No. 10-____

IN THE

Supreme Court of the United States

NAVAJO NATION,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

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?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings below are plaintiff Equal Employment Opportunity Commission, and defendants Peabody Western Coal Company and the Navajo Nation, also known as the Navajo Tribe of Indians.

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Petitioner Navajo Nation respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinions of the Ninth Circuit for which review is sought are published at 610 F.3d 1070 (Pet. App. 2a - 32a) and 400 F.3d 774 (Pet. App. 67a - 87a). The initial District Court opinion is published at 214 F.R.D. 549 (Pet. App. 88a - 121a), and the opinion of the District Court entered after the first remand (Pet. App. 33a - 66a) is unpublished, but may be found at 2006 WL 2816603.

JURISDICTION

The court of appeals denied rehearing and rehearing en banc on September 1, 2010. See Pet. App. 1a. On November 22, 2010, Justice Kennedy extended the time for filing this Petition to and including January 29, 2011. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS AND RULES

Title VII of the Civil Rights Act of 1964

Title VII provides, in relevant part, that "[i]t shall be an unlawful employment practice for an employer to fail or refuse to hire . . . any individual . . . because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Under Title VII, "[t]he term 'employer' . . . does not include (1) the United States . . . [or] an Indian tribe." 42 U.S.C. § 2000e(b).

In addition, Title VII provides that:

> Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

42 U.S.C. § 2000e-2(i). Title VII also provides that:

> In the case of a respondent which is a government, government agency, or political subdivision, if the [Equal Employment Opportunity] Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no

> further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court.

42 U.S.C. § 2000e-5(f)(1).

Indian Land Leasing Statutes and Regulations

The Indian Mineral Leasing Act of 1938 ("IMLA"), 25 U.S.C. §§ 396a-396g, provides in relevant part that:

> unallotted lands within any Indian reservation . . . may, with the approval of the Secretary of the Interior, be leased for mining purposes, by authority of the tribal counsel . . . .

25 U.S.C. § 396a.

The Navajo and Hopi Rehabilitation Act of 1950, 25 U.S.C. §§ 631-638, provides in relevant part that:

> Navajo and Hopi Indians shall be given, whenever practicable, preference in employment on all projects undertaken pursuant to this subchapter, and, in furtherance of this policy may be given employment on such projects without regard to the provisions of the civil-service and classification laws. . . .

25 U.S.C. § 633. The Rehabilitation Act also provides that:

> Any restricted Indian lands owned by the Navajo Tribe . . . may be leased by the Indian owners, with the approval of the Secretary of the Interior, for public . . . or business purposes, including the development or utilization of natural resources in connection with operations under such leases. All leases so granted . . . shall be made under

> such regulations as may be prescribed by the Secretary. . . .

25 U.S.C. § 635(a).

Regulations promulgated by the Secretary under the IMLA have required at all relevant times that "[l]eases . . . shall be on forms prescribed by the Secretary of the Interior or his authorized representative . . . ." 24 Fed. Reg. 7949 (1959) (promulgating 25 C.F.R. § 172.3 (1965)); 25 C.F.R. § 211.57 (2010).

Regulations promulgated by the Secretary under the Rehabilitation Act have also required that "[a]ll leases made pursuant to the regulations in this part shall be in the form approved by the Secretary and subject to his written approval." 25 C.F.R. § 131.5(a) (1960); 25 C.F.R. § 162.604(a) (2010).

Federal Rules of Civil Procedure

Rule 14, Fed. R. Civ. P., provides in relevant part:

> (a) **When a Defending Party May Bring in a Third Party**.
>
> (1) Timing of the Summons and Complaint. A defending party may, as a third-party plaintiff, serve a summons and complaint on a nonparty who is or may be liable to it for all or part of the claim against it. . . .

Rule 19, Fed. R. Civ. P., provides in relevant part:

> (a) **Persons Required to be Joined if Feasible.**
>
> (1) **Required Party.**
>
> A person . . . whose joinder will not deprive the court of subject matter jurisdiction must be joined as a party if:

(A) in that person's absence, the court cannot accord complete relief among existing parties; or

(B) 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 the person's ability to protect that interest; or

(ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

* * *

(b) **When Joinder Is Not Feasible.**

If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include:

(1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;

(2) the extent to which any prejudice could be lessened or avoided by:

(A) protective provisions in the judgment;

(B) shaping the relief; or

(C) other measures;

(3) whether a judgment rendered in the person's absence would be adequate; and

(4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

STATEMENT OF THE CASE

Introduction

The EEOC sued Peabody in 2001, alleging that Peabody's compliance with provisions of two coal leases with the Navajo Nation requiring Peabody to employ qualified Navajo workers violates Title VII. Those leases were drafted, negotiated and approved under the personal supervision of the Secretary of the Interior. Title VII does not authorize the EEOC to sue the Department of the Interior or the Navajo Nation, reserving that authority to the Attorney General.

The District Court dismissed the suit. In two opinions, the District Court held that the EEOC's action could not proceed in the absence of either the Navajo Nation or the Secretary, neither of which EEOC could lawfully join under Title VII. The Ninth Circuit reversed both judgments, with unprecedented applications of Rules 14 and 19 of the Federal Rules of Civil Procedure. First, it held that the EEOC could sue the Navajo Nation under Rule 19 so long as the EEOC's complaint did not expressly seek "affirmative relief" against the Nation. Second, it held that either the Navajo Nation or Peabody could be permitted or required to cure the EEOC's inability under Rule 19 to join the Secretary by impleading the Secretary under Rule 14 and asserting a claim against the Secretary under the Administrative Procedures Act ("APA").

In part in recognition of the contributions of Navajo soldiers and Code-Talkers in World War II, Congress addressed the Navajo situation in the late 1940s. The Department of the Interior reported in 1948 that the median education level of the Navajo people was one year, the Navajo people were living in abject poverty, and there were virtually no roads, utilities, hospitals, or jobs on the reservation. *See, e.g.*, H.R. Rep. No. 81-963 (1949); S. Rep. No. 81-550 (1949). Congress provided for Navajo-specific employment preferences in a specific airport project on land of the State of Utah near the Navajo Reservation in the Act of Sept. 7, 1949, Pub. L. 302, 63 Stat. 695. The next year, Congress accepted the Department's recommendation and more generally provided for Navajo-specific and Hopi-specific employment preferences in the Navajo and Hopi Rehabilitation Act of 1950. *See* 25 U.S.C. § 633.

Both the Rehabilitation Act and the Indian Mineral Leasing Act of 1938 ("IMLA") provide that leases under those laws must be approved by the Secretary. 25 U.S.C. §§ 396a; 635(a). Both laws permit the Secretary to promulgate regulations governing leasing of Navajo lands. 25 U.S.C. §§ 396d; 635(a). The Secretary's regulations under those laws have required that leases be made on forms provided by the Secretary. 24 Fed. Reg. 7949 (1959) (promulgating 25 C.F.R. § 172.30 (1965)), 211.57 (2010) (IMLA); 131.5(a) (1962), 162.604(a) (2010) (Rehabilitation Act). Those form leases, in turn, have required lessees to prefer qualified workers in hiring decisions on a tribe-specific basis. *See, e.g.*, Peter C. Maxfield, *et al.*, *Natural Resources Law on American Indian Lands* (1977) App. A at 277, Pet. App. 124a (form

prospecting permit requiring tribe-specific employment preference), 288, Pet. App. 127a (form mineral lease requiring same).

Peabody's Reservation leases each include a Navajo employment preference requirement. Pet. App. 39a-40a, 128a, 130a. The leases are "an important part of the program to rehabilitate the Navajo Tribe" under the Rehabilitation Act. *See United States v. Navajo Nation*, 556 U.S. ___, ___, 129 S. Ct. 1547, 1556 (2009). They were approved by the Interior Department in 1964 and 1966. Pet. App. 129a, 131a. The drafting and negotiation of those leases were undertaken by the Department under the direct and active supervision of then Secretary Stewart Udall. Udall testified that, although he did not attend every meeting among his staff, Peabody and the Tribe, "[w]hen it got to a crunch where the decision had to be made, I made the decision. I insisted on that." Depo. Tr. 24 (Jul. 6, 2006). Udall explained the employment preference provision in the Peabody lease, stating "if you combine the Navajo and Hopi land, you have an area which is now as large as New Jersey; and the resources they had were very important. And the concept that if jobs were created relating to the resources of the tribes, that in this huge area, the employment preference would be very important and was very important." *Id*. at 43. Udall recalled *no* Navajo lease that did not include a Navajo-specific employment preference. *Id*. at 45-46.

Udall's recollection was accurate. The undisputed record shows that every one of the 326 business site leases approved by the Department to this very day includes a Navajo-specific employment preference requirement. Nonetheless, the Navajo unemployment rate is still a staggering 48%.

After passage of Title VII, the Department of Labor in 1973 examined the question of whether Navajo-specific preferences were compatible with Title VII. The conclusion of the Department of Labor is that "the Indian preference provision of Title VII . . . [allows the Navajo Nation to] legally append bid conditions of its own on federally-assisted construction contracts which impose upon the contractors a burden of hiring an all or predominantly Navajo work force" and "there is no objection to even stronger language requiring employment of Navajos to the maximum extent of their availability." Pet. App. 133a.

A second federal agency, the United States Commission on Civil Rights, examined that same issue in 1975. The Commission observed that the Navajo preference requirement in tribal leases was "approved by the Solicitor's Office of the Department of Labor as being in accord with Title VII" and it recommended that the Bureau of Indian Affairs "demonstrat[e] that the full authority of the Federal Government stands behind enforcement of the Navajo preference clause in tribal contracts" and in other contracts involving reservation activities. U. S. Comm'n on Civil Rights, *The Navajo Nation: An American Colony* (1975) at 49, 126, 135. Pet. App. 137a-139a.

The 1868 treaty between the United States and the Tribe affirms the Navajo Nation's ability to exclude others (except federal officials) and condition their entry. 15 Stat. at 668; *see Williams v. Lee*, 358 U.S. 217, 221, 223 (1959); *see generally Worcester v. Georgia*, 31 U.S. 515, 561 (1832); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 159 (1982). That Treaty "was meant to establish the lands as within the

exclusive sovereignty of the Navajos under general federal supervision." *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 175 (1973). Under that supervision, the Navajo Nation Council passed a law in 1970 that conditions the entry and continued presence of those doing business on the Reservation on compliance with their federally approved leases and with other Navajo laws. *See* 5 N.N.C. § 403 (2005).[1] Those laws include the Navajo Preference in Employment Act ("NPEA") including its federally approved provision requiring Navajo hiring preference, 15 N.N.C. § 604(A)(1).[2]

Prior Proceedings

1. The EEOC sued Peabody in 2001, claiming that Peabody violated Title VII by giving hiring preference to qualified Navajo workers on the Navajo Reservation and seeking damages and injunctive relief. The EEOC alleged that Peabody's actions constituted prohibited discrimination on the basis of "national origin."[3] Compl.1. Peabody is obliged to prefer quali-

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[1] "The grant of the privilege of doing business within the Navajo Nation . . . is conditioned upon the business' compliance with the applicable laws of the Navajo Nation and upon the continuing effect or validity of prior leases . . . authorizing the business to enter upon lands subject to the jurisdiction of the Navajo Nation." 5 N.N.C. § 403 (2005)

[2] "All employers doing business within the territorial jurisdiction . . . of the Navajo Nation . . . shall: (1) Give preference in employment to Navajos." 15 N.N.C. § 604(A)(1) (2005).

[3] But see Morton v. Mancari, 417 U.S. 535 (1974) (federal Indian hiring preferences are permissible because they are based on political, not racial, distinctions). The employment preference here is properly viewed as a political distinction because it is required in a lease of tribal trust property executed by the Navajo Nation as a dependent sovereign with the

fied Navajo workers for two reasons. First, its federally approved coal leases on the Navajo Reservation require such preference. Pet. App. 128a, 130a. Second, Navajo employment law conditions the Navajo Nation's assent to Peabody's continued presence on the Reservation both on its compliance with the leases and on its adherence to the NPEA, including its federally approved, Navajo-specific hiring preference requirement.

Peabody moved to dismiss, arguing, among other things, that the suit was a thinly veiled suit against the Navajo Nation that the EEOC was prohibited from bringing directly. In response, the EEOC moved to join the Navajo Nation as a defendant under Rule 19 and requested that the District Court "order the Navajo Nation to appear and defend any interests it believes may be affected by this litigation." Pet. App. 105a. The District Court recognized that the Navajo interests are substantial, because the EEOC itself "characterizes [its] lawsuit as litigation over 'the validity of [the Navajo Nation's] discriminatory lease provision and employment preference provisions . . . [and] the interplay between its tribal sovereignty and Title VII.'" *Id*. (quoting EEOC's Opp. to Dismissal at 4).

The District Court held that the EEOC could not employ Rule 19 to avoid Title VII's preclusion of suits by EEOC against governments. "The Attorney General clearly has exclusive authority to file suit whenever a government such as an Indian tribe is involved." Pet. App. 108a (citing 42 U.S.C. 2000e-5(f)(1), (2); id. § 2000e-8(c)). The District Court found

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approval of its federal trustee and in accordance with a tribal law limited in scope to the tribal territory.

persuasive decisions of other federal courts rejecting similar attempts by the EEOC to invoke "joinder" to circumvent Title VII's prohibition of suits by the EEOC against government entities. *Id*. at 109a-111a. The District Court explained:

> The EEOC in effect is seeking to sue the Navajo Nation to force it to defend the Navajo Preference in Employment Act and its contracts with employers working on its lands, when it is prohibited from suing the Navajo Nation to enforce Title VII provisions against the tribe directly. This is contrary to the clear provisions of Title VII prohibiting the EEOC from suing governments, and specifically exempting the Indian tribes from its provisions.

Id. 108a-109a.

The District Court examined the Navajo Nation's interests, concluded it was an indispensable party and dismissed the EEOC's complaint because the Navajo Nation could not be joined by the EEOC. *Id.* at 111a-112a.

2. On the EEOC's appeal, the Ninth Circuit reversed. The Court of Appeals agreed with the District Court that the Navajo Nation is a necessary party under Rule 19. *Id.* 73a. It recognized that the Navajo Nation is a signatory to lease provisions that the EEOC challenges under Title VII. *Id.* 76a. The Court of Appeals recognized that the suit is essentially a challenge to provisions of the leases between Peabody and the Navajo Nation that require Navajo-specific hiring preferences. Pet. App. 68a-69a, 76a. The Court of Appeals accordingly agreed that suit could not proceed without the Tribe's presence. *Id*. 77a.

The Court of Appeals did not doubt that, through the provisions of Title VII exempting tribes from the definition of "employer" and providing that only the Attorney General could bring suits involving governments, Congress had prohibited the EEOC from suing the Navajo Nation. Pet. App. 78a. Nonetheless, the panel rejected the District Court's conclusion that the Nation could not be sued by the EEOC under Rule 19 and held that, so long as the EEOC does not seek affirmative relief from the Nation, "joinder . . . is not prevented by the fact that the EEOC cannot state a cause of action against [the Nation]." *Id.* 73a. It ruled that the case was controlled by the Circuit's prior construction of Rule 19 under which "a plaintiff's inability to state a direct cause of action against an absentee does not prevent the absentee's joinder under Rule 19." *Id.* 78a-79a (citing cases).

The Court of Appeals acknowledged that its holding, while assertedly consistent with decisions of the First, Sixth, and Tenth Circuits, was contrary to holdings of the D.C. and Fifth Circuits, with which the Ninth Circuit "has never agreed." Pet. App. 80a (citing *Vieux Carre Prop. Owners v. Brown*, 875 F.2d 453, 457 (5th Cir. 1989) ("it is implicit in Rule 19(a) itself that before a party . . . will be joined as a defendant the plaintiff must have a cause of action against it."), *cert. denied*, 493 U.S. 1020 (1990); *accord Davenport v. Int'l Bhd. of Teamsters, AFL-CIO*, 166 F.3d 356, 366 (D.C. Cir. 1999) (adopting *Vieux Carre*)).

3. After this Court denied Peabody's Petition for Certiorari (No. 05-353), the EEOC amended its complaint to add the Navajo Nation as a defendant. It continued to seek damages against Peabody and an injunction against Peabody "and all persons in active

concert or participation with it from engaging in discrimination on the basis of national origin." Am. Compl. 4.

The Navajo Nation moved to dismiss. Among other grounds, the Nation argued that the amended complaint did in fact seek affirmative relief from the Nation as a person acting in concert or participating with Peabody respecting the leases, and also that the suit could not proceed without the joinder of the Secretary of the Interior whose interests in the suit were substantial but whom the EEOC was statutorily precluded from joining.

The District Court agreed that the EEOC's amended complaint did indeed seek affirmative relief against the Nation. "[T]here can be no doubt that the Navajo Nation falls within the scope of affirmative relief sought by the EEOC. . . . Should the EEOC prevail in this suit and obtain the broad relief sought, the Navajo Nation would then be enjoined from implementing and requiring such lease provisions in the future" . . . . [T]here can be little doubt that the EEOC seeks affirmative relief not only against Peabody Coal but the Navajo Nation as well." Pet. App. 46a.

The District Court observed that the leases provide for Secretarial cancellation if breached by Peabody, found that the Peabody leases were drafted by the Department of Interior, approved by the Secretary of Interior and required that each lease contain a Navajo preference in employment provision, and acknowledged that the Secretary played and plays a similar role in other leases between the Navajo Nation and private business entities. Pet. App. 41a. For these and other reasons, the District Court found that the Secretary at the very least claims an interest

in this litigation. *Id*. 58a-60a. The District Court analyzed all of the Rule 19 factors and emphasized that "no procedural principle is more deeply imbedded in the common law than that, in an action to set aside a lease or contract, all parties who may be affected by the determination of the action are indispensable." *Id*. 59a. The court observed that any judgment in favor of the EEOC would impact not only the Peabody leases but also similar provisions in other leases among the Secretary, the Navajo Nation, and private non-Navajo businesses governed by or seeking lease agreements on the Reservation that require both Navajo and Secretarial approval. *Id*. 41a, 60a. It ruled that the EEOC is statutorily barred from suing federal agencies under Title VII, *id*. 62a, a proposition that the EEOC has never challenged.

All of the Rule 19 factors favored dismissal except the lack of an alternative forum. *See* Pet. App. 63a-65a. In this respect, the District Court ruled that, because of the importance of federal sovereign immunity, there was little need for additional balancing and dismissed for the EEOC's inability to join the Secretary. *Id*. 65a.

4. The Court of Appeals again reversed. First, the Ninth Circuit ruled that the prayer for relief implicating Navajo rights was mere boilerplate and, even if it were properly read as requesting affirmative relief against the Nation, the proper response of the District Court would be to deny the relief rather than dismiss the suit. Pet. App. 16a.

Second, the Court of Appeals agreed with the District Court that the Secretary is a required party under Rule 19. *Id*. 18a-20a. It also agreed that the Secretary has an interest in the subject matter of the

action, because, among other things, the Secretary has an interest in defending the legality of the lease provisions requiring Navajo hiring preferences. *Id*. 20a. It accepted that most "deeply imbedded" principle that, in an action to set aside a lease, all parties who may be affected by the decision are indispensable. *Id*. It had no difficulty finding that the Secretary was such a party because he mandated the challenged lease provisions, continues to exercise oversight over the leases, and has a well established interest in a lawsuit that could result in the invalidation of one of his regulations or practices. *Id*. 20a-22a.

The Court of Appeals *also* agreed that Title VII prohibits the EEOC from joining the Secretary and that only the Attorney General has the power to bring such a suit. *Id*. 22a. Indeed, it understood that "the Attorney General either has refused or will refuse" to do so. *Id*.

But instead of affirming the dismissal for the EEOC's failure and inability to join the Secretary as an indispensable party, the Court of Appeals assigned to the *defendants* the task of curing the EEOC's inability to join all proper parties by an unprecedented use of Rule 14. Recognizing that there was no waiver of federal sovereign immunity in the District Court for money damages that might be sought against the Government by either Peabody or the Navajo Nation, the Ninth Circuit ruled that the EEOC could not seek damages from either Peabody or the Navajo Nation. Pet. App. 23a-25a. By removing a possible damages remedy in favor of the EEOC, the Circuit assured that its ruling would not permit either the Navajo Nation or Peabody to seek money from the Secretary through impleader,

which could have deprived the District Court of jurisdiction over the claim. *Id*. 24a-25a.

The Court of Appeals based its decision on a presumption that either Peabody or the Navajo Nation would implead the Secretary and state a claim under the Administrative Procedures Act ("APA"). *Id*. 25a-29a. It did so without any briefing of the issue by the parties.[4] Now, with the EEOC's claim for damages off the table, Peabody's incentive to expend more resources for this litigation will be dramatically reduced. That leaves the EEOC to litigate primarily against the Secretary and the Navajo Nation, two parties that Congress has precluded the EEOC from suing.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's Rule 14 ruling is a direct affront to federal sovereign immunity and it is contrary to decisions of this Court and of other circuits. The applicable statute expressly precludes the plaintiff from suing a federal agency and does not confer a right of contribution. But, now, a defendant in the Ninth Circuit may be permitted or compelled to hail that agency into court under Rule 14 so that the plaintiff can challenge the agency's regulations or any actions based on these regulations.

The Ninth Circuit's ruling presents a square circuit conflict regarding the use of Rule 19, conflicts with this Court's decisions and decisions of other circuits holding that tribal sovereign immunity protects

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[4] The EEOC mentioned the issue without citation to authority only in one sentence and a footnote in its Reply Brief, saying that Peabody could assert a "cross-claim" under Rule 14 against the Secretary. EEOC Reply Br., *EEOC v. Peabody Western Coal Co*., No. 06-17261 (9th Cir. filed Oct. 26, 2007) at 23 & n.17.

tribes not just from adverse judgments but from the considerable expense of suit, and upsets the careful balance of authority and prerogatives Congress established among the EEOC, the Attorney General, and tribal and other government entities. The Ninth Circuit's ruling in this case also has significant nationwide energy implications, since the tribe-specific preferences have been mandated by the Secretary in his form mineral leases since 1957 at the latest and were material inducements for the tribes to enter mineral leases and pipeline right-of-way agreements that endure to this day.

Certiorari should be granted to resolve the circuit conflicts, conform the Ninth Circuit's decision to the unambiguous precedents of this Court, and restore the allocation of authority between the EEOC and the Attorney General that Congress provided in Title VII.

I. THE NINTH CIRCUIT'S RULE 14 DECISION IMPROPERLY ABROGATES FEDERAL SOVEREIGN IMMUNITY, CONFLICTS WITH THIS COURT'S PRECEDENTS, AND CREATES A CLEAR CIRCUIT CONFLICT.

A. The Decision Below Subverts Federal Sovereign Immunity.

A basic principle of federal law is that the Federal Government cannot be sued without its consent. *Navajo Nation*, 129 S.Ct. at 1551. A well established corollary to that principle is that procedural rules may not be manipulated to chip away at federal sovereign immunity. This was made clear in three opinions of this Court handed down shortly after the adoption of the modern rules of procedure. *See*

United States v. Sherwood, 312 U.S. 584 (1941) (Rule 17 is not properly applied to authorize suit against United States); *United States v. United States Fid. & Guar. Co.* ("*USF&G*"), 309 U.S. 506, 512, 512-13 (1940) (rule permitting cross claims in federal courts did not abrogate federal sovereign immunity where an act of Congress provided that such cross claims could be asserted only in courts in the Indian Territory); *United States v. Shaw*, 309 U.S. 495, 502 (1940) (court rule permitting cross claim cannot abrogate federal sovereign immunity).

Sovereign immunity is not just immunity from an adverse judgment; it is freedom from having to participate in discovery, motion practice, and other litigation demands. *See Shaw*, 309 U.S. at 501 (sovereign immunity is based on considerations of dignity and decorum, and on the need of government officials to "operate undisturbed by the demands of litigants"); *see also Harlow v. Fitzgerald*, 457 U.S. 800, 816-17 & n.29 (1982) (explaining rationale for allowing interlocutory appeal of rejection of defense of official immunity). The Ninth Circuit's ruling will not only permit Peabody, if it is so inclined, to litigate the issue of the employment preference with the Secretary, but also to raise any other claim it may have against the Secretary under Rule 18(a).[5] If the Ninth Circuit's ruling is allowed to stand, the Department of the Interior will be required to spend significant resources to defend its leases and policies. The Navajo Nation has already expended over $300,000 in attorney fees and costs in defending its

[5] "A party asserting a . . . third-party claim may join, as independent or alternative claims, as many claims as it has against an opposing party." *Fed. R. Civ. P. 18(a)*.

leases and its laws since being sued by the EEOC as a "Rule 19 defendant."

The Ninth Circuit's ruling has broad ramifications. Its ruling is based on the apparent inequity of exposing Peabody to liability when its actions are dictated by regulations of and lease terms mandated by a government agency, the Department of the Interior. According to the Ninth Circuit, Peabody is between "a rock and a hard place." Pet. App. 21a. Under these circumstances, the Ninth Circuit held that Peabody may implead the United States under Rule 14 so that complete relief may be effected. *See id*. 18a; *but see USF&G*, 309 U.S. at 513 ("The desirability for complete settlement of all issues between parties must, we think, yield to the principle of immunity."); *Shaw*, 309 U.S. at 502 ("principle of a single adjudication" does not overcome federal sovereign immunity so as to permit cross-claim).

Under the Ninth's Circuit's interpretation of Rule 14, defendants will routinely seek to implead the United States when a federal regulation or action arguably motivated the conduct alleged to have harmed a plaintiff. An early Title VII case illustrates the point. In *Malone v. United States*, 581 F.2d 582 (6th Cir. 1978), *cert. denied*, 439 U.S. 1128 (1979), a trucking company called "Shippers" was sued when one of its trucks collided with a car and killed the car's driver. Shippers claimed that its position was "passive, secondary and involuntary to the active, primary and mandatory position of third party defendant, United States of America" because Shippers had entered into an agreement with the EEOC and the Department of Justice requiring Shippers to hire minority drivers whose qualifications were assertedly less demanding than Shippers' previous

ones. *Id*. at 583. Shippers claimed it was "compelled to hire . . . the black truck driver involved in the accident under the affirmative action program and [it sued] the government . . . on the theory that it would not have hired the black truck driver if the consent decree had not required it to 'lower its standards.'" *Id*. The Sixth Circuit properly affirmed the dismissal of Shippers' third-party complaint. But the Ninth Circuit's novel Rule 14 interpretation would allow such a plaintiff to implead the Government for allegedly imposing particular terms of an agreement to which that plaintiff was bound.

Similarly, under the Ninth Circuit's ruling, if a Government agency, by regulation or agreement, requires the installation of particular technology and that technology fails, a company sued for the consequences of such failure would be able to implead the United States seeking contribution or invalidation of the regulation or agreement. Because of the ubiquitous involvement of federal agencies in commerce, the Government's exposure to litigation under the Ninth Circuit's ruling is virtually limitless.

B. Permitting or Mandating Impleader in a Title VII Case Conflicts Directly with Supreme Court Precedent.

The Ninth Circuit held that the Navajo Nation or Peabody may (or may be required to) implead the United States in a Title VII action under Rule 14 so that the merits could be decided with all interested parties present and accounted for. But impleader is proper only if the federal statute on which the main claim is based confers a right of contribution. *Texas Indus., Inc. v. Radcliff Mat'ls, Inc*., 451 U.S. 630 (1981). Title VII, the only statute the EEOC seeks to enforce, does not confer a right of contribution.

