

**Testimony to the House Committee on Small Business
"Native 8(a) Contracting: Emerging Issues"**

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Thank you for the opportunity to appear and give testimony. My name is Christine V Williams, and I am the founder and managing partner at Outlook Law. Prior to starting my own firm, I was a partner at two international law firms, and I am a Government Contracts law professor with a focus on all SBA programs. I have been voted in the Top Five Percent of Government Contract lawyers in the Nation by my peers for multiple years after leaving big law. I serve on the National Ombudsman Board for the SBA. I am a small woman owned law firm that is growing and thriving because of the hard work and commitment I put in; a sentiment echoed by most small businesses.

I have worked extensively with all SBA program participants, including Tribal and ANC owned firms, as well as individually owned firms, which include firms owned by service-disabled veterans, women owned firms, and HUBZone firms. I have represented one of the largest contingencies of Native American groups to ever come together in front of the D.C. Circuit Court of Appeals in defending the 8(a) Program. Today, I will speak directly to the topic at hand "Native 8(a) Contracting: Emerging Issues." As this is a panel that looks to be focused on entity owned and not individually owned Native 8(a) contractors, I will further focus my testimony there. I am, however, willing to answer questions on how the programs interplay with each other, and how they can and often do work simultaneously together. That is, small businesses, whether owned by Native groups or individuals, work in partnership to get jobs done. In my experience small businesses are drawn to each other to perform contracts due to the experience, adaptability, and ability to perform certain portions of each contract in partnership. The SBA regulations also strongly encourage and reward small businesses to work together. That is an important piece to understand.

The History of Native Owned Firms that Support their Communities

Firms owned by Native groups, whether Tribal, Alaska Native Corporation (ANCs), or Native Hawaiian Organization, are different. They support communities or groups of

shareholders, members or citizens, and deliver benefits to those groups and the communities in which they live. We are not addressing a new topic here. Since the inception of this Nation, Native groups have been recognized as different than any one individual.

Federal Procurement: The Legal Basis Stems from the Constitution, Treaties, and Strong Jurisprudence

The Constitution is explicit that the Federal Government has a special relationship with Native Americans. This is demonstrated by treaties, statutes, and strongly affirmed by the judiciary since the inception of this Nation. Such a relationship "furthers the Federal policy of Indian self-determination, the United States' trust responsibility, and the promotion of economic self-sufficiency among Native American communities."¹ Native Americans have a special relationship, which is not considered race based, with the Federal Government when it comes to set-asides and Federal procurement.² One case considered a constitutional challenge to the legitimacy of a Department of Defense set-aside contract that was awarded to an Alaska Native Corporation (ANC) based, *inter alia*, on its Native American status. In examining the unique relationship between Native Americans and the United States, the Court stated "the only question properly before us is whether the government violated the equal protection component of the Due Process Clause when it . . . grant[ed] a contract to a firm wholly owned by Indian Tribes." The same Court found that ANCs are rightfully treated as a Tribal equal in that they were established as the "modern mechanism that designates Native Alaskan Corporations as the vehicle used to provide continuing economic benefits in exchange for extinguished aboriginal land rights." The Alaska Native Claims Settlements Act or ANSCA passed by Congress reinforces the right of ANCs to participate in Government Contracting as part of the fulfillment of the United States trust obligation to all Native Americans.

As such, economic development programs participated in by Native Americans is mandated by the trust responsibility undertaken by the United States Congress since the inception of the Nation. Indeed, Congress had a long-standing history, backed by Supreme Court jurisprudence as well as treaties, of singling out Native Americans for particular and special treatment under the law – beginning from the Constitution itself, which gives Congress the

¹ *AFGE v. United States*, 195 F. Supp. 2d 4, 21-22 (D.D.C. 2002), *aff'd*, 330 F.3d 513 (D.C. Cir. 2003), *cert. denied*, *AFGE v. United States*, v. U.S., 540 U.S. 1088 (2003).

² *AFGE*, 195 F. Supp. 2d at 18.

power to regulate Commerce with Indian Tribes. This power derives directly from the Constitution: "Congress has the power to regulate Commerce . . . with the Indian Tribes." U.S. Const. art. I, § 8, cl.3; *see also United States v. Sandoval*, 231 U.S. 28, 46 (1913).

