No. 06-17261

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellant,

v.

PEABODY WESTERN COAL COMPANY,

and

NAVAJO NATION,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Arizona

BRIEF OF DEFENDANT-APPELLEE THE NAVAJO NATION

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JURISDICTIONAL STATEMENT

The District Court lacked subject matter jurisdiction over EEOC's claim against the Navajo Nation because the sovereign immunity of the Nation has not been abrogated or waived. See McClendon v. United States, 885 F.2d 627, 629 (9th Cir. 1989). This appeal is timely.

STATEMENT OF THE ISSUES

1. The District Court gave notice to all parties that it would convert the Nation's motion to dismiss to one for summary judgment if it considered extra-pleading materials. EEOC submitted 16 exhibits with its response to the motion. The District Court granted numerous requests by EEOC for extensions of time to conduct discovery and EEOC obtained all the discovery it sought. Has EEOC met its burden to show that the District Court abused its discretion in converting the Navajo Nation's motion to dismiss to a motion for summary judgment?

2. The only evidence in the record, most notably the testimony of former Secretary of the Interior Stewart Udall, demonstrates that the Peabody coal leases at issue were drafted and negotiated by the Department of the Interior in consultation with the Nation, that the Department required these leases to include a Navajo employment preference provision, and that these leases were approved by the Department under the Navajo and Hopi Rehabilitation Act of 1950, 25 U.S.C. §§ 631-38, which specifically authorizes tribe-specific employment preferences on the Navajo and Hopi Reservations.

Do EEOC's speculative legal arguments create a genuine issue of material fact regarding the applicability of the Rehabilitation Act to the Peabody leases?

3. In addition, the Department has approved all 326 business site leases on the Navajo Reservation, each of those includes a Navajo employment preference requirement, and the Department continues to require that provision. The Department is intimately involved with the administration of all these leases as trustee, and retains the sole power to cancel them for lease violations. Has EEOC carried its burden to show that the District Court abused its discretion in determining that the Secretary of the Interior is an indispensable party?

4. Congress amended the Rehabilitation Act twice after Title VII was passed but has left the Act's tribe-specific employment preference requirement intact. Title VII expressly exempts publicly announced Indian preference programs. Did Congress implicitly repeal the Rehabilitation Act by passing Title VII?

5. The employment preference requirements in the Peabody and other 326 leases of Navajo land are material, bargained-for consideration. EEOC's Amended Complaint seeks affirmatively to enjoin the Navajo Nation, as a party acting in concert or participation with Peabody, from enforcing those lease provisions and its own employment preference law. The Nation's treaty rights include the right to condition the entry of nonmembers seeking to do business within the tribal territory, and one of

its fundamental sovereign attributes is immunity from suit. Congress specifically preserved tribal sovereign immunity in Title VII and precluded EEOC from either suing tribes or pursuing claims "involving" governments or government agencies. Under these circumstances:

A. Has EEOC met its burden to show that the District Court abused its discretion in determining that the Nation is an indispensable party who cannot be joined?

B. Did the District Court err in holding that EEOC seeks to expand its substantive rights and diminish the Nation's through use of Rule 19, in violation of the Rules Enabling Act?

STATEMENT OF THE CASE

Nature of the Case, Course of Proceedings, and Disposition Below

EEOC seeks to punish Peabody for its compliance with Navajo employment preference provisions in Peabody's federally-drafted and federally-approved coal leases, and seeks to enjoin the Nation from requiring or enforcing Navajo preference provisions in any Navajo lease agreements. EEOC's original complaint asserted that Peabody's adherence to these lease provisions violates Title VII of the Civil Rights Act

of 1964. EEOCRE 42.[1] The complaint did not name the Nation as a defendant. The District Court dismissed for nonjusticiability and for EEOC's failure and inability to join the Nation. EEOC v. Peabody Coal Co., 214 F.R.D. 549 (D. Az. 2002). This Court reversed, holding that the suit was justiciable and that, only if EEOC sought no affirmative relief against the Nation, EEOC could join the Nation under Rule 19 for the limited purpose of effecting complete relief between the parties. EEOC v. Peabody Western Coal Co., 400 F.3d 774 (9th Cir. 2005).

On remand, EEOC amended its complaint. EEOCRE 47. The Amended Complaint names the Nation as a defendant and recognizes that the Nation is a party to the Peabody leases having an interest in the action. EEOCRE 48, ¶ 9. It complains that Peabody hired members of the Nation for open positions over non-Navajo Indian applicants. EEOCRE 49, ¶ 13. It seeks to enjoin "all persons in active concert or participation with" Peabody from continuing to require lessees to prefer Navajo applicants over Indians of other tribes. EEOCRE 50, ¶ A.

The Nation moved to dismiss on a variety of grounds. Dkt.#89. The Motion to Dismiss relied on, among other extra-pleading materials, the Declaration of former

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[1] "EEOCRE" refers to EEOC's record excerpts. "NNRE" shall refer to the Navajo Nation's record excerpts. "Dkt." shall refer to the District Court's docket entries.

Secretary of the Interior Stewart Udall, EEOCRE 55-56; declarations of nine Navajo Nation records custodians with responsibilities over Navajo leasing in different parts of the Nation, NNRE 14-29; and the declaration of the Nation's Economic Development Specialist, NNRE 30.

Secretary Udall testified that as trustee for the Nation he was personally involved in the planning and decision making culminating in the Peabody leases; the Peabody leases and related development constituted "the centerpiece of the resources development program under the Navajo and Hopi Rehabilitation Act of 1950"; the Department drafted the Peabody leases at issue; and the Department understood that Act to permit and the trust duty to require Navajo-specific employment preferences for businesses locating on the Navajo Reservation. EEOCRE 55-56. The records custodians testified that there are 326 business leases on the Navajo Reservation, all of which require Navajo preference in employment and all of which were approved by the Department. NNRE 15-29. The Economic Development Specialist testified that unemployment on the Navajo Reservation is 48.1%. NNRE 31. All this testimony is unrebutted.

EEOC requested and the District Court granted an extension of time to respond to the Nation's motion to dismiss. Dkt.#90; NNRE 32. The District Court vacated that extended deadline in response to a second EEOC motion for a continuance of an

additional 90 days to engage in discovery and an extension of time to file its response. Dkt.#95; NNRE 34. The District Court then granted EEOC another 30 days to conduct discovery. EEOCRE 32. EEOC immediately filed another motion for extension of time. Dkt.#109. The District Court granted EEOC an *additional* three weeks to conduct discovery and more time to prepare its response. EEOCRE 29. The District Court stated that it would consider additional requests by EEOC for further extensions upon a proper showing. EEOCRE 31. EEOC never made any such request.

EEOC sent interrogatories and requests for production to the Nation, Dkt.#111, and noticed Udall's deposition, Dkt.#115. The Nation timely responded to the discovery requests, Dkt.#117, and EEOC took Udall's deposition, see EEOCRE 66. EEOC's response to the motion to dismiss, Dkt.# 120, included sixteen (16) separate exhibits and not one word suggesting that it was hampered in its effort to respond by a lack of discovery or time. EEOC's exhibits included excerpts from an unauthenticated draft report ("pulled together and final draft prepared by Theodore W. Taylor, BIA," EEOCRE 124) and other unauthenticated hearsay. The Nation moved to strike these materials. Dkt.#124.

The District Court held oral argument on the motion to dismiss. Dkt.#139. It struck EEOC's hearsay exhibits and granted the Nation's motion to dismiss, which it converted into a motion for summary judgment in light of the submission by all parties

of matters outside the pleadings. EEOCRE 7-8. The District Court determined that the Amended Complaint did indeed seek affirmative relief from the Nation such that EEOC could not join the Nation under this Court's prior decision in this case. EEOCRE 10-13 (citing Peabody Western, 400 F.3d at 781). Consistent with Secretary Udall's Declaration and unrebutted deposition testimony, the District Court found that the Rehabilitation Act applies and authorizes tribe-specific employment preferences on the Navajo Reservation. Id. at 14-16. Finally, the District Court determined that the Department – which administers the land in trust for the Nation, drafted and approved these very leases, retains the sole authority to cancel them for violations of their terms, and approved 326 current Navajo leases that include Navajo employment preference requirements – is an indispensable party. Id. at 16-24. EEOC appeals.

Statement of Facts

I. CONGRESS HAS TREATED THE NAVAJO NATION UNIQUELY CONCERNING EMPLOYMENT IN AND NEAR NAVAJO INDIAN COUNTRY.

The Navajo Nation is a federally recognized Indian tribe. Its relationship with the United States is founded on two treaties. 9 Stat. 974 (1849) ("1849 Treaty"); 15 Stat. 667 (1868) ("1868 Treaty"); United States v. Wheeler, 435 U.S. 313, 324 n.20 (1978). These treaties confirm the fundamental power of the Nation to exclude and the correlative power to condition the entry of nonmembers seeking to do business within

the Navajo territory. In this case, both the United States and the Nation require persons seeking to conduct business on Navajo lands to give employment preference to qualified Navajo workers.

The Navajo people experience poverty not found elsewhere in the United States. The 1868 Treaty required the Government to build schools and provide teachers on the Reservation, but it defaulted on that obligation. 26 Cong. Rec. 7703 (1894); H.R. Rep. No. 81-963 (1949) at 3. State school districts largely ignored the need.[2] Thus, when the Department examined the Navajo situation in 1948, it learned that 80% of Navajos were illiterate and 65% spoke no English, H.R. Rep. No. 81-963 at 3, and that the Navajos lived in "abject poverty," S. Rep. No. 81-550 (1949) at 5.

