



United States
Department of
Agriculture

Office of the
Assistant Secretary
for Civil Rights

UNITED STATES DEPARTMENT OF AGRICULTURE
Office of the Assistant Secretary for Civil Rights

1400 Independence
Avenue SW

Washington, DC
20250

Complainant

v

Thomas J. Vilsack
Secretary
Department of Agriculture
Agency

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) Program Complaint No.: FS-11-5171
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Final Agency Decision

I. Introduction

In accordance with 7 C.F.R. Part 15d, this is the final determination of the United States Department of Agriculture (USDA) on this complaint.

II. Issue Presented

Whether Forest Service (FS) officials discriminated against Complainant on the basis of her race (Latina), and national origin (Guatemalan) when they:

1. Subjected the Complainant to an immigration enforcement action on the basis of her race and national origin with the pretext that the official contacted the U.S. Border Patrol (BP) for assistance; and
2. Failed to provide the complainant, an LEP individual, with meaningful access to an FS program or service.

III. Procedural History

Date of Alleged Discrimination:	May 14, 2011
Date Complaint Filed:	July 27, 2011
Date of Investigation:	August 21 – 26, 2011 December 12 – 15, 2011
Date of Report:	January 15, 2012

IV. Background

Complainant is a resident of Forks, Washington. Until the incident, she lived there with her minor children, as well as her long time male partner (MP). Both Complainant and MP made their living harvesting salal, a plant that grows abundantly in the Pacific Northwest Region of Washington, on both state and private lands, and in the Olympic National Forest (ONF). (Report of Investigation (ROI), Exhibit 6, Tab K, p. 2).

To pick salal in ONF, pickers must purchase a permit from FS. The permits cost \$150, and allow pickers to harvest salal in certain regions, depending on the permit. To obtain a permit, harvesters need to present a valid, U.S. Government issued photo ID. (See <http://www.fs.usda.gov/detail/olympic/news-events/?cid=STELPRDB5327177>)

On March 14, 2011, Complainant and MP were harvesting salal in ONF. At some point, Complainant and MP were stopped by a Forest Service Officer (FSO) for the purpose of performing a permit check for the salal they had harvested. Both Complainant and FS dispute many of the circumstances surrounding the decision to stop Complainant's car, and FSO's actions during the stop. Therefore, each side's version of the specific facts will be discussed below.

It is undisputed that FSO approached Complainant's car on the passenger side, and requested photo identification from MP, who was driving the car. MP provided FSO with at least one form of identification issued from the Mexican government, as well as a Washington State-issued driver's license. After receiving these documents, FSO returned to his car. At almost the same time, a BP Agent (BPA) arrived on the scene. The parties do not dispute that FSO specifically called BPA, although they dispute why BPA was called.

Upon seeing BPA, both Complainant and MP fled from their car into the woods. Both FSO and BPA pursued Complainant and MP on foot. FSO caught up with Complainant after a few minutes, and physically restrained her, hand-cuffed her, and returned to his vehicle with her. While FSO was restraining Complainant, BPA ran up to them, and then continued to pursue MP.

At some point, BPA was able to see MP. The pursuit continued for some time, until MP attempted to cross a swiftly moving river. BPA saw MP go under the water. BPA did not go into the water after MP, because she felt the water was too swift for her to navigate it safely. While BPA was still searching for MP, another Border Patrol Agent (BPA2)¹ arrived on the scene. FSO briefed BPA2 on the current

¹ BPA2 is the original BP agent called by FSO. However, BPA was closer to the scene, and arrived first after being contacted by BPA2. (ROI, Exhibit 6, Tab M, p. 2)

situation, and BPA2 then went in the direction of BPA to provide assistance. Several other Border Patrol agents arrived in the following hours, as did one County Deputy (CD), at the request of BP. A local Police Officer (PO) also arrived.

During this time, FSO used the interpretation services of BP agents to question Complainant regarding where she had been harvesting salal, as well as obtain photo identification. FSO used this information to pull records for both Complainant and MP. From the record, it appears that BPA was the BP agent who assisted FSO. (ROI, Exhibit 6, Tab N, p. 3).

Before the search ended, FSO transferred custody of Complainant to BPA, and gave Complainant a violation notice for "interfering and resisting a law enforcement officer." Complainant was then taken into custody by BP for suspicion of immigration violation.

Complainant was held for several days at an immigration facility in Port Angeles, Washington, before being released on humanitarian grounds. (ROI, Exhibit 1, p. 2) MP's body was later recovered from the river on June 5, 2011.

Complainants' Allegations

Complainant's Statements

Complainant states that FSO had driven by her and MP earlier in the day on May 14, 2011, when they were exiting their car. Complainant states that neither she nor MP were harvesting or carrying salal at that time. Later on, Complainant states that she and MP drove past FSO, and he was talking on the phone. FSO then followed Complainant and MP for about five minutes before pulling them over. Complainant states,

When we passed him, we saw that he was talking on the phone. He should have stopped us there but followed us for awhile. It seems like he timed it to get immigration there at the same time. They could have stopped us way in the forest, why did he wait so long to stop us? He just asked us for the permit and ID and immigration showed up. Neither one of us asked for an interpreter.

(ROI, Exhibit 2, p. 6)

Complainant states that FSO pulled her and MP over and approached the vehicle. FSO requested identification and a salal permit from Complainant and MP. FSO was in the process of returning to his car to check their identification when BPA arrived. Complainant states that FSO did not make any radio calls from the time that he approached Complainant and MP, until BPA arrived. Further, Complainant states that neither she nor MP ever requested interpretation assistance, and that when communicating with FSO, he spoke in English, while Complainant and MP

approached Complainant and MP, until BPA arrived. Further, Complainant states that neither she nor MP ever requested interpretation assistance, and that when communicating with FSO, he spoke in English, while Complainant and MP responded in Spanish. Complainant states that, in the course of interacting with FSO, MP provided FSO with several forms of identification. Complainant also states that MP did have a salal permit for "Area 29," although it is unclear whether or not MP provided this permit to FSO. (ROI, Exhibit 1, p. 1, 4, 6)

When Complainant and MP saw BP arrive, both fled their vehicle. Complainant states that, while running, FSO was able to catch up with her. Complainant alleges that FSO, "grabbed [her] by the hair and pulled [her] up. [FSO] yelled at [her] and told me 'on the ground on the ground' and pulled [her] arms behind [her]." Complainant states that she "had bruises on [her] arms for a week," (ROI, Exhibit 2, p. 4)

Complainant states that, for some time, she was detained by FSO while the search continued for MP. During that time, she interacted with several immigration officers. Complainant states she did not speak with BPA while the search was continuing. However, when the search was called off, Complainant was taken into custody by BPA. (ROI, Exhibit 2, p. 5)

Complainant states that at one point, BP and FSO began asking her about MP. She says,

...it isn't fair that [FSO] did this. That immigration showed up from Port Angeles, they said he was a criminal, that [MP] was pulled over by the police that he hit the police. That immigration said that he was a criminal and had no rights to be here. They asked me where he was from and I knew he was Mexican and they said that he wasn't from Mexico, that he was bad and bad. I knew him for 4 years, he was a good person, he never treated anyone bad from what I know.

(ROI, Exhibit 2, p. 7)

Complainant states that FSO "is the really bad one," and "He stops many Mexicans, they say that even though they have a permit, he calls immigration on us. It is only this specific officer with the reputation." Complainant says that while other FS Rangers will simply request your permit and then leave you alone, FSO does not treat salal harvesters fairly. Complainant further states that FSO's "work is with the permit, to give us a ticket. He shouldn't have called immigration. This shouldn't have happened to [REDACTED]." (ROI, Exhibit 2, p. 5, 7)

Complainant further states that "none of" the other FS Rangers has requested interpretation assistance from BP during the process of checking salal permits. She further states that other FS Rangers do not request a license. Complainant also alleges that FSO is known for calling immigration on Latinos. Finally, Complainant alleges that FSO could not see the salal in her car before stopping her, as her windows are very darkly tinted and there was only a small amount of salal in the car. (ROI, Exhibit 2, pp. 5-6)

OASCR notes that, in her affidavit, Complainant was asked to provide her full home address. Her response was, "I don't know in my head. Contact the attorney." (ROI, Exhibit 2, p. 3)

Complainant's First Supporting Witness (CW1)

CW1 is an acquaintance who happened to arrive on the scene on May 14, 2011, after Complainant was initially taken into custody by FSO. CW1 states that there were two packs of salal in Complainant's car, each measuring about 20 inches by 2 inches. She states she was unable to see the salal from outside the car. CW1 further states that the salal had not been removed from Complainant's car, which is not standard procedure in permit check stops where an individual is unable to provide a permit. (ROI, Exhibit 4, Tab C, p. 4)

CW1 also states that FSO has a reputation for calling BP. She further states that she had "a list of people that have been deported as a result of Forest Service, if its [sic] Forest Service, its [sic] usually the same officer." (ROI, Exhibit 4, Tab C, p. 5)

CW1 further states that there is an atmosphere of anxiety in Forks, WA. She states that they have had "[an] issue because FS and Border Patrol are working together." CW1, a preschool teacher, notes that schools are experiencing attendance and participation issues with their Latino students as a result of the FS Rangers in the area working with BP to stop more Latino residents, and subject them to immigration questioning. (ROI, Exhibit 4, Tab C, p. 5)

Complainant's Second Supporting Witness (CW2)

The Office of the Assistant Secretary for Civil Rights (OASCR) notes that, during the interview of this witness, FSO and another FS Ranger spoke in the hallway. During that time, FSO and the other Ranger ran a criminal background check on CW2 to see if he had any outstanding warrants for his arrest. After CW2 finished giving his statement, the other Ranger questioned CW2 about whether he had any outstanding warrants on his criminal record. (ROI, page 12.)

