



# DOT DBE PROGRAM: Changes & Implications What Alaska DBEs Need to Know

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A professional headshot of Molly Henry, a woman with long dark hair, smiling, wearing a dark green sleeveless top. The background is a dark, neutral color.

# Molly Henry

## Shareholder

**I am an experienced civil litigator and appellate attorney. I regularly represent vessel owners, operators, and their underwriters in all aspects of maritime law, including casualty response and investigations, vessel attachments and arrests, commercial disputes, marine-related regulatory compliance, environmental matters, personal injury claims, and cargo claims.**

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# Christopher Slottee

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**Chris has over 15 years of experience handling complex litigation matters, specifically working with Alaska Native Corporations, settlement trusts, and tribal governments.**

Chris's previous experience as Vice President and General Counsel for an ANC gives him an invaluable understanding of the inner workings of ANCs and the unique challenges they face. He is well-versed in issues of corporate governance, legal and risk management, government contracting, corporate transactions, mergers and acquisitions, land use, and real estate matters.

A professional headshot of Paige Spratt, a woman with long dark hair, smiling, wearing a dark green top and a necklace. The background is dark.

# Paige Spratt

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**Combining real-world construction experience with legal know-how, I help contractors find practical solutions to complex problems.**

I handle arbitrations and lawsuits for issues ranging from lien foreclosures, construction claims, and public contracting to employment disputes and complex breach of contract claims. I strive to help clients fully understand the litigation process and present creative, practical solutions.

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# Today's Agenda

- Background: The DOT DBE Program
- Mid-America Milling v. DOT — The Lawsuit
- Proposed Consent Order & Its Stakes
- The Interim Final Rule (IFR) — Key Changes
- Impact on Existing Contracts & Certification
- Alaska Native Corporations: Protected Status & IFR Impact
- What Should Alaska DBEs Do Now?
- Q&A

# What Is the DOT DBE Program?

- Federal program administered under 49 CFR Part 26 requiring recipients of DOT financial assistance to establish DBE programs
- Designed to ensure non-discrimination and promote participation by small businesses owned by socially & economically disadvantaged individuals
- Applies to: FHWA (highways), FTA (transit), FAA (airports), and other DOT-funded programs
- State and local transportation agencies ("recipients") set DBE contract goals for federally-funded projects
- DBE certification is administered through Unified Certification Programs (UCPs) in each state

# The Rebuttable Presumption (Pre-IFR)

- **KEY CONCEPT:** Under prior regulations, certain groups were presumed to be socially disadvantaged — meaning they did NOT have to individually prove disadvantage to qualify for DBE certification.
- **Who Was Presumed Disadvantaged?**
  - Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, Subcontinent Asian Americans, Women
- **What Did the Presumption Mean?**
  - Applicant did NOT need to prove personal experiences of discrimination
  - Status as member of listed group was sufficient for social disadvantage prong
  - Only personal net worth (< \$1.32M) and business size had to be shown
- **Why Was It Challenged?**
  - Opponents argued it constituted unconstitutional disparate treatment based on race/sex
  - Post-SFFA (2023 Supreme Court) environment made race-conscious programs more vulnerable
  - Mid-America Milling filed suit in W.D. Kentucky in 2023

# Mid-America Milling v. DOT

## The Lawsuit That Changed Everything

- Case No. 3:23-cv-00072, W.D. Kentucky, Plaintiff: Mid-America Milling Co. (white-owned contractor)

- **2023**: Mid-America files suit arguing race/sex-based rebuttable presumption violates equal protection
- **Sept 2024**: Court issues preliminary injunction — bars DOT from using race/sex presumptions on projects the plaintiffs bid on in any state
- **May 2025**: DOT & plaintiffs submit proposed joint consent order seeking to settle the case — would have effectively suspended DBE goals nationwide
- **Oct 3, 2025**: DOT issues Interim Final Rule (IFR) — eliminating rebuttable presumption nationwide; effective immediately

# The September 2024 Preliminary Injunction

*"The United States Department of Transportation ... are ENJOINED from mandating the use of race- and gender-based rebuttable presumptions for United States Department of Transportation contracts impacted by DBE goals upon which the Plaintiffs bid, to be effective in any state in which Plaintiffs operate or bid on such contracts."*