Northwest Airlines, Inc. v. Transport Workers U. of Am., 451 U.S. 77, 90-99 (1981). The Ninth Circuit's holding contravenes these clear precedents. Indeed, having taken a damages remedy off the table, the Ninth Circuit transformed Rule 14 from a rule focused on contribution and indemnity into a sort of equitable interpleader rule.

C. Review Is Required to Resolve Conflicts Among the Circuits on the Rule 14 Issue.

Peabody was and is subject to regulations promulgated by the Secretary. Those regulations required, and still require, Peabody and other mineral lessees on Indian lands to use the Secretary's form leases. Those leases, in turn, require Peabody and others to agree to and abide by tribe-specific employment preferences. The Ninth Circuit held that Peabody could implead the Secretary in a case challenging Peabody's compliance with the Secretary's regulations and the lease contract that incorporates them.

The Ninth Circuit stands alone in this respect. Judge Posner put it concisely in a case where a defendant attempted to implead a federal agency to support its defense in a suit on a contract that incorporated an FCC regulation: "we have never heard of a case where a defendant who interposed a defense based on a law or regulation was allowed to implead the enacting body." *City of Peoria v. General Elec. Cablevision Corp.*, 690 F.2d 116, 119 (7th Cir. 1982) (affirming dismissal of third-party complaint against Federal Communications Commission, whose regulation was incorporated in a disputed contract). The Sixth Circuit has also ruled contrary to the Ninth in this case. *Malone*, 581 F.2d 582, discussed *supra* at 20-21. Similarly, the Fifth Circuit, in *Southeast Mort-*

gage Co. v. Mullins, 514 F.2d 747 (5th Cir. 1975), affirmed the dismissal of a third-party complaint against the Department of Housing and Urban Development notwithstanding the contention that HUD's failure to enforce regulations caused the harm alleged by plaintiff. The position of the Sixth Circuit in *Malone*, disallowing impleader of an alleged "coercer" of a Title VII violation, comports with the principal purpose of Title VII; the ruling of the Ninth Circuit below does not. "Disallowing a cause of action over against the alleged coercer of a Title VII . . . violation in no way impairs the Act's principal purpose of discouraging discrimination by the employer; in fact, it is arguably *necessary* for that purpose, since an employer confident of recovering for coercion will be more likely to yield to it." *Carter v. Director, Office of Workers' Comp. Prog., Dep't of Labor*, 751 F.2d 1398, 1402 (D.C. Cir. 1985) (Scalia, J.)(emphasis in original).

More generally, the other circuits, following *Northwest Airlines*, reject attempts to implead third parties in Title VII cases, again contrary to the decision below. *E.g., Atchley v. Nordam Group, Inc.*, 180 F.3d 1143, 1152 (10th Cir. 1999); *Scott v. PPG Indus., Inc.*, 920 F.2d 927, 1990 WL 200655 (4th Cir. 1990) (unpublished).

Finally, if the Navajo Nation and Peabody decide not to implead the Secretary, the case will have to be dismissed because the Secretary is a required party who must but cannot otherwise be joined. *See* Pet. App. 19a-22a.[6] Unless the Ninth Circuit's decision is

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[6] The Navajo Nation has no intention of impleading its trustee for its insistence on lease terms favoring Navajo workers, notwithstanding the Ninth Circuit's curious aside that the Nation "would quite reasonably want to seek prospective relief

to be a vain act, the District Court would be required to *order* Peabody or the Navajo Nation to implead the Secretary, in violation of a central tenet of Rule 14. Rule 14(a) provides that a defending party "may" implead a non-party who may be liable for all or part of a claim against it; Rule 14 claims are therefore "permissive and not compulsory." 3 *Moore's Federal Practice* § 14.03[3] at p. 14-13 (3d ed. 2010). If the Ninth Circuit's decision is properly read as requiring either Peabody or the Navajo Nation to implead the Secretary so that the EEOC's inability to join the Secretary is cured, this, too, is inconsistent with cases decided by the other federal courts of appeal regarding the voluntary use of Rule 14. *See, e.g., Fernandez v. Corporacion Insular de Seguros*, 79 F.3d 207, 210 (1st Cir. 1996); *City of Gretna v. Defense Plant Corp.*, 159 F.2d 412, 413 (5th Cir. 1947); *see also Mennen Co. v. Atlantic Mut. Ins. Co.*, No. CIV 93-5273 (WGB), 1996 WL 257147 at *5 (D.N.J. Jan. 29, 1996) (courts may not compel defendants to implead indispensable third party; using Rule 19 principles to augment Rule 14 "would undermine the system of impleader set forth in Federal Rule of Civil Procedure 14(a)"), *aff'd*, 147 F.3d 287 (3d Cir. 1998); *Jerez v. Cooper Indus., Inc.*, No. CIV 10119 NRB, 2003 WL 22126893 (S.D.N.Y. Sept. 12, 2003) (Rule 19 provides no authority for a plaintiff to compel a defendant to implead under Rule 14 a non-party whom plaintiff could not join).

The Ninth Circuit's application of Rule 14 is creative, "but the fact that [it was] dealing with an issue of sovereign immunity makes such an exercise in creativity inappropriate." *Hillier v. Southern*

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preventing the Secretary from enforcing the [employment preference] provision." Pet. App. 25a.

Towing Co., 714 F.2d 714, 722 (7th Cir. 1983) (rejecting Rule 14 claim against Government where it had breached no legal duty owed to plaintiff) (Posner, J.). And the likelihood that parties will collude to mount a stale and/or collateral attack on a government regulation cannot be discounted. *See Owen Equip. and Erection Co. v. Kroger*, 437 U.S. 365 (1978) (rejecting attempt to use Rule 14 to evade requirement of complete diversity); *City of Peoria*, *supra*.

This Court should therefore grant the Petition, conform the Court of Appeal's decision to this Court's precedents, and resolve the conflict between the Ninth Circuit and the other courts of appeals.

II. THE NINTH CIRCUIT'S RULE 19 DECISION CREATES A CLEAR CIRCUIT CONFLICT AND UNDERMINES TRIBAL SOVEREIGN IMMUNITY CONTRARY TO THIS COURT'S DECISIONS.

A. The Ninth Circuit's Rule 19 Holding Conflicts with Rulings of Other Circuits.

The Ninth Circuit ruled that a plaintiff may join a party to an action under Rule 19 even when no claim may be stated against that party and even if Congress explicitly precluded the plaintiff from suing the absent party. Pet App. 78a-79a. The Ninth Circuit recognized that its holding is contrary to precedent of both the Fifth and D.C. Circuits. *Id*. 80a-81a.

Vieux Carre, 875 F.2d 453, is indeed directly contrary to the ruling of the Ninth Circuit. In *Vieux Carre*, the plaintiffs were attempting to block developers from undertaking a park project. The plaintiffs

posited that, under the federal Rivers and Harbors Act ("RHA"), the project required prior clearance from the Army Corps of Engineers. The plaintiffs sued both the developers and the Corps, relying on the APA.

The Fifth Circuit recognized that the APA provided a "route through which private plaintiffs can obtain federal court review of the decisions of federal agencies" alleged to be violating the RHA. 875 F.2d at 456. But the APA provided no such way for adjudicating the private developers' compliance with the RHA. *Id*. And the plaintiffs could not sue the developers directly under the RHA because there was no private right of action under the RHA. *Id*.

So the plaintiffs contended that the developers could properly be joined under Rule 19 in their APA suit against the Corps, and thereby be subject to an adjudication under the RHA even though Congress had precluded the plaintiffs from achieving this result directly. *See* 875 F.2d at 456-57. The Fifth Circuit rejected that argument for two reasons, both applicable to this case. First, the court held that Rule 19 could not be used to circumvent Congress' determination to authorize only the Attorney General to bring suits to enforce the RHA against developers. *Id*. at 457. Second, and more generally, the Fifth Circuit in *Vieux Carre* held that "it is implicit in Rule 19(a) itself that . . . before [a party] will be joined as a defendant the plaintiff must have a cause of action against it." 875 F.2d at 457.

The Fifth Circuit unquestionably would reject the Ninth Circuit's ruling in this case. It pointedly refused to follow the Tenth Circuit's decision in *Sierra Club v. Hodel*, 848 F.2d 1068 (10th Cir. 1988), which the decision below embraces. Pet. App. 79a.

As shown below, the Ninth Circuit in this case ruled quite the opposite to *Vieux Carre*, allowing the EEOC to sue the Navajo Nation even though the EEOC cannot state a claim directly against the Nation and even though Title VII expressly allows only the Attorney General to sue tribes. Pet. App. 22a.

The Ninth Circuit's Rule 19 holding also conflicts with D.C. Circuit precedent. In *Davenport*, 166 F.3d 356, the D.C. Circuit embraced *Vieux Carre*. In *Davenport*, flight attendants sued their union alleging that the union had violated federal labor laws by entering into an interim labor agreement with an airline. The plaintiffs contended that they could bring the airline into the suit using Rule 19. The court rejected that contention. It did not dispute that the airline was a "necessary party" because the airline was a signatory to the agreement with the union. But the D.C. Circuit noted that the airline had not violated any labor law, and it adopted the Fifth Circuit's view that "while Rule 19 provides for joinder of necessary parties, it does not create a cause of action against them." *Id*. at 366.

The Seventh Circuit, moreover, has observed that the EEOC may not join a governmental agency under Rule 19 in a case against a union that had an agreement with the agency, because only the Attorney General may sue a governmental body under Title VII. *EEOC v. Elgin Teachers Ass'n*, 27 F.3d 292, 293 (7th Cir. 1994) (citing *EEOC v. Elgin Teachers Ass'n*, 45 Fair Empl. Prac. Cas. 446, 1986 WL 68560 (N.D. Ill. 1986)). Indeed, courts in the Seventh Circuit have imposed sanctions on the EEOC for its attempt to use Rule 19 to expand its substantive rights over governmental entities contrary to Title VII. In *EEOC v. American Fed. of Teachers*, Loc. 571

("*AFT*"), 761 F.Supp. 536 (N.D. Ill. 1991), the EEOC filed a complaint against a union and School District no. 205, a governmental entity. The EEOC's complaint "did not allege any claims against, or request any relief from, District 205. Rather, the EEOC named District 205 as a defendant, on the grounds that the school district was a 'necessary party' under *Fed. R. Civ. P.* 19." *Id*. at 537 (footnote omitted). Rejecting EEOC's argument that, in essence, "Congress intended to preclude the EEOC from suing governmental entities for some purposes but not for others," *id*. at 539, the court imposed sanctions of $14,209.50 in attorney fees against the EEOC for its frivolous joinder of the school district, *id*. at 542. The court relied on the fact that the EEOC persisted in its Rule 19 ploy even after it had been squarely rejected in two earlier decisions. *Id*. at 540. The EEOC's allegations regarding the Navajo Nation are no different in substance than those which earned the EEOC sanctions in *AFT*. The EEOC has finally found a court, the Ninth Circuit, that will allow it to sue a government agency.

The circuit conflict over the application of Rule 19 is longstanding and intractable. This Court is respectfully urged to resolve that conflict.

B. The Decision Impermissibly Abrogates Tribal Sovereign Immunity Contrary to Title VII and this Court's Decisions.

Tribal sovereign immunity is an important tribal and federal concern. Abrogation of tribal sovereign immunity by implication is inconsistent with the congressional goal of protecting tribal self-government. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 64 (1978). Tribal self-sufficiency and economic development are surely important federal interests served by tribal

sovereign immunity. *See Oklahoma Tax Comm'n v. Citizen Band Potawatomi indian Tribe*, 498 U.S. 505, 510 (1991).

The Navajo Nation is a "domestic dependent nation." *See Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831). "Being a domestic and dependent state, the United States may authorize suit to be brought against [a tribe]. But, for obvious reasons, this power has been sparingly exercised. It has been the settled policy of the United States not to authorize such suits except in a few cases . . . The intention of Congress to confer such a jurisdiction upon any court would have to be expressed in plain and unambiguous terms." *Thebo v. Choctaw Tribe*, 66 F. 372, 375-76 (8th Cir. 1895); *accord Adams v. Murphy*, 165 F. 304 (8th Cir. 1908). Relying on *Thebo* and *Adams*, this Court in *USF&G* recognized the settled congressional policy forbidding suits against tribes, reasoned that the immunity of the dependent tribal sovereigns passed to the United States for their benefit, and ruled that affirmative statutory authority for such suits was required. 309 U.S. at 514 & n.15.[7] This Court reaffirmed the requirement of clear congressional intent in *Martinez*, 436 U.S. at 72, and acknowledged that "many of the poorer tribes with limited resources and income could ill afford to shoulder the burdens of defending federal lawsuits," *id*. at 65 n.19.

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[7] The Court's citation in footnote 15 of *USF*&G to *Kalb v. Feuerstein*, 308 U.S. 433 (1940), reveals one basis for the ruling that only Congress may authorize suits against tribes. Just as Congress' power over bankruptcy is "plenary," *Feuerstein*, 308 U.S. at 438-39, Congress' authority to regulate commerce with the tribes is also "plenary." U.S. Const. art. I, § 8, cl. 3; *United States v. Lara*, 541 U.S. 193, 200 (2004).

The vast majority of Indian tribes do not own lucrative casinos or other businesses. Most, like the Navajo Nation, are struggling to meet the basic needs of their citizens.[8] Congress "has consistently reiterated its approval of the [tribal] immunity doctrine." *Potawatomi*, 498 U.S. at 510. Most recently, in response to this Court's invitation in *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998), Congress reviewed the doctrine, required greater disclosure and specific terms related to tribal immunity in certain agreements,[9] but kept intact the basic premise that tribes should generally be immune from unconsented-to suits.

Just as sovereign immunity protects the United States not only from judgment but also from pre-trial litigation demands, tribal sovereign immunity guarantees immunity from suit, not merely a defense to liability. *Kiowa*, 523 U.S. at 757; *Martinez*, 436 U.S. at 58; *accord Osage Tribal Council v. U.S. Dep't of Labor*, 187 F.3d 1174, 1179-80 (10th Cir. 1999), *cert. denied*, 530 U.S. 1229 (2000); *Tamiami Partners, Ltd. v. Miccosukee Tribe*, 63 F.3d 1030, 1050 (11th Cir. 1995). And, as with federal sovereign immunity, tribal sovereign immunity may not be undermined by application of the rules of procedure. *Potawatomi*, 498 U.S. at 509-10 (tribal sovereign immunity may not be defeated by assertion of compulsory counterclaim under Rule 13); *USF*&G, 309 U.S. at 514 (rejecting an attempt to sue two tribes "whether

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[8] *See, e.g.*, Pres. Reagan's "Statement on Indian Policy," 19 Weekly Comp. Pres. Doc. 98, 100 (1983) ("Many reservations lack a developed physical infrastructure, including utilities, transportation, and other public services.").

[9] *See* Act of Mar. 14, 2000, Pub. L. 106-179, § 2, 114 Stat. 46 (amending comprehensively 25 U.S.C. § 81).

directly or by cross-action" even when complete relief was unavailable in tribes' absence); *see also Martinez* (rejecting attempt to circumvent tribal sovereign immunity by suing tribal officials).

A clear statement by Congress is required to permit suits against the tribes. *Martinez*, 436 U.S. at 72. But nowhere in Title VII is there even a hint that Congress authorized the EEOC to sue Indian tribes. Rather, Title VII expressly prohibits the EEOC from suing governments, 42 U.S.C. § 2000e-5(f)(1); excludes Indian tribes from the definition of "employer," *id*. § 2000e(b); provides that Title VII does not apply to *any* business operating on or near an Indian reservation in compliance with a publicly announced Indian preference practice; *id*. § 2000e-2(i); and provides that only the Attorney General may proceed in cases involving governments, *id*. § 2000e-5(f)(1), (2). The only pertinent clear statements in Title VII are those which *prohibit* the EEOC from suing Indian tribes.

The incremental invasion of tribal immunity countenanced by the Ninth Circuit is "an intrusion not only on the tribes, but on Congress, as well." *See In Defense of Tribal Sovereign Immunity* 95 Harv. L. Rev. 1058, 1072 & n.83 (1982). The Ninth Circuit's ruling that the EEOC may sue the Navajo Nation under Rule 19 where Congress expressly barred the EEOC from suing Indian tribes contravenes the holdings of this Court that procedural rules may not be employed to circumvent tribal immunity and undermines important federal and tribal interests. Review should be granted to conform the Ninth Circuit's decision to this Court's controlling precedent.

III. THIS COURT SHOULD PRESERVE THE CAREFUL BALANCE CONGRESS ESTABLISHED AMONG THE POWER OF THE EEOC, THE PREROGATIVES OF THE ATTORNEY GENERAL, AND RESPECT FOR STATE, LOCAL AND TRIBAL GOVERNMENTS.

Conforming the Ninth Circuit's decisions to this Court's precedents and resolving the circuit conflicts would also preserve the careful balance of power among government agencies established by Congress in Title VII. This balance implicates important issues of federalism and of the federal/tribal relationship.

Until the Ninth Circuit's rulings, courts rejected the EEOC's attempts to sue governmental entities either directly or indirectly. The Ninth Circuit's first ruling permits the EEOC to sue government entities under Rule 19, and its second ruling now permits the EEOC, in essence, to sue even *federal* agencies by manipulation of Rule 14.

This is contrary to the careful allocation of authority provided in Title VII. Title VII permits the EEOC to "bring a civil action against *any respondent* not a government, governmental agency, or political subdivision," but requires the EEOC to yield to the Attorney General in any "case *involving* a government, government agency, or political subdivision." 42 U.S.C. §2000e-5(f)(1) (emphases added). Congress repeated that demarcation of authority five times in subsections (f)(1) and (f)(2); *accord* 42 U.S.C. §2000e-8(c); *see Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 360 n.11 (1977).

The Navajo Nation is a government, *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195 (1985), and the Department of the Interior is a government agency. Title VII should be construed consistent with its plain language. "Nothing could be broader than the term 'any respondent,'" *EEOC v. Elgin Teachers Ass'n*, 658 F.Supp. 624, 630 (N.D. Ill. 1987),[10] and the word "'involving' is broad and is indeed the functional equivalent of 'affecting,'" *Allied-Bruce Terminex v. Dobson*, 513 U.S. 265, 273-74 (1995). Both the District Court and the Ninth Circuit recognize that the Navajo and Secretarial interests are so significant so as to make them required parties under Rule 19; *a fortiori*, the EEOC's challenge to the Peabody leases, other federally approved business site leases on the Navajo Reservation, the Department's consistent practice in Indian mineral leasing nationwide, and federally approved Navajo laws indisputably "involves" the Tribe and the Secretary.

In cases where such important tribal and Departmental interests are at stake, Title VII reserves the ability to bring suit to the Attorney General. In contrast to the single focus of the EEOC, the Department of Justice has broad responsibilities regarding, and a greater sensitivity to, larger federal and tribal interests. *See* 28 U.S.C. §§ 512, 516, 519; 61 Fed. Reg. 29,424 (1996) (establishing the Office of

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[10] The EEOC argued in the District Court that the Navajo Nation is not a "respondent" because it is not an "employer" under Title VII, such that the restrictions on the EEOC's authority are inapplicable to the Tribe. The District Court rejected that argument, Pet. App. 106a-109a, and the Ninth Circuit did not rule otherwise. Even if the EEOC's logic were adopted, if the Navajo Nation is not a "respondent" for purposes of Section 2000e-5(f)(1)'s restrictions, then it is not a "respondent" for purposes of that Section's *authorization* for EEOC litigation.

Tribal Justice within the Justice Department and publishing the "Department of Justice Policy on Indian Sovereignty and Government-to-Government Relations with Indian Tribes"); 25 U.S.C. §175 (Justice Department shall represent Indians in all suits at law and in equity).

Finally, the Ninth Circuit's ruling opens the door for the EEOC to sue states and state agencies. But charges of discrimination against state agencies posed a special concern to Congress, which sought to reduce the possibility of friction if a federal administrative agency interfered with states and their subdivisions. *See* S. Rep. No. 92-415 (1971) at 25; *see also United States v. Fresno Unified School Dist.*, 592 F.2d 1088, 1090-92 (9th Cir.) (regarding reservation of exclusive ability of Attorney General to sue state agencies for "pattern and practice" violations), *cert. denied*, 444 U.S. 832 (1979). Congress responded to this concern by permitting only the Attorney General to pursue claims involving government agencies. The EEOC tries to circumvent Title VII's structure by claiming here, as it has unsuccessfully claimed in the past, that "'[w]e are not threatening you because we are not seeking relief.'" *AFT*, 761 F.Supp. at 541. However, "[f]or a party to have to defend against litigation, even in the sense of just having to retain counsel . . . and to evaluate what the consequences are, is something that plainly the statute does not impose on the governmental body, except at the instance of the Attorney General." *Id*.

The Ninth Circuit's decision to allow the EEOC to sue the Navajo Nation directly and to litigate against the Department of the Interior through manipulation of Rule 14 implicates important principles of federal-

ism and government-to-government relations that should be addressed by this Court on certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed Sept. 1, 2010]

No. 06-17261
D.C. No. CV-01-01050-MHM
District of Arizona, Phoenix

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff - Appellant,

v.

PEABODY WESTERN COAL COMPANY;
NAVAJO NATION, Rule 19 defendant,
Defendants - Appellees.

ORDER

Before: HUG, KLEINFELD and W. FLETCHER, *Circuit Judges.*

The panel has voted to deny the petitions for rehearing. Judge Fletcher has voted to deny the petitions for rehearing en banc; and Judges Hug and Kleinfeld so recommend.

The full court has been advised of the petitions for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The Appellees' petitions for rehearing and the petitions for rehearing en banc, filed August 9, 2010, are DENIED.

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 06-17261
D.C. No. CV-01-01050-MHM
District of Arizona, Phoenix

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff - Appellant,

v.

PEABODY WESTERN COAL COMPANY;
NAVAJO NATION, Rule 19 defendant,
Defendants - Appellees.

Appeal from the United States District Court
for the District of Arizona
Mary H. Murguia, District Judge, Presiding

Argued and Submitted
September 22, 2008—San Francisco, California
Filed June 23, 2010

Before: Procter Hug, Jr., Andrew J. Kleinfeld, and
William A. Fletcher, Circuit Judges.
Opinion by Judge William A. Fletcher

COUNSEL

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OPINION

W. FLETCHER, *Circuit Judge:*

The Equal Employment Opportunity Commission ("EEOC") appeals various rulings of the district court in its suit against Peabody Western Coal Company ("Peabody"). Peabody leases mines from the Navajo Nation ("the Nation"), and maintains a preference for employing Navajo workers at these mines. EEOC alleges that in maintaining its employment preference Peabody discriminates against non-Navajo Indians, including two members of the Hopi Nation and one member of the Otoe tribe, in violation of Title VII, 42 U.S.C. § 2000e-2(a)(1). The district court first dismissed EEOC's suit in 2002. *EEOC v. Peabody Coal Co.* ("*Peabody I*"), 214 F.R.D. 549 (D. Ariz. 2002). We heard EEOC's appeal from that dismissal in *EEOC v. Peabody Western Coal Co.* ("*Peabody II*"), 400 F.3d 774 (9th Cir. 2005). We reversed, holding that it was feasible to join the Nation under Federal Rule of Civil Procedure 19 and that the suit did not present a nonjusticiable political question. On remand, the district court granted summary judgment to Peabody. EEOC appeals.

In this appeal, we address questions arising out of the joinder of two different parties. We first address the joinder of the Nation. We hold that the amended complaint filed by EEOC after our remand does not render it infeasible to join the Nation. We next address the joinder of the Secretary of the Interior ("the Secretary"). We hold that the Secretary is a required party under Rule 19(a), and that joining him is not feasible. We hold further that Peabody and the Nation may not bring a third-party damages claim against the Secretary under Federal Rule of Civil Procedure 14(a), and that EEOC's claim against Peabody for damages must therefore be dismissed under Rule 19(b). However, we hold that Peabody and the Nation may bring a third-party claim against the Secretary for prospective relief under Rule 14(a), and that EEOC's injunctive claim against Peabody should therefore be allowed to proceed.

We vacate the remainder of the district court's rulings and remand for further proceedings consistent with this opinion.

I. Background

A. Factual Background

Peabody mines coal at the Black Mesa Complex and Kayenta Mine on the Navajo and Hopi reservations in northeastern Arizona. Peabody does so pursuant to leases with the Navajo and Hopi tribes inherited from its predecessor-in-interest, Sentry Royalty Company ("Sentry"). This case involves two leases Sentry entered into with the Nation: a 1964 lease permitting it to mine on the Navajo reservation (lease no. 8580) and a 1966 lease permitting it to mine on the Navajo portion of land jointly used by the Navajo and Hopi nations (lease no. 9910).

Both leases require that Peabody provide an employment preference to Navajo job applicants. The 1964 lease provides that Peabody "agrees to employ Navajo Indians when available in all positions for which, in the judgment of [Peabody], they are qualified," and that Peabody "shall make a special effort to work Navajo Indians into skilled, technical and other higher jobs in connection with [Peabody's] operations under this Lease." The 1966 lease provides similarly, but also states that Peabody may "at its option extend the benefits of this Article [containing the Navajo employment preference] to Hopi Indians." We will refer to these provisions as "Navajo employment preference provisions." Many business leases on the Navajo reservation contain similar employment preferences for Navajo job applicants.

As we noted in *Peabody II*, the Department of the Interior ("DOI") approved both mining leases, as well as subsequent amendments and extensions, under the Indian Mineral Leasing Act of 1938 ("IMLA"). *Peabody II*, 400 F.3d at 776; *see* 25 U.S.C. §§ 396a, 396e; *see also United States v. Navajo Nation* ("*Navajo Nation I*"), 537 U.S. 488, 493 (2003) (explaining that DOI's approval is necessary before leases on reservation land become effective). Former Secretary of the Interior Stewart Udall, who served as Secretary during the period the leases were drafted and approved, stated in a declaration submitted to the district court that DOI drafted the leases and required the inclusion of the Navajo employment preferences. This statement is undisputed. The leases provide that, if their terms are violated, both the Nation and the Secretary retain the power to cancel them after a notice and cure period. Amendments to the leases must be approved by the Secretary.

B. Procedural Background

This is the latest in a series of cases involving Navajo employment preferences. *See Dawavendewa v. Salt River Project Agric. Improvement & Power Dist*. ("*Dawavendewa II*"), 276 F.3d 1150, 1163 (9th Cir. 2002); *Dawavendewa v. Salt River Agric. Improvement & Power Dist*. ("*Dawavendewa I*"), 154 F.3d 1117, 1124 (9th Cir. 1998). We discussed the history of Navajo employment preferences in detail in the first appeal in this case. *See Peabody II*, 400 F.3d at 777.

EEOC filed this suit against Peabody in June 2001, alleging that Peabody was unlawfully discriminating on the basis of national origin by implementing the Navajo employment preferences contained in the leases. EEOC's complaint charged that Peabody had refused to hire non-Navajo Indians including two members of the Hopi and one now-deceased member of the Otoe tribe, as well as unspecified other non-Navajo Indians, for positions for which they were otherwise qualified. EEOC alleged that such conduct violated Title VII, 42 U.S.C. § 2000e-2(a)(1), which prohibits employers from refusing to hire applicants because of their national origin. EEOC's position throughout this litigation has been that the Indian preference exception of Title VII, § 2000e-2(i), permits discrimination in favor of Indians living on or near a particular tribe's reservation, but does not permit discrimination against Indians who live on or near that reservation but are members of another tribe. *Peabody II*, 400 F.3d at 777-78. EEOC alleged further that Peabody had violated the record-keeping requirements of § 2000e-8(c). EEOC requested three forms of relief: (1) an injunction prohibiting Peabody from continuing to discriminate on the basis of national

origin and requiring Peabody to provide equal employment opportunities for non-Navajo Indians living on or near the Navajo reservation; (2) damages, including back pay with interest, compensatory damages, and punitive damages; and (3) an order requiring Peabody to make and preserve records in compliance with Title VII.

