

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

INDIAN EDUCATORS FEDERATION :
(Local 4524 of the AMERICAN FEDERATION :
OF TEACHERS, AFL-CIO), :

plaintiff, :

v. :

GALE A. NORTON, SECRETARY, :
UNITED STATES DEPARTMENT :
OF THE INTERIOR, :

defendant. :

Case No. 1:04-cv-1215 (RWR)

PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT

Pursuant to FED. R. CIV. P. 56(a), the plaintiff Indian Educators Federation hereby moves this Court for summary judgment. This motion is supported by a declaration of Patrick Carr, with exhibits; a Memorandum of Points and Authorities; and an Appendix of Administrative Decisions. A Statement of Material Facts to Which There Is No Genuine Dispute and a Proposed Order have also been filed concurrently with this Motion. Plaintiff respectfully requests an opportunity to present oral argument on this Motion.

Respectfully submitted,

_____/s/_____
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November 12, 2004

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**PLAINTIFF’S STATEMENT OF MATERIAL FACTS
TO WHICH THERE IS NO GENUINE DISPUTE**

1. The Indian Educators Federation (“IEF”) is Local 4524 of the American Federation of Teachers (AFL-CIO). The IEF is an unincorporated membership organization of employees of the Department of the Interior, including the teachers employed by the Bureau of Indian Affairs in BIA schools on Indian reservations, other non-educational employees of the BIA, as well as employees within the Office of Special Trustee for American Indians. Carr Declaration, ¶ 1.

2. Among the objectives of the IEF as set forth in Article III of its Constitution are to promote the welfare of its members, to “expose and fight all forms of racial discrimination” and to promote the objectives of its parent organization, the

American Federation of Teachers. The stated mission of the AFT is to improve the lives of its members, to promote their professional, economic and social aspirations, and to promote human rights. In furtherance of this mission, the AFT and its locals have a long commitment to taking affirmative steps, away from the bargaining table and outside of traditional labor relations activities, in court and elsewhere, to promote equal employment opportunity and to advance the cause of civil rights. In 1918, the AFT called for equal pay for African-American teachers, the election of African-Americans to local school boards, and compulsory school attendance for African-American children. In 1919, the AFT demanded equal educational opportunities for African-American children and in 1928, called for the contributions of African-Americans to be taught in the public schools. In 1954, the AFT filed an amicus brief in support of the plaintiffs in the *Brown v. Board of Education* before the Supreme Court. In the 1960s, AFT members and staff helped organize the 1963 March on Washington for Justice and Jobs. In 1964, '65, and '66, hundreds of AFT members traveled south to register new African-American voters and to teach in freedom schools. The AFT, along with other civil rights organizations, lobbied for passage of key civil rights legislation, such as the Equal Employment Opportunity Act, the Fair Housing Act and the Voting Rights Act. Since then, AFT and its locals have regularly been plaintiffs in civil rights cases, such as *Powell v. Ridge*, (a Pennsylvania case alleging school funding violated Title VI of the Civil Rights Act) and *Jenkins v. Missouri*, (a Missouri school desegregation case). Carr Declaration, ¶ 2.

3. In 1999, the Federal Labor Relations Authority certified the Indian Educators Federation as the certified collective bargaining representative of the non-managerial, non-supervisory employees of the Office of Special Trustee for American Indians nationwide. Carr Declaration, ¶ 3.

4. According to a recent OST Staff Directory, there are approximately 550 positions with the OST throughout the country. These positions are located in Washington, D.C., Albuquerque, NM, and various other locations in Montana, California, Oklahoma, North Dakota, South Dakota, Arizona, Oregon, Kansas, Utah, Wyoming, Wisconsin, Idaho, Minnesota, and the State of Washington. According to a recent report provided to the IEF by the OST, 384 of these employees are non-managerial, non-supervisory, and are represented by the IEF. Carr Declaration, ¶ 4.

5. On June 2, 2003, OST notified the IEF that as a result of a reorganization of the OST, Indian preference would now be limited to positions in the Office of the Deputy Special Trustee - Trust Services and in the Office of Appraisal Services in the Office of Deputy Special Trustee - Field Operations. As a result of this decision to limit the applicability of Indian preference, the Secretary is now according qualified Indians with preference when filling only approximately 170 positions within the OST. Carr Declaration, ¶ 5.

6. Almost all of the IEF members within the OST are Indians and would qualify for Indian preference under the Department of Interior's regulations. Carr Declaration, ¶ 6.

7. In 2001, the IEF was certified by the Federal Labor Relations Authority as the exclusive representative of not only the teachers in all of the BIA schools, but of all the non-managerial and non-supervisory employees of the BIA nationwide. Among its members are Indians who administer the BIA's many programs in Washington, D.C., Reston, Virginia and at BIA agencies at or near Indian communities throughout the country. Carr Declaration, ¶ 14.

8. Indian IEF members have applied for promotions to higher graded positions within the OST and the Office of Assistant Secretary for Indian Affairs ("AS-IA") for which they have been found to be qualified. Carr Declaration, ¶¶ 8-12, 15.

9. Non-Indian applicants have been selected for promotion or hiring in lieu of these qualified Indian applicants for promotion in OST and AS-IA. Carr Declaration, ¶¶ 8-12, 15.

10. These Indian applicants would have been selected for promotion if the Secretary had applied Indian preference when filling these vacant positions because the non-Indian applicants would not have been considered. Carr Declaration, ¶ 6.

11. Indian IEF members, and other Indian employees within the OST and BIA whom the IEF represents, continue to apply on a regular basis, and will apply in the

future, for promotion to positions in OST and AS-IA for which they are qualified and for which they would be selected but not for the Secretary's failure to apply Indian preference to the filling of all vacancies within the OST. Carr Declaration, ¶¶ 13, 15.

12. Because the Secretary has limited Indian preference to a minority of positions within the OST, Indian IEF members, and other Indian employees within the OST whom the IEF represents, have been denied their entitlement to Indian preference in the event of a reduction-in-force. Carr Declaration, ¶ 5.

13. OPM annually publishes a list of positions that are excepted from civil service regulations concerning appointment through competitive procedures. The most recent annual inventory of those positions was published at 68 FED. REG. 71,176 (December 22, 2003). This Federal Register Notice lists the positions within the Department of Interior which have been exempted (or "excepted") from the competitive civil service and includes:

All positions in the Bureau of Indian Affairs and other positions in the Department of the Interior directly and primarily related to providing services to Indians when filed by the appointment of Indians. The Secretary of the Interior is responsible for defining the term "Indian."

68 FED. REG. 71,181.

14. On July 12, 1996, the Secretary published in the Federal Register a proposed rule that would limit the applicability of Indian preference to the Bureau of Indian Affairs and to those office units that have been transferred intact from the Bureau

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT
OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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Table of Contents

Introduction		1
Statement of the Facts.....		2
a. The origins of Indian preference.....		2
b. How Indian preference works		5
c. The Department of the Interior, the Comptroller General, and the Civil Service Commission historically interpreted section 12 of the IRA to apply to all positions in the Department of Interior which are directly and primarily related to providing services to Indians. Congress explicitly endorsed this interpretation of section 12 of the IRA in 1979 when it extended Indian preference to reduction-in-force actions.		7
d. The Department abruptly reversed its interpretation of the scope of section 12 in a 1988 Opinion from Solicitor Tarr. As a result of a challenge to this reversal, the D.C. Circuit advised the Department to pursue a change in its interpretation through notice and comment. The Department subsequently published a proposed rule to change its interpretation of section 12, but implemented this change without ever addressing the negative public comments it received or publishing a final rule.		15
e. Congress created the Office of Special Trustee for American Indians to oversee and reform the Department’s management of lands held in trust for Indians. However, the Secretary has limited the application of Indian preference to positions within the OST that are within organizational units transferred intact from the BIA. Many Indian employees within those units lost their employment preferences when the OST was recently reorganized, and other Indian employees will lose their employment preferences if additional reorganization plans are implemented.		19
f. Many positions have been transferred from the BIA to the Office of the Assistant Secretary for Indian Affairs. The Secretary is not giving Indians preference when filling those or other positions in AS-IA.		26

g. OPM regulations continue to extend Indian preference to all positions within the Department of the Interior that are directly and primarily related to providing services to Indians. 28

ARGUMENT 29

I. Section 12 of the Indian Reorganization Act and section 2 of Pub. L. No. 96-135 require the Secretary to accord Indians preference in employment in all positions within the Department of the Interior which are directly and primarily related to providing services to Indians. 29

