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.	Civil Action No. 1:04CV01215 (RWR)

MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

Defendant hereby moves, through undersigned counsel, for an order dismissing this action pursuant to Rule 12(b)(6), Fed.R.Civ.P., or, in the alternative, for summary judgment pursuant to Rule 56, Fed.R.Civ.P. In support of this motion, the Court is respectfully referred to the Memorandum of Law, the Statement of Material Facts Not In Issue, the Compendium of Legislative and Administrative Materials, and the Declaration of Sally Ann Cummings with exhibits 1 through 7 attached, all filed herewith.

Dated: December 17, 2004

Respectfully submitted,

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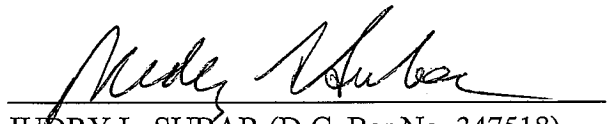

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FOR THE DISTRICT OF COLUMBIA

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Plaintiff,	)	
v.	)	
GALE A. NORTON, Secretary, United States Department of the Interior,	)	Civil Action No. 1:04CV01215 (RWR)
Defendant.	)	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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UNITED STATES DISTRICT COURT
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MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

PRELIMINARY STATEMENT

As is often the case with matters of public policy, competing concerns underlie the rules used to select federal employees to do work relating to Indian services. For one thing, Indian self-government is important in light of the long and complicated history of the trust relationship between the United States government and the Indian people. For another, the government is obliged to avoid discrimination in employment based on race or ethnicity without a compelling justification. Congress has balanced these considerations by creating a bright-line test. Indians seeking positions within the "Indian Office" of the United States Department of the Interior are entitled to a statutory preference over non-Indians, while positions in other offices do not warrant a preference. The term "Indian Office" has a specific, known, meaning. It refers to one, but only one, of several Interior Department subdivisions that relate to Indian matters: the Bureau of Indian Affairs ("BIA"). For purposes of the

relevant statute, the term "Indian Office" encompasses units that have been moved from the BIA elsewhere in the Department, as long as they remain organizationally intact.

The plaintiff in this action, a union that purports to represent Indians entitled to the preference, argues that the reach of the preference law should be stretched to include an undifferentiated mass of Indian-related positions throughout the Interior Department. Plaintiff seeks an order requiring application of the preference to two units that did not even exist until decades after Congress passed the current preference statute. Those two units are far outside the bounds of what Congress contemplated when it used the term "Indian Office."

A straightforward application of the ordinary rules of statutory construction shows that the only way to read the phrase "Indian Office" as used in the preference law is as referring to the BIA. This conclusion is reinforced by reference to a host of authoritative sources. Further, the term cannot be read any more broadly without raising significant constitutional issues that can, and must, be avoided. Nor can plaintiff avail itself of the rule that it cites under which Indian-related statutes are read liberally in favor of affected Indians. That rule only applies when the statute in question is ambiguous, which the preference language is decidedly not.

Finally, plaintiff's citation to a proposed regulation that was never promulgated is to no avail. The fact that the regulation was not finalized proves nothing about the meaning of the statute at issue here and does not constitute a separate violation of plaintiff's rights.

For these various reasons, this action should be dismissed, or summary judgment should be entered in favor of the government.

STATEMENT OF THE CASE

This litigation, like other cases involving Indian law, does not arise in a historical vacuum. Rather, "the intricacies and peculiarities of Indian law deman[d] an appreciation of history." Frankfurter, Foreword to A Jurisprudential Symposium in Memory of Felix S. Cohen, 9 Rutgers L. Rev. 355, 356 (1954) (quoted in South Carolina v. Catawba Indian Tribe, Inc., 476 U.S. 498, 511 (1986) (Blackmun, J., dissenting)). Provided here is an overview of the historical background against which plaintiff asserts a right to have the Indian employment preference applied far beyond the confines of any given office within the Interior Department.

I. THE TRUST RESPONSIBILITIES OF THE UNITED STATES GOVERNMENT

During the early nineteenth century, the approach taken by the United States government towards the Indian people was expansionist and tribe-centered. The overriding theory animating the government's Indian policy was the idea that the tribes should be moved off their lands in the Eastern part of North America, and encouraged or forced to relocate further West to make room for European settlers. Cobell v. Norton, 240 F.3d 1081, 1086-87 (D.C. Cir. 2001). That policy was effectuated by both legal and military efforts to relocate Indian tribes. See, e.g., Indian Removal Act of 1830, 4 Stat. 411, Ch. 148, 21st Cong., 1st Sess. (May 28, 1830); 1 F.P. Prucha, The Great Father: The United States Government and the American Indians 179 et seq. (1984) ("Prucha").

Over time, that policy was superseded by an assimilationist approach that focused on the members of the tribes as individuals, rather than on the tribes themselves. See Muscogee (Creek) Nation v. Hodel, 851 F.2d 1439, 1441 (D.C. Cir.1988). This approach was characterized during its ascendency as "the national policy by which the Indians are to be maintained as well as prepared for

assuming the habits of civilized life, and ultimately the privileges of citizenship." United States v. Rickert, 188 U.S. 432, 437 (1903). One of the most exemplary manifestations of that policy was the practice of allotment, under which the government subdivided land that had been held by the tribes, and awarded it to individual Indians. Felix S. Cohen, Handbook of Federal Indian Law 98 (Rennard Strickland, et al., eds. 1982) ("Cohen"). While allotment had previously been practiced to some extent, it was not undertaken on a wholesale and comprehensive level until passage of the General Allotment Act of 1887 (the Dawes Act), 24 Stat. 388, Ch. 119, 49th Cong., 2d Sess. (Feb. 8, 1887) (codified as amended at 25 U.S.C. § 331 et seq.). See Cohen at 129-30. That statute appointed the government as trustee for individual Indian allottees, with the government collecting funds from activities such as grazing, timber and oil production, and holding the funds in individual accounts for the benefit of the allottees. Cobell, 240 F.3d at 1087. "The objectives of allotment were simple and clear cut: to extinguish tribal sovereignty, erase reservation boundaries, and force assimilation of Indians into the society at large." County of Yakima v. Yakima Indian Nation, 502 U.S. 251, 254 (1992).

By the 1930s, it was clear that the assimilationist approach was not working. A 1928 report commissioned by the Interior Secretary had "described the poverty, disease, suffering, and discontent that pervaded the life of the overwhelming majority of Indians. It also criticized the inefficient, paternalistic administration of Indian policy that neither encouraged nor supported Indian self-sufficiency." Cohen at 144. Thereafter, "federal Indian policy underwent a revolutionary transformation during the presidential administration of Franklin Delano Roosevelt," based on what has been called "the 'pro-tribal autonomy' paradigm of the New Deal." Yuanchung Lee, Rediscovering the Constitutional Lineage of Federal Indian Law, 27 N.M. L. Rev. 273, 314, 315 (1997). This policy

was embodied in the Indian Reorganization Act of 1934, 48 Stat. 984, Ch. 576, 73d Cong., 2d Sess. (June 18, 1934) (codified at 25 U.S.C. § 461 et seq). "The overriding purpose of that particular Act was to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically." Morton v. Mancari, 417 U.S. 535, 542 (1974).

The 1934 legislation had several effects on the allotment policy. In one sense, "[t]he policy of allotment came to an abrupt end in 1934 with passage of the Indian Reorganization Act." Yakima, 502 U.S. at 255.[1] In fact, the end of allotment was a key element of the Act, inasmuch as the "disastrous" conditions in which most Indians lived in the United States at the time of its passage were seen as being "principally" due to the allotment system. Administration Memorandum on the Purpose and Operation of the Wheeler-Howard Indian Rights Bill, published in Hearings on H.R. 7902 Before the House Committee on Indian Affairs, 73d Cong., 2d Sess., pt. 1 at 15 ("Hearings," see Compendium of Legislative and Administrative Materials at 16[2]). Thus, the statute's preamble lists as its first purpose "[t]o conserve and develop Indian lands and resources," and its first section expressly halted any further land allotments to Indians. 48 Stat. 984, 25 U.S.C. § 461.

Yet, "[a]lthough formally repudiated with the passage of the Indian Reorganization Act in1934, the policy favoring assimilation of Indian tribes through the allotment of reservation land left behind a lasting legacy." South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 339-40 (1998) (citation

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[1] The actual grant of allotments ended administratively a year earlier. Cohen at 146.

[2] The Compendium of Legislative and Administrative Materials filed with the present motion contains congressional and regulatory materials that might be difficult for the Court to obtain. It is cited hereinafter as "Compendium." The hearings cited here are not reproduced in their entirety in the Compendium, because they are quite voluminous, and only selected portions are relevant.

omitted). The very same statute that ended future allotments of Indian land extended indefinitely the United States government's trust responsibilities with regard to existing allotments. 25 U.S.C. § 462.

The period since 1934 has been marked by some shifts in Indian policy, although the government has largely supported Indian self-governance. For a short time, the United States attempted to follow a "termination" policy, under which the government tried to terminate the trust relationship that it had with the Indians. Cohen at 152-80. This "short-lived" and "small-scale movement," though, ended in the early 1960s. Lee at 325. Since then, the government has worked to afford self-determination to the tribes. Id. at 325-28; see also Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450. "With the brief exception of the 1950s termination policy, federal Indian policy since the New Deal has not strayed from the pro-tribal path." Lee at 327. Nonetheless, throughout that time, and continuing until today, the federal government has retained trust obligations with regard to millions of acres that were allotted before passage of the 1934 Indian Reorganization Act. Cobell v. Babbitt, 91 F. Supp. 2d 1, 9 (D.D.C. 1999).

The administration of these trusts has long been troubled. A 1992 congressional report found that the "BIA has serious financial management problems permeating almost every aspect of its five trust principal accounting systems, as well as, (sic) other systems." Misplaced Trust: The Bureau of Indian Affairs' Mismanagement of the Indian Trust Fund, Rpt. 102-499, 102d Cong., 2d Sess. at 9 (1992). In the wake of that report, Congress enacted the Indian Trust Fund Management Reform Act of 1994. 25 U.S.C. § 4001 et seq. That act created the Office of Special Trustee for American Indians ("OST") to oversee trust-related reform and to coordinate the discharge of the Interior Department's trust duties. 25 U.S.C. §§ 4042(a), 4043. The statute is specific as to the Trustee's qualifications:

> The Special Trustee shall be appointed by the President, by and with the advice and consent of the Senate, from among individuals who possess demonstrated ability in general management of large governmental or business entities and particular knowledge of trust fund management, management of financial institutions, and the investment of large sums of money.

