Memorandum

U.S. Department of Transportation
Federal Highway Administration

Subject: **INFORMATION:** Indian Employment Preference 23 U.S.C. §140(d)

Date: SEP 20 1994

From: Director, Office of Engineering

Reply to Attn. of: HNG-22

To: Regional Federal Highway Administrators

Previously you were provided an informational copy of Mr. Anthony R. Kane's memorandum dated July 15, 1994, to Acting Regional Administrator Leon J. Witman, Jr., relative to a Region 10 request for a legal interpretation regarding Indian employment preference. Specifically, the Region had asked for a formal opinion regarding FHWA Notice N 4720.7 with respect to its reference to "other Indian lands." Mr. Kane's response included a legal opinion dated July 12, from Chief Counsel Theodore A. McConnell, which addressed the subject issue as it relates to the State of Alaska.

More recently, another request has been received for guidance regarding the scope and applicability of the Indian employment preference provision of 23 U.S.C. §140(d). On August 31, Chief Counsel Theodore A. McConnell responded to this inquiry which had been made by Mr. Peter B. Shawhan, Assistant Counsel, New York Department of Transportation. Mr. McConnell's response addresses three specific questions raised by Mr. Shawhan and provides some additional "background" information which may be of interest. A copy of Mr. McConnell's August 31 response is attached.

If you have any questions regarding this matter, please contact either Mr. David R. Geiger at (202) 366-0355 or Ms. Vivian A. Philbin at (202) 366-1393.

for William A. Weseman

Attachment

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U.S. Department
of Transportation
**Federal Highway
Administration**

400 Seventh St., S.W.
Washington, D.C. 20590

AUG 31 1994

In Reply
Refer to: HCC-32

Mr. Peter B. Shawhan
Assistant Counsel
Office of Legal Affairs
State of New York
Department of Transportation
Albany, New York 12232

Re: 23 U.S.C. § 140(d) Indian Employment Preference

Dear Mr. Shawhan:

This is in response to your April 6 letter to Assistant Regional Counsel Kenneth Dymond. You requested that the Federal Highway Administration (FHWA) provide you with more formal and detailed guidance concerning the scope and applicability of 23 U.S.C. § 140(d) with regard to Federal-aid projects involving facilities and structures on Indian reservations. Your letter enclosed a copy of FHWA Notice N4720.7 dated March 15, 1993, entitled "Indian Preference in Employment on Federal-aid Highway Projects on and near Indian Reservations."

You stated that the New York State Department of Transportation (NYSDOT) is currently negotiating with the Seneca Nation of Indians regarding the applicability of the Seneca Nation's Tribal Employment Rights Law (TERO) to certain NYSDOT contracts. With respect to both the statute and the FHWA Notice, you asked a number of questions. This letter addresses each of your questions, with a combined "background" to questions which are related.

I. Question: To which projects does the Indian employment preference contained in 23 U.S.C. § 140(d) apply? Is the Indian employment preference permissive or mandatory?

Answer: The Indian employment preference applies to all Federal-aid projects on or near Indian reservations. It is discretionary. A State may implement the preference on applicable Federal-aid contracts but is not required to do so.

BACKGROUND

Title 23 U.S.C. § 140(d) provides:

> **Indian employment and contracting.--** Consistent with section 703(i) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2(i)), nothing in this section shall preclude the preferential employment of Indians living on or near a reservation on projects and contracts on Indian reservation roads. **States may implement a preference for employment of Indians on projects carried out under this title near Indian reservations.** The Secretary shall cooperate with Indian tribal governments and the States to implement this subsection. [Emphasis added, bold refers to language added in 1991 amendment.]

The legislative history is helpful. Title 23 U.S.C. § 140 was amended in 1987 by section 122 of the Surface Transportation Reauthorization and Uniform Relocation Assistance Act [STURRA],[1] The purpose of the 1987 amendment (as set forth above, less the bold portion) was to conform the antidiscrimination provisions of section 140 with Title VII of the 1964 Civil Rights Act on the issue of Indian preference in employment and contracting for certain Federal-aid highway projects.[2]

Prior to the 1987 amendment, the FHWA had interpreted 23 U.S.C. § 140 as precluding Indian employment preference on any Federal-aid project. This reasoning was based on an analysis of the competitive bidding and nondiscrimination requirements of Title 23. The FHWA at that time determined that 23 U.S.C. § 140 precluded the application of section 703(i) of the Civil Rights Act of 1964[3] to other than Indian Reservation Road [IRR] projects funded under the IRR program pursuant to 23 U.S.C. § 204.

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[1] Pub. L. No. 100-17, 101 Stat. 132 (Apr. 2, 1987).

[2] H. Conf. Rep. 27, 100th Cong., 1st Sess. 149, 164 (1987) [the conference substitute adopted the Senate amendment [section 127], there was no similar provision in the House bill].

