

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 MEMORANDUM OF POINTS AND AUTHORITIES
IN OPPOSITION TO DEFENDANT’S MOTION TO DISMISS,
OR IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT
and in
REPLY TO DEFENDANT’S OPPOSITION TO PLAINTIFF’S
MOTION FOR SUMMARY JUDGMENT**

RICHARD J. HIRN
5335 Wisconsin Ave NW
Suite 440
Washington, DC 20015
202-274-1812
202-274-1813 fax
richard@hirnlaw.com
DC Bar no. 291849

Attorney for plaintiff Indian Educators
Federation, Local 4524 of the American
Federation of Teachers (AFL-CIO)

TABLE OF CONTENTS

I.	The Indian Reorganization Act should be construed to extend Indian preference to all positions in the Department of the Interior that directly and primarily service Indians in order to give Indians greater participation in their own self-government.	1
A.	The plain language of Section 12 of the Indian Reorganization Act does not limit Indian preference to the Bureau of Indian Affairs.	1
B.	Section 12 of the Indian Reorganization Act must be interpreted in light of the changes which the Department has made in the manner in which it provides services to Indians.	3
C.	The defendant’s narrow interpretation of the scope of §12 undermines Congress’ goal of putting the administration on Indian affairs in the hands of Indians and defeats the purpose of the Indian Reorganization Act.	8
D.	Congress did not intend that Indian preference should apply only to the BIA because it is ostensibly the only office “responsible for giving services directly to tribes.”	13
II.	The language and legislative history of Pub. L. No. 96-135 demonstrate a Congressional intent to apply Indian preference to all offices within the Department that directly and primarily provide services to Indians.	17
III.	The earlier Indian preference laws cover positions outside the BIA. The Department and Congress continue to rely on these statutes and they have not been repealed.	20
A.	The earlier Indian preference statutes have not been repealed.	20
B.	The earlier Indian preference laws are not limited to the “Indian Office” or the BIA.	24
IV.	The IRA, Pub. L. No. 96-135, and the earlier Indian preference statutes must be construed liberally in favor of the Indian members of the IEF.	25

V. The statutes that give Indians preference in employment within the Department should be construed in *pari materia* with the statute that gives Indians preference in employment with government contractors. 27

VI. A construction that applies Indian preference laws to all positions in the Interior Department that provide services to Indians does not place the constitutionality of Indian preference in jeopardy. 29

VII. The Interior Department should have complied with the rulemaking requirements of the APA before changing its policy of extending Indian preference to all positions which are directly and primarily related to the providing of services to Indians. 31

Conclusion..... 33

I. The Indian Reorganization Act should be construed to extend Indian preference to all positions in the Department of the Interior that directly and primarily service Indians in order to give Indians greater participation in their own self-government.

A. The plain language of Section 12 of the Indian Reorganization Act does not limit Indian preference to the Bureau of Indian Affairs.

Congress' indiscriminate use of varying nomenclature in the legislative history of the Wheeler-Howard Act indicates that Congress was more concerned about achieving an end rather than how the bureaucracy was organized. The fact that Indian services were located, at the time, in the "Indian Office" proves that Congress did not affirmatively intend to limit the applicability of Indian preference to a particular office and exclude others. The phrase "Indian Office" was simply used to identify where the various "positions" that were involved "in the administration of functions or services affecting any Indian tribe" were "maintained," rather than as an expression of intent to limit the application of preference to that one office for all time.

The predecessor bill to the Wheeler-Howard Act, authored by the Roosevelt Interior Department, would have broadly defined the term "Office of Indian Affairs" to "*include any functions of the Secretary of the Interior, the Commissioner of Indian Affairs, or subordinate officials, relating to Indian Affairs.*" Title I, § 15(o); *Readjustment of Indian Affairs: Hearings on H.R. 7902 before the House Comm. on Indian Affairs, 73rd Cong., 2nd Sess. 197 (April 9, 1934) (reproduced in Defendant's Compendium at 73)(emphasis supplied). Ultimately, the Wheeler-Howard Act did not include a section which defined any term other than "Indian." However, the definition of*

“Office of Indian Affairs,” which was offered as an amendment by the Department, demonstrates that “Indian Office” was commonly understood to refer to “any functions of the Secretary . . . relating to Indian Affairs” rather than to a particular organizational unit. As Commissioner of Indian Affairs John Collier explained, “[t]his definition is added to preclude any question as to the natural meaning of the term ‘Office of Indian Affairs.’” *Id.* Thus, Interior Solicitor Krulitz was correct when he wrote in his June 13, 1979 Opinion that “[u]se of the term ‘Indian Office’ seems to be generic, referring to that aggregate development of services to Indians occurring within the Department.” (Plaintiff’s Appendix at 13).

The Secretary suggests that the absence of Commissioner Collier’s definition from the enacted statute demonstrates that Congress affirmatively disagreed with the concept. Def. Memo. at 29. However, no such inference can be drawn from language discarded from earlier iterations of the Wheeler-Howard Act. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 n. 9 (1973) (failure to include language from predecessor version of Wheeler-Howard Act that preserved tax exempt status of Indian lands does not suggest that Congress intended to remove traditional tax immunity). It may simply be that Congress agreed with Commissioner Collier’s assessment that the “natural meaning” of the phrase included all functions of the Secretary relating to Indian affairs and did not need to be defined. (Ironically, the Secretary attempts to rely on an essay of Commissioner Collier, who it points out “was deeply involved in the drafting of the 1934

Indian Reorganization Act,” in support of its more limited definition of “Indian Office.”
Def. Memo. at 19.)

B. Section 12 of the Indian Reorganization Act must be interpreted in light of the changes which the Department has made in the manner in which it provides services to Indians.

