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### FEATURE COMMENT: Alaska Native Participation In Government Contracts: Victims Of Success

'Tis the winter of discontent for Alaska Natives, owners of the Alaska Native Settlement Act Corporations (ANCs) engaged in Government contracting. A seemingly unending barrage of negative stories appears in august publications spanning the geographical and ideological spectrum, from *The New York Times*, *The Washington Post*, *Los Angeles Times* and *Mother Jones Magazine* to (et tu, Brute?) the *Fairbanks Daily News/Miner*. Andy Warhol quipped that everyone will enjoy 15 minutes of fame. But, given the scandal-driven tone of today's media, it seems more accurate to say that everyone will suffer 15 minutes of infamy. Either way, for the ANCs on the federal procurement stage, it's showtime!

This FEATURE COMMENT presents the case for the roughly 119,000 Alaska Natives—the present and future owners of the ANCs—and responds to the Caesarean legions of critics who have crossed the Rubicon. At the center of the dispute are warring tensions between competing, and arguably irreconcilable, clusters of public policy issues. On one side are procurement policies, chiefly related to maximizing competition. The other side is federal Indian policy, and specifically, Congress' ongoing obligation to assure that Alaska Natives realize commitments made to them under the Alaska Native Claims Settlement Act (ANCSA), 43 USCA §§ 1601 et seq.

This legislation was a revolutionary change in the way the Government meets its unique responsibility to Native people. See, e.g., Vine Deloria, Jr.,

*Custer Died for Your Sins*. Instead of reservations and pervasive federal involvement that have miserably failed in the past, the ANCSA benefits have been administered through the ANCs—state-chartered, for-profit corporations with success or failure coldly measured by the annual financial statement. ANCs succeed as Government contractors because they are, first and foremost, businesses ... acting like entrepreneurs (and good ones).

**The Heart of the Matter**—Scandal-mongering exposés are fueled by “revelations” that a few ANC 8(a) firms received direct awards of a handful of very large contracts. From this, the media makes the Herculean leap to paint the whole ANC pack as wolf-like, corporate mega-entities insidiously cloaked as sheep-like small businesses. Critics charge that they fail to employ enough shareholders and generally abuse the business development privileges inherent in the easily criticized 8(a) program. The National Black Chamber of Commerce (eBLAST 030505), made a laudably succinct assessment of ANC participation in the 8(a) program: “It is evil!!”

**“One Size Fits All” Won't Fit**—As representative organizations for Alaska Natives, ANCs operate within an array of statutory provisions, mostly shared with the other classes of representative organizations: tribes, Native Hawaiian Organizations, and Community Development Corporations, which forthrightly acknowledge that the rules applicable to individually owned companies (whether small businesses, small disadvantaged businesses, women-owned businesses, HUBZone firms or service-disabled veteran concerns) are unsuitable for the needs of representative organizations with memberships of hundreds, thousands or tens of thousands. The program eligibility rules for representative organizations allow the parent to have multiple businesses participate in business programs, without violating the affiliation limitations. The representative organization provisions also remove the competitive threshold requirement for 8(a) contracts, thereby sanctioning the direct award of large contracts. This higher threshold is consistent with the historical legislative focus on helping these businesses succeed the old-fashioned way—through the develop-

ment of a strong, sustainable revenue base—rather than mandating their employment practices or limiting their capabilities to a single geographical area.

**Can't We All Just Get Along?**—An academician recently opined on public radio that he “would hope that the [Government Accountability Office] ... will show that these contracts are largely being used for the benefit of non-Alaska companies and that even as far as the benefits for the Alaska partners, these tend to go to management or owners and not to anyone working. ...” Some might describe those as fighting words—particularly coming from someone with no connection to ANCSA corporations or insight into their mission or accomplishments.

Alaska Natives are both astonished and profoundly disappointed that any ivory tower denizen would *hope* GAO finds that ANCs are skills for large corporations and systemic abusers of the 8(a) program. This attitude blends a presumption of guilt with a refusal to seriously consider the possibility that ANCs have succeeded as Government contractors through diligent contract performance and skillful use of program tools. Meanwhile, legal analysts wonder how or why a law professor would leap to a conclusion without waiting for any of the substantive proof.

