The original documents are located in Box 56, folder "9/24/76 HR5465 Special Retirement Benefits for non-Indian Employees of the Bureau of Indian Affairs and the Indian Health Service (vetoed)" of the White House Records Office: Legislation Case Files at the Gerald R. Ford Presidential Library.

Vetoed
Delivered to
Clerk of House
of Representatives - 5:00 PM
9/24/76

Vetoed 9/24/76

THE WHITE HOUSE

WASHINGTON

ACTION

Last Day: September 24, 1976

September 22, 1976

MEMORANDUM FOR: THE PRESIDENT

FROM: JIM CANNON

SUBJECT: Enrolled Bill H.R. 5465 - Special Retirement Benefits for non-Indian Employees of the Bureau of Indian Affairs and the Indian Health Service

This is to present for your action H.R. 5465, Special Retirement Benefits for non-Indian Employees of the Bureau of Indian Affairs and the Indian Health Service.

Background

The Indian Reorganization Act of 1934 gives preference to Indians in initial appointments to the Bureau of Indian Affairs and the Indian Health Service, and recent Supreme Court and Court of Appeals decisions extend that preferential treatment to transfers, promotions and reassignments within those two agencies.

The primary purpose of H.R. 5465 is to offset the career disadvantages for the non-Indian employees in the Bureau of Indian Affairs and the Indian Health Service. To accomplish this purpose, the bill would provide optional early retirement for those non-Indian employees who have twice been passed over for promotion, transfer, or reassignment as a result of Indian preference.

It is estimated that by 1986, when the special retirement benefit would terminate, approximately 1,484 non-Indian employees in the Bureau of Indian Affairs and 600 in the Indian Health Service would be eligible for early retirement under the enrolled bill. Approximately 2,500 non-Indian employees in the Bureau of Indian Affairs and 3,340 in the Indian Health Service would not qualify, for a variety of reasons.

The Civil Service Commission estimates that the early retirement benefits in H.R. 5465 would increase the unfunded liability of the Civil Service Retirement Fund by $136 million. Added budget outlays are estimated at $2.9 million in fiscal year 1977, rising to $19.9 million in fiscal year 1981.

H.R. 5465 was passed in both Houses by voice vote despite very strong Administration opposition to its preferential benefits. Similar bills were sponsored or co-sponsored in the Senate by Senators Stevens, Domenici, and Montoya, and in the House by Representatives Steed, Runnels, and Pressler.

Additional discussion of the provisions of the enrolled bill is provided in OMB's enrolled bill report at Tab A.

Arguments for Approval

-- Indians regard H.R. 5465 as a step towards Indian self-determination.

-- The new court-legislative policy of absolute preference for Indians warrants liberalized retirement benefits for non-Indian employees.

-- Congress was not convinced that the efforts of the Bureau of Indian Affairs and the Indian Health Service to place affected employees in other jobs were sufficient.

Arguments for Disapproval

-- The non-Indian employees are not in danger of losing their jobs.

-- The retirement system is not an appropriate means of solving a personnel management problem.

-- The annuity formula in the bill is discriminatory, in that it would provide eligible non-Indian employees more liberal benefits than those provided to any other Federal employee.

-- The policy implicit in H.R. 5465 is that of "buying out" those adversely affected by the Indian preference. This could provide an unwanted precedent in the sensitive area of equal opportunity.

Agency Recommendations

OMB, the Department of the Interior, the Department of Health, Education and Welfare and the Civil Service Commission recommend disapproval of H.R. 5465.

Staff Recommendations

Brad Patterson (White House liaison with Indians) and Counsel's Office (Kilberg) recommend disapproval of the enrolled bill.

Max Friedersdorf recommends approval of the enrolled bill: "Veto cannot be sustained. In addition, Senator Ted Stevens (R-Alaska) is the prime sponsor of this bill. He strongly recommends it be signed, saying it only affects about 200 employees."

I recommend disapproval because passage would represent a very poor precedent for solving personnel problems (with potential impact on affirmative action efforts) and would provide benefits to a small group of employees which exceed those provided to any other Federal employee.

Decision

Sign H.R. 5465 (Tab B) without issuing a signing statement.

Approve _____

Disapprove H.R. 5465 and sign veto message which has been cleared by the White House Editorial Office (Smith) at Tab C.

Approve _____

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

SEP 19 1976

MEMORANDUM FOR THE PRESIDENT

Subject: Enrolled Bill H.R. 5465 - Special retirement benefits for non-Indian employees of the Bureau of Indian Affairs and the Indian Health Service
Sponsor - Rep. Henderson (D) North Carolina

Last Day for Action

September 24, 1976 - Friday

Agency Recommendations

Office of Management and Budget	Disapproval	(Veto message attached)
Department of the Interior	Disapproval	(Veto message attached)
Department of Health, Education, and Welfare	Disapproval	(Veto message attached)
Civil Service Commission	Disapproval	(Veto messages attached)

Discussion

Under the Indian Reorganization Act of 1934, American Indians have long been given preference in initial appointment to jobs in BIA and IHS. As a result of decisions in 1974 by the U.S. Supreme Court and the Court of Appeals for the District of Columbia, preference under the 1934 Act is now also applied in transfers, promotions, and reassignments, where at least minimally qualified Indian employees are applicants for consideration. The effect of the new policy mandated by the courts is to somewhat limit career opportunities in BIA and IHS for non-Indian employees.

The primary purpose of H.R. 5465 is to offset the career disadvantages for the non-Indian employees of these two agencies. To accomplish this purpose, the bill would provide optional early retirement for those non-Indian employees who have twice been passed over for promotion, transfer, or reassignment as a result of Indian preference. These employees could exercise this option up to December 31, 1985, (a) at any age after 25 years of any type of Federal service, or (b) at age 50 with 20 years of such service, provided they have been continuously employed in BIA or IHS since the date

of the 1974 Supreme Court decision and they are not eligible for regular retirement.

The annuities of such employees would be computed under a more liberal formula than that provided most other Federal employees. Federal employees generally may retire voluntarily at age 55 with 30 years of service, or at age 60 with 20 years, with annuities computed at 1 1/2% of "high-3" average salary for the first 5 years, at 1 3/4% for the next 5 years, with a maximum 2% multiplier used for years over 10. Employees involuntarily separated with 25 years of service at any age, or with 20 years of service at age 50, may retire with annuities computed under the regular formula, but reduced by 2% a year for each year under age 55.

Under H.R. 5465, annuities of eligible non-Indian employees would be computed at 2 1/2% of their "high-3" average salary for the first 20 years of service, and at 2% for years over 20, without the customary reduction for retiring before age 55. Non-Indian employees already retired since the 1974 decision would be entitled, on the date of enactment of the bill, to have their annuities recomputed under the more favorable formula.

It is estimated that by 1986, when the special retirement benefit would terminate, approximately 1,484 non-Indian employees in BIA and 600 in IHS would be eligible for early retirement under the enrolled bill. Approximately 2,500 non-Indian employees in BIA and 3,340 in IHS would not qualify, for a variety of reasons.

The Civil Service Commission (CSC) estimates that the early retirement benefits in H.R. 5465 would increase the unfunded liability of the Civil Service Retirement Fund by $136 million, which would have to be amortized in 30 equal payments of approximately $8.4 million. Added budget outlays are estimated at $2.9 million in fiscal year 1977, rising to $19.9 million in fiscal year 1981.

H.R. 5465 was passed in both Houses by voice vote despite very strong Administration opposition to its preferential benefits. As enrolled, it is a modified version of bills originally sponsored and supported in both the Senate and House by Members with strong Indian constituencies. Bills were sponsored or co-sponsored in the Senate by Senators Stevens, Domenici, and Montoya, and in the House by Representatives Steed, Runnels, and Pressler.

Arguments for approval

1. The bill is regarded by Indian employees as a step toward fuller realization of Indian self-determination because it would increase the number of jobs available to Indians in the Indian service agencies, as non-Indians are given an incentive to leave. In view of the Indian preference situation, the Indian employees, as quoted in the Senate report, believe it would be a disservice to Indians and non-Indians alike, for Indian programs to be administered by non-Indians who may be embittered by an employment policy that blocks normal avenues of career progression. The bill was endorsed in testimony by the National Congress of American Indians and by individual Indian and non-Indian employees who would benefit from it.

2. Proponents argue that liberalized retirement benefits for non-Indian employees are warranted by their unique position as a result of the new policy of absolute Indian preference. Such benefits are necessary to induce non-Indian employees to retire early and to redress the economic burden they incur as a result.

3. The House Committee report states that the central issue in this legislation is the Federal Government's "good-faith treatment" of this group of adversely affected employees "who were given assurance at the time of hire that they would be able to compete equally with Indians and all other groups of employees for career advancement."

4. It can be argued that historic policy towards Indians in this country distinguishes the case of non-Indian employees from any other group; thus, this legislation need not become a precedent for other groups of Federal employees adversely affected by a change in Federal personnel policy. On this point, the House committee report states that "no other group of Federal employees is subject to such legally sanctioned discrimination." The contention is that the "dramatic" effect of the Supreme Court decision that recognizes the obligation to Indians as supervening the requirements of equal opportunity in promotion, transfer, and other personnel actions, comes after years of dedicated service by many non-Indian employees who do not question the propriety of Indian preference, and who have devoted their lives and careers to Indians.

5. The Committee reports recognize that both agencies are making special efforts to place the affected employees in other jobs, but the members were not convinced that these efforts are sufficient.

Arguments against approval

1. The retirement system is not an appropriate means of solving what is a personnel management problem. Not only would the lack of long-term promotion ladders for non-Indian employees become a charge against the retirement fund, borne by all participants, but the proposed highly preferential annuity formula might well encourage employees to continue working in BIA and IHS in order to enhance their retirement annuities between now and 1986.

2. Interior, HEW, and CSC all believe that the present situation facing the non-Indian employees does not justify the liberalized retirement benefits in the enrolled bill. These employees are not in danger of losing their jobs. Both Departments have special non-Indian placement programs available to find suitable jobs elsewhere in the Departments for those in BIA and IHS who are adversely affected by Indian preference. CSC is also offering counseling and placement assistance. It is not unlikely, however, that many non-Indian employees have resisted these outplacement efforts in anticipation of enactment of preferential retirement benefit legislation, which was first introduced in the 93rd Congress.

3. The annuity formula for eligible non-Indians under the bill is discriminatory in that it would provide more liberal benefits than those provided to any other group of Federal employees. These benefits would be even more favorable than those provided law enforcement and firefighter employees, who have to complete more than 20 years of work specifically in those professions before they are entitled to the same formula. Under H.R. 5465, non-Indian employees need complete only 11 years' Indian agency service (only 2 if retired prior to enactment but after the 1974 Supreme Court decision), a period a good deal less than a full career.

4. The bill's preferential annuity formula would also have inequitable effects within the Indian agencies themselves. On the basis that their long-term opportunity for advancement may be limited in BIA and IHS, eligible non-Indian employees would receive larger annuities than those Indian and non-Indian employees of BIA and IHS who meet the same age and service conditions but who actually lose their jobs as a result of reductions in force, and have to retire on the less liberal involuntary separation formula.

A further inequity would be produced because non-Indian employees in technical and managerial positions for which qualified Indians are not available would not be displaced by Indian preference and would therefore not be able to take advantage of the enrolled bill's special retirement benefits. For example, despite the most diligent recruitment efforts, there are inadequate numbers of Indian candidates for positions in such career fields as medicine and nursing, teaching, social work, forestry, engineering, personnel and financial management. Non-Indian employees in such positions would be able to complete full careers with BIA and IHS and yet would receive proportionately smaller annuities for longer service than would non-Indians eligible under the bill.

5. The policy implicit in H.R. 5465 is that of "buying out" those adversely affected by Indian preference. Such an approach to the sensitive issue of equal opportunity would appear to be undesirable as a matter of public policy, and can be expected to lead to demands by other groups of employees for similar windfall benefits whenever their promotional opportunities are limited for whatever reason. Support of this bill by Indians and non-Indian employees should not obscure the fact that such a policy could be extremely divisive and controversial if others claiming discrimination as a result of statutory and judicial recognition of special obligations towards veterans, minorities, women, etc., were to demand special treatment in the form of compensation.

Recommendations

All the concerned agencies--Interior, HEW, and CSC--recommend that you veto H.R. 5465, and have attached veto messages to their views letters for your consideration.

In addition to the points noted above, CSC states that there would be great difficulty in administering in a reasonable and fair way the requirement that an employee demonstrate that he or she has twice been passed over for promotion, transfer, or reassignment. Making this determination with any degree of accuracy for the already-retired, covered retroactively by the bill, would be impossible in CSC's view. CSC concludes that adequate justification does not exist for the Government to assume the cost of the benefits provided in H.R. 5465.

HEW, in summary, believes that "the bill would impose an excessive financial burden on the Federal Government in relation to a personnel problem with which we are able to deal without the expenditure of additional funds."

Interior concludes that "H.R. 5465 does not provide a viable solution to the problems created by Indian preference, nor an acceptable alternative to the Departmental Career Placement Assistance Program, and its potential effect could be an inequitable one."

On balance, we believe the arguments for veto outweigh those for approval. We have prepared a draft veto message, which is a revision and consolidation of the messages proposed by the agencies.

James T. Lynn
Director

Enclosures

UNITED STATES CIVIL SERVICE COMMISSION
WASHINGTON, D.C. 20415

CHAIRMAN

September 15, 1976

Honorable James T. Lynn
Director, Office of Management and Budget
Executive Office of the President
Washington, D. C. 20503

Attention: Assistant Director for
Legislative Reference

Dear Mr. Lynn:

This is in reply to your request for the Commission's views on enrolled bill H.R. 5465, "To provide additional retirement benefits for certain employees of the Bureau of Indian Affairs and the Indian Health Service who are not entitled to Indian preference, to provide greater opportunity for advancement and employment of Indians, and for other purposes."

H.R. 5465, if enacted, would provide optional retirement after 25 years of service (not necessarily with BIA or IHS) or after attainment of age 50 and completion of 20 years of service for those non-Indian employees of BIA and IHS who have been continuously employed by that agency since June 17, 1974, who will complete such years of service before December 31, 1985, and who have been passed over on at least two occasions for promotion, transfer, or reassignment to a position representing career advancement because of the granting of preference to Indians in promotions or other personnel actions. The bill provides that the annuities of these employees will be computed at 2 1/2 percent of average pay multiplied by the first 20 years of total service plus 2 percent of average pay multiplied by all years of service in excess of 20 years (with no reduction for age.)

In other words, those qualified non-Indian employees (who in certain cases may still be in their early forties) would have the opportunity to retire with an annuity equal to that of most Federal employees retiring at age 60 or over with approximately 27 years of service.

The Commission recommends that the President veto H.R. 5465.

The Commission does not believe the present situation justifies granting such liberalized retirement benefits to non-Indian employees of BIA and IHS. The special 2 1/2-2% computation formula would, in effect, be a reward for non-Indians who elect to remain employed by the IHS or BIA until December 31, 1985 --- the cutoff date in the bill. Enactment, in our view, would not encourage BIA and IHS non-Indian employees to retire earlier than they otherwise would but would, instead, encourage them to continue working to enhance their retirement annuity computation at such time as they voluntarily decide to retire.

These individuals are not in any danger of losing their jobs. While promotional opportunities are somewhat restricted, they are still available. In a recent check with BIA and IHS, both agencies stated that qualified non-Indians are still being hired and promoted to jobs in occupations where no qualified Indians apply. In addition, non-Indians have the option of requesting a change to different positions either within their respective agencies or to other agencies. In fact, both agencies have set up outplacement assistance plans to help non-Indians who want other jobs. The Commission's area offices have also offered counseling and placement assistance to non-Indians when appropriate. The Commission is very concerned that this type of legislation would set a precedent for other employees who find their promotional opportunities limited for whatever reasons to request similar liberalized retirements.

We are particularly concerned with proposed subsection (g)(5) of section 8336 of title 5. This subsection provides for a non-Indian employee to be eligible for an annuity if he demonstrates "to the satisfaction of the Commission that he has been passed over on at least two occasions for promotion, transfer, or reassignment to a position representing career advancement because of section 12 of the Act of June 18, 1934 (48 Stat. 986) or any other provision of law granting a preference to Indians in promotions and other personnel actions." This criterion is so vague that it would be extremely difficult to administer in a reasonable and fair way. For any promotion action more candidates are considered than could possibly be selected. Normally three to five eligibles are referred to the selecting official under competitive procedures. In a case where a minimally qualified Indian is selected, it is totally inaccurate to say the remaining candidates were "passed over" since only one vacancy existed. The provisions of this subsection would encourage non-Indians to apply for vacancies for which they are minimally qualified and claim they were "passed over" so they would be eligible for liberal retirement benefits. Such a claim could not be substantiated--the most any eligible could prove is that he was one of the competitive eligibles considered for a vacancy. In addition, it would be difficult to determine who had been "passed over on at least two occasions for promotion, transfer, or reassignment to a position representing career advancement..." (Transfers are made only between Federal agencies, not

within an agency, so this appears to be a misnomer.) As far as reassignments within an agency, many of these are at the discretion of management and do not require use of internal competitive promotion procedures. Reassignments do not necessarily lead to promotions, but might enhance an individual's chance for promotion at a later date.

The bill also provides for the liberalized retirements to be available for qualified non-Indians on a retroactive as well as a prospective basis. We see no way this could be applied fairly in a retroactive way. Since Indian preference has not been a discretionary matter but a mandatory requirement, the Indian agencies have not ranked non-Indians if Indians appeared on a promotion certificate. It would be impossible to reconstruct previously issued certificates with any degree of accuracy. Further, we believe that if a liberal view of "passed over" were adopted for actions from June 17, 1974, through October 1, 1976, it would be inconsistent to prospectively require a more restrictive approach for the period from October 1, 1976, through December 31, 1985.

If H.R. 5465 is enacted, we estimate that the unfunded liability of the Civil Service Retirement System would be increased by approximately $136 million which would be amortized in 30 equal annual installments of $8.4 million.

To summarize, in addition to the administrative difficulties involved, H.R. 5465, would offer windfall benefits to a select group of non-Indian employees of BIA and IHS whose promotional opportunities are somewhat limited but who are in no danger of losing their jobs. Enactment of such windfall benefits can be expected to lead to demands by other groups of employees in other agencies---for extension of similar benefits to themselves---whenever their promotional opportunities are limited for whatever reason. Adequate justification simply does not exist for the Government to assume the cost of extending such benefits.

For all of the above reasons, the Commission strongly recommends that the President veto the enrolled enactment.

By direction of the Commission.

Sincerely yours,

Robert Hampton

Chairman

TO THE HOUSE OF REPRESENTATIVES

I am returning without my approval, H.R. 5465, a bill which would liberalize retirement benefits for certain employees of the Bureau of Indian Affairs and the Indian Health Service.

The employees who would be affected by the bill are not in danger of losing their jobs. While their promotional opportunities may be somewhat limited, they have not been limited to an extent which would justify the liberalized retirement benefits proposed by H.R. 5465. The average Federal employee would be required to work approximately 27 years and attain age 60 to be entitled to retirement benefits comparable to those proposed by H.R. 5465 after only 20 years of service and attainment of age 50.

In addition, affected persons have the option of requesting a change to different positions either within their respective agencies, or to other agencies. I see no justification for the Government to assume the cost of providing, for this select group of employees, retirement benefits which are excessively more liberal than those available to Federal employees generally.

Accordingly, I am unable to approve H.R. 5465.

The White House

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

SEP 16 1976

Dear Mr. Lynn:

This responds to your request for the views of this Department on enrolled bill H.R. 5465, "To provide additional retirement benefits for certain employees of the Bureau of Indian Affairs and the Indian Health Service who are not entitled to Indian preference, to provide greater opportunity for advancement and employment of Indians, and for other purposes."

We recommend that the President veto the enrolled bill.

Enrolled bill H.R. 5465, concerns the situation of those civil service employees of the Bureau of Indian Affairs and Indian Health Service who are not eligible for "Indian preference" in promotions, lateral transfers, and reassignments within those agencies. The enrolled bill proposes relief by authorizing special treatment designed to encourage non-Indian preference employees to leave the BIA and to aid in their departure.

Under H.R. 5465, a non-Indian preference employee of the BIA or IHS separated from the service after June 17, 1974, is entitled to retire on an immediate annuity at any time until December 31, 1985, if he: (1) has completed 25 years of service at any age or 20 years of service at age 50; (2) has been continuously employed with the BIA or IHS since June 17, 1974; (3) is not otherwise entitled to full retirement benefits; and (4) can demonstrate to the satisfaction of the U.S. Civil Service Commission that he has been passed over at least twice for promotion, transfer, or reassignment to a position representing career advancement because of Indian preference.

An employee who meets these requirements is entitled to an annuity computed at 2.5% of his average pay for the first 20 years of service plus 2% of his average pay for all service thereafter. No provision is made for reducing the annuity of an employee if he is under age 55 at the time of retirement, a requirement of the present early retirement law.

The bill appears to be based upon the theory that the United States Court of Appeals for the District of Columbia and the Supreme Court decisions of 1974, which established absolute Indian preference in BIA and IHS employment, caught these "eligible employees" in mid-career and left them with little opportunity for advancement in those agencies.

The Department presently operates a Departmental Career Placement Assistance Program (DCPA), specifically implemented in response to this situation, and we believe that this available administrative solution is the most viable approach.

Background

The provision upon which the current Indian preference requirements are based is section 12 of the Indian Reorganization Act of 1934 (48 Stat. 986; 25 U.S.C. 472). In addition, the BIA now encourages tribes to contract for control and operation of most BIA reservation level activities and the January 1975 enactment of section 102 of the Indian Self-Determination Act (88 Stat. 2206; 25 U.S.C.S. 450f) directs the contracting of most BIA activities "upon the request of any Indian tribe".

Two recent court decisions have upheld the validity of section 12 of the Indian Reorganization Act, and its application to initial hires, promotions, transfers and reassignments. They were Freeman v. Morton, 499 F. 2d 494 (D.C. Cir. 1974) and Morton v. Mancari (417 U.S. 535, 1974).

Departmental Career Placement Assistance Program

This Department is aware that the Freeman and Mancari decisions and the implementation of the Indian Self-Determination Act will, in many cases, have an adverse impact upon both non-Indian and Indian employees of the BIA. The Department is committeed to providing placement assistance to those Indian and non-Indian employees of the BIA whose jobs or opportunities have been foreclosed by either Indian preference or the Department's Indian Self-Determination policy, and has formulated a program to provide such assistance. This program became fully operational in December, 1975. To date, 147 persons have applied from the BIA, and 10 have been placed.

This program assists BIA employees with placement within other bureaus in the Department, and with locating reassignments in other Federal agencies.

