IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

DONALD NORMAN HESTER	PLAINTIFF'S
PLAINTIFF	OBJECTION TO REPORT AND RECOMMENDATION OF
	MAGISTRATE JUDGE PAUL M. WARNER
V.	CASE
KENNETH L. SALAZAR, ET AL.	Civil NO: 2:13-CV-00106-DAK-PMW
DEFENDANTS	Filed: August 8, 2013

It was reported to me by a clerk of the District of Utah District Court that this court, does not typically appoint an attorney for a Plaintiff in a Civil Case. If that is factual, then this Plaintiff will be an exception.

In the Plaintiff's final letter from U.S. Equal Employment Opportunity Commission, page two, the letter from the EEOC states:

> *"If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request for the Court that the Court appoint an attorney to represent you and that Court also permit you to file the action without payment of fees, cost, or other security. See Title VII of the Civil Rights Act of 19664, as amended, 42 U.S.C. § 2000e et sez.; the Rehabilitation Act of 1973, as amended, 29 U.S.C. §791 and §794(c)."*

Forma Pauperis

The Plaintiff has already, on January 31, 2013, Applied to Proceed in District Court Without Prepaying Fees or Costs and also on January 31, 2013, Filed a Motion for Appointment of Counsel.

Accordingly, the Plaintiff has already completed every needful thing and the Magistrate Judge Dustin B. Pead has already signed the Plaintiff's *Motion for Leave to Proceed in Forma Pauperis*. That of course means that the Plaintiff has already qualified before the Court as Forma Pauperis.

Certified Eligible Permanently Disabled Person

The Plaintiff has never intended to proceed without appointed counsel; the Plaintiff, a permanently disabled person, is *Certified Eligible* by the Utah State Office of Rehabilitation, Division of Rehabilitation Services. The Plaintiff is not physically able to act Pro Se. If the Judge fails to appoint counsel for the Plaintiff and provide the newly appointed counsel enough time to review, edit, and change the Plaintiff's original Civil Rights Complaint and to respond to Judge Warner's *Report and Recommendations*, the Plaintiff will be forced to bring a Title VII action of discrimination against the State of Utah District Court, Central Division, for discrimination against the Plaintiff, as a permanently disabled person.

Qualification for Appointment of Counsel

According to the law, there are no other qualifying issues needed to allow the Plaintiff the appointment of counsel, other than the Plaintiff's financial condition, in either the State or Federal law. The appointment of counsel should have been made on a timely basis, within 2 weeks of January 31, 2013, when the Plaintiff filed the *Motion for Appointment of Counsel*. Had the Court appointed Plaintiff counsel in a timely manner, the Plaintiff's newly appointed counsel could have amended the Plaintiff's original Civil Rights Complaint to the degree that Judge Warner's conclusion would have a positive, rather than negative toward the Plaintiff. Not appointing counsel for the Plaintiff in a timely manner, the Judge put the Plaintiff's Civil Rights Complaint on a collision course of certain disaster. The Plaintiff should be allowed time for the newly appointed counsel to include

changes in the Plaintiff's Civil Rights Complaint, whatever statement, evidence, or documents are necessary, that will state a claim upon which relief can be granted. The Judge should not penalize the Plaintiff for the Plaintiff's inability to state, in proper legal terminology, a claim upon which relief can be granted, without the assistance of appointed counsel.

The Magistrate Judge's Conclusion

The Magistrate Judge, Paul M. Warner's conclusion (page 9), that

> *"Mr. Hester's motion to appoint counsel and motion for service of process should be deemed moot."*

This WOULD BE an injustice, an egregious misrepresentation of the facts without addressing the truth of the matter. Not one time in his report did Judge Warner entertain the intent of Congress. Which came first, the intent of Congress, or a dozen cases that attempt to deliver benefits never intended by Congress. Instead of considering the intent of Congress, the Judge based his conclusion on a series of cases, that, for the most part, do not pertain to the complaint of this Plaintiff.

Intent of Congress

When Congress authorized the Bureau of Indian Affairs (BIA) and the Indian Health Service (IHS), to utilize Indian Preference (IP), Congress gave Excepted Schedule "A" hiring Authority to both BIA and IHS. Schedule "A" Authority is Indian Preference.

