The original documents are located in Box 3, folder “Indian Preference at Bureau of Indian Affairs (1)” of the Bradley H. Patterson Files at the Gerald R. Ford Presidential Library.

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Memorandum

To: All Area Directors

From: Commissioner of Indian Affairs

Subject: Non-competitive examination of Indian preference eligibles

Questions have been raised repeatedly in the past few years regarding the Bureau’s policy of requiring Indian preference eligibles to successfully pass an examination prior to being considered for a position in the Bureau.

It is the policy of the Bureau to use the qualification requirements established by the Civil Service Commission for all positions within the Federal service, except in the instances where we have found that it has been necessary to develop excepted qualification requirements. Excepted qualification standards have been developed where there has been a problem in recruiting Indian candidates at the established entrance level, for positions which are unique in the Bureau, and for a variety of clerical, and technical positions.

In December, the Juneau Area Office requested a legal interpretation from the Field Solicitor regarding the use of the written test in making excepted appointments in the Bureau. Enclosed for your information is the response from the Office of the Solicitor.

We will continue the policy of using the written test when filling positions for which a test is part of the qualification requirements for the position. While we strive to increase our Indian employment in the Bureau, we must also keep in mind that we are to provide services to the Indian people. In order to do this in the most effective manner, we must find capable and well qualified employees for each position.

Attachment

[Signature]

Comparison

[Date: JUL 6 1976]

[Agency: NAVajo]
MEMORANDUM

TO: Commissioner of Indian Affairs  
Att'n: Personnel Management

FROM: Assistant Solicitor, Indian Affairs

SUBJECT: Non-competitive examination of Indian preference eligibles

By a memorandum dated March 2, 1976, the Juneau Field Solicitor requested our views on the question posed by the Juneau Area Director of the Bureau of Indian Affairs of whether the Bureau policy of requiring that an Indian preference eligible in seeking a position take and pass a written test, if it is part of a Civil Service Commission qualification standard for that position, is in compliance with statutory requirements. Copies of the memoranda are attached.

The pertinent statutory provision is the preference provision of the Indian Reorganization Act, 25 U.S.C. §472. It, in part, provides:

"The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed, without regard to civil service laws, to the various positions maintained, now or hereafter, by the Indian Office. . . . Such qualified Indians shall hereafter have the preference to appointment to vacancies in any such positions."
The last sentence is mandatory in that no exceptions can be made in filling vacancies. Freeman v. Morton, 499 F. 2d 494 (D.C. Cir. 1974). However, the first sentence provides for discretion. Furthermore, it is clear this discretion involves the establishment of standards which do not have to conform to those of the Civil Service Commission. Since preference is implemented in non-competitive selections by conferring a Schedule A appointment, 5 CFR §213.3112(a)(1), requiring examination seems a confusion with a Schedule B appointment; see 5 CFR §§213.3201 and 213.3212.

Nevertheless, the Secretary is empowered to establish standards and to adopt Civil Service standards which he finds appropriate for the Indian positions. It is a matter of policy as to the standard adopted and the Secretary must insure that the candidate is qualified as the final sentence of §472 mandates.

Thus, existing Civil Service tests which are found by the Secretary to be appropriate measures of standards for Indian positions may be utilized for determining appointments to those positions.

Duard R. Barnes

Attachments
Memorandum

To: Duard R. Barnes, Assistant Solicitor
   Division of Indian Affairs

From: Field Solicitor, Juneau

Subject: Indian Preference for Employment

Enclosed please find opinion request dated December 11, 1975, which asks if Indians may be appointed to positions in the Bureau without examination.

The Commissioner's Office has adopted a policy that Indian candidates must take and pass a written test when said test is part of an existing Civil Service Commission Qualification Standard, if such tests are available. Because the above policy has been promulgated by the Commissioner's Office and because the determination on the request for opinion may affect Indian preference employment nation-wide, Charles Soller has advised that I forward the opinion request to your office for disposition.

If additional information is required in this matter, please advise.

John R. Kelly
Field Solicitor

Enclosure

cc: Area Director
TO: Field Solicitor  
DATE: December 11,

FROM: Area Director

SUBJECT: Indian Preference for Employment

I am requesting a legal interpretation regarding the administration of Indian Preference to affect employment in the Jemez Area of the Bureau of Indian Affairs. The decision requested could affect the manner in which Indian Preference is administered in the BIA in total. I have set forth first the information relied upon to support my conclusion, which is followed by the result I believe is justified.

The basis for Indian Preference in employment is, in part, as follows: 48 Statute 984 of 1934 known as the "Indian Reorganization Act" also, as the "Wheeler-Howard Act." Section 12 additionally identified as 25 USC Section 472, provides:

"The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed, without regard to Civil Service laws, to the various positions maintained, now or hereafter, by the Indian Office, in the administration of functions or services affecting any Indian tribe. Such qualified Indians shall hereafter have the preference to appointments to vacancies in any such positions."

This has been reiterated in the "Composite Indian Reorganization Act for Alaska," Alaska Amendment of May 1, 1936 (copy attached).

The U.S. Civil Service Commission Federal Personnel Manual (FPM) Chapter 302 is concerned with employment in the Excepted Service. Part 370 DM (Departmental Manual) 302 (copy attached) prescribes regulations implementing excepted appointments, including the Indian Preference appointing authority. 44 IAN (Indian Affairs Manual) 302 (copy attached) specifies eligibility standards including Indian Preference. FPM Chapter 213 (copy attached) identifies the basis and provisions for the excepted service. Part 370 DM 213 (copy attached) identifies the Indian Preference appointing authority as Schedule "A," Section 213.3112 (a) (7).

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan
370 DM 300 (copy attached) identifies the Department's responsibilities in the employment of Indians. FPM Chapter 271 (copy attached) is concerned with the need for and development of qualification standards. 370 DM 271 (copy attached) identifies parties responsible for the development of qualification standards and provides guidelines for the content. FPM Chapter 338 (copy attached) prescribes the manner in which exception qualification standards will be utilized. 370 DM 338 (copy attached) prescribes the same. 44 IAM 338 (copy attached) prescribes the same.

By memorandum dated May 30, 1973 (copy attached) the then Acting Chief Personnel Officer for the BIA in Washington, D.C. stated that when a written test is part of an existing CSC Qualification Standard, Indian candidates must take and pass such test in order to meet that qualifications. By memorandum dated July 30, 1975 (copy attached) the current Chief Personnel Officer reiterated the policy and provided an alternative for isolated locations where there are no CSC approved test monitors available.

By memorandum dated April 4, 1975 (copy attached), the Commissioner of Indian Affairs stated policy in the administration of Indian Preference.

In correspondence dated August 7, 1975 (copy attached) from the Commissioner of Indian Affairs to all Tribal Chairmen, discussed was Indian Preference and the results of research on the issue.

The Indian Affairs Manual cites as the authority to effect Indian Preference appointments the Indian Reorganization Act of 1934 and Executive Order 8013. The Act has been recognized and interpreted in the Supreme Court decision on Nancari vs. Horton wherein Indian Preference does not constitute invidious racial discrimination violative of the Due Process Clause of the Fifth Amendment nor was it repealed (by implication) with the passage of the Equal Employment Opportunity Act of 1972, and the Court of Appeals decision on Freeman vs. Horton wherein it states:

"It is accordingly ordered this 21st day of December 1972, that all initial hirings, promotions, lateral transfers, and reassignments in the Bureau of Indian Affairs as well as any other personnel movement therein intended to fill vacancies in that agency, however created, be declared governed by 25 U.S.C. Section 472 which requires that preference be afforded qualified Indian candidates."
On January 31, 1939, the President issued Executive Order 8043 which permitted the appointment of Indians of one-quarter or more degree of Indian blood to any position in the Indian Service without examination. For Chapter 213 subsection 2.2(1) identifies Schedule A (which includes Indian Preference) as positions other than those of a confidential or policy determining character for which it is not practicable to examine.

I am of the opinion that there has been sufficient promulgation, by law and regulation, to determine that, in the administration of Indian Preference appointments in the Bureau of Indian Affairs, such appointments may be effected without examination (written test).

Attachments a/s

[Signature]
Adm. Dir.
Memorandum

To: All Area Directors

From: Acting Chief Personnel Officer

Subject: Definition of Indian in 25 USC 479 to Descendants of Members born after June 1, 1934

For your information and guidance in interpreting the new Indian preference policy, attached is a copy of a memorandum from the Solicitor clarifying the meaning of "who are descendants."

Attachment

JUN 24 1976

Received
ADMINISTRATION
JUN 28 1976
NAVajo AREA OFFICE
Memorandum.

To: Commissioner of Indian Affairs  
   Attn: Director, Office of Administration

From: Associate Solicitor, Indian Affairs

Subject: Application of Definition of Indian in 25 U.S.C. §479 to Descendants of Members Born after June 1, 1934

In recent discussions concerning the change of the definition of "Indian" for purpose of the preference in employment from the present quarter-degree standard to one coinciding with the definition in 25 U.S.C. §479, the question of the ambiguity in the descendants category has been frequently raised.

Section 19 of the Wheeler-Howard or Indian Reorganization Act, Act of June 18, 1934, 48 Stat. 984, 988, 25 U.S.C. §479, in pertinent part provides:

"The term 'Indian' as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, ..."
The part underscored is ambiguous in that it is unclear whether the referent for the term "who" after "members" is members or descendants. If it is the member who must have resided within the reservation on June 1, 1934, then the class of descendants is one which is not closed, but which could be of significant size and could—over time—be composed of persons of remote degrees of Indian ancestry. If it is the descendant that must have resided within the reservation, that person must have been a living person on June 1, 1934, so that the class is a closed one, gradually diminishing as such persons pass away.

In my opinion, the latter interpretation is the correct one. First, it is consistent with the overall scheme of the Reorganization Act which was that descendants could become members of tribes reorganizing under the Act. Prior to the Act, there were few tribes with current official membership rolls and even fewer with formal standards. The most common means of identifying persons as Indian at that time was by census rolls—rolls that listed persons who were reservation residents and who were identified by Bureau census-takers as members. */ But without formal membership standards, such rolls were reliable for only indicating residents having some Indian ancestry of the tribe or tribes settled on the reservation. With adoption of a basic organic tribal document pursuant to the Act, formal membership criteria were established for the first time. Descendants could vote to accept the Act and constitution which would then officially make them members as defined under the first category (members of tribes as quoted above) if

*/ Some other types of rolls were also of value in identifying persons as tribal members. Two examples are: 1) rolls prepared to effect payments of funds derived from reservation resources; and 2) rolls prepared to identify specific tribes on specific reservations due annuity payments. An example of a roll which cannot be relied on for identifying members is one which was prepared to effect annuity payments which became descendant oriented and wherein reservation residency was unnecessary.
they met the requirements specified in the constitution. Until a tribe formally organized under the Act (see 25 U.S.C. 3478) and adopted a constitution and membership requirements, then persons alive in 1934 of Indian ancestry descended from persons listed on earlier official rolls would be within the definition.

Secondly, it seems unlikely that Congress intended a proliferation of preference eligibility over time. Such a class of preference eligibles would have a minimal Indian blood quantum (less than the statutory one-half degree) and no membership in any federally recognized tribe served by the Bureau. Such persons would be simply a racial classification bearing little relationship to the needs and functions of either the Bureau of Indian Affairs or its service population.

Finally, the legislative history of the Act shows that at least the Senate Committee considering the revision of the Department’s original bill, H.R. 7502, 73d Cong. 2d Sess. (1934), was made aware of this feature of the definition. Each version of the original and revised bills had a definition provision including a descendant class of reservation residents. When the final bill, S. 3645, was before the Senate Committee on Indian Affairs, the following explanation of the descendant class was given by BIA Commissioner Collier:

Senator Thomas of Oklahoma. Well, if someone could show that they were a descendant of Pocahontas, although they might be only five-hundredth Indian blood, they could come under the terms of this act.

Commissioner Collier. If they are actually residing within the present boundaries of an Indian Reservation at the present time.

Hearings on S. 3645, Senate Comm. on Indian Affairs, 73d Cong., 2d Sess., at 263-264 (1934).
It is clear that Senator Thomas was referring only to descendants and Commissioner Collier explained that it was the descendants who had to be residing on the reservation. Since the BIA drafted the original bill, and since this exchange is the only legislative history instructive on this point, Commissioner Collier's comment is entitled to some weight.

In applying this provision of the definition of "Indian", I conclude that only persons residing within any Indian reservation on June 1, 1934, who are descendants of members may be considered preference eligibles. "Members" in this context means persons identified on approved census rolls or through other means prior to June 1, 1934. Persons born after June 1, 1934, must meet any of the other criteria in order to qualify for preference eligibility.

Reid Peyton Chambers
Reid Peyton Chambers
Memorandum

To: All Area Directors

From: Acting Chief Personnel Officer

Subject: Information regarding new Schedule A appointing authority

Attached for your information is a copy of the most recent letter to the Civil Service Commission requesting a new Schedule A appointing authority which will apply under the revised Indian preference/criteria.

We have asked the Commission to continue an authority whereby we may appoint individuals who are 1/4 or more degree Indian ancestry of a currently federally-recognized tribe whose rolls have been closed by an act of Congress. We would utilize this authority for a three year period which would permit time for the Five Civilized Tribes and Osage Tribe to organize and establish current membership standards. A "grandfather" provision will be used to protect individuals who are presently employed and may lose preference as a result of the new policy. Employees who are now eligible for preference and do not meet the criteria of the new policy will be covered by the "grandfather" clause as long as they are continuously employed by the Bureau.

Attachment

[Signature]

Attachment

RECEIVED
ADDITIONAL
7/3 1976
NAVAJO
AREA OFFICE
Dear Mr. Hampton:

In a letter dated March 18, 1976, I requested the Commission's consideration of a modification in the Schedule A excepted appointment authority implementing Indian preference in the Indian Service, 5 CFR 213.3112(a)(7).

The proposed modification would abolish the present quarter-degree Indian ancestry standard and would establish five criteria for eligibility. This change is required by our view of the definition of "Indian" contained in the Indian Reorganization Act, 25 U.S.C. 847(a), which sets forth three criteria (and a fourth standard for the special circumstances of Alaska natives). Section 479, in pertinent part, reads as follows:

"The term 'Indian' ... shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who were on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. . . . Eskimos and other aboriginal peoples of Alaska shall be considered Indians."

This definition is applicable to the preference-in-employment provision of the same act, 25 U.S.C. 8472. The legal principle which compels a modification is that the quarter-degree standard established by executive orders is in derogation of standards set by statute.

My purpose in writing now is twofold. First, in my earlier letter I stated that a "grandfather" clause would be extended to all current employees of the Bureau of Indian Affairs of one-quarter or more Indian ancestry who received preference prior to the requested change so that they would retain their preference eligibility as long as they were continuously
employed in the Bureau. To be as certain as possible of the validity of this provision, I now request that the Commission specifically approve this measure.

Secondly, it has been called to my attention that the fifth criterion proposed in the March 10 letter may be inconsistent with the statutory provision. That criterion would extend preference eligibility to

"(v) a descendant of an enrolled member of a currently federally-recognized tribe whose rolls have been closed by an act of Congress."

My purpose in proposing this special standard of eligibility - limited to just a few tribes, specifically the Five Civilized Tribes and the Osage Tribe - was to take account of the fact that those tribes had been treated differently by Congress from other tribes; at the time of the enactment of the Indian Reorganization Act in 1934, their reservations had been disestablished and their rolls closed, so that the only "members" were those listed on the final rolls compiled in 1906. Thus, descendants of members of most tribes whose rolls had been closed would not qualify as tribal "members." And the application of the criteria set out in 25 U.S.C. 879 to such persons would in effect be to require that they be of one-half degree Indian ancestry to qualify for preference. Many such persons have previously met the quarter-degree requirement and received preference in employment. Thus, it was to avoid the hardship and inequity of imposing the eligibility standard in this unique unique situation that a special criterion was proposed.

It has now been brought to my attention that in light of section 479 there exists some question as to the lawfulness of the addition of such a special descendent standard for these tribes.

Only the Seminole Nation, several Creek towns and one Cherokee band have since reorganized.
Nevertheless, the reasons for the establishment of a separate standard in recognition of their special situation remain. I would request, therefore, that the original proposal be modified so that the fifth criterion shall have a limited duration of three years from the date of the Commission's approval. This would allow the affected tribes time to organize under the Oklahoma Indian Welfare Act, 25 U.S.C. 5501 et seq., or otherwise, and to establish current membership standards — which will allow the individuals in question to qualify for preference as tribal members.

Thus, I would recommend that the fifth criterion be modified as follows:

(v) until ______________, 1979,
   a descendant of at least one-
   quarter degree Indian ancestry
   of a currently federally-recognized
   tribe whose rolls have been closed
   by an act of Congress.

A date three years from the effective date of the Commission's approval may be inserted at the appropriate time. This provision, I feel, will provide a reasonable transition period and will not unduly disrupt legitimate expectations as would be entailed in the immediate imposition of a standard which does not include any fifth criterion.

Sincerely yours,

/TS/ Thomas S. Kleppa
Secretary of the Interior

Honorable Robert Hampton
Chairman
United States Civil Service Commission
Washington, D.C. 20415
MEMORANDUM

To: All Area Directors
   Field Administrator, Administrative Services Center

From: Commissioner of Indian Affairs

Subject: Indian Preference Policy

On April 22 you were forwarded copies of the revised policy statement effective April 20. The purpose of the revised statement was to bring the granting of preference in conformance with the statutory requirements of the Indian Reorganization Act, June 18, 1934. The criteria outlined in the memorandum will apply in the following types of personnel actions:

(a) Promotion;
(b) reassignment - this term includes reassignment and change of appointing office from within the Department of the Interior;
(c) lateral transfer - the appointment of an individual with competitive status to BIA from another Federal agency;
(d) voluntary request for change to lower grade;
(e) establishment of retention registers.

Individuals who are members of any recognized Indian tribe now under Federal jurisdiction will be eligible for preference based on the new criteria. The tribe is not required to have been organized under the IRA.

We have asked the Civil Service Commission for a new appointing authority whereby we may make initial excepted appointments (Schedule A) under the revised criteria. I have also requested that for three years from the date of publication of the new criteria by Civil Service, individuals who are one-quarter or more degree Indian blood of a Federally recognized tribe continue to be considered preference eligible for appointment. This transition period will allow time for tribes

Secrecy Administration

MAY 26 1976

NAVajo
AREA 0014
whose rolls have been closed by Congress to organize and thereby put their members on a par with other Indians by allowing them to be preference eligible under 25 U.S.C. 472 and 479 by virtue of tribal membership.

Individuals who receive or have preference in Bureau employment will continue to receive preference as long as they are continuously employed by the Bureau (Grandfather clause).

Employees will be responsible for providing the personnel offices with documentation that they are entitled to preference. All employees who feel that they meet the new criteria for preference should immediately take steps to furnish their Personnel Offices with a statement from their home agency superintendent that they meet one of the four criteria. Employees having questions concerning their eligibility under the new criteria should direct their inquiry to their agency or area Branch of Tribal Operations.

Personnel actions that were not effective before April 20 should be reviewed to assure that any individual who applied for a position is properly considered under the new criteria.

Attached are questions and answers which will be helpful to you. Additional questions concerning the interpretation of the new policy in personnel matters should be directed to the Division of Personnel Management. A continuing list of questions and answers will be compiled to share with other appointing offices.

You are urged wherever there is exclusive union recognition that this information be brought to their attention at the earliest possible time.

Movis Thompson

Attachment
1. Q. Will an individual currently employed in BIA based on 1/4 degree preference retain preference for promotion or reassignment when the individual does not meet one of the four criteria now being used?

A. Yes, assuming that the Civil Service Commission approves the Secretary's plan. Under that plan, the individual will be a preference eligible so long as he is continuously employed in the Bureau or in the exercise of statutory reemployment rights. (Grandfather clause.) But until further notice, the individual is to be a preference eligible.

2. Q. Will an individual who has a competitive appointment with another Federal agency receive preference in an appointment to the Bureau based on one of the four criteria?

A. Yes — the transfer would not be a new appointment to the Federal service.

3. Q. If an individual on a Civil Service certificate meets one of the new criteria will he be eligible for preference in the Bureau now?

A. Yes — if the individual is within reach on the Civil Service register, he would be given a competitive appointment.

4. Q. Would an individual meeting the 1/4 degree blood quantum requirement be in competition for preference in appointment with an individual who meets one of the new criteria and is on the Civil Service register?

A. Yes, if the individual meeting the new criteria is within reach on the register. For now, we do not have an excepted appointing authority for anyone except those who are 1/4 or more degree blood quantum.

5. Q. May preference in appointments continue to apply based on 1/4 degree blood quantum?

A. Yes — as long as we have the present Schedule A appointing authority.

6. Q. Will a "grandfather" clause apply to individuals given an excepted appointment based on 1/4 degree blood quantum between April 20 and the time the Civil Service Commission issues a new appointing authority?

A. Yes, with the approval of the Civil Service Commission. With the Commission's approval, the grandfather clause will apply to all such persons as long as they are continuously employed by BIA. (See No. 1.)

7. Q. When will the 1/4 degree blood quantum criterion no longer be a preference factor in making initial appointments?

A. At such time as we receive a new appointing authority from CSC.
8. Q. For preference eligibility is it necessary to be a member of a tribe organized under IRA? (Tribes means any Federally recognized Indian tribe.)
A. No - Preference will be provided to individuals who are members of any tribe organized Federally recognized tribe.

