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.

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
WASHINGTON, D.C. 20245

IN REPLY REFER TO:
Personnel Management

JUN 2 9 1976

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 positio for which a test is part of the qualification requirements for the positio 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.

Morris Thompson

Attachment

AMERICAN REVOLUTION BICENTENNIAL 1776-1976

Ltr. 530

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

JUN 11 1976

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 Commissi 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 matte 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

Duard R. Barnes

Attachments

IN REPLY

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
P. O. Box 849
Juneau, Alaska 99802

INTERIOR DEPT. 145700
MAR 4 1976
SOLICITOR'S DOCKET

March 2, 1976

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 Qualificatic 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 effect 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 H. Kelly
Field Solicitor

Enclosure
cc: Area Director

UNITED STATES GOVERNMENT

Memorandum

DEC 12 REC'D

TO : Field Solicitor

DATE: December 11, 1

FROM : Area Director

SUBJECT: Indian Preference for Employment

I am requesting a legal interpretation regarding the administration of Indian Preference to effect employment in the Juneau 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 IAM (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).

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 conte FPM Chapter 338 (copy attached) prescribes the manner in which excepted 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 8043. The Act has been recognized and interpreted in the Supreme Court decision on Mancari vs. Morton 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. Morton 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 permits the appointment of Indians of one-quarter or more degree of Indian blood to any position in the Indian Service without examination. FPM Chapter 213 subchapter 2.a(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).

Acting Area Director

Attachments a/s

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
WASHINGTON, D.C. 20242

IN REPLY REFER TO:
Personnel Management

JUN 24 1976

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."

Robert L. Murphy

Attachment

RECEIVED
ADMINISTRATION
JUN 28 1976
NAVAJO
AREA OFFICE

Inc: 530
Cy: 100

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

DIVISION OF CONTRACTING

MAR 24 1976

MAR 25 10

CC: 102, 1

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. 9478) 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. 7902, 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

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
WASHINGTON, D.C. 20245

IN REPLY REFER TO:
Personnel Management

JUN 21 1976

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

Inc: 530
Cy: 103

AMERICAN REVOLUTION BICENTENNIAL 1776-1976

RECEIVED
ADMINISTRATION
JUN 23 1976
NAVAJO
AREA OFFICE

Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

JUN 11 1976

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 in our view by the definition of "Indian" contained in the Indian Reorganization Act, 25 U.S.C. §479, which sets forth three criteria (and a fourth standard for the special circumstance 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. §472. 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 18 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. 8479 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 heretofore met the quarter-degree requirement and received preference in employment. Thus, it was to avoid the hardship and inequity of narrowing the eligibility standard in this somewhat 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 descendancy 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 remains. 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. 6501 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,

/s/ Thomas S. Kleppe

Secretary of the Interior

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

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
WASHINGTON, D.C. 20245

IN REPLY REFER TO:
Personnel Management

MAY 21 1976

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

AMERICAN REVOLUTION BICENTENNIAL 1776-1976

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ADMINISTRATION

MAY 26 1976

NAVAJO
AREA OFFICE

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.

Morris Thompson

Attachment

1. Q. Will an individual currently employed in BIA based on ½ 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 ½ 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 ½ or more degree blood quantum.

5. Q. May preference in appointments continue to apply based on ½ 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 ½ 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 ½ 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? (Tribe means any Federally recognized Indian gr

A. No - Preference will be provided to individuals who are members of any 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 vacanc announcements?

A. The information must include preference for ¼ degree in initial appoin ments and the four new criteria. After a new appointing authority has been received, the wording on ¼ 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, w 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 afte 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 crite

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.

Teletype received at PHS, Window Rock 4/26/76

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

Cy: 530

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
WASHINGTON, D.C. 20245

IN REPLY REFER TO:

APR 20 1976

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 wnerever there is exclusive union recognition that this information be brought to their attention at the earliest possible time.

Morris Thompson

Anc 530
Cy $00

AMERICAN REVOLUTION BICENTENNIAL

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

Mr. Robert E. Hampton
Chairman
United States Civil Service Commission
1900 E Street, N.W.
Washington, D. C. 20415

MAR 18 1976

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

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1/ Act of June 30, 1834, 25 U.S.C. §45, 4 Stat. 737; Act of July 4, 1884, 25 U.S.C. §46, 23 Stat. 97; Act of February 8, 1887, 25 U.S.C. §348, 24 Stat. 389; Act of August 18, 1894, 25 U.S.C. §44, 28 Stat. 313; Act of April 30, 1908, 25 U.S.C. §47, 35 Stat. 351; and Section 12, Act of June 18, 1934, 25 U.S.C. §472, 48 Stat. 984. Several treaties with Indian tribes also have preference provisions. Handbook of Federal Indian Law, 534-535 (1958 ed.).

2/ E.O. 6676, April 14, 1934; E.O. 7916, 3 CFR 350 (June 24, 1938); E.O. 8043, 3 CFR 449 (January 31, 1939); E.O. 8383, 3 CFR 636 (March 28, 1940).

set standard. The statutory standard is established by Section 19 of the Indian Reorganization Act of June 18, 1934, supra, 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. Freeman v. Morton, Civ. No. 327-71 (D.D.C.), filed December 21, 1972; aff'd 499 F.2d 494 (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) §2000e-16(a); nor are non-Indian employees deprived of property rights in the application of preference to Indians. Morton v. Mancari, 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. Whiting 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.

3/ The Court indicated that Section 472 replaced the earlier and more narrowly drawn preference statutes. Morton v. Mancari, 417 U.S. at 536, 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 coopted 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, viable 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 exempt 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. 4/ That deprivation can no longer be upheld. The Court in Mancari 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 . . ." 417 U.S. at 554.

Thus, we request that 5 CFR 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 and 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

4/ While many tribes have blood quantum requirements of one-quarter degree and thus a change in the preference eligibility standard 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 preference 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 18 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 5/ so that there are today no current membership rolls for these tribes. The provisions of the definition of Section 19 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.

5/ Act of April 26. 1906, 35 Stat. 137; Act of June 28, 1906, 34 Stat. 539.