25 U.S.C. § 4042(b)(1).

The position of Trustee is not the only one connected to OST as to which Congress specified qualifications. The Trustee is to appoint a nine-member advisory board, of whose members five are to "represent" Indian account holders, two are to have practical experience in trust fund and financial management, one is to be experienced in fiduciary investment management and one must have studied the management of large organizations. 25 U.S.C. § 4046(a). Thus, Congress has incorporated into the OST statute the view that a management background is at least as important in overseeing the government's trust fund obligations as is whether the people engaged in that oversight are Indians.

II. THE BUREAU OF INDIAN AFFAIRS

A plethora of government entities, both within and outside the Department of the Interior, have jurisdiction over Indian affairs.[3] Perhaps the oldest and largest such entity is the Bureau of Indian Affairs. That Bureau has its origins in action taken by Secretary of War John C. Calhoun in the early nineteenth century. On March 11, 1824, Secretary Calhoun issued an order granting to one of his subordinates the duties of "the Bureau of Indian Affairs." H.R. Doc. No. 146, 19th Cong., 1st Sess. 6

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[3] By way of example, the 1994 Trust Fund Reform Act mentions the Bureau of Land Management and the Minerals Management Service as having Indian-related responsibilities. 25 U.S.C. § 4043(b). The Department of Housing and Urban Development has an Assistant Secretary for Public and Indian Housing. 42 U.S.C. § 3533(e)(1)(A). The Environmental Protection Agency administers the Indian Environmental General Assistance Program. 42 U.S.C. § 4368b. Plaintiff does not (and cannot) contend that the preference applies to all positions in those offices.

(Order of March 11, 1824) (Compendium at 135). Almost as soon as that office was created administratively, Congress noted that no statutory authority supported its existence. Thus, on March 21, 1826, the Chairman of the House Committee on Indian Affairs noted that the committee had "searched in vain for the law establishing that office." Id. at 3 (Compendium at 133).

Congress provided some such authority in 1832, when it created the position of Commissioner of Indian Affairs. 4 Stat. 564, 22d Cong., 1st Sess., Ch. 174 (July 9, 1832). The act creating that position, however, did not identify the administrative organization that the Commissioner would oversee. Indeed, concern developed that the history of the office with jurisdiction over Indian affairs was sufficiently confused that a new organic statute was needed. Thus, with reference to that office, a House report said that "[t]he present organization of this department is of doubtful origin and authority . . .. [W]hat was, in fact, mere usage, seems to have been taken as having been established by law. It does not appear that the origin or history of the department has ever attracted the attention of Congress." H.R. Rep. No. 474, 23d Cong., 1st Sess. 2-3 (1834) (Compendium at 140-41).

In 1834, Congress addressed this statutory lacuna by passing "[a]n Act to provide for the organization of the department of Indian affairs." 4 Stat. 735, 23d Cong., 1st Sess., Ch. 162 (June 30, 1834). That statute authorized the appointment of several superintendents of Indian affairs to operate within specified geographic jurisdictions and to "exercise a general supervision and control over the official conduct and accounts of all officers and persons employed by the government in the Indian department." Id. The legislation also established terms and salaries for Indian agents and sub-agents, who were responsible "to manage and superintend the intercourse with the Indians within their respective agencies, agreeably to law; to obey all legal instructions given to them by the Secretary of

War, the commissioner of Indian affairs, or the superintendent of Indian affairs, and carry into effect such regulations as may be prescribed by the President." Id. at 736-37.[4]

In 1849, Congress created the Department of the Interior, and transferred jurisdiction over Indian affairs to that department. That legislation still did not refer by name to the office that had such jurisdiction. The statute simply said that "the Secretary of the Interior shall exercise the supervisory and appellate powers now exercised by the Secretary of the War Department, in relation to all the acts of the Commissioner of Indian Affairs." 9 Stat. 395, 30th Cong., 2d Sess., Ch. 108 § 5 (March 3, 1849).

Although Congress did not affirmatively confer specific names on the respective governmental parts with Indian affairs responsibilities, it did use different names to refer to the organizational entities that now make up the BIA – but not always consistently. Thus, until 1921, when Congress funded the Commissioner and his clerical staff, it identified his office as the "Indian Office." See, e.g., 41 Stat. 1252, 1289, 66th Cong., 3d Sess., Ch. 124 (March 3, 1921); 36 Stat. 468, 513, 61st Cong., 2d Sess., Ch. 297 (June 16, 1910); 35 Stat. 845, 890, 60th Cong., 2d Sess., Ch. 297 (March 9, 1909); 34 Stat. 935, 976, 59th Cong., 2d Sess., Ch. 1635 (Feb. 26, 1907); 30 Stat. 277, 305, 55th Cong., 2d Sess., Ch. 68 (March 15, 1898); 23 Stat. 159, 186 48th Cong., 1st Sess., Ch. 331 (July 7, 1884). The term used in appropriating money for the part of the government that dealt directly with the Indians

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[4] Indian agencies made up one organizational category that was hierarchically inferior to superintendencies, but jurisdictionally superior to subagencies, all of which were in the part of the Interior Department known today as the BIA. See 1 Prucha at 300. At one time, the Interior Department had quite a number of Indian agencies. See, e.g., 23 Stat. 76, 48th Cong., 1st Sess. (July 4, 1884) (appropriating funds for "sixty agents of Indian affairs at the following-named agencies" and listing dozens of Indian agencies by name). No such agencies exist any longer. "In a communication, dated Nov. 29, 1940, from the Office of Indian Affairs of the Department of the Interior, it was stated that there have been no Indian agents since 1908, all of the agencies and schools having been placed under the supervision of superintendents." 25 U.S.C. § 64 note.

in the field was the "Indian Department" – but only through 1909. See, e.g., 35 Stat. 781, 60th Cong., 2d Sess., Ch. 263 (March 3, 1909); 34 Stat. 1015, 59th Cong., 2d Sess., Ch. 2285 (March 1, 1907); 30 Stat. 62, 55th Cong., 1st Sess., Ch. 3 (June 7, 1897); 23 Stat. 76, 48th Cong., 1st Sess., Ch. 180 (July 4, 1884). Beginning in 1910, Congress began using the name "Bureau of Indian Affairs" to refer to that organizational entity. 36 Stat. 269, 61st Cong., 2d Sess., Ch. 140 (April 10, 1910).

This inconsistency was manifested in other respects. During the period when appropriations legislation for the Commissioner's office referred to it as the "Indian Office," Congress elsewhere called that office the "office of the Commissioner of Indian Affairs." 27 Stat. 272, 52d Cong., 1st Sess., Ch. 256 (July 26, 1892). And at a time when the appropriators referred to the part of the government that employed Indian agents as the "Indian Department," a statute was passed using the term "Indian Bureau" for that organizational unit. 22 Stat. 345, 47th Cong., 1st Sess., Ch. 439 (August 7, 1882).

The Snyder Act of 1921 rearticulated and consolidated the Interior Department's authority as to Indian matters. That act provided that "the Bureau of Indian Affairs, under the supervision of the Secretary of the Interior, shall direct, supervise, and expend such moneys as Congress may from to time appropriate, for the benefit, care, and assistance of the Indians throughout the United States." 42 Stat. 208, 67th Cong., 1st Sess., Ch. 115 (Nov. 2, 1921) (codified as amended at 25 U.S.C. § 13). The Snyder Act did not, however, identify or describe the Bureau to which it referred.

Subsequent appropriations measures appropriated money for the Commissioner and his office together with the field work of his service under the caption "Bureau of Indian Affairs." 42 Stat. 552, 559, Ch. 199, 67th Cong., 2d Sess. (May 24, 1922). Even after the Snyder Act was passed, however, Congress did not always use the term "Bureau of Indian Affairs" to refer to that entity. See,

e.g., 43 Stat. 634, Ch. 328, 68th Cong., 1st Sess. (June 7, 1924), (codified at 25 U.S.C. § 56 (referring to "Indian Service")); 44 Stat. 934, 939, Ch. 27 § 1, 69th Cong., 2d Sess. (Jan. 12, 1927), (codified at 25 U.S.C. § 147) (same).

The Interior Department also used different terms to refer to the BIA. In 1894, for example, a set of regulations was issued under the title "Regulations of the Indian Office," bearing the statement on their title page, "Revised by the Indian Office." Compendium at 146. The volume contains a note from the Secretary of the Interior to the Commissioner of Indian Affairs referring to its contents as "[t]he revision of the Regulations of the Indian Department." Id. at 148. The next printed page cites the various sources authorizing the issuance of the regulations, with the only name used for the entity to which the regulations pertain being the "Indian service." Id. at 150.

The practice of using different names to refer to the Interior Department office headed by the Commissioner continued well past 1934, when the legislation at issue in this case was enacted. An internal Interior Department memorandum dated September 17, 1947, indicates that the Bureau of Indian Affairs should thereafter be called by that name, and not by the various other names that had been used, which contained words such as "Office" and "Service." Ex. 7.[5]

III. ASSISTANT SECRETARY FOR INDIAN AFFAIRS

The Interior Secretary is authorized to define the jurisdiction of several Assistant Secretary positions for which Congress has not specifically identified an area of specialization. 43 U.S.C. §§ 1453-54. In 1977, the Secretary exercised this authority by creating the position of Assistant

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[5] The exhibits cited in this brief, which are cited in the form "Ex. __," are attached to the declaration of Sally Ann Cummings, filed herewith.

Secretary–Indian Affairs. Order No. 3010 (Sept. 26, 1977) (Compendium at 151). The Secretarial order relating to that position has been modified periodically. The iteration currently in effect makes particularly clear how broad the responsibilities of that office are.

Unlike the BIA, whose role tends to focus on the delivery of basic services directly to Indians, see Department of the Interior Departmental Manual, 130 DM 1 (discussing BIA's responsibility for carrying out federal Indian policy, and helping the Indian people govern themselves) (Compendium at 153), the role of the Office of the Assistant Secretary is quite broad. That office serves as the administration's liaison with Indian tribes on a "government to government" basis; develops policy; represents the administration in Congress; interacts with a wide range of constituencies that have an interest in the federal government's involvement in Indian affairs; and oversees a variety of programs, both within and outside the BIA. Department Manual, 110 DM 8 (Compendium at 154).

IV. THE INDIAN PREFERENCE STATUTE

In 1934, Congress enacted the provision on which plaintiff bases its case:

> [t]he 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.

