fhwa.dot.gov/civilrights/programs/title_vi/Title%20VI%20Complaint%20Questions%20and%20Answers_Final%2020190409.pdf.

⁴ *Id.*, Question 2e, p. 4.

⁵ *Id.*, Question 3, p. 5.

Project. In a letter to the (b) (6), dated September 21, 2020, the FHWA Office of Civil Rights dismissed the complaint. The letter states, in part, “Our review found that the construction phase of the Kake Access Road Project does not include federal funds; therefore, the DBE regulations do not apply to that contract. Furthermore, although the AKDOT&PF, as a recipient of federal financial assistance from USDOT, is required to comply with Title VI of the Civil Rights Act of 1964, Title VI does not require the AKDOT&PF to implement the DBE Program on contracts that do not include federal funds.”

Following the dismissal of its original complaint, the (b) (6) filed a new complaint alleging that the project would result in various adverse impacts to the local Alaskan Native population. FHWA accepted the complaint for investigation under Title VI on June 23, 2021 and sent ADOT&PF a request for information on July 6, 2021. Between July and November 2021, ADOT&PF submitted project documents to FHWA as requested. In December 2021, ADOT&PF informed the FHWA Office of Civil Rights it had completed construction of the Kake Access Project.

Project Description

The Kake Access Project was a ADOT&PF construction project involving a two-lane unpaved road on northern Kupreanof Island. The project included construction of 5.39 miles of new road, improvements to 21.6 miles of existing unpaved road, and the construction of a boat launch. ADOT&PF’s stated purpose for the project was to provide year-round surface transportation access on Kupreanof Island between the community of Kake and the new boat launch on the eastern shore of the island.⁶ The construction project was completed during winter of 2021.

Discussion of Issues

Discrimination under Title VI can be analyzed under two types of legal analysis: (1) disparate treatment and (2) disparate impact. Regarding disparate impact, the U.S. Supreme Court has held that agencies may create regulations to prohibit practices having a disparate impact on protected groups, even if the actions or practices are not intentionally discriminatory.⁷ The USDOT’s Title VI implementing regulations state that a recipient “may not utilize criteria or methods of administration which have the effect of subjecting persons to discrimination because of their race, color, or national origin,” 49 C.F.R. § 21.5(b)(2). FHWA’s Title VI regulations similarly require Title VI compliance by recipients receiving Federal financial assistance from FHWA. 23 C.F.R. Part 200.

The first step in analyzing any disparate impact case is determining whether the recipient’s criteria or method of administering its programs or activities *adversely* and *disparately* affect members of a protected class. The elements of a Title VI disparate impact claim derive from the

⁶ https://dot.alaska.gov/sereg/projects/kake_acce55/

⁷ *Guardians Ass’n v. Civil Serv. Comm’n*, 463 U.S. 582, 582; *Alexander v. Choate*, 469 U.S. at 292-94; see *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1406 (11th Cir.), reh’g denied, 7 F.3d 242 (11th Cir. 1993).

analysis of cases decided under Title VII disparate impact law.⁸ To establish a prima facie case⁹ of discrimination, the investigating agency must ascertain whether the recipient utilized:

1. A specific, facially neutral policy or practice;
2. That had a disproportionate impact on a protected group; and
3. Whether the policy or practice likely caused the disproportionate impact.

In a Title VI disparate impact analysis, a causal connection must be shown between the facially neutral policy or practice and the disproportionate and adverse impact on the protected group.¹⁰ To demonstrate causation, evidence that “adequately captures” the impact of the project on similarly situated members of protected and non-protected groups must be shown, using an “appropriate measure.”¹¹

Issue #1: Whether ADOT&PF’s Kake Access Project creates disproportionate impacts to the local Alaskan Native population by harming native cultural and historical sites.

The (b) (6) alleged that project construction and the use of a camp for workers near Portage Bay would result in harms to efforts to preserve Kupreanof Island native historical and cultural sites.

Pursuant to the Alaska Historic Preservation Act,¹² ADOT&PF found that no historic properties would be adversely affected by the project.¹³ ADOT&PF investigated an area with a high probability for containing cultural and historic resources.¹⁴ During that investigation, ADOT&PF found two sites of interest. The first was a potential petroglyph that was evaluated by archeologists from the Tongass National Forest Petersburg Ranger District.¹⁵ The U.S. Forest Service archeologists determined that the potential petroglyph is a natural feature and ADOT&PF determined meet the definition of a historic, prehistoric, or archaeological resources under the Alaska Historic Preservation Act.¹⁶

At the second site, ADOT&PF found a midden deposit of degraded shell and bone fragments approximately 22 centimeters below the surface.¹⁷ ADOT&PF stated that it moved the project

⁸ *New York Urban League v. New York*, 71 F.3d 1031, 1036 (2d. Cir. 1995).

⁹ *Larry P. v. Riles*, 793 F.2d 969, 982 (9th Cir. 1984); *Elston*, 997 F.2d 1394, 1407.

¹⁰ *New York City Emtl. Justice Alliance v. Giuliani*, 214 F.3d 65, 69 (2d Cir. 2000).

¹¹ *New York Urban League v. New York*, 71 F.3d 1031, 1037-38 (2d Cir. 1995).

