No. 10-1080

In The
Supreme Court of the United States

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Petitioner,

v.

PEABODY WESTERN COAL COMPANY
and NAVAJO NATION,

Respondents.

On Conditional Cross-Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

NAVAJO NATION'S BRIEF IN OPPOSITION

HARRISON TSOSIE
Attorney General
PAUL SPRUHAN, Attorney
THE NAVAJO NATION
P.O. Box 2010
Window Rock, AZ 86515

PAUL E. FRYE
(Counsel of Record)
LISA M. ENFIELD, *Of Counsel*
FRYE LAW FIRM, P.C.
10400 Academy Rd. N.E.,
Suite 310
Albuquerque, NM 87111
pef@fryelaw.us
(505) 296-9400

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
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QUESTION PRESENTED

The EEOC's conditional cross-petition presents the following question: whether the court of appeals abused its discretion in finding that the Secretary of the Interior is a required party under Rule 19(a)(1), *Fed. R. Civ. P.*, in a case challenging hiring preference provisions of Navajo mineral leases where the Secretary (1) drafted the leases in his role as trustee and required the inclusion of the challenged provisions in the final leases; (2) has required the same provision in all of the business site and mineral leases of Navajo trust land, 326 in number, and sales and services under those leases comprise virtually all of the modern economic activity lawfully permitted on the Navajo Reservation; (3) has required analogous tribe-specific hiring preference provisions in all Indian mineral leases since 1957 pursuant to his regulations requiring use of Interior form leases; (4) faces the risk that all 326 business leases on the Navajo Reservation and all Indian mineral leases nationwide will unravel if the EEOC's suit succeeds; and (5) has the sole power to terminate the leases at issue (and all other Indian mineral and commercial leases) for breach of such material lease provisions under his rulemaking that expressly rejected a tribal role in lease cancellation decisions.

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SUPPLEMENTAL STATEMENT OF THE CASE

This Statement supplements and corrects that of the EEOC in its cross-petition ("Cr. Pet."). *See also* Navajo Nation's Pet. for Writ of Cert., No. 10-981, at 6-17.

Two coal leases are at the heart of this lawsuit. Both leases provide that the lessee Peabody Western Coal Company ("Peabody") give hiring preferences to qualified Navajo workers, and, in one lease involving coal owned jointly with the Hopi Tribe, to Hopi workers also. Pet. App. 128a, 130a. The EEOC challenges these lease provisions as inconsistent with Title VII of the Civil Rights Act of 1964. Pet. App. 105a (EEOC characterizes its suit as one challenging "the validity of . . . discriminatory lease provision and employment preference provisions").

The leases were drafted and negotiated by the Secretary of the Interior ("Secretary"). Pet. App. 5a.[1] The specific provisions that the EEOC assails were required by the Secretary. *Id.* The Secretary approved the leases. *Id.* Contrary to the EEOC's statement that these lease provisions are not required by regulations, Cr. Pet. 14, the Secretary has demanded similar provisions in all other Indian mineral leases

[1] The court of appeals and district court relied on the undisputed affidavit of former Secretary Stewart Udall and on his deposition testimony, in addition to affidavits submitted by Peabody. *See, e.g.,* Pet. App. 5a, 41a-42a. Udall's recollection of details was remarkably clear. The Navajo Nation submits the transcript of the Udall deposition in its proposed Lodging.

throughout the United States from 1957 at the latest, pursuant to lease forms required to be used by Departmental regulations, *see, e.g.,* 25 C.F.R. §§ 171.30 (1965), 211.57 (2010) (requiring that Indian mineral leases be on forms approved by the Department); Pet. App. 122a-27a (1957 form lease provisions requiring tribe-specific preferences). The Secretary has approved all 326 other business leases on the Navajo Reservation with the same employment preference provisions and hundreds of other leases with analogous provisions on other reservations. NN RE[2] 15-29; *see* Pet. App. 5a, 41a; Cr. Pet. 15 ("the Secretary has approved hundreds of leases and contracts containing similar tribe-specific preference provisions and has approved numerous tribal ordinances adopting tribal preferences in hiring on reservations"). Sales and services provided under those 326 federally approved leases necessarily constitute all of the lawful modern economic activity on the Navajo Reservation, since no one can obtain lease rights to reservation land without federal approval. *See generally Oneida Indian Nation v. Oneida County*, 414 U.S. 661, 668 (1974). The employment preference provisions are material terms of the Peabody leases. Cr. Pet. 17 (preference provisions "are a significant part of the parties' current bargain"). The Secretary retains a strong oversight role under various provisions of the leases. *See,*

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[2] "NN RE" refers to the Navajo Nation's Record Excerpts in the Court of Appeals. "EEOC RE" refers to the EEOC's Record Excerpts below.

e.g., Pet. App. 96a-98a; 25 C.F.R. part 211 (2010). Contrary to both the repeated representations of the EEOC here, Cr. Pet. 3-4, 10, 15-16, and the language of the leases themselves, the Secretary has the *sole* authority to cancel the leases for violation of their terms, *see, e.g.,* 61 Fed. Reg. 35,634, 35,650 (Jul. 8, 1996) (promulgating 25 C.F.R. § 211.54); *infra* at 8-9.

The Navajo-specific employment preferences were "approved by the Solicitor's Office of the Department of Labor as being in accord with Title VII" and the Commission on Civil Rights later urged the Secretary of the Interior to exert the "full strength of [his] office" to enforce Navajo preference provisions in all tribal and Government contracts. Pet. App. 138a-39a; *see id.* 132a-36a. The Secretary has done so faithfully for several decades and has necessarily rejected the EEOC's position that the challenged lease provisions are unlawful. *See* Pet. App. 22a.

