Native 8(a) Background and History

The Native American Contractors Association (NACA) exists for Tribally-owned businesses, Alaska Native Corporations, and Native Hawaiian Organizations, ("Native-owned companies") to collaboratively protect our contracting rights and access to business development through advocacy and education. Our mission is to enrich self-determination through the preservation of government contracting participation based on the unique relationship between Native Americans and the federal government. Specifically, NACA seeks to protect the rights of Native American communities to achieve economic self-sufficiency through government contracting.

Congress and the government have an extensive record of supporting Native-owned companies participation in Small Business Administration programs, including in federal government contracting.[1] They include in statute small business contracting goals, including goals for the use of socially and economically disadvantaged contractors.[2]

In 1986, to meet the Federal Government's trust responsibilities to Alaska Natives and Native Americans,[3] and to assist the economic development of Native communities, Congress amended the Small Business Act to provide Tribes, ANCs, or NHOs with a greater opportunity to participate in the 8(a) program. Over the past forty years, Congress has statutorily provided that:

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[1] 15 U.S.C. § 631(a) ("It is the declared policy of the Congress that the Government should aid, counsel, assist, and protect, insofar as is possible, the interests of small-business concerns in order to preserve free competitive enterprise, to insure that a fair proportion of the total purchases and contracts or subcontracts for property and services for the Government (including but not limited to contracts or subcontracts for maintenance, repair, and construction) be placed with small-business enterprises, to insure that a fair proportion of the total sales of Government property be made to such enterprises, and to maintain and strengthen the overall economy of the Nation.")

[2] 15 U.S.C. §644(g)(2) (small business contracting goal is 23%, and "[the Governmentwide goal for participation by small business concerns owned and controlled by socially and economically disadvantaged individuals shall be established at not less than 5 percent of the total value of all prime contract and subcontract awards for each fiscal year.")

[3] *Haaland v. Brackeen.* 599 U.S. 256, 275 (2023) (noting that the Federal Government has "'charged itself with moral obligations of the highest responsibility and trust' " toward Indian tribes.") (citing *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 176, 131 S.Ct. 2313, 180 L.Ed.2d 187 (2011)); *Seminole Nation v. United States*, 316 U.S. 286, 296, 62 S.Ct. 1049, 86 L. Ed. 1480 (1942) ("[T]his Court has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people").

- 1986: Companies owned by Tribes, ANCs, and NHOs are socially disadvantaged for purposes of the 8(a) Program;[4]

- 1989: Companies owned by Tribes, ANCs, and NHOs can receive directed awards and own multiple 8(a) companies.[5]

- 1992: Companies owned by ANCs are economically disadvantaged for purposes of the 8(a) Program.[6]

- 2002: Congress expressly confirmed that Federal procurement programs for Tribes, ANCs, and NHOs are "enacted pursuant to its authority under Article I, Section 8 of the United States Constitution [the Indian Commerce Clause]."[7]

Participation by Native-owned companies in the 8(a) Program is statutorily mandated by Congress, and is an exercise of Congress's constitutional authority to regulate commerce with Indians under the Indian Commerce Clause of the Constitution.[8] The United States Supreme Court has explained that "the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs."[9] Furthermore, "[w]hile under the Interstate Commerce Clause, States retain 'some authority' over trade, [the United States Supreme Court] have explained that 'virtually all authority over Indian commerce and Indian tribes' lies with the Federal Government."[10] Such congressional action is pursuant to the federal government's special relationship with Natives, and is based, as the United States Supreme Court determined fifty years ago, on a *political* and not racial classification.[11]

[4] Pub. L. No. 99-272, § 18015, 100 Stat. 370 (1986).
[5] Section 602(a) of Public Law 100-656, 102 Stat. 3853 (1989) (higher directed awards); Pub. L. No. 101-37, 103 Stat. 70 (1989) (multiple 8(a) companies)
[6] Pub. L. No. 102-415, §10, 106 Stat. 2115 (1992) (codified at 43 U.S.C. § 1626(e)).
[7] Pub. L. No. 102-415, §10, 106 Stat. 2115 (1992) (codified at 43 U.S.C. § 1626(e)).
[8] "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes…." U.S. Const. art. I, § 8, cl. 3.
[9] *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989).
[10] *Id.* (quoting *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 62, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996)).
[11] *Morton v. Mancari*, 417 U.S. 535 (1974). The 8(a) Program does not have a racial component. While the 8(a) program did, at one time, have regulations stating that *individuals* applying to enter the 8(a) program and were of certain races and ethnicities had a presumption of social disadvantage, that presumption has been invalided by court order. There is no current racial component to the 8(a) program. There was never a *racial* component to participation by Tribes, ANCs, and NHOs in the 8(a) Program because the access to the 8(a) Program provided to them by Congress is pursuant to the Indian Commerce Clause and their *political* classification.