A. Section 12 of the IRA and section 2 of Pub. L. No. 96-135 must be liberally construed in favor of their intended beneficiaries, the American Indians. 29

B. The Secretary’s current interpretation of section 12 of the IRA and section 2 of Pub. L. No. 96-135 would not otherwise be entitled to deference because the agency’s interpretation of the statutes has been inconsistent. . 30

C. When section 12 of the IRA, section 2 of Pub. L. No. 96-135, and the preexisting Indian preference laws are read together, the plain language of these statutes clearly requires the Secretary to accord Indians preference to all positions in the Department of the Interior which directly and primarily service Indians. 32

1. The term “Indian Office” contained in section 12 of the IRA was generic and not synonymous with, nor limited to, the Bureau of Indian Affairs. 32

2. Section 12 of the IRA must be read in *pari materia* with the earlier statutes that continue to require that Indians be given preference for employment throughout the Department of the Interior. 33

3. Any doubt about the scope of Indian preference contained in the language of section 12 was eliminated when Congress clearly defined the scope of Indian preference in section 2 of Pub. L. No. 96-135. 35

D. The legislative history of the IRA, Pub. L. No. 96-135, the Trust Reform Act of 1994, and the Indian Self-Determination Act of 1975, all support an interpretation of section 12 that would apply Indian Preference to all positions within OST and AS-IA..... 36

1. Application of Indian preference to the OST and the AS-IA is necessary to effectuate the intent of section 12 of the IRA. 36

2. Congress sought to ensure that Indian preference would apply to all positions in the Department of the Interior directly and primarily related to providing services to Indians when it enacted Pub. L. No. 96-135..... 39

3. Indian preference must apply to positions in the OST in order to effectuate the purposes of the 1995 Trust Reform Act. 40

4. Application of Indian preference to all positions in the Interior Department which primarily and directly provide services to Indians is necessary to achieve Congress’ goal of “maximum Indian participation in the direction of . . . Federal services to Indian communities” set forth in the Indian Self-Determination Act. 41

II. The Department violated the rule making provisions of the Administrative Procedures Act by implementing the proposed rule of July 12, 1996 without considering the comments received from interested persons, by failing to publish a response to the significant comments received, and by failing to publish a final version of the rule and notice of its adoption. 43

Conclusion..... 44

INTRODUCTION

In an effort to give Americans Indians greater control over their affairs, Congress adopted the Indian Reorganization Act of 1934. Section 12 of the Act requires that the Secretary of the Interior grant Indian applicants a hiring preference for “the various positions maintained, now or hereafter, by the Indian Office, in the administration of functions or services affecting any Indian tribe.” The Department of the Interior, the Office of Personnel Management and its predecessor, the Civil Service Commission, and the Comptroller General have historically interpreted section 12 to apply to all positions in the Department having the primary responsibility of providing services to Indians or to Indian tribes. In 1979 Congress extended the hiring preference mandated by section 12 by granting Indians preference in the event of a reduction in force. At the same time, Congress specifically stated that Indian preference applies to the Bureau of Indian Affairs “and all other organizational units in the Department of Interior directly and primarily related to providing services to Indians.”

However, the Secretary has refused to give qualified Indians preference for positions within the Office of Assistant Secretary for Indian Affairs and for most positions within the newly created Office of Special Trustee for American Indians. The Indian Educators Federation is a professional association, labor union and civil rights organization which represents employees of the Office of Special Trustee and the Bureau of Indian Affairs. Most of its members are eligible for Indian preference and its members

have been denied the benefits of Indian preference when they have applied for positions and promotions in the Office of Special Trustee and Office of Assistant Secretary for Indian Affairs. This suit seeks to require the Secretary to accord such preference to qualified Indian applicants when filling all positions, and when conducting a reduction-in-force within these two offices as well as all other positions in the Department which directly or primarily relate to the providing of services to Indians.

STATEMENT OF THE CASE

a. The origins of Indian preference.

The Federal policy of according hiring preference to Indians dates at least as far back as 1834. Section 9 of the Act of June 30, 1834, 4 Stat. 737, provides:

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.

25 U.S.C. § 45. Since that time, Congress has enacted similar broad preference statutes. The Act of May 17, 1882, c. 163, § 6, 22 Stat. 88 and Act of July 4, 1884, c. 180, § 6, 23 Stat. 97, provide:

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

25 U.S.C. § 46. The General Allotment Act of 1887, (which, until enactment of the Indian Reorganization Act of 1934, provided for the allotment of reservation lands to individual Indians and the sale to whites of non-allotted lands), contains the following broadly worded hiring preference:

. . . And in the employment of Indian police, or any other employees in the public service among any of the Indian tribes or bands affected by this Act, and where Indians can perform the duties required, those Indians who have availed themselves of the provisions of this Act and become citizens of the United States shall be preferred.

25 U.S.C. § 348. The Act of August 15, 1894, c. 290, § 10, 28 Stat. 313, provides:

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

25 U.S.C. § 44 (emphasis added).

The Indian Reorganization Act of 1934 (also known as the Wheeler-Howard Act) contained comprehensive changes in government's relationships with Indian nations. The Act primarily put an end to the practice of allotting lands to individual Indians, and authorized the Secretary to acquire additional land in trust for the tribes and individual Indians. The Reorganization Act also indefinitely extended the trust period for lands already allotted, establishing the government's continuing duty to administer allotted

Indian lands, as well as the income derived from those lands. See generally, *Cobell v. Babbitt*, 91 F. Supp.2d 1, 8 (D.D.C. 1999), *aff'd and remanded*, 240 F.3d 1081 (D.C. Cir. 2001). Section 12 of the IRA restated Congress' longstanding directive that Indians should be given preference in hiring for Federal government positions which affected services to the Indian peoples. The 1934 Act went a step further by exempting the hiring of Indians from the Civil Service laws and by directing the Secretary of Interior to establish separate standards by which to judge the unique qualification of Indian applicants:

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

48 Stat. 986; 25 U.S.C. § 472.¹

Some decades later, non-Indian employees of the Department's Bureau of Indian Affairs challenged the validity of section 12 by claiming that it was racially discriminatory. In *Morton v. Mancari*, 417 U.S. 535 (1974), the Supreme Court rejected this argument, finding that Indian preference is not a "racial" preference, but rather a political one "designed to further the cause of Indian self-governance." 417 U.S. at 553-

54 and n. 24. “The overriding purpose of [the Indian Reorganization] Act was to establish a machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically.” 417 U.S. at 542.

Although section 12 of the IRA specifically instructs the Secretary of the Interior to grant Indians preference in hiring for certain positions, courts generally recognized that the Secretary of Health and Human Services must also accord Indians preference in hiring in the Indian Health Service, which was transferred from Interior to the Department of Health, Education and Welfare in 1954. *Mancari*, 417 U.S. at 538, n.1.

b. How Indian preference works.

The Office of Personnel Management and its predecessor, the Civil Service Commission, have established uniform qualification standards for employment in particular professions in the Federal government. Section 12 of the IRA requires the Secretary of the Interior to adopt separate and independent standards for evaluating the qualifications of Indians - “standards that give sufficient weight to the unique experience and background of Indians, including their superior knowledge of Indian needs and problems.” *Preston v. Heckler*, 734 F.2d 1359, 1371 (9th Cir. 1984). The Secretary may consider civil service standards when formulating hiring criteria applicable to Indians, and may ultimately adopt the same standards “after giving full weight to the unique

¹ The Office of Law Revision Counsel subsequently erred in omitting the phrase “without regard to civil-service laws” from the codification of the Indian Reorganization Act. *Preston v. Heckler*, 734 F.2d 1359, 1367-69 (9th Cir. 1984).

experience and background of Indians” if she concludes that the government-wide standards are most appropriate. *Id.* at 1371-72; *Johnson v. Shalala*, 35 F.3d 402, 407 (9th Cir. 1994). However, section 12 of the IRA forbids “blind transference” of civil service qualification requirements to positions which are entitled to Indian preference. *Dionne v. Shalala*, 209 F.3d 705, 707 (8th Cir. 2000), *reh’g en banc denied* (June 27, 2000), *cert. denied*, 531 U.S. 1143 (2001).

Job applicants who seek Indian preference must provide a certification from a tribal or other official that they are either:

- (a) Members of any recognized Indian tribe now under Federal Jurisdiction;
- (b) Descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation;
- (c) All others of one-half or more Indian blood of tribes indigenous to the United States;
- (d) Eskimos and other aboriginal people of Alaska.

