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 Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR CROSS-RESPONDENT PEABODY WESTERN COAL COMPANY IN OPPOSITION TO CONDITIONAL CROSS-PETITION

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QUESTION PRESENTED

Whether the Secretary of the Interior is a "required party," under Federal Rule of Civil Procedure 19(a)(1), to an action brought by the Equal Employment Opportunity Commission against a private employer seeking to enjoin and penalize an employment preference that the Secretary required as a condition of his approval of a mining lease between the employer and an Indian Tribe?

RULE 29.6 STATEMENT

Peabody Western Coal Company is a subsidiary of Peabody Holding Company, LLC, which is a subsidiary of Peabody Investments Corp., which is a subsidiary of Peabody Energy Corporation, a publicly traded company.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (Pet.-App. 1a–30a[1]) is reported at 610 F.3d 1070. The opinion of the United States District Court for the District of Arizona (Pet.-App. 31a–64a) is unpublished but available at 2006 WL 2816603. An earlier opinion of the Court of Appeals (Pet.-App. 65a–85a) is reported at 400 F.3d 774. The District Court's earlier opinion (Pet.-App. 86a–118a) is reported at 214 F.R.D. 549.

JURISDICTION

The Court of Appeals filed its opinion and entered judgment on June 23, 2010 and denied petitions for rehearing and rehearing en banc on September 1, 2010. On November 22, 2010, Justice Kennedy extended the time within which to file a petition for certiorari to and including Saturday, January 29, 2011, making the due date January 31, 2011, under S. Ct. Rule 30.1. The Navajo Nation filed a petition for certiorari on January 28, 2011, which the Court docketed as No. 10-981 on February 1, 2011. Peabody Western Coal Company (Peabody) filed a petition for certiorari on January 31, 2011, which the Court docketed as No. 10-986 on February 2, 2011. The Equal Employment Opportunity Commission (EEOC) filed a conditional cross-petition for a writ of certiorari on March 3, 2011. A series of orders—on March 22, April 28, June 3, and July 5, 2011—successively extended the time for the Navajo Nation

[1] References to "Pet.-App." are to the appendix submitted with Peabody Western Coal Company's petition for certiorari in No. 10-986 (Peabody-Pet.). References to "Br.-Opp.-App." are to the appendix bound with this brief.

and Peabody to file a response to the conditional cross-petition to August 19, 2011.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

REGULATORY PROVISIONS INVOLVED

Title 25 of the Code of Federal Regulations, section 211.55 (2010), is set forth in full in the attached Appendix A.

COUNTERSTATEMENT OF THE CASE

Peabody's fuller Statement is contained in its Petition in No. 10-986. In response to the Government's more limited, Rule 19-focused Statement, Peabody adds the following:

The Court of Appeals held that the Secretary of the Interior has an interest in the subject matter of this action, under Rule 19(a)(1)(B)(i), because the resolution of the action will determine the validity of provisions that the Secretary required to be included in leases that he approved. The Court of Appeals further held that the Secretary's interest will be impaired by his absence from the action because he will be unable to defend the legality of the tribe-specific hiring provisions that he required to be included in the leases. Pet.-App. 18a–19a.

The Court of Appeals also concluded that the Secretary's joinder as a party is required under Rule 19(a)(1)(B)(ii), because otherwise Peabody is subject to a substantial risk of incurring inconsistent obligations. The court explained that, if the Secretary is not a party, he will not be bound by any judgment that the lease provisions offend Title VII of the Civil Rights Act, and thus are illegal, and might choose to enforce them in their current form. When making

employment decisions at its mining operations under the Navajo-Peabody mineral leases, Peabody would be forced to choose between complying with the leases' tribe-specific hiring preferences, as mandated by the Secretary, or obeying an injunction, here sought by the EEOC, prohibiting those very preferences.

INTRODUCTION

In this action, one agency of the United States Government, the EEOC, seeks to enforce its view that Title VII prohibits employment preferences for members of a specific American Indian tribe contained in the tribe's own mineral leases. That view conflicts directly with the long-held view of the Secretary of the Interior. The Secretary has consistently insisted on the tribal employment preference provisions at issue, making their inclusion in the leases a condition of the Secretary's approval—an approval required under federal law for the leases to be effective. 25 U.S.C. § 396a.