[3] Codified at 42 U.S.C. § 2000e-2(i).

Relevant comments of the Senate Committee on Environment and Public Works, pertaining to the 1987 amendment, are as follows:

> Section 127 brings the antidiscrimination provisions of section 140 of title 23, United States Code, into conformity with Title VII of 1964 Civil Rights Act on the issue of Indian preference. Section 703(i) of Title VII makes Indian preference a permissible exception to the general prohibition against discrimination, thereby encoding a longstanding Federal policy towards Indians. During implementation of the STAA of 1982, questions have arisen as to whether the section 703(i) Indian exception is implicit in other antidiscrimination provisions, such as section 140. While the court cases support the principle including 703(i) ..., the bill, to eliminate any doubt on this question, amends section 140 by incorporating 703(i). This subsection shall apply to Indian reservation roads as defined by section 101 of title 23.[4]

As stated in the legislative history, the intent of the 1987 STURRA amendment was to conform 23 U.S.C. § 140 with 42 U.S.C. § 2000e-2(i) [Section 703(i) of the Civil Rights Act of 1964] which allowed private businesses or enterprises on or near reservations to grant employment preference to Indians living on or near reservations. After 1987, it was clear that Federal-aid contractors could, on IRR projects, grant an employment preference to Indians living on or near a reservation.

The STURRA amendment only applied an employment preference for Indians living on or near a reservation and only for Federal-aid IRR projects. This is in contrast to the 1991 amendment, discussed later. However, in 1987, the FHWA issued a memorandum which extended the employment preference to Indians living not only on reservations, but also living in areas defined under the IRR definition of 23 U.S.C. § 101. That definition, as set forth at 23 U.S.C. § 101 states:

> The term 'Indian reservation road' means public roads that are located within or provide access to Indian reservation or Indian trust land or restricted Indian land which is not subject to fee title alienation without the approval of the Federal government, or Indian and Alaska Native

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[4] S. Rep. No. 4, 100th Cong., 1st Sess. 18 (1987).

> villages, groups, or communities in which Indians and Alaskan Natives reside, whom the Secretary of the Interior has determined are eligible for services generally available to Indians under Federal laws specifically applicable to Indians.

Since the purpose of the 1987 amendment was to allow an employment preference for all Federal-aid IRR projects, it makes sense to have this preference apply not just to Indians "living on or near reservations" but also living where the IRRs would be constructed. That is, Indians "residing" within the Indian reservation road definition of:

> Indian trust land or restricted Indian land which is not subject to fee title alienation without the approval of the Federal government, or Indian and Alaska Native villages, groups, or communities in which Indians and Alaskan Natives reside, whom the Secretary of Interior has determined are eligible for services generally available to Indians under Federal laws specifically applicable to Indians.

This approach may be one intent behind the 1991 amendment.

The 1991 Amendment

Title 23 U.S.C. § 140(d) was further amended in 1991. Section 1026(c) of the Intermodal Surface Transportation Efficiency Act of 1991 [ISTEA],[5] addressed the issue of Indian employment preference and added a new sentence to section 140(d):

> States may implement a preference for employment of Indians on projects carried out under this title near Indian reservations.

With respect to ISTEA section 1026(c), the legislative history indicates the following:

> Subsection (b) amends section 140(d) to authorize states to extend Indian employment preference programs to projects near reservations. Currently, such programs are limited to Indians living on or near reservations and to projects on IRR.[6]

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[5] Pub. L. No. 102-240, 105 Stat. 1914 (Dec. 18, 1991)

[6] H.R. Rep. No. 171, Pt. 1, 102d Cong., 1st Sess. 83 (1991) *Similar language contained in* H.R. Conf. Rep. No. 404, 102d Cong., 1st Sess. 324 (1991).

While the specific reference to reservations is contained in floor remarks made by Rep. Miller (D-CA) regarding section 126 of H.R. 2950 (the House version of the surface transportation reauthorization bill), the congressional intent of increased Indian employment is also expressed:

> ...this bill extends Indian employment preferences so that more Indian labor will be used when building on or near reservations.[7]

It is clear that the ISTEA amendment made two separate changes with respect to Indian employment preference. First, it permits an employment preference with respect to all Indians, not just Indians living on or near a reservation. Second, the employment preference applies to all Federal-aid projects near reservations, not just Federal-aid IRR projects. The amendment also reiterates a State's authority to implement Indian employment preference provisions on Federal-aid projects near reservations. Although the 1987 STURRA amendment expressly permits a State to include Indian employment preference in its Federal-aid contracts, the 1991 ISTEA amendment clarifies the issue by the language, "States may implement." It is important to note that neither the STURRA nor ISTEA mandate that States utilize the preference in applicable contracts. A State may require the preference but the State is not required to do so. The FHWA policy, however, has been to encourage the States to implement the Indian employment preference in applicable contracts.