9. Q. Will personnel actions be delayed until applicants can establish that they meet one of the criteria?
A. No - Applicants/candidates must submit a certificate from their Agency verifying that they are eligible for Indian preference based on one of the criteria. Applicants/candidates are responsible for ensuring that proper documentation is on file or with their application when they apply for promotional consideration or a position change. Employees should take steps immediately to verify that they are entitled to preference under the criteria if they have an application currently under consideration.

10. Q. What action is to be taken now on certificates pending selection?
A. All applications should be reviewed to ensure applicants/candidates who may be preference eligibles receive consideration. However, it is not necessary to readvertise the vacancy.

11. Q. How much information regarding preference should be included in vacancy announcements?
A. The information must include preference for 1/2 degree in initial appointments and the four new criteria. After a new appointing authority has been received, the wording on 1/2 degree will be changed. (See No. 1)

12. Q. How do you identify "who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation?"
A. Only persons residing within any Indian reservation on June 1, 1934, who are descendants of members may be considered preference eligibles. "Members" in this context means persons identified on approved census rolls or through other means prior to June 1, 1934. Persons born after June 1, 1934, must meet any of the other criteria in order to qualify for preference eligibility.

13. Q. Does the criteria "all others of one-half or more Indian blood" apply to any tribe other than Federally recognized tribes?
A. Yes - the burden of proof is on the individual that he meets the criteria.
14. Q. May excepted and competitive retention registers continue to be combined in reduction in force?
   A. Yes.

15. Q. Does the preferred retention standing of Indian preference employees still apply on retention registers?
   A. Yes.
ACTING AREA DIRECTOR NAVAJO
BUREAU OF INDIAN AFFAIRS
WINDOW ROCK AZ 86515

RE 4-20-76 MEMORANDUM STATING REVISED INDIAN PREFERENCE POLICY
ANY COMMITMENT MADE FOR FILLING A POSITION PRIOR TO APRIL 20
MUST BE DOCUMENTED IN WRITING AS TO THE DATE OF THE COMMITMENT.
COMMITMENTS MADE AFTER APRIL 20 MUST BE MADE IN ACCORDANCE WITH
THE REVISED POLICY STATEMENT, IMPLEMENTING INSTRUCTIONS WILL BE
ISSUED IMMEDIATELY.
COMMISSIONER OF INDIAN AFFAIRS
MORRIS THOMPSON

[Signature]

[Stamp] 5-30

[Stamp] RECEIVED ADMINISTRATION
27 APR 76

[Stamp] NAVAJO AREA OFFICE
To: All Area Directors
   Field Administrator, Administrative Services Center
From: Commissioner of Indian Affairs
Subject: Indian Preference Policy

During the past several months an extensive study has been made of the definition of Indian in terms of the present policy and the statutory definition in the Indian Reorganization Act, June 18, 1934.

Effective April 20, 1976, the definition of Indian as stated in Section 19, Indian Reorganization Act of June 18, 1934, 25 USC 479, will be the criteria used in recognizing an individual for the purpose of Indian preference in certain personnel actions in the Bureau. Indian means persons of Indian descent:

1) Who are members of any recognized Indian tribe now under Federal jurisdiction;
2) Who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation
3) All others of one-half or more Indian blood, and
4) Eskimos and other aboriginal peoples of Alaska.

An individual meeting any one of the above criteria of the statutory definition will be afforded preference in actions filling a vacancy by a promotion, reassignment or lateral transfer, in the Bureau. This policy will not apply to initial hiring until a new Schedule A appointing authority has been received from the Civil Service Commission. Employees will be responsible for providing the Personnel Office with certificates verifying that they meet one of the criteria above.

You are urged wherever there is exclusive union recognition that this information be brought to their attention at the earliest possible time.
Mr. Robert E. Hampton
Chairman
United States Civil Service Commission
1900 E Street, N.W.
Washington, D. C. 20415

Dear Chairman Hampton:

This is to request the Commission’s consideration of a change in the definition of “Indian” for purposes of the Schedule A excepted appointment authority now contained in 5 CFR §213.3112(a)(7).

The Schedule A authority is conferred in order to implement a preference in employment of Indians. At present eligibility for preference in the selection for positions in the Bureau of Indian Affairs is extended to persons of one-quarter degree Indian ancestry. Numerous statutes 1/ provide the basis for a preference for Indians in employment in the Indian Service. All except one do not define “Indian.” The one statute which does, establishes a different definition of “Indian” than that embodied in the present excepted appointment authority. Thus, it is to harmonize the excepted appointment authority with the statutory definition that we request your approval.

The quarter-degree standard is based on executive orders. 2/ Obviously, executive orders cannot derogate from a statutorily


2/ E.O. 6675, April 14, 1934; .O. T01, 3 CFR 350 (June 24, 1933); E.O. 7116, 3 CFR 350 (June 24, 1933); E.O. 7113, 3 CFR 419 (January 31, 1933); E.O. 3383, 3 CFR 636 (March 22, 1943).
The statutory standard is established by Section 19 of the Indian Reorganization Act of June 18, 1934, cur. sup.; note 1, 25 U.S.C. § 479. Section 12 of the Indian Reorganization Act established an absolute preference for Indians in their selection to fill all vacancies in the Bureau. Horton v. Morton, Cir. No. 327-71 (D.D.C.), filed December 21, 1972; aff'd 499 F.2d 444 (D.C. Cir. 1974). Furthermore, the Supreme Court has held that the Indian preference statutes, particularly § 472, 3/ were not impliedly repealed by the 1972 Equal Employment Opportunity Amendments to the 1964 Civil Rights Act, 42 U.S.C. (Supp. II 1973) §§ 2000-16(a); nor are non-Indian employees deprived of property rights in the application of preference to Indians. Horton v. Bancroft, 417 U.S. 535 (1974). The Associate Solicitor for Indian Affairs has advised that the definition of "Indian" in Section 19 of the Indian Reorganization Act must be read in pari materia with Section 12. This opinion was rendered in response to several administrative appeals of persons who are members of federally-recognized tribes, but who were denied preference eligibility because they are less than a quarter-degree. In addition, another person—a member of a tribe organized under the Indian Reorganization Act but of less than a quarter-degree Indian ancestry—has filed suit claiming eligibility. Wetina v. United States, Civ. No. 75-3007 (D. S.Dak.).

The definition established in Section 19 is that for purposes of the Act "Indian" means persons of Indian descent:

1) who are members of any recognized Indian tribe now under Federal jurisdiction;
2) who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation;
3) all others of one-half or more Indian blood, and
4) Eskimos and other aboriginal peoples of Alaska.

The Court indicated that Section 472 replaced the earlier and more narrowly drawn preference statute. Horton v. Bancroft, 417 U.S. 535, n. 2; see also note 1, supra.
The objective of the Indian Reorganization Act was to put an end to the diminution of the Indian land base and to allow tribes, which at that time were frequently abused by Indian Service agents, to reorganize into organizations which would have some measure of self-government. Thus, rather than have standards of membership established by Federal officials, visible tribal organizations established under the act were to set standards. The difficulty has been that from a personnel administration standpoint tribal membership standards vary from tribe to tribe; and in some instances, tribes do not maintain current membership rolls. Furthermore, some tribes, the largest — the Navajo — in particular, elected not to organize under the Act and others, particularly Oklahoma tribes, could not organize under it, but individuals were not except from the preference and definition provisions. What this has meant is that it has been in the Bureau's interest to maintain a uniform standard of preference eligibility for all Indians; but it has been at the expense of depriving some individuals of a right conferred by law. Thus deprivation can no longer be viable. The Court in *Mack* stated that "[t]he preference, as English, is granted to Indians not as a discrete racial group, but, rather as members of quasi-sovereign tribal entities . . ." 417 U.S. at 554.

Thus, we request that 5 CTR 213.3112(a)(7) be modified to provide as follows:

(7) All positions in the Bureau of Indian Affairs and other positions in the Department of the Interior directly or primarily related to the providing of services to Indians when filled by the appointment of persons of Indian descent who are either:

(i) a member of a recognized tribe under federal jurisdiction; or

(ii) a descendant of a member of a tribe who was on June 1, 1934, residing within the boundaries of any Indian reservation; or

VIII. Many tribes have blood quantum requirements of one quarter degree and thus a change in the preference eligibility standards as proposed would result in little real change in the number of eligibles, a few have no minimum but obviously require some ancestry of the tribe.
(iii) a person of one-half degree or more Indian ancestry; or

(iv) an Eskimo and other aboriginal persons of Alaska; or

(v) a descendant of an enrolled member of a currently federally-recognized tribe whose rolls have been closed by an act of Congress.

Current employees of the Bureau of Indian Affairs who are of one-quarter or more Indian ancestry of a federally recognized tribe and who received preference prior to this change, shall continue to be preferences eligibles as long as they are continuously employed in the Bureau. This "Grandfather" clause will be included in the bureau's regulations to protect current employees' rights.

These criteria will also apply to competitive personnel actions within the Bureau for promotions, reassignments and transfers.

Under Section 13 of the Reorganization Act, tribes could vote to reject the application of it to their reservation. Nevertheless, other preference statutes, note 1, supra, would allow for the application of the same preference and the same definition of Indian. Thus, the above criteria would set a uniform standard throughout the Bureau; although membership standards and degrees of Indian ancestry vary.

While Section 13 of the Reorganization Act provides that some Oklahoma tribes cannot organize under the Act, the preference and definition sections do apply so that Indians of Oklahoma tribes are under these provisions. However, there are now no Indian reservations within the State and the rolls of several Oklahoma tribes (Cherokee, Choctaw, Creek, Chickasaw and Osage) were closed by acts of Congress so that there are today no current membership rolls for these tribes. The provisions of the definition of Section 13 may be inapplicable to persons of such tribal ancestry except to the extent they are one-half or more Indian. In order to achieve the utmost uniformity in standards of eligibility, we propose the fifth criterion so as to include descendants of the members of these tribes.

Since this modification is dictated by statute, we believe it can be achieved through the rulemaking authority of the Commission, 5 U.S.C. §1302. Therefore, we request that approval be given to the proposal and that it be published according to your rulemaking procedures for modification in an agency's Excepted Appointment Authority.

Upon your approval and publication of the new authority, these provisions will become effective within the Bureau of Indian Affairs and the Department of the Interior. If there are any questions, please do not hesitate to contact us.

Sincerely yours,

(Seal) Jane

Secretary of the Interior
Dear Mr. Chairman:

This responds to your request for the views of this Department on H.R. 4988, H.R. 5858 and H.R. 5968, similar bills "To revise retirement benefits for certain employees of the Bureau of Indian Affairs and the Indian Health Service not entitled to Indian preference, provide greater opportunity for advancement and employment of Indians, and for other purposes."

We recommend that these three bills not be enacted.

Provisions of the three bills

We understand that H.R. 4988, H.R. 5858 and H.R. 5968 are intended to relieve the situation of those civil service employees of the Bureau of Indian Affairs and Indian Health Service who are not eligible for "Indian preference" in promotions, lateral transfers, and reassignments within those agencies.

The bills relate to non-Indian preference employees who were employed by the BIA or IHS on June 17, 1974, the date of the U.S. Supreme Court decision on the subject of Indian preference. They would appear to be based upon the theory that the United States Court of Appeals for the District of Columbia and the Supreme Court decisions of 1974, which established absolute Indian preference in BIA and IHS employment, taught these employees in mid-career and left them with little opportunity for advancement in those agencies.

H.R. 5858 and H.R. 5968 are identical. H.R. 4988 is a similar bill. All three bills would amend 5 U.S.C. 8336 to provide for optional retirement after 20 years of service, not necessarily with BIA or IHS, for those non-Indians of either agency who have been continuously employed by the agency since June 17, 1974 (the date of the Supreme Court decision on Indian preference) and who will have completed 20 years of service before December 31, 1985 (H.R. 5858 and H.R. 5968) or December 31, 1986 (E.R. 4988).

This special provision would not apply to anyone who "is otherwise entitled to full retirement benefits."
E.R. 1988 provides that the Secretaries of the Interior and of Health, Education and Welfare may delay retirement thereunder for one year under certain circumstances, and an employee continues to be eligible for early retirement even if he becomes eligible for voluntary retirement during that delay.

All three bills amend 5 U.S.C. 8339 to provide a formula for computing the annuity. While there are differences in the amendments between the two versions, both amendments would provide qualified non-Indian employees—who in certain cases may be in their forties or younger—the opportunity to retire with an annuity equal to that of most Federal employees who retire at age 60 or over with approximately 27 years of service. None of the three bills refer to that provision of 5 U.S.C. 8339(h) which contains a formula reducing annuities for retirements before age 55.

Background

On November 26, 1975, this Department transmitted our views to the Committee on H.R. 5465, a bill that would provide for outplacement of non-Indian preference employees of the BIA and IHE to other parts of those departments. This report details the background of Indian preference, including the case law on the subject (pp. 2-3). We opposed enactment of the bill because we had formulated a Department Assistance Program to assist Indian and non-Indian BIA employees adversely affected by Indian preference and the Indian Self-Determination Act (p. 4). A copy of the November 26, 1975 report is enclosed.

The present early retirement law

Under 5 U.S.C. 8336(d)(1) an employee with 20 years of service at age 50 or with 25 years of service at any age is entitled to retire on an immediate annuity if his job is abolished. This provision applies to any eligible employee of the BIA.

Under 5 U.S.C. 8336(d)(2) an employee may voluntarily retire with an immediate annuity if, upon application of his agency to the Civil Service Commission, the Commission determines that such agency has a "major" reduction-in-force (RIF). The agency could then authorize, during a time period prescribed by the Commission, the employee's retirement if he meets the requisite age and service qualifications (same as 8326(d)(1)).

2
The annuity formula for employees who retire under 5 U.S.C. 8336(d), determined by U.S.C. 8332(h), reduces annuities by 1/6 of 1% for each month the employee is under age 55.

In 1973, 1974 and 1975 the BIA received determinations of major RIF's from the Civil Service Commission under 5 U.S.C. 8336(d)(2). In 1973, 22 BIA employees chose early retirement; 26 employees chose it in 1974, and 167 employees voluntarily retired in 1975. Those who chose to retire were both Indian and non-Indian employees.

The effect of Indian Preference and the Indian Self-Determination Act

Not all non-Indian employees of the Bureau of Indian Affairs have been adversely affected by Indian preference as interpreted by recent court decisions. In fact, many non-Indian employees in a number of occupations have had and continue to have remarkably successful careers within the Bureau.

In many career fields (such as Forestry, Engineering, Social Work, Teaching, Personnel Management, and Financial Management) there are not adequate numbers of Indian candidates to fill the large number of entry level vacancies which exist at any given time in the Bureau. In such fields, Indian preference creates an impediment to non-Indian employees for promotion to the journeyman level of these occupations. This is true, for example, in teaching where 75 percent of vacancies each year are filled by non-Indian employees despite concerted and vigorous attempts to recruit qualified Indians.

However, the effects of Indian preference in some occupations become more apparent above the journeyman levels. Competition for such positions is intense and no Federal employee is offered any guarantee of promotion to supervisory or managerial positions. Nonetheless, even above the journeyman level some promotional opportunities continue to exist for non-Indian employees.

While it is the policy of the Department of the Interior and the Bureau of Indian Affairs to recruit, develop, and utilize qualified Indians to the maximum extent possible, that policy does not rule out utilization and advancement of non-Indian employees. The Commissioner of Indian Affairs has stated:

"There are many opportunities within the Bureau of Indian Affairs for the continued employment and advancement of the present work force. Although accelerated recruitment efforts are being made for qualified Indian candidates, experience has
shown that there are vacancies for which we have not been able to recruit qualified Indians. Non-Indians have been appointed and promoted to these vacancies."

We recognize that some non-Indian employees have had their careers affected by the recent court decisions on Indian preference. As noted in our report on H.R. 1455 this Department is assisting those employees to find continued career opportunities outside the BIA. Additionally, we are increasingly concerned about the potential effects of the Indian Self-Determination Act (P.L. 93-638) on Indian and non-Indian employees alike. The Indian Self-Determination Act could ultimately result in significant numbers of BIA employees leaving the Federal work force.

Recommendation

This Department is committed to our assistance program which provides placement assistance to those Indian and non-Indian employees of the BIA whose jobs or opportunities have been foreclosed by either Indian preference or the operation of P.L. 93-638.

The present situation in the BIA does not justify the liberal retirement benefits contemplated by the three bills which far surpass the benefits available to other Federal employees, and we cannot support such a provision. BIA employees who wish to retire early under 5 U.S.C. 8336 should be subject to the same annuity formula as all other employees who retire pursuant to that provision.

Further, employees of the BIA who are adversely affected by the contracting requirement of P.L. 93-638 may retire pursuant to the provisions of 5 U.S.C. 8336(d).

With regard to the provisions which concern the Department of Health, Education and Welfare, and the Civil Service Commission, we defer in our views to those two agencies.

The Office of Management and Budget has advised that there is no objection to the presentation of this report and that enactment of H.R. 1455, H.R. 9555, and H.R. 9555, would not be in accord with the program of the President.

Sincerely Yours,

[Signature]

Secretary of the Interior

Honorable David N. Henderson
Chairman, Committee on
Post Office and Civil Service
House of Representatives
Dear Mr. Chairman:

This responds to your request for the views of this Department on H.R. 5463, a bill "To allow Federal employment preference to certain employees of the Bureau of Indian Affairs, and to certain employees of the Indian Health Service, who are not entitled to the benefits of, or who have been adversely affected by the application of, certain Federal laws allowing employment preference to Indians."

We recommend against enactment of H.R. 5463. The Department is currently in the process of formulating an assistance program to resolve the problem addressed by H.R. 5463 and we believe that this available administrative solution is the most viable approach.

Provisions of H.R. 5463

We understand that H.R. 5463 is intended to relieve the situation of those civil service employees of the Bureau of Indian Affairs and Indian Health Service who are not eligible for "Indian preference" in promotions, lateral transfers, and reassignments within these agencies.

H.R. 5463 relates to non-Indian preference employees who were employed by the BIA or IHS on June 17, 1974, the date of the U.S. Supreme Court decision on the subject of Indian preference. For the purposes of H.R. 5463, these employees are defined as "eligible employees" under section 1 of the bill.

The bill would appear to be based upon the theory that the United States Court of Appeals for the District of Columbia and the Supreme Court decisions of 1974, which established absolute Indian preference in BIA and IHS employment, caught these "eligible employees" in mid-career and left them with little opportunity for advancement in these agencies.

The bill proposes relief by authorizing special treatment designed to aid "eligible employees" who wish to leave the BIA and the IHS.

It would require the Departments of the Interior and of Health, Education and Welfare to provide for re-employment of "eligible employees" of the BIA and IHS under the bill to other parts of these Departments.

Best Possible Scan from Poor Quality Original
Section 2 of the bill relates specifically to the Department of the Interior. Under section 2 of the bill, all applications by "eligible employees" of the BIA who are qualified in the order of their rating shall be given priority by the Department in consideration of their application for each vacancy occurring in the Interior Department, other than a vacancy for a preference eligible, including those entitled to veterans' preferences, reinstatement of such a preference eligible, or reemployment of a person entitled by law to veterans' re-employment rights.

Under section 3, an "eligible employee" is entitled to the next occurring vacancy, unless the Department files compelling reasons for passing over such employee with the U.S. Civil Service Commission. The Commission may then be required to determine the sufficiency of such reasons, and the Department would be required to comply with the findings of the Commission.

Section 5 authorizes the Civil Service Commission to prescribe regulations to carry out the bill's provisions.

Section 5(b) provides that R.R. 3466 would apply to vacancies occurring during a three-year period beginning after thirty days after enactment, except that the Civil Service Commission could extend such period for one year.

Background

A number of provisions concerning Indian preference in Federal "Indian Service" employment had been enacted by the Congress during the 18th and early 19th centuries (see for example 25 U.S.C. 41-47). However, the broadest and most modern provision, and the one on which the current Indian preference requirements are based, is section 12 of the Indian Reorganization Act of 1934 (43 Stat. 906; 25 U.S.C. 472) which provides:

"The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed without regard to civil-service laws, to the various positions maintained, new or hereafter, by the Indian Office, in the administration of functions or services affecting any Indian tribe. Such qualified Indians shall hereafter have the preference to appointment to vacancies in any such position."

Prior to 1972, the Indian preference provision was administered by the Bureau of Indian Affairs as applying only to initial appointments and not to subsequent promotions. In 1972 the BIA policy was changed to extend the preference to promotions, transfers from
outside the BIA, and reassignments within the BIA which improved promotional prospects. The 1972 policy provided the possibility for the Commissioner of Indian Affairs to grant exceptions to Indian preference by approving the selection and appointment of non-Indians when he considered it in the best interest of the Bureau. The 1972 policy did not extend Indian preference to purely lateral reassignments which did not improve promotional prospects. Indian preference is also utilized in establishing employee retention registers for use in reductions-in-force situations.

In addition, the BIA now encourages tribes to contract for control and operation of most BIA reservation level activities and the January 1975 enactment of section 112 of the Indian Self-Determination Act (83 Stat. 2205; 25 U.S.C. 450f) directs the contracting of most BIA activities "upon the request of any Indian tribe".