The meaning of words in a statute are not frozen in time. “Words in statutes can enlarge or contract their scope as other changes, in law or in the world, require their application to new instances or make old applications anachronistic.” *West v. Gibson*, 527 U.S. 212, 218 (1999). “[A] court can look beyond the plain meaning of a statute in limited circumstances, most notably when there is an assertion of a significant change in circumstances since enactment.” *Consumer’s Union v. Heimann*, 589 F.2d 531, 534 (D.C. Cir. 1978). For example, a court’s “inquiry cannot be limited to ordinary meaning and legislative history” when a statute was drafted long before changes in technology to which it applies. *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 395 (1968) (copyright statute’s protection of exclusive right to “perform publicly” a dramatic work extends to television broadcasts that had not been invented when statute was enacted in 1909). “In other words, the statute may be applied to new situations not anticipated by Congress, if, fairly construed, such situations come within its intent and meaning . . . While statutes should not be stretched to apply to new situations not fairly within their scope, they should not be so narrowly construed as to permit their evasion

because of changing habits . . .” *Jerome H. Remnick Co. v. American Automobile Accessories Co.*, 5 F.2d 411 (6th Cir.), *cert. denied*, 269 U.S. 556 (1925).

Since 1934, the Department has moved many functions from the BIA to the Office of the Assistant Secretary for Indian Affairs (“AS-IA”) and the Office of Special Trustee (“OST”). The Department has also placed the responsibility for the administration of new “functions or services affecting any Indian tribe” in newly created offices outside of the BIA. The term “Indian Office” in the phrase “various positions maintained, now or hereafter, by the Indian Office, in the administration of functions or services affecting any Indian tribe,” should be construed to include AS-IA and OST as a result of these changes.

AS-IA was established by administrative order in 1977 “to administer the laws, functions, responsibilities, and authorities related in Indian affairs matters.” The Assistant Secretary “assume[d] all the authorities and responsibilities of the Commissioner of Indian Affairs.” Departmental Order No. 3010 (September 26, 1977) (reproduced in Defendant’s compendium at 151). Many of the program responsibilities and positions in the Office of the Assistant Secretary for Indian Affairs (“AS-IA”) came directly from the BIA. The BIA was once responsible for overall policy development and for evaluating the effectiveness of all Indian affairs programs:

The Office of the Commissioner develops, interprets, and implements national policy on Indian affairs. It establishes objectives and standards of performance, develops integrated programs designed to accomplish the

Bureau's objectives, and exercises general direction and control over all field operations.

25 C.F.R., chap. I, § 01.6 (1946) (reproduced in Plaintiff's appendix, vol. II, at 75). The Office of the Deputy Assistant Secretary for Policy and Economic Development and the Office of Planning and Policy Analysis within AS-IA have apparently assumed these responsibilities. 110 Departmental Manual 8, §§ 8.3, 8.4(A)(4) (April 21, 2003) (Plaintiff's appendix at 59, 61). A March, 2000 reorganization brought additional BIA functions under the AS-IA. Among the changes made were the transfers 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) (Plaintiff's appendix at 69). Although the Secretary claims that any organizational units which are moved intact from the BIA to other offices retain Indian preference, the plaintiff is unaware of any positions in AS-IA which have Indian preference.¹ Either the offices have not been moved "intact" in the view of the Secretary, or the policy of retaining Indian preference in these limited circumstances has been ignored.

¹ The Office of the Chief Financial Officer was among those offices moved from the BIA to AS-IA in 2000. IEF member Stephen Cloud recently applied to be Director of the Division of Financial Management in that Office. The position was filed without granting Indian preference. Carr decl. § 15 and exhibit K.

Many new “functions or services affecting any Indian tribe” have been placed in AS-IA rather than in the BIA, perhaps to avoid Indian preference. For example, AS-IA has been given responsibility for overseeing Indian gaming as well as for implementing the Tribal Self-Governance Act of 1994, the Indian Self-Determination and Education Assistance Act of 1975, the Indian Employment Training and Related Services Demonstration Act of 1992, and newly enacted grant programs. 110 Departmental Manual 8, § 8.3 (Plaintiff’s appendix at 59). Information technology oversight, development and services used in the administration of Indian affairs have also been placed in AS-IA. *Id.* at § 8.5 (Plaintiff’s appendix at 62-63).

Historically, the BIA had responsibility for administering the Secretary’s trust responsibilities for lands owned both by tribes and by individual tribal members. The American Indian Trust Fund Management Reform Act of 1994 created a new entity within the Department - the “Office of Special Trustee for American Indians.” 25 U.S.C. § 4042. The OST was charged with overseeing and coordinating reforms relating to the management and discharge of the Secretary’s trust responsibilities to Indian tribes and individual Indians. But rather than limiting the OST’s responsibilities to the oversight and coordination functions envisioned by the 1994 Reform Act, the OST assumed actual responsibility for administration of the trusts when the Secretary transferred the Office of Trust Fund Management (“OTFM”) and its personnel from the BIA to the OST. Secretarial Order 3197 (February 9, 1996) (Plaintiff’s appendix at 67).

In keeping with the policy of according Indian preference to units transferred intact from the BIA, positions in the OTFM retained Indian preference for a time after this transfer. But many of the Indian employees who were transferred from the BIA to the OST later lost their employment preferences. 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) (Plaintiff’s 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 (Plaintiff’s appendix at 46-47).

Although the whole of the OST is administering functions or services affecting Indian tribes, Indian preference is being applied to only about one-third of the positions in OST (Carr decl. ¶¶ 4, 5), ostensibly because OST, like AS-IA, is not the “Indian Office” to which the 1934 statute referred. But the construction of § 12 of the IRA must

keep pace with these organizational changes. “[S]tatutes are not confined in application to contemporary circumstances and . . . their principles are to be extended to embrace new factual circumstances.” *Smith v. Pan Air Corp.*, 684 F.2d 1102, 1113 (5th Cir. 1982). Accordingly, §12 of the IRA should be construed to apply to AS-IA and OST.

C. The defendant’s narrow interpretation of the scope of § 12 undermines Congress’ goal of putting the administration on Indian affairs in the hands of Indians and defeats the purpose of the Indian Reorganization Act.

