

Cap Stone
Tribal Employment Preference Policy

Challenges & Opportunities

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History & Context:

Indian Preference for tribes began as early as 1910 with the Buy Indian Act. In 1934 the Indian Reorganization Act (IRA) also known as the Howard Wheeler Act, which contravened the anti-discrimination provisions of the Equal Employment Opportunities Act of 1972 that deprived Indian of property rights without due process. This proved to be in violation of the Fifth Amendment. The court case that set precedence and deemed Indian Preference as a political associate rather than a racial discrimination was the *Morton v. Mancari* that was argued April 24, 1974 and decided on June 17, 1974.

Morton v. Mancari's final decision on Indian Preference does not constitute "racial discrimination" or even "racial" preference, but is an employment criterion designed to further the cause of Indian Self-Government and to make the BIA more responsive to the needs of its constituent groups. The court case also reaffirmed that as long as special treatment of Indians can be tied rationally to the fulfillment of congress's unique obligation toward Indians, such legislative judgments will not be disturbed.

Shortly after the *Morton v. Mancari* was passed, Congress enacted new Indian preference laws as part of the Education Amendments of 1972, giving Indians preference in Government programs for training teachers of Indian children.

Among the most difficult civil rights issues are those that are facing the nation's 25 million American Indians. Federally recognized tribes are considered domestic dependent nations, with their rights to govern themselves, define their own membership, manage tribal property, and to regulate tribal business, and domestic relations; it further recognizes the existence of a government-to-government relationship between tribes and the federal government. The federal government has a special trust obligation to protect tribal lands and resources, protect tribal rights to self-government, and to provide services necessary for tribal survival and advancement. The fight to preserve tribal sovereignty and treaty rights has long been at the forefront of the Native American civil rights movement.

More over, Native Americans suffer from many of the same social and economic problems as other victims of the long-term bias and discrimination-including, for example disproportionately high rates of poverty, infant mortality, unemployment, and low high school completion rates. The struggle for equal employment and education opportunities is the key to addressing these problems in tribal communities.

Race in America is often painted as a Black and White issue. However American Indians are also a racial group who often face discrimination the same as African Americans. In fact, before the civil rights laws were enacted, in some states you could find three separate drinking fountains labeled "whites", "Colored" and "Indian". There were also three sections in movie theatres. All of the civil rights laws that protect people from discrimination because of race or color or national origin also protect American Indians.

Indian Preference Laws over the years has proven to be an effective tool for promoting Indian economic development in employment, contracting and subcontracting. It ensures that the public and private funds spent on Indian Reservations stay on the reservation and promote Indian employment and business development. There are two sources of Indian preference requirements. Tribes, using their inherent sovereign powers, can impose Indian preference requirements on all entities subject to their jurisdiction. The federal government has also imposed Indian preference requirement by statutes. The two sources of preference differ in a number of ways. Preference requirements imposed by tribal law can apply to everyone subject to the tribe's jurisdiction, whether or not the entity is doing business with the tribe. Tribes have put this authority to work by enacting tribal employment rights laws and establishing Tribal Employment Rights Offices (TEROs) to monitor and enforce those laws.

The federal laws imposing Indian preference requirements apply only to entities doing business with the federal government as recipients of contract or grants for the benefit of Indians. Since a large portion of the funds spent on reservations come from the federal government most reservation activity is covered by federal Indian preference laws. Within the broad scope of federal and tribal laws, there is the necessary authority to ensure the optimal participation of Indian workers and firms on virtually all economic activities on a reservation.

The Buy-Indian Act is the oldest of the Indian preference laws on the books, having been adopted in 1910. It applies only to the BIA and IHS. The act, when passed, applied only to the BIA. But, when IHS was split off from the BIA in 1954 and transferred to HEW, it was held that the Buy-Indian Act powers went over the IHS as part of the

transfer. The Act applies to direct prime contracts let by these two agencies, the only Indian preference law applicable to direct federal prime contracts. Both HIS and BIA have interpreted the preference to mean that, while competition will be sought, the competition is to be limited solely to tribal and Indian contractors. The Buy-Indian Act of 1910 states:

“So far as may be practicable, Indian labor shall be employed and purchases of the products of Indian industry may be made in open market in the discretion of the Secretary of the Interior.”