The shocking conditions on the Reservation motivated Congress to pass the Rehabilitation Act. The Rehabilitation Act is unique. "For the first time, there [was] placed before Congress in one bill a composite statement of the needs of the Indians in a specific area. Up to [then], the needs of the Indians ha[d] been presented by function, such as education and health, on a Nation-wide basis, rather than by area." H.R. Rep. No. 81-963 at 2 (Statement of Secretary Krug).

One focus of the Rehabilitation Act was the development of the Nation's natural

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[2] See, e.g., Ramah Navajo School Bd. v. Bureau of Revenue, 458 U.S. 832, 834 (1982) (referring to the Navajo school "children abandoned by the State").

resources, including specifically coal. 25 U.S.C. § 631 (directing the Secretary to undertake a Navajo resource development program and to conduct surveys and studies of coal). The Act authorized the Secretary to issue mineral leases. Id. § 635(a). The focus on mineral resource development is also prominent in the legislative history. E.g., H.R. Rep. No. 81-1474 (1950) at 2 ("The program is designed first to develop the reservation resources in order to support as many Navajos and Hopis as possible . . ."); S. Rep. No. 81-550 at 2, 5-6; 81Cong. Rec. H. 9500 (1949) ("A survey of the . . . mineral resources . . . is needed, so that we can develop them to more adequately serve these people.") (remarks of Rep. D'Ewart); id. at 9501 (one of "three basic goals" is "to develop the natural resources of the reservation to a degree which will provide a decent standard of living for as many members of the tribe as possible") (remarks of Rep. Patten). The Rehabilitation Act authorized the Nation to adopt a constitution, 25 U.S.C. § 636, but the Department *rejected* the one proposed by the Navajo people in large part because it would have transferred control over Navajo mineral resources from the Department to the Nation, Proposed Constitution for Navajo Tribe, II Op. Sol. 1641, 1642 (1954) (NNRE 190, 191).

The Rehabilitation Act also required tribe-specific employment preferences on all projects under the Act "whenever practicable." 25 U.S.C. § 633. This statutory requirement follows a similar requirement in a 1949 law, which authorized a land

exchange between the Nation and the State of Utah, and provided that "in the event the lands acquired by the State of Utah . . . shall be used for airport purposes, members of the Navajo Tribe of Indians shall be given preference in employment in every phase of construction, operation, and maintenance of the airport for which they are qualified." Act of Sept. 7, 1949, Pub. L. 302, 63 Stat. 695. The Department has consistently construed the Rehabilitation Act as applying to business and mineral leases on the Navajo and Hopi reservations. See EEOCRE 55-56 (Udall Decl.); Austin v. Andrus, 638 F.2d 113, 114 (9th Cir. 1981); First Mesa Consol. Villages v. Phoenix Area Dir., 26 IBIA 18, 27-28 & n.14 (1994); NNRE 137-40, 142-46, 148-51, 166-70, 172-76, 178-83, 185-89 (examples of business leases approved by the Department after 1995 expressly under the Rehabilitation Act, all of which require Navajo employment preference).

Congress was aware that a robust Navajo economy would not be built in ten years. E.g., S. Rep. No. 81-550 at 7 ("This is a proposal for a 10-year program. It will not complete the job.") (Statement of Assistant Secretary Warne). Thus, Congress has amended the Rehabilitation Act both before and after the passage of Title VII in 1964,[3]

[3] Act of Aug. 23, 1958, Pub. L. 85-740, 72 Stat. 834 (adding $40 million to authorization for appropriations in section 631); Act of June 11, 1960, Pub. L. 86-505 § 1, 74 Stat. 199 (adding subsections 635(b) and (c)); Act of Dec. 22, 1974, Pub. L. 93-531 § 26, 88 Stat. 1723 (repealing section 640); Act of Aug. 22, 1996, Pub. L. 104-193, tit. I § 110(u), 110 Stat. 2175 (repealing section 639).

but has left intact the provision authorizing tribe-specific preferences for the Navajo and Hopi.

The Navajo situation was examined in depth again in 1975. United States Comm'n on Civil Rights, The Navajo Nation: An American Colony (1975). The Commission found that the Navajo were still "the poorest of America's poor." Id. at iii. It specifically researched the question of Navajo preference in employment. It reviewed the Nation's employment preference guidelines that imposed the duty of hiring a Navajo workforce and required that all apprentices be Navajo, id. at 49, and noted that "[t]hese guidelines have been approved by the Solicitor's Office of the Department of Labor as being in accord with Title VII," id. at 135. The Commission recommended that the Bureau of Indian Affairs "demonstrate that the full authority of the Federal Government stands behind enforcement of the Navajo preference clause in tribal contracts," id. at 126; see id. at 135 (same for federal contracts). The Navajo employment preference provision of another Navajo coal lease is quoted with approval in a second report, by the New Mexico Advisory Committee to the Commission, Energy Development in Northwest New Mexico: A Civil Rights Perspective 153 (Jan. 1982); see also id. at 143-44 (approving of the Nation's employment preference guidelines).

In the Navajo Preference in Employment Act ("NPEA"), 15 N.N.C. §§ 601-19 (2005), the Nation codified in 1985 its employment preference guidelines and complemented the employment preference provisions of the Rehabilitation Act. Compliance with Navajo law and the continuing validity of leases are required for persons doing business on the Reservation under a Navajo law enacted in 1970 pursuant to the Nation's power to exclude. 5 N.N.C. §§ 401, 403 (2005). However, despite any language in the leases to the contrary, only the Secretary, and not the Nation, may cancel an Indian lease for noncompliance. Yavapai-Prescott Indian Tribe v. Watt, 707 F.2d 1072 (9th Cir.), cert. denied, 464 U.S. 1017 (1983); 61 Fed. Reg. 35,634, 35,650 (1996) (promulgating 25 C.F.R. § 211.54 and rejecting tribal authority to cancel mineral leases, citing Yavapai).

Finally, the Department has consistently construed the more generally applicable Indian Mineral Leasing Act of 1938 ("IMLA"), 25 U.S.C. §§ 396a-396g, as permitting tribe-specific preferences, and it did so when it drafted and approved the Peabody leases. Its 1957 form lease included such provisions, EEOCRE 99, and that form was still in use when the principal treatise on Indian mineral leasing was published in 1977. See EEOC Br. at 51.

The 326 federally-approved leases for businesses on the Navajo Reservation are the foundation of the Navajo economy. They represent the only lawfully operated

commercial enterprises in an area the size of West Virginia, are typically approved under both the Rehabilitation Act and under more general Indian leasing laws, and include leases requiring major capital investments, manufacturing operations, medical facilities, funeral homes, banks, fast food operations, motels and restaurants, Navajo sole proprietorships, day care facilities, and gas stations and convenience stores. NNRE 123, 131, 138, 142, 148, 153, 159, 172, 179, 186. Each one of these 326 leases requires the lessee to comply with Navajo preference in employment. NNRE 15-29. The Department has approved all of them and the above examples were all approved after 1995. See id.; NNRE 125, 133, 140, 146, 151, 156, 164, 170, 176, 183, 189; accord Peabody Coal, 214 F.R.D. at 562 (Secretary approved Navajo employment preference provision in Peabody leases as recently as 1999).

II. THE PEABODY LEASES WERE APPROVED UNDER THE REHABILITATION ACT.

Twenty-five years ago, this Court observed that the Peabody leases were approved under the Rehabilitation Act. Austin, 638 F.2d at 114. The factual record is fully in accord.

Even prior to suing the Nation, EEOC had been presented with the affidavits of Peabody witnesses showing that the Department drafted the leases. Peabody Coal, 214 F.R.D. at 555. EEOC had more than four years to uncover facts to refute these

affidavits but did not try or was not able to do so. To buttress Peabody's showing, the Nation supported its motion with the declaration of Secretary Udall, who oversaw this leasing and related developments. EEOCRE 55-56.

EEOC took Udall's deposition. His recollection was remarkably clear notwithstanding EEOC's quibbles, EEOC Br. at 6, 25-26, that he did not recall a few details after 40 or so years. As Secretary he did not personally negotiate the leases but "was involved all along the way." EEOCRE 74. The negotiations were "done by Interior people," id., and the leases were drafted by a team of people at the Department, probably led by the Solicitor's Office, id. at 79. Secretary Udall elaborated on his averment that the Peabody leases were the "centerpiece" of the resource development program under the Rehabilitation Act, stating that the Act "was really a charter in effect for policies to enhance the economic future of both tribes" and that the resource development program under the Act "was very broad. It covered any important economic development activity on these reservations." Id. at 76. Udall explained that the trust duty applies to specific projects and specific tribes under specific laws, so that special duties were owed by the Government to the Navajo and Hopi under the Act. Id. at 77, 81-82. He recalled that the resources of the two tribes were important to Congress, id. at 77, and that the Act's employment preferences applied specifically to these coal leases, id. "Well, if you have a huge Indian Reservation or Indian

Reservations and you have limited resources, and the most important resource economically is coal, if there's to be jobs on the Reservation created by this leasing process that we're talking about, this is -- this is a very critical matter." Id. The inclusion of the Navajo employment preference requirement in the leases did not unlawfully discriminate against other Indians: "the provision of the [Rehabilitation Act] provided for special reasons . . . for the preference on those reservations. . . . Congress wrote [the Rehabilitation Act] and it was my job to carry it out." Id. at 82. EEOC presented no evidence to contradict Secretary's unequivocal and consistent testimony, or the affidavits presented by Peabody in 2002, or this Court's own observations in Austin in 1981.

III. ALL FEDERALLY APPROVED LEASES OF NAVAJO LAND REQUIRE EMPLOYMENT PREFERENCE BE GIVEN TO QUALIFIED NAVAJO WORKERS.

Secretary Udall did not recall *any* Navajo leases that were approved without the Navajo employment preference requirement. Id. at 77-78. Indeed, all 326 business leases on the Navajo Reservation include a Navajo preference provision and the Department approved them all. NNRE 15-29. EEOC presented no evidence to the contrary.