Within the Department, first priority placement assistance is given to competitive career and career-conditional BIA employees when: (1) there is a reduction in force and there are no opportunities

for reassignment within the BIA; (2) an activity or function is being contracted by a tribe and the employee's position is being abolished; and (3) it is imperative to reassign an employee because of certain hardships such as ill-health, or other compelling circumstances. One position offer would be made to employees under the mandatory placement provisions.

Secondary priority placement assistance is afforded to competitive career and career-conditional BIA employees who can demonstrate that they no longer have an opportunity for career advancement in the Bureau because of Indian preference regulations.

The present early retirement law

Under 5 U.S.C. 8336(d)(1) an employee with 20 years of service at age 50 or with 25 years of service at any age is entitled to retire on an immediate annuity if his job is abolished. This provision applies to any eligible employee of the BIA.

Under 5 U.S.C. 8336(d)(2) an employee may voluntarily retire with an immediate annuity if, upon application of his agency to the Civil Service Commission, the Commission determines that such agency has a "major" reduction-in-force (RIF). The agency could then authorize, during a time period prescribed by the Commission, the employee's retirement if he meets the requisite age and service qualifications (same as 8336(d)(1)).

The annuity formula for employees who retire under 5 U.S.C. 8336(d), determined by 5 U.S.C. 8339(h), reduces annuities by 1/6 of 1% for each month the employee is under age 55.

In 1973, 1974 and 1975 the BIA received determinations of major RIFs from the Civil Service Commission under 5 U.S.C. 8336(d)(2). In 1973, 22 BIA employees chose early retirement; 26 employees chose it in 1974; and 167 employees voluntarily retired in 1975. Those who chose to retire were both Indian and non-Indian employees.

The effect of Indian preference and the Indian Self-Determination Act

Not all non-Indian employees of the Bureau of Indian Affairs have been adversely affected by Indian preference as interpreted by recent court decisions. In fact, many non-Indian employees in a number of occupations have had and continue to have remarkably successful careers within the Bureau.

In many career fields (such as Forestry, Engineering, Social Work, Teaching, Personnel Management, and Financial Management) there are not adequate numbers of Indian candidates to fill the large

number of entry level vacancies which exist at any given time in the Bureau. In such fields, Indian preference creates no impediment to non-Indian employees for promotion to the journeyman level of these occupations. This is true, for example, in teaching where 75 percent of vacancies each year are filled by non-Indian employees despite concerted and vigorous attempts to recruit qualified Indians.

However, the effects of Indian preference in some occupations become more apparent above the journeyman levels. Competition for such positions is intense and no Federal employee is offered any guarantee of promotion to supervisory or managerial positions. Nonetheless, even above the journeyman level some promotional opportunities continue to exist for non-Indian employees.

While it is the policy of the Department of the Interior and the Bureau of Indian Affairs to recruit, develop, and utilize qualified Indians to the maximum extent possible, that policy has never precluded the utilization and advancement of non-Indian employees.

The potential impact of H.R. 5465 on the BIA

There are 4,267 permanent employees of the BIA who are without Indian preference, as of June, 1976 rosters. This excludes persons hired or re-hired since June, 1974. 1,375 are now eligible for regular retirement, or will become so before they become eligible for retirement under H.R. 5465. 1,261 do not become eligible for either regular or early retirement by the end of 1985. Therefore, 1,631 are potential beneficiaries under the bill in that they can meet the service and age requirements of H.R. 5465. Their average grade level is 10.5. We would note that this analysis is based on Indian preference as it stands in the current BIA records. However, pursuant to the consent decree signed on April 12, 1976, by the U.S. District Court Judge in Whiting v. United States, Civ. No. 75-3007 (D. S. Dak.), the regulations governing Indian preference are being revised and expanded by the BIA beyond the present 1/4 blood degree requirement to conform to the statutory definition of "Indian" as established by section 19 of the Indian Reorganization Act (25 U.S.C. 479). The general effect will be to increase the number of employees eligible for Indian preference, and we estimate that employees eligible for retirement under H.R. 5465 would be correspondingly decreased by about 9%.

We estimate that the total potential for additional retirement payments amounts to approximately $108 million. This estimate includes the additional retirement payments made under the bill as compared to payments these persons would receive under regular retirement, plus payments lost to the Retirement Fund by these earlier retirements.

The percentage of the salary paid at retirement under H.R. 5465 is 2.5% for the first 20 years and 2% thereafter. The percentage of salary paid at regular retirement is 1.5% for the first five years, 1.75% for the second five years, and 2% thereafter.

Recommendation

This Department is committed to our assistance program which provides placement assistance to those Indian and non-Indian employees of the BIA whose jobs or opportunities have been foreclosed by either Indian preference or the operation of P.L.93-638. In our judgment, our program will meet the objectives of H.R. 5465.

Further, the potential effect of H.R. 5465 is an inequitable one. An Indian preference employee whose job is adversely affected by a reduction-in-force or the implementation of Public Law 93-638 could only qualify for early retirement at the present reduced benefits, while a non-Indian preference employee in the identical situation would take advantage of the liberal benefits under H.R. 5465. Our assistance program was specifically designed to avoid any unequal treatment of this sort.

The present situation in the BIA does not justify the liberal retirement benefits contemplated by the enrolled bill which far surpass the benefits available to other Federal employees, and we cannot support such a provision. BIA employees who wish to retire early under 5 U.S.C. 8336 should be subject to the same annuity formula as all other employees who retire pursuant to that provision.

Further, employees of the BIA who are adversely affected by the contracting requirement of P.L. 93-638 may retire pursuant to the provisions of 5 U.S.C. 8336(d).

As enrolled, H.R. 5465 does not provide a viable solution to the problems created by Indian preference, nor an acceptable alternative to the Departmental Career Placement Assistance Program, and its potential effect could be an inequitable one. Accordingly, we recommend that the President veto the enrolled bill.

Sincerely yours,

Ronald M. Coleman

Assistant Secretary of the Interior

Honorable James T. Lynn
Director, Office of
Management and Budget
Washington, D.C. 20503

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

SEP 17 1976

The Honorable James T. Lynn
Director, Office of Management
and Budget
Washington, D. C. 20503

Dear Mr. Lynn:

This is in response to your request for a report on H.R. 5465, an enrolled bill "To provide additional retirement benefits for certain employees of the Bureau of Indian Affairs and the Indian Health Service who are not entitled to Indian preference, to provide greater opportunity for advancement and employment of Indians, and for other purposes."

We recommend that the President return the enrolled bill to Congress without his approval, because the bill would impose an excessive financial burden on the Federal government in relation to a personnel problem with which we are able to deal without the expenditure of additional funds.

The enrolled bill would provide for payment, under certain conditions, of an immediate annuity to non-Indian employees of the Indian Health Service (IHS) or of the Interior Department's Bureau of Indian Affairs (BIA) who retire before 1986. An employee would be eligible for the special annuity provided by the enrolled bill if he--

(1) has been continuously employed by the IHS or the BIA since June 17, 1974 (when the Supreme Court upheld the legal validity of giving Indian personnel preference in promotion over non-Indians),

(2) is not otherwise entitled to an immediate annuity under the law,

(3) has been twice passed over for promotion or transfer because of a preference given to an Indian, and

(4) has completed 25 years of Federal service or has reached 50 years of age and has completed 20 years of service; the usual requirement for an immediate annuity is 30 years of service after reaching 55 years of age, or 20 years of service after reaching 60 years of age.

The annuity would be computed at the rate of 2-1/2 percent of an employee's average pay for each of the first 20 years of service and 2 percent for each additional year; the usual computation is 1-1/2 percent of an employee's average pay for each of the first 5 years of service, 1-3/4 percent for each of the next 5 years, and 2 percent for each additional year.

The Congressional Budget Office estimates that enactment of this bill would increase the unfunded liability of the Civil Service Retirement System by $136 million. An annual appropriation of $8.4 million over the next 30 years would be needed to amortize this liability. We estimate that approximately 600 non-Indian employees of the IHS would be potentially eligible for the special benefits provided by the enrolled bill, although we cannot say what portion of those employees would actually meet all the criteria specified in the bill for entitlement to the benefits.

Proponents of the enrolled bill maintain that the bill provides in an equitable manner for a relatively small number of Federal employees who, through no fault of their own, are being denied normal career advancement opportunities because of a national policy to increase the participation of Indians in programs which most directly affect the welfare of Indians themselves.

We agree that Indian preference requirements in the IHS may have an adverse impact on some non-Indian employees, but we feel that the enrolled bill is an overreaction to this problem. No employee will actually lose his position due to Indian preference requirements; these requirements apply only to promotions or transfers. Further, the IHS will have a continuing need for a great variety of professional and paraprofessional staff members over the next few years. The Indian population will include some, but not all, of the

persons with the skills needed to fully staff the IHS. Non-Indian personnel will continue to be needed. Finally, within the next month this Department intends to implement an administrative mechanism to provide priority outplacement assistance to those non-Indian employees of the IHS whose career opportunities are adversely affected by the application of the Indian preference requirements.

We feel that the enrolled bill is an excessive reaction to a problem with which we intend to deal administratively. We therefore recommend that the President return the enrolled bill to Congress without his signature. A draft veto message is enclosed.

Sincerely,

Secretary

Enclosure

TO THE HOUSE OF REPRESENTATIVES

I am returning without my approval, H.R. 5465, a bill which would liberalize retirement benefits for certain non-Indian employees of the Bureau of Indian Affairs (BIA) and the Indian Health Service (IHS) whose careers may have been adversely affected by the granting of Indian preference.

Acceptance of a Federal appointment does not carry with it a guarantee that an individual will automatically advance to a top position in his or her career field. Throughout the Government there are only a limited number of top positions to be filled. For each of these positions there may be dozens of fully qualified individuals but only one can be selected.

I do not believe it is the responsibility of the Federal Government to compensate those employees who, though qualified, fail to attain their highest career potential. Most Federal employees of necessity serve throughout their careers in secondary positions.

While I sympathize with those non-Indian employees of BIA and IHS, it is illogical to assume that because of Indian preference, their promotional opportunities have been limited to an extent which would justify the liberalized retirement benefits proposed by H.R. 5465. Benefits, moreover, which are far more generous than those enjoyed by the average Federal employee who would be required to work approximately 27 years and attain age 60 to be entitled to retirement benefits comparable to those proposed by H.R. 5465 after only 20 years of service and attainment of age 50.

The employees who would be affected by the bill are not in danger of losing their jobs. While their promotional opportunities may be somewhat limited, they still exist. Qualified non-Indians are still being hired and promoted to jobs in occupations where no qualified Indians apply. In addition, non-Indians have the option of requesting a change to different positions either within their respective agencies or to other agencies. Both BIA and IHS have established assistance plans to help non-Indians who want other jobs.

With this assistance already available, I see no justification for the Government to assume the cost of providing, for this select group of employees, retirement benefits which are excessively more liberal than those available to Federal employees generally.

Accordingly, I am unable to approve H.R. 5465.

The White House

To: J. Johnston 9-20-76 10:45 a.m.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

SEP 19 1976

MEMORANDUM FOR THE PRESIDENT

Subject: Enrolled Bill H.R. 5465 - Special retirement benefits for non-Indian employees of the Bureau of Indian Affairs and the Indian Health Service
Sponsor - Rep. Henderson (D) North Carolina

Last Day for Action

September 24, 1976 - Friday

Agency Recommendations

Office of Management and Budget	Disapproval	(Veto message attached)
Department of the Interior	Disapproval	(Veto message attached)
Department of Health, Education, and Welfare	Disapproval	(Veto message attached)
Civil Service Commission	Disapproval	(Veto messages attached)

Discussion

Under the Indian Reorganization Act of 1934, American Indians have long been given preference in initial appointment to jobs in BIA and IHS. As a result of decisions in 1974 by the U.S. Supreme Court and the Court of Appeals for the District of Columbia, preference under the 1934 Act is now also applied in transfers, promotions, and reassignments, where at least minimally qualified Indian employees are applicants for consideration. The effect of the new policy mandated by the courts is to somewhat limit career opportunities in BIA and IHS for non-Indian employees.

The primary purpose of H.R. 5465 is to offset the career disadvantages for the non-Indian employees of these two agencies. To accomplish this purpose, the bill would provide optional early retirement for those non-Indian employees who have twice been passed over for promotion, transfer, or reassignment as a result of Indian preference. These employees could exercise this option up to December 31, 1985, (a) at any age after 25 years of any type of Federal service, or (b) at age 50 with 20 years of such service, provided they have been continuously employed in BIA or IHS since the date

of the 1974 Supreme Court decision and they are not eligible for regular retirement.

The annuities of such employees would be computed under a more liberal formula than that provided most other Federal employees. Federal employees generally may retire voluntarily at age 55 with 30 years of service, or at age 60 with 20 years, with annuities computed at 1 1/2% of "high-3" average salary for the first 5 years, at 1 3/4% for the next 5 years, with a maximum 2% multiplier used for years over 10. Employees involuntarily separated with 25 years of service at any age, or with 20 years of service at age 50, may retire with annuities computed under the regular formula, but reduced by 2% a year for each year under age 55.

Under H.R. 5465, annuities of eligible non-Indian employees would be computed at 2 1/2% of their "high-3" average salary for the first 20 years of service, and at 2% for years over 20, without the customary reduction for retiring before age 55. Non-Indian employees already retired since the 1974 decision would be entitled, on the date of enactment of the bill, to have their annuities recomputed under the more favorable formula.

It is estimated that by 1986, when the special retirement benefit would terminate, approximately 1,484 non-Indian employees in BIA and 600 in IHS would be eligible for early retirement under the enrolled bill. Approximately 2,500 non-Indian employees in BIA and 3,340 in IHS would not qualify, for a variety of reasons.

The Civil Service Commission (CSC) estimates that the early retirement benefits in H.R. 5465 would increase the unfunded liability of the Civil Service Retirement Fund by $136 million, which would have to be amortized in 30 equal payments of approximately $8.4 million. Added budget outlays are estimated at $2.9 million in fiscal year 1977, rising to $19.9 million in fiscal year 1981.

H.R. 5465 was passed in both Houses by voice vote despite very strong Administration opposition to its preferential benefits. As enrolled, it is a modified version of bills originally sponsored and supported in both the Senate and House by Members with strong Indian constituencies. Bills were sponsored or co-sponsored in the Senate by Senators Stevens, Domenici, and Montoya, and in the House by Representatives Steed, Runnels, and Pressler.

Arguments for approval

1. The bill is regarded by Indian employees as a step toward fuller realization of Indian self-determination because it would increase the number of jobs available to Indians in the Indian service agencies, as non-Indians are given an incentive to leave. In view of the Indian preference situation, the Indian employees, as quoted in the Senate report, believe it would be a disservice to Indians and non-Indians alike, for Indian programs to be administered by non-Indians who may be embittered by an employment policy that blocks normal avenues of career progression. The bill was endorsed in testimony by the National Congress of American Indians and by individual Indian and non-Indian employees who would benefit from it.

2. Proponents argue that liberalized retirement benefits for non-Indian employees are warranted by their unique position as a result of the new policy of absolute Indian preference. Such benefits are necessary to induce non-Indian employees to retire early and to redress the economic burden they incur as a result.

3. The House Committee report states that the central issue in this legislation is the Federal Government's "good-faith treatment" of this group of adversely affected employees "who were given assurance at the time of hire that they would be able to compete equally with Indians and all other groups of employees for career advancement."

4. It can be argued that historic policy towards Indians in this country distinguishes the case of non-Indian employees from any other group; thus, this legislation need not become a precedent for other groups of Federal employees adversely affected by a change in Federal personnel policy. On this point, the House committee report states that "no other group of Federal employees is subject to such legally sanctioned discrimination." The contention is that the "dramatic" effect of the Supreme Court decision that recognizes the obligation to Indians as supervening the requirements of equal opportunity in promotion, transfer, and other personnel actions, comes after years of dedicated service by many non-Indian employees who do not question the propriety of Indian preference, and who have devoted their lives and careers to Indians.

5. The Committee reports recognize that both agencies are making special efforts to place the affected employees in other jobs, but the members were not convinced that these efforts are sufficient.

Arguments against approval

1. The retirement system is not an appropriate means of solving what is a personnel management problem. Not only would the lack of long-term promotion ladders for non-Indian employees become a charge against the retirement fund, borne by all participants, but the proposed highly preferential annuity formula might well encourage employees to continue working in BIA and IHS in order to enhance their retirement annuities between now and 1986.

2. Interior, HEW, and CSC all believe that the present situation facing the non-Indian employees does not justify the liberalized retirement benefits in the enrolled bill. These employees are not in danger of losing their jobs. Both Departments have special non-Indian placement programs available to find suitable jobs elsewhere in the Departments for those in BIA and IHS who are adversely affected by Indian preference. CSC is also offering counseling and placement assistance. It is not unlikely, however, that many non-Indian employees have resisted these outplacement efforts in anticipation of enactment of preferential retirement benefit legislation, which was first introduced in the 93rd Congress.

3. The annuity formula for eligible non-Indians under the bill is discriminatory in that it would provide more liberal benefits than those provided to any other group of Federal employees. These benefits would be even more favorable than those provided law enforcement and firefighter employees, who have to complete more than 20 years of work specifically in those professions before they are entitled to the same formula. Under H.R. 5465, non-Indian employees need complete only 11 years' Indian agency service (only 2 if retired prior to enactment but after the 1974 Supreme Court decision), a period a good deal less than a full career.

4. The bill's preferential annuity formula would also have inequitable effects within the Indian agencies themselves. On the basis that their long-term opportunity for advancement may be limited in BIA and IHS, eligible non-Indian employees would receive larger annuities than those Indian and non-Indian employees of BIA and IHS who meet the same age and service conditions but who actually lose their jobs as a result of reductions in force, and have to retire on the less liberal involuntary separation formula.

A further inequity would be produced because non-Indian employees in technical and managerial positions for which qualified Indians are not available would not be displaced by Indian preference and would therefore not be able to take advantage of the enrolled bill's special retirement benefits. For example, despite the most diligent recruitment efforts, there are inadequate numbers of Indian candidates for positions in such career fields as medicine and nursing, teaching, social work, forestry, engineering, personnel and financial management. Non-Indian employees in such positions would be able to complete full careers with BIA and IHS and yet would receive proportionately smaller annuities for longer service than would non-Indians eligible under the bill.

5. The policy implicit in H.R. 5465 is that of "buying out" those adversely affected by Indian preference. Such an approach to the sensitive issue of equal opportunity would appear to be undesirable as a matter of public policy, and can be expected to lead to demands by other groups of employees for similar windfall benefits whenever their promotional opportunities are limited for whatever reason. Support of this bill by Indians and non-Indian employees should not obscure the fact that such a policy could be extremely divisive and controversial if others claiming discrimination as a result of statutory and judicial recognition of special obligations towards veterans, minorities, women, etc., were to demand special treatment in the form of compensation.

Recommendations

All the concerned agencies--Interior, HEW, and CSC--recommend that you veto H.R. 5465, and have attached veto messages to their views letters for your consideration.

In addition to the points noted above, CSC states that there would be great difficulty in administering in a reasonable and fair way the requirement that an employee demonstrate that he or she has twice been passed over for promotion, transfer, or reassignment. Making this determination with any degree of accuracy for the already-retired, covered retroactively by the bill, would be impossible in CSC's view. CSC concludes that adequate justification does not exist for the Government to assume the cost of the benefits provided in H.R. 5465.

HEW, in summary, believes that "the bill would impose an excessive financial burden on the Federal Government in relation to a personnel problem with which we are able to deal without the expenditure of additional funds."

Interior concludes that "H.R. 5465 does not provide a viable solution to the problems created by Indian preference, nor an acceptable alternative to the Departmental Career Placement Assistance Program, and its potential effect could be an inequitable one."

On balance, we believe the arguments for veto outweigh those for approval. We have prepared a draft veto message, which is a revision and consolidation of the messages proposed by the agencies.

James T. Lynn
Director

Enclosures

TO THE HOUSE OF REPRESENTATIVES

I am returning, without my approval, H.R. 5465, a bill which would provide special retirement benefits to certain non-Indian employees of the Bureau of Indian Affairs (BIA) and the Indian Health Service (IHS) who are adversely affected by Indian preference requirements.

I strongly support the objective of having Indians administer the Federal programs directly affecting them. And I understand the concern of non-Indian employees of these agencies about their long-term career prospects because of Indian preference. But H.R. 5465 is the wrong way to deal with this problem.

This bill is designed to increase employment opportunities for Indians by providing special compensation to non-Indian employees in BIA and IHS who retire early. It seeks to accomplish this purpose by authorizing payment of extraordinary retirement benefits under certain conditions to non-Indian employees of these agencies who retire before 1986--benefits more liberal than those available to any other group of Federal employees under the civil service retirement system. I believe that this approach will result in inequities and added costs that far exceed the problem it is attempting to solve--a problem which is already being addressed through administrative actions by the agencies involved.

H.R. 5465 would provide windfall retirement benefits only to a relatively small number of the non-Indian employees of these agencies. The Indian employees and other non-Indian employees in these same agencies would not receive these benefits. The eligible employees are not in danger of losing their jobs. Because they may face

a limited outlook for promotion, the bill would pay these employees costly annuities after substantially less than a full career. Payments could be made at age 50 after only 20 years of Federal service, of which as little as 11 years need be Indian-agency service. Their annuities would be equivalent to the benefits it would take the average Federal employee until age 60 and 27 years of service to earn.

This would seriously distort and misuse the retirement system to solve a problem of personnel management not essentially different from that encountered in many agencies, and for which there are far more appropriate administrative solutions. The Departments of the Interior and Health, Education and Welfare have established special placement programs to help non-Indian employees who desire other jobs. I am asking the Chairman of the Civil Service Commission to make certain that those placement efforts are rigorously pursued with all agencies of the Federal Government.

Further, these Departments assure me that many non-Indian employees continue to have ample opportunity for full careers with Indian agencies if they so desire. Accordingly, H.R. 5465 represents an excessive, although well-motivated, reaction to the situation. Indian preference does pose a problem in these agencies, but it can and should be redressed without resort to costly retirement benefits.

I am not prepared, therefore, to accept the discriminatory and costly approach of H.R. 5465.

THE WHITE HOUSE

September , 1976

THE WHITE HOUSE

WASHINGTON

September 20, 1976

MEMORANDUM FOR THE STAFF SECRETARY

FROM: BRADLEY PATTERSON, JR.

Subject: Enrolled Bill Memorandum on H.R. 5465

I concur in OMB's memorandum and in the veto action which it proposes.

I concur in OMB's proposed veto message with two amendments:

(a) Begin the third sentence of the Message with the words, "I am familiar with and I understand...". This will help underscore to the many anxious employees in BIA and IHS that the President has personally noted the arguments supporting their position.