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,

(Sgd) Tom

Secretary of the Interior

26 500

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

FEB 2 1976

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, caught 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, 1984 (H.R. 4988). This special provision would not apply to anyone who "is otherwise entitled to full retirement benefits."

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H.R. 4988 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 out placement of non-Indian preference employees of the BIA and IHS 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 8336(d)(1)).

The annuity formula for employees who retire under 5 U.S.C. 8336(d), determined by U.S.C. 8339(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 no 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. 5465 this Department is assisting these 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. 4988, H.R. 5858, and H.R. 5968, would not be in accord with the program of the President.

Sincerely yours,

James T. Clark

Assistant Secretary of the Interior

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

United States Department of the Interior

OFFICE OF THE SECRETARY

NOV 20 1975

Dear Mr. Chairman:

This responds to your request for the views of this Department on H.R. 5465, 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. 5465. The Department is currently in the process of formulating an assistance program to resolve the problem addressed by H.R. 5465 and we believe that this available administrative solution is the most viable approach.

Provisions of H.R. 5465

We understand that H.R. 5465 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 those agencies.

H.R. 5465 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. 5465, 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 out-placement of "eligible employees" of the BIA and IHS under the bill to other parts of these Departments.

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 mandatory priority by the Department in consideration of their application for each vacancy occurring in the Interior Department, other than a vacancy in the BIA. However, the provisions of section 2 shall not apply to applications for filling a vacancy by transfer or appointment of a preference eligible, including those entitled to veteran's preference, reinstatement of such a preference eligible, or restoration 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 would 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 H.R. 5465 would apply to vacancies occurring during a three year period beginning after ninety 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 19th and early 20th centuries (see for example 25 U.S.C. 44-47). 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 (48 Stat. 986; 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, 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 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 102 of the Indian Self-Determination Act (88 Stat. 2206; 25 U.S.C.S. 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. Morton, 499 F.2d 494, 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 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 (Morton v. Mancari, 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 impliedly 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 Freemen and Mancari 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 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 bureaus 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-conditional BIA employees when: (1) there is a reduction in force and there are no opportunities for reassignment within the BIA; (2) an activity or function is being contracted by a tribe and 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 offer would be made to employees under the mandatory placement provisions.

Secondary priority placement assistance would be afforded to competitive career and career-conditional 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. 5465 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 programs 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 distinction 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,

Assistant 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.

Director, Organization and Personnel Management

Attachments

INQUIRIES: Mr. S. Donald Youso, Division of Organization and Manpower Management, Room 5023, Extension 7764

DISTRIBUTION: Bureau Headquarters

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 overseas 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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(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 Requirement. Under the DCPA, employees who are eligible for 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 insure 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 in 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 reinstatement 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.

(4) Eligibility for retention on a DCPA 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 DCPA 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 promotion.

(2) Salary Retention. An employee placed in a lower grade, who is eligible for salary retention under FPM Chapter 551, Subchapter 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 fulltime 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 promotee. The standard RIF 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)

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 office'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, 1.5E.

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

.5 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 accomodate 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, 1.3C and D.

(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 DM 330, 1.3D(1), must do so by September 30, 1976, 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 Morton) 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 DCPA, the losing servicing personnel office obtains an updated SF-171, a supervisory evaluation, and a completed 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 DCPA List and they will not be eligible for the program.

(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 Program 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.

D. 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 DCPA and will be provided information about Department activities in which they have expressed in 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 Forms, DI 1532, 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 (60-90 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 counseled on the various possibilities of increasing the opportunities for placement.

F. Preparation and Distribution of DCPA 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 Departmentwide, 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 DCPA 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 RPL as described in FPM Chapter 330, 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 two weeks 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 departmental activity which meets the grade level(s) and location(s) 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 370 DM 330, 1.5H, 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, DCPA 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 1832).

(b) Dates of counseling, and 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 DCPA. 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.

Attachment A

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 370 DM 330.1.

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-118 and in which the employee has expressed interest.

		Pay Plan	Series	Grade(s)
1.	_____	_____	_____	_____
2.	_____	_____	_____	_____
3.	_____	_____	_____	_____

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 _____

Attachment B

DEPARTMENT OF THE INTERIOR

CAREER PLACEMENT ASSISTANCE PROGRAM ELIGIBLES

Name	(2) Present Pay/ Series/Grade	(3) Title/Duty Station	(4) Other Series/ Grade Qualified	(5) Category Group	(6) Accp. Geog. Location	(7) Accp. Grade	(8
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Servicing Personnel Office number identifies the office which submitted the Career Placement Assistance Application. See Attachment C for listing.

SERVICING PERSONNEL OFFICE IDENTIFICATION CODES

IN01	Office of the Secretary - Division of Personnel Services
IN19	Alaska Power Administration
IN04	Southeastern Power Administration
IN03	Southwestern Power Administration
IN02	Bonneville Power Administration
IN09	Bureau of Mines - Headquarters Office
IN091	Bureau of Mines - Pittsburgh Office
IN092	Bureau of Mines - Denver Office
IN20	MESA - Headquarters Office
IN20P	MESA - Pittsburgh Office
IN20D	MESA - Denver Office
IN150	Fish and Wildlife Service - Headquarters Office
IN151	Fish and Wildlife Service - Portland Region 1
IN152	Fish and Wildlife Service - Albuquerque Region 2
IN153	Fish and Wildlife Service - Twin Cities Region 3
IN154	Fish and Wildlife Service - Atlanta Region 4
IN155	Fish and Wildlife Service - Boston Region 5
IN156	Fish and Wildlife Service - Denver Region 6
IN17	Bureau of Outdoor Recreation
IN05	Bureau of Land Management - Headquarters Office
IN0550	Bureau of Land Management - Alaska State Office
IN0504	Bureau of Land Management - California State Office
IN0536	Bureau of Land Management - Oregon State Office
IN0552	Bureau of Land Management - Denver Service Center
IN0S	Geological Survey - Headquarters Office
IN0S1	Geological Survey - Eastern Region Office
IN0S2	Geological Survey - Central Region Office
IN0S3	Geological Survey - Western Region Office
IN0S4	Geological Survey - Mid-Continent Personnel Office
IN10E	National Park Service - Headquarters Office
IN10E1	National Park Service - National Capital Parks
IN10A	National Park Service - Southeast Regional Office
IN10G	National Park Service - Midwest Regional Office
IN10K	National Park Service - Western Regional Office
IN10F	National Park Service - Mid-Atlantic Regional Office
IN10P	National Park Service - North Atlantic Regional Office
IN10M	National Park Service - Pacific Northwest Regional Office
IN10J	National Park Service - Southwest Regional Office
IN100	National Park Service - Rocky Mountain Regional Office
IN10N	National Park Service - Harpers Ferry Center
IN07	Bureau of Reclamation - Headquarters Office
IN0710	Bureau of Reclamation - Engineering & Research Center
IN0701	Bureau of Reclamation - Pacific Northwest Regional Office
IN0702	Bureau of Reclamation - Mid-Pacific Regional Office
IN0703	Bureau of Reclamation - Lower Colorado Regional Office
IN0704	Bureau of Reclamation - Upper Colorado Regional Office
IN0705	Bureau of Reclamation - Southwest Regional Office
IN0706	Bureau of Reclamation - Upper Missouri Regional Office
IN0707	Bureau of Reclamation - Lower Missouri Regional Office