25 C.F.R. § 5.1. They may be required to provide a family history and other background information. See Form BIA 4432 attached to Declaration of Patrick Carr as exhibit C.

Indians are not only entitled to preference not in initial hiring, but in promotion, lateral transfer or reassignment to other positions as well. 25 C.F.R. § 5.2; *Freeman v. Morton*, 499 F.2d 494 (D.C. Cir. 1974). For all practical purposes, consideration can only be given to non-Indian applicants when filing vacancies if there are no qualified

applicants who are entitled to Indian preference. (See “Indian Preference Policy” on page 1 of exhibit B attached to declaration of Patrick Carr.) As will be discussed in more detail below, in 1979 Congress expanded the scope of Indian preference by entitling Indians to preference in retaining their jobs in the event of a reduction-in-force.

- c. **The Department of the Interior, the Comptroller General, and the Civil Service Commission historically interpreted section 12 of the IRA to apply to all positions in the Department of Interior which are directly and primarily related to providing services to Indians. Congress explicitly endorsed this interpretation of section 12 of the IRA in 1979 when it extended Indian preference to reduction-in-force actions.**

The scope of Indian preference (that is to say, the positions to which it applies), is at the heart of this case and has been the subject of numerous legal opinions from the Comptroller General and various Interior Department Solicitors.

In 1977, the Chair of a House Post Office and Civil Service Subcommittee sought a formal opinion from the Comptroller General whether the Department was properly extending Indian preference to positions outside the Bureau of Indian Affairs (“BIA”). In his Opinion of September 20, 1977, B-161468, the Comptroller General noted that “from at least 1968, and presumabl[y] earlier, the Civil Service Commission (CSC) has regarded the Indian preference as applicable to positions within the Department of the Interior but not within the BIA.” Op. Comp. Gen. B-161468 (Sept. 20, 1977) at 2. (Appendix A-2). (In fact, as noted in a later Solicitor’s Opinion, the CSC’s regulations authorized Interior to extend Indian preference department-wide as early as 1954. 96

Interior Dec. 1, 6 (1988) (Appendix A-31)). The Comptroller General cited a provision of the Code of Federal Regulations which exempted from competitive examination “all positions in the Bureau of Indian Affairs *and other positions in the Department of the Interior directly and primarily related to providing services to Indians when filled by the appointment of Indians.*” (Appendix A-2). The Comptroller General then examined in depth the legislative history of section 12 of the IRA and concluded that a construction of section 12 which limited the applicability of Indian Preference to the BIA would defeat the legislative intent:

The broader construction of the Indian preference as applicable to all positions within the Department of the Interior “directly and primarily related to the providing of services to Indians” adopted by the Civil Service Commission more fully gives effect to the purpose of Indian preference than does a construction which would limit its application to positions within the Bureau of Indian Affairs. Moreover, a narrower construction of the preference could, in large part, defeat its purpose. Much of the legislation dealing with Indians places authority in the Secretary of the Interior rather than in the Commissioner of Indian Affairs. Section 1(a) of title 25 of the United States Code authorizes the Secretary of the Interior to delegate to the Commissioner of Indian Affairs his responsibility for administration of the laws governing Indian matters, to the extent he deems proper. A determination by the Secretary to retain a particular responsibility within his own office rather than to delegate it to the Commissioner of Indian Affairs could, for all practical purposes, defeat the Indian preference with respect to that particular function. The CSC’s regulation at 5 C.F.R. § 213.3112(a)(7) preserves the preference, depending only upon the nature of the services involved insofar as they fall within the responsibility of the Secretary of the Interior, regardless of whether responsibility for administration is delegated to the Commissioner of Indian Affairs or retained by the Secretary. Thus Indian preference is preserved and its purpose assured notwithstanding changes in Government policy as to whether all Indian matters are or are not retained within a single Bureau of the Department of the Interior.

Op. Comp.Gen. B-161468 (Sept. 20, 1977) at 10-11. (Appendix A-10-A-11).

The Secretary of the Interior established the position of Assistant Secretary for Indian Affairs by Secretarial Order 3010 (Sept. 27, 1977) to elevate the importance of Indian issues within the organizational structure of the Department. The new Office of Assistant Secretary for Indian Affairs (“AS-IA”) had oversight responsibility for the BIA and its programs. *See generally*, 96 Interior Dec. at 7-8; 109 Departmental Manual Chapter 8 (April 21, 2003). (Appendix A-32, A-54).

In 1979, the Department’s Personnel Officer sought an opinion from Department of the Interior Solicitor Leo Krulitz whether Indian preference would apply to the newly created Office of Policy, Planning and Evaluation as well as the Office of Administrative Oversight, both of which would be located, not within the BIA, but within the Office of the Assistant Secretary for Indian Affairs. Solicitor Krulitz examined the legislative history of the IRA and concluded that the term “Indian Office” in section 12 “seems to be generic, referring to that aggregate development of services to Indians occurring within the Department. It does not seem to refer to a static, finally defined entity.” Op. Solicitor (June 13, 1979) at 2 (Appendix A-13). Solicitor Krulitz reasoned that it made no difference whether the positions in question were originally within the “Indian Office” at the time the IRA was enacted in 1934 and subsequently transferred elsewhere in the

Department, or whether it was a newly created position in a newly created office within the Department:

I do not believe there is a difference in the requirement for preference application between those functions which were organizationally within the Indian Office as it existed at the time of the passage of the Indian Reorganization Act in 1934 and which were subsequently transferred to other bureaus or offices within the Department and those positions subsequently created outside the Indian Office.

Id. at 3 (Appendix A-14). Solicitor Krulitz noted that the new offices within the Office of the Assistant Secretary for Indian Affairs would be responsible for formation and analysis of the Department's Indian policies and for oversight of not only the BIA but of all Departmental programs pertaining to Indian affairs. *Id.* at 5 (Appendix A-16).

The legislative history of the Indian Reorganization Act demonstrates that preference was intended to apply to just such positions as those within the Office of Policy, Planning and Evaluation. It is difficult to imagine positions to which the application of preference as contemplated by the Act would be more critical.

Id. at 6 (Appendix A-17). The Solicitor also cited the Declaration of Policy contained in the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450a, which he read in *pari materia* with the IRA:

(a) The Congress hereby recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination by *assuring maximum Indian participation in the direction of educational as well as other Federal services to Indian communities* so as to render

such services more responsive to the needs and desires of those communities.

(b) The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy which will permit *an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services . . .*

(emphasis added). The Solicitor reasoned that the “policy of self-determination” and “maximum Indian participation” required that Indians be given preference for employment in all Department positions involved in the administration of Indian programs.

Solicitor Krulitz concluded that the Comptroller General made a “compelling case” for his conclusion that application of Indian preference to all Department positions which are “directly and primarily related to the providing of services to Indians is legally justified.” *Id.* at 2 (Appendix A-13). Relying on the language of section 12 and his conclusion that the term “Indian Office” was generic, the Solicitor opined that the scope of Indian preference was even broader: “The standard contained in section 12 merely requires that the positions be those which are ‘in the administration of functions or services affecting any Indian tribe.’” *Id.*

In 1970, the Court of Appeals for the Tenth Circuit struck down Interior’s policy of granting Indians preference in job retention during reduction-in-force actions.

Mescalero Apache Tribe v. Hickel, 432 F.2d 956 (10th Cir. 1970), *cert. denied*, 401 U.S. 981 (1971). Because the objective of applying Indian preference in filling vacancies would be thwarted if Indian preference did not also apply in releasing competing employees during a reduction-in-force, Congress made a statutory correction in Pub. L. No. 96-135, 93 Stat. 1056 (1979), “*An Act to amend Civil Service retirement provisions as they apply to certain employees of the Bureau of Indian Affairs and of the Indian Health Service who are not entitled to Indian employment preference and to modify the application of the Indian employment preference laws as it applies to those agencies.*” In so doing, Congress also statutorily sanctioned the Civil Service Commission’s and the Comptroller General’s interpretation of section 12 as applying not only to the Bureau of Indian Affairs and the Indian Health Service, but also to “all other organizational units in the Department of the Interior directly and primarily related to providing services to Indians.” Section 2 of Pub. L. No. 96-135 reads in relevant part:

(a) Establishment of retention categories for purposes of reduction-in-force procedures

For purposes of applying reduction-in-force procedures under subsection (a) of section 3502 of Title 5 with respect to positions within the Bureau of Indian Affairs and the Indian Health Service, the competitive and excepted service retention registers shall be combined, and any employee entitled to Indian preference who is within a retention category established under regulations prescribed under such subsection to provide due effect to military preference shall be entitled to be retained in preference to other employees not entitled to Indian preference who are within such retention category.