The Indian Self-Determination and Education Assistance Act (P.L 93-638) states:

“Any contract, subcontract, grant, or subgrant pursuant to this Act, the Act of April 16, 1934 (48 Stat. 596) as amended, (THE Johnson-O’Malley Act) or any other Act authorizing federal contracts with or grants to Indian organizations or for the benefit of Indians, shall require that to the greatest extent feasible:

- A. Preference and opportunities for training and employment in connection with the administration of such contracts or grants shall be given to Indians; and*
- B. Preference in the award of subcontracts in connection with the administration of such contracts or grants shall be given to Indian organizations and to Indian-owned economic enterprises as defined in Section 3 of the Indian Financing Act of 1974.”*

Executive Order 11246

Specific Coverage of Indian preference Under Executive Order 11246 for work on or near Indian reservations states:

“It shall not be a violation of the equal opportunity clause for a construction or non-construction 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. 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 requirement contained in this chapter.”

Title VII of the Civil Rights Act

Specific Coverage of Indian Preference under Title VII of the Civil Rights Act states:

“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 enterprise under which preferential treatment is given to any individual because he is an Indian.

In 2004 the Muckleshoot Indian Tribe created an Indian Preference committee to draft a policy that could be included in the tribe's personnel policies and procedures. This all came about because of an issue that was addressed at a General Council Meeting regarding issues of hiring tribal members to positions in which they qualified for. Directors were hiring non-Indian members in positions that members were qualified for creating hostility amongst tribal members and non-tribal members in the hiring practices of the tribe.

In forming the Indian Preference Committee the tribal member were included on the committee but none of those individuals actually worked for the tribe in the administration. Therefore they needed to place administrative employees on the (IPC) committee also to off-set the balance of individuals and employees.

In 2004, the tribal council hired a firm to look at employee compensation scales to ensure that employees were being paid according to the scale of other jobs with similar duties. This also created uproar amongst the general council because they felt there existed educated tribal members who had the experience necessary to assess positions within the tribe to ensure that they were on target.

The uniformed tribal classification pay system that the tribe operates under for job classifications has only been in implementation for four years. By conducting a new study the committee feels that tribal member positions again will be classified low on the pay scale.

The IPC has been working with the tribal attorney's office to draft an Indian Preference Policy that will be equal and fair to all tribal members. In doing so, the tribal attorney asked the question "How does one enforce Indian Preference?" if the failure to

apply Indian preference was to an applicant (member rejected even if he/she meets the job qualifications). But does the tribe want to provide a limited remedy despite its immunity to allow challenges? Such a challenge could expose the difference between Indian and tribal preference, although it is possible this difference will survive as long as federal or state funds are not used for tribal preference.

The Indian Preference Committee came up with the following draft policy:

Preference in Hiring - Preference in employment shall be given in the following order:

1st to an enrolled member of the Muckleshoot Indian tribe where the position is funded by tribal funds, or where such Muckleshoot Tribal Preference is not otherwise contrary to applicable law; further definition is where there are Muckleshoot tribal members who meet the minimum job qualifications and Muckleshoot Tribal Preference applies, a Muckleshoot Tribal member shall be employed; where there are two or more tribal members who meet the minimum qualifications the Muckleshoot tribal member who is the most qualified shall be employed.

2nd to the descendent of an enrolled Muckleshoot Tribal member defined as the son, daughter, grandson or granddaughter of an enrolled member of the Muckleshoot Indian Tribe where the position is funded by Tribal funds or where such preference is not otherwise contrary to applicable law; further definition where there are descendants of Muckleshoot tribal members, as defines, who meet the minimum job qualifications and the Muckleshoot descendant preference applies, a Muckleshoot descendant shall be employed, where there are two or more descendants who meet the minimum qualifications the descendants who is the most qualified shall be employed.

3rd to a member of a federally recognized Indian tribe; where there is a member of a federally recognized Indian tribe who meets the minimum job qualifications and Muckleshoot preference or Muckleshoot descendant preference does not apply, the member of the federally recognized tribe shall be employed.

