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ACTION PLAN STEPS

<u>Number</u>	<u>Action</u>	<u>Time frame</u>	<u>Responsible official</u>
G 1	Establish an effective institutional focus for internal management	First half FY 77	Commissioner w/
G 2	Establish and operate an analytical program in the organizational, manpower allocation/utilization, and work methods areas	First half FY 77	Commissioner
G 3	Design and conduct a program evaluation operation	During FY 77	Commissioner
G 4	Develop a communication/team work management style	During FY 77	Commissioner
G 5	Institute a management development program	First half FY 77	Commissioner & Director of Adm
HR 1	Forecast the Bureau's manpower needs	Qtr 2 - FY 77	Director of Adm & Chief P.O.
HR 2	Institute a positive recruitment system	First half FY 77	Director of Adm & Chief P.O.
HR 3	Develop and operate an Indian intake-and-development program	During FY 77, for	Commissioner &
HR 4	Take steps to grow Indian candidates for technical/specialist positions	for Qtr 1, FY78, class	Director of Adm
HR 5	Issue guidelines on the application of Indian preference	During FY 77	Commissioner & Director of Adm
HR 6	Obtain legislative modifications in Indian preference	Qtr 1 - FY 77	Chief P.O.
HR 7	Further facilitate outplacement of non-Indians	During FY 77	Commissioner & Director of Adm
HR 8	Develop qualification standards/guidelines for major types of positions	First half FY 77	Commissioner & Director of Adm
HR 9	Improve procedures for determining qualifications for specific vacancies	Qtr 3 - FY 77	Chief P.O.
HR10	Reissue updated and more specific guidelines for tribal consultation on personnel selections	During FY 77	Chief P.O.
HR11	Develop and operate an effective position mgmt/classification program	During FY 77	Commissioner
HR12	Conduct management orientation and supervisory training in pers. mgmt.	Qtr 3 - FY 77	Chief P.O.
PF 1	Redefine and clarify the role of a personnel office	First half FY 77	Chief P.O.
PF 2	Establish a program planning system	Qtr 1 - FY 77	Chief P.O.
PF 3	Provide Bureauwide coordination within the function	Qtr 1 - FY 77	Chief P.O.
PF 4	Improve operational methods	During FY 77	Chief P.O.
PF 5	Conduct an evaluation program	Qtr 1 - FY 77	Chief P.O.



A-500  
NA 530  
BB 532A  
GPA

NOTE: Where it is feasible, a syllabus (headnote) will be re-  
lected, as is being done in connection with this case, at the time  
the opinion is issued. The syllabus constitutes no part of the opinion  
of the Court but has been prepared by the Reporter of Decisions for  
the convenience of the reader. See *United States v. Detroit Lumber*  
*Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

MORTON, SECRETARY OF THE INTERIOR, ET AL.  
v. MANCARI ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF NEW MEXICO

No. 73-362. Argued April 24, 1974—Decided June 17, 1974\*

Appellees, non-Indian employees of the Bureau of Indian Affairs (BIA), brought this class action claiming that the employment preference for qualified Indians in the BIA provided by the Indian Reorganization Act of 1934 contravened the anti-discrimination provisions of the Equal Employment Opportunities Act of 1972, and deprived them of property rights without due process of law in violation of the Fifth Amendment. A three-judge District Court held that the Indian preference was implicitly repealed by § 11 of the 1972 Act prescribing racial discrimination in most federal employment and enjoined appellant federal officials from implementing any Indian employment preference policy in the BIA. *Held:*

1. Congress did not intend to repeal the Indian preference, and the District Court erred in holding that it was repealed by the 1972 Act. Pp. 9-16.

(a) Since in extending general anti-discrimination machinery to federal employment in 1972, Congress in no way modified and thus reaffirmed the preferences accorded Indians by §§ 701 (b) and 703 (i) of Title VII of the Civil Rights Act of 1964 for employment by Indian tribes or by private industries located on or near Indian reservations, it would be anomalous to conclude that Congress intended to eliminate the longstanding Indian preferences in BIA employment, as being racially discriminatory. Pp. 12-13.

(b) In view of the fact that shortly after it passed the 1972

\*Together with No. 73-364, *Amerind v. Mancari et al.*, also on appeal to the same court.

Recommendations re. Federal vs. VT pending  
due in Wn by 7/31/74.



## Syllabus

Act Congress enacted new Indian preference laws as part of the Education Amendments of 1972, giving Indians preference in Government programs for training teachers of Indian children, it is improbable that the same Congress condemned the BIA preference as racially discriminatory. P. 13.

(c) The 1972 extension of the Civil Rights Act to Government employment being largely just a codification of prior anti-discrimination Executive Orders, with respect to which Indian preferences had long been treated as exceptions, there is no reason to presume that Congress affirmatively intended to erase such preferences. Pp. 13-14.

(d) This is a prototypical case where an adjudication of repeal by implication is not appropriate, since the Indian preference is a longstanding, important component of the Government's Indian program, whereas the 1972 anti-discrimination provisions, being aimed at alleviating minority discrimination in employment, are designed to deal with an entirely different problem. The two statutes, thus not being irreconcilable, are capable of co-existence, since the Indian preference, as a specific statute applying to a specific situation, is not controlled or nullified by the general provisions of the 1972 Act. Pp. 14-15.

2. The Indian preference does not constitute invidious racial discrimination in violation of the Due Process Clause of the Fifth Amendment but is reasonable and rationally designed to further Indian self-government. Pp. 16-20.

(a) If Indian preference laws, which were derived from historical relationships and are explicitly designed to help only Indians, were deemed invidious racial discrimination, 25 U. S. C. in its entirety would be effectively erased and the Government's commitment to Indians would be jeopardized. Pp. 16-17.

(b) The Indian preference does not constitute "racial discrimination" or even "racial" preference, but is rather an employment criterion designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups. Pp. 18-19.

(c) As long as the special treatment of Indians can be tied rationally to the fulfillment of Congress' unique obligation toward Indians, such legislative judgments will not be disturbed. Pp. 19-20.

359 F. Supp. 585, reversed and remanded.

BLACKMUN, J., delivered the opinion for a unanimous Court.

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## SUPREME COURT OF THE UNITED STATES

Nos. 73-362 AND 73-364

Rogers C. B. Morton, Secretary of the Interior, et al.,

Appellants,

73-362 v.

C. R. Mancari et al.

Amerind, Appellant,

73-364 v.

C. R. Mancari et al.

On Appeals from the United States District Court for the District of New Mexico.

[June 17, 1974]

Mr. Justice BLACKMUN delivered the opinion of the Court.

The **Indian Reorganization Act of 1934** accords an employment preference for qualified Indians in the Bureau of Indian Affairs [BIA]. Appellees, non-Indian BIA employees, challenged this preference as contrary to the anti-discrimination provisions of the Equal Employment Opportunity Act of 1972, and as violative of the Due Process Clause of the Fifth Amendment. A three-judge federal district court concluded that the Indian preference under the 1934 Act was impliedly repealed by the 1972 Act. *Mancari v. Morton*, 359 F. Supp. 585 (N. M. 1973). We noted probable jurisdiction in order to examine the statutory and constitutional validity of this longstanding Indian preference. 414 U. S. 1142 (1974).

## I

Section 12 of the Indian Reorganization Act, also known as the Wheeler-Howard Act, 48 Stat. 986 (1934), 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,<sup>1</sup> 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."<sup>2</sup>

In June 1972, pursuant to this provision, the Commissioner of Indian Affairs, with the approval of the Secretary of the Interior, issued a directive (Personnel Management Letter No. 72-12) stating that the BIA's policy would be to grant a preference to qualified Indians not only, as before, in the initial hiring stage, but also in the situation where an Indian and a non-Indian, both already employed by the BIA, were competing for a promotion within the Bureau.<sup>3</sup> The record indicates that this policy was implemented immediately.

<sup>1</sup>The Indian Health Service was transferred in 1954 from the Department of the Interior to the Department of Health, Education, and Welfare. Act of August 5, 1954, § 1, 68 Stat. 674, 42 U. S. C. § 2091. Presumably, despite this transfer, the reference in § 12 to the "Indian Office" has continuing application to the Indian Health Service. See 5 CFR § 213.3116 (b)(8) (1974).

<sup>2</sup>There are earlier and more narrowly drawn Indian preference statutes. 25 U. S. C. §§ 44, 45, 46, 47, and 274. For all practical purposes, these were replaced by the broader preference of § 12. Although not directly challenged in this litigation, these statutes, under the District Court's decision, clearly would be invalidated.

[Footnote 3 is on p. 3]

Shortly thereafter, appellees, who are non-Indian employees of the BIA at Albuquerque,<sup>4</sup> instituted this class action, on behalf of themselves and other non-Indian employees similarly situated, in the United States District Court for the District of New Mexico, claiming that the "so-called 'Indian Preference Statutes'" were repealed by the 1972 Equal Employment Opportunity Act and deprived them of rights to property without due process of law, in violation of the Fifth Amendment.<sup>5</sup> Named as defendants were the Secretary of the Interior,

<sup>4</sup>The directive stated:

"The Secretary of the Interior announced today [June 23, 1972] he has approved the Bureau's policy to extend Indian preference to training and to filling vacancies by original appointment, reinstatement, and promotion. The new policy was discussed with the national president of the National Federation of Federal Employees under national consultation rights NFFE has with the Department. Secretary Morton and I jointly stress that careful attention must be given to protecting the rights of non Indian employees. The new policy provides as follows: 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. This new policy is effective immediately and is incorporated into all existing programs such as the promotion program. Revised manual releases will be issued promptly for review and comment. You should take immediate steps to notify all employees and recognized unions of this policy."

<sup>4</sup>The appellees state that none of them is employed on or near an Indian reservation. Brief for Appellees 8. The District Court described the appellees as "teachers . . . or programmers, or in computer work." *Mancari v. Morton*, 359 F. Supp. 585, 587 (N. M. 1973).

<sup>5</sup>The specific question whether § 12 of the 1931 Act authorizes a preference in promotion as well as in initial hiring was not decided by the District Court and is not now before us. We express no opinion on this issue. See *Freeman v. Morton* — U. S. App. D. C. —, — F. 2d — (1974). See also *Mescalero Apache Tribe v. Hickel*, 432 F. 2d 956 (CA10 1970), cert. denied, 401 U. S. 931 (1971) (preference held inapplicable to reduction in force).

Mancari

the Commissioner of Indian Affairs, and the BIA Directors for the Albuquerque and Navajo Area Offices. Appellees claimed that implementation and enforcement of the new preference policy "placed and will continue to place [appellees] at a distinct disadvantage in competing for promotion and training programs with Indian employees, all of which has and will continue to subject the [appellees] to discrimination and deny them equal employment opportunity."

A three-judge court was convened pursuant to 28 U. S. C. § 2282 because the complaint sought to enjoin, as unconstitutional, the enforcement of a federal statute. Appellant Amerind, a nonprofit organization representing Indian employees of the BIA, moved to intervene in support of the preference; this motion was granted by the District Court and Amerind thereafter participated at all stages of the litigation.

After a short trial focusing primarily on how the new policy, in fact, has been implemented, the District Court concluded that the Indian preference was implicitly repealed by § 11 of the Equal Employment Opportunity Act of 1972, Pub. L. 92-261, 86 Stat. 111, 42 U. S. C. (Supp. II 1973) § 2000e-16 (a), proscribing discrimination in most federal employment on the basis of race.<sup>6</sup>

<sup>6</sup> Section 2000e-16 (a) reads:

"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, in executive agencies (other than the General Accounting Office) as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commissioner, 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

Who put up their money?

Having found that Congress repealed the preference, it was unnecessary for the District Court to pass on its constitutionality. The court permanently enjoined appellants "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." The execution and enforcement of the judgment of the District Court was stayed by MR. JUSTICE MARSHALL on August 16, 1973; pending the disposition of this appeal:

## II

The federal policy of according some hiring preference to Indians in the Indian service dates at least as far back as 1834.<sup>7</sup> Since that time, Congress repeatedly has enacted various preferences of the general type here at issue.<sup>8</sup> The purpose of these preferences, as variously expressed in the legislative history, has been to give Indians a greater participation in their own self-

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of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin."

<sup>7</sup> Act of June 30, 1834, § 9, 4 Stat. 737, 25 U. S. C. § 45:

"In all cases of the appointments of interpreters or other persons employed for the benefit 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."

<sup>8</sup> Act of May 17, 1882, § 6, 22 Stat. 88, and Act of July 4, 1884, § 6, 23 Stat. 97, 25 U. S. C. § 46 (employment of clerical, mechanical, and other help on reservations and about agencies); Act of August 15, 1891, § 10, 28 Stat. 313, 25 U. S. C. § 14 (employment of herdsmen, teamsters, and laborers, "and where practicable in all other employments" in the Indian service); Act of June 7, 1897, § 1, 30 Stat. 83, 25 U. S. C. § 274 (employment as matrons, farmers, and industrial teachers in Indian schools); Act of June 25, 1910, § 23, 36 Stat. 861, 25 U. S. C. § 47 (general preference as to Indian labor and products of Indian industry).

government; <sup>9</sup> to further the Government's trust obligation toward the Indian tribes; <sup>10</sup> and to reduce the negative effect of having non-Indians administer matters that affect Indian tribal life.<sup>11</sup>

The preference directly at issue here was enacted as an important part of the sweeping Indian Reorganization Act of 1934. The overriding purpose of that particular Act was to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically.<sup>12</sup> Congress was

<sup>9</sup> Senator Wheeler, co-sponsor of the 1934 Act, explained the need for a preference as follows:

"We are setting up in the United States a civil service rule which prevents Indians from managing their own property. It is an entirely different service from anything else in the United States because these Indians own this property. It belongs to them. What this policy of this Government is and what it should be is to teach these Indians to manage their own business and control their own funds and to administer their own property, and the civil service has worked very nearly so far as the Indian Service is concerned . . ." *Hearings before the Senate Committee on Indian Affairs on S. 2755 and S. 3645 (Part 2), 73d Cong., 2d Sess., 256 (1934).*

<sup>10</sup> A letter, contained in the House Report to the 1934 Act, from President F. D. Roosevelt to Congressman Howard states:

"We can and should, without further delay, extend to the Indian the fundamental rights of political liberty and local self-government and the opportunities of education and economic assistance that they require in order to attain a wholesome American life. This is but the obligation of honor of a powerful nation toward a people living among us and dependent upon our protection." *H. R. Rep. No. 1894, 73d Cong., 2d Sess., 8 (1934).*

<sup>11</sup> "If the Indians are exposed to any danger, there is none greater than the residence among them of unprincipled white men." *H. R. Rep. No. 474, 23d Cong., 1st Sess., 98 (1834)* (letter dated February 10, 1834, from Indian Commissioners to the Secretary of War).