SUMMARY OF THE ARGUMENT

The EEOC obtained all the discovery it asked for. The District Court properly converted the Nation's Rule 12(b) motion to one for summary judgment after it considered materials outside the pleadings, including numerous exhibits attached to EEOC's response to the motion. An unauthenticated excerpt of a draft document submitted by EEOC was properly stricken and its consideration would not have made any difference anyway.

Congress expressly permitted Navajo-specific employment preferences within Navajo Indian country in the Rehabilitation Act. The Department has construed for at least forty years the Rehabilitation Act and its employment preference provisions to apply to the leases at issue, and the Department's construction of the Act, not EEOC's musings, is entitled to great deference. Before Title VII was enacted, the Department had also announced, through its form leases and regulations, a policy requiring tribe-specific preferences in mineral leasing. Title VII itself expressly preserves such Indian employment preference programs.

In consultation with Navajo representatives, the Department drafted and approved the Peabody leases and required the Navajo employment preference provisions. The Department has approved all of the 326 business site leases in Navajo Indian country and all require that the lessees give qualified Navajos preference in

employment. These 326 leases form the foundation of the struggling Navajo economy. The Secretary has the responsibility to ensure compliance with all lease terms and the sole authority to cancel leases for their violation. The Secretary has a nationwide policy of promoting tribe-specific employment preferences in Indian mineral leases. The District Court did not abuse its discretion in ruling that the Secretary is indispensable.

This is surely a case "involving" government agencies. The factual record is vastly expanded and the legal predicates are quite different from those of the cases relied on by EEOC. Together they demonstrate that EEOC's claim would intrude into interrelated core interests of the Nation and its federal trustee, the Department of the Interior. Under Title VII, only the Attorney General has the authority to proceed in such a case. EEOC's pretenses aside, the affirmative relief sought by EEOC would prevent the Nation from enforcing material terms of its leases, and significantly compromise its treaty-based rights to condition the entry of nonmembers businesses and to control Reservation economic activity. If EEOC prevails, the Nation would suffer the loss of valuable consideration for rights granted to its minerals and water, and the integrity of the other 326 leases would similarly be jeopardized. As the District Court held, the joinder of the Nation under Rule 19 here violates Title VII.

ARGUMENT

I. STANDARD OF REVIEW

The District Court's decisions to limit or permit discovery and to admit or exclude evidence at summary judgment must be upheld unless it abused its discretion. United States Cellular Inv. Co. v. GTE Mobilnet, Inc., 281 F.3d 929, 934 (9th Cir. 2002). In this context, discretion is abused only where no reasonable person would take the view adopted by the trial court. Id. Furthermore, a decision to limit discovery is an abuse of discretion only if the movant diligently pursued its previous discovery opportunities and can show how additional discovery would have precluded summary judgment. Id. The clearest showing of actual and substantial prejudice is required; "ruminative speculation" by the complaining party is insufficient. See, e.g., Martel v. County of Los Angeles, 56 F.3d 993, 996 (9th Cir.) (en banc), cert. denied, 516 U.S. 944 (1995).

The District Court's decision to convert a motion to dismiss[4] into a motion for summary judgment is reviewed for abuse of discretion. Salveson v. Western States Bankcard Ass'n, 731 F.2d 1423, 1430 (9th Cir. 1984). Its decision to dismiss for

[4] This Court applies summary judgment standards not only to motions under Rule 12(b)(6), but also in appropriate cases to those made under other subsections of that rule. See Trentacosta v. Frontier Pac. Aircraft Indus., Inc., 813 F.2d 1553, 1558 (9th Cir. 1987) (Rule 12(b)(1) motion).

EEOC's inability to join indispensable parties (here, the Secretary and the Nation) is also reviewed for abuse of discretion. Clinton v. Babbitt, 180 F.3d 1081, 1086 (9th Cir. 1999); Walsh v. Centeio, 692 F.2d 1239, 1241-43 (9th Cir. 1982). Normally, this Court will reverse a trial court under this standard only when it is "convinced firmly that the reviewed decision lies beyond the pale of reasonable justification under the circumstances." Harman v. Apfel, 211 F.3d 1172, 1175 (9th Cir.), cert. denied, 531 U.S. 1038 (2000).

A grant of summary judgment is reviewed de novo. Jackson v. City of Bremerton, 268 F.3d 646, 650 (9th Cir. 2001). Under this standard, the Court of Appeals must determine whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. Id. EEOC raises no genuine issue of material fact regarding the application of the Rehabilitation Act to these leases. Therefore, this Court need only determine if the lower court's legal conclusions are correct.

II. THE DISTRICT COURT'S PROCEDURAL AND EVIDENTIARY RULINGS WERE WELL WITHIN ITS PERMISSIBLE DISCRETION.

A. EEOC Had Notice of the Conversion and Obtained All the Discovery It Sought.

1. EEOC Had Notice of the Conversion.

EEOC complains that the District Court did not give it proper notice that the

Nation's motion to dismiss would be converted to a motion for summary judgment. EEOC Br. 23-28. To the contrary, the District Court plainly indicated that if materials outside the pleadings were considered, the court would convert the motion to dismiss into a motion for summary judgment. EEOCRE 35 ("[T]he Court will make its own determination as to whether the extraneous materials in support of the 12(b)(6) basis for dismissal will be considered. If those documents are not considered, then the Court will not convert the Motion to dismiss into a motion for summary judgment."). EEOC then submitted 16 extra-pleading exhibits of its own in response to the motion to dismiss.

A represented party who submits matters outside the pleadings has notice that the judge may convert a motion to dismiss to one for summary judgment. Olsen v. Idaho Bd. of Med., 363 F.3d 916, 922 (9th Cir. 2004) (plaintiff "herself included extraneous materials in her opposition to appellee's motions to dismiss"). Given the District Court's statement and the reliance by all parties on extra-pleading materials, EEOC was fairly apprised that the motion could be treated as a motion for summary judgment. Salveson, 731 F.2d at 1430.

EEOC did not object below to, or seek reconsideration of, the conversion. EEOC's failure to do so confirms the propriety of the District Court's ruling. See Townsend v. Columbia Operations, 667 F.2d 844, 850 (9th Cir. 1982); Dayco Corp.

v. Goodyear Tire and Rubber Co., 523 F.2d 389, 393 & n.2 (6th Cir. 1975). EEOC tries to bolster its argument that the conversion was error with a contention that it was denied discovery, but that assertion is false.

2. EEOC Obtained All the Discovery It Sought.

EEOC was given more than five months to respond to the Nation's motion to dismiss. During that time, EEOC obtained all the discovery it sought.

The Nation filed its motion to dismiss on February 17, 2006. Dkt.#89. The District Court granted a series of motions filed by EEOC seeking extensions of time to respond. See Dkt.#90, 95; NNRE 32, 34. EEOC's April 13, 2006 motion to extend the time for its response to permit discovery, Dkt.#95, was based entirely on its counsel's affidavit. EEOCRE 58-60; EEOC Br. at 25. That affidavit stated that "[a]bsent discovery, the EEOC cannot respond to the Navajo Nation's statement about the role of the Department in drafting the lease provisions; nor can the EEOC determine the Department's position on the effect of the Navajo Preference provision on employment of the Hopis . . . ." EEOCRE 59. It adverted to the Nation's showing that other leases of Navajo land require Navajo employment preference. Id. It stated that the discovery "might include a deposition of Stewart Udall" and "also might include the depositions of other individuals involved in the negotiation of the original leases."

Id. EEOC offered no other justification for its motion.[5]

The District Court *granted* EEOC's motion to engage in discovery on *all* these matters, though not at the more leisurely pace that EEOC desired. EEOCRE 37-38. EEOC immediately filed *another* Motion for Time Extension for Discovery for Compelling Good Cause, Dkt.#109, arguing, with no affidavit of counsel, that "initial written discovery, and the deposition of Stewart Udall, may reveal that additional depositions are necessary to determine the role of the Secretary of the Interior in the process of drafting, negotiations, and approving the leases." Dkt.#109 at 3. The District Court *granted* that motion, extending discovery for an additional three weeks through July 13, 2006, five months after the Nation filed its motion to dismiss and five years after EEOC filed its Complaint. EEOCRE 31; cf. Cornwell v. Electra Cent. Credit U., 439 F.3d 1018, 1026 (9th Cir. 2006) (collecting representative cases); Century 21 Real Estate Corp. v. Sandlin, 846 F.2d 1175, 1181 (9th Cir. 1988).

EEOC took Udall's deposition, delving deeply into the Department's role in drafting, negotiating and approving the leases and into the effect of Navajo preference on Hopi Indians. E.g., EEOCRE 73-75, 79-82. EEOC also propounded interrogatories

[5] EEOC's affidavit also stated that EEOC "also will seek copies of the leases during discovery." EEOCRE 60. EEOC had actually been given copies of the Peabody leases some seven years earlier by Peabody, Dkt.#101 at 6 and Ex. A, but the Nation immediately sent duplicates to EEOC anyway. See Dkt.#114 at 2.

seeking the identities of other people involved in the negotiations. Peabody and the Nation provided those names, see NNRE 39-47, but EEOC did not notice *any* of their depositions. Cf. Dkt.#115 (reflecting notice of Udall deposition). Nor did EEOC take depositions of the Navajo records custodians who testified about the other 326 leases of Navajo trust land, or of anyone else. Cf. id. EEOC affirmatively *rejected* the Nation's offer to send it the 326 leases referred to by the Nation's records custodians in their declarations. NNRE 99-107. Moreover, although the District Court had granted one of EEOC's extension motions for compelling good cause, EEOCRE 29, and in that Order had indicated that it would grant EEOC further extensions on a like showing, EEOCRE 31, EEOC did not request any further extensions, filed no motions to compel, and responded to the motion to dismiss with its 16 exhibits without a hint that its presentation was hindered by inadequate discovery or time. See Dkt.#120.