> BIA's Excepted Schedule "A" Authority is identified as 213.3112(a)(7)
> IHS's Excepted Schedule "A" Authority is identified as 213.3116(b)(8)
>
> OST is a ROGUE AGENCY with no Excepted Schedule A Authority and has hi-jacked BIA's authority and is using BIA's authority illegally, for all of OST's offices.

Ask this one question, "Why did congress create two Schedule "A" Authorities, one for the BIA and one for the IHS?" The Plaintiff's case hangs on the answer to this question. So, why didn't Congress just create one Schedule "A" authority,

that would be like, one shoe fits all. The answer is obvious. Congress wanted to confine the use of Indian Preference to the BIA and IHS. Congress did not intend for the use of Indian Preference to spread beyond the BIA and IHS. If only one Schedule "A" had been issued, it would have opened the flood-gates to any Indian organization to utilize Indian Preference hiring.

The BIA cannot legally use IHS's Indian Preference and IHS cannot legally use BIA's Indian Preference. If this true, and it is, then OST, the ROGUE AGENCY, cannot legally use either BIA's or IHS's Indian preference. The Plaintiff's case is that simple.

The above is the Intent of Congress.

To get the proper sense of how important the Intent of Congress was when Congress created OST as a separate entity within the DOI, all you have to do is to read the LEGAL OPINION of the Deputy Solicitor of DOI wherein he provided OST with his Legal Opinion dated April 10, 1996. Please note the intent of congress, when Congress created OST; here is a series of examples of the Intent of Congress, that either are directly or indirectly related to how OST should operate. The items below were all quotes from Congress with one quote from the GAO.

To insure the Intent of Congress in General, the Office of Special Trustee should:

- "Provide for more effective management of, and accountability for the proper discharge of, the Secretary's trust responsibilities to Indian Tribes and individual Indians."
- "Work across bureau lines and to ensure that all Bureaus with the Department with a role to play in the management of Indian Trust funds were carrying through integrated, consistent, and effective policies."
- "Oversee and coordinate reforms within the Department of practices relating to the management and discharge of such responsibilities."

To insure the intent of Congress, the House Committee, the Office Special Trustee should:

- "The Committee strongly believes that only a long-term commitment by the Department in conjunction with management and financial experts and account holders can result in the efficient and productive management at Indian trust assets. At the top of needed reform must be one entity with the knowledge and authority to ensure that reform takes place and coordinates that action."

To insure the intent of Congress,the GAO, the Office of Special Trustee should:

- "This office (OST) would help to ensure the proper discharge of the Secretary's trust responsibilities by:
  - Developing a comprehensive strategic plan for all phases of the the Indian trust management business cycle
  - Overseeing reform efforts within BIA, BLM, and MMS, and
  - Coordinating the development of BIA, BLM, and MMS policies, procedures, system, and practices."

Definitions:
BIA is the Bureau of Indian Affairs
BLM is the Bureau of Land Management
MMS is the Minerals Management Service

OST was created by Congress to "reform" current policies, ensure that all policies are consistent, and to assure that all policies would be effective.

OST has failed to create its own written personnel policies. While BIA and IHS have developed highly sophisticated personnel policies to properly implement Indian Preference, OST has not done the same. OST was charged by congress to reform policies, instead OST hasn't even bothered to write OST's own personnel policies. Why? Because OST chooses to implement an illegal hiring policy to enable OST to illegally use Indian Preference. If OST had written policies for personnel, then anyone could read what OST was doing and the cat would be out

of the bag. If you request a copy of OST's personnel policies, OST may offer a single paragraph to represent OST's entire personnel policies. That is what OST gave to Plaintiff. Effectively, OST had no written personnel policies. Congress could not have known the outcome 20-30 years down the line. Congress could not have known that they had just created another layer of corruption. Plaintiff is referring to only one policy, one that is hidden deep within OST. OST has totally frustrated the Intent of Congress by introducing and maintaining a corrupt, illegal "Indian only" hiring policy. Congress gave Schedule "A" hiring authority (Indian Preference) to the BIA and IHS, which the Plaintiff supports. OST knows that OST does not have Schedule "A" hiring authority and OST had to hi-jacked BIA's hiring authority in order to use Indian Preference. The whole world, except for the Plaintiff, has turned a blind eye to this violation of the Intent of Congress and a violation of federal law. This use of Indian Preference by OST, the Plaintiff does not support; it is illegal. The EEOC knows exactly what OST is doing and they know it is illegal; the EEOC has refused to challenge OST. In the meantime, with OST's brazen behavior, OST easily ignores the law and so far, OST has suffered absolutely no consequences. Congress never intended OST to become so corrupt that OST would flaunt the law and violate it with impunity. This is corruption at the highest level within OST and there is nothing, no body, no one to stand up against OST and hold OST accountable, except for the Plaintiff's Civil Complaint and class action suit.