CW2 is a Latino resident of the Forks, WA area. CW2 states that on one day, he and some other salal harvesters were stopped by FSO and asked for salal permits. CW2 states that they gave FSO their permit, and FSO then asked other individuals in the car for their IDs. CW2 states that FSO told the individuals to wait in the car for awhile, because it would take some time to write up tickets for everyone in the car. CW2 says they waited about an hour and twenty minutes before looking up and seeing BP pull up. At that point, the driver of the car drove a few miles, stopped the car, and CW2, as well as the other individuals, fled on foot. (ROI, Exhibit 2, Tab D, pp. 4-5)

FSO caught up with CW2. FSO told CW2 to stop, and when CW2 turned around, FSO reached for his gun. CW2 surrendered peacefully. CW2 states that FSO approached him

from behind, dropped him to the ground, and put his foot on CW2's head. FSO returned to his car with CW2, while BP chased the other individuals. None were found. BP officers eventually returned to the road, where FSO transferred custody of CW2 to BP. CW2 states that BP officials thanked FSO, and that FSO laughed at CW2 while CW2 was being taken away. CW2 was or is currently in removal proceedings as a result of this interaction with FSO. (ROI, Exhibit 2, Tab D, p. 5)

CW2 also states that, generally, he sees FSO in his neighborhood. This neighborhood is primarily Latino, and is not located on National Forest land. CW2 states that FSO is also "involved...with" local police. CW2 does not understand why FSO is coming into his neighborhood. (ROI, Exhibit 2, Tab D, p. 6) CW2 states that many Latino residents are fleeing the Forks, WA area due to perceived discrimination on the part of FSO (specifically) and Border Patrol agents, generally. (ROI, Exhibit 2, Tab D, p. 4)

Complainant's Third Supporting Witness (CW3)

CW3 is the legal director at Northwest Immigrants Rights Project (NIRP). His organization is representing Complainant in these matters. CW3 states that there has been a pattern of harassment on the part of FS, dating back to 2008. CW3 states that, in 2008, a group of Latino individuals traveling in a van in ONF were stopped by an FS officer, and detained for over four hours, despite the fact that all passengers had proper permits for harvesting salal. These individuals were detained until BP arrived. CW3 says that, since this incident, there have been "a couple dozen" situations where FS officers have called BP under the "pretext of language assistance." (ROI, Exhibit 2, Tab F, p. 4)

CW3 states that FS's interactions with BP are causing fear in the communities around ONF. CW3 further states that Latino individuals, both lawful residents and undocumented individuals, are fearful of this harassment. CW3 further states that other protected classes, such as Native Americans and small Asian communities have spoken with NIRP about racial profiling concerns. (ROI, Exhibit 2, Tab F, p. 5)

Complainant's Fourth Supporting Witness (CW4)

CW4 is a staff attorney at NIRP. She is currently representing CW2 in removal proceedings resulting from a stop by FSO. CW4 provided the incident report generated by BP April 9, 2011, the date that CW2 was arrested. This incident is the same as the one described above under CW2's testimony. (ROI, Exhibit 2, Tab H, pp. 3-4)

The incident report notes that BP Agents "responded to a call for assistance from FSO." BP Agents arrived as CW2 and the other individuals in his car were fleeing from BP. After terminating pursuit of the other individuals, the BP Agents returned to FSO's vehicle, and questioned CW2 regarding his citizenship status. CW2 confirmed that he was not a lawful resident of the U.S., and was subsequently arrested for an immigration violation. (ROI, Exhibit 2, Tab H, pp. 8-9)

CW4 further reported that she has worked with residents in Forks, WA, who have reported that when FS Rangers stop them to check for permits, they will frequently take the person's photo identification, and hold it to give to BP when a BP Agent arrives on the scene, rather than returning it to the individual. Additionally, CW4 reports that area BP Agents who respond to calls from FS are do not limit their activities to interpretation. Rather, once BP Agents have assisted FS Rangers in interpreting, BP Agents initiate their own line of questioning regarding the individual's citizenship status. (ROI, Exhibit 2, Tab H, p. 5)

Complainant's Fifth Supporting Witness (CW5)

CW5 is the mayor of Forks, WA. CW5 generally reported an atmosphere of distrust between Latinos and FS/BP in Forks. Additionally, CW5 noted that local and state law enforcement agencies in Forks, WA, use Language Line² (LL), not BP, for interpretation services. Further, he notes that the "most serious" complaints received by his office regarding law enforcement activities in Forks, WA, have all been against FS. In a news article regarding the incident that predicated this complaint, CW5 also noted, "It really is just an atmosphere of fear." (See http://www.huffingtonpost.com/2011/06/18/benjamin-roldan-salinas-dead-border-patrol-twilight_n_879842.html, 04/17/2012)

Complainant's Sixth Supporting Witness (CW6)

CW6 is a witness who provided an account of her interaction with FSO. CW6 states that FSO stopped her and a relative on one day while they were cutting mushrooms. CW6 and her relative provided FSO with their mushroom picking permits. FSO then requested to see their driver's licenses. CW6's relative stated that he had not driven, and therefore did not have his license. CW6 states that FSO then began questioning them on their immigration status, and requested their "papers to be in the country." There is no information in the file that says how this incident was resolved.

Complainant's Seventh Supporting Witness (CW7)

CW7 is a community member living in Forks, WA. She provides interpretation services at the hospital, and is a substitute teacher. CW7 arrived on the scene on May 14, 2011 at around 5:30 p.m., after BP had begun its search for MP. When CW7 arrived, FSO had Complainant's trunk open and was looking at the salal. CW7 states she would be surprised if FSO was able to see the salal from the road, as Complainant's windows are heavily tinted. (ROI, Exhibit 9, Tab Q, p. 4-5)

CW7 reports a general atmosphere of distrust and tension between Latino residents of Forks, WA, FS and BP. CW7 reports one specific incident during which she interacted with FSO. On February 4, 2011, two individuals, who were lawful residents, were being detained by BP agents. CW7 went with another individual to learn more about the

circumstances of the individuals, and bring their vehicle back to town. At approximately 6 p.m. FSO pulled up to CW7's location. At this point, only CW7 was visible to FSO. CW7's friend walked from around the backside of the vehicle, and the three spoke briefly to confirm CW7 and her friend were going to take the vehicle. FSO then left the scene. (ROI, Exhibit 9, Tab Q, p. 6)

CW7 states that, approximately an hour later, she and her companion (a Latino person) were driving around near a campground when they noticed a car sitting across the road with its lights off. This was around 7 p.m. CW7 and her friend continued driving, and the car began to follow them. They pulled over a few miles down the road, and saw that it was FSO in the car following them. CW7 states that FSO stopped his vehicle in the middle of the road, where there is no shoulder, a short distance beyond where CW7 had pulled over. FSO then waited there. CW7 then began driving again, and FSO resumed following them. CW7 pulled over again, and this time FSO did not follow them any further. (ROI, Exhibit 9, Tab Q, p. 6)

CW7 and her friend then returned to the van to drive it home. They arrived at the van around 7:15 p.m. Upon arriving at the campsite, CW7 and her friend were surrounded by BP cars on a dead end road in ONF. CW7 notes that it was dark outside. CW7 believes that this stop was instigated by FSO. (ROI, Exhibit 9, Tab Q, p. 7)

CW7 contacted FSO's supervisor (Supervisor) following this incident. Supervisor told CW7 that FSO stated he followed CW7 because her companion was speaking Spanish, and FSO thought he might have come from the woods. CW7 notes that her friend willingly joined CW7 while she was speaking with FSO, and also that her friend was freshly showered and wearing clean clothes. (ROI, Exhibit 9, Tab Q, p. 7)

CW7 also reported an incident where FSO, as well as some BP agents, appeared to be working in collaboration while off duty. This incident, which occurred on March 24, 2011, involved FSO and some BP agents drove their personal cars to a remote parking lot area adjacent to a florist where salal harvesters sell their products. FSO and the BP agents left all their cars except for one in this parking lot for several hours before returning to get them. CW7 states this is an area out of town that one would not normally use to leave their vehicle for a day. CW7 believes these cars were left in the parking lot to intimidate salal harvesters. One of the cars left there is known in the community to be FSO's personal car. (ROI, Exhibit 9, Tab Q, p. 7)

Finally, CW7 notes that, on the day of the local high school graduation, FSO attended the event in full uniform, including his gun. FSO stood at the door to the school auditorium the entire time. This event occurred shortly after MP had gone missing, and before his body was found. CW7 notes that FSO was there to support the daughter of a deceased colleague. However, CW7 notes that other FS agents attended the graduation in plain clothes, without their weapons. (ROI, Exhibit 9, Tab Q, p. 8)

Agency's Response

FSO's Statements

FSO explains that, on May 14, 2011, he was leaving for work in the morning when he encountered a BP car. BPA2 was in the car. This was the first time FSO and BPA2 had met. They exchanged contact information, and agreed that they would be available to help each other when backup was needed. (ROI, Exhibit 6, Tab J, p. 7)

FSO was patrolling in the early afternoon when he noticed a blue SUV parked on Highway 101 near milepost 214. FSO notes that the vehicle was not parked on National Forest land, and also that cars do not generally park in that area. FSO noted this activity, and continued patrolling. (ROI, Exhibit 6, Tab J, p. 8)

Later, FSO drove past milepost 214 again, and noted that the same blue SUV was parked in the area, backed up against a gate located on state land. FSO states,

I saw what appeared to be a Hispanic female standing next to the passenger side of the vehicle. As I was driving past, I looked over at the vehicle and when she saw me driving past her on the highway, I saw what appeared to be a very alarmed expression. It is hard to describe the look. I could see the alarm and panic in her face when she saw me drive by. Seeing that reaction immediately told me something is going on. It was not a normal reaction to seeing a law enforcement officer. This told me there was possible criminal activity afoot. I continued driving...

(ROI, Exhibit 6, Tab J, p. 8)

FSO states that he was suspicious these individuals were harvesting salal on National Forest land. FSO reached this conclusion because the gate where the blue SUV was parked backs up to a road that allows access from state land into ONF. FSO had also received "intelligence" from a BP agent that BP had observed cars using that area to harvest salal, and that the salal might have been harvested from ONF. While the gate to this road was locked on May 14, 2011, FSO states it was previously open. While the gate was open, FSO states that he regularly drove along the road and observed the terrain. FSO notes that while it is "steep and rough," it would make it easier "to access the National Forest in that area." FSO notes also that when he was patrolling this area, he noticed a foot trail that led up to a large area where salal was growing. While FSO's testimony is unclear, it appears he is alleging that this salal was in ONF. (ROI, Exhibit 6, Tab J, pp. 9-10)

FSO further states,

Having received the intelligence... from BP, having driven the road first hand, having seen the terrain someone would have to traverse in order to access the National Forest, and having seen the type of terrain a salal harvester is willing to traverse in an area in close proximity to state land in order to harvest the salal and also the female's reaction to my presence, I

felt I had reasonable suspicion that they may have been engaged in the removal of salal from the National Forest.