- Scope — Not Nationwide (Initially): Court declined to issue a full nationwide injunction, limiting scope to contracts the plaintiffs bid upon in any state.
- Applies Wherever Plaintiffs Bid: Despite the geographic limitation, any DOT project nationwide where plaintiffs submitted a bid was covered — creating nationwide practical reach.
- DOT vs. Plaintiffs Disagreed on Scope: DOT argued the injunction was limited to Indiana/Kentucky. Plaintiffs argued it applied wherever they bid. Court sided with plaintiffs.
- The Path to IFR: Rather than continue litigating scope, DOT ultimately responded with the IFR — eliminating the presumption altogether.

# The Proposed Consent Order

## A Near-Total Shutdown of DBE Goals

- **May 28, 2025** — DOT & Plaintiffs Submit Joint Proposed Consent Order to Resolve Mid-America Litigation

- DOT acknowledges race- and sex-based presumptions can no longer pass constitutional scrutiny under current equal protection jurisprudence
- DBE eligibility based on race/sex presumptions violates the Due Process Clause of the Fifth Amendment
- Use of DBE contract goals in ANY jurisdiction where ANY DBE relied on a race/sex presumption is unconstitutional
- DOT MAY NOT approve any federal, state, or local DOT-funded project with DBE contract goals if ANY DBE in that state relied on the presumption

# Stakes of the Consent Order & The Intervenor

## PRACTICAL EFFECT

- Because UCPs across the country used the race/sex presumption, virtually every state would be barred from using DBE goals
- Even Alaska Native Corporations and Tribes — who do NOT rely on the presumption — would be unable to count DBE work because goals would be barred entirely
- A single company certified via presumption in a state would freeze all DBE goals in that state
- Effectively a nationwide DBE program shutdown pending mass recertification

## THE INTERVENORS

- Court approved motion to intervene filed by: National Assoc. of Minority Contractors; Women First National Legislative Committee; Airport Minority Advisory Council; Women Construction Owners & Executives; and others

## THE RESOLUTION: IFR

- Rather than finalize the consent order, DOT issued the Interim Final Rule on October 3, 2025 — eliminating the rebuttable presumption nationwide by regulation, providing a more controlled pathway than the consent order's blunt approach.

# The Interim Final Rule (IFR)

## What Is It & Why It Matters

- **WHAT:** A binding regulatory change to 49 CFR Parts 23 and 26, published in the Federal Register on **October 3, 2025**
- **EFFECTIVE:** Immediately upon publication — **October 3, 2025**. No transition period.
- **WHY IFR?** DOT used the Interim Final Rule process (vs. typical notice-and-comment rulemaking) due to the urgency of the constitutional issues raised in Mid-America
- **SCOPE:** Applies to all DOT DBE and ACDBE (Airport Concessions) programs nationally, affecting thousands of state and local transportation agencies

# IFR: Three Core Changes

## 1. Eliminates the Rebuttable Presumption

- The IFR removes from 49 CFR Part 26 the provision allowing members of specified racial/gender groups to be presumed socially disadvantaged. **Effective October 3, 2025**, ALL applicants must prove disadvantage individually.

## 2. Requires Mass Recertification of Existing DBEs

- Every UCP must identify all currently certified DBEs, notify them, provide an opportunity to submit new evidence of individual disadvantage, and issue written decisions on recertification or decertification.

## 3. Suspends DBE Goals Until Recertification Is Complete

- No recipient may set DBE contract goals or count DBE participation toward overall goals until the UCP in that state completes full recertification of all DBEs. This suspension applies immediately.