4th to Non-Indian employee; where there is no member of the Muckleshoot Indian tribe, a descendant or a member of a federally recognized tribe who meet the minimum qualifications, the most qualified candidate shall be employed.

The Indian Preference Committee is also looking at Reduction in Force Lay Off's, Years of Experience clause for substitution of education, and seniority. These are all issues that have continued to come up at General Council meetings for discussion. Tribal members are not receiving jobs in which they qualify for, and are not being promoted to higher positions that they have worked for, through education, years of experience, and longevity.

These new policies and procedures will allow the Muckleshoot Indian Tribe to hire qualified tribal members and increase employment opportunities for tribal members. The Muckleshoots' have a long way to go in this process, but with the continued help and assistance from tribal members and the tribal council this will happen.

In conclusion, Indian preference has proven to have a positive affect for many tribes. For example, as described early in this paper, the Muckleshoot tribe enforces this policy and has proven to provide more employment opportunities for their tribal members. The Muckleshoot tribe implements their Indian preference through their policy and procedure manual.

A program that was derived out of Indian preference is the Tribal Employment Rights Office (TERO). TERO enforces Indian preference and the hiring of qualified Indians for contract jobs on or near the reservation. Many TERO offices have also created qualified Indian businesses.

Indian preference is a necessary tool providing authority to ensure the optimal participation of Indian workers and firms on all economic activities on a reservation. It enables federally recognized tribes to maintain and preserve their rights to tribal sovereignty by allowing tribes' to govern themselves, define their own membership, manage tribal property, and regulate tribal business and domestic relations on reservation lands.

Through out the many years of the history the Muckleshoot people were told that education is the key to employment, and had been told to us over and over again repeatedly, by our parents, our grandparents and leaders of our community. From the time of the Muckleshoot tribe becoming a federally recognized tribe in 1874, through an Executive Order from the President, the U.S. wanted to assimilate our people into becoming like them. As the years progressed, our elder's were sent off to boarding schools and others were sent away to serve in the armed forces, as youngsters as part of the assimilation process, many went off to live as the non-Indians lived, off the reservation, some returned home to live. Those who returned made it a point to make sure that the next generation lived a better life. In 1969 Muckleshoot established its first education program, Muckleshoot Head Start, it created a new atmosphere of educating our tribal children. By this time many of our tribal members were returning from being relocated out of state to get training in a trade school and obtain job skills in a different

area. Many of the Muckleshoot Tribal members were sent to California to the San Francisco area to the many different trade schools in that area. This so called Relocation which was the last major assimilation initiative where the BIA encouraged Indians to leave the reservation for the cities. This Relocation fell into disfavor because of the coercion and ineffectiveness. “However one bright light began to shine, although relocation provided few benefits to the people directly, many of their children, having grown up in the cities, are helping to build the Indian professional middle class on our reservations today.” (Blood Struggle, Charles Wilkinson).

As the tribe started to develop their Economic base by selling Fireworks and having tribal members learn customer service skills, the Tribal Council bought school shoes and coats for many of the tribal children with the income that they made. They then went on to start the Muckleshoot Tribal Enterprise which sold cigarettes, and Liquor and employed eight tribal members, the funds were set aside to send tribal members to college, to assist with shoes, coats, school supplies and to purchase land for the tribe. The Tribal Enterprise building also doubled for the tribal offices and IHS clinic and well child program. In the early 1980’s the tribe received a Vocational Education Grant which assisted with sending tribal members to Vocational school to learn, cooking, cashier, and other classes that they would need to assist with skills that would be needed as the tribe went on to expand their economic by building the Muckleshoot Bingo Hall. At the same time Antioch University came to partner with the tribe to start a Bachelor’s degree program in which 6 – 10 tribal members received their Bachelor’s degree. Also in the 1980’s the tribe started the Muckleshoot Tribal School, Kindergarten to the Eight Grade. They also had their own Adult Basic Education classes to assist tribal members in

obtaining their GED's. This was a great success because many of the tribal members that had not completed high school went through this program. By the 1990's as the tribes economic growth became more important and vital to the tribe, they started The Evergreen State College Reservation Based program which had been started with other tribes earlier and then Muckleshoot joined in 1997. This was a beginning of a new generation of tribal members to become educated with a degree with the emphasis in Tribal Government.

