

**TESTIMONY
of**

**MR. NEAL McCaleb
CHAIRMAN OF THE BOARD OF DIRECTORS
CHICKASAW NATION INDUSTRIES, INC.**

on

“DIVERSIFYING NATIVE ECONOMIES”

before the

**UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON NATURAL RESOURCES**

September 19, 2007

Good Morning Chairman Rahall, Ranking Member Young, and Members of the Committee, my name is Neal McCaleb and I am honored to bring you greetings on behalf of the Unconquered and Unconquerable Chickasaw Nation and to represent Chickasaw Nation Industries, Inc. at today’s important hearing on Diversifying Native Economies. I am an enrolled member of the Chickasaw Nation, a federally recognized Tribe of approximately 38,000 members located in south central Oklahoma, and I serve as the Chairman of the Board of Chickasaw Nation Industries, Inc. I bring today the perspective of a career spent in private sector business, service to the great State of Oklahoma, federal service to our great Nation, and now service to the Chickasaw Nation.

I am also honored because the subjects we are discussing today are so critical to the future well being of Native peoples, their governments and economies. Indian Country and its Tribal Nations are now experiencing some of the benefits of the modern era of Self-Determination in Federal Indian Policy. While so many discussions in this modern era have focused on economic development, our focus today and for moving forward needs to be on developing economies. That is, rather than focusing on what federal, Tribal, and private sector policies and program mechanisms can provide for a single, or even a series, of good businesses, we should focus instead on the elements of those policies and programs that create an entire atmosphere in Native communities for empowering entrepreneurialism and sustaining economic opportunities. While increased opportunities for Tribal jobs are an important and valuable byproduct, the focus of the Chickasaw Nation’s businesses is on the bottom line, with the ultimate goal of creating market leading companies that have their own strong capabilities, with sustainable acumen and corporate infrastructures.

Tribal Nations and the Federal Government must work together as partners to ensure that opportunities for economic success grow, and the prosperity experienced by Tribes now are not diminished. Tribal lands are not easy places to grow an economy. Not every Native Nation is well positioned. Basic elements of economic opportunity that exist outside of Indian Country often are not available to those within it. Tribes cannot tax their citizenship to create investment revenue, and lands held in trust, or that are trust restricted, cannot effectively be used to collateralize a business loan the way I could use my own home.

It is also important to recognize that successes of Native people and their governments come only after they have endured the residual effects of the eras of removal, reservation, assimilation and termination. One should also note that certain of these historic eras, and the actions taken in them, were responses to the then increasing economic strength of Tribal nations as land owners and market participants. While in the past our presence served to threaten others, today we represent an important opportunity for partnership and shared success across America, especially in rural and remote America. As Tribes work toward modern prosperity and enjoy varying degrees of economic success in our times,

we remember well what happened in those eras. Working together with the federal government, the private sector and our neighbors, will ensure that the experiences of those eras never return. In that vein, our charge today is to discuss those elements that will help Native economies grow and prosper.

Over the past two decades under the leadership of Governor Bill Anoatubby, the economy of the Chickasaw Nation has experienced unprecedented levels of success in the history of the Chickasaw people. I believe, however, that every Chickasaw would agree we have much more to do in strengthening our economy. The Chickasaw Nation has built businesses, acquired firms and their expertise, and expanded its strategic alliances. These successful economic development and business diversification efforts provide a number of benefits which help the Tribe accomplish its sovereign mission to enhance the quality of life of Chickasaw people. Governor Anoatubby has often stated, "A nation cannot be truly sovereign until it is economically independent."

Creating a robust Chickasaw economy is part of the Chickasaw Nation's overall plan to promote a better way of life. Chickasaw Nation business interests include Chickasaw Nation Division of Commerce; Chickasaw Nation Industries, Inc.; Solara Healthcare; and, Bank2, a full service bank. Chickasaw Nation Division of Commerce employs 6,488 workers and operates more than 57 businesses including motels, restaurants, travel plazas, gaming centers, recreation centers, convenience stores, two commercial radio stations, a golf course, a newspaper, and a chocolate factory. Chickasaw Nation Division of Commerce operates its business enterprises largely within the historical boundaries of the Chickasaw Nation in south central Oklahoma. Its successful gaming enterprises and business operations have enabled the Chickasaw Nation to invest in a number of new businesses. Investment in Solara Healthcare, which operates health care facilities in Oklahoma, Texas and Louisiana, is an example of business diversification efforts aimed at providing the best opportunity for stable long-term returns. Successful gaming enterprises have also enabled the Chickasaw Nation to develop other business interests, including Bank2, which has enjoyed rapid expansion and consistent profits since it was established in 2001.

Chickasaw Nation Industries, Inc. is a family of companies that provides a variety of products and services that include professional services, construction management, manufacturing, property management, information and communications technologies, aviation technology services, records management, environmental, logistics, and medical and dental staffing. Currently, Chickasaw Nation Industries, or CNI, manages business enterprises that collectively employ more than 2,200 people, providing services to a wide variety of government entities in over twenty five federal agencies and a number of private firms. Currently, CNI is made up of twelve different companies that include seven federally designated Small Business Administration Tribal 8(a) companies and five non-8(a) or graduated 8(a) companies all working under the CNI umbrella.

CNI was created in 1996 by a vote of the Chickasaw people. We are a federally chartered corporation with our charter granted to us by the Department of Interior. Our Board of Directors is appointed by the Governor and confirmed by our Legislators to serve a three year term and may be reappointed. All of our board members are Chickasaw. The long-term strategy of CNI is to continue to grow our market share in the federal and private sectors by delivering exceptional products and services at competitive prices. With the mission of creating commercial strength in new geographic and subject matter markets, CNI has offices located in Ada, OK; Albuquerque, NM; Atlanta, GA; Chicago, IL; Huntsville, AL; Marietta, OK; Norman, OK; Oklahoma City, OK; Purcell, OK; Ridgeland, MS; San Antonio, TX; Cape Canaveral, FL; and Washington DC.

Business entities of both Chickasaw Nation Division of Commerce and Chickasaw Nation Industries have received national and state wide awards and acclaim, however, perhaps the most important benefit of economic development is providing more opportunities for individual Chickasaws to succeed. Because the Tribe is focused on increasing the number and quality of opportunities available, its success is measured by the number of people who seize those opportunities. By that measure, tribal economic development has been very successful, as the Chickasaw Nation now employs more than 10,400 workers.

Another measure of success is the ultimate use of business revenues, which directly enable the Tribe to develop programs in addition to those supported by federal government programs, and to supplement federal funding of federal services that have seen steady reduction in several past budgets. Recently implemented health, education, housing and aging services developed for Chickasaws living beyond the tribal service area are one example of these augmented services. Funding specifically for our youth workers is another. Other examples include our elders' prescription program and our medication assistance program. The Chickasaw Nation also operates several Community Centers and Wellness Centers and will soon open one of the first Sick Child Care Centers in the State of Oklahoma.

Because it is so important to the vitality of a Tribal nation to support its people through the profits of its economic efforts, allow me to highlight some of the ways in which the Chickasaw Nation utilizes its business revenues at home. Last year alone the Tribe awarded \$3.1 million in grants and scholarships to 4,273 students pursuing a higher education. This is nearly three times the amount of total Tribal assets in 1988 when Governor Anoatubby took office, before gaming became a significant source of income and before the Tribe stimulated its diversification efforts.