It is baffling to hear criticism that the benefits to the Alaska partners end up with the owners of the firms. The owners of the firms *are* the Alaska Native shareholders. It is not clear where the benefits to the Alaska partners should go, if not to the owners. Rarely does any Alaska Native own so much as one percent of the company. For the larger corporations, the individual ownership interests are miniscule. For example, Arctic Slope Regional Corporation has about 9,000 owners, with an original shareholder owning just over one-hundredth of one percent interest in the company.

Sadly, these contorted views on ANCs appear widespread; perhaps a reflection that, regardless of truth, if the media reports something enough times, it becomes “fact.” Nonetheless, ANCs share their critics’ enthusiasm for the involvement of GAO, albeit for antipodal reasons. They share a collective confidence that the GAO investigation and report will vindicate them in a war heretofore fought with a trident of gossip, innuendo and supposition. ANCs welcome GAO to cause all the players to either show their cards or leave the game.

**The Affair as Procurement Policy**—Congress (not known for passing up a bandwagon) has

piled on. The House Government Reform Committee led the charge, requesting GAO to investigate the procurement issues surrounding ANC participation in the Small Business Administration’s 8(a) Business Development Program. In a March 4 letter, Reps. Tom Davis (R-Va.) and Henry Waxman (D-Calif.) requested a GAO review of the Government’s use of ANCs through the 8(a) program and its impact on the federal competitive procurement process. A list of questions was included, framed to solicit negative information about ANCs. In all fairness to Davis, he exhibits the classic symptoms of acute open-mindedness; when asked whether he is considering altering or eliminating the regulations giving ANCs their advantage over other contractors, he stated that he would not prejudge what rules might be changed.

**The Affair as Indian Policy**—When the matter is viewed exclusively through the lens of procurement policy, both Indian policy and Congress’ continuing obligations to ANCs are rendered invisible. These absent perspectives were returned to the debate by Rep. Don Young (R-Alaska), chair of the House Transportation Committee. Young asked GAO to investigate the extent to which the procurement rules for ANCs are an aspect of the obligations owed Alaska Natives under ANCSA, assess the impact on Alaska Natives of a repeal or severe curtailment of the ANC rules and report on other federal programs and sources available to counteract the negative impact on Alaska Natives.

**Balancing Procurement and Indian Policy**—The assessment of allowing special accommodations to the ANCs in Government contracting presents a clear divide between procurement policy goals and Indian policy objectives. To those who place the procurement policy of maximizing competition atop the sacred altars of the Government’s *raison d’être*, the current ANC scenario is anathema. If competition is your guide, preference programs instinctively prompt skepticism. But to those placing a higher priority on Indian policy, ANCs are a wonderful success story in a world where successes are few and far between.

It must be clear that, whether procurement policy or Indian policy, the categorical imperatives of maintaining the integrity of the acquisition system and providing unimpaired transparency must never be reduced to mere relative weights on some policy scale. (Nota bene: No ANC Government con-

tractor appears on the Excluded Party list; none has ever been charged under the False Claims Act; and there is a complete absence of documented instances of intentional violation of 8(a) program rules.)

Some might say it is comparing apples to oranges, but isn't this always the case? While most readers of this publication may be expected to root for the procurement policy team, it's difficult to ignore the strength of the argument favoring Indian policy. No doubt, procurement policy is important, but the Constitution doesn't have an Efficiency in Procurement clause. As discussed at length below, Indian policy is rooted in the extraordinary government-to-government relationship of the Federal Government and Indian tribes, and the unique wardship-like status of Indians, including Alaska Natives and Native Hawaiians. Procurement, on the other hand, may be a necessary means by which the Government fulfills its primary roles. But procurement itself is not a mission of Government. Rather, procurement is ancillary to those purposes: It's the way to get somewhere else.

**Indian Policy: the Constitutional Foundation**—The formulation and advancement of Indian policy are core missions of the Federal Government and derive from a number of explicit and implicit expressions in the Constitution. For more, see Vine Deloria & David E. Wilkins, *Tribes, Treaties, & Constitutional Tribulations*. The major clause for Indian policy is the grant to Congress of the power “to regulate Commerce ... with the Indian Tribes.” Article I, § 8, ¶ 3. The lesser clause is the exclusion of “Indians not taxed” in the formula for apportionment of representatives. Article 1, § 2, ¶ 3. There is also a basketful of other provisions which, from time to time, have served as the basis for the exercise of implied powers by Congress.

**Indian Policy: the Unique Relationship**—Chief Justice John Marshall, in first articulating the unique federal relationship to the American aboriginal people as resembling wardship (but assiduously avoiding a statement that it was wardship), said “They look to our government for protection. ... They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory, and an act of hostility.” *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831).