In the decisions below, both the district court and the court of appeals carefully examined whether the Secretary is a required party under each of the three factors set forth in Rule 19(a)(1). Pet. App. 17a-22a, 54a-60a. Contrary to the EEOC's suggestion, Cr. Pet. at 9, neither court simply assumed at the outset that the Secretary was a necessary party. Nor did the court of appeals equate the Secretary to a contracting lessor as a way of justifying his status as a required party, as contended by the EEOC. *Cf.* Cr. Pet. 6-7. To the contrary, after determining that the Secretary has important interests that could be affected by the litigation under Rule 19, both the district court and

the court of appeals applied the following underlying principle to the Secretary: "No procedural principle is more deeply embedded in the common law than that, in an action to set aside a lease or a contract, all parties who may be *affected* by the determination of the action are indispensable." Pet. App. 20a, 59a (citations omitted; emphasis added). Nor did Peabody "desire to seek contribution from the Secretary," as stated by the EEOC. Cr. Pet. 12. The court of appeals focused not on Peabody's supposed desire to seek contribution, but on the unfairness to Peabody if it were to become "obliged to pay damages for having engaged in conduct that was mandated by the Secretary" when the Secretary was not a party to the suit. Pet. App. 19a. It was in this context that the court ruled that complete relief among the existing parties could not be accorded in the Secretary's absence because Peabody could not seek indemnification from the Secretary.

SUMMARY OF THE ARGUMENT

The EEOC does not present a question worthy of this Court's consideration. Rule 19(a) issues are entrusted to the sound discretion of the lower courts based on the facts and circumstances of each case. Without mentioning the applicable standard of review, the cross-petition argues that the court of appeals is incorrect on this point, but it is not. In any event, that kind of error correction is not the work of this Court.

There is no conflict among the circuits or any dissonance with any decision of this Court on the Rule 19(a)(1) issue raised by the EEOC and the EEOC makes no attempt to show otherwise. The question presented by the EEOC has no exceptional importance and the EEOC admits that it does not.

Nor is review of the lower courts' Rule 19(a) required party determination a prerequisite to review of the questions presented by the Navajo Nation and Peabody in their petitions for writs of certiorari.[3] The Rule 19(a) ruling challenged by the EEOC is distinct from the Rule 19(b) determination of whether an action may proceed in the absence of a required party in equity and good conscience. The questions presented in the Nation's and Peabody's petitions concern the court of appeals' reliance on the impleader rule, Rule 14, *Fed. R. Civ. P.*, in its Rule 19(b) analysis of

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[3] The questions presented by the Navajo Nation are: "1. May the sovereign immunity of the United States and of a federally recognized Indian tribe, preserved in Title VII of the Civil Rights Act of 1964, be abrogated by application of Rules 14 and 19 of the Federal Rules of Civil Procedure? 2. May a court use Rule 14 to permit or require a party to implead the Secretary of the Interior in a case where the applicable statute does not confer a right of contribution?" NN Pet. (No. 10-981) at (i). The question presented by Peabody is: "Where the EEOC contends that conduct required by a tribal coal mining lease provision mandated by the Secretary of the Interior violates Title VII of the Civil Rights Act of 1964, which statute expressly bars the EEOC from suing the Secretary to enforce Title VII, does Federal Rule of Civil Procedure 14 permit the coal mining lessee or the tribal lessor to implead the Secretary as a third-party defendant?" Peabody Pet. (No. 10-986) at (i).

whether other measures could avoid prejudice to Peabody so that the EEOC's suit would not need to be dismissed for its inability to join the Secretary. Pet. App. 29a-31a.

ARGUMENT

I. THE CROSS-PETITION PRESENTS NO ISSUE WORTHY OF THIS COURT'S CONSIDERATION.

From the beginning, this Court has entrusted questions of indispensable parties to the sound discretion of the lower courts. *Mallow v. Hinde*, 25 U.S. (12 Wheat.) 193, 197 (1827).[4] There is no prescribed formula for determining in every case whether a person is an indispensable party. *Niles-Bement-Pond Co. v. Iron Moulders' U. Loc. No. 68*, 254 U.S. 77, 80 (1920). Rather, application of Rule 19 is intensely fact-bound and depends on the circumstances of each particular case. *See Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 116 n.12, 118-19 (1968); 7 C. Wright, A. Miller and M. Kane, *Federal*

[4] Prior to its amendment in 2007, Rule 19 referred to "necessary" and "indispensable" parties. *Republic of the Philippines v. Pimentel*, 553 U.S. 851, 855-56 (2008). The 2007 amended rule deleted the word "indispensable" and replaced the word "necessary" in Rule 19(a) with the word "required." *Id.* at 855. These changes were stylistic only, *id.*, and the Nation uses the terminology of the current rule except when citing authority which utilizes the pre-2007 terminology.

Practice & Procedure Civ. 3d § 1604 at 39 (2001). Thus, a lower court's Rule 19(a) decision will be overturned only if it abused its discretion. *Cloverleaf Standardbred Owners Assoc., Inc. v. National Bank of Washington*, 669 F.2d 1274, 1277 (D.C. Cir. 1983) (per Ginsburg, C.J., with Circuit Judge Scalia on the panel); *see generally Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1982) (where decision is committed to sound discretion of the trial court, its decision will be reversed only for clear abuse of discretion); *cf. Republic of Philippines v. Pimentel*, 553 U.S. 851, 864 (2008) (Court has not addressed the standard of review for Rule 19(b) decisions).

The abuse of discretion standard is quite deferential. "[W]hen a district judge adverts to the relevant considerations and engages in a careful, pragmatically-oriented analysis to determine whether a person who cannot be joined as a party is 'needed for just adjudication,' an appellate panel should generally respect the 'judgmental discretion' exercised by the court of first instance." *Cloverleaf Standardbred*, 699 F.2d at 1280; *see generally Piper Aircraft, supra*. The lower courts engaged in that careful, practical analysis. Pet. App. 17a-22a, 54a-65a. Such deference is particularly warranted in the Rule 19(a) context because of the fact-specific nature of the determination. *See Pierce v. Underwood*, 487 U.S. 552, 562 (1988).