In the areas of healthcare and wellness, according to 2006 records, the Chickasaw Nation Health System had more than 336,000 patient visits at the Carl Albert Indian Health Facility in Ada, the seat of Chickasaw Government, and the five health clinics located throughout the 13-county area of the Chickasaw Nation. Last year, more than 800,000 prescriptions were filled through six pharmacy sites. The Chickasaw Nation operates two wellness centers, and has a third center currently under construction. Through an interactive cooking show called the "Get Fresh!" program, the Chickasaw Nation Health System offers free demonstrations and healthy and nutritious cooking to everyone in the community. Nutrition sites and food distribution grocery stores ensure adequate access for all citizens in need of healthy food options. The Chickasaw Nation also operates partnerships with other programs such as the Oklahoma University Medical Center, Oklahoma Blood Institute, Juvenile Diabetes research Foundation, Dean McGee Eye Institute, Oklahoma State Health Department, and the National Diabetes Education Program.

Several efforts are made to care for our elders. Healthy, nutritious lunches are provided free of charge for those 60 and over at 10 senior nutrition centers throughout the Chickasaw Nation. An eleventh location is also currently under construction. Health screenings, home health care services, transportation to medical appointments, home maintenance, an over-the-counter medication program and wellness education are also available to seniors. Continuing education opportunities are available through language and computer classes provided at all senior nutrition center locations. This exposure to technology has opened doors for seniors to learn new computer programs and hundreds have received free computers through the Tribe's computer distribution program.

The Tribe is also dedicated to its youth. More than 650 Native American youth, aged 14-21, participated in the Chickasaw Nation Summer Youth program, which is aimed at recognizing, identifying, and promoting the talents of young workers. The program offers paid employment in many fields for various employers. The Chickasaw Nation is devoted to year-long learning and 15 camps, offered free of charge to Chickasaw youth, keep the children's skills sharp. Whether participating in our premier sports camps like basketball and baseball, our paramount trade camps like arts, aviation and space, or our entrepreneur academies, youth have the opportunity to perfect a skill or just learn something new. Nearly 900 students participated in the camps last year.

In ensuring the vitality of our families, the Chickasaw Nation knows that children raised in strong families are much more likely to be happy, healthy and successful. In its second year, the Governor's Family Initiative offers several methods to help families grow stronger, including relationship enhancement programs, fatherhood accountability groups, abstinence education, and single parent support groups. 7,000 area residents and employees have participated in the classes. Our nationally recognized child support services program has collected more than \$5.1 million dollars to ensure the financial stability of our families. The office also administers the tribal employment placement program that assists and monitors the progress of non-custodial parents in obtaining and maintaining employment.

In support of continuing education, last year, numerous grants and scholarships were awarded totaling more than one half of a million dollars toward continuing education.

The Chickasaw Child Care Development program provided child care services to 587 children ages six weeks through 6th grade, focusing on physical, intellectual, emotional and social development. Chickasaw Nation Child Care incorporates programs like the Reading is Fundamental program where more than 750 books were distributed to 256 Head Start students. In addition, computer-driven SmartBoards were installed in several of our Head Start classrooms, to provide first-hand innovative technology to pre-school children. In addition, a newly added program providing \$200 yearly clothing grants ensure that all school age children from 3-18 are dressed for success. 5,500 students participated in the program this past year.

In the area of housing, the Tribe's Division of Housing provides a variety of programs and services to assist families including home ownership, homeowner education, rental assistance, storm shelter installation and driveway repair. Since the program began in 2003, nearly 900 storm shelters have been installed for Chickasaw families. The innovative and national award winning "Chuka Chukmasi" program has assisted nearly 500 families in more than a dozen states by providing low down payment and flexible home loans to Chickasaw citizens and Chickasaw Nation employees. Since the Tribe assumed control of housing programs in 1997, more than 440 new homes have been constructed for Native American families, compared to far fewer prior to 1997.

The Tribe is also working to multiply these opportunities by striving to work with individual Chickasaw business owners in a number of ways. A directory of tribal businesses was created, giving individual Chickasaw business owners the opportunity to become preferred providers for tribal businesses. Chickasaws considering starting a business now have access to a number of important resources through the Chickasaw Nation Small Business Development Center (CNSBDC), which offers a number of services to aspiring entrepreneurs. These include help in developing a business plan, management counseling, marketing assistance, technical assistance and assistance in locating financing. Every individual who comes to the center receives individual attention, but that process goes beyond assistance in developing a business plan and completing loan applications. Staff at the center also discuss the advantages of the different types of businesses and provide direction in registering the business with the state. There are a number of grants, loans and loan guarantees available through the CNSBDC and other entities. For that reason, the CNSBDC works with a number of other government entities and financial institutions to make the best use of all available resources.

These diverse business interests will enable the Chickasaw Nation to continue to provide a level of service that not only benefits Chickasaw citizens, but has a significant positive impact on the greater community. Dozens of businesses created by the Chickasaw Nation have a powerful impact on Oklahoma's economy. Thousands of Oklahomans, both Indian and non-Indian are directly employed by the Chickasaw Nation. These jobs and businesses not only increase the Oklahoma tax base, they also provide additional funding for the many programs and services provided by the Tribe. At the current annual payroll of almost \$200 million in Oklahoma, it is estimated those employees pay more than \$7.5 million in Oklahoma withholding taxes. The nation-wide operations of Chickasaw Nation Industries and Solara Healthcare provide similar benefits to those states.

Chickasaws and many other Oklahomans receive higher quality health care, education, housing and family services because of efficient, effective local administration of federal programs. Programs such as the Women, Infants and Children (WIC) nutrition program, Head Start early childhood education program and others serve all Oklahomans, enhancing the level of education, health care, family and nutrition services for the entire state. In FY 2005, the Tribe donated more than \$1.5 million to fire departments, schools, churches, civic, and charitable organizations. In addition, millions of dollars are invested in Oklahoma roads and bridges through tribal nations. The Chickasaw Nation Roads program joined efforts with various counties throughout the year to complete many projects. Examples of this partnership include replacement of a dilapidated bridge and road repairs in many counties. Thus, the Chickasaw Nation and its economic enterprises are committed to being a good neighbor.

With these experiences, and our commitment to our sole owner, the Chickasaw people, I now wish to address recommendations to you on behalf of Chickasaw Nation Industries that will enhance the ability of Tribal Nations to diversify sustainable economies.

To set the context of our first set of recommendations, I wish to provide our perspective on the importance of the Tribal 8(a) program. CNI is created as a federal government contracting entity to utilize the Tribal 8(a) program of the Small Business Administration (SBA) as its primary tool of economic diversification. The Tribal 8(a) program is one of the best examples of enlightened legislation in the history of federal tribal policy. It recognizes the right to act and grow as entrepreneurs, without sacrificing or limiting the Native government's authority to exercise their sovereign powers in fulfilling their responsibility to care for their people. Some entities outside the program claim that it is federal charity. We know that it is economic self-determination. We know that it is based on the sound premise that the federal dollar returns two fold – it buys a quality product or service on time at a good price – and it circulates in Native communities to help sustain Native economies.