Many tribal members were told that if they did not get their college degrees they would not be allowed to hold management positions within the tribe. Education was going to be a key factor in being allowed to hold those positions or to be promoted to upper level management. In the year 2000, the tribe reorganized their government and some of the tribal members were given key positions.

Problem/Issue:

Does the Muckleshoot Indian Tribe support the idea that “self determination” to the maximum extent feasible” that tribal members should hold key management positions in Tribal Government or Tribal Enterprises?

Does the Muckleshoot Tribal Council understand the meaning of self determination and what it means to the tribe?

In 1975 The United States Congress passed the Indian Self Determination and Education Assistance Act which authorized the federal government to enter into contracts with tribes so that they could assume responsibility for the administration of federal Indian programs. Many congressional policies continue today to strengthen and favor tribal self development, reduce their dependence upon the federal government, to develop

a strong and stable tribal government, and to work on a government to government relationship with tribes and the federal programs.

With tribal members receiving their degree's many of them with their Bachelor's degree, are still working in entry level positions. The Tribe has over 50 Managerial positions and many of them have non-tribal members working in those positions.

The reason given why tribal members are not in those positions is because they do not have the experience or the supervision skills needed to hold those positions. How are they going to get the skills if they are not allowed to apply or have a chance to obtain the job?

The problem is that tribal members are not having the chance to get hired for a managerial position without some interference from upper management. Many of the position descriptions that are being written are made for certain individuals in whom management favors. This process needs to be changed and being currently worked on.

Many of the tribal members whom have applied for managerial positions have settled for entry level positions, and others have gone outside of the tribe to work for the experience when they should be able to obtain that experience with the tribe itself.

A program needs to be developed to mentor tribal members into managerial positions if we are to allow them to obtain these positions with some skills, and then develop a training program to assist them with supervisory skills.

Hypothesis:

#1. Does the Muckleshoot Indian Tribe support the idea that “self determination” means to the extent feasible tribal members should hold key management positions within the tribal government and within tribal enterprises?

#2. What about fairness to non-tribal members?

#3. What about minimum standards v. top quality?

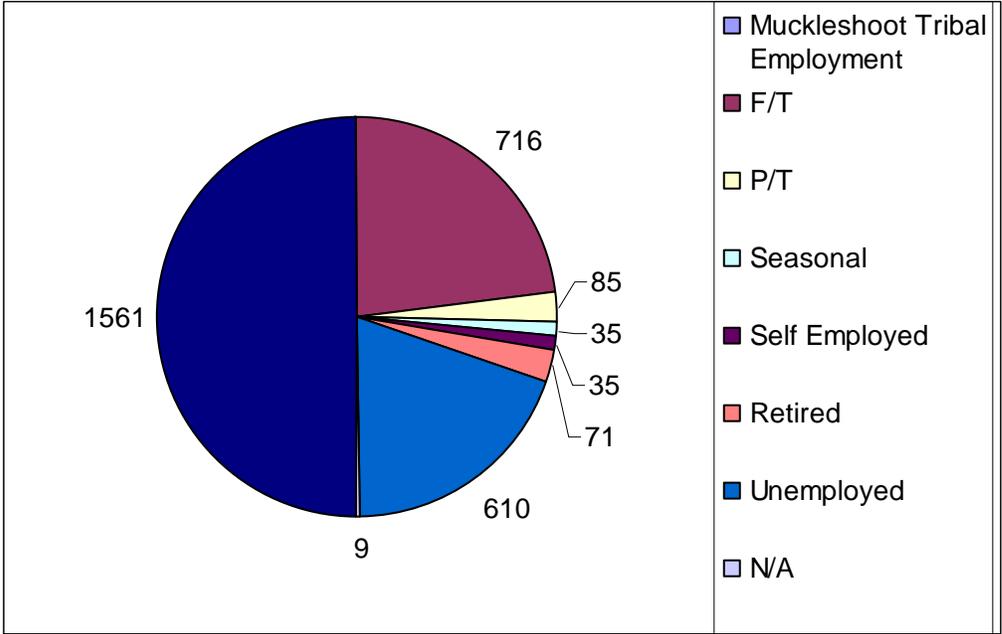
#4. How many Management level positions in tribal government and tribal enterprises are held by tribal members?

