



NATIONAL  
CONGRESS  
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INDIANS

*Testimony for the*  
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Committee on Homeland Security and  
Governmental Affairs  
Ad Hoc Subcommittee on Contracting  
Oversight

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Hearing on  
Contracting Preferences for Alaska Native Corporations

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TRIBAL AND ALASKA NATIVE CORPORATION 8(A) BUSINESS  
DEVELOPMENT: PROMOTING TRIBAL SELF-DETERMINATION AND SELF-  
SUFFICIENCY

*Introduction*

The National Congress of American Indians (NCAI) is the intergovernmental body for American Indian and Alaska Native tribal governments. For over sixty-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 present at the Senate Committee on Homeland Security and Governmental Affairs, Ad Hoc Subcommittee on Contracting Oversight 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.

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.

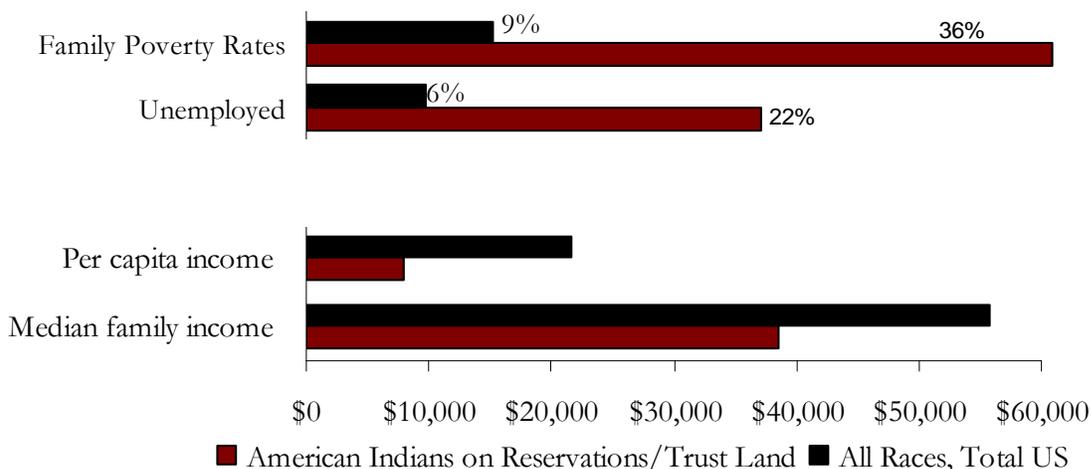
To promote economic development for Indian tribes and Alaska Native Regional and Village Corporations ("ANCs"), Congress authorized their participation in the Small Business Act's Section 8(a) Business Development program. When certified as an 8(a), they may contract with the federal government under unique terms which permit a federal agency to award a contract that is 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, to provide tools to combat poverty in tribal communities, and to remedy the low level of tribal and Alaska Native participation in the government contracting industry.

Due to the recent public and Congressional attention on sole-source contracting, recent investigations and press coverage 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 that legislative changes to the program be made. Indeed, the 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. However, there are

hundreds more who remain nearly invisible, who are struggling economically to preserve their lands and community. The 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 average. 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.<sup>1</sup> Real per-capita income of Indians living on reservations is still less than half of the national average. In 2000, Indian 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 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 businesses.<sup>2</sup> 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.

<sup>1</sup> Jonathan Taylor, “Native American Section 8(a) Contracting,” p. 6 (October 2007).

<sup>2</sup> Matthew Fletcher, “In Pursuit of Tribal Economic Development as a Substitute for Reservation Tax Revenue,” 80 North Dakota Law Review 759 (2004).

Economic growth in the nation's tribal communities remains a substantial challenge, and until this improves significantly, the unique 8(a) contracting benefits should be part of the federal government's arsenal of policies that promote economic development.

### *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 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."<sup>3</sup> 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 Natives.<sup>4</sup> 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...<sup>5</sup>

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. Constitution.<sup>6</sup> 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

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<sup>3</sup> Article I, § 8, ¶ 3.

<sup>4</sup> See 43 U.S.C §1601, *et seq.*

<sup>5</sup> See *Id.* at § 1601.

<sup>6</sup> 43 U.S.C. § 1629(e)(4)(A).

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, Native capacity building is often the key goal of tribal governments and ANCs. In its 2006 Report, the GAO found that one-third of the ANC's it interviewed had management training programs in place that encourage the recruitment, training, and development of Native employees.<sup>7</sup> 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.

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 that is a certified environmental remediation firm which provides 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, and 23 of these interns are currently employed by Sealaska.

Benefits derived from the government contracting program go beyond developing local Native capacity through scholarships, internships, and employment. Other benefits, that 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 many Native communities.. When elder shareholders reach age 65, they are offered a special dividend along with additional shares, which 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 camp, leadership training, curriculum development, and language preservation are.