It is important to recognize that while this legislation gave our businesses significant contracting rights, it did not simultaneously confer instant capabilities. As we have demonstrated, we are committed to creating our own capabilities. We also know that with our rights come responsibilities. Native communities have assumed greater responsibilities to protect the integrity of the program by creating effective means of entering the marketplace and by creating strong internal corporate infrastructures, controls, and capabilities.

At CNI, we have also assumed an unprecedented responsibility to others through our Native American Minority Empowerment Program (NAMEP) to engage in team relationships that share concepts and business strategies and to coordinate the communication of those concepts to federal partners, with Congress, and the non-Native, minority, and small business worlds. The NAMEP program is our own diversity program, and its most important mission is to respectfully encourage and assist other small and developing business entities as teammates and subcontractors by sharing economic opportunities, experiences and hard lessons learned. NAMEP is a business development and empowerment program, not philanthropy, and includes engaging teaming opportunities with Tribal and Native-owned businesses, African-American, Hispanic, Women-owned, Veteran-owned businesses and minority individuals.

Thus, over the past several months CNI has engaged with a number of other Native business entities and national Tribal policy organizations to address the concerns that have been raised on Capitol Hill and elsewhere about the participation of Native entities in the 8(a) program. While these issues and recommendations are highlighted here, they are also discussed in further depth in the appendices to this testimony.

Appendix 1 includes a series of three CNI whitepapers shared with other Native contracting entities in the ad hoc working group convened by the National Congress of American Indians, Native American Contractor's Association, and the National Center for American Indian Enterprise Development, focusing on 8(a) issues over the past year and a half. CNI was invited by the SBA and Native entities to take part in these discussions and share its policy recommendations from our own experiences in that forum. This working group has also endeavored to address the concerns expressed in the April 2006 Government Accountability Office (GAO) Report entitled "Contract Management; Increased Use of Alaska Native Corporation's Special 8(a) Provisions Calls for Increased Oversight." (GAO-06-399). While the 2006 GAO report focused solely on certain Alaska Native Corporations, which are different in legal composition from Tribally-owned businesses, the implications of the report concern the same provisions in the 8(a) program which cover Tribal 8(a) businesses. As a Tribal 8(a) entity, CNI has advocated in this forum, with virtually unanimous agreement from its peers, that there be recommendations shared with the SBA for policy changes in the areas of subcontracting, mentor-protégé arrangements, and reporting—all with the goal of strengthening and honoring the goals of the 8(a) program.

Regarding subcontracting requirements, it is important to note that the 8(a) business entities of Native Hawaiian Organizations (NHOs), Alaska Native Corporations (ANCs) and Tribes, collectively referred to here as Native Concerns, are significantly different from traditional small businesses. Tribal

business entities exist for the economic development of their Tribal governments, as opposed to individual small business owners, who operate for individual wealth. NHOs exist for the benefit of their members, and ANC business entities exist for the benefit of their shareholders. In spite of the importance of the success of Native Concerns to the public, it is also important to assure traditional small businesses that their access to procurement opportunities is not negatively impacted by the special provisions applicable to Native Concerns.

The resulting recommendation embodied in Appendix 1 involves a new requirement that Native 8(a) business entities receiving a sole-source contract in excess of Twenty Million Dollars (\$20,000,000) over the life of the contract, including option years, would be required to submit and negotiate a subcontracting plan that separately addresses subcontracting with small business, veteran-owned small business, service-disabled veteran owned small business, HUBZone small business concerns, small disadvantaged business, and women-owned small business concerns. CNI believes that an appropriate response to the issue raised by traditional small businesses--that the lack of a cap on Native Concerns negatively impacts their contracting opportunities--is to exclude Native Concerns from the small business exemption in circumstances where the sole-source contract is of a size normally only available to other than small businesses.

It is important to note that while CNI's original recommendation reflected in Appendix 1 was at a \$10 million requirement level, the collective working group agreed that a \$20 million requirement level would be more appropriate for those Native business entities that may not have as much experience in the program or with developing subcontracting and teaming relationships, while simultaneously charged with developing their own capabilities and corporate infrastructures. While Native Concerns acting on behalf of hundreds of thousands of Tribal members have only just begun to penetrate a previously unreachable federal marketplace, this proposal will effectively respond to these perceived issues, while balancing the interests of all of SBA's constituents.

Regarding the role of Native Concerns in mentor-protégé arrangements, CNI recommends an approach that recognizes the SBA Mentor-Protégé program is designed to encourage large business Mentors to provide various forms of assistance to small businesses. These include the provision of technical assistance, management assistance, financial assistance in the form of equity investments and loans, subcontracts awarded to the Protégé by the Mentor, or assistance in performing prime contracts with the Government in the form of joint venture arrangements. Whether the Protégé is a traditional small business or an Alaska Native Corporation, a Tribally owned entity, or a Native Hawaiian Organization, the goal of the Mentor-Protégé program is to enhance the capabilities of the Protégé and to improve their ability to successfully compete for and perform government contracts.

Past experience, however, shows that Mentors (especially very large Mentors) approach traditional small businesses differently than they approach Native Concerns. This difference is due to the ability of Native Concerns to obtain larger contracts. Consequently, some Mentor firms primarily seek a relationship with Native Concerns contemplating the ability of participating in and performing large sole source contracting opportunities. This creates an environment wherein the Protégé is at risk to be a mere vehicle for the Mentor to obtain a contract that it would not otherwise have been entitled to receive. Without Protégé performance requirements under the program, the Mentor is not motivated to grow the Protégé's participation, and therefore not motivated to provide mentoring assistance.

In response to these concerns, CNI recommends that a Protégé in a Joint Venture should be required to increase their level of performance annually over the term of the contract, including option years. Thus, at each anniversary of the contract, the Protégé would be required to increase its performance in increments of 10%, until the Protégé's percentage of work is no less than 60%. This proposal would meet the objectives of ensuring that sole source contracts awarded to 8(a) Mentor-Protégé joint ventures are not abused as mere pass-through contracts for large businesses. And by limiting the required percentage of work to be performed by the Protégé, the Mentor firms will still see incentives to participate in the program.

The final policy recommendation embodied in Appendix 1 involves reporting by Native Concerns. The 2006 GAO Report asserted that SBA is not providing adequate oversight to assure that Alaska Native Corporation Protégés and other firms are performing an appropriate amount of work, are overly subcontracting work, and not tracking contract modifications, change orders, and changes in scope. The report indicates that failure in oversight of the SBA is in part due to a lack of information from government agencies, and that the agencies didn't provide the appropriate information despite Memorandums of Understanding between the SBA and the agencies, and due to the fact that some data are simply not tracked at this time.

CNI's recommendation is that Native Concerns should be required to supply reports to the SBA to demonstrate compliance with the spirit and letter of the 8(a) program. This would ensure that Native Concerns are performing at the appropriate level or making progress to the appropriate level, thus benefiting the 8(a) participant as the Program intended. Annual reports provided pursuant to existing regulatory requirement regarding the level of attainment of the Mentor-Protégé program performance and direct award contracts, and semi-annual reports to SBA upon modifications, change orders, and changes in scope, would achieve this and demonstrate compliance.

