

Testimony for the

United States Senate
Committee on Indian Affairs

Hearing on

"Promise Fulfilled: The Role of the SBA 8(a) Program in
Enhancing Economic Development in Indian Country."

Thursday, April 7, 2011 - 2:15PM - Dirksen - 628



NATIONAL
CONGRESS
OF AMERICAN
INDIANS

National Congress of American Indians
Embassy of Tribal Nations
1516 P Street, NW
Washington, DC 20005

202-466-7767

www.ncai.org

"Promise Fulfilled: The Role of the SBA 8(a) Program in Enhancing Economic Development in Indian Country."

Introduction

The National Congress of American Indians (NCAI) is the intergovernmental body representing American Indian and Alaska Native tribal governments. For more than 60 years, tribal governments have come together as a representative congress through NCAI to deliberate issues of critical importance to tribal governments and endorse consensus policy positions. NCAI is honored to participate in the Senate Committee on Indian Affairs hearing to discuss the history, structure, and benefits of the Native 8(a) Business Development program that our membership has deemed critical to growing tribal economies and creating career paths for Native people where few existed before.

The Native 8(a) program demonstrates Congress' commitment to promoting tribal self-determination and self-sufficiency. This business development program reflects the unique character of Native communities and their responsibility to provide governmental services and other benefits to their members.

To promote economic development for American Indian tribes and Alaska Native Regional and Village Corporations ("ANCs"), Congress authorized their participation in the Small Business Act's Section 8(a) Business Development program. When certified as an eligible 8(a) participant, American Indian tribes or ANCs may contract with the federal government under unique terms, which permit a federal agency to award a contract not subject to the competitive threshold that applies to individually-owned 8(a) companies and allows tribes and ANCs to operate multiple 8(a) firms. Congress purposefully created these distinctions to further its federal trust obligation to American Indian and Alaska Native tribes, and to provide tools to combat escalating poverty in tribal communities and to remedy the low level of American Indian and Alaska Native participation in the government contracting industry.

Due to the recent public and Congressional attention on sole-source contracting, a number of investigations and press coverage unfortunately have cast an unfair and harsh light on tribal and ANC sole source contracting. The U.S. Government Accountability Office's (GAO) 2006 report of Alaska Native Corporation's (GAO-06-399) participation in the 8(a) Program recommended that the Small Business Administration (SBA) and contracting agencies exert greater oversight and monitoring of ANC sole source contracting. It did not recommend legislative changes that would effectively disband the program and reverse all of its positive contributions to advancing American Indian and Alaska Native policy. American Indian tribes and Alaska Native Corporations unique 8(a) provisions are consistent with other Congressional policies that advance Indian self-determination and economic development. The 8(a) Business Development program has demonstrated that it brings revenue growth, employment, profits, and social investment to tribal communities.

Indian Country is a world of economic extremes. There are a few high profile examples of tribes and ANCs who have prospered economically. These examples of tribes and ANCs with some wealth receive public attention. However, there are several hundreds more who remain nearly invisible, who are struggling economically to preserve their lands and community. The

"Promise Fulfilled: The Role of the SBA 8(a) Program in Enhancing Economic Development in Indian Country."

social and economic conditions in many Native communities are comparable to those in developing nations around the world.

Generational poverty among American Indians and Alaska Natives remains a serious challenge. American Indians and Alaska Natives are among the most economically distressed populations in the United States. Nationwide, this population experiences a poverty rate of 25.7%, exceeding that of all other racial categories and more than double the national average of 12.4%. Indians living on reservations face poverty rates more than three times the national average¹. Reservation poverty is so pronounced it can be clearly seen on national maps, with hot spots of poverty in the northern plains, eastern Arizona, southeastern Utah, and western New Mexico, which overlap directly with Indian reservations. Real per-capita income of American Indians living on reservations is still less than half of the national average. In 2000, American Indian and Alaska Native unemployment stood at twice the national average and was more than three times as high on Indian reservations.