Plaintiff's Critic of Judge Warner's *Report and Recommendation*

Some of the Judge's analysis will have to be rebutted by my appointed counsel and those things I defer to my appointed counsel. Otherwise, there are a few things that I have the ability to rebut, they are listed below:

***Judge** (Page 2 – Background) – Mr. Hester does not dispute that OST identified all five positions as subject to Indian Preference in the Job postings on USA Jobs.*

Plaintiff Response – It would be a lot more accurate to say that OST advertised all five jobs illegally using the hiring authorization of Bureau of Indian Affairs (BIA). OST has flaunted the law by hi-jacking BIA's Indian Preference Schedule "A" hiring authority and illegally using it for all of OST.

Judge *(Page 2&3 –Background, last sentence) Mr. Hester appealed the EEOC Administrative Judge's decision of October 22, 2010, that "rejecting (Plaintiff argument that the Agency's decision to ignore all non-Indian applicants once a pool of qualified Indian Preference applicants had been selected was Illegal." The AJ found that the Agency's actions in Mr. Hester's case were in accordance with Morton v. Mancari, 417 US535 (1974, in which the Supreme Court held that the application of the IPA does not violate Title VII's proscription against racial discrimination."*

Plaintiff Response – This is an incoherent misinterpretation of the facts. The Plaintiff has always supported BIA's and IHS's legal application of Indian Preference and the Plaintiff has knowledge that either BIA or IHS have applied Indian Preference either inappropriately or illegally. Plaintiff believes their use of Indian Preference is well within the intent of Congress. The Mancari case clearly applies to any discrimination case of BIA and IHS where Indian Preference may be an issue. In such cases the application of Indian Preference does not violate Title VII and does not trigger a discrimination violation. However, the Mancari case does not extend to OST, or any other ROGUE agency, where discrimination is coupled with Indian Preference, because OST is illegally using BIA's Indian Preference; OST or any other ROGUE agency that illegally implements Indian Preference ,then discriminates against employees or applicants because of the color of their skin or because an employee or applicant is not an American Indian, then the Mancari case affords no protections to OST or other Rogue agencies from being prosecuted for violations of Title VII for discrimination.

Therefore the Judge's reference to Morton v. Mancari, through-out the Judge's entire document, is inappropriate, misguided and misrepresents the actual facts. It causes the reader to conclude that the Plaintiff does not support Indian Preference for BIA and IHS, while the truth is just the opposite; Plaintiff definitely support BIA's and IHS's legal claim to the use of Indian Preference. Morton v. Mancari however, does not address any issue of the Plaintiff's case, because OST is illegally using Indian Preference of the BIA for all of its offices.

Regarding the AJ decision, the Plaintiff appealed the EEOC AJ decision because the AJ illegally refused to convert Plaintiff's EEOC complaint into a Class Action suit and for other reasons too. The AJ, among many other illegal actions, received

Plaintiff's official request to change to a Class Action suit. The AJ was obligated by law to respond within:

> "This case involves a Class Action Complaint filed by the Complainant on August 24, 2010 and delivered on August 25, 2010; this Class Action Complaint, the Administrative Judge is wrongfully delaying Certification.
>
> Section 1614.204 provides the statute for processing a Class Complaint. First, a Class Complaint is to be process without any undue delays, on the part of anyone, and that includes the Administrative Judge.
>
> Class Complaint: Section 1614.204.(c)(3)
>
> "(3) The complaint shall be processed promptly; the parties shall cooperate and shall proceed at all times without undue delay."
>
> Section 1614.204 provides the length of time for the agency to accept or dismiss a Class Complaint. The agency has 30 days from August 24, 2010.
>
> Class Complaint: Section 1614.204.(d)
>
> (d) Acceptance or dismissal. (1) Within 30 days of an agency's receipt of a complaint, the agency shall: Designate an agency representative who shall not be any of the individuals referenced in Sec. 1614.102(b)(3), and forward the complaint, along with a copy of the Counselor's report and any other information pertaining to timeliness or other relevant circumstances related to the complaint, to the Commission. The Commission shall assign the complaint to an administrative judge or complaints examiner with a proper security clearance when necessary. The administrative judge may require the Complainant or agency to submit additional information relevant to the complaint."

The AJ ignored the law and illegally delayed action on Plaintiff's class action suit for months, until on October 22, 2010, when the AJ made her decision in favor of OST. Through her illegal action, she avoided having to address Plaintiff's request to change Plaintiff complaint to a Class Action suit.

Regarding the "pool of qualified Indian Preference applicants..." This is a gross misstatement of facts and a mischaracterization, as OST inappropriately and incorrectly applied BIA's Indian Preference to OST's. Also OST's own interpretation of Indian Preference is not the same as BIA's interpretation and application of Indian Preference.

It is a fact, that for all of the positions of OST that Plaintiff applied for, none of these positions ever had a pool of qualified Indians. In fact, all of the Indian applicants were rejected by management because management stated, "They were not qualified."

It does not work to use a reference (Morton v. Mancari) of a court case that might work for BIA and then expect it to work for OST. The BIA has written and well established personnel policies. BIA is adequately supervised and staffed, while OST has no written personnel policies, is poorly supervised and OST has an untrained staff.

It appears as though the Judge is randomly using references to other cases that do not apply to OST, in any way. Plaintiff does not dispute that some of the cases may substantially support BIA or IHS's actions, but when taken out of context and applied to OST, these cases do not support OST's illegal actions.

Judge *(Page 4) Because Mr. Hester is proceeding pro se, the court will "construe his pleadings liberally and hold the pleadings to a less stringent standard than formal pleadings drafted by lawyers"*

Plaintiff Response - Plaintiff is not going to proceed under pro se, under any conditions. Due to his permanent disability, the Plaintiff cannot physically conduct this case pro se. The Judge must appoint counsel for this Plaintiff. In addition, this case will be a class action suit with trial and jury.

Judge *(Page 4) Hall v. Bellman We do not believe it is the proper function of the district court to assume the role of advocate for the pro se litigant.*

Plaintiff Response – Plaintiff states again that Plaintiff will not be physically able to proceed under pro se, due his permanent disability. Treatment of the Plaintiff as described by Hall v. Bellman is not necessary and is not wanted, as the Court

will appoint counsel for the Plaintiff. It would be a proper function of the Court to appoint counsel for the Plaintiff.

Judge *(Page 5, last sentence) Mr. Hester applied for five different executive positions in OST which he does not dispute is part of the DOI.*

Plaintiff's Response – The BIA is an agency within the DOI; IHS is an agency within the Department of Health and Human Service, and OST is another agency also within the DOI; all three agencies are separate entities. The 5-positions the Plaintiff applied for were exclusively OST positions. They were not BIA positions and they were not IHS positions.

Judge *(Page 5, first sentence, middle paragraph) Mr. Hester argues in his complaint to the EEOC, in his appeal from the AJ's decision and in his requester for reconsideration, as he does in his complaint now before this court, that the IPA does not apply to OST..."*

Plaintiff's Response – This is incorrect, Plaintiff argued that of OST's 16-offices, one OST office could legally use BIA's Indian Preference; however, the other 15-offices of OST could not legally use BIA's Indian Preference hiring authority.

Judge *(Page 5, second sentence, middle paragraph) "...therefore, OST's failure to consider him as an applicant, based on his race, is a violation of his civil rights under Title VII prohibits discrimination..."*

Plaintiff's Response – That is correct!