Case Law on Indian Preference

Two recent court decisions have upheld the validity of section 12 of the Indian Reorganization Act, and its application to initial hires, promotions, transfers and reassignments.

On April 25, 1974, the United States Court of Appeals for the District of Columbia in Freeman v. Norton, 517 F.2d 464, upheld an unreported District Court decision in a suit brought by four Indian BIA employees. The Court held that under the 1934 Indian preference provision Indian preference applies to the filling of all vacancies in the BIA, including initial hires, promotions, lateral transfers, and reassignments in the Bureau, and that no exceptions are possible where there is an at least a minimally qualified candidate who is eligible for Indian preference.

On June 17, 1974 the U.S. Supreme Court in an 8-0 decision (Martin v. Hancock, 417 U.S. 535) reversed the decision of a three-judge District Court for the District of New Mexico which had held, in a suit by a group of non-Indian BIA employees, that the 1934 Indian preference provision (25 U.S.C. 472) had been implicitly repealed by enactment of Section 11 of the Equal Employment Opportunity Act of 1972 (86 Stat. 111; 42 U.S.C. 2000 e-16), prohibiting discrimination in most federal employment on the basis of race.

The Court held that Indian preference was not a racial preference but, rather, it was an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups.
Departmental Assistance Program

This Department is aware that the present and recent decisions and the implementation of the Indian Self-Determination Act will, in many cases, have an adverse impact upon both non-Indian and Indian employees of the BIA. The Department is committed to providing placement assistance to those non-Indian and non-Indian employees of the BIA whose jobs or opportunities have been foreclosed by either Indian preference or the Department's Indian Self-Determination policy, and has been formulating a program to provide such assistance. This program is being implemented and will become fully operational in December, 1975. Some initial orientation sessions for the program have been held at both field and headquarters locations and further sessions are currently in the planning stage and will be held in the near future. A copy of the manual instructions which describe the program and the implementing procedures is enclosed for your information.

This program will assist BIA employees with placement within other Bureau in the Department, and with locating reassignments in other Federal agencies.

Within the Department, first priority placement assistance would be given to competitive career and career-conditioned BIA employees when: (1) there is a reduction in force and there are no opportunities for reassignment within the field; (2) an activity or function is being contracted out or the employee's position is being abolished and (3) it is imperative to reassign an employee because of certain hardships such as ill-health, loss of effectiveness with a tribe, or other compelling circumstances. The position would be made to employees under the mandatory placement provisions.

Secondary priority placement assistance would be afforded to competitive career and career-conditioned BIA employees who can demonstrate that they no longer have an opportunity for career advancement in the Bureau because of Indian preference regulations.

Recommendations

We are opposed to the enactment of H.R. 5465. Since the Department is committed to its assistance program, we believe that this available administrative solution should be adopted and tried before any solutions are mandated by legislation. In our judgment, our program, when implemented, will meet the objectives of H.R. 5465.

In our judgment, enactment of this legislation may result in an adverse impact upon the Department; it does not differentiate the need among employees for varying degrees of assistance; and it proposes an administrative process which may result in some personnel disruptions.
The broad application of section 2 could have a widespread impact upon the process of filling positions throughout the Department. Application of H.R. 2465 to the filling of positions internally through reassignment or promotion could go beyond any similar employment preference accorded under re-employment priority or separated career employee provisions of the Civil Service Commission.

The bill grants, in section 3, virtually mandatory employment rights to all "eligible employees" of BIA, regardless of their particular occupational situation. It would provide mandatory placement rights to individuals who might wish to leave BIA because they anticipate career obstacles but who have not actually been displaced. We would note that a significant disincentive exists between persons who are actually displaced through formal procedures and those whose opportunities are either limited or might be limited by Indian preference.

Enactment of this legislation may potentially affect the BIA program capability in that it could deprive the Bureau of Indian Affairs of a number of highly experienced employees with technical and managerial expertise at a time when their skills and experience are most needed by the BIA. We believe that the Departmental program now nearing implementation will provide a meaningful and gradual process for outplacement.

With regard to the provisions which concern the Department of Health, Education and Welfare, and the Civil Service Commission, we defer in our views to those two agencies.

The Office of Management and Budget has advised that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely yours,

[Signature]

Addressee Secretary of the Interior

Honorable David N. Henderson
Chairman, Committee on
Post Office and Civil Service
House of Representatives
Washington, D.C. 20515

Enclosure
United States Department of the Interior
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

October 17, 1975

PERSONNEL MANAGEMENT LETTER NO. 75-40 (330)

SUBJECT: Departmental Career Placement Assistance Program Regulations

To: Personnel Officers

Attached is an advance copy of the Departmental Career Placement Assistance Program (DCPA) Regulations.

The procedural requirements of the regulations are effective the date of this PML and are to be incorporated into the Departmental Manual pending receipt of the published regulations.

Training sessions will be conducted for all servicing personnel offices of the Department to provide guidance on the implementation and operation of DCPA. A schedule will be published in the near future listing locational sites and dates for training sessions.

[Signature]
Director, Organization and Personnel Management

Attachments

INQUIRIES: Mr. S. Donald Youso, Division of Organization and Manpower Management, Room 3023, Extension 7764

DISTRIBUTION: Bureau Headquarters

[Stamp: CONSERVE AMERICAN ENERGY]
Subchapter 1. Career Placement Assistance Program.

.1 Purpose. This chapter describes the Departmentwide Career Placement Assistance Program which provides placement assistance to eligible employees of the Department. The Departmentwide Career Placement Assistance Program (DCPA) provides the primary method through which employees can apply and be considered for placement assistance. It is the intent of the Department to provide continuing career opportunities for all employees. In the past, situations have existed in the Department where certain activities were expanding. At the same time, other activities were faced with reduction-in-force situations. This program provides coordination of Departmentwide movement and placement of employees from one activity to another.

.2 Policy. It is the policy of the Department to provide maximum placement assistance to employees whose careers are affected by reduction in force, contracting out of Departmental functions, changes in overflow employment, and the implementation of Indian preference in the Bureau of Indian Affairs.

.3 Coverage, Scope, Relationships and Definitions.

A. Departmentwide Career Placement Assistance Program.

(1) The Department Career Placement Assistance Program (DCPA) is the mechanism through which the Department assists employees who qualify under the program eligibility criteria to find other employment in the Department.

(2) The terms and provisions of this program shall apply to all eligible employees without regard to age, race, color, religion, sex, national origin, or any other non-merit factor.

(3) The Career Placement Assistance Program is an extension of and a supplement to existing Department and Civil Service Commission policies and programs and is not intended to supersede or negate other Department or CSC requirements concerning placement assistance.
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A. Departmentwide Career Placement Assistance Program.

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(3) The Career Placement Assistance Program is an extension of and a supplement to existing Department and Civil Service Commission policies and programs and is not intended to supersede or negate other Department or CSC requirements concerning placement assistance.
B. Basic Recruitment. Under the DCPA, employees who are eligible and have applied for career placement assistance, will be afforded maximum consideration for vacancies throughout the Department. It is the responsibility of each servicing personnel office to assure that DCPA applicants receive priority consideration for all vacancies for which they are qualified, and at geographical locations where they have indicated availability.

C. Category I Placement Assistance. Category I placement assistance provides eligible candidates consideration for all vacancies at their current grade level Departmentwide, for which they qualify, and offers placement opportunity in a continuing position when there is an available vacancy which matches their grade level and geographical location preference. Category I placement assistance will be given to competitive career and career-conditional employees of the Department under the following circumstances:

(1) When an employee is faced with loss of job caused by a reduction in force.

(2) When an employee of the Bureau of Indian Affairs must be reassigned because of documented life or health threatening circumstances beyond the employee’s control, and when reassignment cannot be effected within the Bureau by reason of the operation of Indian preference.

(3) When an employee of the Trust Territory of the Pacific Islands is displaced by a Micronesian and must return to the Continental United States.

(4) Eligibility for retention on a DCPA List for Category I placement assistance is limited to a two year period.

D. Category II Placement Assistance. Category II placement assistance provides eligible candidates consideration for all vacancies at their current grade level Departmentwide, for which they qualify. Category II placement assistance will be afforded to employees of the Department under the following circumstances:

(1) When career and career-conditional employees of BIA can demonstrate that opportunities for career advancement in the Bureau of Indian Affairs are not possible because of Indian preference regulations.
(2) When an employee in the Virgin Islands, Guam, Trust Territory of the Pacific Islands, and in American Samoa having re-
instatement eligibility, expresses an interest in returning to the
Continental United States.

(3) When an employee in the Excepted Service in the
Government of American Samoa without reinstatement eligibility,
wishes to return to the Continental United States, and is within
reach on a Civil Service Commission register for a position to be
filled that the employee is in the process of...

(4) Eligibility for retention on a DCAP List for Category II placement assistance is limited to a two year period.

E. Salary and Pay,

(1) Highest Previous Rate. An employee of the Department
who is placed through DCAP will have his/her pay fixed in the new
grade at a step which preserves, as far as possible, his/her last
earned rate, except when such rate is earned while serving under a
temporary position.

(2) Salary Retention. An employee placed in a lower grade,
who is eligible for salary retention under FPM Chapter 331, Sub-
chapter 5, will be accorded salary retention if such rate is higher
than that which can be provided under the highest previous rate rule.

F. Continuing Positions. It is intended that employees
referred for placement will be placed in continuing positions. A
continuing position is an unencumbered or uncommitted full time
position in the competitive service without a known termination date
that is scheduled to be filled, or any full-time position in the
competitive service without a known termination date encumbered by
a TAPER, or temporary appointee or procuree. The standard RIP
definition of a position that will continue for more than 90 days
will not be used as the criterion.

4. Responsibilities,

A. Department of the Interior-Office of the Secretary.

(1) The Office of Organization and Personnel Management
is responsible for:

(a) Designating a Career Placement Ad...
representative to assist employees eligible to apply for the program.

(b) Exploring placement efforts for applicants for the program, and referring to the bureau headquarters applicants who cannot be placed within that personnel officer's area of responsibility. Referrals made to bureau headquarters will document placement efforts that have been made.

(c) Insuring that all personnel actions are made in accordance with the requirements spelled out in this chapter.

(d) Determining employee eligibility for the program, counseling employees, and registering employees in the program in accordance with paragraph 370 DM 330, 1.4C.

(e) Establishing contacts with local Federal agencies to be appraised of their recruitment needs and referring employees who request Career Placement Assistance.

.S Procedures.

A. Advance Planning. The Departmentwide Career Placement Assistance Program presupposes that all servicing personnel offices, faced with a reduction-in-force situation, or other personnel situations requiring action and qualifying under the category I or Category II placement assistance aspects of this Chapter, will make every effort to effect satisfactory placements. As part of this effort, each office/bureau will develop an internal manpower relocation program. This program will provide for a systematic and equitable way to reassign bureau personnel to accommodate changes in program priorities and to provide for proper utilization of personnel within the bureau. Referrals by a bureau of individuals eligible for placement under the Career Placement Assistance Program should not be made until such time as all placement efforts have been exhausted within the bureau.

B. Eligibility.

(1) Employees are eligible to apply for the Career Placement Assistance Program who qualify under the criteria listed in 370 DM 330, 1.4C and B.
(2) Employees who receive a specific notice of reduction in force must apply for the program no later than 30 calendar days after the date of receipt of the RIF notice in order to be eligible.

(3) Employees applying for Category II Placement Assistance under the provisions of 370 DI 330, 1.30(1), must do so by September 30, 1974, in order to receive consideration.

(4) Career or career-conditional employees of the Bureau of Indian Affairs, not eligible for Indian preference, employed after the Supreme Court decision (Mancari vs Norton) of June 17, 1974, are not eligible for Category II Assistance. This does not obviate the opportunity for placement assistance under the Category I provisions of this chapter.

C. Application.

(1) Application is voluntary on the part of eligible employees, and only those who are willing to accept employment at other activities within the Department should apply.

(2) When an eligible employee applies for the DCBA, the losing servicing personnel office obtains an updated SF-171, a supervisory evaluation, and a complete Career Placement Assistance Form DI 1832. This form is included as attachment A to this chapter, and should be obtained through the usual supply channels. Until regular stock of DI 1832 is obtained, the form may be reproduced locally. A copy of SF-171, a copy of the supervisory evaluation, and a copy of DI 1832 are sent by the losing personnel office to the Bureau Headquarters for appropriate action. A copy of DI 1832 should be given to the employee. A copy of DI 1832 will be retained by the servicing personnel office.

(3) Eligible employees will be given a choice in selecting geographical areas where they are willing to work. In the application process, the losing personnel office should advise applicants that a broad geographical preference area will afford increased opportunities for placement. However, applicants must be cautioned that completion of the application form requesting placement consideration in a specific geographic area means they must accept a position if offered in that particular geographic area. If they do not, their names will be removed from the DCBA List and they will not be eligible for the program.
Personnel Retirement, Selection and Placement (General)

(4) Employees may apply for not more than three occupational series for which they are qualified and available which do not exceed their present grade level or the grade level held at the time of the reduction-in-force action. They may also apply for acceptable lower grade positions for which they qualify. Employees may not apply at grade levels to which temporarily promoted.

(5) Applications must be submitted to the Bureau Headquarters as soon as possible prior to the proposed date to terminate the employee or to allow for reassignment in a hardship case. The Bureau Career Placement Assistance Coordinator will review the application to determine if all Bureau placement efforts have been exhausted. This must be accomplished no later than 20 days after the application is received. Only then will the request be forwarded to the Department. If placement assistance is requested because of medical reasons, a statement from a medical doctor must accompany the application.

B. Employee Obligations. Applicants must cooperate with and keep their servicing personnel office advised of current address and telephone number where they can be contacted. They must notify such office immediately if for some reason they are not available to accept Department employment, or if they decide to withdraw as a participant in the program.

E. Counseling.

(1) Eligible employees will be counseled, by the losing personnel office, regarding their rights and obligations under the UCPA and will be provided information about Department activities in which they have expressed interest. If appropriate, applicants should also be counseled on the advantage of considering lower grade positions because of the additional opportunity for selection which will be afforded. Upon completion of the counseling session and preparation of the Career Placement Assistance Application Form, DC 152, both the applicant and the representative of the servicing personnel office will sign the forms.

(2) This counseling will be important for all employees, but especially for employees of the Bureau of Indian Affairs who are applying for Category II placement assistance. These employees must receive guidance regarding career opportunities, and it must be determined if the employee has other career interests, or specialized skills or experience which can be identified. These applicants...
should be advised that, realistically, it may not be possible to provide immediate placement and a reasonable length of time should be allowed for suitable vacancies to be located.

(3) When an applicant fails to receive an offer after a reasonable period of time (30-90 days) and the losing servicing personnel office determines that it is unlikely that placement will be made because of the size of the original area or the employee's restrictions as to availability (positions, locations, or acceptable grade level) the employee will be considered on the various possibilities of increasing the opportunities for placement.

F. Preparation and Distribution of DCPS Lists.

(1) Career Placement Assistance Program lists will be prepared by the Departmental Career Placement Assistance Coordinator from the application forms (Attachment A) provided by the Headquarters Office of each bureau, and will follow the format found in Attachment B. Copies of the list will be distributed to each major servicing personnel office Department-wide, and to each Bureau Headquarters as listed in Attachment C. The servicing personnel offices are responsible for further distribution of the lists to any office under the jurisdiction which exercises appointing authority.

(2) The lists will be divided into two groups, individuals eligible for Category I placement consideration and individuals eligible for Category II placement consideration.

(3) A new and complete list of current applicants will be prepared and distributed at the beginning of each month. Periodically during the month update information will be distributed by the Departmental Career Placement Assistance Coordinator.

(4) Losing personnel offices are responsible for keeping the Departmental Career Placement Coordinator informed of changes to be made in the lists.

G. Selections from Career Placement Assistance Program Lists.

(1) When a servicing personnel office receives a DCPS List of eligibles for placement consideration, the list will be screened to determine if there are applicants whose skills match existing vacancies.
(2) If, after screening the DCPA List there are applicants whose skills match vacancies, requests will be made for the SF-171's of the available applicants. Contact is made directly with the the Departmental Program Coordinator to obtain the SF-171's.

(3) Category I and Category II applicants will be afforded, as a minimum, the same consideration as eligibles on an Interior Reemployment Priority List in every location for which they have indicated availability. Selections of DCPA applicants must be in accordance with the procedures governing selection from a SPL as described in 5 CFR Chapter 320, Subchapter 2. Category I and Category II applicants may be selected noncompetitively for lateral reassignment or for placement in positions of a lower grade level. If the appointing authority announces a position through merit promotion procedures, Category I and II applicants must be entered into the promotion file and given maximum consideration for placement.

(4) Selections from the DCPA lists must be made in category order. Persons in Category I must be selected before persons in Category II. The losing activity will release employees within ten days after positions are accepted, or in no case later than 30 days without mutual agreement between the releasing and gaining activities.

(5) It is the responsibility of each bureau headquarters to monitor placement efforts within their bureau. If Category I applicants are not placed within 60 days after distribution of a DCPA List or if Category II applicants are not placed within 120 days after distribution of a DCPA List, the Office of Organization and Personnel Management will review the placement efforts of each bureau and determine the appropriate action required to effect placement. Such measures for Category I may include, but are not limited to, action by the Office of the Secretary in imposing Departmentwide hiring restrictions for specific occupations, locations or organizations, directed placement procedures, or other action which will be necessary to effect placement. Bureau personnel officers will be consulted prior to implementation of extended placement procedures.
H. A Valid Offer. A valid offer is the offer of a continuing position by a substantial activity which meets the grade level(s) and locations, for which the employee has applied. Provided the offer includes payment of travel and transportation expenses either by the gaining or losing office when relocation is required. Only one position offer will be made to an applicant eligible for either Category I or Category II Placement Assistance.

I. Payment of Travel Expenses. As a general rule, the losing office will pay the applicable travel and transportation expenses. However, arrangements may be made, through negotiation between the gaining and losing offices, for cost sharing of travel expenses.

J. Removal From the Program. When an applicant accepts a position, declines a designated valid offer as specified in paragraph 330 of 320, 1.5, fails to keep the losing servicing personnel office informed of his/her whereabouts, or requests voluntary removal from the program, the losing servicing personnel office will immediately instruct the Department Career Placement Coordinator to remove the applicant from the program. To the extent possible, OCPA lists should contain only available eligibles. In view of this, the above notification should be made initially by telephone. This will be followed by a confirmation memorandum stating the applicant's name, organization, servicing personnel office, and the reason for removal.

K. Records and Reports.

1. Losing servicing personnel offices will maintain an individual folder on each employee applicant in the Department Career Placement Assistance Program. The folder will be maintained for a period of one year after the applicant is removed from the program and will contain the following information:

(a) A copy of the Career Placement Assistance Application Form (DI 1332).

(b) Dates of counseling, name of individual providing counseling.

(c) Position title, series, and grade at time of application.
(d) Copies of any general or specific reduction-in-force, separation or demotion notices, functional transfer offers, and declinations.

(e) Offers received, accepted, or declined and from which organizations or activities.

(f) Reasons for declinations.

(g) Date removed from the Program and the reason.

(2) Each servicing personnel office will submit a 60-day report to their bureau headquarters detailing placement efforts that have been made for applicants of the RPRA. The report will list the total number of Category I and Category II applicants considered and the successful placements made.

Consolidated reports will be submitted to the Director, Office of Organization and Personnel Management by each bureau headquarters.
DEPARTMENT OF THE INTERIOR

CAREER PLACEMENT ASSISTANCE APPLICATION

This form is designed to be used by individuals applying for the Departmental Career Placement Assistance Program (DCPA). Application is voluntary on the part of eligible employees, and only employees applying for the DCPA will be provided placement assistance. The information contained on this form will be used to establish eligibility and provide placement assistance for applicants of the DCPA as provided in SF 171.

Form will be completed in triplicate. One copy is retained by the servicing personnel office; one copy is given to the applicant; one copy is forwarded to the bureau headquarters with the SF-171 and supervisory evaluation.

To be completed by servicing personnel office in consultation with employee.

I. PERSONAL DATA

1. Name: ________________________________

2. Position Title: ________________________________

3. Organization and Employment Location: ________________________________

4. Service Computation Date: ____________________
   Year   Month   Day

5. Category Group: ______
   (I or II)

6. Reason for Requesting Assistance:

7. Special Family Needs: Health, Schools, or other unique problems:
II. POSITIONS

The positions below are those for which the employee is qualified under CSC Handbook X-113 and in which the employee has expressed interest.

<table>
<thead>
<tr>
<th>Pay Plan</th>
<th>Series</th>
<th>Grade(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>3.</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Lowest Acceptable Salary ________
Lowest Acceptable Grade ________

III. LOCATIONS

Indicate below the geographic areas where the employee is available to work.

1. ________
2. ________
3. ________
4. ________
5. ________

If an employee declines an offer of a position and grade and location for which application is made, the applicant will be removed from the program.

All applicants must keep their servicing personnel office advised of current address and telephone number where they can be reached and if for any reason they are not available to accept departmental employment. Employees who fail to keep the servicing personnel office informed of their whereabouts and cannot be located will be removed from the program.