In addition to the above recommendations pertaining to broader 8(a) policy issues addressed in national forums and Native working groups, I also wish to highlight recommendations CNI recently addressed directly to the SBA pertaining to current operations of our own businesses and our specific experiences under the agency's administration of the program. These involve issues that we have experienced to be inconsistently administered with the SBA from office to office or, in some instances, within the same office. We believe the inconsistency arises primarily from a lack of clear standard operating procedures or a lack of defined rules, leaving personnel with apparent discretion, hazarding arbitrary actions. Without stated rules, standard operating procedures, or a willingness to follow established SOPs, it becomes more difficult for a Tribal participant to operate within the program.

It is important to note at the outset of these concerns that earlier this month CNI's General Counsel met with the SBA's General Counsel on these matters and significant agreement was had upon the perspectives and positions of CNI. CNI is encouraged by the receptivity and agreeable, solution-oriented approach of the SBA General Counsel and offers these only to be illustrative of issues and reveal a need to give SBA personnel clarity and direction as they attempt to oversee and administer this important program.

Attached as Appendix 2 is a memorandum addressed to Mr. Bill Largent, the National Director of SBA's Office of Native American Affairs, that outlines specific actions of the SBA that amount to barriers to entry and growth in four areas. These include significant delays in actions regarding the approval of change of managers, an unnecessarily repeated requirements of proof of Tribal status as "economically disadvantaged," reluctance or onerous requirements for approval of secondary North American Industry Classification System (NAICS) codes requested for the diversification of our 8(a) business entities, and a specious requirement not contemplated by the 8(a) certification application rules requesting submission of tax returns by all directors and the Chief Executive Officer (CEO) of the Tribally owned holding entity, CNI, which owns the applicant company.

With respect to the economically disadvantaged status of the Tribe, in CNI's last three applications for 8(a) certification, we have been required to provide the Chickasaw Nation's financial statements. Upon inquiry, we were informed that SBA had a right to look at them "to determine if the tribe needed the 8(a) program." As a Tribe that recognizes the potentially limited nature of gaming as its future principal source of revenue, the Chickasaw Nation has aggressively pursued business development outside of gaming. The 8(a) program has proven a very effective diversification tool, as stated above. It is unsettling to think that gaming revenue, the very activity the Tribe is trying to replace, could cause the loss of a valuable economic development tool in that effort. Tribal economies should not be punished for their own successes. Markets vary and conditions change. Lasting corporate capabilities created through the 8(a) program will ensure a sustainable economy.

Regarding the approval of change of managers, we have experienced significant delays in the approval of managers named to replace departed managers of participant concerns. With respect to the need for secondary NAICS codes, only some but not all SBA regional offices are supportive of the participant's business development opportunities and recognize that products and services offered by a business may change during its life in the program due to market forces, strategic decisions, or economic conditions. In recent applications filed by companies wholly owned by CNI, the SBA has required that the last three years tax returns of the Directors of CNI and the CEO of CNI be submitted, along with proof of payment of taxes. Historically, only the manager of the LLC applicant was required to submit returns. This requirement is burdensome, time consuming, and for no apparent purpose.

Again, CNI is encouraged by its recent interaction with SBA on these issues. As these concerns relate directly to the ability of our businesses to continue their development and diversification through the use of the program, we look forward to continued coordination with SBA and ultimate solutions on these matters. CNI is committed to working directly with the SBA to ensure that the goals and prerogatives of the 8(a) program receive compliance and are honored.

In addition to providing perspectives and recommendations on the important 8(a) program, I want to highlight another important piece of proposed legislation that would support the diversification efforts of Tribes.

H.R. 1954 was introduced earlier this year in this Committee and is designed to allow Tribal governments to transfer the credit for electricity produced from renewable resources to their development partners. This ability would seize upon the significant developments in Public Law 109-58, the 2005 Energy Policy Act, and especially Title V of that act, entitled Indian Energy. The 2005 Energy Policy Act shifted the paradigm of Indian energy from that of royalties to ownership and operation. Currently, because of the tax exempt status of Tribal governments, if a Tribal entity seeks to enter into an outside partnership on any renewable energy project occurring on Tribal lands the effort cannot benefit from the production tax credit for renewable resources as a private landowner would. The Tribe also cannot transfer its portion of the credit to its taxable partners. A disincentive to locate such projects on Tribal lands thereby results, as a non-Tribal partner may receive half of the credit it would receive if locating on private lands.

H. R. 1954 would simply amend the Internal Revenue Code of 1986 to allow Tribal governments and their subdivisions to transfer their share of the production tax credit to their taxable partners in joint venture, renewable energy projects on tribal lands. This would be a significant opportunity for Tribal economic enterprise, and the sharing of knowledge and strategic growth between Tribal and private sector entities. While the Chickasaw Nation is not a significant energy resource Tribe, it does have significant corporate capabilities that could bring strategic value to many parts of the chain of operations and services required for successful renewable energy projects. Like so many other Tribes and Tribal businesses nationwide, CNI has considered many renewable energy projects that have varying degrees of potential success, but all share one common challenge: funding. The ability to transfer tax credits could significantly increase the value proposition for many of these opportunities for Tribes on a national scale. As concerns for the environment and the need for fossil fuel alternatives mount, the importance of such renewable energy projects continues to increase nationwide. Congress and this Committee should recognize that Indian Energy can play a prominent role in this process, and that passage of H. R. 1954 would also support the continued diversification of Tribal economies.

In closing, Chairman Rahall, Ranking Member Young and Members of the Committee, I want to reiterate that as this Committee moves forward to further strengthen opportunities for economic development in Indian Country and stimulate the diversification of Tribal economies, it should focus on the programs and conditions that create an entire environment of entrepreneurialism and opportunity in Native communities, rather than simply what elements can make a single success or provide for a particular motivation. While Tribal jobs and increased opportunity for advancement are valuable and important goals, and indeed exist among the core missions of Tribes, they should be viewed as a beneficial byproduct of healthy commerce and part of a overall sustainable Tribal economic system. Certain federal programs, such as the 8(a) program, are stalwart programs in this effort, assisting Tribal

businesses in achieving actual capabilities and contract performance experience. This program must be honored and refined.

As the Chickasaw Nation continues to work towards an ever more robust economy it is motivated by the need to move forward on several different fronts at once. Caring for its citizens, providing a future for its youth, working with the small businesses of its people and those of similarly disadvantage communities, and endeavoring to ensure that national policies keep its important capabilities and opportunities strong and viable--these will continue to be the motivations of the Chickasaw Nation.

Thank you.

SUBCONTRACTING
BY NATIVE CONCERNS

Issues:

Two subcontracting issues have been identified by the GAO as concerns related to performance by Alaska Native Corporations (ANCs) under the Small Business Administration's 8(a) program. These issues are also relevant to Native Hawaiian Organizations (NHOs) and Tribal firms participating in the 8(a) program. Hereafter, ANCs, NHOs, and Tribal firms will be collectively referred to as "Native Concerns". The subcontracting issues are:

1. **Too much subcontracting.** The GAO raised a concern that there is increased risk that large firms, partnered with ANCs, are performing an inappropriate degree of work due to the lack of monitoring during contract performance. This issue may arise regardless of the legal relationship between a Native Concern and one or more large businesses i.e. joint venture/mentor protégé or prime/subcontractor. Suggested approaches to address this issue are contained in the paper on Joint Venture/Mentor Protégé submitted separately on August 2, 2007.
2. **Too little subcontracting.** Additionally, the GAO raised a concern that SBA is not consistently determining whether other small businesses are losing contracting opportunities when large, sole-source contracts are awarded to 8(a) ANC firms. In addition to the issue raised by the GAO report, there is a general concern in the traditional small business community, that the ability of Native Concerns to receive large sole-source contracts, unfairly limits their opportunities to receive contracts under the 8(a) program. These concerns are addressed in this paper, also submitted on August 2, 2007.