<sup>12</sup> As explained by John Collier, Commissioner of Indian Affairs: "[T]his bill is designed not to prevent the absorption of Indians in

seeking to modify the then-existing situation whereby the primarily non-Indian-staffed BIA had plenary control, for all practical purposes, over the lives and destinies of the federally recognized Indian tribes. Initial congressional proposals would have diminished substantially the role of the BIA by turning over to federally chartered self-governing Indian communities many of the functions normally performed by the Bureau.<sup>13</sup> Committee sentiment, however, ran against such a radical change in the role of the BIA.<sup>14</sup> The solution ultimately adopted was to strengthen tribal government while continuing the active role of the BIA, with the understanding that the Bureau would be more responsive to the interests of the people it was created to serve.

One of the primary means by which self-government would be fostered and the Bureau made more responsive was to increase the participation of tribal Indians in the BIA operations.<sup>15</sup> In order to achieve this end, it was recognized that some kind of preference and exemption from otherwise prevailing civil service requirements

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white communities, but rather to provide for those Indians unwilling or unable to compete in the white world some measures of self-government in their own affairs." Hearings on S. 2735 before the Senate Committee on Indian Affairs (Part 1), 73d Cong., 2d Sess., 23 (1934).

<sup>13</sup>Hearings before the House Committee on Indian Affairs on H. R. 7502, Readjustment of Indian Affairs, 73d Cong., 2d Sess., 1-7 1934 [House Hearings]. See also *Mescalero Apache Tribe v. Jones*, 411 U. S. 145, 152-153, fn. 9 (1973).

<sup>14</sup>House Hearings 491-497.

<sup>15</sup>"[Section 12] was intended to integrate the Indian into the government service connected with the administration of his affairs. Congress was anxious to promote economic and political self-determination for the Indian" (footnote omitted). *Mescalero Apache Tribe v. Hiekel*, 432 F. 2d, at 960.

was necessary.<sup>16</sup> Congressman Howard, the House sponsor, expressed the need for the preference:

"The Indians have not only been thus deprived of civic rights and powers, but they have been largely deprived of the opportunity to enter the more important positions in the service of the very bureau which manages their affairs. Theoretically, the Indians have the right to qualify for the Federal civil service. In actual practice there has been no adequate program of training to qualify Indians to compete in these examinations, especially for technical and higher positions; and even if there were such training, the Indians would have to compete, under existing law, on equal terms with multitudes of white applicants. . . . The various services on the Indian reservations are actually local rather than Federal services and are comparable to local municipal and county services, since they are dealing with purely local Indian problems. It should be possible for Indians with the requisite vocational and professional training to enter the service of their own people without the necessity of competing with white applicants for these positions. This bill permits them to do so." 78 Cong. Rec. 11729 (1934).

Congress was well aware that the proposed preference would result in employment disadvantages within the

<sup>16</sup> "The bill admits qualified Indians to the position [sic] in their own service.

"Thirty-four years ago, in 1900, the number of Indians holding regular positions in the Indian Service, in proportion to the total of positions, was greater than it is today.

"The reason primarily is found in the application of the generalized civil service to the Indian Service, and the consequent exclusion of Indians from their own jobs." House Hearings 19 (Memorandum dated February 19, 1934, submitted by Commissioner Collier to the Senate and House Committees on Indian Affairs).

BIA for non-Indians.<sup>17</sup> Not only was this displacement unavoidable if room were to be made for Indians, but it was explicitly determined that gradual replacement of non-Indians with Indians within the Bureau was a desirable feature of the entire program for self-government.<sup>18</sup> Since 1934, the BIA has implemented the preference with a fair degree of success. The percentage of Indians employed in the Bureau rose from 31% in 1934 to 57% in 1972. This reversed the former downward trend, see n. 16, *supra*, and was due, clearly, to the presence of the 1934 Act. The Commissioner's extension of the preference in 1972 to promotions within the BIA was designed to bring more Indians into positions of responsibility and, in that regard, appears to be a logical extension of the congressional intent. See *Freeman v. Morton, supra*, and n. 5, *supra*.

### III

It is against this background that we encounter the first issue in the present case: whether the Indian preference was repealed by the Equal Employment Opportunity Act of 1972. Title VII of the Civil Rights Act of 1964, 78 Stat. 253, was the first major piece of federal

<sup>17</sup> Rep. Carter, an opponent of the bill, placed in the Congressional Record the following observation by Commissioner Collier at the Committee Hearings:

"[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." 78 Cong. Rec. 11737 (1934).

<sup>18</sup> "It should be possible for Indians to enter the service of their own people without running the gauntlet of competition with whites for these positions. 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." 78 Cong. Rec. 11731 (1934) (remarks of Rep. Howard).

legislation prohibiting discrimination in *private* employment on the basis of "race, color, religion, sex, or national origin." 42 U. S. C. § 2000e-2 (a). Significantly, §§ 701 (b) and 703 (i) of that Act explicitly exempted from its coverage the preferential employment of Indians by Indian tribes or by industries located on or near Indian reservations. 42 U. S. C. §§ 2000e (b) and 2000e-2 (i).<sup>19</sup> This exemption reveals a clear congressional recognition, within the framework of Title VII, of the unique legal status of tribal and reservation-based activities. The Senate sponsor, Senator Humphrey, stated on the floor by way of explanation:

"This exemption is consistent with the Federal Government's policy of encouraging Indian employment and with the special legal position of Indians." 110 Cong. Rec. 12723 (1964).<sup>20</sup>

The 1964 Act did not specifically outlaw employment discrimination by the federal government.<sup>21</sup> Yet the

"Section 2000e (b) excludes "an Indian Tribe" from the Act's definition of "employer." Section 2000e-2 (i) states:

"Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation."

<sup>20</sup> Senator Mundt supported these exemptions on the Senate floor by claiming that they would allow Indians "to benefit from Indian preference programs now in operation or later to be instituted." 110 Cong. Rec. 13702 (1964).

<sup>21</sup> The 1964 Act, however, did contain a proviso, expressed in somewhat precatory language:

"That it shall be the policy of the United States to insure equal employment opportunities for Federal employees without discrimination because of race, color, religion, sex or national origin." 78 Stat. 254.

This statement of policy was reenacted as 5 U. S. C. § 7151, 80 Stat. 523 (1966), and the 1964 Act's proviso was repealed, *id.*, at 662.

mechanism for enforcing long-outstanding Executive Orders forbidding government discrimination had proved ineffective for the most part.<sup>22</sup> In order to remedy this, Congress, by the 1972 Act, amended the 1964 Act and proscribed discrimination in most areas of federal government. See n. 6, *supra*. In general, it may be said that the substantive anti-discrimination law embraced in Title VII was carried over and applied to the Federal Government. As stated in the House Report,

"To correct this entrenched discrimination in the Federal service, it is necessary to insure the effective application of uniform, fair and strongly enforced policies. The present law and the proposed statute do not permit industry and labor organizations to be the judges of their own conduct in the area of employment discrimination. There is no reason why government agencies should not be treated similarly." H. R. Rep. No. 92-238, on H. R. 1746, 92d Cong., 1st Sess. 24-25 (1971).

Nowhere in the legislative history of the 1972 Act, however, is there any mention of Indian preference.

Appellees assert, and the District Court held, that since the 1972 Act proscribed racial discrimination in government employment, the Act necessarily, albeit *sub silentio*, repealed the provision of the 1934 Act, that

<sup>22</sup> "This disproportionate [sic] distribution of minorities and women throughout the Federal bureaucracy and their exclusion from higher level policy-making and supervisory positions indicates the government's failure to pursue its policy of equal opportunity.

"A critical defect of the Federal equal employment program has been the failure of the complaint process. That process has impeded rather than advanced the goal of the elimination of discrimination in Federal employment." H. R. Rep. No. 92-238, on H. R. 1746, 92d Cong., 1st Sess., 23-24 (1971).

called for the preference in the BIA of one racial group, Indians, over non-Indians:

"When a conflict such as in this case, is present, the most recent law or Act should apply and the conflicting Preferences passed some 39 years earlier should be impliedly repealed." Brief for Appellees 7.

We disagree. For several reasons we conclude that Congress did not intend to repeal the Indian preference and that the District Court erred in holding that it was repealed.

First: There are the above-mentioned affirmative provisions in the 1964 Act excluding coverage of tribal employment and of preferential treatment by a business or enterprise on or near a reservation, 42 U. S. C. §§ 2000c (b) and 2000c-2 (i). See n. 19, *supra*. These 1964 exemptions as to private employment indicate Congress' recognition of the longstanding federal policy of providing a unique legal status to Indians in matters concerning tribal or "on or near" reservation employment. The exemptions reveal a clear congressional sentiment that an Indian preference in the narrow context of tribal or reservation-related employment did not constitute racial discrimination of the type otherwise proscribed. In extending the general anti-discrimination machinery to federal employment in 1972, Congress in no way modified these private employment preferences built into the 1964 Act, and they are still in effect. It would be anomalous to conclude that Congress intended to eliminate the longstanding statutory preferences in BIA employment, as being racially discriminatory, at the very same time it was reaffirming the right of tribal and reservation-related private employers to provide Indian preference. Appellees' assertion that Congress implicitly repealed the preference as racially discriminatory, while

retaining the 1964 preferences, attributes to Congress irrationality and arbitrariness, an attribution we do not share.

Second: Three months after Congress passed the 1972 amendments, it enacted two *new* Indian preference laws. These were part of the Education Amendments of 1972, 86 Stat. 235, 20 U. S. C. (Supp. II 1973) §§ 887c (a) and (d), and § 1119a. The new laws explicitly require that Indians be given preference in government programs for training teachers of Indian children. It is improbable, to say the least, that the same Congress which affirmatively approved and enacted these additional and similar Indian preferences was, at the same time, condemning the BIA preference as racially discriminatory. In the total absence of any manifestation of supportive intent, we are loathe to imply this improbable result.

Third: Indian preferences, for many years, have been treated as exceptions to Executive Orders forbidding **government employment discrimination.** The 1972 extension of the Civil Rights Act to government employment is in large part merely a codification of prior anti-discrimination Executive Orders that had proved ineffective because of inadequate enforcement machinery. There certainly was no indication that the substantive

<sup>23</sup> See, e. g., Ex. Order 7423, July 26, 1936, 1 Fed. Reg. 885-886. When President Eisenhower issued an Order prohibiting discrimination on the basis of race in the civil service, Exce. Order 10577, No. 22, 1954, 19 Fed. Reg. 7521, § 4.2, he left standing earlier Executive Orders containing exceptions for the Indian service. *Id.*, § 391. See also 5 CFR § 213.3112 (a)(7) (1974), which provides a civil service exemption for:

"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 Indians who are one-fourth or more Indian blood."

See also 5 CFR § 213.3116 (b) (5) (1974) (Indian Health Services).

proscription against discrimination was intended to be any broader than that which previously existed. By codifying the existing anti-discrimination provisions, and by providing enforcement machinery for them, there is no reason to presume that Congress affirmatively intended to erase the preferences that previously had co-existed with broad anti-discrimination provisions in Executive Orders.

Fourth: Appellees encounter head-on the "cardinal rule . . . that repeals by implication are not favored." *Posedas v. National City Bank*, 236 U. S. 497, 503 (1963); *Wood v. United States*, 16 Pet. 342-343, 363 (1842); *Universal Interpretative Shuttle Corp. v. Washington Metropolitan Area Transit Comm'n*, 393 U. S. 186, 193 (1965). They and the District Court read the congressional silence as effectuating a repeal by implication. There is nothing in the legislative history, however, that indicates affirmatively any congressional intent to repeal the 1934 preference. Indeed, as explained above, there is ample independent evidence that the legislative intent was to the contrary.

This is a prototypical case where an adjudication of repeal by implication is not appropriate. The preference is a longstanding, important component of the Government's Indian program. The anti-discrimination provision, aimed at alleviating minority discrimination in employment, obviously is designed to deal with an entirely different and, indeed, opposite problem. Any perceived conflict is thus more apparent than real.

In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable. *Georgia v. Pennsylvania R. Co.*, 324 U. S. 439, 456-457 (1945). Clearly, this is not the

case here. A provision aimed at furthering Indian self-government by according an employment preference within the BIA for qualified members of the governed group can readily co-exist with a general rule prohibiting employment discrimination on the basis of race. Any other conclusion can be reached only by formalistic reasoning that ignores both the history and purposes of the preference and the unique legal relationship between the Federal Government and tribal Indians.

Furthermore, the Indian preference statute is a specific provision applying to a very specific situation. The 1972 Act, on the other hand, is of general application. Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment. See, e. g., *Bulora Watch Co. v. United States*, 365 U. S. 753, 758 (1961); *Rodgers v. United States*, 185 U. S. 83, 87-89 (1902).

The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective. "When there are two acts upon the same subject, the rule is to give effect to both if possible . . . . The intention of the legislature to repeal 'must be clear and manifest.'" *United States v. Borden Co.*, 308 U. S. 188, 198 (1939). In light of the factors indicating no repeal, we simply cannot conclude that Congress consciously abandoned its policy of furthering Indian self-government when it passed the 1972 amendments.