Peabody moved for summary judgment and for dismissal of the action. Peabody argued, first, that Rule 19 required dismissal because the Nation was a necessary and indispensable party to the action and, second, that the action presented a nonjusticiable political question between EEOC and DOI because DOI had approved the mining leases. The district court agreed and granted Peabody's motion to dismiss on both grounds. *Peabody I*, 214 F.R.D. at 559-63. The district court also dismissed EEOC's record-keeping claim, even though Peabody had not sought dismissal of this claim. *Id*. at 563.

We reversed in *Peabody II*. First, we held that the Nation was a necessary party under Rule 19, but that EEOC's suit need not be dismissed because joinder of the Nation was feasible. *Peabody II*, 400 F.3d at 780-81. Because EEOC is an agency of the United States, the Nation could not assert sovereign immunity as a defense to joinder. Although EEOC lacked statutory authority to state a cause of action against the Nation, joinder of the Nation for the purposes of res judicata was still possible and would be effective in providing "complete relief between the parties." *Id*. at 781. Second, we held that EEOC's claim did not present a nonjusticiable political question. *Id*. at 784-85. Third, we held that the district court erred in dismissing EEOC's recordkeeping claim. *Id*. at 785.

We remanded for further proceedings with the Nation joined under Rule 19. *Id*. at 785.

On remand, EEOC filed an amended complaint that included the same claims and prayer for relief as its initial complaint. The newly joined Nation moved to dismiss under Rule 19, arguing, *inter alia*, that EEOC's amended complaint impermissibly seeks affirmative relief against the Nation, and that the Secretary of the Interior is a necessary and indispensable party. Peabody filed its own motion to dismiss. *Inter alia*, it agreed with the Nation's argument that the Secretary was a necessary and indispensable party. This was the first time in this litigation that anyone had argued that the Secretary was a necessary and indispensable party.

The district court converted the motions to dismiss into motions for summary judgment. The district court granted summary judgment against EEOC, holding, in the alternative, that (1) EEOC was seeking affirmative relief against the Nation in its amended complaint, and that the Nation therefore could not be joined under Rule 19; (2) the Secretary was a necessary and indispensable party for whom joinder was not feasible; and (3) the Rehabilitation Act of 1950, 25 U.S.C. § 631-638, authorized the tribe-specific preferences challenged by EEOC. The district court also granted the Nation's motions to strike two EEOC exhibits and to strike an EEOC footnote reference. Finally, the court denied EEOC's motion to strike two forms upon which Peabody relied. EEOC timely appealed all of the district court's rulings.

We reach only holdings (1) and (2), as to which we reverse the district court. We vacate the rest of the court's decision and remand for further proceedings.

II. Standard of Review

We review a district court's decision on joinder for abuse of discretion, and we review the legal conclusions underlying that decision de novo. *Peabody II*, 400 F.3d at 778.

III. Discussion

This case continues to present somewhat complex compulsory party joinder issues. As we explained in *Peabody II*, Federal Rule of Civil Procedure 19 governs compulsory party joinder in federal district courts. In its recently amended form, Rule 19 provides, in relevant part:

> (a) Persons Required to Be Joined if Feasible.
>
> (1) Required Party.
>
> A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:
>
> (A) in that person's absence, the court cannot accord complete relief among existing parties; or
>
> (B) 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 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.

(2) Joinder by Court Order.

If a person has not been joined as required, the court must order that the person be made a party. A person who refuses to join as a plaintiff may be made either a defendant or, in a proper case, an involuntary plaintiff.

. . .

(b) When Joinder Is Not Feasible.

If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include:

(1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;

(2) the extent to which any prejudice could be lessened or avoided by:

(A) protective provisions in the judgment;

(B) shaping the relief; or

(C) other measures;

(3) whether a judgment rendered in the person's absence would be adequate; and

(4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder. . . .

Fed. R. Civ. P. 19. Although the wording of Rule 19 has changed since the district court dismissed this

case, its meaning remains the same.[1] When dealing with the amended rule in this opinion, we will use the new language.

A Rule 19 motion poses "three successive inquiries." *Peabody II*, 400 F.3d at 779. "First, the court must determine whether a nonparty should be joined under Rule 19(a)." *Id*. That nonparty (or "absentee") is now referred to as a "person required to be joined if feasible." If an absentee meets the requirements of Rule 19(a), "the second stage is for the court to determine whether it is feasible to order that the absentee be joined." *Id*. "Finally, if joinder is not feasible, the court must determine at the third stage whether the case can proceed without the absentee" or whether the action must be dismissed. *Id*. A nonparty in whose absence an action must be

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[1] As of December 1, 2007, Rule 19 no longer refers to "necessary" or "indispensable" parties. Instead, it refers to "persons required to be joined if feasible" and persons in whose absence, if they cannot be joined, the action should not proceed.

The advisory committee notes indicate that the 2007 amendments to the civil rules were merely stylistic. With respect to Rule 19, they state:

> The language of Rule 19 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.
>
> Former Rule 19(b) described the conclusion that an action should be dismissed for inability to join a Rule 19(a) party by carrying forward traditional terminology: "the absent person being thus regarded as indispensable." "Indispensable" was used only to express a conclusion reached by applying the tests of Rule 19(b). It has been discarded as redundant.

Fed. R. Civ. P. 19 advisory committee's note (2007).

dismissed is one who "not only [has] an interest in the controversy, but [has] an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." *Shields v. Barrow*, 58 U.S. 130, 139 (1855).

With these principles in mind, we consider the Rule 19 joinder of both the Navajo Nation and the Secretary of the Interior.

A. Joinder of the Navajo Nation under Rule 19

In *Peabody II*, we held that the Navajo Nation was a necessary party for whom joinder was feasible. *Peabody II*, 400 F.3d at 778. It is undisputed that the Nation was a necessary party, and is now, under the amended rule, a person required to be joined if feasible. As we explained in *Peabody II*, the Nation is a party to the leases whose employment preference is challenged in this lawsuit.

> If the EEOC is victorious in this suit but the Nation has not been joined, the Nation could possibly initiate further action to enforce the employment preference against Peabody, even though that preference would have been held illegal in this litigation. Peabody would then be, like the defendant in *Dawavendewa II*, 276 F.3d at 1156, "between the proverbial rock and a hard place—comply with the injunction prohibiting the hiring preference policy or comply with the lease requiring it." By similar logic, we have elsewhere found that tribes are necessary parties to actions that might have the result of directly undermining authority they would otherwise exercise.

Id. at 780. We held that it was feasible to join the Nation even though under Title VII no affirmative relief was available to EEOC against the Nation.

After our remand, EEOC amended its complaint to add the Nation as a defendant. The district court held that EEOC sought affirmative relief against the Nation in its amended complaint even though we had specifically held in *Peabody II* that such relief was not available. Under its reading of EEOC's amended complaint, the district court dismissed EEOC's suit on the ground that the Nation could not, after all, be joined. For the reasons that follow, we hold that the district court should not have dismissed EEOC's amended complaint on this ground.

In *Peabody II*, Peabody made two arguments why joinder of the Nation was not feasible. We disagreed with both of them. First, Peabody argued that the Nation could not be joined because of sovereign immunity. *Id*. at 780. We held that the Nation's sovereign immunity did not shield it from a suit brought by EEOC and therefore did not bar its joinder. *Id*. at 781. We explained, "Tribal sovereign immunity does not 'act as a shield against the United States,' even when Congress has not specifically abrogated tribal immunity." *Id*. (quoting *United States v. Yakima Tribal Ct*., 806 F.2d 853, 861 (9th Cir. 1986)).

Second, Peabody argued that because Title VII exempts the Nation from the definition of employer, 42 U.S.C. § 2000e(b), EEOC could not state a claim against the Nation. *Peabody II*, 400 F.3d at 781. Therefore, Peabody argued, the Nation could not be joined in a suit brought by EEOC. But "a plaintiff's inability to state a direct cause of action against an absentee does not prevent the absentee's joinder under Rule 19." *Id*. An absentee can be joined under Rule 19

in order to subject it, under principles of res judicata, to the "minor and ancillary" effects of a judgment. *Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 399 (1982). We wrote that

> EEOC has no claim against the party it seeks to join and is not seeking any affirmative relief directly from that party. Joinder is necessary for the "sole purpose" of effecting complete relief between the parties . . . by ensuring that both Peabody and the Nation are bound to any judgment upholding or striking down the challenged lease provision.

Peabody II, 400 F.3d at 783.

On remand, the district court concluded that EEOC's amended complaint sought affirmative relief against the Nation. The district court found that "with the benefit of the filing of the Amended Complaint and limited discovery, it is apparent to this Court that the EEOC is not merely seeking relief against Peabody Coal, but all parties acting in concert with it, which includes the Navajo Nation." In so holding, the district court relied on the language in the amended complaint seeking "a permanent injunction enjoining Peabody . . . and all persons in active concert or participation with it, from engaging in discrimination on the basis of national origin." The court found that

> there can be no doubt that the Navajo Nation falls within the scope of affirmative relief sought by the EEOC. . . . Should the EEOC prevail in this suit and obtain the broad relief sought, the Navajo Nation would then be enjoined from implementing and requiring such lease provisions in the future as it would already be subject

> to injunctive relief from this Court based upon the determination that such provisions are contrary to Title VII. As such, there can be little doubt that the EEOC seeks affirmative relief not only against Peabody Coal but the Navajo Nation as well.
>
> The language added to the amended complaint provides, in its entirety:
>
> Defendant Navajo Nation is a party to a lease agreement with the Defendant employer, Peabody Coal Company, and is therefore named as a party pursuant to Rule 19(a) of the Federal Rules of Civil Procedure, in that, in its absence, complete relief cannot be accorded among those already parties, and it has an interest in the subject of this action.

This added language says nothing about any kind of relief against the Nation.

The original complaint was before us when we decided *Peabody II*. The language in the amended complaint upon which the district court relied to conclude that EEOC was seeking affirmative relief is word-for-word the same as in the original complaint. It is, in its entirety:

> Wherefore, the Commission respectfully requests that this Court:
>
> A. Grant a permanent injunction enjoining Peabody, its officers, successors, assigns, and all persons in active concert or participation with it, from engaging in discrimination on the basis of national origin.

Some of this added language is standard boilerplate drawn from Rule 65(d)(2)(C), describing the "persons

bound" by "every injunction" as including "other persons who are in active concert or participation" with the party or parties served with an injunction.

There are two possible readings of the amended complaint. Under one reading, EEOC is not seeking any injunctive relief against the Nation. The Nation is "bound" by the injunction only in the sense that it is res judicata as to the Nation, not in the sense that the injunction affirmatively requires the Nation to do something. In our view, this is the better reading of the boilerplate language in the complaint, given that the explicit premise of our holding in *Peabody II* was that EEOC has no cause of action against the Nation under Title VII and that, as a necessary corollary, EEOC can obtain no injunctive relief against the Nation. However, the district court did not adopt this reading.

Under the reading adopted by the district court, EEOC sought injunctive relief against the Nation in its amended complaint. Even if this is the correct reading, the district court nonetheless erred in dismissing EEOC's suit. Because we had held in *Peabody II* that joinder of the Nation was feasible despite the unavailability of injunctive relief against it, the proper response of the district court would have been simply to deny EEOC's request for injunctive relief. As we held in *Peabody II*, joinder of the Nation is feasible, and dismissal under Rule 19 is not required even though injunctive relief is unavailable.

The district court therefore erred in dismissing EEOC's complaint on the ground that it sought injunctive relief against the Nation.

B. Joinder of the Secretary of the Interior under Rule 19

On remand from *Peabody II*, Peabody and the newly joined Nation argued under Rule 19 that the suit could not proceed without joinder of the Secretary. Even though Peabody had been a defendant in the suit from the outset, this was the first time it made this argument. Because the Nation had just been joined, this was its first opportunity to make the argument. We agree with Peabody and the Nation that the Secretary is a person to be joined if feasible under Rule 19. But we do not agree that the entirety of EEOC's suit must be dismissed.

The central problem is that Peabody is caught in the middle of a dispute not of its own making. EEOC contends that the Navajo employment preference provision contained in the leases violates Title VII. The Secretary required that this 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.

If the district court were to hold that the Navajo employment preference provision violates Title VII and to award damages against Peabody, it would be profoundly unfair if Peabody could not seek indemnification from the Secretary. It would be similarly 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.

The same is true, though to a lesser extent, for the Nation. As we held in *Peabody II*, EEOC can obtain neither damages nor injunctive relief against the Nation. But if the district court holds that the

employment preference provision violates Title VII, the Nation will be bound to that result by res judicata. If the Secretary is not made a party to the suit, he may ignore the court's judgment and place conflicting demands upon the Nation who will be required by res judicata to honor the judgment.

1. The Secretary as a Required Party under Rule 19(a)

A person is required to be joined if feasible under Rule 19(a)(1)(A) if, "in that person's absence, the court cannot accord complete relief among the existing parties" or under Rule 19(a)(1)(B) 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 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." "There is no precise formula for determining whether a particular nonparty should be joined under Rule 19(a). . . . The determination is heavily influenced by the facts and circumstances of each case." *N. Alaska Envtl. Ctr. v. Hodel*, 803 F.2d 466, 468 (9th Cir. 1986) (quoting *Bakia v. County of Los Angeles*, 687 F.2d 299, 301 (9th Cir. 1982) (per curiam)) (alterations in original). The Secretary meets the standards of both Rule 19(a)(1)(A) and Rule 19(a)(1)(B).

First, under Rule 19(a)(1)(A), in the absence of the Secretary, the district court cannot accord complete relief among the existing parties. The record makes clear that the Secretary insisted that the disputed 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. If EEOC prevails in its interpretation of Title VII, it may recover damages from Peabody based on Peabody's compliance with the employment preference provision. In that event, Peabody will be obliged to pay damages for having engaged in conduct that was mandated by the Secretary. If the Secretary is not made a party, Peabody will not be able to seek indemnification from the Secretary.

Further, if EEOC prevails it may obtain an injunction ordering Peabody to disregard the employment preference provision. The Secretary has the power, if the lease terms are violated, to cancel the leases after a notice and cure period, and Peabody is unable to modify the terms of the leases without the approval of the Secretary. If the Secretary is not made a party, Peabody may be obliged by the court to disregard the preference provision, while the Secretary would remain free to insist that Peabody honor it, upon pain of losing the leases. *See, e.g., Associated Dry Goods Corp. v. Towers Fin. Corp.*, 920 F.2d 1121, 1124 (2d Cir. 1990) (holding that landlord was required party in suit brought by tenant against subtenant, as subtenant would not be able to obtain complete relief in counterclaims against tenant for increased electrical capacity without approval of landlord); *Wymbs v. Republican State Executive Comm.*, 719 F.2d 1072, 1080 (11th Cir. 1983) (holding that national political party committee was required party in suit on the constitutionality of a local political party's delegate selection rule when the local rule was derived from the national rule and the national party still had the ability to determine which delegates would be seated).

Second, under Rule 19(a)(1)(B), the Secretary has an interest in the subject matter of this action.

Resolving this action in the Secretary's absence may both impair the Secretary's ability to protect that interest and leave Peabody and the Nation subject to a substantial risk of incurring inconsistent obligations. If the Secretary is not joined, he will be unable to defend his interest in the legality of the lease provisions. We have repeatedly held that "[n]o 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." *Lomayaktewa v. Hathaway*, 520 F.2d 1324, 1325 (9th Cir. 1975); *see also Dawavendewa II*, 276 F.3d at 1156.

Although *Lomayaktewa and Dawavendewa II* involved parties who were signatories to a contract, which the Secretary is not, the underlying principle applies here. The Secretary mandated the provisions and continues to exercise oversight over the leases. A public entity has an interest in a lawsuit that could result in the invalidation or modification of one of its ordinances, rules, regulations, or practices. *See, e.g., Davis v. United States*, 192 F.3d 951, 959 (10th Cir. 1999) (holding that Seminole Nation of Oklahoma was necessary party as a ruling on the merits would modify the Nation's ordinances); *Ricci v. State Bd. of Law Exam'rs*, 569 F.2d 782, 784 (3d Cir. 1978) (holding that Pennsylvania Supreme Court was indispensable party to an action that would, if it succeeded, invalidate one of the Court's rules of admission). The Secretary thus has an interest in an action that would require him to modify the terms of leases he approves for entities conducting business on the Navajo reservation. The Secretary therefore qualifies as a person to be joined under Rule 19(a)(1)(B)(i).

If the Secretary is not made a party and if EEOC prevails, the Secretary may choose to cancel the leases or to modify them to eliminate the Navajo employment preference. Alternatively, the Secretary may choose to continue the leases in their current form, ignoring the judgment in the case to which he has not been made a party. If the Secretary chooses to do this, he will put both Peabody and the Nation "between the proverbial rock and a hard place," *Peabody II*, 400 F.3d at 780 (quoting *Dawavendewa II*, 276 F.3d at 1156), forcing them to choose between complying with the injunction or risking cancellation of the leases for violating terms mandated by the Secretary. The Secretary therefore qualifies as a person to be joined under Rule 19(a)(1)(B)(ii).

EEOC argues that the Secretary is not a person required to be joined under Rule 19(a), citing to the *Navajo Nation* line of cases decided by the Supreme Court. In these cases, the Court held that the DOI did not owe a fiduciary duty to the Navajo Nation in managing, negotiating, or approving leases under the statutes at issue in this litigation, and that the Nation therefore could not state a cause of action against DOI for breach of fiduciary duty. *United States v. Navajo Nation* ("*Navajo Nation II*"), 129 S. Ct. 1547, 1558 (2009) (holding that the Navajo-Hopi Rehabilitation Act of 1950 and Surface Mining Control and Reclamation Act of 1977 do not provide a cause of action to the *Navajo Nation* against the United States for breach of trust in its approval of coal mining leases); Navajo Nation I, 537 U.S. at 506 (holding the same for the IMLA). These cases indicate the limits of DOI's fiduciary duty to the Nation with respect to the leases, but they say nothing about whether DOI possesses a cognizable interest in the outcome of

litigation challenging lease terms mandated by the Secretary.

We therefore hold that the Secretary is a person required to be joined if feasible under Rule 19(a)(1)(A) and Rule 19(a)(1)(B).

2. Feasibility of Joining the Secretary

Rule 19(a) contemplates that a required party be joined as either a plaintiff or defendant. In the posture of this suit, the Secretary would be joined as defendant rather than a plaintiff. However, we conclude that EEOC cannot join the Secretary as a defendant.

EEOC is prevented by 42 U.S.C. § 2000e-5(f)(1) from filing suit against the Secretary on its own authority. Section 2000e-5(f)(1) provides that if EEOC is not able to obtain a conciliation agreement with a governmental agency, it cannot itself bring suit against that agency. Instead, § 2000e-5(f)(1) provides that if EEOC is unable to obtain an agreement, it "shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court." We were told at oral argument by EEOC's attorney that EEOC has no expectation that the Attorney General will file suit against the Secretary. While there is no evidence in the record of a formal referral to and refusal by the Attorney General, we assume for purposes of our decision that the Attorney General either has refused or will refuse to file suit against the Secretary.

3. Dismissal "In Equity and Good Conscience"

If a required party under Rule 19(a) cannot be joined as a plaintiff or defendant, we look to the factors

provided in Rule 19(b) to determine whether, "in equity and good conscience, the action should proceed among the existing parties or should be dismissed." Fed. R. Civ. P. 19(b). Rule 19(b) provides four factors that we must consider in making this determination: (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties; (2) the extent to which any prejudice could be lessened or avoided by shaping the judgment or the relief; (3) whether a judgment rendered in the person's absence would be adequate; and (4) whether the plaintiff would have an adequate remedy if the action were dismissed. *Id*. The heart of this inquiry is the question of "equity and good conscience." *See Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 125 (1968); *Dawavendewa II*, 276 F.3d at 1161. "The inquiry is a practical one and fact specific . . . and is designed to avoid the harsh results of rigid application." *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990) (internal citations omitted).

For the reasons that follow, we conclude that EEOC's claim for damages against Peabody must be dismissed under Rule 19(b), but that its claim for an injunction against Peabody should be permitted to proceed.

a. EEOC's Claim for Damages

If EEOC's suit against Peabody were allowed to proceed, the district court would almost certainly award damages against Peabody if it concludes that the Navajo employment preference provision violates Title VII. In that event, Peabody would quite reasonably look to the Secretary for indemnification, given that the preference provision was included in the leases at the insistence of the Secretary. Rule

14(a) would permit Peabody to file a third-party complaint against the Secretary for indemnification. But because Peabody's indemnification suit would seek damages, it would be barred by the government's sovereign immunity unless that immunity is waived by statute. We can find no waiver of sovereign immunity to such a suit.

The Tucker Act, 28 U.S.C. § 1346(a)(2), waives the government's sovereign immunity in damage suits based on contract, as well as for some claims arising under the Constitution and statutes of the United States. Under the Tucker Act, a party's claims must either rest upon a contract, "seek the return of money paid by them to the Government," or establish an entitlement to money damages under a federal statute that "'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.'" *United States v. Testan*, 424 U.S. 392, 400 (1976) (quoting *Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1009 (Ct. Cl. 1967)); *see also Lake Mohave Boat Owners Ass'n v. Nat'l Park Serv.*, 78 F.3d 1360, 1365 (9th Cir. 1995). The Federal Tort Claims Act, 28 U.S.C. § 1346(b), waives the sovereign immunity of the United States for suits in tort. *See FDIC v. Meyer*, 510 U.S. 471, 477 (1994). However, neither the Tucker Act nor the Federal Tort Claims Act waives the government's sovereign immunity in the circumstances of this case.

Title VII also waives the government's sovereign immunity to some extent. Based on that waiver, a federal employee may sue the government for damages under Title VII, provided that administrative remedies with EEOC have been exhausted. 42 U.S.C. § 2000e-16(c); *see Library of Cong. v. Shaw*, 478 U.S. 310, 319 ("Congress waived the Government's immunity under

Title VII as a defendant, affording federal employees a right of action against the Government for its discriminatory acts as an employer."); *cf. Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (Title VII abrogates the states' sovereign immunity). But we can find nothing in Title VII that waives the government's sovereign immunity to a damages suit brought by a private employer that has itself violated Title VII.

Peabody's only sin, if indeed it was a sin, was to comply with an employment preference provision inserted in its lease at the insistence of the Secretary. It would be profoundly unfair for a court to award damages against Peabody while allowing Peabody no redress against the government. We are unable to see any way to mitigate this unfairness by, for example, "protective provisions in the judgment; . . . shaping relief; or . . . other measures." Fed. R. Civ. P. 19(b)(2)(A-C). We therefore conclude that "in equity and good conscience" EEOC's damages claim against Peabody must be dismissed under Rule 19(b).

b. EEOC's Claim for an Injunction

If EEOC's suit is allowed to proceed and if the district court were to hold that the Navajo employment preference provision violates Title VII, the district court would almost certainly grant an injunction requiring Peabody to ignore the provision in making its employment decisions. This injunction would not only require Peabody to take certain actions; it would also operate as res judicata against the Nation. In the event such an injunction were issued, Peabody and the Nation would quite reasonably want to seek prospective relief preventing the Secretary from enforcing the provision. Rule 14(a) would permit Peabody and the Nation to file a third-party complaint seeking such relief against the Secretary. Sovereign

immunity does not bar prospective injunctive relief against the Secretary. We conclude that the availability of prospective relief through a third-party complaint under Rule 14(a) means that "in equity and good conscience" EEOC's suit against Peabody should be permitted to proceed.

i. Sovereign Immunity

A claim to which sovereign immunity is not a defense may be entertained even if another claim in the suit is dismissed because of sovereign immunity. *See, e.g., United States v. Georgia*, 546 U.S. 151, 159 (2006) (finding sovereign immunity of state was not a bar to some of the plaintiffs' claims and remanding to the district court to allow suit to proceed for any claims that were not shielded by sovereign immunity). Therefore, the district court may entertain Peabody and the Nation's third-party claim for prospective relief if it is not barred by the United States' sovereign immunity, even if a Peabody claim for damages would have to be dismissed.

Prospective relief requiring, or having the effect of requiring, governmental officials to obey the law has long been available. Sovereign immunity does not bar such relief. The case often cited for this proposition is *Ex parte Young*, 209 U.S. 123 (1908), which permitted an injunction against the Attorney General of Minnesota despite the Eleventh Amendment. The *Ex parte Young* fiction remains the basis for prospective relief against state officers. For example, in *Verizon Maryland, Inc. v. Public Service Commission*, 535 U.S. 635 (2002), the Supreme Court allowed injunctive and declaratory relief against individual state officials despite the Eleventh Amendment.

For a number of years, prospective relief against federal officials was available under the fiction of *Ex parte Young*. For example, in *Larson v. Domestic & Foreign Commerce Corp*., 337 U.S. 682 (1949), the Supreme Court allowed prospective relief against a federal official despite an asserted defense of sovereign immunity. The Court wrote:

> There may be, of course, suits for specific relief against officers of the sovereign which are not suits against the sovereign. If the officer purports to act as an individual and not as an official, a suit directed against that action is not a suit against the sovereign. . . . [W]here the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden. His actions are ultra vires his authority and therefore may be made the object of specific relief.

Id. at 689. We explicitly followed the "legal fiction" described in *Larson in Washington v. Udall*, 417 F.2d 1310, 1314 (9th Cir. 1969), and did so again in *Rockbridge v. Lincoln*, 449 F.2d 567, 572-73 (9th Cir. 1971).

However, since 1976 federal courts have looked to § 702 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 702, to serve the purposes of the *Ex parte Young* fiction in suits against federal officers. In *Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518 (9th Cir. 1989), we explained that after § 702 was amended in 1976, it replaced the *Ex parte Young* fiction as the doctrinal basis for a claim for prospective relief. We wrote:

> It is particularly significant that [in enacting § 702 of the APA] Congress referred disapprovingly to the *Ex parte Young* fiction, which permitted a plaintiff to name a government official as the defendant in equitable actions to redress government misconduct, on the pretense that the suit was not actually against the government. By invoking the *Young* fiction plaintiffs could, even before Congress amended § 702 in 1976, maintain an action for equitable relief against unconstitutional government conduct, whether or not such conduct constituted "agency action" in the APA sense. *See, e.g., Larson v. Domestic & Foreign Commerce Corp. . . . Congress' plain intent in amending § 702 was to waive sovereign immunity for all such suits, thereby eliminating the need to invoke the Young fiction.*

Id. at 525-26 (citations omitted) (emphasis added).

In *Presbyterian Church* we wrote, "On its face, the 1976 amendment [to § 702] is an unqualified waiver of sovereign immunity in actions seeking nonmonetary relief against legal wrongs for which governmental agencies are accountable." 870 F.2d at 525. We explained that the waiver is not limited to judicial review in suits challenging "agency action" as defined in the APA, but instead covers "all actions seeking relief from official misconduct except for money damages." *Id*. In *Gallo Cattle Co. v. United States Department of Agriculture*, 159 F.3d 1194 (9th Cir. 1998), we stated that "the APA's waiver of sovereign immunity contains several limitations," including the "final agency action" requirement that we had considered irrelevant in *Presbyterian Church*. *Id.* at 1198. We held that, because the plaintiffs failed to challenge "final agency action," the waiver of sovereign

immunity did not apply. *Id*. In *Gros Ventre Tribe v. United States*, 469 F.3d 801 (9th Cir. 2006), we discussed but declined to resolve the tension between the two cases, observing that there is "no way to distinguish *The Presbyterian Church from Gallo Cattle*." *Id*. at 809.