II. Question: The statute states that the Indian employment preference may be implemented on projects "near" Indian reservations. FHWA Notice N4720.7 3(a)(1) states: "Roads 'near' an Indian reservation are those within a reasonable commuting distance from the reservation." Is the interpretation of the word "near" subject to State discretion and negotiation?

Answer: Yes.

BACKGROUND

Title 41 C.F.R. § 60-1.5(a)(6) [**Office of Federal Contract Compliance Programs**] provides:

> **Work on or near Indian reservations.** It shall not be a violation of the equal opportunity clause for a construction or nonconstruction contractor to extend a publicly announced preference in employment to Indians living on or near an Indian reservation in connection with employment

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[7] 137 Cong. Rec. E-3566 (Oct. 28, 1991).

> opportunities on or near an Indian reservation. The use of the word 'near' would include all that area where a person seeking employment could reasonably be expected to commute to and from in the course of a work day. Contractors or subcontractors extending such a preference shall not, however, discriminate among Indians on the basis of religion, sex, or tribal affiliation, and the use of such a preference shall not excuse a contractor from complying with the other requirements contained in this chapter.

The Equal Employment Opportunity Commission (EEOC) has addressed the above regulation and the word "near" as used in this context. On May 16, 1988 the EEOC issued Notice N-915-027, "Policy Statement on Indian Preference under Title VII" (attached). This policy statement, signed by then EEOC Chairman (now Justice) Clarence Thomas, was not published in the Federal Register but is contained in the appendix to Volume II of the EEOC Compliance Manual, a manual published by various commercial distributors. It is not "binding" on other Federal agencies but is used as "enforcement guidance" to the field. The policy statement set forth the EEOC's interpretation of the meaning and scope of the Indian preference provision contained in Section 703(i) of Title VII of the Civil Rights Act of 1964, as amended. A number of areas relative to Indian employment preference are discussed, including the meaning of the phrase "on or near an Indian reservation."

In addressing the language contained in the above OFCCP regulation, the EEOC stated:

> Upon considering the intent of Section 703(i), the Commission is persuaded that the definition of 'near' in the OFCCP regulations cited above is consistent with and furthers the purpose of the Title VII provision. As noted, this definition appears in the specific context of an Indian preference provision that parallels that in Title VII. Unlike a definition that establishes the outer reach of that term by specifying a fixed distance applicable in all cases, a definition based on what may be considered reasonable commuting distance provides the flexibility necessary to take differing geographic and economic circumstances into account. Thus, since proximity to employment

> sources varies from one reservation to another and one part of the country to another, such a definition avoids potential inequities and promotes a fair application of the statutory exception.
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> * * *
>
> [D]eterminations of whether the "on or near" criterion is met shall be made on a case-by-case basis.[8]

III. Question: Does FHWA view § 140(d) as authorizing Indian preferences only for equal employment opportunity hiring purposes, or also for Minority Business Enterprise subcontractor utilization as well?

Answer: The Indian employment preference program set forth in 23 U.S.C. §140 (d) does not apply to the Disadvantaged Business Enterprise (DBE) program.

BACKGROUND

The Indian employment preference contained in 23 U.S.C. § 140(d) is a hiring preference. It is not a contractor preference. The only contracting preference which can be recognized in a Federal-aid highway contract is that authorized by the DBE provisions.

The DBE program provides that, except to the extent the Secretary determines otherwise, not less than 10 percent of the programs listed in 49 C.F.R. § 23.63 (which includes the Federal-aid highway program) shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals. Native Americans are presumed disadvantaged. The DBE program was initially established pursuant to section 105(f) of the Surface Transportation Assistance Act of 1982.[9] The DBE program was reauthorized in the STURRA[10] and again reauthorized in the ISTEA.[11]

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[8] EEOC Notice N-915.027 dated 5/16/88 at page 8.

[9] Pub. L. No. 97-424, 96 Stat. 2097 (Jan 6, 1983).

[10] § 106(c) of Pub. L. No. 100-17, 101 Stat. 132 (Apr. 2, 1987).

[11] § 1003(b) of Pub. L. No. 102-240, 105 Stat. 1914 (Dec. 18, 1991).

I hope the above is of assistance to you. Please contact Vivian Philbin of my staff at (202) 366-1393 should you have any additional questions.

Sincerely yours,

Theodore A. McConnell
Chief Counsel

Enclosures

NOTICE

(Automatically Cancelled in 180 Days)

NUMBER
N-915.027

DATE
5/16/88

1. SUBJECT. Policy Statement on Indian Preference Under Title VII.

2. PURPOSE. This policy statement sets forth the Commission's interpretation of the meaning and scope of the Indian preference provision contained in Section 703(i) of Title VII of the Civil Rights Act of 1964, as amended.