# New Definition: Social & Economic Disadvantage

## BEFORE (Pre-IFR)

- Members of designated groups PRESUMED disadvantaged
- No individual proof of discrimination required for social disadvantage
- Burden on certifier to rebut the presumption
- Application process: primarily net worth + business size

## AFTER (IFR Effective **Oct 3, 2025**)

- ALL applicants must prove disadvantage on case-by-case basis
- Determinations CANNOT be based in whole or in part on race or sex
- Must submit a Personal Narrative (PN) establishing actual disadvantage
- Burden is on applicant to prove by preponderance of evidence

# The Personal Narrative (PN) Requirement

## What Must the PN Establish?

- Must prove social and economic disadvantage by a PREPONDERANCE OF EVIDENCE
- Must describe specific instances of economic hardship, systemic barriers, and denied opportunities
- Must NOT rely on or reference race or sex
- Must state HOW and to WHAT EXTENT the impediments caused economic harm
- Must establish that owner is economically disadvantaged relative to similarly situated non-disadvantaged persons
- Required: PNW statement, financial information, Uniform Application Form

## Practical Implications

- Existing DBEs must participate in UCP reevaluation — failure to submit documentation means decertification
- Applicants should begin gathering documentation now: loan rejections, business setbacks, educational barriers, etc.
- This mirrors the SBA 8(a) post-Ultima narrative approach
- Decertified DBEs may appeal to DOT under 49 CFR § 26.89
- UCP must complete review "as quickly as practicable" — no hard deadline set

# The UCP Recertification Process

Starting October 3, 2025, each UCP must complete four steps — in sequence — for every currently certified DBE

- Step 1 — Identify: Identify each currently certified DBE in its directory
- Step 2 — Notify & Request: Provide each DBE with the opportunity to submit documentation demonstrating DBE eligibility under the new individual disadvantage standards
- Step 3 — Evaluate: Determine whether each currently certified DBE meets the new DBE eligibility standards (individual, race/sex-neutral disadvantage)
- Step 4 — Issue Written Decision: Issue a written decision to each DBE indicating it has been recertified under the new standards OR is decertified

No hard deadline for UCP completion — must be done "as quickly as practicable." DBE goals remain suspended until entire process is complete.

# Impact on Existing Contracts & DBE Goals

- **Contracts Advertised But NOT Yet Let:**
  - Recipients MUST issue amendments removing DBE contract goals from the advertisement
- **Contracts Let But NOT Yet Awarded:**
  - Recipients must take appropriate action to zero out the DBE goal. DOT allows amendment without re-advertising (check state law on recompetition)
- **Contracts Already Awarded & Executed:**
  - NOT required to be modified — but DBE participation cannot be counted toward contract or overall DBE goals until UCP completes recertification
- **DBE Goal Setting — Going Forward:**
  - NO recipient may set any new DBE contract goals, and no DBE participation may be counted toward goals — until UCP completes full recertification

# Key Operational Rules During Reevaluation Period

## Protections That Continue

- DBE Termination Provisions Still Apply
- Prime contractors CANNOT terminate a DBE or reduce its work without written recipient consent upon showing of good cause (49 CFR § 26.53(f)).
- Prompt Payment Requirements Unchanged
- Prompt payment requirements (49 CFR § 26.29) continue in full force — prime contractors must still pay DBE subcontractors within 30 days.

## Temporarily Suspended

- CUF Reviews Suspended
- Recipients are NOT required to conduct Commercially Useful Function (CUF) reviews of DBE work during reevaluation. Normal CUF requirements will resume post-reevaluation.
- Uniform Reports & Goal Submissions
- Recipients are NOT required to submit Uniform Reports or update overall DBE goals until the UCP has completed reevaluation.

A photograph showing two workers from behind, wearing high-visibility yellow-green vests and winter jackets. They are standing on a rocky terrain, looking at a rock face marked with red paint. The markings include the number '126' and 'N82'. One worker is pointing at the rock, and the other is holding a tablet. The scene is outdoors, likely at a construction or mining site.

# Alaska Native Corporations & the IFR

Protected Status, Indirect Impacts & What Hasn't Changed

# ANC Statutory DBE Protection: The Foundation

## 43 U.S.C. § 1626(e)(2)

- ANC Subsidiary Status
- Each Alaska Native Corporation subsidiary is deemed, for all purposes under federal law, to be a minority and economically disadvantaged business enterprise.

## 43 U.S.C. § 1626(e)(4)

- Mandatory DBE Certification
- Each Alaska Native Corporation 8(a) participant is required to be certified as a DBE under DOT regulations — this is a congressional mandate, not a regulatory discretion.