(ROI, Exhibit 6, Tab J, p. 9)

FSO also notes that, in forming his decision that he had reasonable suspicion to make a stop, he believed that the female he observed may have mistaken him for a BP agent "based on her reaction." We presume that FSO was describing the female's "alarm and panic in her face." FSO also notes that it could have been possible that the Complainant knew who he was, because, since he arrived in the Forks, WA, community in 2010, "the Hispanic community in Forks were [sic] doing activities that [he] perceived as tracing [his] movements." (ROI, Exhibit 6, Tab J, p. 11)

FSO then notes that he pulled his vehicle over and contacted BPA2. FSO states that, in certain areas of ONF, he is reliant on his cell phone because his BP radio cannot pick up frequencies for him to make a radio call. While it appears that this is not "standard" procedure for FS officers, it does seem that this is an acceptable practice that solves a genuine communication problem when in remote areas of ONF. While on the phone with BPA2, FSO states that he observed salal in the back of the blue SUV, and made a determination to pull over the vehicle. BPA2 communicated that he was driving towards FSO. (ROI, Exhibit 6, Tab J, pp. 11, 13)

Pictures submitted by FS show that salal leaves are visible through the back of Complainant's trunk. The bundle of salal goes almost from the bottom of the SUV to the top, obscuring most of the rear window. (ROI, Exhibit 12, p. 1-3)

FSO states that he contacted BPA2 for two reasons: (1) interpretation assistance, and (2) backup. FSO notes that salal harvesters use machetes or gloves with knives or razors attached to them, in order to harvest the plant. FSO also notes that, over the course of his career in Forks, he has noticed that individuals who harvest salal are "predominantly Hispanic, and there is often times a significant communication issue." FSO states that he has experienced difficulty interacting with salal harvesters on previous occasions. Finally, FSO notes that his predecessor in his position was killed in the line of duty while performing a traffic stop. (ROI, Exhibit 6, Tab J, pp. 11-13)

FSO states that he is unaware of any FS policy on Limited English Proficiency (LEP) access. He states that it is common for him to call BP for interpretation services. Additionally, he says that he is not aware of any salal harvester in Forks, WA, who are not Hispanic, and that the majority of the salal harvesters have limited English abilities. FSO states he does not always call BP, nor do they always respond when he calls them. Additionally, FSO notes, "In working with BP, there have been some occasions where BP was involved, they were there to assist me, and BP did not make an arrest." FSO does not note if BP made immigration status inquiries during those instances. (ROI, Exhibit 6, Tab J, p. 23)

Earlier in his affidavit, FSO also noted that, during his training, he was shown videos to help him assess the safety of a traffic stop or other enforcement action. FSO recounts this instance:

One video that I think was part of the training involved a State Trooper out of Texas. The Trooper pulls a vehicle over with multiple subjects inside the vehicle. Some of them appear to be Hispanic and appear to be speaking Spanish. He discovers marijuana in the trunk. Two subjects were outside the vehicle. They ambushed the officer. They took the Trooper to the ground. They removed his sidearm from his holster and killed him. In the video the subjects were speaking Spanish. There was behavior and communication... events leading up to the attack that would have led somebody to believe an attack was imminent. There were warning signs. Language was one of the indicators. (ROI, Exhibit 6, Tab J, p. 2)

FSO further notes that he was trained on how to control a law enforcement situation, as well as how to assess "pre-assault" indicators. FSO notes that he was not given LEP or diversity training, although he received basic Spanish for law enforcement training in December, 2010,³ and completed a diversity training module on AgLearn⁴. (ROI, Exhibit 6, Tab J, pp. 2-4)

Regarding backup calls, FSO states that, in the area of ONF, there is an "informal agreement... with nearly every law enforcement officer" that they will assist each other with backup needs. (ROI, Exhibit 6, Tab J, p. 29)

Regarding FS's role in immigration stops, FSO states,

... we can detain a person suspected of entering the country illegally, but not arrest. Detaining is I am holding the person temporarily and they are not free to go. Before I detain them further I get the word from BP. I do not pull someone over under suspicion of an immigration violation. Detaining is temporary.

(ROI, Exhibit 6, Tab J, p. 5)

FSO states that on May 14, 2011, he pulled the blue SUV over as soon as he identified a safe place with a wide shoulder. FSO approached the SUV on the passenger side, and encountered Complainant and MP. This occurred before BPA or BPA2 arrived. FSO says he spoke with MP, who was driving the car. FSO states he identified himself, and said that he was pulling them over to check for their salal permit. FSO states that MP was speaking in Spanish, and there was a difficulty communicating. FSO repeatedly

³ This training "was a three day class focused on 50 Spanish phrases." ((ROI, Exhibit 6, Tab J, p. 3)

⁴ USDA's computer and web based training system.

asked for MP's salal permit, and MP "gesture[ed] toward the direction of Forks." (ROI, Exhibit 6, Tab J, p. 15)

FSO then requested identification from MP, and MP gave him a "Mexican voter ID card" and a driver's license. FSO requested these items in Spanish. FSO then told them, in Spanish, to stay in the car, and began returning to his vehicle. (ROI, Exhibit 6, Tab J, p. 16)

At this time, BPA arrived on scene, and Complainant and MP fled. FSO began a foot pursuit. FSO eventually got closer to both Complainant and MP. FSO states that he "was getting close to [Complainant], but [was] going for [MP]." As FSO approached Complainant, she stopped and faced FSO with her hands at her hips in front of her. FSO states that she looked like she was in a "wrestler stance." FSO believed Complainant might attack him and said that she looked "seriously pissed off." FSO states that, given what he perceived as a threatening posture, he redirected his attention toward Complainant, and was "on a full out sprint" when he approached her. He was commanding Complainant to get on the ground in both English and Spanish. (ROI, Exhibit 6, Tab J, pp. 17-18)

FSO approached Complainant and grabbed her right arm to pull it down while turning her. FSO got Complainant to the ground and looked around for MP. FSO states Complainant struggled to get up and he pushed her "on her back and straight down to the ground" with his hands. He commanded her in Spanish to lie, face, down, on the ground. At this point, BPA approached and FSO told her what direction MP had run. BPA followed MP. FSO stood Complainant up, handcuffed her, did a weapons search, and walked her back to his vehicle. FSO states that Complainant never communicated she was in pain. (ROI, Exhibit 6, Tab J, pp. 18, 20)

FSO placed Complainant in his vehicle with the window lowered. He asked her for ID, and she said she didn't have any. BPA2 then arrived and went to assist BPA. Through BP agents, FSO questioned Complainant and determined it was possible she had been harvesting salal on state lands. Complainant communicated to BP that her driver's license was in the car, and BP agents retrieved it. FSO did a criminal records check for both MP and Complainant, and neither had outstanding warrants. (ROI, Exhibit 6, Tab J, pp. 18, 21)

When the search was called off, FSO transferred custody of Complainant to BPA, and provided her with a citation for "interfering and resisting a forest officer." Custody of Complainant was then transferred from FSO to BPA. ((ROI, Exhibit 6, Tab J, p. 22)

FSO denies discriminating against Complainant in any manner, or considering her race or national origin in choosing to stop her or call BP. (ROI, Exhibit 6, Tab J, pp. 23-24)

Following this incident, FSO reports several instances where he believes members of the local Hispanic community were observing him. FSO provided pictures of an individual, who FSO identifies as Hispanic, sitting in a bus stop across from FSO's home, texting.

FSO perceived this situation as threatening, and felt that the individual was behaving in an evasive manner. FSO states that as FSO drove away, he saw Complainant leave the bus stop on foot. FSO returned to his home a few hours later, and the individual had returned, and was texting, and then got up and walked into the trailer park across the street from FSO's home. (ROI, Exhibit 6, Tab J, pp. 30-31)

FSO also reported several Hispanic members of the community behaving in an intimidating or aggressive manner on the day MP's body was found. (ROI, Exhibit 6, Tab J, pp. 29-30) FSO also reports an incident where a woman "associated" with CW2, was watching his home shortly before MP's body was located. He states that he arrived home one night and was sitting in his driveway completing his duty notes when a car pulled up to the bus stop across the street. A woman who was either "Hispanic or Native American" exited the car, and was alternately watching his home and sending text messages. (ROI, Exhibit 6, Tab J, p. 32)

FSO denies assaulting CW2, or using inappropriate force to restrain him. FSO also denies using foul language during the stop, but states he may have told CW2 to cease resisting. FSO denies discriminating against Complainant. (ROI, Exhibit 6, Tab J, p. 32)

Agency's First Supporting Witness (AW1)

AW1 is FSO's direct supervisor. She states that she is stationed four hours away from FSO, in Everett, WA. However, AW1 states that she has patrolled with FSO before, and interacts with him via email with frequency. AW1 states that she is aware of one occasion where she received information about a complaint filed against FSO. The individual stated that, during an interaction with FSO, FSO kept his hand on the gun. This individual felt that this stance was threatening. It is unclear from the record whether or not AW1 addressed this with FSO right away, or at a later date. AW1 says that, when she spoke with FSO about the incident, he stated he was "resting his hands on his belt." This contact was with an individual using an Off Highway Vehicle (OHV). AW1 advised FSO to be careful about having an intimidating stance when interacting with community members. (ROI, Exhibit 6, Tab K, p. 3)

Regarding the local high school graduation, AW1 states that she believes a lot of people overreacted. Further, she states that FSO was standing in the doorway to "get ventilation because it was a very hot day." (ROI, Exhibit 6, Tab K, p. 4)

AW1 also received a complainant against FSO regarding the interactions referenced in CW7's testimony, above. AW1 states that she communicated with CW7 via email, and answered her questions. AW1 further states that she has never heard of FSO racially profiling, and that he is a hard worker who wants to learn. AW1 believes FSO had probable cause to stop Complainant on May 14, 2011. (ROI, Exhibit 6, Tab K, p. 5)

AW1's testimony indicates she believes FSO was correct in contacting Border Patrol. She notes that the nearest Forest Service Officer is two hours away from where FSO was stopped. She states there is no formal FS protocol for requesting backup, and cell phones

are commonly used on patrol due to spotty radio frequency reception. AW1 also noted that FSO has access to a variety of law enforcement agencies in the area, including the Sheriff's office, police department, state patrol, Department of Natural Resources officers, Department of Fish and Wildlife officers, Tribal Police, BP and National Park Service. AW1 states that FSO utilizes all of these resources. (ROI, Exhibit 6, Tab K, p. 6)

AW1 states that the other Forest Service Officers who deal with salal harvesting enforcements have not had complaints, and that the May 14, 2011, incident is the "only" incident with FSO. It does not appear from her affidavit that AW1 was aware of any Federal LEP guidelines prior to this incident. (ROI, Exhibit 6, Tab K, p. 7-9)

Overall, the impression from AW1's affidavit is that she finds FSO to be a competent, thorough and conscientious worker. She does not believe he behaved in a discriminatory manner during this incident. (ROI, Exhibit 6, Tab K, p. 7-9)

Agency's Second Supporting Witness (AW2)

AW2 states that there have been "no complaints from the public within the office" concerning FSO. However, AW2 notes that he has had individuals approach him outside of the office and complain that FSO is "a hard ass." AW2 notes that this was from an OHV user, and that most OHV users are white. AW2 also notes that he has heard similar complaints "second hand" from the salal community. AW2 is a District Ranger, and appears to function in a supervisory role for FSO, as well. AW2 states he is "90%" satisfied with FSO's job performance. (ROI, Exhibit 6, Tab L, pp. 2-3)

Agency's Third Supporting Witness (AW3, also referenced as BPA2)