(b) Delete from the first full paragraph on page 2 of the Message the words, "Not essentially different from that encountered in many agencies,". Because of the Mancari and Freeman Court decisions, this is a unique problem and it would unnecessarily embitter the affected employees for the President to tell them that their concerns are lumped in with "personnel management" matters allegedly common to many agencies.

Changes were added to Jim Cavanaugh

TO THE HOUSE OF REPRESENTATIVES

I am returning, without my approval, H.R. 5465, a bill which would provide special retirement benefits to certain non-Indian employees of the Bureau of Indian Affairs (BIA) and the Indian Health Service (IHS) who are adversely affected by Indian preference requirements.

I strongly support the objective of having Indians administer the Federal programs directly affecting them. And I understand the concern of non-Indian employees of these agencies about their long-term career prospects because of Indian preference. But H.R. 5465 is the wrong way to deal with this problem.

This bill is designed to increase employment opportunities for Indians by providing special compensation to non-Indian employees in BIA and IHS who retire early. It seeks to accomplish this purpose by authorizing payment of extraordinary retirement benefits under certain conditions to non-Indian employees of these agencies who retire before 1986--benefits more liberal than those available to any other group of Federal employees under the civil service retirement system. I believe that this approach will result in inequities and added costs that far exceed the problem it is attempting to solve--a problem which is already being addressed through administrative actions by the agencies involved.

H.R. 5465 would provide windfall retirement benefits only to a relatively small number of the non-Indian employees of these agencies. The Indian employees and other non-Indian employees in these same agencies would not receive these benefits. The eligible employees are not in danger of losing their jobs. Because they may face

a limited outlook for promotion, the bill would pay these employees costly annuities after substantially less than a full career. Payments could be made at age 50 after only 20 years of Federal service, of which as little as 11 years need be Indian-agency service. Their annuities would be equivalent to the benefits it would take the average Federal employee until age 60 and 27 years of service to earn.

This would seriously distort and misuse the retirement system to solve a problem of personnel management [~~not essentially different from that encountered in many agencies, and~~] for which there are far more appropriate administrative solutions. The Departments of the Interior and Health, Education and Welfare have established special placement programs to help non-Indian employees who desire other jobs. I am asking the Chairman of the Civil Service Commission to make certain that those placement efforts are rigorously pursued with all agencies of the Federal Government.

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I am not prepared, therefore, to accept the discriminatory and costly approach of H.R. 5465.

THE WHITE HOUSE

September , 1976

THE WHITE HOUSE

ACTION MEMORANDUM WASHINGTON LOG NO.:

Date: September 20 Time: 1115am

FOR ACTION: Brad Batterson veto
Dick Parsons
David Lissy
SpencersJohnson veto
Robert Hartmann

cc (for information): Jack Marsh
Jim Connor
Ed Schmults

(veto message attached)

FROM THE STAFF SECRETARY

DUE: Date: September 21 Time: 200pm

SUBJECT:

H.R. 5465-Special retirement benefits for non-Indian employees of the Bureau of Indian Affairs and the Indian Health Service

ACTION REQUESTED:

____ For Necessary Action ____ For Your Recommendations

____ Prepare Agenda and Brief ____ Draft Reply

x
____ For Your Comments ____ Draft Remarks

REMARKS:

pleaee return to judy johnston, ground floor west wing

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

If you have any questions or if you anticipate a delay in submitting the required material, please telephone the Staff Secretary immediately.

K. R. COLE, JR.
For the President

THE WHITE HOUSE

ACTION MEMORANDUM WASHINGTON LOG NO.:

Date: September 20 Time: 1115am

FOR ACTION: Brad Patterson
Max Friedersdorf
David Lissy
Spencer Johnson
Robert Hartmann
Bobbie Kilberg

cc (for information): Jack Marsh
Jim Connor
Ed Schmults

(veto message attached)

FROM THE STAFF SECRETARY

DUE: Date: September 21 Time: 200pm

SUBJECT:

H.R. 5465-Special retirement benefits for non-Indian employees of the Bureau of Indian Affairs and the Indian Health Service

ACTION REQUESTED:

____ For Necessary Action

____ Prepare Agenda and Brief

x
____ For Your Comments

____ For Your Recommendations

____ Draft Reply

____ Draft Remarks

REMARKS:

please return to judy johnston, ground floor west wing

Recommend veto. Agree with B. Patterson's comments on veto message.

Bobbie Greene Kilberg

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

If you have any questions or if you anticipate a delay in submitting the required material, please telephone the Staff Secretary immediately.

James M. Cannon
For the President

THE WHITE HOUSE

ACTION MEMORANDUM WASHINGTON LOG NO.:

Date: September 20 Time: 1115am

FOR ACTION: Brad Patterson
Max Friedersdorf
David Lissy
Spencer Johnson
Robert Hartmann
Bobbie Kilberg

cc (for information): Jack Marsh
Jim Connor
Ed Schmults

(veto message attached)

FROM THE STAFF SECRETARY

DUE: Date: September 21 Time: 200pm

SUBJECT:

H.R. 5465-Special retirement benefits for non-Indian employees of the Bureau of Indian Affairs and the Indian Health Service

ACTION REQUESTED:

____ For Necessary Action
____ For Your Recommendations
____ Prepare Agenda and Brief
____ Draft Reply
x
____ For Your Comments
____ Draft Remarks

REMARKS:

please return to judy johnston, ground floor west wing

Ok can veto
SC
JM

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

If you have any questions or if you anticipate a delay in submitting the required material, please telephone the Staff Secretary immediately.

James M. Cannon
For the President

9/20/76 - 12:noon

THE WHITE HOUSE

ACTION MEMORANDUM WASHINGTON LOG NO.:

OK/CH

Date: September 20 Time: 1115am

FOR ACTION: Brad Patterson
Max Friedersdorf
David Lissy
Spencer Johnson
Robert Hartmann
Bobbie Kilberg

cc (for information): Jack Marsh
Jim Connor
Ed Schmults

to Reo 3:11
9-20
GAm

(veto message attached)

FROM THE STAFF SECRETARY

DUE: Date: September 21 Time: 200pm

To OJS 10:28 9/21

SUBJECT:

H.R. 5465-Special retirement benefits for non-Indian employees of the Bureau of Indian Affairs and the Indian Health Service

ACTION REQUESTED:

____ For Necessary Action
____ For Your Recommendations
____ Prepare Agenda and Brief
____ Draft Reply
x
____ For Your Comments
____ Draft Remarks

REMARKS:

please return to judy johnston, ground floor west wing

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

If you have any questions or if you anticipate a delay in submitting the required material, please telephone the Staff Secretary immediately.

James M. Cannon
For the President

9/20/76 - 12:00 noon

THE WHITE HOUSE

ACTION MEMORANDUM WASHINGTON LOG NO.:

Date: September 20 Time: 1115am

FOR ACTION: Brad Patterson
Max Friedersdorf
David Lissy
Spencer Johnson
Robert Hartmann
Bobbie Kilberg

cc (for information): Jack Marsh
Jim Connor
Ed Schmults

(veto message attached)

FROM THE STAFF SECRETARY

DUE: Date: September 21 Time: 200pm

SUBJECT:

H.R. 5465-Special retirement benefits for non-Indian employees of the Bureau of Indian Affairs and the Indian Health Service

ACTION REQUESTED:

____ For Necessary Action
____ For Your Recommendations
____ Prepare Agenda and Brief
____ Draft Reply
x
____ For Your Comments
____ Draft Remarks

REMARKS:

please return to judy johnston, ground floor west wing

9/20/76 - copy sent for researching. nm
9/21/76 - Researched copy returned. nm

OK as edited

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

If you have any questions or if you anticipate a delay in submitting the required material, please telephone the Staff Secretary immediately.

James M. Cannon
For the President

THE WHITE HOUSE

WASHINGTON

September 21, 1976

MEMORANDUM FOR: JIM CAVANAUGH

FROM: MAX L. FRIEDERSDORF MLF

SUBJECT: H.R. 5465 - Special retirement benefits for non-Indian employees of the Bureau of Indian Affairs and the Indian Health Service

The Office of Legislative Affairs ~~concurs~~ differs with the agencies, and recommends that the subject bill be signed. Veto cannot be sustained.

Attachments

In addition, Senator Ted Stevens (R-~~KA~~ ALAska) is the prime sponsor of this bill. He strongly recommends it be signed, saying it only effects about 200 employees.

THE WHITE HOUSE

WASHINGTON

September 24, 1976

MEMORANDUM FOR THE STAFF SECRETARY

Subject: Revised Figures in the Enrolled Bill Memo on H.R. 5465

Senator Stevens, a sponsor of HR 5465, called me yesterday to complain that the Civil Service Commission had inaccurately estimated the cost figures for HR 5465. He had met with Chairman Hampton and as a result of that, and some BIA refiguring, more accurate figures (BIA now tells me) should be in that memorandum.

I explained to Ted that the memorandum was on the President's desk, but promised to find out from BIA what the accurate figures were, and to send a memorandum forward to make sure the record was accurate.

The right figures, according to BIA, which belong in the 4th full paragraph on page 2, are:

a) Assuming that potential retirees would elect to retire at their earliest possible eligible moment: 107 million (instead of 136).

b) Assuming that potential retirees would wait until the last possible eligible moment to retire early: 40 to 45 million (instead of 136).

I send this memorandum forward to keep my commitment to Senator Stevens.

Bradley H. Patterson, Jr.

cc: Director Lynn
Commissioner Thompson

DRAFT VETO MESSAGE

To the House of Representatives:

I am returning without my approval H.R. 5465, an enrolled bill which would provide special retirement benefits to certain non-Indian employees of the Bureau of Indian Affairs (BIA), Department of the Interior, and the Indian Health Service (IHS), Department of Health, Education, and Welfare, who are adversely affected by Indian preference requirements.

H.R. 5465 would provide for payment, under certain conditions, of an immediate annuity to non-Indian employees of the IHS or BIA who retire before 1986. An employee would be eligible for the special annuity provided by H.R. 5465 if he--

(1) has been continuously employed by the IHS or the BIA since June 17, 1974 (when the Supreme Court upheld the legal validity of giving Indian personnel preference in promotion over non-Indians),

(2) is not otherwise entitled to an immediate annuity under the law,

(3) has been twice passed over for promotion or transfer because of a preference given to an Indian, and

(4) has completed 25 years of Federal service or has reached 50 years of age and has completed 20 years of service; the usual requirement for an immediate annuity is 30 years of service after reaching 55 years of age, or 20 years of service after reaching 60 years of age.

The annuity would be computed at the rate of 2-1/2 percent of an employee's average pay for each of the first 20 years of service and 2 percent for each additional year; the usual computation is 1-1/2 percent of an employee's average pay for each of the first 5 years of service, 1-3/4 percent for each of the next 5 years, and 2 percent for each additional year.

The Congressional Budget Office estimates that enactment of this bill would increase the unfunded liability of the Civil Service Retirement System by $136 million. An annual appropriation of $8.4 million over the next 30 years would be needed to amortize this liability.

Proponents of H.R. 5465 maintain that the bill provides in an equitable manner for a relatively small number of Federal employees who, through no fault of their own, are being denied normal career advancement opportunities because of a national policy to increase the participation of Indians in programs which most directly affect the welfare of Indians themselves.

I recognize that Indian preference requirements may have an adverse impact on some non-Indian employees, but I believe that H.R. 5465 is an overreaction to this problem. No employee will actually lose his position due to Indian preference requirements; these requirements apply only to promotions or transfers. Further, there will be a continuing need for a great

variety of professional and paraprofessional staff members over the next few years. This need cannot currently be fully met solely through Indian personnel. Finally, the Department of the Interior and the Department of Health, Education, and Welfare are implementing administrative mechanisms to provide priority outplacement assistance to those non-Indian employees whose career opportunities are adversely affected by the application of the Indian preference requirements.

TO THE HOUSE OF REPRESENTATIVES:

I return herewith, without my approval, H.R. 5465, a bill "To provide additional retirement benefits for certain employees of the Bureau of Indian Affairs and the Indian Health Service who are not entitled to Indian preference, to provide greater opportunity for advancement and employment of Indians, and for other purposes."

This bill authorizes special retirement benefits designed to encourage non-Indian preference employees to leave the Bureau of Indian Affairs and Indian Health Service, and to aid in their departure.

The Department of the Interior recognizes that some non-Indian BIA employees have had their careers affected by recent court decisions on Indian preference. Further, the Department is increasingly concerned that implementation of Public Law 93-638, the Indian Self-Determination Act, may, in many cases, have an adverse impact upon both Indian and non-Indian BIA employees. The Department, and the Administration, are committed to providing placement assistance to those BIA employees whose jobs or opportunities have been adversely affected by Indian preference or the Indian Self-Determination Act. The Department of the Interior is carrying out this commitment through its Departmental Career Placement Assistance Program, specifically implemented in response to this situation. We believe that this available administrative solution is the most viable approach and should be tried and evaluated before any solutions are mandated by legislation. In our judgment, this program meets the objectives of H.R. 5465.

Not all non-Indian employees of the BIA have been adversely affected by Indian preference. Many non-Indian employees in a number of occupations have had, and continue to have, remarkably

successful careers within the BIA. We want to encourage these individuals to remain, and contribute their talents and skills. Legislation such as H.R. 5465 might have the opposite effect, particularly because the bill authorizes liberal retirement benefits which far surpass the benefits available to other Federal employees.

For these reasons I feel that the approval of H.R. 5465 would not be desirable.

THE WHITE HOUSE

September 15, 1976

OK/CHM

TO THE HOUSE OF REPRESENTATIVES

I am returning, without my approval, H.R. 5465, a bill which would provide special retirement benefits to certain non-Indian employees of the Bureau of Indian Affairs (BIA) and the Indian Health Service (IHS) who are adversely affected by Indian preference requirements.

I strongly support the objective of having Indians administer the Federal programs directly affecting them. And I understand the concern of non-Indian employees of these agencies about their long-term career prospects because of Indian preference. But H.R. 5465 is the wrong way to deal with this problem.

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Gerald R. Ford

THE WHITE HOUSE,

September 24, 1976.

94TH CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
2d Session } { No. 94-1003

EMPLOYMENT PREFERENCE FOR CERTAIN EMPLOYEES OF THE BUREAU OF INDIAN AFFAIRS AND THE INDIAN HEALTH SERVICE

APRIL 2, 1976.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. HENDERSON, from the Committee on Post Office and Civil Service, submitted the following

REPORT

[To accompany H.R. 5465]

The Committee on Post Office and Civil Service, to whom was referred the bill (H.R. 5465) to allow Federal employment preference to certain employees of the Bureau of Indian Affairs, and to certain employees of the Indian Health Service, who are not entitled to the benefits of, or have been adversely affected by the application of, certain Federal laws allowing employment preference to Indians, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

The amendment to the text of the bill is a complete substitute therefor and appears in italic type in the reported bill.

The title of the bill is amended to reflect the amendment to the text of the bill.

EXPLANATION OF AMENDMENTS

The committee amendment to H.R. 5465 substitutes an entirely new text for the text of the introduced bill. The explanation of the provisions of the substitute text is contained in the explanation of the bill as set forth hereinafter in this report. The title of the bill is amended to conform to the substitute text.

PURPOSE

The primary purpose of H.R. 5465 is to provide assistance to certain employees of the Bureau of Indian Affairs or the Indian Health Service whose career opportunities have been adversely affected by the Indian preference laws and policies by requiring that such employees be given preferential consideration for appointments to vacant positions within the Department of the Interior or the Department of Health, Education, and Welfare, as applicable.

In addition, the bill provides eligibility for retirement in accordance with the involuntary retirement provisions of the civil service retirement law under specific conditions prescribed in the bill.

COMMITTEE ACTION

H.R. 5465, as amended, was ordered reported by voice vote of the Committee on Post Office and Civil Service on February 19, 1976.

On February 3 and 4, 1976, the Subcommittee on Manpower and Civil Service held public hearings (Hearing No. 94–62) on H.R. 5465, H.R. 5858, H.R. 5968 and H.R. 4988. The latter three bills provide only for preferential retirement benefits and contain no provisions relating to employment preference. During the hearings, testimony was presented by Members of Congress; representatives of the United States Civil Service Commission, the Department of the Interior, and the Public Health Service; representatives of employee organizations; and individual employees of the agencies involved.

STATEMENT

A number of provisions concerning Indian preference in Federal "Indian Service" employment were enacted by the Congress during the 19th and early 20th centuries (see for example 25 USC 44–47). However, the broadest and most modern provision, and the one on which the current Indian preference requirements are based, is section 12 of the Indian Reorganization Act of 1934 (48 Stat. 986; 25 USC 472) which provides:

> The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed without regard to civil-service laws, to the various positions maintained, now or hereafter, by the Indian Office, 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 position.

Prior to 1972, the Indian preference provision was administered by the Bureau of Indian Affairs as applying only to initial appointments and not to subsequent promotions. In 1972 the BIA policy was changed to extend the preference to promotions, transfers from outside the BIA, and reassignments within the BIA which improved promotional prospects. The 1972 policy provided for the Commissioner of Indian Affairs to grant exceptions to Indian preference by approving the selection and appointment of non-Indians when he considered such action to be in the best interest of the Bureau. The 1972 policy did not extend Indian preference to purely lateral reassignments which did not improve promotional prospects. Indian preference is also utilized in establishing employee retention registers for use in reduction-in-force situations.

In addition, the BIA now encourages tribes to contract for control and operation of most BIA reservation level activities, and the January 1975 enactment of section 102 of the Indian Self-Determination Act (88 Stat. 2206; 25 UCSC 450f) directs the contracting of most BIA activities "upon the request of any Indian tribe."

Two recent court decisions have upheld the validity of section 12 of the Indian Reorganization Act and its application to initial hires, promotions, transfers and reassignments.

On April 25, 1974, the United States Court of Appeals for the District of Columbia in *Freeman* v. *Morton*, 499 F.2d 494, upheld an unreported District Court decision in a suit brought by four Indian BIA employees. The Court held that under the 1934 Indian preference provisions Indian preference applies to the filling of all vacancies in the BIA, including initial hires, promotions, lateral transfers, and reassignments in the Bureau, and that no exceptions are possible where there is at least a minimally qualified candidate who is eligible for Indian preference.

On June 17, 1974, the U.S. Supreme Court in an 8–0 decision (*Morton* v. *Mancari*, 417 U.S. 535) reversed the decision of a three-judge District Court for the District of New Mexico which had held, in a suit by a group of non-Indian BIA employees, that the 1934 Indian preference provisions (25 USC 472) had been impliedly repealed by enactment of Section 11 of the Equal Employment Opportunity Act of 1972 (86 Stat. 111; 42 USC 2000 e–16), prohibiting discrimination in most Federal employment on the basis of race.

The Supreme Court held that Indian preference was not a racial preferne but, rather, it was an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups.

The effect of the Supreme Court's decision on employees in the Indian service agencies who are not entitled to Indian preference has been dramatic.

The central issue involves the Federal government's good-faith treatment of this group of adversely affected employees who were given assurance at the time of hire that they would be able to compete equally with Indians and all other groups of employees for career advancement. Since the *Morton* v. *Mancari* decision, they have seen this entire "game plan" changed. The Indian service agencies are no longer able to honor their assurances of free and open competition based on merit factors alone.

H.R. 5465 will benefit Indians as well as non-Indians. As the non-Indians are able to leave the Indian service agencies via the bill's placement assistance program, qualified Indians will be able to assume their positions, often through promotion. Placing non-Indians outside the agencies results in more Indians being retained within.

At the present time the Department of Interior does have a placement assistance program for the affected employees, This program did not go into effect until December 1975, even though the *Morton* v. *Mancari* decision was issued in June 1974, and the Bureau of Indian Affairs had been implementing the absolute Indian preference policy since 1972. Testimony before the subcommittee and information contained in numerous letters to the subcommittee indicate that BIA employees have little faith in the success of this program. It puts the burden of proof on the non-Indian employee to demonstrate he has been adversely affected before he can be registered in the program. To date very few employees have registered. In addition, the principle thrust of the Department of Interior program is to keep non-Indian employees in the BIA as long as possible. Affected employees can

qualify for the placement assistance program only if all attempts to find other jobs for them within BIA have failed. This appears merely to be prolonging the problem, as the employee is shunted from one BIA position to another—and these must be positions for which no Indian can qualify or for which no Indian chooses to apply

The placement assistance program which H.R. 5465 establishes does have many features in common with the existing Department of Interior program. Under both systems eligible employees are accorded a certain priority but one which ranks below the priority granted three other groups: (1) employees affected by a reduction in force, (2) employees in an Indian service agency who must be moved because of threats to life or health, or (3) employees of the Pacific Trust Territories who must be returned to the United States to make room for a Micronesian. Employees having veterans preference also would receive consideration ahead of eligible employees under H.R. 5465.

Under this legislation, however, the emphasis would be on moving non-Indians out of the Indian service agencies rather than moving them from job to job within those agencies for as long as possible. Further, the onus of proving that he has been adversely affected by the Indian preference laws would be lifted from the non-Indian employee; any individual not eligible for Indian preference would automatically qualify for placement assistance.

The Indian Health Service does not have a placement assistance program. Testimony before the subcommittee indicated that the IHS sees no immediate need for one and consequently the matter is still in the discussion stage.

The Civil Service Commission and the Departments of Interior and Health, Education, and Welfare unanimously oppose H.R. 5465. They make the point that non-Indian employees still have jobs, and that many will even be able to win promotions because they work in fields which have, as yet, few qualified Indians. There is also the fear that the placement program established by this legislation could set an undesirable precedent whereby other groups of employees might demand similar consideration. These arguments overlook the fact that the position of the non-Indian presently within the Indian service agencies is truly unique. No other group of Federal employees is subjected to such legally sanctioned discrimination. Testimony before the subcommittee revealed that almost none of these non-Indian employees questions the propriety of Indian preference. They have dedicated their lives and careers to the service of the Indian people and they understand the desirability of Indian self-determination. They do not object to being replaced by Indians providing they have somewhere to go.

The placement assistance program under H.R. 5465 would operate only for a three-year period with an option for the Civil Service Commission to extend it one additional year. This one-time effort to correct a glaring injustice should not unduly hamper departmental personnel policies.

SECTION ANALYSIS

First Section

The first section of the bill defines the terms "eligible employee" and "vacancy" for purposes of the Act.

The term "eligible employee" is defined as meaning an employee of the Bureau of Indian Affairs (BIA) or an employee of the Indian Health Service (IHS) who is serving under a career or a career-conditional appointment and who has been so employed since June 17, 1974—the date of the Supreme Court's decision in the case of *Morton* v. *Mancari*, 417 U.S. 535—and who is not entitled to benefits under, or has been adversely affected by the application of, the various provisions of Federal law granting Federal employment preference to Indians. The provisions of the bill will not apply to any individual who is or was appointed to a position in the BIA or IHS after June 17, 1974.