We therefore hold that the District Court erred in ruling that the Indian preference was repealed by the 1972 Act.

## IV

We still must decide whether, as the appellees contend, the preference constitutes invidious racial discrimination in violation of the Due Process Clause of the Fifth Amendment. *Bolling v. Sharpe*, 347 U. S. 497 (1954). The District Court, while ~~pretermitt~~ing this issue, said, "[W]e could well hold that the statute must fail on constitutional grounds." 359 F. Supp., at 591.

Resolution of the instant issue turns on the unique legal status of Indian tribes under federal law and upon the plenary power of Congress, based on a history of treaties and the assumption of a "guardian-ward" status, to legislate on behalf of federally-recognized Indian tribes. The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself. Article I, § 8, cl. 3, provides Congress with the power to "regulate Commerce . . . with the Indian Tribes," and thus, to this extent, ~~single Indians out as a proper subject for separate~~ legislation. Article II, § 2, cl. 2, gives the President the power, by and with the advice and consent of the Senate, to make treaties. This has often been the source of the Government's power to deal with the Indian tribes. The Court has described the origin and nature of the special relationship:

"In the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them an uneducated, helpless and dependent people, needing protection against the selfishness of others and their own improvidence. Of necessity, the United States assumed the duty of furnishing that protection, and with it the authority to do all that was required to perform that obligation and to prepare the Indians to take their place as independ-

ent, qualified members of the modern body politic." *Board of County Comm'rs v. Seber*, 313 U. S. 705, 715 (1943).

See also *United States v. Kayama*, 113 U. S. 375, 383-384 (1886).

Literally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the BIA, single out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U. S. C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized. See *Simmons v. Eagle Seclatsee*, 244 F. Supp. 808, 814 n. 13 (ED Wash. 1965), aff'd, 384 U. S. 209 (1966).

It is in this historical and legal context that the constitutional validity of the Indian preference is to be determined. As discussed above, Congress in 1934 determined that proper fulfillment of its trust required turning over to the Indians a greater control of their own destinies. The overly paternalistic approach of prior years had proved both exploitative and destructive of Indian interests. Congress was united in the belief that institutional changes were required. An important part of the Indian Reorganization Act was the preference provision here at issue.

Contrary to the characterization made by appellees, this preference does not constitute "racial discrimination." Indeed, it is not even a "racial" preference.<sup>4</sup>

<sup>4</sup>The preference is not directed towards a "racial" group consisting of "Indians"; instead, it applies only to members of "federally recognized" tribes. This operates to exclude many individuals who



Rather, it is 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. It is directed to participation by the governed in the governing agency. The preference is similar in kind to the constitutional requirement that a United States Senator, when elected, be "an Inhabitant of that State for which he shall be chosen," Art. I, § 3, cl. 3, or that a member of a city council reside within the city governed by the council. Congress has sought only to enable the BIA to draw more heavily from among the constituent group in staffing its projects, all of which, either directly or indirectly, affect the lives of tribal Indians. The 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. See n. 24, *supra*. In the sense that there is no

*How does this apply to Non-F. Indians?*

are racially to be classified as "Indians." In this sense, the preference is political rather than racial in nature. The eligibility criteria appear in 44 BIA M 335 3.1:

*has been ruled invalid*

"1 Policy--An Indian has preference in appointment in the Bureau. To be eligible for preference in appointment, promotion, and training, 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 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.

"This program does not restrict the right of management to fill positions by methods other than through promotion. Positions may be filled by transfers, reassignment, reinstatement, or initial appointment." App. 92.

*The main point here seems to be that the Supreme Court has ruled that preference was only an employment criteria reasonably designed to further the cause of Indian self government. They ~~based their decision on the criteria used in the BIA under 44 BIA M 335 3.1 which in turn is based on Executive Orders. They are now planning to~~*

substitute a statute defining Indians that the  
Supreme Court was aware of. It is extremely  
doubtful the Supreme Court has been so  
notified

other group of people favored in this manner, the legal status of the BIA is truly *suu generis*.<sup>25</sup> Furthermore, the preference applies only to employment in the Indian service. The preference does not cover any other government agency or activity, and we need not consider the obviously more difficult question that would be presented by a blanket exemption for Indians from all civil service examinations. Here, the preference is reasonably and directly related to a legitimate, nonracially based goal. This is the principal characteristic that generally is absent from proscribed forms of racial discrimination.

On numerous occasions this Court specifically has upheld legislation that singles out Indians for particular and special treatment. See, e. g., *Board of County Comm'rs v. Seber*, 318 U. S. 705 (1943) (federally granted tax immunity); *McClenahan v. Arizona State Tax Comm'n*, 411 U. S. 164 (1973) (same); *Simmons v. Eagle Seclatsec*, 384 U. S. 200 (1966), affirming, 244 F. Supp. 808 (D. Wash. 1965) (statutory definition of tribal membership, with resulting interest in trust estate); *Williams v. Lee*, 358 U. S. 217 (1959) (tribal courts and their jurisdiction over reservation affairs). Cf. *Morton v. Ruiz*, --- U. S. --- (1974) (federal welfare benefits for Indians "on or near" reservations). This unique legal status is of long standing, see *Cherokee Nation v. Georgia*, 5 Pet. 1 (1831); *Worcester v. Georgia*, 6 Pet. 515 (1832), and its sources are diverse. See, generally, U. S. Dept. of Interior, *Federal Indian Law* (1958); Comment, *The Indian Battle for Self-Determination*, 58 Cal. L. Rev. 445 (1970). As long as the special treatment can be tied rationally to the fulfillment

<sup>25</sup> Senator Wheeler described the BIA as "an entirely different service from anything else in the United States." Hearings before the Senate Committee on Indian Affairs on S. 2755 and S. 3645 (Part 2), 73d Cong., 2d Sess., 256 (1934).

of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed. Here, where the preference is reasonable and rationally designed to further Indian self-government, we cannot say that Congress' classification violates due process.

The judgment of the District Court is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

*Dis the District Court ever do anything?*



MONDAY, MARCH 29, 1975.

**OVERVIEW HEARING—BUREAU OF INDIAN AFFAIRS**

**SCHOOL CONSTRUCTION AND MAINTENANCE**

**WITNESSES**

- JOSE A. ZUNI, ACTING COMMISSIONER OF INDIAN AFFAIRS**
- WILLIAM C. SEARCY, ACTING ASSISTANT DIRECTOR, FINANCIAL MANAGEMENT**
- FRANK WILES, DIRECTOR OF BUDGET, DEPARTMENT OF THE INTERIOR**
- SIDNEY L. MILLS, ASSISTANT DIRECTOR, MANAGEMENT SERVICES**
- PATRICIA DONNELLY, PROGRAM BUDGET COORDINATOR, MANAGEMENT SERVICES**
- EDWARD G. MARICH, PROGRAM BUDGET COORDINATOR, INDIAN EDUCATION PROGRAMS**
- DAVE WARREN, ACTING DIRECTOR, INDIAN EDUCATION PROGRAMS**

**INDIAN SCHOOL CONSTRUCTION AND MAINTENANCE**

**Mr. YATES.** The committee will be in order. This is a special oversight hearing on the matter of Indian school construction and maintenance.

We have before us Mr. Jose Zuni, the Acting Commissioner of Indian Affairs.

**Mr. Zuni,** I was visited recently by Dr. Wauneka and a consultant on Navajo school problems. They showed me pictures that I am sure you have seen, indicating the condition of Navajo schools. I suppose you are familiar with these problems.

**Mr. ZUNI.** Yes, we are familiar with the problems.

**Mr. YATES.** Why should this happen? In looking through this look there are pictures of schools, some that were built less than 10 years ago that are falling apart.

The committee, in all good faith, gives BIA money to construct schools, expecting that the schools will be of excellent construction and that they be properly maintained. Apparently that has not taken place.

**Mr. ZUNI.** No, Mr. Chairman.

**Mr. YATES.** Tell us why it has not taken place.

**Mr. ZUNI.** To begin with, we do not get enough money to do an adequate job of preventive maintenance. As a result, our buildings deteriorate, which causes another problem in terms of a major rehabilitation program. And, of course, if this is neglected, this in turn requires new construction. So this is a cause and effect problem that we have in the Bureau.

**Mr. YATES.** Are you given enough money to build schools?

Mr. ZUNI. We are faced with this dilemma, Mr. Chairman. As was brought out in a previous hearing, we do not believe we get enough money to do a proper and adequate job of constructing school facilities, nor do we get enough money to do an adequate job of properly maintaining these facilities.

Mr. YATES. When I asked Mr. Thompson whether the amount he requested from us was adequate for administering the BIA programs, he told us they were. I had attempted to make clear to Mr. Thompson that our committee considered itself to be as important as OMB and the Department of the Interior in being advised of the amount of money necessary to carry on BIA's programs adequately. As you know from this committee's action, the best example of which occurred last year, we are willing to provide extra money for schools and hospitals.

You are requesting in fiscal year 1977 \$62,788,000 for facilities management.

If we were to appropriate the full \$62,788,000, would that be adequate?

Mr. ZUNI. No.

Mr. YATES. How much would be adequate?

Mr. ZUNI. We almost have to double that to start working on the backlog.

Mr. YATES. Is that because of the condition of the schools?

Mr. ZUNI. Yes.

Mr. YATES. Are you building any new schools?

Mr. ZUNI. Yes; we are.

#### QUALITY OF INDIAN SCHOOL CONSTRUCTION

Mr. YATES. Are you going to have enough money to build schools that will last for years? Is there any reason why a school built on the Navajo reservation should not have the same life as a school built in, say, the city of Albuquerque?

Mr. ZUNI. No reason.

Mr. YATES. Is it just a question of adequate funding for the purpose?

Mr. ZUNI. That is right.

Mr. YATES. And adequate supervision of the contract.

Mr. ZUNI. Yes, sir.

Mr. YATES. Are the problems with schools limited to the Navajos, or are they true with respect to all Indian communities?

Mr. ZUNI. I think the Navajo problem is a microcosm of what ails the Bureau in terms of the construction program and the maintenance program.

Mr. YATES. Tell us what we ought to be doing, in your view, and tell us as though there were no OMB and no Secretary, because we want to know the truth.

#### BACKLOG IN CONSTRUCTION

Mr. ZUNI. If this were the case, I think our construction budget would have to be increased considerably.

We estimate that our backlog in construction is over \$500 million. We estimate that our backlog in major, or what we call facility improvement, is over \$100 million. We consider our repair and maintenance program to have a backlog of around \$70 million.

**Mr. YATES.** Is that for construction of new schools or just maintenance?

**Mr. ZUNI.** I mentioned three programs, Mr. Chairman. I mentioned the construction program, the facility improvement program, and the regular repair and maintenance program.

**LETTER FROM THE NAVAJO NATION**

**Mr. YATES.** I received a letter from the Navajo Nation, signed by Mr. Wilson Skeet, Vice Chairman of the Navajo Tribal Council, dated March 23, 1976. It reads:

Last week Dr. Annie D. Wauneka, representing the Navajo Area School Board Association; Mr. Manuel Shirley and Mr. Harvey McKerry, representing the education committee of the Navajo Tribal Council, visited your office to submit documentation of the dangerous, illegal, and unsafe conditions at many Navajo boarding schools.

Some of these conditions must be corrected during the coming summer if our children are to attend these schools next fall. Your support of our request for a supplemental appropriation is urgently needed.

As an attachment to that letter they gave me a list of the sewage treatment lagoons that have to be added at a cost of \$2,390,000. Have they given you copies of this as well?

**Mr. ZUNI.** We have just received one, Mr. Chairman.

**LETTER TO COMMISSIONER OF INDIAN AFFAIRS**

**Mr. YATES.** I also have a copy of a letter to the Commissioner of Indian Affairs, dated February 9, 1976, from Mr. Julian Franklin, saying this:

During the past several years, several laws with far-reaching effects have been passed that are creating financial and legal burdens upon my position and in turn your position. I have done much pondering of this problem and though my staff and I have worked diligently on it, I feel I must bring it to your attention for advice on a possible solution. It is a problem that can only be solved essentially with resources, as I feel you will agree.

The first law with an economic impact is the Federal Pollution Control Act Public Law 92-500. Though all of our facilities were up to Federal standards when originally built, the new law requires us to upgrade 34 of our sewerage treatment lagoons at a cost of \$2,390,000.

I don't remember that being brought to our attention. Was that brought to your attention?

**Mr. ZUNI.** Not in the last hearings, no.

**Mr. YATES.**

The second law to affect us is Public Law 91-512, Solid Waste Disposal Act. In compliance with the law we are planning four large land disposal sites with daily coverage of waste. The equipment and construction costs will total \$2,500,000.

The third law to affect us is the Occupational Safety and Health Act commonly called OSHA. This act covers a tremendous array of hazards corrections such as rewiring buildings, ventilation improvements, workers safety tools, materials and equipment in our work areas and also in our educational facilities. Due to the extensive requirements of the law, a complete inventory has not been made. Also due to rapidly changing requirements, it probably never will be completely done. From our sample surveys, it is conservatively estimated that 23 million will be needed to correct the most flagrant violations of this law.

I am going to place this memorandum in the record at this point, rather than reading the whole thing. But the summary that he has attached here indicates the necessary amounts come to \$25,321,000. There

are not only the first three acts I mentioned, but also the Indian health service requirements, \$1,875,000, the Safe Drinking Water Act, \$1,235,000; the Bureau of Indian Affairs fire protection requirements, \$8,514,000; and insulation of facilities, \$2,757,000.

What does Mr. Franklin mean by Bureau of Indian Affairs fire protection requirements? Is that for the schools?

Mr. ZUNI. Yes. He is talking about our responsibility for fire protection of Government facilities.

Mr. YATES. You are not meeting them?

Mr. ZUNI. Not adequately, no.

[The letter follows.]