Within the boundaries of this relationship is a recognition that “[t]he Indian nations had always been considered as distinct, independent political communities ... and the settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to self government, by associating with a stronger, and taking its protection.” *Worcester v. Georgia*, 31 U.S. 515 (1832). No other subgroup of citizens has a comparable relationship with the Government. It is essential to understand that settled constitutional principles hold the relationship to be a political one, not a racial classification.

These bedrock expressions of the unique federal responsibility and relationship to Aboriginal Americans, with particular meaning for Alaska Natives, remain good law. Moreover, they are the cardinal points for articulating the obligation of the Government to Alaska Natives in relation to the formulation of ANCSA, and to the mandate for the creation of corporate structures for implementing the settlement, the ANCs. For more, see David S. Case & David A. Voluck, *Alaska Natives & American Laws*, 2nd Ed.

**Understanding Alaska Natives and Land Claims**—Alaska Natives have inhabited the whole of Alaska from time immemorial ... in the *Native* way of land use. For more, see V. Deloria, *God is Red*. Alaska Natives were not conquered, nor did they willingly abandon their rights to occupancy, use and control of the land. (Note on the unique status of Indians: Under the Fifth Amendment, the Government ordinarily cannot take private property without just compensation, but the taking of aboriginal title requires no compensation, just a clear expression of congressional intent.)

**I Want To Be Left Alone**—Starting with the 1867 Treaty of Cession, the Government confirmed, with rhythmic regularity, the rights of Natives to the peaceful possession of any lands in their use or occupancy—Government action mostly confined to lofty, but impotent, words. Native lands were simply taken over at will, and without violent resistance. (One noteworthy aspect of Alaska Native culture is the almost complete absence of organized warfare.) The final pronouncement of protection was § 4 of Alaska Statehood Act (P.L. 85-508): “As a compact with the United States said State and its people do agree and declare that they forever disclaim all right and title ... to any lands or other property, (including fishing rights), the right or title

to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called Natives) or is held by the United States in trust for said natives. ...”

**The Black Gold Rush: Crude Oil**—The Act gave the nascent state of Alaska a birthing present of the right to select about 103 million acres of federal lands for state ownership. The state wasted no time in making its selections, with eyes wide shut to any Native ownership.

Ignoring the time immemorial use and occupancy of the Nunamiut Inupiat, the state selected a forlorn corner of the North Slope in the Sagavanirktok River delta (perhaps because of the plentiful surface oil seepages), quaintly named Deadhorse, and often referred to as Prudhoe Bay—the largest North American oil field. In 1968, the oil companies holding state leases announced that the field held an estimated 10 billion barrels of recoverable oil, a very low guess. From that moment forward, Alaska has never been, and never will be, the same.

Of course, the oil wasn’t worth anything without delivery to market. The Trans-Alaska Pipeline System—a 799-mile straw from the oil patch to Valdez, an ice-free harbor in Prince William Sound—offered a solution, but the pipeline required federal permits. While the State celebrated its newly found wealth-beyond-dreams, Alaska Natives were finally becoming politically aware and active. A blizzard of notices of Native land rights fell on the Bureau of Land Management and the Bureau of Indian Affairs. By the end of 1966, Interior Secretary Stewart Udall imposed a “land freeze,” effectively stopping all transfers of federal land. Non-Native Alaskans were not amused.

To keep this story short, Congress realized that Alaska Native land claims needed to be settled post haste, and did just that by enacting ANCSA. In December 1971, the Alaska Federation of Natives (AFN) assembled and, by a vote of 511 to 56, accepted the settlement. By special telephone arrangements, the delegates, standing motionless and silent, heard President Nixon say, “I want you to be among the first to know that I have just signed the Alaska Native Claims Settlement Act.”

Alaska Natives forever relinquished 89 percent of Alaska, were allowed to retain about 44 million acres and received a nominal payment of \$950 million. To administer the settlement benefits, the Act created regional and village corporations. The

shareholders of these state-chartered, for-profit corporations elect directors who, in turn, appoint officers. By virtue of the central role of Native self-determination, all recognized that the approach was an Olympic leap in the evolution of Indian policy.