The term "vacancy" is defined as meaning a vacancy in a position in the competitive service for which the minimum rate of basic pay is less than the minimum rate for grade GS–16 of the General Schedule (currently $36,338 per annum). The reference to GS–16 is for pay rate purposes only. The term "vacancy" is not limited to positions under the General Schedule (5 U.S.C. 5332).

Section 2

Subsection (a) of section 2 sets forth the order in which applicants for each vacancy occurring in the Department of the Interior (other than a vacancy in the BIA) shall be considered. Except as provided in subsection (b) of section 2, discussed below, all eligible employees of the BIA who are qualified to fill the vacant position shall first be considered in the order of their ratings and, thereafter, the remaining applicants shall be considered in the order and manner which would have occurred in the absence of this Act.

While subsection (a) of section 2 prescribes the general rule for filling vacancies in the Department of the Interior, subsection (b) of section 2 contains specific exceptions to that general rule which are necessary to preserve existing veterans' preference benefits and certain reemployment rights under existing law, or to protect employees who are faced with separation from the service because of circumstances beyond their control. Thus, the general rule prescribed in subsection (a) does not apply when a vacancy in the Department of the Interior is filled—

(1) by transfer or appointment of a preference eligible entitled to 10 additional points under 5 U.S.C. 3309 (1);

(2) by reinstatement of a preference eligible entitled to 10 or 5 additional points under 5 U.S.C. 3309 (1) or (2);

(3) by restoration of a person under the veterans' reemployment provisions of chapter 43 of title 38, United States Code;

(4) by restoration of a person under section 8151 of title 5, United States Code, relating to employees who sustain compensable job-related injuries or disabilities;

(5) by an employee of the Department of the Interior who has received a specific notice of separation by reduction-in-force;

(6) by an employee of the Bureau of Indian Affairs who must be reassigned because of circumstances beyond his control which threaten his life or health and who cannot be reassigned to a position within BIA because of the operation of the Indian preference laws; or

(7) by an employee of the Trust Territory of the Pacific Islands who is displaced by a Micronesian and must be returned to the United States.

Section 3

Section 3 of the bill provides that when an appointing authority has twice considered and passed over an eligible employee for a vacancy in the Department, such eligible employee is entitled to be appointed to the next occurring vacancy in the Department for which he applies, and for which he is qualified, unless the appointing authority determines that compelling reasons exist for passing over the eligible employee. In determining whether an eligible employee has been twice passed over for appointment to a vacancy, there is disregarded any instance in which another eligible employee is appointed to the vacancy or any instance in which an individual is appointed to the vacancy under one of the exceptions set forth in subsection (b) of section 2, discussed above.

It should be noted that while compelling reasons need not exist for passing over an eligible employee in the first two instances, the intent of this legislation clearly is to require priority consideration of eligible employees who are qualified to fill a vacancy. After the first two instances, however, if an eligible employee is passed over for appointment, the appointing authority must file written reasons supporting such action with the Civil Service Commission.

The Commission is required to make the submitted reasons a part of the employee's record and may require the appointing authority to submit more detailed information in support of his action. The Commission must determine the sufficiency or insufficiency of the appointing authority's reasons and send its findings to the appointing authority who must comply with the Commission's findings. The eligible employee, or his representative, is entitled, upon request, to a copy of the submitted reasons and the findings of the Commission.

Section 4

Section 4 of the bill provides two options for an eligible employee who is passed over for compelling reasons determined to be sufficient by the Civil Service Commission under section 3 of the bill. If the employee meets the statutory age and service requirements, he may apply for retirement under the provisions of 5 U.S.C. 8336(d). Under those provisions, an employee must have attained 50 years of age and completed 20 years of service or must have completed 25 years of service, regardless of age, to be eligible for an annuity. Such annuity is reduced, under section 8339(h) of title 5, by 2 percent a year for each year the employee is under age 55 at the date of separation.

If the employee chooses not to retire or is ineligible for retirement under 5 U.S.C. 8336(d), upon application he is entitled to be appointed in accordance with section 3 of the bill to the next occurring vacancy for which he is qualified. If the employee does apply for appointment, he may be passed over only for compelling reasons determined to be sufficient by the Civil Service Commission. In that event he again will have the option of retiring under 5 U.S.C. 8336 (d) or applying for the next occurring vacancy for which he is qualified.

An employee who elects to retire under this section must file his application for separation not later than the 90th day following the date of the Civil Service Commission's determination under section 3 of the bill. The employee's separation is deemed to be an involuntary separation.

Under this section no time limit is contemplated with respect to an application for appointment to the next occurring vacancy. However, see the discussion under section 6 of the bill.

Section 5

Section 5 of the bill provides that the appointment to each vacancy in the Department of Health, Education, and Welfare, other than a vacancy in the Indian Health Service, shall be made, with respect to applicants for such appointments who are eligible employees of the Indian Health Service, in accordance with the provisions of sections 2, 3, and 4 of the bill. Thus, while section 2 of the bill refers only to the Department of the Interior and the Bureau of Indian Affairs, it is intended that such section and sections 3 and 4 of the bill will have equal application to the Department of Health, Education and Welfare and the Indian Health Service. As discussed earlier, under the first section of the bill the term "eligible employee" is defined as including an employee of the Indian Health Service.

Section 6

Subsection (a) of section 6 provides that the Civil Service Commission shall prescribe such regulations as it deems necessary to carry out the provisions of the bill.

Subsection (b) provides that the provisions of the Act shall apply with respect to vacancies (as defined under the first section of the bill) which occur during the 3-year period beginning with the month which begins more than 90 days following the effective date of the Act. However, the Civil Service Commission may extend such period one additional year with respect to vacancies in the Department of the Interior, or in HEW, or in both Departments.

Subsection (c) provides that the Act shall take effect on October 1, 1976, or on the date of the enactment of the Act, whichever is later.

COST

Under section 8348(f) of title 5, United States Code (as added by Public Law 91–93; October 20, 1969), any statute which authorizes new or liberalized retirement benefits is deemed to authorize appropriations to the Civil Service Retirement and Disability Fund in equal amounts for 30 years in order to finance the unfunded liability created by that statute. Since H.R. 5465 does authorize liberalized retirement benefits for approximately 1,000 employees, the provisions of section 8348(f) are applicable to this legislation.

The committee received an informal cost estimate on this legislation from the Civil Service Commission and a formal estimate from the Congressional Budget Office. Both estimated that the enactment of this legislation would increase the unfunded liability of the retirement fund by approximately $25 million which would be amortized by 30 annual appropriations of $1.5 million. Since the amounts which are authorized to be appropriated each year under section 8348(f) are intended to fund the early retirement benefits, except for future cost-

of-living increases, the committee believes that such annual payments represent the true cost of this legislation. Therefore, pursuant to clause 7 of the House Rule XIII, the committee's estimate of the cost which would be incurred in carrying out this legislation is as follows:

[In millions]

Fiscal year:		Fiscal year	
1976	0	1979	1.5
1977	0	1980	1.5
1978	1.5	1981	1.5

The cost estimate prepared by the Congressional Budget Office pursuant to setcion 403 of the Congressional Budget Act is set forth below:

CONGRESS OF THE UNITED STATES,
CONGRESSIONAL BUDGET OFFICE,
Washington, D.C., March 11, 1976.

Hon. DAVID N. HENDERSON,
Chairman, Committee on Post Office and Civil Service, U.S. House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has prepared the attached cost estimate for proposed legislation pertaining to certain employees of the Bureau of Indian Affairs and the Indian Health Service.

Should the Committee so desire, we would be pleased to provide further details on the attached cost estimate.

Sincerely,

ALICE M. RIVLIN, *Director.*

Attachment.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

MARCH 8, 1976.

1. Bill Number: H.R. ——

Proposed legislation pertaining to certain employees of the Bureau of Indian Affairs and the Indian Health Service.

2. Purpose of Bill:

To allow Federal employment preference to certain employees of the Bureau of Indian Affairs, and to certain employees of the Indian Health Service, who are not entitled to the benefits of, or who have been adversely affected by the application of, certain Federal laws allowing employment preference to Indians and who have been employed since June 17, 1974. Section 4 of the print provides for optional early retirement under the provisions of 5 U.S. Code 8336(d).

3. Budget Impact:

Enactment of this proposed legislation would increase the unfunded liability of the Civil Service Retirement System by an estimated $25 million. An annual appropriation of $1.5 million over the next 30 years would need to be requested by the Civil Service Commission to amortize the increased liability. Outlays represent the payment of

benefits to individuals who would qualify for optional early retirement under the proposed legislation.

[Dollar amounts in millions]

	Fiscal year—				
	1977 [1]	1978	1979	1980	1981
BA	[1] $1.5	$1.5	$1.5	$1.5	$1.5
Outlays		6.9	7.3	7.7	8.1

[1] Administrative processes necessary to exhaust employment alternatives would preclude any significant outlays in fiscal year 1977.

Estimated annual outlays exceed the annual BA estimates since outlays for early retirement would be paid to the annuitants during the first ten years while the liability (Budget Authority) would be amortized over the statutory 30 year period. The 30 years of amortization payments would fund the early retirement benefits except for increases due to future cost-of-living adjustments. There are no significant costs beyond the increase in liability to the civil service retirement fund associated with the enactment of the proposed legislation.

4. Basis for Estimate:

Section 4 of the proposed legislation extends involuntary retirement provisions to an estimated 1,000 employees who meet age and service requirements (age 50 with 20 years of service or 25 years of service regardless of age). Under normal circumstances employees must be age 55 with 30 years of service or age 60 with 20 years of service to retire. The enactment cost of the proposed legislation, in the long run, is the difference between the expected value of the early retirement benefits less the expected value of the normal retirement benefits. The critical variables in estimating the cost are the number of participants, their average salary, the annuity valuation factor and the benefit percentage. The values for these variables were provided by the Civil Service Commission and the Bureau of Indian Affairs at the request of CBO. In deriving the unfunded liability estimate the Civil Service Commission followed its customary practice of not including cost-of-living adjustments in its calculations.

Cost variables

A. Number of participants [1]	1,000
B. Average salary	$14,900
C. Annuity valuation factor (represents the increase in liability to the retirement fund for each $1 of average salary)	$1.65
D. Benefit percentage	45
Increase in unfunded liability (derived from multiplying (A×B×C))	$24,600,000
Budget Authority (annual payments for 30 yr amortized at 5 percent)	$1,500,000
Outlays (derived from multiplying (A×B×D))	$6,700,000

[1] Assumes 50 percent of all eligible employees will participate in the early retirement option.

The outlays for fiscal years 1977–1981 (see table below) are in accordance with mortality assumptions provided by the Civil Service Commission and CBO cost-of-living assumptions.

5 YR OUTLAYS

[Dollar amounts in millions]

	Base	Reductions [1]	Increases [2]	Total net outlays
Fiscal year:				
1977				
1978				
1979	$6.7		$0.2	$6.9
1980	6.7	$0.1	.7	7.3
1981	6.7	.1	1.1	7.7
	6.7	.1	1.5	8.1

[1] Attributable to a mortality factor assumption of 0.9925 provided by the Civil Service Commission.
[2] Due to annuity increases from cost-of-living adjustments.

5. Estimate Comparison: Not applicable.
6. Previous CBO Estimate: Not applicable.
7. Estimate Prepared By: David M. Delquadro (225–5228)
8. Estimate Approved By:

JAMES L. BLUM,
Assistant Director for Budget Analysis.

NEW BUDGET AUTHORITY

H.R. 5465 is considered by the Committee on the Budget as providing "new spending authority" as that term is defined in section 401(c) of the Congressional Budget Act of 1974, and, therefore, a statement relating to new budget authority is not required under section 308(a) of the Congressional Budget Act of 1974.

OVERSIGHT

Under the rules of the Committee on Post Office and Civil Service, the Subcommittee on Manpower and Civil Service is vested with legislative and oversight jurisdiction over the subject matter of this legislation. As a result of the hearings on this legislation, the subcommittee concluded that there was ample justification for amending the law in the manner provided under H.R. 5465.

The committee received no report of oversight findings or recommendations from the Committee on Government Operations pursuant to clause 2(b)(2) of House Rule X.

INFLATIONARY IMPACT STATEMENT

Pursuant to clause 2(l)(4) of House Rule XI, the committee has concluded that, because of the minimal cost involved, the enactment of H.R. 5465 will have no inflationary impact on the national economy.

AGENCY VIEWS

There are set forth below the reports of the United States Civil Service Commission, the Office of Management and Budget, the Department of the Interior, and the Department of Health, Education, and Welfare.

UNITED STATES CIVIL SERVICE COMMISSION,
Washington, D.C., June 17, 1975.

Hon. DAVID N. HENDERSON,
Chairman, Committee on Post Office and Civil Service, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This is a further reply to your request for the Commission's views on H.R. 5465, a bill "To allow Federal employment preference to certain employees of the Bureau of Indian Affairs, and to certain employees of the Indian Health Service, who who are not entitled to the benefits of, or who have been adversely affected by the application of, certain Federal laws allowing employment preference to Indians."

H.R. 5465 provides for priority employment consideration of those non-Indian employees who were on the rolls of BIA and IHS on or prior to June 17, 1974. Priority consideration would last 3 years, with the Civil Service Commission having the option to extend the program for 1 year. Priority consideration would only be for jobs within other elements of the departments concerned. If a non-Indian were passed over three times for other available jobs, the reasons for the third passover would have to be submitted to the Civil Service Commission for determination as to their adequacy and for binding decision.

We agree with the basic objective of the bill—to assist non-Indian employees whose opportunities for advancement in BIA and IHS may be reduced through no fault of their own. However, we do not believe the situation is such as to require legislation. Administrative approaches under current agency and Commission programs would appear to offer a better answer to the needs of these employees.

By way of background, the Supreme Court Decision (Mancari vs. Morton) of June 17, 1974, upheld the policy, based on the Indian preference statutes, of giving preference to Indians in hiring, promotions, transfers and reassignments within the Bureau of Indian Affairs. The Court held unanimously that the Indian preference laws did not constitute racial discrimination or racial preference but were instead valid employment criteria designed to further the cause of Indian self-determination and encourage the Indian agencies to be more responsive to their constituents. The special treatment of Indians, as viewed by the Supreme Court, was the intent of Congress in passing the original laws and is legitimately tied to the fulfillment of a special obligation to Indians.

As a result of the decision, qualified Indians are given preference over non-Indians for positions in BIA and IHS, whether for initial hires or other personnel actions. While their long-range career advancement prospects may be limited in these agencies, these employees are not in danger of losing their jobs. And if there are no qualified Indians available for positions, they can compete with other qualified candidates and be selected for positions within BIA and IHS. In addition, they can be transferred to other available positions in their respective departments and other Federal agencies.

The Department of Interior has developed an outplacement program to assist non-Indians who wish to move from BIA to other elements of

the Department. This program is expected to go into effect this summer. Although the Department of Health, Education, and Welfare has not developed a specific outplacement program for non-Indians, it does have such a program already available for employees faced with a reduction in force and could include non-Indians in the program if the need arises.

In addition to the assistance available within these agencies, the Commission's area offices nationwide are offering assistance and counseling to non-Indians who wish to leave the BIA or IHS.

In conclusion, we are opposed to the enactment of H.R. 5465 because we do not believe legislation is necessary to deal with the needs of non-Indian employees in BIA and IHS. We will continue to work with the agencies concerned to assure that non-Indian employees have an opportunity to continue meaningful careers in the Federal service. and we will be alert to the need for any further action which may be warranted.

The Office of Management and Budget advises that, from the standpoint of the Administration's program, there is no objection to the submission of this report.

By direction of the Commission:

Sincerely yours,

ROBERT HAMPTON, *Chairman.*

UNITED STATES CIVIL SERVICE COMMISSION,
Washington, D.C., June 12, 1975.

Hon. DAVID N. HENDERSON,
Chairman, Committee on Post Office and Civil Service,
House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This is in further reply to your request for the Commission's views on H.R. 4988, a bill "To revise retirement benefits for certain employees of the Bureau of Indian Affairs and the Indian Health Service not entitled to Indian preference, provide greater opportunity for advancement and employment of Indians, and for other purposes."

On June 17, 1974 (in *Morton* v. *Mancari*, 42 U.S.L.W. 4933 (U.S. June 17, 1974)), the Supreme Court held that the Indian preference provision (Section 12) of the Indian Reorganization Act of 1934 (Wheeler-Howard Act) was not repealed by the Equal Employment Opportunity Act of 1972 and does not violate the Due Process Clause of the Fifth Amendment. With regard to the applicability of Indian preference to promotions, the Court did not express an opinion, but noted "The Commissioner's extension of the preference in 1972 to promotions within the BIA was designed to bring more Indians into positions of responsibility and, in that regard, appears to be a logical extension of the congressional intent." 42 U.S.L.W. at 4936. However, in *Freeman* v. *Morton*, 499 F.2d 494 (D.C. Cir. 1974), the court held that the law *requires* that Indian preference be applied to initial hiring, promotions, lateral transfers and reassignments. As a result of that decision, it would appear that certain non-Indian employees of BIA (now BIA and the Indian Health Service (IHS)) would not

receive any further promotions if qualified Indians applied for the positions involved.

H.R. 4988, if enacted, would provide optional retirement after 20 years of service (not necessarily with BIA or IHS) for those non-Indian employees of BIA and IHS who have been continuously employed by that agency since June 17, 1974 (the date of the Supreme Court decision) and who will complete 20 years of service on or before December 31, 1984. [The effective date of early retirement may be delayed up to one year, in certain cases.] Furthermore, the bill provides that the annuities of these employees would amount to 2 percent of average pay multiplied by the number of years of service (with no reduction for age).

The Commission does no believe the present situation justifies granting such liberalized retirement benefits to non-Indian employees of BIA and IHS. While their career prospects in BIA and IHS could be limited, they are not in danger of losing their jobs. BIA and IHS employees also have the option of transferring to other positions elsewhere in the Departments of the Interior, Health, Education, and Welfare, and other Federal agencies where greater opportunity for further advancement exists. There is no indication that these employees cannot have full and satisfying careers in other agencies or in other activities. Moreover, limited promotion ladders should not become a charge against the retirement system as proposed by H.R. 4988.

Commission representatives have been in close touch with officials at the departments involved. We have been assured that both BIA and IHS are sensitive to the situation and that opportunities do exist for many non-Indians to fulfill their hopes and aspirations for the future through careers elsewhere in the Federal service.

Understandably, some non-Indian employees are interested in leaving the Bureau of Indian Affairs because of their concern over the application of the Indian preference laws. The Commission's 65 area offices have been alerted to this situation and have been instructed to give all possible assistance to non-Indian employees who have expressed an interest in leaving the Indian agencies, and to alert other Federal agencies to the availability of such employees.

If H.R. 4988 is enacted, we estimate that the normal cost of the Civil Service Retirement System of all employees would be increased by .012 percent of payroll and the unfunded liability of the Civil Service Retirement and Disability Fund by $95 million. Under the financing provisions of section 8348(f) of title 5, United States Code, this amount would be amortized in 30 equal annual installments of approximately $5.9 million.

In conclusion, for the reasons stated above, the Commission is strongly opposed to enactment of H.R. 4988.

The Office of Management and Budget advises that, from the standpoint of the Administration's program, there is no objection to the submission of this report.

By direction of the Commission:

Sincerely yours,

ROBERT E. HAMPTON, *Chairman.*

UNITED STATES CIVIL SERVICE COMMISSION,
Washington, D.C., February 2, 1976.

Hon. DAVID N. HENDERSON,
Chairman, Committee on Post Office and Civil Service,
House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: The Commission is voluntarily submitting its views on H.R. 5858, H.R. 5968, and H.R. 11479, identical bills "To revise retirement benefits for certain employees of the Bureau of Indian Affairs and the Indian Health Service not entitled to Indian preference, provide greater opportunity for advancement and employment of Indians, and for other purposes."

On June 17, 1974 (*in Morton* v. *Mancari*, 42 U.S.L.W. 4933 (U.S. June 17, 1974)), the Supreme Court held that the Indian preference provision (Section 12) of the Indian Reorganization Act of 1934 (Wheeler-Howard Act) was not repealed by the Equal Employment Opportunity Act of 1972 and does not violate the Due Process Clause of the Fifth Amendment. With regard to the applicability of Indian preference to promotions, the Court did not express an opinion, but noted "The Commissioner's extension of the preference in 1972 to promotions within the BIA was designed to bring more Indians into positions of responsibility and, in that regard, appears to be a logical extension of the congressional intent." 42 U.S.L.W. at 4936. However, in *Freeman* v. *Morton*, 499 F.2d 494 (D.C. Cir. 1974), the court held that the law requires that Indian preference be applied to initial hiring, promotions, lateral transfers and reassignments. As a result of that decision, it would appear that certain non-Indian employees of BIA (now BIA and the Indian Health Service (IHS)) would not receive any further promotions if qualified Indians applied for the positions involved.

Any of these bills, if enacted, would provide optional retirement after 20 years of service (not necessarily with BIA or IHS) for those non-Indian employees of BIA and IHS who have been continuously employed by that agency since June 17, 1974 (the date of the Supreme Court decision) and who will complete 20 years of service before December 31, 1985. Furthermore, the bill provides that the annuities of these employees would amount to 2½ percent of average pay multiplied by the first 20 years of service plus 2 percent of the average pay multiplied by years of service over 20 (with no reduction for age). In other words, those qualified non-Indian employees (who in certain cases may be in their early forties or even younger) would have the opportunity to retire with an annuity equal to that of most Federal employees retiring at age 60 or over with approximately 27 years of service.

The Commission does not believe the present situation justifies granting such liberalized retirement benefits to non-Indian employees of BIA and IHS. While their career prospects in BIA and IHS could be limited, they are not in danger of losing their jobs. BIA and IHS employees also have the option of transferring to other positions elsewhere in the Departments of the Interior, Health, Education, and Welfare, and other Federal agencies where greater opportunity for further advancement exists. There is no indication that these employees cannot have full and satisfying careers in other agencies or in other activities. Moreover, limited promotion ladders should not

become a charge against the retirement system as proposed by H.R. 5858, H.R. 5968, and H.R. 11479.

Commission representatives have been in close touch with officials at the departments involved. We have been assured that both BIA and IHS are sensitive to the situation and that opportunities do exist for many non-Indians to fulfill their hopes and aspirations for the future through careers elsewhere in the Federal service.

Understandably, some non-Indian employees are interested in leaving the Bureau of Indian Affairs because of their concern over the application of the Indian preference laws. The Commission's 65 area offices have been alerted to this situation and have been instructed to give all possible assistance to non-Indian employees who have expressed an interest in leaving the Indian agencies, and to alert other Federal agencies to the availability of such employees.

