VOLUME NO. 43 OPINION NO. 42

EDUCATION - Applicability of Montana Human Rights Act to public school districts on Indian reservations;

INDIANS - Existence of federally-protected tribal interest in school district hiring practices;
INDIANS - Validity of preferences with respect to reservation-based public school employment under Montana Human Rights Act;
LABOR RELATIONS - Existence of federally-protected tribal interest in school district hiring practices;
SCHOOL DISTRICTS - Existence of federally-protected tribal interest in school district hiring practices;
SCHOOL DISTRICTS - Validity of Indian preferences with respect to reservation-based employment under Montana Human Rights Act;
MONTANA CODE ANNOTATED - Sections 49-2-101 to 49-2-601, 49-2-303(1)(a), 49-2-403(1);
MONTANA CONSTITUTION - Article II, section 4;
UNITED STATES CODE - 20 U.S.C. §§ 236 to 240; 25 U.S.C. § 81; 25 U.S.C. § 450e(b); 25 U.S.C. § 472; 42 U.S.C. §§ 2000e to 2000e-17; 42 U.S.C. § 2000e(b); 42 U.S.C. § 2000e-2(i); 42 U.S.C. § 2000e-7; 42 U.S.C. § 2000h-4;
UNITED STATES CONSTITUTION - Article II, section 8, clause 3; Amendments V, XIV.

HELD: The Montana Human Rights Act applies to public school districts lying wholly or partially within Indian reservations on district-owned lands and prohibits the school district from granting employment preferences to Indians unless specifically required by federal statute. Indian tribes do not have a federally-protected interest in requiring that such preferences be granted their members or other Indians.

November 16, 1989

James C. Nelson
Glacier County Attorney
P.O. Box 428
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Dear Mr. Nelson:

You have requested my opinion concerning the following question:

> Does the prohibition in the Montana Human Rights Act against racial discrimination apply to employment decisions by public school boards whose districts lie wholly or partially within an Indian reservation so as to render unlawful the granting of employment preferences to Indians, even when such preferences are required by tribal resolution or ordinance?

I conclude that the Montana Human Rights Act, §§ 49-2-101 to 601, MCA, does apply and prohibits the granting of reservation-based employment preferences to Indians unless specifically required by federal statute. I further conclude that, under the facts here, this Act's application does not impermissibly infringe on the self-government powers of the Blackfeet Tribe.

East Glacier School District No. 51 is located entirely within the exterior boundaries of the Blackfeet Indian Reservation. The district's physical facilities are situated in the town of East Glacier on lands owned by it, and its student population for school year 1988-89 is approximately 40 pupils, divided in roughly equal parts between Indian and non-Indian children. The employment at issue occurs in the district's facilities and affects tasks such as teaching, clerical, and janitorial services. Funding for such activities is derived almost entirely from payments under the state foundation program, revenues generated from property tax levies, and federal impact aid pursuant to Public Law No. 81-874, 67 Stat. 1100 (codified as amended at 20 U.S.C. §§ 236-240). None of the positions in question is subject to a federal statute requiring employment preferences for Blackfeet tribal members or other Indians.

The Blackfeet Tribe has established by resolution a tribal employment rights office and requires "[a]ll employers operating within the exterior boundaries of the Blackfeet Reservation ... to give preference to Indians in hiring, promotion, training, [and] all other aspects of employment[.]" Blackfeet Tribal Resolution No. 126-82, para. 2 (Nov. 24, 1981). The resolution subjects noncomplying employers to a broad range of penalties, including "denial of the right to commence business on the Blackfeet Reservation, fines, suspension of the employer's operation, termination of the employer's operation, denial of the right to conduct any further business on the Blackfeet Reservation, payment of back pay or other relief to correct any harm done to aggrieved Indians, and the summary removal of employees hired in violation of the Blackfeet Tribe's employment rights requirements." *Id.*, para. 4. The Tribe has informed School District No. 51 that the district must honor these preference provisions and that, therefore, qualified Blackfeet tribal members or other Indians must be awarded positions within the district irrespective of the qualifications of non-Indian employees or applicants.

Your opinion request raises serious issues under both state and federal law. They involve the questions of whether the prohibition against racial discrimination in the Human Rights Act should be construed as encompassing reservation-based Indian employment preferences and, if the state act does proscribe such preferences, whether this prohibition may be given effect in light of the tribal resolution. I address these questions in order.

I.

Section 49-2-303(1)(a), MCA, of the Human Rights Act makes it unlawful for any Montana public or private employer to discriminate on the basis of race. No exemptions from this prohibition exist. The threshold issue is thus whether an exception should nevertheless be implied, as a matter of state law, for Indian employment preferences because of the unique status of tribes and their members under federal law.