AW3 is the same individual as BPA2, discussed above. For consistency, OASCR will always refer to this individual as BPA2. BPA2 states that, on May 14, 2011, he received a call from FSO, indicating that FSO intended on making a traffic stop. BPA2 began heading that way, and radioed BPA as well. BPA2 states that shortly after BPA stated she was approaching FSO's location, BPA came back over the radio and appeared out of breath. BPA2 felt the situation was urgent. (ROI, Exhibit 6, Tab M, pp. 2-3)

BPA2 approached and encountered FSO, who indicated BPA was still in the woods. BPA2 went after BPA. BPA notes that he did not see any bruises on Complainant, and that she was "emotionally upset, but appeared to [sic] physically fine." BPA2 also states that BP is the only law enforcement agency in the area that he is aware of that has full Spanish language capabilities. (ROI, Exhibit 6, Tab M, p. 3)

Agency's Fourth Supporting Witness (AW4, also referenced above as BPA)

AW4 is the same individual as BPA, discussed above. For consistency, OASCR will always refer to this individual as BPA. BPA states that she approached FSO on May 14, 2011, after he had detained Complainant. When she approached, FSO was stating

commands in Spanish to Complainant. BPA did not see any visible marks or bruises on Complainant, and notes that she was lying "prone on the ground," with FSO standing about 2 feet away. She states that FSO was not "roughing up" Complainant. (ROI, Exhibit 6, Tab N, p. 2)

Agency's Fifth Supporting Witness (AW5)

AW5 is a Supervisory Border Patrol Agent in Port Angeles, WA. He notes that all BP agents are required to attend Spanish classes that are equivalent to a two-year college course. (ROI, Exhibit 6, Tab O, p. 2) AW5 notes that approximately 15% of salal harvesters are able to speak English. AW5 further notes,

On occasion, [FS] will back up our Agents. Most of the time, BP contacts the County police. It is almost guaranteed that if [FSO] stops anybody, it is a very high probability that the person does not speak English. The Agents know this and if a call comes in from FSO, BP may go offer back up or move towards the "stop." Very close to 100% of the assistance that BP provides to FSO, BP usually finds immigration violations as well.

(ROI, Exhibit 6, Tab O, p. 3)

AW5 also notes that FSO works by himself, and that he is the only Forest Service officer patrolling that area, and that BP goes out of their way to help him because of this. AW5 states that BP will assist regardless of the person's race or national origin, and that the assistance is not always for language services. AW5 notes that contact between FSO and BP "goes both ways," and that BP is "most likely to provide assistance due to FSO's location, and the availability of BP resources." He notes that law enforcement agencies other than FS rely on BP for interpretation services, and that "if someone does not speak English, BP has the authority to do an immigration inspection." (ROI, Exhibit 6, Tab O, p. 4)

Agency's Sixth Supporting Witness (AW6)

AW6 is a Law Enforcement Officer with the Washington State Department of National Resources. AW6 recounts an incident where he approached a salal picker, and was attacked. He states that a man "came up on [him] with a machete." AW6 states that he told the individual to drop the machete, and the individual responded, "fuck you." AW6 drew his gun and told the individual that he was "going to drop the weapon one of two ways." The individual said "fuck you" again, and got within 10 feet of AW6 before dropping the machete and running. AW6 notes that this individual was Hispanic. (ROI, Exhibit 6, Tab P, p. 2)

AW6 notes there are two "different groups of thieving" in the Forks, WA area. He states that "one group is white and they steal cedar blocks and the other is Hispanic taking brush (salal)." (ROI, Exhibit 6, Tab P, p. 2)

AW6 also states, "I know FSO. I know him by working in the same area and our offices are in the same compound. I have had to back him up a few times. Most of them have been with drunks along the ride. All of the drunks are white." (ROI, Exhibit 6, Tab P, p. 2)

AW6 further says that he has never heard FSO use "derogatory racial terms." He states that he frequently uses BP for interpretation assistance, as well. AW6 says,

I always try to get language assistance if the pickers to not speak English and a crime is being committed. If I knew backup was available, I would contact them for assistance. If the picker provides me with a valid permit, I say, "fine, have a nice day," and go on my way. There is no reason to call for backup or interpretive assistance.

(ROI, Exhibit 6, Tab P, p. 3)

AW6 states that he believes FSO is a little more laid back than his predecessor, and that, while his predecessor focused mainly on cedar thefts, which are more complex, FSO "covers everything." (ROI, Exhibit 6, Tab P, p. 3)

Documentary Evidence

Memorandum of Understanding (MOU)

An MOU was entered into by USDA, U.S. Department of Homeland Security (DHS), which oversees BP, and U.S. Department of Interior (DOI) on March 31, 2006. Relevant provisions of this MOU state:

The parties will develop and share joint operational strategies at the local, regional and national levels, including joint requests for infrastructure and other shared areas of responsibility.

(ROI, Exhibit 10, p. 4)

The DOI and USDA will assist [BP] in search and rescue operations on lands within the respective land managers' administration when requested.

The [BP] and land management agencies may cross-deputize or cross-designate their agents as law enforcement officers under each other agency's statutory authority. Such cross-deputation or cross-designation agreements entered into by the local land management agency and the field operations manager for [BP] shall be pursuant to policies and procedures of each agency.

DOI and USDA will work at the field operations level with affected local [BP] stations to establish protocols for notifying [BP] agents when DOI or

USDA law enforcement personnel are conducting law enforcement operations in an area where [BP] and DOI/USDA operations can or will overlap.

(ROI, Exhibit 10, p. 7)

Emails

This section will quote several relevant emails provided by FSA.

On May 16, 2011, an individual working with DHS sent an email to local Forks, WA newspapers confirming that on May 14, 2011, a BP agent responded to a request for interpretation assistance from an FS officer. The BP agent (BPA) then took that individual (Complainant) into custody. (ROI, Exhibit 11, p. 16)

On June 6, 2011, FSO sent an email out to several recipients regarding a press release about MP, who was still missing. A Forest Service Officer stationed in Sedro Woolley, WA, responded to this email, saying, "that is why you should not jump into rivers.... watch your back and let us know if you need anything."

On June 8, 2011, FSO sent an email to several individuals describing a person watching his house. A BP officer responded, "The great thing would be to request translation assistance so that we are able to *sack this guy up*." (emphasis added) (ROI, Exhibit 11, p. 25)

On the same day, FSO sent an email to a BP officer in Forks, WA. He was alerting this officer to his concerns that his home was being watched. In the email, FSO states that his supervisor, AW1, informed him that, "there would be no change in how we do business, investigate violations and cooperate with other Agencies." FSO also stated, "As I understand it the Washington Office for USFS LEI is behind me." There is an email containing the statements attributed to AW1 in our ROI. (ROI, Exhibit 11, p. 20, 20A)

In an email from July 6, 2011, the Patrol Commander for the Pacific Northwest Region of FS, Law Enforcement and Investigations sent an email to another FS employee. This individual is the Patrol Commander for FSO's region. In the email, he stated that FS officers "don't actively check citizenship status in all the contacts they make. In some situations where it becomes apparent that there may be an immigration issue, the case may be forwarded to" BP, and, "[b]eing in the country illegally is still a violation of the law and the [Forest Service officers] have an obligation to hand off that information if they become aware of a potential issue." (ROI, Exhibit 11, p. 17)

FSO's Incident Reports

As part of its Agency Position Statement (APS), FS submitted all violation reports filed by FSO since he began his job. OASCR reviewed all of these incident reports, but does not find it necessary to summarize these reports individually. It does not appear that FSO

is required to document when and for what reason he contacts backup. However, OASCR notes that (1) there is not a single incident report where FSO requested BP backup, or notes that BP responded to the scene, where the individual stopped was non-Hispanic, and (2) FS approached many armed individuals and groups (hunters, wood harvesters with axes), and did not request backup. There are incidents in these reports where FSO detained a Hispanic individual and it does not appear that BP responded to the scene. (ROI, Exhibit 13) There is no evidence in the record to suggest that FSO ever called an agency other than BP for assistance with a stop of a Latino individual.

OASCR does note several issues observed in FSO's violation reports. First, there is significant documentation that FSO encountered several Caucasian individuals who were unable to produce either (1) driver's licenses or other photo identification, or (2) valid permits for harvesting forest products. In none of those situations did FSO question those individuals about their immigration status, or call Border Patrol for further investigation. Nor did FSO use the individual's inability to produce a valid permit as an excuse to pursue questioning regarding that person's immigration status. Rather, FSO simply cited the individual for the appropriate violation, and allowed them to leave. Several of these stops were traffic stops, where, again, FSO did not request backup. (ROI, Exhibit 13, p. 1-14, 18-30, 37-39, 47-51; ROI, Exhibit 14, p. 1-7, 16-18) By contrast, several of FSO's violation notices demonstrate that BP responded to provide backup where Hispanic individuals were involved. (ROI, Exhibit 13, p. 40-42; Exhibit 14, p. 19-45)

OASCR also notes that FSO stopped some black individuals on September 10, 2011, and detected marijuana in the car. These individuals were issued a citation, subjected to no further investigation, and released. (ROI, Exhibit 14, p. 8-15)

Additionally, there are several instances where FSO approaches non-Hispanic individuals who have various weapons or dangerous items (chainsaws, guns, fireworks) or are behaving aggressively, yet FSO does not call for backup. (ROI, Exhibit 13, p. 5-8, 14-24, 31-36, 43-45; Exhibit 14, p. 2-7)

V. Preliminary Findings

As a preliminary matter, our office notes that the salal in Complainant's car was clearly visible, as demonstrated in the pictures submitted by FS. We therefore find that FSO's determination to stop Complainant and MP, in order to check for valid salal harvesting permits, was lawful. This finding does not indicate that we have found, at this point, that FSO's decision to call BP, for interpretation or backup assistance, was appropriate. This finding does not reach a decision on whether or not FSO's stated reason to stop Complainant and MP, for a salal harvesting permit check, was pretextual. It also does not state an opinion on whether or not the use of a pretextual stop implicates civil rights issues. We find that addressing these issues is unnecessary in the instant case, as the critical issue in this case is whether or not FS policy to utilize BP for backup and interpretation assistance is consistent with USDA civil rights policy and whether the decision to do so in this instance was discriminatory.

VI. Applicable Legal Standards

USDA regulation 7 C.F.R. § 15d provides:

“No agency, officer, or employee of the United States Department of Agriculture shall, on the ground of race, color, religion, sex, age, national origin, marital status, familial status, sexual orientation, or disability, or because all or part of an individual's income is derived from any public assistance program, exclude from participation in, deny the benefits of, or subject to discrimination any person in the United States under any program or activity conducted by the United States Department of Agriculture.”