The Secretary’s statutory analysis is flawed because it focuses solely on what Congress meant by “Indian Office” rather than on what Congress was attempting to achieve. “While the plain language of the statute is an important guide, ‘manifest intent prevails over the letter.’” *United States v. Stewart*, 104 F.3d 1377, 1387 (D.C. Cir.), *cert. denied*, 520 U.S.1746 (1997), *quoting In re Nofziger*, 925 F.2d 428, 434 (D.C. Cir. 1991). “We must interpret the language of the Indian Preference Act in light of its purpose and in light of the purposes of the comprehensive act of which it is a part.” *Preston v. Heckler*, 734 F.2d 1359, 1370 (9th Cir. 1984).

“Frequently . . . even when the plain meaning did not produce absurd results but merely an unreasonable one ‘plainly at variance with the policy of the legislation as a whole’ this Court has followed that purpose rather than the literal words.” *United States v. American Trucking Ass’ns*, 310 U.S. 534, 541 (1940). “A statute is not to be read overliterally. It has long been settled that acts of Congress must be interpreted in light of

the spirit in which they were written and the reasons for their enactment.” *General Service Employees Union Local No. 73 v. NLRB*, 578 F.2d 361, 366 (D.C. Cir. 1978); accord *City of Roseville v. Norton*, 348 F.3d 1020, 1029 (D.C. Cir. 2003), *cert. denied*, 124 S.Ct. 1888 (2004) (broader, rather than narrow interpretation of phrase “restoration of lands” preferred because it will effectuate purposes of Indian Gaming Regulatory Act and Auburn Indian Restoration Act). “A statute should ordinarily be read to effectuate its purposes rather than frustrate them.” *United States v. Barnes*, 295 F.3d 1354, 1364 (D.C. Cir. 2002), quoting *Motor Vehicle Mfrs. Ass’n of U. S., Inc. v. Ruckelshaus*, 719 F.2d 1159, 1165 (D.C. Cir. 1983). “[T]he intention of the drafters, rather than the strict language, controls.” *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989).

In his 1977 decision, the Comptroller General reasoned that a broad interpretation of the scope of § 12 was necessary to effectuate Congressional intent. This Court “should prudently consider” the Comptroller General’s “expert opinion.” *Ass’n of Civilian Technicians v. FLRA*, 269 F.3d 1112, 1115 (D.C. Cir. 2001). The Comptroller General feared that a future Secretary might intentionally or unintentionally avoid Indian preference through bureaucratic restructuring if Indian preference did not apply to all positions in the Department which are “directly or primarily related to providing services to Indians”:

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. (Plaintiff’s appendix at 10-11).

The Comptroller General’s reasoning was prescient. As discussed, AS-IA has assumed most new and many preexisting “functions or services affecting any Indian tribe.” The responsibility for most, if not all, trust matters have migrated to OST. The refusal to extend Indian preference to all positions in OST in particular conflicts with Congress’ express desire to have Indians assume maximum responsibility for the lands held in trust by the Secretary. As the Supreme Court said in *Mancari*, “[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).

The American Indian Policy Review Commission determined that the intent of §12 "cannot be fulfilled" unless the Department applies Indian preference to all positions in the Department which "administer Indian service type functions."

This Commission was created by Pub. L. No. 93-580, 88 Stat. 1910 (January 2, 1975) "to conduct a comprehensive review of the historical and legal developments underlying the Indians' unique relationship with the Federal government in order to determine the nature and scope of necessary revisions in the formulation of policies and programs for the benefit of Indians." The Commission consisted of six Members of Congress and five Indian representatives. *Id.* The Commission was charged with making a "comprehensive investigation" which would include "an examination of the statutes and procedures for . . . extending services to Indian communities and individuals" and with making recommendations for "modification of existing law, procedures, regulations, policies and practices." *Id.* The Reports of the Commission and its Task Forces have been cited as authoritative by numerous courts. *E.g.*, *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 50 (1989); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 64 n. 19, 21, 22 (1978); *Preston v. Heckler*, 734 F.2d at 1373; *St. Paul Intertribal Housing Board v. Reynolds*, 564 F. Supp. 1408, 1413 (D. Minn. 1983).

The Commission's Task Force No. 9 issued a report which included an "analysis and recommendations regarding the applicability of preference to programs transferred out of the BIA or which are Indian Service Type Programs within the Department of Interior or other agencies." American Indian Policy Review Commission, Task Force No. 9, Final Report on Law Consolidation, Revision and Codification, 205 (Comm. Print 1976).² The Task Force concluded that Indian preference must apply to any "Indian service type" position in the Department. "If the intent of the preference laws are to be fulfilled it is necessary to look at the character of the functions performed . . . not where these functions happen to be pigeonholed in the administrative structure of the Department of the Interior. *Id.* at 207-208. The Task Force also concluded that it was not enough to apply of Indian preference to units transferred intact from the BIA:

There are dangers in this later standard because functions transferred from the BIA might not retain their specific identity once transferred, however they might still be basically Indian service type functions. As recently stated by the Supreme Court, the intent of the Indian preference laws are "to give Indians a greater participation in their own self-government; to further the government's trust obligation toward the Indian tribes; and to reduce the negative effect of having non-Indians administer matters that affect Indian tribal life." It appears that the intent of the preference laws would be frustrated by failure to accord preference to any functions transferred from the BIA which might not retain its specific identity in the new bureau but which nonetheless remains an Indian service type function. . .

² Sections of the Final Report of the American Indian Policy Review Commission and the Final Report of Task Force No. 9 which pertain to Indian preference have been reproduced in Plaintiff's appendix, vol. III, filed concurrently with this memorandum.

Task Force No. 9 Final Report at 207. In summary, “[t]he intent of the preference laws should not be allowed to be subverted by reorganization for administrative convenience.” *id.* at 209.