Because EEOC obtained all the discovery it asked for, EEOC cannot meet its burden to show that the District Court abused its discretion in proceeding to rule on the Nation's motion. See Frederick S. Wyle Prof. Corp. v. Texaco, Inc., 764 F.2d 604, 612 (9th Cir. 1985) (no error in denying additional time for discovery when there was "no evidence that the [appellant] was denied the opportunity to depose the affiants" and where appellant did not file Rule 56(f) motion); Second Amendment Found. v. U.S. Conf. of Mayors, 274 F.3d 521, 525 (D.C. Cir. 2001) ("To get discovery, however, one

must ask for it."). And even if the District Court had somehow denied discovery and EEOC had preserved the issue below, EEOC's present challenge fails to make the required "clearest showing that denial of discovery result[ed] in actual and substantial prejudice." See Martel, 56 F.3d at 995-96.

B. The District Court Properly Refused the Unauthenticated Draft Report Excerpts.

EEOC contends that the District Court improperly excluded excerpts from an unauthenticated draft report "pulled together and final draft prepared by Theodore W. Taylor," said to be an employee of the Department of the Interior. EEOC Br. 48-51; EEOCRE 124. The excerpts are assertedly maintained in an Interior library. EEOCRE 166. EEOC's position that the District Court abused its discretion in rejecting these excerpts overlooks the requirement that only admissible evidence may be considered on a motion to dismiss where extra-pleading materials are submitted. See Orr v. Bank of America, NT & SA, 285 F.3d 764, 773 (9th Cir. 2002); Beyene v. Coleman Sec. Services, Inc., 854 F.2d 1179, 1182 (9th Cir. 1988).

To be admissible, a document must be authenticated. Orr, 285 F.3d at 773. Documents authenticated through personal knowledge "must be attached to an affidavit that meets the requirements of [Rule] 56(e) and the affiant must be a person through whom the exhibits could be admitted into evidence." Id. at 774 (internal quotation

marks and footnote omitted). A writing is not authenticated simply by attaching it to an affidavit, even if the writing appears to have originated from some governmental agency. Beyene, 854 F.2d at 1182; Fed. R. Evid. 902(4). This Court requires strict compliance with the authenticity rules. United States v. Perlmutter, 693 F.2d 1290, 1292 (9th Cir. 1982).

EEOC initially submitted the excerpts without any attempt to authenticate. Dkt.#120, Ex. C. After the Nation moved to exclude them, EEOC submitted the affidavit not of anyone through whom they could properly be admitted but through one of its own employees. EEOCRE 166. Even now, EEOC confesses that it does not know if the excerpts are from a draft or a final report. EEOC Br. at 51. No evidence was presented as to the nature of Taylor's authority or position. The District Court's rejection of these excerpts was proper. See Orr, 285 F.3d at 774; Perlmutter, 693 F.2d at 1292-93.

Moreover, the excerpts offered by EEOC include only the index and pages 2 and 15-17. According to the index, these pages concern appropriations; EEOC did *not* include pages 18-24 which deal with funds actually expended by year and tribe (according to the index), nor did it include the section on surveys and studies (pages 63-69), which would presumably include information on the development of the coal resources that the Department was mandated to study. See 25 U.S.C. § 631(3). The

rule of completeness prevents the admission of selective excerpts of documents. See United States v. Cervantes-Flores, 421 F.3d 825, 832 (9th Cir. 2005), cert. denied, 547 U.S. 1114 (2006); Dugan v. R.J. Corman R. Co., 344 F.3d 662, 669 (7th Cir. 2003).

Even if the excerpts had been properly submitted, EEOC offered them merely to show that various infrastructure projects undertaken before 1974 under the Rehabilitation Act "were for the most part completed by 1960, several years before these leases were signed." EEOC Br. at 13.[6] This is immaterial. Assuming that counsel's assertions are true, the excerpts would not refute Secretary Udall's unequivocal testimony, tested in deposition, that the Peabody leases were issued under the Rehabilitation Act and that the Department required Navajo employment preference in conformity with that Act. The draft report excerpts might give some background information but would raise no material issue of fact regarding the Peabody leases. Their exclusion was therefore not an abuse of discretion. See Defenders of Wildlife v. Bernal, 204 F.3d 920, 927-28 (9th Cir. 2000). A party resisting summary judgment must present specific facts constituting significant probative evidence showing that there is a genuine issue for trial; thus, EEOC's speculative inferences from the rejected

[6] The statute provided that the infrastructure part of the development program should be completed "so far as practicable, within ten years from April 19, 1950," 25 U.S.C. § 632, but Congress and the Department knew that the entire effort would take much longer than this initial period. See supra n.3 and accompanying text.

excerpts are not properly considered. See T.W. Elec. Service, Inc. v. Pacific Electrical Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987).

C. The District Court Did Not Abuse its Discretion in Admitting the Department's Form Leases.

The District Court properly admitted the Interior form prospecting permit and tribal mineral lease. See EEOCRE 91-100. EEOC now contests their admission solely on relevance grounds,[7] arguing that there is no showing that the 1957 form leases were used in 1964 and 1966, that they might also apply to individually allotted trust lands, and that maybe their tribe-specific employment preference terms are simply guidelines, rather than required terms. EEOC Br. at 51-53.

EEOC's curiosities are easily satisfied. The form lease is dated 1957, and its inclusion as a "current form" in the 1977 treatise shows that it was still in effect then. See EEOCRE 96, 174-76. Clearly, the form lease applies to tribal lands: its subtitle is "Mining Lease .....Reservation," EEOCRE 96, and the index of forms states that it is for tribal lands. EEOCRE 176. It requires the mining company to "giv[e] priority to lessor and other members of *its* tribe in all positions for which they are qualified." EEOCRE 99, ¶ 19 (emphasis added). And Interior rules resolve EEOC's uncertainty

[7] EEOC has thus waived any of its other objections to the form leases raised in the District Court. See Chappel v. Laboratory Corp. of Am., 232 F.3d 719, 725 n.3 (9th Cir. 2000).

regarding whether the form leases were to be used. At all times, the regulations required mineral leases on tribal lands to be on forms approved by the Department. E.g., 25 C.F.R. § 171.30 (1960) ("Leases, assignments and other papers shall be on forms prescribed by the Secretary of the Interior . . . ."); 25 C.F.R. § 211.30 (1987) (same).

These form leases and the regulations requiring their use are relevant. As discussed below, they reflect the Department's publicly announced policy of tribe-specific preferences in Indian mineral leases preserved by Title VII itself.

III. THE REHABILITATION ACT AND THE DEPARTMENT'S POLICY OF REQUIRING TRIBE-SPECIFIC EMPLOYMENT PREFERENCES IN INDIAN MINERAL LEASES GOVERN OVER GENERAL TITLE VII REQUIREMENTS.

A. Title VII Preserves the Rehabilitation Act's Tribe-Specific Employment Preferences.

The Nation and Peabody, with respect to its leases of Navajo land for mineral development pursuant to publicly announced tribe-specific employment preference requirements, are exempt from the provisions of Title VII. 42 U.S.C. §§ 2000e(b)(1), 2000e-2(i). These exemptions reveal "a clear congressional recognition, within the framework of Title VII, of the unique legal status of tribal and reservation-based activities." Morton v. Mancari, 417 U.S. 535, 545-46 (1974). The sponsor of these exemptions, Senator Mundt, explained that they would allow Indians "to benefit from

Indian preference programs now in operation or later to be instituted." Id. at 546 n.20. That exemption in Title VII was included to benefit Indian tribes and it must be construed generously in the tribes' favor. See Montana v. Blackfeet Tribe, 471 U.S. 759, 767-68 (1985).

The Rehabilitation Act includes a publicly announced employment practice permitting Navajo and Hopi employment preferences on their respective reservations. 25 U.S.C. § 633. This provision reflects the "unique legal status of tribal and reservation-based activities" on the Navajo Reservation, since the Nation's treaties with the United States guarantee the right to exclude nonmember businesses and to condition their entry. See Williams v. Lee, 358 U.S. 217, 221 (1959) (1868 treaty "provided that no one, except United States Government personnel, was to enter the reserved area"); Babbitt Ford, Inc. v. Navajo Indian Tribe, 710 F.2d 587, 593-94 (9th Cir. 1983), cert. denied, 466 U.S. 926 (1984); Quechan Tribe of Indians v. Rowe, 531 F.2d 408, 410-11 (9th Cir. 1976) (tribes have right to determine who may enter the reservation, to define the conditions on which they may enter, and expel those who violate tribal law). Indeed, the Rehabilitation Act is expressly intended "to further the purposes of existing treaties with the Navajo Indians." 25 U.S.C. § 631. Both the Nation and the Department have conditioned the ability of Peabody to do business on the Navajo Reservation on Peabody's agreement to employ qualified Navajos.

The Rehabilitation Act governs these leases. Austin, 638 F.2d at 114; EEOCRE 14-16 (District Court opinion). The evidence here – most notably the declaration and deposition testimony of Secretary Udall – unequivocally supports that conclusion. EEOCRE 55-56, 66-82. To this day, the Department requires Navajo preference in all business site leases of Navajo land under the Rehabilitation Act. NNRE 15-29; 137-51, 166-89 (examples of leases). This consistent construction of the Rehabilitation Act by the Department charged with its implementation controls, not EEOC's unsubstantiated argument. Udall v. Tallman, 380 U.S. 1, 16 (1965); see British Airways Bd. v. Boeing Co., 585 F.2d 946, 953-54 (9th Cir. 1978), cert. denied, 440 U.S. 981 (1979).