In addition, tribal governments have a severely limited tax base. Tribes cannot impose property taxes on trust land, and an income tax on impoverished people is not feasible. Recent U.S. Supreme Court cases have compounded this problem by permitting state taxation on Indian land while at the same time limiting the ability of tribes to tax non-members. In addition, tribes are hamstrung in their ability to access other traditional governmental revenue streams, such as tax exempt bond financing, in order to raise revenue for governmental services and are limited to what can be developed from tribal businesses². In sum, tribal citizens often have greater service needs than their non-Native counterparts, and at the same time, tribal governments have fewer resources with which to fulfill their governmental responsibilities to their citizens. Meaningful economic development is sorely needed.

Economic growth in our nation's tribal communities remains a substantial challenge, and until this improves significantly, the unique 8(a) contracting benefits extended to tribes and ANCs should be part of the federal government's arsenal of policies, promoting economic development and working to alleviate dire poverty. The 8(a) program provides tribes and ANCs with critical tools needed to compete in the federal marketplace and enhances market-based competitive capabilities.

Federal Indian Policy

The U.S. Constitution and many statutes establish rights for American Indian and Alaska Native tribes based on their trust relationship with the federal government. In exchange for Native peoples ceding over 500 million acres of land, the United States entered into a trust relationship with American Indians and Alaska Natives. Treaties, the supreme law of our land, were originally the primary way that this trust relationship was expressed. Today, the trust relationship is carried out through the U.S. Constitution and the many statutes enacted by

¹ Jonathan Taylor, "Native American Section 8(a) Contracting," p. 6 (October 2007).

² Matthew Fletcher, "In Pursuit of Tribal Economic Development as a Substitute for Reservation Tax Revenue," 80 *North Dakota Law Review* 759 (2004).

"Promise Fulfilled: The Role of the SBA 8(a) Program in Enhancing Economic Development in Indian Country."

Congress, including the Alaska Native Claims Settlement Act (ANCSA) and the Native 8(a) business development provisions. The federal government's unique relationship with American Indian and Alaska Native tribal governments derives from the U.S. Constitution's grant of power to Congress "to regulate Commerce... with the Indian Tribes."³ This Constitutional provision, and its interpretation in landmark Supreme Court decisions, gave rise to the federal government's special political relationship and trust responsibilities to American Indians and Alaska Natives.

The federal government has enacted numerous policies that are aimed at reducing poverty and creating economic opportunities for Indian tribes and Alaska Natives. Congress was even more specific about strategies to realize these goals when articulating, in the Alaska Native Claims Settlement Act ("ANCSA"), the federal government's relationship with Alaska Natives⁴. This law required compensation to settle land claims, and Congress mandated that for-profit corporations be used to implement the settlement. In ANCSA, Congress declared:

- (a) there is an immediate need for a fair and just settlement of all claims... based on aboriginal land claims; and (b) the settlement should be accomplished rapidly, with certainty, in conformity with the real economic and social needs of Natives, without litigation, with maximum participation by Natives in decisions affecting their rights and property...⁵

Furthermore, in ANCSA, Congress confirmed that federal procurement programs for tribes and Alaska Native Corporations are enacted under the authority of the Commerce Clause, Article I, Section 8 of the U.S. Constitution⁶. Among the most successful of these laws are the special provisions implementing Section 8(a) of the Small Business Act. These rules have helped tribal and ANC businesses overcome economic barriers. Competitive businesses have been created in both the private and federal markets. New business opportunities and career paths have been created in remote rural communities that are far removed from major markets, and profits, when earned, are invested to ensure future sustainability or returned as benefits to their communities.

Community Benefits

Because of the high unemployment rates in tribal communities, capacity building for Native people is often the key goal of tribal governments and ANCs. In its 2006 Report, the GAO found that one-third of the ANCs interviewed had management training programs in place that encourage the recruitment, training, and development of Native employees⁷. Tribes and ANCs use internships, scholarships, on the job training, and subcontracting opportunities to build their own talent. This process can be slow and arduous as multi-generational poverty has taken its toll on worker preparedness, but success can be significant when it is achieved.

³ Article I, § 8, ¶ 3.

⁴ *See* 43 U.S.C §1601, *et seq.*

⁵ *See Id.* at § 1601.

⁶ 43 U.S.C. § 1629(e)(4)(A).

⁷ US GAO, (GAO-06-09) 2006, 81.

"Promise Fulfilled: The Role of the SBA 8(a) Program in Enhancing Economic Development in Indian Country."