Section 12 of the IRA should also be construed in a manner that effectuates the purposes of the Indian Self-Determination and Education Assistance Act of 1975. *Preston v. Heckler*, 734 F.2d at 1370-1371. In that act, Congress declared “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 . . . meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services.” 25 U.S.C. § 450a. Indian preference must be applied to AS-IA and OST because these offices have now assumed major responsibility for “the planning, conduct and administration of . . . programs for, and services to, Indians.” *Id.*

D. Congress did not intend that Indian preference should apply only to the BIA ostensibly because it is the only office “responsible for giving services directly to tribes.”

The Secretary argues that Congress “evidently intended” that Indian preference would apply only to the BIA, ostensibly because the BIA is the only office which directly services Indian *tribes*. According to the Secretary, this would exclude AS-IA, because it only develops policy and ostensibly provides no services. It would also exclude OST,

ostensibly because it services individual Indians, and not Indian tribes. Def. Memo. at 15-16. The factual premises underlying this construction of § 12 are incorrect, and there are seven reasons why the Secretary's argument must be rejected:

1. This reasoning has never before served as the basis for the Department's determination of where and when Indian preference should apply. The Department simply has never before interpreted the IRA in this manner. It is not the basis on which the agency actually determined that Indian preference does not apply to the OST or AS-IA. This interpretation does not appear in any of the Solicitor's opinions nor in any regulation or prior policy announcement. This distinction is a *post hoc* rationale of counsel, and cannot be sustained on this basis. *Association of Civilian Technicians*, 269 F.3d at 1116.

2. Congress could not have intended to treat those offices that provide an oversight and policy role differently when it enacted the IRA in 1934 because, as the Secretary has pointed out, the responsibility for all Indian matters rested within the BIA at the time. Before AS-IA was established in 1977, the policy development and oversight functions for all Indian affairs were lodged in the Office of the Commissioner of Indian Affairs, in the BIA, to which Indian preference applied. (See discussion, *supra* at 4).

3. As Solicitor Krulitz said with regard to AS-IA's Office of Policy, Planning and Evaluation, "[i]t is difficult to imagine positions to which the application of preference as contemplated by the Act would be more critical." Op. Solicitor at 6 (June

13, 1979) (Plaintiff's appendix at 17). Even Solicitor Tarr (whose erroneous 1988 Opinion is at the root of this lawsuit) conceded that "it is a close question whether the preference applies" to AS-IA. (Plaintiff's appendix at 33).

4. AS-IA is engaged in policy implementation with Indian tribes, not just policy development or oversight. The Principal Deputy Assistant Secretary "manages, directs and coordinates functions to strengthen the government-to-government relationship with Indian tribes." 110 Departmental Manual § 8.2 (April 21, 2003) (Plaintiff's appendix at 58). AS-IA's Office of Self-Governance and Self-Determination also has responsibility to administer contracts and grants; for vocational training and employment assistance; and to provide guidance, technical advice and assistance to tribes. *Id.* at § 8.3(B) (Plaintiff's appendix at 59-60). The Deputy Assistant Secretary for Policy and Economic Development approves: self-governance compacts and annual funding agreements negotiated with Indian tribes; Tribal-State compacts; requests from tribes to take land into trust for the purpose of conducting gaming activities, and requests from tribes to lease land for gaming activities. 210 Departmental Manual § 8.2(A) (April 21, 2003) (Plaintiff's appendix at 66).

5. The OST was *not* "created for the express purpose of administering the Indian trust accounts" as the Secretary contends. Defs. Memo. at 15. In fact, as discussed above on page 6, nothing in the Trust Reform Act of 1994 required the OST to actually administer either individual or tribal trust accounts. That responsibility was transferred to

the OST from the BIA by administrative order. The employees who had trust administration responsibilities while at the BIA were accorded Indian preference, and many of these employees still retain Indian preference because they are assigned to what remains of the Office of Trust Fund Management.

6. The OST does service tribes - not just individual Indians. The OST has responsibility for "Tribal Trust Fund" accounts, not just "Individual Indian Money" trust fund accounts. 110 Departmental Manual 26.6 (October 6, 2003). The OST was established "to provide for a more effective management of, and accountability for the proper discharge of, the Secretary's trust responsibilities to Indian tribes," not just "individual Indians." 25 U.S.C. § 4041(1). The OST was charged with preparing a comprehensive reform plan "after consultation with Indian tribes" which would "ensure proper and efficient discharge of the Secretary's trust responsibilities to Indian tribes" as well as to individual Indians. 25 U.S.C. § 4043(a)(1). This plan was to include "provisions for opportunities for Indian tribes to assist in the management of their trust accounts." 25 U.S.C. § 4043(2)(B). The Trust Reform Act also requires the Special Trustee to monitor the reconciliation of tribal as well as individual Indian money accounts. 25 U.S.C. § 4043(b)(2)(A). The OST was required to submit a report to Congress concerning reconciliation of "each tribal trust fund account." 25 U.S.C. § 4044.

7. When Congress extended Indian preference to reduction in force actions in 1979, it did not limit the scope of Indian preference to those organizational units which

provided services to Indian *tribes*. Congress said that Indian preference applied to the BIA and all other “organizational units” which are “directly and primarily related to providing services to Indians.” 25 U.S.C. § 472a.

II. The language and legislative history of Pub. L. No. 96-135 demonstrate a Congressional intent to apply Indian preference to all offices within the Department that directly and primarily provide services to Indians.