An error of law may constitute an abuse of discretion in the Rule 19 context. *Pimentel*, 553 U.S. at 864. But the EEOC's three attempts to impute legal error in the lower courts are all based on

demonstrably false premises. First, the EEOC contends that neither the federal laws governing leases of Indian lands nor the Secretary's regulations require adoption of tribal-preference provisions. Cr. Pet. 14. In fact, federal law governing leasing on the Navajo and Hopi Reservations mandates that hiring preferences be given to Navajo and Hopi Indians "whenever practicable," 25 U.S.C. § 633, and both the Indian Mineral Leasing Act of 1938 ("IMLA"), 25 U.S.C. §§ 396a-396g, and the Navajo and Hopi Rehabilitation Act of 1950, 25 U.S.C. §§ 631-638, give the Secretary the power to promulgate regulations governing operation of mineral and other leases. 25 U.S.C. §§ 396d, 635(a). Regulations promulgated under these laws have required at all relevant times that all leases be made on forms provided by the Department. 24 Fed. Reg. 7949 (Oct. 2, 1959) (promulgating 25 C.F.R. § 171.30 (1965)), 25 C.F.R. § 211.57 (2010) (IMLA); 26 Fed. Reg. 10,966 (Nov. 23, 1961) (promulgating 25 C.F.R. § 131.5(a) (1966)), 25 C.F.R. § 162.604(a) (2010) (Rehabilitation Act). In turn, the Secretary's form mineral leases, applicable to all tribes, require tribe-specific employment preferences. Pet. App. 122a-27a (excerpts of 1957 Departmental form leases reproduced as current lease forms in Peter C. Maxfield, *et al., Natural Resources Law on American Indian Lands* (1977) at App. A pp. 277, 288).

Second, the EEOC asserts that the court below committed legal error because it "overlooked that the termination provisions in the leases must be *jointly* exercised by the Navajo Nation and the Secretary."

Cr. Pet. 15-16 (emphasis in original). The Department's regulations are to the contrary, and Indian tribes have *no* right to terminate their leases *even if the leases say they do*. When the Secretary promulgated the current mineral leasing regulations, tribes sought that authority. The Department rejected it, stating: "The request for tribal authority to cancel leases is not included in final regulations. The mineral lease approved by the Secretary concerns lands which the Department has a statutory obligation to protect. The Secretary will review any and all information an Indian mineral owner may have concerning whether or not a lease should be cancelled but the final decision to cancel must remain with the Secretary: See *Yavapai-Prescott Indian Tribe v. Watt*, 707 F.2d 1072 (9th Cir. 1983), *cert. denied*, 464 U.S. 1017." 61 Fed. Reg. 35,634, 35,650 (July 8, 1996) (promulgating 25 C.F.R. § 211.54). *Yavapai-Prescott* rejected a tribe's attempt to cancel a lease even though the approved lease itself stated that the tribe "and/or" the Secretary could do so. 707 F.2d at 1075-76.[5]

The EEOC's third attempt to impute legal error is its misstatement that the court of appeals treated the Secretary as if he were a party to the lease in order to find the Secretary a required party. Cr. Pet.

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[5] The Department had earlier rejected a specific attempt by the Navajo Nation to control its own mineral leasing through a proposed tribal constitution. *See Proposed Constitution for Navajo Tribe*, 2 Op. Sol. of Dep't of Interior on Indian Affairs 1641, 1642 (1954).

13-14. The court of appeals did no such thing. Rather, both it and the district court applied this underlying principle: "no procedural principle is more deeply imbedded in the common law than that, in an action to set aside a lease or a contract, all parties who may be *affected* by the determination of the action are indispensable." Pet. App. 20a, 59a (emphasis added; internal quotation marks and citations omitted). That principle has long and strong roots. *See, e.g., Shields v. Barrow*, 58 U.S. (17 How.) 130, 138-39 (1854); *Provident Tradesmens*, 390 U.S. at 124-25. The EEOC concedes that the Secretary will be *affected* by a ruling in this case. *See* Cr. Pet. 13 n.8, 15. It makes no argument that the court of appeals (or the district court) misstated a relevant rule of law.

Without even a nod to the proper standard of review, the EEOC is thus left with its contention that the court of appeals' Rule 19(a)(1) "conclusion . . . is incorrect." Cr. Pet. 10. It even offers that its suit, if successful, will have little or no practical impact on the Navajo Reservation, much less nationwide. Cr. Pet. 17 n.11 (speculating that, even if its case succeeds, Peabody might be able to comply with the lease provision because most of the people living near its mine are Navajos).

Error correction in a fact-bound suit that may not even have local practical significance would be a most unusual use of this Court's time. *Sup. Ct. R.* 10. And, as shown below, there is no error in the lower courts' Rule 19(a)(1) determination.

II. THE COURTS BELOW CONCLUDED THAT THE SECRETARY IS A REQUIRED PARTY IN CONFORMITY WITH DECISIONS OF THIS COURT AND THE OTHER CIRCUITS.

Under Rule 19(a)(1), there are three distinct ways in which an absent party will be found to be a person required to be joined if feasible. Under Rule 19(a)(1)(A), a person must be joined as a party if, "in that person's absence, the court cannot accord complete relief among the existing parties." Under the relevant portions of Rule 19(a)(1)(B), a person must be joined as a party if "that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may: (i) as a practical matter impair or impede that person's ability to protect the interest; or (ii) leave an existing party subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations because of that interest." If any one of these three criteria is met, an absent party is a required party under Rule 19(a)(1). In this case, both lower courts determined that all three criteria were met. Pet. App. 18a-22a, 54a-62a.

This Court's venerable ruling in *Shields v. Barrows* still provides the basic principle underlying Rule 19 practice: "[p]ersons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it" should be joined. 58 U.S. (17

How.) at 139; *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 739 (1977); 7 C. Wright, A. Miller and M. Kane, *Federal Practice & Procedure*, Civ. 3d § 1604 at 38 & n.9 (2001). The Rule 19(a)(1) determination below is faithful to this principle, and there is no conflict with any decision of this Court or any inter-circuit conflict on that determination. Rather, the determination of the court of appeals that the Secretary is a required party under each of the three criteria set forth in Rule 19(a)(1) comports fully with decisions and guidance of this Court and with decisions of the other circuits.