In evaluating a claim of disparate treatment based on membership in a protected class, it is USDA policy to follow the burden shifting framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

Under *McDonnell Douglas*, the Complainant must first raise an inference of discrimination by establishing a *prima facie* case. The elements of a *prima facie* under our analysis are: (1) Complainant is a member of a protected class; (2) Complainant applied for and was eligible to receive the benefit sought; (3) Despite Complainant's eligibility, he or she was rejected, referred elsewhere, or otherwise treated differently; and, (4) The Agency/Respondent accepted or treated more favorably similarly situated applicants who were not members of the protected class or classes. See *Lawson v. CSX Transp., Inc.*, 245 F.3d 916 (7th Cir. 2001); *McDonnell Douglas Corp.*, 411 U.S. at 802.

Once a complainant has established a *prima facie* case for discrimination, the burden of production then shifts to the Agency/Respondent to articulate a legitimate, nondiscriminatory reason for its actions. See *McDonnell Douglas Corp.*, 411 U.S. at 802. Once the Agency has satisfactorily produced a legitimate, nondiscriminatory reason for its actions, the burden returns to the complainant to establish that the Agency's legitimate, nondiscriminatory reason is pretext for discrimination. See *McDonnell Douglas* at 804-05.

Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978), the Supreme Court explained that the McDonnell Douglas test “was never intended to be rigid, mechanized, or ritualistic.” 438 U.S. at 577. see also Lattimore v. Citibank Federal Savings Bank, 151 F.3d 712, 715 (7th Cir. 1998) (at the heart of the McDonnell Douglas test is the idea that when a person of one race is treated worse than a person of another race person in a situation in which there is no *obvious* reason for the difference, there is something for the Agency to explain).

LEP Access

Executive Order 13166 states:

Sec. 2. Federally Conducted Programs and Activities.

Each Federal agency shall prepare a plan to improve access to its federally conducted programs and activities by eligible LEP persons. Each plan shall be consistent with the standards set forth in the LEP Guidance, and shall include the steps the agency will take to ensure that eligible LEP persons can meaningfully access the agency's programs and activities. Agencies shall develop and begin to implement these plans within 120 days of the date of this order, and shall send copies of their plans to the Department of Justice, which shall serve as the central repository of the agencies' plans.

Sec. 5. Judicial Review.

This order is intended only to improve the internal management of the executive branch and does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers or employees, or any person.

Since 1976, Justice Department regulations have expressly required communication between funding recipients and program beneficiaries in languages other than English to ensure Title VI compliance. Justice Dept. regulations provide that:

[w]here a significant number or proportion of the population eligible to be served or likely to be directly affected by a federally assisted program (e.g., affected by relocation) needs service or information in a language other than English in order effectively to be informed of or to participate in the program, the recipient shall take reasonable steps, considering the scope of the program and the size and concentration of such population, to provide information in appropriate languages to such persons.

28 C.F.R. § 42.405(d)(1)

In 2000, President Clinton issued Executive Order 13166, directing all Federal agencies to "examine the services they provide, identify any need for services to those with limited English proficiency (LEP), and develop and implement a system to provide those services so LEP persons can have meaningful access to them. It is expected that agency plans will provide for such meaningful access consistent with, and without unduly burdening, the fundamental mission of the agency." 65 Fed.Reg. 50121 (Aug. 11, 2000). That order directed the agencies implement plans "consistent with the standards set forth in" a Justice Department guidance document, published the same day, which outlines "the compliance standards that recipients must follow to ensure that the programs and activities they normally provide in English are accessible to LEP persons and thus do not discriminate on the basis of national origin in violation of title VI ... and its implementing regulations." The Justice Department made clear that the standards in that guidance were an articulation of an existing requirement for funding recipients, not the creation of a new one. The DOJ guidance notes that the "Department of Justice has consistently adhered to

the view that the significant discriminatory effects that the failure to provide language assistance has on the basis of national origin, places the treatment of LEP individuals comfortably within the ambit of Title VI and agencies' implementing regulations." 65 Fed.Reg. 50123, 50124 (Aug. 11, 2000)

DOJ has recently explained LEP access requirements for assisted programs as follows:

The Supreme Court decided over three decades ago that a federal funding recipient's denial of an education to a group of non-English speakers violated Title VI and its implementing regulations. *Lau v. Nichols*, 414 U.S. 563, 569 (1974). As the Court explained, "[i]t seems obvious that the Chinese-speaking minority receive fewer benefits than the English-speaking majority from respondents' school system which denies them a meaningful opportunity to participate in the educational program—all earmarks of the discrimination banned by" Title VI regulations. *Id.* at 568; see also *id.* at 570-71 (Stewart, J., concurring in result)

Since the Supreme Court's decision in *Lau*, other courts have found that the failure by a recipient to provide meaningful access to LEP persons constitutes national origin discrimination. See, e.g., *Sandoval v. Hagan*, 197 F.3d 484, 510-11 (11th Cir. 1999) (holding that English-only policy for driver's license applications constituted national origin discrimination under Title VI), *rev'd on other grounds*, 532 U.S. 275 (2001); *Almendares v. Palmer*, 284 F. Supp. 2d 799, 808 (N.D. Ohio. 2003) (holding that allegations of failure to ensure bilingual services in a food stamp program could constitute a violation of Title VI).

See

http://www.justice.gov/crt/about/cor/FAQ_About_LEP_Title_VI_and_Title_VI_Regs.pdf

Our office believes that the DOJ guidance referenced above, while directed more towards assisted programs, is analogous to the duties of Federal Agencies under conducted programs, as Section 2 of Executive Order 13166 states that the plans developed by Agencies "shall be consistent with" the DOJ guidance. Therefore, OASCR finds that, similarly to the fact that the right to LEP access derives from Title VI, and denial of such access can be national origin discrimination prohibited by Title VI, the right to LEP access in conducted programs derives from 7 C.F.R. §15d. Accordingly, failure to provide meaningful access can also be construed as national origin discrimination under 7 C.F.R. §15d.

While FS argues that Section 5 of Executive Order 13166 precludes a private right of action, OASCR notes that the right to LEP access created is "not a new one," as it is simply re-articulating existing obligations, under both Title VI and our Agency non-discrimination regulations. Therefore, we construe Complainant's second accepted issue, not as an attempt to assert a private right of action under Executive Order 13166, but

rather simply to assert her rights under 7 C.F.R. §15d, which were clarified under Executive Order 13166.

VII. Discussion and Analysis

Prima Facie Case (All Bases)

a. Is Complainant a member of a protected class?

Complainant has established that she is a member of a protected class on the basis of her race (Latina) and her national origin (Guatemalan) for both accepted issues.

b. Did Complainant seek to access a program or service and was Complainant eligible to do so?

Handbook DM4330-001 of the Office of the Assistant Secretary for Civil Rights defines conducted programs or activities as “Solitary (one time) or continuing decisions, efforts, policies, procedures and practices of a USDA agency for the purpose of, that result in or otherwise contribute to the availability or delivery of services, benefits or resources for the use, enjoyment or consumption of the public.” (DM4330-001, Chapter II, Par. 2L) (emphasis added)

Complainant sought to visit the ONF and was eligible to do so. We find that the manner in which an FS employee interacts with a guest of a national forest, as well as the decisions made in how to perform a law enforcement stop, are both a “procedure or practice...that result[s] in or otherwise contribute[s] to the availability or delivery of services, benefits or resources” as considered under DM4330-001. FS’s programs and services, which include FS law enforcement actions, must be administered in a manner that complies with 7 C.F.R. §15d, and other USDA civil rights policies and regulations. This includes providing LEP access, as well as the conduct of a stop by FS personnel. For instance, Spanish-speaking visitors are entitled not to experience an escalation in their interaction with law enforcement that their English-proficient counterparts would not experience. Accordingly, we find that Complainant was entitled to the benefits of equitable access to the Forest, and proper treatment in the conduct of a stop by FS personnel. She has therefore satisfied the second prong of this analysis for both accepted issues.

c. Despite Complainant's eligibility, was she rejected, referred elsewhere or otherwise treated differently?

OASCR finds the evidence overwhelmingly clear that Complainant was “treated differently” than other individuals. On May 14, 2011, Complainant, *at worst*, was unlawfully picking salal in the National Forest; a civil violation with only a minimal financial penalty. FSO’s citation reports contain numerous examples where FSO stopped other individuals for harvesting mushrooms and timber, and FSO did not call in a law enforcement agency capable of visiting more serious penalties on that individual. Rather, FSO issued a citation.

In Complainant's case, however, she was not afforded the opportunity to (1) communicate effectively with FSO during the stop, and (2) undergo a law enforcement stop without the escalated threat of BP involvement. We therefore find that Complainant has satisfied the third prong of our analysis, with respect to both claim one and two.

d. Did the Agency/Respondent accept or treat similarly situated applicants who were not members of the protected class more favorably?

It is clear from the record that non-Hispanic individuals were not subjected to law enforcement stops that involved BP. Furthermore, we cannot find evidence of non-Hispanic individuals being subjected to any escalation of threat during a law enforcement stop, such as involvement of another Federal, state or local law enforcement agency.

It does appear that there is some evidence that local law enforcement may respond to assist FSO with drunk driving stops. However, OASCR does not view this as analogous, because the responding officer in these situations comes to assist with the violation that triggered the stop, and not to escalate the nature of the investigation. These stops generally terminated in a warning, or issuance of a summons. OASCR cannot find a single incident report where the detention of a non-Hispanic individual resulted in an arrest. Simply put, non-Hispanic individuals stopped by FSO experienced a level of threat proportionate to the unlawful activity for which they were detained.

To the contrary, Complainant, and, as the record indicates, other Hispanic individuals were subjected to a threat disproportionate to the unlawful activity for which FSO claims they were detained. Specifically, Hispanic individuals subjected to a law enforcement stop by FSO experienced the additional threat of BP involvement. This involvement is inconsistent with the perceived penalty associated with potential FS law enforcement stops. When an individual enters a National Forest, she understands that she may be stopped for infractions such as littering, speeding, excessive noise, or other violations of that nature. Additionally, when one harvests product in a National Forest, she understands the risk of being stopped and asked for a permit for harvesting, and possibly penalized for unlawful harvesting. As the record indicates, non-Hispanic individuals, even those unable to produce identification and proof of lawful residence, are not subjected to the rigors of a BP inquiry into their immigration status. We are therefore convinced that the harm associated with FS law enforcement stops is different, and more favorable, for non-Hispanic individuals. Complainant has accordingly satisfied prong four for issue one.

Regarding the second accepted issue, it is axiomatic that only LEP individuals will have occasion to experience the quality of LEP access offered by a Federal Agency. Therefore, comparison of similarly situated individuals experience with LEP access, outside of their protected class, would be relatively futile. Instead, OASCR notes that accessibility, in general, is hindered by FS's lack of LEP policy.