**The Essence of the Bargain**—The heart of ANCSA is the congressional findings and declaration of policy (§1602) that

(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, without establishing any permanent racially defined institutions, rights, privileges, or obligations, without creating a reservation system or lengthy wardship or trusteeship, and without adding to the categories of property and institutions enjoying special tax privileges or to the legislation establishing special relationships between the United States Government and the State of Alaska.

The ANCs’ core mission is the actualization of these aspirations—not an easy thing to do.

Under the declaration of settlement, all prior conveyances were approved, all aboriginal title, including hunting rights, was terminated and all claims against the Government were extinguished. ANCSA settled everything. Alaska Natives received shares of stock, and, on that note, the Government washed its hands.

By virtue of ANCSA, the Government enjoyed a bargain. It relieved itself of its wardship responsibilities and avoided the baggage of reservations. The state of Alaska got all its land selections, including Prudhoe Bay, which eventually brought the Alaska Permanent Fund, the savings account now holding \$30 billion, not counting the \$13 billion thus far paid out to Alaska residents as dividends. Since 1982, oil revenues have covered about 80 percent of the state’s annual budget. The oil companies got the pipeline, which translates into 1996–2004 oil industry profits from the North Slope oil fields of \$30.5 billion.

Finally, the Alaska Natives became shareholders in an experiment.

**Innovation Gone Awry**—The experiment, however, produced mixed and often dismal results.

“As a group, the 12 regional corporations lost 80 [percent] of their original cash endowment between 1973 and 1993.” Colt, *Alaska Natives and the “New Harpoon”: Economic Performance of the ANCSA Regional Corporations*, Institute of Social and Economic Research (2001).

The harsh reality is that ANCs are structurally noncompetitive and inherent money-losers. The fundamental mischief lies in the massive expense of just being an ANC. The high administrative costs of land selection, operating a land department, keeping shareholder records, maintaining shareholder relations and related items render them competitively inefficient. In other words, the transactional costs for ANCs—the cost of using the market-price mechanism—are prohibitive. For more, see Robert H. Coase, *The Nature of the Firm*.

**Losing by Winning**—All of which brings us back to the bright shining light for ANCs: their success as Government contractors. Bear in mind that nowhere in the ocean of press reporting will readers find a single suggestion that ANCs are not competent contractors. Indeed, in all of the negative press coverage over the last 12 months, the lost but recurring message from Government customers has been that ANC contractors perform quite well.

The ANC statistics for Government contracting range from impressive to astonishing. Section 8(a) program participants grew from one in 1988 to about 200 today. They paid shareholder dividends (attributable to federal contracts) of \$18 million in 2003 and \$27 million in 2004. From 1999 to 2004, they awarded shareholder scholarships of \$14 million. In 2004 alone, ANCs made \$4.8 million in additional donations to benefit Alaska Natives. In 2004, ANCs employed 2,084 shareholders in jobs related to Government contracts. ANCs provided jobs to 7,684 Alaskans, with a total payroll in Alaska attributable to federal contracts of \$137.5 million. These numbers are proof the ANCs consider their mission to advance the real economic and social needs of their shareholder to be serious.

**Tools of the Trade**—If the ANCs stand indicted for abusing the 8(a) program, the accusers ignore two co-conspirators: SBA and GAO.

SBA’s complicity is found in the 2004 revisions to the size eligibility rules, which clarified that an ANC-owned business concern is never deemed affiliated with its parent company, nor with an intermediate holding company. Between sister operat-

ing companies, affiliation may not be based on common ownership, common management or sharing of administrative services. 69 Fed. Reg. 29192 (May 21, 2004). From GAO comes a ruling, made in a case involving an ANC concern, that “[a]n agency properly may attribute the experience or past performance of a parent or affiliated company to an offeror where the firm’s proposal demonstrates that the resources of the parent or affiliate will affect the performance of the offeror.” *Ecompex, Inc.*, B-292865.4, 2004 CPD ¶ 149. These rules are two of the biggest contributors to ANC success. Their operating companies are not affiliated for size purposes, but are affiliated for past performance enhancement.

**Just Desserts (and a Decaf Latté)**—This FEATURE COMMENT does not address the question of whether Alaska Natives *deserve* preferential treatment. Instead, it contends that Alaska Natives, as American Indians, have a unique status under the Constitution that requires Congress to act affirmatively for the protection of their well-being and ensure procurement programs are consistent with this obligation. The Government’s constitutional obligations are not conditioned by a preliminary inquiry of whether its citizens deserve the Constitution. Put differently, Indians have a lexical first priority in the distribution of Government benefits. Also see John Rawls, *A Theory of Justice*.