Courts have further distinguished the strict scrutiny standard applied to racial classifications from Native American contractors in the *Adarand* case by declaring that the Supreme Court "has made it clear enough that legislation for the benefit of recognized Indian Tribes is not to be examined in terms applicable to suspect racial classifications. [T]he unique legal status of Indian Tribes under Federal law permits the Federal Government to enact legislation singling out Tribal Indians, legislation that might otherwise be constitutionally offensive."³ As Justice Scalia enunciated when he was serving on the D. C. Circuit Court of Appeals:

Morton v. Mancari, for instance, upheld a longstanding statutory preference for hiring members of federally recognized Indian tribes to fill positions in the Department of Interior's Bureau of Indian affairs. Two years after *Mancari*, the Court sustained as against an equal protection challenge a court-ordered exemption from a state sales tax for cigarettes sold on a reservation to tribal members residing on the reservation. *See Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 US 463, 479-80 (1976). In both cases, the Court tested the special preference in terms similar to those used in judging equal protection attack on other economic legislation. *See US v. R.R. Ret. Bd. v. Fritz*, 449 US 166, 174-176 (1980); *Williamson v. Lee Optical*, 348 U.S. 483, 491 (1955). ***For legislation regulating commerce with Indian tribes, as 'long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed.'*** *Mancari*, 417 U.S. at 555; *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73, 85 (1977); *Moe*, 425 U.S. at 480. In *Narraganset Indian Tribe v. National Indian Gaming Commission*, 158 F.2d 1335 (D.C. Cir. 1998), we summed up the state of the law this way: ***'ordinary rational basis scrutiny applies to Indian classifications just as it does to other non-suspect classifications under equal protection analysis.'*** *Id.* at 1340.

Thus, and specifically in the 8(a) Business Development context, the Courts have examined and affirmed that the 8(a) Program for Native Americans is an economic tool for self-determination that was firmly established by the United States Constitution and enacted into law by the U.S. Congress.

³ *AFGE*, 330 F.3d at 521 (quoting *Morton*, 471 U.S. at 551-52) (additional citations omitted).

Federal Procurement Policies and Native Americans are Unique in Obligations and Responsibilities

The relationship between the United States and Native Americans is "perhaps unlike that of any other two people in existence . . . marked by peculiar and cardinal distinctions which exist nowhere else." *Cherokee Nation v. Georgia*, 30 U.S. 1, 16 (1831) (Marshall, C.J.). The Constitution, with the Indian Commerce Clause, was enacted in 1789, to be followed by the first Native American legislation in 1790, the Intercourse Act. "[B]y the 1870s, the government had successfully placed Native Americans in a state of coerced dependency. [T]his relationship of dependency between the United States and the Indian people was forcibly established."⁴

This relationship of forced dependency decimated Native Americans in numerous ways as a magnitude of studies, papers, and Congressional hearings have established. History books are replete with stories of Native Americans suffering under laws condemning their traditions, forbidding the usage of their languages, denying religious freedoms, and forcing the removal of children from their families in order to "assimilate" them. In the history of the United States, only Native Americans had their aboriginal lands, cultures, economies, rights, institutions and sovereignty appropriated, converted and/or extinguished.⁵

Procurement and Native American Groups

Access to government contracting has long been an accepted means to fulfill the United States' fiduciary and trust obligations to Native Americans and the 8(a) Business Development Program is no exception. For instance, Jovita Carranza, Deputy Administrator, U.S. Small Business Administrator stated that:

8(a) is an important source of revenue for Native American firms in particular . . . Indian Reservations are the underserved communities of underserved communities. While it may be challenging to encourage lenders to expand their rural or inner-city programs, we all know the challenges are much greater for

⁴ *Cobell v. Babbitt*, 91 F. Supp. 2d 1, 7 (D.D.C. 1999), *aff'd and remanded sub nom. Cobell v. Norton*, 240 F.3d 1081 (D.C. Cir. 2001).