Judge *(Page 5, middle paragraph) The Supreme Court held in Mancari that Indian preference is an important part of the IRA, and this preference does not constitute racial discrimination. Mancari, 417 U.S. at 553*

Plaintiff's Response – Plaintiff does not contest the Mancari case when it is properly applied to either the BIA or to IHS. Why, because both BIA and IHS are properly applying Indian Preference under their own individual Schedule "A" Authority that is authorized by Congress and they do not have an "Indian Only" hiring policy like OST; however, the Mancari case cannot be equally applied to OST actions, because OST has no Schedule "A" Authority or Indian Preference and therefore, OST cannot legally utilize either BIA or IHS Indian Preference. And, the Mancari case cannot be applied to OST. If OST is illegally using Indian Preference

of the BIA, then the Marcari case constitutes no protection for discrimination under Title VII for OST against employee EEOC complaints of discrimination received from non-Indian employee applicants or employees with a different color skin. If OST, a Rogue agency, cannot legally use Indian Preference, then OST is guilty of discrimination based on two things: 1) the color of the applicant's skin and 2) the applicant is not an American Indian. OST would be subject to Title VII discrimination and violations, just like all other agencies in the U.S.A., except for the BIA and IHS.

Judge *(Page 5, last paragraph, first sentence) "Mr. Hester argues that the IRA and Indian Preference in hiring applies only to the Bureau of Indian Affairs (BIA) and Indian Health Service (IHS), but not to any other office within the DOI, and therefore preference to Indian applicants in hiring outside of the BIA and IHS constitutes an illegal 'Indian only' hiring policy that amounts to racial discrimination against him"*

Plaintiff's Response –Judge Warner did not understand the "Indian Only" hiring policy of OST and therefore not understanding what constitutes an "Indian Only" makes the Judge's statement untrue or ½ true and ½ false. OST's "Indian Only" hiring policy involves much more than just the issue of Indian Preference.

> OST follows their Indian Preference Policy in order to maintain an "Indian only" hiring policy. OST claims that if just one applicant for a position is an Indian, whether or not management may disqualify the Indian applicant because the applicant is not qualified for the job, the fact that at least one Indian applied, permanently blocks all non-Indian applications. One of the positions applied for by Plaintiff, had no Indian applicants. When that happened, OST cancelled the advertisement and did not give any of the non-Indians consideration for that position.
>
> a. This happened with Plaintiff's applications. Indian Preference candidates were presented as being "qualified" (when they were not professionally qualified) but their status was a sham that was used by OST to prevent Plaintiff and other non-Indian applicants from being considered for a job.
>
> > i. This policy empowered OST to enable OST to maintain an "Indian Only" hiring policy.

ii. OST routinely and illegally uses BIA's Indian Preference authority.

Judge *(Page 5, last paragraph) He admits that each of the postings for the positions to which he applied announced that Indian Preference would be applied.*

Plaintiff's Response – The Judge does not have the facts right. OST did announce that the positions were subject to Indian Preference; however, OST's announcement also stated that non-Indian applicants would be considered for each position, if there were no qualified Indian applicants. On all 5-positions that Plaintiff applied, management declared every Indian candidate as "not qualified." Therefore, OST was obligated to give consideration to the qualified non-Indians applicants, but although all of the Indian candidates were "not professionaly qualified" OST still did not give consideration to any non-Indian applicant and certainly not the Plaintiff.

After applying for 5-positions, the Plaintiff discovered that OST announced all OST jobs using BIA's Schedule "A" Indian Preference. OST knew that OST could not legally hire using Indian Preference unless OST had hiring authority. OST did not have any hiring authority, so, OST then hi-jacked BIA's Indian Preference, at that point OST was making illegal use of BIA's hiring authority.

Judge *(Page 6, first paragraph) Mr. Hester submits a memorandum from the Deputy Solicitor of the DOI dated April 10, 1996, in which the Deputy Solicitor interprets the scope of Indian Preference as it relates to OST.*

Plaintiff's Response - Judge Warner improperly characterized the document that was written by the DOI Deputy Solicitor. The judge states the Deputy Solicitor document merely interprets, when in fact, the Deputy Solicitor was issuing a legal opinion. Deputy Solicitor's document also explained the "Personnel Rules Applicable to the Office of Special Trustee." The Deputy prepared a legal opinion for DOI and OST. The Deputy Solicitor had been asked for a "legal" opinion regarding the use of Indian Preference for one single office within OST. OST has 15 other offices that had no basis for the use of Indian Preference. The office in question was "The Office of Trust Fund Management," one of the many offices within OST. In the Deputy Solicitor's legal opinion, he stated that Indian Preference has basis for this one office within OST and only one; "The Office of

Trust Fund Management," all other 15-offices within OST have no basis for Indian Preference.