A. The Court Below Properly Recognized That a Decision in the EEOC's Case Would Be a "Paper Judgment" Not Affording Complete Relief Among the Parties.

The courts below both determined under Rule 19(a)(1)(A) that complete relief could not be afforded among the parties in the Secretary's absence. Specifically, both courts determined that any judgment rendered in the case without the Secretary's participation would be hollow and would likely be followed by more litigation among the parties and the Secretary. Pet. App. 18a-19a (court of appeals); 56a-58a, 64a (district court). The EEOC appears to believe that the only issue under Rule 19(a)(1)(A) is whether it, as plaintiff, might win effective relief. Cr. Pet. at 12. This is an incorrect supposition. Rule 19(a)(1) instructs courts to look at whether "complete relief among the parties" can be accorded, which would

include complete relief for a defendant such as Peabody here. Pet. App. 19a (citing authorities).

The EEOC's discussion of Rule 19(a)(1)(A) overlooks the fact that the Rule 19(a)(1)(A) test is typically used "in conjunction with at least one of the other bases of compulsory party joinder," 4 *Moore's Federal Practice*, § 19.03[2][c] at 19-43 & n.41 (3d ed. 2011), and ignores the Advisory Committee Notes which state that "[t]he interests that are being furthered [by what is now Rule 19(a)(1)(A)] are not only those of the parties, but also that of the public in avoiding repeated lawsuits on the same essential subject matter." Adv. Comm. Notes on *Fed. Rule Civ. P. 19*, 28 U.S.C. App. p. 146; *see, e.g., Evergreen Park Nursing & Convalescent Home, Inc. v. American Equitable Assurance Co.*, 417 F.2d 1113, 1115 (7th Cir. 1969) (rejecting a "closely analytical view" of Rule 19(a)(1)(A) in reliance on Advisory Committee Notes). The lower courts' analyses of whether an absent person is a required party under Rule 19(a)(1) therefore properly considered whether additional litigation is likely or unavoidable despite a judgment that may appear to satisfy a plaintiff.

The courts below correctly determined that, in the Secretary's absence, Peabody could not obtain complete relief if the EEOC prevailed on the merits, and that a judgment enjoining Peabody from abiding by its Secretarially approved lease would be hollow given the likelihood of additional litigation. Pet App. 19a, 57a-58a. Peabody would have no recourse against the Secretary, who insisted on the preference

provision, is ultimately responsible for its continued inclusion in the leases, and would remain free to insist that Peabody honor the challenged lease provisions upon pain of losing the leases. Pet App. 18a-19a. Thus, a judgment enjoining Peabody from complying with its leases would fail to provide any final resolution to the EEOC's claims. Pet. App. 19a, 57a-58a. Contrary to the EEOC's position, Rule 19(a)(1)(A) is properly invoked when a judgment against a defendant might lead to later litigation by or against it based on the same transaction, and Rule 19(a)(1)(A) protects a litigant such as Peabody from getting "whipsawed," whether by two agencies of the same government, as here, or by other parties. *Schlumberger Indus., Inc. v. National Surety Corp.*, 36 F.3d 1274, 1285-87 (4th Cir. 1994).

The Rule 19(a)(1)(A) determination below is also supported by Peabody's inability to obtain any relief in this lawsuit from the Navajo Nation if the EEOC obtains an injunction that would, in effect, require Peabody to violate a material term of its Navajo coal leases. Peabody has already served on the Navajo Nation – a government tacked on to the litigation by the Ninth Circuit solely for the purpose of binding it to a judgment, *see* Pet. App. 13a-14a, 78a-79a – its notice of intent to sue the Nation in tribal court if the lease is determined illegal.[6] Peabody cannot raise its

[6] A copy of Peabody's Notice is included in the Navajo Nation's proposed Lodging.

claims against the Navajo Nation in this case because Congress has not abrogated and the Nation has not waived its sovereign immunity for such a claim by a private party in federal court. *See, e.g., Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509-10 (1991). Thus, the court of appeals' ruling that complete relief cannot be accorded among existing parties may and should be upheld on the basis of Peabody's inability to obtain any relief from the Navajo Nation in federal court, even without consideration of Peabody's inability to join the Secretary and the likelihood of more litigation between them. *See Keweenaw Bay Indian Cmty. v. State of Michigan*, 11 F.3d 1341, 1346-47 (6th Cir. 1993) (where litigation with non-party tribe was likely and that tribe could not be joined in original suit, dismissal under Rule 19(a)(1)(A) appropriate).

In the absence of the Secretary, the EEOC itself would be unable to get meaningful relief should the trial court rule in its favor on the merits. The EEOC does not address this possibility but the court of appeals did. It properly determined that the Secretary would not be bound by any judgment in favor of the EEOC in this action if he could not be joined as a party, and that he would be free to insist that the lease provision be honored by both Peabody and the Navajo Nation. Pet. App. 17a-18a. Especially where the Secretary has primary jurisdiction to execute the trust responsibility, *see Nevada v. United States*, 463 U.S. 110, 127 (1983), and the sole ability to permit mineral companies to mine Indian lands, 25 U.S.C.

§§ 396a, 635(a), 2102(a), a ruling in favor of the EEOC could potentially have no impact on the discrimination that was apparently the reason for the lawsuit, *Carpenters 46 No. Cal. Counties Jt. Apprenticeship & Training Comm. v. Eldredge*, 459 U.S. 917, 920 (1982) (Rehnquist, J., dissenting from denial of certiorari). The EEOC cannot acquire power over the Department of the Interior by simply claiming that power in its own regulations or in litigation to which the Secretary is not a proper party, and the EEOC's suit fails even the constitutional redressability requirement. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 569-70 & nn.4-5 (1992). The EEOC's approach is hardly the pragmatic and practical one prescribed in *Provident Tradesmens*, 390 U.S. at 106-07, 116-17, and would "tend to reduce the district courts to issuers of paper decrees which neither adjudicate nor, in the end, protect rights," *Eldredge*, 459 U.S. at 922 (citation and internal quotation marks omitted); *see Arizona v. California*, 298 U.S. 558, 571-72 (1936).