* * *

(e) **Definitions**

For purposes of this section--

(3) The term "Bureau of Indian Affairs" means (A) the Bureau of Indian Affairs and (B) *all other organizational units in the Department of the Interior directly and primarily related to providing services to Indians and in which positions are filled in accordance with the Indian preference laws.*

25 U.S.C. § 472a (emphasis added)

In 1986, the Department sought an Opinion from the Solicitor concerning whether Indian preference would apply if the Department consolidated administrative services provided to the BIA and other departmental units and reassigned the employees who were performing those services from the various bureaus (including the BIA) to a “host” agency. In a May 6, 1986 Opinion, the Acting Associate Solicitor wrote that “by using language similar to that used by the Comptroller General in its 1977 opinion” in enacting § 472a(e), “Congress was implicitly recognizing the validity of the Comptroller General’s approach to the question of which positions were covered by the Indian preference law.” Op. Solicitor (May 6, 1986) at 2 (Appendix A-22). The Acting Associate Solicitor concluded that in order to determine whether Indian preference would apply to the positions reassigned from the BIA to a “host” agency,

. . . the primary issue will be the extent to which the positions are involved in the delivery of services to Indians. The more Departmental-wide the duties of a position are, the less likely Indian preference would apply to that

position. Whether Indian preference applies will have to be determined on a case by case basis, considering all facts and circumstances presented. . . .

* * *

[T]he application of Indian preference is not limited by bureau boundaries. Whether Indian preference applies will depend upon the duties to be assigned to the position.

Id. at 2-3 (Appendix at A-22-A-23). The Acting Associate Solicitor cautioned against consolidating positions which serviced Indians with those that did not because it would be contrary to the intent of the 1975 Indian Self-Determination Act, in which Congress declared that it was national policy to “assur[e] maximum Indian participation in the direction of . . . Federal services to Indian communities.” The Acting Associate Solicitor wrote that:

It should be recognized that “diluting” the duties of positions that had formerly dealt solely with the delivery of services to Indians with the result that non-Indians assume to a significant extent the delivery of these services could be interpreted as being inconsistent with this policy declaration.

Id. at 3 (Appendix at A-23).

- d. The Department abruptly reversed its interpretation of the scope of section 12 in a 1988 Opinion from Solicitor Tarr. As a result of a challenge to this reversal, the D.C. Circuit advised the Department to pursue a change in its interpretation through notice and comment. The Department subsequently published a proposed rule to change its interpretation of section 12, but implemented this change without ever addressing the negative public comments it received or publishing a final rule.**

Decades of progress in vesting Indians with the authority to govern their own affairs suffered a major setback in 1988 when Interior Secretary Donald Hodel requested Solicitor Ralph Tarr to revisit the issue of whether Indian preference applied outside of the Bureau of Indian Affairs. Specifically, Solicitor Tarr was asked whether Indian preference should be applied to the Office of the Assistant Secretary for Indian Affairs, the Division of Indian Affairs in the Office of Solicitor, and the Office of Construction Management, which, although not part of the BIA, had assumed responsibility for management of BIA facilities, such as Indian schools.

In an Opinion dated June 10, 1988, Solicitor Tarr concluded that the term “Indian Office” contained in section 12 of the IRA was intended to mean the Bureau of Indian Affairs, and only the Bureau of Indian Affairs. 96 Interior Dec. 1, 1988 WL 410388 (Appendix A-27). Mr. Tarr conceded that “it is a close question whether the preference applies” to the Office of Assistant Secretary for Indian Affairs. 96 Interior Dec. at 8 (Appendix A-33). However, he concluded that the legislative history of the IRA indicated that Congress had intended the term “Indian Office” and BIA to be synonymous. Although Solicitor Tarr cited references to the legislative history of the IRA

in which members of Congress ostensibly used terms such as “Indian Bureau” and “the Indian Service” synonymously with “BIA,” his opinion failed to cite a single example of Congress’ use of “the Indian Office” interchangeably with the term “BIA” in its deliberations over the IRA. 96 Interior Dec. at 2 (Appendix A-28). (This was the same loose terminology which led the Comptroller General and Solicitor Krulitz to conclude earlier that Congress used the term “Indian Office” generically.)

Solicitor Tarr also offered a tortured reading of the Supreme Court’s decision in *Mancari* in support of a claim that the only reason the Supreme Court found section 12 to be constitutional was because it was limited to the BIA. Solicitor Tarr reasoned that if Indian preference was extended beyond “that one entity whose activities are most intimately and pervasively directed toward [Indians]” it would no longer be “reasonably and directly related to a legitimate, nonracially based goal.” *Id.* at 5. (Appendix A-30). However, the scope of Indian preference was not an issue before the Court in *Mancari*. Moreover, under Solicitor Tarr’s own reasoning, extension of Indian preference to positions in any office or entity whose activities are “intimately and pervasively directed toward [Indians]” (such as the OST and AS-IA) would survive constitutional scrutiny.

An organization ostensibly representing Indian employees in the Office of Construction Management (“OCM”) subsequently brought suit in this Court against the Secretary of the Interior alleging that the failure to extend Indian preference to positions in OCM violated section 12 of the IRA. Summary judgment was granted in the

Secretary's favor and the plaintiff appealed. The Court of Appeals affirmed the dismissal after concluding that the plaintiff lacked standing because its members admittedly never applied for promotion within OCM, and thus never suffered any harm as a result of the challenged policy. *Albuquerque Indian Rights v. Lujan*, 930 F.2d 49 (D.C. Cir. 1991). The Court of Appeals wrote that, although the appellant lacked standing to litigate its claim,

. . . if we were evaluating the merits, it would pose a difficult task because of the scant agency record available in the present case. Should DOI choose to reevaluate its present interpretation of the Indian preference provision, it may wish to conduct a rulemaking process, thereby providing a reviewing court with a more informative record.

930 F.2d at 58. The Court of Appeals further noted that "when faced with a justiciable lawsuit, Interior would have to justify its departure from past departmental interpretations of the statute." *Id.* It noted that Solicitor Tarr's Opinion "represents a dramatic break with past interpretations of the preference provision" and that this abrupt reversal "might be especially problematic" because of the longstanding judicial policy of construing statutes "liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." 930 F.2d at 58, quoting *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). The Court of Appeals concluded by "suggest[ing]" that "the Department might give serious consideration to reexamining its interpretation in a forum providing more due process, allowing more opportunity for input from interested parties, and

creating a more reviewable record, rather than simply adopting an *ex parte* memorandum followed by the posting of an employment notice.” 930 F.2d at 59.

Several years passed before the Department acted on the Court’s suggestion. On July 12, 1996, the Department published in the Federal Register a proposed rule which would change the Department’s policy with regard to the scope of Indian preference. The summary stated that the proposed regulations would “amend the Preference in Employment regulations by clarifying the application of Indian preference not only within BIA but to other organizations within the Department of the Interior.” 61 FED. REG. 36671. This was a deceptive characterization of the proposed rule, however. Rather than expanding the scope of Indian preference as the summary implied, the actual proposed regulation would substantially restrict the application of Indian preference by formally adopting Solicitor Tarr’s June 10, 1988 Opinion. The proposed rule, which would amend 25 C.F.R. § 5.2, reads:

§ 5.2 *Do certain individuals receive preference in employment?*

Yes. Certain persons who are of Indian descent, as described in § 5.3, receive preference when appointments are made to vacancies in positions:

- (a) In the Bureau of Indian Affairs; and
- (b) In any unit that has been transferred intact from the Bureau of Indian Affairs to a Bureau or Office within the Department of the Interior and that continues to perform the functions formerly performed as part of the Bureau of Indian Affairs.

61 FED. REG. 36673. The notice of proposed rulemaking solicited public comments, which were due by September 10, 1996. 61 FED. REG. 36671. Eight years have passed since the proposed rule was published, but *no final rule has yet been issued*. Nevertheless, as will be explained below, the Department has implemented this rule even though formal rulemaking procedures have not been completed.