3. EFFECTIVE DATE. May 16, 1988

4. EXPIRATION DATE. As an exception to EEOC Order 205.001, Appendix V, Attachment 4, § a(5), this Notice will remain in effect until rescinded or superseded.

5. ORIGINATOR. Title VII/EPA Division, Office of Legal Counsel.

6. INSTRUCTIONS. This notice supplements the discussion at Section 604.10(d) of EEOC Compliance Manual, Volume II, Section 604, Theories of Discrimination. The notice should be filed behind the appendices to that section.

7. SUBJECT MATTER.

Section 703(i) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2(i) (1982), provides an exception to Title VII's general nondiscrimination principles allowing certain employers under certain circumstances to exercise an employment preference in favor of American Indians. 1/ That section provides as follows:

> Nothing contained in this title shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

The statutory language makes it clear that an employer seeking to avail itself of the Indian preference exception must meet three conditions: (1) the employer must be located on or near an Indian reservation, (2) the employer's preference for Indians must be publicly announced, and (3) the individual to whom preferential treatment is accorded must be an Indian living on or near a reservation. Neither Section 703(i) nor any other section of the Act, however, defines the terms "Indian reservation" or "near."

1/ This policy statement does not extend to charges/complaints brought under either the Age Discrimination in Employment Act of 1967, as amended (ADEA), 29 U.S.C. § 621 et seq. (1982), or the Equal Pay Act of 1963 (EPA), 29 U.S.C. § 206(d) (1982), since, unlike Title VII, neither of those statutes contains an Indian preference exception. Additionally, neither the ADEA nor the EPA provides a jurisdictional exemption for Indian tribes as does Section 701(b)(1) of Title VII.

Although the Commission has issued several decisions involving the jurisdictional exemption of Indian tribes under Section 701(b)(1) of Title VII, 2/ its one published decision involving the Indian preference exception under Section 703(i) of the Act turned solely on the question of whether the employer had satisfied the public announcement requirement of that section. See Commission Decision No. 74-26, CCH EEOC Decisions (1983) ¶ 6398. Thus, the Commission did not have occasion in that case to address the statutory requirement of being "on or near an Indian reservation."

Because the Commission has received various requests from employers, Indian tribes, and state fair employment practices agencies for its interpretation of the "on or near" phrase and the applicability of the Indian preference exception and because the issue is an increasingly important one on which the Commission has not previously issued guidance, the Commission now delineates its position with respect to the exception provided in Section 703(i) of the Act. Specifically, the Commission addresses: (1) the definition of "Indian reservation" for Title VII purposes, (2) the meaning of the term "near," (3) the scope of the term "employment practice," and (4) the issue of whether a preference based on tribal affiliation conflicts with the provisions of Title VII.

Indian Reservation

The need to define the term "Indian reservation" within the meaning of Section 703(i) of Title VII arises in connection with the circumstances that exist in the state of Oklahoma. As has been brought to the Commission's attention, Oklahoma is the home of a large number of Indian tribes and many areas of the state contain high Native American populations, yet there are no longer any Indian reservations as such in Oklahoma. 3/ Many employers in the state, however, are located in and around the sites of former reservations. Thus, the question presented is whether the Indian preference exception provided in Section 703(i) is available to such employers or whether applicability of that provision is dependent upon the present existence of an Indian reservation as the necessary base from which to measure whether the "on or near" requirement is met.

The issue is one of first impression. As noted above, Title VII does not define the term "Indian reservation." Nor is there any indication in the legislative history of the Act of the meaning intended by Congress in its use of that term in Section 703(i). Further, research has disclosed no court decision defining the term for Title VII purposes.

2/ See Commission Decision No. 80-14, CCH EEOC Decisions (1983) ¶ 6823, and Commission Decision Nos. 85-6 and 85-7, CCH Empl. Prac. Guide ¶¶ 6847 and 6848, respectively.

3/ Prior to statehood in 1907, the area comprising present-day Oklahoma was Indian Territory. For a detailed discussion of the history of that land, see F. Cohen, Handbook of Federal Indian Law 770-75 (1982 ed.). See also S. Pevar, The Rights of Indians and Tribes 231-33 (Bantam ed. 1983).

Before examining statutory use of the term outside the context of Title VII, we consider its ordinary meaning:

> The term "Indian reservation" originally had meant any land reserved from an Indian cession to the federal government regardless of the form of tenure. During the 1850's, the modern meaning of Indian reservation emerged, referring to land set aside under federal protection for the residence of Tribal Indians, regardless of origin. 4/

Although "Indian reservation" is the more commonly familiar term, the governing legal term for most jurisdictional purposes is "Indian country." 5/ The latter is defined at 18 U.S.C. § 1151 as follows:

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country," as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

The definition in Section 1151 is controlling with respect to the applicability of federal criminal law in Indian country. While this definition relates specifically to determinations of federal criminal jurisdiction, the Supreme Court has noted that it is also applicable to questions of federal civil jurisdiction. 6/ However, although Indian reservations are included in the statutory definition of Indian country, the term "Indian reservation" is not separately defined. 7/

4/ Cohen, supra note 3, at 34.