If any one of these bills is enacted, we estimate that the normal cost of the Civil Service Retirement System for *all* employees would be increased by 0.02 percent of payroll and the unfunded liability of the Civil Service Retirement and Disability Fund by $174.9 million. Under the financing provisions of section 8348(f) of title 5, United States Code, this amount would be amortized in 30 equal annual installments of approximately $10.8 million.

In conclusion, for the reasons stated above, the Commission is strongly opposed to enactment of H.R. 5858, H.R. 5968, or H.R. 11479.

The Office of Management and Budget advises that there is no objection to the submission of this report and that enactment of any of these bills would not be in accord with the program of the President.

By direction of the Commission:
Sincerely yours,

ROBERT HAMPTON, *Chairman.*

EXECUTIVE OFFICE OF THE PRESIDENT,
OFFICE OF MANAGEMENT AND BUDGET,
Washington, D.C., June 11, 1975.

Hon. DAVID N. HENDERSON,
Chairman, Committee on Post Office and Civil Service, House of Representatives, Cannon House Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: This is in reply to the Committee's request for the views of this Office on H.R. 4988, "To revise retirement benefits for certain employees of the Bureau of Indian Affairs and the Indian Health Service not entitled to Indian preference, provide greater opportunity for advancement and employment of Indians, and for other purposes."

The purpose of this bill is to grant preferential retirement benefits to certain non-Indian employees of the Departments of Interior, and Health, Education, and Welfare. In its reports the Civil Service Commission states its reasons for strongly opposing enactment of H.R. 4988.

We concur in the views expressed by the Civil Service Commission and, accordingly, strongly recommend against enactment of H.R. 4988.

Sincerely,

JAMES M. FREY,
Assistant Director for Legislative Reference.

EXECUTIVE OFFICE OF THE PRESIDENT,
OFFICE OF MANAGEMENT AND BUDGET,
Washington, D.C., August 18, 1975.

Hon. DAVID N. HENDERSON,
Chairman, Committee on Post Office and Civil Service, House of Representatives, Cannon House Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: This is in reply to the Committee's request for the views of this Office on H.R. 5465, "To allow Federal employment preference to certain employees of the Bureau of Indian Affairs, and to certain employees of the Indian Health Service. who are not entitled to the benefits of, or who have been adversely affected by the application of, certain Federal laws allowing employment preference to Indians."

The purpose of this bill is to provide special employment preference for certain non-Indian employees of the Bureau of Indian Affairs, Department of the Interior and the Indian Health Service, Department of Health, Education, and Welfare.

In their reports these Departments as well as the Civil Service Commission state their reasons for opposing enactment of H.R. 5465.

We concur in the views expressed by the Departments concerned and by the Civil Service Commission and, accordingly, recommend against enactment of H.R. 5465.

Sincerely,

JAMES M. FREY,
Assistant Director for Legislative Reference.

UNITED STATES DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, D.C., November 26, 1975.

Hon. DAVID N. HENDERSON,
Chairman, Committee on Post Office and Civil Service, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This responds to your request for the views of this Department on H.R. 5465, a bill "To allow Federal employment preference to certain employees of the Bureau of Indian Affairs, and to certain employees of the Indian Health Service, who are not entitled to the benefits of, or who have been adversely affected by the application of, certain Federal laws allowing employment preference to Indians."

We recommend against enactment of H.R. 5465. The Department is currently in the process of formulating an assistance program to resolve the problem addressed by H.R. 5465 and we believe that this available administrative solution is the most viable approach.

PROVISIONS OF H.R. 5465

We understand that H.R. 5465 is intended to relieve the situation of those civil service employees of the Bureau of Indian Affairs and Indian Health Service who are not eligible for "Indian preference" in promotions, lateral transfers, and reassignments within those agencies.

H.R. 5465 relates to non-Indian preference employees who were employed by the BIA or IHS on June 17, 1974, the date of the U.S.

Supreme Court decision on the subject of Indian preference. For the purposes of H.R. 5465, these employees are defined as "eligible employees" under section 1 of the bill.

The bill would appear to be based upon the theory that the United States Court of Appeals for the District of Columbia and the Supreme Court decisions of 1974, which established absolute Indian preference in BIA and IHS employment, caught these "eligible employees" in midcareer and left them with little opportunity for advancement in those agencies.

The bill proposes relief by authorizing special treatment designed to aid "eligible employees" who wish to leave the BIA and the IHS. It would require the Departments of the Interior and of Health, Education and Welfare to provide for out-placement of "eligible employees" of the BIA and IHS under the bill to other parts of those Departments.

Section 2 of the bill relates specifically to the Department of the Interior. Under section 2 of the bill, all applications by "eligible employees" of the BIA who are qualified in the order of their rating shall be given mandatory priority by the Department in consideration of their application for each vacancy occurring in the Interior Department, other than a vacancy in the BIA. However, the provisions of section 2 shall not apply to applications for filling a vacancy by transfer or appointment of a preference eligible, including those entitled to veteran's preference, reinstatement of such a preference eligible, or restoration of a person entitled by law to veterans' re-employment rights.

Under section 3, an "eligible employee" is entitled to the next occurring vacancy, unless the Department files compelling reasons for passing over such employee with the U.S. Civil Service Commission. The Commission would then be required to determine the sufficiency of such reasons, and the Department would be required to comply with the findings of the Commission.

Section 5 authorizes the Civil Service Commission to prescribe regulations to carry out the bill's provisions.

Section 5(b) provides that H.R. 5465 would apply to vacancies occurring during a three year period beginning after ninety days after enactment, except that the Civil Service Commission could extend such period for one year.

BACKGROUND

A number of provisions concerning Indian preference in Federal "Indian Service" employment had been enacted by the Congress during the 19th and early 20th centuries (see for example 25 U.S.C. 44–47). However, the broadest and most modern provision, and the one on which the current Indian preference requirements are based, is section 12 of the Indian Reorganization Act of 1934 (48 Stat. 986; 25 U.S.C. 472) which provides:

"The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed without regard to civil-service laws, to the various positions maintained, now or hereafter, by the Indian Office, 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 position."

Prior to 1972, the Indian preference provision was administered by the Bureau of Indian Affairs as applying only to initial appointments and not to subsequent promotions. In 1972 the BIA policy was changed to extend the preference to promotions, transfers from outside the BIA, and reassignments within the BIA which improved promotional prospects. The 1972 policy provided the possibility for the Commissioner of Indian Affairs to grant exceptions to Indian preference by approving the selection and appointment of non-Indians when he considered it in the best interest of the Bureau. The 1972 policy did not extend Indian preference to purely lateral reassignments which did not improve promotional prospects. Indian preference is also utilized in establishing employee retention registers for use in reductions-in-force situations.

In addition, the BIA now encourages tribes to contract for control and operation of most BIA reservation level activities and the January 1975 enactment of section 102 of the Indian Self-Determination Act (88 Stat. 2206; 25 U.S.C.S. 450f) directs the contracting of most BIA activities "upon the request of any Indian tribe".

CASE LAW ON INDIAN PREFERENCE

Two recent court decisions have upheld the validity of section 12 of the Indian Reorganization Act, and its application to initial hires, promotions, transfers and reassignments.

On April 25, 1974, the United States Court of Appeals for the District of Columbia in *Freeman* v. *Morton*, 499 F. 2 494, upheld an unreported District Court decision in a suit brought by four Indian BIA employees. The Court held that under the 1934 Indian preference provision Indian preference applies to the filling of all vacancies in the BIA, including initial hires, promotions, lateral transfers, and reassignments in the Bureau, and that no exceptions are possible where there is at least a minimally qualified candidate who is eligible for Indian preference.

On June 17, 1974 the U.S. Supreme Court in an 8–0 decision (*Morton* v. *Mancari*, 417 U.S. 535) reversed the decision of a three-judge District Court for the District of New Mexico which had held, in a suit by a group of non-Indian BIA employees, that the 1934 Indian preference provision (25 U.S.C. 472) had been impliedly repealed by enactment of Section 11 of the Equal Employment Opportunity Act of 1972 (86 Stat. 111; 42 U.S.C. 2000 e–16), prohibiting discrimination in most Federal employment on the basis of race.

The Court held that Indian preference was not a racial preference but, rather, it was an employment criterion reasonbly designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups.

DEPARTMENTAL ASSISTANCE PROGRAM

This Department is aware that the *Freemen* and *Mancari* decisions and the implementation of the Indian Self-Determination Act will, in many cases, have an adverse impact upon both non-Indian and Indian employees of the BIA. The Department is committed to providing placement assistance to those Indian and non-Indian em-

ployees of the BIA whose jobs or opportunities have been foreclosed by either Indian preference or the Department's Indian Self-Determination policy, and has been formulating a program to provide such assistance. This program is being implemented and will become fully operational in December, 1975. Some initial orientation sessions for the program have been held at both field and headquarters locations and further sessions are currently in the planning stage and will be held in the near future. A copy of the manual instructions which describe the program and the implementing procedures is enclosed for your information.

This program will assist BIA employees with placement within other bureaus in the Department, and with locating reassignments in other Federal agencies.

Within the Department, first priority placement assistance would be given to competitive career and career-conditional BIA employees employees when: (1) there is a reduction in force and there are no opportunities for reassignment within the BIA; (2) an activity or function is being contracted by a tribe and the employee's position is being abolished and (3) it is imperative to reassign an employee because of certain hardships such as ill-health, loss of effectiveness with a tribe, or other compelling circumstances. One position offer would be made to employees under the mandatory placement provisions.

Secondary priority placement assistance would be afforded to competitive career and career-conditional BIA employees who can demonstrate that they no longer have an opportunity for career advancement in the Bureau becauseof India preference regulations.

RECOMMENDATIONS

We are opposed to the enactment of H.R. 5465. Since the Department is committed to its assistance program, we believe that this available administrative solution should be adopted and tried before any solutions are mandated by legislation. In our judgment, our program, when implemented, will meet the objectives of H.R. 5465.

In our judgment, enactment of this legislation may result in an adverse impact upon the Department: it does not differentiate the need among employees for varying degrees of assistance; and it proposes an administrative process which may result in some personnel disruptions.

The broad application of section 2 could have a widespread impact upon the process of filling positions throughout the Department. Application of H.R. 5465 to the filling of positions internally through reassignment or promotion could go beyond any similar employment preference accorded under re-employment priority or separated career employee programs of the Civil Service Commission.

The bill grants, in section 3, virtually mandatory employment rights to all "eligible employees" of BIA, regardless of their particular occupational situation. It would provide mandatory placement rights to individuals who might wish to leave BIA because they anticipate career obstacles but who have not actually been displaced. We would note that a significant distinction exists between persons who are actually displaced through formal procedures and those

whose opportunities are either limited or might be limited by Indian preference.

Enactment of this legislation may potentially affect the BIA program capability in that it could deprive the Bureau of Indian Affairs of a number of highly experienced employees with technical and managerial expertise at a time when their skills and experience are most needed by the BIA. We believe that the Departmental program now nearing implementation will provide a meaningful and gradual process for outplacement.

With regard to the provisions which concern the Department of Health, Education and Welfare, and the Civil Service Commission, we defer in our views to those two agencies.

The Office of Management and Budget has advised that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely yours,

JAMES T. CLARKE,
Assistant Secretary of the Interior.

UNITED STATES DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, D.C., October 17, 1975.

Personnel Management Letter No. 75-40 (330)

Subject: Departmental Career Placement Assistance Program Regulations.

To: Personnel Officers.

Attached is an advance copy of the Departmental Career Placement Assistance Program (DCPA) Regulations.

The procedural requirements of the regulations are effective the date of this PML and are to be incorporated into the Departmental Manual pending receipt of the published regulations.

Training sessions will be conducted for all servicing personnel offices of the Department to provide guidance on the implementation and operation of DCPA. A schedule will be published in the near future listing locational sites and dates for training sessions.

JOHN F. MCKUNE,
Director, Organization and Personnel Management.

Attachments.

DEPARTMENT OF THE INTERIOR

DEPARTMENTAL MANUAL

Subchapter 1. Career Placement Assistance Program

.1 PURPOSE

This chapter describes the Departmentwide Career Placement Assistance Program which provides placement assistance to eligible employees of the Department. The Departmentwide Career Placement Assistance Program (DCPA) provides the primary method through which employees can apply and be considered for placement

assistance. It is the intent of the Department to provide continuing career opportunities for all employees. In the past, situations have existed in the Department where certain activities were expanding. At the same time, other activities were faced with reduction-in-force situations. This program provides coordination of Departmentwide movement and placement of employees from one activity to another.

.2 POLICY

It is the policy of the Department to provide maximum placement assistance to employees whose careers are affected by reduction in force, contracting out of Departmental functions, changes in overseas employment, and the implementation of Indian preference in the Bureau of Indian Affairs.

.3 COVERAGE, SCOPE, RELATIONSHIPS AND DEFINITIONS

A. Departmentwide career placement assistance program

(1) The Department Career Placement Assistance Program (DCPA) is the mechanism through which the Department assists employees who qualify under the program eligibility criteria to find other employment in the Department.

(2) The terms and provisions of this program shall apply to all eligible employees without regard to age, race, color, religion, sex, national origin, or any other non-merit factor.

(3) The Career Placement Assistance Program is an extension of and a supplement to existing Department and Civil Service Commission policies and programs and is not intended to supersede or negate other Department or CSC requirements concerning placement assistance.

B. Basic requirement

Under the DCPA, employees who are eligible for and have applied for career placement assistance, will be afforded maximum consideration for vacancies throughout the Department. It is the responsibility of each servicing personnel office to insure that DCPA applicants receive priority consideration for all vacancies for which they are qualified, and at geographical locations where they have indicated availability.

C. Category I placement assistance

Category I placement assistance provides eligible candidates considering for all vacancies at their current grade level Departmentwide, for which they qualify, and offers placement opportunity in a continuing position when there is an available vacancy which matches their grade level and geographical location preference. Category I placement assistance will be given to competitive career and career-conditional employees of the Department under the following circumstances:

(1) When an employee is faced with loss of job caused by a reduction in force.

(2) When an employee of the Bureau of Indian Affairs must be reassigned because of documented life or health threatening circumstances beyond the employee's control, and when reassignment cannot

be effected within the Bureau by reason of the operation of Indian preference.

(3) When an employee of the Trust Territory of the Pacific Islands in displaced by a Micronesian and must return to the Continental United States.

(4) Eligibility for retention on a DCPA List for Category I placement assistance is limited to a two year period.

D. Category II placement assistance

Category II placement assistance provides eligible candidates consideration for all vacancies at their current grade level Department-wide, for which they qualify. Category II placement assistance will be afforded to employees of the Department under the following circumstances:

(1) When career and career-conditional employees of BIA can demonstrate that opportunities for career advancement in the Bureau of Indian Affairs are not possible because of Indian preference regulations.

(2) When an employee in the Virgin Islands, Guam, Trust Territory of the Pacific Islands, and in American Samoa having reinstatement eligibility, expresses an interest in returning to the Continental United States.

(3) When an employee in the Excepted Service in the Government of American Samoa without reinstatement eligibility, wishes to return to the Continental United States, and is within reach on a Civil Service Commission register for a position to be filled.

(4) Eligibility for retention on a DCPA List for Category II placement assistance is limited to a two year period.

E. Salary and pay

(1) *Highest previous rate.*—An employee of the Department who is placed through DCPA will have his/her pay fixed in the new grade at a step which preserves, as far as possible, his/her last earned rate, except when such rate is earned while serving under a temporary promotion.

(2) *Salary retention.*—An employee placed in a lower grade, who is eligible for salary retention under FPM Chapter 531, Subchapter 5, will be accorded salary retention if such rate is higher than that which can be provided under the highest previous rate rule.

F. Continuing positions

It is intended that employees referred for placement will be placed in continuing positions. A continuing position is an unencumbered or uncommited fulltime position in the competitive service without a known termination date that is scheduled to be filled, or any full-time position in the competitive service without a known termination date encumbered by a TAPER, or temporary appointee or promotee. The standard RIF definition of a position that will continue for more than 90 days will not be used as the criterion.

RESPONSIBILITIES

A. Department of the Interior—Office of the Secretary

(1) The Office of Organization and Personnel Management is responsible for:

(a) Providing a program whereby eligible employees will be assisted in being placed in other bureaus and offices in the Department.

(b) Preparing and distributing Career Placement Assistance Program Lists to all bureaus and offices in the Department.

(c) Overall supervision and monitoring of the DCPA to insure that the objectives of the program are accomplished.

(d) Designation of a Career Placement Assistance Coordinator who will work directly with designated counterparts in each bureau headquarters.

(e) Appointing a panel consisting of three bureau Personnel Officers to serve in an advisory capacity in the operation of the Career Placement Assistance Program and to make recommendations to the Director, Office of Organization and Personnel Management.

B. Bureau headquarters

(1) The Division of Personnel Management at each bureau headquarters is responsible for:

(a) Designating a Career Placement Assistance Coordinator to serve as a contact with the bureau field Personnel Officers and the Office of Organization and Personnel Management.

(b) Coordinating bureauwide placement efforts of applicants for the Career Placement Assistance Program.

(c) Referring applicants for the DCPA to the Director, Office of Organization and Personnel Management when all placement efforts have been exhausted within the bureau. Referrals will state reasons for requesting assistance and will document placement efforts.

C. Bureau Servicing Personnel Office

(1) The bureau servicing personnel offices are responsible for:

(a) Designating a Career Placement Assistance representative to assist employees eligible to apply for the program.

(b) Exploring placement efforts for applicants for the program, and referring to the bureau headquarters applicants who cannot be placed within that personnel office's area of responsibility. Referrals made to bureau headquarters will document placement efforts that have been made.

(c) Insuring that all personnel actions are made in accordance with the requirements spelled out in this chapter.

(d) Determining employee eligibility for the program, counseling employees, and registering employees in the program in accordance with paragraph 370 DM 330, 1.5E.

(e) Establishing contacts with local Federal agencies to be appraised of their recruitment needs and referring employees who request Career Placement Assistance.

.5 PROCEDURES

A. Advance planning

The Departmentwide Career Placement Assistance Program presupposes that all servicing personnel offices, faced with a reduction-in-force situation, or other personnel situations requiring action and qualifying under the Category I or Category II placement assistance aspects of this Chapter, will make every effort to effect satisfactory placements. As part of this effort, each office/bureau will develop an internal manpower relocation program. This program will provide for a systematic and equitable way to reassign bureau personnel to accommodate changes in program priorities and to provide for proper utilization of personnel within the bureau. Referrals by a bureau of individuals eligible for placement under the Career Placement Assistance Program should not be made until such time as all placement efforts have been exhausted within the bureau.

B. Eligibility

(1) Employees are eligible to apply for the Career Placement Assistance Program who qualify under the criteria listed in 370 DR 330, 1.3C and D.

(2) Employees who receive a specific notice of reduction in force must apply for the program no later than 30 calendar days after the date of receipt of the RIF notice in order to be eligible.

(3) Employees applying for Category II Placement Assistance under the provisions of 370 DM 330, 1.3D(1), must do so by September 30, 1976, in order to receive consideration.

(4) Career or career-conditional employees of the Bureau of Indian Affairs, not eligible for Indian preference, employed after the Supreme Court decision (Mancari vs Morton) of June 17, 1974, are not eligible for Category II Assistance. This does not obviate the opportunity for placement assistance under the Category I provisions of this chapter.

C. Application

(1) Application is voluntary on the part of eligible employees, and only those who are willing to accept employment at other activities within the Department should apply.

(2) When an eligible employee applies for the DCPA, the losing servicing personnel office obtains an updated SF–171, a supervisory evaluation, and a completed Career Placement Assistance Form DI 1832. This form is included as attachment A to this chapter, and should be obtained through the usual supply channels. Until regular stock of DI 1832 is obtained, the form may be reproduced locally. A copy of SF–171, a copy of the supervisory evaluation, and a copy of DI 1832 are sent by the losing personnel office to the Bureau Headquarters for appropriate action. A copy of DI 1832 should be given to the employee. A copy of DI 1832 will be retained by the servicing personnel office.

(3) Eligible employees will be given a choice in selecting geographical areas where they are willing to work. In the application process, the losing personnel office should advise applicants that a broad geographical preference area will afford increased opportunities for placement. However, applicants must be cautioned that completion of the application form requesting placement consideration in a specific geographic area means they must accept a position if offered in that

particular geographic area. If they do not, their names will be removed from the DCPA List and they will not be eligible for the program.

(4) Employees may apply for not more than three occupational series for which they are qualified and available which do not exceed their present grade level or the grade level held at the time of the reduction-in-force action. They may also apply for acceptable lower grade positions for which they qualify. Employees may not apply at grade levels to which temporarily promoted.

(5) Applications must be submitted to the Bureau Headquarters as soon as possible prior to the proposed date to terminate the employee or to allow for reassignment in a hardship case. The Bureau Career Program Placement Assistance Coordinator will review the application to determine if all bureau placement efforts have been exhausted. This must be accomplished no later than 20 days after the application is received. Only then will the request be forwarded to the Department. If placement assistance is requested because of medical reasons, a statement from a medical doctor must accompany the application.

D. Employee obligations

Applicants must cooperate with and keep their servicing personnel office advised of current address and telephone number where they can be contacted. They must notify such office immediately if for some reason they are not available to accept Department employment, or if they decide to withdraw as a participant in the program.

E. Counseling

(1) Eligible employees will be counseled, by the losing personnel office, regarding their rights and obligations under the DCPA and will be provided information about Department activities in which they have expressed in interest. If appropriate, applicants should also be counseled on the advantage of considering lower grade positions because of the additional opportunity for selection which will be afforded. Upon completion of the counseling session and preparation of the Career Placement Assistance Application Forms, DI 1832, both the applicant and the representative of the servicing personnel office will sign the forms.

(2) This counseling will be important for all employees, but especially for employees of the Bureau of Indian Affairs who are applying for Category II placement assistance. These employees must receive guidance regarding career opportunities, and it must be determined if the employee has other career interests, or specialized skills or experience which can be identified. These applicants should be advised that, realistically, it may not be possible to provide immediate placement and a reasonable length of time should be allowed for suitable vacancies to be located.

(3) When an applicant fails to receive an offer after a reasonable period of time (60–90 days) and the losing servicing personnel office determines that it is unlikely that placement will be made because of the size of the original area or the employee's restrictions as to availability (positions, locations, or acceptable grade level) the employee will be counseled on the various possibilities of increasing the opportunities for placement.