Employee's Signature ___________ Date ________

Personnel Office Representative's Signature ___________ Date ________

Servicing Personnel Office ________________________________

Employee's Signature ___________ Date ________

Personnel Office Representative's Signature ___________ Date ________

Servicing Personnel Office ________________________________
### CAREER PLACEMENT ASSISTANCE PROGRAM ELIGIBLES

<table>
<thead>
<tr>
<th>Name</th>
<th>(2) Present Pay/ Series/Grade</th>
<th>(3) Title/Duty Station</th>
<th>(4) Other Series/ Grade Quailed</th>
<th>(5) Category Group</th>
<th>(6) Accp. Geog. Location</th>
<th>(7) Accp. Grade</th>
<th>(8)</th>
</tr>
</thead>
</table>

Servicing Personnel Office number identifies the office which submitted the Career Placement Assistance Application. See Attachment C for listing.
SERVICING PERSONNEL OFFICE IDENTIFICATION CODES

1101 Office of the Secretary - Division of Personnel Services
1119 Alaska Power Administration
1104 Southeastern Power Administration
1103 Southwestern Power Administration
1102 Bonneville Power Administration
1109 Bureau of Mines - Headquarters Office
1101 Bureau of Mines - Pittsburgh Office
1102 Bureau of Mines - Denver Office
1110 MESA - Headquarters Office
1111 MESA - Pittsburgh Office
1112 MESA - Denver Office
1115 Fish and Wildlife Service - Headquarters Office
1119 Fish and Wildlife Service - Portland Region 1
1115 Fish and Wildlife Service - Albuquerque Region 2
1114 Fish and Wildlife Service - Twin Cities Region 3
1114 Fish and Wildlife Service - Atlanta Region 4
1113 Fish and Wildlife Service - Boston Region 5
1115 Fish and Wildlife Service - Denver Region 6
1117 Bureau of Outdoor Recreation
1110 Bureau of Land Management - Headquarters Office
110550 Bureau of Land Management - Alaska State Office
110504 Bureau of Land Management - California State Office
110556 Bureau of Land Management - Oregon State Office
110552 Bureau of Land Management - Denver Service Center
1112 Geological Survey - Headquarters Office
11061 Geological Survey - Southeast Region Office
11062 Geological Survey - Central Region Office
11063 Geological Survey - Western Region Office
11064 Geological Survey - Mid-Continent Personal Office
11102 National Park Service - Headquarters Office
111021 National Park Service - National Capital Parks
11104 National Park Service - Southeast Regional Office
11106 National Park Service - Midwest Regional Office
11108 National Park Service - Western Regional Office
11107 National Park Service - Mid-Atlantic Regional Office
11109 National Park Service - North Atlantic Regional Office
11104 National Park Service - Pacific Northwest Regional Office
11105 National Park Service - Southwest Regional Office
11106 National Park Service - Rocky Mountain Regional Office
11108 National Park Service - Harpers Ferry Center
1107 Bureau of Reclamation - Headquarters Office
110710 Bureau of Reclamation - Engineering & Research Center
110701 Bureau of Reclamation - Pacific Northwest Regional Office
110702 Bureau of Reclamation - Mid-Pacific Regional Office
110703 Bureau of Reclamation - Lower Colorado Regional Office
110704 Bureau of Reclamation - Upper Colorado Regional Office
110705 Bureau of Reclamation - Southwest Regional Office
110706 Bureau of Reclamation - Upper Missouri Regional Office
110707 Bureau of Reclamation - Lower Missouri Regional Office
Bureau of Indian Affairs - Headquarters Office
Bureau of Indian Affairs - Billings Area Office
Bureau of Indian Affairs - Muskogee Area Office
Bureau of Indian Affairs - Navajo Area Office
Bureau of Indian Affairs - Portland Area Office
Bureau of Indian Affairs - Administrative Services Center
Bureau of Indian Affairs - Juneau Area Office
Bureau of Indian Affairs - Albuquerque Area Office
Bureau of Indian Affairs - Phoenix Area Office
To All Tribal Chairmen:

Indian preference for employment in the Bureau has ranked very high among the major policy issues facing the Bureau during the past two and one-half years. Now that the Supreme Court has upheld employment preference for Indians, a secondary question of how the determination is made as to who has Indian preference must be faced. The present criteria of "one-fourth degree of Indian blood of a Federally-recognized tribe" which was established by Executive Order, has been challenged through administrative appeal and as of April 17, 1975, by court action.

In October, 1974 I established a BIA Study Committee to give me a recommendation as to how we should proceed to more effectively advance our Indian preference policies including a thorough review of the existing policy statement. The majority of this Committee recommended that the present policy be changed to more accurately reflect the preference requirements set forth in Section 19 of the Indian Reorganization Act (IRA).

In December, 1974 I requested that the Solicitor research the question of Indian employment preference and advise me concerning the legal basis for the administration of this policy. In April the Solicitor issued his opinion which advised that the Indian Reorganization Act of 1934 contained the primary statutory basis for Indian preference, and that this Act did in fact supersede the Executive Orders, upon which the present policy is based. According to the Solicitor's research, the Bureau's Indian preference policy in terms of qualifications for BIA employment, must be expanded to provide "preference" to all members of tribes organized under the Indian Reorganization Act of 1934 regardless of degree of Indian blood.

The expansion of Indian preference employment eligibility represents a significant policy change for the Bureau. The Solicitor has advised that some flexibility does exist for
the extension of the "tribal membership" criteria to other Federally-recognized non-IRA tribes. Before we start the action necessary to make this policy change, I would like to have an expression from you and your Tribal Council on this matter. Based on the recommendations from the Committee I appointed to study this matter and the research and findings of the Solicitor, I am proposing that the following be adopted as the BIA policy for Indian preference in employment:

"An Indian has preference in initial appointment, including lateral transfer from outside the Bureau, reinstatement and promotion. To be eligible for preference, an individual must meet any one of the following:

(a) a member of any recognized tribe now under Federal jurisdiction, or

(b) a descendant of a member of a Federally-recognized tribe who was on June 1, 1934, residing within the boundaries of any Indian reservation under Federal jurisdiction (For purposes of definition, the residing of either the descendant or the antecedent members satisfies the requirements of this provision.), or

(c) one-half or more Indian blood, or

(d) an Eskimo or a person descended from the other aboriginal peoples of Alaska, or

(e) a person one-fourth or more Indian blood who is a descendant of a member of the Five Civilized Tribes in Eastern Oklahoma and the Osage tribe that have not organized under the Oklahoma Welfare Act, or

(f) a person of one-fourth degree of more Indian blood of a Federally-recognized tribe who was eligible for "preference" under existing policy as of the effective date for this new policy."

The alternative would be to follow a very strict interpretation of the 1934 Act which would mean that only members or descendants of members of tribes organized under the IRA and other related acts would be eligible for employment preference without
regard to degree of Indian blood. The following represents the optional approach to the proposed policy:

"An Indian has preference in initial appointment, including lateral transfer from outside the Bureau, reinstatement and promotion. To be eligible for preference, an individual must meet any one of the following:

(a) a member of any recognized tribe organized under the Indian Reorganization Act and other related acts now under Federal jurisdiction, or

(b) a descendant of a member of a Federally-recognized tribe organized under the Indian Reorganization Act or other related acts who was on June 1, 1934, residing within the boundaries of any Indian reservation under Federal jurisdiction (For purposes of definition, the residing of either the descendant or the antecedent members satisfies the requirements of this provision.), or

(c) one-half or more Indian blood, or

(d) an Eskimo or a person descended from the other aboriginal peoples of Alaska, or

(e) a person one-fourth or more Indian blood who is a descendant of a member of the Five Civilized Tribes in Eastern Oklahoma and the Osage tribe that have not organized under the Oklahoma Welfare Act, or

(f) a person of one-fourth degree of more Indian blood of a Federally-recognized tribe who was eligible for "preference" under existing policy as of the effective date for this new policy."

Two things should be noted in your considerations: (1) This policy change effects BIA employment qualifications only and has no bearings on program or service eligibility. (2) This proposal contains a provision which maintains the eligibility for all persons covered under the present policy.
I would like to have your response to this proposed policy change by September 15, 1975. If possible, I would like to have a Council resolution expressing the position of the majority of the Council on this matter. I recognize that this is a short time allowance, particularly for a Council resolution. The reason for the short response time is that a case has been filed in Federal court on the very question of tribal membership in an IRA tribe and eligibility for Indian preference. It is, therefore, very important that we move as quickly as possible in determining the new policy for Indian preference and not have the courts directing the Indian employment preference.

Your cooperation and assistance in this vital policy area will be appreciated.

Sincerely yours,

[Signature]

Commissioner of Indian Affairs
Attached is a letter which I plan to send out to all Tribal Chairmen soliciting their recommendations for the revision of the Bureau's Indian preference employment policy. This letter is based on the Solicitor's opinion given on April 9.

I would like for you to review this letter immediately and phone your comments and recommendations to Jim Robey on or before July 18. I regret the short turn-around time in this vital matter. However, I feel we must get the letter to the Tribal Chairmen in the mail by July 28 in order to have their responses by September 1. This very tight timetable is dictated by a court action on this subject now pending in the Aberdeen area.

Your cooperation and assistance is greatly appreciated.

Maurice Thompson

Attachment
To All Tribal Chairmen:

Indian preference for employment in the Bureau has ranked very high among the major policy issues facing the Bureau during the past 2 1/2 years. Now that the Supreme Court has upheld the policy of employment preference for Indians, the secondary question of how the determination is made on who is an Indian must be faced. The present policy of "1/4 degree Indian blood of a Federally-recognized tribe" which was established by 1934 Executive Order, has been challenged through administrative appeal and as of 4/17/75 by court action.

In December, 1974 I requested that the Solicitor research the question of Indian employment preference and advise me concerning the legal basis for the administration of this policy. In April the Solicitor issued his opinion which advised that the Indian Reorganization Act of 1934 contained the primary statutory basis for Indian preference, and that this Act did in fact supersede the 1934 Executive Order, upon which the present policy is based. According to the Solicitor's research, the Bureau's Indian preference policy, in terms of qualifications for BIA employment, must be expanded to provide "preference" to all members of tribes organized under the Indian Reorganization Act of 1934 regardless of degree of Indian blood.
The expansion of Indian preference employment eligibility represents a significant policy change for the Bureau. The Solicitor has advised that some flexibility does exist for the extension of the "tribal membership" criteria to other federally-recognized non-IRA tribes. Before we start the actions necessary to make this policy change, I would like to have an expression from you and your Tribal Council as to the policy that should be adopted. Based on the Solicitor's findings there are two primary options that can be reasonably considered.

Option I contains the basic requirements derived from the Solicitor's research. That is that enrolled members of an IRA tribe are eligible for Indian preference for BIA employment. Under this option all other persons from other federally recognized (non-IRA) tribes qualify on the same basis as they do now; one quarter or more of Indian blood.

Option II would extend the tribal membership basis to all federally-recognized tribes as a qualification for Indian preference eligibility; in other words, the proviso would be as written, that enrolled members of all federally-recognized tribes would be eligible for Indian preference. Additionally, the one quarter degree requirement would be maintained primarily for descendants of members of the five civilized tribes in Oklahoma.

Two things should be noted in your considerations: (1) This policy change affects BIA employment qualifications only and
has no hearings on program or service eligibility.

(2) Each option contains a provision which maintains the eligibility for all persons covered under the present policy.

I would like to have your response, in terms of a preferred option, by September 1. If possible, I would like to have a Council resolution expressing the wishes of the majority of the Council on this question. I recognize that this may be a short time span, particularly if a Council resolution is requested. The reason for the short response time is that a case has been filed in Federal court on the very question of tribal membership in an IRA tribe and eligibility for Indian preference. It is, therefore, very important that we move as quickly as possible in determining the new policy for Indian preference.

Your cooperation and assistance in this vital policy area will be appreciated.

Sincerely,

Commissioner of Indian Affairs
Option I

Under this option persons may qualify for "Indian Preference" in seeking employment with the Bureau of Indian Affairs who meet either of the following qualifications of Indian ancestry:

- Members of tribes organized under the Indian Reorganization Act.
- Persons who are 1/4 degree Indian blood of a Federally recognized tribe.

Option II

Under this option persons may qualify for "Indian Preference" in seeking employment with the Bureau of Indian Affairs who meet either of the following qualifications of Indian ancestry:

- Members of Federally-recognized tribes.
- Persons who are 1/4 degree Indian blood of a Federally recognized tribe.
MEMORANDUM

Mr. James Robey, Office of the Commissioner

DATE: 11 JUL 1975

COM: Acting Chief Personnel Officer

SUBJECT: Draft of Letter to the Tribal Chairmen re: Indian Preference

I have discussed your draft with Mr. Billy by telephone. It is his wish that we proceed with the letter to the Tribal Chairmen which was worked out in accordance with discussions with the Deputy Commissioner and the Commissioner. The letter needs some editing and change in format, but otherwise indicates the thinking of the participants in a meeting last month with Deputy Commissioner Frankel, Ron Esquerra, Les Gay of Tribal Operations and others.

As a side note on your draft, however, you state present policy is based on a 1934 Executive Order which was superseded by the Indian Reorganization Act. This is in error. Present policy and Civil Service Commission regulations are based on Ex.O. 8043 signed on January 31, 1939. Personnel in the Bureau and in the Department are of the opinion the regulations are based on an interpretation of the IRA in order to implement the provisions of the Act in a "reasonable and equitable" manner, as stated in the present regulations.

In the second paragraph you also state "According to the Solicitor's research the Bureau's Indian preference policy, in terms of qualifications for Section 31A employment, must be expanded --". We believe the word should be "may" since it is an opinion we are discussing, not a court order. The Chairman of the Interior and Insular Affairs Committee in his letter of May 19, 1975, addressed to the Solicitor questions whether legal opinions of Associate Solicitors are binding upon employees of the Department in their official activities, unless it has been determined that such opinions are binding. It does not appear the Commissioner is mandated to change policy or regulations. It should be noted that the particular opinion of April 9, 1975, was questioned in the letter cosigned by Senator Jackson and Congressman Meeds as to its validity as a Secretarial position.

[Signature]

[Inc. 100]

[Stamp: RECEIVED]

[Stamp: AUG 8 1975]
To All Tribal Chairmen:

Indian preference for employment in the Bureau has ranked very high among the major policy issues facing the Bureau during the past 2 1/2 years. Now that the Supreme Court has upheld the policy of employment preference for Indians, the secondary question of how the determination is made on who is an Indian must be faced. The present policy of "1/4 degree Indian blood of a Federally-recognized tribe" which was established by 1934 Executive Order, has been challenged through administrative appeal and as of 4/17/75 by court action.

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Option I contains the basic requirements derived from the Solicitor's research. That is that enrolled members of an IRA tribe are eligible for Indian preference for BIA employment. Under this option all other persons from other Federally-recognized (non-IRA) tribes qualify on the same basis as they do now; one quarter or more of Indian blood.

Option II would extend the tribal membership basis to all Federally-recognized tribes as a qualification for Indian preference eligibility; in other words, the proviso would be as written, that enrolled members of all Federally-recognized tribes would be eligible for Indian preference. Additionally, the one quarter degree requirement would be maintained primarily for members of tribes in Oklahoma whose rolls have been closed for several years.

Two things should be noted in your considerations: (1) This policy change affects BIA employment qualifications only and
has no bearing on program or service eligibility.

(2) Each option contains a provision which maintains the eligibility for all persons covered under the present policy.

I would like to have your response, in terms of a preferred option, by September 1. If possible, I would like to have a Council resolution expressing the wishes of the majority of the Council on this question. I recognize that this may be a short time span, particularly if a Council resolution is requested. The reason for the short response time is that a case has been filed in Federal court on the very question of tribal membership in an IRA tribe and eligibility for Indian preference. It is, therefore, very important that we move as quickly as possible in determining the new policy for Indian preference.

Your cooperation and assistance in this vital policy area will be appreciated.

Sincerely,

Commissioner of Indian Affairs
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Under this option persons may qualify for "Indian Preference" in seeking employment with the Bureau of Indian Affairs who meet either of the following qualifications of Indian ancestry.

- Enrolled members of tribes organized under the Indian Reorganization Act.

- Persons who are 1/4 degree Indian blood of a Federally-recognized tribe.

-----------------------------

Option II

Under this option persons may qualify for "Indian Preference" in seeking employment with the Bureau of Indian Affairs who meet either of the following qualifications of Indian ancestry.

- Enrolled members of Federally-recognized tribes.

- Persons who are 1/4 degree Indian blood of a Federally-recognized tribe.
## INDIAN PREFERENCE ALTERNATIVES:

1. **No Change—Continue to Operate as We Have Been**

### Advantages
- Uniformity and Consistency. One nationwide standard that is uniformly accepted by employees and Tribes.
- Operational Guidance. Presidential Executive Orders, Civil Service Commission, Indian, and Bureau regulations are all related to 1/8 criteria. Our Indian appointment authority is based on the Executive Order and we would not have to request another Order.
- Indian. A person would have to be at least 1/8 degree Indian blood before we recognize him as an Indian.
- Federal Employment. The 1/8 degree requirement is designed for Federal employment procedures on a national scale. Many present BIA employees now are able to transfer to other Federal Agencies.
- Lack of Discontent. We have had very few appeals by employees or applicants concerning the 1/8 degree requirement over the last 15 years. No organized employee group has indicated that they desire to change this criteria.

### Disadvantages
- The Indianization would not receive any of the present law and administrative appeal on the 1/8 criteria.
- Court Decision. There is no result in a Court policy. The determination which any or any not conform with BIA or Tribal desires.

---

**Federal Employment.** The 1/8 degree requirement is designed for Federal employment procedures on a national scale. Many present BIA employees now are able to transfer to other Federal Agencies.
(7) ADJUST ASSOCIATE SCHOOLING REQUIREMENTS FROM TRIBES (i.e.,
Indians are members of federally-recognized tribes, or descendants of
members of federally-recognized tribes who were residing within the
boundaries of a reservation on June 1, 1934, or all other persons of
one-half or more degree Indian ancestry, whether or not a member of
a federally-recognized tribe and whether or not the source of ancestry
is attributable to more than one federally-recognized tribe) WITH THE
1/2 FEE PROTEO AND ADMINISTRATIVELY ESTABLISH A 1/8 DEGREE CRITERIA FOR
ALL OTHER THINGS.

Adventures

Law  Preference regulations
would conform with BLM pro-
visions for TRA tribes.

Tribal Members. This would
eliminate the situation where
tribal members of TRA tribes
who are less than 1/6 degree
are treated differently than
other tribal members.

Lawsuits. This would settle
all suits from members of TRA
tribes appealing the 1/6
criteria.

Disadvantages

Indians. This would create a situation
where the Bureau would be granting pre-
ence to individuals of little or no In-
cluded under the TRA tribal membership
proviso.

Current Regulations. Presidential the
Order, CEC criteria and Departmental
regulations are all based on 1/6 degree
requirement and they would have to be
changed.

Differing Criteria. A dual system for
and non-TRA tribes would have to be
established.

Indian Appointments. Indian appointed
appointments are based on 1/6 criteria
we have no authority to change using
different criteria. An order 1/6
Indians under the TRA criteria until a
Executive Order was issued. This line
would place us in the position of using
initial appointments on 1/6 criteria to
other personnel actions for TRA tribal
members on a different criteria.

Executive Order. A new Executive Order
would have to be issued return to a old,
in current appointment procedures, it
could take up to two years to complete.

Five Civilized Tribes. Tribes with
closed membership roles would be over

Best Possible Scan from Poor Quality Original
Advantages

Would treat all tribal members the same.

NCAI supports this criteria.

Exchanges the benefits of tribal membership.

Disadvantages

Require a new Executive Order.

Consideration would have to be given by each personnel office to the membership criteria of more than 400 separate tribal entities.

Would place an additional burden on NIA staff in developing and maintaining current tribal membership rules, a task that is already large.

Without current roles, Personnel Office could not determine who was and who was not Indian. This would delay filling positions and could result in improper appointments or in Court ordered fees on hiring until roles are current.

Would not be appropriate for the Five Civilized Tribes as they have placed membership roles. The requirement of tribal constitutions allowing the enrollment of descendents and the continuing enrollment on a current base could change society this discrimination.

Tribes might not accept “Indian” candidates for NIA positions whose Indigenous status based on other criteria.

Would not allow Indian employees to transfer to other Civil Service positions.
(ii) IRAVIAL MEMBERSHIP WITH \( \frac{1}{2} \) PROVISION AND \( \frac{1}{2} \) DEGREE FOR ALL OTHER FEDERAIIY RECOGNIZED TRIBES.

<table>
<thead>
<tr>
<th>Advantages</th>
<th>Disadvantages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Basically the same as option #2.</td>
<td>Same as Option #2</td>
</tr>
<tr>
<td>Eliminate Indians from non-Federally recognized Tribes.</td>
<td></td>
</tr>
</tbody>
</table>
NOTE: We have also listed a fifth option. This option allows for nation-wide tribal consultation prior to any final decision. This could be done prior to implementing any of the other options.