For example, the General Manager of Sealaska Environmental Services and a shareholder of Sealaska Corporation earned a bachelor and graduate degree with Sealaska Corporation. He interned at the company and eventually started a new 8(a) subsidiary of Sealaska, which is a certified environmental remediation firm, providing a number of support services to federal facilities. Former scholarship recipients also have earned positions at Sealaska as: Vice President and Financial Officer; Vice President, Corporate Secretary, and Human Resources; Vice President and Chief Investment Officer; and Vice President and General Counsel. Sealaska Corporation has provided scholarships to 3,000 tribal shareholder recipients since the inception of its scholarship program, and from 2000-2008, it provided \$5.7 million in scholarships. Since the inception of its internship program in 1981, Sealaska has provided 200 internships, with 23 of these interns currently employed by Sealaska.

Benefits derived from the government contracting program go beyond developing local Native capacity through scholarships, internships, and employment. Other benefits, which are just as important, have begun to take hold and advance self-determination, ensure cultural preservation, and ameliorate dire social conditions. For example:

- One Alaska Native Corporation has aligned its cultural values with its dividend payments. A special dividend program has been developed to provide additional support for elders, who hold a highly respected position in Native communities. When elder shareholders reach age 65, they are offered a special dividend along with additional shares, that provide a larger dividend payment in the future.
- Community-based non-profit organizations, supported through 8(a) business revenues, are carrying forward cultural values through such wide-ranging activities as youth camps, leadership trainings, curriculum development, and language preservation.
- Cultural values and practices are reinforced through social and community programs funded by tribal and ANC 8(a) businesses, such as learning a traditional dance or language. These practices focus on preserving cultural values and traditions for Native communities, with an emphasis on providing youth with positive environments and influences.
- Native people serve as role models for fellow tribal members and are valued for their contribution to community. Tribal and ANC 8(a)s provide an opportunity for American Indians and Alaska Natives to see one of their own go to college, get a job, or work toward a career. These positive role models can increase community and individuals' hope for the future as well as provide inspiration.
- Business capacity is developed in the local community when tribal members and shareholders gain transferable business skills, such as financial literacy, strategic planning, and management. These skills are necessary for all aspects of economic and community development. Native community members may choose to utilize their skills

"Promise Fulfilled: The Role of the SBA 8(a) Program in Enhancing Economic Development in Indian Country."

in variety of ways: to start a local business as a supplier or provide a service that has been lacking in the community.

- Leadership capacity is developed when Native boards and tribal councils gain experience in making decisions that will directly affect the lives of their family, neighbors, and communities. Important investment and sustainability decisions are made in each tribal community: hiring, budgeting, dividend allocation, meeting community needs, and business and cultural sustainability.

This needed business development program has enabled tribal communities to participate in the mainstream economy as intended, and the capacity building component has reaped real rewards as infrastructure and human capital have been built in local communities.

As Congress monitors measures, both legislative and administrative, to bring more transparency and accountability to the 8(a) Business Development program, it also needs consider the legal, policy, and economic context for the special 8(a) provisions while gauging their effectiveness as regulatory policies are implemented.

Native 8(a) Contracting History

Since World War II, the federal government has adopted policies to increase the diversity of suppliers to the federal government. The intention is to assist businesses that have substantial barriers to capital formation and allow them to effectively compete in a highly concentrated market. The Small Business Act's Section 8(a) Business Development program directs the government to purchase from small businesses. In 1987 and 1988, the Senate Indian Affairs Committee held hearings to determine why so few Native American-owned firms participated in government contracting and why a Presidential Commission on Indian Reservation Economies found that existing procurement policies created substantial obstacles to Indian reservation economic development. As a result of these Congressional inquiries, changes to federal laws were made to ensure that American Indian and Alaska Native tribes could more effectively compete in the federal market place in a manner that reflects the unique federal obligations and different legal frameworks that apply in Indian Country.

Except in a few important ways, the rules and regulations that are applicable to all 8(a) companies owned by individuals, women, and minorities apply to American Indian tribal enterprises and to Alaska Native Corporations. Congress altered this legal framework to take into account the unique ownership structures of enterprises owned by tribal governments and by Alaska Native Corporations created under the Alaska Native Claims Settlement Act. These ownership structures distinguish them from all minority-owned businesses and other types of private sector firms. Thus, tribal and ANC contracting differs from private 8(a) contracting.