Does Judge Warner think that he knows more about OST, DOI, and Indian Preference, than the Deputy Solicitor? The Deputy Solicitor provided a legal opinion intended to be used by OST to formulate OST own personnel policies. This was a big deal within the DOI. How long did OST adhere to the DOI legal opinion? Plaintiff does not know. This much is known, sometime later, OST swept the DOI's legal opinion under the rug and commenced violating EEOC's discrimination laws. Since OST is not authorized by Congress to use Indian Preference, if OST then illegally uses Indian Preference, then OST is not entitled to any protection provided by the Mancari case; when OST violates EEOC's discrimination laws under Title VII's proscription against racial discrimination, the Mancari case does not apply to OST. These protections are available and provided to BIA and IHS, but not to OST when its actions in question are illegal.

Judge *(Page 6, first paragraph last sentence) "Based on this memorandum, Mr. Hester concludes and asks this court to conclude, that Indian Preference applies only to OTFM within OST and no other Office of OST."*

Plaintiff's Response –Judge Warner is correct, according to the legal opinion of the Deputy Solicitor of DOI, OST only has one office within OST that has basis to use Indian Preference, that office is "The Office of Trust Fund Management,". All of the other 15-offices within OST have no basis to be using Indian Preference and OST has illegally hi-jacked BIA's Schedule "A" hiring authority for the remaining 15-offices. These offices do not provide services directly to Indians and according to the Deputy Solicitor and do not qualify to use Indian Preference.

Judge *(Page 6, second paragraph) "However, the AJ concluded that the Agency's actions in Mr. Hesters case were in accordance with Mancari, in which the Supreme Court held that "the application of the IPA does not violate Title VII proscription against racial discrinination*

Plaintiff's Response –The AJ certainly got this one wrong! Judge Warner again cites the Mancari case. In BIA and IHS cases dealing with the issue of Indian Preference and Title VII discrimination violation. It would be proper to cite the Mancari case, and the Plaintiff would agree, that implementing Indian Preference

in the BIA or IHS does not trigger a Title VII discrimination violation; however, when OST implemented Indian Preference, the citing of the Mancari case would be irrelevant because OST is implementing Indian Preference in 15-offices within OST, illegally.

The Mancari case cannot be cited, at the same time, for both agencies that "legally" use Indian Preference and also for agencies that "illegally" use Indian Preference. What OST is doing illegally and it does triggers a Title VII discrimination violation.

Judge *(Page 6, middle paragraph) Judge Warner states, "In denying Mr. Hester's request for reconsideration, the EEOC rejected his argument that OST was illegally applying the IPA and concluded that the AJ's decision was not erroneous, nor was the Agency's implementation of the AJ's decision"*

Plaintiff's Response –Yes, Plaintiff has lost this case every step of the way; however, at every step of the way the Defendants were represented by seasoned and experienced attorneys, while the Plaintiff had no attorney representing him. The Plaintiff went through the whole process biding his time, losing at every stage, until at last, the case could be taken to Federal court where the Plaintiff would qualify to be represented by a court appointed attorney. This will level the playing field and this time the outcome will be totally different. The Plaintiff will win and win when it really counts.

Judge *(Page 6, last paragraph and page 7) Furthermore, the D.C. District Court had held the term "Indian Office in Section 12 of the IRA must be construed to mean positions in the DOI, whether within or without the [BIA], that directly and primarily relate to the providing service to Indians when filled by appointment of Indians.*

Plaintiff's Response – Surely the Judge Warner knows that the Indian Educators v. Kempthorne case is referring to BIA positions, not to OST positions. And if it were referring to an OST case, the issue must be referring to offices *"that directly and primary relate to the providing of service to Indians when filled by appointment of Indians."* All of OST's 15-offices do not qualify as providing a service directly to Indians. This case reference has been taken totally out of context by Judge Warner and is being inappropriately applied to OST. It is illogical to use the

Kempthorne case because OST's 15-offices do not provide direct services to Indians.