In Morton v. Mancari, 417 U.S. 535 (1974), the United States Supreme Court upheld the constitutionality of section 12 of the Indian Reorganization Act, 25 U.S.C. § 472, which requires the Secretary of the Interior "to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed to the various positions maintained ... by the Indian Office, in the administration of functions or services affecting any Indian tribe" and to grant such qualified Indians "the preference to appointment to vacancies in any such positions." Mancari arose after section 12 preferences were utilized in the Albuquerque, New Mexico, office of the Bureau of Indian Affairs to select Indians over non-Indians for various promotions. The non-Indians alleged that the preferences were racially grounded and, in the absence of a compelling state interest, violated the due process clause of the Fifth Amendment. The Supreme Court, however, concluded otherwise, reasoning that the statutory preference was political, not racial, in nature:

> Contrary to the characterization made by appellees, this preference does not constitute "racial discrimination." Indeed, it is not even a "racial" preference. Rather, it is 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. It is directed to participation by the governed in the governing agency. ... The preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion. ... Furthermore, the preference applies only to employment in the Indian service. The preference does not cover any other governmental agency or activity, and we need not consider the obviously more difficult question that would be presented by a blanket exemption for Indians from all civil service examinations.

Id. at 553-54 (footnote omitted). The Court then concluded by stating that, "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed" and that the section 12 preference provision was "reasonable and rationally designed to further Indian self-government[.]" *Id.* at 554. Later decisions have relied upon the Mancari distinction between "political"

and "racial" discrimination to reject due process or equal protection challenges where unique legal status or privileges accorded Indians were at stake. E.g., Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658, 673 n.20 (1979) (upholding validity of treaty fishing rights retained by tribal members); United States v. Antelope, 430 U.S. 641, 645-46 (1977) (rejecting Fifth Amendment challenge to 18 U.S.C. § 1153 which subjects Indians, but not non-Indians, to federal prosecution for specified major crimes); Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463, 479-80 (1976) (rejecting claim that common-law tax immunity granted Indians constituted invidious racial discrimination against non-Indians); Fisher v. District Court, 424 U.S. 382, 390-91 (1976) (per curiam) (vesting exclusive jurisdiction in tribal court over adoption proceedings involving only tribal members residing on reservation did not impermissibly deny them access to state courts on racial grounds); Mullenberg v. United States, 857 F.2d 770, 772 (Fed. Cir. 1988) ("the failure to extend notice requirements to nonpreference eligible excepted service employees is not racial discrimination since Indian status is political and not racial"); Duro v. Reina, 851 F.2d 1136, 1144 (9th Cir.), petition for reh'g en banc denied, 860 F.2d 1463 (1988), cert. granted, 109 S. Ct. 1930 (1989) (finding no equal protection violation by virtue of tribal court criminal jurisdiction over nonmember Indians but not over non-Indians); Barona Group of Capitan Grande Band of Mission Indians v. American Management and Amusement, 840 F.2d 1394, 1406-07 (9th Cir. 1987), cert. dismissed, 109 S. Ct. 7 (1988) (upholding validity of 25 U.S.C. § 81 which requires federal approval of contracts made with Indian tribes or Indians); Alaska Chapter, Associated General Contractors v. Pierce, 694 F.2d 1162, 1166-70 (9th Cir. 1982) (upholding constitutionality of Indian preference provision in 25 U.S.C. § 450e(b)); see also Regents v. Bakke, 438 U.S. 265, 304 n.42 (1978) ("In Mancari, we approved a hiring preference for qualified Indians in the Bureau of Indian Affairs of the Department of the Interior. ... We observed in that case, however, that the legal status of the BIA is *sui generis*").

Mancari was clearly premised on the special relationship existing between the United States and Indian tribes, and it is doubtful the decision stands for the general proposition that states may, without congressional authorization, bestow preferential employment rights on individuals because of their Indian status. See Queets Band v. Washington, 765 F.2d 1399, 1404 n.1 (9th Cir. 1985), vacated upon joint motion, 783 F.2d 154 (1986). A contrary conclusion, moreover, would raise significant concerns under the equal protection clauses of the Fourteenth Amendment and Article II, section 4 of the Montana Constitution. The United States Supreme Court thus recently stated in City of Richmond v. J.A. Croson Company, 109 S. Ct. 706, 719 (1989), that merely because "Congress may identify and redress the effects of society-wide [racial] discrimination does not mean, *a fortiori*, the States and their political subdivisions are free to decide that such remedies are appropriate." The Court later said that, "[w]hile the States and their subdivisions may take remedial action when they possess evidence that their

own spending practices are exacerbating a pattern of prior discrimination, they must identify that discrimination, public or private, with some specificity before they may use race-conscious relief." *Id.* at 727. Although the analysis in City of Richmond concerning Congress' more expansive authority to formulate "race-conscious" statutory schemes was premised on section 5 of the Fourteenth Amendment, which provides that "[t]he congress shall have power to enforce, by appropriate legislation" such amendment, the Court's reasoning appears particularly apt here since Congress, but not the states, has plenary power over Indian affairs pursuant to Article II, section 8, clause 3 of the federal constitution and a special relationship with tribes and their members. E.g., McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 172 n.7 (1973).