⁵ This is well beyond the standards articulated in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 504 (1989) and *O'Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420, 425 (D.C. Cir. 1992), by which the government may take action to remedy passive participation in past discrimination and/or the government possess evidence that their fiscal policies are exacerbating a pattern of prior discrimination. Not only does the government have a compelling interest, it has a narrowly tailored remedy in the limited 8(a) Business Development Program, as is clearly demonstrated herein -*even-if-Native American group were considered a racial classification, which they are not.*

Indian Reservations. And this, we recognize, is crippling for small business ventures, which need capital to start, to grow and to create jobs and opportunities. Successfully starting a small business under the most auspicious conditions is a Herculean task. But the additional challenges that Native Americans face make it all the more so. Limited access to markets, limited access to an experienced workforce, and limited infrastructure are just a few problems. For these reasons, 8(a) is an essential program for developing Native American economies.⁶

"[P]referential contracts . . . constitute an important tool in government efforts to promote Indian economic development."⁷ "The major Indian problem facing our country today is providing economic development - to bring economic justice to Indians, as part of the American commonwealth." The tribes' "brightest success" is in "the area of federal contracting."⁸

As the late Senator Inouye from Hawaii stated:

Unfortunately, as this committee has discovered in previous oversight hearings, this public policy goal has not been achieved with respect to the participation of businesses owned by Native Americans.

On the other hand, it is very clear that anything we can do to increase the participation of Native owned businesses in government procurement contracting will have a very beneficial effect on the various Native American communities.⁹

⁶ *Preferences for Alaska Native Corporations: Hearing before the S. Subcommittee on Contracting Oversight, Committee on Homeland Security and Gov't Affairs, 111th Cong. (2009)* (written statement of Sarah Lukin) (quoting Jovita Carranza, Deputy Administrator, SBA); see also *Report of the Task Force on Indian Economic Development of the U.S. Department of the Interior: Interior Task Force Report* at 240, July 1986 ("The Federal government has assumed a permanent trust responsibility for Indians."); see also S. Hrg. 96-7, *Indian Economic Development Programs: Oversight Hearings Before the Committee on Interior and Insular Affairs of the U.S. House of Representatives, 96th Cong. (1980)*, at 1, 10, and 21 (statements of Chairman Kogovsek; Thomas Sherman, Acting Deputy Assistant Secretary for Public Housing and Indian Programs, Department of Housing and Urban Affairs; and Theodore Krenzke, Acting Deputy Commissioner of Bureau of Indian Affairs, Department of the Interior, respectively). S. Hr'g 101-150, *1989 Select Committee Hearing on Indian Participation: Indian Participation in Government Procurement Contracting: Hearing Before the Select Committee on Indian Affairs of the U.S. Senate, 101st Cong. (1989)* (statement by Robert W. Perry, Raytheon Manager and Chairman of the Contract Services Association of America at 104).

⁷ *Report of the Task Force on Indian Economic Development of the U.S. Department of the Interior* (July 1986) at 240, 165 and & 211-23, Chapter 7: Preferential Contracting.

⁸ *H. Hr'g 103-18, House Oversight Hearing April 6, 1993: Economic Development-Part I: Oversight Hearing Before the Subcommittee on Native American Affairs of the Committee on Natural Resources of the U.S. House of Representatives* (statement of Fort Peck Tribes Chairman Caleb Shields at 4-5).

⁹ *1988 Select Committee Hearing on Barriers*, at 1-2.

Fast forward to 2018 and 2019 and that the statement of the late Senator continues to be true: fulfillment of the trust obligation that this Nation has promised its indigenous people is still needed, as I will speak to later.

Congress recognized the basic facts in relation to Native Americans: the statistics are dismal and government contracting may represent one of the brightest lights as an economic driver. That is, communities with high Native American populations have a much lower percentage of college graduates, while having considerably higher rates of poverty, crime, and unemployment. Native American businesses in the 8(a) Program represent only a fraction of all Federal contracts. Yet, the effects of those dollars are amplified in the Native American communities (and the communities to which they serve). These statistics are further demonstrated in detail in the testimony of Carl Marrs, an Alaska Native and Marine Corp Veteran, who serves as the CEO of Old Harbor Native Corporation. His testimony is appended to mine for the reference material it contains.