(5) TRIBAL CONSULTATION PRIOR TO ANY ACTION

<table>
<thead>
<tr>
<th>Advantage</th>
<th>Disadvantage</th>
</tr>
</thead>
<tbody>
<tr>
<td>This option gives the tribes the opportunity</td>
<td>This approach would not resolve any</td>
</tr>
<tr>
<td>for input on this major policy decision prior</td>
<td>of the immediate personnel problem.</td>
</tr>
<tr>
<td>to any final decision.</td>
<td></td>
</tr>
<tr>
<td>Could request the Courts for a stay on pending</td>
<td></td>
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<tr>
<td>law suits until this nation-wide review</td>
<td></td>
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<tr>
<td>complete.</td>
<td></td>
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<tr>
<td>Would anticipate top</td>
<td></td>
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<tr>
<td>Congressional interest</td>
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<tr>
<td>in any change of policy</td>
<td></td>
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<tr>
<td>Jackson-Weeds letter</td>
<td></td>
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<tr>
<td>remained Associate Solicitor's letter.</td>
<td></td>
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<tr>
<td>Copy attached</td>
<td></td>
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</tbody>
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Attachment - TRIBAL MEMBERSHIP (includes Alaska). Figures given are estimates.

<table>
<thead>
<tr>
<th>Category</th>
<th>Figures</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total membership of BIA recognized tribes</td>
<td>600,000</td>
</tr>
<tr>
<td>IRA tribal membership</td>
<td>600,000</td>
</tr>
<tr>
<td>Non-IRA tribal membership</td>
<td>200,000</td>
</tr>
<tr>
<td>Indians possessing at least one quarter degree of Indian blood (3/4 of total Indian population)</td>
<td>600,000</td>
</tr>
<tr>
<td>Number of IRA tribes (50% current roll)</td>
<td>206</td>
</tr>
<tr>
<td>Number of non-IRA tribes (10% current roll)</td>
<td>278</td>
</tr>
<tr>
<td>Number of IRA tribes requiring minimum of 1/6 degree (generally no blood degree requirement for base roll, meaning blood degree requirement applicable to persons under 18 years.)</td>
<td>?</td>
</tr>
<tr>
<td>Number of non-IRA tribes requiring 1/4 minimum (generally no blood degree requirement for base roll, meaning blood degree requirement applicable to persons under 18 years.)</td>
<td>?</td>
</tr>
<tr>
<td>Number of Indians at least eighteen years of age (ratio 4 children to 6 adults)</td>
<td>270,000</td>
</tr>
</tbody>
</table>
Dear Mr. Chairman:

Historically, the Bureau has always granted preference to Indians in employment. This preference has been greatly expanded within the last few years to include filling of all vacancies whether for initial hire, or as a result of promotions, lateral transfer or reassignment in the Bureau. The Supreme Court's ruling in *Hernadi v. Morton* affirmed that this expanded preference policy is consistent with law. There can be no exceptions to this policy. The growing importance of Indian preference has led to an examination of the Bureau's criteria for establishing eligibility for Indian preference.

A number of laws established Indian preference in employment, beginning with the establishment of the Bureau. Gradually, regulations were issued and appointing procedures formalized which included instructions for determining who was an Indian. This process resulted in an Executive Order signed by President Roosevelt in 1939 which allowed the Bureau to appoint Indians of one-fourth or more degree Indian blood to positions without regard to Civil Service Competitive rules. The Bureau throughout the years has followed this blood quantum requirement; and the additional requirement that the applicant must be a member of a Federally recognized tribe in establishing its regulations defining Indian for employment preference purposes.

Our personnel regulations have been built around this requirement since 1939. The Civil Service Commission expanded Indian preference to reduction-in-force actions in the early 1950's using the same criteria to determine who is an Indian.
We have used this criteria to grant Indian preference appointments and more recently to identify employees entitled to preference in promotions and other personnel actions.

Recently, a number of studies have questioned the one-quarter degree requirement. They point out that the Indian Reorganization Act, the most recent law establishing Indian preference, defines an Indian using different criteria. Under the IRA, Indians are:

(A) all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction.

(B) all persons who are descendants of such members who were on June 1, 1934, residing within the present boundaries of any Indian reservation.

(C) all persons of one-half or more Indian blood.

(D) Eskimos and other aboriginal Indians of Alaska.

The IRA definition has no effect on Tribes that did not accept it.

I need your views and opinions. Do we need to change our present one-quarter degree requirement? The alternative would be to use IRA criteria for those Tribes organized under that Act and another acceptable criteria for non-IRA Tribes (perhaps the present one-quarter criteria). This multiple system in identifying individuals eligible for Indian preference admittedly would be more complex to administer from our point of view. This, however, is not the real issue. Whatever system we have must be consistent with law and to the maximum extent possible with the desires of the Indian tribes and their people.

I would appreciate your views on changing or retaining our criteria of using one-quarter degree Indian blood and membership in a Federally recognized tribe to identify Indian preference eligibles.

Would you favor retaining the present one-quarter requirement, or adopting the IRA alternative or seeking legislation to allow implementation of other criteria. Could I have your views within 60 days.

Sincerely yours,

Commissioner of Indian Affairs
Memorandum

To: Commissioner of Indian Affairs
From: Associate Solicitor, Indian Affairs
Subject: Definition of "Indian" for Preference Eligibility

By memorandum dated December 9, 1974, you requested an opinion on the legal constraints on the definition of the term "Indian" for purposes of employment preference, so as to aid in deciding certain appeals by Bureau employees claiming preference. Some of these appeals involve the issue of whether persons who are enrolled members of a federally-recognized tribe organized under the Indian Reorganization Act (IRA), 25 U.S.C. § 461, et seq., are entitled to preference eligibility under section 472 by virtue of the definition of the term "Indian" under section 479, even though they do not possess one-quarter degree of Indian blood. Presently, the Bureau's regulations provide that a person must be one-quarter degree or more Indian blood in order to qualify for a preference in...
employment. 44 BM 335, 31, issued October 30, 1972.

However, the definition of "Indian" in 25 U.S.C. § 479 establishes membership in a tribe, irrespective of blood quantum, as a standard for preference eligibility.

I have concluded that preference must, as a matter of law, be afforded to all persons of Indian descent who are members of tribes organized under the Indian Reorganization Act and to all other persons not members of any federally-recognized tribe who are of one-half degree Indian blood. However, the Bureau may - as a matter of policy - establish a one-quarter degree standard for members of recognized tribes not organized under the Indian Reorganization Act. My analysis follows.

and Section 12 of the IRA, supra, see Morton v. Mancari, ___ U.S. ___, 42 L.W. 4933, c935 (June 17, 1974).

Several treaties also have preference provisions, Federal Indian Law, 534-535 (1958 ed.). These provisions of law imply, and sometimes state, that the Secretary of the Interior has the responsibility for affording preference. Compare 25 U.S.C. §§ 44, 47, and 472 with §§ 45, 46 and 348. However, ever since the inception of the Federal Civil Service in the year 1883, the Bureau has been under its aegis.

Indians entering the Office of Indian Affairs were required to qualify in regular Civil Service examinations, except that certain preferences were allowed in compliance with statutes providing that Indians shall be employed whenever practicable. Federal Indian Law, at 533.

The Civil Service is governed by a commission through the President who implements the recommendations of the commission by executive order. See Act of January 16, 1883, 22 Stat. 403; 5 U.S.C. §§ 1301 and 3301. The essence of civil service is that of merit and competition. Thus, because preference is contrary to ordinary civil service principles, it has been afforded by virtue of an executive order promulgating civil service rules which
confer certain excepted appointment authority on the Secretary of the Interior.

The Civil Service Rules established by Executive Order 209, March 20, 1903, for example, provided for a Schedule A appointment for:

- Indians employed in the Indian Service at large, except those employed as superintendent, teachers, manual training teachers, kindergartners, physicians, matrons, clerks, seamstresses, farmers, and Industrial teachers.

Schedule A, VI(7)

The excepted appointment authority for Indians was expanded by Executive Order 4948 of August 14, 1928, and contracted by Executive Order 5213 of October 28, 1929. However, no appointment authority to that date defined an Indian. The first Departmental employment manual in the year 1932 mentioned a preference for Indians in the Bureau field services; but, again, Indian was not defined. Regulations Governing Appointments in the Field Services of the Department of the Interior, Section 43 (January 11, 1932).
With the depression of the 1930s, federal employment was used as a means of resurrecting a healthy economy and countering massive unemployment in the private sector. The Work Projects Administration and Civilian Conservation Corp. are the most notable of these efforts. But also an Indian Civilian Conservation Corp. was created to provide jobs for Indians. See Federal Indian Law, supra, at 539. In this manner, many became employees of the Bureau of Indian Affairs through excepted appointments.

A liberalization of the excepted appointment authority was conferred in Executive Order 6676 of April 14, 1934. It established a Schedule B appointment: a non-competitive examination for Indians of one-quarter or more Indian blood. Prior to that time, it was only Indian applicants for particular positions listed in Schedule A who received an excepted appointment if they were otherwise qualified. So, some two months before enactment of the Indian Reorganization Act, the quarter-degree standard was administratively established. 1/

1/ An earlier version of the IRA bill, S.3645, 73rd Cong., 2nd Sess., contained a definition of "Indian" in Section 21 in terms the same as the present Section 479 except that one-quarter degree was used rather than one-half. See 78 Cong. Rec. 11732. The quarter-degree standard was raised to one-half by House Conference Report 2049, 73rd Cong., 2nd Sess., 78 Cong. Rec. 12004.
The development of personnel regulations pertaining to Indians up to the time of passage of the IRA is succinctly described in a statement circulated to Interested Indians soliciting their views on implementation of the employment preference in section 472.

For several years the Indian Service was permitted to appoint Indians to many types of positions without civil service examination; and for certain other types, such as teaching and clerical work, they might qualify for appointment by passing a non-competitive examination, that is, by meeting the minimum requirements. In 1929, by Executive Order, the range of positions to which Indians could be appointed without examination was narrowed and Indians were required to qualify in competitive civil service examinations for practically all positions for which white applicants had been required to qualify in that manner. There was adopted at that time, however, a preferential clause whereby Indians could be certified in order of rating on a separate Indian register of civil service eligibles and be considered before white applicants. This arrangement failed to increase materially the number of Indians appointed to Indian Service positions since it was necessary for Indians desiring positions to wait until a regular civil service examination was announced, and during recent years, due to economic conditions, few new examinations were needed to maintain civil service lists of eligibles.
In April, 1934, this situation was remedied by an Executive Order permitting noncompetitive examinations for Indians of one-fourth or more Indian blood for all positions not then excepted for examination. Under the provisions of this Order, a noncompetitive examination can be given only when there is a specific vacancy for which the Indian to be examined is recommended by the Commissioner, subject to passing the examination. In carrying out the plan for noncompetitive examinations, all applications for employment received by the Indian Office from Indians of one-fourth or more Indian blood are carefully classified under the various types of civil service positions for which the applicants appear to be qualified. As vacancies arise, the persons listed for the kinds of work involved are considered and one or more (not over five) names are submitted to the civil service commission for non-competitive examination.

Manual of Civil Service Requirements for Indian Service Positions (February 1935).

Of course, the underlying statutory preference provisions were expanded by Congress in enacting the IRA. See Morton v. Mancari, supra, at 4935-4936, and Freeman v. Morton, 499 F.2d 494 (CA DC 1974). However, the subsequent executive orders seem not to have taken into consideration the effects of a more expanded preference and the definition of Indian.
On June 24, 1938, Executive Order 7916 (3 CFR 350) was signed which brought all positions not then in the competitive classified civil service into it. If an Indian occupied a position excepted under Schedule A or had taken a noncompetitive examination, passed and received a Schedule B appointment, he then received, by virtue of the Order, a classified competitive appointment.

Executive Order 7916 also promised revision of Schedules A and B. Those schedules were revised in Executive Order 6043 of January 31, 1939, 3 CFR 449, which brought the excepted appointment previously conferred in Executive Order 6676 in Schedule B to Schedule A. Thereafter, Indians of one-quarter degree need not have taken an examination in order to obtain employment in the Bureau.

Then, on March 25, 1940, Executive Order 8389, 3 CFR 636, brought all those employees who had received excepted appointments in the Bureau of Indian Affairs into the competitive civil service, just as Executive Order 7916 had done for the general civil service.

The one-quarter degree requirement is an administrative doctrine which, absent any statute defining an Indian, would appear to be within the Commissioner's discretion.
to establish. But with respect to preference under section 472, the definition of Indian in the Indian Reorganization Act must be used where the tribe which the person is affiliated with comes under the Indian Reorganization Act.

With respect to tribes which voted to accept the Indian Reorganization Act and those which did not reject it and the provisions of the act are applicable to the tribe, the definition established by section 479 sets the standard for preference eligibility. Those persons of Indian descent are:

1. Members of federally-recognized tribes;

2. Descendants of members of federally-recognized tribes who were residing within the boundaries of a reservation on June 1, 1934; and

3. All other persons of one-half or more degree Indian ancestry, whether or not a member of a federally-recognized tribe and whether or not the degree of ancestry is attributable to more than one federally-recognized tribe.

It is our belief that where Congress provided for the formal organizing of the tribe under a constitution...
approved by the Secretary of the Interior, membership criteria would as a consequence be formalized and membership would then be a meaningful standard for defining an Indian. Defining a person as Indian entails more than identifying mere Indian ancestry. If preference is to have any meaning, some measure of "Indianness" must be the standard of eligibility. The Supreme Court in the Mancari decision emphatically stated that "[t]he preference, as applied, is granted to Indians not as a discrete racial group, but, rather as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion. Morton v. Mancari, supra, Slip Opn. at 18.

The mandate of Congress in enacting the Indian Reorganization Act was that tribes, rather than the Bureau of Indian Affairs, would have the power to define their members by way of a formal organization and a basic self-governing document. That inherent power must be recognized to the extent Congress intended.

In order that the present authority to confer preference on Indians may be modified to comply with the statutory definition of Indian, the present excepted appointment authority in 5 C.F.R § 213.3112(a)(7) would have to be
revised by executive order. The procedure for obtaining
an executive order is set out in 1 CFR Part 19. We
would also advise you that in order to avoid any
questioning of the manner in which those present
employees who have competitive appointments and who are
to receive preference in the selection for a position do
not lose their competitive appointment that a modifying
executive order also contain the authority to afford
preference by not conferring an excepted appointment.

On the other hand, I believe that you possess discretion
to set a quarter-blood standard for preference
eligibility with respect to members of recognized tribes
that voted to reject the Indian Reorganization Act. It
is my opinion that rejection of the IRA meant not only
rejection of the opportunity to organize a tribal
government under it, but also to be defined under its
terms and receive the benefits of preference.

The three-judge New Mexico District Court in the case of
Mancari v. Morton, 359 F.Supp. 585, held that preference
under section 412 extended to individuals regardless
whether their tribal members had voted to accept or
reject the act. 359 F.Supp. at 588. The court stated
that
...we cannot believe that Congress intended all the Indian tribes to vote on the extension of boundaries of the Papago Reservation (section 463a, 50 Stat. 536), on the Secretary making rules and regulations for the operation and management of Indian forestry units (section 466, 48 Stat. 986), or on appropriations for vocational and trade schools (section 471, 48 Stat. 985), or on other provisions found in the Indian Reorganization Act. Id. (underscoring added).

As you know, the District Court's decision was reversed. Even apart from the validity of the decision in light of its reversal, the court's reasoning seems incorrect. The citation to section 463a in the part of the opinion just quoted is erroneous. Section 463a was not enacted until the year 1937. Act of July 28, 1937, 50 Stat. 536.

To be sure, there are several provisions in Section 3 of the IRA, 48 Stat. 984, now section 463, which affect the Papago Reservation, but the main provision calls for the restoration to tribal ownership of the remaining surplus lands of a reservation which had been opened to sale—a matter upon which tribal members could well express their desire. Furthermore, the act also established the Revolving Loan Fund in Section 10, the eligibility for loans from which was originally limited to Indian
chartered corporations. Section 10 of IRA, now 25 U.S.C. § 470. But the eligibility provision has been twice amended: first by extending it to individual Indians of not less than one-quarter degree of tribes which had not voted to reject the act, Act of May 10, 1939, 53 Stat. 698, 25 U.S.C. § 480; and, second, by extending it to tribes and their members who had voted to reject the act or had not organized under it, Act of May 7, 1948, 62 Stat. 211, 25 U.S.C. § 482. See Senate Interior Committee Report on H.R. 2622, Sen. Rept. No. 1147, 80th Cong., 2d Sess. and House Committee on Public Lands Report on H.R. 2622, H. Rept. No. 939, 80th Cong., 2d Sess. If the benefits of the revolving loan fund were to be extended to all individuals of more than a quarter-degree Indian blood after the first amendment there would have been no need to enact the second amendment. But it is clear from the Department's legislative file on the 1948 Amendment that members of tribes that had not organized under the IRA or Oklahoma Welfare Act, Act of June 26, 1936, 49 Stat. 1967, 25 U.S.C. § 501, et seq., had been interpreted by the Department to be ineligible for a loan.
I conclude, accordingly, that you possess discretion as Commissioner to establish standards for preference eligibility for this group of persons under the earlier, pre-1934 preference statutes. 25 U.S.C. §§ 44-46.

Reid Peyton Chambers

Reid Peyton Chambers
A BILL

To allow Federal employment preference to certain employees of the Bureau of Indian Affairs, and to certain employees of the Indian Health Service, who are not entitled to the benefits of, or who have been adversely affected by the application of, certain Federal laws allowing employment preference to Indians.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

That, for purposes of this Act—

(1) "eligible employee" means an employee who—

(A) is employed in a position in the Bureau of Indian Affairs of the Department of the Interior, or in the Indian Health Service of the Department
of Health, Education, and Welfare, under a career or a career-conditional appointment, and who has been so employed since June 17, 1974; and

(B) is not entitled to benefits under, or has been adversely affected by the application of—

(i) section 12 of the Act of June 18, 1934 (25 U.S.C. 472);

(ii) the first section of the Act of June 7, 1897 (25 U.S.C. 274);

(iii) the Act of April 30, 1908, and section 23 of the Act of June 25, 1910 (25 U.S.C. 47);

(iv) section 6 of the Acts of May 17, 1882, and July 4, 1884 (25 U.S.C. 49);

(v) section 2069 of the Revised Statutes (25 U.S.C. 45);

(vi) section 10 of the Act of August 15, 1884 (25 U.S.C. 44); or

(vii) any other provision of Federal law providing Indians preferential employment consideration for positions within the Federal competitive service.

(2) "vacancy" means a vacancy in a position in the competitive service for which the minimum rate of basic pay is less than the minimum rate for GS-16.
SEC. 2. (a) Applicants for each vacancy occurring in the Department of the Interior (other than a vacancy in the Bureau of Indian Affairs) shall, except as provided in subsection (b), be considered in the following order:

(1) all eligible employees of the Bureau of Indian Affairs who are qualified to fill such vacancy, in the order of their ratings, and

(2) remaining applicants, in the order and number which would have occurred in the absence of this Act.

(b) The provisions of subsection (a) shall not apply with respect to the filling of a vacancy by—

(1) transfer or appointment of a preference eligible who is entitled to additional points under section 3309 (1) of title 5, United States Code,

(2) reinstatement of a preference eligible who is entitled to additional points under section 3309 (1) or (2) of such title,

(3) restoration of a person under chapter 43 of title 38, United States Code, relating to veterans' re-employment rights.

SEC. 3. When an appointing authority has twice considered and passed over an eligible employee (disregarding any instance in which another eligible employee or an individual referred to in section 2 (b) of this Act was appointed to the position, or in which the eligible employee
was passed over, under this section, for compelling reasons, such eligible employee is entitled to appointment to the next occurring vacancy in such Department for which he applies, unless the appointing authority determines that compelling reasons exist for passing over such employee, and files such reasons in writing with the Civil Service Commission. The Commission shall make these reasons a part of the record of the eligible employee. The Commission may require the submission of more detailed information in support of the passing over of such employee. The Commission shall determine the sufficiency or insufficiency of the reasons submitted and shall send its findings to the appointing authority. The appointing authority shall comply with the findings of the Commission. The eligible employee or his representative, on request, is entitled to a copy of—

(1) the reasons submitted by the appointing authority; and

(2) the findings of the Commission.

Sec. 4. The appointment to each vacancy occurring in the Department of Health, Education, and Welfare (other than a vacancy occurring in the Indian Health Service) shall be made, with respect to applicants who are eligible employees of the Indian Health Service, in accordance with sections 2 and 3 of this Act.

Sec. 5. (a) The Civil Service Commission shall pre-
scribe such regulations as it deems necessary to carry out the
provisions of this Act.

(b) The foregoing provisions of this Act shall apply
with respect to vacancies occurring during the three-year
period beginning with the month which begins more than
ninety days following the date of the enactment of this Act,
except that the Civil Service Commission may extend such
period one additional year with respect to vacancies—
(1) in the Department of the Interior, or
(2) in the Department of Health, Education, and
Welfare, or
(3) in both Departments.
TO: All Area Directors (See Attached List of Addresses)

PROJECT DIRECTOR, JOINT USE ADMINISTRATIVE OFFICE

IT HAS COME TO OUR ATTENTION THAT WE NEED TO CLARIFY INSTRUCTIONS WITH RESPECT TO THE APPLICATION OF INDIAN PREFERENCE. WHEN ONE POSITION IS ADVERTISED AT SEVERAL DIFFERENT GRADE LEVELS, THE FACT REMAINS THAT THERE IS ONLY ONE POSITION TO BE FILLED, THEREFORE IF THERE IS A QUALIFIED INDIAN AVAILABLE AT ANY ONE OF SUCH GRADE LEVELS, THAT INDIAN HAS PREFERENCE TO THE VACANCY AND A NON-INDIAN MAY NOT BE SELECTED AT ONE OF THE OTHER GRADE LEVELS SO LONG AS THE INDIAN IS AVAILABLE. 441AM 335.3.15 ESTABLISHES TIME LIMITS FOR ACCEPTING APPLICATIONS UNDER VACANCY ANNOUNCEMENTS. THESE TIME LIMITS SHOULD BE ADHERED TO AND LATE APPLICATIONS WHETHER FROM INDIANS OR NON-INDIANS SHOULD NOT BE ACCEPTED FOR THAT PARTICULAR VACANCY. IN THE EVENT INSUFFICIENT APPLICATIONS WERE RECEIVED OR NO SELECTION IS MADE FROM THE CERTIFICATE OF ELIGIBLES, THE POSITION SHOULD BE READVERTISED.