Yet, even if states do have the discretion to enact reservation-based employment preferences for Indians, Montana's Human Rights Act requires, as a general matter, even-handed treatment which neither benefits nor penalizes individuals because of their Indian status. Cf. Taylor v. Department of Fish, Wildlife & Parks, 205 Mont. 85, 666 P.2d 1228, 1232 (1983) (even express statutory exceptions in the Human Rights Act must be strictly construed). In either situation the employment practice is racially motivated and proscribed under section 49-2-303(1)(a), MCA. See Tuveson v. Florida Governor's Council on Indian Affairs, 495 So. 2d 790, 794 (Fla. Dist. Ct. App. 1986) ("[t]he [employer's] conclusion that Indian preference is legal under Federal law is irrelevant; what is legal under Federal law is not the same as what is legal under Florida law"). As a matter of state law, therefore, such preferences are prohibited at least where, as here, they are not remedial devices designed to correct prior discriminatory practices by the employer. See § 49-2-403(1), MCA (race "may not comprise justification for discrimination unless the nature of the service requires the discrimination for the legally demonstrable purpose of correcting a previous discriminatory practice"). I express no opinion concerning whether or under what circumstances racially-conscious affirmative action plans may be utilized pursuant to Montana law.

II.

The second issue is whether, under federal law principles, application of the Human Rights Act under the circumstances here infringes impermissibly on the Blackfeet Tribe's sovereignty. Because the involved operations of the district occur on nontribal land and the Tribe seeks to regulate the conduct of a nonmember entity, I apply the analytical standards articulated in Montana v. United States, 450 U.S. 544 (1981).

Montana arose from an action filed by the United States which, in part, sought to establish that the Crow Tribe had exclusive jurisdiction to regulate reservation hunting and fishing--including such activity by nonmembers on nonmember-owned fee land. The Supreme Court held the tribe's inherent

authority was "not so broad" as to support this claim, remarking that such authority had normally been limited to matters of internal concern involving tribal members and that "the exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." *Id.* at 564. Regulation of hunting and fishing by nonmembers on nontribal or nontrust land was then characterized as having "no clear relationship to tribal self-government or internal relations." *Ibid.* The Court did observe that tribes may retain "inherent sovereignty to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands," citing as examples (1) activity by nonmembers who have entered into a consensual relationship with a tribe or its members and (2) activity by nonmembers which "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566. The Court found no consensual relationship and no threat to the Crow Tribe's political or economic security with respect to nonmember hunting and fishing on nonmember lands. These basic principles were recently reaffirmed in Brendale v. Confederated Tribes and Bands of the Yakima Nation, 109 S. Ct. 2994 (1989), although Justice White suggested in his plurality opinion, joined in by three other members of the Court, that the tribal interests protected under Montana may only be vindicated on a case-by-case basis in a civil proceeding and not through exercise of tribal regulatory jurisdiction. *Id.* at 3007-08.

Here there is no consensual or contractual relationship between School District No. 51 and the Blackfeet Tribe. The district is a creature of state statute and exists solely to provide education to children in accordance with Montana and federal law. Its presence on the reservation is also not contingent upon tribal approval. The question accordingly becomes whether the school district's activity has a sufficient connection to the "economic security" of the Tribe to justify the latter's enforcement of its Indian preference requirements.

That question cannot fairly be resolved without balancing the Tribe's interest as sovereign in maximizing member or other Indian employment and the state interest in employing the most qualified persons to provide, within budgetary constraints, services essential to the educational process. Cf. Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 156 (1980) ("[t]he principle of tribal self-government, grounded in notions of inherent sovereignty and in congressional policies, seeks an accommodation between the interests of the Tribes and the federal government, on the one hand, and those of the State, on the other"). The state interest has been deemed highly significant even with respect to employment decisions in connection with grants subject to Indian employment preferences under section 7(b) of the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450e(b). Johnson v. Central Valley School District No. 356, 645 P.2d 1088, 1094 (Wash. 1982), cert. denied, 459 U.S. 1107 (1983) ("Here, one of the express

conditions of the grant was that the school district utilize the best possible talent and resources. The purpose of the grant was to improve the learning abilities and opportunities of Indian children. Nowhere in the Act authorizing the grant did Congress express a finding that this service could best be rendered by persons of Indian heritage, irrespective of their training, experience and other capabilities").