- e. **Congress created the Office of Special Trustee for American Indians to oversee and reform the Department's management of lands held in trust for Indians. However, the Secretary has limited the application of Indian preference to positions within the OST that are within organizational units transferred intact from the BIA. Many Indian employees within those units lost their employment preferences when the OST was recently reorganized, and other Indian employees will lose their employment preferences if additional reorganization plans are implemented.**

A significant portion of land owned by Indians and Indian tribes are held in trust by the Secretary of the Interior. The Secretary is responsible for management of the lands and for collecting and accounting for the income derived from the lease of land, such as timber stumpage, oil, gas and mineral royalties, grazing and agricultural fees. The BIA has generally held primary responsibility for trust land management (such as appraisals, approval of leases and land transfers) and income collection. The Bureau of Land Management and the Minerals Management Service also have responsibilities associated with land management and collection of royalties from lessees of Indian lands. The BIA's Office of Trust Fund Management ("OTFM") has historically exercised responsibility for "banking" functions, such as depositing revenues, maintaining over

300,000 accounts for individual Indian land owners, and ensuring that trust income is paid to account holders. See generally, *Cobell v. Norton*, 240 F.3d 1081, 1088 (D.C. Cir. 2001).

There is a long history of mismanagement of the lands and money held in trust. In short, no accurate records of land ownership had been kept; royalty and lease payments went uncollected; funds were not invested; and the Department had no reliable records of the moneys held in trust and to whom they were to be paid. In litigation brought in this Court by individual trust beneficiaries, Judge Lamberth has written that “[i]t would be difficult to find a more historically mismanaged federal program . . .” *Cobell*, 91 F.Supp.2d at 6. “Volumes have been written about improper management of funds within the Bureau of Indian Affairs since its inception,” including numerous General Accounting Office, Inspector General and Congressional committee reports which have condemned the longstanding and wholesale mismanagement of the Indian trust land and funds. H. R. REP. NO. 778, 103 Cong., 2nd Sess., at 9-10 (1994) *reprinted in* 1994 U.S.C.C.A.N. 3467, 3468.

The American Indian Trust Fund Management Reform Act of 1994 was intended to bring comprehensive reform to the manner in which the Secretaries have managed (or more precisely, mismanaged) their trust responsibilities. The purpose of the 1994 Reform Act was “to bring about better accountability and management of Indian trust funds by the Department of the Interior and to provide an opportunity for Indian tribes to directly

manage their own trust funds.” *Id.*, 1994 U.S.C.C.A.N. at 3467. Title I of the 1994 Reform Act contained provisions governing the Secretary’s reporting requirements to trust beneficiaries and permissible investments. Title II provided authority for Indian tribes to independently manage their own trust funds upon submission and approval of an adequate plan to do so.

Title III created a new entity within the Department - the “Office of Special Trustee for American Indians.” 25 U.S.C. § 4042. The Office of Special Trustee (“OST”) is headed by the “Special Trustee” who has been charged with overseeing and coordinating reforms within the Department relating to the management and discharge of the Secretary’s trust responsibilities to Indian tribes and individual Indians. 25 U.S.C. §4041(1). The 1994 Reform Act charges the Special Trustee and his or her Office with developing a strategic plan “that will ensure proper and efficient discharge of the Secretary’s trust responsibilities” and which would provide opportunities for Indian tribes to assist in the management of their trust accounts. 25 U.S.C. § 4043(a). The OST was charged with, *inter alia*, (a) overseeing and coordinating all reform efforts within the Department relating to the Secretary’s trust responsibilities; (b) monitoring the BIA’s reconciliation of tribal and individual trust accounts; (c) ensuring that the BIA adopts procedures that provide a periodic accounting to trust beneficiaries of collections, investments and disbursements; (d) ensuring that the BIA maintain complete and accurate land ownership records; and (e) ensuring that the Minerals Management Service adopts

policies which ensure that lessees of Indian lands accurately report production and timely pay lease royalties. 25 U.S.C. § 4043(b). Congress did not envision that the OST would be a permanent fixture. It required the Special Trustee to establish a date by which the OST's reforms efforts would be completed and the operations of the OST terminated. 25 U.S.C. § 4042(c).

Secretarial Order 3197 (February 9, 1996) established the OST. But rather than limiting the OST's responsibilities to the oversight and coordination functions envisioned by the 1994 Reform Act, the Secretary also transferred the Office of Trust Fund Management and its personnel from the BIA to the OST. (Appendix A-67). Thus, the Special Trustee assumed many of the operations it was assigned to reform and oversee. The Special Trustee sought the opinion of the Solicitor's Office whether Indian preference should be applied to the OST in general and the employees of the OTFM in particular.

Although the proposed rule covering the issue was about to be published for comment, the Deputy Solicitor issued an Opinion on April 10, 1996 in which he concluded that "the statutory Indian preference, 25 U.S.C. 472, does not apply in general to the Office of Special Trustee." Op. Solicitor at 4 (April 10, 1996) (Appendix A-42). However, the Deputy Solicitor also concluded that Indian preference continued to apply to the OTFM, so long as it remained an administratively segregated unit within the OST:

[T]he BIA's organizational unit has been transferred intact by virtue of an administrative decision from the BIA to the Office of Special Trustee

where it will continue to perform the functions it formally performed as part of the BIA. This office effectively remains, we believe, a BIA organizational unit and preference continues to apply. As a matter of administrative certainty as to the prospective applicability of the preference to OTFM, the functions and personnel structure of the OTFM should continue to be segregated from the remainder of the Special Trustee.

Op. Solicitor at 5 (April 10, 1996) (Appendix A-43).

Although the Deputy Solicitor advised that the “personnel structure of the OTFM” remain intact in order to preserve the employees’ entitlement to Indian preference under the Department’s newly adopted narrow reading of section 12 of the IRA, many of the Indian employees who were transferred from the BIA to the OST lost their employment preferences when employees of the OTFM were later dispersed. During a 2003 reorganization, an unspecified number of employees from OTFM were transferred to three new offices within OST - Trust Accountability; Budget, Finance and Administration; and External Affairs. In an Opinion dated May 5, 2003, the Associate Solicitor concluded, with regard to the OTFM employees transferred to the Office of Deputy Special Trustee for Trust Accountability, that

. . . The transfer of some positions from OTFM to this new office will not make either the office or these specific positions subject to preference. This new office is performing an essentially new set of responsibilities. Because there was no “transfer intact” of any organizational unit currently subject to Indian preference to the new office, Indian preference will not apply.

Op. Solicitor at 3 (May 5, 2003) (Appendix A-46). The Associate Solicitor reached similar conclusions with regard to the Office of Budget, Finance and Administration and Office of External Affairs. *Id.* at 3-4 (Appendix A-46-A-47). As a consequence, the Indian OTFM employees affected by this transfer are no longer entitled to preference in retention in the event of a future reduction-in-force (as might occur when the work of the OST winds up), nor are they any longer entitled to preference when applying for promotion within their work units. On June 2, 2003, the plaintiff Indian Educators Federation was notified that:

[O]n or about June 15, 2003 the Office of Special Trustee for American Indians (OST) will make a change in the application of Indian Preference when filing vacancies. This change is part of the overall reorganization of OST and the Bureau of Indian Affairs (BIA). Based upon a decision that was provided by the Department of the Interior, Office of the Solicitor, Indian Preference will now be limited to positions in the Office of the Deputy Special Trustee - Trust Services [the remnants of the OTFM] and in the Office of the Deputy Special Trustee - Field Operations, Office of Appraisal Services only. As positions are announced under the new organizational structure, these are the only locations that will include language indicating Indian Preference applies.

(exhibit A, declaration of Patrick Carr). As a result of this decision to limit the applicability of Indian preference, the Secretary is now according qualified Indians with preference when filling only approximately 170 of the approximately 550 positions within the OST. Qualified Indian IEF members who have sought promotion or transfer to

vacant positions to which Indian preference is not being applied have been passed over in favor of non-Indian applicants. See Declaration of Patrick Carr, ¶¶ 7-13.

The Associate Solicitor did conclude in his May 5, 2003 letter that the employees in the “Office of Appraisal Services” continued to retain Indian preference because that office had been transferred intact from the BIA to OST by Secretarial Order 3240 (March 12, 2002). *Id.* at 3 (Appendix A-46). However, a month later, the Secretary announced a plan to consolidate all the Department’s real estate appraisal functions into a single organization. The Associate Solicitor was asked for an opinion whether the Indian employees in the OST’s Office of Appraisal Services would retain employment preferences if that office was included in the consolidation. In an Opinion dated October 23, 2003, the Associate Solicitor advised the Assistant Secretary for Policy, Management and Budget that it was “likely” that preference would no longer apply to the positions transferred to the consolidated appraisal unit, and he recommended that measures be taken to ensure that it did not:

We suggest that if the transfer of the OAS is implemented, care be taken in the drafting of position descriptions, in the formation of organizational units, and in the distribution of assignments within the new organization in order to make it clear as possible that the entire appraisal responsibilities of the Department have been integrated into a single office and that no unit or group of appraisers remains primarily responsible for any particular bureau’s real estate.