We similarly need not resolve this tension here. Unlike in *Gallo Cattle*, there is final agency action in this case, because the Secretary has mandated the disputed lease terms. "Agency action" under the APA is defined as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). "Persons" entitled to judicial review under the APA include "an individual, partnership, corporation, association, or public or private organization other than an agency." 5 U. S.C. § 701(b)(2) (providing that, for purposes of provisions on judicial review, definition of "person" in 5 U.S.C. § 551 applies); *id*. § 551 (providing definition of "person"). Both Peabody and the Navajo Nation come within this definition of "person." Peabody is a corporation, and the Nation is a "public organization." *Id*. Therefore, under § 702 of the APA, as would be the case under the *Ex parte Young* fiction, either Peabody or the Nation may assert a claim against the Secretary requesting injunctive or declaratory relief. We therefore conclude that neither Peabody nor the Nation is barred by sovereign immunity from bringing a third-party complaint seeking prospective relief against the Secretary under Rule 14(a).

ii. Third-party Complaints under Rule 14(a)

If a required party under Rule 19(a) cannot be joined as a plaintiff or defendant, the court must determine whether under Rule 19(b) the action must

be dismissed "in equity and good conscience." Among the factors to be considered in making that determination is whether, under Rule 19(b)(2)(C), "measures" may be taken that would lessen or avoid any prejudice. To the degree that Peabody and the Nation may be prejudiced by the absence of the Secretary as a plaintiff or defendant, that prejudice may be eliminated by a third-party complaint against the Secretary under Rule 14(a).

The courts of appeals that have addressed the question are unanimous in holding that if an absentee can be brought into an action by impleader under Rule 14(a), a dismissal under Rule 19(b) is inappropriate. In *Pasco International (London) Ltd. v. Stenograph Corp*., 637 F.2d 496 (2d Cir. 1980), the Second Circuit repeatedly indicated that prejudice to existing parties could be eliminated by impleader under Rule 14(a). The court wrote, "Stenograph can always protect itself from the possibility of inconsistent verdicts by impleading Croxford under Rule 14[.] . . . [T]he existence of the Rule 14 provisions demonstrates that parties such as Croxford who may be impleaded under Rule 14 are not indispensable parties within Rule 19(b)." *Id.* at 503. It summarized, "[A]ll persons subject to impleader by the defendant are not indispensable parties. This is . . . merely an extension of the settled doctrine that Rule 19(b) was not intended to require the joinder of persons subject to impleader under Rule 14 such as potential indemnitors." *Id*. at 505 n.20. The other circuits that have addressed the question have come to the same conclusion. *See, e.g., Boone v. General Motors Acceptance Corp*., 682 F.2d 552, 553 (5th Cir. 1982) (defendants "could protect their interests by joining the dealer as a third party should they care to do so"); *Challenge Homes, Inc. v.*

Greater Naples Care Ctr., Inc., 669 F.2d 667, 671 (11th Cir. 1982) (defendant "may protect itself against [prejudice] by impleading [the absent person] under Rule 14").

c. Summary

We conclude that prospective relief in the form of an injunction or declaratory judgment is available in a Rule 14(a) impleader against the Secretary. Such prospective relief against the Secretary is enough to protect Peabody and the Nation, both with respect to EEOC's request for injunctive relief against Peabody and with respect to any res judicata effect against the Nation. Such relief would also protect the Secretary because, once brought in as a third-party defendant, he will be able to defend his position on the legality of the leases. We therefore conclude, "in equity and good conscience," that EEOC's claim against Peabody for injunctive relief should be allowed to proceed.

C. Remaining Issues

EEOC has appealed the district court's various other rulings, including its holding that the Navajo employment preference does not violate Title VII. We vacate all of these rulings to allow reconsideration once the Secretary has been brought into the suit as a third-party defendant. This will allow the court to consider the arguments of the Secretary on the legality of the employment preferences before issuing a final ruling. We note, further, that the presentation of the Secretary's views in the district court, and the district court's considered ruling taking those views into account, will be useful to us in the event of a further appeal.

Conclusion

We again hold that joinder of the Navajo Nation under Rule 19 is feasible. We hold that the Secretary of the Interior is a party required to be joined if feasible under Rule 19(a), but that joinder of the Secretary as a defendant is not feasible. We hold that EEOC's damages claim against Peabody must be dismissed under Rule 19(b). Finally, we hold that EEOC's injunctive claim against Peabody should be allowed to proceed. We vacate the other rulings of the district court and remand for further proceedings consistent with this opinion.

REVERSED in part and VACATED in part. Each party to bear its own costs.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV 01-01050-PHX-MHM

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff,

vs.

PEABODY WESTERN COAL COMPANY D/B/A
PEABODY COAL COMPANY,
Defendant.

NAVAJO NATION
Rule 19 Defendant

ORDER

Currently before the Court is Rule 19 Defendant Navajo Nation's Motion to Dismiss for Lack of Subject Matter Jurisdiction, Lack of Personal Jurisdiction, Insufficiency of Process, Failure to State a Claim, Lack of Capacity, Failure to Exhaust Tribal Remedies and Failure to Join the United States as an Indispensable Party and Memorandum in Support Thereof (Dkt. #89); Navajo Nation's Motion to Strike Exhibits 9 and 16 of the EEOC's Response (Dkt. #124); the Equal Employment Opportunity Commission's ("EEOC") Motion to Strike Exhibits D and E of Peabody Coal's Response to the Navajo Nation's Motion to Dismiss (Dkt. #134-2); and the Navajo Nation's Motion for Leave to File Notice of Supple-

mental Authority (Dkt. #140). After reviewing the pleadings and holding oral argument on September 18, 2006, the Court issues the following Order.

I. Procedural History

On June 13, 2001 Plaintiff EEOC filed its Complaint against Defendant Peabody Western Coal Company ("Defendant" or "Peabody Coal") asserting a violation of Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. §§ 2000e *et seq*. ("Title VII"), based upon the preference afforded to hiring Navajos over non-Navajo Native Americans in coal mining operations. (Dkt. #1). On March 29, 2002, Peabody Coal moved for summary judgment on the grounds that: (1) the Navajo Nation is a necessary and indispensable party to this litigation and its joinder not being feasible under Rule 19(b) because of the EEOC's inability to bring an action against the Navajo Nation and, in the alternative, (2) the case presenting a nonjusticiable political question. The Court agreed with Peabody Coal and held that dismissal was proper because the Navajo Nation was a necessary and indispensable party to the litigation and could not be made a party to the litigation by the EEOC. (Dkt. #59). The Court also granted summary judgment on the alternative basis that the case presents a nonjusticiable political question. (*Id*.). The EEOC appealed this ruling on November 21, 2002. (Dkt. #61).

On June 3, 2005, the Ninth Circuit reversed and remanded this Court's decision, holding that it would not reach the merits of the EEOC's claims but that the Navajo Nation is a necessary party to the action and that it is feasible to join it. *EEOC v. Peabody Western Coal Company*, 400 F.3d 774 (9th Cir. 2005). The Ninth Circuit also held that the EEOC's claim is

not precluded as a nonjusticiable political question. (Dkt. #65). On June 17, 2005, the EEOC filed its Amended Complaint naming both Peabody Coal and the Navajo Nation as Defendants. (Dkt. #67). The Amended Complaint seeks monetary relief against Peabody Coal and a "permanent injunction enjoining Peabody . . . and all persons in active concert or participation with it, from engaging in discrimination on the basis of national origin." (Amended Complaint, Prayer for Relief, ¶A). The Amended Complaint expressly joins the Navajo Nation to the suit under Rule 19. (*Id.* at ¶9).

On September 16, 2005, Defendant Peabody Coal filed its Motion to Stay Proceedings pending Petition of Writ of Certiorari. (Dkt. #76). On October 4, 2005, this Court granted Peabody Coal's Motion to Stay the proceedings pending the Supreme Court's disposition of its Petition and/or issuance of the mandate of the Supreme Court. (Dkt. #81). On February 2, 2006, the Court was notified that the Petition for Certiorari was denied, thus the Court directed the Navajo Nation to file its initial pleading. (Dkt. #86). On February 17, 2006, the Navajo Nation's filed its instant Motion to dismiss. (Dkt. #89). The Court granted the EEOC and Peabody Coal two extensions to file any respective responses and granted the EEOC's request to conduct discovery regarding certain matters raised in the Navajo Nation's Motion, most notably the Secretary of the Interior's ("SOI" of the "Secretary") involvement in the drafting and formulations of the lease agreements that are at issue in this litigation. (Dkt. #108, 114). Both the EEOC and Peabody Coal filed have filed their respective Responses to the Motion to Dismiss and the Navajo Nation filed its Reply.

II. Motions to Strike

A. Navajo Nation's Motion to Strike

The Navajo Nation moves to strike exhibits 9 and 16 presented in the EEOC's Response to the Navajo Nation's Motion to dismiss. The Navajo Nation objects to Exhibit 9, which is purported to be a document or report from Theodore W. Taylor, Assistant to the Commissioner Bureau of Indian Affairs. (EEOC Response, Exhibit 9). Specifically, the Navajo Nation contends that this report is unauthenticated hearsay. *See Orr v. Bank of America*, NT & SA, 285 F.3d 764, 773 (9th Cir. 2002) (stating that authentication is "evidence sufficient to support a finding that the matter in question is what its proponent claims."). The Navajo Nation further argues that doubt surrounding the document's authenticity is created by the fact that on page 2 of the document there appears to be a handwritten notation stating that the documents were "pulled together and final draft prepared by Theodore W. Taylor, B/A. " In response the EEOC offers the declaration of EEOC Librarian Holly Wilson to support the document's authenticity. (EEOC Response to Motion to Strike, Exhibit 1). Ms. Wilson states that while employed with the EEOC she located this report through the catalogue of the library of the United States Department of Interior and that the author identified is Theodore W. Taylor. While, Ms. Wilson, states that she identified such a document within the Department of Interior library that was authored by Theodore W. Taylor, there is still doubt as to whether the version that is offered as Exhibit 9 is the same that is identified by Ms. Wilson. Notably, there is no explanation as to the handwritten note on Exhibit 9 which suggests that the exhibit may have simply been "pulled together" as a draft of

the final version. With such doubt surrounding the document's authenticity, the Court will not consider it as evidence.

In addition, the Navajo Nation moves to strike the reference in Footnote 5 on page 27 of the EEOC's Response as well as Exhibit 16 of the EEOC's Response. Footnote 5 consists of a reference to two newspaper articles regarding the closure of the Black Mesa Mine on the Navajo reservation as a result of the closure of the Mohave Generating Station and Exhibit 16 appears to be a website from Salt River Project describing the Navajo Generating Station. The Navajo Nation objects to this evidence on the grounds that the references to the articles and website printout constitute unauthenticated hearsay. In response to the Navajo Nation's motion, the EEOC states that although the Navajo Nation objects to these references and exhibit, the Navajo Nation does not dispute the factual information underlying these exhibits such as the closure of the Mohave Generating Station and the significant impact of such closure on the Navajo Nation. As such, the EEOC contends that the Court can take judicial notice of these facts. *See* Rule 201 (b) Fed.R.Evid. (stating "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.).

However, the EEOC's request ignores that newspaper articles constitute inadmissible hearsay as to their content. *E.g. Larez v. City of Los Angeles*, 946 F.2d 630, 642-43 (9th Cir. 1991). In addition, the facts that the EEOC requests that this Court take

judicial notice of do appear to be subject to dispute and are not generally known within the jurisdiction of this Court. (Navajo Nation Reply to Motion to Strike, Exhibit A). As such Exhibits 9 and 16 will be struck and footnote 5 will not be considered by this Court.

B. EEOC's Motion to Strike

The EEOC moves to strike exhibits D and E submitted by Peabody Coal in its response to the Navajo Nation's Motion to Dismiss. The EEOC takes issue with the authenticity and relevance of these documents.

First, with respect to the authenticity of these documents, it appears that these documents are what the proponent claims them to be. Specifically, Peabody Coal relates that Exhibits D and E are forms from the Bureau of Indian Affairs appearing in the appendix of the treatise, "Natural Resources Law on American Lands." The EEOC contests their authenticity as sample forms appearing in the back of the above treatise. In response, Peabody Coal provides the affidavit of Gregory Leisse, an attorney in good standing with the Arizona State bar, identifying these forms as forms used in the above treatise. (Peabody Coal Response to Motion to Strike, Exhibit B and B1). This Court finds that these documents which are held out to be forms obtained from the Bureau of Indian Affairs and attached in the appendix of the treatise of "Natural Resources Law on American Lands" are properly authenticated.

Second, contrary to the EEOC's position, these documents are relevant to these proceedings. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence

to the determination of the action more probable or less probable . . .” Peabody Coal cites these forms as evidence that such forms were consulted by the Department of Interior in implementing the leases at issue, described below. Based upon the declaration and deposition testimony of the former SOI these form leases appear to provide probative value regarding the leases at issue in this case, thus the Court finds these exhibits to be relevant to these proceedings.

III. Background Regarding Navajo Employment Preference

Peabody Coal performs mining operations on the Navajo and Hopi reservations in Arizona pursuant to lease agreements. Most notably, Peabody Coal's predecessor in interest Sentry Royal Company, entered into two such leases with the Navajo Nation: (1) the 1964 lease referred to as the 8580 lease and (2) the 1966 lease referred to as the 9910 lease. Both leases possess provisions requiring that preference in employment be afforded to members of the Navajo Nation. For instance the 8580 lease provides in pertinent part:

> Lessee agrees to employ Navajo Indians when available in all positions, for which, in the judgment of Lessee, they are qualified, and to pay prevailing wages to such Navajo employees and to utilize services of Navajo contractors where feasible.
>
> Lessee shall make a special effort to work Navajo Indians into skilled, technical and other higher jobs in connection with Lessee's operations under this Lease . . .

(EEOC Response to Navajo Nation Motion to Dismiss, Exhibit 13)

In addition, the 9910 lease provides a virtually identical provision with the only exception being that the Lessee has the option to extend this preference to Hopi Indians as well. (EEOC Response, Exhibit 10). These Navajo preference provisions are at the heart of this litigation as it is the EEOC's position that Peabody Coal is unlawfully discriminating against non-Navajo Native Americans when it applies and enforces this provision pursuant to the terms of the leases above.

Both lease agreements also possess provisions implicating the Secretary's role in the enforcement of such lease provisions. For instance Article XVI of the 8580 lease provides in pertinent part:

> When, in the opinion of the Mining Engineer of the Navajo Tribe and the Secretary of the Interior, before restrictions are removed, there has been a violation of any of the terms and conditions of this lease, the Secretary of the Interior and the Navajo Tribe shall have the right . . . to declare this lease null and void . . .

(EEOC Response, Exhibit 13).

Again, the 9910 lease contains an identical provision providing the Secretary with authority with respect to lease termination in the event of non-compliance. (EEOC Response, Exhibit 10).

In addition to the Secretary's authority with respect to cancellation with these leases, the SOI appears to have played a substantial role in the implementation of the 8580 and 9910 leases. For instance, the Secretary at the time of the leases

establishment, Mr. Stewart L. Udall, provides his declaration and testimony stating that he approved the lease agreements. (Navajo Nation Motion, Exhibit A, ¶2; Peabody Coal Response, Exhibit A, p.24, ll.9-14;). Specifically, Secretary Udall provides his declaration stating that these leases were drafted by the Department of Interior, approved by the Secretary of Interior and that the Department of Interior required that each lease contain a Navajo preference in employment provision. (*Id*. at ¶5,6,7). Thus, in addition to the Secretary's power of cancellation of these leases in the event of non-compliance, the evidence reveals that the Secretary required the leases to contain Navajo preference provisions prior to his approval. In addition, to the Secretary's involvement in these leases, it appears that the Secretary played and plays a similar role in other leases between the Navajo Nation and private business entities. (Navajo Nation Motion to Dismiss, Exhibit 2).

IV. Conversion of Motion to Dismiss to Motion for Summary Judgment

The Navajo Nation has presented multiple 12(b) theories in support of its position that this matter be dismissed, including lack of subject matter jurisdiction, lack of personal jurisdiction, failure to state a claim and failure to join a necessary and indispensable party. The Navajo Nation, Peabody Coal and the EEOC have presented multiple exhibits in support of their respective positions. In addition, the Court granted the EEOC's request to engage in discovery regarding issues raised in the Navajo Nation's motion to dismiss, which included the deposition testimony of former Secretary Udall regarding his involvement in the implementation of the lease agreements that

possess the Navajo employment preference provisions at issue. (Dkt. #108, 114). Because of the attachment of such exhibits in support of the Navajo Nation's motion which includes a 12(b)(6) argument, the Court must determine if conversion of the motion to dismiss to a motion for summary judgment is necessary. As a general matter, a motion to dismiss for failure to state a claim for relief under Rule 12(b)(6) must be treated as a motion for summary judgment under Rule 56 Fed.R.Civ.P. if either party presents materials outside the pleadings. *Anderson v. Angelone*, 86 F.3d 932, 934 (9th Cir. 1996). Here, the Court has considered such exhibits in support of the Navajo Nation's argument regarding dismissal based upon the Navajo Nation's 12(b)(6) theory. Specifically, the Navajo Nation, with Peabody Coal joining, has argued that the conduct at issue in this litigation is expressly exempted from the scope of Title VII because of the impact and relevance of the Navajo-Hopi Rehabilitation Act of 1950, 25 U.S.C. § 631-638 (Rehabilitation Act). Although the Navajo Nation argues that the Rehabilitation Act deprives this Court of subject matter jurisdiction, the proper inquiry is whether the Rehabilitation Act authorizes the Navajo employment preference at issue, thus suggesting that the EEOC has failed to state a claim. Because the Court has received and accepted exhibits from all parties regarding this issue, it is proper to convert the Navajo Nation's motion to dismiss into a motion for summary judgment. *See* Rule 12(b)(6) Fed.R.Civ.P. (stating if matters outside the pleadings are presented pursuant to 12(b)(6) theory and not excluded by the court, the motion shall be treated as Rule 56 motion and all persons shall be given a reasonable opportunity to present material pertinent). In the Ninth Circuit, where the parties have been

notified that the court is considering material beyond the pleadings, the parties will have received effective notice of the conversion to summary judgment. *Grove v. Meadh Sch. Dist. No. 354*, 753 F.2d 1528, 1533 (9th Cir. 1985), *cert denied*, 474 U.S. 826 (1985). The submission of such matters outside the pleadings to the court provides sufficient notice. *Id*. Thus, the Court hereby converts the Navajo Nation's motion to dismiss into a motion for summary judgment.

A motion for summary judgment may be granted only if the evidence shows "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). To defeat the motion, the non-moving party must show that there are genuine factual issues "that properly can be resolved only be a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 250, 106 S.Ct. 2505, 2511 (1986). The party opposing summary judgment "may not rest upon the mere allegations or denials of [the party's] pleadings, but . . . must set forth specific facts showing that there is a genuine issue for trial." Rule 56(e). *See Matsushita Elec. Indus. Co., v. Zenith Radio Corp*., 475 U.S. 574, 586-87 106 S.Ct. 1348 (1986). The evidence must be viewed in the light most favorable to the nonmoving party. *Devereaux v. Abbey*, 263 F.3d 1070, 1074 (9th Cir. 2001) (en banc).

V. Impact of Ninth Circuit Ruling in this Case.

As discussed above, the Ninth Circuit reversed and remanded this Court's original decision with its opinion filed on March 10, 2005. *Peabody W. Coal*, 400 F.3d 774 (9th Cir. 2005). The Ninth Circuit held that the Navajo Nation is a necessary party and can be joined under Rule 19 of the Federal Rules of Civil

Procedure. The Ninth Circuit held that "where the EEOC asserts a cause of action against Peabody and seeks no affirmative relief against the [Navajo] Nation, joinder of the [Navajo] Nation under Rule 19 is not prevented by the fact that the EEOC cannot state a cause of action against it. Because the EEOC is an agency of the United States, the [Navajo] Nation cannot object to joinder based on sovereign immunity. . . We therefore hold that joinder of the Nation is feasible." *Id*. at 778.

As discussed below, although the Ninth Circuit has addressed the issue of joinder of the Navajo Nation to this suit, this case is in a different posture with the filing of an Amended Complaint and the addition of the Navajo Nation as a party to this litigation. However, with respect to those arguments that fall within the scope of previous consideration of the Ninth Circuit, this Court will not depart from such binding precedent. *Yong v. I.N.S*., 208 F.3d 1116, 1119 n.2 (9th Cir. 2000); *see also Poland v. Stewart*, 169 F.3d 573, 582-83 (9th Cir. 1999) (noting that Ninth Circuit rulings can only be changed by an en banc court or subsequent Supreme Court authority). For instance, in its Motion, the Navajo Nation argues that the protection of sovereign immunity protects it from being joined as a party to this suit. However, although the Navajo Nation was not a party to this litigation when this issue was before the Ninth Circuit, the Ninth Circuit has squarely rejected this argument. *See Peabody W. Coal*, 400 F.3d at 781 (holding that "[b]ecause the EEOC is an agency of the United States, 'tribal sovereign immunity does not apply in suits brought by the EEOC.'"). However, while this issue has been addressed by the Ninth Circuit, the Navajo Nation and Peabody Coal assert arguments, addressed below, that are unique and

have not been squarely addressed by the Ninth Circuit.

VI. Argument

A Navajo Nation as Necessary and Indispensable Party

It is undisputed that the Navajo Nation is a necessary party to this litigation pursuant to Rule 19(a) of the Federal Rules of Civil Procedure. *Id*. at 780. However, because of the relief sought by the Amended Complaint, the Navajo Nation argues that Rule 19 mandates dismissal because it cannot be joined to this suit and is an indispensable party.

As a preliminary matter, it is important to keep in mind that the Ninth Circuit in this case restricted its holding regarding the feasibility of joinder of the Navajo Nation to instances where no affirmative relief is sought against it. Specifically, the Ninth Circuit noted that it has consistently held that the "inability to state a direct cause of action against an absentee does not prevent the absentee's joinder under Rule 19." *Id*. (citations omitted). Moreover, the Ninth Circuit stated " . . . the EEOC has no claim against the party it seeks to join and is not seeking any affirmative relief directly from that party [the Navajo Nation]. Joinder is necessary for the 'sole purpose' of effecting complete relief between the parties . . . by ensuring that both Peabody Coal and that Nation are bound to any judgment upholding or striking down the challenged lease provision." *Id*. at 783. However, a reading of the Amended Complaint filed after the Ninth Circuit's ruling belies the notion that the EEOC is not seeking any affirmative relief against the Navajo Nation. The Amended Complaint seeks "a permanent injunction enjoining Peabody . . .

and all person in active concert or participation with it, from engaging in discrimination on the basis of national origin." (Amended Complaint, Prayer for Relief ¶ A). While the Navajo Nation is not expressly named as a party to be enjoined from engaging in discrimination in violation of Title VII principles, there can be no doubt that the Navajo Nation falls within the scope of affirmative relief sought by the EEOC. It has been well established since the beginning of this litigation that the Navajo Nation and Peabody Coal entered into the lease agreements, the 8580 and 9910, that are at the heart of this litigation. Should the EEOC prevail in this suit and obtain the broad relief sought, the Navajo Nation would then be enjoined from implementing and requiring such lease provisions in the future as it would already be subject to injunctive relief from this Court based upon the determination that such provisions are contrary to Title VII. As such, there can be little doubt that the EEOC seeks affirmative relief not only against Peabody Coal but the Navajo Nation as well.

The significance of such affirmative relief is that it precludes the Navajo Nation from being joined in this suit. While it is well established that the Navajo Nation is not protected by sovereign immunity from suit by the EEOC, it is also clear that "an Indian tribe is specifically exempt from the definition of 'employer,' and thus Title VII does not apply to Indian tribes when they act as employers." *Id*. at 781 (citing 42 U.S.C. § 2000e(b)). As such, the EEOC's requested relief against the Navajo Nation based upon violations of Title VII cannot stand. Therefore, in taking the Amended Complaint at face value, the Navajo Nation cannot be joined to this suit based upon the affirmative relief sought by the EEOC.

With the determination that the Navajo Nation is a necessary party that cannot be joined based upon the affirmative relief sought against it, this Court is left with the determination of whether the Navajo Nation is an indispensable party to this litigation pursuant to Rule 19(b) Fed.R.Civ.P. (citations omitted). "A party is indispensable if in 'equity and good conscience,' the court should not allow the action to proceed in its absence." *Dawavendewa v. Salt River Project Agr. Imp. and Power Dist*, 276 F.3d 1150, 1161 (9th Cir. 2002) (*Dawavendewa II*). To make this determination, courts balance four factors: (1) the prejudice to any party or the absent party; (2) whether relief can be shaped to lessen prejudice; (3) whether an adequate remedy, even if not complete, can be awarded without the absent party; and (4) whether there exists an alternative forum. *Id.* This Court originally determined that in balancing these four factors that the Navajo Nation is an indispensable party. *EEOC v. Peabody Coal Co*., 214 F.R.D. 549, 559-60 (D.Ariz. 2002), *rev'd on other grounds*, *Peabody W. Coal*, 400 F.3d 744. The Court makes the same determination again based upon the affirmative relief sought against the Navajo Nation in this suit. As to the first factor, in the absence of the Navajo Nation, the Navajo Nation would be prejudiced from protecting its interest with respect to the viability of the lease provisions at issue and the affirmative relief sought against it. Second, the relief could not be shaped to lessen any prejudice against the Navajo Nation in its absence. In the event that the EEOC were to succeed in its suit against Peabody Coal, such relief would clearly come at the expense of the Navajo Nation. Third, this line of reasoning also rebuts the possibility of an adequate remedy in the Navajo Nation's absence. The EEOC's broadly requested

relief eliminates the possibility of such a remedy as it seeks to enjoin Peabody Coal as well as the Navajo Nation from complying with the Navajo preference provisions at issue. With the Navajo Nation's absence, there is no way to shape such relief. Lastly, as noted in this Court's original decision, the only factor that does not favor dismissal is that there remains no alternative forum for the EEOC to proceed should this case be dismissed. *Peabody Coal*, 214 F.R.D. at 560. However, again, while recognizing the effects of such a dismissal, this Court finds that in balancing these four factors, that dismissal is appropriate.

B. Rules Enabling Act and Title VII Requirements

In addition to the consequences resulting from the affirmative relief sought against the Navajo Nation with respect to Rule 19, this affirmative relief also raises further issue with respect to the viability of the EEOC's suit against Peabody Coal and the Navajo Nation.

(1) Rules Enabling Act

The Rule Enabling Act of 28 U.S.C. § 2072(a) provides that the Supreme Court "shall have the power to prescribe general rules of practice and procedure . . . for cases in the United States district courts." In addition § 2072(b) relates "such rules shall not abridge, enlarge or modify any substantive right . . ." Here, based upon the relief sought by the EEOC and the impact created by a favorable ruling for the EEOC it is apparent to this Court that the EEOC's requested relief is inconsistent with its substantive rights.