Further, Alaska Natives and the Government made a bargain, memorialized in ANCSA and fully performed on the Native side: land for stock. The *contractual* nature of ANCSA is symbolized by the enactment ceremony in which the AFN voted to accept and President Nixon announced, his signature. Alaska Natives assert that Congress honors its ongoing duty of good faith and fair dealing by assuring that the goals expressed in the policies and purposes of ANCSA are achieved. The ANC procurement rules are an experiential manifestation of that duty.

**Lions and Tigers and Bears, Oh My!**—The reactions to ANCs by many of the individual-owner classes of preferential procurement programs seem centered in fear. Some worry that ANCs take too much and should be starved out for the well-being of the remainder. But if there isn’t enough food, why not bake a bigger pie? Lobby Congress to provide genuine oversight for the enforcement of the existing small business goals or increase them. As an aside, the Government prime contracting pie has

ballooned to over \$300 billion in recent years. No interest group has actually “lost” volume from their sacred slice, the only change is to the perception that they might have had more on which to feast.

Other program participants seem to covet the achievements of ANCs. Does the success of ANCs place an unwelcome spotlight on their own under-achievements?

The fear that ANCs are the root of the Defense Department’s anticompetitive practices is a laughable allegation, bereft of even tangential contact with reality. Keep in mind that total ANC contract revenues for all types of awards was only \$1.6 billion in 2003 and \$2.2 billion in 2004. Conversely, for Fiscal Years 1999 to 2004, the Defense Department awarded \$360 billion in contracts without full and open competition. (That’s more than one-third of the defense procurement budget!)

**A Little Place to Call Home**—In stating the case for the ANCs, I am not unmindful that individually owned small businesses, especially 8(a) program participants, feel squeezed out. To them, it is unfair that ANCs have special rules, just as to ANCs it is unfair that a representative organization, with members in the thousands, have the same rules as companies with one, two or even five owners. Although the fear is real, it is also largely groundless, to the extent that the total Native American share of 8(a) contract awards is 6.22 percent. (Source: The Center for Public Integrity.)

One option is simply to eliminate the special rules and suffer the consequences of almost 8,000 unemployed Alaskans and the loss of tens of millions in dividends and scholarships—hardly offset by a 6.22 percent increase in 8(a) contracts. A second option is to lobby Congress to increase the 8(a) contracting goals or change the rules for the benefit of the individual companies. This would still leave ANCs and the other representative organizations in the same programs with the individually owned business concerns and with the same set of imbalanced rules.

The third (and preferable) option requires Congress to create a new program limited to representative organizations, with its own goals and rules that meet their special needs. This would leave the current 8(a) program to its homogeneous participants (all individually owned firms) and empower a new representative organization contracting program with its own parameters and goals.

**Parting Thoughts: A Deal’s a Deal**—Those who say that ANCs are merely false fronts or program abusers would better serve the debate by shedding their delusions of adequacy when it comes to understanding ANCs or the interplay of procurement and Indian policy. Perhaps the critics, whether members of Congress, the press or ANC market competitors, need to frankly state their real agendas.

It’s a safe bet that ANCs will be largely vindicated by GAO. For the daily double, bet that many in Congress will continue to call for emasculation or even removal of the tribal preferences. For the trifecta, wager that many on the Indian side will view these events as a shameful continuation of a 200-year congressional tradition of legislating benefits to Native Americans (reservation lands, resources, business opportunities, etc.) only so long as the Natives are not too successful. As history proves time and again, if it turns out that there is any real value in a benefit bestowed upon the Indian, it will swiftly be removed upon the first coveting by some “worthy” recipient. For more, see Dee Brown, *Bury My Heart at Wounded Knee*.

Before deployment of a “nuclear option”—killing the program—Congress must be ready to answer the thousands of newly unemployed Alaska Natives and have an equivalent replacement for the tens of millions in vanished dividends. What will replace what is taken away? Would the Government return Prudhoe Bay? The land claims were relinquished for the return promise for the creation and maintenance of organizations (ANCs) with the ability and resources to advance the real economic and social needs of Alaska Natives. Government contracting has proven to be an excellent—and, perhaps, the most effective—tool for aiding the ANCs. Take away the ability to contract under the current rules, and the deal falls apart. So, just give back all the land.

After all, a deal’s a deal, right?



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