IN06K	Bureau of Indian Affairs - Headquarters Office
IN06A	Bureau of Indian Affairs - Aberdeen Area Office
IN06C	Bureau of Indian Affairs - Billings Area Office
IN06G	Bureau of Indian Affairs - Muskogee Area Office
IN06N	Bureau of Indian Affairs - Navajo Area Office
IN06P	Bureau of Indian Affairs - Portland Area Office
IN06S	Bureau of Indian Affairs - Administrative Services Center
IN06E	Bureau of Indian Affairs - Juneau Area Office
IN06M	Bureau of Indian Affairs - Albuquerque Area Office
IN06X	Bureau of Indian Affairs - Phoenix Area Office

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
WASHINGTON, D. C. 20245

IN REPLY REFER TO:

AUG 7 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 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 supercede 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

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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,

Morris Thompson
Commissioner of Indian Affairs

OPTIONAL FORM NO. 10
MAY 1962 EDITION
GSA FPMR (41 CFR) 101-11.6

UNITED STATES GOVERNMENT

Memorandum

TO : Area Directors
Central Office Directors

DATE: JUL 11 1975

FROM : Commissioner of Indian Affairs

SUBJECT: Indian Preference Policy

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.

Morris Thompson

Attachment

7/17

d r a f t

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 supercede 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 bearings 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.

JULY EDITION
GSA FPMR 141 CFR 101-11.6

UNITED STATES GOVERNMENT

Memorandum

) : Mr. James Robey, Office of the Commissioner DATE: 11 JUL 1975

ROM : Acting Chief Personnel Officer

BJECT: 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 superceded by the Indian Reorganization Act. This is in error. Present policy and Civil Service Commission regulations are based on E.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 BIA 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.

Lawrence M. Frankel

Inc. 100

d r a f t

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 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.

no option for 5 Tribes - no data for payt

Two things should be noted in your considerations: (1) This policy change effects 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.

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Sincerely,

Commissioner of Indian Affairs

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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 Nation-wide standard that is generally accepted by employees and Tribes.

Operational Guidelines. Presidential Executive Order, Civil Service Commission, Department and Bureau regulations are all related to 1/4 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 1/4 degree Indian blood before we recognize him as an Indian.

Federal Employment. The 1/4 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 1/4 degree requirement over the last 35 years. No organized employee group has indicated that they desire to change this criteria.

A change could lead to other challenges. If the 1/4 criteria is modified for employment purposes; individuals and Tribes would soon question its application in other Bureau matters (e.g. enrollment in Bureau Boarding Schools, eligibility for educational grants etc.)

Disadvantages

Law Suits. Inaction would not resolve any of the present Civil and Administrative appeals on the 1/4 criteria.

Court Decision. Inaction may result in a Court making the determination which may or may not conform with BIA or Tribal desires.

(2) ADOPT ASSOCIATE SOLICITOR'S RECOMMENDATION FOR IRA 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 degree of ancestry is attributable to more than one federally-recognized tribe) WITH THE 1/2 PROVISO AND ADMINISTRATIVELY ESTABLISH A 1/4 DEGREE CRITERIA FOR ALL OTHER TRIBES.

Advantages

Law. Preference regulations would conform with IRA provisions for IRA tribes.

Tribal Members. This would eliminate the situation where tribal members of IRA tribes who are less than 1/4 degree are treated differently than other tribal members.

Law Suits. This would settle all suits from members of IRA tribes appealing the 1/4 criteria.

Disadvantages

Indian. This would create a situation where the Bureau would be granting preference to individuals of little or no Indian blood under the IRA tribal membership proviso.

Current Regulations. Presidential Executive Order, CSC criteria and Departmental regulations are all based on 1/4 degree requirement and they would have to be changed.

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

Indian Appointments. Indian excepted appointments are based on 1/4 criteria we have no authority to appoint using a different criteria. We could not appoint Indians under the IRA criteria until a Executive Order was issued. This time would place us in the position of basing initial appointments on 1/4 criteria and other personnel actions for the tribal members on a different criteria.

Executive Order. A new Executive Order would have to be issued prior to a change in excepted appointment procedures. This could take up to two years to complete.

Five Civilized Tribes. Tribes with closed membership rolls would be excluded

(3) TRIBAL MEMBERSHIP ROLES THE SOLE CRITERIA.

Advantages

Would treat all tribal members the same.

NCAI supports this criteria.

Enchances 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 BIA staff in developing and maintaini current tribal membership roles; a task that is already lagging.

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

Would not be appropriate for the Five Civilized Tribes as they have closed membership roles. The adoption of Tribal constitutions allowing the enrollment of descendants and the continuing enrollment on a current bas could change modify this disadvantage.

Tribes might not accept "Indian" candidates for BIA positions whose Indianness was based on other Tribes criteria.

Would not allow Indian employees to transfer to other Civil Service positi

(4) IRA TRIBAL MEMBERSHIP WITH 1/2 PROVISO AND 1/4 DEGREE FOR ALL OTHER FEDERALLY RECOGNIZED TRIBES.