Op. Solicitor at 4 (October 23, 2003). (Appendix A-51). This recommendation stands in marked contrast with the Acting Associate Solicitor's Opinion of May, 1986 which advised *against* consolidating, on a Department-wide basis, positions which service Indians with those that did not because it would be inconsistent with the policies embodied in the 1975 Indian Self-Determination Act. Op. Solicitor at 3 (May 6, 1986)(Appendix A-23) (see discussion *supra* at 14). The proposed consolidation of the OST's Office of Appraisal Services with other Interior Department appraisal services has not yet taken place.

f. Many positions have been transferred from the BIA to the Office of the Assistant Secretary for Indian Affairs. The Secretary is not giving Indians preference when filling those or other positions in AS-IA.

Many of the program responsibilities and positions in the Office of the Assistant Secretary for Indian Affairs ("AS-IA") came from the BIA. Secretarial Order No. 3214 (March 21, 2000) realigned certain BIA functions under the AS-IA, ostensibly to "strengthen management and accountability for Indian Affairs matters." § 1(c) (Appendix A-69). The result was to further reduce the number of positions to which Indian preference applied. Among the changes made by the 2000 reorganization was a transfer of the BIA's Office of Congressional Affairs, Office of Public Information, Executive Secretariat, Office of Equal Employment Opportunity, Office of Chief Financial Officer, and the Office of Chief Information Officer to the AS-IA. Secretarial Order No. 3214, § 3(a)(2), § 3(b)(2), §§ 3(b)(4) (Appendix A-70). Secretarial Order No. 3214 clearly

indicates that AS-IA has responsibility for overseeing and providing services to the BIA. AS-IA's Office of Policy, Planning and Performance has responsibility for development and evaluation of programs in the BIA, and AS-IA's Office of Human Resources has responsibility for delivery of personal services in the BIA. § 3(b)(3). AS-IA's Office of Equal Employment Opportunity continues to have responsibility for administering the antidiscrimination and Indian preference laws in the BIA. § 4 (c) (Appendix A-70).

In short, significant portions of the BIA's headquarters staff in Washington, D.C. and Reston, Virginia, have been moved, on paper, from the BIA to the AS-IA. The IEF represents the non-supervisory, non-managerial employees of the BIA nationwide. As a result of the transfer of many positions from the BIA to AS-IA, qualified and eligible IEF members no longer benefit from Indian preference when applying for promotion to positions for which they would have received preference had those positions remained in the BIA. For example, in September, 2004 IEF member Stephen Cloud, who is employed in the BIA's Division of Accounting Management, applied for a promotion to be the Director of the Division of Financial Management, in the Office of the Chief Financial Officer in the Office of Assistant Secretary for Indian Affairs. The Office of Chief Financial Officer was transferred from the BIA to the Office of Assistant Secretary in 2000. Mr. Cloud is a Creek and is entitled to Indian preference. However, he was not accorded Indian preference in the selection process and although Mr. Cloud was found

qualified for the job, a non-Indian was selected. Carr declaration ¶ 15 and exhibits K and L attached thereto.

g. OPM regulations continue to extend Indian preference to all positions within the Department of the Interior that are directly and primarily related to providing services to Indians.

Although the Secretary has now sharply limited the application of Indian preference within the Department in general and OST in particular, regulations annually issued by the Office of Personnel Management *still* apply section 12 of the IRA to *all* positions throughout the Department which primarily and directly service Indians. OPM annually publishes a list of positions that are exempt or “excepted” from the requirement that competing applicants be “examined” or evaluated against qualification standards and requirements applicable throughout the civil service. 5 C.F.R. §§ 213.102, 213.103, 213.3101. The most recent annual inventory of those positions was published at 68 FED. REG.71,176 (December 22, 2003). Section 213.3112 lists the positions within the Department of Interior which may be filed without regard to the qualification standards for the civil service and includes:

All positions in the Bureau of Indian Affairs and other positions in the Department of the Interior directly and primarily related to providing services to Indians when filed by the appointment of Indians. The Secretary of the Interior is responsible for defining the term “Indian.”

68 FED. REG.71,181. It is the position of the plaintiff Indian Educators Federation that OPM's regulation is the correct interpretation of section 12 of the IRA and must be applied by the Secretary in the OST and AS-IA.

ARGUMENT

I. Section 12 of the Indian Reorganization Act and section 2 of Pub. L. No. 96-135 require the Secretary to accord Indians preference in employment in all positions within the Department of the Interior which are directly and primarily related to providing services to Indians.

A. Section 12 of the IRA and section 2 of Pub. L. No. 96-135 must be liberally construed in favor of their intended beneficiaries, the American Indians.

As the D.C. Circuit observed in *Albuquerque Indian Rights*, the Secretary's narrow construction of the scope of Indian preference is "especially problematic" in light of the longstanding canon that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." 930 F.2d at 58 *quoting Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). Although courts will normally defer to an agency's interpretation of an ambiguous statute under *Chevron USA, Inc. v. NRDC*, 467 U.S. 837 (1984), this rule is inapplicable when a court must construe a statute enacted to benefit Indians. *Cobell v. Norton*, 240 F.2d at 1101; *accord Muscogee Creek Nation v. Hodel*, 851 F.2d 1439, 1445 n.8 (D.C. Cir. 1988), *cert. denied*, 488 U.S. 1010 (1989); *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1461-62 (10th Cir. 1997);

contra, Williams v. Babbitt, 115 F.3d 657, 663 n. 5 (9th Cir. 1997), *cert. denied*, 523 U.S. 1117 (1998) (deferring to agency interpretation under *Chevron* notwithstanding pro-Indian presumption). “[T]he liberality rule applied in *Blackfeet Indians*, and other cases involving native Americans derives from principles of equitable obligations and normative rules of behavior, rather than from ordinary statutory exegesis.” *Albuquerque Indian Rights*, 930 F.2d at 59. A rule of interpretation favoring Indians rather than the government dates back two centuries. Nearly a hundred years ago, the Supreme Court wrote in a case involving the taxation of Indian lands that:

The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized, without exception, for more than a hundred years, and has been applied in tax cases.

Choate v. Trapp, 224 U.S. 665, 675 (1912).

B. The Secretary’s current interpretation of section 12 of the IRA and section 2 of Pub. L. No. 96-135 would not otherwise be entitled to deference because the agency’s interpretation of the statutes has been inconsistent.

Even if the Court were not required to interpret the statutes in favor of the Indians, the burden would be on the defendant “to justify its departure from past departmental interpretations” of section 12 of the IRA. *Albuquerque Indian Rights*, 930 F.2d at 58. “[T]he weight of an administrative interpretation will depend, among other things, upon

'its consistency with earlier and later pronouncements' of an agency.” *Morton v. Ruiz*, 415 U.S. 199, 237 (1974), quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)(noting BIA’s “somewhat inconsistent posture” regarding whether Indians residing near reservations are entitled to assistance). As the D.C. Circuit observed in *Albuquerque Indian Rights*, Solicitor Tarr’s 1988 Opinion “represents a dramatic break with past interpretations of the preference provision” because it for the first time “limits the definition of the term ‘Indian Office’ and, therefore, the application of the Indian preference, to units within the BIA and any unit which had been transferred intact out of the BIA.” 930 F.2d at 58.

In determining the degree of deference to be granted to the Solicitor’s current interpretation, or reinterpretation, the Court must not only “consider the consistency with which an agency interpretation has been applied” but also “whether the interpretation was contemporaneous with the enactment of the statute being construed.” *NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 124 n. 20 (1987). The Secretary’s current interpretation of the scope of section 12 of the IRA did not come to the fore until 1988, *over a half century after its enactment*.

C. When section 12 of the IRA, section 2 of Pub. L. No. 96-135, and the preexisting Indian preference laws are read together, the plain language of these statutes clearly requires the Secretary to accord Indians preference to all positions in the Department of the Interior which directly and primarily service Indians.

1. The term “Indian Office” contained in section 12 of the IRA was generic and not synonymous with, nor limited to, the Bureau of Indian Affairs.