The EEOC claims that the court of appeals' Rule 19(a)(1)(A) determination is inconsistent with *Temple v. Synthes Corp., Ltd.*, 498 U.S. 5 (1990) (*per curiam*). Cr. Pet. at 12. It is not. *Temple* simply confirmed that joint tortfeasors with the "usual joint and several liability" in a personal injury case are not indispensable. 498 U.S. at 7. In contrast to *Temple*, this case is not a garden variety tort action involving joint tortfeasors. This is a Title VII case brought by the EEOC against Peabody as a proxy for two governmental entities the EEOC is statutorily barred from

suing – the Department of the Interior and the Navajo Nation. No party has asserted, and neither court below ruled, that this case involves joint and several liability.[7]

Temple does, however, lend support to the Navajo Nation's position in No. 10-981 that a court cannot require a defendant to implead a third party when a plaintiff cannot join that party without defeating subject matter jurisdiction. 498 U.S. at 6-8; *see* NN Pet. (No. 10-981) at 24. And, as the Navajo Nation observes in No. 10-981 and the EEOC now concedes, Title VII permits no contribution or indemnification through Rule 14. NN Pet. 21-22; EEOC Cr. Pet. 12 (both citing *Northwest Airlines, Inc. v. Transport Workers U.*, 451 U.S. 77, 98-99 (1981)). Therefore, the Ninth Circuit's ruling that it could force or permit either Peabody or the Navajo Nation to implead the Secretary under Rule 14 in order to cure the EEOC's inability to join the Secretary should be reversed under *Texas Indus., Inc. v. Radcliffe Mat'ls, Inc.*, 451 U.S. 630 (1981).

Peabody cannot obtain complete relief with regard to either the Navajo Nation or the Secretary, the Nation's trustee and an agency of the same government as the EEOC. Nor can the EEOC itself obtain complete relief as a practical matter in the absence of

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[7] The two appellate decisions cited on this point by the EEOC, Cr. Pet. 12, are similarly inapposite, involving tort claims, indemnification, and/or joint obligors.

the Secretary. The court of appeals' determination that the Secretary is a required party under Rule 19(a)(1)(A) is plainly correct.

B. The Secretary Has Significant Interests Relating to the Suit That Would Be Impaired by a Judgment in His Absence.

1. The Secretary Claims an Interest Relating to the Suit.

Rule 19(a)(1)(B) requires initially only that the absent party "claim[] an interest relating to the subject of the action." The proper focus is on whether the absentee can claim an interest, not whether it possesses such an interest, and the rule covers claimed interests unless they are "patently frivolous." *E.g., Shermoen v. United States*, 982 F.2d 1312, 1318 (9th Cir. 1992), *cert. denied*, 509 U.S. 902 (1993). In *Pimentel*, this Court admonished that "where sovereign immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action must be ordered where there is a potential for injury to the interests of the absent sovereign." 553 U.S. at 867. As the following examples show, the Secretary's interests in this controversy are far from frivolous, and dismissal should have been ordered under *Pimentel*.

The Secretary drafted the leases, insisted on tribe-specific employment preferences, and approved the leases as trustee. The EEOC's suit "necessarily allege[s] that the contract itself [is] illegal." *See*

Disabled Rights Action Comm. v. Las Vegas Events, Inc., 375 F.3d 861, 882 (9th Cir. 2004). Invalidation of one material term of these contracts could cause the "entire tapestry of the agreement[s] to unravel." *Dawavendewa v. Salt River Agric. Improvement & Power Dist.*, 276 F.3d 1150, 1156 (9th Cir.), *cert. denied*, 537 U.S. 1098 (2000). Surely, as the courts below ruled, the Secretary has a direct interest in the lawfulness of these two coal leases, the other 326 leases of Navajo trust property, and all other mineral leases in Indian country containing analogous employment preference provisions. Pet. App. 20a, 58a. Both of these coal leases require Peabody to conform its activities to any and all regulations of the Secretary, NN RE 60, 84, and those regulations cover in detail all aspects of Peabody's operations, *see* 25 C.F.R. part 211 (2010). Indeed, the Secretary has ensured by regulation that, so long as the lands are held in trust, all of the lease obligations of the 326 business site leases on the Navajo Reservation are obligations owed directly to the United States as well as to the Indian owners of the land. 26 Fed. Reg. 10,966 (Nov. 23, 1961) (promulgating 25 C.F.R. § 131.5(a) (1966)); 25 C.F.R. § 162.604(g)(1) (2010). This conjunction of a claim to and interest in the very property and the very transaction involved in the EEOC's suit presents an especially strong Secretarial interest for purposes of Rule 19(a)(1)(B). 7C C. Wright, A. Miller and M. Kane, *Federal Practice & Procedure* Civ. 3d § 1908.2 at 374 (2007).

In addition, the EEOC concedes that the employment preference provisions are significant terms of the coal leases. Cr. Pet. 17. Those provisions were mandated under the Department's regulations which require the use of its form leases that include such tribe-specific hiring preferences. If Peabody violates those provisions, only the Secretary may cancel the leases for their violation. 25 C.F.R. § 211.54 (2010); *Yavapai-Prescott, supra*. The Secretary's unique role in enforcing his regulations and his approved leases, both on the Navajo Reservation and nationwide, is hardly a frivolous interest. *See Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 373 (1968) ("If the Government does determine that there has been waste in violation of [an Indian mineral] lease, it will of course satisfy its trust obligations by filing the necessary court action."). The Government's interest in tribal lands is not just a technical property interest, but involves important national interests. *United States v. Hellard*, 322 U.S. 363, 366-68 (1944). So the rule has developed that suits challenging the rights of tribes related to their lands cannot proceed without the Secretary as a representative of the United States, while suits by tribes or individual Indians to protect their land-based rights do not generally require the Secretary's joinder. *Poafpybitty*, 390 U.S. at 369-71; *see* 7 C. Wright, A. Miller and M. Kane, *Federal Practice & Procedure*, Civ. 3d § 1617 at 258-60 & nn.16-18 (2001).