**WHY THIS MATTERS FOR THE IFR:** ANC DBEs do NOT rely on the race/sex-based presumption. The IFR does NOT change, override, or eliminate the ANCSA statutory DBE eligibility provisions. The DOT DBE regulations governing ANC 8(a) participants (49 CFR § 26.63(c)) were NOT changed by the IFR.

# ANC DBEs: Direct Impact vs. Indirect Impact

## NOT DIRECTLY AFFECTED

- ANC DBE certification itself is NOT revoked or suspended by the IFR
- ANC DBEs are NOT subject to the new Personal Narrative requirement
- ANC 8(a) participants are specifically required to be DBE-certified by statute
- DOT has confirmed ANC DBEs will generally not have relied upon the rebuttable presumption
- 49 CFR § 26.63(c) was NOT amended by the IFR

## INDIRECTLY AFFECTED

- The IFR suspends all DBE goals until the UCP in each state completes full recertification — ANC DBEs cannot be counted toward goals during this period
- Prime contractors and state agencies are NOT required or incentivized to meet DBE goals — reducing the practical utility of ANC DBE status in the short term
- If a single company in Alaska was certified via rebuttable presumption, ALL Alaska DOT projects lose their DBE goals until full AK UCP recertification
- No Uniform Reports required, no contract goals set, no credit for DBE participation

# ANC 8(a) Participants & the DBE Program

## What the IFR Does NOT Change

- For ANC subsidiaries that are SBA 8(a) participants, a separate and independent legal framework governs DBE eligibility — the IFR does not alter this framework.
- Statutory Basis: 43 U.S.C. § 1626(e)(4) requires ANC 8(a) participants to be certified as DBEs — this is a congressional mandate that regulations cannot override
- 49 CFR § 26.63(c): The DOT regulation specifically addressing Tribes and ANCs as DBE participants was NOT amended by the IFR — it remains intact and operative
- No Rebuttable Presumption Reliance: ANC 8(a) DBE eligibility has never depended on the race/sex rebuttable presumption — therefore the IFR's elimination does not affect their certification
- Recertification Process: While the UCP may still reach out as part of its reevaluation, ANC 8(a) DBEs should be able to confirm their statutory eligibility basis — they are not required to submit a Personal Narrative
- Bottom line: ANC 8(a) DBE status is legally protected — but ANC DBEs will still feel the indirect impact of suspended DBE goals until Alaska's UCP completes recertification.

# What Should Alaska DBEs Do Right Now?

1. **Know Your Certification Basis:** Confirm with your certifying UCP whether your DBE certification was based on the rebuttable presumption, statutory ANCSA eligibility, or individual proof.
2. **Monitor the UCP Reevaluation in Alaska:** Track the Alaska DOT&PF UCP reevaluation process. Goals cannot be set or counted until Alaska's UCP completes full recertification.
3. **ANC DBEs — Prepare Your Statutory Documentation:** Gather documentation of your ANC/8(a) status and ANCSA eligibility basis. Be prepared to respond to UCP inquiries quickly.
4. **Non-ANC DBEs — Start Your Personal Narrative Now:** Begin documenting specific instances of economic hardship, denied opportunities, and systemic barriers. Work with legal counsel to ensure your narrative meets the preponderance of evidence standard.
5. **Review Existing Contract Obligations:** If you are a DBE subcontractor on existing contracts: your termination protections remain in force. Understand your rights.
6. **Stay Informed:** The Mid-America consent order proceedings continue. Intervenors may seek modifications. Additional regulatory or legislative action is possible.

# Key Events Timeline

- **2023:** Mid-America Milling files suit challenging DOT's use of race/sex rebuttable presumptions
- **Sept 2024:** W.D. Kentucky issues preliminary injunction barring DOT from using presumptions on contracts where plaintiffs bid
- **May 2025:** DOT & plaintiffs submit proposed joint consent order — would have effectively barred DBE goals nationwide
- **Oct 3, 2025:** DOT Interim Final Rule takes effect — eliminates rebuttable presumption, triggers nationwide recertification, suspends all DBE goals
- **Post-IFR:** State UCPs begin recertification process; ANC DBEs confirm statutory eligibility; Non-ANC DBEs submit Personal Narratives
- **Future:** Goals may be reinstated state-by-state as UCPs complete recertification. Mid-America consent order proceedings continue.

Thank you!  
Questions