Accordingly, the 8(a) Program furthers Congress's goals of the advancement and promotion of economic development for Native Americans. For instance, a GAO report studying Native American 8(a) contracting found that ANCs provide shareholders and their descendants the following benefits: (1) employment opportunities; (2) dividends; (3) scholarships; (4) cultural preservation programs; (5) land management; (6) economic development; and (7) advocacy for Alaska Native people and communities. By investing in various cultural programs, ANCs seek to preserve Alaska Native culture once attacked by governmental policies.¹⁰

To provide these benefits, the 12 regional ANCs contribute, on average, 75-85 percent of their total net income annually to scholarships, contributions to Alaska Native non-profit organizations, and shareholder dividends. These investments in the Alaska Native community are made possible, in part, because of the 8(a) Business Development Program.

This is not unusual for Native groups to contribute and lift their own communities where one would normally expect Federal, state, or local authorities to be present. Attorney General William Barr visited Alaska this past June and instituted emergency measures because of what he saw in everyday life in Native communities when he visited rural Alaska. (More on that later.) The 8(a) Program has only begun to reverse the forced dependency of Native groups.

¹⁰ The investments include “museums, culture camps, [and] native language preservation.” GAO-06-399, at 83 (April 2006), available at <http://www.gao.gov/assets/250/249930.pdf>.

In 2018, as Associate Administrator for Government Contracting and Business Development for the SBA acknowledged, education and reversing misinformation surrounding Native owned firms performing contracts is a key component of Tribes, ANCs, and NHOs, for successful competition in Government Contracting; specifically, in the 8(a) Business Development Program because of the broader purpose these entities serve as stewards for generations to come. "ANCs, Hawaiian Natives, and Native Tribes have a greater responsibility than a typical 8(a) since they must bear responsibility to help preserve past, present, and future generations of people and their lands. From my visits here in Alaska and in D.C., the commitment that Alaskans have to Alaska and to each other is palpable."¹¹

That is, Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) establishes a business development program for socially and economically disadvantaged small business concerns. The objective of this time-limited (nine years) business development program, restricted to small businesses, is to allow socially and economically disadvantaged businesses access to the economic mainstream.¹² This is accomplished by gaining a foothold in the 8(a) Program, which is a subset of the overall small disadvantaged business set aside aspirational goals.

As a limited business development program, the only one so named and treated by the SBA, the Program attaches goals/milestones that must be met so that the training and footholds to ensure those goals inure to those businesses once they graduate from the Program.

Participation in the Program requires - first full certification and acceptance in the Program by the SBA. Then the Program requires compliance goals such as: (1) maintaining a balance between commercial and government contracting; (2) performing annual reviews of the company, including its goals and achievements; (3) requiring developed business plans; and (4) complying with subject to systematic business line and company evaluations as well as tracking revenue by NAICS Code to ensure no two primary codes are used at the same time and no dominance occurs. Other programs that have been receiving sole-source awards are only now

¹¹ Testimony of Associate Administrator of GC/BD for the SBA, Robb Wong, June 18, 2018, Senate Small Business Committee Hearing.

¹² It should be noted that the recent regulatory change to the 8(a) Business Development Program, through and with Women Owned Small Business ("WOSB") regulations, increased the economic disadvantage threshold to match the Economically Disadvantaged ("WOSB") to \$750,000, which excludes a home, the business, and retirement funds.

beginning to become certified much less meet any other type of goal as those listed above; even though they have asked for the assistance to help develop and meet those compliance goals.

Again, participation in the 8(a) Business Development program is in furtherance of Congresses' enunciated goals borne out of the forced dependency of the Native American groups. The need to fulfill its trust obligations, as reaffirmed by strong jurisprudence, has not gone away. One need only look at the Native American groups furthering the goals of their respective communities of self-determination and economic security.

American Indian Tribes

By most accepted socio-economic indicators, American Indian Tribes are at the bottom of the socio-economic ladder, struggling with a legacy of rural isolation and stagnant local economies. American Indians have suffered from centuries of discrimination, poverty, and neglect. The roughly 29 percent poverty rate in Indian Country exceeds that of all other categories, undoubtedly playing into high unemployment rates, which can be multiples of the national average. When President Obama visited Indian Country, only the third President to do so, he toured Standing Rock Sioux Tribal Nation, which has an astounding unemployment rate of 60 percent, according to the Bureau of Indian Affairs.