Advantages	Disadvantages
Basically the same as option #2.	Same as Option #2
Eliminate Indians from non-Federally recognized Tribes.	

NOTE: We have also listed a fifth option. This option allows for nation-wide tribal consultation prior to any firm decision. This could be done prior to implementing any of the other options.

(5) TRIBAL CONSULTATION PRIOR TO ANY ACTION

Advantages	Disadvantages
This options gives the tribes the opportunity for input on this major policy decision prior to any final decision.	This approach would not resolve any of the immediate personnel problems.
Could request the Courts for a stay on pending law suits until this nation-wide review complete.	
Would anticapate top Congressional interest in any change of policy Jackson- Meeds letter mentioned Associate Solicitor's letter. Copy attached	

Attachment - TRIBAL MEMBERSHIP (includes Alaska). All figures given are estimates.

Total membership of BIA recognized tribes	-	800,000
IRA tribal membership	-	600,000
Non-IRA tribal membership	-	200,000
Indians possessing at least one quarter degree of Indian blood (3/4 of total Indian population)	-	600,000
Number of IRA tribes (50% current roll)	-	206
Number of non-IRA tribes (50% current roll)	-	278
Number of IRA tribes requiring minimum of 1/4 degree (generally no blood degree requirement for baseroll, meaning blood degree requirement applicable persons under 18 years.)		?
Number of non-IRA tribes requiring 1/4 minimum (generally no blood degree requirement for baseroll, meaning blood degree requirement applicable to persons under 18 years.)		?
Number of Indians at least eighteen years of age (ratio 4 children to 6 adults)		270,000

BUREAU OF INDIAN AFFAIRS
WASHINGTON, D. C. 20245

IN REPLY REFER TO:
Personnel Management

Proposed letter [illegible]

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 Mancari 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.

CONSERVE AMERICAN ENERGY

Save Energy and You Serve America!

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

United States Department of the Interior

OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

IN REPLY REFER TO:

APR. 9 1975

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 BIAM 335, 3.1, 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.

It will be helpful in rendering our opinion to trace the evolution of Indian preference and the quarter-degree standard. Various statutes, beginning with one in the year 1834, have established one form or another of preference. Act of June 30, 1834, 25 U.S.C. § 45, 4 Stat. 737; Act of July 4, 1884, 25 U.S.C. § 46, 23 Stat. 97; Act of February 8, 1887, 25 U.S.C. § 348, 24 Stat. 389; Act of August 18, 1894, 25 U.S.C. § 44, 28 Stat. 313; Act of April 30, 1908, 25 U.S.C. § 47, 36 Stat. 861;

and Section 12 of the IRA, supra. See Morton v. Mancari, ____ U.S. ____, 42 L.W. 4933, 4935 (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 8043 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 28, 1940, Executive Order 8383, 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 Opin. 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 CFR § 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 472 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

Inc: 530
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94TH CONGRESS
1ST SESSION

H. R. 5465

IN THE HOUSE OF REPRESENTATIVES

MARCH 25, 1975

Mr. HENDERSON introduced the following bill; which was referred to the Committee on Post Office and Civil Service

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. 46);

(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.

500 file

TELEGRAPHIC MESSAGE

NAME OF AGENCY	PRECEDENCE	SECURITY CLASSIFICATION
BUREAU OF INDIAN AFFAIRS	ACTION: INFO:	
ACCOUNTING CLASSIFICATION K00-53/5/3500/7265	DATE PREPARED 2/14/75	TYPE OF MESSAGE [X] SINGLE [ ] BOOK [ ] MULTIPLE-ADDRESS
FOR INFORMATION CALL		
NAME David E. George	PHONE NUMBER 5547	

THIS SPACE FOR USE OF COMMUNICATION UNIT

MESSAGE TO BE TRANSMITTED *(Use double spacing and all capital letters)*

FEB 19 1975

TO: ALL AREA DIRECTORS (SEE ATTACHED LIST OF ADDRESSEES)
ACTING ADMINISTRATOR, ADMINISTRATIVE SERVICES CENTER
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. 44 IAM 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 ELIGIBILES, THE POSITION SHOULD BE READVERTISED.

DIRECTOR, OFFICE OF ADMINISTRATION

COPY

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FEB 21 1975
AREA OFFICE

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STANDARD FORM 14

* U.S. GOVERNMENT PRINTING OFFICE : 1972 O - 460-070

IN REPLY REFER TO:

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
Navajo Area Office
P. O. Box 1060
Gallup, New Mexico 87301

DEC 2 0 1974

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.

IN REPLY REFER TO:

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
Navajo Area Office
P. O. Box 1060
Gallup, New Mexico 87301

DEC 17 1974

To:

From: ASST. Area Director, Navajo Area, Bureau of Indian Affairs

Subject: Letter of Introduction

This is to introduce _____, 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.

Julian R Trombley

BIA NAVAJO AREA OFFICE
WINDOW ROCK, ARIZONA

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AREA DIRECTOR BUREAU OF INDIAN AFFAIRS
WINDOW ROCK AZ [illegible]

WE HAVE BEEN NOTIFIED THAT THE U.S. DISTRICT COURT, NORTHERN DIVISION OF SOUTH DAKOTA HAS ISSUED A TEMPORARY RESTRAINING ORDER ENJOINING BIA FROM FILLING VACANCIES WHEREVER SITUATION WHEREIN INDIAN PREFERENCE RULES WILL BE GIVEN CONSIDERATION. FIRM COMMITMENTS MADE PRIOR TO THIS DATE MAY BE HONORED. NO COMMITMENTS FOR FILLING A VACANCY ARE TO BE MADE AFTER THE DATE OF THIS TELEGRAM. FURTHER INSTRUCTIONS WILL BE PROVIDED AS SOON AS POSSIBLE. WE ARE DILIGENTLY TAKING STEPS TO PROVIDE FURTHER REMEDY.

KENNETH L. PEYTON

[illegible] DEPUTY ASSISTANT [illegible] [illegible]

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
WASHINGTON, D.C. 20242

IN REPLY REFER TO:
BCCO 3401
EEO

APR 25 1974

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 appointme 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 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."