Judge *(Page 7, middle of page) Mr. Hester does not argue that particular positions in the OST should be exempt from Indian Preference because they do not "directly and primarily relate to providing services to Indians when filled by the appointment of Indians." Kemphthorne1, 541 F. Supp. 2d at 264. Rather, Mr. Hester argues that the IPA does not apply to the entire OST.*

Plaintiff's Response – The Judge's comment is not true in any sense of the word. Judge Warner states that the Plaintiff "argues that IPA (Indian Preference) does not apply to the entire OST." As already stated before by Plaintiff, the Deputy Solicitor of DOI, made it very clear that only one office within OST has legal basis to use Indian Preference and that is "The Office of Trust Fund Management," all of the other 15-offices, and there are many, have no basis to use Indian Preference, because they "*do not "directly and primarily relate to providing services to Indians when filled by the appointment of Indians.*" The Plaintiff witnesses that none of the positions applied for were in "The Office of Trust Fund Management." All 5-positions were in the other 15-offices within OST; therefore Indian Preference does not apply for any of the positions applied for by the Plaintiff. "The Office of Trust Fund Management," according to the Deputy Solicitor, dated April 10, 1996, qualifies for Indian Preference because, according to the "Solicitor Ralph Tarr of the DOI:

> "The legal position of the Department of the Interior on the scope of the preference is set forth in June 10, 1988, opinion by then Solicitor Ralph Tarr, "The Scope of Indian Preference Under the Indian Reorganization Act, M-36960, 96 I.D. 1, which concludes, in general, that the preference is limited to application to the Bureau of Indian Affairs or units removed intact from the Bureau of Indian Affairs to another Departmental bureau."

The Judge's assertion is not true and the Plaintiff has not at any time claimed that all of OST had no legal basis to use Indian Preference because "The Office of Trust Fund Management," does have legal basis; however, the remaining 15-offices, according to the Deputy Solicitor, and the prior Solicitor Ralph Tarr, have no basis to be using Indian Preference. OST is illegally using BIA's hiring authority for

Indian Preference on the remaining 15-offices. The Plaintiff's applications were for positions in the remaining 15-offices, not in "The Office of Trust Fund Management." Therefore, OST was illegally using BIA's hiring authority and as a result, receives no protection from the Mancari case. And violations of OST of Title VII, result in acts of discrimination against the Plaintiff based on Plaintiff's skin color and because the Plaintiff is a non-Indian, not an American Indian.

Judge *(Page 7 & 8) Even if Mr. Hester had argued that the IPA should not apply to these particular positions, or if he were allowed to amend his complaint to make that argument, Mr. Hester's allegations would still not support a claim for legal relief.*

Plaintiff's Response – Judge Warner is wrong. Plaintiff argues that none of the positions for which Plaintiff applied had any basis to use Indian Preference because none of the positions directly serve any Indians directly; however, OST does have another office, "The Office of Trust Fund Management," where it is totally legal for OST to use BIA's Indian Preference Schedule "A" hiring authority. Why? Because "The Office of Trust Fund Management," when OST was formed, was taken out of the BIA, intact, and transferred to OST. Under those circumstances, OST can legally utilize BIA hiring authority in OST. Remember, that the positions that Plaintiff applied for had no basis for using Indian Preference. Since that is the case, the court case of Kempthorne 1 in interpreting the term "Indian Office" whether or not the term is ambiguous, does not matter and the Kempthorne case and Montana v. Blackfeet Tribe of Indians case, and the Oneida County v. Oneida Indian Nation cases, would not be applicable to the Plaintiff Civil Rights Complaint. None of these cases would apply to OST, because OST was engaging in an illegal action and none of these cases are appropriate to be used to justify illegal actions. Collecting and referring to cases that are not relevant to the Plaintiff's Civil Right Complaint.