Tribal enterprises are owned by tribal governments. Tribal citizens determine who governs them and ultimately how their government will carry out economic activities through a tribally-owned business. The authority to create a tribal enterprise is typically governed by a tribe's constitution or governing authorities. A tribal governing council usually determines the

"Promise Fulfilled: The Role of the SBA 8(a) Program in Enhancing Economic Development in Indian Country."

officers of a tribal enterprise and hires a manager to oversee the day-to-day operations of the business. Usually, the tribal governing body will retain overall strategic direction of the enterprise, have the authority to acquire or distribute assets, and reinvest or distribute profits for the benefit of its tribal membership. Often, the sole shareholder of tribal enterprise is the tribal governing body itself.

The corporate structures created under ANCSA represented a new approach to settling land claims between the United States and Alaska Natives. ANCSA established a framework in which village and regional corporations would manage the assets, land, and natural resources that Alaska Natives received under the settlement.

Under ANCSA, shareholders may not sell their shares to non-Natives. Congress explicitly intended the use of corporate structures to give Alaska Natives greater control of their economic destiny—to achieve self-sufficiency as well as self-governance. In fact, in furtherance of this economic settlement, the opportunity to participate in federal procurement programs, including the 8(a) program, was embedded in ANCSA by amendments passed by Congress making it clear that ANC participation in these programs business development opportunities would be an integral part of the ANCSA settlement and contribute to the development a sustainable economy⁸.

The ownership structures of both tribally-owned enterprises and ANCs create a much broader mandate to address a wider range of interests than other minority-owned 8(a)s; tribal and ANC firms must operate and provide benefits that go far beyond the bottom-line of profitability. The special provisions which apply to tribal and ANC 8(a) contracting were tailored to take into account these differences and to take into account the federal Indian policy of promoting self-determination and economic self-sufficiency.

The special provisions include different criteria which govern the admission of tribal and ANCs into the 8(a) program, and they exempt tribal and ANCs from lower⁹ competitive threshold that applies to individually-owned firms¹⁰ and also establish different affiliation rules, which permits tribal governments and ANCs to have multiple 8(a) companies. However, many of the other rules that apply to all 8(a) firms apply equally to tribes and ANCs. For example, all 8(a) firms have a maximum 9-year participation term in the 8(a) Program. Likewise, all 8(a) firms must be small to receive an 8(a) contract. When an ANC 8(a) firm grows out of its applicable size standard, it graduates out of the program, just like other 8(a) firms. Tribes and ANCs are permitted to form new 8(a) firms in different industries because of their responsibility

⁸ In 1988, Congress passed amendments to the Alaska Native Claims Settlement Act, P.L. 100-241, which granted presumptive minority status to ANCs, as defined in 43 U.S.C. § 1626(e)(2). The intent was to grant qualifying ANCSA corporations or ANCSA corporation-owned firms the status of "a minority owned and controlled corporation for purposes of federal law." In 1992, the Alaska Land Status Technical Corrections Act, Public Law 102-415, amended §§1626(e)(1) and (2) by granting ANCSA corporations or ANCSA corporation-owned firms "economically disadvantaged" status.

⁹ Justification and Authorization needed for all contracts over \$20 million as passed in the National Defense Authorization Act of 2010, Section 811, P.L. 111-84 [H.R. 2647]

¹⁰ Section 602 of the Business Opportunity Development Reform Act of 1988, P.L. 100-656 [H.R. 1807], November 15, 1988.

"Promise Fulfilled: The Role of the SBA 8(a) Program in Enhancing Economic Development in Indian Country."

to improve the livelihood of hundreds or thousands of community members. Accordingly, tribes and ANCs can operate multiple 8(a) firms and do not have a limit on the size of contract that can be awarded to them on a sole source basis. These provisions were intended to prepare tribal enterprises and ANCs to compete with others in their industry, particularly large contractors who have established relationships with government customers and possess capital and proposal capability sufficient to dominate the federal procurement market.

In order to compete effectively, Congress provided tribes and ANCs flexibility to hire experienced staff and management and the ability to use partnerships and subcontracting tools that are available to other contractors. Tribes must present a plan for Native managers to assume operations, while Alaska Native participants have the flexibility of hiring both Native and non-Native managers. However, the direction of the company and the management of assets and distribution of profits are ultimately determined by a tribal governing council or Alaska Native Board of Directors. The governing council or board of directors is elected by tribal members or by Alaska Native shareholders. Top managers are tasked with the responsibility of improving the assets and profitability of the company, while at the same time carrying out cultural and broader social goals of the Native community.