The gist of the GAO concern is that large sole-source contracts which Native Concerns are eligible to receive, may adversely impact other incumbent small businesses, and SBA is not consistently performing adverse impact studies pursuant to 13 CFR § 124.504 (c). Two specific cases are cited by GAO to support their conclusion, but it is difficult to conclude from their study that there is a significant failure by SBA in this regard.

Native Concerns are significantly different from traditional small businesses. Native Concerns exist for the economic development of their tribal governments, as opposed to individual small business owners, who operate for individual wealth. The Native Concerns generate revenue for use by their tribal governments to fund social programs, create jobs for tribal members, traditionally under-employed at best, and impoverished at worst. The special provisions for Native Concerns support the laudable efforts of tribes who create them, to achieve self sufficiency, thus reducing dependence on the federal government. It is important to recognize the difference, and equally important to maintain the special provisions that allow Native Concerns the opportunity to support a large population base.

In spite of the importance of the success of Native Concerns to the public, it is also important to assure traditional small businesses that their access to procurement opportunities is not negatively impacted by the special provisions applicable to Native Concerns. An educational approach can be taken to validate the fact that the contract opportunities coming to Native Concerns are most often opportunities previously reserved for large businesses rather than small, and where small businesses were performing the work, 13 CFR § 124.504(c) provides adequate protection. However, this paper is concerned with the enhancement of the regulatory scheme. The following proposal attempts to address both the interests of Native Concerns and traditional small businesses.

Proposal:

Native Concerns receiving a sole-source contract in excess of Ten Million Dollars (\$10,000,000) over the life of the contract, including option years, would be required to submit and negotiate a subcontracting plan that separately addresses subcontracting with small business, veteran-owned small business, service-disabled veteran owned small business, HUBZone small business concerns, small disadvantaged business, and women-owned small business concerns in the same manner as required of other than small businesses under 48 CFR § 52.219-9

This proposal could be implemented by merely adding the following language at the end of the sentence at 48 CFR § 52.219-9(a):

“except small disadvantaged businesses concerns owned by Alaska Native Corporations, Native Hawaiian Organizations or Tribally owned firms in relation to a contract awarded as a sole-source contract in excess of \$10,000,000 over the life of the contract, including options.”

Justification for the Proposal:

The logic of excluding small business from the subcontracting plan requirement of 48 CFR § 52.219-9 is obvious. However, the drafters probably did not contemplate a small business that could receive a \$10,000,000 contract. The GAO confirms the broadly held belief that Native Concerns offer to agencies an easy and expedient method of meeting time-sensitive requirements. As a result of that reality, Native Concerns have seen an increase in larger sole-source contracts. An appropriate response to the issue raised by traditional small businesses; that the lack of a cap on Native Concerns negatively impacts their contracting opportunities, is to exclude Native Concerns from the small business exemption in circumstances where the sole-source contract is of a size normally only available to other than small businesses.

Conclusion:

The 8(a) program has been successfully administered by the Small Business Administration to the benefit of small business, veteran-owned small business, service-disabled veteran owned small business, HUBZone small business concerns, small disadvantaged business, and women-owned small business concerns and Native Concerns. Unfortunately, an investigation of one participant group, conducted by reviewing a few contracts, does not provide adequate data to conclude that wholesale changes should be made to a program that is proving to be successful for all of its participants. According to SBA’s response to the GAO report, the following participant groups received federal contract dollars in FY 04 as set forth below:

ANC concerns	\$ 1.1 billion
Women owned small businesses	\$ 9.1 billion
Service disabled veteran small businesses	\$ 1.2 billion
HUBZone firms	\$ 4.8 billion
Small business in general	\$69.2 billion

According to the GAO report, total federal procurement in FY 04 was > \$341 billion

Native Concerns, acting on behalf of hundreds of thousands of tribal members, have just begun to penetrate a previously unreachable federal marketplace. The proposal submitted in this and other papers presented today will effectively respond to any perceived issues raised by the GAO report, while balancing the interests of all of SBA’s constituents.

NATIVE CONCERN JOINT VENTURE/MENTOR-PROTÉGÉ ARRANGEMENTS

Issue:

The Small Business Administration (SBA) Mentor-Protégé program is designed to encourage large business Mentors to provide various forms of assistance to small businesses. This assistance includes the provision of technical assistance, management assistance, financial assistance in the form of equity investments and loans, subcontracts awarded to the Protégé by the Mentor, or assistance in performing prime contracts with the Government in the form of joint venture arrangements. Whether the concern is a traditional small business or an Alaska Native Corporation, Tribally Owned Entity, or a Native Hawaiian Organization (hereinafter collectively referred to as "Native Concerns"), the goal of the Mentor-Protégé program is to enhance the capabilities of the Protégé and to improve their ability to successfully compete for and perform government contracts.

However, past experience shows that Mentors (especially very large Mentors) approach traditional small businesses differently than they approach Native Concerns. This difference is due to the ability of Native Concerns to obtain larger contracts. Consequently, some Mentor firms primarily seek a relationship with Native Concerns contemplating the ability of participating in and performing large sole source contracting opportunities. This creates an environment wherein the Protégé is at risk to be a mere vehicle for the Mentor to obtain a contract that it would not otherwise have been entitled to receive. Without Protégé performance requirements under the program, the Mentor is not motivated to grow the Protégé's participation, and therefore not motivated to provide mentoring assistance.

The above concerns have been widely discussed in the GAO and SBA-OIG report. In addition, from a political standpoint, the individual government agencies who receive small business credit where Mentors are performing the majority of the work are also being generally criticized. However, terminating the Mentor-Protégé program, or placing dollar restrictions on the amount of the Native Concern contract awards would only deprive Native Concerns of needed mentoring and greatly limit Native Concerns from achieving the tribal goals Congress intended to support: economic development, job creation and self sufficiency. Instead, performance and reporting requirements discussed below would address the concerns and maintain the integrity and spirit of the Mentor-Protégé Program.

Proposal:

Performance Requirements: A Protégé in a Joint Venture should be required to increase their level of performance annually over the term of the contract, including option years. Thus, at each anniversary of the contract, the Protégé would be required to increase its performance in increments of 10%, until the Protégé's percentage of work is no less than 60%.

In addition, other possible proposals should include: tying the attainment of the performance goals mentioned above to the exercise of options under the contract; developing and enforcing other goals such as increased management, worker training, and technology transfer.

Justification for Proposal:

This proposal would meet the objectives of ensuring that sole source contracts awarded to 8(a) Mentor-Protégé joint ventures are not abused as mere pass-through contracts for large businesses. In addition, by imposing specific reporting requirements on this limited universe of

Mentor-Protégé joint venture contracts, the criticisms leveled by the GAO and OIG would be addressed. By limiting the required percentage of work to be performed by the Protégé, the Mentor firms will still be incentivized to participate in the program.