The Rehabilitation Act provides that it should be implemented "in accordance with the provisions of . . . existing laws relating to Indian affairs." 25 U.S.C. § 632. It is therefore unsurprising that the Department did not promulgate separate regulations for mineral leasing conducted under the Rehabilitation Act, but instead used those promulgated under the Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396g, and other federal laws governing coal mining on Indian lands.[8] See Peabody Coal Co. v. State, 761 P.2d 1094, 1099 (Ariz. Ct. App. 1988) (noting that various federal

[8] The regulations relied on by EEOC apply to business site leases, not mineral leases. See EEOC Br. at 7 (citing 25 C.F.R. Part 162); Yavapai, 707 F.2d at 1073.

statutes and regulations "govern[ ] virtually every aspect of [Peabody's] coal mining activities"), cert. denied, 490 U.S. 1051 (1989).[9] The 1938 IMLA and the more specific Rehabilitation Act must be construed together, and the regulations typically associated with leasing under IMLA must be construed and applied consistently with the more specific policies, goals, and provisions of the Rehabilitation Act. See FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133, 143 (2000).

Congress authorized the Department to promulgate regulations governing Indian mineral leases in IMLA. 25 U.S.C. § 396d. Under this authority, the Department requires Indian mineral leases to be on forms prescribed by the Secretary and publicly announced its general policy of requiring tribe-specific employment preferences in its form lease. Again, this policy reflects the unique legal status of Indian reservations nationwide, since a tribe needs no treaty or grant of authority from the federal government in order to exercise the power to exclude or condition the entry of nonmembers. See Ortiz-Barraza v. United States, 512 F.2d 1176, 1179 (9th Cir. 1975). Moreover, the Nation's own preference policies, originally set forth in the ONLR

[9] EEOC relies on an extra-record excerpt from extended proceedings in the Court of Federal Claims. EEOCRE 190-91; EEOC Br. 31. This excerpt was not presented to the District Court and should not be considered here. See Fed. R. App. P. 10(a); Cir. R. 10-2; Barcamerica Int'l USA Trust v. Tyfield Importers, Inc., 289 F.3d 589, 593-94 (9th Cir. 2002). As shown in the contemporaneously filed Motion to Strike, the Nation has always relied on the Rehabilitation Act in the Court of Federal Claims.

guidelines and now in the NPEA, are publicly announced employment policies that have been specifically approved by the United States Commission on Civil Rights and the Department of Labor, see American Colony at 49, and, by inclusion of the NPEA requirements in leases approved after the NPEA was passed in 1985, by the Department of the Interior.

B. Summary Judgment Was Proper Because the Specific Preference Provisions of the Rehabilitation Act, Not the General Title VII Requirements, Govern the Peabody Leases.

Repeals by implication are disfavored. Mancari, 417 U.S. at 549. The tribe-specific employment preference provisions of the Rehabilitation Act would be repealed by implication by Title VII only if the Rehabilitation Act and Title VII were irreconcilable. They are not.

The Rehabilitation Act applies to a very specific situation in which Congress legislated comprehensively in a tribe-specific manner for the first time. It authorized the leasing of Navajo land for "the development or utilization of natural resources" by the Secretary, 25 U.S.C. § 635(a), and expressly authorized tribe-specific employment preferences, id. § 633. EEOC would "harmonize" the Rehabilitation Act with Title VII by confining it to the initial ten-year period (or so) and to government infrastructure improvements, i.e., by negating the ongoing vitality of that section of the Rehabilitation Act. EEOC Br. at 29-30. Similarly, EEOC would negate the Interior Department's

publicly announced preference policy in Indian mineral leasing by the single statement that "[t]he IMLA governs Indian mineral leasing; Title VII governs nondiscrimination in employment." Id. at 32.

EEOC's reasoning runs directly contrary to Mancari. Unless there is a "clear intention" otherwise, a specific statute, such as the Rehabilitation Act, will not be controlled or nullified by a general one, regardless of the priority of enactment. Mancari, 417 U.S. at 550-51. Here, Congress' clear intention in Title VII itself *favors* the continued vitality of both the Rehabilitation Act's tribe-specific employment preference and the Department's policy regarding Indian mineral leases generally. It expressly *preserved* such publicly announced Indian preference programs. 42 U.S.C. § 2000e-2(i). EEOC's position awkwardly juxtaposes against the fact that Congress amended the Rehabilitation Act twice after Title VII was enacted, but has chosen to leave its employment preference provisions intact. See supra n.3 and accompanying text.

Title VII can be construed harmoniously with the treaties, the Rehabilitation Act, and Interior policy under IMLA, but not in the way EEOC contends. The Navajo treaties and the Rehabilitation Act intended to further them "apply[ ] to a very specific situation," while Title VII "is of general application." Mancari, 417 U.S. at 550; EEOCRE 16 (District Court opinion); see United States v. Smiskin, 487 F.3d 1260,

1263-64 (9th Cir. 2007) (federal laws of general applicability, silent on the issue of applicability to Indian tribes, do not apply to them if their application would abrogate treaty rights). Similarly, the Indian mineral leasing statutes apply to reservations nationwide, where tribes have the right to condition the entry of nonmembers seeking to mine tribal lands, and the Department's announced policy requiring tribe-specific employment preferences in IMLA mineral leases applies in those particular settings. Just as the Indian preference provisions in the 1934 Indian Reorganization Act could be harmonized with Title VII in Mancari without diluting the effectiveness of Indian preference, so can Title VII be harmonized with the Rehabilitation Act and IMLA without diluting authorized tribe-specific employment preferences.

The District Court properly construed and applied the applicable law. Because EEOC raised no genuine issue of material fact, the grant of summary judgment must be affirmed.

IV. THE DISTRICT COURT'S DETERMINATION THAT THE SECRETARY IS INDISPENSABLE WAS NOT AN ABUSE OF DISCRETION.

The question of whether the Secretary is indispensable is determined by a three-part inquiry. Peabody Western, 400 F.3d 779. First, would joinder of the Secretary be "desirable"? If so, the Secretary is a necessary party under Rule 19(a). Id. Second, is joinder of the Secretary feasible? Id. If not, the court must determine whether the

action should be dismissed in equity and good conscience, using the four factors of Rule 19(b). Id. at 779-80. EEOC has not satisfied its burden to show that the District Court abused its discretion in balancing those factors.

A. The Secretary Is a Necessary Party Under Rule 19(a).

In consultation with the Nation, the Secretary negotiated and drafted the Peabody leases, required then and requires now that Peabody give qualified Navajos preference in employment under these leases, has required Navajo employment preference in all 326 of the business site leases of Navajo trust lands, has adopted a nationwide policy promoting tribe-specific employment preferences in all Indian mineral leases under his rulemaking authority conferred by IMLA, and retains the sole authority to cancel Peabody's leases for violation of any of its terms. The Secretary, as trustee, is required to protect the property, contractual and sovereignty interests of the Nation. Poafpybitty v. Skelly Oil Co., 390 U.S. 365, 373 (1968) (if the Department finds a "violation of a lease [of Indian minerals], it will *of course* satisfy its trust obligation by filing the necessary court action") (emphasis added); HRI, Inc. v. EPA, 198 F.3d 1224, 1245 (10th Cir. 2000) ("The federal government bears a special trust obligation to protect the interests of Indian tribes, including protecting tribal property and jurisdiction."). If the Navajo preference requirement is rendered unenforceable in the Peabody leases and the other 326 business leases as a result of EEOC's suit, the Nation

will request the Department to cancel or reform at least some of these leases, or hold the Government to its trust if it fails to do so.

Rule 19(a) simply defines the persons whose joinder is *desirable*. Peabody Western, 400 F.3d at 779. The District Court correctly ruled that the Secretary is a necessary party under both of the Rule 19(a) criteria. EEOCRE 17-21. Assuming only for the sake of argument that the Navajo employment preference provision of the leases requires Peabody to discriminate unlawfully, the Secretary required Peabody to agree to do so as a condition for obtaining the leases. Another arm of the federal Government, the EEOC, would exact compensatory and punitive damages for the named parties and an undefined class from Peabody for its compliance with that term. EEOCRE 51. Peabody would have standing to assert a cross-claim against the Secretary if EEOC joined him, see Monterey Mech. Co. v. Wilson, 125 F.3d 702 (9th Cir. 1997), but EEOC cannot.

The District Court properly rejected EEOC's frivolous contention that the Secretary has no legitimate interest in the pending suit. EEOCRE 19-20; see generally United States v. Hellard, 322 U.S. 363, 366-68 (1944) (explaining national interests in protecting Indian's interests in trust lands); cf. EEOC Br. 42 (with no authority and contrary to Udall's testimony, EEOC opines that the Secretary's interest here "is limited to ensuring that private entities do not take unfair advantage of the tribe's

valuable assets"). The Secretary played an active role in drafting and approving the leases and in requiring Navajo employment preference, and the EEOC is "necessarily alleg[ing] that the contract itself [is] illegal." Disabled Rights Action Comm. v. Las Vegas Events, Inc., 375 F.3d 861, 882 (9th Cir. 2004). The Secretary has required Peabody to comply with the preference provisions to the present day, and has required similar provisions in all 326 of the business site leases on the Reservation, including the many leases expressly approved under the Rehabilitation Act. Moreover, as the District Court pointed out, "it appears that the [Secretary] still is an integral part of the leases as [the Secretary] retains the authority to terminate the lease in the event of non-compliance," EEOCRE 19 (citing Yavapai), and if Peabody fails to comply with its lease the Secretary "would be faced with a decision as to whether to take any action by terminating the leases," id. at 20; Poafpybitty, 390 U.S. at 373. The Secretary is not only necessary, then, but indispensable, since "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." Dawavendewa v. Salt River Agric. Improvement & Power Dist., 276 F.3d 1150, 1156 (9th Cir.) ("Dawavendewa II") (citation and internal quotation marks omitted) (emphasis added), cert. denied, 537 U.S. 820 (2002); see Pimalco v. Maricopa County, 937 P.2d 1198, 1203 (Ariz. Ct. App. 1997). The District Court properly rejected as speculative EEOC's prediction that the Interior Department would do

nothing in its trustee capacity if the Nation were deprived of consideration it obtained in exchange for its coal. EEOCRE 20; cf. EEOC Br. 45 (EEOC's present speculation to the contrary).