Additionally, tribes and ANCs, like other individually-owned 8(a) companies, have the ability to form partnerships or subcontract in order to complete jobs and make profits. SBA regulations permit all 8(a) contractors to subcontract a portion of the work under certain conditions. This can create benefits for local businesses where a contract is awarded by permitting tribes and ANCs to work with local companies while still fulfilling its own goals of self-sufficiency.

Similarly, tribes and ANCs can form joint ventures with large companies in the same manner available to all 8(a) firms. All 8(a) firms can form joint ventures under SBA's Mentor-Protégé Program. The use of teams and joint ventures are encouraged by the federal government as a means to stimulate growth, forge new business relationships, and develop expertise.

For example, Mandaree Enterprise Corporation faced bankruptcy in 1994. The tribal government owners, the Mandan, Hidatsa, and Arikara Nations of the Ft. Berthold Reservation in North Dakota, hired a CEO to develop a turn-around strategy. Mandaree Enterprise became certified in the 8(a) Business development program and grew rapidly as it expanded into government contracting. Part of its success was due to its participation in U.S. Department of Defense's Mentor-Protégé Program, which encourages major defense prime contractors to work in tandem with small disadvantaged businesses to develop their business and enhance their technical capabilities. The ultimate goal is to enhance the potential contributions of protégés, like Mandaree Enterprise Corporation, thus allowing them to more effectively compete for defense-related work. Through this program, Mandaree Enterprise Corporation developed a relationship with Northrop Grumman, which contributed to their capabilities in manufacturing cables, wire harnesses, and circuit boards. During two separate occasions, the Mandaree Enterprise Corporation and Northrop Grumman received special recognition from the U.S. Department of Defense by winning the Nunn-Perry award.

"Promise Fulfilled: The Role of the SBA 8(a) Program in Enhancing Economic Development in Indian Country."

The criticism about tribal and ANC contracting success from some in the small business community is misplaced and misguided. It distracts from the many issues that all small contractors have in common. While the federal contracting market has increased substantially, many small businesses believe they have been shut out of the market. The size of the market has increased; however, the federal government's statutory goals, which are intended to ensure small business participation, have remained stagnant, not keeping pace with the potential for greater small business participation. Additionally, the overall small business share has declined due to a number of reasons, such as bundling, the consolidation of contracts beyond the reach of many small business capabilities. The federal procurement market is huge, and there is plenty of room for tribal and ANC and all minority businesses to participate. NCAI has worked with other small business organizations, such as the Minority Business Roundtable and Women Impacting Public Policy, to urge Congress to increase opportunities for all small businesses by increasing agency contracting goals and size standards, as well as increasing the thresholds for individually owned 8(a) companies. The Administration has acted to increase size standards for some industries and is undertaking an effort to unbundle contracts, last least in the information technology arena. All are positive steps for all 8(a) participants.

Fostering the development of successful small business contractors advances the government's interests by broadening and diversifying its industrial base of service providers and suppliers. More competition can result by combating the consolidation of the government contracting industry into a few dominant large businesses. By providing different contracting provisions to qualified tribal enterprises and ANCs, Congress increased the likelihood of sustaining business opportunities, ownership, and revenues for American Indians and Alaska Natives. These provisions are helping to alleviate poverty, provide economic growth, and increase the business capacity of tribes and ANCs.

Recommendations for Program Improvement

We feel it is important for this Committee and Congress to know that these tools created to promote economic self-sufficiency in Native communities are working as the federal government intended. The 8(a) program is still a long way from universally building local tribal economies and offering hope to tribal citizens. However, even its infancy, it has already proved to be an effective tool for those tribes and ANCs who have the ability and tenacity to compete and profit in the federal market place.

Our member tribes, ANCs, and Native communities have all given us input on this issue, and their message has been simple and clear: Keep the program in place. It is working. While a handful of tribes and ANCs have achieved significant success in government contracting, the vast majority of tribes and ANCs remain in desperate need of meaningful, diversified economic development opportunities. Tribal communities face many obstacles to economic development, including lack of access to capital, inadequate infrastructure, remote locations, complicated legal and regulatory status, and insufficient access to training and technical assistance, among others. In fact, given its proven success in a limited number of communities, we should all be working towards ways to strengthen the 8(a) program so more communities can benefit from the purchasing power of the federal government.

