IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

INDIAN EDUCATORS FEDERATION (Local 4524 of the AMERICAN FEDERATION OF TEACHERS, AFL-CIO),	:	
plaintiff,	:	
v.	:	
KIRK KEMPTHORNE, SECRETARY, UNITED STATES DEPARTMENT OF THE INTERIOR,	:	**Case No. 1:04-cv-1215 (TFH)**
defendant.	:	

REPLY TO DEFENDANT'S OPPOSITION TO
PLAINTIFF'S MOTION FOR PERMANENT INJUNCTION

The instant dispute over the scope of the requested injunction is the first time in the seventy year history of the statute that the Department of the Interior has taken the position that Section 12 of the Indian Reorganization Act "contemplate[s] a position-by-position . . . rather than office-by-office" analysis of whether Indian preference should apply. Def. Memo in Opp. at 7. As the defendant notes, Interior regulations apply Indian preference to every position in the Bureau of Indian Affairs. 25 C.F.R. § 5.1. If the Court accepts the defendant's "position-by-position" interpretation of the scope of Indian preference, there will be no legal basis on which the Department can continue to apply this regulation. The BIA's practice of applying preference to every position will be subject to challenge by disappointed non-Indian applicants who are passed over for any

position which is arguably not "primarily and directly" related to providing services to Indians. The Interior Department will use the Court's decision as a basis for rescinding 5 C.F.R. § 5.1. The net result of this lawsuit will be a major contraction, rather than a modest expansion, of the application of Indian preference. The retrenchment of Indian preference caused by Solicitor Tarr's 1988 opinion will pale in comparison.

The language of the 1979 amendment states that Indian preference applies to the BIA "and all other *organizational units* in the Department of Interior directly and primarily related to providing services to Indians," as opposed to individual positions. 25 U.S.C. § 472a(e) (emphasis added). The defendant incorrectly claims that the language which follows - "and in which positions are filled in accordance with the Indian preference laws" - indicates that preference applies only to positions. But that reads the first clause out of the statute. And if AS-IA and OST are not among the other "organizational units" outside the BIA where Indian preference applies, which ones are?

Further, Section 12 of the IRA does not limit the application of Indian preference solely to those positions that "primarily" and/or "directly" provide services to Indians. As Solicitor Krulitz noted, Section 12 is "less stringent than 'directly and primarily related to providing services to the providing of services to Indians.' The standard contained in § 12 merely requires that the positions be those which are 'in the administration of functions or services affecting any Indian tribe.'" Opinion of the Solicitor (June 13, 1979) at 2 (reproduced at page A-13 of the Appendix to the Plaintiff's Motion for Summary Judgment). Attached to the plaintiff's opening memorandum was a letter from the Interior

Department's Solicitors Office which describes the functions of the Office of the Assistant Secretary for Indian Affairs. Although the defendant claims that the letter is irrelevant because it "does not discuss the Indian employment preference" (Def. Memo in Opp. at 10), the defendant does not dispute that the letter demonstrates that the positions in the Office of AS-IA are all responsible for "the administration of functions or services affecting any Indian tribe."

This Court retains "substantial latitude, much more so than in the typical agency case, to fashion an equitable remedy because the lawsuit . . . is an Indian case." *Cobell v. Norton*, 391 F.3d 251, 257 (D.C. Cir. 2004). An injunction remains necessary in this case because individual employees have no judicial remedy under the Indian preference statute or the Civil Service Reform Act in the event of a continuing or future violation. The defendant suggests that employees might avail themselves of a remedy under the Administrative Procedures Act. Def. Memo in Opp. at 4. However, the injury would still be irreparable because back pay would be unavailable in such an action. *Beams v. Norton*, 327 F.Supp.2d 1323 (D. Kan. 2004), *aff'd* 141 Fed. Appx. 769 (10th Cir. Sept. 1, 2005), *cert. denied*, 546 U.S. 1215 (2006). The defendant could continue to violate the Indian preference statute with impunity, perhaps based on yet another novel interpretation of the statute that undermines its viability. But why should injunctive relief wait until some future APA lawsuit? The affected employees have already collectively brought such an action herein. And while the injunction would not be enforceable by individual

employees, it would be enforceable in contempt proceedings by the plaintiff Indian Educators Federation.

The action which the plaintiff seeks to enjoin is not transient or unlikely to reoccur - particularly as the defendant now seeks to weasel out of its loss on the merits herein by proposing to conduct a "position-by-position" analysis of whether preference should apply to particular positions. In *Albuquerque Indian Rights v. Lujan*, 930 F.2d 49, 58 (D.C. Cir. 1991), the D.C. Circuit found that Solicitor Tarr's 1988 reinterpretation of the statute "represents a dramatic break with past interpretations of the preference provision" and was "especially problematic." However, that reinterpretation, which eventually led to the filing of this lawsuit, is now 20 years old, and there is no reason to believe that it will lightly be abandoned. The Court of Appeals advised the defendant to revisit Solicitor Tarr's opinion or to subject its reinterpretation of the statute to notice and comment. Although the defendant published new proposed regulations limiting the scope of preference in 1996, it abandoned the notice and comment process and never issued a final rule that could have been subject to review. In short, the Interior Department has sought to avoid any accountability for how it interprets and apply Indian preference, and has ignored the Court of Appeals' strong suggestion in *Albuquerque Indian Rights* that its interpretation was illegal. An injunction is now necessary to ensure compliance with the statute.

An injunction is in the public interest because it will further self-governance by three million native Americans. In *Morton v. Mancari*, 417 U.S. 535 (1974), the Supreme

Court noted that Section 12 was "designed to further the cause of Indian self-governance." 417 U.S. at 553-54 and n. 24. "The overriding purpose of [the Indian Reorganization] Act was to establish a machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically." 417 U.S. at 542. An injunction would further the national policy of turning over the management of Indian affairs to Indians embodied in other statutes. The Congressional Declaration of Policy contained in the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450a, states:

> (a) The Congress hereby recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination by *assuring maximum Indian participation in the direction of* educational as well as *other Federal services to Indian communities* so as to render such services more responsive to the needs and desires of those communities.
>
> (b) The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy which will permit *an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services . . .*

(emphasis added). "One of the purposes of the Indian Self-Determination Act is to develop leadership skills in Indians." *Alaska Chapter Associated General Contractors, Inc. v. Pierce*, 694 F.2d 1162, 1170 (9th Cir. 1982).

An injunction requiring all positions in the Office of Special Trustee be filled through Indian preference will effectuate the purposes for which the agency was created.

"The purpose of [the 1994 Trust Reform Act] is to bring about better accountability and management of Indian trust funds by the Department of the Interior and *to provide an opportunity for Indian tribes to directly manage their trust funds."* H.R. Report No. 778, 103rd Cong., 2nd Sess. 8 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3467. Title II of the Act authorizes the Secretary to turn over his trust responsibilities to Indian tribes upon their request. Among the factors he must consider before doing so, however, is "[t]he capability and experience of the individuals or institutions that will be managing the trust funds." 25 U.S.C. § 4022(b)(2)(A). Indians must be ensured preference in employment in OST in order to obtain such relevant experience so that the goal of the Act, which is to "give Indian tribal governments greater control over the management of such trust funds," (25 U.S.C. § 4021) can be achieved.

In short, an injunction will protect not only the private rights of the IEF's members who seek employment or promotion within AS-IA or OST, but will also protect the larger political and economic rights of three million American Indians.

For the foregoing reasons, the plaintiff's motion for a permanent injunction should be granted.

Respectfully submitted,

/s/

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