The District Court also properly determined that the Secretary's absence would impair his ability to protect the Department's interests in the Peabody and other leases, and that his non-joinder creates a substantial risk to Peabody of inconsistent obligations. As the District Court noted, the reasoning of Peabody Western compels that conclusion: if EEOC prevails, Peabody will be stuck between a rock and a hard place because it will either comply with the injunction prohibiting the hiring preference policy and risk termination of the leases by the Secretary (at the Nation's request or otherwise)[10] or comply with the hiring preference requirement contrary to an order of a federal court. EEOCRE 21-22 (citing Peabody Western, 400 F.3d at 780).

B. EEOC Cannot Join the Secretary.

The District Court determined that EEOC was barred by the United States' sovereign immunity and by Title VII itself from joining the Secretary. EEOCRE 22. EEOC does not contend otherwise.

[10] See Yavapai; EEOCRE 85, 88-89 (cancellation provisions of leases).

C. EEOC's Single Conclusory Paragraph Does Not Satisfy Its Burden to Show that the District Court Abused its Discretion in Holding that the Secretary Is Indispensable.

EEOC concedes that the District Court's determination that a party is indispensable under Rule 19(b) must be upheld unless it is an abuse of discretion. EEOC Br. at 14. The District Court examined each of the four factors of Rule 19(b) carefully. EEOCRE 22-24. Perhaps because the applicable abuse of discretion standard is so narrow, EEOC does not try to show that this Court can be "convinced firmly that the reviewed decision lies beyond the pale of reasonable justification under the circumstances." See Harmon, 211 F.3d at 1175 (explicating abuse of discretion standard). Rather, in one conclusory paragraph, EEOC merely asserts that the District Court "erred" in its Rule 19(b) weighing. EEOC Br. 47-48. That paragraph simply repeats EEOC's erroneous contentions that the Secretary has no "legal interest" in the suit and therefore cannot be prejudiced by any ruling, that the present parties will not be prejudiced by the Secretary's absence, and that complete relief can be rendered without him, because the case relates "to a single lease term." EEOC Br. 47.

This "single lease term" is one that the Secretary required in the Peabody leases, was a material inducement and consideration for the Nation and the Secretary to grant rights to Peabody for Navajo coal, and is present in 326 other Secretarially-approved leases. Cf. Dawavendewa II, 276 F.3d at 1156 (judgment invalidating one provision

of lease could cause the "entire tapestry of the agreement to unravel"). It is almost axiomatic that the Secretary is an indispensable party in cases seeking to establish (here, to modify) rights in tribal trust land. See Hellard, 322 U.S. at 366-68; Imperial Granite Co. v. Pala Band of Mission Indians, 940 F.2d 1269, 1272 n.4 (9th Cir. 1991). The Secretary acted, at least in part, for the Navajo Nation in requiring Navajo employment preference as a condition of the alienation of trust land and suit may not be maintained in his absence. See Superior Oil Co. v. United States, 353 F.2d 34, 36 (9th Cir. 1965). EEOC's conclusory, technical paragraph is insufficient to satisfy its burden to demonstrate that the District Court's weighing of the Rule 19(b) factors was an abuse of discretion. See, e.g., Aguilar v. Los Angeles County, 751 F.2d 1089, 1093 (9th Cir.), cert. denied, 471 U.S. 1125 (1985); Kescoli v. Babbitt, 101 F.3d 1304, 1310-11 (9th Cir. 1996).

V. TITLE VII AND THE RULES ENABLING ACT PRECLUDE EEOC'S PURSUIT OF THIS CLAIM.

A. EEOC May Not Pursue This Action Because It "Involves" Governments.

The test for when EEOC must yield to the Attorney General under Title VII is whether the controversy "involves" a government or government agency, not whether EEOC is suing the government or whether it is seeking "affirmative relief" from it, as EEOC repeatedly implies. See EEOC Br. at 12, 22. Section 2000e-5(f)(1) of Title 42

prohibits EEOC not only from proceeding "[i]n the case of a respondent which is a government, government agency, or political subdivision," id., it also requires EEOC to yield to the Attorney General in any "case involving a government, government agency, or political subdivision."[11] That demarcation of authority is repeated 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). Title VII should be construed consistent with its plain language. E.g., Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 552-53 (1987). "The word 'involving' is broad and is indeed the functional equivalent of 'affecting,'" Allied-Bruce Terminex Cos. v. Dobson, 513 U.S. 265, 273-74 (1995), and Congress' careful protection of tribes as sovereigns in Title VII supports an expansive reading of that word, see id. This result is bolstered by the canon of statutory construction that doubtful expressions in statutes passed for the benefit of Indian tribes, such as Title

[11] In a footnote, EEOC Br. at 22 n.12, EEOC tries to resuscitate a previously rejected argument that the Nation cannot be a government "respondent" unless it is also an "employer" under Title VII. This argument was rejected in Peabody Coal, 214 F.R.D. at 558, and that decision, not reversed by this Court in Peabody Western, remains the law of the case. EEOC's representation that it addressed this issue on remand at pages 6-8 of its brief below, EEOC Br. at 22 n.12, is false, and its present footnote would not preserve the argument at any rate. See Hilao v. Estate of Marcos, 103 F.3d 767, 778 n.4 (9th Cir. 1996)

VII's exemption for businesses operating on or near Indian reservations, should be resolved in favor of the tribes, and also by the critical importance of natural resources to them. See Blackfeet Tribe, 471 U.S. at 767-68; Dille v. Council of Energy Resource Tribes, 801 F.2d 373, 375 (10th Cir. 1986).

In contrast to the singular focus of EEOC, the Justice Department has broad responsibilities regarding, and a greater sensitivity to, larger tribal and federal interests. See, e.g., 61 Fed. Reg. 29,424 (June 10, 1996) (establishing the Office of Tribal Justice 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 lawsuits). The broader focus of the Justice Department is especially critical in a case involving another federal agency, the Interior Department, which is the focal point of the Government's trust duties to Indians. See Nevada v. United States, 463 U.S. 110, 135 n.15 (1983).

Even EEOC admits that its suit significantly affects the Nation. If EEOC is awarded the relief it seeks, the Nation would be enjoined from enforcing a material term of its mineral lease, EEOC Br. at 44; NNRE 207 (EEOC states at oral argument that "the Navajo Nation would be barred by res judicata from – from doing *anything* if this Court were to enjoin Peabody") (emphasis added), and would thus be deprived of valuable consideration, see Dawavendewa II, 276 F.3d at 1157 (such relief

"challenges the Nation's ability to secure employment opportunities and income for the reservation – its fundamental consideration for the lease"); Yazzie v. Morton, 59 F.R.D. 377, 382 (D. Az. 1973). Such relief would also undermine the "Nation's ability to negotiate contracts," which in turn "undermines the Nation's ability to govern the reservation effectively and efficiently." Dawavendewa II, 276 F.3d at 1157. It is also clear that the relief sought, if granted, would prohibit the Nation from requiring future lessees to prefer qualified Navajo workers, see EEOC Br. at 10, in derogation of the Nation's treaty-secured right to condition the entry of nonmembers seeking to do business in the tribal territory.

EEOC's case involves even more than that from the Nation's perspective. Peabody would cross-claim against the Nation, with no congressional abrogation or tribal waiver of Navajo sovereign immunity. See NNRE 204. The Nation's own employment preference statute, the NPEA, is "clearly an exercise of sovereign authority over economic transactions on the reservation." See NLRB v. San Juan Pueblo, 276 F.3d 1186, 1200 (10th Cir. 2002) (en banc). That law would be rendered nugatory if EEOC succeeds here. If EEOC were to prevail, all 326 of the Reservation business site leases would be directly affected since all of them require Navajo preference in employment. See Dawavendewa II, 276 F.3d at 1156 (judgment invalidating one lease provision could cause the "entire tapestry of the agreement to

unravel"). Furthermore, as shown below, such relief would effectively compromise the Nation's immunity from suit under Title VII with no congressional abrogation or tribal waiver.

The relief sought by EEOC affects the Department, as well. Contrary to EEOC's view, the Secretary is not an idle bystander. The interests of the Nation and its trustee in the Peabody leasing are "interrelated" and based on significant federal policies. Peabody Coal Co., 761 P.2d at 1099; see HRI, 198 F.3d at 1245. The leases maintain a strong Secretarial presence in almost all areas. See NNRE 49-97; United States v. Newmont USA Ltd., __ F.Supp. 2d __, 2007 WL 2386425 at *21-23 (E.D. Wash. Aug. 21, 2007). The Department required Navajo employment preference in the Peabody leases and has continued to do so in the other 326 leases of Navajo trust land. The Department's position that such terms are lawful is unchanged to this day.