The Secretary incorrectly claims that Congress intended that phrase “*and in which positions are filled in accordance with the Indian preference laws*” to limit Indian preference to those positions in organizational units transferred intact from the BIA. At the time this language was enacted in December, 1979 every extant administrative and Congressional authority interpreted § 12 of the IRA in a manner that made it applicable throughout the Department - not just to those units transferred intact from the BIA.³ There is no reason to believe that Congress intended the scope of Indian preference to apply more narrowly than anyone else. In 1979, “organizational units . . . in which positions are filled in accordance with Indian preference laws” meant all units in Interior which provided services to Indians. A “longstanding administrative construction is

³ A 1973 letter from the Civil Service Commission took issue with the Department’s practice of giving Indians excepted service appointments to positions outside the BIA in organizational units other than those transferred intact from the BIA. Final Report of Task Force No. 9 at 206. But after the Policy Review Commission criticized the CSC for “illegally assum[ing] authority to establish criteria to determine whether Indian preference applies,” (Final Report of Task Force No. 9 at 114), the CSC sent another letter to Interior on January 2, 1977 deferring to Interior on its interpretation of the scope of Indian preference. 96 Interior Dec. at 14, n.1 (Plaintiff’s appendix at 38).

entitled to great weight, particularly when, as here, Congress revisited the act and left the practice untouched.” *Saxbe v. Bustos*, 419 U.S. 65, 74 (1974).

Solicitor Krulitz’s Opinion extending Indian preference to AS-IA and elsewhere in the Department was issued on June 13, 1979, while Pub. L. No. 96-135 was under consideration and five weeks before the House Post Office and Civil Service Committee reported the bill. *See* H.R. REPT. No. 370, 96th Cong., 1 Sess. (1979), 1979 U.S.C.C.A.N. 2068. The House Report noted that the Committee was advised that the Department intended to apply Indian preference to positions in AS-IA, which was the subject of Solicitor Krulitz’s recent opinion. This was the opinion in which the Department interpreted § 12 of the IRA to apply to all positions which provide services to Indians, not just those transferred from the BIA. Solicitor Krulitz wrote:

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.

(Plaintiff’s appendix at 14). There is every reason to believe, and no reason not to believe, that Congress was aware of the Solicitor’s Opinion and how the Department intended to apply the scope of § 12.

Although the Committee Report stated that non-Indians in organizational units transferred from the BIA would be eligible for early retirement benefits authorized by

Pub. L. No. 96-135, there is nothing in the Committee Report which indicates that the scope of Indian preference would be *limited* to such units. 1979 U.S.C.C.A.N. at 2076. The recitation of particular units to which early retirement benefits would surely apply is not, as the Secretary contends, an “express[] recogni[tion]” that Indian preference would *only* apply to positions in organizations that were moved intact from the BIA. Def. Memo. at 30. In 1972, this Court extended Indian preference to promotions within the BIA in *Freeman v. Morton*, 1972 WL 258, 5 Empl. Prac. Dec. ¶ 8601 (D.D.C. Dec. 21, 1972), *aff’d*, 499 F.2d 494 (D.C.Cir.1974). The adverse impact of that decision on career advancement of non-Indians prompted Congress to extend early retirement benefits to non-Indians who had been hired into the BIA prior to that date with the expectation of career advancement. The Committee Report states that “the provision makes it clear that otherwise eligible employees who are in an organizational unit which had been part of the BIA” at the time of this Court’s decision in *Freeman v. Morton* would be eligible for early retirement benefits. 1979 U.S.C.C.A.N. at 2076. The Secretary reads too much into the Committee Report when it claims that the scope of Indian preference would be limited in the future to solely those units.

Congress’ own Comptroller General had issued an opinion just two years earlier in which he determined that the scope of Indian preference applied “to all positions within the Department of the Interior ‘directly and primarily related to the providing of services to Indians.’” (Plaintiff’s appendix at 10). 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 (Plaintiff’s appendix at 22).

The American Indian Policy Review Commission had also, just two years earlier, submitted its report to Congress in which it concluded that Indian preference applies to “Indian service type positions” throughout Interior, regardless of whether they originated in the BIA. The Commission also recommended Congress amend § 12 of the IRA “to make Indian preference applicable to all Federal agencies administering programs specifically directed to Indian affairs.” Final Report at 21. Although Congress did not go that far when it enacted Pub. L. No. 96-135, there is no indication that it disagreed with its own Commission’s recent interpretation of the existing scope of § 12.

III. The earlier Indian preference laws cover positions outside the BIA. The Department and Congress continue to rely on these statutes and they have not been repealed.

A. The earlier Indian preference statutes have not been repealed.

The Secretary’s memorandum appears to be the first time that the Department of the Interior (or anyone else for that matter) has taken the position that the Indian preference laws enacted between 1834 and 1894 have been repealed. In 1996 the Department cited the 1834, 1882, 1887 and 1894 Indian preference acts as legal authority

for the publication of the proposed (and prematurely implemented) rule which would limit Indian preference to the BIA and organizational units transferred intact from the BIA. 61 FED. REG. 33673. The same statutes were also cited as authority for the promulgation of Indian preference regulations in 1978. 43 FED. REG. 2393, 2394 (January 17, 1978).

Congress itself understands that earlier Indian preference laws have continued application. In Pub. L. No. 96-135, Congress defined the term “Indian preference laws” to mean § 12 of the IRA or “any other provision of law granting a preference to Indian in promotions and other personnel actions.” 25 U.S.C. § 472a(e)(1)(B)(2). A 1988 amendment to the Indian Self-Determination Act added a section that states that any Indian who receives “an excepted appointment under the authority of section 472 of this title, *or any other provision of law granting a preference to Indians in personnel actions* shall be converted to a career appointment in the competitive service after three years of continuous service and satisfactory performance.” 25 U.S.C. § 450i(m) (emphasis added).

The American Indian Policy Review Commission noted that “[a]t the present time, there are at least seven Federal statutes dating back as far as 1834 which provide for Federal employment preference for Indians within the Indian Service.” Final Report at 276. Task Force No. 9 went so far as to recommended repeal of the pre-IRA Indian preference laws because, at the time, the Department’s Solicitor took the position that the

earlier laws were the *only* ones applicable to the tribes which did not ratify the IRA. Final Report of Task Force No. 9 at 112-113; 202-204.