NATIVE CONCERN REPORTING

Issue:

The GAO report asserts that SBA is not providing adequate oversight to assure that Protégés and other firms are performing an appropriate amount of work. Additionally, the GAO report asserts that individual firms are not performing the appropriate amount of work and are overly subcontracting work. Finally, the GAO report also asserts that SBA is not tracking contract modifications, change orders, and changes in scope. The failure in oversight of the SBA is in part due to a lack of information from government agencies. The GAO report indicated that the agencies didn't provide the appropriate information despite Memorandums of Understanding between the SBA and the agencies. This was due to agency misunderstanding and the fact that some data is simply not tracked at this time. Therefore, Native Concerns in general should track and report their compliance or non-compliance with the SBA 8(a) performance requirements, i.e. that the 8(a) firm is performing the required percentage of work in a particular contract. Steps taken by SBA and the proposals submitted hereafter will alleviate the GAO concern that SBA is "failing to ensure that the partnerships between ANC firms and large firms are functioning in the way they were intended under the 8(a) program (i.e., operating merely as a front to acquire the contract) and failing to maintain information on ANCs' 8(a) activity."

Proposal:

Native Concerns should be required to supply reports to the SBA to demonstrate compliance with the spirit and letter of the 8(a) program. This would ensure that the Native Concern is performing at the appropriate level or making progress to the appropriate level, thus benefiting the 8(a) participant as the Program intended. The following reports will achieve this and demonstrate compliance with the special programs afforded to them.

Mentor-Protégé Reporting Requirements

The Protégé should be required to report to the SBA in their annual business plan required by 13 CFR 124.520 the level of attainment of the program performance participation requirements as proposed herein. This would ensure that the Protégé is performing at the appropriate level or making progress to the appropriate level, thus benefiting the 8(a) participant as the Program intended.

Sole Source Contracts Reporting Requirements

Native Concerns should provide annual reports on all sole source contracts. The report should include the following:

- Performance and/or subcontracting levels pursuant to the Limitation on Subcontracting clause at FAR 52.219-14, 13 CFR 124.510, and 13 CFR 125.6

Modification, Change Orders, and Changes in Scope

Pursuant 13 CFR 124.501, procuring agencies who have been delegated execution authority are required to report to SBA all awards, modifications, and options. The GAO report identified that this reporting function was not being consistently followed by agencies awarding 8(a) contracts.

Native Concerns can assist SBA in their oversight responsibility by providing such information to the SBA on a semi-annual basis, thus providing a failsafe approach to this reporting deficiency. Thus, Native Concerns should provide a semi-annual report of all contract modifications, change orders, and changes in scope of specific contracts to SBA.

MEMORANDUM

TO: BILL LARGENT
FROM: CHICKASAW NATION INDUSTRIES, INC.
DATE: SEPTEMBER 6, 2007
RE: TRIBAL 8(A) PROGRAM ISSUES

Thank you for the opportunity to present some issues CNI has encountered during its participation in the Small Business Administration's 8(a)SDB program. As a tribal concern, we have begun to experience the economic development envisioned by Congress by its inclusion of tribes and their wholly owned entities in the program. Although we have been in the program less than 10 years, we have been able to build an economic engine outside of gaming that will provide meaningful job opportunities to tribal members in law, human resources, information technology, accounting, management and manner other trades and professions. Our dividends to the tribe will allow young tribal members to pursue educations that would have been economically impossible for them in the past. With the job opportunities we are creating, they know they have a place to put that education to work. This fact alone, encourages the young members of the tribe to take advantage of the scholarship programs being offered.

Due to the uniqueness of the program when applied to tribes, some issues have arisen that reveal a need to give SBA personnel clarity and direction as they attempt to oversee and administer the program. The following issues are some that we have experienced to be inconsistently administered from office to office or, in some instances, within the same office. We believe the inconsistency arises primarily from a lack of clear Standard Operating Procedures or a lack of defined rules, leaving personnel with apparent discretion. In both instances, personnel often apply their own set of rules or exercise discretion in apparently arbitrary ways. Without stated rules, standard operating procedures, or a willingness to follow established SOPs, it is more difficult for a participant to operate within the program.

1. CHANGE OF MANAGERS

We have experienced significant delays in the approval of managers that have been named to replace departed managers of participant concerns. Three participant concerns changed managers more than 11/2 years ago and immediately notified their Business Opportunity Specialist to gain approval of the successor managers. To date no decision has been forthcoming.

Regulatory Treatment

13 CFR § 124.105

(1)Change of ownership. A Participant may change its ownership or business structure so long as one or more disadvantaged individuals own and control it after the change and SBA approves the transaction in writing prior to the change. The decision to approve or deny a Participant's request for a change in ownership or business structure will be made and communicated to the firm by the Director, Office of Business Development. The decision of the Director, Office of Business Development is the final decision of the Agency. The Director, Office of Business Development will issue a decision within 60 days from receipt of a request containing all necessary documentation, or as soon thereafter as possible. If 60 days lapse without a decision from SBA, the Participant cannot presume that it can complete the change without written approval from SBA. A decision to deny a request for change of ownership or business structure may be grounds for program termination where the change is made nevertheless. . . .

(4) Where a Participant requests a change of ownership or business structure, and proceeds with the change prior to receiving SBA approval (or where a change of

ownership results from the death or incapacity of a disadvantaged individual for which a request prior to the change in ownership could not occur), SBA will suspend the Participant from program benefits pending resolution of the request. If the change is approved, the length of the suspension will be restored to the Participant's program term in the case of death or incapacity, or if the firm requested prior approval and waited 60 days for SBA approval.

Standard Operating Procedure

Chapter 7

2. What Is a Change of Business Structure?

A change of business structure is a change in the legal identity of a participant, *e.g.*, a change from a sole proprietorship to a corporation.

Discussion:

Although neither the regulation, nor the SOP, clearly identify a mere management change as a business restructure, the documents required under the above SOP may indicate a management change is considered a change in business structure, without approval of which, SBA is authorized to suspend program participation. In our effort to comply with the regulatory scheme, we have submitted manager change approval requests to our BOS. Their response indicates that they too, believe the mere change of LLC managers must be approved before effective.

Due to the apparent opinion of our SBA BOS that manager changes must be approved before implemented, and due to the nearly two year delay in acting upon the requests, the participants are placed in the untenable position of either ceasing their participation in the program or moving forward without approval. As you can see from the regulations, the latter approach is at the participant's risk.

Suggested Action:

Modify the standard operating procedure to clarify that mere manager changes in a participant are not deemed a change of business structure, except where the manager is an owner of 20% or more of the participant or is the person whose status as a disadvantaged individual is the basis of the participant's program participation. If manager changes of LLC participants are deemed essential to proper oversight of the program, those changes should be acted upon within 30 days of a request containing proper documentation, and participants should be allowed to treat a failure to act within 30 days as approval of the request.

2. PROOF OF TRIBAL STATUS AS "ECONOMICALLY DISADVANTAGED"

In CNI's last three applications for 8(a) certification, we have been required to provide the Chickasaw Nation's financial statements. Upon inquiry, we were informed that SBA had a right to look at them "to determine if the tribe needed the 8(a) program." As a tribe that recognizes the tenuous and in some ways, unsavory nature of gaming as its principal source of revenue, the Chickasaw Nation has aggressively pursued business development outside of gaming. The 8(a) program has proven to be successful as stated above. It is unsettling to think that gaming revenue, the very activity the tribe is trying to replace, could cause the loss of a valuable economic development tool in that effort.