F. Preparation and distribution of DCPA lists

(1) Career Placement Assistance Program Lists will be prepared by the Departmental Career Placement Assistance Coordinator from the application form (Attachment A) provided by the Headquarters Office of each bureau, and will follow the format found in Attachment B. Copies of the list will be distributed to each major servicing personnel office Departmentwide, and to each Bureau Headquarters as listed in Attachment C. The servicing personnel offices are responsible for further distribution of the lists to any office under the jurisdiction which exercises appointing authority.

(2) The lists will be divided into two groups, individuals eligible for Category I placement consideration and individuals eligible for Category II placement consideration.

(3) A new and complete list of current applicants will be prepared and distributed at the beginning of each month. Periodically during the month update information will be distributed by the Departmental Career Placement Assistance Coordinator.

(4) Losing personnel offices are responsible for keeping the Departmental Career Placement Coordinator informed of changes to be made in the lists.

G. Selections from career placement assistance program lists

(1) When a servicing personnel office receives a DCPA List of eligibles for placement consideration, the list will be screened to determine if there are applicants whose skills match existing vacancies.

(2) If, after screening the DCPA List there are applicants whose skills match vacancies, requests will be made for the SF–171's of the available applications. Contact is made directly with the Departmental Program Coordinator to obtain the SF–171's.

(3) Category I and Category II applicants will be afforded, as a minimum, the same consideration as eligibles on an Interior Reemployment Priority List in every location for which they have indicated availability. Selections of DCPA applicants must be in accordance with the procedures governing selection from a RPL as described in FPM Chapter 330, Subchapter 2. Category I and Category II applicants may be selected noncompetitively for lateral reassignment or for placement in positions of a lower grade level.

If the appointing authority announces a position through merit promotion procedures, Category I and II applicants must be entered into the promotion file and given maximum consideration for placement.

(4) Selections from the DCPA Lists must be made in category order. Persons in Category I must be selected before persons in Category II. The losing activity will release employees within two weeks after positions are accepted, or in no case later than 30 days without mutual agreement between the releasing and gaining activities.

(5) It is the responsibility of each bureau headquarters to monitor placement efforts within their bureau. If Category I applicants are not placed within 60 days after distribution of a DCPA List or if Category II applicants are not placed within 120 days after distribution of a DCPA List, the Office of Organization and Personnel Management will review the placement efforts of each bureau and determine the appropriate action required to effect placement. Such measures for Category I may include, but are not limited to, action by the Office of the Secretary in imposing Departmentwide hiring restrictions for specific occupations, locations or organizations, directed placement procedures, or other action which will be necessary to effect placement. Bureau personnel officers will be consulted prior to implementation of extended placement procedures.

H. A valid offer

A valid offer is the offer of a continuing position by a Departmental activity which meets the grade level(s) and location(s) for which the employee has applied provided the offer includes payment of travel and transportation expenses either by the gaining or losing office when relocation is required. Only one position offer will be made to an applicant eligible for either Category I or Category II Placement Assistance.

I. Payment of travel expenses

As a general rule, the losing office will pay the applicable travel and transportation expenses. However, arrangements may be made, through negotiation between the gaining and losing offices, for cost sharing of travel expenses.

J. Removal from the program

When an application accepts a position, declines a designated valid offer as specified in paragraph 370 DM 330, 1.5H, fails to keep the losing servicing personnel office informed of his/her whereabouts, or requests voluntary removal from the program, the losing servicing personnel office will immediately instruct the Department Career Placement Coordinator to remove the applicant from the program. To the extent possible, DCPA Lists should contain only available eligibles. In view of this, the above notification should be made initially by telephone. This will be followed by a confirmation memorandum stating the applicant's name, organization, servicing personnel office, and the reason for removal.

K. Records and reports

(1) Losing servicing personnel offices will maintain an individual folder on each employee applicant in the Department Career Placement Assistance Program. The folder will be maintained for a period of one year after the applicant is removed from the program and will contain the following information:

(a) A copy of the Career Placement Assistance Application Form. (DI 1832).

(b) Dates of counseling, and name of individual providing counseling.

(c) Position title, series, and grade at time of application.

(d) Copies of any general or specific reduction-in-force, separation or demotion notices, functional transfer offers, and declinations.

(e) Offers received, accepted, or declined and from which organizations or activities.

(f) Reasons for declinations.

(g) Date removed from the Program and the reason.

(2) Each servicing personnel office will submit a 60-day report to their bureau headquarters detailing placement efforts that have been made for applicants of the DCPA. The report will list the total number of Category I and Category II applicants considered and the successful placements made.

Consolidated reports will be submitted to the Director, Office of Organization and Personnel Management by each bureau headquarters.

UNITED STATES DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, D.C., February 2, 1976.

Hon. DAVID N. HENDERSON,
Chairman, Committee on Post Office and Civil Service,
House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This responds to your request for the views of this Department on H.R. 4988, H.R. 5858 and H.R. 5968, similar bills "To revise retirement benefits for certain employees of the Bureau of Indian Affairs and the Indian Health Service not entitled to Indian preference, provide greater opportunity for advancement and employment of Indians, and for other purposes."

We recommend that these three bills not be enacted.

PROVISIONS OF THE THREE BILLS

We understand that H.R. 4988, H.R. 5858 and H.R. 5968 are intended to relieve the situation of those civil service employees of the Bureau of Indian Affairs and Indian Health Service who are not eligible for "Indian preference" in promotions, lateral transfers, and reassignments within those agencies.

The bills relate to non-Indian preference employees who were employed by the BIA or IHS on June 17, 1974, the date of the U.S. Supreme Court decision on the subject of Indian preference. They would appear to be based upon the theory that the United States Court of Appeals for the District of Columbia and the Supreme Court decisions of 1974, which established absolute Indian preference in BIA and IHS employment, caught these employees in mid-career and left them with little opportunity for advancement in those agencies.

H.R. 5858 and H.R. 5968 are identical. H.R. 4988 is a similar bill. All three bills would amend 5 U.S.C. 8336 to provide for optional retirement after 20 years of service, not necessarily with BIA or IHS, for those non-Indians of either agency who have been continuously employed by the agency since June 17, 1974 (the date of the Supreme Court decision on Indian preference) and who will have completed 20 years of service before December 31, 1985 (H.R. 5858 and H.R. 5968) or December 31, 1984 (H.R. 4988). This special provision would not apply to anyone who "is otherwise entitled to full retirement benefits."

H.R. 4988 provides that the Secretaries of the Interior and of Health, Education and Welfare may delay retirement thereunder for one year under certain circumstances, and an employee continues to be eligible for early retirement even if he becomes eligible for voluntary retirement during that delay.

All three bills amend 5 U.S.C. 8339 to provide a formula for computing the annuity. While there are differences in the amendments between the two versions, both amendments would provide qualified non-Indian employees—who in certain cases may be in their forties or younger—the opportunity to retire with an annuity equal to that of most Federal employees who retire at age 60 or over with approximately 27 years of service. None of the three bills refer to that provision of 5 U.S.C. 8339(h) which contains a formula reducing annuities for retirements before age 55.

BACKGROUND

On November 26, 1975, this Department transmitted our views to the Committee on H.R. 5465, a bill that would provide for out placement of non-Indian preference employees of the BIA and IHS to other parts of those Departments. This report details the background of Indian preference, including the case law on the subject (pp. 2–3). We oppose enactment of the bill because we had formulated a Department Assistance Program to assist Indian and non-Indian BIA employees adversely affected by Indian preference and the Indian Self-Determination Act (p. 4). A copy of the November 26, 1975 report is enclosed.

THE PRESENT EARLY RETIREMENT LAW

Under 5 U.S.C. 8336(d)(1) an employee with 20 years of service at age 50 or with 25 years of service at any age is entitled to retire on an immediate annuity if his job is absolished. This provision applies to any eligible employee of the BIA.

Under 5 U.S.C. 8336(d)(2) an employee may voluntarily retire with an immediate annuity if, upon application of his agency to the Civil Service Commission, the Commission determines that such agency has a "major" reduction-in-force (RIF). The agency could then authorize, during a time period prescribed by the Commission, the employee's retirement if he meets the requisite age and service qualifications (same as 8336(d)(1)).

The annuity formula for employees who retire under 5 U.S.C. 8336(d), determined by U.S.C. 8339(h), reduces annuities by 1/6 of 1% for each month the employee is under age 55.

In 1973, 1974 and 1975 the BIA received determinations of major RIF's from the Civil Service Commission under 5 U.S.C. 8336(d)(2). In 1973, 22 BIA employees chose early retirement; 26 employees chose it in 1974, and 167 employees voluntarily retired in 1975. Those who chose to retire were both Indian and non-Indian employees.

THE EFFECT OF INDIAN PREFERENCE AND THE INDIAN SELF-DETERMINATION ACT

Not all non-Indian employees of the Bureau of Indian Affairs have been adversely affected by Indian preference as interpreted by recent court decisions. In fact, many non-Indian employees in a number of occupations have had and continue to have remarkably successful careers within the Bureau.

In many career fields (such as Forestry, Engineering, Social Work, Teaching, Personnel Management, and Financial Management) there

are not adequate numbers of Indian candidates to fill the large number of entry level vacancies which exist at any given time in the Bureau. In such fields, Indian preference creates no impediment to non-Indian employees for promotion to the journeyman level of these occupations. This is true, for example, in teaching where 75 percent of vacancies each year are filled by non-Indian employees despite concerted and vigorous attempts to recruit qualified Indians.

However, the effects of Indian preference in some occupations become more apparent above the journeyman levels. Competition for such positions is intense and no Federal employee is offered any guarantee of promotion to supervisory or managerial positions. Nonetheless, even above the journeyman level some promotional opportunities continue to exist for non-Indian employees.

While it is the policy of the Department of the Interior and the Bureau of Indian Affairs to recruit, develop, and utilize qualified Indians to the maximum extent possible, that policy does not rule out utilization and advancement of non-Indian employees. The Commissioner of Indian Affairs has stated:

"There are many opportunities within the Bureau of Indian Affairs for the continued employment and advancement of the present work force. Although accelerated recruitment efforts are being made for qualified Indian candidates, experience has shown that there are vacancies for which we have not been able to recruit qualified Indians. Non-Indians have been appointed and promoted to these vacancies."

We recognize that some non-Indian employees have had their careers affected by the recent court decisions on Indian preference. As noted in our report on H.R. 5465 this Department is assisting these employees to find continued career opportunities outside the BIA. Additionally, we are increasingly concerned about the potential effects of the Indian Self-Determination Act (P.L. 93–638) on Indian and non-Indian employees alike. The Indian Self-Determination Act could ultimately result in significant numbers of BIA employees leaving the Federal work force.

RECOMMENDATION

This Department is committed to our assistance program which provides placement assistance to those Indian and non-Indian employees of the BIA whose jobs or opportunities have been foreclosed by either Indian preference or the operation of P.L. 93–638.

The present situation in the BIA does not justify the liberal retirement benefits contemplated by the three bills which far surpass the benefits available to other Federal employees, and we cannot support such a provision. BIA employees who wish to retire early under 5 U.S.C. 8336 should be subject to the same annuity formula as all other employees who retire pursuant to that provision.

Further, employees of the BIA who are adversely affected by the contracting requirement of P.L. 93–638 may retire pursuant to the provisions of 5 U.S.C. 8336(d).

With regard to the provisions which concern the Department of Health, Education and Welfare, and the Civil Service Commission, we defer in our views to those two agencies.

The Office of Management and Budget has advised that there is no objection to the presentation of this report and that enactment of

H.R. 4988, H.R. 5858, and H.R. 5968, would not be in accord with the program of the President.

Sincerely yours,

JAMES T. CLARKE,
Assistant Secretary of the Interior.

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE,
February 11, 1976.

DAVID N. HENDERSON,
Chairman, Committee on Post Office and Civil Service, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your request for a report on H.R. 5465, a bill "To allow Federal employment preference to certain employees of the Bureau of Indian Affairs, and to certain employees of the Indian Health Service, who are not entitled to the benefits of, or who have been adversely affected by the application of, certain Federal laws allowing employment preference to Indians."

We oppose enactment of the bill because our present procedures are adequate to deal with the adverse effects of the Indian employment preference upon non-Indian employees of the Indian Health Service.

The bill would provide special employment preference for a period of three years to non-Indian employees of the Bureau of Indian Affairs and Indian Health Service who are not entitled to Indian preference, who are serving in career or career-conditional appointments and who have been so employed since June 17, 1974. Eligible employees would receive special preference in selection for any vacancy in the Department of the Interior or the Department of Health, Education, and Welfare, respectively, for which they apply, with certain exceptions.

The continuity of Federal employment for the non-Indian employees of the Indian Health Service is not adversely affected by the application of the Indian preference laws. While there are approximately 3,000 non-Indian employees in the Indian Health Service who may find their career prospects somewhat limited, they are not in danger of losing their jobs. Non-Indian employees are eligible for transfer to other programs in the Department of Health, Education, and Welfare under existing personnel procedures. As the need arises, the Department will take the initiative to develop a mechanism to facilitate placement assistance and to open up career opportunities in other organizational components.

Although we understand some non-Indian employees have expressed an interest in leaving the Indian Health Service because of their concern over the application of the Indian preference laws, the Department does not believe the present situation justifies granting such employment preferences.

We therefore recommend that the bill not be favorably considered.

We are advised by the Office of Management and Budget that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely,

MARJORIE LYNCH,
Under Secretary.

○

Calendar No. 786

94TH CONGRESS, 2d Session | SENATE | REPORT No. 94-828

RETIREMENT BENEFITS FOR CERTAIN EMPLOYEES OF INDIAN AGENCIES

MAY 13, 1976. Ordered to be printed

Mr. MCGEE, from the Committee on Post Office and Civil Service, submitted the following

REPORT

[To accompany H.R. 5465]

The Committee on Post Office and Civil Service, to which was referred the bill (H.R. 5465) to revise retirement benefits for certain employees of the Bureau of Indian Affairs and the Indian Health Service not entitled to Indian preference, provide greater opportunity for advancement and employment of Indians, and for other purposes having considered the same, reports favorably thereon with an amendment and an amendment to the title, and recommends that the bill as amended do pass.

AMENDMENT

The Committee amendment to H.R. 5465 strikes all after the enacting clause and inserts new language.

The new language inserted is that of the bill S. 509 with two changes, both of which pertain to the criteria to be met by an employee if he is to establish eligibility for an annuity under the provisions of the bill. One would require that the employee complete 25 years of service or, after becoming 50 years of age, complete 20 years of service. The second would require that an affected employee demonstrate that he has been passed over on at least two occasions for promotion, transfer, or reassignment to a position representing career advancement because of a law granting a preference to Indians in promotions and personnel actions.

PURPOSE

The purpose of the bill is to extend to certain non-preference employees of the Bureau of Indian Affairs, Department of the Interior, and the Indian Health Service, Department of Health, Education, and Welfare, improved retirement provisions to off-set their loss of competitive status for promotions and transfers. The benefits accorded by the bill are authority to retire on an immediate annuity prior to December 31, 1985, provided the employee has completed 25 years of service or after becoming 50 years of age has completed 20 years of service and has been continuously employed in the Bureau of Indian

57-010—76——1

Affairs or the Indian Health Service since June 17, 1974, is not otherwise entitled to full retirement benefits, and has been passed over on two occasions because of the application of the Indian preference laws; and an annuity computation formula providing that an employee covered by the bill shall receive 2½ percent of his "average pay" for each of the first 20 years of service and 2 percent for each year thereafter.

Background

The Federal policy of according some hiring preference to Indians in the Indian service dates to at least 1834, though the present statute giving rise to the bill is the Wheeler-Howard Act of 1934, which reorganized the administration of Indian affairs and accorded an employment preference for qualified Indians.

For reasons which are not entirely clear, the Indian preference provision of the 1934 Act, codified in section 472 of title 25, United States Code, was not enforced beyond the stage of initial appointment until 1972. Subsequent to the extension of Indian preference to other personnel actions, such as promotions to fill vacancies for which an Indian and a non-Indian were competing, two lawsuits were decided which reaffirmed the preference and its application to promotions, reassignments to vacant positions, and assignments to training programs (*Freeman* v. *Morton*, 499 F. 2d 494 and *Morton* v. *Mancari*, 417 U.S. 535).

Administration witnesses before the Committee agreed that employees hired by the affected agencies had, until relatively recently, understood that they enjoyed full competitive status for personnel actions subsequent to initial appointment. The policy of the Bureau of Indian Affairs was stated in section 2 of an August 18, 1966, Personnel Management Letter from the Commissioner:

> 2. Policy.—It is the policy of the Bureau to give preference in initial employment and re-employment to qualified individuals of one-fourth or more degree Indian blood. This preference applies only when an appointment action is taken. In cases other than the granting of Indian preference at the time of appointment, equal employment opportunity is provided, on a competitive basis, for all qualified persons, without regard to race, creed, color, national origin, sex, marital status, or physical handicap. This policy shall apply to recruitment, employment, promotion, transfer, selection for training, and all other personnel actions, programs, and practices.

While opposing the proposed legislation, Administration witnesses also conceded that the position in which the non-preference employees of the Indian service find themselves is unique in the Federal service. So long as a qualified Indian applicant is available, these employees do not enjoy equal opportunity for career advancement. Thus, the law—or at least the Government's failure to properly interpret and enforce it for a long period—has had a deleterious effect on these employees.

The Committee is aware, too, that the provisions of the recently enacted Indian Self-Determination Act which authorizes tribes to contract services presently delivered by the Bureau of Indian Affairs and Indian Health Service could have far-reaching impact on these employees and possibly on Indian employees as well, since there can be no guarantee that the present employees would be retained under such contracts.

That impact, however, is not ascertainable at this point since the pertinent provisions of the Self-Determination Act did not not become effective until November, 1975.

The Committee does intend to observe the impact of that Act (P.L. 93–638) on career employees closely.

Statement

S. 509 was introduced in the Senate on January 30, 1975, by Senator Stevens with the cosponsorship of Senators Montoya and Domenici. The substance of S. 509 has been substituted for H.R. 5465, a bill referred to the Committee on May 4, 1976.

The bill is intended to redress the loss of career opportunity and concomitant economic loss incurred by those non-preference employees of the Bureau of Indian Affairs and Indian Health Service who have pursued careers in the civil service under the impression that they enjoyed full competitive status and who have been affected by strict application of the Indian Preference Act.

The Committee in no way questions the Indian preference law itself. Rather, it sees the bill as a step toward fuller realization of Indian self-determination. Many non-preference employees may be able to take advantage of careers outside the Indian agencies, but for many others such opportunities are severely restricted if they exist at all. It makes no sense, in the Committee's view, to have non-Indian employees who find promotional opportunities closed to them and who thus feel trapped in dead-end jobs administering Indian programs and encumbering these positions while equally frustrated but highly motivated and qualified Indian people must wait for them to eventually vacate these positions before they can gain more control over their own affairs.

As one non-Indian employee testified to the Subcommittee on Compensation and Employment Benefits:

> We who are urging the passage of this legislation are not responsible for any of the alleged wrongs or discrimination which the Indian people may have had visited upon them during the past 2 or 3 centuries.
>
> None of us is in a position to control the policies of the U.S. Government toward the Indian people. We have done our utmost to fulfill our obligations to give an honest day's work in return for an honest day's pay * * *
>
> In all sincerity, we cannot dispute the right of the Indian people to rule their own destinies. As we stated earlier, however, in order for the Indian people to exercise their God given rights to life, liberty and the pursuit of happiness; to pursue their own goals; to attempt to preserve what remains of an ancient culture, an ethnic identity, if you will; then we, the non-preference employee, must be displaced to make room for them * * *

The nonpreference employees of BIA and IHS who occupy management and midlevel positions must be given an incentive to retire and give the surging tide of American Indian cultural awareness the opportunity to meet the challenges of today.

Another witness before the Subcommittee, representing the National Congress of American Indians, generally agreed with the legislation, saying:

> To put in a word for the non-Indian, many of them entered the service not realizing that opportunities for promotions and advancement would be as limited as they turned out to be under the new "Indian preference" procedures. This is not their fault nor could they have possibly foreseen what eventually transpired. We feel that since Indians have preference—and rightly so—those non-Indians that are in the Bureau should be eligible for an early out * * * it is a little fearful to imagine a non-Indian teacher or person of similar rank and responsibility, made bitter because of what to him would be restrictions placed on his livelihood by Indians, still responsible to serve Indians. It seems to me that such a situation is undesirable for everyone.

The Subcommittee's hearings on S. 509 also involved the bill S. 771, introduced February 20, 1975, by Senator McGee. The latter bill is intended to assist employees who are displaced or find career opportunities foreclosed in the Indian agencies in relocating in other Federal positions by granting them a preference for vacancies which they are qualified to fill if they remain ineligible to retire or wish to continue in a civil service career.

The Committee believes that S. 771 has had a desirable effect in that the Department of the Interior has issued a new Career Placement Assistance Program intended to help displaced employees or those who can demonstrate a lack of advancement opportunity in locating other positions within the Department. But the initial orientation sessions on that new departmental program did not take place until November 11, 1975; thus the effect of the program cannot be assessed at this time. In any event, the Committee is concerned that positions within the Department for many of the employees involved may prove most difficult, if not impossible, to locate. The Committee requests that the Departments of Interior and Health, Education, and Welfare, and the Civil Service Commission, cooperate to insure the effective use of all available procedures to relocate displaced employees. The Committee further requests the Departments to forward reports by January 1, 1977, relative to the effectiveness of their outplacement programs, including information bearing on the number of applicants for assistance, their grades and occupations, and the grades and occupations in which they were placed as a result of the program, as well as the numbers, grades and occupations of those applicants not relocated.

The Committee has accepted in good faith the Interior Department's testimony that it will support a legislated outplacement program if its administrative remedy proves unequal to the task.

Committee Action

Hearings were held on the bill S. 509 on June 18 and 19, 1975. The Committee approved H.R. 5465, after amending it by substituting the provisions of S. 509 with amendments by voice vote on May 11, 1976, Senator Fong voting in the negative.

Sectional Analysis

Section 1 of the bill authorizes payment of an immediate annuity to employees without Indian preference who retire prior to December 31, 1985, and who at the time of retirement have completed at least 20 years of service and are at least 50 years of age or have completed 25 years of service, and were continuously employed in the Bureau of Indian Affairs or the Indian Health Service from June 17, 1974, until their retirement, are not otherwise entitled to full retirement benefits, and can demonstrate that application of Indian preference has denied them career advancement opportunities on at least two occasions.

The effect of this section is to extend the benefits of the bill to those adversely affected employees who will become eligible for retirement under the bill's provisions by December 31, 1985, and who elect to retire, provided they are not otherwise entitled to full retirement and were continuously employed by one of the Indian agencies from the date of the Supreme Court's decision in *Morton* v. *Mancari* until their retirement.