5/ Id. at 27.

6/ DeCoteau v. District County Court, 420 U.S. 425 (1975). "While § 1151 is concerned, on its face, only with criminal jurisdiction, the Court has recognized that it generally applies as well to questions of civil jurisdiction." Id. at 427 n.2 (citations omitted).

7/ In determining whether a particular tract of land constitutes a reservation within the meaning of § 1151(a), courts have examined the history of the land in light of acts of Congress, rulings by the Department of the Interior, and prior judicial decisions bearing on its status. See, e.g., United States v. John, 437 U.S. 634 (1978); Cheyenne-Arapaho Tribes v. State of Oklahoma, 618 F.2d 665 (1980); and Langley v. Ryder, 602 F. Supp. 335 (W.D. La. 1985).

Similarly, the terms "Indian reservation" or "reservation" appear but are undefined in numerous other federal statutes. 8/ A review of Title 25 of the U. S. Code, which pertains specifically to Indians, has disclosed only three instances in which "reservation" is defined, although the term is used repeatedly throughout that title. 9/ Of these three definitions, one relates specifically to an Indian tribe in Connecticut. 10/ A second definition, which is of general application, is found in the Indian Child Welfare Act of 1978, 25 U.S.C. § 1901 et seq. Incorporating and expanding upon the definition of Indian country, that Act provides as follows:

> "[R]eservation" means Indian country as defined in section 1151 of title 18 and any lands, not covered under such section, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation.

25 U.S.C. § 1903(10).

The third definition appears in the Indian Financing Act of 1974, 25 U.S.C. § 1451 et seq., which provides Indian tribes and individuals capital in the form of loans and grants to promote economic development. That definition specifically includes former Indian reservations in Oklahoma. As defined therein:

> "Reservation" includes Indian reservations, public domain Indian allotments, former Indian reservations in Oklahoma, and land held by incorporated Native groups, regional corporations, and village corporations under the provisions of the Alaska Native Claims Settlement Act [43 U.S.C. 1601 et seq.].

25 U.S.C. § 1452(d).

8/ See, e.g., 16 U.S.C. §§ 796(2), 797(e); 25 U.S.C. §§ 33, 46, 155, 175, 176, 196, 200, 211, 231-233, 253, 262, 264, 279, 280, 283, 286, 291, 292, 304, 307, 309, 311, 312, 318a-321, 331, 333, 334, 336, 337, 339, 340, 342, 344, 348, 350-352, 380, 381, 393, 396a, 397-399, 400a, 402a, 407, 415, 461, 463, 463e, 465, 467, 468, 476-479, 488, 501, 631, 1083, 1311, 1466, 1495, 1521; 43 U.S.C. §§ 149, 150, 851, 856, 868, 1195-1196.

9/ See citations to 25 U.S.C. supra note 8.

10/ See 25 U.S.C. § 1752 (Supp. III 1985).

While no statutory definition discovered other than that in the Indian Financing Act explicitly recognizes former Indian reservations in Oklahoma, they are included in the definition of "reservation" contained in various regulations promulgated by the Bureau of Indian Affairs (BIA) of the Department of the Interior. For example, in the regulations governing BIA's financial assistance and social services program, 25 C.F.R. § 20.1 et seq. (1987), the following definition is provided:

> "Reservation" means any federally recognized Indian tribe's reservation, Pueblo, or Colony, including former reservations in Oklahoma, Alaska Native regions established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688), and Indian allotments.

25 C.F.R. § 20.1(v) (1987). 11/

Against this background, the Commission must determine the meaning of the term "Indian reservation" under Section 703(i) of Title VII. In so doing, the Commission is mindful that Title VII is remedial social legislation and is, therefore, entitled to liberal construction in order to effectuate the purpose of the Act. 12/ The purpose for the inclusion of Section 703(i) is explained in the legislative history:

11/ The cited regulations were issued under 25 U.S.C. § 13, which authorizes BIA to expend money appropriated by Congress for the benefit, care, and assistance of Indians. For other instances in which BIA regulations define "reservation" including former Indian reservations in Oklahoma, see 25 C.F.R. §§ 101.1(k), (loans to Indians from revolving loan fund), 103.1(h) (loan guaranty, insurance, and interest subsidy), 151.2(f) (land acquisitions), 273.2(o) (education contracts under Johnson O'Malley Act), and 286.1(j) (Indian business development program).

A similar definition is provided in regulations of the Department of the Interior (implementing Section 7(b) of the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450e(b)), at 48 C.F.R. § 1404.7001 (1987). That section provides:

> "Indian reservation" includes Indian reservations, public domain Indian allotments, former Indian reservations in Oklahoma, and land held by incorporated Native groups, regional corporations, and village corporations under the provisions of the Alaska Native Claims Settlement Act (85 Stat. 688; 43 U.S.C. 1601 et seq.).