Judge *(Page 8) Because the Supreme Court has ruled in Mancari that Indian Preference does not constitute racial discrimination. Mancari, 471 U.S. at 553, Mr. Hester's claims that he was subjected to racial discrimination and that his civil rights have been violated are not valid. Therefore, because Mr. Hester has not stated a claim upon which relief can be granted, and it would be futile to amend his complaint, his complaint should be dismissed under the authority of 28 USC § 1915(e)(2)(B)9ii)*

Plaintiff's Response – Judge Warner is wrong. Any court case, including the Supreme Court case of Mancari, used by Judge Warner to support the use of Indian Preference, by either the BIA or IHS, in relation to Indian Preference are not relevant to the Plaintiff Civil Rights Complaint. The Plaintiff supports legal Indian Preference including both the BIA and IHS. OST also can legally use BIA's Indian Preference for "The Office of Trust Fund Management." However, none of the rest of OST 15-offices provide direct services to Indians; therefore, these offices do not qualify for Indian Preference. In addition, the positions applied for by Plaintiff at OST were not for "The Office of Trust Fund Management," they were all for those offices that have no basis for using Indian Preference. OST uses Indian Preference legally for "The Office of Trust Fund Management." However, OST is illegally using Indian Preference for all of the other 15-offices within OST. All cases referencing Indian Preference are unrelated to Plaintiff's complaint and of no value when referencing OST illegal use of Indian Preference. Illegal use of Indian Preference cannot garner support from cases that have legal use of Indian Preference. Plaintiff has no issue with legal use of Indian Preference; however, Plaintiff strongly opposes illegal use of Indian Preference as used at OST.

Conclusion

The BIA, IHS, and OST are three exclusively separate entities. OST is not a part of the BIA or IHS. BIA and IHS both have separate congressional approval to implement Schedule "A" hiring authority (Indian Preference). OST is not a part of the BIA or IHS. OST has no such approval from Congress, except for one of its 16-offices; the other 15-offices cannot legally use BIA's Indian Preference hiring authority because these 15-offices do not provide services directly to Indians.

If OST is illegally using BIS's Indian Preference, then OST derives no protection from the Mancari case, against Title VII complaints of discrimination, when OST discriminates against employees or applicants because they either have white skin, a different color skin, or because they are not American Indians. In fact, if OST is using BIA's Indian Preference illegally, then there is no case law that will support OST's illegal actions.

If it is okay for OST, a Rogue agency, to illegally use BIA's Schedule "A" hiring authority (Indian Preference) for all of OST's 16- offices, what will stop other agencies, other Indian corporations, or other Indian non-profits from using BIA's Indian Preference? What will stop Indian partnerships or Indian proprietorships from using BIA's Indian Preference? What will stop Indian clubs or Indian Associations from using BIA's Indian Preference? If OST can use BIA's Indian Preference for all of OST's 16-offices, then there is nothing that can stop or prevent any Indian organization from using BIA's Indian Preference. This is certainly not the original intent of Congress.

Plaintiff's Civil Rights Complaint has not failed to state a claim, as claimed by Judge Warner. Judge Warner is wrong in his assessment and the Plaintiff will prevail on the facts of Plaintiff's Complaint. There are no grounds sufficient to dismiss Plaintiff's complaint for failure to state a claim. In fact, Judge Warner's contention that Plaintiff has failed to state a claim is utterly absurd. In any case, if Judge Warner was correct, which he is not, but if he were correct, then Plaintiff's newly court appointed attorney, would certainly take care of that problem when he re-submits Plaintiff, original complaint containing whatever information, documents or evidence needed to advance the complaint in the federal court process.

Therefore, Plaintiff begs the court to:

- Set aside all Conclusions and Recommendations of Judge Warner, and
- Proceed foreword and immediately to complete the appointment of counsel, for Plaintiff's Civil Rights Complaint and class action suit, and
- Provide appointed counsel enough time to revise Plaintiff's original Civil Rights Complaint and to respond to Judge Warner's Report and Recommendation, and
- Immediately serve process on all Defendants, and

Plaintiff is somewhat perplexed, not being an attorney, and asks for an explanation of when and why was Judge Warner directed to step into the

shoes of the Defendants and attack the Plaintiff and to attempt to destroy Plaintiff complaint? From the Plaintiff's point of view, seemingly this exercise was all on behalf of the Defendants. Did the Plaintiff miss something? That does not sound right to the Plaintiff. Shouldn't the judge be neutral, but instead, Judge Warner has made it 2 against 1; the Judge and the Defendants on one side and the Plaintiff on the other side. Does that sound right to everyone else?

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