Data Collected:

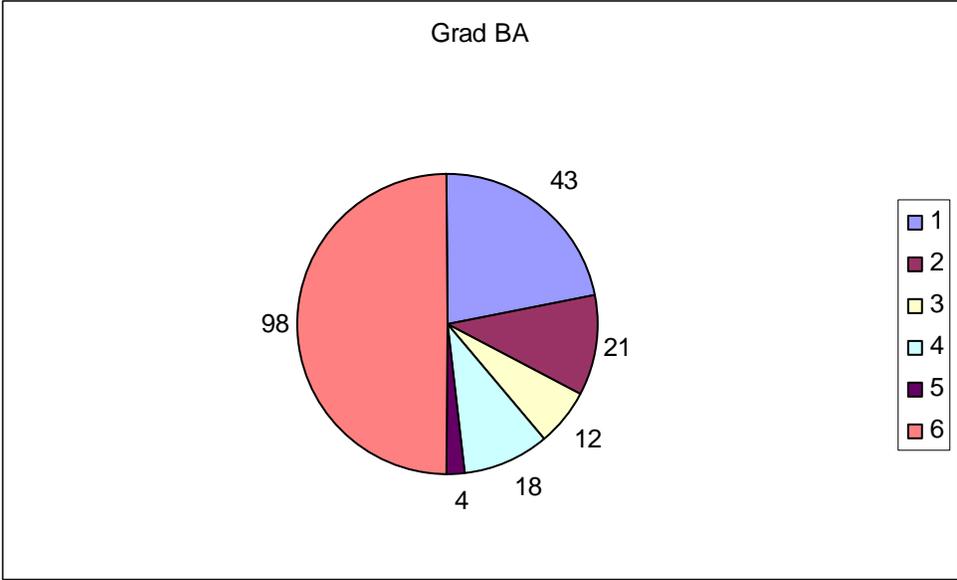
Data was collected from several different sources, the tribes Tribal Demographics summary report that is done every two years, the Human Resources Employee list, and from the Tribal Enterprises such as, Tribal Casino, Muckleshoot Bingo, Muckleshoot Smoke Shop, and White River Amphitheatre.

The data that has been collected has shown that Muckleshoot Tribal members are not in key Management positions within the tribe, in the government as well as in the tribal Enterprises.

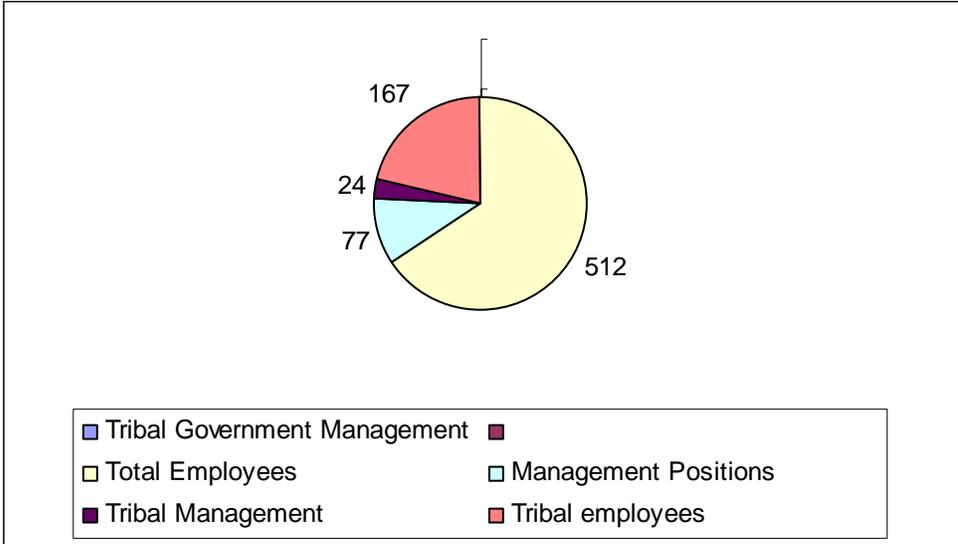
The following graphs and charts will show how many positions there are in the Tribal Government, and in the Tribal Enterprises.