While English-speaking individuals can interact with FS services, from written material to interactions with FS officers, LEP individuals are at times unable to do so. It is clear that FS does not train its FS officers in Spanish, or other languages, proficiently. The question then becomes whether or not they have other language resources to provide meaningful access to FS services. We believe Complainant has established sufficient evidence to show that FS's current policy of utilizing BP for "interpretation assistance" does not provide meaningful access, as the increased threat associated with BP interaction, for both Hispanic lawful residents and undocumented individuals, discourages LEP individuals from accessing FS services, and may actively harm them when BP interpretation services are utilized. Consequently, we find that the evidence is sufficient to establish a *prima facie* case for discrimination based on both Complainant's claims.

Legitimate, Nondiscriminatory Reason

The only inquiry to determine whether or not the Agency has produced evidence to sufficiently articulate a legitimate, nondiscriminatory reason is whether the Agency's evidence has "framed the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext." See *Texas Department of Community Affairs v. Burdine*, 450 U.S. 255-56 (1981)

FS asserts several legitimate, non-discriminatory reasons for its actions. First, FS argues that FSO's decision to stop Complainant and MP was lawful, because he had reasonable suspicion to believe that Complainant and MP were harvesting salal on National Forest land. Second, FS argues that FSO's decision to call BP was appropriate because FSO reasonably believed that he would need interpretation assistance. Additionally, FS argues that FSO's decision to call BP was proper because FSO wanted backup for the stop. FS argues that FSO's desire for backup was appropriate in this situation, and that BP's assistance is not only authorized under the interagency MOU discussed above, but also that BP's presence in the area makes them a readily available resource for backup. FS argues that the decision to use BP to provide LEP access is not only consistent with the MOU, but also is an effective means of spreading Federal resources among local agencies, thus conserving costs.

Finally, regarding Complainant's claim that FS has violated Executive Order 13166, and failed to provide her with LEP access as required, FS notes that Section 5 of Executive Order 13166 prohibits a private right of action for enforcement. FS does state, however, that it will develop an LEP access plan when one is developed by USDA agency-wide. In the interim, FS "is developing... LEP guidance for conducted and assisted programs." (ROI, Exhibit 5, APS, p. 16)

Regarding FSO's decision to call BP for interpretation assistance, FS asserts that this is consistent with the MOU developed between DOI, DHS and USDA. FS points to the following two portions of the MOU to support its position:

The parties will develop and share joint operational strategies at the local, regional and national levels, including joint requests for infrastructure and other shared areas of responsibility.

and;

DOI and USDA will work at the field operations level with affected local [BP] stations to establish protocols for notifying [BP] agents when DOI or USDA law enforcement personnel are conducting law enforcement operations in an area where [BP] and DOI/USDA operations can or will overlap.

FS states that these provisions allow both agencies to cooperate with one another in the administration of their programs and services. As FSO is not proficient in Spanish, FS therefore argues that calling upon BP agents, who are known to be proficient in Spanish, was appropriate and consistent with the provisions of the MOU. In its APS, FS justifies FSO's decision to contact BP *before* interacting with Complainant and MP as follows:

The population of Forks, Washington, is approximately 26% Hispanic. Based on [FSO's] experience, most salal harvesters in the Forks area are Hispanic and speak little to no English. Only approximately half of salal harvesters are able to communicate with [FSO] using his basic Spanish skills or through the use of an English speaker in their group... Based on these facts, it is irrelevant whether [FSO] contacted [BP] for backup and interpretation assistance before or after he initiated the traffic stop.

(ROI, Exhibit 5, APS, p. 15)

FS also argues that the MOU between DHS, DOI and USDA provides for USDA to use BP for backup assistance. Through many of its witnesses, FS notes that salal harvesters often carry items that can be used as weapons, such as; machetes, knives and gloves with razor blades attached. FSO also noted that traffic stops are a dangerous part of his job, and that his predecessor was killed during a traffic stop. FS argues, therefore, that their officers are allowed to request backup for traffic stops, and that utilizing BP for such backup is lawful. Further, FS argues that calling for backup before stopping the car is consistent with a desire to ensure that the entire interaction with the occupants of a vehicle during a traffic stop is safe.

Concerning officer safety, FSO notes that, "one of the most dangerous things an officer does is contacting a vehicle on a traffic stop." FSO notes that his predecessor, "was murdered while conducting a traffic stop." (ROI, Exhibit 5, Tab J, p. 13) In support of this contention, FSO noted that, during his training, he viewed multiple videos on maintaining officer safety during traffic stops. (ROI, Tab 5, Exhibit J, p. 2-3) FSO further notes that he is "responsible for [a] person's safety when I detain them." (ROI, Tab 5, Exhibit J, p. 14)

FS states that FSO's actions are consistent with FS policies regarding backup during traffic stops. FS asserts that FSO was rightfully concerned for his safety during the stop, and that BP was nearby in the area and available for backup. FS argues, therefore, that FSO's decision to call BP, in part due to officer safety, was justifiable and non-discriminatory.

Regarding FSO's decision to use BP, as opposed to another Federal Agency, to satisfy backup and interpretation assistance needs, FS notes that FSO's decision to call BP, "was entirely consistent with applicable authorities and was appropriate and prudent, given the remote location and [FSO's] concerns regarding his personal safety and ability to communicate effectively with [Complainant and MP]." FS further notes that FSO "did not initiate an immigration enforcement action on the basis of Complainant's and MP's ethnicity." (ROI, Exhibit 5, APS, p. 15) FS presumably notes this to argue that FSO was entitled to request backup and interpretation assistance, and FSO should not be deterred from making either of these requests because of a potential further law enforcement action on the part of BP.

Pretext

A complainant may satisfy his/her final burden by establishing either that "a discriminatory reason more likely motivated the Agency or indirectly by showing that FSA's proffered explanation is unworthy of credence." *Burdine* at 256. To carry this burden, a complainant must persuade the fact-finder that a preponderance of the evidence mandates a finding that the Agency intentionally discriminated against him/her because of his/her membership in a protected class. See *St. Mary's Honor Center v. Hicks*, 509 U.S. 510-511 (1993).

In *St. Mary's*, the Court described the relationship between the *prima facie* case, and the evidence presented by a complainant during the pretext argument that the Agency's articulated reason should not be given credence, as follows:

The fact-finder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the *prima facie* case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination." *St. Mary's* at 511.

LEP Access

We will first address Complainant's argument that FS's current policy on LEP access denied Complainant meaningful access to the programs and services offered by FS, and discriminates against her on the basis of national origin. We note, however, that in Complainant's case, she was not even afforded the opportunity to request LEP access, or make a decision for herself. Rather, FSO contacted BP before even stopping

Complainant, thus removing all choice on Complainant's part regarding how their interaction would proceed.

Complainant asserts that FS's reasons for calling BP in connection with the traffic stop performed by FSO are mere pretext for discriminatory practices, and that FSO's true reasons for calling BP before interacting with Complainant and MP was because of FSO's discriminatory animus towards the Latino residents of Forks, WA. Complainant further asserts that FS's policies regarding interagency relationships, as well as FS's lack of a concrete plan to provide appropriate interpretation services, fostered an environment where FSO was able to engage in discriminatory behavior that resulted in ONF visitors who were LEP or who were perceived by FSO to be LEP because they were Latino, being subjected to questioning by BP.

Complainant first asserts that FS's current policy of using BP for interpretation services is discriminatory. Complainant states that Executive Order 13166, and, by implication, USDA's regulations prohibiting national origin discrimination, require that FS provide her meaningful access to the services or programs offered by FS. Complainant contends that interaction with FSO during the context of a traffic stop is undoubtedly a service or program offered by FS. Further, Complainant states that FS's policy of utilizing BP for interpretation services not only fails to provide meaningful access, but actively dissuades LEP individuals from availing themselves of FS services, programs and resources.

Complainant states that the harm visited on Latino visitors of ONF due to this policy is even more extreme than in other agencies failing to provide LEP access. Because the interaction with BP often arises in the context of a traffic stop, Complainant, and other Latino individuals, are not free to simply disengage or walk away from the situation. Under traditional circumstances, the frustration and embarrassment visited on LEP individuals where there is a lack of LEP access is limited to an inability to get a question answered, engage in a business transaction, or otherwise persist in a consensual encounter.

FS's policy in the context of this case visits a wholly different harm on Complainant and other LEP visitors to ONF. Complainant was not free to leave once FSO initiates a stop. FSO had rudimentary Spanish skills, while Complainant and MP were not native English speakers. Complainant's possible options were: (1) attempt to communicate about a criminal offense with limited communication ability, thus potentially not being able to communicate any defenses she had to FSO's suspicions, (2) utilize the BP agents as interpretation assistance, and potentially subject herself to questioning regarding her lawful status, or (3) refuse to communicate with FSO or BP agents, potentially subjecting herself to additional criminal charges. Complainant pointedly notes that none of these options present a positive outcome for her, and that the harm of FS's LEP access policy is heightened here, given that her presence at FSO's stop was compulsory.

BP agents, charged with enforcing immigration laws on and within the U.S. border cannot turn a blind eye to individuals who they suspect may not be lawful residents. Any information that a BP agent learns during the course of interpretation, such as place of

birth, nature of photo identification, language, etc., can become grounds for an independent inquiry by the BP agent serving as the interpreter. The “interpretation services” that BP provides FS, therefore, do not satisfy the ethical⁵ standards of interpretation services; they are not impartial, or confidential, nor do they advise individuals of the potential conflicts of interest and risks in using BP as interpreters. Further, their presence may have the tendency not to maintain calm during the incident, but rather, may tend to cause individuals to flee from the scene. It is axiomatic that a policy that causes individuals to actually flee from the service being provided does not provide meaningful access.

Complainant notes an email, sent from a BP Agent to FSO, suggesting “requesting translation assistance to sack this guy up.” The implication of this email was that the practice of requesting interpretation assistance is a guise for initiating an immigration enforcement action. While it appears from the record that FSO did not respond to this email, that fact carries little weight in our analysis. The tone of this email clearly implied that this was a standing practice between FSO and BP.

We find Complainant’s arguments persuasive. We can think of no instance where LEP access is more critical than during a law enforcement stop that may lead to potential criminal action. However, FS’s current policy discourages LEP individuals from seeking interpretation services (assuming they are even given the option to utilize or decline such services). The use of BP for interpretation assistance escalates the fear, distrust, and risk of a law enforcement stop. The effect of this policy is felt by both lawful residents and undocumented individuals who have LEP. In this situation, many of these individuals are of Latino descent; however, LEP individuals with other national origins could similarly feel the pain of this policy, due to the stress, embarrassment and threat of increased inquiry due to FS’s actions on the basis of their national origin. Whether this inquiry ends in the institution of removal proceedings, or after the individual is able to establish their lawful presence in the US, the effect is the same: to subject LEP individuals to the risk of a negative, heightened line of inquiry not visited upon their English-proficient counterparts.