The Court of Appeals held that the "EEOC cannot join the Secretary as a defendant" in this case. Pet-App. 20a. The EEOC never sought to do so, and the EEOC does not challenge this holding of the Court of Appeals. Instead, the EEOC contends that the Secretary may be excluded from this case in which the EEOC asks the judiciary to enforce its view of government policy at the expense of the inconsistent policy of the Secretary. Peabody is caught between the battling agencies. It is the employer required—by lease provisions mandated by the Secretary—to extend tribe-specific hiring preferences that the EEOC contends are illegal. Peabody is thus at substantial risk of facing inconsistent obligations, so long as this case proceeds as the EEOC wants it to proceed, that is, without the Secretary's involvement.

The Court of Appeals correctly recognized that the Secretary is a required party to this litigation under Rule 19, but, rather than dismissing the action on the ground that the EEOC cannot sue the Secretary, ruled that Peabody can implead the Secretary under Rule 14. As explained in Peabody's pending petition for certiorari (No. 10-986), however, Rule 14 does not permit Peabody to implead the Secretary, because the Secretary is not and cannot be responsible for any of the relief the EEOC seeks from Peabody. Thus, Rule 14 cannot serve as the "solution" to the Rule 19 "problem" this case presents. Both the Navajo Nation and the Secretary must properly be made parties for this case to proceed. Because the Secretary cannot properly be joined here, Rule 19(b), as the District Court properly held, requires that the case be dismissed.

In its Conditional Cross-Petition, the EEOC maintains that in its enforcement action against Peabody it can press its side of the Janus-like Government's inconsistent policy demands by challenging the validity of the Secretary's obligatory lease provisions free of the Secretary's involvement, because the Secretary assertedly lacks the "interest" needed to meet Rule 19(a)'s required-party analysis. The Cross-Petition seeks to sideline the Secretary from the EEOC's attack on his policies by ignoring—but not disclaiming—his long-term insistence that tribe-specific hiring preferences be included in tribal leases, his direct involvement in compelling their inclusion in the two Peabody-Navajo mineral leases in this case, and his ability to levy penalties for violation of these lease terms. The Court of Appeals correctly ruled that the Secretary is a required party for purposes of Rule 19. Because the Cross-Petition cites no conflicting authority, and this aspect of the

Court of Appeals' decision is well-grounded in the factual record, there is no need for this Court to address the Court of Appeals' Rule 19 ruling. The Cross-Petition should be denied.

REASONS TO DENY THE CONDITIONAL CROSS-PETITION

1. Under Rule 19(a)(1)(B), a required party is a person who:

> 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 the 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 the interest.

Fed. R. Civ. P. 19(a)(1)(B).[2]

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[2] A person is also a required party under Rule 19(a)(1)(A) if "in that person's absence, the court cannot accord complete relief among existing parties." In addition to correctly determining that the Secretary is a required party under both standards in Rule 19(a)(1)(B), the Court of Appeals correctly concluded that the Secretary is a required party under subparagraph (A) because, in his absence, complete relief could not be accorded *to Peabody*. Pet.-App. 16a–18a. The Cross-Petition argues (Cross-Pet. at 11–12) that complete relief can be accorded because the EEOC can secure all the relief *it seeks* against Peabody. The EEOC's reformulation of this requirement, for which it offers no case support, cannot be reconciled with the Rule's text. The Rule requires consideration of complete relief to *all* parties, not just the plaintiff who chooses not to, or who cannot, sue an absent (but required) party.

The Court of Appeals analyzed the application of each of these alternative tests with care and readily determined that the Secretary is a required party under both tests. The analysis plowed no new ground, was plainly correct, and does not warrant this Court's review.

2. The Court of Appeals correctly recognized that the Secretary is a required party under Rule 19(a)(1)(B)(i) because, "[i]f the Secretary is not joined, he will be unable to defend his interest in the legality of the lease provisions."[3] Pet.-App. 18a.

a. The Court of Appeals recognized the Secretary's obvious interest "in the legality of the lease provisions," as the legality of tribal, as opposed to American Indian, hiring preferences in these leases is the heart of the EEOC's Title VII action. Pet.-App. 18a. The Court of Appeals concluded, "the record makes clear that the Secretary insisted that the disputed [tribe-specific] employment preference provision be included in the leases between Peabody and the Nation, and that the Secretary is ultimately responsible for its continued inclusion in the leases."