12/ See EEOC v. First Catholic Slovak Ladies Association, 694 F.2d 1068, 1070, 30 EPD ¶ 33,175 (6th Cir.), cert. denied, 464 U.S. 819, 32 EPD ¶ 33,829 (1983); and Zimmerman v. North American Signal Company, 704 F.2d 347, 352, 31 EPD ¶ 33,486 (7th Cir. 1983).

> A new subsection 703(i) has been added permitting enterprises on or near Indian reservations to follow preferential hiring practices toward Indians. This exemption is consistent with the Federal government's policy of encouraging Indian employment and with the special legal position of Indians. 13/

In the Commission's view, the Congressional purpose of encouraging the voluntary extension of employment opportunities to Indians would be unduly hampered by narrowly defining the term "Indian reservation" within the meaning of Section 703(i) to exclude former Indian reservations in Oklahoma. Such a definition would effectively preclude the applicability of Title VII's Indian preference provision to employers in a state which was originally Indian Territory and whose present population includes a high percentage of Native Americans, a result which appears contrary to the intent of Section 703(i). Additionally, the Commission takes note that a narrow definition of that term would similarly render the preference inapplicable in the state of Alaska. 14/

In light of these considerations, the Commission believes that the purpose of Section 703(i) would be furthered by defining "Indian reservation" in a manner that accords special recognition to the circumstances that exist in both Oklahoma and Alaska. Therefore, guided by the definitions of "reservation" provided in the Indian Financing Act of 1974 and in regulations issued by the Bureau of Indian Affairs, 15/ it is the Commission's position that the terms "Indian reservation " and "reservation" in Section 703(i) of Title VII include former Indian reservations in Oklahoma and land held by incorporated Native groups, regional corporations, and village corporations in Alaska under the provisions of the Alaska Native Claims Settlement Act.

Should a dispute arise regarding whether a particular tract of land falls within this definition, the Commission will present the question to the Bureau of Indian Affairs and will make its determination after consideration of the conclusion reached by that agency.

On or Near an Indian Reservation

Section 703(i) of Title VII uses the phrase "on or near an Indian reservation" in identifying the businesses or enterprises that may lawfully exercise the Indian preference exception provided in that section. The individual Indians to whom preferential treatment may be extended are similarly identified as those living "on or near a reservation." With respect to this phrase, the issue presented in determining whether the statutory criterion is met regards the meaning of the word "near," which is undefined in the Act.

13/ 110 Cong. Rec. 12723 (1964) (statement of Senator Humphrey).

14/ For a discussion of native land rights in Alaska, see Cohen, supra note 3, at 739-48.

15/ See supra note 11.

The sole Title VII case deciding the applicability of the Indian preference contained in Section 703(i) is Livingston v. Ewing, 601 F.2d 1110, 20 EPD ¶ 30,002 (10th Cir.), cert. denied, 444 U.S. 870, 20 EPD ¶ 30,266 (1979). In that case, the non-Indian plaintiffs challenged the policy of the Museum of New Mexico in Santa Fe of permitting only Indians to sell their handmade jewelry and crafts on the grounds of the Museum. Holding that the Museum's policy came within the Section 703(i) exception, even though the Museum was not the direct employer of the Indians, the court found that the "on or near" requirement was satisfied by facts showing that the Museum was located eight miles from an Indian reservation and within a "short distance" of other reservations, including the ones from which the Indians came. 601 F.2d at 1115.

However, because the court's holding in Livingston v. Ewing is fact-specific, the decision in that case does not provide a definition of the word "near" for Title VII purposes. Nor is general guidance on the meaning of that term found outside of Title VII in the Supreme Court's decision in Morton v. Ruiz, 415 U.S. 199 (1974). Although the Court there held that, in appropriating funds for the Bureau of Indian Affairs' general assistance program, Congress did not intend to limit eligibility for benefits under the program to Indians living "on" a reservation, to the exclusion of those living "near" one, the Court did not decide the breadth of the term "near." Rather, the Court held that it covered the Indian plaintiffs, who lived in an Indian community fifteen miles from their reservation.

Although applicable judicial precedent defining "near" is lacking, a definition of that term is found in regulations issued by the Office of Federal Contract Compliance Programs (OFCCP) of the Department of Labor. 41 C.F.R. § 60-1.1 et seq. (1987). The regulations, which apply to federal contractors, define "near" with reference to an Indian preference provision similar to that contained in Section 703(i) of Title VII. The regulations provide in pertinent part:

> Work on or near Indian reservations. It shall not be a violation of the equal opportunity clause for a construction or nonconstruction contractor to extend a publicly announced preference in employment to Indians living on or near an Indian reservation in connection with employment opportunities on or near an Indian reservation. The use of the word "near" would include all that area where a person seeking employment could reasonably be expected to commute to and from in the course of a work day.