Section 12 of the Indian Reorganization Act, 48 Stat. 986 (codified at 25 U.S.C. § 472).[6] While "[t]here are earlier and more narrowly drawn Indian preference statutes. 25 U.S.C. §§ 44, 45, 46, 47,

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[6] As codified in the United States Code, the statute leaves out the phrase "without regard to civil service laws." At least one court has concluded that this omission was an error by the Office of the Law Revision Counsel. See Preston v. Heckler, 734 F.2d 1359, 1367-69 (9th Cir. 1984).

and 274," "[f]or all practical purposes, these were replaced by the broader preference of § 12 [of the 1934 Reorganization Act]." Morton v. Mancari, 417 U.S. 535, 538 (1974). The Interior Department administers this statute by giving Indians a preference with regard to jobs within the BIA, and also in any organizational unit moved intact from the BIA to another part of the Department. See Plaintiff's Appendix of Administrative Decisions at A-27 to A-51.

This liberal application of the statute is narrower than what plaintiff would like. The Complaint in this case seeks an order that would afford Indians the right to preempt other job applicants in a wide array of Interior Department posts. Plaintiff seeks to have the preference applied indiscriminately to all positions within OST and the Office of the Assistant Secretary, as well as all positions throughout the Department that "directly or primarily relate to" Indian services. Second Amended Complaint at 14 (emphasis added).

ARGUMENT

I. THE INDIAN PREFERENCE STATUTE THAT GOVERNS THIS CASE HAS BEEN PROPERLY CONSTRUED BY THE INTERIOR DEPARTMENT

A. The "Indian Office" of the Preference Statute Is the Bureau of Indian Affairs

The ultimate task of a court in construing a statute is "'to give effect to the will of Congress.'" Negonsott v. Samuels, 507 U.S. 99, 104 (1993), quoting Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 570 (1982). In the 1934 legislation, Congress expressed its intent that, an Indian preference in employment be applied in connection with positions "maintained . . . by the Indian Office." 25 U.S.C. § 472. The Department of the Interior construes the term "Indian Office" to mean a specific office – the Bureau of Indian Affairs – and applies the preference to jobs in the BIA, and to positions in

organizational subparts of the BIA that have moved intact to other parts of the Interior Department. Under every canon of construction, the Interior Department's interpretation is the right one.

1. The Statutory Language Requires the Rejection of Plaintiff's Position

The starting point in discerning congressional intent is the relevant statutory language. Landreth Timber Co. v. Landreth, 471 U.S. 681, 685 (1985). The preference statute could hardly be clearer: it creates an employment preference applicable to positions within a specific entity known as the "Indian Office," a term referring to the BIA.

a. The Meaning of the Statute Is Made Clear By Its Context

Statutory language cannot be read in isolation. Rather, "the meaning of statutory language, plain or not, depends on context." King v. St. Vincent's Hosp., 502 U.S. 215, 221 (1991). The Supreme Court has explained that the contextual reading of statutory terms has several significant elements. First, courts are to read statutory language in the context of the rest of the statute in which it is found, because "a phrase gathers meaning from the words around it." General Dynamics Land Systems, Inc. v. Cline, 540 U.S. 581, 124 S. Ct. 1236, 1246 (2004) (citations and internal quotation marks omitted). Second, "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." Branch v. Smith, 538 U.S. 254, 281 (2003). Third, "[l]egislation dealing with Indian affairs 'cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted [it].' Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 206 (1978)." Wilson v. Omaha Indian Tribe, 442 U.S. 653, 666 (1979). Consideration of these three aspects of "context" makes plain that the Indian Office to which the preference statute refers is the BIA, and that the Interior Department is, therefore, acting entirely

appropriately in applying the preference only to that bureau and to its organizational progeny.

i. The Indian Reorganization Act of 1934 As a Whole Demonstrates That the Government's Reading of the Preference Provision Is Correct

The preference statute here was enacted as only one element of a significant legislative reworking of the relationship between the Indian people and the United States government. The major thrust of the legislation was to restore to the Indians a much greater degree of self-government than they had enjoyed for decades, if not longer. Thus, the preference provision applies to Indian Office employees doing work "affecting any Indian tribe."

Although the language of the preference provision might be construed to mean that the preference applies to positions that affect Indian tribes, but does not apply to a post that only affects Indians as individuals, the Interior Department has not interpreted it that narrowly. Rather, the preference has been applied to the entire Indian Office, that is, to all of the BIA and its institutional outgrowths. Nonetheless, the reference to Indian tribes was clearly included in the statute for a reason. Given the purpose of the act as a whole, Congress evidently intended the office to which the preference would apply to be the one responsible for giving services directly to the tribes. That office was, and continues to be, the BIA.

By sharp contrast, the Office of Special Trustee, to which plaintiff wants the preference to apply, was created for the express purpose of administering the Indian trust accounts. Those accounts came into being because of the allotment system, the very purpose of which was to take power away from the tribes and to give it to individual Indians. Yakima, 502 U.S. at 254. Over 300,000 trust accounts are held by individual Indians, Cobell, 240 F.3d at 1089, clearly many more than are held by

tribes. A clear distinction exists, then, between: (1) parts of the Interior Department that happen to relate in some way to Indians, and (2) those that administer functions or services affecting tribes as tribes. Because Congress applied the preference to Indian Office positions that fill the latter role, the statute should be construed as so limited by its language, and should not be read to include all of OST, just because it has something to do with Indians.

So, too, the Office of the Assistant Secretary for Indian Affairs does not exist to "administ[er] functions or services." Rather, it engages in policy development and high level oversight. Therefore, Congress could not have had in mind all kinds of positions throughout that office when the employment preference was statutorily limited to the "Indian Office."

ii. Congress Has Used the Term "Indian Office" in Other Statutes to Mean the BIA

As discussed above, from time to time Congress has used the terms "Indian Office," "Indian Department," "Office of Indian Affairs" and "Indian Bureau." In each such situation, Congress made clear that it did not intend to refer to an undifferentiated mass of positions or employees throughout the government, or even the Interior Department, that have something to do with Indians. Rather, these various phrases have been used to refer specifically to the Bureau of Indian Affairs or its subdivisions. The appropriations legislation referring to the "Indian Office" and the "Indian Department" cited above, for example, provided money for various parts of the BIA.

Even after the Snyder Act consolidated these two parts of the government in 1921, Congress continued to refer to the BIA by other names. Appropriations legislation pertaining to the BIA passed in 1931 stated that "[a]ppropriations herein made for road work and other physical improvements in the

Indian Service shall be immediately available." 46 Stat. 1141, 75th Cong., 33d Sess., Ch. 187 (Feb. 14, 1931). Similar legislation passed ten years later referred to expenses relating to telephone calls "on business pertaining to the Indian Service sent and received by the Bureau of Indian Affairs in Washington." 55 Stat. 303, 311, 77th Cong., 1st Sess., Ch. 259 (June 28, 1941). The same act contained a section captioned "Vehicles, Indian Service," which discussed expenses for vehicles "for the use of employees in the Indian field service." Id. In 1924 and 1925, Congress appropriated money "for the employment of additional clerks in the Indian Office in connection with the work of determining the heirs of deceased Indians." 43 Stat. 1141, 1147, 68th Cong., 2d Sess., Ch. 462 (March 3, 1925); 43 Stat. 390, 397, 68th Cong., 1st Sess., Ch. 264 (June 5, 1924). In 1948, legislation was passed concerning the ownership of certain equipment to which reference had been made in a 1945 memorandum of understanding between two subdivisions of the Interior Department: the Bureau of Reclamation and "the Office of Indian Affairs, Department of the Interior (hereinafter referred to as the 'Indian Office')." 62 Stat. 36, Ch. 75, 80th Cong., 2d Sess. (Feb. 27, 1948). Thus, although the government had no congressionally constituted "Office of Indian Affairs," "Indian Office" or "Indian Service," Congress nevertheless referred to the BIA or its various subdivisions by these names, in accordance with common usage, in a variety of statutes including the preference law.[7]

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[7] While it might be argued that the term "Indian Office" was used, after the passage of the Snyder Act, to refer to that part of the BIA that was in Washington, while the "Indian Service" consisted of the BIA's field operation, such an understanding of these terms would not account for the 1948 law referring to the BIA as the "Office of Indian Affairs" and the "Indian Office." In any event, such a reading of the term "Indian Office" for purposes of this case would render the preference statute much narrower than the Interior Department has interpreted it, and would not help plaintiff.

iii. When Congress Enacted the 1934 Preference Statute, the Term "Indian Office" Was Widely Used to Mean the BIA

It was not only Congress that used these various terms to refer to the BIA or its relevant subdivisions in the time frame during which the Indian Reorganization Act was passed. For example, on April 2, 1929, the Interior Secretary's Administrative Assistant wrote to his Solicitor, as follows:

> The Secretary desires to substitute the words "The Indian Service" for "Bureau of Indian Affairs" wherever this may legally be done. Of course, in correspondence, memoranda, etc. this may be done, but whether the letterheads could be changed seems to be a question. The term "Indian Office" seems to be met with as frequently in the law as "Bureau of Indian Affairs." The object is to discontinue the use of the word "Bureau" wherever possible.

Ex. 1. The April 3, 1929, response to that note reviewed the history of the different names used by Congress for the BIA, and opined that nothing prevented use of the term "Indian Service" in official correspondence. This conclusion was based in large part on the following considerations:

> "Indian Office", "Indian Service" and "Indian Affairs" are now used far more frequently than any other term, the expression "Indian Bureau" being used infrequently. Practically all stationery now used by the Indian Office here in Washington bears a printed heading "United States Department of the Interior Office of Indian Affairs", while that used in the field usually carries the heading "United States Department of the Interior Indian Field Service."

Ex. 2.

The use of these variants continued for over a decade after the Reorganization Act was passed. Thus, a BIA periodical called "Indians at Work" published during the Roosevelt Administration, referred to its publisher as the "Office of Indian Affairs." See, e.g., 7 Indians at Work No. 5 (Jan. 1940); Indians at Work: Reorganization Number (June 1936) (Compendium at 157, 165). The cover of the latter issue notes that it was published by the Office of Indian Affairs as "A News Sheet for

Indians and the Indian Service." One of these two issues contains an essay by the then-Commissioner of Indian Affairs John Collier, who was deeply involved in the drafting of the 1934 Indian Reorganization Act. Compendium at 161. That essay, which is largely devoted to a discussion of the preference provision, uses the phrase "Indian Office" to refer to the BIA. Compendium at 162. The other issue, which is devoted to the 1934 act, includes a similar essay by Commissioner Collier, in which the following passage is found:

> The Indian Service ultimately is nothing but practical projects carried out within local areas. The useful functionaries of the Indian Office are those men and women who, within local areas, form themselves into local teams, and in their capacity as local teams, proceed to develop local programs in cooperation with local Indians.