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[3] The Cross-Petition inaccurately states that the Court of Appeals perceived the Secretary's role in approving the leases—and therefore his interest in this action—as being akin to actually being a signatory to the leases. Cross-Pet. at 6. The Court of Appeals fully recognized that the Secretary is not a contractual party. Pet-App. 18a. It also fully recognized that the facts here are not identical to those in cases in which a governing body or institution is a required party under Rule 19(a)(1)(B)(i) in connection with a challenge to that body's regulation or ordinance. Pet-App. 18a. Application of Rule 19(a)(1)(B)(i), however, is not limited to these contexts. *See, e.g., Piccioto v. Continental Cas. Co.*, 512 F.3d 9, 16 (1st Cir. 2008) (adverse party was necessary party where adverse judgment could be persuasive precedent in a subsequent proceeding).

Pet.-App. 17a. The Cross-Petition does not dispute any of this.[4]

Rather, the Cross-Petition argues that the Secretary cannot have an interest in the action because he is not a signatory to the leases and because neither the Indian Mineral Leasing Act of 1938 (IMLA) nor Interior's regulations require adoption of tribe-specific hiring preferences.

This is a *non sequitur*. Neither logic nor authority supports such a cramped reading of Rule 19(a)'s "interest" language. The Secretary's interest in tribe-specific hiring preferences is not so limited. As Peabody shows in its Petition, the solid mineral lease form that the Secretary prescribed for use under the IMLA, *see, e.g.*, 25 C.F.R. § 186.30 (1939); 25 C.F.R. § 171.30 (1965), has required hiring preferences for members of the lessor tribe since as early as 1957. Peabody Pet. at 5, 8. The Secretary did so here when he approved the leases entered into by the Navajo Nation and Peabody in 1964 and 1966. Peabody Pet. at 8. Additionally, Section 3 of the Navajo-Hopi Rehabilitation Act, which the Cross-Petition ignores in analyzing the Secretary's interest, specifically directed the Secretary that "Navajo and Hopi Indians shall be given, whenever practicable, preference in employment on all projects undertaken pursuant to

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[4] If the Secretary has no interest here and accedes to the EEOC's 1988 policy statement on American Indian hiring preferences, then one would expect the Solicitor General to announce in the Cross-Petition this unified position of the United States—disavowing the Secretary's long-standing policy requiring tribe-specific hiring preferences as a violation of Title VII. The Cross-Petition contains no such announcement. The Government seems committed to keeping entities like Peabody who do business on tribal lands under tribal leases caught in the snares of its conflicting policy demands.

this [Act], and, in furtherance of this policy may be given employment on such projects without regard to the provisions of the civil-service and classifications laws." 25 U.S.C. § 633. Even though these tribal mineral leases were issued under the IMLA, the congressional directive in the Rehabilitation Act may certainly inform the Secretary's setting of policy—regarding both employment preferences under the IMLA and coordination of the various statutes that govern economic development on tribal lands—with respect to the conditions he may require where per federal law the Tribe and its lessee have no effective contract absent Secretarial approval.[5]

Nothing about the Secretary's actions concerning tribe-specific employment preferences is accidental. Any doubt about the Secretary's interest in the legality of the preferences is dispelled by the record, as the Court of Appeals expressly held. Former Interior Secretary Stewart Udall, describing his personal involvement in the planning and decision-making that culminated in the Navajo-Peabody mineral leases, testified that these leases "were drafted by the Department of the Interior, and the Department *required* that they each contain a Navajo preference in employment provision." Br.-Opp.-App. 2a–3a (emphasis added). Secretary Udall explained that "requiring Navajo preference in employment for businesses on the Navajo Reservation *was of particular significance to the Department of Interior's lease ap-*

[5] As the Navajo Petition in No. 10-981 notes (at p. 8), the record below established that the Secretary has approved 326 business site leases of Navajo lands containing tribe-specific hiring preferences where Secretarial approval is required by statutes other than the IMLA.

proval function . . . .." *Id.* (emphasis added).[6] The Cross-Petition neither addresses nor contests these facts, which formed a critical part of the Court of Appeals' decision.

The EEOC seeks by this litigation to overturn a major element of federal Indian policy that the Secretary has routinely implemented over the past four decades by requiring tribe-specific hiring preferences as a standard term of Interior-approved leases of tribal land. The Secretary's interest cannot plausibly be denied.