DIRECTOR, OFFICE OF ADMINISTRATION
Memorandum

To: All Employees, Navajo Area

From: Area Director

Subject: BIA current Indian preference policy

The current Indian preference policy in the Bureau of Indian Affairs is summarized below:

In filling any position in the Bureau of Indian Affairs, whether by new appointment, reinstatement, transfer, reassignment, or promotion, an Indian will be selected, if a qualified Indian is available. A non-Indian may be selected only when no qualified Indian is available.

In keeping with the policy of the Bureau of Indian Affairs regarding Indian preference in employment and the concept of self-determination, the following changes in Navajo Area recruiting and staffing procedures will be effective immediately:

1. All vacant positions GS-7 and above will be advertised at least Bureau-wide in an attempt to locate qualified Indian candidates.

2. The Personnel Office and operating officials will make positive recruiting efforts to locate potential Indian applicants. These recruiting efforts should be documented and made available on request.

3. Selecting officials will make every effort to select, train and promote persons qualified for Indian preference.

4. When practical, vacancies will be re-engineered to the lowest level to provide vehicles for advancement of those employees in the lower grades and to provide maximum opportunity for Indian candidates.
5. The Personnel Office will make every effort to publicize known vacancies in other Bureaus of the Department of the Interior. Those non-Indian employees believing their career opportunities are diminished as a result of the Bureau of Indian Affairs preference policy will be given every assistance in applying for positions in other Federal Agencies. Any resulting vacancies will be filled according to procedures stated above.

In addition to the above changes, a letter of introduction, copy attached, will be available from the Area Personnel Office and the Agency Personnel Offices for those desiring to actively seek positions outside the Bureau of Indian Affairs.

I expect each employee and supervisor to support and endorse the statements listed above.

[Signature]
To:  
From:  Area Director, Navajo Area, Bureau of Indian Affairs  
Subject:  Letter of Introduction  

This is to introduce [Name], an applicant for employment in your agency, and to explain his reasons for seeking such employment.  

The Indian preference policy in the Bureau of Indian Affairs is stated:  

In filling any position in the Bureau of Indian Affairs, whether by new appointment, reinstatement, transfer, reassignment, or promotion, an Indian will be selected if a qualified Indian is available. A non-Indian may be selected only when no qualified Indian is available.  

Many non-Indian employees feel this policy restricts their career opportunities and desire employment in other Federal agencies. Your consideration and employment of this individual will provide you with an experienced, ambitious employee and will create a vacancy with the Bureau of Indian Affairs, which will probably be filled with an Indian employee. This will help effect the policy of self-determination, Indians serving Indians. 

Your serious consideration of this candidate is appreciated.
WE HAVE BEEN NOTIFIED THAT THE U.S. DISTRICT COURT, NORTHERN
DIVISION OF SOUTHERN ARIZONA HAS ISSUED A TEMPORARY RESTRAINING
ORDER ENJOINING THE PROTESTING COMMUNITY, THE THEN-EXISTING
TRIBAL COUNCIL, FROM VIOLATING THE TERMS OF A PREVIOUS
AGREEMENT. ALL PARTY AGREEMENTS WILL BE CONSIDERED IN
CONTRACTS PREVIOUS TO THIS DATE. NO COMPLAINTS ARE TO BE MADE AFTER THIS
DATE OF THIS TEMPORARY RESTRAINING ORDER. FURTHER INSTRUCTIONS WILL BE
PROCEEDED AS SOON AS POSSIBLE.

KENNETH L. NEYTO

IN REPLY REFER TO:
BCCO 3401
EEO

Mr. John A. Buggs
Staff Director
U. S. Commission on Civil Rights
Washington, D. C. 20425

Dear Mr. Buggs:

Further reference is made to your letter of June 19, 1973, pertaining to recommendations based on information developed in hearings in Albuquerque, New Mexico, and Phoenix, Arizona, on the civil rights problems of American Indians in the Southwest.

It would appear that the Bureau of Indian Affairs is exceeding your recommendations Nos. 1 thru 4 concerning employment, promotion, and reassignment of Indians, even to the point of being unable to satisfy the requirements of the Civil Service Commission in the field of Equal Employment Opportunity. It is a matter of record that in the Bureau of Indian Affairs an Indian has preference, by law, in appointment provided the candidate has established proof that he or she is one-fourth or more Indian and meets the minimum qualifications for the position to be filled. (25 U.S.C. Section 472). This legislation directs the Secretary of the Interior "to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed, without regard to civil service laws, to the various positions maintained, now or hereafter, by the Indian Office, in the administration of functions or services affecting any Indian tribe. Such qualified Indian shall hereafter have the preference to appointment to vacancies in any such position."

In the case of Freeman vs. Morton the U.S. District Court for the District of Columbia issued a summary decision which reads as follows:

"It is accordingly ordered this 21st day of December 1972, that all initial hirings, promotions, lateral transfers, and reassignments in the Bureau of Indian Affairs as well as any other personnel covenant therein intended to fill vacancies in that agency, however created, be declared governed by 25 U.S.C. Section 472 which requires that preference be afforded qualified Indian candidates."

United States Department of the Interior
BUREAU OF INDIAN AFFAIRS
WASHINGTON, D.C. 20242

APR 25 1974
Recommendation 5 is being met by the inclusion of a standard condition in all contracts directing attention of bidders to sections 701(b)(1) and 703(i) of Title VII of the Civil Rights Act of 1964 which provide:

- that preference in employment may be given to Indians living on or near an Indian Reservation.

Recommendation 6 is adequately covered in existing regulations and we are prepared to move decisively if and when any substantiated cases are brought to our attention. Action needed to improve the Indian educational system administered by the Bureau of Indian Affairs.

1. Participation of Indian parents and community groups in the education programs operated by the Bureau of Indian Affairs is both encouraged and facilitated. Indian communities have the option of contracting with the Bureau for the management and operational control of schools serving their communities. In 1973-74 there were 14 schools operating under such contracts. The Bureau has also contracted with Indian groups for the operation of summer programs, ESEA Title programs, pre-school programs and for the administration of higher education assistance programs and Johnson-O'Malley funds. A total of more than $48 million in education funds was expended in 1974 through contracts with Indian groups for education services and materials. This represents an increase of $32 million over 1973.

In addition, advisory school boards are functioning at all Bureau schools. All schools with Title I programs have a parent advisory council. Special training is provided for school board members to help them function more effectively.
2. The number of Indian personnel at some levels of the BIA school system has been limited by the availability of qualified persons. The Bureau's rapidly growing higher education assistance program is helping to correct this. Of the more than 13,500 Indian college students receiving assistance in 1973-74, more than one-fifth are majoring in education. One phase of this program is now assisting approximately 85 students toward post-graduate degrees in education administration.

Career opportunity programs in the Bureau schools are also providing Indian aides the chance to obtain college degrees while continuing to earn a salary. Most of these programs permit aides to become certified teachers in four years—a substantial development of their own potential and a valuable contribution of more Indian teachers in the Bureau schools.

3. It is now required that all schools receiving Johnson-O'Malley funds have an Indian advisory committee which participates in the planning, development and monitoring of the programs for which Johnson-O'Malley funds are used. The amount of Johnson-O'Malley money used for special programs, as opposed to basic school support, has increased substantially in recent years. Basic support is still necessary, however, in some areas.

You have touched upon some of my major concerns in the administration of Indian Affairs and I appreciate the opportunity to comment on the recommendations of the Civil Rights Commission staff. Please be assured of my continuing interest and commitment to providing service to the Indian people in a competent and equitable manner.

Sincerely yours,

[Signature]

Acting Deputy Commissioner of Indian Affairs

May 5, 1974
Appellant's reliance upon our decision in Hartigh v. Latin, 158 U.S.App.D.C. 259, 465 F.2d 1005 (1972), is misplaced. In the two cases decided by our opinion, orders of certification to the Superior Court were reversed for error in the interpretation of the Supreme Court decision in District of Columbia v. Carter, 409 U.S. 418, 93 S.Ct. 602, 34 L.Ed.2d 613 (1973). In neither case had the defendants disputed the plaintiffs' allegations that the amount in controversy exceeded $10,000. Moreover, in both cases there were allegations of severe physical injuries and assaults committed by police during incarceration, and in both cases medical assistance was sought and shown on the record.

Appellant also proposes that the District Court erred in certifying the case so promptly after District of Columbia v. Carter, supra, that appellant was deprived of the opportunity to assert jurisdiction under a separate statute, 28 U.S.C. § 1331 (1970) without a minimum jurisdictional amount. Appellant argues that he would have reformulated his complaint in the face of the Carter decision. He admits, however, that many of the facts supporting a reformulation into a § 1331 action, a private suit for racial discrimination, are not in the record presently. Nowhere in the present pleadings is there an allegation of racial discrimination. Nor do we find any precedent in law or policy for requiring a trial court to consider whether some set of additional facts might be pleaded which would preserve federal jurisdiction before that court certifies a case to a local court. Appellant had already amended his complaint once, and deposi-

In the instant case, there was testimony that after detention in a back room of a grocery store for some twenty minutes for questioning, the plaintiff was "hysterical and in terror." In both cases, however, there seems to have been a probable cause for the detention.

12. All persons within the jurisdiction of the United States shall have the same right in

Bloor E. TRIFIRMAN, on behalf of herself and others similarly situated v.
No. 73-1109.
United States Court of Appeals,
District of Columbia Circuit.
April 25, 1974.
Argued Feb. 21, 1974.

Indian employees of BIA sought declaratory judgment that statute relating to Indian preference in filling of vacancies within the BIA applied to lateral transfers, promotions, and training, as well as to initial hiring. The District Court for the District of Columbia denied the BIA application for summary judgment as to lateral transfers and promotions, and Secretary of the Interior appealed from the ruling with respect to lateral transfers. The Court of Appeals,

every State and Territory to make and enforce such rules and regulations prescribing fines, penalties, and forfeitures of every kind, and to compel so
Christensen, Senior District Judge, held that statute applied to lateral transfers as well as to hirings and promotions; and that statute did not grant Commissioner of Indian Affairs the right to make exceptions to the policy for exceptional administrative or management reasons.

Affirmed.

1. Indians

Statute giving preference to Indians in the filling of vacancies within the BIA applies to all appointments to fill vacancies, whether filled from within or without the bureau and whether effected through initial hiring, promotions, reinstatement within same office, or lateral transfers from another office. Indian Reorganization Act, § 12, 25 U.S.C.A. § 472.

2. Indians

For purposes of statute giving preference to Indians in the filling of vacancies in the BIA, whether a vacancy exists depends upon whether a position is vacant and susceptible of being filled, not upon how it is filled. Indian Reorganization Act, § 12, 25 U.S.C.A. § 472.

3. Indians

When position in BIA is open, need to be filled, there is a "vacancy" in contemplation of statute giving preference to Indians in the filling of vacancies, and if the position is filled by transferring to it an employee from a position of similar status elsewhere within the BIA, that employee's former position also becomes a "vacancy" to be filled with due regard for the Indian preference. Indian Reorganization Act, § 12, 25 U.S.C.A. § 472.

See 28 U.S.C. § 161 for other judicial constructions and definitions.

4. Constitutional Law

If there are no reasonable administrative or management alternatives to violation of mandated preference, the district court may consider solution for employees not on the brief, for appellants.

For BAZELON, Chief Judge, McGOWAN, Circuit Judge, and CHRISTENSEN, United States Senior District Judge for the District of Utah.
This is an appeal by defendants-appellees Eugene C. B. Morton and other officials of the Bureau of Indian Affairs (BIA) from a final order of the United States District Court for the District of Columbia granting summary declaratory judgment in favor of plaintiffs-appellants, Enola E. Freeman and three other employees of BIA, that all initial transfers, promotions, lateral transfers and reassignments in the Bureau of Indian Affairs as well as any other personnel movement therein intended to fill vacancies in that agency, however treated, be declared governed by 25 U.S.C. § 472.

This section, which was a part of the Indian Reorganization Act of 1934 provides as follows:

Standards For Indians Appointed To Indian Office

The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed, without regard to civil-service laws, to the various positions maintained, now or hereafter, by the Indian Office, in the administration of functions or services affecting any Indian tribe. Such qualified Indians shall hereafter have the preference in appointment to vacancies in any such positions, June 18, 1934, c. 576, § 4(a).

From the passage of the statute until the institution of this suit, the Bureau had narrowly applied this preference provision by confining the term "appointment to vacancies" to mean initial assignments only. Appellants were, and presumably still are, employed by the Bureau of Indian Affairs. Each at one or more times during her employment applied for appointment to a vacant position within the Bureau, had been classified at least as "qualified" and in some cases as "well qualified" or "best qualified" and was denied the position when a non-Indian was given the assignment.

In some instances the non-Indian had received a lower qualification rating than the Indian applicant. Challenging this construction as altogether too prodigious, appellants asserted in this action that the Indian preference applies to all appointments whether filled from within or outside the Bureau, and whether affected through initial hiring, promotions, reassignments within the same office or lateral transfers from another office.

While this action was pending the Bureau issued a revised policy statement allowing Indians a preference not only in hiring but generally in promotions, transfers from outside the Bureau and reassignments within the Bureau which increased promotion prospects. Purely lateral reassignments within the Bureau, however, were excepted from such policy, as were promotions with respect to which the Commissioner found a "wanton" disregard of the Indian preference within the Bureau. Plaintiffs limited their claims for relief to a declaration of their preference rights. The ruling of the district court that the Indian preference did not extend to lateral transfers or reassignments is not in question.

Neither party has attacked the preference on civil rights or constitutional grounds. Furthermore, the parties took no cross-appeal. See Plaza v. Ann Arbor Ry. Co., 289 U.S. 226, 53 S.Ct. 646, 77 L.Ed. 1173 (1933). The operation of that ruling too has been stayed pending appeal to the Supreme Court, where probable cause exists.

1. In addition to declaratory relief the amended complaint sought preliminary and mandatory injunctive relief, as well as damages. For purposes of their motion for summary judgment, however, plaintiffs waived all relief after submission of their preference rights in the areas of promotion, lateral transfers and training.

2. The district court rejected appellees' claim that the preference applies to lateral transfers. Appellees take no cross-appeal. See Plaza v. Ann Arbor Ry. Co., 289 U.S. 226, 53 S.Ct. 646, 77 L.Ed. 1173 (1933). The operation of that ruling too has been stayed pending appeal to the Supreme Court, where probable cause exists.
agree that all of the controlling facts appear without dispute of record and that the case was ripe for resolution by summary judgment one way or another. The Tenth Circuit holding that the Indian preference does not apply to reduction-in-force situations has not been questioned in these proceedings. And the parties have accepted the definition of "Indians" as those of one-quarter or more Indian blood as valid and as applying to each of the plaintiffs for the purposes of the statute. As a consequence of these circumstances the issues presented by the parties and to which we shall limit further discussion are narrow and apparently of first impression.

Jurisdiction has been noted, 411 U.S. 114, 93 S.Ct. 155, 35 L.Ed.2d 77 (1973). Except as it discusses the shared position of 32 parties before this court that the Indian preference, however, it is essential to recite the basic here, in valid, and it is more interesting than significant to note that both appellants' counsel and counsel representing appellees are asking the Supreme Court to reverse Mears, No. 32 U.S.C. 115, No. 33-302 (1931); Id., No. 73-793.

4. There were extensive demands for admission which were largely unmet except as they called for conclusory of law.


6. Employees eligible for Indian preference are those with one-fourth or more Indian Indian blood, regardless of the type of appointment they have received, and those employees with lesser degree of Indian blood to whom preference was extended at the time of appointment. 411 U.S. 114, 93 S.Ct. 155 (1973).

7. It is noted in the opinion that there are a few individuals in the latter category who were imported before the one-fourth Indian blood requirement went into effect.

8. This court's decision in Fox v. Graves, 31 U.S.App.D.C. 382, 85 F.2d 567, cert. denied, 304 U.S. 621, 58 S.Ct. 97, 82 L.Ed. 502 (1938), involved a reduction-in-force problem of veterans in the context of a significant difference statute and rule making power of the Civil Service Commission. McCollum v. Bland, 342 F.2d 920 (10th Cir. 1965), cert. denied, 381 U.S. 944, 85 S.Ct. 1796, 14 L.Ed.2d 333 (1965), supra, 381 U.S. 944, 85 S.Ct. 1796, 14 L.Ed.2d 333 (1965), involved a reduction-in-force situation which involved Indians; the court held that "appointments in retention" were not involved as an in-
They rely upon statements in Mescalero Apache Tribe v. NCAA, 462 F.2d 956, 968 (10th Cir. 1972), supra, and draw particular attention to a comment that "[t]he language of § 472 was specifically limited to appointments to vacancies because of concern that the section as originally drafted would allow qualified Indian applicants to immediately displace "white" employees of the B.I.A."

But the reason, Mescalero did not apply the Indian preference to reduction-in-force situations was simply that "appointments to vacancies" within the contemplation of the preference statute were involved. The discretionary judgment under review here covers only "personnel movements . . . intended to fill vacancies in that [BIA] agency, however created . . . ." Under the order if no vacancies to be filled exist the preference does not apply, but if there is a vacancy to be filled, whether for initial hiring, or by or as a result of promotions, lateral transfers or reassignments in the Bureau, it does apply. We agree with the district court that this is what Section 472 means, and requires.

Vague reference is made by appellants to "merely" reductions of jobs or reassignments of duties essential to efficient administration, which they imply are unreasonably inhibited by the district court's judgment. It would be inappropriate for us to pursue such generalities not involved in the situations of the plaintiffs nor defined in the record, except to indicate, as did the trial court, that only appointments to vacancies are covered by the preference, reassignments in assignments or tasks not involving the creation of, or appointment to, vacancies are unaffected, unless of course personal adjustments are used as mere subterfuges to avoid the statute as interpreted here.

The most persuasive situation for an exception to the preference was specifically presented only after the entry of the court's order, in connection with the application for its stay. 18 circumstances dictating the transfer of a particular non-Indian employee because of problems beyond his control or when his safety or continued effectiveness is threatened, for example. Even though such a necessity may be thought not to justify disregard of the preference in any lateral transfer to an existing vacancy, appellants argue that at least an exchange of positions would be proper to meet such an emergency. This lateral swapping of positions would bring into more acute question the meaning of "vacancy" as well as "appointment". Where two employees of identical status, with the approval of their superiors, merely exchange positions it is suggested by appellants that there would be no vacancy with respect to either position. Of course if this device were to be employed to shift an employee contemplating retirement or promotion from a position having an available Indian replacement to a position for a different reservation for example, having only non-Indian replacements available, obviously the intent of the statute under any view would be defeated. Yet appellants say that the BIA should be permitted to utilize in good faith the theory of exchange of positions without applying the Indian preference.

19. "472, "a 'vacancy' is a 'vacancy', its opinion observed, no matter how created. Congress drew no distinction as it could easily have done had it so intended."

10. The Mescalero affidavits in support of the request for a stay or appeal stated: "Lateral reassignments of Indians of Indian Affairs' employees to vacant positions are frequently made because breakdowns in relationships between employees at the same level and the officials that he serves. Such breakdowns usually result from conditions over which an employee has no control. These situations require that the employee be moved as quickly as possible to avoid furtherification of the task, and occasionally, the threat of physical violence to the employee and his family. When a qualified Indian candidate is available for the position to which a non-Indian employee may be reassigned under these circumstances, it becomes impossible to meet the non-Indian employee."
[2.3] As tempting as this continued approach of the statute may appear, we cannot approve it. That would require an unacceptable version of the term "vacancy" or the word "appointment", or both. Whether a vacancy exists depends upon whether a position is vacant and susceptible of being filled, not upon how it is filled. According to appellants' argument, for example, if an employee in office A should retire, his former position would be vacant only if his replacement were either transferred to that position or hired from outside the BIA to fill it; the determination of whether a vacancy occurs would be delayed until the vacancy no longer existed. We believe Judge Corcoran correctly reasoned that when a position is open, needing to be filled, it is vacant in the contemplation of the statute, and if the position is filled by transferring to it an employee from a position of similar status somewhere else within the BIA, that employee's former position also becomes a vacant position to be filled with due regard for the Indian preference.

Appellants' approach to the word "appointment" is to say that the word has come to mean, through common and usage in civil-service contexts, "initial hiring from outside"; and it is suggested that this was the meaning intended by Congress in using the word in the statute. It is interesting to note in passing, as the record indicates, that Civil Service practice now accepts promotions as "appointments". But here we are not dealing with Civil Service application but practice expressly intended to depart from them. The Secretary is directed "to establish standards . . . for Indians who may be appointed without regard to civil-service laws . . ." Furthermore, to concede, as many Indian commissions have been created within the law.