It is undisputed that the EEOC can assert no cause of action against the Navajo Nation. *Peabody W. Coal*, 400 F.3d at 781 (citing 42 U.S.C. § 2000e(b)). However, a plain reading of the Amended Complaint indicates that despite the inability to seek relief from the Navajo Nation, the EEOC seeks to enjoin the Navajo Nation from complying and enforcing the Navajo employment preference provisions at issue. This relief is inconsistent with the EEOC's substantive rights under Title VII and furthermore, is inconsistent with the Ninth Circuit's holding in this case. The Ninth Circuit in this case when addressing the argument set forth by Peabody Coal regarding the impact of the Rules Enabling Act held in pertinent part:

> Because the EEOC is not seeking to hold the Navajo Nation liable under Title VII, we reject Peabody's argument that our reading or Rule 19 conflicts with the Rules Enabling Act's restriction that the federal rules of civil procedure "shall not abridge, enlarge or modify any substantive right." Joinder of the Nation does not, and cannot, create any substantive rights that the EEOC may enforce against the Nation, and the EEOC does not contend otherwise.

Id. at 783.

However, now with the benefit of the Amended Complaint asserted by the EEOC, it appears to this Court that the EEOC is in fact seeking to enlarge or modify its substantive rights under Title VII against the Navajo Nation. Because such a claim and affirmative relief is inconsistent with the EEOC's substantive rights against the Navajo Nation, it is not viable.

(2) Title VII Requirements of Suit

In addition, the affirmative relief sought by the EEOC also raises considerations as to the proper methods of bringing such relief against the Navajo Nation. For instance, pursuant to 42 U.S.C. § 2000e-5(f)(1), in suits against government respondents, it is the Attorney General that is to bring suit, not the EEOC. However, here, it is the EEOC that is seeking affirmative relief against the Navajo Nation. Peabody Coal advanced a similar argument to the Ninth Circuit in this case; however, it was rejected on the basis that this requirement was not necessary as the Navajo Nation was being joined to the litigation in name only to effectuate complete relief. *Id*. at 781. However, now with the benefit of the filing of the Amended Complaint and limited discovery, it is apparent to this Court that the EEOC is not merely seeking relief against Peabody Coal, but all parties acting in concert with it, which includes the Navajo Nation. In such instances, this relief is not to be asserted by the Navajo Nation, but the Attorney General after conciliation efforts between the EEOC and the Navajo Nation, a government respondent under § 2000e-5(f)(1). As such, this analysis also favors dismissal of the Amended Complaint against the Navajo Nation and in turn against Peabody Coal as the suit cannot proceed without the joinder of the Navajo Nation.

C. Relevance of Rehabilitation Act

The Navajo Nation argues that even if EEOC's Complaint were somehow permissible against it, the EEOC's Title VII suit fails because the conduct at issue is exempted from Title VII by the Navajo-Hopi Rehabilitation Act of 1950, 25 U.S.C. § 631-638. The Rehabilitation Act was passed in 1950 in response to

the poor economic and overall living conditions on the Navajo and Hopi reservations. The Act authorizes the Secretary of the Interior to undertake and implement "a program of basic improvements for the conservation and development of the resources of the Navajo and Hopi Indians, the more productive employment of their manpower, and the supplying of means to be used in their rehabilitation, whether on or off the Navajo and Hopi Reservations." Moreover, according to the Secretary at the time of the implementation of the leases at issue, coal-leasing was one of the centerpieces under the Rehabilitation Act to assist with the means of rehabilitation. (Navajo Nation Motion, Exhibit 1, Declaration of Stewart Udall, ¶3) *see also Navajo Nation v. United States*, 68 Fed.Cl. 805, 812 (Fed Ct.Cl. 2005); *Austin v. Andrus*, 638 F.2d 113, 114 (9th Cir. 1981) (noting that Rehabilitation Act provided funds for surveys and studies of coal on Navajo and Hopi lands). In addition, the Navajo Nation notes that § 633 of the Rehabilitation Act possesses a tribal preference provision. Specifically, § 633 relates that "Navajo and Hopi Indians shall be given, whenever practicable, preference in employment on all projects undertaken pursuant to this subchapter . . ." In addition, the Rehabilitation Act has been amended twice since the enactment of Title VII in 1964; however, this tribal preference provision has yet to be modified or removed by Congress. *See* 25 U.S.C. §§ 639, 640. The Navajo Nation, with Peabody Coal joining, argues that the Rehabilitation Act's tribal preference provision can and should be read harmoniously with § 2000e-2(i) of Title VII, which possesses a general Indian Preference exemption for employers who provide preferential treatment to Indians living on or near a reservation.

In response, the EEOC sets forth two arguments. First, the EEOC contends that the Rehabilitation Act is not applicable as it does not relate to coal leases, such as the 8580 and 9910 leases. (EEOC Response, Exhibit 8). Second, the EEOC argues that Title VII is clear that tribe specific employment provision are unlawful. With respect to the EEOC's first argument that the Rehabilitation Act does not apply to the coal leases at issue, it is clear to this Court that the discovery requested by the EEOC and performed in this case simply does not support such a position. As mentioned above, Secretary Udall, provides his declaration stating that the Rehabilitation Act played a central role in the implementation of such leases. (Navajo Nation Motion, Exhibit 1 ¶3). In addition, Secretary Udall relates that the Navajo preference provisions were implemented in such leases pursuant to the terms of the Rehabilitation Act. (*Id*. ¶5). Finally, Secretary Udall's deposition testimony further supports the key role the Rehabilitation Act played in the leases and their provision. (Peabody Coal Response to Navajo Nation Motion to Dismiss, Exhibit A, pp.37-38, ll.21-4). Based upon this evidence it is apparent that the leases at issue are governed by the Rehabilitation Act.

Second, in this Court's view, the Rehabilitation Act expressly approves the type of tribal preference provision at issue in this case. Specifically, as noted above § 633 of the Rehabilitation Act "Navajo and Hopi Indians shall be given, whenever practicable, preference in employment on all projects undertaken pursuant to this subchapter . . ." The Court finds that such preference invoked in projects governed by the Rehabilitation Act, such as in this case, controls and is not inconsistent with Title VII's Indian Preferences exemption pursuant to § 2000e-2(i), which

applies broadly to Indians rather than specific tribes. In *Dawavendewa v. Salt River Project Agr. Imp. and Power Dist*., 154 F.3d 1117, 1123 (9th Cir. 1998) the Ninth Circuit held that Title VII's Indian Preferences exemption, § 2000e-2(i), provides against any preference given to one specific Indian tribe over another. The Ninth Circuit in *Dawavendewa I* rejected the district court's reliance on the Indian Self-Determination and Education Assistance Act (ISDA) as authorizing the specific tribal employment preference given by the employer in that case, the Salt River Project. *Id*. at 1122-23. The ISDA, which was implemented to allow tribes to contract with with the Department of Interior and Health and Human Services to administer certain programs themselves, also possessed a provision stating that "tribal employment or contact preference law adopted by such tribe will govern." *Id*. at 1122. The Ninth Circuit rejected the argument that this provision, implemented as an amendment in 1994, provided support that the Indian Preferences exemption of Title VII allowed for specific tribal employment preference. Notably, the Ninth Circuit stated that there was no contention that the employer, SRP, was acting pursuant to a self-determination contract subject to the ISDA. *Id*. at 1123. The situation in this case is quite different. Here, the employer Peabody Coal engaged in lease agreements with the Navajo Nation that are governed and implemented pursuant to the Rehabilitation Act, which has provided for specific tribal preference since 1950. In addition, the Rehabilitation Act has been amended twice since the enactment of Title VII in 1964, each time silent as to any modification or repeal of such specific tribal employment preference provisions in § 633. In this Court's view, the Rehabilitation Act tribal preference

provision can and should be read harmoniously with Title VII's Indian Preferences exemption. Specifically, the Rehabilitation Act applies only in limited circumstances and addresses specific tribal employment preference whereas Title VII's Indian Preferences exemption applies broadly to all other such provisions that are implemented outside the scope of the Rehabilitation Act. As such, the two can be read together. *See Morton v. Mancari*, 417 U.S. 535, 550, 94 S.Ct. 2474 (1974) (stating that repeal by implication is only appropriate where statutes are irreconcilable and that where there is no clear intention otherwise, specific statute will not be controlled or nullified by general one). Thus, this Court finds that the Rehabilitation Act and Title VII can be read together harmoniously. Because the lease agreements are governed by the Rehabilitation Act and authorize the Navajo employment preference provisions that are at issue, the EEOC's suit fails to state a claim.

D. Secretary of Interior as Necessary and Indispensable Party

Finally, in the alternative, this Court finds that even if the EEOC's suit does not seek any affirmative relief against the Navajo Nation and is not contrary to the specific provisions of the Rehabilitation Act, the EEOC's suit fails because the Secretary of Interior ("Secretary" or "SOI") is a necessary party that cannot be joined to this litigation and is indispensable to this litigation. Both the Navajo Nation and Peabody Coal have set forth persuasive argument that because the SOI was also involved in the drafting and implementation of the leases as well as still plays an integral role in these leases that the SOI is a necessary and indispensable party to this

litigation. In addition, the SOI cannot be joined to this lawsuit as the SOI is immune from suit, absent consent.

As referenced above, Rule 19 of the Federal Rules of Civil Procedure requires that a court determine (1) whether an absent party is necessary to this action; and then (2) if the party is necessary but cannot be joined, whether the party is indispensable such that in "equity and good conscience" the suit should be dismissed. *Confederated Tribes v. Lujan*, 928 F.2d 1496, 1498 (9th Cir. 1991). This two prong test is actually made up three successive factors: first, the court must determine if the absent party is necessary; second, the court must determine whether joinder is feasible; and third, if joinder is not feasible, the court must determine if the party is an indispensable party. *Peabody W. Coal*, 400 F.3d at 779 (citing *United States v. Bowen*, 172 F.3d 682, 688 (9th Cir. 1999).

(1) Secretary of Interior: Necessary Party Analysis

Rule 19(a) provides in pertinent part:

> A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already existing parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties

subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

(a) Complete Relief Cannot be Accorded in the Secretary's Absence

The first prong of the necessary party analysis deals with whether complete relief can be made in the SOI's absence. The Navajo Nation and Peabody Coal argue that complete relief cannot be afforded in this suit without the Secretary's presence in this suit. These parties again cite the Secretary's involvement in the implementation of the leases at issue and authority to cancel such leases in the event of non-compliance. In response to the Secretary's role in the implementation of the leases as well the Navajo preference provisions, the EEOC contends that complete relief can be accorded among the existing parties without the Secretary's involvement. The EEOC cites the Ninth Circuit's holding in this case to exemplify that no affirmative relief has been asserted against the Navajo Nation. Rather, the "[j]oinder of the Navajo Nation only renders the final judgment of this Court binding on the Nation under the doctrine of res judicata. . . . Should the EEOC prevail, complete relief will be accorded to the parties by the award of monetary, declaratory and injunctive relief from Peabody, and the res judicata effect of the decision on the Navajo Nation." (EEOC Response, p. 21). Thus, the EEOC contends that complete relief can be accorded among the existing parties because the EEOC does not seek any relief beyond that stated above.

Notwithstanding that the Court disagrees with the EEOC regarding the lack of any affirmative relief asserted against the Navajo Nation, the EEOC's

argument ignores the current posture of this litigation. The EEOC has asserted direct claims of relief against Peabody Coal, and at the very least joined the Navajo Nation. Even if Peabody Coal is the only defendant in this litigation facing affirmative relief, Peabody Coal is certainly permitted to raise any defenses or counterclaims or cross-claims that are applicable in this litigation. Notably, because of the Secretary's involvement in the formation and implementation of these leases, it is not unreasonable, given the circumstances, that Peabody Coal could assert a cross-claim against the SOI were the Secretary a party to this litigation. For example, based upon the record presented, the SOI required and even drafted the leases with the Navajo employment preference provisions as a requirement of the leases.

As noted by Peabody Coal, a similar situation was presented in *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702 (9th Cir. 1997). In Monterey, a contractor brought suit against trustees of California State University seeking declaratory, injunctive and monetary relief on the basis that the state statute that required him to discriminate on the basis of race when hiring subcontractors violated the Equal Protection Clause. *Id*. at 705. The district court denied his request for preliminary injunction and plaintiff appealed. On appeal, the Ninth Circuit held that the plaintiff did possess the requisite standing to assert a claim against the government even though plaintiff was not being directly discriminated against, but rather was the individual that was required to discriminate based upon race when retaining subcontractors. In finding that the plaintiff possessed the requisite standing to sue, the Ninth Circuit stated "[a] 'law compelling persons to discriminate against other persons because of race' is a palpable violation

of the Fourteenth Amendment regardless of whether the persons required to discriminate would have acted the same way regardless of the law. The contractor required to discriminate also suffers injury in fact because the statute exposes him to liability for discrimination." *Id*. at 707-08.

A similar situation is presented here. If the SOI were a party to this litigation, it is feasible that Peabody Coal would assert a cross-claim against the SOI based upon the fact that the Secretary is the person that required the Navajo Nation and Peabody Coal implement such provisions. Should the EEOC succeed in this suit, Peabody Coal would be forced to incur monetary and injunctive relief based upon the government's requirement that Peabody Coal only give preference to Navajo Indians for employment on the reservation. Thus, in the absence of the Secretary, complete relief cannot be accorded among the parties because of the inability of Peabody Coal to assert any claim against the SOI.

(b) The Secretary Claims an Interest Relating to the Subject of this Action

The second mutually exclusive prong of the necessary party analysis, deals with whether the absent party claims an interest in the pending suit. The EEOC contends that the SOI has no interest in this litigation. However, as demonstrated by the Secretary's involvement in the drafting and implementation of these leases, it is clear that the Secretary at the very least claims an interest in this litigation. Not only did the Secretary play an active role in approving the leases and requiring specific Navajo employment preference provisions, it appears that the SOI still is an integral part of the leases as the SOI retains the authority to terminate the lease in

the even of non-compliance. (Peabody Coal Response, Exhibits B and C) *See also Yavapai-Prescott Indian Tribe v. Watt*, 707 F.2d 1072, 74 (9th Cir. 1983) (noting that Secretary possess the authority to terminate lease between commercial entity and Indian tribe).

For instance, as noted in *Dawavendewa II*, 276 F.3d at 1156, "[n]o procedural principle is more deeply imbedded in the common law than that, in an action to set aside a lease or contract, all parties who may be affected by the determination of the action are indispensable. (quoting *Lomayaktewa v. Hathaway*, 520 F.2d 1324, 1325 (9th Cir 1975). Specifically, in *Dawavendewa II*, the Ninth Circuit found the Navajo Nation to possess an interest in the suit because of its status as a contracting party to the lease agreements at issue and the possibility that an adverse ruling would threaten its contractual interests. The same is true here with respect to the SOI. While the Amended Complaint does not specifically seek to set aside or cancel the lease provisions at issue; the effect of a favorable ruling in support of the EEOC undoubtedly implicates such a possibility given that Peabody Coal could be bound by a judgement that is inconsistent with the Navajo preference provisions in the 8580 and 9910 leases. In the event Peabody Coal fails to comply with the Navajo employment preference provisions, the SOI would be faced with a decision as to whether to take any action by terminating the leases. The EEOC argues that cancellation of the leases is not a realistic possibility given the revenue generated for the Navajo Nation based leases with such provisions. However, the EEOC's argument is speculative and it cannot be disputed that a favorable result for the EEOC undoubtedly impacts the lease provisions at issue given that the provisions expressly require preferen-

tial hiring treatment to Navajo Native Americans. The mere fact that the question is posed as to what the SOI will do in the event of non-compliance by Peabody Coal demonstrates that the Secretary claims an interest in this litigation. The EEOC, by arguing that Secretary will not act to cancel the leases containing the Navajo preference provisions, is in effect taking on the role of the SOI.

(i) Disposition of this Action in the SOI's Absence Would Impede or Impair the Secretary's Ability to Protect that Interest

The EEOC contends that if the Court were to determine that the SOI possesses an interest in this litigation, in any event, the SOI's absence from this suit does not impair or impede the Secretary's interest. Specifically, the EEOC argues that this lawsuit does not seek affirmative relief against the Navajo Nation, but rather binds the Navajo Nation to this suit as well as bars it from any future challenge to enforce the Navajo employment preference provisions at issue. (EEOC Response, p. 25). Thus, the EEOC argues that this litigation cannot prevent the Secretary from continuing to approve tribal preference provisions in future leases. However, again this argument ignores the impact of a favorable result for the EEOC in this litigation. Undoubtedly, such a judgment would impact these and other related Navajo preference provisions between the Secretary, Navajo Nation and private non-Navajo businesses governed by or seeking lease agreements. Moreover, no other party can represent the Secretary's interest in this suit. As such, the Secretary's absence would impair or impede the Secretary's ability to protect this interest.

(ii) Non-Joinder of the SOI Creates a Substantial Risk of Multiple, Inconsistent Obligation to Existing Parties

Moreover, the EEOC contends that even if this Court were to find that the SOI has an interest in this suit, there is nothing to suggest that any of the existing parties would be subject to a substantial risk of multiple or inconsistent obligations in the Secretary's absence. As mentioned above, the EEOC contends there is no risk that the Secretary would cancel or modify the lease agreements to the detriment of Peabody Coal. In other words, the EEOC contends that even if Peabody Coal and the Navajo Nation were bound by a favorable judgment in support of the EEOC, such a judgment would not create a substantial risk of inconsistent obligations to Peabody Coal even though Peabody Coal would be bound by a monetary and injunctive judgment against it as well as face lease termination by the SOI.

As noted above, the EEOC's argument 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. The Ninth Circuit in this case noted this exact dilemma, but did so in relation to the Navajo Nation, the other party to the lease agreement. *Peabody W. Coal*. 400 F.3d at 780. Now, even though the Navajo Nation is joined to this lawsuit the same problem is created by the absence of the Secretary should the EEOC prevail: "comply with the injunction prohibiting the hiring preference policy or comply with the lease requiring it." *Id*. The Secretary's authority includes the authority to termi-

nate or cancel the lease agreements should there be a breach by a contracting party, such as Peabody Coal. (Peabody Coal's Response, Exhibits B and C). Thus, again Peabody Coal is stuck between the "proverbial rock and a hard place," that was created in the absence of the Navajo Nation.

It is clear that the SOI is a necessary party to this litigation because both mutually exclusive prongs of Rule 19(a) Fed.R.Civ.P. are satisfied.

(2) Feasibility of Joinder of SOI

It is well established that the United States is not subject to suit absent its consent. *United States v. Sherwood*, 312 U.S. 584, 586, 61 S.Ct. 767 (1942) (holding that United States, as sovereign, is immune from suit save as it consents to be sued); *Gilbert v. DaGrossa*, 756 F.2d 1455, 1457 (9th Cir. 1985). Moreover, the EEOC is statutorily barred from bringing suit against the United States absent its consent. *See* 42 U.S.C.A. § 2000e-5(f)(1). Lastly, unlike the situation in joining the Navajo Nation to this litigation in order to provide for complete relief between the parties, there is no authority suggesting that such action is proper when the absent party is the United States. The Ninth Circuit in *Peabody W. Coal*, 400 F.3d at 781, determined it feasible to join the Navajo Nation to this litigation because in suits asserted by the EEOC, the Nation's tribal sovereign immunity does not bar suits asserted by the United States. However, there is no authority suggesting that this ruling can be expanded to join the United States in similar situations. As such, it is not feasible to join the SOI to the present litigation absent his consent.

(3) SOI as Indispensable Party

Finally, the last step in this analysis, requires the Court to determine if the SOI is an indispensable party requiring the dismissal of this action. As noted above, "[a] party is indispensable if in 'equity and good conscience,' the court should not allow the action to proceed in its absence." *Dawavendewa II*, 276 F.3d at 1161 (citations omitted). To make this determination, courts balance four factors: (1) the prejudice to any party or the absent party; (2) whether relief can be shaped to lessen prejudice; (3) whether an adequate remedy, even if not complete, can be awarded without the absent party; and (4) whether there exists an alternative forum. *Id*. (citations omitted).

First, this Court has discussed at length the prejudice created by the absence of the SOI from this suit. *See Clinton v. Babbitt*, 180 F.3d 1081, 1090 (9th Cir. 1999) (noting that prejudice test under Rule 19(b) is essentially the same as necessary party inquiry under Rule 19(a)). Most notably, as discussed above, that with the Secretary's absence Peabody Coal will still be stuck between the "proverbial rock and hard place" which the Ninth Circuit cited when the Navajo Nation was the absent party from this suit. *Peabody W .Coal*. 400 F.3d at 780. The evidence submitted by the Parties demonstrates the SOI's integral role in establishing the leases at issue, and others like it, as well as the Secretary's continuing role in these leases including the authority with respect to cancellation were the lessee to breach a contractual provision of the lease, such as the Navajo preference provision.

Second, there does not appear to be any relief that can be shaped to lessen prejudice. As with the earlier procedure posture of this case, if the EEOC were to

succeed, Peabody Coal would again be prejudiced facing the possibility of complying with the Court's judgment while balancing the possibility of lease non-compliance. There is no way to lessen such prejudice.

Third, there does not appear to be an adequate remedy, even if not complete, that can be awarded without the SOI. The EEOC argues simply that relief can be accorded based upon the EEOC obtaining monetary and injunctive relief against Peabody Coal and barring the Navajo Nation from a subsequent challenge because of res judicata. Further, the EEOC cites its position that there is no risk that the Secretary would invalidate any of the leases based upon Peabody Coal's compliance with the Court's judgment. However, it is clearly not an adequate remedy to proceed with this litigation placing Peabody Coal and the Navajo Nation at odds with the Secretary's requirement that the leases at issue and others like it possess Navajo preference provisions.

Fourth, and finally, it is not disputed that there is no alternative forum should the Court dismiss the instant litigation. In such situations, the district court must be extra cautious before dismissing the suit. *Mikah Indian Tribe v. Verity*, 910 F.2d 555, 560 (9th Cir. 1990). However, the lack of an alternative forum does not automatically preclude dismissal of a suit. *E.g. Confederated Tribes of the Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1500 (9th Cir. 1991). Moreover, the situation presented in this case is not unlike the situation previously encountered by this Court in determining dismissal appropriate based upon the Court's determination that the Navajo Nation is a necessary party that cannot be joined to this litigation. However, this time it is the United States that is the subject of the sovereign

immunity. The Ninth Circuit has noted that in such situations where the necessary party is immune from suit, there is little need for balancing. *Id*. at 1499. Thus, although there is no alternative forum available, given the immunity governing the SOI, the Court finds that the factors of Rule 19(b) support dismissal.

VII. Summary

This Court finds that the dismissal of the EEOC's lawsuit is warranted for several reasons. First, the EEOC is currently seeking affirmative relief against the Navajo Nation in the form of injunctive relief enjoining the Navajo Nation from requiring and enforcing its Navajo employment preference provisions. This affirmative relief is contrary to Title VII's exemption of Indian tribes from suit. Because the Navajo Nation is immune from such suit it cannot be a party to this litigation thus making it a necessary and indispensable party pursuant to Rule 19 Fed.R.Civ.P. Second, because the EEOC is seeking such affirmative relief against the Navajo Nation, the EEOC's suit is contrary to the Rules Enabling Act and runs afoul of proper procedural requirements when asserting a suit against a government respondent. Third, the Rehabilitation Act expressly authorizes the employment preference provisions at issue in this litigation, thus invalidating the EEOC's claims as a matter of law. Fourth and finally, this Court finds that even if the EEOC has properly brought suit against Peabody Coal and the Navajo Nation regarding the current Navajo employment preference given, its suit fails as the SOI is a necessary party that cannot be joined to this litigation and is indispensable pursuant to Rule 19 Fed.R.Civ.P.

Accordingly,

IT IS HEREBY ORDERED granting the Navajo Nation's Motion to Dismiss, which has been converted into a Motion for Summary Judgment. (Dkt. #89).

IT IS FURTHER ORDERED granting the Navajo Nation's Motion to Strike Exhibits 9 and 16 of the EEOC's Response to the Navajo Nation's Motion to Dismiss. (Dkt. #124). In addition, the Court did not consider the newspaper articles cited in footnote 5 of the EEOC's Response.

IT IS FURTHER ORDERED denying the EEOC's Motion to Strike Exhibits D and E to Peabody Coal's Response to the Navajo Nation's Motion to Dismiss. (Dkt. #134-2).

IT IS FURTHER ORDERED denying the Navajo Nation's Motion for Leave to File Notice of Supplemental Authority as moot. (Dkt. #140).

IT IS FURTHER ORDERED directing the Clerk to enter judgment accordingly. DATED this 30th day of September, 2006.

/s/ Mary H. Marguia
Mary H. Marguia
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 02-17305

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellant,

v.

PEABODY WESTERN COAL COMPANY,
Defendant-Appellee.

March 3, 2005, Resubmitted
March 10, 2005, Filed

COUNSEL: Benjamin N, Gutman (Argued), EEOC, Washington, D.C., Ralph E. Chamness, Katherine Kruse, EEOC, Phoenix, Arizona, for the plaintiff-appellant.

Lawrence Jay Rosenfeld, Mary E. Bruno, John F. Lomax, Jr., Greenberg Traurig, Phoenix, Arizona, for the defendant-appellee.

JUDGES: Before: Procter Hug, Jr., Arthur L. Alarcon, and William A. Fletcher, *Circuit Judges*. Opinion by Judge William A. Fletcher.

OPINION

W. FLETCHER, *Circuit Judge*:

The Equal Employment Opportunity Commission ("EEOC") filed this action against Peabody Western Coal Company ("Peabody") for maintaining a Navajo

hiring preference at the mines that Peabody leases from the Navajo Nation. The EEOC alleges that Peabody has discriminated against non-Navajo Native Americans, including two members of the Hopi Nation and one member of the Otoe tribe, in violation of Title VII, 42 U.S.C. § 2000e-2(a)(1).

On appeal, we are presented with three questions. The first is whether, under Federal Rule of Civil Procedure 19, it is feasible to join the Navajo Nation as a party. We hold that it is feasible to join the Nation in order to effect complete relief between the parties. Because the EEOC is an agency of the United States, the Navajo Nation cannot assert its sovereign immunity as a defense to joinder. The second is whether the EEOC's claim presents a nonjusticiable political question. We hold that it does not. The third is whether the district court erred in dismissing the EEOC's claim that Peabody failed to keep records as required by Title VII, 42 U.S.C. § 2000e-8(c). We hold that it did. We reverse and remand for further proceedings.

I. Background

Peabody mines coal at the Black Mesa Complex on the Navajo and Hopi reservations in northeastern Arizona. It does so pursuant to leases with the tribes entered into by Peabody's predecessor-in-interest, the Sentry Royal Company ("Sentry"). Sentry entered into two leases with the Navajo Nation: a 1964 lease allowing it to mine on the Navajo Nation's reservation (lease no. 8580), and a 1966 lease allowing it to mine on the Navajo portion of land set aside for joint use by the Navajo and Hopi Nations (lease no. 9910). Both leases contain provisions requiring that preference in employment be given to members of the Navajo Nation. The 1964 lease provides that Peabody

"agrees to employ Navajo Indians when available in all positions for which, in the judgment of [Peabody], they are qualified," and that Peabody "shall make a special effort to work Navajo Indians into skilled, technical, and other higher jobs in connection with [Peabody's] operations under this lease." The 1966 lease contains a similar provision, but also specifies that Peabody may "at its option extend the benefits of this Article [containing the Navajo employment preference] to Hopi Indians." The record indicates that the language of the Navajo employment preferences remains unchanged and does not show that the preference has been extended to members of the Hopi Nation.