Compendium at 169 (emphasis in original).

The use of different terms for the same bureau continued after the Roosevelt Administration. In 1946, the BIA issued regulations describing its organizational makeup. 11 Fed. Reg. 177A-219 (Sept. 11, 1946) (Compendium at 171). While the body of these regulations used the term "Bureau of Indian Affairs," their caption referred not to the BIA, but, instead, to the "Office of Indian Affairs."

Correspondence from the following year is even more instructive. On June 12, 1947, Senator George Aiken, Chairman of the Senate Committee on Expenditures in the Executive Departments, wrote to Julius Krug, the Secretary of the Interior, with regard to a report that Senator Aiken's committee had issued on nomenclature in the Executive Branch. Ex. 3. Senator Aiken commented on "the confusion which exists at present in the names of Government units," as described in a report that the committee had prepared. The report described an Executive Branch containing a hodge-podge of bureaus, sections, services, branches, offices and divisions, as well as "458 names which are too

diversified to classify." Ex. 4. Senator Aiken recommended a uniform system of organization. Ex. 3. On June 21, 1947, Secretary Krug undertook to comply with the recommendation in a response to Senator Aiken, undertaking to comply with the recommendation, Ex. 5, and on the same day, instructed "All Bureaus and Offices" within the Interior Department to work with the Department's Division of Budget and Administrative Management to effect Senator Aiken's recommendations. Ex. 6. On September 17, 1947, the Director of that Division wrote to the Chief of the "Budget and Operations Division, Office of Indian Affairs" to acknowledge a memorandum listing changes in the BIA's organizational chart. Ex. 7. The September 17 memorandum noted that "[a]lthough there is no specific mention in your communication, we assume that henceforth your organization will be the 'Bureau of Indian Affairs', and that 'Office of' and 'Service' will be avoided in all cases." Id.

In sum, the congressional use of the phrase "Indian Office" to refer to the BIA in the 1934 Indian Reorganization Act was entirely in keeping with the practice of the day. "[T]he assumptions of those who drafted" the legislation, which illuminate its construction, Oliphant, 435 U.S. at 206, plainly included the belief that the term "Indian Office" needed no definition. The manner in which that term was used in the decades before and after the passage of the law in question makes clear that the term "Indian Office" was known to its drafters to mean the BIA. Plaintiff's contention that Congress intended to refer to some amorphous mass of positions within the Interior Department whose incumbents might spend some of their time on Indian-related matters must be rejected.

b. Authoritative Definitional Sources Provide Further Support for the Interior Department's Reading of the Statute

"When Congress has failed to define statutory language, the Supreme Court has resorted to

authoritative texts to determine the ordinary meaning of statutory language." Penobscot Indian Nation v. Key Bank of Maine, 112 F.3d 538, 547 (1st Cir. 1997) (citing Smith v. United States, 508 U.S. 223, 229 (1993)). The fact that the term "Indian Office" in the preference statute clearly refers to the BIA is well supported by highly respected scholarly work.

Francis Paul Prucha's The Great Father,[8] which speaks directly to the point at issue, contains an appendix entitled "Nomenclature of the Bureau of Indian Affairs." 2 Prucha at 1227-29. The appendix notes that "[u]nfortunately for those who like consistency, the terminology used to designate the organization has been inconsistent and confused." Id. at 1227. Citing some of the same sources mentioned above, Prucha discusses the fact that the BIA has been variously called the "Indian Office," the "Office of Indian Affairs," the "Indian Service" and the "Indian Bureau." He explains the interest expressed in 1929 by the Interior Secretary in having the BIA called the "Indian Service" as follows.

> During the decade of the 1920s, when John Collier [who became Commissioner of Indian Affairs under President Roosevelt] and his friends mounted a strong attack on the management of Indian affairs, their criticism was usually aimed at the "Bureau." So serious was this attack that Secretary of the Interior Ray Lyman Wilbur in 1929 directed that the term Bureau be avoided because of its unhappy connotations and that the term Indian Service be used instead.

Id. at 1228. "Little, however, seems to have changed in the usage of the office." Id. Even after the 1929 order, "the practice [regarding references to what is now known as the BIA] was not uniform

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[8] This two-volume set has been termed Prucha's "authoritative work on federal Indian policy," Berger, After Pocahontas: Indian Women and the Law, 1830 to 1934, 21 Am. Ind. L. Rev. 1, 3 (1997). Prucha is one of the most prolific writers in the field of Indian history. Federal courts have often relied on his works in the area of Indian affairs. See, e.g., Oneida County, N.Y. v. Oneida Indian Nation of New York State, 470 U.S. 226, 231 (1985); United States v. John, 437 U.S. 634, 640 (1978); Oneida Indian Nation of New York v. City of Sherrill, New York, 337 F.3d 139, 149 n.9 (2d Cir. 2003); Bear Lodge Multiple Use Ass'n v. Babbitt, 175 F.3d 814, 817 (10th Cir. 1999).

within the government." Id. Not until the 1947 correspondence described above was some uniformity achieved. "From that time on, although it took a while for everyone to conform, the title has been the Bureau of Indian Affairs, for which the abbreviation BIA has become almost universal." Id. at 1229.

Various courts that have commented on the scope of the term "Indian Office" have also understood it to refer to the BIA, and not to some undifferentiated aglomeration of Indian-related jobs throughout the Interior Department. See Pittsburg & Midway Coal Min. Co. v. Yazzie, 909 F.2d 1387, 1390 n.5 (10th Cir. 1990) ("In the course of the history recited in this opinion, the Indian Office came to be called the Bureau of Indian Affairs."); Cobell v. Norton, 214 F.R.D. 13, 17 (D.D.C. 2003) ("the Indian Office (now the Bureau of Indian Affairs or BIA)"); Red Lake Band v. United States, 17 Cl. Ct. 362, 443 (1989) ("the Indian Office of the Department of the Interior (later known as the BIA)").

Thus, the several names used for the BIA when the preference statute was passed, including the phrase "Indian Office," were all understood by authorities on the subject and by the courts to refer to the same entity: the Bureau of Indian Affairs.

2. The Construction of the Preference Statute Advocated By Plaintiff Would Create Unacceptable, But Avoidable, Constitutional Issues

As a matter of well-settled precedent, "'[a] statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score.'" Rust v. Sullivan, 500 U.S. 173, 191 (1991) (quoting United States v. Jin Fuey Moy, 241 U.S. 394, 401

(1916)).[9] Thus, for example, in Gomez v. United States, 490 U.S. 858 (1989), the Court construed a statute narrowly rather than broadly, even though it did not determine that a broad reading actually would have been unconstitutional, because "[i]t is our settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question." Id. at 864. In this case, Supreme Court authority regarding the very statute at the center of the present dispute makes clear that the construction advocated by plaintiff would indeed implicate significant constitutional concerns.

The Supreme Court directly addressed the constitutionality of the Indian preference statute in Morton v. Mancari. In that case, non-Indians challenged the preference statute, arguing, among other things, that it violated their equal protection rights. The Court disagreed. In analyzing the constitutional contention, the Court explained that any discrimination inherent in the statute does not warrant strict scrutiny, because it does not discriminate on the basis of ethnicity. Rather, the Court said, the statute merely makes a political distinction between members of Indian tribes and people who are not members, providing the preference only to the former group. 417 U.S. at 553-54. Because political discrimination does not implicate a suspect classification, the Court applied the relatively lenient "rational basis" test of constitutionality, and upheld the validity of the statute. Id. at 554.

In reaching its conclusion, the Court relied heavily on its perception that the preference law

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[9] For constitutional considerations to be grave enough to be of concern in this respect, they must be "real" and "likely," not "hypothetical." AFGE v. United States, 330 F.3d 513, 519 (D.C. Cir. 2003). As discussed below, this test is easily met here.

applies only to the BIA. Id. at 542-44.[10] The Court described the purpose of the statute as being "to make the BIA more responsive to the needs of its constituent groups." Id. at 554. "The [Mancari] opinion was careful to note . . . that the case was confined to the authority of the BIA." Rice v. Cayetano, 528 U.S. 495, 520 (2000). Importantly, in the Court's view, "the BIA [is] 'an entirely different service from anything else in the United States.'" Mancari, 417 U.S. at 554 n.24 (quoting from remarks of Senator Howard, Hearings on S. 2755 and S. 3645 Before the Senate Committee on Indian Affairs, 73d Cong., 2d Sess., pt. 2, p. 256 (1934)). If the BIA were a less unique agency with a broader mandate to serve the needs of non-Indians, or if the preference applied beyond the BIA, the Court would have undertaken a different analysis. Thus,

> [t]he preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion. In the sense that there is no other group of people favored in this manner, the legal status of the BIA is truly sui generis. Furthermore, the preference applies only to employment in the Indian service. The preference does not cover any other Government agency or activity, and we need not consider the obviously more difficult question that would be presented by a blanket exemption for Indians from all civil service examinations.

417 U.S. at 554 (citation and footnote omitted). Because statutes must be read to avoid constitutional questions, the preference should be given the scope that the Supreme Court associated with it: to apply to the BIA, and not to an undifferentiated mass of positions throughout the Interior Department.

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[10] The Court understood the preference also to apply to parts of the BIA that were moved intact elsewhere within the government, just as the Interior Department does. As the Court explained in Mancari, the preference presumably applies to the Indian Health Service ("IHS"), even though that office was moved from the Interior Department to the Department of Health and Human Services in 1954. 417 U.S. at 538 n.1 ("Presumably, despite this transfer, the reference in § 12 to the 'Indian Office' has continuing application to the Indian Health Service.").

That this conclusion is the right one is reinforced by the analysis advanced by Justice Stevens in dissent in Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995), and by the court in Williams v. Babbitt, 115 F.3d 657, 663 (9th Cir. 1997). In Adarand, the Court held that all governmental racial classifications are subject to a "strict scrutiny" equal protection analysis. Justice Stevens dissented, and commented in particular on the majority's expressed interest in treating all race discrimination the same. He suggested that such consistency would, in theory, require an Indian preference statute to be analyzed in the same manner as an official policy permitting slavery. 515 U.S. at 244-45 & n.3. Because the latter type of policy obviously would run afoul of the Equal Protection Clause, at least Justice Stevens (and Justice Ginsburg who concurred in his opinion) might question the continued vitality of Mancari now that Adarand has been decided. As the entire Court said in Mancari, although the preference statute is legitimate if read narrowly, the result might not be the same if it were understood differently. 417 U.S. at 554. This Court can – and should – minimize any question as to the constitutionality of the statute by construing it as narrowly as the Supreme Court did in Mancari.