Area Plant  
 1000 410.1

Navajo Area Office  
 P. O. Box 1060  
 Gallup, New Mexico 87301

FEB 9 1976

FILE COPY
SURNAME
<i>Mulla</i>
<i>Richard</i>

Memorandum

To: Commissioner of Indian Affairs  
 From: ACTING  
 Area Director

Subject: Facilities Management, Compliance with Laws and Regulations

During the past several years, several laws with far-reaching effects have been passed that are creating financial and legal burdens upon my position and in turn your position. I have done much pondering of this problem and though my staff and I have worked diligently on it, I feel I must bring it to your attention for advice on a possible solution. It is a problem that can only be solved essentially with resources, as I feel you will agree.

The first law with an economic impact is the Federal Pollution Control Act, Public Law 92-500. Though all of our facilities were up to Federal standards when originally built, the new law requires us to upgrade 3/4 of our sewerage treatment lagoons at a cost of \$2,300,000. (See Attachment No. 1.)

The second law to affect us is Public Law 91-512, Solid Waste Disposal Act. To comply with the law we are planning four large land disposal sites with daily coverage of waste. The equipment and construction costs will total \$2,500,000. (See Attachment No. 2.)

The third law to affect us is the Occupational Safety and Health Act commonly called OSHA. This act covers a tremendous array of hazards corrections such as rewiring buildings, ventilation improvements, workers safety tools, materials and equipment in our work areas and also in our educational facilities. Due to the extensive requirements of the law, a complete inventory has not been made. Also due to rapidly changing requirements, it probably never will be completely done. From our sample surveys, it is conservatively estimated that \$3,000,000 will be needed to correct the most flagrant violations of this law.

We have also analyzed where further savings can be made. One area that is very promising is the installation of insulation. We would receive a 20 per cent cost reduction figured at today's fuel prices. Naturally if fuel costs increase, particularly natural gas as we presently expect, the payoff will correspondingly accelerate. Cost of 20 projects - \$2,757,000. Annual energy cost reductions - \$551,400. (See Attachment No. 5.)

One problem we encounter is that we are in terrible financial shape in our Facility Management area. We have received the lowest funding per square foot in the Bureau of Indian Affairs and have for many years. (See Attachment No. 6.)

We are unable to make the kind of investment of operating resources to take advantage of future payoffs due to their multi-year character.

Upon looking at all of the above projects, you will notice a common thread running through them. They are all projects that fall under the category of Major Alterations and Improvements. In fact, I am at a complete loss to conceive of any other legal method of accomplishing these projects.

This brings me to the problem of serious and unfair under funding of the Navajo Facility Management functions. The attached chart shows the Maintenance and Operations and Major Alterations and Improvements of Facility Improvements funding levels of all areas for the past six years. You will note the Navajo Area has been the lowest for several years. An overall review of the tables will also show a lack of a meaningful funding pattern.

Since climate and weather have very strong effects upon Operations and Maintenance costs, it would be reasonable to assume that the Navajo Area allocations should be similar to surrounding adjacent and intermingled areas, namely Phoenix and Albuquerque. The facts are somewhat different. If you will note Attachment No. 6, Table I, the average funding per square foot per year for Fiscal Years 1971 and 1976 has been:

Albuquerque	\$1.99 per square foot
Phoenix	\$1.48 per square foot
Navajo	\$1.03 per square foot

The Navajo Deficit Chart, Attachment No. 13, shows the long-range pattern of under funding we have experienced. This has caused a deterioration of our plant with accelerating deleterious effects. Along with the unabated erosion of our facilities, obvious safety hazards are popping up faster than we can handle them. Inflation, particularly of fuel costs, is superimposing their ill effects upon our funding.



Under the Indian Health Service Enabling Act, we are constantly under the inspection of their personnel for compliance with the Public Health standards. During the last several years, the standards that they are holding us to, have become more stringent. Hardly a week goes by without a detailed inspection being dropped on us that asks us to increase the size of a ventilator, provide a special restroom, enlarge the food storage area, renovate the kitchens and make a host of changes that are beyond the capabilities of resources on the Navajo Area Repair and Maintenance organization.

Since this is a continuing and seemingly accelerating process, we must admit we do not have a total dimension of the problem. Our Engineers estimate that each installation would require an average of \$75,000 to modify our kitchens, dining rooms and dormitory areas to conform to the current health inspection requirements. This may prove woefully inadequate if the Indian Health Service continues to accelerate their standards. Cost - \$75,000 x 65 installations = \$4,875,000.

Under the Safe Drinking Water Act, Public Law 93-503, it will be necessary to complete 60 projects costing \$1,235,000. Most of these projects are for chlorination but a few are for fluoridation and even defluoridation. (See Attachment No. 3.)

All of the above projects are legal requirements and I interpret these laws to say that I am to obey these laws and if I do not obey them, I and/or the United States Government is liable under the Tort Act to being sued for negligence.

An area of concern to me and covered under Bureau of Indian Affairs regulations is the requirement to provide fire protection. We have identified 55 projects that do not meet our design criteria and the recommendations of the National Board of Fire Underwriters. Total cost of the 55 projects is \$3,514,000. (See Attachment No. 4.)

In case of serious injury or death in a fire situation, I believe the Government would be in serious difficulty protecting itself against a liability suit. In addition, it appears a prudent course to provide adequate fire protection to protect the over \$500,000,000 plant on the Navajo Reservation.

In addition to the above legal requirements and the Bureau of Indian Affairs regulation requirements, your office has strenuously pushed our Energy Conservation Program. We have done what we can in this area and are strengthening our efforts again. There is, of course, only so much that can be accomplished locally.

Much of our Repair and Maintenance monies have been diverted to cover air fuel costs. The percentage of our total facilities management dollar spent on fuel has risen from 17 per cent in Fiscal Year 1971 to 31 per cent by Fiscal Year 1976. (See Attachment No. 14.)

To return to the first part of our memorandum, we have arrived at a point where the responsibilities of the Government have risen from several recent laws. This is also coupled with an increasing awareness of the Indian population that the Government may be sued and many times made to pay large sums of money for negligence. We have several areas as tabulated below that require substantial resources to solve.

Federal Pollution Control Act, P. L. 92-500	\$ 2,390,000
Solid Waste Disposal Act, P. L. 91-512	2,550,000
Occupational Safety and Health Act	3,000,000
Indian Health Services Requirements	4,875,000
Safe Drinking Water Act, P. L. 93-523	1,235,000
Bureau of Indian Affairs Fire Protection Requirements	3,514,000
Insulation of Facilities	<u>2,757,000</u>
<b>Total</b>	<b>\$25,321,000</b>

In addition to these areas that can be rightly addressed only by the Facilities Improvements Program, Navajo Area will have by July 1976, a completed up-to-date Facilities Improvements backlog that will amount to approximately \$100,000,000. These items will cover a tremendous range of projects, such as drainage systems that were left out of the original construction projects, roof modifications to correct serious design deficiencies, shelter belts, sidewalks, parking areas, play areas, building modifications for changing educational programs, to name a few. We have already accumulated a partial list of more than \$53,000,000.

What concerns me is a feeling I get that the Central Office does not understand or appreciate the Facilities Improvements Program, its interrelation to the needs of the field installations, the results of certain recent laws and the requirements of some of our long standing regulations. The final crusher to me has been a recent announcement from the Central Office that our Fiscal Year 1977 tentative allocation has been reduced from \$1,400,000 to \$112,500.

I cannot agree that this program should be cut. It should be increased and I also believe that the Navajo Area needs a larger share than they have been getting for the last decade. If you do not believe what I am saying, please come out and look at our facilities. If we are wrong, let us know where. We need help either in resources or in guidance to overcome a seriously developing problem. Most of all, we need to communicate.

*Julian R. Franklin*

Enclosures

cc: Area Director's Reading File  
500 Chrono

File  
005  
M & F  
Reading

MFRochelleau:jmc:1/30/76  
Retyped 2/3/76

## OBSERVATION OF AREA PLANT MANAGEMENT OFFICER

Mr. YATES. I also have a letter written to Dr. Wauneka from Mr. Rocheleau, the area plant management officer of the Navajo area office, dated March 23, 1976.

I have received and studied the Navajo Area School Board Association resolution of March 1, 1976, regarding your deep concern over the terrible condition of the schools in the Navajo Area. I agree with your findings. The buildings are run down, the roofs leak, electrical hazards develop faster than we can cope with them and in many cases, we just cannot handle the workload that has been imposed upon us.

The reasons for this have been varied but mostly fall upon past policies and practices. Until we made a study last summer and fall, no study had been made concerning the scope of the problem and the funding necessary to accomplish proper maintenance. The last 6 years funding on a square-foot basis for the Navajo Area was only 73 percent of the funding of the Phoenix Area and 54 percent of the Albuquerque Area funding.

This 6-year average for funding does not tell the whole story since the longer things went on, the worse they kept getting \* \* \*

Mr. Rocheleau included a list of the backlog of maintenance and repair items that have to be done, totaling \$26 million, and a list of major alterations and improvements totaling \$76 million:

[The letter follows:]



## United States Department of the Interior

BUREAU OF INDIAN AFFAIRS  
 Navajo Area Office  
 P. O. Box 1060  
 Gallup, New Mexico 87301

IN REPLY REFER TO:  
 Area Plant  
 Management  
 NOO 415.C

FAR 23 1976

Dr. Annie D. Wauneka  
 Delegate  
 Navajo Tribal Council  
 Window Rock, Arizona 86515

Dear Dr. Wauneka:

I have received and studied the Navajo Area School Board Association resolution of March 1, 1976, regarding your deep concern over the terrible condition of the schools in the Navajo Area. I agree with your findings. The buildings are run down, the roofs leak, electrical hazards develop faster than we can cope with them and in many cases, we just cannot handle the work load that has been imposed upon us.

The reasons for this have been varied but mostly fall upon past policies and practices. Until we made a study last summer and fall, no study had been made concerning the scope of the problem and the funding necessary to accomplish proper maintenance. The last six years funding on a square foot basis for the Navajo Area was only 73% of the funding of the Phoenix Area and 54% of the Albuquerque Area funding.

The six-year average for funding does not tell the whole story since the longer things went on, the worse they kept getting. In Fiscal Year 1976, again on a square foot basis, Navajo Area got only 69% of the Phoenix Area funding and 46% of the Albuquerque Area funding.

During the last four fiscal years, our fuel costs have increased from \$2,000,000 to \$5,000,000. Less than half of this increase was funded and the rest was taken out of repair and maintenance. Our program increases during the last several years have not kept up with the cost of living. Pay raises have not been covered and we have drifted into a very tight, almost ludicrous, financial situation.

An effort to try to maintain the building, supplying our workers with tools and materials and providing them with the necessary equipment has put us over our present budget. If no relief is in sight, we will have to reduce our maintenance even more between now and July 1, 1978. We are emptying our tanks to make \$250,000 available. This begins to tell you our problems, as last year we started out the year with our tanks full.



If we do not get any financial help this year or in Fiscal Year 1977, we will not be able to do the job no matter how hard our men try. To give you some idea of how hard they are trying, we have increased our weekly shop order production from 850 in the fall of 1974 to a present weekly average of 1,250 with essentially the same number of workers. This increased productivity will not in itself stem the tide nor restore the deleterious effects of the tens of millions of dollars of under funding that the Navajo Area has suffered during the last several years. If we are to repair, and in many cases restore, the schools, we need money and the sooner the better.

Under present proposals, we will be ground down to a totally unsatisfactory level of accomplishment if no change in funding patterns occurs.

Our Major Alterations and Improvements and Repair and Maintenance Backlogs are as follows:

REPAIR AND MAINTENANCE:

ITEM	QUANTITY	TOTAL COST
Presently leaking roofs	1,470,000 square feet	\$ 2,189,000
Foundation stabilization projects	15 schools	3,782,000
Street repair projects	35 schools	2,974,000
Painting projects	55 schools	5,305,000
Window replacements	35 schools	1,192,000
Gas line replacement	245,000 lineal feet	2,625,000
Replace noncode LP gas tanks	50 each	70,000
Waterline replacement	325,000 lineal feet	3,750,000
Sidewalk repair and replacement	27,000 square yards	265,000
School fencing repair and replacement	227,395 feet	543,910
Ceiling repairs	405,000 square feet	1,121,000
Floor repairs	635,000 square feet	1,112,000
Door repair and replacement	2,115 each	263,000

Painting plants replacement	20 each	515,000
Electrical repair and renewal	15 installations	431,000
Kitchen equipment replace- ments	42 kitchens	<u>623,000</u>
TOTAL REPAIR AND MAINTENANCE BACKLOG		\$26,769,910

## MAJOR ALTERATIONS AND IMPROVEMENTS:

ITEM	TOTAL COST
Federal Pollution Control Act	\$ 2,390,000
Solid Waste	2,550,000
OSHA	3,000,000
Indian Health Services Requirements	4,875,000
Safe Drinking Water Act	1,235,000
BIA Fire Protection Requirements	8,514,000
Insulation of Facilities	2,757,000
Improve and/or Provide Utility Systems	5,770,000
Five Streets, Provide Curbs and Gutters	6,700,000
Construct Sidewalks and Walkways	905,000
Construct Fences	2,845,000
Erosion Control, Drainage and Landscaping	9,145,000
Athletic Facilities (Outdoor)	3,500,000
Rehab Institutional Buildings	5,935,000
Additions to Existing Buildings	4,205,000
Improve Ventilation Systems	1,940,000
Improve Electrical Systems	2,000,000
Change Roof Systems	5,700,000

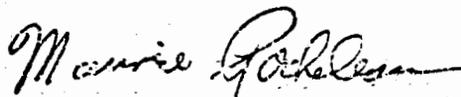
Evacuation Protection	1,271,000
Fire Alarm System Additions	1,290,000
Solar Heating Projects	72,000
TOTAL MAJOR ALTERATIONS AND IMPROVEMENTS BACKLOG	\$76,091,000

To get the Navajo Area Facilities and Schools back into commonly acceptable shape, we should have funding at the following levels:

FISCAL YEAR	PRESENT FUNDING	INCREASE	PROPOSED FUNDING
1976	\$ 15,481,900	\$ 2,000,000	\$17,481,900
INTERIM QUARTER	3,867,000	4,000,000	7,867,000
1977	15,478,600	15,000,000	30,478,600
1978	16,200,000	15,000,000	31,200,000

If this type of funding was granted us, we would still be getting less per square foot than the Albuquerque Area. It is also important to let you know it would be at least five years before our schools would be in the shape the rest of the country enjoys.