It is evident that FS’s policy of using BP for interpretation services does not provide the meaningful access envisioned by EO 13166 or USDA’s regulations prohibiting national origin discrimination. Rather, it increases the risk and anxiety of the interaction, and serves to deter individuals from seeking interpretation assistance. Given the availability of other low-cost alternatives, such as Language Line, other radio or telephone interpretation services, community volunteers, training and education for current staff, and hiring a bilingual staff, OASCR does not find FS’s budgetary arguments compelling. We find Complainant has established that FS failed to provide her with interpretation assistance, and concur that FS’s arguments that BP is used due to budgetary and resource restrictions is insufficient to justify a policy that has a discriminatory effect on individuals based on their race and national origin.

⁵ See generally <http://www.najit.org/about/NAJITCodeofEthicsFINAL.pdf>
http://www.language-line.com/code_of_ethics
http://www.ncsconline.org/wc/publications/Res_CtInte_ModelGuideChapter9Pub.pdf (March 14, 2012)

In addition to the evidence presented in this case, OASCR also notes that BP spoke to the press several times during the course of the months following this incident. Some of their comments include:

Much of the local criticism of the Border Patrol has come from arrests of migrant workers picking salal. [BP officer] said that they don't specifically target salal workers but when the Forest Service calls for aid, agents respond.

"We can do our job by determining what their immigration status is," [BP officer] said. "And if they're in the country illegally, we'll arrest them for those immigration violations."

See http://www.huffingtonpost.com/2011/06/18/benjamin-roldan-salinas-dead-border-patrol-twilight_n_879842.html (04/17/2012)

[BP officer], of the Border Patrol, said agents are trained to spot those who may be in the country illegally without resorting to racial profiling. "If we have reasonable suspicion that someone is an illegal immigrant," he said, "it leads to a line of questioning to determine their status."

See http://seattletimes.nwsources.com/html/localnews/2015435439_forks27m.html (04/17/2012)

Border Patrol agents, who are required to speak Spanish, are just trying to be helpful, [BP officer] says. But if they arrive on the scene and suspect that someone's an illegal alien, "they have a duty to ask," he says. (The agency, however, makes an exception for victims or witnesses.)

"It seems to be a majority of the time" that interpretation thereby leads to immigration enforcement, [BP officer] says.

See http://blogs.seattleweekly.com/dailyweekly/2011/05/forks_man_disappears_into_sol.php (04/17/2012)

Given these statements, coupled with the witness statements obtained during this investigation, it is apparent to OASCR that BP routinely questions individuals about their immigration status when providing interpretation assistance. OASCR finds that, given the increased risk of being questioned about immigration status during an interaction with BP, the policy of using BP for interpretation assistance is problematic in all situations because it places a burden on LEP individuals that non-LEP individuals do not experience. Because LEP individuals are more likely to be national origin minorities, this policy has a disparate impact on people based on their national origin. Due to the systemic nature of this problem, OASCR finds that the use by FS of BP for interpretation assistance is discriminatory on its face, and not solely in the circumstances of this case.

Use of Backup

Complainant further alleges that FSO's statement that FSO decided to call BP for backup is pretextual. To the contrary, Complainant asserts that FSO is only in the practice of calling BP for backup assistance on traffic stops that involve Latino individuals, for the purpose of instigating a probe into the residency status of these individuals. Complainant asserts there is ample evidence to support this claim.

Complainant notes, again, that FSO called for backup before approaching the vehicle, or seeing an indication that approaching Complainant and MP would be dangerous. Additionally, further evidence, discussed below, tends to support Complainant's assertion that, in this instance, FSO did not perceive a threat to his personal safety when deciding to perform this traffic stop. Certainly, an officer should be free, at any time, to request backup in a situation perceived as "dangerous. However, that belief must be genuine, not pretext, and the officer should evaluate the threat of a situation without regard for the national origin of an individual.

Complainant next points to FSO's incident reports as evidence of a discriminatory bias. She notes that within the existing record there is not one instance of FSO requesting back up from BP in a stop of non-Latino individuals. Indeed, there are very few incident reports that indicate FSO requested any type of backup when not dealing with Latino individuals, despite dealing with individuals who had chainsaws, guns, and other dangerous items. Complainant suggests, therefore, that FSO's claims of fear for his personal safety ring hollow.

OASCR finds FSO's incident reports concerning. While it appears that FSO is not required to document whether or not he called for backup, we find that, in all instances where BP is mentioned, the individuals stopped were Latino. This evidence contradicts FSO's assertion that the true reason for contacting BP is for officer safety. Were that the case, the data should reflect that individuals of all races and national origins came into contact with BP as a result of FSO's request for backup. Furthermore, our office is mindful of the fact that FSO regularly approached armed and more apparently threatening individuals, who were not Latinos, without requesting backup.

Complainant also notes that, despite FSO's officer safety argument, BP's arrival on the scene had the opposite effect. Instead of Complainant and MP remaining in their car, they fled, causing both FSO and BPA to engage in a foot pursuit. This pursuit ended in MP's death. BP's arrival on the scene escalated the severity and danger of this situation, for all parties. The evidence demonstrates that individuals detained during a traffic stop will become more agitated when agency contacted for backup presents a clear, escalated threat to the detained individual, beyond the initial infraction that caused the stop.

Moreover, this was not the first time a situation such as this occurred. CW2 testified to a very similar situation during a traffic stop conducted by FSO on CW2 and his friends. Complainant therefore argues that FSO was well-aware of the potential consequences of calling BP to this situation, and that FSO's decision only makes sense when construed as

part of a scheme to create opportunities for BP to investigate an individual's residency status.

OASCR is persuaded by this argument. After FSO's incident with CW2, OASCR believes that FSO was on notice that BP's presence at a traffic stop had the potential not to maintain a calm situation, or to deescalate a tense one. OASCR notes that these situations endanger not only the detained individuals, but also the officers, who must now engage in a foot pursuit through rough terrain in the forest. OASCR does not find that the predictable outcome of calling BP to a routine traffic stop involving Latino individuals is likely to promote the safety of the officer, or the detained individuals. The evidence supports a conclusion that FSO calls BP with the intention of — or at least disregard for the likelihood of — escalating the stop, and visiting further harm, namely an immigration inquiry, on the detained individuals.

OASCR notes that this argument holds true for all Latino individuals, regardless of their immigration status. A citizen or other lawful resident still runs the risk of an interrogation into their status, which OASCR notes could quickly turn into a humiliating experience. This humiliation goes beyond whatever general embarrassment an individual feels during a custodial stop. As a society, we have accepted that some inconvenience or embarrassment due to a custodial stop is acceptable in order for law enforcement to do its job.

However, in this situation, the level of embarrassment and humiliation is much higher, and is as a result of a person's membership in a protected class. FS's policy of using BP as backup, therefore, visits additional harm on Latino individuals as a result of their national origin. This harm is compounded by the fact that it appears that FS targets the use of BP as back up only for stops of Latino individuals.

Finally, should that lawful resident not have their documents with them, they may be further detained, or compelled to call a friend or family member to bring those documents. This situation could, as well, endanger the resident's friends and family. For all of these reasons, OASCR notes BP's involvement is likely to concern a Latino individual, regardless of their residency status. Therefore, while not specifically asserted by FS, OASCR would be thoroughly unpersuaded by any argument contending that "only guilty people would run," therefore justifying the call to BP.

Next, Complainant references an email from another FS officer responding to the news that MP's body had been located. It simply states, "this is why you shouldn't jump into rivers." Another email from FSO2 to FSO, regarding FSO's perception that his house was being watched, stated, "we can hit it all this weekend and see what happens." Complainant argues that these emails show a tension between Latino community members and some FS employees, which FSO seems to be furthering, rather than correcting. Complainant argues that these emails demonstrate a discriminatory bias towards Latino individuals on the part of FSO and this FS office, and that such discriminatory bias is the true reason for calling BP for backup during traffic stops of Latino individuals.

OASCR is disturbed by the tone of these emails. MP's death was not a joke. Had it been FSO or BP that perished that day, we doubt FSO2 would have made a similar comment. We find the disregard for MP's life by FSO2 to be concerning. The email stating that FSO and another FS officer could "hit it all weekend," is also alarming, and possibly indicative of intimidation tactics used against black individuals during the civil rights movement.

Complainant also notes that AW5's statements that "virtually 100%" of the backup calls that BP responds to, immigration violations are found as well. Complainant asserts that this belies FS's argument that BP is used to provide backup assistance, and not to ferret out immigration violations, and further argues that, if Latinos were not being targeted, the estimate from AW5 would not be so skewed.

Finally, Complainant notes that several law enforcement agencies, including, FS, DOI, State troopers, county sheriffs and local police officers, as well as BP, work in the area where FSO patrols. Complainant argues, therefore, that FSO's first reaction, to call BP, the only agency capable of visiting the type of escalated harm experienced by Complainant and MP, is indicative of a discriminatory bias towards Latino individuals.

OASCR finds Complainant's arguments on this issue persuasive. OASCR finds it concerning that "virtually 100%" of FSO's backup requests to BP result in immigration detentions. OASCR finds this statement to be indicative of the fact that FSO's incident reports do not reflect anywhere near the actual number of times FSO calls BP during stops with Latino individuals. It is clear that only Latinos are subjected to "backup assistance" by BP. OASCR also finds no evidence in the record that FSO ever calls an agency other than BP for backup with Latino individuals. In fact, the only other witness for FS that recalls being used for backup by FSO is AW6, who states that FSO generally calls him for drunk drivers, and that "all of the drunks are white." It clearly seems, therefore, that FSO calls BP only on Latino individuals. OASCR finds this fact highly concerning, and, again, indicative of a discriminatory bias.

OASCR finds FS's statement, that BP was called for "backup assistance" for safety reasons to be not credible. OASCR recognizes the importance of officer safety, and does not discourage the use of backup in traffic stops. However, if the true reason for involving another law enforcement agency was to ensure safety during the stop, FSO would he would not exclusively contact BP for backup when he stops Latinos.

Finally, Complainant notes that FS's arguments that FSO frequently loses radio signal, and is reliant on his cell phone, is yet another unpersuasive asserted reason for why BP was involved. OASCR understands that FSO's radio signals may be limited. However, FSO did indicate that he had communicated with state dispatch before approaching Complainant and MP. (ROI, Exhibit 6, Tab J, p. 12) Clearly, FSO had some communication abilities with other officers, whether through radio traffic or his cell phone. Furthermore, OASCR sees no reason why FSO cannot use his cell phone to

contact any one of the several other law enforcement agencies in the area, such as AW6, who apparently assists on drunk driving stops.