As the D.C. Circuit noted in *Albuquerque Indian Rights*, the term “Indian Office” is nowhere defined in the IRA; nor was it then, nor is it now, the name of any agency or office within the Department of the Interior. 930 F.2d at 51. Interior Solicitor Krulitz correctly read the statute when he concluded the “[u]se of the term ‘Indian Office’ seems to be generic, referring to that aggregate development of services to Indians occurring within the Department.” Op. Solicitor at 2 (June 13, 1979) (Appendix A-13). Even if Congress was referring to the Bureau of Indian Affairs when it used the term “Indian Office,” these are words of description, rather than words of limitation, because they merely identified where the “various positions” which were involved “in the administration of functions or services affecting any Indian tribe” were maintained at the time.

Congress could not have intended that the Indian preference it had mandated could be easily avoided by the simple expedient of moving the positions from the BIA to some newly created office which also serviced Indians. The use by Congress of the phrase “maintained, now *or hereafter*,” indicates a Congressional recognition that there would

be organizational fluidity, and that Indian preference would “go with the flow.” To read section 12 to apply to the BIA and not to other offices in Interior which are involved “in the administration of functions or services affecting any Indian tribe” (such as AS-IA and OST) produces an absurd result. Statutes should not be construed in a manner which produces absurd results. *United States v. Wilson*, 290 F.3d 347, 361 (D.C. Cir.), *cert. denied*, 537 U.S. 1028 (2002); *In re Nofzinger*, 925 F.2d 428, 434, *reh’g denied*, 938 F.2d 1397 (D.C. Cir. 1991); *Alabama Power Co. v. Costle*, 636 F.2d 323, 360 n. 89 (D.C. Cir. 1979).

2. Section 12 of the IRA must be read in *pari materia* with the earlier statutes that continue to require that Indians be given preference for employment throughout the Department of the Interior.

The meaning of section 12 of the IRA can also be discerned by reference to the Indian preference statutes which existed at the time. As discussed, *supra*. at 2, Congress enacted a series of laws requiring Indian preference well before the IRA of 1934. The 1834 law provides that “[i]n 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.” 25 U.S.C. § 45. The 1884 law states that “[p]reference shall at all times, as far as practicable, be given to Indians in the employment of clerical, mechanical, and other help on reservations and about agencies.” 25 U.S.C. § 46. The General Allotment Act of 1887

provides that “in the employment of Indian police, *or any other employees in the public service among any of the Indian tribes or bands affected by this Act*, and where Indians can perform the duties required, those Indians who have availed themselves of the provisions of this Act and become citizens of the United States shall be preferred.” 25 U.S.C. § 348 (emphasis added). The 1894 law requires that “Indians shall be employed as herders, teamsters, and laborers, and where practicable in all other employments in connection with the agencies and the Indian Service.” 25 U.S.C. § 44.

None of these four statutes limit the hiring preference to positions in the BIA, and none have been repealed. The Department of the Interior’s own treatise on Indian law recognizes that the “broader provision” contained in the Indian Allotment Act of 1887 “also includes positions outside the Indian Bureau.” U.S. DEPARTMENT OF THE INTERIOR, FEDERAL INDIAN LAW 535 (1958). The 1894 law requires that preference be applied in “the agencies *and* the Indian Service,” explicitly indicating that it preference was not limited to the “Indian Service.”

There is no indication that section 12 of the IRA was intended to reduce the scope of or otherwise limit Indian preference, but rather to expand its use by exempting these positions from the civil service regulations which had been promulgated since the enactment of the earlier statutes, and by requiring the Secretary to establish separate qualification standards that Indians might more readily meet. In *Mancari*, the Supreme Court noted that the earlier preference statutes were “more narrowly drawn” and “for all

practical purposes . . . were replaced by the broader preference of § 12" of the IRA. 417 U.S. at 538 n.2. The earlier statutes could only be "replaced for all practical purposes" if the 1934 statute provided *more* than was required by the earlier statutes. As *Mancari* held, with regard to the issue of whether the 1972 amendments to Title VII of the Civil Rights Act repealed §12 of the 1934 IRA, there is a "cardinal rule . . . that repeals by implication are not favored." 417 U.S. at 549.

3. Any doubt about the scope of Indian preference contained in the language of section 12 was eliminated when Congress clearly defined the scope of Indian preference in section 2 of Pub. L. No. 96-135.

Although section 2 of Pub. L. No. 96-135 was enacted decades after section 12 of the IRA, both provisions are effectively one statute and must be read together:

And it is, of course, the most rudimentary rule of statutory construction . . . that courts do not interpret statutes in isolation, but in the context of the *corpus juris* of which they are a part, including later-enacted statutes:

"The correct rule of interpretation is, that if divers statutes relate to the same thing, they ought all to be taken into consideration in construing any one of them. . . . If a thing contained in a subsequent statute, be within the reason of a former statute, it shall be taken to be within the meaning of that statute . . .; and if it can be gathered from a subsequent statute in *pari materia*, what meaning the legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute." *United States v. Freeman*, 3 How. 556, 564-565, 11 L.Ed. 724 (1845).

Branch v. Smith, 538 US 254, 281 (2003).

Pub. L. No. 96-135, 25 U.S.C. § 472a, entitles any employee who has “Indian preference” to preference during reduction-in-force actions which take place in either the BIA or Indian Health Service. Section 472a(e)(3)(B) defines “Bureau of Indian Affairs” for the purposes of this statute as not only the BIA, but “all other organizational units in the Department of the Interior directly and primarily related to providing services to Indians and in which positions are filled in accordance with the Indian preference laws.” This would cover both the Office of Assistant Secretary for Indian Affairs and the Office of Special Trustee. “Indian preference” is defined in § 472a(e)(2) by reference to § 472. Therefore, sections 472 and 472(a) should be read together as a whole. The broad scope of Indian preference defined in § 472a(e) must be applied not only to reduction-in-force actions covered by §472a, but also to hiring actions covered by § 472.

D. The legislative history of the IRA, Pub. L. No. 96-135, the Trust Reform Act of 1994, and the Indian Self-Determination Act of 1975, all support an interpretation of section 12 that would apply Indian Preference to all positions within OST and AS-IA.

1. Application of Indian preference to the OST and the AS-IA is necessary to effectuate the intent of section 12 of the IRA.

It is clear from the legislative history of section 12 of the IRA that Congress specifically intended that Indians be given preference for employment in the positions that concern oversight and administration of the Secretary’s trust responsibilities, such as those in the OST. In *Mancari*, the Supreme Court reviewed the legislative history of

section 12 and concluded that “[t]he purpose of these preferences, as variously expressed in the legislative history, has been to give Indians a greater participation in their own self-government *to further the Government's trust obligation toward the Indian tribes*” 417 U.S. at 541-42 (emphasis added). Solicitor Krulitz cited this language in his 1979 Opinion when he concluded “that this purpose would be served by having employment preference apply to whatever positions within Interior which directly and primarily relate to Indians.” Op. Solicitor at 4 (June 13, 1979).

Senator Wheeler, Chair of the Senate Committee on Indian Affairs and cosponsor of the 1934 Act, had the trust positions in mind when he argued for the necessity of Indian preference:

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 the 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 poorly so far as the Indian Service is concerned . . .

Hearings on S.2755 and S.3645 before the Senate Committee on Indian Affairs, 73rd Cong., 2d Sess., pt. 2, p. 256 (1934), *as quoted in Mancari v. Morton*, 417 U.S. at 542 n.

9. The principal purpose of the IRA was to acquire additional lands to be held in trust for Indians, and to extend the Secretary’s trust responsibilities indefinitely. Surely it was

envisioned that Indians would be given preference when hiring personnel to carry out those trust responsibilities, as the OST is now charged with doing.

The statement which Senator Wheeler made when he reported the bill to the Senate demonstrates that the Indian Affairs Committee intended the hiring preference was not limited to the BIA, but would apply to the generic “Federal Indian Service.” Senator Wheeler explained that the Indian preference provision would

. . . open the way for qualified Indians to hold positions in the Federal Indian Service on the Indian reservations. At present by reason of the civil-service rules and regulations, we find that competent Indians are absolutely unable to take or hold positions in the Indian Service.

78 CONG. REC. 11123 (June 12, 1934). Senator Wheeler gave as an example Indians who had graduated from nursing school “but are unable to be employed in the Indian Service” because they could not obtain practical nursing experience in white nursing institutions. However, in the next paragraph, and in at least two other locations in the same statement introducing the bill, Senator Wheeler referred specifically to the Bureau of Indian Affairs. *Id.* Had Senator Wheeler intended that preference would apply only within the BIA, he would have used that term in his discussion of the need of the Indian preference provision as he did elsewhere. Use by Senator Wheeler of two different terms in discussion of the same statute indicates that he intended the terms to have different meanings. *Cf. Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 843 (D.C. Cir.), *cert.*

denied, 469 U.S. 881 (1984); *DirectTV, Inc. v. Brown*, 371 F.3d 814, 818 (11th Cir. 2004).