Sincerely yours,



Area Plant Management Officer

## PROGRAM TO CORRECT SITUATION

Mr. YATES. Speaking as one member of the committee, I would like to take steps to begin a program that will correct the situation. Does BIA have any program for correcting the situation?

Mr. ZUNI. Yes, we do.

I don't think that we have adequate resources to properly address the total scope of the problem area.

## CONSTRUCTION PROCEDURES

Mr. YATES. How do you go about constructing a school? What is the procedure?

Do you require bids?

Mr. ZUNI. Yes.

Mr. YATES. Do you know when you let the bid that the amount will be inadequate to build a good school?

Mr. ZUNI. Well, we, as you know, ask for money for planning and design purposes. After we do that, we advertise for the design work. After that, we ask your committee and the Senate committee for construction funds. Then we advertise for bids based upon the designs that have been prepared and dispatched by the A. & E. firm.

Mr. YATES. Are your designs as good as those of the public schools?

Mr. ZUNI. I would have to say yes. I think they are equivalent to the design of the public school system.

Mr. YATES. Why do Indian schools fall apart, and public schools don't, if your designs are as good as theirs?

Mr. ZUNI. Well, even if the design, the construction, is equivalent to the public school system, one does not have adequate preventive maintenance, then deterioration would start sooner, faster, and after a period of time, you have a poor building on your hands.

Mr. YATES. We could criticize BIA very strongly for not having advised the committee of this. I had a feeling when you asked for \$62 million for facilities management, that you were not telling us the whole story.

For instance, in the justifications under "Facilities management" you have a request for \$62 million, including \$30,738,000 for repair and maintenance of buildings and utilities.

You say in the justification: \$30,738,000 requested for this portion of the program will provide a minimum level of repair and maintenance of Bureau plant facilities located throughout the United States including Alaska.

A minimum level of repair is not adequate, is it? You should have said, "inadequate level of repair," rather than "minimum". Should you not?

Mr. ZUNI. Yes.

## AVERAGE AGE OF SCHOOL FACILITIES

Mr. YATES. I am glad we are getting the truth now. The Bureau operates and maintains approximately 8,736 individual buildings containing 28,700,000 square feet of floor area, together with related utility systems to support facilities at 400 separate locations. Seventy-seven boarding schools, 19 dormitories, and 117 day schools are among the facilities maintained and operated over an area stretching from

Alaska to Florida. The average age of these facilities is in excess of 40 years.

Mr. McKAY. The interesting thing to note in the pictures presented is that the building built in 1919 is in as good or better shape than the one built in 1966. That seems to be an incredible degradation of construction capabilities. And the 1919 construction is an adobe which wouldn't deteriorate if you had any roof at all. And the roof structures that I see here apparently were woefully inadequate to maintain the roof. Anytime a roof goes everything else is going to go. It is just a matter of when. I saw this with the military out in Wright-Patterson when they let the roof go—put a little paint on the inside, so the offices looked nice, but let the roof go. Then they have buckets under there.

Well, the priorities are backwards.

I am concerned that we are not getting a standard of construction, even though we build the building. You say you put out the bids and get the design but if the foundation is not constructed adequately, if the materials are not correct it is going to fall apart after dedication. You are dead. You are rebuilding it constantly.

I am wondering if we are really getting a standard of excellence when we build them to begin with.

Mr. ZUNI. Well, I believe the pictures that are shown in the report all represent flat roofs, in a very dry area of the country. And one would think that perhaps pitch roofs would be a better approach to construction.

#### FLAT ROOFS VERSUS PITCH ROOFS

Mr. YATES. The design wasn't proper in the first instance, was it?

Mr. ZUNI. Not being an engineer, I cannot determine the merits of the type of roof.

Mr. YATES. This is the criticism that I have heard—that the roofs were flat, and therefore subject to deterioration more quickly than pitch roofs.

Mr. McKAY. Except that you do the same thing here. I just returned from Cameron Station, the military installation—they have flat roofs there. They have some problems. But in these pictures, you have a completed building. I think it was the heating unit built in 1927. The roof was off of there—the corrugation was just plain off. It is not nailed down or anything. So whether the roofs are flat or not, that kind of situation does not seem to make sense.

Mr. YATES. I don't know why you should take the heat for Mr. Thompson and Mr. Frankel, do you?

Mr. ZUNI. Well, somebody has to keep the house, Mr. Chairman.

Mr. YATES. Are you next in line?

Mr. ZUNI. Yes.

#### GAO REPORT ON REPAIRS TO BUILDINGS

Mr. YATES. I have a report from the Comptroller General of the United States, dated September 25, 1968. At that time GAO said their review showed that large sums had been programed and expended to repair, improve and rehabilitate old buildings. Some of these old buildings were demolished shortly after they had been extensively repaired or rehabilitated.

Is this what you are going to do with some of these buildings. Are you going to patch up here, put a band-aid there, and then hope it goes on for another couple of years. It won't work, will it?

Mr. ZUNI. No. It would be more desirable, of course, to replace the buildings on a planned schedule.

#### SCHOOL REPLACEMENT

Mr. YATES. We provided you with funds to replace schools that had burned down. Isn't that correct?

Mr. ZUNI. Right.

Mr. YATES. Have those schools been rebuilt yet?

Mr. ZUNI. No. We are in the process of construction.

Mr. YATES. Are we going to have the same story with respect to the schools that burned down? Are they going to be inadequate schools?

Mr. ZUNI. If we don't properly maintain them, yes.

Mr. YATES. Will they be inadequate when you build them? Are they going to have the flat roofs?

Mr. ZUNI. I am not familiar with the design plans, sir.

Mr. YATES. Please check into that. I would like a report on what is happening with respect to those three schools.

If it is wrong to build schools with flat roofs, it does not make sense to continue to build them. Who knows the answer to that? Would an engineer know the answer to that?

Mr. ZUNI. Engineers should have the answer.

Mr. YATES. Is anybody in the Bureau an engineer?

Mr. ZUNI. Yes; we employ engineers.

Mr. YATES. Have they told you whether that is the wrong design?

Mr. ZUNI. The merits of a flat roof and a pitch roof have never been discussed.

Mr. YATES. Does it snow in that area?

Mr. ZUNI. Yes.

Mr. YATES. It snows and rains, and therefore there has to be some way of getting the water and snow off the roof. So presumably a pitch roof would serve that purpose better than a flat roof.

Would you provide us with a report on the schools you are rebuilding, and the planning and design for the new schools you requested money for?

Mr. ZUNI. Yes.

Mr. YATES. I would also like to know whether the amount that has been allocated for the construction of those schools is adequate.

[The information follows:]

#### ROOF DESIGN

The three schools that burned down are going to be constructed in fiscal year 1977. Chevak, Alakanuk and Mekoryuk all have pitched roof design. Also included is the Jemez, which has a minimum one quarter inch per foot roof slope design (flat).

#### ALLOCATED CONSTRUCTION FUND IS ADEQUATE

The fiscal year 1977 budget estimates are only estimates based on available information at the time they are prepared. There are changes in concepts, unpredictable increases in material and labor costs, and other unforeseen factors. It should be realized that normally there is a wide range of construction bids and our estimates are within an acceptable range at this stage.

[NOTE.--The Department failed to supply all the requested information in time to be printed in the hearing record.]

INSPECTING CONTRACTORS' WORK

Mr. YATES. What procedures do you have for making sure the contractor does a decent job?

Mr. ZUNI. We have inspectors that inspect the construction jobs.

Mr. YATES. BIA inspectors?

Mr. ZUNI. Right.

Mr. YATES. Where do you have new schools that have just recently been finished?

Mr. ZUNI. We have one in Arizona, Santa Rosa.

Mr. YATES. Is that anywhere near Phoenix?

Mr. ZUNI. That is near Tucson.

We just completed one down in Riverside, Calif., and Cherokee.

Mr. YATES. Where is that?

Mr. MARICH. North Carolina.

Mr. YATES. Do you have the same trouble in those communities, Riverside and Cherokee, that you have with the Navajos?

Mr. ZUNI. No, not the new structures.

Mr. YATES. GAO noted in its review that major alteration and improvement funds and repair and maintenance funds were used interchangeably to finance the same type of projects, and that in some instances the costs of supportive services were not charged to the proper fund.

The GAO report also states:

GAO believes the Bureau could realize more efficient and effective use of funds appropriated for repair and alteration of buildings if it would establish a strong central control organization to provide field management with meaningful criteria and guidelines.

Do you have a strong central control organization?

Mr. ZUNI. Yes, we have a centralized engineering organization in Albuquerque.

Mr. McKAY. Will the gentleman yield?

Mr. YATES. Sure.

NAVAJO SCHOOL BOARD

Mr. McKAY. You have a school board, a Navajo school board, that is elected from the Navajo Tribe itself, is that correct?

Mr. ZUNI. Yes, there are several school boards?

Mr. McKAY. On the Navajo Reservation?

Mr. ZUNI. Yes.

Mr. McKAY. What authority or responsibility do they have for maintenance over your responsibilities. What do you provide and what do they as a school board provide. In most school districts the school board is responsible for maintenance, upkeep, general curriculum, et cetera. Where do you interact with the school boards in responsibility to these buildings?

Mr. ZUNI. I think this is probably the first instance where we are interreacting, in that this hearing is a result of the interests of the NASBA or the Navajo area school boards.

Mr. McKAY. I know. But under your authority in BIA, you have certain responsibilities of trust and other things with the tribes. At

what point do you take over the responsibility of maintaining the buildings and at what point does the Navajo school board take over responsibility, or is it kind of run between where neither takes hold?

Mr. ZUNI. Well, we have a continuing responsibility to operate and maintain the facilities, unless the tribe or the school board contracts for the operation of the school.

Mr. MCKAY. How many of these facilities have been contracted by the tribe to be taken care of?

Mr. ZUNI. Ed, do we have any?

Mr. MARICH. Of the ones that are in the report?

Mr. MCKAY. Yes. Those are the ones we are talking about at present.

Mr. MARICH. I do not know the specifics about the schools in the report.

#### NAVAJO SCHOOLS UNDER CONTRACTS

Mr. MCKAY. Well, how many schools are your responsibility and how many are not?

Mr. MARICH. We have, I believe, three schools on the Navajo under contract operations—Rock Point, Rough Rock, and Borrego Pass.

Mr. MCKAY. Under that contract what are your responsibilities for those schools? Do you have any, or is it just turned over with their appropriate share of the money.

Mr. MARICH. The funds are contracted to the particular board.

Mr. MCKAY. At that point do you leave it up to them?

Mr. ZUNI. Yes.

Mr. MCKAY. Under self-determination, you get your fingers out of it, is that right?

Mr. ZUNI. Well, not completely, because we negotiate the contract annually. We are responsible for getting the money.

Mr. MCKAY. To them.

Mr. ZUNI. Yes, to them.

Mr. MCKAY. Then you tell them how to use the money, and all they do is administer it, is that right?

Mr. ZUNI. Well, they have some leeway.

Mr. MCKAY. What kind of leeway?

#### DEVELOP MAINTENANCE PROGRAMS

Mr. ZUNI. To determine and develop a proper maintenance program for the facility.

Mr. MCKAY. Do they have to bring it back to you for approval?

Mr. ZUNI. Not in all instances.

Mr. MCKAY. In what instances don't they?

Mr. ZUNI. They develop an annual program. And unless they deviate from this program, then they are free to administer the program.

Mr. MCKAY. As they choose?

Mr. ZUNI. Right.

Mr. MCKAY. But that plan has received your prior approval under the contract, is that right?

Mr. ZUNI. Yes.

Mr. MCKAY. Well, then, if I get it correctly—and I didn't see the names you mentioned in the report here—then all of these schools are under your absolute jurisdiction for maintenance and construction.

Mr. ZUNI. Yes.

## MAINTENANCE COSTS PER SQUARE FOOT

Mr. McKAY. You indicated here you have \$1.99 per square foot for annual square-foot costs. I assume that is maintenance, isn't it? Average funding per square foot per year for fiscal 1971 through 1976 is \$1.99 per square foot for Albuquerque, \$1.48 for Phoenix, \$1.08 for the Navajo.

Now, Albuquerque and Phoenix, are those regional office costs?

Mr. ZUNI. Yes; those are two separate area offices.

Mr. McKAY. And they get 50 cents to a dollar more per square foot for maintenance than the Navajo Area?

Mr. ZUNI. I would have to dispute that conclusion.

Mr. McKAY. Well, give us the facts, then. What is the case?

Mr. ZUNI. I believe the author of the study indicates that the Navajo is not getting its equitable share of funding for its maintenance program, using the square footage as the sole criterion for the allocation of funds.

We do not allocate money for that purpose solely on the basis of square footage. There are other factors that enter into the determination of the allocation.

Mr. McKAY. What are they?

Mr. ZUNI. They include the type of facilities involved, the location, the climatic conditions, the age of the buildings, the utility to which the building is put to use.

Mr. McKAY. Are those figures accurate that I just gave you?

Mr. ZUNI. If you use square footage as the yardstick, probably yes.

Mr. McKAY. The Navajo Reservation has approximately \$1 per square foot less than Albuquerque for maintenance. Is Albuquerque a regional office of the Bureau?

Mr. ZUNI. Yes.

Mr. McKAY. Do you base this on the fact that you can get things done cheaper on the Navajo Reservation than you can in Albuquerque?

Mr. ZUNI. No; I don't think so. I think the costs would be similar, if not more expensive on the Navajo, because of the geographic isolation.

Mr. YATES. That study from BIA would seem to indicate that there is a discrimination against the Navajos, in terms of allocation in the area. Would you check those figures and let us know?