41 C.F.R. § 60-1.5(a)(6) (1987) (emphasis added). 16/

16/ The Commission notes that the term "near" is similarly defined in Department of the Interior regulations implementing the Indian preference provision of the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450e(b). At 48 C.F.R. § 1404.7001 (1987), these regulations provide:

> "On or near an Indian reservation" means on a reservation or the distance within that area surrounding an Indian reservation(s) that a person seeking employment could reasonably be expected to commute to and from in the course of a work day.

Upon considering the intent of Section 703(i), the Commission is persuaded that the definition of "near" in the OFCCP regulations cited above is consistent with and furthers the purpose of the Title VII provision. As noted, this definition appears in the specific context of an Indian preference provision that parallels that in Title VII. Unlike a definition that establishes the outer reach of that term by specifying a fixed distance applicable in all cases, a definition based on what may be considered reasonable commuting distance provides the flexibility necessary to take differing geographic and economic circumstances into account. Thus, since proximity to employment sources varies from one reservation to another and one part of the country to another, such a definition avoids potential inequities and promotes a fair application of the statutory exception.

For these reasons, the Commission adopts the definition of "near" provided in the OFCCP regulations set forth above as the definition of that term under Section 703(i) of Title VII. Applying this definition, determinations of whether the "on or near" criterion is met shall be made on a case-by-case basis.

Employment Practice

To what extent may preferential treatment be accorded Indians under Section 703(i)? That section provides an Indian preference exception with respect to "any publicly announced employment practice." The legislative history, discussed above, indicates that this exception permits covered employers to follow preferential hiring practices toward Indians. 17/ The question before the Commission is whether the term "employment practice" in Section 703(i) thus refers solely to initial hiring decisions.

In Morton v. Mancari, 417 U.S. 535, 7 EPD ¶ 9431 (1974), the Supreme Court upheld an employment preference for Indians in the Bureau of Indian Affairs (BIA) under Section 12 of the Indian Reorganization Act of 1934, 25 U.S.C. § 472. The Court held that the preference provided in the 1934 Act was not repealed by implication by the 1972 amendments to Title VII, which extended Title VII's discrimination prohibitions to federal sector employment. The Court further held that the preference did not constitute invidious racial discrimination in violation of the Due Process Clause of the Fifth Amendment. The statute at issue in Mancari provides a preference with respect to "appointment to vacancies." Although the preference previously had been accorded only at the initial hiring stage, under BIA policy as revised in 1972 it was extended to filling vacancies by original appointment, reinstatement, and promotions. 417 U.S. at 538 n.3. Because the question of whether the 1934 Act authorized a preference in other than initial hiring was not before the Court in Mancari, the Court noted that it expressed no opinion on that issue. Id. at 539 n.5. However, the Court cited two lower court decisions in which the phrase "appointment to vacancies" in Section 12 of the 1934 Act was specifically construed, Freeman v. Morton and Mescalero Apache Tribe v. Hickel.

In Freeman v. Morton, 499 F.2d 494 (D.C. Cir. 1974), the court held that the BIA preference applies to filling vacancies through initial hiring, promotion, lateral transfer, and reassignment. In Mescalero Apache Tribe v. Hickel,

17/ See supra note 13 and accompanying text.

432 F.2d 956 (10th Cir. 1970), cert. denied, 401 U.S. 981 (1971), the court concluded that the preference was not applicable to reductions in force since such circumstances do not involve the filling of vacancies. Based on the statutory language and the legislative history, the court in Mescalero found that Congress did not intend the preference to be applied in a manner that would result in the displacement of existing non-Indian employees of BIA. Following the Tenth Circuit's decision in Mescalero, however, Congress enacted legislation making the preference applicable to reductions in force at BIA and the Indian Health Service. See 25 U.S.C. § 472a(a) (1982). "The purpose of this provision is to overcome the adverse effects of the Mescalero decision...." H.R. Rep. No. 370, 96th Cong., 1st Sess. 12, reprinted in 1979 U.S. Code Cong. & Ad. News 2068, 2077. See Preston v. Heckler, 734 F.2d 1359, 1371 n.15 (1984) (commenting on the Congressional response to Mescalero in a case involving application of the preference in the Indian Health Service).

In the Commission's view, Congress's use of the general term "employment practice" in Section 703(i) of Title VII suggests an intent to permit preferential treatment of Indians more broadly than in the context of hiring alone. Although the court cases discussed above analyze the scope of an Indian preference authorized under a statute other than Title VII, the Commission believes that these decisions and the subsequent Congressional enactment in response to Mescalero provide useful guidance in determining the breadth of the term "employment practice" in Section 703(i).