Having misstated the underlying principle that the court of appeals applied, having misunderstood

that the Secretary and only the Secretary has the power to terminate the leases for violation of their terms, and having erroneously asserted that the lease provisions it challenges are not mandated by the Secretary's regulations, *see supra* at 8, the EEOC admits that the Secretary has an interest in the underlying merits of this case for several reasons, but downplays those interests as a "general interest." Cr. Pet. 15.

The "'interest' test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967) (analyzing "interest" under Rule 24 with reference to Rule 19). Rule 19 does not distinguish between assertedly general interests and other interests. Even those interests identified by the EEOC satisfy Rule 19(a)(1)(B). The EEOC recognizes that "the Secretary has approved hundreds of leases and contracts containing similar tribe-specific preference provisions and has approved numerous tribal ordinances adopting tribal preferences in hiring on reservations." Cr. Pet. 15. Given that invalidating these provisions in the two Peabody leases and the hundreds of other ones approved by the Secretary could cause them to unravel, *Dawavendewa*, 276 F.3d at 1156, the interest test is satisfied, *see Provident Tradesmens*, 390 U.S. at 108; *SEC v. United States Realty & Improvement Co.*, 310 U.S. 434, 460 (1940) (SEC has "sufficient interest in the maintenance of its statutory authority and the performance of its public duties" to entitle it to intervene under analogous

standards of Rule 24). This Court has made it abundantly clear that the Secretary's interest in the administration of the Indian trust is an important federal interest, Congress having designed the trust relationship to serve the public interests of the United States as well as to benefit the Indian tribe. *United States v. Jicarilla Apache Nation*, No. 10-382, ___ U.S. ___, 2011 WL 2297786 at *9-*12 (June 13, 2011).

The EEOC's alarm that "under the court of appeals' reasoning, the Secretary could be a required party to most or all lawsuits seeking to challenge the validity of a provision of one of those contracts" approved by the Department and relating to economic activity on Indian trust lands, Cr. Pet. 10, is no alarm at all; that is settled law. *See, e.g., Anicker v. Gunsburg*, 246 U.S. 110 (1918). The concern that the Secretary would be forced to participate in such litigation is properly traced to the court of appeals' novel and erroneous interpretation of Rule 14, *not* to the lower courts' determination that the Secretary has important interests challenged in the EEOC's lawsuit. If the Ninth Circuit's ruling that the Nation or Peabody could be forced or permitted to implead the Secretary under Rule 14 in order to cure the EEOC's statutory inability to join him under Rule 19 is reversed, as the Nation and Peabody urge in Nos. 10-981 and 10-986, there will be no danger of the Secretary being forced to participate in such litigation given his statutory immunity from suits brought by the EEOC under Title VII.

What is truly striking about the EEOC's contention that the Secretary does not have a sufficient

interest in Indian leases to qualify as a required party under Rule 19(a)(1) is the necessary implication that the Secretary would not have a sufficient interest to warrant intervention under Rule 24 in a suit brought in his absence to invalidate Secretarially imposed lease provisions concerning, for example, special protection for unique resources or environmental conditions, or to reform royalty provisions.

2. The Secretary's Interests Would Be Impaired As a Practical Matter.

Rule 19(a)(1)(B)(1) commands that the question of whether an absent person's interest may be impaired or impeded be determined "as a practical matter." *Provident Tradesmens*, 390 U.S. at 110; 4 *Moore's Federal Practice* § 19.03[3][c] at 19-50 (3d ed. 2011). For example, the fact that the Secretary may not be technically bound by a judgment does not mean that the case may proceed without him. *See Provident Tradesmens, supra.*

Martin v. Wilks, 490 U.S. 755 (1989), *superseded by statute in part on other grounds,* Civil Rights Act of 1991, § 108, 105 Stat. 1076-77, 42 U.S.C. § 2000e-2(n), is instructive on the impairment test. One group of employees had sued to obtain promotions to positions superior to those of absentees. The absentees' relative potential for promotion would be decreased if the plaintiffs prevailed, even though the absentees could have sued the employer separately. In such a case, the Court found that the absentees had an interest in the litigation that, as a practical matter, could be

impaired or impeded. *Martin*, 490 U.S. at 767-68; *see* 4 *Moore's Federal Practice* § 19.03[3][c] at 19-51 & n.66 (3d ed. 2011). The Secretary's specific interests in this case are bound up with his interest in the maintenance of his statutory authority, the performance of his public duties and the operation and validity of his regulations and policies. *See Jicarilla Apache Nation*, *supra*. The impairment test should be particularly sensitive to those public interests. *See SEC*, 310 U.S. at 460 (construing analogous provisions of Rule 24). The courts below did not abuse their discretion in finding that the Secretary's interests could be impaired or impeded, as a practical matter, by the EEOC's suit. *See* Pet. App. 20a, 60a.

The EEOC rationalizes that the Secretary can protect his interests by "seeking to intervene or filing a brief as *amicus* in an appropriate case, or by resolving any important legal or policy disagreements with a sister federal agency," presumably the EEOC. Cr. Pet. 15. Most fundamentally, this assertion overlooks the importance of sovereign immunity in the Rule 19 calculus. *See Pimentel*, 553 U.S. at 866-67, citing *Minnesota v. United States*, 305 U.S. 382 (1939) (United States indispensable in suit involving Indian lands); *Kickapoo Tribe v. Babbitt*, 43 F.3d 1491, 1498 (D.C. Cir. 1995) ("Failure to intervene is not a component of the [Rule 19] prejudice analysis where intervention would require the absent party to waive sovereign immunity.").