The Williams decision is to like effect. That case involved a statute that gives Alaskan natives more rights than non-natives to engage in reindeer herding. The plaintiffs asserted that Mancari was overruled by Adarand, and that a broad interpretation of the reindeer statute advocated by the government made the statute subject to strict scrutiny. The Ninth Circuit avoided that issue, invoking the rule requiring a statute to be read narrowly to avoid constitutional problems. 115 F.3d at 661 & n.4. In doing so, the court relied on its understanding that "[t]he preference at issue in Mancari only applied to the BIA." Id. at 663. Just as the Ninth Circuit followed the lead of the Supreme Court in Mancari by reading the statute under consideration narrowly enough to escape constitutional difficulties,

this Court should hew closely to the narrow construction which, as the Mancari decision emphasized, was a significant factor in the conclusion that the preference statute is constitutional.

While the issue of the preference provision's constitutionality has not been raised by the plaintiff in this case, it is surely implicated. The constitutionality of the statute was sustained in Mancari on the basis of a construction that is consistent with the government's and at odds with plaintiff's. A broader construction could put the conclusion reached in Mancari at risk. Such a result should be rejected.

3. Legislative History Provides Further Support for the Government's Position

Although "resort to legislative history is not appropriate in construing plain statutory language," United States ex rel. Totten v. Bombardier Corp., 380 F.3d 488, 494 (D.C. Cir. 2004), it can assist a court in resolving legislative ambiguity. Bullcreek v. Nuclear Regulatory Com'n, 359 F.3d 536, 541 (D.C. Cir. 2004). While the preference provision is sufficiently clear on its own, reference to legislative history here confirms the meaning of the statutory language at issue.

a. The History of the 1934 Legislation

The primary congressional focus in enacting the 1934 preference law was on making it easier for Indians to obtain the sort of employment that would allow them to engage in self-government, which was – and remains – employment in the BIA. Thus, as Congressman Edgar Howard, one of the primary sponsors of the legislation, explained, the Indian Reorganization Act would help to address a situation in which the Indians had become impoverished (as shown by survey data collected by the "Indian Office") in the wake of various federal policies, especially the practice of allotment. 78 Cong. Rec. 11726 (June 15, 1934). A key feature of such policies, Congressman Howard said, was that they

allowed for the use of money obtained through the sale of Indian assets "to pay the salaries of employees, generally whites, in the Indian Service," which he also characterized as the payment of "salaries to Indian Bureau employees." Id. The proposal that became 25 U.S.C. § 472, Howard said, would permit the "admission of qualified Indians to the Indian Service." Id. at 11725, 11727. He supported the preference so that qualified Indians could be employed in "their own service," because "[t]he effect of existing requirements which bar them from such employment is grossly unfair." Id.

Senator Burton Wheeler, the other principal sponsor of the bill, referred to the obstacle to many Indians being employed in the "Indian Service" as "the rules and regulations of the Bureau of Indian Affairs and the civil service" which required certain types of formal training that Indians could not easily obtain. 78 Cong. Rec. 11123 (June 12, 1934). He described the preference section of the bill as "a provision to open the way for qualified Indians to hold positions in the Federal Indian Service." Id.

This discussion of the final version of the bill by its key congressional supporters reflects their understanding of the term "Indian Office" as synonymous with "Indian Service," "Indian Bureau" and "Bureau of Indian Affairs." It also demonstrates that the intended purpose of the preference statute was "to modify the then-existing situation whereby the primarily non-Indian-staffed BIA had plenary control, for all practical purposes, over the lives and destinies of the federally recognized Indian tribes." Mancari, 417 U.S. at 542 (analyzing legislative history). The primary function of the BIA has been in keeping with the purpose referenced in this legislative history: to provide services to Indians directly, in the manner of a state or local government. See United States Government Manual at 255-56 (2004-05) (available at www.gpoaccess.gov/gmanual) (Compendium at 176-77). By contrast, OST was created to help implement the federal government's trust functions, Cobell, 240 F.3d at 1089-90, and

serves "to allow the Secretary to effectively discharge the Government's trust responsibilities." United States Government Manual at 252 (Compendium at 175) (emphasis added). Thus, rather than providing direct services to Indians or allowing Indians to govern themselves in the manner encouraged by the 1934 legislation, the focus of OST is on helping the federal government fulfill responsibilities left over from the days of the allotment policy. The mission of the Office of the Assistant Secretary for Indian Affairs is, likewise, broad and national, rather than primarily local and service oriented. United States Government Manual at 250-52 (Compendium at 173-75). Thus, the purpose of the 1934 legislation was to further the mission of the BIA in providing services to Indian tribes, but did not correspond to the raison-d'être of the other two offices implicated by plaintiff's Complaint. This point is strengthened by the consideration that Congress said that the "Indian Office" is to be staffed by Indians, while OST is to be led by people with financial and management backgrounds. 25 U.S.C. §§ 4042(b)(1), 4046(a).

The legislative history also shows what Congress decided not to do, which is relevant because a congressional decision not to adopt language considered early in the legislative process shows that Congress intended to eliminate the concept found in the deleted language. Doe v. Chao, 540 U.S. 614, 124 S. Ct. 1204, 1209-10 (2004). At one point during the legislative process, the Roosevelt Administration proposed a definition of the term "Office of Indian Affairs" that would have been similar to plaintiff's proposed interpretation of the term "Indian Office." Hearings at 197 (Compendium at 73). Assuming that such a proposed definition would have had some bearing on the issue in this case,[11] its

[11] Such an assumption would probably be unwarranted, given that neither the initial draft of the preference provision nor its final version – both of which were just small parts of large bills – used the

absence from the enacted statute demonstrates that Congress intended not to adopt the concept upon which plaintiff relies here.

b. History of Subsequent Legislation

Legislative history is germane here in one additional respect. While the history of subsequent enactments is generally eschewed as a basis for rejecting a construction of a statute in accordance with its plain meaning, see, e.g., Doe v. Chao, 124 S. Ct. at 1212, in this case subsequent legislative history is instructive, inasmuch as it augments the case for construing "Indian Office" to refer to the BIA.

In 1979, Congress enacted legislation relating to the application of the Indian employment preference in the context of reductions in force. 25 U.S.C. § 472a. That statute acknowledges that the preference applies in the "Bureau of Indian Affairs," and defines that term to mean "(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(e)(3) (emphasis added). Plaintiff argues that the first clause of subparagraph B helps its case, but accords the underlined language no particular meaning. See Plaintiff's Memorandum of Law ("Plt. Mem.") at 36. Such an approach, of course, runs afoul of the requirement that a court "must give effect to every word of a statute wherever possible." Leocal v. Ashcroft, 125 S. Ct. 377, 384 (2004). This maxim is particularly pertinent here because the legislative history demonstrates that Congress did have a very specific meaning in mind in drafting the underlined language, and that its intended meaning is precisely congruent with the Interior Department's position.

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term "Office of Indian Affairs," Hearings at 4 (Compendium at 5); 25 U.S.C. § 472.

> The provision makes it clear that otherwise eligible employees who are in an organizational unit which had been part of the BIA and was actually subject to the Indian preference laws on December 21, 1972,[12] are covered by the provisions of the subsection even though, because of a reorganization, the organizational unit is no longer part of the BIA but remains subject to the Indian preference laws.

H.R. Rep. No. 96-370 at 11 (July 20, 1979), reprinted at 1979 U.S.C.C.A.N. 2068, 2076. The report went on to provide the short list of units that had been identified by the Interior Department as being in this category: a Job Corps Conservation Center in Washington State, and "organizational units which may be reassigned from the BIA to the Office of the Assistant Secretary of the Interior for Indian Affairs." Id. Thus, Congress expressly recognized that jobs in the Assistant Secretary's office were only entitled to the preference if they were in organizations that had been moved intact from the BIA.

Plaintiff provides an alternate, but incorrect, interpretation of the 1979 legislative history. Plaintiff cites a statement in the 1979 House Report that the scope of the preference is based on a long-standing Civil Service Commission ("CSC") regulation that was reissued every year (and is now reissued annually by the Office of Personnel Management) to catalogue those positions that are exempt from ordinary civil service rules.[13] That regulation lists those positions within the Interior Department

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[12] The 1972 date has to do with an issuenot present in this case. See H.R. Rep. No. 96-370 at 5 (July 20, 1979), reprinted at 1979 U.S.C.C.A.N. 2068, 2070.

[13] Plaintiff also relies on this regulation to argue that the Interior Department's current position is at odds with historical practice. Material that plaintiff itself has submitted belies that contention. See Plaintiff's Appendix of Administrative Decisions at A-31 (discussing fact that between 1934 and 1954, preference not applied outside the BIA; fact that in 1954, CSC authorized application of preference to BIA units that retained their identity after transfer; fact that in 1973, Interior heeded advice from CSC to limit application of preference outside of BIA to situations in which BIA function was transferred elsewhere intact); id. at A-37 ("Indian preference of the scope set forth in the Krulitz opinion (a 1979 opinion by the Solicitor construing the preference broadly) has never been implemented in this Department either before or since.").

whose incumbents provide services to Indians, "when filled by the appointment of Indians." H.R. Rep. No. 96-370 at 11 (July 20, 1979), reprinted at 1979 U.S.C.C.A.N. 2068, 2075-76; Plt. Mem. at 40. Plaintiff dates the regulation to some unspecified date before 1968, and implies that the the regulation must have originated as a method of implementing the 1934 preference statute outside the BIA. Id.

Plaintiff is mistaken. In fact, the regulatory language on which plaintiff relies is found in civil service rules dating from much earlier than even 1934. See, e.g., Exec. Order 1180 (March 23, 1910) (Compendium at 178). It has its origins in the last two decades of the nineteenth century, when government reform efforts changed from a process of staffing the BIA under a political patronage system to one based on professional civil service standards. 2 Prucha at 731-32. Presidential directives issued in 1891, and again in 1896, required most BIA positions to be filled under civil service rules. Id. The competitive civil service rules, though, "did not apply to Indians themselves, who in increasing numbers were employed at the agencies, usually in positions of lower rank." Id. at 732. See Hearings at 491 (Compendium at 123) (in responding to question from congressman as to whether he was familiar with Executive Order of President Cleveland regarding employment of Indians in civil service, Commissioner of Indian Affairs John Collier responded "I am not, but I imagine it is similar to the one issued by President Roosevelt, which enables us to employ certain Indians for lowly positions without civil service.").[14]

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[14] The Roosevelt order to which Collier referred, which was issued less than a month before Collier's quoted testimony, can be found in the Compendium at 181. That order amended Schedule B of the then-extant Civil Service Rules to provide that "[p]ositions in the Indian Service not now excepted from examination under schedule A," would be filled by noncompetitive examination where the applicants were Indians. Compendium at 187. Schedule A lists Interior Department positions, including some positions in the Indian Service, and some specifically filled by Indians, that were exempt

These facts, coupled with the explicit congressional understanding that the preference only applied to the BIA and to units that began their bureaucratic existence within the BIA, demonstrate that plaintiff has it wrong. The CSC regulation says no more than that the preference applies however broadly it is supposed to apply, and that when it does apply the ordinary civil service rules do not. Under the 1934 legislation, the preference applies just as the 1979 House Report said it should: to units that are within the BIA, and to units that started in the BIA and moved elsewhere.