Drawing upon this guidance, it is the Commission's position that, for Title VII purposes, employment practices under which preferential treatment may be accorded to Indians are those requiring the selection of individuals to fill positions, however created, or to retain positions when jobs are eliminated. Accordingly, the preference is applicable to employment decisions involving, for example, hiring, promotion, transfer, and reinstatement as well as to layoffs and reductions in force.

The Commission does not reach a determination of whether the term "employment practice" in Section 703(i) covers other terms, conditions, or privileges of employment, such as compensation, benefits, work assignments, or training. The issue of whether the Indian preference in Title VII extends to employment decisions involving such terms and conditions is non-CDP. Charges raising this issue should be processed according to the instructions provided in EEOC Compliance Manual § 603 for processing priority-issue charges.

Tribal Affiliation

The final issue to be addressed is whether the extension of an employment preference based on tribal affiliation—that is, a preference limited to Indians who belong to a particular tribe, to the exclusion of members of any other tribe—is permissible under Section 703(i) of Title VII. The issue arises, for example, where an employer located on or near a specific Indian tribe's reservation wishes to accord a preference restricted to members of that tribe either on its own initiative or in compliance with a tribal ordinance requiring that a preference be given to members of the tribe.

The Indian preference exception provided in Section 703(i) is stated in general terms. That section neither expressly authorizes nor prohibits a distinction among Indians based on tribal membership. By contrast to Title VII, which is silent on the issue of tribal affiliation, regulations promulgated by the Office of Federal Contract Compliance Programs (OFCCP) of the Department of Labor and by the Department of the Interior specifically prohibit consideration of tribal affiliation in according the preferences permitted.

The relevant provision of the OFCCP regulations, which are applicable to federal contractors, is found at 41 C.F.R. § 60-1.5(a)(6) (1987). The first two sentences of that section are set out in the foregoing discussion of the definition of the phrase "on or near an Indian reservation." The final sentence of the section provides, in pertinent part, as follows:

> Contractors or subcontractors extending such a preference shall not, however, discriminate among Indians on the basis of religion, sex, or tribal affiliation ....

41 C.F.R. § 60-1.5(a)(6) (1987) (emphasis added).

Section 7(b) of the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450e(b), requires the inclusion of Indian preference provisions in certain federal contracts and grants. Regulations issued by the Department of the Interior, governing the implementation of Section 7(b) of that Act, appear at 48 C.F.R. § 1404.7000 et seq. and §§ 1452.204-71 and 72 (1987). These regulations require the insertion of the following clause in specified contracts:

> The Contractor agrees to give preference to Indians who can perform the work required regardless of age (subject to existing laws and regulations), sex, religion, or tribal affiliation for training and employment opportunities under this contract and, to the extent feasible consistent with the efficient performance of this contract, training and employment preferences and opportunities shall be provided to Indians regardless of age (subject to existing laws and regulations), sex, religion, or tribal affiliation who are not fully qualified to perform under this contract.

48 C.F.R. § 1452.204-71 (1987) (emphasis added).

Thus, under the cited regulations of both OFCCP and the Department of the Interior, covered federal contractors may not discriminate among Indians on the basis of tribal affiliation in extending an employment preference. Although Title VII is silent in this regard, the Commission considers the prohibition expressed in those regulations to best serve the purpose intended by Section 703(i).

On this point, the Commission believes that, in enacting Section 703(i), Congress intended to encourage the extension of employment opportunities to Indians generally, without allowing discrimination among Indians of different

tribes. Under Section 703(i), the exception applies to employment practices under which preferential treatment is given to "any individual because he is an Indian living on or near a reservation" (emphasis added). The statutory language supports the conclusion that Congress did not intend to permit tribal distinctions among Indians otherwise qualifying for such preferential treatment.

Further, as a practical matter, the Commission notes that in some instances employers may be located on or near the reservation of only one tribe and that the Indians living on or near that reservation may be members of that tribe. Under such circumstances, the preference may operate, in effect, to favor only members of that specific tribe without disadvantaging Indians of other tribes. However, in some parts of the country employers are situated near the reservations of more than one tribe or more than one tribe may share the same reservation. The potential inequities resulting from according a preference based on tribal affiliation are most clearly evident when these circumstances are contemplated.

In light of these considerations, it is the Commission's position that extension of an employment preference on the basis of tribal affiliation is in conflict with and violates Section 703(i) of Title VII. The Commission emphasizes, however, that its position with respect to Section 703(i) affects only employers covered by Title VII. Since Indian tribes are exempt from the provisions of the Act under Section 701(b)(1), preferences or requirements based on tribal membership or affiliation imposed by a tribe with respect to its own employment practices are not violative of Title VII. See Wardle v. Ute Indian Tribe, 623 F.2d 670, 23 EPD ¶ 31,035 (10th Cir. 1980).

DATE 5/16/88

APPROVED Clarence Thomas
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Chairman