Mr. ZUNI. Yes.

Mr. McKAY. And then outline the criteria you use to arrive at the maintenance allocations for the various school buildings.

[The information follows:]

## MAINTENANCE FACTOR

The methods used in allocation of funds were related to inventories that took into consideration factors other than just square footage.

The facilities management allocation system used to establish maintenance dollars was initiated in the early 1960's and used through fiscal year 1973. The system was based on our facility inventories costs which were equated to each inventory category. These combined costs gave the basic theoretical maintenance dollars per location. To these dollars, dollars (percent of basic maintenance dollar) were added for major repair, equipment repair, and support services. These totals per location were the projected maintenance program. The area offices would review and from experience modify the data. This revised program then became the approved repair and maintenance allocation.

Since fiscal year 1971, the allocations have been based on tribal priorities as reflected in the band analysis.

#### TRIBES DETERMINE PRIORITY

Mr. ZUNI. I would like to point out one thing, Congressman.

Until 4 years ago, we used to allocate money to the area offices on a formula basis, that we have just been discussing. But now we have included the funding for plant operation and maintenance on the band analysis, or tribal priority basis. The tribes are now participating in determining the priorities of programs on their respective reservations. So it becomes a matter of the individual tribes that are participating in the development of our budget estimates: to give priority to this program. Plant operation and maintenance is not a popular program. It is not a sexy program. The tribes invariably will give more attention to programs that directly benefit them.

By way of illustration, the range water development program, an education program, a scholarship program, would probably rate a higher priority than the operation and repair of buildings and utilities.

Mr. McKAY. You are talking about the total budget that goes to the Indians.

Mr. YATES. Is that true with respect to the Navajos? The Navajos apparently don't believe that, do they?

Mr. ZUNI. No. This is an exception, really, in that the School Board Association is concerned about the state—the condition.

Mr. YATES. And it is in very bad condition, is it not?

Mr. ZUNI. Right.

Mr. YATES. And we ought to do something about it, shouldn't we?

Mr. ZUNI. We should.

Mr. McKAY. Even though the tribes have some voice in priority selection, you are still telling us that you have authority and responsibility. It seems to me, in all honesty to the Indians and the U.S. taxpayer, that we should not waste the money already invested in school buildings. I do not know if you have the choice to let schools and school maintenance go to pieces.

Mr. ZUNI. No. I think the investment of the U.S. Government should be protected, especially when it is serving or supporting a very important program: the education of the Indian youngsters in this particular instance.

Mr. McKAY. But you implied that the reason you did not submit a different budget was because the Indians said, "We want this as our priority." And then you let the other one—schools and maintenance—go. But under your charge as trustees, maybe you are giving undue weight to those priorities—either that, or, as the chairman indicated, you better be coming in here asking for 10 times more, or whatever the cost may be, so that you can maintain your present investment before starting on another program, hadn't you?

Mr. ZUNI. Yes—if we did not have the constraints of a fiscal policy, we would probably be doing precisely that.

## FISCAL CONSTRAINTS

Mr. YATES. It really is not fair to approach it that way. It is not fair to the Navajos; it is not fair to the other Indians in the Indian community to say that we have fiscal restraints and cannot do it. As far as they are concerned, they have had fiscal constraints going back 50 years and more, haven't they?

Mr. ZUNI. Yes.

Mr. YATES. So that the business of applying a standard now that you say is restricted because of budget conditions, is a standard that the Indian community always has had to face. The question is what do we do now in order to correct what you agree is a very, very bad situation on the Navajo reservation? The committee would like to be apprised of what the situation is in other Indian communities as well. If other Indian communities are suffering the same kind of degraded school facilities and environment that is apparent in the Navajo community, this committee wants to be apprised of that as well, so that we can take steps to correct it.

I don't think the BIA has told us the whole story, and I think it should be criticized for it. The committee wants to be told the full story. We want to know what the Government should be doing in this budget for the Indian community. We haven't been told that story, not only in this respect, but I assume in other respects as well. I think that we ought to be facing up to what the responsibilities of the Government are.

## ADMINISTRATIVE COSTS

In making funds available for school construction, are the administrative costs of BIA deducted from the amounts available?

Mr. ZUNI. Yes.

Mr. YATES. Is that through each of the levels, from the BIA in Washington through the area representative, through the agency office, down to the tribe? Is that deducted from the amount of funds made available for the construction of the schools?

Mr. SEARCY. Well, for the operation of the area office, superintendents out in the reservation, his personal staff, field type administration operation, that is true—the Washington office is not.

Mr. YATES. How significant a charge on the fund is that?

Mr. SEARCY. We are talking about 4 percent, sir.

Mr. MCKAY. Will the Chair yield?

Mr. YATES. Sure.

## MATCHING EDUCATION FUND

Mr. MCKAY. In funds presented by this committee to the school boards, tribe, and area offices, are there matching funds provided by the tribes?

Mr. ZUNI. No.

Mr. MCKAY. None at all?

Mr. ZUNI. No, sir.

Mr. MCKAY. So we totally fund the education program of the Indians?

Mr. ZUNI. One hundred percent.

Mr. MCKAY. Whether Navajos or any other?

No Construction Funds  
at Area or Agency  
at Facility Government only  
1959

Mr. ZUNI. Right.

Mr. MCKAY. They do not put in anything?

Mr. ZUNI. That is correct.

#### DETERMINING SCHOOL CONSTRUCTION NEEDS

Mr. YATES. How does the BIA determine school construction needs on a nationwide basis?

Mr. ZUNI. The Bureau follows a criteria of replacing those facilities that have burned down or are destroyed by an act of God, and that would be a No. 1 priority. The second priority would be to replace those buildings and facilities that are a danger to the health and safety of the youngsters. And third, to house students that might be unhoused. Those are the criteria.

Mr. YATES. How do you get that information?

Mr. ZUNI. This is based upon the information that is provided to us by the field.

Mr. YATES. We were told by Dr. Wauneka, and by the gentleman who accompanied her, that they had difficulty making known this condition to the Commissioner. They sent him material and never received an acknowledgement. When they went to see him, and had an appointment with him, he said he had never seen the material. Is this representative of the way the Bureau operates? How much material does the Commissioner see and how much does he not see?

Mr. ZUNI. Well, I think that the Commissioner usually has this type of material reviewed and digested by this staff and the information made available to him by his staff.

Mr. YATES. Apparently the staff swallowed this material because it never got to the Commissioner.

Mr. ZUNI. Well, very poor staff work in this instance.

Mr. YATES. It seems unfortunate that Navajo representatives have to come all the way to Washington in order to make their complaint known; doesn't it?

Mr. DUNCAN. Mr. Chairman, did you go into the responsibility of those who designed and built these?

Mr. YATES. I propose to do that. Would you like to ask some questions?

Mr. DUNCAN. If you have some, go ahead.

#### CONSTRUCTION AND MAINTENANCE STANDARDS

Mr. YATES. What standards does the BIA follow for construction and maintenance of school facilities? Have you any established standards? Are your standards the same as those of public schools in the surrounding area?

Mr. ZUNI. Yes, we do. And I would like to ask Pat Donnelly to respond to the criteria that we follow.

Ms. DONNELLY. Up until about a year ago, we were using Navy standards for maintenance. But we have developed and have in process now our new manual, which will have supplements for maintenance.

Mr. YATES. For maintaining school properties?

Ms. DONNELLY. Yes.

It will give the standards in maintaining floors, walls, and so forth. Up to about a year ago, we had been using the Navy standards.

Mr. YATES. Why were not standards for schools used?

Mr. DUNCAN. You are talking about construction standards?

Mr. YATES. I am talking about both construction and maintenance standards.

Ms. DONNELLY. I was directing my remarks to maintenance.

Mr. YATES. What about construction standards?

Ms. DONNELLY. I don't know of any that have been developed.

Mr. YATES. Do you know of any?

Mr. ZUNI. I don't think the Bureau has its own set of standards for school construction. We are governed by the standards that prevail in the States in which we are constructing our facilities.

#### POOR DESIGN AND CONSTRUCTION

Mr. DUNCAN. Mr. Chairman—surely you had an architect that drew some specifications and some plans.

Looking through this book, this is not vandalism by the Indian youngsters. This is just absolutely poor design or poor construction. And it seems to me that even the architect or the contractor that built the buildings ought to be going back there and doing something about it.

Have you investigated this aspect of it?

Mr. ZUNI. No, sir, we have not.

Mr. DUNCAN. Why not?

Isn't that the most obvious way to go, rather than to come back for more money to rebuild them?

Mr. ZUNI. Yes.

Mr. DUNCAN. Am I incorrect—did someone tell me these buildings were 10 years or less of age?

Isn't that a fair statement?

Mr. ZUNI. Yes.

Mr. DUNCAN. Has this deterioration just begun to be visible in the last few months, or is this something that was visible within months of occupancy?

Mr. ZUNI. I am not aware of the situation.

Mr. DUNCAN. You are not?

Mr. ZUNI. No.

Mr. DUNCAN. Well, who would be?

Mr. ZUNI. Our plant managers probably would be. But we do have a problem with our buildings in some locations.

Mr. DUNCAN. Weren't they all let out to contract?

Mr. ZUNI. Yes.

Mr. DUNCAN. These were not self-constructed, as a self-help Indian thing?

Mr. ZUNI. No.

Mr. DUNCAN. If they had been, I bet they would not be falling apart.

Mr. ZUNI. Probably better constructed.

## LIST OF CONSTRUCTION CONTRACTORS

Mr. DUNCAN. I think that we ought to ask your maintenance man to supply for the record at this point the names and addresses of the designers and the construction contractors on each one of these buildings.

Mr. YATES. And the architects.

Mr. DUNCAN. All right. The architect, the designer, the contractor, the amounts you paid? What if any efforts were made to have the contractor make adjustments, either in dollar damages, or by restoring the building to the condition that it should have been constructed to in the first place.

Mr. YATES. May I supplement that? I think we would like to know, in addition, what inspection methods you employed, not only at the time of construction, but also, say, a year later, by somebody checking to see when this deterioration took place.

Would your local people know that?

Mr. ZUNI. Yes.

Mr. YATES. And would they have advised you about that?

Mr. ZUNI. Yes.

Mr. YATES. Would your files show that?

Mr. ZUNI. Yes.

Mr. YATES. Please provide that information for the record.

[The information follows:]

NAMES AND ADDRESSES OF THE CONSTRUCTION CONTRACTORS

Sanostee School - Photograph 1, 2, 3, 4,  
30, 22, 23, 24, 25, 26, 27, & 28

Contractor - Northeast Construction Co. of W. Virginia  
500 Sycamore Street  
Tiffin, Ohio  
Contract - \$3,859,000  
Award - 4/11/66  
Inspection - B.I.A  
Architect/Engineer - In-house

Ft. Defiance - Quarters - Photograph 5, 6, & 7  
Constructed 1938. Records lacking.

Toadlena Boarding School - Photograph 8, 9, 10, 11  
& 12

Contractor - H.R. McBride Construction Co.  
Drawer 1320  
Farmington, New Mexico  
Contract - \$1,437,000  
Award - 4/13/62  
Inspection - B.I.A  
Architect/Engineer - In-house

Ft. Wingate High School - Photograph 13, 14, 15 & 39

Contractor - Kaufman & Broad Bldg. Co.  
3033 N. Central, Suite 408  
Phoenix 12, Arizona  
Contract - \$5,597,900  
Award - 6/28/63  
Inspection - B.I.A  
Architect/Engineer - Kruger, Lake & Henderson  
Albuquerque, New Mexico

Unidentified Location - Photograph 16 & 17  
Data unavailable

Kebeto School - Photograph 18, 19, 20, 21, & 31

Contractor - Lemka Construction Co.  
Albuquerque, New Mexico  
Contract - \$758,802  
Award - 4/6/62  
A/E - In-house

Cont. Kaitoto School

Contractor - Northeast Construction Co. of W. Virginia  
 Contract - \$4,195,080  
 Award - 1/20/64  
 A/E - In-house

Greasewood School - Photograph 32, 34, & 40

Contractor - Lembke Construction Co., Inc.  
 P.O. Box 455  
 Albuquerque, New Mexico  
 Contract - \$3,195,062  
 Award - 10/19/62  
 A/E - In-house

Ft. Defiance Supt. Office - Photograph 33  
Unknown due to lack of recordsFt. Wingate Elementary School - Photograph 35 & 36

Contractor - George A. Rutherford, Inc.  
 Box 1778  
 Albuquerque, New Mexico  
 Contract - \$1,176,800  
 Award - 7/8/59  
 A/E - In-house

Contractor - Hesselden Construction Co.  
 P.O. Box 3146, Sta. D  
 Albuquerque, New Mexico  
 Contract - \$144,840 (girls dorm)  
 Award - 9/23/60  
 A/E - In-house

Ft. Wingate - 1906-39 - Photograph 37, 38, 41, & 29  
Lack of records

Tuba City Boarding School - Photograph 42  
 Built 1919 - unknown due to lack of records

## INSPECTION

The projects were inspected during construction. Also a 1-year warranty inspection was performed and contractor deficiencies corrected for each project in accordance with standard procedures.

Mr. DUNCAN. Mr. Chairman.—I would like to see a sample copy at least of your contract with the architect or designer, and your contract with the building contractor, to see what specifications, what performance standards, you had in those contracts. And it seems to me that you ought to be contacting the Solicitor of the Bureau of Indian Affairs, the Department of the Interior, to see whether the Department of Justice ought to look into this or not.

Mr. YATES. We will call the Solicitor's Office and have him look into this matter for you.

[NOTE.—The information was supplied to the committee.]

## CONSTRUCTION STANDARDS

Mr. YATES. Has the BIA ever consulted with GSA about construction standards? GSA, as you know, does a tremendous amount of construction work for the Government.

Mr. ZUNI. I do not recall ever consulting with GSA.

Mr. YATES. Did BIA ever consult with recognized school architects about the design of the school buildings? Did you use ordinary contractors for this in laying out the design, or did you use school contractors or architects?