IV. "The words "initial hiring from outside" have been so clearly intended as to preclude the possibility of the court's placing upon the status such a meaning that the parties' agreement would be denied a court's approval."

51. "The result [of present civil-service rules] has been that the Indians have been given no opportunity to humble their own status or to take advantage of their own qualifications. This is what the Indians, and Indian leaders, have fought against over the years." - Roy C. Switzer, as quoted by Judge Corcoran in his opinion.

Thus, this court recognizes the principal aspect in their own quality and nature, and . . . mandates a method of ascertaining the true nature of the status of the Federal Indian Service." Memorandum on 27th. by James Allain, Commissioner for Indian Affairs, presented to
sion the mass termination of all non-Indian employees, but there can be little doubt that traditional civil service service was deliberately subordinated to the objectives of the Indian preference.

We conclude that the district court correctly determined the reach of Section 472.

II

Even assuming, as we hold, that the Indian preference applies to lateral transfers in connection with which vacancies are to be filled, appellant contends that the Commissioner of Indian Affairs has a discretion to make limited exceptions with reference to lateral transfers, as well as promotions when this is expressly found to be in the best interests of the Bureau. The existing administrative interpretation to this effect, the appellees assert, is entitled to great weight in view of such cases as Udall v. Tallman, 330 U.S. 1, 85 S.Ct. 292, 13 L.Ed.2d 16 (1965). To the contrary, we consider appellants' contention weakened by the fact that shortly before its present position was taken it was Bureau policy set to recognize promotions as filling within the purview of Section 472 at all. The contention is rendered suspect by the illegality of reading exceptions into the statute with regard to promotions and applying an inflexible rule concerning initial hiring,

is further thrown into question by a certain confusing ambivalence in appellee's position even during the final hearing below, and is disquieted by a

14. "... It is in the policy for promotional consideration that where two or more candidates who meet the established qualification requirements are available for filling a vacancy, if one of them is an Indian, he shall be given preference to filling the vacancy. In accordance with the /Justice statement made by the Secretary, the Commissioner may grant exceptions to this policy by approving the promotion and appointment of non-Indians when he considers it in the best interest of the Bureau." 113 Cong. Rec. 11721 (1967).

15. Appellants point to in their brief that "It is not conceded that there is a discretion to make exceptions as regards initial hiring" but do not attempt to reconcile this with an ambiguous policy statement with their view of discretion as to promotions. Although we now assume in general that promotions are covered by the Section.

16. On June 22, 1972, Secretary Morton expanded the exception of preference to promotion and training. In December 1972, when the Senate Finance Committee held hearings before the district court the position of the defendant was modified: that apparently concluded that while the Indian preference could be applied by the Bureau in promotions, such application was not mandatory but that the Bureau could continue the preference "as a special remedial measure pending exceptions, as was their contention concerning lateral assignments." In the course of the argument below they then seemed to withdraw somewhat from the expressions of that statement by implying that the ancillary not necessarily requires the preference to be applied in cases of promotions but may be "reserved administratively."

17. The existing administrative interpretation to this effect, the appellees assert, is entitled to great weight in view of such cases as Udall v. Tallman, 330 U.S. 1, 85 S.Ct. 292, 13 L.Ed.2d 16 (1965). To the contrary, we consider appellants' contention weakened by the fact that shortly before its present position was taken it was Bureau policy set to recognize promotions as filling within the purview of Section 472 at all. The contention is rendered suspect by the illegality of reading exceptions into the statute with regard to promotions and applying an inflexible rule concerning initial hiring, is further thrown into question by a certain confusing ambivalence in appellees' position even during the final hearing below, and is disquieted by a
comprehension of the provisions of your
Indian predecessors' statutes with those of
the act concerning the circumstances of
this case. As pointed out by Judge Corcoran, a
qualified statute does not say the "Indians ... may
have preferred." It says: "... qualified Indians shall therefore have
preference ..." and "Congress
hath intended to write discretionary power
into the language of Sec. 172 it would have done so expressly ..."
I need only look at certain Indian prefer-
tence statutes to recognize that Congress
was well aware of the distinction be-
 tween discretionary and mandatory
action.

(5, 6) Any conflicting administrative
interpretation to the contrary must yield
to the clear provisions of the act. Even
though some ambiguity might be perceived
under certain situations they should be resolved, rather permitting,
in favor of the Indians. Corcoran v. Trupp,
224 U.S. 663, 22 S.Ct. 565, 56 L.Ed. 941
(1902). But ambiguity, as has been
pointed out, is largely confined to the
starting position of the applicability and
their predecessors who, in administering
a statute designed in 1913 to progressively
correct a situation where there
was a smaller proportion of Indians in
the NIA than there was in 1909, have
achieved little more than the old
ratio during the intervening forty years.
All of these circumstances are
at best as persuasive as those in Morton
er. Ruiz, 415 U.S. 528, 56 S.Ct. 1005, 39
of clerical, mechanical, and other help on
construction and naval services. In contrast,
section 172, the more recent Congressional
enactments on the subject, provide that the In-
dians involved here, without regard to Civil
Service laws, "shall have preference in
nominations" and from filing, and
warrant the manner in which they are
appointed."

"That in the government's dealings with the
Indians the rule is nearly the opposite. The
uninformative manner of the act, is identical
doubled twice, instead of being resolved
in favor of the United States, are to be
refused in favor of a weak and defenseless
people, who are wards of the nation, and
defending them upon its protection and good
faith. This rule of construction has been
recognized, without reservation, for more than a
hundred years ..." 224 U.S. at 662. See also
Christian v. Oklahoma, 279 U.S. 103, 106, 109, 110, 35 L.Ed. 262
(192, interpretation of "Indian..."
The law, as has been
described, 279 U.S. 103, 111, 113, 274,
294, 310, 315, 318 (192, interpretation of
the order.

19. Thirty years ago, in 1890, the num-
ber of Indians holding regular positions in the
Indian Service, in prevention of the usual posi-
tions were greater than it is today. (Memo-
randum of Mr. K. 355 submitted to the Senate
Committee on Indian Affairs by Rear Admiral
Commissioner of Indian Affairs, reported in
Senate Hearings, supra.)

20. The record indicates that Indians composed
two-thirds of the total number of employees in 1913 but that this percentage decreased to 66% in
1920. In 1930 only a little more than
half of all employees were Indians and the
numbers of these were reported in the lower
regulatory jobs.
In oral argument appellants' counsel suggested that the word "preference" connoted "a choice" according to some dictionary definition or usage in other context. It was implied that this "choice" was to be made by the Commissioner. "We reject this view on two grounds: and return to the clear meaning of the Act in context with its purpose, history, and wording—qualified Indians, not the Commissioner, have a right to the preference in appointments to vacancies. The statute makes the choice."

"[1] In Mescalero Apache Tribe v. Hickel, 432 F.2d 904, 909-910 (10th Cir. 1970), cert. denied, 401 U.S. 691, 91 S. Ct. 1195, 29 L.Ed.2d 333 (1971), Chief Judge Lewis, writing for the court, recognized that the government's position contained "veracity of the age-old Indian complaint of the forced tongues... and that the objective of Section 472 for the BIA to "gradually become an Indian service predominantly in the hands of educated and competent Indians" was not being realized. That court felt constrained to hold that the Indian preference did not apply to reductions-in-force because "no appointments to vacancies" were involved. Accepting the rationale of Mescalero as applied to the facts there, as we have, and that the promotions and lateral transfers involved in the case before us do involve appointments to vacancies, as we must, for us to hold that the Indian preference established by Section 472 need not be observed if it is determined impractical to do so by the Commissioner, notwithstanding, as we have noted, that Section 472 was intended by the Congress to change prior statutes which...

21. "We have remanded that the weight of an administrative interpretation will depend, among other things, upon its consistency with earlier and later pronouncements of an agency. In this instance the BIA's somewhat inconsistent posture before its present position in order to an agency interpretation therefore had granted a preference only; "maximum or practical", would render understandable a disavowal of the ancient grievance against the duty of deceit to which the Indian race so long resorted and which it was to be hoped had been held to rest by considerate modern legislation, including Section 472. We conclude that this section means what it says, as the trial court determined.

The partial stay herebefore granted is vacated and the judgment and order of the district court affirmed.

DICK JONES et al., Appellants.

DISTRICT OF COLUMBIA REDEVELOPMENT LAND AGENCY et al.

(Three cases).

Nos. 73-1507, 73-1516 and 73-1716.

United States Court of Appeals, District of Columbia Circuit.


Argued July 24, 1972.

Residents of area in proposed urban renewal plan brought action against the District of Columbia Redevelopment Land Agency, the National Capital Planning Commission and the Department of Housing and Urban Development to challenge the legality of certain actions of the agencies in formulating and executing plan for urban renewal pursuant to neighborhood development programs. The United States District Court for the District of Columbia, Howard F. Corson, Judge, entered an order granting defendants' motion for judgment on the pleadings; the District of Columbia Circuit reversed an order in the nature of mandamus.

22. "The district court refused any stay of the order, but upon application of appellants we allowed a stay pending the last limited to the effect of the order upon lateral transfers..."
Memorandum

To: Area Directors
    Acting Director, Administrative Services Center
    Director, Southeast Agencies

From: Commissioner of Indian Affairs

Subject: Guidelines to Implementation of Stay in Freeman Decision


A noncompetitive reassignment of a non-Indian employee may be made to a vacant position, providing it is to a position where there is no promotion potential, only under situations where compelling circumstances are present. Compelling circumstances are any one of the following: (1) For reasons of health of either the employee or members of his immediate family, when documented by a letter from a physician; (2) Where, by tribal council resolution, replacement of a particular employee at an agency is requested; (3) Where the employee has lost the confidence of the Indian community, or has ceased to be effective in his position, or is subjected to threats or he or his family is under duress from the Indian community. When filling the vacancy created by the reassignment, a vacancy announcement will be issued and the present policy in granting preference to Indians will apply.

Reduction-in-force will be conducted in accordance with Civil Service Commission, Department, and Bureau regulations. Indian preference will continue to be applied in reduction-in-force. In reduction-in-force situations, employees may be reassigned to positions with no known promotion potential even though the resulting vacancy remains unfilled or is abolished.
A report must be sent to this office in every instance when personnel actions are taken pursuant to the above. This includes a personnel action involving a change to lower grade. The report shall include full documentation on the steps taken to fill the vacancy resulting from the reassignment, or, if the vacancy is not filled or the position is abolished, a complete statement of reasons for that action.

RECEIVED
ADMINISTRATION
APR 29 1974
NAVADO
AREA OFFICE
FROM MARVIN FRANKLIN ASSISTANT TO THE SECRETARY FOR INDIAN AFFAIRS

TO TONY LINCOLN AREA DIRECTOR NAVAJO AREA


ALL PERSONNEL ACTIONS ARE NOW, UNTIL FURTHER INSTRUCTED, TO BE TAKEN APPLYING THE FREEMAN DECISION, WHICH HAS HELD: "THAT ALL INITIAL HIRING, PROMOTIONS, LATERAL TRANSFERS AND REASSIGNMENTS IN THE BUREAU OF INDIAN AFFAIRS AS WELL AS ANY OTHER PERSONNEL MOVEMENT THEREIN INTENDED TO FILL VACANCIES IN THAT AGENCY, HOWEVER CREATED, BE DECLARED GOVERNED BY 25 USC 472, WHICH REQUIRES THAT PREFERENCE BE AFFORDED QUALIFIED INDIAN CANDIDATES."

Called from Phoenix Area Office 4:15 p.m., 8/17/73, by Lillian in Mr. Artichoker's Office.
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

G. R. RANGARI, ANTHONY FRANCO,
WILMORTH GARRETT and JULES
COOPER, on behalf of themselves and all others
similarly situated,

Plaintiffs,

v.

ROGERS C. B. MORTON, as
Secretary of the Interior,
LOUIS A. BRUCE, as Commissioner
of Indian Affairs, CHARLES G.
OLSON, as Area Director, Bureau
of Indian Affairs, Albuquerque
Area Office, and ANTHONY LINCOLN,
as Area Director, Bureau of
Indian Affairs, Navajo Area Office,

Defendants.

JUDGMENT

IT IS ORDERED, ADJUDGED AND DECREED that the named
defendants are hereby permanently enjoined from implementing
any policy in the Bureau of Indian Affairs which would hire,
promote, or reassign any person in preference to another
solely for the reason that such person is an Indian, since
25 U.S.C. §§ 44, 46 and 472 are contrary to the Civil Rights
Act, and are inoperative.

IT IS SO ORDERED.

[Signature]
United States Circuit Judge.

[Signature]
United States District Judge.

[Signature]
United States District Judge.

RECEIVED
JUN 7 1973
NAVAJO AREA OFFICE
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

C. R. MANCINI, ANTHONY FRANCO,
MILANIA GARCIA and JULES
COOPER, on behalf of them-
seves and all others similarly
situated,

Plaintiffs,

v.

ROGERS C. B. MORTON, as
Secretary of the Interior,
LOUIS R. BRUCE, as Commissioner
of Indian Affairs, WALTER O.
OLSON, as Area Director, Bureau
of Indian Affairs, Albuquerque,
Area Office, and ANTHONY LINCOLN,
as Area Director, Bureau of
Indian Affairs, Navajo Area Office,

Defendants.

MEMORANDUM OPINION

This is a class action brought by the named plaintiffs
on behalf of themselves and all other employees of the Bureau
of Indian Affairs who are of less than twenty-five per cent
Indian blood. Plaintiffs seek to enjoin the defendants from
implementing and enforcing a policy of the Bureau of Indian
Affairs to give preference to persons of one-quarter or more
Indian blood in initial hiring, training, promotion, and
reinstatement.

Plaintiffs allege that Title 25, United States Code,
§§ 44-46 and 472 (hereinafter the Indian Preference Statutes),
are being improperly construed by the Secretary and the
Commissioner in that those sections were meant to extend a
preference to Indians in initial hiring only. Plaintiffs fur-
ther allege that this expanded policy violates their rights
under the Civil Rights Acts of 1964 and 1972, which rights are
guaranteed them in Title 42, United States Code, §§ 2000e et
seq., and Public Law 92-261, § 717. Finally plaintiffs allege
that the Indian Preference Statutes are unconstitutional be-
cause they deprive plaintiffs of their rights to property
without due process of law in violation of the Fifth Amendment
to the United States Constitution.

The non-Indian plaintiffs are longtime employees of the
BIA. They are teachers at the Albuquerque Polytechnic Institu-
tive, or programmers, or in computer work, or teachers in other
areas. They testified as to particular training or advance-
ments for which they had applied, and which in their opinion
were denied by reason of the application of the preference
policy. We find that the plaintiffs demonstrated sufficient
connection with the application of the policy to bring this
action for themselves and others similarly situated.

The defendants are persons occupying official positions
relating to the BIA and are responsible for the application
of the Acts herein concerned.

We find that there are asserted substantial constitu-
tional questions requiring consideration by a three-judge
court.

The United States Attorney, who appears for the de-
fendants, challenges the court's jurisdiction over the sub-
ject matter. The Court of Appeals in Mescalero Apache Tribe
v. Hickel, 432 F.2d 936 (10th Cir.), held that there was
jurisdiction under 5 U.S.C. § 704 in that action. Here the
plaintiffs assert jurisdiction under 42 U.S.C. § 2000e and
28 U.S.C. § 1331(a)(2). This could be considered under the
latter statute since the action was against "Rogers C. B.
Norton, as Secretary of the Interior," and against other named persons in their official capacities. As indicated, the
United States Attorney has 'appeared as counsel for the defendants. However, we hold that there is jurisdiction under 42
U.S.C. § 2000e, and any further challenge before the Depart-
ment concerned would be an idle gesture in the face of the
issuance of the policy statement and its implementation by re-
gulations and orders. The issue is not an interpretation of
policy statements or their application, but is a direct chal-
lege to the validity of the statute on which the departmental
policy is based. There is thus no purpose shown why any fur-
ther administrative action would serve any useful purpose.
Mescalero Apache Tribe v. Hickel, 432 F.2d 958 (10th Cir.),
we believe, is significant on this point although it dealt
with 5 U.S.C. § 704 where no administrative machinery was ex-
pressly provided.

Defendants contend that they are directed by 25 U.S.C.
§ 472 to implement the policy of Indian preference. Section
472 provides as follows:

"The Secretary of the Interior is directed
to establish standards of health, age, character,
experience, knowledge, and ability for Indians
who may be appointed, without regard to civil-
service laws, to the various positions maintained,
now or hereafter, by the Indian Office, in the
administration of functions or services affecting
any Indian tribe. Such qualified Indians shall
hereafter have the preference to appointment to
vacancies in any such positions."
Other statutory provisions relating to preference, although less explicit, appear at 25 U.S.C. §§ 44 and 46.

The gist of the preference policy which precipitated the challenge was embodied in Personnel Management Letter No. 72-12, issued by the Albuquerque Area Office of the BIA, which provided in part as follows:

"The Secretary of the Interior announced today he has approved the Bureau's policy to extend Indian preference to training and filling vacancies by original appointment, reinstatement and promotions."

"The new policy provides as follows: Where two or more candidates who meet the established requirements are available for filling a vacancy, if one of them is an Indian, he shall be given preference in filling the vacancy. This policy is effective immediately, and is incorporated into all existing programs such as the Promotion Program."

The policy was officially announced and, as we find from the evidence that it is being carried out, applies the preference in hiring and promotions. Instances of promotional preferences were testified to by the witnesses. The policy is thus a reality, and far beyond the formative stage.

A preliminary issue relates to the validity of 25 U.S.C. § 472, quoted above, in view of its inclusion in the heterogeneous Indian Reorganization Act of 1934. This provision was included in the Reorganization Act together with other sections which relate to a variety of subjects. In one of the sections, now 25 U.S.C. § 478, provision is made for submission of "the Act" for acceptance or rejection by the various Indian tribes. This voting section (§ 478) on its face would appear to make the application of section 472, with which we are here concerned, optional with individual tribes by requiring a
special election of the adult members of the tribe to vote on the application of the entire Act.

The Reorganization Act was submitted and voted on and was rejected by a considerable number of tribes. This rejection and acceptance tribe by tribe creates some uncertainty, but a careful reading of the other sections, as well as a review of the Congressional history of the Act, convinces us that the elections were to be only for the purpose of accepting or rejecting sections 476 and 477 of Title 25, 48 Stat. 987-88. For example, we cannot believe that Congress intended all the Indian tribes to vote on the extension of boundaries of the Papago Reservation (section 463a, 50 Stat. 536), on the Secretary making rules and regulations for the operation and management of Indian forestry units (section 466, 48 Stat. 986), or on appropriations for vocational and trade schools (section 477, 48 Stat. 985), or on other provisions found in the Indian Reorganization Act. It is difficult to see how under any other construction the Act would be valid.

Senator Wheeler, one of the sponsors of the Reorganization Act, made the following remarks in his discussion of sections 476 and 477 of the Act:

"The third purpose of the bill is to stabilize the tribal organization of Indian tribes by vesting such tribal organizations with real, though limited, authority, and by prescribing conditions which must be met by such tribal organizations. This provision will apply only if a majority of the Indians on any Indian reservation desire this sort of organization. As a matter of fact, however, it does not change to any great extent the present tribal organization, except that when a majority of the Indians want to establish this tribal organization and extend the provisions of the bill to it, they may do so." (1934 Congressional Record, p. 11123).
Nothing which followed in the debate or in the way of amendments suggests to us that the option of acceptance was extended to any other portion of the Act, and therefore the preference section here concerned must be held to extend to all Indians as individuals.

The issue of the proper construction of 25 U.S.C. § 472 is urged on this appeal and is a significant problem. The United States Court of Appeals for the Tenth Circuit in Mesalago Apache Tribe v. Hickel, 432 F.2d 956, considered the application of the preference statutes to reductions in the work force of the Bureau of Indian Affairs, and held the preference not applicable. There section 472 was considered, as were sections 44 and 46 of 25 U.S.C., and references were made to the legislative history. The parties and the court were there concerned only with the particular issue at hand. There was no other issue nor a general challenge to the Act. The preference thus does not apply to reductions in the work force.

The United States District Court for the District of Columbia, in Freeman v. Morton, Civ. No. 327-71 (not yet reported), had before it the question of whether or not section 472 gave the plaintiff a preference over all non-Indian employees in the Bureau of Indian Affairs with respect to promotions, reassignments to vacant positions within the BIA, and to assignments to available training positions (the contrary position was that the preference was only as to initial hiring). The district court in Freeman held that section 472 required the preference be given in promotions.
and reassignments to vacant positions within the Bureau, but
that it did not extend to positions in training programs.

We do not decide whether the preference is as broad as
the court in Freeman v. Morton indicates. It is sufficient
to permit consideration of the basic issue to observe that
no one challenges the application of the preference acts to
initial hiring and indeed the wording does not permit such a
challenge.