OASCR understands that it is convenient for FS to assert that the combined need of interpretation and backup assistance makes BP a logical choice to call. These assertions also make compelling arguments that can easily distort the discriminatory purposes for utilizing BP. Therefore, OASCR sees this reason as merely an excuse to target Latino individuals for immigration enforcement.

OASCR is cognizant of the fact that, at times, there will be emergency situations that present an immediate safety threat. During those times, OASCR does not expect that FS officers would be required to first contact less problematic forms of back-up. Rather, an emergency situation would implicitly authorize the officer to seek back-up from the closest available officer, regardless of what agency they work for. However, OASCR finds that the use of BP as back-up, especially when requests for BP assistance are correlated with the race or national origin of the vehicle occupants, increases the likelihood that we may find that discriminatory actions have occurred. Therefore, OASCR finds that the use of BP as back-up should be pursued with caution.

In reaching that conclusion, we note that FSO's supervisor, AW1, noted that there would be no change in their policies, or how they do their work, as a result of this incident. OASCR finds this shocking and indicative of a broader problem at this FS office. A human being died, due to an FS policy that only escalated the danger of the situation – for FSO, BPA, Complainant and MP. AW1's inability to recognize a need for change – to protect both ONF visitors and her staff – is indicative of obtuse management skills.

Further, several witnesses noted a palpable tension between FS, BP and the local Latino Community. OASCR also notes that Complainant was clearly concerned about disclosing her home address during the course of our investigation; possibly for fear that it would end up in the hands of local FS or BP officers. The fact that AW1 has not taken steps to rectify or improve this relationship is concerning, and indicative of AW1's poor supervisory and management skills. In an area with such rampant and heated tension, it is essential that FS's management be keenly aware of, and responsive to, the tensions between FS and the local community.

OASCR also notes that the use of BP for translation and backup assistance is not unique to this case. Rather, FS's APS states,

... these... MOUs authorize coordination between the Forest Service and CBP for backup and translation assistance in connection with traffic stops conducted by LEOs on NFS lands.

(ROI, Exhibit 5, APS, p. 7)

It is evident, therefore, that this is a broader policy. OASCR finds this policy concerning for several reasons. Similar to OASCR's conclusion on the issue of LEP access, OASCR

also determines that the FS policy of using BP as backup in non-emergency situations presents a heightened risk that individuals will be subjected to discrimination based on national origin. Nonetheless, OASCR does not conclude that using BP for backup assistance by FS is always discriminatory. OASCR recognizes that decisions about backup involve a more compelling interest in officer safety. In addition, situations in which FS requires interpretation assistance are always likely to be closely correlated with national origin, in a way that situations in which FS requires back up are not. Thus while the risk of national origin discrimination is heightened by FS use of BP as backup, it can be mitigated by well designed practices and policies. However, OASCR finds current FS practice provides inadequate protection against discrimination based on national origin, FS has no specific, written policy regarding the use of BP as backup to provide guidance or safeguards against national origin discrimination, and no comprehensive data collection methods for measuring whether FS agents disproportionately call BP for backup in incidents involving individuals of certain national origins.

For all of the reasons discussed above, OASCR finds that FS has failed to articulate credible, legitimate, non-discriminatory reasons for FSO's actions, FS policy on working with BP, or FS policy on LEP access. Complainant has amply satisfied her burden of establishing, by a preponderance of the evidence that FSO's actions were due to discriminatory policies within FS, and a personal discriminatory bias on the part of FSO. Accordingly, we order FS to comply with the requirements set out below, in the order of relief.

VIII. Conclusion

Based on the available record, USDA finds that Complainant has met her burden of proof on the issue raised in this complaint and that a violation of 7 C.F.R. § 15d occurred. This is the USDA's final action on this matter.

No person shall be subject to reprisal or harassment for filing a discrimination complaint against USDA; participating in or contributing to the identification, investigation, prosecution, or resolution of civil rights violations by an agency of USDA or by a recipient of Federal financial assistance from USDA; or otherwise aiding or supporting the enforcement of civil rights laws, rules, regulations or policies applicable to USDA programs.

ORDER OF RELIEF

I. Introduction

On _____, the Assistant Secretary for Civil Rights (ASCR) determined that USDA, through the Forest Service (FS) discriminated against Complainant in violation of the 7 CFR 15(d) when it denied Complainant Limited English Proficiency (LEP) access to its programs and services, and when it subjected Complainant to discriminatory practices in conjunction with a law enforcement stop.

II. Authority

7 C.F.R. § 2.88 grants ASCR the authority to determine what corrective actions are required to resolve program complainants.

III. Relief

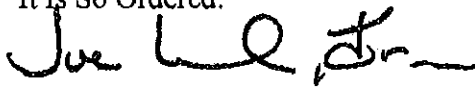
1. Programmatic and Equitable Relief:

- A. **Training:** Within 60 days of this order, FSO and AW1 will complete a minimum of 40 hours of civil rights training.
- B. **LEP Access:** FS will work collaboratively with OASCR to develop and implement an LEP policy. Within 90 days of this order, FS will submit to OASCR for approval by OASCR an LEP policy that:
 - a. Provides LEP individuals meaningful access to FS services and programs, including interaction with FS rangers, officers and other employees.
 - b. Provides for the use of qualified language resources, including bilingual staff and telephonic and radio interpretation services.
 - c. Ensures that all interpreters are neutral parties whose presence does not create an escalated risk of harm to an LEP individual as a result of their interaction with FS.
 - d. Develops ongoing mechanisms for increasing LEP capability of FS employees, including training for existing employees, and efforts to hire bilingual employees.
- C. **Data Collection on Traffic Stops and Use of Backup:** FS will work collaboratively with OASCR to develop and implement a policy on law enforcement data collection. Within 90 days of this order, FS will submit to OASCR for approval by OASCR a data collection policy that will:
 - a. Provide a method for FS to track information about stops by FS LEOs, including the observed race of the person(s) detained, the reason for the stop, the outcome of the stop (arrest, citation, warning, etc,) whether back up was requested, and from whom.

- b. Provide for annual reporting to OASCR about the nature, character, and demographics of FS LEO practices around the country, enhancing the Department's ability to assess the appropriate application of the authority and broad discretion entrusted to FS law enforcement.
 - c. Provide for accountability and an ongoing process for changes policy, practice and training where racial profiling issues are identified.
- D. Notice of Civil Rights: Within 3 months of this decision, the Forks, Washington FS office will publish a notice affirming FS's commitment to civil rights and informing individuals of how to file a civil rights complaint against the FS. For a period of 6 months, the Forks, Washington FS office shall publish this information in all newsletters, mass mailings and other periodicals mailed by FS. This notice will also be publicized in the local FS offices, and any message boards near FS facilities. This notice shall be written in English and Spanish. Such notice shall include information on where Complainants can find complaint forms.
- E. Posting of Finding of Discrimination: FS is ordered to post at office stations, message boards and other applicable FS structures throughout the Olympic National Forest, a copy of the *attached notice*. The notice, after being signed by the FS Administrator, shall be posted within thirty (30) calendar days of FSA's receipt of this decision, and shall remain posted for sixty (60) consecutive days, in a conspicuous and public place. FS shall take reasonable steps to ensure that the notice is not altered, defaced, or covered by any other material. One of the original signed notices is to be submitted to the Compliance Division within ten (10) calendar days of the expiration of the posting period.
- F. Certification of Compliance: Within 180 days from the date FS receives this decision, FS must provide a written statement and evidence to demonstrate compliance with this Order. These materials should be mailed to: USDA, Office of Compliance, Policy and Training, Compliance Division, 1400 Independence Avenue, SW, Mail Stop 9401, Washington, DC 20250-9401.

No person shall be subject to reprisal or harassment for filing a discrimination complaint against USDA; participating in or contributing to the identification, investigation, prosecution, or resolution of civil rights violations by an agency of USDA or by a recipient of Federal financial assistance from USDA; or otherwise aiding or supporting the enforcement of civil rights laws, rules, regulations or policies applicable to USDA programs.

It Is So Ordered.



Joe Leonard, Jr., Ph.D.
Assistant Secretary for Civil Rights

APR 28 2012

Date



POSTED BY ORDER OF THE U.S. DEPARTMENT OF AGRICULTURE

This Notice is posted pursuant to an order by the United States Department of Agriculture (USDA), dated _____ which found that a violation of 7 C.F.R. §15d has occurred at the Forest Service (FS) office for the Olympic National Forest.

Federal law prohibits discrimination in any program or activity conducted by the USDA or receiving federal financial assistance from the USDA based on an individual's RACE, COLOR, RELIGION, SEX, AGE, NATIONAL ORIGIN, MARITAL STATUS, FAMILIAL STATUS, SEXUAL ORIENTATION, RECEIPT OF PUBLIC ASSISTANCE INCOME, REPRISAL, or DISABILITY. USDA Regulation 7 C.F.R. §15, *et. Seq.*

This facility was found to have violated 7 C.F.R. §15d when: FS subjected an individual to discrimination on the basis of her national origin during a traffic stop.

As a result, the Agency has been ORDERED by the USDA to: Provide relief to the aggrieved individual; post this notice, and undertake certain actions to ensure that the discriminatory conduct will not recur.

This facility will ensure compliance with the requirements of all Federal civil rights laws and regulations as they pertain to programs and activities assisted or conducted by the USDA, and will not retaliate against any individual who files a civil rights complaint.

If you believe you have been discriminated against, you may file a complaint by sending a signed letter to:

**U.S. Department of Agriculture
Office of the Assistant Secretary for Civil Rights
1400 Independence Avenue, SW
Washington, DC 20250-9410**

Thomas Tidwell
Chief
Forest Service

Date

**U.S. DEPARTMENT OF AGRICULTURE
Office of the Assistant Secretary for Civil Rights
Complaint of Program Discrimination**

Complainant: [REDACTED]
Complaint No.: 11-5171
Agency: Forest Service

Certificate of Service

I certify that the document listed was sent on this date by certified mail (unless otherwise specified) to:

Complainant: [REDACTED]
c/o Jorge Baron, Esq.
Northwest Immigrant Rights Project
615 2nd Avenue
#400
Seattle, WA 98104

Complainant's Representative: Jorge Baron, Esq.
Northwest Immigrant Rights Project
(same as above)

Agency Head: Thomas Tidwell (*interoffice mail*)
Chief, Forest Service
4th Floor, NW-Wing
Yates Building

Agency Liaison: Deborah Muse (*interoffice mail*)
Director, Civil Rights
Forest Service
4th Floor, SW-Wing
Yates Building

Compliance Division: Geraldine Herring (*interoffice mail*)
Chief, Compliance Division
Office of Compliance, Policy and Training
Office of the Assistant Secretary for
Civil Rights
1400 Independence Avenue, SW
Mail Stop 9401

Enclosures: Final Decision dated _____

Certified by: _____ **Date:** _____