Regulatory Treatment

13 CFR §124.109 states the following:

(b) Tribal eligibility. In order to qualify a concern which it owns and controls for participation in the Director, Office of Business Development program, an Indian tribe must establish its own economic disadvantaged status under paragraph (b)(2) of this section. . .

(2) Economic disadvantage. In order to be eligible to participate in the 8(a) BD program, the Indian tribe must demonstrate to SBA that the tribe itself is economically disadvantaged. This must involve the consideration of available data showing the tribe's economic condition, including but not limited to, the following information: (i) The number of tribal members. (ii) The present tribal unemployment rate. (iii) The per capita income of tribal members, excluding judgment awards. “

“(3) Forms and documents required to be submitted. Except as otherwise provided in this section, the Indian tribe generally must submit the forms and documents required of 8(a) BD applicants as well as the following material: ...

(iv) Documents or materials needed to show the tribe's economically disadvantaged status as described in paragraph (b)(2) of this section”

Thus, the tribe must at least initially submit documentation to demonstrate that the tribe itself is economically disadvantaged for purposes of SBA review.

However, 124.109(b) also states the following:

“... Thereafter, it need not reestablish such status in order to have other businesses that it owns certified for Director, Office of Business Development (sic) program participation, unless specifically required to do so by the Director, Office of Business Development or designee. Each tribally-owned concern seeking to be certified for Director, Office of Business Development participation must comply with the provisions of paragraph (c) of this section.”

Standard Operating Procedures

13. What Documentation Must Concerns Owned by Indian Tribes, Alaska Native Corporations (ANCs), Native Hawaiian Organizations (NHOs), or Community Development Corporations (CDCs) Submit as Part of Their Application for Participation in the 8(a) BD Program?

Concerns owned by Indian Tribes, ANCs, NHOs, and CDCs must submit the same information as other concerns in order to establish program eligibility except to the extent that requiring this information is inconsistent with 13 CFR 124.109 (Indian Tribes and ANCs), 124.110 (NHOs) and 124.111 (CDCs). Further, in several instances, concerns owned by these special entities must submit additional information. The main areas of differentiation for information required by concerns owned by these special entities are as follows:

a. Documentation not required by concerns owned by these special entities.

(1) Social disadvantage. Indian Tribes, ANCs, NHOs and CDCs, as defined in 13 CFR 124.3, are considered socially disadvantaged and concerns at least 51 percent owned by them do not have to submit documentation on social disadvantage. However, CDCs must evidence that they have received financial assistance under 42 USC § 9805, et seq.

(2) Economic disadvantage except Indian Tribes. ANCs, NHOs and CDCs, as defined at 13 CFR 124.3, are considered economically disadvantaged and concerns owned by them do not have to submit documentation on economic disadvantage, including SBA Form

413 by individuals responsible for their management and control. However, Indian Tribes themselves must submit documentation of economic disadvantage as detailed in 13 CFR 124.109(b)(2). **Concerns owned by economically disadvantaged Indian Tribes are considered economically disadvantaged**, but they must have a “sue and be sued” clause in their Articles of Incorporation, Articles of Organization, or Partnership Agreement as detailed in 13 CFR 124.109(c).

Discussion:

The Chickasaw Nation, as required by regulation, provided the documentation and established its status as economically disadvantaged in conjunction with its first 8(a) application. Having done so, it should not be required to resubmit that information unless specifically required to do so by the Director, Office of Business Development, or his designee. To our knowledge, the requests are not coming from the Director or his designee. Rather they are being requested as a matter of course in conjunction with 8(a) applications by concerns owned by the Chickasaw Nation, and those concerns, under both the regulatory language and the SBA’s standard operating procedures, are considered economically disadvantaged without further proof.

Suggested Action:

If the Director, Office of Business Development, or his designee specifically requires the Chickasaw Nation to reestablish its economic disadvantaged status, that action should be preceded by a formal notice to the Nation of its requirement, and an opportunity to fully respond. Until such action is taken, SBA personnel should follow the standard operating procedure set forth in 13 (a)(2) which provides in pertinent part “concerns owned by economically disadvantaged Indian Tribes are considered economically disadvantaged,

3. MANIPULATION OF NAICS CODES

Over the past several years we have experienced a significant change in attitude by our BOS in the Oklahoma City office related to the approval of secondary NAICS codes requested by participants. The attitude is quite different than that experienced in other offices around the country and even different than the attitude of our previous BOS in Oklahoma. Some offices are supportive of the participant’s business development opportunities, and seem to recognize that products and services offered by a business may change during its life in the program due to market forces, strategic decisions, or economic conditions. These offices have proven to be quick to approve secondary NAICS codes in support of the participant’s business opportunities. The Oklahoma City office seems to take the view that a business should not change its product offerings from that which it offered when entering the program. Requests for approval of secondary codes are met with resistance and increasingly onerous demands are made for documentation to prove the participant’s ability to perform work in the new line of business.

Regulatory Treatment

13 CFR § 121.107: Under 13 CFR 121.107, SBA considers the distribution of receipts, employees and costs of doing business among the different industries in which business operations occurred for the most recently completed fiscal year. SBA may also consider other factors, such as the distribution of patents, contract awards, and assets. 13 CFR § 121.201 lists the NAICS codes and size standards for each code.

13 CFR §124.102: Under the 8(a) program a concern’s Primary Industry Classification is the appropriate six-digit NAICS code which best describes the primary business activity of the applicant. Using the criteria from 13 CFR 121.107, it is arguable that a concern doing more work in a secondary code would allow the SBA under this clause to “deem” a

secondary code with more activity than a listed primary code as a concern's true primary industry classification.

48 CFR § 19.303(c)(1): The contracting officer's determination is final unless appealed as follows: An appeal from a contracting officer's NAICS code designation and the applicable size standard must be served and filed within 10 calendar days after the issuance of the initial solicitation. SBA's Office of Hearings and Appeals (OHA) will dismiss summarily an untimely NAICS code appeal.

13 CFR 124.503: (b) *Verification of NAICS code.* As part of the acceptance process, SBA will verify the appropriateness of the NAICS code designation assigned to the requirement by the procuring activity contracting officer.

(1) SBA will accept the NAICS code assigned to the requirement by the procuring activity contracting officer as long as it is reasonable, even though other NAICS codes may also be reasonable.

(2) If SBA and the procuring activity are unable to agree as to the proper NAICS code designation for the requirement, SBA may either refuse to accept the requirement for the 8(a) BD program, appeal the contracting officer's determination to the head of the agency pursuant to §124.505, or appeal the NAICS code designation to OHA under part 134 of this title.

(c) *Sole source award where procuring activity nominates a specific Participant.* SBA will determine whether an appropriate match exists where the procuring activity identifies a particular Participant for a sole source award.