The Cross-Petition also fails to acknowledge that the Solicitor General has previously advised the Court of multiple different grounds on which tribe-specific hiring preferences in leases of tribal land may ultimately be sustained against the EEOC's position. These grounds may be found in statutes, treaties and federal Indian policies largely administered by the Secretary.[7]

b. The Secretary's interest in the enforceability of these preferences will be prejudiced as a practical matter by this action.

Rule 19(a)(1)(B)(i) "recognizes the importance of protecting the person whose joinder is in question against the practical prejudice to him which may

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[6] The Navajo-Peabody leases have since been amended several times—each time with the express approval of the Secretary—but the hiring preferences exist today exactly as they did when first approved in 1964 and 1966. Peabody Pet. at 9.

[7] Brief for EEOC as Amicus Curiae supporting Respondent at 9–10 & n.1, *Salt River Project v. Dawavendewa*, No. 98-1628 (1999); Brief for the Respondent in Opposition at 23 n.7, *Peabody Western Coal Co. v. EEOC*, No. 05-353 (2005) (filed following the Court of Appeals' first decision in this case.)

arise through a disposition of the action in his absence." Fed. R. Civ. P. 19 advisory committee's note (1966). Indeed, the rule's text requires practical—not legal—prejudice, requiring only that disposition of the action in a person's absence "as a practical matter impair or impede" his interest. Fed. R. Civ. P. 19(a)(1)(B)(i).

The Court of Appeals correctly recognized that, as a practical matter, the Secretary's ability to protect his interest in the legality of the lease provisions would be impaired or impeded by this action because, in effect, it "might require the Secretary to modify the terms of leases he approves for entities conducting business on the Navajo reservation." Pet.-App. 19a. Indeed, the EEOC's position in this action is that the Secretary has prescribed and approved—repeatedly, over many years—illegal lease provisions, and that the Secretary himself was directly involved in doing so here. A determination by the District Court that Title VII entitles the EEOC to an injunction against Peabody would necessarily require that court to rule that the tribe-specific employment preference provisions mandated by the Secretary are illegal.[8]

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[8] Contrary to what the EEOC suggests, there is no institutional problem resulting from the Court of Appeals' application of Rule 19(a)(1) in this case. The Court of Appeals did not suggest, and Peabody does not contend, that the Secretary is a required party in every action arising out of conduct undertaken in connection with an Interior-approved lease or contract. Whether joinder is necessary is a fact-specific inquiry. *Cachil Dehe Band of Wintun Indians of the Colusa Indian Cmty. v. California*, 547 F.3d 962, 970 (9th Cir. 2008). Where the EEOC's test case requires that a court decide the legality of a lease term insisted upon by the Secretary in connection with his approval function—a lease term that the record establishes re-

3. The Court of Appeals also correctly concluded that the Secretary is a required party under the alternative criterion of Rule 19(a)(1)(B)(ii), because there is a substantial risk that, if the Secretary is not joined, Peabody and the Navajo Nation would be stuck, as the court expressed it, "between the proverbial rock and a hard place": They would be forced to choose between complying with the mandate of the injunction the EEOC seeks in this action and complying with the tribe-specific employment preference provision mandated by the Secretary in the mineral leases. Pet.-App. 19a.

The Court of Appeals' ruling was premised on its recognition that "[t]he central problem is that Peabody is caught in the middle of a dispute not of its own making," because:

> The Secretary required that [the Navajo employment] preference provision be included in the leases. EEOC seeks damages and an injunction against Peabody, which has complied with the lease terms upon which the Secretary insisted.
>
> . . .
>
> It would be . . . unfair if the district court were to grant an injunction requiring Peabody to disregard the preference provision but leaving the Secretary free, despite the court's holding, to insist that Peabody comply with it.

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flects a strong, long-standing departmental policy—the Secretary is so situated that the action will as a practical matter impair or impede his ability to protect that interest. This is precisely the situation that Rule 19(a)(1) addresses. *See Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1023 (9th Cir. 2002).

Pet.-App. 15a–16a.

The Cross-Petition nowhere challenges this characterization of the core of the EEOC's enforcement action against Peabody. The "substantial risk" that Peabody will be bound to inconsistent obligations as a result of this litigation is obvious—an obligation to adhere to the lease terms' tribe-specific hiring preferences, on the one hand, and an injunction not to adhere to those hiring preferences, on the other. The Court of Appeals held that unless the Secretary can properly be joined, he will not be bound by this case's outcome. Under these circumstances, there is a substantial risk that the Secretary may simply ignore any judgment in the EEOC's favor against Peabody and choose to enforce the leases in their current form. Pet.-App. 19a.