"Promise Fulfilled: The Role of the SBA 8(a) Program in Enhancing Economic Development in Indian Country."

With this directive from our member tribes, ANCs, and Native communities, NCAI set out to evaluate the program, listen to those who had concerns, and try to correct misperceptions. During a national summit held jointly with the U.S. Department of the Interior, NCAI heard from tribal leaders about these economic challenges and opportunities. In addition, a joint working group was formed with NCAI, the Native American Contractors Association, and the National Center for American Indian Enterprise Development to ensure that we were speaking with a unified voice and representing the issues and concerns of all American Indian and Alaska Native entities.

NCAI evaluated concerns about the program by carefully reviewing the April 2006 GAO report on Alaska Native Corporation 8(a) contracting (GAO-06-399). The GAO recommendations centered on the need for greater oversight activities by the Small Business Administration (SBA) and federal agencies. In response, we held a series of government-to-government tribal consultations with the SBA Administrator to discuss the GAO and other SBA Inspector General (IG) recommendations and to identify potential solutions to address these concerns.

Through this process, we developed two comprehensive sets of administrative recommendations to improve oversight in response to the recommendations made in the GAO report (GAO-06-399) and other 8(a) SBA IG reports. We submitted these reports as part of the administrative record for the tribal consultation process that the SBA undertook as part of its 8(a) rulemaking on the SBA mentor/protégé program. Additionally, we have urged Congress to increase funding for the SBA to provide additional staff resources and to conduct an SBA assessment on re-engineering the Native 8(a) program with the goal of providing more transparency, accountability, and training. This effort was undertaken to ensure that this program remains one of the critical tools available more broadly in Indian Country as a way to generate revenue and build business capacity. These recommendations were developed to strengthen reporting systems and provide improved transparency and accountability for many of the concerns that have been raised.

Since these recommendations were developed, both Congress and the Administration acted to address a number of concerns regarding how Native and all other firms participate in the SBA 8(a) program. Congress, through the National Defense Authorization Act for Fiscal Year 2010, enacted legislation that directly and disproportionately impacts Native 8(a) firms. The Act requires all federal agencies to justify and approve all contract awards over \$20 million.

The Office of Management and Budget, through the Federal Acquisitions Regulatory (FAR) Council hosted consultations before releasing the regulations that will guide the level of justification and approval. The Far Council should be commended for hosting its first tribal government consultation and for drafting regulations that adhere to those specifically included in the legislation. These regulations are not intended to cap sole source contracting to a \$20 million limit, but should add a layer of tax payer protection for all large contracts.

"Promise Fulfilled: The Role of the SBA 8(a) Program in Enhancing Economic Development in Indian Country."

The Administration, through the SBA, released regulations earlier in 2011 that will add additional oversight and accountability. The SBA held a number of consultations with tribal governments before the regulations were drafted and is promising to conduct further consultations to give guidance on the new rules and discuss a delayed regulation governing benefits reporting. The regulations answer concerns raised over the years by NCAI and our partner organizations, participants, administrative officials, and Congress. Among other things, the new rules add accountability by clarifying mentor-protégé, joint venture, and sub-contracting relationships. The rules also provide new guidelines for NAICS codes and size standards and provide greater transparency for excessive or executive compensation.

While all of these new rules promise greater accountability and transparency, Congress, in its oversight role, should ensure the regulations are implemented and enforced in a manner that sets new standards for program participants without detracting from the programs' intent or deter contractors from using the program.

Additionally, Congress should ensure that the benefits reporting regulations being developed are done so in a way that reflects current federal Indian policy. Tribes and ANC's, by nature of their governing systems, are already responsive their respective citizen and shareholder interests and for the well-being of their communities and culture. The reporting mechanisms should not favor certain expenditures or limit the use of revenues to what may be acceptable to external interests.

We want to thank you for giving us the opportunity to address the importance of the 8(a) Business Development program to tribal communities. We look forward to your continued support of tribal self-determination efforts and our use of effective economic tools.