Needless to say, full application of the Tribe's preference regulations might well result in additional employment for some members or other Indians and, by so doing, generally further tribal economic security. Such an effect on the Tribe, even if not merely marginal, can nonetheless hardly be metamorphosed into the kind of impact which Montana envisioned as rebutting the presumptive absence of a protectible tribal interest with respect to nonmember activity occurring on nonmember land. See Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 109 S. Ct. at 3008 (under Montana, "[t]he impact must be demonstrably serious and imperil the political integrity, economic security or the health and welfare of the tribe"). Moreover, this economic interest likely runs contrary to the Tribe's presumably equal or greater interest in all reservation children receiving the best possible education--regardless of whether that education is provided by Indians or non-Indians. Under these circumstances, I find no protected tribal interest in the school district's employment decisionmaking.

My conclusion concerning the absence of a protected tribal interest in School District No. 51's hiring practices is unaffected by the "on or near" reservation exemption in Title VII of the Equal Employment Opportunity Act, 42 U.S.C. §§ 2000e to 2000e-17. Section 703(i) of this statute, 42 U.S.C. § 2000e-2(i), excludes from coverage under Title VII "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." Also excluded from the definition of "employer" under section 701(b) of the federal law, 42 U.S.C. § 2000e(b), are Indian tribes. These exemptions "reveal[] a clear congressional recognition, within the framework of Title VII, of the unique legal status of tribal and reservation-based activities" and "a clear congressional sentiment that Indian preference in the narrow context of tribal or reservation-related employment did not constitute racial discrimination of the type otherwise proscribed." Mancari, 417 U.S. at 548. However, the exemption in 703(i) does not affirmatively direct, as section 12 of the Indian Reorganization Act and section 7(b) of the Indian Self-Determination and Education Assistance Act do, the granting of preferences to qualified Indians either generally or, as conditioned in section 7(b), "to the greatest extent feasible" but, instead, merely renders Title VII neutral as to preferential reservation-based employment practices. See Shaw v. Delta Air Lines, 463 U.S. 85, 103 (1983) ("[q]uite simply, Title VII is neutral on the subject of all employment practices it does not prohibit"). Coupled with such neutrality is the express disclaimer in sections 708 and

1104 of the federal act of, respectively, any intent "to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under [Title VII]" or "to occupy the field in which [the federal act] operates to the exclusion of State laws on the same subject matter ... [or] invalidat[e] any provision of State law unless such provision is inconsistent with any of the purposes ... or any provision [of the federal act]." 42 U.S.C. §§ 2000e-7, 2000h-4. Sections 708 and 1104 were enacted, as their literal language indicates, to "explicitly disclaim[]" all preemptive intent except where state law purports to sanction what is prohibited under the federal act or "stands 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" California Federal Savings and Loan Association v. Guerra, 479 U.S. 272, 281 (1987).

It is evident from these various provisions of the Equal Employment Opportunity Act that Congress determined to leave almost entirely unfettered state authority to legislate against employment discrimination and to recognize a limited exception from federal liability for reservation-based preferential hiring of Indians. Read together or separately, though, these provisions cannot be viewed as giving either states or tribes jurisdiction over matters which they otherwise lack. See Pervel Industries v. Department of Industry, 468 F. Supp. 490, 493 (D. Conn. 1978), aff'd mem., 603 F.2d 214 (2d Cir. 1979), cert. denied, 444 U.S. 1031 (1980) ("Title VII did not create new authority for state anti-discrimination laws; it simply left them where they were before the enactment of Title VII"). The scope of such jurisdiction or, as in this matter, a tribe's protected interest must instead be determined independently by reference to other principles like those articulated in Montana.

Finally, this opinion is necessarily limited to its particular facts. I thus do not conclude that the Blackfeet Tribe, or any other tribe, may never enforce its preference requirements on reservation employers. Where, for example, a business relationship exists between an employer and the Tribe, somewhat different preemption principles will apply and application of the Human Rights Act may be foreclosed. See, e.g., White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142-45 (1980). There may also be situations in which preferences are expressly required by a federal statute such as section 7(b) of the Indian Self-Determination and Education Assistance Act. Applicability of the Human Rights Act to reservation-related activities must therefore be carefully decided on a case-by-case basis.

THEREFORE, IT IS MY OPINION:

The Montana Human Rights Act applies to public school districts lying wholly or partially within Indian reservations on district-owned lands

and prohibits the school district from granting employment preferences to Indians unless specifically required by federal statute. Indian tribes do not have a federally-protected interest in requiring that such preferences be granted their members or other Indians.

Sincerely,

MARC RACICOT
Attorney General