Beyond sovereign immunity, the notion that the Secretary should, in essence, be forced to intervene or risk the compromise of important federal interests

is surely erroneous; under Rule 24, intervention is voluntary. *Martin*, 490 U.S. at 763; *Chase Nat'l Bank v. City of Norwalk*, 291 U.S. 431 (1934). Moreover, the EEOC's position that the Secretary may intervene inherently conflicts with the EEOC's contention that the Secretary lacks an interest sufficient to satisfy Rule 19(a)(1)(B). This is so because the Secretary would need to have an interest in the litigation to intervene as of right under Rule 24(a)(2), and the interest test under Rule 24(a)(2) mirrors the interest test under Rule 19(a)(1)(B). *See Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 134 n.3 (1967) (citing 1966 Adv. Comm. Notes on *Fed. R. Civ. P. 24*).

The Secretary's interests would not be adequately protected by the filing of briefs *amicus curiae*. Participation as an *amicus* is not a right but a privilege within the sound discretion of the courts. *Northern Sec. Co. v. United States*, 191 U.S. 555 (1903). In the Ninth Circuit in particular, a court would not be required to consider arguments raised by the Secretary in tension with strategic positions taken by the litigants. *Golden Gate Rest. Ass'n v. City & County of San Francisco*, 546 F.3d 639, 653 (9th Cir. 2008), *cert. denied*, ___ U.S. ___, 130 S.Ct. 3497 (2010). The courts in the Ninth Circuit do not consider new facts submitted by federal agencies in *amicus* briefs. *Ministry of Def. of the Islamic Repub. of Iran v. Gould, Inc.*, 969 F.2d 764, 773 (9th Cir. 1992). The Secretary would not have the rights to participate in and exert control over the litigation as a party would. *Miller-Wohl Co. v. Comm'r of Labor & Indus. of Montana*, 694 F.2d 203, 204 (9th Cir. 1982). The Secretary, as

an *amicus*, would not be bound by the result, *Munoz v. Imperial County*, 667 F.2d 811, 816 (9th Cir.), *cert. denied*, 459 U.S. 825 (1982), and could not appeal from a final judgment, *United States v. City of Los Angeles*, 288 F.3d 391, 400 (9th Cir. 2002). Furthermore, the Secretary may have other priorities that predominate over filing briefs *amicus curiae* in cases throughout the country where other litigants seek to challenge his regulations, policies or contracts.

Ironic at best is the EEOC's contention that the Department could protect its interests by resolving its disagreements with the EEOC as a "sister agency." Through almost a decade of litigation, the EEOC has been unable to resolve its fundamental difference with the Secretary's policies, regulations and lease requirements. Instead, the EEOC has brought litigation against Peabody as a proxy for the Secretary, whom the EEOC is prevented from suing by Title VII. *See* 42 U.S.C. § 2000e-5(f)(1); *cf. Mine Safety Appliances Co. v. Forrestal*, 326 U.S. 371, 375 (1945) (federal government's liability cannot be tried "'behind its back'") (quoting *State of Louisiana v. Garfield*, 211 U.S. 70, 78 (1908)). The EEOC has not been able to persuade the Attorney General to file suit against the Secretary. *See* Pet. App. 22a. The result has been to burden the Navajo Nation and Peabody with large litigation expenses to which neither should have been exposed. The EEOC and the Department of the Interior have been at loggerheads for years. The EEOC's suggestion that there is a chummy resolution with its "sister agency" in the offing strains all credulity, even if one could imagine such a resolution that

would not involve further litigation among the Secretary, Peabody and the Navajo Nation.

C. Peabody Is Clearly At Risk of Inconsistent Obligations.

Peabody has a contractual obligation, insisted on by the Department of the Interior, to prefer qualified Navajo workers on its Navajo reservation mine. The EEOC seeks an order from a federal court to *prohibit* Peabody from preferring qualified Navajo workers on its Navajo reservation mine. Peabody cannot comply with its contract obligation *mandating* that Peabody grant Navajo hiring preference and a court order *forbidding* Peabody from granting Navajo hiring preference. Those obligations, one imposed by contract and the other imposed by a court, would be inconsistent obligations. Peabody would be required either to abide by the lease terms and violate the injunction that the EEOC seeks, or to abide by the injunction and violate its lease.

The EEOC's cross-petition presents three arguments to the contrary. The first is based on the false premise that the Navajo Nation has the ability to terminate the lease, either on its own or somehow jointly with the Secretary. Cr. Pet. 15-16; *cf. supra* at 8-9. The second is also based on that false premise, *see* Cr. Pet. 16 ("If Peabody can no longer comply with a term of the leases, the Secretary and the Nation might well be able to exercise their authority to modify the leases or terminate them and negotiate new ones.") (footnote omitted), and on the question-begging position that

"this Title VII action against Peabody is not a forum for resolving any broader contractual issues between Peabody and the Navajo Nation, much less the Secretary's role with respect to any such issues," *id.* at 16-17. The third claims that the risk of lease cancellation flowing from the inconsistent obligations is "speculative" because the Navajo Nation gets substantial royalties from the leases and the Secretary would be loathe to risk that income stream. *Id.* at 17. As the district court observed, "[t]he mere fact that the question is posed as to what the [Secretary] will do in the event of non-compliance by Peabody Coal demonstrates that the Secretary claims an interest in this litigation. . . . [T]he EEOC's argument that the risk of lease cancellation is speculative substitutes the EEOC's judgment for that of the Secretary's and does not provide persuasive evidence of the absence of the risk of inconsistent obligations. Rather, the opposite is true." Pet. App. 60a-61a.