Pursuant to the Indian Mineral Leasing Act of 1938 ("IMLA"), the Department of Interior has approved both the leases, as well as subsequent amendments and extensions. *See* 25 U.S.C. §§ 396a, 396e; *see also United States v. Navajo Nation*, 537 U.S. 488, 493 (2003) (explaining that the Department of the Interior's approval is necessary before the leases become effective). If the lease terms are violated, the Navajo Nation and the Department of the Interior ("DOI") retain the power to cancel the leases after a notice and cure period.

In June 2001, the EEOC filed this action in District Court for the District of Arizona, alleging that Peabody was unlawfully discriminating on the basis of national origin by implementing the Navajo employment preference. Specifically, the EEOC's complaint charged that Peabody had refused to hire non-Navajo Native Americans—two members of the Hopi and one now-deceased member of the Otoe tribe, as well as unspecified other non-Navajo Native Americans—for positions for which they were other-

wise qualified. The EEOC argued that such conduct violated 42 U.S.C. § 2000e-2(a)(1), which prohibits employers from refusing to hire applicants because of their national origin. The complaint further alleged that Peabody had violated the record-keeping requirements of § 2000e-8(c).

Questions arising out of transactions, including coal mining leases, on the Navajo and Hopi reservations and on the tribes' joint land have been extensively litigated. *See, e.g., Navajo Nation*, 537 U.S. at 493-513 (rejecting claim by Navajo Nation that the Secretary of the Interior breached fiduciary duties owed to the Nation by approving the coal leases); *Peabody Coal Co. v. Navajo Nation*, 373 F.3d 945, 946 (9th Cir. 2004) (holding that the court lacked jurisdiction to enforce arbitration settlement agreement about lease royalty rates); *see also Clinton v. Babbitt*, 180 F.3d 1081, 1083-86 (9th Cir. 1999) (describing the lengthy dispute between Navajo and Hopi Nations over joint use land in Arizona); *Navajo Nation v. Peabody Holding Co*., 209 F. Supp. 2d 269, 275-76 (D.D.C. 2002) (describing history of amendments to the leases in a RICO suit by the tribe against Peabody).

Navajo employment preference provisions also have been the subject of prior litigation. *See Dawavendewa v. Salt River Project Agr. Imp. & Power Dist*., 276 F.3d 1150, 1163 (9th Cir. 2002) ("*Dawavendewa II*"); *Dawavendewa v. Salt River Agr. Imp. & Power Dist*., 154 F.3d 1117, 1124 (9th Cir. 1998) ("*Dawavendewa I*"). In *Dawavendewa I*, we interpreted the Indian preference exception of Title VII, § 2000e-2(i), to permit discrimination in favor of Indians living on or near a reservation, but not to permit discrimination against Indians belonging to other tribes. *Id*. at 1124. On

remand to the district court, the private contractor defendant moved to dismiss the case for failure to join the Navajo Nation as an indispensable party under Federal Rule of Civil Procedure 19(b).

In *Dawavendewa II*, 276 F.3d at 1153, we agreed with the district court that the Navajo Nation was an indispensable party. We held that "as a signatory to the lease . . . the Nation is a necessary party that cannot be joined because it enjoys tribal sovereign immunity." *Id*. We noted when balancing the factors to determine whether the Nation was an indispensable party that the plaintiff

> may have a viable alternative forum in which to seek redress. Sovereign immunity does not apply in a suit brought by the United States. Moreover, recently, in *EEOC v. Karuk Tribe Housing Authority*, 260 F.3d 1071, 1075 (9th Cir. 2001), we held that because no principle of law 'differentiates a federal agency such as the EEOC from the United States itself,' tribal sovereign immunity does not apply in suits brought by the EEOC.

Id. at 1162-63. When the EEOC moved "at the eleventh hour" to intervene, we denied the motion. We observed, however, "that nothing precludes Dawavendewa from refiling his suit in conjunction with the EEOC." *Id*. at 1163.

In June 2002, the EEOC brought the present action, alleging intertribal discrimination as in *Dawavendewa I* and *Dawavendewa II*. In February 2002, Peabody moved for summary judgment under Federal Rule of Civil Procedure 56 and for dismissal of the action under Federal Rules of Civil Procedure 12(b)(7) and 12(b)(1). Peabody neither admitted nor denied that it

had discriminated against non-Navajo Native Americans in violation of Title VII. Instead, Peabody asserted that Rule 19 required dismissal because the Navajo Nation was a necessary and indispensable party. Peabody also asserted that the issue of the legality of this lease provision was a nonjusticiable political question, on the theory that because the DOI had approved the mining leases, the court would have to make an "initial policy choice" between the positions of the DOI and the EEOC.

The district court held that it was not feasible to join the Navajo Nation, and that the Nation was not only a necessary but also an indispensable party. In the alternative, it found the legality of the Navajo employment preference in the lease to be a nonjusticiable political question. The district court dismissed the entire action, including the EEOC's record-keeping claim. The EEOC timely appealed. We reverse and remand for further proceedings.

II. Discussion

A. Joining the Navajo Nation Under Rule 19

Rule 19 governs compulsory party joinder in federal district courts. The district court held that it was not feasible to join the Navajo Nation because, under Title VII, the EEOC cannot directly sue the Nation. See 42 U.S.C. § 2000e(b)(1) (exempting Indian tribes from the statutory definition of "employer"); *see also Dawavendewa II*, 276 F.3d at 1159 n.9 (observing that "pursuant to § 2000e(b), Indian tribes are specifically exempt from the requirements of Title VII"). Although the district court decided the issue on a motion for summary judgment, we construe the motion as one to dismiss for failure to join an indispensable party under Rule 12(b)(7). *See Dredge*

Corp. v. Penny, 338 F.2d 456, 463-64 (9th Cir. 1964) (explaining that dismissal for failure to join a party must be decided on a motion to dismiss, not summary judgment). We review de novo the district court's legal conclusion that it is not feasible to join the Navajo Nation. *United States v. Bowen*, 172 F.3d 682, 688 (9th Cir. 1999) (explaining that although "generally, we review a district court's decision regarding joinder for abuse of discretion[,] . . . . we review legal conclusions underlying that decision de novo") (internal citation and quotation marks omitted).

We hold that the Navajo Nation is a necessary party under Rule 19. We hold, further, that where the EEOC asserts a cause of action against Peabody and seeks no affirmative relief against the Nation, joinder of the Nation under Rule 19 is not prevented by the fact that the EEOC cannot state a cause of action against it. Because the EEOC is an agency of the United States, the Nation cannot object to joinder based on sovereign immunity, as we noted in *Dawavendewa II* 276 F.3d at 1162-63. We therefore hold that joinder of the Nation is feasible.

1. Rule 19

In relevant part, Rule 19(a) provides that

> [a] person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii)

> leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. . . . If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.

Rule 19(b) provides that if it is not feasible for the court to join a person meeting the requirements of Rule 19(a), the court

> . . . shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court [in determining whether a party is indispensable] include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Applying these two parts of Rule 19, there are three successive inquiries. *Bowen*, 172 F.3d at 688 (describing Rule 19's "three-step process"). First, the court must determine whether a nonparty should be joined under Rule 19(a). We and other courts use the term "necessary" to describe those "persons to be joined if feasible." Fed. R. Civ, P. 19(a); *see also Disabled Rights Action Committee v. Las Vegas Events, Inc.*, 375 F.3d 861, 867 n.5 (9th Cir. 2004) (explaining that

the term "necessary" is a "term[] of art in Rule 19 jurisprudence"); *Bowen*, 172 F.3d at 688. If understood in its ordinary sense, "necessary" is too strong a word, for it is still possible under Rule 19(b) for the case to proceed without the joinder of the so-called "necessary" absentee. In fact, Rule 19(a) "defines the persons whose joinder in the action is *desirable*" in the interests of just adjudication. Fed. R. Civ. P. 19 Advisory Committee Note (1966) (emphasis added); *see also Bowen*, 172 F.3d at 688. Absentees whom it is desirable to join under Rule 19(a) are "persons having an interest in the controversy, and who ought to be made parties, in order that the court may act[.]" *Shields v. Barrow*, 58 U.S. (17 How.) 130, 139 (1854).

If an absentee is a necessary party under Rule 19(a), the second stage is for the court to determine whether it is feasible to order that the absentee be joined. Rule 19(a) sets forth three circumstances in which joinder is not feasible: when venue is improper, when the absentee is not subject to personal jurisdiction, and when joinder would destroy subject matter jurisdiction. *See* Fed. R. Civ. P. 19(a); *see also Tick v. Cohen*, 787 F.2d 1490, 1493 (11th Cir. 1986) (listing the three factors that may make joinder unfeasible).

Finally, if joinder is not feasible, the court must determine at the third stage whether the case can proceed without the absentee, or whether the absentee is an "indispensable party" such that the action must be dismissed. As the Advisory Committee Note explains, Rule 19 uses "the word 'indispensable' only in a conclusory sense, that is, a person is 'regarded as indispensable' when he cannot be made a party and, upon consideration of the factors [in Rule 19(b)], it is determined that in his absence it would be preferable to dismiss the action, rather than to retain it." Fed. R.

Civ. P. 19 Advisory Committee Note (1966). Indispensable parties under Rule 19(b) are "persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." *Shields*, 58 U.S. at 139.

2, The Navajo Nation as a Necessary Party

The EEOC and Peabody agree, as they did in district court, that the Navajo Nation is a necessary party under Rule 19(a)(1) because the Nation is a party to the lease with Peabody. For the sake of clarity, we explain why we also agree. Rule 19(a) is "concerned with consummate rather than partial or hollow relief as to those already parties, and with precluding multiple lawsuits on the same cause of action." *Northrop Corp. v. McDonnell Douglas Corp*., 705 F.2d 1030, 1043 (9th Cir. 1983) (citing Advisory Committee's Note Fed. R. Civ. P. 19 (1966)). As in *Dawavendewa II*, 276 F.3d at 1156, the Nation is a signatory to lease provisions that the plaintiff challenges under Title VII. The EEOC seeks declaratory, injunctive, and monetary relief. If the EEOC is victorious in its suit against Peabody, monetary damages for the charging parties can be awarded without the Nation's participation. But declaratory and injunctive relief could be incomplete unless the Nation is bound by res judicata. The judgment will not bind the Navajo Nation in the sense that it will directly order the Nation to perform, or refrain from performing, certain acts. But it will preclude the Nation from bringing a collateral challenge to the judgment. If the EEOC is victorious in this suit but the Nation has not been joined, the Nation could

possibly initiate further action to enforce the employment preference against Peabody, even though that preference would have been held illegal in this litigation. Peabody would then be, like the defendant in *Dawavendewa II*, 276 F.3d at 1156, "between the proverbial rock and a hard place—comply with the injunction prohibiting the hiring preference policy or comply with the lease requiring it." By similar logic, we have elsewhere found that tribes are necessary parties to actions that might have the result of directly undermining authority they would otherwise exercise. *See Pit River Home v. United States*, 30 F.3d 1088, 1092 (9th Cir. 1994) (Pit River Tribal Council was a necessary party in suit challenging its designation by the Secretary of Interior as the beneficiary of reservation property); *Confederated Tribes of Chehalis Reservation v. Lujan*, 928 F.2d 1496, 1497 (9th Cir. 1991) (Quinault Nation was a necessary party in suit challenging the United States' continued recognition of the Nation as sole governing authority of the Quinault Indian Reservation). Following these cases, we conclude that the Navajo nation is a necessary party under Rule 19(a).

3. Feasibility of Joinder

We turn next to the issue of whether it is feasible to join the Navajo Nation. Peabody does not contest that the court could exercise personal jurisdiction over the Nation. Rather, Peabody argues that the district court lacked jurisdiction because of the Nation's sovereign immunity.

In many cases in which we have found that an Indian tribe is an indispensable party, tribal sovereign immunity has required dismissal of the case. *See, e.g., Dawavendewa II*, 276 F.3d at 1163; *American Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1027

(9th Cir, 2002), By contrast, in a suit brought by the EEOC, the Nation's tribal sovereign immunity does not pose a bar to its joinder. Tribal sovereign immunity does not "act as a shield against the United States," even when Congress has not specifically abrogated tribal immunity. *United States v. Yakima Tribal Court*, 806 F.2d 853, 861 (9th Cir. 1986); *United States v. Red Lake Band of Chippewa Indians*, 827 F.2d 380, 382 (8th Cir. 1987). Because the EEOC is an agency of the United States, "tribal sovereign immunity does not apply in suits brought by the EEOC." *Dawavendewa II*, 276 F.3d at 1162-63; *Karuk*, 260 F.3d at 1075.

Peabody argues, however, that the district court lacked the authority to join the Nation because the EEOC cannot state a claim against an Indian tribe under Title VII. The parties agree that the EEOC cannot sue an Indian tribe under Title VII regarding the tribe's own employment practices. Under § 2000e(b), an Indian tribe is specifically exempt from the definition of "employer," and thus Title VII does not apply to Indian tribes when they act as employers. In addition, Title VII limits the EEOC's authority to proceed against "a respondent which is a government, governmental agency, or political subdivision." 42 U.S.C. § 2000e-5(f)(1). In the case of a governmental respondent, if the EEOC fails to resolve the matter by informal means, the EEOC "shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent." *Id*.

However, a plaintiff's inability to state a direct cause of action against an absentee does not prevent the absentee's joinder under Rule 19. In *Beverly Hills Federal Savings and Loan Association v. Webb*, 406

F.2d 1275, 1279-80 (9th Cir. 1969), we stated that "a person may be joined as a party [under Rule 19(b)] for the sole purpose of making it possible to accord complete relief between those who are already parties, even though no present party asserts a grievance against such person." We held that a title company acting as a trustee for some of the defendants' property was properly named as a defendant "for the *sole purpose* of 'facilitating' the enforcement of any orders that might be made by the court with respect to the trust or the trust property." *Id*. at 1279 (emphasis added). We so held even though the plaintiff did not "assert any claim against the Title Company with respect to which [the district] court has subject matter jurisdiction." *Webb*, 406 F.2d at 1279 (emphasis added).

In *National Wildlife Federation v. Espy*, 45 F.3d 1337, 1344-45 (9th Cir. 1995), we held that private parties could be named as defendants along with federal agencies in a suit brought under the Administrative Procedure Act to enforce rights conferred by the National Environmental Policy Act and by the Food, Agriculture, Conservation and Trade Act of 1990. Although none of these statutes authorized causes of action against the private parties, we held that Rule 19 nonetheless authorized their joinder as defendants. *Id*. In so holding, we cited *Sierra Club v. Hodel*, 848 F.2d 1068, 1077 (10th Cir. 1988), in which the Tenth Circuit held that joinder of a county was proper in an action under the Administrative Procedure Act against a federal agency, even though the plaintiff could not sue the county directly.

Our circuit's reading of Rule 19 not to require a cause of action between a plaintiff and a party sought to be joined under the rule is consistent with Supreme

Court precedent. In *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 356 (1977), the Supreme Court held that a labor union named as a defendant was not liable for any discrimination. Thus, the plaintiff had no viable cause of action against the union. Accordingly, the Court vacated a district court injunction against the union. Nevertheless, the Supreme Court wrote that "the union will properly remain in this litigation as a defendant so that full relief may be awarded the victims of the employer's post-Act discrimination." *Id*. at 356 n.43 (citing Fed. R. Civ. P. 19(a); *EEOC v. MacMillan Bloedel Containers, Inc*., 503 F.2d 1086, 1095 (6th Cir. 1974)). The Supreme Court reaffirmed *Teamsters*' approach to Rule 19 in *Zipes v. Trans World Airlines, Inc*., 455 U.S. 385, 400 & n.14 (1982) (reiterating the Supreme Court's holding in Teamsters, 431 U.S. at 356, n.43).

We recognize that the Fifth Circuit has stated that "it is implicit in Rule 19(a) itself that before a party . . . will be joined as a defendant the plaintiff must have a cause of action against it." *Vieux Carre Prop. Owners v. Brown*, 875 F.2d 453, 457 (5th Cir. 1989); *see also Davenport v. Bhd. of Teamsters, AFL-CIO*, 166 F.3d 356, 366 (D.C. Cir. 1999) (quoting this statement from *Vieux Carre*). However, our circuit has never agreed with the rule stated in *Vieux Carre*. Moreover, the actual holdings of *Vieux Carre* and *Davenport* (as distinct from their abstract statement of the rule) can be reconciled with the Supreme Court's and with our own Rule 19 cases. In *Vieux Carre* and Davenport, the courts were answering different questions from the question in this case. In *Vieux Carre*, the issue was whether the court could join under Rule 19 and then impose an injunction directly on a party against whom the plaintiff could

not state a cause of action. The court held it could not. 875 F.2d at 456-57. In *Davenport*, the issue was the same as in *Vieux Carre*. 166 F.3d at 366. The D.C. Circuit held in *Davenport*, "it is not enough that plaintiffs 'need' an injunction against Northwest in order to obtain full relief. They must also have a right to such an injunction, and Rule 19 cannot provide such a right." *Id.*

The difference between the situation presented here, in which plaintiffs seek no affirmative relief against the Navajo Nation, and that in *Vieux Carre* and *Davenport*, in which plaintiffs sought injunctions against the party sought to be joined, is captured in the majority and concurring opinions in *General Building Contractors Association v. Pennsylvania*, 458 U.S. 375 (1982). In *General Building*, the Supreme Court held that injunctive relief to enforce Title VII rights could not be granted against employers who were "parties found not to have violated any substantive rights of [the plaintiffs]." *Id*. at 399. The Court, however, also clarified that "this is not to say that [the employer] defendants . . . might not, upon an appropriate evidentiary showing, be retained in the lawsuit and even [be] subject to such minor and ancillary provisions of an injunctive order as the District Court might find necessary to grant complete relief." *Id*. (citing *Zipes*, 455 U.S. at 399-400). In her concurrence, Justice O'Connor emphasized this point, observing that even though the Court in *Teamsters v. United States*, 431 U.S. 324 (1977), had found that the union had not violated Title VII, it had nonetheless "directed the union [under Rule 19] to remain in the litigation as a defendant so that full relief could be awarded the victims of the employer's post-Act discrimination." *Id.* at 405 (O'Connor, J., concurring) (quoting *Zipes*, 455 U.S. at 399-400).

As in *Teamsters*, *Espy*, and *Webb*, the EEOC has no claim against the party it seeks to join and is not seeking any affirmative relief directly from that party. Joinder is necessary for the "sole purpose" of effecting complete relief between the parties, *Webb*, 406 F.2d at 1279-80, by ensuring that both Peabody and the Nation are bound to any judgment upholding or striking down the challenged lease provision. Because the EEOC is not seeking to hold the Navajo Nation liable under Title VII, we reject Peabody's argument that our reading of Rule 19 conflicts with the Rules Enabling Act's restriction that the federal rules of civil procedure "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). Joinder of the Nation does not, and cannot, create any substantive rights that the EEOC may enforce against the Nation, and the EEOC does not contend otherwise.

Our interpretation is consistent with other courts that have allowed the EEOC to join a party under Rule 19 against which it does not or cannot state a cause of action. In *EEOC v. Union Independiente de la Autoridad de Acueductos*, 279 F.3d 49, 52 (1st Cir. 2002), for example, the EEOC filed a complaint against a labor union for alleged discrimination against an employee. The First Circuit observed without disapproval that the EEOC had named a Puerto Rican governmental employer as a Rule 19 defendant "to ensure that complete relief, including [the employee's] reinstatement, was available." *Id*. Under Peabody's theory of Rule 19 and Title VII, the EEOC would not have had statutory authority to join a government as an employer because it could not sue that employer directly. *See* 42 U.S.C. § 2000e-5(f)(1) (granting authority to litigate against a government respondent to the Attorney General). In *EEOC v.*

MacMillan Bloedel, the Sixth Circuit held that it was proper to join a union under Rule 19, although the union was not charged with a Title VII violation. 503 F.2d at 1088. The court so held "because the decree entered by the court might affect its collective bargaining agreement[.]" *Id*. at 1095. "As a practical matter," the Sixth Circuit observed, "the Union need not play a role in the litigation until the court finds that [the employer] has violated Title VII." *Id*.; *see also id*. at 1096 (citing cases in which union was joined in order to participate in the remedy). We agree with the Sixth Circuit in *MacMillan Bloedel* that our understanding of Rule 19 is "consistent with Title VII's grant of broad equitable powers to the courts to eradicate the present and future effects of past discrimination." 503 F.2d at 1095-96. *See also Gen. Tel. Co. v. EEOC*, 446 U.S. 318, 333 (1980) (stating that Congress intended to give the EEOC "broad enforcement powers.").

Our interpretation of Rule 19 is also consistent with both the purpose and text of the rule. The Northern District of California provided a succinct statement of this purpose when it explained that "by definition, parties to be joined under Rule 19 are those against whom no relief has formally been sought but who are so situated as a practical matter as to impair either the effectiveness of relief or their own or present parties' ability to protect their interests." *Eldredge v. Carpenters 46 Northern California Counties Joint Apprenticeship and Training Committee*, 440 F. Supp. 506, 518 (N.D. Cal. 1977). The Nation fits this definition—it is a party against which relief has not formally been sought but is so situated that effectiveness of relief for the present parties will be impaired if it is not joined. We hold that its joinder is feasible. *See* Fed. R. Civ. P. 19(a).

Finally, we note what we do, and do not, decide today. We do decide that the Navajo Nation is a necessary party that is feasible to join under Rule 19(a). However, we do not decide, even implicitly, the merits of the EEOC's Title VII suit against Peabody. That determination is for the district court on remand.

B. Political Question Doctrine

We next address the district court's ruling that the case involves a nonjusticiable political question. In *Baker v. Carr*, 369 U.S. 186 (1962), the Supreme Court identified six factors that may make a question nonjusticiable:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217. *See also Los Angeles County Bar Ass'n v. Eu*, 979 F.2d 697, 702 (9th Cir. 1992) (quoting the six *Baker* factors). The *Baker* factors must be interpreted in light of the purpose of the political question doctrine, which "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of

the Executive Branch." *Japan Whaling Association v. Am. Cetacean Society*, 478 U.S. 221, 230 (1986).

The district court misunderstood the political question doctrine when it held that the third, fourth, and sixth Baker factors were implicated by the EEOC's claim. A nonjusticiable political question exists when, to resolve a dispute, the court must make a policy judgment of a legislative nature, rather than resolving the dispute through legal and factual analysis. *See Koohi v. United States*, 976 F.2d 1328, 1331 (9th Cir. 1992). While it is true that the EEOC is challenging a lease that the DOI has approved, the district court was not called upon to make an "initial policy determination." Resolving whether and how Title VII applies is a matter of statutory interpretation and thus involves simply implementing policy determinations Congress has already made. The issues here are entirely legal, and are of a sort "familiar to the courts." *Eu*, 979 F.2d at 702.

Nor do the fourth and fifth *Baker* factors apply merely because, at the behest of the EEOC, the district court was asked to rule on the legality of a lease that the DOI had approved. We regularly review the actions of federal agencies to determine whether they comport with applicable law. *See Japan Whaling Ass'n*, 478 U.S. at 230 (explaining that the political question doctrine did not bar a challenge to the Secretary of Commerce's action when a decision required "applying no more than the traditional rules of statutory construction, and then applying this analysis to the particular set of facts presented"). Nor do controversies between departments of the federal government necessarily present political questions. *See, e.g., United States v. Nixon*, 418 U.S. 683, 693 (1974) (dispute between the President and the Special

Prosecutor); *United States v. ICC*, 337 U.S. 426, 430 (1949) (suit by the United States to review decision of the Interstate Commerce Commission); *TVA v. EPA*, 278 F.3d 1184, 1198 (11th Cir. 2002) (dispute between federal agencies about the meaning of the Clean Air Act). We therefore conclude that no part of this case presents a nonjusticiable political question.

C. Record-Keeping Claim

We turn finally to the EEOC's record-keeping claim. Title VII requires a covered employer to make and preserve records that are "relevant to the determinations of whether unlawful employment practices have been or are being committed." 42 U.S.C. § 2000e-8(c). In its complaint, the EEOC alleged that Peabody had failed to keep employment applications and sought an injunction directing Peabody to do so. Peabody has a record-keeping obligation under Title VII unrelated to the challenged Navajo employment preference. Although the district court did not explicitly discuss or analyze this claim, its entry of final judgment nonetheless effectively dismissed it.

Peabody's motion for summary judgment did not mention the record-keeping claim, and its motion to dismiss argued only that the EEOC was not entitled to a jury trial on the claim. In the absence of argument by the parties, fair notice to the EEOC that its record-keeping claim faced dismissal, or any justification offered by the district court for entering summary judgment on the claim, we vacate the judgment as to the EEOC's record-keeping claim and remand for further proceedings. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (the moving party "bears the initial responsibility of informing the district court of the basis for its motion"); *Couveau v. American Airlines, Inc.*, 218 F.3d at 1081 (observing

that when the reasons for the district court's decision are not clear, we may vacate summary judgment and remand).

Conclusion

We do not decide the merits of the EEOC's Title VII claim against Peabody today. We hold simply that the Navajo Nation is a necessary party to the action, and that it is feasible to join the Nation in order to effect complete relief between the parties. We also hold that the EEOC's suit does not present a non-justiciable political question. Finally, we reverse the district court's dismissal of the EEOC's record-keeping claim. We remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CIV 01-1050-PHX-MHM

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff,

vs.

PEABODY COAL COMPANY,
Defendant.

September 24, 2002, Decided
September 26, 2002, Filed

COUNSEL: For EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, plaintiff: Mary Joleen O'Neill, Esq, Katherine J Kruse, Equal Employment Opportunity Commission, Phoenix, AZ.

For PEABODY COAL COMPANY, defendant: Lawrence Jay Rosenfeld, Esq, Mary E Bruno, John F Lomax, Jr, Greenberg Traurig LLP, Phoenix, AZ.

For DELBERT MARIANO, THOMAS SAHU, intervenors: Tod F Schleier, Esq, Bradley Hugh Schleier, Esq, James M Jellison, Schleier Jellison & Schleier PC, Phoenix, AZ.

ORDER

Pending before this Court are the following motions: Defendant's Motion for Summary Judgment (Doc. # 38); Defendant's Motion to Dismiss and/or Stay and/or Motion to Strike (Doc. # 24); Plaintiff's

Motion to Strike Portions of the Statement of Facts and Affidavits Submitted by Defendant in Support of its Motion for Summary Judgment (Doc. # 43); Defendant's Motion to Strike Plaintiff's Reply in Support of Plaintiff's Motion to Strike as Untimely (Doc. # 49); and Delbert Mariano and Thomas Sahu's Motion to Intervene as Plaintiffs (Doc. # 23).

I. FACTUAL BACKGROUND

The Equal Employment Opportunity Commission ("EEOC") has filed this Complaint against Peabody Western Coal Company ("Peabody Coal") claiming a violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq*.

Specifically, the EEOC alleges that Peabody Coal violates Title VII's prohibitions against national original discrimination by giving preference in hiring to Navajos over non-Navajo Native Americans at its coal mining operations located on the Navajo and Hopi Indian Reservations (the "Black Mesa Complex").

The EEOC claims that Delbert Mariano and Thomas Saha, members of the Hopi Tribe, and Robert Koshiway, a member of the Otoe Tribe (now deceased), applied for positions with Peabody Coal and were denied employment in favor of members of the Navajo Nation. Before filing this lawsuit against Peabody Coal, the EEOC engaged in some informal conciliation. The conciliation process failed to resolve the matter, and this lawsuit was filed.