Unemployment is disturbingly high and educational level low for American Indians. The Economic Policy Institute did a study on the unemployment rates for American Indians and Alaska Natives concluding that their unemployment rate is nearly double that of Caucasians nationally. Likewise, the national statistics for higher education are equally dismaying, with some variation coming into play by location and percentage of Native American population. A history of economic hardship in these American Indian communities is compounded by the associated social ills: inadequate healthcare; a suicide rate that is double the national average; high levels of alcohol and drug abuse; and alarming rates of diabetes and obesity.

The 8(a) Program is beginning to fulfil this nation's obligations to American Indians and mitigate the harm done. While the Federal Government has provided Native American communities with approximately \$19 billion for social services, including education, the 8(a) Program allows American Indians to become empowered to build their own successful businesses to create jobs and economic opportunities in their communities, rather than relying on Federal social programs.

Alaska Native Corporations

Congress created Alaska Native Corporations in 1971 through the Alaska Native Claims Settlement Act (“ANCSA”). ANCSA created 13 regional corporations that divided the state into 12 geographic regions (the 13th was not land bearing) and approximately 200 village corporations, which exist within the area of the regional corporations but are distinct entities. As I have previously stated, a GAO report studying Native American 8(a) contracting found that ANCs provide shareholders and their descendants the following benefits: (1) employment opportunities; (2) dividends; (3) scholarships; (4) cultural preservation programs; (5) land management; (6) economic development; and (7) advocacy for Alaska Native people and communities. By investing in various cultural programs, ANCs seek to preserve Alaska Native culture once attacked by governmental policies. The investment of between 75-85 percent of net revenue back into the Native community is possible because, in part, of the 8(a) Program. Indeed, the GAO report found that ANCSA mandated that the economic drivers of the ANCs was to deliver benefits to their respective communities.

Not surprisingly, and statistically proven, such as those cited in the submitted testimony of Carl Marrs, areas with higher Alaska Native populations have lower education levels, higher unemployment, and staggering crime rates compared to the nation as a whole. Noteworthy, is when attorney General William Barr visited rural Alaska this summer, he declared it to be a state of emergency to which he addressed by ordering 30 agency directives to be implemented immediately.

Not all is dismal. Native Corporations are now able to return benefits to its stakeholders in the form of both financial dividends and scholarships, job opportunities, and much needed social programs. While a \$1000 death benefit may not seem like much to a lot of people, in a village it can allow a family to have a true burial for its loved one. Newspapers are full of accounts of poverty-stricken villagers unable to afford proper transportation or burial of loved ones. Even basic sanitation that most of the country takes for granted can be non-existent in some villages. Villagers rely on the “honey bucket” system in which human waste is collected in buckets, then emptied into a central dumping station, and returned to the home. As the ANCs help build infrastructures in the villages, a function normally provided by state, local or Federal Government without private corporation's assistance, the honey bucket system is becoming more

and more obsolete. Certainly, Congress did not intend that private corporations supplant the infrastructure that Government provides; rather, history reflects that Congress intended Alaska Natives to advance economic self-determination through business corporations. To state otherwise is a gross distortion of history and a dishonor to the intentions of ANCSA.

*Native Americans in the Military*¹³

One of the single hardest sets of regulations and laws I encounter is directly related to Veterans. While the Small Business Act was significantly amended twice for Veterans, the regulations between the SBA and the Veterans' Affairs ("VA") often come into conflict. As a daughter and wife of veterans, when I serve my veteran clients, I often have to push, pull, and just push again to get veterans the benefits Congress intended. SBA assists in this effort and has made several reach outs to the VA, along with other agencies, on how to apply SBA regulations in conjunction with that agency's own regulations. In regard to 8(a), these regulations in conflict, especially in the JV context for individually owned veteran firms, which can be the most complex to understand and navigate. I have and do represent Service-Disabled Veteran Owned Small Business, which includes WOSBs and individual Natives.