The 1882, 1884 and 1894 statutes continue to remain valid even though they were enacted as part of appropriations acts. Although provisos contained in appropriations acts which limit the expenditure of funds are valid only for one fiscal year,

Congress, of course, has undoubted power to permanently change existing law even in an appropriation act, and the fact that it is universally recognized as exceedingly bad legislative practice and is forbidden by the rules of both Houses of Congress does not subject it to judicial scrutiny. Instances of most important permanent legislation being contained in appropriation acts have been so often upheld by the courts as not to require examination and citation here.

Taylor v. Kjaer, 171 F.2d 343, 344 (D.C. Cir. 1948). There is no indication in the language of these statutes that the Indian preference provisions were intended for a limited duration or that they would be tied to the appropriation or expenditure of funds. The introductory paragraph of each of these three statutes states: “An act making appropriations . . . *and for other purposes.*” The Indian preference language of the 1882 and 1884 acts was contained in the same section that authorized the President to consolidate Indian tribes as well as servicing agencies, which clearly was not intended to be temporary. 22 Stat. 68, 88, 47th Cong., 1st Sess., ch. 163, § 6 (1882); 23 Stat. 76, 97, 48th Cong., 1st Sess., ch. 180, § 6 (1884). The 1894 act also contained provisions which were clearly not limited to one fiscal year, such as the requirement of an annual report of

the number of employees and the authority “to advertise in the spring of each year for bids” for goods and supplies for the Indian service, “notwithstanding the fact that the appropriations for such fiscal year have not been made.” 28 Stat. 286, 312, 313, 53rd Cong., 2nd Sess., ch. 290, §§ 4, 9 (1894).

These 1882, 1884 and 1894 statutes are codified at 25 U.S.C. §§ 46 and 44. The inclusion of these provisions in the U. S. Code indicates that Congress intended these provisions to be permanent even though included in appropriations acts. U.S. GENERAL ACCOUNTING OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, vol. I, p. 2-37 (3rd ed. 2004).

The 1910 statute, which provides “[t]hat so far as may be practicable Indian labor shall be employed,” did not repeal the earlier Indian preference laws as the Secretary contends. Def. Memo. at 33. This statute does not even apply to the employment of personnel within the BIA or the Department. The 1910 is known as the “Buy Indian Act” and its current version is codified at 25 U.S.C. § 47. It grants Indians preference in contracting with, rather than employment within, the Department. See generally, Opinion of Acting Associate Solicitor, “Impact of Indian Preference and the Buy Indian Act on Consolidated Administrative Services,” 5-6 (May 6, 1986) (Plaintiff’s appendix at 25-26); *Lakota Contractors Ass’n. v. Dep’t of Health and Human Services*, 882 F.2d 320 (8th Cir. 1989); *Colorado Contractors Corp. v. U. S.*, 57 Fed. Cl. 648 (2003). The Buy Indian

Act and the Indian preference statutes are not irreconcilable and therefore the earlier statutes were not repealed by implication. *Morton v. Mancari*, 417 U.S. at 550.

B. The earlier Indian preference laws are not limited to the “Indian Office” or the BIA.

In a footnote in *Mancari*, the Supreme Court characterized the earlier Indian preference laws as “more narrowly drawn” than § 12 of the IRA. The Court stated that “[f]or all practical purposes, these were replaced by the broader preference of § 12.” 417 U.S. at 538 n.2. Section 12 is broader in the sense that it exempts Indians from civil service regulations that generally require competitive appointments, and because it requires the Secretary to develop independent qualification standards applicable only to Indians. As the American Indian Policy Review Commission noted, the absence of the two features in the earlier Indian preference laws made them ineffective. Final Report at 276-277. Assuming that §12 is broader in its coverage as well, it must extend beyond the BIA. As the Department’s own treatise on Federal Indian law notes, the Indian preference provision of the General Allotment Act of 1887, 25 U.S.C. § 348, “includes positions outside the Indian Bureau.” U.S. DEPARTMENT OF INTERIOR, FEDERAL INDIAN LAW, 535 (1958) (Plaintiff’s appendix, vol. II, at 80).

Similarly, the 1834 statute extends preference to the “appointment of interpreters or other persons employed for the benefit of Indians” without restriction. 25 U.S.C. § 45. Although this clause followed a discussion of the hiring of blacksmiths, farmers,

mechanics and teachers in the statute as originally enacted, it was not intended to be limited to those enumerated occupations as the Secretary contends. Def. Memo. at 34.

The sentence which immediately followed what is now codified at 25 U.S.C. § 45 states:

. . . And where any tribes are, in the opinion of the Secretary of War, competent to direct the employment of their blacksmith, mechanics, teachers, farmers *or other persons engaged for them*, the direction of such persons may be given to the proper authority of the tribe.

4 Stat. 735, 737, 23rd Cong., 1st Sess., ch. 162, § 9 (1834) (emphasis added). The use of the phrase “or other persons engaged for them” demonstrates that this provision was not limited to the employment of blacksmiths, mechanics, teachers and farmers.

IV. The IRA, Pub. L. No. 96-135, and the earlier Indian preference statutes must be construed liberally in favor of the Indian members of the IEF.

If a statute benefitting Indians “can reasonably be construed as the [Indians] would have it construed, it *must* be construed that way.” *Musogee (Creek) Nation v. Hodel*, 851 F.2d. 1439, 1445 (D.C. Cir.1988), *cert. denied*, 488 U.S. 1010 (1989) (emphasis in original). It would be hard to characterize plaintiff’s construction of § 12 as “unreasonable” because it is the same interpretation held by the Comptroller General, the American Indian Policy Review Commission, and the Department’s own Solicitor. The construction proffered by the plaintiff was the official interpretation given to the statute

by the Department from at least 1979 through 1986.⁴ See Opinion of Acting Associate Solicitor on *Impact of Indian Preference and Buy Indian Act on Consolidated Administrative Services* (May 6, 1986)(Plaintiff's appendix at 21-26).