Muckleshoot Tribal Employment	
F/T	716
P/T	85
Seasonal	35
Self Employed	35
Retired	71
Unemployed	610
N/A	9
Total Population	1561



Grad BA	Grad MA	Total in College
43		185
21		
12		
18		
4		
98	12	185



Tribal Government Management

Total Employees	512
Management Positions	77
Tribal Management	24
Tribal employees	167

Muckleshoot Enterprises Data:

Muckleshoot Casino	
Supervisor Positions	
Non Tribal	145
Tribal	12
Other Tribal	17
	174
Casino Positions	
Non Tribal	1639
Tribal	97
Other Tribal	164
	1900
Director Positions	
Non Tribal	8
Tribal	0
Other Tribal	2
	10
Managers	
Non Tribal	46
Tribal	2
Non Tribal	3
	51

Muckleshoot Smoke Shop	
Supervisors	
Tribal	1
Other Tribal	2
Non Tribal	0
Smoke Shop Positions	
Tribal	4
Other Tribal	2
Non Tribal	1

Muckleshoot Bingo		
Supervisors		15
Tribal		8
Other Tribal		5
Non Tribal		2
Bingo Positions		
Tribal		
Other Tribal		
Non Tribal		

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Tribal Gas		
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See attached Amphitheatre Stats.

White River Amphitheatre Tribal Hiring Review-2005 Season

Company	Clear Channel Entertainment
Total Hired	274
# of Muckleshoot Tribal Members	23
# of Other Native American/Alaskan	35
Department Breakdown	
	Admin (including Sales)
Total Staff	18
# of Muckleshoot Tribal Members	2
# of Other Native American/Alaskan	0
	Box Office
Total Staff	9
# of Muckleshoot Tribal Members	0
# of Other Native American/Alaskan	0
	Box Host
Total Staff	19
# of Muckleshoot Tribal Members	0
# of Other Native American/Alaskan	0
	Production
Total Staff	15
# of Muckleshoot Tribal Members	2
# of Other Native American/Alaskan	1

	Operations
Total Staff	3
# of Muckleshoot Tribal Members	1
# of Other Native American/Alaskan	0

	Event Office
Total Staff	15
# of Muckleshoot Tribal Members	6
# of Other Native American/Alaskan	1

	Usher/Ticket Taker
Total Staff	99
# of Muckleshoot Tribal Members	9
# of Other Native American/Alaskan	16

	Parking
Total Staff	96
# of Muckleshoot Tribal Members	3
# of Other Native American/Alaskan	17

It has continued to be a challenge to get up to date data because employees change all the time. I believe that I got the most current data in most of the Tribal Enterprises and with the Tribal Government Operations.

In reviewing the Bachelor Degree graduates, many of them work in entry level positions within the tribe. As you look at the Tribal Employment and how many of the Managerial positions are held by tribal members, only 12 out of the 24 hold a Bachelors Degree, 3 hold an additional Masters Degree Certificate. When many of the 98 tribal members who have graduated were asked what was their goal for going to college, many responded in saying that “The Tribe has provided for our education, we now must simply give back and work for our people”. Many feel that the tribe does not value their education and commitment to work for the tribe, because many of them are not able to obtain a managerial position or even obtain employment with the tribe. Many of the tribal members wish to go back to school to obtain their Master’s degree in an area of expertise that will assist the tribe, either in Education, Law, Planning, Fisheries, Social

Services, or upper management and a few want to start their own businesses because they feel that the tribe doesn't want them to utilize their skills and knowledge that they have learned.