Section 2 of the bill provides that the annuity of an employee retired under the authorization established by section 1 shall be 2½ percent of his "average pay" for each of the first 20 years of service and 2 percent of his average pay for each year thereafter. By definition, average pay is the result of averaging an employee's basic pay in effect for any three consecutive years of creditable service.

Section 3 of the bill makes conforming amendments to provisions of subchapter III of chapter 83, title 5, United States Code, which deal with survivor annuities and annuities and pay on reemployment.

Section 4 states that amendments made by the bill would take effect on October 1, 1976, or on the date of enactment, whichever is later, and shall only apply to employees separated from the service on and after June 17, 1974, the date of the U.S. Supreme Court decision in *Morton* v. *Mancari*.

Cost

The Civil Service Commission has estimated the cost of S. 509 as follows:

> An increase in the normal cost of the Civil Service Retirement Fund of .02 percent of payroll.
>
> An increase in the unfunded liability of the Fund of $167 million, which would require, under the provisions of section 8348(f) of title 5, United States Code, 30 annual amortization payments of approximately $10.4 million each.

The cost stemming from application of the benefit to those immediately eligible were estimated as a $110 million increase in the

unfunded liability, requiring 30 annual payments of $6.8 million, according to the Commission.

Testimony from the chief statistician of the Bureau of Indian Affairs estimated the potential added cost of the benefit proposed for the 2,808 BIA employees potentially eligible at $160.7 million, assuming retirement when last eligible, or $177.1 million, assuming retirement when first eligible.

The Committee has no information at variance with these estimates, but the adoption of provisions limiting eligibility to those who attain 20 years of service by age 50 or 25 years of service at any age and requiring that an employee be able to demonstrate that his career advancement has been impeded on at least two occasions by the application of Indian preference—provisions adopted subsequent to all cost estimates—will reduce the outlays.

Congressional Budget Office Estimate

Congress of the United States,
Congressional Budget Office,
Washington, D.C., May 11, 1976.

Hon. Gale McGee,
Chairman, Committee on Post Office and Civil Service,
U.S. Senate, Washington, D.C.

Dear Mr. Chairman: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has prepared the attached cost estimate for S. 509, a bill to revise retirement benefits for certain employees of the Bureau of Indian Affairs and the Indian Health Service not entitled to Indian preference, and for other purposes.

Should the Committee so desire, we would be pleased to provide further details on the attached cost estimate.

Sincerely,

Alice M. Rivlin, *Director.*

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

May 10, 1976.

1. Bill No: S. 509.

2. Purpose of bill: To revise retirement benefits for certain employees of the Bureau of Indian Affairs and the Indian Health Service not entitled to Indian preference and for other purposes.

3. Cost estimate: Enactment of S. 509 would increase the unfunded liability of the Civil Service Retirement system by an estimated $168.1 million. An annual appropriation of $10.4 million over the next 30 years would need to be requested by the Civil Service Commission to amortize the increased liability. Outlays represent the payment of benefits to individuals who would qualify for the liberalized early retirement provisions of the proposed legislation.

COSTS
[In millions of dollars: fiscal years]

	1977	1978	1979	1980	1981
Budget authority	10.4	10.4	10.4	10.4	10.4
Outlays	7.8	11.5	19.6	27.4	30.8

Estimated annual outlays exceed the annual budget authority estimates since outlays for early retirement would be paid to the annuitants during the first ten years while the liability would be amortized over the statutory 30 year period. The 30 years of amortization payments would fund the early retirement benefits *except for increases due to future cost-of-living adjustments* (see table below).

5-YR OUTLAYS
[In millions of dollars; fiscal years]

	1977	1978	1979	1980	1981
Outlays based on CSC model	7.4	10.3	16.8	21.3	22.6
Annuity increases based on CBO cost-of-living projections	.4	1.2	2.8	6.1	8.2
Total net outlays	7.8	11.5	19.6	27.4	30.8

4. Basis for Estimate: S. 509 extends liberalized early retirement provisions to an estimated 3,150 employees who meet age and service requirements. *The enactment cost of the proposed legislation, in the long run, is the difference between the expected value of the liberalized early retirement benefits less the expected value of the normal retirement benefits.* (Under current requirements employees usually must be age 55 with 30 years of service or age 60 with 20 years of service to retire.)

The critical variables in estimating the five-year cost impact of S. 509 are the number of participants, their average salary, and the unfunded liability cost factor. Data necessary for the determination of these variables were provided by the Civil Service Commission at the request of CBO and are based on Bureau of Indian Affairs testimony of June 19, 1975, before the Senate Subcommittee on Compensation and Employee Benefits. In deriving the unfunded liability estimate, the Civil Service Commission followed its customary practice of not including cost-of-living adjustments in its calculations.

Cost variables	
(A) Number of participants	3,150
(B) Average salary	$17,213
(C) Unfunded liability cost factor (represents the longrun cost increase for each additional dollar of unfunded liability)	$3.10
(D) Increase in unfunded liability (derived from multiplying (A×B×C)) (millions)	$168.1
Budget authority (annual payments for 30 years amortized at 5 percent) (millions)	$10.4

The outlays for fiscal years 1977–1981 (see table below) are in accordance with mortality assumptions provided by the Civil Service Commission and CBO cost-of-living assumptions.

5-YR OUTLAYS
[In millions of dollars]

Fiscal year—	Base [1]	Increase in participation	Subtotal	Cost-of-living increases [2]	Total net outlays
1977	7.1	0.3	7.4	0.4	7.8
1978	7.6	2.7	10.3	1.2	11.5
1979	12.7	4.1	16.8	2.8	19.6
1980	20.4	.9	21.3	6.1	27.4
1981	21.7	.9	22.6	8.2	30.8

[1] Base includes full-year cost of increased participation from prior year and decreases attributable to a mortality factor assumption of 0.98 provided by the Civil Service Commission.
[2] Costs for annuity increases resulting from cost-of-living adjustments based on CBO 5-yr budget projections.

5. Estimate comparison: Not applicable.
6. Previous CBO estimate: Not applicable.
7. Estimate prepared by: David M. Delquadro.
8. Estimate approved by: ——— ———, for James L. Blum, Assistant Director for Budget Analysis.

AGENCY VIEWS

U.S. CIVIL SERVICE COMMISSION,
Washington, D.C., May 20, 1975.

Hon. GALE W. MCGEE,
Chairman, Committee on Post Office and Civil Service,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This is in further reply to your request for the Commission's views on S. 509, a bill "To revise retirement benefits for certain employees of the Bureau of Indian Affairs and the Indian Health Service not entitled to Indian preference, provide greater opportunity for advancement and employment of Indians, and for other purposes."

On June 17, 1974 (in *Morton* v. *Mancari*, 42 U.S.L.W. 4933 (U.S. June 17, 1974)), the Supreme Court held that the Indian preference provision (Section 12) of the Indian Reorganization Act of 1934 (Wheeler-Howard Act) was not repealed by the Equal Employment Opportunity Act of 1972 and does not violate the Due Process Clause of the Fifth Amendment. With regard to the applicability of Indian preference to promotions, the Court did not express an opinion, but noted "The Commissioner's extension of the preference in 1972 to promotions within the BIA was designed to bring more Indians into positions of responsibility and, in that regard, appears to be a logical extension of the congressional intent." 42 U.S.L.W. at 4936. However, in *Freeman* v. *Morton*, 499 F. 2d 494 (D.C. Cir. 1974), the court held that the law *requires* that Indian preference be applied to initial hiring, promotions, lateral transfers and reassignments. As a result of that decision, it would appear that certain non-Indian employees of BIA (now BIA and the Indian Health Service (IHS)) would not receive any further promotions if qualified Indians applied for the positions involved.

S. 509, if enacted, would provide optional retirement after 20 years of service (not necessarily with BIA or IHS) for those non-Indian employees of BIA and IHS who have been continuously employed by that agency since June 17, 1974 (the date of the Supreme Court decision) and who will complete 20 years of service before December 31, 1985. Furthermore, the bill provides that the annuities of these employees would amount to 2½ percent of average pay multiplied by the first 20 years of service plus 2 percent of the average pay multiplied by years of service over 20 (with no reduction for age). In other words, those qualified non-Indian employees (who in certain cases may be in their early forties or even younger) would have the opportunity to retire with an annuity equal to that of most Federal employees retiring at age 60 or over with approximately 27 years of service.

The Commission does not believe the present situation justifies granting such liberalized retirement benefits to non-Indian employees of BIA and IHS. While their career prospects in BIA and IHS could be limited, they are not in danger of losing their jobs. BIA and IHS employees also have the option of transferring to other positions elsewhere in the Departments of the Interior, Health, Education, and Welfare, and other Federal agencies where greater opportunity for further advancement exists. There is no indication that these employees cannot have full and satisfying careers in other agencies or in other activities. Moreover, limited promotion ladders should not become a charge against the retirement system as proposed by S. 509.

Commission representatives have been in close touch with officials at the departments involved. We have been assured that both BIA and IHS are sensitive to the situation and that opportunities do exist for many non-Indians to fulfill their hopes and aspirations for the future through careers elsewhere in the Federal service.

Understandably, some non-Indian employees are interested in leaving the Bureau of Indian Affairs because of their concern over the application of the Indian preference laws. The Commission's 65 area offices have been alerted to this situation and have been instructed to give all possible assistance to non-Indian employees who have expressed an interest in leaving the Indian agencies, and to alert other Federal agencies to the availability of such employees.

If S. 509 is enacted, we estimate that the normal cost of the Civil Service Retirement System for *all* employees would be increased by 0.02 percent of payroll and the unfunded liability of the Civil Service Retirement and Disability Fund by $167.1 million. Under the financing provisions of section 8348(f) of title 5, United States Code, this amount would be amortized in 30 equal annual installments of approximately $10.4 million.

In conclusion, for the reasons stated above, the Commission is strongly opposed to enactment of S. 509.

The office of Management and Budget advises that, from the standpoint of the Administration's program, there is no objection to the submission of this report.

By direction of the Commission:

Sincerely yours,

ROBERT HAMPTON,
Chairman.

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, D.C., June 17, 1975.

Hon. GALE W. MCGEE,
Chairman, Committee on Post Office and Civil Service, U.S. Senate,
Washington, D.C.

DEAR MR. CHAIRMAN: This responds to your request for the views of this Department on two bills: S. 509, a bill "To revise retirement benefits for certain employees of the Bureau of Indian Affairs and the Indian Health Service not entitled to Indian preference, provide greater opportunity for advancement and employment of Indians,

and for other purposes;" and S. 771, a bill "To assist certain employees of the United States in finding other employment in the civil service."

We recommend against enactment of both bills. The Department is currently in the process of formulating an assistance program to resolve the problem addressed by S. 509 and S. 771 and we believe that this available administrative solution is the most viable approach.

PROVISIONS OF S. 509 AND S. 771

We understand that both S. 509 and S. 771 are intended to releive the situation of those civil service employees of the Bureau of Indian Affairs and Indian Health Service who are not eligible for "Indian preference" in promotions, lateral transfers, and reassignments within those agencies. Both bills relate to non-Indian preference employees who were employed by the BIA or IHS on June 17, 1974, the date of the U.S. Supreme Court decision on the subject of Indian preference. The bills are based upon the theory that the Supreme Court decision of 1974 which established absolute Indian preference in BIA and IHS employment caught non-Indian preference employees in mid-career and left them with little opportunity for advancement in those agencies.

Both bills propose relief by authorizing special treatment designed to encourage non-Indian preference employees to leave the BIA and to aid in their departure. S. 509 does so by authorizing earlier and more advantegeous civil service retirement benefits for non-Indian preference employees and S. 771 does so by providing for the placement of such employees in civil service positions in other Federal agencies.

BACKGROUND

A number of provisions concerning Indian preference in Federal "Indian Service" employment had been enacted by the Congress during the 19th and early 20th centuries (see for example 25 U.S.C. 44–47). However, the broadest and most modern provision, and the one on which the current Indian preference requirements are based, is section 12 of the Indian Reorganization Act of 1934 (48 Stat. 986; 25 U.S.C. 472) which provides:

"The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed without regard to civil-service laws, to the various positions maintained, now or hereafter, by the Indian Office, 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 position."

Prior to 1972, the Indian preference provision was administered by the Bureau of Indian Affairs as applying only to initial appointments and not to subsequent promotions. In 1972 the BIA policy was changed to extend the preference to promotions, transfers from outside the BIA, and reassignments within the BIA which improved promotional prospects. The 1972 policy provided the possibility for the Commissioner of Indian Affairs to grant exceptions to Indian preference by approving the selection and appointment of non-Indians when he considered it in the best interest of the Bureau. The 1972 policy did not extend Indian preference to purely lateral reassignments

which did not improve promotional prospects. Indian preference is also utilized in establishing employee retention registers for use in reductions-in-force situations.

In addition, the BIA now encourages tribes to contract for control and operation of most BIA reservation level activities and the January 1975 enactment of section 102 of the Indian Self-Determination Act (88 Stat. 2206; 25 U.S.C.A. 450f) directs the contracting of most BIA activities "upon the request of any Indian tribe".

CASE LAW ON INDIAN PREFERENCE

Two recent court decisions have upheld the validity of section 12 of the Indian Reorganization Act, and its application to initial hires, promotions, transfers and reassignments.

On April 25, 1974, the United States Court of Appeals for the District of Columbia in *Freeman* v. *Morton*, 499 F. 2d 494, upheld an unreported District Court decision in a suit brought by four Indian BIA employees. The Court held that under the 1934 Indian preference provision Indian preference applies to the filling of all vacancies in the BIA, including initial hires, promotions lateral transfers, and reassignments in the Bureau, and that no exceptions are possible where there is at least a minimally qualified candidate who is eligible for Indian preference.

On June 17, 1974 the U.S. Supreme Court in an 8–0 decision (*Morton* v. *Mancari*, 417 U.S. 535) reversed the decision of a three-judge District Court for the District of New Mexico which had held, in a suit by a group of non-Indian BIA employees, that the 1934 Indian preference provision (25 U.S.C. 472) had been impliedly repealed by enactment of Section 11 of the Equal Employment Opportunity Act of 1972 (86 Stat. 111; 42 U.S.C. 2000 e–16), prohibiting discrimination in most Federal employment on the basis of race.

The Court held that Indian preference was not a racial preference but, rather, it was an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups.

DRAFT DEPARTMENTAL ASSISTANCE PROGRAM

This Department is aware that the *Freeman* and *Mancari* decisions and the implementation of the Indian Self-Determination Act will, in many cases, have an adverse impact upon both non-Indian and Indian employees of the BIA. The Department is committed to providing placement assistance to those Indian and non-Indian employees of the BIA whose jobs or opportunities have been foreclosed by either Indian preference or the Department's Indian Self-Determination policy, and has been formulating a program to provide such assistance. The program is in the process of being finalized and has not yet been implemented. The draft program is currently being reviewed by the bureaus within the Department, at both field and headquarters levels.

The draft program will assist BIA employees with placement within other bureaus in the Department, and with locating reassignments in other Federal agencies.

Within the Department, mandatory placement assistance would be given to competitive career and career-conditional BIA employees when: (1) there is a reduction in force and there are no opportunities

for reassignment within the BIA; (2) an activity or function is being contracted by a tribe and the employee's position is being abolished; and (3) it is imperative to reassign an employee because of certain hardships such as ill-health, loss of effectiveness with a tribe, or other compelling circumstances. Two position offers would be made to employees under the mandatory placement provisions.

Priority placement assistance would be afforded to competitive career and career-conditional BIA employees who can demonstrate that they no longer have an opportunity for career advancement in the Bureau because of Indian preference regulations.

RECOMMENDATIONS

We are opposed to the provisions of S. 509. Enactment of this legislation could deprive the Bureau of Indian Affairs of an inordinately large number of highly experienced employees with technical and managerial expertise at a time when their skills and experience are most needed by the BIA. It could remove from the mainstream of public service exceptionally well-qualified and dedicated professionals. Our estimate is that this legislation could affect approximately 1600 employees who might choose early retirement thereunder. The impact of this legislation, therefore, could be counterproductive to the Department's mission of providing services and assistance to Indians.

With regard to the impact that this legislation would have on the Civil Service Retirement Fund we defer in our views to the Civil Service Commission.

The provisions of S. 509, for the above reasons, do not provide a viable solution to the problems created by Indian preference. In our judgment, our draft program which would assist BIA employees nationwide, is a more viable alternative, and would avoid the adverse result that enactment of S. 509 may have.

We are also opposed to enactment of S. 771. Since the Department is committed to its draft assistance program, we believe that this available administrative solution should be adopted and tried before any solutions are mandated by legislation.

Pursuant to the legislation any displaced employee of the BIA would be given priority consideration for any vacancy in the competitive service for which he is qualified. Further, upon request to the Civil Service Commission, the displaced employee's name shall be placed on all registers maintained by the Commission, and entered ahead of all others, including preference eligibles, having the same rating. Finally, the Secretary of the Interior shall assist the Commission in identifying those employees "who are likely to become displaced. . . ."

The Civil Service Commission already operates a Displaced Employee Program, and if S. 771 was enacted, those eligible for placement thereunder would not only be placed ahead of preference eligibles including veterans but would also be competing with those displaced employees already participating in the Commission's program. Further, under S. 771 BIA employees would not have to be actually displaced to qualify under the bill's provisions, but only to have "not receive[d] consideration for promotion, transfer, or training. . . ." Employees of the BIA not actually displaced would be competing with employees under the Commission's program who actually are

displaced. With regard to the impact of this provision we defer to the Civil Service Commission. However, we would note that a significant distinction exists between persons who are actually displaced through formal procedures and those whose promotional opportunities are either limited or might be limited by Indian preference requirements. It is almost impossible to estimate how many employees would be affected by these provisions, especially since the definition of "displaced" is so general.

While we believe that there might be merit to a Government-wide placement program, we feel that S. 771 is premature in light of the present administrative efforts. Further before such an approach is legislated, the Federal agencies involved should be given the opportunity to work together to arrive at a solution.

With regard to the provisions of both bills which concern the Indian Health Service, we defer in our views to the Department of Health, Education, and Welfare.

The Office of Management and Budget has advised that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely yours,

JAMES T. CLARKE,
Assistant Secretary of the Interior.

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE,

June 6, 1975.

Hon. GALE MCGEE,
Chairman, Committee on Post Office and Civil Service,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This letter is in response to your request of April 17, 1975, for a report on S. 509, a bill "To revise retirement benefits for certain employees of the Bureau of Indian Affairs and the Indian Health Service not entitled to Indian preference, provide greater opportunity for advancement and employment of Indians, and for other purposes."

The bill would revise retirement benefits for certain employees of the Bureau of Indian Affairs and the Indian Health Service (IHS) not entitled to Indian preference.

The Department of Health, Education, and Welfare believes that the current situation in IHS does not warrant granting such liberalized retirement benefits to non-Indian employees. Our critical manpower needs in IHS are for doctors, nurses, and para-medical personnel Many of these positions are now occupied by non-Indian employees due to the lack of qualified Indian employees. While every effort is being made to train more Indian employees to fill these needs, there is an inadequate supply of trained Indian personnel available at this time. Therefore, enactment of this proposed legislation could lead to an increase in the number of early retirements by non-Indians. This could have an adverse effect on the Federal Government's ability to deliver quality health care to the Indians. As an adequate supply of qualified Indians becomes available to handle their health care needs, we will expand career programs to provide opportunities throughout

the Department of Health, Education, and Welfare for non-Indian employees desiring transfers.

We therefore recommend that S. 509 not be favorably considered.

We are advised by the Office of Management and Budget that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely,

CASPAR W. WEINBERGER,
Secretary.

EXECUTIVE OFFICE OF THE PRESIDENT,
OFFICE OF MANAGEMENT AND BUDGET,
Washington, D.C., May 20, 1975.

Hon. GALE W. MCGEE,
Chairman, Committee on Post Office and Civil Service,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This is in reply to the Committee's request for the views of this Office on S. 509, "To revise retirement benefits for certain employees of the Bureau of Indian Affairs and the Indian Health Service not entitled to Indian preference, provide greater opportunity for advancement and employment of Indians, and for other purposes."

The purpose of this bill is to grant preferential retirement benefits to certain non-Indian employees of the Departments of Interior, and Health, Education, and Welfare. In its report the Civil Service Commission states its reasons for strongly opposing enactment of S. 509.

We concur in the views expressed by the Civil Service Commission and, accordingly, strongly recommend against enactment of S. 509.

Sincerely,

JAMES M. FREY,
Assistant Director for
Legislative Reference.

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, D.C., May 30, 1975.

B-161468.

Hon. GALE MCGEE,
Chairman, Committee on Post Office and Civil Service,
U.S. Senate.

DEAR MR. CHAIRMAN: Reference is made to your letter of February 11, 1975, requesting our comments on S. 509, 94th Congress, a bill which, if enacted, would revise retirement benefits for certain employees of the Bureau of Indian Affairs and the Indian Health Service not entitled to Indian preference and provide greater opportunity for advancement and employment of Indians. The purpose of the bill is to encourage the early retirement of non-Indian employees in order to provide for greater employment and advancement opportunities for Indians.

As indicated below, the retirement benefits proposed to be made available to non-Indian employees of the Bureau of Indian Affairs

and the Indian Health Service are considerably more generous than those usually available under the Civil Service retirement system. Our Office generally has not favored legislation which grants preferential treatment for specific groups or classes of employees under the Civil Service retirement system in the absence of a compelling reason.

However, we recognize that a recent Supreme Court decision is significant in this regard. In *Morton* v. *Mancari*, 417 U.S. 535 (1974), the Supreme Court reaffirmed and upheld the policy, as enunciated by Congress in prior legislation, of providing Indian employees of the Bureau of Indian Affairs with employment and promotional preferences. This decision and its likely impact on the careers of non-Indian employees in the Bureau of Indian Affairs was recognized and emphasized by the sponsors of this bill and may serve as sufficient justification for congressional consideration of the preferential legislation.

Section 1 of the bill would authorize payment of an immediate annuity to non-Indian employees who retire prior to December 31, 1985, and at the time of retirement (1) have completed at least 20 years of service, (2) have been continuously employed in the Bureau of Indian Affairs or the Indian Health Service since June 17, 1974, and (3) are not otherwise entitled to full retirement benefits.

The bill contains no limitations with regard to an employee's age at the time of retirement nor does it contain requirements for reducing annuities in cases where employees retire before a specified age. In contrast, most Federal employees under the Civil Service retirement system may retire and receive an immediate annuity only at the following ages and then only if they have at least the amounts of Federal service shown:

Earliest age	Years of service	Remarks
62	5	
60	20	
55	30	
50	20	Must be involuntarily separated; annuity reduced by ⅙ of 1 percent for each month under age 55.
Any	25	Do.
Any	5	Must be totally disabled.