Although the Secretary claims that “the statute here is not ambiguous” (Def. Memo. at 38), she has found it necessary to go beyond the language of § 12 itself by relying on extensive historical materials and “context” to support its narrow interpretation. As the Court of Appeals noted, “[t]he term ‘Indian Office’ is nowhere defined in the statute.” *Albuquerque Indian Rights v. Lujan*, 930 F.2d 49, 51 (D.C. Cir. 1991).

The Secretary argues that it “has interpreted the preference provision liberally enough” by extending preference to positions in units transferred intact from the BIA. However, the promise to preserve preference when units are transferred from the BIA has proven to be illusory. Although Indian employees in the Office of Trust Fund Management retained their preference when they were transferred from the BIA to the OST in 1996, many lost preference when OST was reorganized in 2003 because the OTFM no longer remained “intact.” Opinion of the Associate Solicitor (May 5, 2003) (Plaintiff's appendix at 45-47). Although Indian employees in the BIA's Office of

⁴ In fact, it was Solicitor Krulitz' view that Indian preference extended to any position “in the administration of functions or services affecting any Indian tribe.” (Plaintiff's appendix at 13). In his 1986 Opinion, the Acting Associate Solicitor determined that Congress' use of the “directly and primarily” related language in Pub. L. No. 96-135 made coverage more narrow than that suggested earlier by Solicitor Krulitz. (Plaintiff's appendix at 22, n.2).

Appraisal Services retained preference when it was transferred to the OST in 2002, those employees may lose preference when the office is consolidated with other Department appraisal functions, as has been proposed. Opinion of the Associate Solicitor (October 23, 2003) (Plaintiff's appendix at 48-51).⁵ Further, it appears that the Department simply ignored its claimed policy of continuing preference when it transferred 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 in 2000. Secretarial Order No. 3214, § 3(a)(2), §3(b)(2), §§ 3(b)(4) (Plaintiff's appendix at 70). These serial reorganizations demonstrate why the policy of retaining preference when units are transferred intact is insufficient to preserve the objectives of § 12 of the IRA.

V. The statutes that give Indians preference in employment within the Department should be construed in *pari materia* with the statute that gives Indians preference in employment with government contractors.

Federal law not only gives Indians preference in employment in those positions which are "directly and primarily related to providing services to Indians," but also to employment under any contract "specifically for the benefit of Indians." This includes contracts issued not only by the BIA, but by any entity within the Department of the Interior.

⁵ An extended discussion of these reorganizations appears on pages 23-26 of plaintiff's November 12, 2003 Memorandum of Points and Authorities filed in support of its Motion for Summary Judgment.

The Indian Self-Determination and Education Assistance Act provides that any contract or grant “to Indian organizations or for the benefit of Indians” shall require that “preferences and opportunities for training and employment” under the contract or grant “shall be given to Indians” if feasible. 25 U.S.C. § 450e(b). This employment preference is not limited to the BIA or even to contracts and grants dealing with Indian self-government. It applies to any contract “for the benefit of Indians.” *Alaska Chapter, Associated General Contractors of America, Inc. v. Pierce*, 694 F.2d 1162, 1165 (9th Cir. 1982). The Federal Acquisition Regulations require that Indian preference clauses be contained in all solicitations and contracts issued by the BIA and “a contracting activity [within the Department of the Interior] other than the Bureau of Indian Affairs where the work performed is specifically for the benefit of Indians.” 48 C.F.R. § 1426.7003(a)(3).

This employment preference also applies to the “contracting-out” of the Department’s own activities conducted under the authority of OMB Circular A-76. *See* Opinion of the Acting Associate Solicitor (May 6, 1986) at 4-5 (Plaintiff’s appendix at 24-25). The Secretary’s construction of § 12 produces the anomalous result that, although Indian preference does not apply to employment in AS-IA or OST, it applies to employment with private contractors when functions of AS-IA or OST are contracted-out. The OST’s FY 2005 Budget Justification submitted to Congress reports that “[m]uch of the organization’s administrative functions (i.e., personnel, finance, etc) are

performed by contract” and “OST will continue to seek out opportunities for further contracting of non-inherently governmental work.” (Plaintiff’s appendix, vol. 2 at 85-86).

VI. A construction that applies Indian preference laws to all positions in the Interior Department that provide services to Indians does not place the constitutionality of Indian preference in jeopardy.

The Secretary incorrectly states that “statutes must be read to avoid constitutional questions.” Def. Memo. at 24. In a recent case which sanctioned the exclusive award of certain gaming franchises to Indians, the Ninth Circuit wrote that “statutes should be interpreted to avoid *serious* constitutional doubts, not to eliminate all possible contentions that the statute *might* be unconstitutional.” *Artichoke Joe’s California Grand Casino v. Norton*, 353 F.3d 712, 730 (9th Cir.), *cert. denied*, 125 S.Ct. 51 (2004) (emphasis in original), *quoting Reno v. Flores*, 507 U.S. 292, 314 n. 9 (1993). Courts should “scrutinize constitutional objections” to a particular interpretation “skeptically” and reject only those which raise “serious” constitutional concerns. *Williams v. Babbit*, 115 F.3d 657, 662 (9th Cir. 1997), *cert. denied*, 523 U.S. 1117 (1998).

The plaintiff’s construction of the IRA and other statutes does not offend the holding or rationale of *Morton v. Mancari*. The Supreme Court wrote that “a blanket exemption for Indians from all civil service examinations” would pose an “obviously

more difficulty [constitutional] question.” 417 U.S. at 554.⁶ The plaintiff does not suggest that Indian preference should be applied that broadly, nor even to “an undifferentiated mass of positions throughout the Interior Department,” which is how the Secretary has inaccurately and unfairly characterized the plaintiff’s position. Def. Memo. at 24. The plaintiff interprets §12 to apply to only those positions in the Department which are “directly and primarily related to providing services to Indians.” This construction is not even as broad as that given to § 12 by Solicitor Krulitz in the years immediately following the Supreme Court’s decision in *Mancari*. See footnote 4, *supra*.