¹² The Alaska Historic Preservation Act, A.S. 41.35.070, requires review of State public construction projects to determine if historic, prehistoric, or archeological sites may be adversely affected. *See* <http://dnr.alaska.gov/parks/oha/shpo/sec106.htm#:~:text=The%20Alaska%20Historic%20Preservation%20Act%20requires%20a%20review%20of%20State,sites%20may%20be%20adversely%20affected.>

¹³ Letter from ADOT&PF to the Alaska Office of History and Archeology, “Finding of Affect: No historic properties adversely affected,” February 3, 2021.

¹⁴ *Id.* at 3.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

footprint away from this site to avoid impacts to the potential cultural resource.¹⁸ Therefore, available information is insufficient to show that the Kake Access Project harmed Alaskan Native cultural and historical sites.

Issue #2: Whether the ADOT&PF's Kake Access Project creates disproportionate impacts to the local Alaskan Native population by harming the Kupreanof Island ecosystem that Alaskan Native residents rely on for their subsistence lifestyle.

The (b) (6) alleged that road improvements would lead to an increase in hunting, fishing, and other harms to the Kupreanof Island ecosystem that native residents rely on for their subsistence lifestyle. For Title VI investigations involving federally-funded projects, FHWA typically relies on environmental documents developed pursuant to the National Environmental Policy Act (NEPA). However, as a state-funded project, the Kake Access Project was not required to undergo NEPA review. As a result, FHWA reviewed federal permitting and other documents regarding potential impacts to subsistence lifestyles on Kupreanof Island.

FHWA's document review showed differences of opinion on this issue and no definitive answer as to whether there would be specific impacts. ADOT&PF stated its belief that the improved road would give residents of Kupreanof Island the increased ability to access subsistence resources.¹⁹ Early planning documents from FHWA Western Federal Lands²⁰ showed different opinions as to whether an improved road would improve or harm subsistence lifestyles. One stakeholder said an improved road could "open up those old areas that we used to gather and we will access new areas to collect subsistence like hunting, fishing, fire wood, berries, plants, shell fish and recreation areas."²¹ However, other stakeholders expressed concerns that the project could lead to "declines in wildlife numbers by fragmenting habitat and change existing access patterns, increasing competition between rural and non-rural residents for subsistence wildlife resources."²²

Other provided documents discuss the issue of subsistence lifestyle. In issuing a permit for expanding three rock quarries for the project, the U.S. Forest Service found the requested activity would not restrict subsistence users from having access to subsistence resources on National Forest System lands and the "the action will not result in a significant possibility of a significant restriction of subsistence use of wildlife, fish, or other foods."²³

¹⁸ Letter from ADOT&PF to FHWA, "Kake Access Project Title VI Complaint – Position Statement," November 5, 2021.

¹⁹ *Id.*

²⁰ FHWA Western Federal Lands had originally planned to build the Kake Access Project before deciding to close the project in 2016. See "Notice to Rescind a Notice of Intent for an Environmental Impact Statement for the Kake Access Project in Southeast Alaska," Federal Register, Vol. 81, No. 71, April 13, 2016.

²¹ Letter from Mike A. Jackson, Transportation Director, Organized Village of Kake, to FHWA Western Federal Lands, April 25, 2013.

²² Resolution of the City of Kupreanof, Alaska, Resolution No. 13-4, May 4, 2013.

²³ Decision Memo: Three Rock Pit Expansions in Support of the Kake Access Project, U.S. Forest Service, Petersburg Ranger District, September 22, 2020.

In 2016, the U.S. Forest Service released a Final Environmental Impact Statement for a transmission line project in the Tongass National Forest.²⁴ Several areas of the transmission line project overlap with areas in the Kake Access Project.²⁵ The report discussed the possibility future road improvements in the area: “Road building is an important agent of change in Southeast Alaska. Road networks provide greater access to areas previously not accessible and can affect subsistence both positively and negatively by providing access, dispersing hunting pressure, and creating the potential for increased competition for favored hunting areas among communities connected by the existing road system.”²⁶

In its document review, FHWA was unable find specific documented impacts to the ecosystem that would reduce subsistence resources. FHWA was also unable to find data regarding potential increased competition for resources from increase use of an improved road. Therefore, available information is insufficient to show that the Kake Access Project adversely harms the subsistence lifestyle activities on Kupreanof Island.

Issue #3: Whether ADOT&PF violated Title VI for inadequate public outreach and community engagement related to the Kake Access Project

The (b) (6) alleged that ADOT&PF failed to engage the local Alaskan Native population. ADOT&PF stated that it conducted public outreach during the project development process including a meeting an outreach meeting in Kake.²⁷ It conducted outreach procedures specific to the U.S. Army Corp. of Engineers permitting process and the Alaskan Historic Preservation Act.²⁸ In its letter to the Alaska Office of History and Archaeology, ADOT&PF said he received several comments from stakeholders including one from the (b) (6).²⁹ Therefore, available information is insufficient to show that ADOT&PF’s public outreach constitutes race discrimination.

For these reasons, the complaint will be dismissed by FHWA and closed with no further action. If you have any questions, please contact Nichole McWhorter at (202) 366-1396.

²⁴ Final Environmental Impact Statement, Kake to Petersburg Transmission Line Interie Project, Tongass National Forest, June 2016.

²⁵ *Id.*

²⁶ *Id.* at 3-158.

²⁷ Letter from ADOT&PF to FHWA, “Kake Access Project Title VI Complaint – Position Statement,” November 5, 2021

²⁸ *Id.*

²⁹ Letter from ADOT&PF to the Alaska Office of History and Archeology, “Finding of Affect: No historic properties adversely affected,” February 3, 2021.

Sincerely,

Nichole McWhorter

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Title VI Team Leader
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