Section 2 of the bill proposes that the annuity of a non-Indian employee of the Bureau of Indian Affairs or the Indian Health Services who retires under the authorization provided in section 1 shall be 2½ percent of his "average pay" for each of the first 20 years of service and 2 percent of his average pay for each year thereafter. By definition, the term "average pay" means the largest annual rate resulting from averaging an employee's basic pay in effect over any 3 consecutive years of creditable service (high-3 average salary). In contrast, most civil service annuities are computed on the basis of high-3 average salaries multiplied by 1.5 percent for each of the first 5 years of service, 1.75 percent for each of the next 5 years of service, and 2 percent for each year of service over 10 years.

The retirement benefits proposed under S. 509 are more liberal than the benefits available to certain other groups of Federal employees that have been granted special treatment. For example air traffic con-

trollers may retire after 20 years of service but they must be at least 50 years of age (or after 25 years without regard to age) and their annuities are computed as stated above instead of the 2½ percent of average pay for each of the first 20 years of service provided for in S. 509. We would also point out that while firefighters and law enforcement personnel (whose annuities are computed in the same manner as provided in the bill) may retire after 20 years of service, they also must be be at least 50 years of age.

At the end of fiscal year 1974 the Bureau of Indian Affairs had 13,901 employees and the Indian Health Service had 7,881 employees. Information was not readily available regarding the number of these employees who would be eligible for the retirement benefits proposed to be made available under S. 509. The Civil Service Commission estimated, however, that the bill would increase "normal cost" by .02 percent of payroll. The bill also would create a liability of $167 million to the Civil Service Retirement Fund which would require 30 annual amortization payments of $10.4 million each to the fund.

Sincerely yours,

R. F. KELLER,
Deputy Comptroller General.

CHANGES IN EXISTING LAW

In compliance with subsection 4 of rule XXIX of the Standing Rules of the Senate, changes in existing law made by the bill as reported are shown as follows (existing law in which no change is proposed is shown in roman; existing law proposed to be omitted is enclosed in black brackets; new matter is shown in italic):

TITLE 5, UNITED STATES CODE

* * * * * * *

PART III—EMPLOYEES

* * * * * * *

SUBPART G—INSURANCE AND ANNUITIES

* * * * * * *

CHAPTER 83—RETIREMENT

* * * * * * *

§ 8336. Immediate retirement

(a) * * *

* * * * * * *

(h) An employee is entitled to an annuity if he (1) is separated from the service after completing 25 years of service before December 31, 1985, or after becoming 50 years of age and completing 20 years of service before December 31, 1985, (2) was employed in the Bureau of Indian Affairs or the Indian Health Service continuously from June 17, 1974, to the date of his separation, (3) is not otherwise entitled to full retirement benefits, and (4) is not an Indian entitled to a preference under section 12 of the Act of June 18, 1934 (48 Stat. 986) or any other provision of law granting a preference to Indians in promotions and other personnel actions.

[(h)] (i) An annuity or reduced annuity authorized by this section is computed under section 8339 of this title.

* * * * * * *

§ 8339. Computation of annuity

(a) * * *

* * * * * * *

(f) The annuity computed under subsections (a)–(e) *and (n)* of this section may not exceed 80 percent of—

(1) the average pay of the employee; or

(2) the greatest of—

(A) the final basic pay of the Member;

(B) the average pay of the Member; or

(C) the final basic pay of the appointive position of a former Member who elects to have his annuity computed or recomputed under section 8344(b)(1) of this title.

(g) The annuity of an employee or Member retiring under section 8337 of this title is at least the smaller of—

(1) 40 percent of his average pay; or

(2) the sum obtained under subsections (a)–(c) of this section after increasing his service of the type last performed by the period elapsing between the date of separation and the date he becomes 60 years of age.

(h) The annuity computed under subsections (a), (b), and (f) of this section for an employee retiring under section 8336(d) of this title is reduced by ⅙ of 1 percent for each full month the employee is under 55 years of age at the date of separation. The annuity computed under subsections (c) and (f) of this section for a Member retiring under the second or third sentence of section 8336(g) of this title or the third sentence of section 8338(b) of this title is reduced by ½ of 1 percent for each full month not in excess of 60 months, and ⅙ of 1 percent for each full month in excess of 60 months, the Member is under 60 years of age at the date of separation.

(i) The annuity computed under subsections (a)–(h) and (n) of this section is reduced by 10 percent of a deposit described by section 8334(c) of this title remaining unpaid, unless the employee or Member elects to eliminate the service involved for the purpose of annuity computation.

(j) The annuity computed under subsections (a)–(i) and (n) of this section for a married employee or Member retiring under this subchapter, or any portion of that annuity designated in writing for the purpose of section 8341(b) of this title by the employee or Member at the time of retirement, is reduced by 2½ percent of so much thereof as does not exceed $3,600 and by 10 percent of so much thereof as exceeds $3,600, unless the employee or Member notifies the Civil Service Commission in writing at the time of retirement that he does not desire any spouse surviving him to receive an annuity under section 8341(b) of this title. An annuity which is reduced under this subsection or any similar prior provision of law shall, for each full month

during which a retired employee or Member is not married, be recomputed and paid as if the annuity had not been so reduced. Upon remarriage of the retired employee or Member, the annuity shall be reduced by the same percentage reductions which were in effect at the time of retirement.

(k)(1) At the time of retiring under section 8336 or 8338 of this title, an unmarried employee or Member who is found to be in good health by the Commission may elect a reduced annuity instead of an annuity computed under subsections (a)–(i) *and* (*n*) of this section and name in writing an individual having an insurable interest in the employee or Member to receive an annuity under section 8341(c) of this title after the death of the retired employee or Member. The annuity of the employee or Member making the election is reduced by 10 percent, and by 5 percent for each full 5 years the individual named is younger than the retiring employee or Member. However, the total reduction may not exceed 40 percent.

(2) An employee or Member, who is unmarried at the time of retiring under a provision of law which permits election of a reduced annuity with a survivor annuity payable to his spouse and who later marries, may irrevocably elect, in a signed writing received in the Commission within 1 year after he marries, a reduction in his current annuity as provided in subsection (j) of this section. His reduced annuity is effective the first day of the month after his election is received in the Commission. The election voids prospectively any election previously made under paragraph (1) of this subsection.

(l) The annuity computed under subsections (a)–(k) *and* (*n*) of this section for an employee who is a citizen of the United States is increased by $36 for each year of service in the employ of—

(1) the Alaska Engineering Commission, or The Alaska Railroad in Alaska between March 12, 1914, and July 1, 1923; or

(2) The Isthmian Canal Commission, or the Panama Railroad Company on the Isthmus of Panama between May 4, 1904, and April 1, 1914.

(m) In determining service for the purpose of computing an annuity under each paragraph of this section, 45 per centum of each year, or fraction thereof, of service referred to in section 8332(b)(6) which was performed prior to the effective date of the National Guard Technicians Act of 1968 shall be disregarded.

(n) In computing any annuity under subsections (a)–(e) *and* (*n*) of this section, the total service of an employee who retires on an immediate annuity or dies leaving a survivor or survivors entitled to annuity includes, without regard to the limitations imposed by subsection (f) of this section, the days of unused sick leave to his credit under a formal leave system, except that these days will not be counted in determining average pay or annuity eligibility under this subchapter.

(n) The annuity of an employee retiring under section 8336(h) of this title is:

(A) 2½ percent of his average pay multiplied by so much of his total service as does not exceed 20 years; plus

(B) 2 percent of his average pay multiplied by so much of his total service as exceeds 20 years.

* * * * * * *

§ 8341. Survivor annuities

(a) * * *

* * * * * * *

(b)(1) Except as provided in paragraph (2) of this subsection, if an employee or Member dies after having retired under this subchapter and is survived by a spouse to whom he was married at the time of retirement, or by a widow or widower whom he married after retirement, the spouse, widow, or widower is entitled to an annuity equal to 55 percent, or 50 percent if retired before October 11, 1962, of an annuity computed under section 8339(a)–(i) *and* (*n*) of this title as may apply with respect to the annuitant, or of such portion thereof as may have been designated for this purpose under section 8339(j) of this title, unless the employee or Member has notified the Commission in writing at the time of retirement that he does not desire any spouse surviving him to receive his annuity.

(2) If an annuitant—

(A) who retired before April 1, 1948; or

(B) who elected a reduced annuity provided in paragraph (2) of section 8339 (k) of this title;

dies and is survived by a widow or widower, the widow or widower is entitled to an annuity in an amount which would have been paid had the annuitant been married to the widow or widower at the time of retirement.

(3) A spouse acquired after retirement is entitled to a survivor annuity under this subsection only upon electing this annuity instead of any other survivor benefit to which he may be entitled under this subchapter or another retirement system for Government employees. The annuity of the spouse, widow, or widower under this subsection commences on the day after the annuitant dies. This annuity and the right thereto terminate on the last day of the month before the spouse, widow, or widower—

(A) dies; or

(B) remarries before becoming 60 years of age.

(c) The annuity of a survivor named under section 8339(k) of this title is 55 percent of the reduced annuity of the retired employee or Member. The annuity of the survivor commences on the day after the retired employee or Member dies. This annuity and the right thereto terminate on the last day of the month before the survivor dies.

(d) If an employee or Member dies after completing at least 18 months of civilian service, his widow or widower is entitled to an annuity equal to 55 percent of an annuity computed under section [8339 (a)–(f) and (i)] *section 8339 (a)–(f), (i) and* (*n*) of this title as may apply with respect to the employee or Member, except that, in computation of the annuity under such section, the annuity of the employee or Member shall be at least the smaller of—

(1) 40 percent of his average pay; or

(2) the sum obtained under such section after increasing his service of the type last performed by the period elapsing between the date of death and the date he would have become 60 years of age.

The annuity of the widow or widower commences on the day after the employee or Member dies. This annuity and the right thereto terminate on the last day of the month before the widow or widower—

(A) dies; or
(B) remarries before becoming 60 years of age.
(e) * * *

* * * * * * *

§ 8344. Annuities and pay on reemployment

(a) If an annuitant receiving annuity from the Fund, except—
(1) a disability annuitant whose annuity is terminated because of his recovery or restoration of earning capacity;
(2) An annuitant whose annuity is based on an involuntary separation from the service other than an automatic separation; or
(3) a Member receiving annuity from the Fund;
becomes employed after September 30, 1956, or on July 31, 1956, was serving, in an appointive or elective position, his service on and after the date he was or is so employed is covered by this subchapter. Deductions for the Fund may not be withheld from his pay. An amount equal to the annuity allocable to the period of actual employment shall be deducted from his pay, except for lump-sum leave payment purposes under section 5551 of this title. If the annuitant serves on a full-time basis, except as President, for at least 1 year in employment not excluding him from coverage under section 8331(1) (i) or (ii) of this title—
(A) his annuity on termination of employment is increased by an annuity computed under section 8339 (a), (b), (d), (e), (h), [and (i)] *(i) and (n)* of this title as may apply based on the period of employment and the basic pay, before deduction, average during that employment; and
(B) * * *

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Calendar No. 971

94TH CONGRESS 2d Session } SENATE { REPORT No. 94-1029

THE BUREAU OF INDIAN AFFAIRS REVISED RETIREMENT BENEFITS AMENDMENTS OF 1976

JULY 2 (legislative day, JUNE 18), 1976.—Ordered to be printed

Mr. MCGEE, from the Committee on Appropriations, submitted the following

REPORT

[To accompany H.R. 5465]

The Committee on Appropriations, to which was referred the bill (H.R. 5465) to revise retirement benefits for certain employees of the Bureau of Indian Affairs and for other purposes, reports the same to the Senate without amendment and presents herewith an explanation of the contents of the bill.

H.R. 5465 passed the House of Representatives on May 3, was referred to the Senate Committee on Post Office and Civil Service, and was reported to the Senate on May 13 with an amendment.

In accordance with Section 401(b)(2) of the Congressional Budget and Impoundment Control Act of 1974 (covering the disposition of entitlements), H.R. 5465 was referred to the Committee on Appropriations on June 22, 1976. The referral to the Committee on Appropriations was necessary because the Committee on Post Office and Civil Service in a report dated May 28, 1976, on Section 302(b) allocations did not allow any additional amounts for new legislation which would increase the cost of the Civil Service Retirement System. H.R. 5465 would, in fact, increase those costs in fiscal year 1977, and if enacted as reported, would cause the new budget authority amounts allocated to the Committee on Post Office and Civil Service (as set forth in the First Concurrent Resolution) to be exceeded. While the total of such spending is not large, such bills must, nonetheless, be reviewed separately by this Committee.

H.R. 5465 proposes to extend retirement and employment preferences to non-Indian employees of the Bureau of Indian Affairs and Indian Health Service who otherwise would not be treated equitably by existing laws.

The Congressional Budget Office has estimated the enactment of H.R. 5465 would require an additional $8.4 million in new budget authority and $3.0 million in outlays for fiscal year 1977 if enacted.

The Committee on Appropriations considered the bill and reported it to the Senate without amendment. In recommending no amendment, the Committee notes that the amount of mandated new budget authority is not of great size in the context of the overall allocations to the Committee on Post Office and Civil Service, and notes the possible distortions in the operation of this particular piece of legislation caused by any amendment at this date. This Committee fully expects to review and amend all future entitlements to the extent necessary to assure the maintenance of the integrity of the Congressional budget process.

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94TH CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
2d Session } { No. 94-1456

RETIREMENT BENEFITS FOR CERTAIN EMPLOYEES OF THE BUREAU OF INDIAN AFFAIRS AND THE INDIAN HEALTH SERVICE

SEPTEMBER 1, 1976.—Ordered to be printed

Mr. HENDERSON, from the committee of conference, submitted the following

CONFERENCE REPORT

[To accompany H.R. 5465]

The committee of conference on the disagreeing votes of the two Houses on the amendments of the Senate to the bill (H.R. 5465) to allow Federal employment preference to certain employees of the Bureau of Indian Affairs, and to certain employees of the Indian Health Service, who are not entitled to the benefits of, or who have been adversely affected by the application of, certain Federal laws allowing employment preference to Indians, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the House recede from its disagreement to the amendment of the Senate to the text of the bill and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the Senate amendment insert the following:

That section 8336 of title 5, United States Code, is amended by redesignating subsections (g) and (h) as subsections (h) and (i), respectively, and inserting immediately after subsection (f) the following new subsection:

"*(g) An employee is entitled to an annuity if he—*

"*(1) is separated from the service before December 31, 1985, after completing 25 years of service or after becoming 50 years of age and completing 20 years of service,*

"*(2) was employed in the Bureau of Indian Affairs or the Indian Health Service continuously from June 17, 1974, to the date of his separation,*

"*(3) is not entitled to an annuity under subsection (a), (b), (c), or (e) of this section or under section 8337 of this title,*

"*(4) is not entitled to a preference under section 12 of the Act of June 18, 1934 (48 Stat. 986) or any other provision of law*

granting a preference to Indians in promotions or other personnel actions, and

"(5) demonstrates to the satisfaction of the Commission that he has been passed over on at least two occasions for promotion, transfer, or reassignment to a position representing career advancement because of section 12 of the Act of June 18, 1934 (48 Stat. 986) or any other provision of law granting a preference to Indians in promotions or other personnel actions."

SEC. 2. (a) Section 8339(d) of title 5, United States Code, is amended by striking out "8336(c)" and inserting in lieu thereof "8336 (c) or (g)".

(b) Section 8339(h) of title 5, United States Code, is amended by striking out "section 8336(g)" and inserting in lieu thereof "8336(h)".

SEC. 3. The amendments made by this Act shall take effect on October 1, 1976, or on the date of the enactment of this Act, whichever date is later, and shall only apply with respect to employees separated from the service after June 17, 1974.

And the Senate agree to the same.

That the House recede from its disagreement to the amendment of the Senate to the title of the House bill and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the amendment of the Senate to the title of the House bill, insert the following:

An Act to provide additional retirement benefits for certain employees of the Bureau of Indian Affairs and the Indian Health Service who are not entitled to Indian preference, to provide greater opportunity for advancement and employment of Indians, and for other purposes.

And the Senate agree to the same.

DAVID N. HENDERSON,
MO UDALL,
DOMINICK V. DANIELS,
RICHARD C. WHITE,
WILLIAM D. FORD,
Managers on the Part of the House.

GALE W. MCGEE,
QUENTIN N. BURDICK,
TED STEVENS,
Managers on the Part of the Senate.

JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

The managers on the part of the House and the Senate at the conference on the disagreeing votes of the two Houses on the amendments of the Senate to the bill (H.R. 5465) to allow Federal employment preference to certain employees of the Bureau of Indian Affairs, and to certain employees of the Indian Health Service, who are not entitled to the benefits of, or who have been adversely affected by the application of, certain Federal laws allowing employment preference to Indians, and for other purposes, submit the following joint statement to the House and the Senate in explanation of the effect of the action agreed upon by the managers and recommended in the accompanying conference report:

The Senate amendment to the text of the bill struck out all of the House bill after the enacting clause and inserted a substitute text.

The House recedes from its disagreement to the amendment of the Senate with an amendment which is a substitute for the House bill and the Senate amendment. The differences between the House bill, the Senate amendment, and the substitute agreed to in conference are noted below, except for clerical corrections, conforming changes made necessary by agreements reached by the conferees, and minor drafting and clarifying changes.

APPOINTMENT PREFERENCE

House bill

The House bill provides assistance to employees of the Bureau of Indian Affairs of the Department of the Interior and employees of the Indian Health Service of the Department of Health, Education, and Welfare, whose career opportunities have been adversely affected by Indian preference laws by requiring that they be given priority consideration for appointment to vacant positions within their Department. If an employee eligible for such assistance is considered and passed over twice for such a vacancy, he would be entitled to be appointed to the next vacancy for which he applies, unless the appointing authority determines that compelling reasons exist for again passing over the employee. In such a case, the appointing authority would have to file with the Civil Service Commission written reasons supporting the action under procedures comparable to the procedures applicable in cases where individuals who have veterans preference are passed over.

Senate amendment

The Senate amendment does not contain any provision providing appointment preference for individuals who are adversely affected by Indian preference laws.

Conference substitute

The conference substitute does not provide for appointment assistance for individuals adversely affected by Indian preference laws.

RETIREMENT BENEFITS

House bill

Section 4 of the House bill authorizes an employee who availed himself of appointment assistance provided by the bill and who was considered and passed over 3 times to apply for retirement and an annuity under section 8336(d) of title 5, United States Code, if he has completed 25 years of service or has attained 50 years of age and completed 20 years of service.

Senate amendment

The Senate amendment authorizes payment of an immediate annuity to employees not entitled to the benefits of Indian preference laws who retire before December 31, 1985, and at the time of retirement—

(1) have completed 20 years of service and are at least 50 years of age or have completed 25 years of service regardless of age;

(2) have been continuously employed in the Bureau of Indian Affairs or the Indian Health Service since June 17, 1974;

(3) have been twice passed over for promotion or transfer because of the Indian preference laws; and

(4) are not otherwise entitled to full retirement benefits.

An employee who meets the above requirements is entitled to an annuity computed at—

(1) 2½ percent of his average pay for the first 20 years of service, plus

(2) 2 percent of his average pay for all service in excess of 20 years.

No provision is made for reducing the annuity of an employee if such employee is under age 55 at the time of retirement.

Conference substitute

The conference substitute is essentially the same as the Senate amendment.

EFFECTIVE DATE

House bill

The House bill would take effect on October 1, 1976, or, if later, on the date of the enactment of the bill.

Senate amendment

The effective date in the Senate amendment is essentially the same as the provisions of the House bill, except that the amendments made by the Senate amendment would also apply to any eligible employee who separated after June 17, 1974 (the date of *Morton* v. *Mancari*, 417 U.S. 535) and before the effective date in the House bill. The annuity of any such employee is to be determined as if such amendments were in effect on the date on which he separated. However, no amount of annuity accruing by reason of such amendments would be

payable for any period before October 1, 1976 (or the date of enactment, if later than such date).

Conference substitute

The conference substitute is essentially the same as the Senate amendment.

DAVID N. HENDERSON,
MO UDALL,
DOMINICK V. DANIELS,
RICHARD C. WHITE,
WILLIAM D. FORD,
Managers on the Part of the House.

GALE W. MCGEE,
QUENTIN N. BURDICK,
TED STEVENS,
Managers on the Part of the Senate.

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H. R. 5465

Ninety-fourth Congress of the United States of America

AT THE SECOND SESSION

Begun and held at the City of Washington on Monday, the nineteenth day of January, one thousand nine hundred and seventy-six

An Act

To provide additional retirement benefits for certain employees of the Bureau of Indian Affairs and the Indian Health Service who are not entitled to Indian preference, to provide greater opportunity for advancement and employment of Indians, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 8336 of title 5, United States Code, is amended by redesignating subsections (g) and (h) as subsections (h) and (i), respectively, and inserting immediately after subsection (f) the following new subsection:

"(g) An employee is entitled to an annuity if he—

"(1) is separated from the service before December 31, 1985, after completing 25 years of service or after becoming 50 years of age and completing 20 years of service,

"(2) was employed in the Bureau of Indian Affairs or the Indian Health Service continuously from June 17, 1974, to the date of his separation,

"(3) is not entitled to an annuity under subsection (a), (b), (c), or (e) of this section or under section 8337 of this title,

"(4) is not entitled to a preference under section 12 of the Act of June 18, 1934 (48 Stat. 986) or any other provision of law granting a preference to Indians in promotions or other personnel actions, and

"(5) demonstrates to the satisfaction of the Commission that he has been passed over on at least two occasions for promotion, transfer, or reassignment to a position representing career advancement because of section 12 of the Act of June 18, 1934 (48 Stat. 986) or any other provision of law granting a preference to Indians in promotions or other personnel actions.".

SEC. 2. (a) Section 8339(d) of title 5, United States Code, is amended by striking out "8336(c)" and inserting in lieu thereof "8336(c) or (g)".

(b) Section 8339(h) of title 5, United States Code, is amended by striking out "section 8336(g)" and inserting in lieu thereof "8336(h)".

SEC. 3. The amendments made by this Act shall take effect on October 1, 1976, or on the date of the enactment of this Act, whichever date is later, and shall only apply with respect to employees separated from the service after June 17, 1974.

Speaker of the House of Representatives.

Vice President of the United States and President of the Senate.

September 24, 1976

Received from the White House a sealed envelope said to contain a message from the President wherein he transmits H.R. 5465, An Act to provide additional retirement benefits for certain employees of the Bureau of Indian Affairs and the Indian Health Service who are not entitled to Indian preference, to provide greater opportunity for advancement and employment of Indians, and for other purposes, and a veto message thereon.

Edmund L. Henshaw, Jr.
Clerk of the House of Representatives
by D Pickett

5:00 p.m.
Time received