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The mandate of Indian preference is determined to be of such import as to require that when attempting to fill positions, by any means, all efforts will be asserted to locate qualified Indian candidates. Until such time as this mandate is by legal means determined void - Indian preference is the over-riding policy of the Bureau of Indian Affairs.

We estimate that Bureau-wide during Calendar Year 1973, at least ninety percent of all new appointees and employees promoted were Indian. In the Muskogee Area, for instance, the actual figure was 97%.

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 eduational 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,

La Follett Butler

Acting Deputy Commissioner of Indian Affairs

Appellant's reliance upon our decision in Hartigh v. Latin, 158 U.S.App.D.C. 289, 485 F.2d 1068 (1973), 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' allegation 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, 42 U.S.C. § 1981 (1970),[12] which provides for jurisdiction under 28 U.S.C. § 1343(1) (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 § 1981 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 basis in 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 depositions had already been taken by both parties. Surely, if facts amounting to racial discrimination were in existence, the appellant had had opportunities over the seven months of litigation to bring them before the court.

We find no abuse of discretion in the District Court Order of certification on the record before us. Accordingly, we affirm that order.

So ordered.

Enola E. FREEMAN, on behalf of herself and all others similarly situated

v.

Rogers C. B. MORTON, Secretary of the Interior, et al., Appellants.

No. 73-1409.

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, Howard F. Corcoran, granted employees' motion 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,

In the latter 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 tears." In both cases, moreover, there seems to have been no probable cause for the detention.

12. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

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 ⇐4

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, reassignments within same office, or lateral transfers from another office. Indian Reorganization Act, § 12, 25 U.S.C.A. § 472.

2. Indians ⇐4

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 ⇐4

When position in BIA is open, needing 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 publication Words and Phrases for other judicial constructions and definitions.

4. Constitutional Law ⇐70.1(12)

If there are no reasonable administrative or management alternatives to violation of mandated preference in filling of vacancies within administrative agency for emergency situations, or transfer of nonpreferred employees necessary to maintain efficiency, solution to the problem must come from the legislature and not the judiciary.

5. Statutes ⇐219(4)

Any conflicting administrative interpretation must yield to clear provisions of a congressional act.

6. Indians ⇐4

Any ambiguities which might be perceived in statute providing preference for Indians in appointment to vacancies within the BIA should be resolved, reason permitting, in favor of the Indians. Indian Reorganization Act, § 12, 25 U.S.C.A. § 472.

7. Indians ⇐4

Statute giving preference to Indians in the filling of vacancies within the BIA does not give Commissioner of Indian Affairs discretion to make limited exceptions with reference to lateral transfers or promotions, even when Commissioner expressly finds the exception to be in the best interests of the Bureau. Indian Reorganization Act, § 12, 25 U.S.C.A. § 472.

Eva R. Datz, Atty., Dept. of Justice, with whom Wallace H. Johnson, Asst. Atty. Gen., Harold H. Titus, Jr., U. S. Atty. at the time the brief was filed, Leonard Belter, Asst. U. S. Atty., and Edmund B. Clark, Atty., Dept. of Justice, were on the brief for appellants. John A. Terry and James F. McMullin, Asst. U. S. Attys., also entered appearances for appellants.

Patrick F. J. Macrory, Washington, D. C., with whom Stuart J. Land, Washington, D. C., was on the brief, for appellees.

Before BAZELON, Chief Judge, McGOWAN, Circuit Judge, and CHRISTENSEN,* United States Senior District Judge for the District of Utah.

* Sitting by designation pursuant to 28 U.S.C. § 294(d).

CHRISTENSEN, Senior District Judge.

This is an appeal by defendants-appellants Rogers 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-appellees, Enola E. Freeman and three other employees of BIA, "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. Sec. 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 to appointment to vacancies in any such positions. June 18, 1934, c. 576, § 12, 48 Stat. 986.

From the passage of the statute until the institution of this suit the Bureau had narrowly applied this preference provision by construing the term "appointment to vacancies" to mean initial hirings only. Appellees were, and presumably still are, employed by the Bureau of Indian Affairs. Each at one or more times during her employment applied for assignment 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 grudging, appellees asserted in this action that the Indian preference applies to all appointments whether filled from within or outside the Bureau, and whether effected 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 improved 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 "waiver" of the general policy to be in the best interest of the Bureau. Plaintiffs limited their claims for relief to a declaration of their preference rights.[1] The ruling of the district court that the Indian preference did not extend to training opportunities is not in question.[2] Neither party has attacked the preference on civil rights or constitutional grounds.[3] Furthermore, the parties

1. In addition to declaratory relief the amended complaint sought prohibitory and mandatory injunctions, as well as damages. For purposes of their motion for summary judgment, however, plaintiffs waived all relief other than a declaration of their preferential rights in the areas of promotion, lateral transfers and training.

2. The district court rejected appellees' claim that the preference rights included preferential designation for training assignments. Appellees took no cross-appeal. See Fed.R.App. P. 4(a).

3. During the proceedings below a three-judge court in New Mexico, not reaching the constitutional issue presented, ruled that the statute construed here was impliedly repealed by the Civil Rights Acts of 1964 and 1972 (42 U.S.C. § 2000e-2 as amended). Mancari v. Morton, 359 F.Supp. 585 (D.N.M.1973). The application of that ruling has been stayed pending appeal to the Supreme Court, where probable

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.[4] The Tenth Circuit holding that the Indian preference does not apply to reduction-in-force situations[5] 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[6] 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:[7]

I. Does 25 U.S.C. § 472 apply to transfers and reassignments within the Bureau of Indian Affairs which are purely lateral?[8]

II. Does that section allow the granting of exceptions to the preference policy with reference to promotions, as well as with respect to lateral transfers or reassignments, for exceptional administrative or management reasons?

I

[1] The appellants argue that the district court's order is erroneously broad because it gives Indians preference "even as regards purely lateral reassignments . . . where a job and/or its occupant is merely relocated."

jurisdiction has been noted. 414 U.S. 1142, 94 S.Ct. 893, 39 L.Ed.2d 99 (1973). Except as it documents the shared position of all parties before this court that the Indian preference, however, it is construed to resolve the issue here, is valid, it may be more interesting than significant to note that both appellants' counsel and counsel representing appellees are asking the Supreme Court to reverse *Mancari*. See 42 U.S.L.W. 3158, No. 73-362 (1973); *Id.*, No. 73-364.