As the Comptroller General noted, Congress could not have intended that the scope of Indian preference be limited to the BIA, and not other organizational units which provide services to Indians, because the objective of the legislation could easily be thwarted by reducing the responsibilities of the BIA and vesting responsibility for executing new and existing programs which service Indians in other offices within the Department. Op. Comp. Gen. B-161468 at 10 (Appendix A-10). What the Comptroller General predicted might happen 25 years ago came to pass when the OST was created and when programs and positions were shifted from the BIA to the AS-IA. As discussed *supra* at 22-23, positions in the BIA's OTFM were transferred to the OST and eventually dispersed among numerous OST sub-entities. As the Deputy Solicitor noted in his April 10, 1996 Opinion, these positions may eventually be returned to the BIA when the OST is terminated. Op. Solicitor at 5 n.5 (April 10, 1996) (Appendix A-43). At that point, the positions would have been populated by non-Indians because Indian preference no longer applies to many OTFM positions which came from the BIA.

2. Congress sought to ensure that Indian preference would apply to all positions in the Department of the Interior directly and primarily related to providing services to Indians when it enacted Pub. L. No. 96-135.

The legislative history of Pub. L. No. 96-135 proves that Congress specifically intended to enshrine, by statute, the administrative interpretation given to the scope of Indian preference by the Office of Personnel Management, and its predecessor, the Civil Service Commission. The House Report stated that the language of subsection (2)(e)(3) “is based in part on the long-standing Civil Service Commission (now, Office of Personnel Management) regulation (5 C.F.R. 213.31112(A)(7)) implementing the Indian Preference laws.” H. R. REP. NO. 370, 96th Cong., 1st Sess., pt.1, at 11 (1979), *reprinted in* 1979 U.S.C.C.A.N. 2068, 2075-76. Since as early as 1968 and continuing uninterrupted to today, the CSC and OPM have defined the scope of Indian preference to encompass not only the BIA but also all “other positions in the Department of the Interior directly and primarily related to providing services to Indians when filed by the appointment of Indians.” 68 FED. REG.71,181; *see also* Op. Comp. Gen. B-161468 at 1-2 (September 20, 1977) (Appendix A-1-A-2).

3. Indian preference must apply to positions in the OST in order to effectuate the purposes of the 1995 Trust Reform Act.

“The purpose of [the 1994 Trust Reform Act] is to bring about better accountability and management of Indian trust funds by the Department of the Interior

and to provide an opportunity for Indian tribes to directly manage their trust funds.” H.R. Report No. 778, 103rd Cong., 2nd Sess. 8 (1994), reprinted in 1994 U.S.C.C.A.N. 3467. The goal of providing an opportunity for Indians to manage their own trust funds cannot be achieved if non-Indians are hired for the job.

Title II of the Act authorizes the Secretary to turn over her trust responsibilities to Indian tribes upon their request. Among the factors she must consider before doing so, however, are “[t]he capability and experience of the individuals or institutions that will be managing the trust funds.” 25 U.S.C. § 4022(b)(2)(A). Indians must be given preference in employment in OST in order to obtain such relevant experience so that the goal of the Act, which is to “give Indian tribal governments greater control over the management of such trust funds,” (25 U.S.C. § 4021) can be achieved.

4. Application of Indian preference to all positions in the Interior Department which primarily and directly provide services to Indians is necessary to achieve Congress’ goal of “maximum Indian participation in the direction of . . . Federal services to Indian communities” set forth in the Indian Self-Determination Act.

In determining that the scope of Indian preference should not be interpreted narrowly, Solicitor Krulitz also relied upon the Congressional Declaration of Policy contained in the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450a:

(a) The Congress hereby recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination by *assuring maximum Indian participation in the direction of* educational

as well as *other Federal services to Indian communities* so as to render such services more responsive to the needs and desires of those communities.

(b) The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy which will permit *an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services . . .*

(emphasis added). The Solicitor correctly reasoned that in order to achieve “maximum Indian participation” as Congress intended, Indians must be given preference for employment in all Department positions involved in the administration of Indian programs. “One of the purposes of the Indian Self-Determination Act is to develop leadership skills in Indians.” *Alaska Chapter Associated General Contractors, Inc. v. Pierce*, 694 F.2d 1162, 1170 (9th Cir. 1982). The Congressional Declaration of Policy contained in the Self-Determination Act is a highly relevant tool in interpretation of the Indian preference laws because a 1988 amendment to the Act expanded preference rights by entitling Indians appointed under the authority of section 12 of the IRA to competitive civil service status after three years so that they might compete government-wide if displaced during a reduction-in-force. 25 U.S.C. §450i(m); *Mescalero Apache Tribe*, 755 F.Supp. at 1484 n.4.

II. The Department violated the rule making provisions of the Administrative Procedures Act by implementing the proposed rule of July 12, 1996 without considering the comments received from interested persons, by failing to publish a response to the significant comments received, and by failing to publish a final version of the rule and notice of its adoption.

Even assuming that the Secretary's current interpretation of the scope of Indian preference is legally defensible, the Department failed to comply with the rulemaking procedures contained in the Administrative Procedures Act. "The APA's rulemaking provisions require three steps to enact substantive rules: notice of the proposed rule, a hearing or receipt and consideration of public comments, and the publication of the new rule." *United States v. DeLeon*, 330 F.3d 1033, 1036 (8th Cir. 2003). The APA requires agencies to publish proposed rules in the Federal Register at least 30 days in advance of their adoption, and to provide interested persons an opportunity to participate in the rulemaking through submission of written data, views or arguments on the proposed rule. 5 U.S.C. §553(b). The agency is required to consider these comments before promulgating a final version of the rule, and to publish in the Federal Register a response to the significant comments received and a notice of the final adoption of the rule. "For an agency's decisionmaking to be rational, it must respond to significant points raised during the public comment period." *Allied Local & Regional Mfrs. Caucus v. EPA*, 215 F.3d 61, 80 (D.C. Cir. 2000), *cert. denied*, 532 U.S. 1018 (2001); *accord Louisiana Federal Land Bank Ass'n. v. Farm Credit Admin.*, 336 F.3d 1075, 1079 (D.C. Cir. 2003); *Blue Water Fisherman's Assn. v. Mineta*, 122 F.Supp.2d 150, 159 (D.D.C. 2000). "[T]he

opportunity to comment is meaningless unless the agency responds to significant points raised by the public. A response is also mandated by *Overton Park*, which requires a reviewing court to assure itself that all relevant factors have been considered by the agency.” *Home Box Office v. FCC*, 567 F.2d 9, 35-36 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977) (citations omitted).

The Secretary published a proposed rule changing the Department’s longstanding application of the scope of Indian preference on July 12, 1996. The Secretary has yet to respond to the public comments received in response to the proposed rule or to publish the final rule. Nonetheless, the Secretary applied the new rule, rather than the Department’s preexisting practice, when the Office of Special Trustee was established in 1996 and reorganized in 2003. These actions conflict with the only extant Federal regulation addressing the scope of Indian preference, published by OPM at 68 FED. REG.71,181, which states that section 12 applies, not only to the BIA, but to “other positions in the Department of the Interior directly and primarily related to providing services to Indians when filed by the appointment of Indians.”

CONCLUSION

Between 1834 and 1979, Congress enacted at least six laws granting Indians preference in hiring for positions involving the governance of their affairs. The most recent enactment explicitly provides that Indian preference will apply, not only to the BIA, but also to all other organizational units in the Department of the Interior directly

and primarily related to providing services to Indians. Since 1988, the Department of the Interior has systemically undermined these laws and deprived Indians of any opportunity to be responsible for their own affairs.

For the foregoing reasons, the plaintiff's motion for summary judgment should be granted and the Court should enter an order declaring the Secretary's policy of not providing qualified Indians with preference when filling all vacant positions within the Office of Special Trustee for American Indians, the Office of the Assistant Secretary for Indian Affairs and all other positions in the Department which directly or primarily relate to the providing of services to Indians unlawful, and enjoining her from failing to provide qualified Indians with preference when filling all such positions.

Respectfully submitted,

/s/

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November 12, 2004