The Department has the sole ability to cancel the Peabody lease. Yavapai, 707 F.2d at 1075. The Nation has already sued the Government for failing to secure proper consideration for the Peabody coal,[12] and the Nation may ask the Secretary to cancel this lease, and perhaps others, if this essential component of the consideration is

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[12] See Navajo Nation v. United States, 46 Fed. Cl. 217 (Fed. Cl. 2000), rev'd, 263 F.3d 1325 (Fed. Cir. 2001), rev'd, 537 U.S. 488 (2003), on remand, 347 F.3d 1327 (Fed. Cir. 2003), on remand, 68 Fed. Cl. 805 (2005), rev'd, No. 2006-5059, ___ F.3d ___ (Fed. Cir. Sept. 13, 2006).

negated. The Department's nationwide policy requiring tribe-specific employment preferences in Indian mineral leases is directly implicated here.

EEOC's lawsuit involves in most significant ways two government entities. Title VII prohibits EEOC from pursuing this action.

B. EEOC Seeks Affirmative Relief Against the Nation, So Its Claim Is Barred by Title VII.

EEOC's argument that the District Court abused its discretion in its Rule 19 analysis and in its determination that EEOC's joinder of the Nation violated Title VII and the Rules Enabling Act is based on the erroneous premise that EEOC seeks no affirmative relief against the Nation, EEOC Br. at 3, 12, 21, and on EEOC's false and irresponsible representation that the Nation has never asserted otherwise, id. at 15 ("a position never advanced by the Nation"), 16 ("the Nation conceded that EEOC's Amended Complaint does not seek any affirmative relief against it"). In fact, the Nation asserted that the Amended Complaint *on its face* did not state any claim whatsoever against the Nation and could be dismissed on that basis alone. But the Nation's central position was and is that EEOC does indeed seek such affirmative relief, notwithstanding its attempt at artful pleading. See, e.g., NNRE 2-13 (Motion to Dismiss excerpts), 110-13 (Heading and section of Navajo Reply Brief arguing "The EEOC Seeks Affirmative Relief Against the Navajo Nation."), 114-19 (other Reply

Brief excerpts); 197-201 (oral argument).

"Examination of the relief Plaintiffs sought does not stop at the parties' allegations. . . . Our task . . . is to discern the nature of the relief being sought and focus on the type of relief that will result from the action." Marceau v. Blackfeet Housing Auth., 455 F.3d 974, 985 (9th Cir. 2006) (internal quotation marks and citation omitted). That is precisely how the District Court ruled. EEOC sued the Nation, seeks to prohibit Peabody from complying with a material term of its lease with the Nation, and seeks to enjoin "Peabody . . . and all persons in active concert or participation with it, from engaging in discrimination on the basis of national origin." EEOCRE 2, 50. EEOC argues that this language is just boilerplate. EEOC Br. at 16-17. Be that as it may,

> 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.

EEOCRE 10; accord EEOC Br. at 44 (Nation would be precluded from enforcing lease provision against Peabody if relief granted).

The focus here must be on the type of relief that will result from the injunction that EEOC seeks. Marceau; see Kescoli, 101 F.3d at 1310. If EEOC prevails, the

Nation would be enjoined from enforcing the Navajo preference provision in the Peabody lease, enforcing the same provision in the other 326 federally-approved leases of Navajo land, enforcing the NPEA against Peabody and other lessees, and including the Navajo preference provision now required under Navajo and federal law in any future leases, because these actions would be considered "discrimination on the basis of national origin" under paragraph A of EEOC's Prayer for Relief. See Dawavendewa v. Salt River Agric. Improvement & Power Dist., 154 F.3d 1117, 1119 (9th Cir. 1998) ("Dawavendewa I"), cert. denied, 528 U.S. 1098 (2000).[13] The injunction would have the real-world effect of requiring the Nation, and, as discussed above, the Secretary, to determine which leases should be cancelled or reformed for failure of consideration. These many interests may be trivial to EEOC (as is apparently the 48% unemployment rate on the Reservation) but they are significant to the Nation, the Secretary, and all those who do business on Navajo lands.

A suit is one against the sovereign if the judgment would interfere with public administration or effectively restrain the government from acting. Dugan v. Rank, 372 U.S. 609, 620 (1963). Thus, in Cruz v. Town of Cicero, 1999 WL 560989 (N.D. Ill. 1999), as adopted, 2000 WL 369666 at *7 (N.D. Ill. 2000), plaintiffs were held to be

[13] The Nation preserves its position that tribe-specific preferences are political distinctions, not discrimination based on race or national origin. See Mancari, 417 U.S. at 553-54 & n.24.

seeking "affirmative relief" from a municipality in a discrimination suit when the municipality would be forced to change or abandon its duly-enacted parking policies, despite plaintiffs' contention that they were only requesting "a restraint from interference" from the municipality. 1999 WL 560989 at *10. Even EEOC's crimped view of its claim admits that it would restrain the Nation from seeking to enforce its rights under the lease, and its requested injunction would further restrain the Nation from enforcing those terms in the other 326 leases of Navajo land and from enforcing its employment laws.

EEOC's spin on its Amended Complaint cannot negate its implications for Navajo self-government, the Nation's right to condition the entry of nonmembers, its contractual interests, and its struggle to attain self-sufficiency and productive employment of Navajo people, consistent with the Rehabilitation Act's purposes, 25 U.S.C. § 631. The cases on which EEOC relies are predicated on the erroneous assumption that EEOC is not seeking relief against the Nation. Those cases are therefore inapposite. Indeed, Peabody Western and the other cases support dismissal under Rule 19 even if EEOC's spare Complaint and requested injunctive relief are taken at face value. See 400 F.3d at 782 (distinguishing Vieux Carre Prop. Owners v. Brown, 875 F.2d 453, 457 (5th Cir. 1989), cert. denied, 493 U.S. 1020 (1990), on the basis that the Vieux Carre plaintiffs "sought injunctions against the party sought to be

joined").

EEOC's suit seeks affirmative relief from the Nation and is therefore against the Nation as a respondent under Title VII. Title VII bars this action. See Peabody Western, 400 F.3d at 778.

C. Because EEOC Seeks Affirmative Relief Against the Nation, Navajo Sovereign Immunity Bars EEOC's Suit.

1. EEOC's Basic Assumptions Are Erroneous.

EEOC posits that this Court has "held" that tribe-specific preferences violate Title VII in Dawavendewa I and in Peabody Western. E.g., EEOC Br. at 2 n.2, 34. However, this Court admonished in *both* cases that it was not deciding the merits of EEOC's position. Dawavendewa II, 276 F.3d at 1158 n.7; Peabody Western, 400 F.3d at 784. Indeed, Dawavendewa I held "only that a hiring preference policy based on tribal affiliation, as described in the complaint, stated a claim upon which relief could be granted," Dawavendewa II, 276 F.3d at 1158, and neither Dawavendewa nor Peabody Western considered whether the 1868 Treaty, the Rehabilitation Act, the Department's mineral leasing policies, or Navajo law permit Navajo-specific preferences.

EEOC also assumes that Peabody Western binds the Nation as the law of the case even though the Nation was not a party then. E.g., EEOC Br. at 12, 18-19. Not

so. To the extent that the Nation's arguments in this or other respects may conflict with dicta or rulings in Peabody Western, those rulings do not bind the Nation. E.g., United States v. Brown, 761 F.2d 1272, 1276 (9th Cir. 1985). And this Court's broad dictum in Dawavendewa II that EEOC can join Indian tribes, the basis for Peabody Western's premise to the same effect, does not control or preclude contrary arguments not raised or fully developed by the parties in those cases which are now squarely presented by the Navajo Nation. See NLRB v. Boeing Co., 412 U.S. 67, 72 (1973).[14] As shown below, that statement in Dawavendewa II relies on an inapposite case and does not apply in the circumstances of EEOC's claim here.

2. The Dawavendewa II Dictum, Repeated in Peabody Western, Does Not Control This Case on This Record.

The statement in Peabody Western that EEOC could join the Nation under Rule 19 in this case was expressly limited to the situation where EEOC seeks "no affirmative relief" against the Nation, 400 F.3d at 778, 782, and where the judgment sought by EEOC "will not bind the Navajo Nation in the sense that it will directly order the Nation to . . . refrain from performing certain acts," id. at 780. With the benefit of

[14] Even if the law of the case did apply to arguments not addressed in the preceding decision, the exception to that doctrine noted by EEOC would prevail here, given that substantially different evidence was adduced in the proceeding below. See EEOC Br. at 19, n.9; Hegler v. Borg, 50 F.3d 1472, 1475 (9th Cir. 1995).

EEOC's Amended Complaint and concessions in briefs and at argument,[15] we know that EEOC does indeed seek affirmative relief from the Nation and intends that the Nation would be barred from enforcing its contractual rights and, indeed, "from doing anything if this Court were to enjoin Peabody." NNRE 205-07. Therefore, assuming for the sake of argument that EEOC may join the Nation when it is statutorily barred from suing the Nation directly,[16] Peabody Western supports the Nation's position that Title VII bars EEOC's suit in the context of this claim and on this record.

Dawavendewa II states that the plaintiff in that case "may have a viable alternative forum in which to seek redress. Sovereign immunity does not apply in a suit brought by the United States" including EEOC. 276 F.3d at 1162. That statement was unnecessary for the court's holding that the plaintiff's claim could not be heard without joinder of the Nation and is thus dictum. See Trent v. Valley Elec. Ass'n, Inc. 195 F.3d 534, 537 (9th Cir. 1999), cert. denied, 531 U.S. 871 (2000). That dictum is based on EEOC v. Karuk Tribe Hous. Auth., 260 F.3d 1071, 1075 (9th Cir. 2001), but Karuk did not concern Title VII. Karuk concerned the Age Discrimination in Employment Act ("ADEA"). Unlike Title VII, the ADEA does not contain an exemption for

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[15] Such concessions are "admissions on file" for summary judgment purposes. See e.g., Nieves v. University of Puerto Rico, 7 F.3d 270, 280 (1st Cir. 1993).