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

5. Mescalero Apache Tribe v. Hickel, 432 F.2d 956 (10th Cir. 1970), cert. denied, 401 U.S. 981, 91 S.Ct. 1195, 28 L.Ed.2d 333 (1971).

6. Employees eligible for Indian preference are those with one-fourth or more degree 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. 44 BIA Manual 713, 1.2. It is noted in the Manual that there are a few individuals in the latter category who were appointed before the one-fourth Indian blood requirement went into effect.

7. This court's decision in Fass v. Gray, 91 U.S.App.D.C. 28, 197 F.2d 587, cert. denied, 344 U.S. 839, 73 S.Ct. 39, 97 L.Ed. 653 (1952), involved a reduction-in-force problem of veterans in the context of a significantly different statute and the rule making power of the Civil Service Commission. Mescalero Apache Tribe v. Hickel, 432 F.2d 956 (10th Cir. 1970), cert. denied, 401 U.S. 981, 91 S.Ct. 1195, 28 L.Ed.2d 333 (1971), *supra*, also was a reduction-in-force case although involving Indians; the court held that "appointments to vacancies" were not involved so as to invoke control by Section 472. Mancari v. Morton, 359 F.Supp. 585 (D.N.M.1973), *supra*, expressly excludes our problem from consideration by the following language: "The United State District Court for the District of Columbia . . . 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 district court in Freeman held that section 472 required the preference be given in promotions and reassignments to vacant positions within the Bureau . . . 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." 359 F.Supp. at 589.

8. *I. c.*, movements of personnel which do not entail promotions or changes in salary, responsibility or promotion potentials, the latter element of which appellants concede also would justify considering the transfer as a promotion. We see difficulties in any such differentiation: the practical one of predicting promotional opportunity or lack of it in any shift; the control superiors would have through judgmental or discretionary action over the application of the Indian preference, by reason of this uncertain aspect, and the opportunities for thwarting the preference itself by transfers of current non-Indian employees from positions having no available qualified Indian replacements to vacant positions for which there are qualified Indians available. These problems are reduced or eliminated by the district court ruling.

They rely upon statements in Mescalero Apache Tribe v. Hickel, 432 F.2d 956, 960 (10th Cir. 1970), *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 no "appointments to vacancies" within the contemplation of the preference statute were involved. The declaratory 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.[9]

Vague reference is made by appellants to "mere" relocations of jobs or reassignments of duties essential to efficient administration, which they imply are undesirably 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; readjustments in assignments or tasks not involving the creation of, or appointment to, vacancies are unaffected, unless of course these personnel 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:[10] 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 (on a different reservation for example) having only non-Indian replacements available, obviously the intent of the statute under any view would be defeated. Yet appellees say that the BIA should be permitted to utilize in good faith this theory of exchange of positions without applying the Indian preference.

9. "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 McKune affidavit in support of the request for a stay on appeal stated: "Lateral reassignment of Bureau of Indian Affairs' employees to vacant positions are frequently made because of a breakdown in relationships between an employee at the agency level and the tribes 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 further alienation of the tribe, 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 move the non-Indian employee."

[2, 3] As tempting as this continued softening of the statute may appear, we cannot approve it. That would require an unacceptable torsion 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 promoted 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 custom 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 practices 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 appellees do, that "appointment" refers not only to initial hiring, but also to promotions, while maintaining that the term does not include lateral transfers, would be to only selectively accept the contended-for meaning, but largely to reject it to coincide with previously announced policies and the exigencies of this suit.

[4] Except in extremely exceptional circumstances a non-Indian would be transferred out of an existing position only if, taking into consideration the Indian preference, he could fill legally another vacancy because of the unavailability of a qualified Indian. If he were thus laterally transferred, then his former position would become vacant, subject to being filled also in a manner consistent with the Indian preference. To bend this interpretation of the statute in an effort to accommodate its contrary terms to extraordinary situations envisaged by appellants would not be justified. Many administrative adjustments already have been necessary, and more should have been made earlier, to achieve the purposes and mandate of the law. If there are no reasonable administrative or management alternatives to violation of the mandated preference for meeting the situations discussed—and the record falls far short of demonstrating that there are not—the problem is a legislative and not a judicial one. In view of the legislative history it does not appear likely that it will be weakened by Congress for insubstantial reason; more to the point, it is not within our province to do so at all.

Relevant legislative history disclosed a congressional intent actively and positively to establish, through an orderly process, Indian control of Indian services.[11] True, Congress did not envi-

11. "The result [of present civil service rules] has been that the Indians have been given no opportunity to handle their own affairs or to be trained in their own affairs. This bill, we think, gives them the opportunity to which they are entitled . . . [T]o make the Indians the principal agents in their own economic and racial salvation and . . . progressively reduce and largely decentralize the powers of the Federal Indian Service." Memorandum on S. 2755 by John Collier, Commissioner for Indian Affairs, reprinted in

sion the mass termination of all non-Indian employees,[12] but there can be little doubt that traditional civil service security for non-Indians in the Indian service was deliberately subordinated to the objectives of the Indian preference.[13]

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, appellants contend 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.[14] The existing administrative interpretation to this effect, the appellants assert, is entitled to great weight in view of such cases as Udall v. Tallman, 380 U.S. 1, 85 S.Ct. 792, 13 L.Ed.2d 616 (1965). To the contrary, we consider appellants' contention weakened by the fact that shortly before its present position was taken it was Bureau policy not to recognize promotions as falling within the purview of Section 472 at all. The contention is rendered suspect by the illogic of reading exceptions into the statute with regard to promotions and applying an inflexible rule concerning initial hirings,[15] is further thrown into question by a certain confusing ambivalence in appellants' position even during the final hearing below,[16] and is dissipated by a

Hearings on S. 2755 Before Senate Committee on Indian Affairs, 73d Cong., 2d Sess., 1, 19 (1934).

"The definite goal [of the Act] is to have Indians eventually handling everything. . . ." Testimony of Commissioner Collier, Senate Hearings, 322.