B. Pre-1934 Indian Preference Statutes Are of No Effect In This Case

As discussed above, over the course of time Congress has enacted numerous statutes that can be read as giving Indians preference in federal employment. The Supreme Court, however, was manifestly correct when it said that "[f]or all practical purposes, these were replaced by the broader preference of § 12 [of the 1934 Reorganization Act]," and when it characterized the earlier provisions it referenced as "more narrowly drawn" than the 1934 legislation. Mancari, 417 U.S. at 538. Therefore, plaintiff's case is not helped by its argument that the 1934 statute should be read in pari materia with earlier Indian preference legislation. Plt. Mem. at 33-35.

1. Pre-1934 Indian Preference Statutes Have Been Repealed

Although statutes are generally to be read "in pari materia" – that is, consistently with other statutes on the same topic – there are limits to this rule. Thus, while the repeal of a statute does not render that statute entirely irrelevant for purposes of in pari materia analysis, Wachovia Bank v. Schmidt, 388 F.2d 414, 422 n.2 (4th Cir. 2004), a repealed statute is generally just used as a tool to

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from civil service examinations altogether. Compendium at 185.

interpret the actual statute that effects the repeal. 2b Norman J. Singer, Sutherland Statutory Construction § 51.04 at 173 (1992 ed.). On the other hand, "[p]rovisions in an obsolete and inoperative act which are omitted in another act relating to the same subject matter cannot be applied in a proceeding under the other act because to do so would give effect to the inoperative act." Id.

The early preference statutes on which plaintiff relies, which date from 1834, 1882, 1884, 1887 and 1894, were, indeed, repealed well before Congress enacted the 1934 law at issue in this case. In 1910, Congress directed that another Indian employment preference provision be implemented "to the extent practicable," and delegated to the Commissioner of Indian Affairs the authority to decide how and when to apply that preference. 36 Stat. 861, 61st Cong., 2d Sess., Ch. 431 § 23. The very same legislation expressly repealed all previous legislation that was inconsistent with it. Therefore, the pre-1910 legislation on which plaintiff attempts to rely is simply of no moment here.[15]

2. The 1934 Statute's Antecedents Were Narrower Than the 1934 Law

Even if the older preference laws were still effective, they would not entitle plaintiff to relief. They are considerably narrower than the 1934 law, which itself is limited to the BIA. To begin with, two versions of the pre-1934 laws cited by plaintiff were included in Indian Department appropriations measures. 25 U.S.C. § 44, enacted at 28 Stat. 286, 313, 53d Cong., 2d Sess., Ch. 290 § 10 (Aug.

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[15] Today's Supreme Court views a statute that provides generally for the repeal of prior inconsistent statutes as effecting a repeal even if the earlier statutes are not identified with specificity. See Clinton v. City of New York, 524 U.S. 417, 446 n.40 (1998) (interpreting just such a repealing statute as clearly effecting a repeal of all inconsistent provisions; see also United States Shipping Bd. Emergency Fleet Corp. v. Rosenberg Bros. & Co., 276 U.S. 202, 213-14 (1928) (to same effect). Thus, contrary authority, Hess v. Reynolds, 113 U.S. 73, 79-80 (1885); Moyle v. Director, Office of Workers' Compensation Programs, 147 F.3d 1116, 1119 n.4 (9th Cir. 1998) (citing 1A Norman J. Singer, Sutherland Statutory Construction § 23.07, at 332, 334), should not be relied upon.

15, 1894); 25 U.S.C. § 46, enacted at 23 Stat. 76, 97, 48th Cong., 1st Sess, Ch. 180 § 6 (July 4, 1884), and 22 Stat. 68, 88, 47th Cong., 1st Sess., Ch. 163 § 6 (May 17, 1882). Appropriations laws "have the 'limited and specific purpose of providing funds for authorized programs.' Tennessee Valley Authority v. Hill, 437 U.S. 153, 190 (1978)." Donovan v. Carolina Stalite Co., 734 F.2d 1547, 1558 (D.C. Cir. 1984); see also Calloway v. District of Columbia, 216 F.3d 1, 8-9 (D.C. Cir. 2000) (discussing "very strong presumption" that appropriations legislation does not alter substance of existing law). Indeed, Congress considered it necessary to reenact in 1884 the very language that it adopted in 1882. Because these acts did not provide money for non-BIA agencies, their provisions cannot be interpreted as giving Indians a preference in obtaining positions outside the BIA.

Even beyond this consideration, the early statutes on which plaintiff relies, Plt. Mem. at 33-35, did not encompass even every position within the BIA, let alone positions outside that bureau. One of those laws, passed in 1834, created the Indian Department, and authorized the hiring of Indians to serve in several categories of jobs. The statute permitted the employment of one interpreter for each agency, and provided that blacksmiths, farmers, mechanics and teachers could be hired when a treaty between the United States and an Indian tribe so required. 4 Stat. 735, 737, 23d Cong., 1st Sess., Ch. 162 (June 30, 1834). The very same section of the 1834 statute provided for an Indian preference in hiring "interpreters or other persons employed for the benefit of the Indians" Id., (codified at 25 U.S.C. § 45). The term "other persons" in this context must be understood as including only employees of the Indian Department, and only the other types of persons enumerated in the statute, namely blacksmiths, mechanics, farmers and teachers, "for under the established interpretative canons of noscitur a sociis and ejusdem generis, where general words follow specific words in a statutory

enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." Washington State Dep't of Social & Health Servs., v. Keffeler, 537 U.S. 371, 384 (2003) (internal quotation marks and citation omitted).

So, too, the 1882 and 1884 legislation cited by plaintiff provides a preference only for "clerical, mechanical, and other help on reservations and about agencies," and even then only when "practicable." 25 U.S.C. § 46. Congress could not have intended this "other help" to include all positions related to Indians anywhere in the Interior Department. The rule of ejusdem generis would not allow such a broad reading of that language. Further, that provision only applies to "help on reservations and about agencies." The positions in OST and the Office of the Assistant Secretary for Indian Affairs to which plaintiff claims the preference applies are not on reservations, see Exhibits D, G, I and K attached to Plaintiff's Declaration of Patrick J. Carr, and are certainly not at Indian agencies, which no longer even exist. 25 U.S.C. § 64 note.[16]

The 1894 legislation on which plaintiff relies is also limited to four types of positions: herders, teamsters, laborers and "where practicable in all other employments in connection with the agencies and the Indian Service." 25 U.S.C. § 44. The first three types of jobs are clearly not implicated by plaintiff's Complaint. The last category also gives plaintiff no basis for relief. Aside from the fact that it applies only "where practicable," it also affords no preference to any position outside of the agencies or

[16] That the term "agencies" here refers to the local offices that were run by "Indian agents" is made clear, first of all, because no other meaning would make sense. This point is emphasized by the fact that the language from the 1884 legislation cited by plaintiff is found in the very section that authorized the President to "consolidate one or more tribes, and abolish such agencies as are thereby rendered unnecessary." 23 Stat. § 6 at 97.

the Indian Service.[17] Therefore, this provision, too, is narrower than the 1934 preference measure.

Nor does the 1887 Dawes Act's preference section help plaintiff. That statute was applicable to "Indian police" and "any other employees in the public service among any of the Indian tribes or bands affected by" the act. Dawes Act § 5, 24 Stat. at 390. Thus, even if some of the positions within its scope might have been outside the BIA, this measure, also, applied narrowly to certain types of field positions, and not to administrative posts such as those to which plaintiff wants the preference to relate. The 1887 preference provision was more restricted than all of the other such statutes in another respect. It did not give a preference to just any Indian. It only did so for those Indians who became United States citizens by accepting land allotments under other terms of the Dawes Act or by living separately from Indian tribes and "adopt[ing] the habits of civilized life."[18] Id. § 6. But in 1924, Congress gutted the Dawes Act's mechanism for deciding which Indians could get a preference, by conferring citizenship on every Indian born within the territory of the United States, 43 Stat. 253, 68th Cong., 2d Sess., Ch. 233 (June 2, 1924). Therefore, not only was the Dawes Act narrower than the 1934 provision; viewing the 1887 statute as still having any force would be anachronistic in the extreme.

One further factor shows that Congress did not intend the early preference statutes to be as broad as the 1934 provision. Plaintiff's Complaint omits any reference to several additional pre-1934

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[17] As discussed more fully above, the term "Indian Service" refers to what is now known as the BIA. There certainly is no basis for believing that the "Indian Service" mentioned in the 1894 law is any larger a collection of positions within the Interior Department than the "Indian Office" of the 1934 statute.

[18] In 1901, Congress added another method of becoming a citizen under this statute, and thereby becoming entitled to the Indian preference: by being "in Indian Territory." 31 Stat. 1447, Ch. 868, 56th Cong., 2d Sess. (March 3, 1901).

preference statutes. For example, an 1897 law, 25 U.S.C. § 274, requires that "Indian boys" be given jobs as teachers and farmers, and that "Indian girls" be employed as assistant matrons, when practicable. In 1908 and 1910, Congress enacted provisions (the first of which is in an appropriations act) under which "Indian labor" was to be employed when practicable, with broad discretion given to the Commissioner of Indian Affairs in this regard. 36 Stat. 855, 861, 61st Cong., 2d Sess., Ch. 431 § 23 (June 25, 1910); 35 Stat. 70, 71, 60th Cong., 1st Sess., Ch. 153 (April 30, 1908).

The 1897, 1908 and 1910 versions of the preference law are relevant not only because plaintiff could hardly get relief on the basis of a statute that authorizes "Indian boys" or "Indian girls" to get certain jobs, or on the strength of laws giving wide discretion to the Commissioner of Indian Affairs to apply the preference only when practicable. By failing to mention several of the old preference laws, plaintiff has emphasized just how many disparate, seriatim enactments on the subject of Indian preference were adopted over the course of a century. Because the legislature normally "is assumed to be conscious of what it has done," American Petroleum Inst. v. E.P.A., 198 F.3d 275, 279 (D.C. Cir. 2000), Congress must have intended to do something different each time it enacted one of the preference laws. Given that the language of the 1934 provision at issue here is so much broader than the earlier statutes, Congress clearly intended it to be a comprehensive new treatment of an issue that it had addressed only partially before. Consequently, none of the earlier laws supports a reading of the 1934 legislation any broader than its language, its context and its history require.