(1) Once SBA determines that a procurement is suitable to be accepted as an 8(a) sole source contract, SBA will normally accept it on behalf of the Participant recommended by the procuring activity, provided that:

(i) The procurement is consistent with the Participant's business plan;

(ii) The Participant complies with its applicable non-8(a) business activity target imposed by §124.509(d);

(iii) The Participant is small for the size standard corresponding to the NAICS code assigned to the requirement by the procuring activity contracting officer; and

(iv) The Participant has submitted required financial statements to SBA.

13 CFR § 124.517: (d)(1) The NAICS code assigned to a sole source 8(a) requirement may not be challenged by another Participant or any other party either to SBA or any administrative forum as part of a bid or contract protest. Only the Director, Office of Business Development may appeal a NAICS code designation with respect to a sole source 8(a) requirement.

13 CFR 124.109(c)(3)(ii), Tribes are allowed multiple 8(a) companies as long as none have the same primary NAICS code.

The issuance and receipt of secondary NAICS codes are not per se covered by the Code.

Standard Operating Procedures:

The SBA Standard Operating Procedures do not provide any guidance on the issue of changing a company's primary NAICS code, nor on the issue of approving secondary codes.

Chapter 4A, Part 18: "As part of the acceptance process, SBA will verify the appropriateness of the NAICS code assigned by the procuring activity. In general, SBA will accept the NAICS code assigned as long as it is reasonable, even though other NAICS codes may also be reasonable. If SBA and the procuring activity disagree over the NAICS code assigned, the District Office should make every effort to resolve the matter through discussion with the procuring activity. If negotiations fail, SBA may reject the requirement, appeal the designation to the head of the procuring agency pursuant to 13 CFR § 124.505, or appeal the NAICS code assigned to the Office of Hearings and Appeals (OHA). See 13 CFR § 124.503(b)."

Chapter 4A, Part 54: The NAICS code assigned to a sole source requirement may not be challenged by another Participant or any other party either to SBA or any administrative forum as part of a bid or contract protest. Only the AA/8(a) BD may appeal a NAICS code designation with respect to a sole source requirement. See 13 CFR 134.302(b); 13 CFR 124.517(d)(1).

Chapter 4A, Part 55: In connection with a competitive procurement, any interested party who has been adversely affected by a NAICS code designation may appeal the designation to SBA's Office of Hearings and Appeals in accordance with 13 CFR Part 134.

Chapter 3, Part 7(a)(2): (a) To enable SBA to determine the firm's business development needs, the business plan must be comprehensive, setting forth business targets and objectives. Whether the participant uses the SBA form or its own format, at a minimum, the business plan must contain: (2) The participant's primary NAICS code and all related NAICS codes;

Chapter 3, Part 7(b): States that "The firm will be eligible to perform any 8(a) contract opportunity regardless of whether the NAICS code assigned to the requirement is contained in its approved business plan, so long as it demonstrates the capability and responsibility to perform the contract in question to the procuring agency's contracting officer and so long as it qualifies as a small business under the size standard attached to that NAICS code."

Discussion:

A long list of regulations is presented to establish the importance placed on the NAICS code system by the SBA. Contracting Officers are required to designate a NAICS code that they deem best describes the goods or services being procured. Their decision is given great deference by SBA. Appeal procedures are established where disputes arise regarding the selected code. Size qualifications are based upon NAICS size standards. Applicants are required to apply under a specific primary NAICS code. Tribes are allowed to own multiple companies, so long as no two of them have the same primary NAICS code. Yet there is no regulatory guidance establishing criteria for the approval of primary or secondary NAICS codes. Nor is there a standard operating procedure to guide SBA personnel when a participant applies for approval of a particular code.

Due to this lack of clarity, inconsistent responses are experienced between different Business Opportunity Specialists in the same or different offices. Most recently, the National office designated for processing tribal 8(a) applications, suggested the possibility that a new tribal 8(a) applicant would have to be denied because another firm owned by the tribe was in the same business. The applicant firm applied under a primary code that was not the same as the primary code of the other firm. In fact, the other firm did not have one dollar of revenue under the NAICS code the applicant firm sought as its primary code. The SBA office suggested that they could change the primary industry classification of the other firm to that of the Applicant's requested primary and thus deny the application because two tribally owned firms would have the same primary NAICS. Assuming, arguendo, that the SBA may reclassify a participant's primary industry, the new primary code would have to be based on the criteria set forth in 13 CFR § 121.107, i.e. receipts, employees and cost of doing business amongst the different industries in which business activities occurred in the most recent fiscal year. Since no revenue has ever been received under the applied for NAICS code, SBA would have to ignore the NAICS system and apply a rule that does not exist.

Suggested Action:

i)

There is no regulation or SOP which per se allows a concern's primary NAICS classification to be changed based on work performed. As such, once a firm has been given a primary NAICS, it should remain such. This leads to the further argument and the issue in the paper to Joe. Under 13 CFR 124.109(c)(3)(ii), Tribes are allowed multiple 8(a) companies as long as none have the same primary NAICS code. It's a NAICS standard, not a primary industry standard. No two NAICS codes are the same, and thus, two firms with differing primary NAICS codes cannot factually be in the same primary industry. That should be the mandatory interpretation of the SBA of these regulations.

ii)

If the SBA has an issue with a NAICS code designation from a procuring agency, it has its appeal processes. If there is to be any attempt by the SBA to change a NAICS designation, it MUST be required to follow the regulations and the SOP's in that regard. A certifier cannot unilaterally determine that a NAICS was inappropriate, and use that determination to preclude a party from receiving certification.

iii)

There is no regulatory procedure for requiring approval of a secondary NAICS code. As for the SOP's, there is no approval process required beyond the initial business plan submission. With respect to secondary codes after certification, the SOP's state that the decision is left to the procuring agency's contracting officer. In short, the decision should be left to the respective contracting officer, and not the SBA, as the SBA's own procedures direct. A standard operating procedure should be adopted which allows participants to self certify as to their ability to perform under secondary NAICS codes. If a set aside opportunity arises in which a participant is nominated by the procuring agency, and the nominated participant self certifies its ability to perform the contract, SBA should accept the contract on behalf of the participant nominated.

4 REQUIREMENT AT APPLICATION FOR 8(A) CERTIFICATION OF SUBMISSION OF TAX RETURNS BY ALL DIRECTORS AND THE CEO OF THE TRIBALLY OWNED FIRM THAT OWNS THE APPLICANT.

In recent applications filed by companies wholly owned by CNI, the SBA has required that the last three years tax returns of the Directors of CNI and the CEO of CNI be submitted, along with proof of payment of taxes. Historically, only the manager of the LLC applicant was required to submit returns. This requirement is burdensome, time consuming, and for no apparent purpose.

Regulatory Treatment

There is no regulatory requirement for the submission of tax returns by the Directors and CEO of the firm owning the applicant.

Standard Operating Procedures

There are no standard operating procedures requiring the submission of tax returns by the Directors and CEO of the firm owning the applicant.

Discussion:

Inquiry has been made as to why this information is requested. The only explanation given is that it allows SBA to identify conflicts of interest. There are much less burdensome means available to SBA. The federal government is typically satisfied with an affidavit of no conflict of interest. The affidavit should be given under oath, and enforced through penalties for perjury.

Suggested Action:

A Standard Operating Procedure should be adopted by SBA directing that Directors and the CEO of tribally owned companies that own an applicant may submit an affidavit of no conflict of interest in lieu of tax returns in support of the application.