"Indian progress and ambition will be enormously strengthened as soon as we adopt the principle that the Indian service shall gradually become, in fact as well as in name, an Indian service predominantly in the hands of educated and competent Indians." Rep. Howard, 78 Congressional Record 11731 (1934).

"[Section 472] directs the Secretary of the Interior to establish the necessary standards of health, age, character, experience, knowledge and ability for Indian eligibles and to appoint them without regard to civil service laws . . . This provision in no way signifies a disregard of the true merit system, but it adapts the merit system to Indian temperament, training and capacity." *Id.*

12. "This does not mean a radical transformation overnight or the ousting of present white employees. It does mean a preference right to qualified Indians for appointments to future vacancies in the local Indian field service and an opportunity to rise to the higher administrative and technical posts." *Id.*

13. ". . . [W]e must not blind ourselves to the fact that the effect of this bill if worked out would unquestionably be to replace white employees by Indian employees. I do not know how fast, but ultimately it ought to go very far indeed." Comm'r Collier, Hearings on H.R. 7902 Before House Committee on Indian Affairs, 73d Cong., 2d Sess., 39 (1934).

14. ". . . It is 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 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." 44 BIA Manual 335, 3.1 (as amended June 23, 1972).

15. Appellants assure us in their brief that "it is not contended that there is discretion to make exceptions as regards initial hiring" but do not attempt to reconcile this long standing position with their view of discretion as to promotions, although they now concede in general that promotions are covered by the Section.

16. On June 22, 1972, Secretary Morton expanded the recognition of preferences to promotions and training. By December 8, 1972, when the motions for summary judgment came before the district court the position of the defendants was modified; they apparently contended that while the Indian preference could be applied by the Bureau to promotions, such application was not required but that the Bureau could accommodate the preference to special circumstances justifying exceptions, as was their contention concerning lateral assignments. In the course of the argument below they then seemed to withdraw somewhat from the concessions of that statement by arguing that the statute did not necessarily require the preference to be applied in cases of promotion but it may be "extended administratively

comparison of the provisions of prior Indian preference statutes with those of the act controlling in the circumstances of this case.[17] As pointed out by Judge Corcoran, the controlling statute does not say the "'Indians . . . *may* have preference'. It says: '. . . qualified Indians *shall* hereafter have . . . preference'", and "if Congress had intended to write discretionary power into the language of Sec. 472 it would have done so expressly . . . One need only look at various Indian preference statutes to recognize that Congress was well aware of the distinction between 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 ambiguities might be perceived under certain situations they should be resolved, reason permitting, in favor of the Indians. Choate v. Trapp, 224 U.S. 665, 32 S.Ct. 565, 56 L.Ed. 941 (1912).[18] But ambiguities, as has been pointed out, are largely confined to the shifting position of the appellees and their predecessors who, in administering a statute designed in 1934 to progressively correct a situation where there was a smaller proportion of Indians in the BIA then than there was in 1900,[19] have achieved little more than the old ratio during the intervening forty years.[20] All of these circumstances are at least as persuasive as those in Morton v. Ruiz, 415 U.S. 199, 94 S.Ct. 1055, 39

into the area of promotions", and that non-Indians "may be promoted other than as a last resort." Later in the argument appellants' counsel argued generally that Congress did not intend to cover promotions as distinguished from initial hiring, and finally the claim seemed to be that while the preference statute did generally apply to promotions and lateral assignments, as well as initial hiring, a discretion resided in the Bureau to make exceptions in cases of administrative convenience or necessity. Counsel for appellants then said: "In a situation where selecting someone who is qualified but whose qualifications simply don't match someone else's and where a program might be jeopardized, the commissioner may make an exception; but, virtually, that is it. A qualified Indian gets preference for promotion." Later counsel for appellants said: "With respect to promotion we are saying the statute says vacancies, it must apply across the board . . . Now in the area of training . . . the statute says vacancies; it is inapplicable to training."

17. 25 U.S.C. § 44, originally enacted in 1894, 28 Stat. 313, provided that 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. . . ." Section 45, derived from the Act of June 30, 1834, 4 Stat. 737, provides that in all cases of the appointments of interpreters or other persons employed for the benefits of the Indians, a preference shall be given to persons of Indian descent, "if such can be found, who are properly qualified for the execution of the duties." Section 46, derived from the Act of May 17, 1882, 22 Stat. 88 provides that "[p]reference 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. In contrast, Section 472, the most recent Congressional mandate on the subject, provides that the Indians involved here, without regard to Civil Service laws "shall hereafter have the preference to appointment to vacancies. . . ."

18. "But in the government's dealings with the Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal: doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized, without exception, for more than a hundred years. . . ." 224 U.S. at 675. See also Choctaw Nation v. Oklahoma, 397 U.S. 620, 631, 642, 90 S.Ct. 1328, 25 L.Ed.2d 615, (1970) (interpretation of treaties), and Haley v. Seaton, 108 U.S.App.D.C. 257, 281 F.2d 620, 623 (1960) (interpretation of executive orders).

19. "Thirty four years ago, in 1900, the number of Indians holding regular positions in the Indian Service, in proportion to the total positions was greater than it is today." (Memorandum on S. 2755 submitted to the Senate Committee on Indian Affairs by John Collier, Commissioner of Indian Affairs, reprinted in Senate Hearings, *supra*.)

20. The record indicates that Indians comprised 51% of the total number of employees in 1941 but that this percentage decreased to 48% in 1969. In 1970 only a little more than half of all employees were Indians and the majority of these were employed in the lower ranking jobs.

L.Ed.2d 270 (1974), against control of judicial interpretation by administrative treatment.[21]

In oral argument appellants' counsel suggested that the word "preference" connoted "a choice" according to some dictionary definition or rulings in other context. It was implied that this "choice" was to be made by the Commissioner. We reject this play on words, 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.