We turn now to the asserted conflict between the Indian
Preference statute and the Civil Rights Acts of 1964 and
1972 (Equal Employment Opportunity Act, 1972, Public Law
92-261). As indicated above plaintiffs assert that the Indian
Preference Policy adopted and implemented by the Bureau is in
direct conflict with the Civil Rights Acts of 1964 and 1972,
and more specifically with Title 42, United States Code,
§ 2000e-7 and as amended by Public Law 92-261. Plaintiffs in
their challenge to the preference acts thus assert that the
Bureau, by refusing to obey the Congressional mandate set forth
in section 717 of Public Law 92-261, is violating the rights
given them under that added section.

Section 717 provides in part as follows:

"Sec. 717. (a) All personnel actions af­­
fecting employees or applicants for employment
(except with regard to aliens employed outside
the limits of the United States) in military de­­
partments as defined in section 102 of title 5,
United States Code, in executive agencies (other
than the General Accounting Office) as defined
in section 105 of title 5, United States Code
(including employees and applicants for employ­­
ment who are paid from nonappropriated funds),
in the United States Postal Service and the
Postal Rate Commission, in those units of the
Government of the District of Columbia having
positions in the competitive service, and in
those units of the legislative and judicial branches of the Federal government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

On its face, section 717 applies to all agencies of the federal government. There is nothing in the Committee Report or in House Report No. 92-238, accompanying H. R. 1746, enacted into law as Public Law 92-261, which would indicate that the Bureau of Indian Affairs be excepted from its provisions (see 1972 U.S. Code Cong. & Ad. News, pp. 2137, 2157). Exceptions are contained in the Act, but none as to the Indians or the Bureau.

Senator Byrd of West Virginia, speaking in favor of the bill, made the following remarks:

“I do not favor special treatment or special consideration or favored employment of any individual on the basis of that person’s being black or white, male or female... Notwithstanding what I have just said, the fact remains that discrimination in employment, on the basis of race, does exist, and discrimination against sex does persist. Wherever there is such discrimination in employment, it is violative of the Constitution of the United States..."

"In other words, he should rise or fall on the basis of merit, not on the basis of race or religion or sex. Every qualified individual — black, white or else — should be given an equal chance — not preferential treatment — at employment." (Congressional Record, January 26, 1972, at s. 550).

And Senator Humphrey, speaking for the bill, made the following statement:

“We must make absolutely clear the obligation of the Federal Government to make all personnel actions free from discrimination based on race, color, sex, religion, or national origin.” (Congressional Record, January 20, 1972, at 75, 172-173).
This is not a simple instance of a relationship of a general statute to a special subject statute which often occurs. Each statute purports to cover the same particular subject of personnel actions relating to, as section 717 described them, "... discrimination based on race, color, religion, sex, or national origin." One Act applies to all but some excepted bureaus or agencies and the other to the "Indian Office." This is not a sufficient difference in the scope to bring into consideration the doctrine relating to conflicts between special and general statutes. Further by the nature of the subject matter and scope, the two cannot exist side by side. See Posadas v. National City Bank, 296 U.S. 477.

There was no evidence introduced to show in any way that having seventy-five per cent non-Indian blood and twenty-five per cent Indian blood was in any way a job-related criterion. Griggs v. Duke Power Co., 401 U.S. 424. There was no evidence whatever presented to show any national-public purpose concerned in the preference policy as compared with the nondiscrimination statutes. There would certainly have to be some showing of these factors before defendants' arguments could be considered to support the preference statutes as an exception.

We do not consider that Board of County Com'rs v. Seber, 318 U.S. 705, or Simmons v. Eagle Scalespee, 382 U.S. 209, led to a contrary conclusion. It is apparent that Indian tribes have been the subject of particular legislation from time to time. But this of itself is no reason for a different
treatment of Indians generally. Indians as such are not con-
sidered to have rights, so far as here pertinent, different
from other citizens; they are citizens and are obviously en-
titled to all rights, privileges, and burdens thereof.

We have not considered the challenge by plaintiffs to
the constitutionality of the preference statutes. This is-
ue involves the consideration of the reasonable governmental
purpose or objective sought to be attained in creating the
preferred position for certain persons having a stated per-
centage of Indian blood as compared to others. There was
testimony as to the manner in which certain non-Indians were
affected by the policy. The separate treatment was thereby
established together with its impact on the individuals.
The defendants had the burden of coming forward with evidence
of an important governmental objective but put on no evidence
directed to this matter. Under these circumstances, we could
well hold that the statute must fail on constitutional grounds,
but instead we hold as above described that the preference
statutes must give way to the Civil Rights Acts.

[Signatures]
United States Circuit Judge.

[Signatures]
United States District Judge.

[Signatures]
United States District Judge.
Memorandum

To: Area Directors and Chief, Field Support Services Office, Bureau of Indian Affairs

From: Director, Organization and Personnel Management

Subject: Implementation of Indian Preference Policy and Clearance Required for Filling Vacancies at GS-13 and Above

Per your discussion with Secretary Bodman, we are enclosing memoranda relative to the procedural application of the new Indian preference policy in the Bureau of Indian Affairs and the Secretary's requirement that all vacancies filled at GS-13 and above have prior approval of this office.

In the near future you will receive more specific instructions from the Bureau Chief Personnel Officer concerning the application of Indian preference in promotions. The Secretary's memorandum applies to vacant positions filled by original appointment, transfers and promotions. Lateral reassignments within the bureau and promotions resulting from reclassification actions do not require prior approval of this office unless such clearance is required by 370 BN 311.

Your requests to fill vacancies should be directed to the Acting Chief Personnel Officer, Bureau of Indian Affairs, who will coordinate with and obtain the approval of this office.

If you have any questions about either of these policies, please feel free to call me on 202-343-6781.

Enclosure
Memorandum

To: Assistant Secretaries
Deputy Assistant Secretaries
Bureau Chiefs
Office Heads

From: Secretary of the Interior

Subject: Candidates for Senior Level Positions (GS-13 and above)

In view of the anticipated volume of requests for employment during the next three months, it is imperative that maximum coordination on recruitment actions exist throughout the Department.

Accordingly, until further notice, the qualifications of all prospective candidates for employment in senior level positions will be reviewed by Assistant Secretary Bodman's office before any commitments are made. All accessions, promotions, and transfers into vacant positions should be forwarded to the Office of Personnel Management for appropriate review and processing.

Rogers C.B. Anderson
Memorandum

To: Commissioner, Bureau of Indian Affairs
From: Assistant Secretary - Management and Budget
Subject: Implementation of New Indian Preference Policy

Your proposed procedures implementing the new policy extending Indian preference into promotions have been reviewed by this office. The attached procedures, which have been amended to conform to Departmental policy, are approved for implementation in the Bureau.

We understand the difficulties faced by your staff in developing these procedures. The new Indian preference policy and procedures will have a significant impact on employment practices in the Bureau. Their development has required a special sensitivity to this impact to insure the application of preference on an equitable basis within statutory limitations.

Training

Your covering memorandum of August 14 and the proposed procedures addresses the issue of preference in training. Although the policy statement approved by the Secretary on June 22, 1972, provided for greater emphasis on training for the development of Indian employees, it did not extend absolute preference into training. By letter dated July 5, 1972, Chairman Hampton of the Civil Service Commission endorsed our new Indian preference policy. We have since had discussions with members of the Commission staff and they point out that Chairman Hampton's endorsement of our policy did not include an endorsement of preference in training.

Training will continue to be performed in accordance with Federal training policy and Chapter 41 of Title 5, USC, i.e., to meet the immediate and long-range needs of the agency. Any reference to Indian preference in training must be deleted from Bureau issuances.

Promotions, Reinstatements and Initial Appointments

The statement of policy outlined in the Bureau's implementing procedures states in the last sentence, first paragraph: "Positions may be filled by transfers, reassignments, reinstatement, or initial appointment, but Indian preference applies in all cases except (1) when the Commissioner makes an exception and (2) in lateral transfer and reassignment before a Promotional Opportunity Bulletin is issued."
The policy statement approved by the Secretary extended Indian preference into filling of vacancies by original appointment, reinstatement, and promotion. Transfers into the Bureau from other Federal agencies should be considered original appointments to the Bureau rolls and therefore subject to the same requirements as original appointments as far as Indian preference is concerned. The noncompetitive reassignment of employees within the Bureau was not covered by the policy statement. We believe that the application of Indian preference in lateral reassignment actions would restrict unnecessarily your authority to reassign employees as the needs of Bureau programs may dictate. Since the noncompetitive lateral reassignment (actions which do not result in reassignment to a position with known promotion potential) would not place an employee in a better competitive position for advancement, preference would serve no useful purpose. Therefore, such actions should be exempt from the Indian preference requirements. However, there will be instances when an employee is reassigned to a position with known potential for advancement. In making a reassignment of this nature, Indian preference must be applied, since a promotion would ultimately result. We have amended the approved procedures accordingly.

Keeping Employees Informed.

You proposed to provide a copy of the justification for selecting a non-Indian employee to each candidate or applicant who was not selected from a promotion certificate. It is our opinion that such action would have no value. In addition, Federal Merit Promotion Policy, contained in FPM Chapter 335, states that: "An employee is not entitled to see an appraisal of another employee." Since the justification for selecting a non-Indian employee for promotion would of necessity take the form of an evaluation or appraisal of his capabilities to perform in a particular position, such justification would be inappropriate for distribution to all candidates. We have deleted this statement from your procedures.

Exceptions to Indian Preference in Promotion.

Exceptions to the Indian preference policy are expected to be limited, according to the approved policy. It is contemplated that exceptions will be granted only in those rare instances where the qualifications of a non-Indian candidate for promotion are so superior to competing Indian candidates that a decision not to select him will jeopardize the success of a program or project. We feel that it is important to all employees that the credibility of the Indian preference policy be maintained. Any exceptions will be subjected to close scrutiny by Indian and
non-Indian employees alike. It is important, therefore, that the Bureau grant exceptions only in instances which fully meet the rigid requirements of the policy.

Enclosure
Policy - An Indian has preference in initial appointment, including lateral transfer from outside the Bureau, reinstatement, and promotion. To be eligible for preference, an individual must be one-fourth or more degree Indian blood and be a member of a Federally-recognized tribe. It is the policy for promotional consideration that where two or more candidates who meet the qualification requirements are available for filling a vacancy, if one of them is an Indian, he shall be given the preference in filling the vacancy. In accordance with the policy statement approved by the Secretary, the Commissioner may grant exceptions to this policy by approving the selection and appointment of non-Indians, when he considers it in the best interest of the Bureau. Positions may be filled by transfer, reassignment, reinstatement, or initial appointment, but Indian preference applies in all cases except (1) when the Commissioner makes an exception and (2) in reassignment within the Bureau.

The Promotion Program does not restrict the right of management to fill positions by methods other than through promotion.
All items remain the same except for 1.

Content of announcement:

1. The following statement will be included on each POB issued: "In filling this vacancy by promotion, initial appointment, lateral transfer from outside the Bureau, or reinstatement, priority in selection will be given to candidates who present proof of eligibility for Indian preference. A Certificate of Indian Blood must be part of the official personnel record of an applicant who claims Indian preference."
Items A, C, D, E, F, and G remain the same.

14 Methods and Procedures for Consideration.

B. Applications

An employee may file for an announced vacancy by submitting an SF-171 through supervisory channels to the appropriate job holding office. The supervisor will complete an evaluation form to attach to the application and forward it to the Personnel Office for submission to the job-holding Personnel Office.

An employee who claims Indian preference is responsible for submitting a Certificate of Indian Blood with his application if none is currently on record. Employees are responsible for submitting a CIB to the job-holding Personnel Office, if other than their current servicing Personnel Office. Indian preference in promotion will not be considered unless there is a CIB on file for the applicant claiming preference.
A & B are now -pen and ink changes renumbering old 17B to 17C; old 17C to 17D; and old 17D to 17E.

27 Evaluating Eligible Candidates

All qualified candidates to be considered for a vacancy will be arranged in two groups - Indian and non-Indian.

A. Method of Evaluating. Candidates who are basically eligible will be evaluated on a combination of factors dealing with their overall knowledge, skills, education, and experience. Rating panels will be established, unless it is impracticable to do so, in order to rate candidates for positions at GS-5 and above under the Promotion Plan. When rating panels are used in the evaluation process, personnel staff members and the selecting official may serve only in a technical or advisory capacity.

B. Evaluation of Outside Candidates. When recruitment efforts are extended to include applications from candidates outside the Federal service and other Federal agencies, these applications will be rated, ranked, and certified in the same manner as Bureau employees applying for consideration. When written evaluations are not available, telephone contacts with former or present employers will be documented as the supervisor's evaluation.
A. Ranking by Category

1. **Indian candidates.** All Indian candidates who meet the minimum qualification requirements for a position will be rated as qualified and they will be ranked into two groups - Qualified and Highly Qualified according to paragraph .17, "Evaluating Eligible Candidates." The best qualified will be selected from the Highly Qualified group.

2. **Non-Indian Candidates.** All non-Indian candidates who meet the minimum qualification requirements for a position will be rated as qualified and they will be ranked into two groups - Qualified and Highly Qualified according to paragraph .17, "Evaluating Eligible Candidates." The best qualified will be selected from the Highly Qualified group.

B. Referral of Candidates to Selection Official (Certification)

1. Three to 5 of the best qualified Indian candidates will be listed on the certificate. If meaningful distinctions cannot be made among the best qualified candidates as many as 10 names may be certified.

2. Where there are no best qualified Indian candidates available, 3 to 5 of the best qualified non-Indian candidates will be certified together with all qualified Indian candidates. Consideration of non-Indians will not be made until all qualified Indians have been considered. Selection of a best qualified non-Indian candidate, when there are qualified Indian candidates on the certificate, will require approval by the Commissioner as an exception to the Indian preference policy.

C. Exceptions. Requests for approval of the selection of a non-Indian will be submitted to the Commissioner. Exceptions will be granted only in those rare instances where the qualifications of a non-Indian candidate for promotion are so superior to competing Indian candidates in relation to job requirements, including any special needs, that a decision not to select him will jeopardize the success of a program or project.

1. **Justification for Exception.** A complete justification of why the selected non-Indian has superior qualification to the qualified Indian shall be submitted to the Washington Office together with the certificate of eligibles, applications, and supervisors evaluations.
CERTIFICATE OF ELIGIBLES

BEST QUALIFIED INDIAN CANDIDATES

QUALIFIED INDIAN CANDIDATES (may not be selected when best qualified Indians are available)

BEST QUALIFIED NON-INDIAN CANDIDATES (The selection of a non-Indian candidate is subject to approval by the Commissioner if there are qualified or best qualified Indian candidates available)

Selecting Official
Memorandum

To: All Employees, Navajo Area

From: Area Director

Subject: Indian Preference

In order that all Navajo Area employees will be informed of the latest developments regarding Indian preference, excerpts of the Commissioner's latest wire are stated as follows:

"THE SECRETARY OF THE INTERIOR ANNOUNCED TODAY HE HAS APPROVED THE BUREAU POLICY TO EXTEND INDIAN PREFERENCE TO TRAINING AND TO FILL VACANCIES BY ORIGINAL APPOINTMENT, RE-INSTATEMENT AND PROMOTION. . . . THE SECRETARY OF THE INTERIOR AND THE COMMISSIONER STRESS THAT CAREFUL ATTENTION MUST BE GIVEN TO PROTECTING THE RIGHTS OF NON INDIAN EMPLOYEES . . . . THIS NEW POLICY IS EFFECTIVE IMMEDIATELY AND IS TO BE INCORPORATED INTO ALL EXISTING PROGRAMS SUCH AS THE PROMOTION PROGRAM, REVISED MANUAL RELEASES WILL BE ISSUED PROMPTLY FOR REVIEW AND COMMENT."

We will make every effort to make available copies of the revised manual releases as soon as they are received from the Washington Office.

[Signature]
Area Director
Mr. Walter O. Olson
Area Director
Bureau of Indian Affairs
P.O. Box 3327
Albuquerque, N.M. 87106

Re: Mescalero Apache Tribe v. Nickal, et al., Court of Appeals, Tenth Circuit, No. 60-70.

Mr. Olson:

On March 22, 1971, the U.S. Supreme Court denied the Plaintiff's petition for review of the decision of the Court of Appeals, Tenth Circuit. The effect of this denial is that the Court of Appeals' decision, affirming the District Court ruling, stands.

This now concludes this litigation, and I am closing our file on the matter.

Sincerely yours,

[Signature]

Lotario D. Ortega
Field Solicitor

cc: Mescalero Agency
Memorandum

To: Area Directors

From: Area Director


Enclosed is a copy of the Government's Brief in opposition to the petition for writ of review filed by the plaintiffs December 31, 1970.

This Brief is transmitted to keep you currently advised of the status of the case.

[Signature]

Acting Area Director

Enclosure
February 16, 1971

Mr. Walter O. Olson
Area Director
Bureau of Indian Affairs
P.O. Box 8327
Albuquerque, N.M. 87108


Dear Mr. Olson:

Enclosed for your information and records is a copy of the Government's brief in opposition to the petition for writ of review filed by the plaintiffs December 31, 1970. We will advise you of the Court's decision on whether it chooses to review the lower court's decision as soon as it is announced.

Sincerely yours,

Lotario D. Ortega
Field Solicitor

1 Enclosure
In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1186

MESCALERO APACHE TRIBE, ET AL., PETITIONERS

v.

ROGERS C. B. MORTON, SECRETARY OF THE
INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A,
1a-10a) is reported at 432 F.2d 956. The opinion of
the district court (Pet. App. B, 11a-14a) is unre-
ported.

JURISDICTION

The judgment of the court of appeals was entered
on October 5, 1970. The petition for a writ of cer-
tori was filed on December 31, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**QUESTION PRESENTED**

Whether probationary Indian employees of the Bureau of Indian Affairs must be preferred over tenured non-Indian civil service employees during a reduction in force.

**STATUTES INVOLVED**

25 U.S.C. 44 provides:

In the Indian Service Indians shall be employed as herders, teamsters, and laborers, and where practicable in all other employments in connection with the agencies and the Indian Service. And it shall be the duty of the Secretary of the Interior and the Commissioner of Indian Affairs to enforce this provision.

25 U.S.C. 46 provides:

Preference shall at all times, as far as practicable, be given to Indians in the employment of clerical, mechanical, and other help on reservations and about agencies.

25 U.S.C. 472 provides:

The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed, without regard to civil-service laws, to the various positions maintained, now or hereafter, by the Indian Office, in the administration of functions or services affecting any Indian tribe. Such qualified Indians shall
hereafter have the preference to appointment to vacancies in any such positions.

STATEMENT

Two Indians, discharged during an ordinary reduction in force, brought an action for mandatory injunctive relief to require the Bureau of Indian Affairs to re-employ them. The two Indians, a caretaker and a building repairman, each had less than three years' service with the Bureau of Indian Affairs and were in a career-conditional, or probationary, status. Two non-Indians were retained in similar jobs; each had more than three years' service, and thus was in a career, or tenured, status under standard Civil Service Commission and Bureau practices. The Indians asserted that, because they would have had a statutory preference in hiring for the jobs, under 25 U.S.C. 44, 46 and 472, they must also be given retention preference during a reduction in force, without regard to their different tenure status. After a hearing, the district court ruled that (Pet. App. B, 14a):

* * * Only a strained construction of the preference statutes will result in the interpretation that they are intended to apply to reductions in force, and this conclusion is equally applicable to the cited legislative history.

The court of appeals affirmed, finding the statutory interpretation sought by the Indians "strained and untenable." The court said (Pet. App. A, 9a-10a):

* * * Congress intended to promote Indian employment in the B.I.A. but also to provide job
security for non-Indian employees by giving Indians only a preference in "appointment to vacancies." This security is lost if the Indian preference statutes are applied to reductions in force since inevitably all non-Indian employees would be "ousted" by such reductions. Besides posing a threat to non-Indians now employed by the B.I.A., the loss of job security would also constitute a significant deterrent in recruiting non-Indians for B.I.A. jobs. Although qualified Indians are to be actively sought and accorded a preference in initial hiring, it may still be necessary to employ non-Indians whenever it is not "practicable" to do otherwise.

ARGUMENT

The decision is correct, does not conflict with any decision of this Court or any court of appeals, and presents no question warranting further review.

The statutes involved do not, in their face, deal with reductions in force. 25 U.S.C. 44 and 46 speak of employing Indians "where practicable." As the court of appeals noted, if an extensive search for a qualified Indian employee fails, and a non-Indian must be hired, that could hardly be done if the non-Indian could be offered no job security of any kind.

1 This is a reference by the court to the legislative history. 78 Cong. Rec. 11731 (1934).

2 This is a reference by the court to Chapter 713 of the Bureau of Indian Affairs Manual, sec. 713, 1.20.

3 Reductions in force in the Bureau of Indian Affairs occur once or twice a year (Tr. 10).
25 U.S.C. 472, on its face, applies only to vacancies, and its legislative history, 78 Cong. Rec. 11731 (1934), shows plainly that it was not meant to cause the discharge of non-Indians in the Bureau of Indian Affairs. While the Bureau of Indian Affairs has in the past used the Indian preference in choosing among employees with identical civil service status during reductions in force, nothing in the administrative history suggests that probationary employees, although Indian, are to be favored over tenured ones. So to hold would be entirely contrary to established practice. See 5 U.S.C. (Supp. V) 3502; 5 C.F.R. 351.501, 351.602.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
SHIRO KASHIWAs,
Assistant Attorney General.
GEORGE R. HYDE,
CARL STRASS,
Attorneys.

JANUARY 1971.