C. Plaintiff Would Have This Court Misapply Canons of Statutory Construction

Generally, if a statute "is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984). In cases involving Indian law, however, courts have applied a different presumption, resolving ambiguities in such a way as to benefit the Indians. Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985).[19] Plaintiff's argument that the Blackfeet presumption supports its position, but that Chevron does not, is misguided.

1. The Canon of Construction Favoring Indians Does Not Support Plaintiff's Position

The "use of canons of construction are (sic) appropriate when they aid, rather than displace, the search for statutory meaning." Interstate Natural . v. Federal Energy Regulatory Comm'n, 716 F.2d 1, 10 (D.C. Cir. 1983); see also Shields v. United States, 698 F.2d 987, 990 (9th Cir. 1983) ("The canon of construction cannot be used by the courts to accomplish what Congress did not intend."). Indeed, the Court of Appeals for this Circuit has emphasized that the Blackfeet presumption is to be used to resolve statutory ambiguity. Cobell, 240 F.3d at 1101.[20] Because the statute at issue here is not ambiguous, plaintiff cannot rely on the Indian presumption.

Even if the Blackfeet presumption did apply here, the Interior Department has interpreted the

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[19] The D.C. Circuit seems to consider this Indian presumption as supplanting Chevron in cases to which it applies. See, e.g., Cobell, 240 F.3d at 1101 ("even where the ambiguous statute is one entrusted to an agency, we give the agency's interpretation careful consideration but we do not defer to it" (internal quotations omitted)). This view, though, is not unanimous. Williams v. Babbitt, 115 F.3d 657, 663 n.5 (9th Cir. 1997) (concluding that the Indian presumption "must give way to agency interpretations that deserve Chevron deference because Chevron is a substantive rule of law"). Even under the D.C. Circuit's understanding of the presumption, however, the Secretary's interpretation should still be upheld for the reasons given below.

[20] But see Arizona Pub. Serv. Co. v. E.P.A., 211 F.3d 1280, 1293 (D.C. Cir. 2000) (mentioning – although apparently not applying – Indian presumption in context of "Step I" of Chevron analysis, where statute is not seen as ambiguous).

preference provision liberally enough to be entitled to deference. The preference is statutorily limited to positions affecting Indian tribes, when such positions are in the "Indian Office." The preference is not, however, limited by the Interior Department to certain positions within the BIA, or even to all positions in that bureau. "Where an organizational unit is removed intact by virtue of an administrative decision from the BIA to another agency and continues to perform the functions it performed in the BIA," the preference applies. Memo to Special Trustee from Deputy Solicitor Cohen (Apr. 10, 1996), Plaintiff's Appendix at A-43. On the basis of this reading of the preference, the Interior Department has applied it to units moved outside the BIA, such as the Office of Trust Fund Management, which moved from the BIA to OST. Id.; Memo to Sandra Streets from Hugo Teufel III (May 5, 2003), Plaintiff's Appendix at A-46. This approach clearly favors Indians and demonstrates that, in deciding the scope of the preference, the Secretary has construed "Indian Office" liberally in their favor. Accordingly, under both Chevron and Blackfeet, the Secretary's interpretation would be entitled to deference.

The construction advocated by plaintiff would do much more than give a the statute a liberal reading favoring Indians. Plaintiff attempts to read the term "Indian Office" out of the statute entirely, so that the preference effectively would apply to any Department of Interior office that provides services to Indians. Thus, as rewritten by plaintiff, the preference would apply to "positions maintained, now or hereafter, [anywhere in the Interior Department], in the administration of functions or services affecting any Indian tribe." 25 U.S.C. 472; compare 25 U.S.C. 472 with Plt. Mem. at 2 (explaining that 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 [OST and the Office of Assistant Secretary for Indian Affairs] as well as all other positions in the Department which directly or primarily

relate to the providing of services to Indians"). This expansive interpretation is not the type of liberal construction contemplated by the Indian presumption, but a wholesale rewriting of the law.

To whatever degree the Blackfeet presumption requires that statutes relating to Indians be construed liberally, it does not require that any view advanced by Indians be upheld. Penobscot, 112 F.3d at 555. To the contrary, that presumption "does not require a court to ignore compelling authority supporting a conclusion contrary to the position that a particular Indian tribe advances." Id. Here, compelling authority, as well as the plain language of the statute, establish that it cannot be understood as advocated by plaintiff. Accordingly, this Court should reject plaintiff's invocation of Blackfeet to achieve a result not intended by Congress.

2. The Secretary's Interpretation of the Preference Is Not Inconsistent with Past Practice

Plaintiff erroneously contends that the Secretary's interpretation is not entitled to deference because it departs from past departmental interpretations. See Plt. Mem. at 30. Relying on dicta in Albuquerque Indian Rights v. Lujan, 930 F.2d 49, 58 (D.C. Cir. 1991),[21] plaintiff claims that the Secretary's current interpretation of the preference "represents a dramatic break with past interpretations of the preference provision." Plt. Mem. at 31. The record belies that claim.

The history of the Interior Department's position is discussed in an extensive opinion issued by

[21] The plaintiff in Albuquerque Indian Rights challenged the Secretary's failure to apply the Indian preference within the Office of Construction Management, outside the BIA. Even though the court held that plaintiff lacked standing to bring that claim, it went on to discuss the merits of his claim. In doing so, however, the court acknowledged that "[w]e certainly do not rule and do not intend to imply that the Department cannot successfully defend" the interpretation at issue here. See Albuquerque Indian Rights, 930 F.2d at 59.

the Department's former Solicitor. Opinion of Solicitor of the Interior Ralph W. Tarr, The Scope of Indian Preference Under the Indian Reorganization Act (June 10, 1988), Plaintiff's Appendix at A-27 to A-38 ("Tarr Opinion"). As explained in the Tarr Opinion, "the weight of the Department's practice has been to apply [the] preference only within the BIA." Plaintiff's Appendix at A-31. For the first twenty years after the statute's enactment, "there was no application of the preference outside the BIA." Id. In 1954, the Civil Service Commission authorized but did not require the Secretary to apply the excepted service appointment authority to "BIA units transferred to another bureau under circumstances in which the unit retained its identity as providing services to Indians." Id. That authorization made clear that "[n]o other use of this authority was intended or authorized." Id. As of 1979, "the Department had never applied Indian preference to units that had never been a part of the BIA." Id. at A-32. "[D]espite the fact that in 1979 numerous non-BIA positions in the Interior Department . . . were currently 'providing services to Indians,'" only one Interior Department unit outside the BIA qualified for the preference. See id. at A-35 ("The Department has been sparing in its application of Indian preference outside the BIA, largely limiting its application to the Ft. Simcoe Job Conservation Corps prior to 1979.").

For a period in the late 1970s, the then-Solicitor of the Department of Interior theorized that the Indian preference had broader application. See Opinion of Solicitor Leo Krulitz (June 13, 1979), Plaintiff's Appendix at A-12 to A-20 ("Krulitz Opinion"). However, the "Indian preference of the scope set forth in the Krulitz Opinion ha[d] never been implemented in th[e] Department either before or since." Tarr Opinion at A-37. Plaintiff has not identified, and cannot identify, a single instance to the contrary. See Plt. Mem. at 30-31 (discussing claim that "the agency's interpretation of the statutes has

been inconsistent"). Since 1988, the Tarr Opinion has consistently been regarded as stating the Department's position on the scope of the preference. See Memorandum to Special Trustee from Deputy Solicitor Cohen (Apr. 10, 1996) ("The legal position of the Department of the Interior on the scope of the preference is set forth in a June 10, 1988, opinion by then Solicitor Ralph Tarr"), at A-39; Memorandum to Sandra Streets from Hugo Teufel III (May 5, 2003) (same), at A-44; Memorandum to Counselor to the Assistant Secretary from Hugo Teufel III (Oct. 23, 2003) (same), at A-49.

As further evidence that the Secretary's interpretation has been consistent, in proposed regulations and final rules pursuant to the Indian Preference Act and published in the Federal Register, the following description of the scope of the preference has consistently appeared: "The preference conferred in 25 U.S.C.[§] 472 must be applied in the filling of every vacant position within the Bureau of Indian Affairs. Freeman v. Morton, 499 F.2d 494 [should be 492] (D.C. Cir. 1974)." Preference in Employment, 49 Fed. Reg. 39157 (Oct. 4, 1984) (emphasis added);[22] Preference in Employment, 51 Fed. Reg. 32631 (Sept. 15, 1986) (same); Preference in Employment, 54 Fed. Reg. 282 (Jan. 5, 1989); Preference in Employment, 59 Fed. Reg. 47046 (Sept. 13, 1993); Preference in Employment, 61 Fed. Reg. 36671 (July 12, 1996). Thus, the Court should conclude that the consistency of the Secretary's practices supports affording deference to the interpretation challenged here.

Even if the Court concludes that the Department has changed course, the Court should still uphold that construction of the statute. "[A]n agency may depart from its past interpretation so long as it provides a reasoned basis for the change." National Classification Comm. v. United States, 22 F.3d

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[22] Notably, the Department did not cite the Leo Krulitz Opinion (June 13, 1979) in explaining the scope of the preference.

1174, 1177 (D.C. Cir. 1994). The Tarr Opinion, which sets forth the Secretary's current interpretation of the preference, provides a reasoned basis for the application of the preference to the BIA and any unit that has been transferred intact out of the BIA. See Tarr Opinion at A-28 (thorough analysis concluding that term "Indian Office" has been used "coextensively with, and no broader than the term 'Bureau of Indian Affairs'"); id. at A-30 (concluding that the more the preference moves beyond its "unique context" – the BIA – "the more it verges on invidious Equal Protection Clause and Federal civil rights statutes"). Accordingly, even if it were seen as a new position, the Secretary's interpretation of the preference law should be upheld.

II. THE SECRETARY HAS NOT VIOLATED RULEMAKING REQUIREMENTS

Plaintiff contends that the Secretary implemented a proposed rule limiting the scope of the Indian preference provision without finalizing the rule in accordance with the Administrative Procedure Act ("APA"), 5 U.S.C. § 553. That argument is unfounded for two reasons.