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<sup>7</sup> US GAO, (GAO-06-09) 2006, 81.

- 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. Characteristics that bolster youth against negative 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 better still, 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, like 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 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.

Tribal government and ANC 8(a) companies have built in accountability- to their citizens and shareholders- and their decision-making is an exercise of Native self-determination. This 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 contemplates measures 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.

### *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 and to help businesses that have substantial barriers to capital formation and job creation more effectively compete and get a foot in the door in 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 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, and the tribal citizens determine who governs them and ultimately how the 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 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. In fact, 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 economy.<sup>8</sup>

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<sup>8</sup> 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.

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 the competitive threshold that applies to individually-owned firms<sup>9</sup> 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 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. This means that employees and top managers may not always be tribal members or Alaska Natives but the direction of the company, the management of assets and distribution of profits, is 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.

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<sup>9</sup> Section 602 of the Business Opportunity Development Reform Act of 1988, P.L. 100-656 [H.R. 1807], November 15, 1988.

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 DoD'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. Mandaree Enterprise Corporation and Northrop Grumman twice received special recognition from DoD by winning the Nunn-Perry award.

The criticism about tribal and ANC contracting success from some in the small business community is misplaced. It distracts from the many issues 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. We have 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. (*See Appendix A: Joint Legislative Recommendations, Sept. 25, 2007*).

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, providing economic growth, and increasing the business capacity of tribes and ANCs.

Native people in the U.S. still suffer disproportionately higher rates of poverty and unemployment than other groups. The 8(a) program provides tribes and ANCs with critical tools needed to compete in the federal marketplace and enhances market-based competitive capabilities.

### *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, but in its infancy, it has already proved to be an effective tool for those tribes and ANCs who have the 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 program so more communities can benefit from the purchasing power of the federal government.

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 under misperceptions. We heard from tribal leaders about the economic challenges and opportunities during a national summit held jointly with the Department of the Interior. 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 we were adequately representing the issues and concerns of American Indian/Alaska Native entities and speaking with a unified voice.

We evaluated concerns about the program by carefully reviewing the report and recommendations contained in 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. To evaluate potential program improvements, we also held a series of government-to-government tribal consultations with the SBA Administrator to discuss the GAO and other SBA IG report 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 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.

Increased oversight and enforcement by SBA and other federal agencies of existing requirements will verify that tribal enterprises and ANCs are good stewards of taxpayer funds. These recommendations strengthen reporting systems and provide improved transparency and accountability for many of the concerns that have been raised. We have attached both sets of our recommendations and will highlight some of the key points that are related to ownership, performance of work, and compensation issues:

1. A web portal should be established for 8(a) companies to report data, such as contract performance, status of Mentor-Protégé and joint venture agreements, and annual reports, to the SBA. This would provide information to the SBA and contracting agencies on a real-time basis and could also serve as a mechanism for flagging potential problems early on so that they can be corrected.
2. Web-based reporting could track compliance with contractor performance requirements for all 8(a) sole source awards and could provide more detailed reporting on the amount of work performed by the 8(a) prime contractor and by sub-contractors which the CEO of the company would be required to certify.
3. Milestones should be established for reporting all 8(a) Mentor-Protégé joint ventures contracts awarded, including ownership interests; direct and indirect profits; and prime and subcontractor performance. This would provide greater accountability to ensure the tribal or ANC 8(a) protégé is gaining experience and contributing towards its performance requirements.
4. More transparency in the disclosure of ownership agreements could be provided by a confirmation of ownership and the status of ownership agreements in the annual audited financial statements.
5. On the issue of compensation of 8(a) managers, transparency and accountability in disclosures on the individual compensation worksheets could be improved by clarifying and applying consistent directives on what should be reported.

*(See Appendix B: Joint Administrative Recommendations, Executive Summary)*

We believe these improvements would go a long way to addressing concerns that have been raised which question whether tribal 8(a) enterprises and ANCs are performing the work required of them and whether tribal members or Alaska Native shareholders sufficiently benefit from the 8(a) program. There are numerous ways to strengthen the procurement system, without new statutory requirements, so that compliance with existing rules and benefits can be better reported and tracked.

## *Conclusion*

To address concerns about obtaining good value for taxpayers in contracting and whether the goals of the program are being met, Congress and the Administration should focus on addressing the weaknesses in the procurement system that GAO identified and consider implementing the administrative recommendations we have made for program improvement, including additional funding for the SBA to strengthen its staffing and oversight function.

Limiting tribal government enterprises' and ANCs access to the federal marketplace will have devastating effects on Native communities. Tribal governments will need to look to Congress to establish additional tools to deal with the critical need to strengthen local tribal economies so that tribal governments will have more--not fewer—resources and opportunities to provide programs and services for their citizens. With conditions in Native communities comparable to developing nations, we should all be working to improve programs like the 8(a) program that create economic opportunity in Indian Country.

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