Mr. ZUNI. Well, the invitation to bid is made to all the A. & E. firms that have an interest in bidding for the job. So I would have to say that the opportunity is there for this individual firm, with varying types of experience, to bid for the jobs.

Mr. YATES. How many schools are there in the Indian community?

Mr. MARICH. 193.

## NUMBER OF SCHOOLS IN POOR CONDITION

Mr. YATES. And how many are in poor condition?

Mr. ZUNI. Except for the new ones that have been constructed recently, I would say about 50 percent of them.

Mr. YATES. Fifty percent of the 193?

Mr. ZUNI. No; except those that have been recently constructed.

Mr. YATES. How many have been recently constructed? I do not know what you mean by recently.

Mr. ZUNI. Ten or twenty.

Mr. YATES. So let's say 175 have not been recently constructed. Of the 175 schools, how many are in deteriorated condition, comparable to those in the pictures that the committee has viewed today?

Mr. ZUNI. I think that we will have to provide that for the record.

Mr. YATES. I think we ought to know, and I think you ought to know, also.

Mr. DUNCAN. Mr. Chairman. I would like you to put in the record, too, what steps you are taking with respect to your architectural contracts and your construction contracts to see that that does not happen again. There is no use in us putting add-ons in here for school construction for the Indians if we are going to have to rebuild every building

every 10 years—absolutely not. And I think it is incumbent upon the Bureau to advise this committee what they are doing, both to recoup the loss, and to prevent such things happening again.

Mr. ZUNI. Yes, sir.

[The information follows:]

#### DETERIORATED CONDITION OF SCHOOLS

Facilities are designed, constructed, and inspected using acceptable practices and applicable codes and/or regulations. There is a certain amount of maintenance required if deteriorated conditions are to be minimized. In addition, certain material has an effective lifetime cycle and must be replaced on a periodic basis. Therefore, all facilities are at some stage of deterioration. An effective manager would schedule resources for replacing or repair of materials to prolong the useful life of the facilities. Our estimate of facilities which are at the level of maintenance indicated in the pictures is 10 percent of 175 or 18.

#### CONSTRUCTION BACKLOG

Mr. YATES. Do you have a current backlog of construction needs of Indian schools?

Mr. ZUNI. Yes; we do.

Mr. YATES. What is that backlog?

Mr. ZUNI. Construction backlog—as I mentioned earlier—is around \$500 million.

Mr. YATES. Is the backlog for new construction?

Mr. ZUNI. This is all new construction.

Mr. YATES. How many schools are represented by that figure?

Mr. ZUNI. This represents all construction. I do not know what percent of this would represent schools.

Mr. McKAY. Mr. Chairman—does that take into consideration the study? The Commissioner testified here that they are in the process of reviewing their "need," for more schools because their numbers of children and availability of schools were not adding up. And they said they are in the process of that. When is it coming out—do we have a note as to when they will complete that?

Your figure does not anticipate the results of that study?

Mr. ZUNI. That is right. It is entirely possible that as we continue our study, that because of shift in populations on a reservation, or economic shift, that some of the schools that are planned will not materialize.

Mr. McKAY. How recent is this figure of \$500 million?

Mr. ZUNI. It is fairly recent.

Mr. McKAY. Meaning what—6 months, 1 year?

Mr. ZUNI. About a year ago.

Mr. McKAY. Would you provide for the record how you arrived at that figure?

Mr. ZUNI. Yes.

Mr. McKAY. And the statistics you used to determine need and that sort of thing.

Mr. ZUNI. Yes.

[The information follows:]

#### CONSTRUCTION REQUIREMENT

The \$500 million construction requirement was developed by our area/agency offices and reflects the needs for facilities at locations under their jurisdiction.

Established criteria are used in developing Bureau construction priorities for budget requests.

#### BIA MAINTENANCE COMPARED WITH OTHER AGENCIES

Mr. YATES. Has BIA ever compared their maintenance figures with those of other Federal agencies or school districts?

Mr. ZUNI. I am not aware that they do.

Mr. YATES. If you are not aware of it, it means that the BIA is not aware of it, does it not?

Mr. ZUNI. Yes.

Mr. YATES. So the BIA is not aware of it.

Mr. WILES. Mr. Chairman, over the years we have compared our maintenance standards to GSA standards, over a number of years.

Mr. YATES. What do you mean by that—you have compared them?

Mr. WILES. Well, we would say GSA has \$1.50 per square foot, and BIA has some other number. I can go back to the justifications over the years and find that, if you want me to, where we have compared it to other standards.

Mr. YATES. Have you compared them with other schools? We are talking about schools.

Mr. WILES. I thought you said other standards—excuse me.

Mr. YATES. These are schools we are talking about. Have you compared them with other schools?

Mr. WILES. Not that I recall. I thought you said other standards.

Mr. YATES. You haven't compared them with school districts, have you?

Mr. WILES. Not that I recall.

Mr. MCKAY. Does GSA deal with standards for military schools or is that the responsibility of local school districts?

Mr. WILES. I suppose. Or military standards.

Mr. YATES. Mr. Wiles, is there any reason why the Indian schools should deteriorate so much more rapidly than the schools in the urban community?

Mr. WILES. Not that I know of, Mr. Chairman.

Mr. YATES. The same expenditures are made for construction, are they not?

Mr. WILES. Right.

Wait a minute, there may be a reason. The Bureau's facilities are boarding facilities, where the children are there 24 hours a day, and the school buildings are used during the school day and sometimes after the school day. So the BIA boarding school will get a lot more use than the ordinary day school.

Mr. YATES. Have you seen the pictures? Is that a reason why the walls on the outside should crack, or the roofs wear out?

Mr. WILES. I was talking about more wear inside the school.

Mr. YATES. The stairs would be worn more.

Mr. DUNCAN. We are not talking about ordinary wear and tear or vandalism. We are talking about shoddy design and construction.

#### ADEQUACY OF FUNDING REQUESTS

Mr. YATES. Does the BIA have any system for verifying the adequacy of funding requests by your field people? Do you take the word

of your field people that this much money is needed for a particular purpose?

Mr. ZUNI. Not always.

Mr. YATES. You usually cut them down?

Mr. ZUNI. They usually ask for more than we can afford to allocate.

Mr. YATES. So if they say that so much money is needed to prevent a school from falling apart, you look at your budget, and you decide this is the amount you can give them rather than the amount that is necessary; correct?

Mr. ZUNI. Yes; unfortunately.

Mr. REGULA. Who has final responsibility for approval of contracts, architects, et cetera, in the construction of the building? Does it rest with the BIA, or does it rest with a local board of education?

Mr. ZUNI. It rests with BIA—the contracting officer is responsible.

Mr. REGULA. Thank you.

#### TRANSFER OF FUNDS

Mr. MCKAY. Is there a possibility that any of the funds for maintenance are transferable to causes other than maintenance?

Mr. ZUNI. It is entirely possible that the funds could and have been diverted for other purposes.

Mr. MCKAY. How much has been diverted at any given time in the last 4 or 5 years?

Mr. ZUNI. This is not admitting, however, that this is permitted to happen.

Mr. MCKAY. We fund \$62 million a year for maintenance, and they have arbitrary authority to move or change it to other priorities.

Mr. YATES. What do you mean they have arbitrary authority? You don't have authority to transfer funds; do you?

Mr. ZUNI. No. If we were to program it for a different purpose, then we would have to get permission.

Mr. YATES. Doesn't that always happen?

Mr. ZUNI. Yes. I think there have been some instances in which we have come in for such permission.

Mr. MCKAY. Some instances where you ask for permission.

Mr. YATES. You have requested a certain amount for maintenance of schools. Do the funds we allocate for that purpose always go for the maintenance of schools?

#### COSTS OF UTILITIES INCREASING

Mr. ZUNI. Yes. But let me tell you of a dilemma faced by our people out in the field.

As this committee is aware, the price of fuel has gone up.

Mr. YATES. Very significantly.

Mr. ZUNI. So some of our operators, in order to get by, will delay repairing a hole in the wall, fixing the roof, so that they can have money to pay for the higher fuel bills. This results in the delay of repair work which increases the deterioration of the building.

Mr. YATES. Why don't you request a supplemental for those extra costs?

Mr. ZUNI. We have in the past.

Mr. YATES. But you had already used some of the money for the cost of fuel. Then you came back to us for a supplemental to take care of either the fuel or fixing the hole.

Mr. ZUNI. Yes.

Mr. YATES. The question is where did the money go? Did it go to fix the hole?

Mr. ZUNI. Of course, if you are far behind and you are in a catchup game, then the holes are always ahead.

Mr. YATES. What you are saying is that you never catch up?

Mr. ZUNI. That is right.

#### BACKLOG IN NAVAJO SCHOOL PROJECTS

Mr. YATES. How much of a backlog is there on the construction of Navajo school projects?

Ms. DONNELLY. \$210 million.

Mr. YATES. That is the backlog for Navajo alone?

Ms. DONNELLY. Yes.

Mr. MCKAY. That is just for repairs—not new construction?

Ms. DONNELLY. That is new construction.

Mr. YATES. New construction of what, schools?

Ms. DONNELLY. Facilities, yes.

I haven't actually seen the list. This has just recently been updated. I was advised \$210 million of the new construction was Navajo. They have about a \$70 to \$100 million in major alterations and improvements.

Mr. YATES. How much money is going to be used to catch up with that backlog this year?

Ms. DONNELLY. \$1 million.

#### ENROLLMENT PATTERNS

Mr. REGULA. Mr. Chairman—has there been any evidence presented as to the enrollment patterns for the last 5-year period?

Mr. YATES. In the schools?

Mr. REGULA. Yes.

Mr. YATES. Ask Mr. Zuni.

Mr. REGULA. Has there been any evidence presented here today about your enrollment figures?

Mr. ZUNI. No.

I will ask—Dave, will you respond to the question?

Mr. WARREN. We have an ongoing study regarding the overall Bureau enrollment, and it is on a decline. Specific to the Navajo area we can provide that information.

[The information follows:]

#### NAVAJO REA ENROLLMENT

	1971	1972	1973	1974	1975
Day school.....	1,223	1,292	1,255	1,255	1,158
Boarding school.....	21,467	20,802	19,321	18,605	17,758
Dormitory.....	2,253	2,164	2,048	1,702	1,458

Mr. REGULA. This is what concerns me. I have seen a number of local school districts get overbuilt because they did not take the time to evaluate birth statistics, and project their first grades on through. I am wondering if you are making an accurate estimate of what your needs will be, and thereby getting a realistic assessment of what would be needed in buildings as opposed to what would be ideal.

Mr. WARREN. I think this is going to be forthcoming in the report that the Senate Appropriations Committee has asked us for regarding the off-the-reservation boarding schools—the costs, the general characteristics and requirements of those schools. There is a population or demographic component to those; yes.

Mr. REGULA. How could you arrive at a \$210 million figure as being needed for new school construction without those figures being first achieved, and then projected?

Mr. ZUNI. These are estimates, Congressman. Let me assure you that the Bureau can never achieve the ideal funding. We seldom achieve the minimum funding requirements.

Mr. YATES. You have asked for the minimum for maintenance, haven't you? You stated that in your justifications. As a matter of fact, you haven't even asked for the minimum, really. You have asked for a figure that won't nearly take care of your maintenance needs. Isn't that correct?

Mr. ZUNI. That is correct.

#### BIA SUPERVISION OF CONSTRUCTION

Mr. YATES. I am impressed by the fact that I do not think the Bureau should be the one to construct these schools. I think there ought to be another agency that is given the responsibility of planning, designing, and constructing the schools, and a system of maintenance and inspection established, so that this condition is stopped once and for all, rather than going on year after year after year.

What confidence can the committee have in the future of BIA construction supervision, based on the past?

Mr. ZUNI. I would like to propose this, Mr. Chairman—that we are talking about probably five different schools.

Mr. YATES. Only five schools?

Mr. ZUNI. The pictures that are reflected.

Mr. YATES. Those are not indicative of other schools.

Mr. ZUNI. No, I am not saying that.

Mr. YATES. You are not?

Mr. ZUNI. What I would like to do is for the Bureau to investigate the age, the contractor that was involved, the inspector that was involved, and under what conditions the Bureau accepted the buildings.

Mr. YATES. I think it is about time.

Mr. DUNCAN. Would you also tell us how many more years of useful life you would expect to get out of these on a building-by-building basis if we put this money you requested in them?

Mr. ZUNI. Yes.

Mr. DUNCAN. Because they may be worn out now.

[The information follows:]

## USEFUL LIFE ON BUILDING-BY-BUILDING BASIS

Photographs 1 through 4 - The roofs (installed in 1967) shown for the institutional buildings started to leak in 1970. The leaks were repaired using recognized maintenance procedures.

Photograph 5, 6 and 7 - The photographed building was constructed in 1938 and the 25 year old roof started to leak in 1963. 25 years is considered in excess of the normal roofing material lifetime expectancy. Normal inspections were made and records indicate roof repairs were performed yearly from 1965 through 1975. A new roof was then installed.

Photographs 8 through 12 - The ceiling damage for the Toadlena School project was caused by roof leaks. The initial roof was installed in 1963 and started to leak in 1966. Roof repairs were performed several times a year from 1966 through 1975. A new roof system was then installed. Recent inspection indicates that the new urethane roof system is inferior to the original and requires replacement within 2 - 3 years.

Photographs 13 through 15 - The wall and soffit damage for the 10 year old Wingate High School could have been minimized through routine maintenance. The pictures show the results of a 10 year deterioration cycle.

Photographs 16 and 17 - The photographs indicate normal residential construction for post WWZ. Normal maintenance to prevent soffit and fascia damage would normally be scheduled painting and/or gutters with downspouts. Gutters in themselves will not solve the problem unless properly maintained.

Photographs 18 through 21 - The Kaibeto School was completed in 1965. Some of the structural damage was caused by shifting soils. Through routine maintenance, the damage could have been minimized.