This is "the proverbial rock and a hard place" described by the Court of Appeals, *see* Pet.-App. 19, and it is where Peabody is placed should the EEOC prevail on its claims on remand without joinder of the Secretary. The inconsistent obligations arise immediately in that scenario because the Secretary is authorized to assess penalties against a lessee for any unabated breach of a provision of the lease. *See* 25 C.F.R. § 211.55 (2010). The Secretary promulgated this rule for the express purpose of establishing clear, effective, alternative sanctions for a breach of lease terms under circumstances where it would not be in the best interests of the tribal lessor for the Secretary to cancel the mineral lease. As the Secretary's Bureau of Indian Affairs explained in supplementary information provided with promulgation of the final rule:

> A penalties section in the [BIA] minerals regulations continues to be necessary because the

> only other remedies available to the Secretary for noncompliance with permit requirements or breach of the lease are cessation of operations or cancellation of the lease,[9] either of which may be seen as extreme measures and may cause harm to the interests of the Indian mineral owner.

61 Fed. Reg. 35,634, 35,637 (July 8, 1996) (explaining the penalty rules codified at 25 C.F.R. § 211.55 (tribal mineral leases) and 25 C.F.R. § 212.55 (allotted lands mineral leases)).

The Cross-Petition ignores completely the Secretary's authority to impose penalties as a sanction for breach of any lease provision. In light of these substantial potential monetary penalties, the EEOC's argument (Cross-Pet. at 15–17) that Peabody faces no "substantial risk" of inconsistent obligations because the Secretary is not likely to cancel the leases is wholly beside the point.

The Cross-Petition instead proposes speculative hypotheticals (Cross-Pet. at 14–15) to suggest that the present risk of inconsistent obligations might be resolved in future litigation. But the theoretical possibility of future resolution of these inconsistent obligations does not render Rule 19(a)(1)(B)(ii) inapplicable. On the contrary, it is the actual, present consequences that matter for purposes of the Rule 19

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[9] The "Cancellation and Forfeiture" Article of the two Navajo-Peabody mineral leases grants to the Secretary and the Navajo "the right . . . to declare this lease null and void." Pet.-App. 90a, 95a.

analysis. *See, e.g., Sac & Fox Nation of Mo. v. Norton*, 240 F.3d 1250, 1259 (10th Cir. 2001).[10]

Rule 19 does not require final, adverse and incompatible outcomes binding on Peabody, but simply a "substantial risk" of inconsistent obligations. That risk exists here in the possibility that that the EEOC will prevail on remand and that Peabody will be enjoined from complying with the leases.

* * * *

The Cross-Petition does not raise any substantial question about the correctness of the conclusion of both courts below that the Secretary is a required party in this EEOC effort to have the District Court establish that the EEOC's view of the legality of tribe-specific hiring practices prevails over the Secretary's. The Cross-Petition expresses the fear that "leaving undisturbed the Court of Appeals' [Rule 19] holding . . . would artificially broaden [Petitioners'] Rule 14 question." Cross-Pet. at 9. This has it backwards—Petitioners' Rule 14 question deserves the Court's attention *because* it springs from a correct, unexceptional application of Rule 19. While the Court should consider whether the Court of Appeals properly allowed the EEOC's action to proceed by holding that Peabody (or the Navajo Nation) could

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[10] Moreover, the EEOC's hypothetical that Peabody can, in some other case, bind the Navajo Nation to the judgment the EEOC seeks on remand here also ignores the Navajo Nation's likely assertion of sovereign immunity to bar any such claim *by Peabody* against it. *See, e.g., Dawavendewa v. Salt River Project*, 276 F.3d 1150, 1159–60 (9th Cir.), *cert. denied*, 537 U.S. 820 (2002), and cases cited therein. The Navajo Nation is only a "Rule 19 defendant" in this case because it does not enjoy immunity from suit brought *by the United States* (here solely in the guise of the EEOC).

implead the Secretary under Rule 14, there is no compelling reason to consider the Court of Appeals' conclusion that the Secretary is a party required to be joined if feasible.

CONCLUSION

For these reasons, although Peabody's Petition in No. 10-986 (and the Navajo's Petition in No. 10-981) should be granted to resolve whether the inter-agency conflict at the core of this EEOC enforcement case can be decided by the District Court, the Cross-Petition should be denied.

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