A. THE COAL LEASES

Peabody Coal conducts coal mining operations on the Navajo and Hopi Reservations in northeastern Arizona pursuant to drilling and exploration permits

and coal mining leases executed with the respective tribes.[1] These permits and coal leases require Peabody Coal to provide preference in employment to members of the respective tribes. These permits and coal leases also require approval of the United States Secretary of the Interior under certain circumstances. Specifically, these provisions are as follows.

1. The 1961 Navajo Permit

The Drilling and Exploration Permit executed on May 13, 1961 between The Navajo Tribe of Indians and Sentry Royalty Company, Peabody Coal's predecessor in interest, provides in pertinent part:

> 9. Permittee shall commence prospecting operations for coal within ninety (90) days of the approval of this permit by the Secretary of the Interior . . .
>
> 10. Permittee will employ members of the Navajo Tribe when available in all positions for which they are qualified and pay prevailing wages to such Navajo employees. Permittee will make a special effort to work members of the Navajo Tribe into skilled, technical and other jobs in connection with its operations under this permit.
>
> * * *
>
> 12. This permit shall not be assignable without approval of the Advisory Committee of the Navajo Tribal Counsel and the Secretary of the Interior.

[1] These operations provide coal to the Salt River Project Agricultural Improvement and Power District generating station in Page, Arizona, and to Southern California Edison's Mojave generating station.

This Drilling and Exploration Permit (the "1961 Navajo Permit") was signed and is dated February 6, 1962, by James F. Canan, assistant area director, Bureau of Indian Affairs, Department of the Interior. Article XIX of the form Lease attached as Exhibit B to the 1961 Navajo Permit" also contains a Navajo employment preference provision as follows:

> ARTICLE XIX. NAVAJO EMPLOYMENT PREFERENCE
>
> Lessee agrees to employ Navajo Indians when available in all position for which, in the judgment of Lessee, they are qualified, and to pay prevailing wages to such Navajo employees and to utilize services of Navajo contractors whenever feasible.
>
> Lessee shall make a special effort to work Navajo Indians into skilled, technical and other higher jobs in connection with Lessee's operations under this lease.

2. The 1964 Navajo Coal Lease No. 8580

A Mining Lease executed on February 1, 1964 between the Navajo Tribe and Sentry Royalty Company, Peabody Coal's predecessor in interest, for the lands that were subject of the 1961 Navajo Permit ("Navajo Coal Lease No, 8580"), provides in pertinent part:

> ARTICLE VI. TERMINATION OF FEDERAL JURISDICTION
>
> During the period that the land so leased is under Federal jurisdiction, the royalty provisions of this lease are subject to reasonable adjustment by the Secretary of the Interior or his authorized representative at the end of twenty years from

the effective date of this lease, and at the end of each successive ten-year period thereafter...

* * *

ARTICLE VIII. SUSPENSION OF MINING OPERATIONS

Whenever permitted by law, if the Secretary of the Interior or his authorized representative considers the marketing facilities inadequate or the economic conditions unsatisfactory, he may, with the concurrence of the Advisory Committee of the Navajo Tribal Council, authorize the suspension of mining operations for such time as he considers advisable.

* * *

ARTICLE X. REGULATIONS

Lessee shall abide by and conform to any and all regulations of the Secretary of the Interior now or hereafter in force relative to such leases . . .

* * *

ARTICLE XI. ASSIGNMENT OF LEASE

Lessee shall not assign this lease or any interest therein by an operating agreement or otherwise, or sublet any portion of the leased premises, except with the prior approval of the Secretary of the Interior and the Advisory Committee of the Navajo Tribal Council . . .

* * *

ARTICLE XVI. CANCELLATION AND. FORFEITURE

When, in the opinion of the Mining Engineer of the Navajo Tribe and the Secretary of the Inte-

rior, before restrictions are removed, there has been a violation of any of the terms and conditions of this lease, the Secretary of the Interior and the Navajo Tribe shall have the right . . . to declare this lease null and void . . .

* * *

ARTICLE XIX. NAVAJO EMPLOYMENT PREFERENCE

Lessee agrees to employ Navajo Indians when available in all positions for which, in the judgment of Lessee, they are qualified, and to pay prevailing wages to such Navajo employees and to utilize services of Navajo contractors where feasible.

Lessee shall make a special effort to work Navajo Indians into skilled, technical and other higher jobs in connection with Lessee's operations under this Lease.

* * *

ARTICLE XXII. OBSERVANCE OF TRIBAL RESOLUTIONS

"Lessee agrees to comply with all lawful resolutions adopted by the Navajo Tribal Council."

* * *

ARTICLE XXVIII. NOTICES

Any notice, demand or request provided for in this lease, or given or made in connection with it shall be deemed to be properly given if delivered in person, or sent by registered or certified mail . . . to the persons specified below:

To or upon the Tribe:

Chairman
Navajo Tribal Council
Window Rock, Arizona

and

General Superintendent
Navajo Agency, Bureau of Indian Affairs
Window Rock, Arizona . . .

Navajo Coal Lease No. 8580 was approved on August 28, 1964 by John C. Dibbern, assistant area director of the Bureau of Indian Affairs, Department of the Interior.

3. The 1964 Joint Use Permit

A Drilling and Exploration Permit executed on June 1, 1964 between The Hopi Tribe of Arizona and The Navajo Tribe of Indians and Sentry Royalty Company, Peabody Coal's predecessor in interest (the "Joint Use Permit"), contains provisions nearly identical to those in the 1961 Navajo Permit. The Joint Use Permit provides in pertinent part:

> 1. Pursuant to authority contained in a resolution of the Hopi Tribal Council, H-7-64 dated June 1, 1964, and a resolution of the Advisory Committee of the Navajo Tribal Council, ACMY-77-64 dated May 7, 1964, Permittee is hereby granted the exclusive right to drill and explore for coal for a period of two years from and after the date of approval hereof by the Secretary of the Interior . . .
>
> * * *
>
> 10. Permittee will employ members of the Hopi and Navajo Tribes when available in all posi-

> tions for which they are qualified and pay prevailing wages to such Hopi and Navajo employees. Permittee will make a special effort to work members of the Hopi and Navajo Tribes into skilled, technical, and other higher jobs in connection with its operations under this permit.
>
> * * *
>
> 12. This permit shall not be assignable without the prior approval of the Hopi Tribal Council, the Advisory Committee of the Navajo Tribal Council, and the Secretary of the Interior.

The Joint Use Permit was approved and signed on October 20, 1964 by John C. Dibbern, area director, Gallup Area Office, Bureau of Indian affairs, Department of the Interior, and on October 23, 1964, by George W. Hadden, area director, Phoenix Area Office, Bureau of Indian Affairs, Department of the Interior.

Exhibit B to the Joint Use Permit, made a part thereof pursuant to paragraph 1 of the Joint Use Permit, and entitled "United States Department of the Interior Bureau of Indian Affairs Mining Lease between Sentry Royalty Company [Peabody Coal's predecessor in interest] and the Hopi and Navajo Tribes" (the "Joint Use Lease") contains provisions nearly identical to those in Coal Lease No. 8580, except that employment preference is given to both Hopis and Navajos. Before execution of the Joint Use Lease, however, a dispute arose regarding the terms of this Joint Use Lease. As a result, the Hopi Tribe and the Navajo Tribe executed separate mining leases on June 6, 1966.

The resulting Hopi Coal Lease, entitled "United States Department of the Interior Bureau of Indian Affairs Mining Lease between the Hope [sic] Tribe, State of Arizona and Sentry Royalty Company" required Sentry (predecessor in interest to Peabody Coal) to give Hopi Indians preference in hiring, allowed the Hopi Tribe to extend the preference to Navajo Indians, and required Sentry (predecessor in interest to Peabody Coal) to "make a special effort to work Hopi and Navajo Indians into skilled, technical and other higher jobs in connection with Lessee's operations under this lease.

4. The 1966 Navajo Coal Lease No. 9910

The resulting Navajo Lease ("Navajo Coal Lease No. 9910"), "United States Department of the Interior Bureau of Indian Affairs Mining Lease between Sentry Royalty Company and the Navajo Tribe State of Arizona," contained terms virtually identical to those in Navajo Coal Lease No. 8580, except that it allowed Sentry, predecessor in interest to Peabody Coal, to extend the employment preference provision to members of the Hopi Tribe. It provided in pertinent part as follows:

> ARTICLE IV. ANNUAL RENTAL
>
> Lessee agrees . . . to pay or cause to be paid to the Secretary of the Interior or his authorized representative, for the use and benefit of the Navajo Tribe . . .
>
> * * *
>
> ARTICLE VI. SUSPENSION OF MINING OPERATIONS
>
> Whenever permitted by law, if the Secretary of the Interior or his authorized representative

considers the marketing facilities inadequate or the economic conditions unsatisfactory, he may, with the concurrence of the Lessor, authorize the suspension of mining operations for such time as he considers advisable...

* * *

ARTICLE VIII. REGULATIONS

Lessee shall abide by and conform to any and all regulations of the Secretary of the Interior now or hereafter in force relative to such leases...

* * *

ARTICLE IX. ASSIGNMENT OF LEASE

Lessee shall not assign this lease or any interest therein by an operating agreement or otherwise, or sublet any portion of the leased premises, except with the prior approval of the Secretary of the Interior and the Lessor . . .

* * *

ARTICLE XI. INSPECTION

The leased premises and producing operation, improvements, machinery and fixtures thereon and connected therewith and all pertinent books and accounts of Lessee shall be open at all times for inspection by agents of the Lessor or any duly authorized representative of the Secretary of the Interior.

* * *

ARTICLE XIV. CANCELLATION AND FORFEITURE

When, in the opinion of the Lessor and the Secretary of the Interior, before restrictions are

removed, there has been a violation of any of the terms and conditions of this lease, the Secretary of the Interior and the Lessors shall have the right . . . to declare this lease null and void . . .

* * *

ARTICLE XVII. EMPLOYMENT PREFERENCE

Lessee agrees to employ Navajo Indians when available in all positions for which, in the judgment of Lessee, they are qualified, and to pay prevailing wages to such Navajo employees and to utilize services of Navajo contractors where feasible.

Lessee shall make a special effort to work Navajo Indians into skilled, technical and other higher jobs in connection with Lessee's operations under this Lease. Lessee may at its option extend the benefits of this Article to Hopi Indians.

* * *

ARTICLE XXVII. NOTICES

Any notice, demand or request provided for in this lease, or given or made in connection with it, shall be deemed to be properly given if delivered in person, or sent by registered or certified mail . . . to the persons specified below:

Chairman
Navajo Tribal Council
Window Rock, Arizona

Secretary of the Interior (2 copies). . .

Navajo Coal Lease 9910 was approved and signed on July 7, 1966, by Graham Holmes, area director, Bureau of Indian Affairs, Department of the Interior.

5. Drafting, Negotiations, and Amendments

Peabody Coal in-house counsel Edward L. Sullivan Jr. has testified by affidavit that it is his understanding, based on his review of the 1961 Navajo Permit and the 1964 Joint Use Permit and the history of Peabody Coal's leasing rights in Arizona, that the 1961 Navajo Permit and the form of lease attached as Exhibit B thereto and the 1964 Joint Use Permit and the form of lease attached as Exhibit B thereto were drafted by the United States Secretary of Interior or his authorized representative and presented to Sentry with no meaningful opportunity to bargain over the employment preference term.

The 1964 Navajo Coal Lease No. 8580 and the 1966 Navajo Coal Lease No. 9910 contain virtually identical terms as excerpted above, to the terms in the form leases, with the exception that the 1966 Navajo Coal Lease No. 9910 allows Sentry to extend the Navajo hiring preference to the Hopi Tribe as well.

Attorney Sullivan has further testified pursuant to affidavit that the 1964 Navajo Coal Lease No. 8580 and the 1966 Navajo Coal Lease No. 9910 have been amended twice since they were executed, each time with the approval of the Secretary of the Interior, and each time without any changes to the employment preference provision. In 1987, he testified, a new article was added to each lease, stating that all provisions of the original leases would continue in full force and effect, except as expressly modified by the amendments. The most recent amendment was approved on March 29, 1999, by Bruce Babbitt, then Secretary of the Interior, he testified.

Attorney Marvin O. Young, former Peabody Coal general counsel from 1968 to 1985, further testified by affidavit that he is familiar with two other Mining Leases executed with the Navajo Nation, one by Utah International, and one by P&M, and that each contains a Navajo employment preference clause. He testified by affidavit that "It is my understanding that the United States Secretary of the Interior required these employment preference provisions as a condition of the leases, as part of a standardized practice by the Secretary of the Interior at the time."

5. Navajo Preference in Employment Act

While this lawsuit has been pending, Peabody Coal has been subject to legal action by the Navajo Nation seeking to enforce the Navajo Preference in Employment Act, 15 NNC § 601, *et seq*.

Section 604 of the Navajo Preference in Employment Act states as follows:

> § 604. Navajo employment preference
>
> A. All employers doing business within the territorial jurisdiction [or near the boundaries] of the Navajo Nation, or engaged in any contract with the Navajo Nation, shall:
>
> 1. Give preference in employment to Navajos . . .

15 NNC § 604.

B. EEOC'S OBJECTIONS TO THE EVIDENCE

The EEOC has not offered any evidence to controvert the evidence offered by Peabody Coal and outlined above, nor has it suggested that it has any such evidence. The EEOC has not disputed that the documents offered by Peabody Coal, specifically the

1961 Navajo Permit, the 1964 Joint Use Permit, the Hopi Lease, and 1964 Navajo Coal Lease No. 8580 and the 1966 Navajo Coal Lease No. 9910 contain the terms outlined.[2]

The EEOC, however, has moved to strike certain statements outlined in section A.4., *supra,* by Peabody Coal former and present in-house counsel relating to the Secretary of Interior's direct involvement in drafting and approving the Coal Leases, and whether the Navajo employment preference is typically included in such Coal Leases. These statements, the EEOC argues, should not be admitted with regards to Peabody Coal's argument that the issue in this litigation presents a nonjusticiable political question.

The EEOC originally also moved to strike Mr. Sullivan's sworn statements referring to the contents of the amendments to the Coal Leases, *i.e.,* his testimony that the Coal Lease amendments did not change the Navajo hiring preference. The EEOC, however, has since stipulated that the amendments and related supplements to Navajo Coal Lease 8580 and Navajo Coal Lease 9910 "did not change, or address, the hiring preferences outlined in those leases." *See* Corrected Stipulation Regarding Lease Amendments, dated 7/23/02 (Doc. # 57).

The EEOC apparently retains its original objections to Mr. Sullivan's sworn statements as to his understanding that the Secretary of the Interior drafted the original Permits and form of Leases, and

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[2] The EEOC states at page 2 of its brief that "to the extent that the two affiants' avowals rely on actual language from the lease agreements or other documents attached to their affidavits, the Commission has not challenged the avowals."

that Sentry was not provided the opportunity to bargain over the employment preference term, arguing he has not shown personal knowledge of the negotiations. The EEOC also moved to strike Attorney Young's statement that it was his understanding that the Navajo employment preference was required by the Secretary of Interior in mining leases, and was typical of such leases, on the ground attorney Young has not established personal knowledge.

Peabody Coal, however, cites to a brief that the EEOC filed with the United States Court of Appeals for the Ninth Circuit, wherein Peabody Coal conceded that the Navajo employment preference provisions are aggressively pushed by the Navajo Nation and are in a number of the Navajo Nation's lease agreements. *See* EEOC's Motion to Intervene in *Dawavendewa v. Salt River Project Agricultural Improvement and Power District,* at p. 14, attached as Ex. B to Defendant's Response to Plaintiff's Motion to Strike.

II. PROCEDURAL BACKGROUND

Defendant Peabody Coal has moved pursuant to Rule 56 of the Federal Rules of Civil Procedure for summary judgment to dismiss this Complaint on the ground that 1) the Navajo Nation is a necessary and indispensable party to this litigation and its joinder is not feasible under Rule 19(b) because the EEOC is not empowered to bring this action against the tribe; or alternatively 2) this case presents a nonjusticiable political question. In the event this Court does not grant Peabody Coal's motion for summary judgment, Defendant Peabody Coal has moved pursuant to Rules 12(b)(6) and Rule 12(f) to dismiss and/or stay and/or strike this Complaint on the grounds that 1) the EEOC failed to conciliate as required by Title VII; 2) the EEOC failed to set forth legal bases warrant-

ing the relief it requests; and 3) the EEOC has defined a class in a manner not permitted by Section 706 of the Civil Rights Act of 1964 on which the EEOC relies.

Finally, Delbert Mariano and Thomas Sahu, members of the Hopi Tribe, and the charging parties in the EEOC complaint, have moved pursuant to Rule 24 of the Federal Rules of Civil Procedure to intervene as plaintiffs in this lawsuit.

II. STANDARD OF REVIEW

A motion to dismiss for failure to state a claim for relief under Rule 12(b)(6) must be treated as a motion for summary judgment under Federal Civil Procedure Rule 56 if either party to the motion to dismiss submits materials outside the pleadings in support of or in opposition to the motion that the Court relies on in its ruling. *Anderson v. Angelone,* 86 F.3d 932, 934 (9th Cir. 1996).

A motion for summary judgment may be granted only if the evidence shows "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). To defeat the motion, the non-moving party must show that there are genuine factual issues "that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202 (1986).

The party opposing summary judgment "may not rest upon the mere allegations or denials of [the party's] pleadings, but . . . must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *see also Matsushita Elec. Indus.*

Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986). The Court views the evidence in the light most favorable to the nonmoving party, Plaintiff here, and draws any reasonable inferences in the nonmoving party's favor. *See Warren v. City of Carlsbad,* 58 F.3d 439, 441 (9th Cir. 1995), *cert. denied,* 516 U.S. 1171, 134 L. Ed. 2d 209, 116 S. Ct. 1261 (1996).

A case is deemed to have raised a political question not suitable for judicial review if one of the following formulations is inextricable from the case:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. 186, 217, 82 S. Ct. 691, 710, 7 L. Ed. 2d 663 (1962) (emphasis added),

III, DISCUSSION

Rule 19 of the Federal Rules of Civil Procedure requires that this Court determine 1) whether an absent party is necessary to the action; and then 2) if the party is necessary but cannot be joined, whether

the party is indispensable such that in "equity and good conscience" the suit should be dismissed. *Confederated Tribes v. Lujan,* 928 F.2d 1496, 1498 (9th Cir. 1991).

The EEOC has expressly conceded that the Navajo Nation is a necessary party to this litigation under Rule 19(a) of the Federal Rules of Civil Procedure. *See* Plaintiff's Opposition at page 4, lines 2-3.

The EEOC argues, however, that dismissal is not appropriate because this Court can and should Order that the Navajo Nation be made a party to this litigation, The EEOC specifically asks that this Court "order the Navajo Nation to appear and defend any interests it believes may be affected by this litigation." *See* Plaintiff's Opposition at page 4, lines 24-25. The EEOC further indirectly characterizes this lawsuit as litigation over "the validity of its [the Navajo Nation's] discriminatory lease provision and employment preference provisions . . . [and] the interplay between its tribal sovereignty and Title VII." *Id.* at p. 5, lines 18-21. Thus, the initial issue before this Court on Peabody Coal's Motion for Summary Judgment is whether the Navajo Nation can properly be joined as defendant in this lawsuit.

A. The EEOC's Statutory Authority To Sue The Navajo Nation

Peabody Coal does not argue that The Navajo Nation cannot assert sovereign immunity against any lawsuit that might be brought by the EEOC, as representative of the United States.

Instead, Peabody Coal claims that the Court may not join the Navajo Nation because the Commission may not maintain an action "against a government, governmental agency, or political subdivision." *See* 42

U.S.C. § 2000e-5(f)(1); 42 U.S.C. § 2000e-4(g)(6). The first cited statute reads in pertinent part as follows:

> . . . In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court.

42 U.S.C. § 2000e-5(f)(1) (emphasis added). The second cited statute authorizes the EEOC to intervene in actions brought under 2000e-5 against "a respondent other than a government, governmental agency or political subdivision." *See* 42 U.S.C. 2000e-4(g)(6) (emphasis added).

The EEOC does not dispute that the Navajo Nation is a "government, governmental agency, or political subdivision" under these statutes. The EEOC, however, argues that the plain language of this portion of Title VII applies *only* to a "respondent" who is "a government, governmental agency, or political subdivision," It further argues that the Navajo Nation is not a "respondent" under the statutory definition. The referenced statute provides as follows:

> (n) The term "respondent" means an employer, employment agency, labor organization, joint labor-management committee controlling apprenticeship or other training or retraining program, including an on-the-job training program or Federal entity subject to section 2000e-16 of this title.

42 U.S.C. 2000e(n). The EEOC argues that the Navajo Nation was not an employer in this case, and thus cannot be considered a "respondent" for purposes of 42 U.S.C. § 2000e-5(f)(1). Thus, the EEOC concludes, 42 U.S.C. § 2000e-5(f)(1) does not limit its power to sue the Navajo Nation.

Another district court, addressing the similar argument that the EEOC had authority to sue a government so long as it did not directly seek relief from the government, soundly rejected it, reasoning:

> In short, the EEOC argues that Congress intended to preclude the EEOC from suing governmental entities for some purposes but not for others. This position is entirely unsupported by the language of the statute, by case law, and by any reasonable policy justification.

EEOC v. AFT Local # 571, 761 F. Supp. 536, 539 (N.D. Ill. 1991) (holding that EEOC's joinder of a school district, a participant in a collective bargaining agreement, as a necessary party under Rule 19 "was frivolous in view of unambiguous statutory and case law authority which prohibited the EEOC from naming [a governmental entity] as a defendant"). The Court quoted another court's reasoning with approval as well:

> It goes too far to argue that EEOC in suing a private party must be able to join indispensable governmental entities or enforcement of the statute will be frustrated. The Attorney General is, after all, part of the federal government also and if he decides to sue a public body he will necessarily have to make the converse decision to join the indispensable private party. The motion to dismiss the Board is granted.

Id. at 540. The same reasoning applies here to reject the EEOC's contention that the statute does not prohibit it from suing the Navajo Nation, a government, because it is not a "respondent" government. The EEOC argument is too strained to support what the statute clearly was not intended to authorize.

The EEOC concedes, moreover, that Indian tribes, including the Navajo Nation, are specifically exempt as employers from the requirements of Title VII, pursuant to 42 U.S.C. § 2000e(b), which provides in pertinent part as follows:

(b) The term "employer" . . . does not include (1) . . . an Indian tribe . . . 42 U.S.C. § 2000e(b). The EEOC concludes from this section, however, that Congress intended to exempt the Navajo Nation from suit *only* when it was an employer, and *not* when it might instead be considered a "government entity."

The EEOC's interpretation of these two statutes together is mistaken, as contrary to their plain meaning. The Attorney General clearly has exclusive authority to file suit whenever a government such as an Indian tribe is involved. *See* 42 U.S.C. § 2000e-5(f)(1); *see also* 42 U.S.C. § 2000e-5(f)(2); 42 U.S.C. § 2000e-8(c) (the Attorney General is to take the appropriate action "in a case *involving* a government, governmental agency, or a political subdivision.") The EEOC cannot expand its authority to bring suit against an Indian tribe, which is clearly exempt from the provisions of Title VII, and is also a "government" specifically exempted from suit by the EEOC, on such a thin argument. No meaningful distinction exists between "respondent" and "defendant" under the circumstances presented here. The EEOC in effect is seeking to sue the Navajo Nation to force it to defend the Navajo Preference in Employment Act and its

contracts with employers working on its lands, when it is prohibited from suing the Navajo Nation to enforce Title VII provisions against the tribe directly. This is contrary to the clear provisions of Title VII prohibiting the EEOC from suing governments, and specifically exempting the Indian tribes from its provisions. *See EEOC v. AFT Local # 571,* 761 F. Supp. at 539.

The EEOC further argues that it has the authority to sue the Navajo Nation pursuant to 42 U.S.C. § 2000e-5(a), which provides in pertinent part as follows:

> The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title.

42 U.S.C. § 2000e-5(a). The EEOC argues that the statutory definition of "person" specifically includes "governments, governmental agencies, political subdivisions." *See* 42 U.S.C. § 2000e(a). Therefore, the EEOC concludes, "there simply is no basis for Peabody's claim that the Commission cannot litigate this claim when the Navajo Nation is present." *See Plaintiff's Opposition* at page 7. This argument also fails. The EEOC's authority under this section is limited to enforcement of sections 2000e-2 and 2000e-3, which specifically prohibit an "employer," as defined in 2000e(n), from discrimination on the basis of national origin, or retaliation.

The EEOC's reliance on the suggestion in *Dawavendewa v. Salt River Project Agricultural Improvement & Power District,* 276 F.3d 1150, 1162 (9th Cir. 2002) *(Dawavendewa II)* that plaintiff might have a viable alternative forum by virtue of a lawsuit insti-

tuted by the EEOC, since "tribal sovereign immunity does not apply in suits brought by the EEOC," is misplaced. *See Dawavendewa II,* 276 F.3d at 1162 (quoting *EEOC v. Karuk Tribe Hous. Auth.,* 260 F.3d 1071, 1075 (9th Cir. 2001)).[3] This issue was not specifically before the Court or necessary to its holding, and is therefore dicta. *See id.* Moreover, that Court did not address the issue of whether the EEOC had statutory authority to bring a lawsuit against an Indian tribe, the issue here. *See id.*

This Court is not persuaded that Title VII grants the EEOC authority to sue an Indian tribe when it is not the employer, but is instead a party to Coal Leases executed with the employer that direct it to give preference to Navajos. After all, Title VII expressly exempts Indian tribes from its provisions, and expressly prohibits the EEOC from naming as respondent parties "governments," a term the EEOC does not dispute includes Indian tribes. This Court is persuaded that Congress did not intend to authorize the EEOC to name the Indian tribes as defendants in a lawsuit alleging Title VII violations, no matter what their role. This Court is further persuaded that joinder of an Indian tribe under Rule 19 would divest

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[3] The EEOC mistakenly cites Karuk and Dawavendewa II for the proposition that the Ninth Circuit "has twice expressly stated than an Indian tribe is a proper party to litigation brought by the Commission." *See* Opposition at p.4, 11, 7-9. In neither of those cases did the Ninth Circuit address the issue of whether the EEOC has statutory authority to sue an Indian tribe under Title VII. In Karuk, the Ninth Circuit specifically held that the EEOC did not have regulatory jurisdiction over an Indian tribe under the Age Discrimination in Employment Act, even though the ADEA does not expressly exempt Indian tribes from its jurisdiction, as does Title VII. *See* Karuk, 260 F.3d at 1082.

the EEOC of its authority to litigate. *See EEOC v. AFT, Local # 571,* 761 F. Supp. at 539.

Accordingly, this Court concludes that the joinder of the Navajo Nation, a necessary party under Rule 19(a) of the Federal Rules of Civil Procedure, is not feasible.

B. Whether the Navajo Nation is an Indispensable Party

Thus, this Court must decide whether the Navajo Nation is an indispensable party to this lawsuit such that in "equity and good conscience" the suit should be dismissed. *See Confederated Tribes v. Lujan,* 928 F.2d at 1498; Fed. Civ. Pro. Rule 19(b).

To make this determination, the Court must balance four factors: 1) the prejudice to any party or to the absent party; 2) whether relief can be shaped to lessen prejudice; 3) whether an adequate remedy, even if not complete, can be awarded without the absent party; and 4) whether there exists an alternative forum. *See Kescoli v. Babbitt,* 101 F.3d 1304, 1310 (9th Cir. 1996).