Photographs 22 through 28 and 30 - The photographs for the Sanostee School indicate structural damage caused by extremely unstable soil. The problem possibly could have been eliminated by a different site selection which may have solved a portion of the differential soil movement. Sand removal, repair of utility leaks and similar maintenance is necessary to minimize damage. Corrective action should have commenced when damage was identified.

Photograph 29 - The housing photograph of a 1939 structure indicates foundation failure. The house is vacant, condemned and awaiting razing.

Photograph 41 and 42 - The photographs indicate even the better older building need routine maintenance to lengthen the useful life.

## ROOF REPAIRS

Mr. DUNCAN. You know, these roofs—I got to thinking about them as I walked over to the floor—these are flat roofs, tar paper mopped, aren't they?

Mr. ZUNI. Right.

Mr. DUNCAN. Have these roofs been mopped at all since they were built?

Mr. ZUNI. I don't know that.

Mr. DUNCAN. I would like to know that—because the first one was built in 1967, and that is 9 years—they surely should have been mopped and maybe another layer of paper put over in that length of time.

Mr. ZUNI. Yes.

Congressman, as a native of New Mexico, and having lived in Arizona, usually the lifespan of a roof, as shown in those pictures, is less than 10 years. A contractor will not guarantee anything beyond 10 years.

That means that perhaps some maintenance work should have been done, if they are older than 10 years.

Mr. DUNCAN. They probably should not guarantee them 10 years, unless you agree to mop them at least every 3 years. So if these have not been mopped at all, maybe it is not the contractor's fault on the roofs. But that still does not explain the foundation.

## MR. RAYMOND SMITH, NAVAJO REPRESENTATIVE

Mr. YATES. Mr. Raymond R. Smith, who is a member of the Navajo Tribal Council, Budget and Finance Committee and Mr. Jack Crowder are here representing the Navajos. Will you please identify yourself for the record.

Mr. CROWDER. I am a consultant for the Navajo Area School Board Association, and also I am working with the education committee today.

Mr. McKAY. Are you an attorney?

Mr. CROWDER. No, I am a consultant.

Mr. McKAY. What is your background?

Mr. CROWDER. I have been involved in the Navajo reservation for 22 years. I do educational writing. And I do a lot of photography and gather data for the school board association. I helped organize the school board association into a tightly knit unit a little over a year ago when it became viable.

Mr. YATES. Please proceed, Mr. Smith.

Mr. SMITH. Members of the committee, I appreciate the opportunity to make a statement here on behalf of the education committee and the Navajo Area School Board Association.

I am not a member of either one of the committees. I am a member of the budget and finance committee of the Navajo Tribe. Last year I testified before this committee with respect to the add-ons for the BIA band, and also in respect to add-ons for various operations of the Navajo Tribe, which the BIA is supporting the Navajo Tribe.

As I have heard here—I was kind of pressed into this situation on a last minute notice by Miss Wauneka. They felt I was capable of explaining some of the areas in which the Navajo Tribe, especially

the budget finance committee, was involved in the band analysis, or the budgetary process of BIA.

As I understand it, the education committee and the Navajo Area School Board Association were here last week conferring with Commissioner Thompson to seek ways to alleviate the condition of these BIA schools on the Navajo Reservation. I won't go into the details as I have noticed you have seen the photos of these schools, and also there was a reference made to a memo dated February 9, 1976, to Commissioner of Indian Affairs from the acting area director, and the subject was, "Facility Management, Compliance with the Laws and Regulations," and also it cites the flagrant violations of laws which is very serious in our estimation as a member of the budget and finance committee.

So the budget and finance committee, as a member, supports all efforts of everyone concerned here, especially on behalf of the Navajo Tribe, and would like to see something done in this respect.

#### INPUT OF THE NAVAJO BUDGET AND FINANCE COMMITTEE

I would like to go back to March of 1975. That was a time when the budget and finance committee had their input into the band analysis of the Bureau, or the budgeting process of the BIA. And as recommended from the local chapter, which is composed of 102 chapters, and also from the agency level, their priorities, coming from the agency and chapter levels, was that education was No. 1. So consequently, you can see here that somebody was at fault for not informing the budget and finance committee that when you are talking about education, you are talking about construction of buildings, you are talking about educating the people, the students, and also various things that are allied in this respect.

In the limited time that the budget and finance committee was allocated to have their input into the band analysis of the tribe, at that time the budget and finance committee was making a recommendation to the Navajo Tribal Council of certain add-ons, which amounted to \$12 million, plus or minus. And at that time, the committee, the budget finance committee, was completely unaware of the financial condition of the plant management activities. Had the budget and finance committee known at the time that these financial situations were in such deplorable conditions, we would have made a recommendation possibly for an add-on, in addition to the \$12 million which was presented to this committee in 1976, for 1977 add-ons. But they were not informed that these financial conditions of the plant management activities were in such a horrible plight.

Mr. YATES. I don't understand that statement. Isn't the budget and finance committee aware of the condition of the Navajo schools?

Mr. SMITH. We were not aware of the financial position of the plant management.

Mr. DUNCAN. But you must have noticed them disintegrating, though, didn't you, as you went past them, or into them?

Mr. SMITH. Well, the budget and finance committee is a committee which deals strictly with the tribal budget. We are kind of relying on other committees to give us the information that we need to ask for additional funds, or add-ons in this respect, in a band analysis.

Mr. YATES. Are you saying your education committee, which presumably knows the condition of the schools, has not requested you to ask for funds for the school?

Mr. SMITH. I have asked the budget and finance committee and the NASBA School Board Association, if they were aware of these conditions and they were not aware.

Evidently the Bureau of Indian Affairs did not make it known to the education committee of the tribe or the Navajo Area School Board, until they personally inspected these facilities.

Mr. MCKAY. Aren't those people who live in the area members of the Navajo School Board?

Mr. SMITH. Yes, sir.

Mr. MCKAY. How do they arrive at policy of any kind if they haven't been around to know what the circumstances of their schools are? Did they wait for the BIA to tell them what is wrong?

Mr. CROWDER. Let me repeat Mr. Smith's answer. First he said the business and finance committee was not aware of the financial plight of plant management. The budget and finance committee would not be directly involved in our BIA schools because their children go to public schools. The school board association are parents of children in those schools. They are very much aware and have been for a long time of the deteriorating condition of the buildings.

But they did not know why they were not getting results from their criticism of the plant management personnel. We spent 2 years attacking plant management, demanding that they do more work.

Mr. MCKAY. The BIA.

Mr. CROWDER. Right.

We tried to pin down plant management to make them fix this today, that tomorrow, this next week. When they didn't do that, we put together programs to try to force them.

Mr. MCKAY. But the implication here is that the school board association of the Navajos did not report their plight to the finance committee.

Mr. CROWDER. Because we didn't know it was a money problem. We assumed it was because plant management was not well organized. We put together all sorts of attacks on the thing. We did not know they didn't have the money to do the work.

This study has only been recently done, about 6 months. It is the first study that has ever been made to show the exact amount of funding available to plant management, the kind of funding that is necessary to do the job.

#### FUNDS ARE NOT GIVEN TO SCHOOL BOARD

Mr. YATES. Maybe we do not know how the money that goes to repair these schools comes from BIA to the budget and finance committee, and then to the school committee?

Mr. CROWDER. The money at no time ever comes to the school board. We are purely advisory. We have absolutely no authority.

#### FUNCTION OF BUDGET AND FINANCE COMMITTEE

Mr. YATES. What is the function of the budget and finance committee?

Mr. CROWDER. They are invited each year to participate in planning of a block of money, about \$200 million. They are asked, what priority is first, second, and third?

Mr. YATES. By BIA?

Mr. CROWDER. Yes.

Mr. YATES. And you told BIA that your first priority was education?

Mr. SMITH. Yes; education.

Mr. YATES. Did that include the rehabilitation of the schools?

Mr. SMITH. When you talk about education, you are talking about education, educating students, and that entails construction of schools; and maintenance of schools. So this all ties in. They are all allied.

So when the band analysis was brought to the budget and finance committee, the Bureau fiscal officer should explain to the budget finance committee that these things should have been joined together.

Mr. YATES. Do you mean the BIA man should have told you?

Mr. SMITH. That is the way I feel. As I stated, the budget and finance committee, we are used to a tribal budget which has line items This is from year to year. But you have the BIA band analysis which talks about 95 percent, 110, 120 percent constraint funding. So this was completely foreign to the budget and finance committee when it came to us in that form.

And we told the Bureau of Indian Affairs that it was completely foreign to us, that we did not know what they were talking about.

Mr. YATES. Is this the BIA agent you are talking about, the area representative?

Mr. SMITH. BIA fiscal officer from Gallup, N. Mex.

Mr. YATES. Apparently there was a misunderstanding between you and the BIA.

Mr. SMITH. Yes. The budget and finance committee did not fully understand the way that the band analysis operates or how this funding process was done.

But we did select a subcommittee of the budget and finance committee of the Navajo Tribe, and we did work with the fiscal officer, and we did come to some sort of understanding.

Mr. YATES. An understanding as to what?

Mr. SMITH. As to how the 95-percent, the 110-, 120-percent constraint funding was allocated.

Mr. YATES. Then you understand it more than we do. What does that mean?

#### BUREAU PRIORITY SYSTEM

Mr. SMITH. Let me try to explain that. If I am wrong, Mr. Zuni will correct me.

You have a base figure, which is picked up from the previous year. The Bureau is asking the tribe, "Well, all right, you have a base figure for 1976, which is  $x$  amount of dollars." They say: "All right, if you are cut 5 percent, how would you allocate these funds along these line items?" Or they will ask the question, "If you get 110 percent, or 10 percent over 100 percent, how would you allocate these funds in these line items?"

Also in the 120 percent—"You are getting 20 percent more. So how would you allocate these funds?" This is how the budget and finance committee was confronted. And it was very confusing to us,

because we have to transfer funds back and forth, and you only have so much money to play with.

There is not enough money to transfer into these line items. Consequently, when you get into the 95-percent constraint funding, you run into trouble.

Mr. MCKAY. Then what you are telling me is that the BIA said—"All right, Navajo Tribe, you have so much money. Now, if that is cut 5 percent, what are your priorities?"

Mr. SMITH. Right.

Mr. MCKAY. But in that situation, it was never discussed on any of the items as to need; is that right?

Mr. SMITH. Well, yes—

Mr. MCKAY. I mean, for example—it is \$200 million, we are going to cut out 10 percent, or 5 percent of the budget, and if we cut 5 percent, where are your needs?

Did you at that point discuss the condition of the schools, or the condition of the roads, or the conditions of scholarships—those kind of things—to make your decision as to which was priority?

Mr. SMITH. Yes, Congressman.

Mr. MCKAY. But the BIA in that discussion did not give it to you.

Mr. SMITH. We took our priority listing from the chapter level, and also the agency level. And their recommendation was that education would be a No. 1 priority. Roads would be No. 2, housing would be No. 3, and so on down the line. There also was a "Need" column in which you could enter any amount you wanted.

Mr. YATES. What is band analysis?

Mr. ZUNI. Priority system.

Mr. SMITH. May I complete my statement?

Mr. YATES. Yes.

Mr. SMITH. As I have stated here, the budget and finance committee did not become aware of the financial plight of the plant management conditions until late 1975, whereupon the area plant manager informed the budget and finance committee of the inequities of funding for maintenance. For example, I think you have the figures there, \$1.99 per square foot for the Albuquerque area, \$1.48 for the Phoenix area, and \$1.08 for the Navajo area. We feel, in talking in the budget and finance committee, as was explained by the plant management for the area, that there are inequities, and there is discrimination against the Navajo.

Albuquerque and Phoenix are in a geographical area where they do not have too much rain or too much snow. But the Navajo, we have a considerable amount of snow, and we feel that something is lacking—the budget and finance committee feels that these flat roofs should not be built. In other words, maybe we should be spending a little more money to have a pitched roof, especially in the heavy snow falls that we have, especially around Crystal, and these areas. So we have a point there that we want to make clear to the committee, that these things should be alleviated to correct the situation. Also, I think you have a resolution from one chapter.

Mr. YATES. We do. Those are already in the record.

Mr. SMITH. And also a resolution from the advisory committee, and the Navajo area school board.

Gentlemen, I think what I have said here, if there are any other questions—we do need help in getting the maintenance money for repairs of these facilities on the Navajo Reservation.

#### REPAIR VERSUS NEW CONSTRUCTION

Mr. YATES. Very frankly, Mr. Smith, I do not know that repairs will do any good. It is something we have to take up with the BIA. If the buildings are so far gone that they cannot be corrected, just putting a bandage or a rubberband around them won't do any good, because you are going to have to have new facilities one of these days. The pictures indicate that they are so far gone that maintenance is almost impossible.

The committee wants to look into the matter. We want to decide whether we will send people out there to look at the condition of your schools. The pictures are very graphic. We want to make sure that we do the right thing. Just putting money into the budget for maintenance as such may not help you. It may just tide you over a year or two. But you may have to have a new school there.

We are unhappy about the condition of the schools. We are unhappy about the fact that we were not told everything that we should have been told by the BIA. We are grateful to you for coming in and letting us have the viewpoint of the Navajo Nation, and of the Budget and Finance Committees.

Mr. SMITH. Mr. Chairman, I would like to make another point. We have a bank called the Great Western Bank at Window Rock. Originally they also put a flat roof on their building. Consequently, within 2 or 3 years it started leaking. So now they have a pitched roof. And also we have a supermarket at Window Rock, and they also have a flat roof, and consequently their roof is leaking now, and it is going to cost the tribe \$20,000 to at least put some tar over it. But that does not solve the problem. So I do not know where these architects are coming from, or how they design these building.

Mr. YATES. I think we need some new architects, Mr. Smith. At any rate, thank you and Mr. Crowder for coming today. Give our regards to Miss Wauneka.

Mr. SMITH. We will.

Mr. YATES. Mr. Zuni, thank you very much.

Mr. ZUNI. Thank you.