[7] In Mescalero Apache Tribe v. Hickel, 432 F.2d 956, 959–960 (10th Cir. 1970), cert. denied, 401 U.S. 981, 91 S. Ct. 1195, 28 L.Ed.2d 333 (1971), Chief Judge Lewis, writing for the court, recognized that the government's position contained "overtones of the age-old [Indian] complaint of the 'forked tongue' . . . ." 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 theretofore had granted a preference only "insofar as practicable", would render understandable a disinterment of the ancient grievance against the duality of deceit to which the Indian race so long reacted and which it was to be hoped had been laid 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 heretofore granted[22] is vacated and the judgment and order of the district court affirmed.

Dick JONES et al., Appellants,

v.

DISTRICT OF COLUMBIA REDEVELOPMENT LAND AGENCY et al.
(three cases).

Nos. 73-1507, 73-1638 and 73-1751.

United States Court of Appeals,
District of Columbia Circuit.

Decided April 26, 1974.

Argued July 24, 1973.

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. Cor-

21. "We have recognized 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 belies its present assertions. In order for an agency interpretation to be granted deference it must be consistent with the congressional purpose." (Citations omitted.)

22. The district court refused any stay of its order, but upon application of appellants we allowed a stay *pendente lite* but limited to the effect of the order upon lateral transfers.

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
WASHINGTON, D.C. 20242

IN REPLY REFER TO:
Personnel Management

APR 18 1974

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

The Circuit Court of Appeals for the District of Columbia issued a stay order in Freeman V. Morton, No. 73-1409 on November 7, 1973.

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.

cy: NCAO
NAGE

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.

(Sgd) [illegible]

87-500

FROM MARVIN FRANKLIN ASSISTANT TO THE SECRETARY FOR INDIAN AFFAIRS

TO TONY LINCOLN AREA DIRECTOR NAVAJO AREA

BY ORDER OF THE SUPREME COURT ON AUGUST 16, 1973, THE DECISION OF THE COURT IN THE MANCARI CASE PROHIBITING THE APPLICATION OF INDIAN PREFERENCE HAS BEEN STAYED.

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.

COPY

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

C. R. MANCARI, ANTHONY FRANCO, WILBERT 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 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.

No. 9626 Civil.

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.

United States Circuit Judge.

United States District Judge.

United States District Judge.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

C. R. MANCARI, ANTHONY FRANCO, WILBERT 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 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.

No. 9626 Civil.

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 these sections were meant to extend a

preference to Indians in initial hiring only. Plaintiffs further 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 because 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 Institute, or programmers, or in computer work, or teachers in other areas. They testified as to particular training or advancements 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 constitutional questions requiring consideration by a three-judge court.

The United States Attorney, who appears for the defendants, challenges the court's jurisdiction over the subject matter. The Court of Appeals in Mescalero Apache Tribe v. Hickel, 432 F.2d 956 (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. § 1346(a)(2). This could be considered under the latter statute since the action was against "Rogers C. B. Morton, 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 Department concerned would be an idle gesture in the face of the issuance of the policy statement and its implementation by regulations and orders. The issue is not an interpretation of policy statements or their application, but is a direct challenge to the validity of the statute on which the departmental policy is based. There is thus no purpose shown why any further administrative action would serve any useful purpose. Mescalero Apache Tribe v. Hickel, 432 F.2d 956 (10th Cir.), we believe, is significant on this point although it dealt with 5 U.S.C. § 704 where no administrative machinery was expressly 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 471, 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 Mescalero 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-2 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 affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments 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 employment 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:

> "Ido 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. 590).

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 ss. 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. 497.

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 Comm'rs v. Seber, 318 U.S. 705, or Simmons v. Eagle Seelatsee, 384 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 considered to have rights, so far as here pertinent, different from other citizens; they are citizens and are obviously entitled to all rights, privileges, and burdens thereof.

We have not considered the challenge by plaintiffs to the constitutionality of the preference statutes. This issue 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 percentage 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.

Alvin Rudkin
United States Circuit Judge.

United States District Judge.

United States District Judge.

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

DEC 7 1972

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 DM 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 202-343-6761.

John F. McKeon

Enclosure

cc: 500 530 101 200 300 400 all chapters

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

NOV 22 1972

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. Morton

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

OCT 30 1972

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.

Richard S. Fuchs

Enclosure

.1 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 I.

.12 Content of Announcement

I. 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.

.17 A & B are new - pen and ink changes renumbering old 17B to 17C; old 17C to 17D; and old 17D to 17E.

.17 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.

This paragraph will supersede entire paragraph .18

.18 Ranking and Selection

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.

Form 5-4408 (Revised)

Illustration 8

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

Lorraine

IN REPLY REFER TO:

Personnel

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
Navajo Area Office
P. O. Box 1060
Gallup, New Mexico 87301

JUN 2 6 1972

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.

Area Director

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
Room 7102
FEDERAL BUILDING AND U.S. COURT HOUSE
POST OFFICE BOX 1696
ALBUQUERQUE, NEW MEXICO 87103

IN REPLY REFER TO:

October 28, 1971

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

Re: Mescalero Apache Tribe v. Hickel, et al., Court of Appeals, Tenth Circuit, No. 40-70.

Dear 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,

Lotario D. Ortega
Field Solicitor

cc: Mescalero Agency

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
ALBUQUERQUE AREA OFFICE
P. O. BOX 8327
ALBUQUERQUE, NEW MEXICO 87108

IN REPLY REFER TO:

FEB 2 1 1971

Memorandum

To: Area Directors

From: Area Director

Subject: Mescalero Apache Tribe, et al., v. Morton, Sec'y of Interior et al., No. 1186, U.S. Supreme Court. Government's Brief.

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.

Acting Area Director

Enclosure

IN REPLY REFER TO:

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
Room 7102
Federal Building and U.S. Co.. House
Post Office Box 1696
Albuquerque, New Mexico 87103

February 16, 1971

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

Re: Mescalero Apache Tribe, et al., v. Morton, Sec'y. of Interior, et al., No. 1186, U.S. Supreme Court.

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 unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 5, 1970. The petition for a writ of cer-

tiorari 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 vacanices." This security is lost if the Indian preference statutes are applied to reductions in force since inevitably all non-Indian employees would be "ousted" [1] 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 [2] 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.[3]

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[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, 1.2B.

[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 KASHIWA,
Assistant Attorney General.

GEORGE R. HYDE,
CARL STRASS,
Attorneys.

JANUARY 1971.

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