Those that hold a Bachelor's Degree that work within the tribal administration earn anywhere from \$22,800. a year - \$85,000. a year. Many hold Administrative Assistant positions within departments.

In Conclusion:

In conclusion to the findings, many of the managerial positions are not held by tribal members, many tribal members with Bachelor Degrees are not in those positions, so how do we turn this around?

The Muckleshoot Indian tribe has started with changing the hiring policy, which should be finished by the end of 2006; this will assist in ensuring tribal members an equal chance of obtaining positions within the tribe. A mentoring program needs to start with educating tribal members about management positions, an employment placing testing needs to begin, to assist tribal members in their areas of interest on where they would like to be employed and where their skills can best be utilized.

Tribal members cannot become quality employees until they have been given a chance to show their skills in the work place. Many have very critical thinking skills that can be very creative in programs and in dealing with problems within a program setting. Fresh ideas and new faces to a program can lift a program to produce better service to the

people. Minimum skills can be a detriment to a program, but with education and guidance it can be turned around to be a quality of workmanship from that employee.

Is this Tribal Preference Policy going to be fair to the non-tribal members who apply for positions within the tribe? If they read the job postings and see that most positions say that Indian Preference to those positions, they must understand what Indian preference is, and they have to understand that some of the job postings will say Tribal Preference first. Individuals who apply from the outside may be screened out before even having an opportunity for an interview. This happens now and I do not see it changing in the future. Many of the non-tribal members need to understand that the tribe is taking a stand at hiring tribal members and that we are a sovereign nation and we have that right.

A question was raised about whether we want quality service or minimum service in the health area. Sure we want quality but if that person who works in the Health Area is not compassionate or doesn't like their job, they are not going to do quality work. Where a tribal member was hired, and had minimal qualifications because they had not had the hourly experience, they would be a good employee and would do their service with compassion, because it is their own people that they are servicing and they would want to do a good job.

So does the Muckleshoot Indian Tribe want Self Governance and self determination for their people? A policy should be developed to state that the Muckleshoot Indian tribe which is to provide the maximum tribal member participation in the Muckleshoot Government and in the education of our people, and to provide full participation of all

tribal members in programs and services conducted by the tribe and to encourage tribal members to assist with developing our community.

The prolonged Federal domination of tribal service programs has served to retard rather than enhance the progress of our people and our community, by depriving tribal members of the full opportunity to develop leadership skills that are crucial to the realization of self-government, and has denied our tribal people an effective voice in planning and implementing programs for the benefit of the Muckleshoot people, who are responsive to the true needs of our tribes community.

The Muckleshoot people should never surrender their desire to control their relationships both among themselves and with non-Indian governments, organizations and persons.

True self-determination in any tribal society of people is dependent upon and educational process which will insure the development of qualified people to fulfill meaningful leadership roles.

The Tribes responsibility for and to assist with education of our children has not affected the desired level of education achievements or created the divers opportunities and personal satisfaction which education within our tribal government can should provide, and parental and tribal community control of the educational and government process is of crucial importance to our Muckleshoot people

The Muckleshoot tribe should declare that a major tribal goal should be to provide the quantity and quality educational and support services and opportunities which will permit all tribal members to compete and excel in the life areas of their choices, and to achieve the measure of self-determination essential to their social and economic well being.

Bibliography

Uneven Ground, American Indian Sovereignty and Federal Law, David E. Wilkins & K.

Tsianina Lomawaima

Blood Struggle, The rise of modern Indian Nations, Charles Wilkinson

American Indian Law in a Nut Shell, William Canby Jr.

Documents of United States Indian Policy, Second Edition, Francis Paul Prucha

The Indian Reorganization act, June 8, 1934 (Wheeler-Howard Act) retrieved from web at www.infca.org/tribes/IRA.htm

Indian Self-determination and Education Assistance Act

U.S. Supreme Court: Morton v Mancari 1974, Retrieved from the web at:

www.caselaw.lp.findlaw.com

Muckleshoot Indian Tribe Draft Amendments to Personnel Policies & Procedures.

Muckleshoot Indian Tribe.

Muckleshoot Tribe Tribal Demographics Summary Report 1/2005