The Ninth Circuit addressed these factors in *Dawavendewa II,* involving a lease between Salt River Project and the Navajo Nation that contains a Navajo Employment Preference provision similar to the one in the Coal Leases at issue here. *See Dawavendewa II,* 276 F.3d at 1161-63.

With regards to the first factor, prejudice to any party or to the absent party, the Ninth Circuit found in that case that any decision in the absence of the Navajo Nation would prejudice the Navajo Nation's economic interests in the lease, "namely its ability to provide employment and income for the reservation."

See id. at 1162. The court also found that a decision would "prejudice the Nation's sovereign interests in negotiating contractual obligations and governing the reservation." *See id.* The court also found that the absence of the Nation would prejudice the defendant by preventing the resolution of its lease obligations. *See id.* The same prejudice would occur here with respect to the Navajo Nation and Peabody Coal.

With regards to the second factor, whether relief can be shaped in the Nation's absence to lessen prejudice, the court found that any decision mollifying the plaintiff would prejudice the Nation in its contract with the defendant and its governance of the tribe. *See id.* The same is true here: any relief for the EEOC would come at the expense of the economic and sovereign interests of the Nation.

With regards to whether an adequate remedy could be fashioned absent the Nation, the court found that no partial relief would be adequate, that injunctive relief would necessarily result in the above-described prejudice to the defendant and the Nation, and an award of damages would not resolve defendant's potential liability to other plaintiffs. *See id.* The same holds true here as well. This factor also warrants dismissal.

The only distinction between the Ninth Circuit's analysis in *Dawavendewa II* and this case with respect to the issue of whether the Navajo Nation is an indispensable party is with regards to the fourth factor, whether there exists an alternative forum, In *Dawavendewa II,* the Ninth Circuit suggested in dicta that the plaintiff "may have a viable alternative forum in which to seek redress" by joining in a lawsuit filed by the EEOC (on the premise the Nation could not assert sovereign immunity against the

EEOC), or by suing in tribal court, obtaining an adverse decision, and then bringing suit against the officials in federal court. *See id.* at 1162-63 and n.12. "Recognizing the resources and aggravation consumed in relitigating," however, the court determined that this factor "remains in equipose." *See id.* at 1163. The court noted, moreover, that the absence of any alternative forum to air the grievance was not an impediment to dismissal on grounds an absent party was indispensable. *See id.* at 1162. Here, there may be no alternative judicial forum. This Court, however, finds that this is not an impediment to dismissal.

On balancing these four factors, this Court finds, as did the Ninth Circuit in *Dawavendewa II,* that the Nation is an indispensable party, and that "in equity and good conscience" the lawsuit cannot proceed in its absence. *See id.* at 1163.

Dismissal of this action is therefore proper because the Navajo Nation, a necessary and indispensable party to this litigation, cannot be made a party to this litigation by the EEOC under the specific provisions of Title VII. *See* 42 U.S.C. § 2000e-5(f)(1)(prohibiting the EEOC from filing action against a "government"); 42 U.S.C. § 2000e(b) (exempting Indian tribes from provisions of Title VII); *Dawavendewa II,* 276 F.3d at 1162 (holding that the Navajo Nation was a necessary and indispensable party to employment discrimination lawsuit involving its leases, and that the lawsuit could not go forward in its absence).

C. Whether this Case Presents a Nonjusticiable Political Question

Even if arguably the EEOC did have statutory authority to sue the Navajo Nation under the circumstances presented here, and its joinder did not

divest the EEOC of its authority to litigate, this Court also finds that this case presents a nonjusticiable political question, and it must be dismissed on this alternative ground as well.

The political question doctrine is a "tool for the maintenance of governmental order," and "primarily a function of the separation of powers." *Baker v. Carr,* 369 U.S. 186, 214, 210, 82 S. Ct. 691, 709, 706, 7 L. Ed. 2d 663 (1962). In deciding whether a case raises a political question that is not suitable for judicial review, the Court fashioned the following test:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217, 82 S. Ct. at 710 (emphasis added). If any one of these "formulations is inextricable from the case at bar," the case should be dismissed on the ground it presents a nonjusticiable political question. *See id.; see also Powell v. McCormack,* 395 U.S. 486, 518-19, 89 S. Ct. 1944, 1962, 23 L. Ed. 2d 491 (1969) (noting that a nonjusticiable political question must

involve at least one of these formulations).[4] It is necessary to conduct a "discriminating inquiry into the facts and posture of the particular case" to ascertain whether it presents a nonjusticiable political question. *Baker v. Carr,* 269 U.S. at 217, 82 S. Ct. at 710.

1. The Issues Presented

The EEOC seeks in this action in effect to enjoin enforcement of the Navajo Employment Preference provisions agreed to by the Navajo Nation and Peabody Coal and approved by the Department of the Interior through a representative of the Bureau of Indian Affairs in 1964 Navajo Coal Lease No. 8580 and the 1966 Navajo Coal Lease No. 9910. The EEOC has specifically requested in its Complaint that this Court in part:

> A. Grant a permanent injunction enjoining Peabody, its officers, successors, assigns and all persons in active concert or participation with it, from engaging in discrimination on the basis of national origin.

Complaint, Prayer for Relief at A. In fact, the EEOC has indicated that it intends not only to seek to void or rework the Navajo Nation's Coal Leases, but also to seek to enjoin the Navajo Nation from enforcing its Navajo Preference in Employment Act. *See* Plaintiff's Opposition, at p. 8, lines 4-6, p. 15, n.7. The Navajo Nation Preference in Employment Act directs that "all employers doing business within the territorial

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[4] As evidenced by these portions of the Courts' opinions, the EEOC is mistaken in its assertion that the doctrine is not implicated absent a "textually demonstrable constitutional commitment." *See id.*

jurisdiction . . . of the Navajo Nation, or engaged in any contract with the Navajo Nation, shall . . . "give preference in employment to Navajos. . ." 15 NNC § 604. The EEOC suggests, however, that the Navajo Nation is free *only* to require that private company such as Peabody Coal operating on their reservations "adopt hiring preferences for all Native Americans living on or near the reservations," but *not* to adopt hiring preferences applicable to Navajos only. *See id.* at p. 15 n.7. In Plaintiff's Motion to Strike Portions of The Statement of Facts and Affidavits Submitted by Defendant, in fact, the EEOC describes "the central issue in this case" as "whether the Navajo Nation can discriminate against non-Navajo Native Americans." *See* Plaintiff's Motion to Strike, p.2, 11. 19-20. The EEOC suggests, moreover:

> There is nothing in Title VII which says that the Navajo Nations, as a sovereign subordinate to the superior sovereignty of the United States, cannot be enjoined from engaging in actions clearly prohibited by Title VII.

See Plaintiff's Opposition, at page 8, lines 4-6.

This EEOC position on its face appears to be in direct contradiction to the position taken by the United States Department of the Interior through its approval and signature of its authorized representatives on the Coal Leases containing the Navajo Employment Preference provision at issue.

The EEOC concedes in this action that the documents offered by Peabody Coal, specifically the 1961 Navajo Permit, the 1964 Joint Use Permit, the Hopi Lease, and 1964 Navajo Coal Lease No. 8580 and the 1966 Navajo Coal Lease No. 9910, contain the terms outlined. It is therefore undisputed that the permits

and leases at issue was approved and signed by a representative of the United States Department of the Interior. It is undisputed that these documents are replete with provisions that require the oversight of the Secretary of the Interior. It is undisputed that the Secretary of the Interior has specific authority to declare either of these leases "null and void" when in the opinion of the Secretary of the Interior and the Mining Engineer of the Navajo Tribe, "there has been a violation of any of the terms and conditions of the lease." Moreover, it is undisputed that Navajo Coal Lease No. 9910 is specifically entitled: "United States Department of the Interior Bureau of Indian Affairs Mining Lease between Sentry Royalty Company [predecessor in interest to Peabody Coal] and the Navajo Tribe State of Arizona. "Finally, the EEOC has stipulated that the amendments to these Coal Leases "did not change, or address, the hiring preferences outlined in those leases." Thus, it is undisputed that as recently as 1999, the Secretary of the Interior through its authorized representative, approved or signed off on the Navajo Employment Preference provision.

2. The EEOC's Objections

The EEOC in fact has offered no evidence at all to dispute the evidence offered by Peabody Coal. Nor has the EEOC suggested that the testimony offered by Peabody Coal attorneys is false or that these attorneys are somehow wrong in their sworn testimony that it is their understanding that the Secretary of the Interior drafted the initial documents, and routinely requires this type of provision in such leasing agreements.

Instead, the EEOC moves to strike these sworn statements, on the grounds that the attorneys

making the statements do not have personal knowledge necessary to make these statements. This Court declines to do so. Attorney Sullivan, senior counsel for Peabody Holding Company, Inc., who serves as primary in-house counsel for Peabody Coal, testified that in that capacity he had "become familiar with numerous documents reflecting the relationship between Sentry Royalty Company ("Sentry") PWCC's [Peabody Coal's] predecessor in interest, and both the Navajo Tribe and the Hopi Tribe." He testified that those documents included the Navajo Coal Lease No. 8580 and Navajo Coal Lease 9910, and the amendments thereto. By virtue of his experience and his review of these documents in his capacity as in-house counsel for Peabody Coal, Attorney Sullivan had the personal knowledge and competency required under the governing law to testify as to his understanding as to the documents' origin, development and meaning. *See, e.g., Barthelemy v. Air Lines Pilots Assoc.,* 897 F.2d 999, 1017 (9th Cir. 1990) (corporate officers' "personal knowledge and competence to testify are reasonably inferred from their positions"); *Federal Say. & Loan Ins. Corp. v. Griffin,* 935 F.2d 691, 702 (5th Cir. 1991) (corporation's senior attorney could testify to matters in affidavit that the learned through the corporation's business records, even though he did not have "personal knowledge" as to all matters). Former Peabody Coal general counsel Attorney Young testified by affidavit that in his capacity as general counsel and as part of his job duties, he "became familiar with lease agreements that Peabody predecessor, Sentry Royalty Company, entered into with the Navajo Nation for coal mining operations . . . [and] with the terms of coal mining leases that other entities had with the Navajo Nation." Based on his experience and job duties,

attorney Young had the personal knowledge and competency required under the governing law to testify as to his understanding that the Secretary of the Interior required the Navajo Employment Preference as a condition of the leases. *See id.*

Even if the Peabody Coal's counsels' statements to which the EEOC objects were stricken, however, this Court finds that the actual Permits and Coal Leases in the undisputed record before this Court provide ample support for the proposition that the Secretary of the Interior, through the Bureau of Indian Affairs, has to this date a policy of requiring or at least approving Navajo Employment Preference provisions in Coal Leases executed by private companies with the Navajo Nation.

The EEOC's position in this lawsuit therefore is in direct contradiction to the position of the Secretary of the Interior. Any decision by this Court would of necessity require it to make an initial policy choice between the EEOC's enforcement of Title VII and its underlying policies against discrimination and the Secretary of the Interior's policies and practices with regards to Indian tribes. This is the type of case presenting "the impossibility of deciding without an initial policy determination of a kind clearly for non judicial discretion" that is not appropriate for judicial resolution. *See Baker v. Carr,* 369 U.S. at 217, 82 S. Ct. at 710. Moreover, any decision by this Court would require it to show a lack of respect for one of the two governmental entities: either the EEOC or the Department of the Interior. For this reason also, this case presents a nonjusticiable political question. *See id.* (a political question is presented when it is clear "the impossibility of a court's undertaking independent resolution without expressing lack of the

respect due co-ordinate branches of government"). Finally, any decision by this Court is likely to lead to the potential "of embarrassment from multifarious pronouncements by various departments on one question." *See id.* The EEOC and the Department of the Interior, through the Bureau of Indian Affairs, have different interests and opposing views on the issue of the Navajo Employment Preference provision. For all of these reasons, this Court finds that this case presents a nonjusticiable political issue, and it must be dismissed on this alternative ground also. *See id.*

Accordingly,

IT IS HEREBY ORDERED that Defendant's Motion for Summary Judgment (Doc. # 38) is GRANTED;

IT IS FURTHER ORDERED that Plaintiff's Motion to Strike Portions of the Statement of Facts and Affidavits Submitted by Defendant in Support of its Motion for Summary Judgment (Doc. # 43) is DENIED;

IT IS FURTHER ORDERED that Defendant's Motion to Strike Plaintiff's Reply in Support of Plaintiff's Motion to Strike as Untimely (Doc. # 49) is DENIED;

IT IS FURTHER ORDERED that Defendant's Motion to Dismiss and/or Stay and/or Motion to Strike (Doc. # 24) is VACATED AS MOOT;

IT IS FURTHER ORDERED that Delbert Mariano and Thomas Sahu's Motion to Intervene as Plaintiffs (Doc. # 23) is VACATED AS MOOT.

IT IS FURTHER ORDERED That Clerk of the Court shall ENTER JUDGMENT ACCORDINGLY.

DATED this 24th day of September, 2002.

Mary H. Murguia
United States District Judge

APPENDIX F

NATURAL RESOURCES LAW ON AMERICAN INDIAN LANDS

Peter C. Maxfield, Mary Frances Dieterich,
Frank J. Trelease

[Logo]

Published by Rocky Mountain
Mineral Law Foundation

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Fleming Law Building
University of Colorado
Boulder, Colorado

[239] APPENDIX A

List of Current Forms

Form Number New	Old	Title	Issue Date
* * *			
5-5437	5-155b	Mineral Prospecting Permit (Exclusive with option)	10-57
* * *			
5-5440	5-159	Mining Lease Indian Lands (For Mineral Other than Oil and Gas)	10-57
* * *			

[275] UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS

Form 5-5437 Contract No._____
Oct. 1957

_____Agency
_____

MINERAL PROSPECTING PERMIT
(Exclusive With Option)

This Agreement made and entered into this _____ Day of _____ 19_____, by and between the _____ party of the first part, hereinafter called permitter, whose address is _____ and _____ whose address is _____ party of the second part, hereinafter called Permittee.

* * *

[277]* * *

(m) INDIAN LABOR—The permittee shall employ Indians, giving priority to permitter and other members of its tribe in all positions for which they are qualified and available and shall pay the prevailing wage rates for similar services in the area. The permittee shall do everything practicable to employ qualified Indians, giving priority to the permitter and other members of its tribe and its equipment in all hauling of materials under this permit, insofar as permittee does not use its own equipment for that purpose. Permittee agrees to make special efforts to work Indians giving priority to the permitter and other members of its tribe into skilled, technical and other higher jobs in connection with the permittee's operations under this permit.

* * *

* * *

IN WITNESS WHEREOF, the said parties have hereunto subscribed their names and affixed their seals on the day and year first above mentioned.

Two witnesses to execution
By Permitter:

_____ _____[SEAL]
P.O._____

_____
P.O._____

Two witnesses to execution
By Permittee:

_____ _____[SEAL]
P.O._____

_____
P.O._____

The within permit is ____approved. _____19___

_____
Area Director

[285] UNITED STATES
DEPARTEMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS

Form 5-159 Contract No._____
Oct. 1957

_____

MINING LEASE INDIAN LANDS
(For Minerals other than Oil and Gas)

_____Mining Lease_____Reservation

THIS INDENTURE OF LEASE, made and entered into in sextuplicate, on this _____ day of _____, 19___, between _____
_____
_____
_____
_____
of _____, State of _____ part __ of the first part, hereinafter called the lessor, and _____ of _____ State of _____, part _____ of the second part, hereinafter called the lessee

* * *

[288] *Natural Resources Law on American Indian Lands*

* * *

(19) INDIAN LABOR—The lessee shall employ Indians, giving priority to lessor and other members of its tribe in all positions for which they are qualified and available and shall pay the prevailing wage rates for similar services in the area. The lessee shall do everything practicable to employ qualified Indians, giving priority to the lesser and other members of its tribe and their equipment in the hauling of all materials under this lease insofar as lessee does not use its own equipment for that purpose. Lessee agrees to make special efforts to work Indians giving priority to the lessor and other members of its tribe into skilled, technical and other higher jobs in connection with the lessee's operations under this lease.

* * *

[289] IN WITNESS WHEREOF, the said parties have hereunto subscribed their names and affixed their seals on the day and year first above mentioned.

Two WITNESSES to execution by LESSOR

_____ _____[SEAL]

P.O._____

_____ _____[SEAL]

P.O._____

TWO WITNESSES TO EXECUTION BY LESSEE

_____ _____[SEAL]

P.O._____

_____

P.O._____ Attest _____

MINING LEASE

CONTRACT NO. 14-20-0603-8580

Between

SENTRY ROYALTY COMPANY AND
THE NAVAJO TRIBE

THIS INDENTURE OF LEASE made and entered into in sextuplicate effective the 1st day of February, 1964, by and between THE NAVAJO TRIBE, designated herein as "Lessor" and the SENTRY ROYALTY COMPANY, A Nevada corporation with offices at 301 North Memorial Drive, St. Louis, Missouri 63102 herein designated as "Lessee,"

WITNESSETH

* * *

ARTICLE XIX.

[14] NAVAJO EMPLOYMENT PREFERENCE

Lessee agrees to employ Navajo Indians when available in all positions for which, in the judgment of Lessee, they are qualified, and to pay prevailing wages to such Navajo employees and to utilize services of Navajo contractors whenever feasible.

Lessee shall make a special effort to work Navajo Indians into skilled, technical and other higher jobs in connection with lessee's operations under this lease.

* * *

[24] IN WITNESS WHEREOF the parties hereto have caused this lease to be signed by their duly authorized officers the day and year first above written.

THE NAVAJO TRIBE OF INDIANS LESSOR

By [Illegible]
Chairman
Navajo Tribal Council

SENTRY ROYALTY COMPANY, Lessee

By [Illegible]
Vice president

Attest:

William A. Schneider
Secretary

Approved AUG 28, 1964

S/ JOHN C. DIBBERN
Assistant Area Director

Contract No. 14-20-0603-9910

UNITED STATES
DEPARTEMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS

MINING LEASE

Between
SENTRY ROYALTY COMPANY AND
THE NAVAJO TRIBE

State of Arizona

THIS MINING LEASE, made and entered into this 6th day of June, 1966, by and between THE NAVAJO TRIBE OF INDIANS, hereinafter referred to as "Lessor," and SENTRY ROYALTY COMPANY, a Nevada corporation having offices at 301 North Memorial Drive, St. Louis, Missouri, hereinafter referred to as "Lessee,"

WITNESSETH:

* * *

[15] ARTICLE XVII. EMPLOYMENT PREFERENCE

Lessee agrees to employ Navajo Indians when available in all positions for which, in the judgment of Lessee, they are qualified, and to pay prevailing wages to such Navajo employees and to utilize services of Navajo contractors whenever feasible.

Lessee shall make a special efforts to work Navajo [16] Indians into skilled, technical and other higher jobs in connection with Lessee's operations under this lease. Lessee may at its option extend the benefits of this Article to Hopi Indians.

* * *

* * *

[24] IN WITNESS WHEREOF the parties hereto have caused this lease to be signed by their duly authorized officers the day and year first above written.

THE NAVAJO TRIBE OF INDIANS, Lessor

By [Illegible]
Chairman
Navajo Tribal Council

SENTRY ROYALTY COMPANY, Lessee

By [Illegible]
President

Attest:

[Illegible]
Secretary
Dated: June 6, 1966

THE NAVAJO TRIBE OF INDIANS, Lessor

By [Illegible]
Chairman
Navajo Tribal Council

Attest:

[Illegible]
Secretary
Dated: June 6, 1966

APPROVED JUL 7 1966

[Illegible]
AREA DIRECTOR

August 17, 1973

Guidelines for Establishment of Navajo Manpower Utilization Requirements in Construction Activity

Phillip J. Davis
Director, OFCC

Pursuant to your request, we have reviewed the Guidelines proposed by the Office of Navajo Labor Relations (ONLR) in determining whether they may be properly included in federally-assisted construction contracts let by the Navajo tribe, and whether any sections are compatible with Executive Order 11246, as amended, and Title VII of the Civil Rights Act of 1964. The following analysis is in accord with OFCC's position that the Executive Order program should adopt the Indian Preference clause in Title VII as its own policy in order for the two programs to function under consistent standards for contractors operating on or near Indian reservations.

Section 703(i) of Title VII[1] provides that the prohibitions of Title VII do not apply to the employment of Indians on or near reservations. Therefore, the preference for Indian employment is an absolute one which may work to the total exclusion of all non-Indian employees, trainees, apprentices, or other members of the workforce. The absolute preference for Indians may, where Indians and non-Indians are both members of the work force on or near a reservation, also extend to promotions, transfers, and layoffs, as well as any other benefits of employment.

---

[1] "Nothing contained in this Title shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which preferential treatment is given to any individual because he is an Indian living on or near a reservation."

The only application of Title VII on or near an Indian reservation would be in cases of discrimination involving non-Indians of different races, color or national origin, or between male and female non-Indians.

Under this interpretation of the Indian preference provision of Title VII, and in turn, OFCC's Indian preference policy, it is our opinion that the ONLR may legally append bid conditions of its own on federally-assisted construction contracts which impose upon the contractors a burden of hiring an all or predominantly Navajo work force. Although the proposed ONLR Guidelines have taken the goals and timetables approach utilized in comparable bid conditions, there is no objection to even stronger language requiring employment of Navajos to the maximum extent of their availability. The Guidelines already take this approach in requiring that all apprentices must be members of the Tribe.

The same interpretation supports the ONLR's position that foremen should be employed in the same ratio as there are Navajos on the job, and that Navajos receive preference for all promotions. Additionally, it allows use of the provision which would prohibit laying off any Navajo until all non-Navajos in the same craft have been terminated.

Although the basic premise upon which the Guidelines are based is valid under present interpretation of the Indian preference policy, there are some changes necessary for the Guidelines to fully conform to the requirements of federal law.

The major weakness of the Guidelines is that it does not include the goals and timetables in the invitation for bids, but specifies that they shall be negotiated between the ONLR and the contractor

after award. Post-award negotiations for material conditions such as the numbers or percentages of required Indian manpower utilization would violate the Comptroller General's opinion striking down similar practices in the first Philadelphia Plan. The ONLR has agreed to revise the Guidelines in accord with the Comptroller General's opinion and has prepared goals for the first year the Plan is in effect. A copy of these goals is attached, for your information.

The Guidelines include within its definitions of contractors and subcontractors covered under its terms "government agencies." Since these provisions will be included in all contracts let by the Tribe, whether or not federally assisted, it is essential to amend that definition to read "non-Federal government agencies." Otherwise the Federal government, in contracting for construction on Indian reservations, may be required by contract to hire a (?) Indian work force, although forbidden to do so by Federal laws presently applicable to Federal employees. These contracts would most probably be with the Bureau of Indian Affairs, whose Indian Preference law was recently struck down by a three-judge District Court on the grounds that it violated the 1972 amendment to Title VII prohibiting discrimination in Federal employment.[2]

Let us also call your attention to Section J.6., which purports to provide that the ONLR Guidelines could supersede any conflicting provision in a collective bargaining agreement. The ONLR Guidelines do not have the force and effect of Federal law or regulations. Therefore, there is some question whether such

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[2] *Mancari v. Freeman*,—F. Supp.—, 5 FPD 8643 (June 1, 1973).

Guidelines could supersede collective bargaining agreements.

The remaining questionable provisions are both in the sanctions section.

The first is Section II 0.2., which would allow the ONLR, upon a finding of non-compliance, to debar the contractor or subcontractor from any future work on the reservation for up to five years. This action could not be taken under Executive Order 11246 and questions of legality would be, as would the following question, more properly addressed to the Comptroller General since both raise procurement law considerations on Federally-involved contracts.

Section 0.6., would allow the ONLR to order a non-compliant contractor to pay treble damages to the tribe based on a sum equal to the wages, salaries and benefits that would have been paid to Navajo employees had the contractor complied with its utilization requirements, plus any other damages arising from dilatory action. Since the guidelines also authorize the award of money damages to the tribe for any injuries to it arising from the contractor's failure to comply,[3] and similar damages, in the form of restitution, to any Navajo not hired or promoted in accord with the Guidelines,[4] this section may not serve a valid purpose. However, this provision, as well as the provision relating to treble damages, could not be imposed under Executive Order 11246. As indicated in the preceding paragraph, questions concerning their propriety on Federally-involved contracts should be addressed to the Comptroller General.

---

[3] Section II 0.4.

[4] Section II 0.4.

In conclusion, it should be noted that when a contract is to be performed on or near a reservation, it is not a violation of Executive Order 11246 if an Indian is given preference over a non-Indian for any job or promotion, or on layoffs, or in any other aspect of employment.

Ronald M. Green
Acting Assistant Solicitor

Attachment

THE NAVAJO NATION: AN AMERICAN COLONY

A REPORT OF THE UNITED STATES
COMISSION ON CIVIL RIGHTS

SEPTEMBER 1975

* * *

[49] The ONLR is still trying to work out the difficulties with this system. At the same time, it is trying to make sure that the tribe gets its fair share of jobs from future contractors on the reservation. For example, the ONLR now appends bid conditions of its own to federally-assisted construction contracts. These clauses impose upon the contractors a burden of hiring an all or predominantly Navajo work force. There is also a provision for an affirmative action program on the part of contractors to assure training, upgrading, and promotional opportunities to Navajos at all levels, including management. The office's guidelines also require that all apprentices be members of the tribe.[165]

These guidelines were approved by the Solicitor's Office of the Department of Labor as a legal interpretation of Navajo rights under Title VII of the Civil Rights Act of 1964.

* * *

[125] Tribal efforts to get stronger Navajo preference provisions inserted in approximately 100 contracts and leases with large employers on and near the reservation have ranged from persuasive

---

[165] Guidelines for the Establishment of Navajo Manpower Utilization Requirements in Construction Activity, Office of Navajo Labor Relations (effective Mar. 1, 1973 and amended Sept. 7 1973), Exhibit No. 13, p. 799.

bargaining to at least one major EEOC complaint. The tribe finds the alternative of going to court with contractors who violate the preference clause impractical for financial reasons. The corporations doing business on the reservation include some of the richest in the country, with resources adequate for the longest litigation. Since, the BIA must approve all of the tribe's contracts and leases, it would seem to bear some responsibility for securing enforcement. But no contractor has been sued by the Government for violation of a contract's employment provisions.

Overall, the Commission found the BIA's response to the Navajo unemployment problem has ranged from obstructionist to, at best, insufficient to change the status quo. Where the BIA should be exercising a leadership role, as in the wording of its own Contracts with private employers, the Commission found it instead in last place, with the weakest employment Provisions of all. Where the [126] BIA should be demonstrating that the full authority of the Federal Government stands behind enforcement of the Navajo preference clause in tribal contracts, instead it closes its eyes to even the possibility of violations. The BIA, in short, has created and maintains an elaborate machinery that intrudes on almost every aspect of Navajo life but is incompetent—or unwilling—to enforce Navajo rights.

* * *

[135] 2. The Secretary of the Interior should put the full strength of that office behind tribal efforts to renegotiate inadequate preferential employment provisions of existing leases and contracts between the tribe and outside enterprises to reflect the Department of Labor opinion as to full compliance under Title VII of the Civil Rights Act of 1964.

The Office of Navajo Labor Relations has drawn up a new and more precisely worded preference clause, as well as guidelines for training and upgrading of Navajo employees. These guidelines have been approved by the Solicitor's Office of the Department of Labor as being in accord with Title VII and are now included along with the preference provisions in new contracts and leases of the tribe.

* * *