In this regard, as we are focusing on Native contracting here today, Native Americans have the single greatest percentage of service in the military of any group and that is when they identify *as only* Native American. Disability because of military service is at 30% among Native Americans-the highest group to be disabled in service to the United States.

Not surprisingly, Native Americans have a long history of serving in the military. Even before being granted American citizenship, Native Americans were fighting for this Nation. In 1918, during World War I, the code talkers were documented as beginning their service using the various Native American languages, establishing a code that could not be broken. Numerous medals and a path for U.S. citizenship was established for those that served. (U.S. Veterans Affairs).

This service continued in WWII, as documented in the movie *Windtalkers*, and the Marines depended heavily on the code talkers in providing secrecy in their movements from 1942-1945. During the Vietnam War, a time of burning draft cards, Native Americans

¹³ These statistics are taken directly from the U.S. Veterans Administration on American Indians and Alaska Natives. *American Indian and Alaska Native Servicemembers and Veterans*, September 2012; *American Indian and Alaska Native Veterans: 2015 American Community Survey*, August 2017.

volunteered and did so in force in service of the United States. 90 percent of Native Americans serving in the Vietnam War did so on a volunteer basis. The service and loyalty continue as this Nation prepares to honor its Native American veterans in 2020. The following list, developed by the Veterans Administration, demonstrates basic statistics for Native Americans.

AIAN Veteran Analysis- U.S. VA [AIAN=American Indian/Alaska Native]

- Similar to AIAN Servicemembers, AIAN Veterans are younger as a cohort.
- AIAN Veterans have served in more recent conflicts.
- AIAN Veterans have lower incomes, lower educational attainment, and higher unemployment than Veterans of other races.
- AIAN Veterans are also more likely to lack health insurance and to have a disability, service-connected or otherwise, than Veterans of other races.

Congress, the SBA, and the VA have recognized the uniqueness of the Native Americans in service and in business. The "forced decimation" is being slowly rebuilt, but there still is no comparison to the social ills Native American people must combat every day in their communities. It is important to remember that when one is speaking of Veterans, one is necessarily and without exception speaking of Native Americans with a distinguished record of leadership and service in this Nation's military. And when one is speaking of firms owned by Native Americans participating in SBA programs, one is necessarily speaking of firms owned by entities that directly benefit the most underserved communities in the Nation.

The Real Threat-Category Management

Category management is a real and present threat to small businesses. Some would call it the single greatest threat encountered by small business. GSA has recently issued a deviation to the FAR which would allow certain firms to skip certification; thereby giving new contracts to other than small businesses while claiming credit for small business goaling-for the same firms it does not deem need to be certified as small. With limited on-ramp periods, no substantive or defined method of qualification, monitoring, or compliance in place, category management effectively takes existing small business contracts and disqualifies currently performing small businesses. Regardless of the size of the small business or size of the contract-category management does not discriminate-it simply takes from contracts from the 8(a) and other programs without sufficient and mandated justification and puts it into the category it deems it fits best. The reduction in competition and the removal of small business contracting opportunities is an actual and real threat only growing in strength in its boldness to limit small

business contracts. Category management started as a tool for supermarkets, not small business procurement. Simply put, small business set-asides should be exempt from category management.

Closing Remarks

The challenges Native American groups face in 8(a) contracting is the serious and significant misunderstanding about these groups. We are also seeing this type of misunderstanding coming into play with other programs, such as the Women Owned Small Businesses. Just this month, the SBA IG's report considered over \$52.2 million was not awarded correctly to Women Owned Small Businesses. A startlingly 50 out of 56 contracts were examined and found the contracts were inappropriately procured. Fraud? More likely incorrect understanding of the program and regulations. Another example, the HUBZone program, or what used to be known as the one and done because of the serious and statutory requirements of that program that made it not fulfill the intent of Congress. Multiple certifications at different times, unlike any other program, that made it a challenge. With the new regulations, that program can closer align to the stated goals of Congress in bringing economic development to historically underutilized business zones. Contracting shops are crying out for training. The training I perform with the SBA is greeted with enthusiasm and informed questions. This has to be continued, especially as more businesses move into the sole source arena. Thank you again for inviting me to testify.