First, a claim based on the government's failure to act, such as plaintiff's contention that the Interior Department should have finalized its proposed rule, "can proceed only where a plaintiff asserts that an agency failed to take a discrete agency action that it is required to take." Norton v. Southern Utah Wilderness Alliance, 124 S. Ct. 2373, 2379 (2004) (emphasis in original). This limitation to "required agency action rules out judicial direction of even discrete agency action that is not demanded by law." Id. at 2380 (emphasis in original). The Secretary was under no legal obligation to issue a regulation interpreting the preference statute. Moreover, since well before the publication of the proposed rule cited by plaintiff, the Department has had regulations that are entirely consistent with the construction of the preference statute challenged here. See, e.g., 42 Fed. Reg. 27609 (May 31, 1977);

43 Fed. Reg. 2393 (Jan. 17, 1978) (currently codified at 25 C.F.R. § 5.1). Therefore, plaintiff's APA claim should be dismissed.

Second, even if the Secretary had implemented a new interpretation of the scope of the Indian preference, that interpretation would be exempt from the rulemaking provisions of the APA on two accounts.[23] Those provisions expressly provide that "[e]xcept when notice or hearing is required by statute, this subsection does not apply [] to interpretative rules." 5 U.S.C. § 553(b)(3)(A); see also Lincoln v. Vigil, 508 U.S. 182, 196 (1993) ("The notice-and-comment requirements apply [] only to so-called 'legislative' or 'substantive' rules; they do not apply to 'interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice."). "[A]n interpretative rule simply states what the administrative agency thinks the statute means, and only 'reminds' affected parties of existing duties." General Motors Corp. v. Ruckelshaus, 742 F.2d 1561, 1565 (D.C. Cir. 1984). Any interpretation of the scope of the Indian preference would do nothing more than to clarify a policy the Secretary has long held. Consequently, if such an interpretation were even considered a rule, it would be an interpretative rule and therefore exempt from the APA's notice-and-comment requirements.

Alternatively, the Secretary's interpretation is exempt from those requirements because it involves "a matter relating to agency management or personnel." 5 U.S.C. § 553(a)(2). The Secretary invoked this very provision in the past in connection with the scope of the preference. See Preference in Employment, 49 Fed. Reg. 39157 (Oct. 4, 1984) (extending application of the preference to persons

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[23] Although the court in Albuquerque Indian Rights suggested that the Secretary "may wish to conduct a rulemaking process" as to the scope of the preference, the court "recognize[d] that this is the Department's choice and not ours." Albuquerque Indian Rights, 930 F.2d at 58.

of the Osage Tribe of Oklahoma without notice and comment and citing "5 U.S.C. 553(a)(2), because this final rule applies to the Bureau of Indian Affairs' personnel management practices"); Preference in Employment, 51 Fed. Reg. 32631 (Sept. 15, 1986) (same); Preference in Employment, 54 Fed. Reg. 282 (Jan. 5, 1989) (same). Therefore, for this independent reason, the Secretary was not required to engage in formal rulemaking as to the interpretation at issue here. Accordingly, plaintiff's claim that the Secretary violated the rulemaking requirements of the APA has no merit and should be dismissed.

CONCLUSION

For the reasons set forth above, the Court should deny plaintiff's Motion for Summary Judgment, and grant defendant's Motion to Dismiss or, in the Alternative, for Summary Judgment.

Dated: December 17, 2004

Respectfully submitted,

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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,	)	Civil Action No. 1:04CV01215 (RWR)
Defendant.	)	

DEFENDANT'S RESPONSE TO PLAINTIFF'S STATEMENT OF MATERIAL FACTS TO WHICH THERE IS NO GENUINE ISSUE

Defendant hereby responds to plaintiff's Statement of Material Facts as to Which There Is No Genuine Issue ("Statement") paragraph by paragraph, using the paragraph numbers in plaintiff's Statement, as follows:

1. For purposes of plaintiff's Motion for Summary Judgment, defendant does not contest the facts stated in this paragraph, but does not concede either the facts or their materiality for any other purpose.

2. For purposes of plaintiff's Motion for Summary Judgment, defendant does not contest the facts stated in this paragraph, but does not concede either the facts or their materiality for any other purpose.

3. For purposes of plaintiff's Motion for Summary Judgment, defendant does not contest the facts stated in this paragraph, but does not concede either the facts or their materiality for any other

purpose.

4. For purposes of plaintiff's Motion for Summary Judgment, defendant does not contest the facts stated in this paragraph, but does not concede either the facts or their materiality for any other purpose.

5. This paragraph in plaintiff's Statement refers to a notification dated June 2, 3003. Defendant assumes that this reference is to correspondence dated June 2, 2003, attached as Exhibit A to the Declaration of Patrick J. Carr filed by plaintiff. In response to the substance of this paragraph, which purports to characterize Exhibit A, defendant respectfully refers the Court to Exhibit A for a full and fair statement thereof, and further refers the Court to the Memorandum dated May 5, 2003, included in plaintiff's Appendix of Administrative Decisions beginning at page A-44, which provides context for Exhibit A. Those documents establish that, contrary to the implication of this paragraph in plaintiff's Statement, the position taken by the Department of the Interior in Exhibit A did not represent the adoption of a new policy with regard to the scope of the employment preference at issue in this action.

6. For purposes of plaintiff's Motion for Summary Judgment, defendant does not contest the facts stated in this paragraph, but does not concede either the facts or their materiality for any other purpose.

7. For purposes of plaintiff's Motion for Summary Judgment, defendant does not contest the facts stated in this paragraph, but does not concede either the facts or their materiality for any other purpose.

8. For purposes of plaintiff's Motion for Summary Judgment, defendant does not contest the facts stated in this paragraph, but does not concede either the facts or their materiality for any other

purpose.

9. Plaintiff's statement in this paragraph that certain non-Indians have been selected for promotion "in lieu of" certain Indians is not a statement of fact, but constitutes a conclusion of law as to which defendant takes issue for the reasons set forth in the Memorandum filed in support of her Motion to Dismiss or, in the Alternative, for Summary Judgment. For purposes of plaintiff's Motion for Summary Judgment, defendant does not contest the facts stated in the balance of this paragraph, but does not concede either those facts or their materiality for any other purpose.

10. For purposes of plaintiff's Motion for Summary Judgment, defendant does not contest the facts stated in this paragraph, but does not concede either the facts or their materiality for any other purpose.

11. For purposes of plaintiff's Motion for Summary Judgment, defendant does not contest the facts stated in this paragraph, but does not concede either the facts or their materiality for any other purpose.

12. The statements in this paragraph are not statements of fact, but constitute conclusions of law as to which defendant takes issue for the reasons set forth in the Memorandum filed in support of her Motion to Dismiss or, in the Alternative, for Summary Judgment.

13. The statements in this paragraph are immaterial, constitute conclusions of law, or both. Defendant contests their materiality and/or takes issue with their legal validity for the reasons set forth in the Memorandum filed in support of her Motion to Dismiss or, in the Alternative, for Summary Judgment.

14. The statements in this paragraph are immaterial, constitute conclusions of law, or both.

Defendant contests their materiality and/or takes issue with their legal validity for the reasons set forth in the Memorandum filed in support of her Motion to Dismiss or, in the Alternative, for Summary Judgment.

15. The statements in this paragraph are immaterial, as set forth in the Memorandum filed in support of her Motion to Dismiss or, in the Alternative, for Summary Judgment.

16. The statements in this paragraph are immaterial, as set forth in the Memorandum filed in support of her Motion to Dismiss or, in the Alternative, for Summary Judgment.

Defendant does not concede either the facts or the materiality of any statements of fact made in plaintiff's Statement of Material Facts as to Which There Is No Genuine Issue to which defendant has not responded above. Any concession of fact that is deemed to have been made implicitly above is not made for any purpose other than plaintiff's Motion for Summary Judgment.

Dated: December 17, 2004

Respectfully submitted,

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Assistant Attorney General

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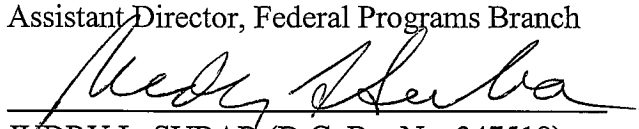

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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.	Civil Action No. 1:04CV01215 (RWR)

DEFENDANT'S STATEMENT OF MATERIAL FACTS NOT IN ISSUE

In accordance with Rule 7.1(h) of the Local Rules of this Court, defendant provides the Court with this statement of facts material to defendant's Motion for Summary Judgment that are not in dispute.

1. The Bureau of Indian Affairs ("BIA") was created by administrative action on March 11, 1824. Compendium of Legislative and Administrative Materials ("Compendium") at 135.

2. Between 1824 and 1947, the BIA and its subdivisions were known popularly by a number of names. One term used to refer to the BIA during that period was the "Indian Office." Compendium, passim; Exhibits 1-7, attached to Declaration of Sally Ann Cummings ("Cummings Dec.").

3. In 1988, the Solicitor of the United States Department of the Interior issued an opinion ("Tarr Opinion") concluding that the Indian employment preference to which reference is made in section 12 of the Indian Reorganization Act of 1934, 25 U.S.C. § 472, applies only within the Bureau of Indian Affairs. Plaintiff's Appendix of Administrative Decisions at A-27. In a memorandum dated

April 10, 1996, the Deputy Solicitor of the United States Department of the Interior issued a memorandum concluding that the application of the Indian employment preference to the BIA included its application to organizational units transferred intact from the BIA to other locations in the Department. Plaintiff's Appendix of Administrative Decisions at A-39.

4. The Interior Department has historically applied the preference statute in a manner consistent with the Tarr Opinion. Id. at A-37.

5. A contrary view expressed by Solicitor of the Interior Leo Krulitz in 1979 was an anomaly, and was not followed. Id.

6. The scope of the Indian employment preference, as articulated by the Department of the Interior in the Tarr Opinion, and as applied consistently with that articulation, is consistent with the meaning of the legislative language requiring application of the preference. Compendium,passim; Exhibits 1-7 attached to Cummings Dec.

Dated: December 17, 2004

Respectfully submitted,

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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.	Civil Action No. 1:04CV01215 (RWR)

ORDER

Upon consideration of plaintiff's Motion for Summary Judgment and defendants' Motion to Dismiss, or in the Alternative, for Summary Judgment, it is hereby

ORDERED that plaintiff's Motion for Summary Judgment is DENIED, and it is further

ORDERED that defendant's Motion to Dismiss, or in the Alternative, for Summary Judgment, is GRANTED, and it is further

ORDERED that this action is dismissed in its entirety with prejudice.

Dated:

UNITED STATES DISTRICT JUDGE