Application of Indian preference to positions in AS-IA and OST is as “reasonably and directly related to a legitimate, nonracially based goal” of allowing Indians maximum opportunity for governance of their own affairs as is the application of such preference to the BIA. See 417 U.S. at 554. “Legislation that relates to Indian land, tribal status, self-government or culture passes *Mancari*’s rational relation test.” *Williams*, 115 F.3d at 664. OST and AS-IA are as involved in these matters as BIA, if not more so. The OST now has near total responsibility for managing land held in trust for Indians and Indian tribes. AS-IA’s Office of Federal Acknowledgment, *and not the BIA*, has responsibility for granting petitioners status as federally recognized tribes. 110 Departmental Manual

⁶ In sustaining the constitutionality of a statute which granted contracting preference to firms that were majority owned by Native Americans, the Court of Appeals recently noted that “the Court said the case would be ‘more difficult,’ not that the blanket exemption would be unconstitutional.” *American Federation of Government Employees v. United States*, 330 F.3d 513, 521 (D.C. Cir. 2003).

§8.2(B) (April 21, 2003) (Plaintiff's appendix at 58); 25 C.F.R. Part 83. AS-IA's "Office of Self-Governance and Self-Determination" has responsibility for implementing tribal "self-governance" laws. 110 Departmental Manual at § 8.3(B) (Plaintiff's appendix at 59). Application of Indian preference to these two offices promotes Indian interests in self-government and therefore passes constitutional muster.

The Supreme Court and the courts of appeal have even applied *Mancari* to Indian interests broader than self-government. *United States v. Antelope*, 450 U.S. 641, 646 (1977)(statute "implicating Indian interests" subject to rational basis test); *Alaska Chapter, Associated General Contractors*, 649 F.2d at 1168 (contracting preference permissible). The D. C. Circuit has held contracting preferences that advance the broad goal of promoting the economic development of Indian tribes and their members is rationally related to a legitimate purpose and is constitutional under *Mancari*. *AFGE*, 330 F.3d at 521-522.

VII. The Interior Department should have complied with the rulemaking requirements of the APA before changing its policy of extending Indian preference to all positions that are directly and primarily related to the providing of services to Indians.

A policy affecting whether Indian preference is applicable to all positions that directly and primarily provide services to Indians and Indian tribes is not merely an "interpretive rule," nor one that solely relates to "agency management or personnel." As the Supreme Court recognized in *Mancari*, the extension of Indian preference to those

positions in the Department which affect Indian matters is an aspect of Indian self-governance. The extension of Indian preference and exemption from the civil service laws was “one of the primary means by which self-government would be fostered.” 417 U.S. at 543. Indian preference “is an employment criterion reasonably designed to further the cause of Indian self-government . . . similar in kind to the constitutional requirement that a United States Senator, when elected, be ‘an inhabitant of the State for which he shall be chosen’ or that a member of a city council reside within the city governed by the council.” 417 U.S. at 554.

Thus, the defendant’s Indian preference policies affect interests far more important than the personal employment rights of Department employees - they create (or extinguish) rights of Indian tribes and their members to engage in self-government. The exemption for regulations affecting “agency management or personnel” must be narrowly construed. *Joseph v. Civil Service Commission*, 554 F.2d 1140, 1153 n. 23 (D.C. Cir. 1977); accord *American Federation of Government Employees v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981).

Courts have previously rejected Interior Department claims that regulations that determine rights of Indians under Indian statutes were merely “interpretive.” The Ninth Circuit held that the BIA violated the APA by establishing new eligibility standards under which Indians could qualify for higher education grants without notice and comment. The Court of Appeals rejected the BIA’s claim that its new eligibility standards

were merely “interpretative rules,” because the new standards conclusively affected the rights of Indian applicants. *Malone v. BIA*, 38 F.3d 433, 438 (9th Cir. 1994). The Supreme Court held in *Morton v. Ruiz*, 415 U.S. 199, 23-236 (1974), that the BIA was required to promulgate rules establishing standards under which Indians would be eligible for general assistance funds through the notice and comment provisions of the APA.

The notice and comment requirements of 5 U.S.C. § 553 apply not only to all substantive, or legislative, rules but also to “those interpretive rules which both constitute a change in prior agency position and have a “substantial impact on private rights and obligations.” *National Retired Teachers Ass'n v. U. S. Postal Service*, 430 F.Supp. 141, 147 (D.D.C. 1977), *aff'd*. 593 F.2d 1360 (D.C. Cir. 1979). If an interpretive rule “constitutes a change in prior agency position and has a substantial impact on the rights and obligations of [private parties], the rule would be invalid for failure to comply with the notice and comment requirements.” *id.* As discussed in *Albuquerque Indian Rights*, Solicitor Tarr’s Opinion was a “dramatic break with past interpretations of the preference provision.” 930 F.2d at 58. Because it has substantially diminished the right of Indian tribes and their members to engage in self-governance, the new policy should not have been implemented until the Department completed the notice and comment process it began when it published what it characterized as a “proposed rule” on July 12, 1996. 61 FED. REG. 36671. As the Court of Appeals said in *Albuquerque Indian Rights*, “it is essential that the legitimate expectation of . . . Indians not be extinguished by what

amounts to an unpublished *ad hoc* determination.” 930 F.2d at 58, *quoting Morton v. Ruiz*, 415 U.S. at 236.

Conclusion

For the foregoing reasons, the Secretary’s motion to dismiss, or in the alternative for summary judgment, should be denied and the plaintiff’s motion for summary judgment should be granted.

Respectfully submitted,

/s/

RICHARD J. HIRN
5335 Wisconsin Ave NW
Suite 440
Washington, D.C. 20015
202-274-1812
202-274-1813 fax
richard@hirnlaw.com
DC Bar no. 291849

Attorney for plaintiff Indian Educators
Federation, Local 4524 of the American
Federation of Teachers (AFL-CIO)