The EEOC truly speculates in a footnote that Peabody might be able to comply with both an injunction *prohibiting* tribe-specific employment preferences and a lease *mandating* them because perhaps only Navajos will apply for the jobs due to demographics on the Navajo Reservation. Cr. Pet. 17 n.11. For nearly ten years of litigation prior to this *post hoc* rationalization, the EEOC has claimed that a "class" of non-Navajo workers has been harmed by Peabody's compliance with its lease. *See, e.g.,* Second Am. Compl. (Dec. 27, 2010) at 5, ¶ 17 ("Peabody has engaged in, and continues to engage in, unlawful employment practices by discriminating against Charging Parties

and a class of qualified non-Navajo Native Americans. . . ."). The EEOC's bald speculation cannot be credited; in fact, over 9,000 non-Navajo Native Americans live on the Navajo Reservation. *Means v. Navajo Nation*, 432 F.3d 924, 928 (9th Cir. 2005), *cert. denied*, 549 U.S. 952 (2006).

III. REVIEW OF THE LOWER COURTS' RULE 19(a) DETERMINATION IS NOT A PREDICATE TO REVIEW OF THE QUESTIONS PRESENTED BY THE NAVAJO NATION OR PEABODY.

Review of the lower courts' Rule 19(a) determination that the Secretary is a required party is not a predicate to the review sought by the Navajo Nation and Peabody on the Ninth Circuit's unique invocation of Rule 14 in its Rule 19(b) analysis. The focus of the Rule 19(b) inquiry is whether "in equity and good conscience, the action should proceed among the existing parties or should be dismissed" when the required party cannot be joined. This inquiry is distinct from the Rule 19(a) required party analysis and, absent appropriately compelling reasons, review of a Rule 19(a) determination need not be undertaken before review of a Rule 19(b) analysis. *Pimentel,* 553 U.S. at 863-64 (turning to Rule 19(b) analysis when application of Rule 19(a) is uncontested); *Provident Trademens*, 390 U.S. at 108 (assuming at outset that absentee was a necessary party and reviewing only the lower court's Rule 19(b) determination). There are many predicates, as a matter of abstract logic, to

review of the Rule 19(b) issues presented in the Nation's and Peabody's petitions, such as subject matter jurisdiction and standing, but that does not mean this Court must necessarily review all such logical predicates if they fail to present certworthy issues.

In Nos. 10-981 and 10-986, the Nation and Peabody seek review of the court of appeals' Rule 19(b) decision that they could be required to implead the Secretary under Rule 14 to cure the EEOC's inability to join the Secretary under a statute that does not contain a right of contribution or indemnity. The questions presented in the Nation's and Peabody's petitions, *supra* at 5 n.3, concern the court of appeals' reliance on Rule 14 in its Rule 19(b) analysis of whether other measures could lessen or avoid the prejudice to Peabody and the Secretary such that dismissal for the EEOC's failure to join the Secretary could be avoided.

The EEOC argues that review of the court of appeals' application of Rule 14 in the Rule 19 context "would artificially broaden the significance of the Rule 14 question" unless the Rule 19(a) required party determination were addressed as a preliminary matter. Cr. Pet. 9. The EEOC also fears that if this Court reverses the Rule 14 ruling, "the court of appeals might well conclude that the remainder of the case must be dismissed under Rule 19(b)." *Id.* at 10. But that result would in no way artificially broaden the significance of the Rule 14 question or create a "spill over" of a Rule 14 holding to "a class of cases

that should not be affected." Cr. Pet. 9-10. It would merely mean that the EEOC would not prevail in this particular lawsuit.

The full significance of the Rule 14 question can and should be addressed in the consideration of the petitions of the Navajo Nation and Peabody which directly implicate that issue. The EEOC's claim of "spill over" is inconsistent with the fundamentally fact-based and case-specific analysis prescribed under Rule 19(b). *See supra* at 6-7; *State of Idaho v. States of Washington & Oregon*, 444 U.S. 380, 390-91 (1980) (reversing special master's finding that Secretary as trustee for tribes was indispensable party to action concerning Northwest fishing rights and observing that case was quite different from another suit where the Court adopted the finding of a special master that the United States was indispensable in a case that necessarily affected the Government in its fiduciary capacity for certain Indians).

The EEOC faces a problem of its own making. The EEOC initially chose to sue only Peabody to challenge the Secretary's and Navajo Nation's lease provisions, policies and regulations. In the court of appeals, the EEOC introduced the Rule 14 "solution" in its reply brief, which asserted that Peabody could assert a "cross-claim" against the Secretary under Rule 14 if no damages were sought.[8] While the Rule

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[8] EEOC Reply Br., *EEOC v. Peabody Western Coal Co.*, No. 06-17261 (9th Cir. filed Oct. 26, 2007) at 23 n.17. This

(Continued on following page)

19(a)(1) required party determination must necessarily be made before a trial court examines Rule 19(b) issues, that fact alone does not make the Rule 19(a)(1) question certworthy. With no split among the circuits on the Rule 19(a)(1) ruling, no inconsistency of that ruling with any decision of this Court, a fact-bound and case-specific application of Rule 19(a)(1) subject to review for abuse of discretion, a cross-petition that the EEOC hints has no particular importance, and a well reasoned Rule 19(a)(1) required party determination by both courts below, the EEOC's request for review of the required party issue should be rejected.

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represented a partial reversal of the EEOC's position stated in its initial brief below, which argued that Peabody could *not* assert a "cross-claim" under Rule 14 against the Secretary because there was no waiver of federal sovereign immunity. Brief of EEOC as Appellant, *EEOC v. Peabody Western Coal Co.*, No. 06-17261 (9th Cir. filed July 26, 2007) at 38-39.

CONCLUSION

The EEOC's cross-petition should be denied.

Respectfully submitted,

PAUL E. FRYE
(*Counsel of Record*)
LISA M. ENFIELD, *Of Counsel*
FRYE LAW FIRM, P.C.
10400 Academy Rd. N.E.,
Suite 310
Albuquerque, NM 87111
pef@fryelaw.us
(505) 296-9400

HARRISON TSOSIE
Attorney General
PAUL SPRUHAN, Attorney
THE NAVAJO NATION
P.O. Box 2010
Window Rock, AZ 86515

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