[16] The Nation preserves its argument to the contrary. See Dkt.#89 at 29-30 & n.6; Dkt.#132 at 9-12; Part VI, infra.

publicly announced Indian employment preference policies, does not expressly preserve the sovereign immunity of tribes from suits by EEOC, and does not prohibit EEOC from pursuing any case involving a tribal or other government. Karuk, 260 F.3d at 1080 ("the ADEA is silent on its applicability to Indian tribes"). The Karuk case involved no attempted administrative abrogation of a tribe's treaty-based right to condition the entry of nonmembers seeking to do business on the Reservation. No special statute such as the Rehabilitation Act was involved. This case *does* involve those factors not at issue or considered in Karuk – or Dawavendewa II – and the factual record here is significantly different, so the rulings and dictum in those cases do not bind this Court in this case. See Brown, 761 F.2d at 1276; Hegler, 50 F.3d at 1475; Wisconsin v. EPA, 266 F.3d 741, 746-47 (7th Cir. 2001) (general statements about tribal sovereignty in prior case do not control where specific federal statute controls), cert. denied, 535 U.S. 1121 (2002); see generally Armour & Co. v. Wantock, 323 U.S. 126, 132-33 (1944) (reminding counsel that "words of . . . opinions are to be read in the light of the facts of the case under discussion").

The Nation acknowledges that tribal sovereign immunity does not prevent the United States from exercising its superior sovereign powers. Quileute Indian Tribe v. Babbitt, 18 F.3d 1456, 1459 (9th Cir. 1994). But Congress knows how to limit the sovereign immunity of tribes when it wants to, In re Greene, 980 F.2d 590, 594 n.3 (9th

Cir. 1992), cert. denied, 510 U.S. 1039 (1994), and it also knows how to permit joinder of sovereigns under Rule 19 when it deems joinder appropriate, see Orff v. United States, 545 U.S. 596, 601-04 (2005) (construing 43 U.S.C. § 390uu, which provides "consent . . . to join the United States as a necessary party defendant" in suits to adjudicate contractual rights under Federal reclamation law). And even when consent to suit or joinder is granted, such consent must be strictly construed. Id. at 601-02; United States v. Mottaz, 476 U.S. 834, 845-46 (1986); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978). Congress has not abrogated Navajo sovereign immunity or permitted the Nation's joinder in suits brought by EEOC under Title VII.

Because the EEOC does indeed seek affirmative relief against the Nation, and because the broad Dawavendewa II dictum was predicated on the ADEA, not Title VII, that dictum does not control this case on the special laws and full factual record before this Court.

3. Navajo Sovereign Immunity Bars EEOC's Suit Which Seeks Relief Against the Nation.

Even taken at face value, EEOC's Amended Complaint seeks to enjoin the Nation from engaging in what EEOC believes to be national origin discrimination. EEOCRE 11 (District Court opinion). The conclusion that EEOC seeks affirmative relief from the Nation is underscored when one focuses on the relief that will actually

result if EEOC prevails, and not on EEOC's self-serving spin on its lawsuit. See Marceau, 455 F.3d at 985; Kescoli, 101 F.3d at 1310.

An Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity. Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc., 523 U.S. 751, 754 (1998); Dawavendewa II, 276 F.3d at 1159. There is no tribal waiver here, and any congressional abrogation must be unequivocal and clear. E.g., Martinez, 436 U.S. at 58. Title VII did not abrogate tribal sovereign immunity. Dawavendewa II, 276 F.3d at 1159. The Nation's sovereign immunity, fully preserved in Title VII, therefore precludes a suit by EEOC that seeks relief against the Nation. See Peabody Western, 400 F.3d at 778, 782.

The Nation is a necessary party to this action. Peabody Western, 400 F.3d at 778. EEOC itself has indicated its belief that the Nation is also indispensable by alleging that the Nation is a party to the Peabody lease, has an interest in the litigation, and, in its absence, "complete relief cannot be accorded among those already parties." EEOCRE 48 (Amended Complaint ¶ 9); see Enterprise Mgmt. Consultants v. United States, 883 F.2d 890, 894 n.3 (10th Cir. 1989) (plaintiff "itself indicated its belief that the Tribe was an indispensable party by arguing . . . that 'there won't be any way to enforce [a ruling in its favor] absent tribal participation in this [case] as a Defendant."). There is very little need to balance the four factors of Rule 19(b) because tribal

sovereign immunity is so compelling a factor in its own right that dismissal is required. E.g., Kescoli, 101 F.3d at 1311. The emphasis placed on tribal immunity in the weighing of the Rule 19(b) factors "turns on the fact that society has consciously opted to shield Indian tribes from suit without congressional or tribal consent." Quileute, 18 F.3d at 1461. Nonetheless, a weighing of the individual factors of Rule 19(b) also compels dismissal, even if this Court relies solely on EEOC's concession that the Nation would be enjoined from enforcing the Navajo preference lease term.

Dawavendewa II weighed the four Rule 19(b) factors in an analogous case. The plaintiff there also challenged the Navajo employment preference requirement in a lease of Navajo land. This Court found that the prejudice factor under Rule 19(b) was essentially the same as the necessity inquiry under Rule 19(a). This Court has already determined the Nation is a necessary party. Peabody Western, 400 F.3d at 778. Moreover, because a decision rendered on the merits of the case could prejudice the Nation's economic interests in its lease with Peabody and its ability to provide employment and income for the Nation, dismissal is appropriate under the prejudice factor. Dawavendewa II, 276 F.3d at 1162. As in Dawavendewa II, no shaping of relief can mitigate the prejudice to the Nation. Any decision mollifying EEOC would prevent the Nation from enforcing its contract with Peabody and interfere with its governance of its people and territory. Id. at 1157. Nor is any partial relief adequate.

Injunctive relief would prejudice both the Nation and Peabody, and an award of damages would not resolve Peabody's potential liability to other plaintiffs. See id. at 1158. Finally, the lack of an alternative forum does not make dismissal inappropriate. Id. at 1162; Quileute, 18 F.3d at 1460-61. Furthermore, tribal sovereign immunity is not the only bar to EEOC's ability to bring this lawsuit. As discussed above, the treaties, the Rehabilitation Act, EEOC's inability to join the Secretary, and Title VII itself bar this action.

Without the Nation's presence, a suit challenging the legality of one of its leases may not go forward under settled precedents of this Court construing Rule 19. E.g., Dawavendewa II, 276 F.3d at 1156; Clinton, 180 F.3d at 1088; Lomayaktewa v. Hathaway, 520 F.2d 1324, 1325 (9th Cir. 1975), cert. denied, 425 U.S. 903 (1976). EEOC's requested injunction would also prevent the Nation from enforcing its other 326 business leases, enforcing the NPEA, and exercising its treaty rights. The actual relief sought by EEOC, not its see-no-evil spin, governs and EEOC's claim must be dismissed under Title VII.

D. EEOC's Suit Seeks to Enlarge Its Rights and Diminish the Nation's in Violation of the Rules Enabling Act.

The Rules Enabling Act provides that the Rules "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). Title VII expressly bars EEOC

from suing tribes and prohibits EEOC from pursuing allegations of employment discrimination involving governments or government agencies. As the District Court held, the Rules Enabling Act precludes EEOC's attempt to evade these statutory limitations through manipulation of Rule 19. EEOCRE 12-13; see United States v. Sherwood, 312 U.S. 584, 590 (1941).

Moreover, EEOC's present suit seeks to diminish and modify the substantive rights of the Navajo Nation, again in violation of the Rules Enabling Act. The Nation's fundamental sovereign attributes, recognized by treaty, include its ability to condition the entry of those seeking to do business in the tribal territory and to govern employment and economic activity on the Reservation. Williams, 358 U.S. at 221; Quechan, 531 F.2d at 411; Dawavendewa II, 276 F.3d at 1157; San Juan Pueblo, 276 F.3d at 1200. The Nation's fundamental sovereign attributes include its immunity from suit unless Congress has abrogated that immunity. Lomayaktewa, 520 F.2d at 1326; Cherokee Nation v. Babbitt, 117 F.3d 1489, 1498 (D.C. Cir. 1997). EEOC's suit, if allowed to proceed and if successful, would prevent the Nation from receiving the consideration it bargained for in lease agreements, and from enforcing tribal laws that secure those rights.

The Rules Enabling Act precludes EEOC's use of Rule 19 to diminish these substantive rights. Sovereign immunity is one substantive right protected by the Rules

Enabling Act. Sherwood, 312 U.S. at 590; see United States v. United States Fid. & Guar. Co., ("USF&G"), 309 U.S. 506, 512-13 (1940) (tribal sovereign immunity is coextensive with Government's); Sekaquaptewa v. MacDonald, 619 F.2d 801, 808 (9th Cir.) (same), cert. denied, 449 U.S. 1010 (1980).[17] The Supreme Court has consistently rejected efforts to evade tribal sovereign immunity through manipulations of the Rules. In USF&G, the Court rejected an attempt to sue two tribes "whether directly or by cross-action" even though complete relief was unavailable in the tribes' absence. 309 U.S. at 512-14. The Court analogized the tribes' sovereign immunity to that of the United States, and relied on United States v. Shaw, 309 U.S. 495 (1940), a case involving federal sovereign immunity. Similarly, in Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505 (1991), the Court held that tribal sovereign immunity could not be defeated through the assertion of a compulsory counterclaim under Rule 13. Id. at 509-10.

Surely, the Navajo Nation's treaty-based rights, fundamental sovereign attributes, and contractual rights are "substantive rights." EEOC's suit would constitute an unauthorized administrative abrogation of these fundamental rights,

[17] Tribal sovereign immunity not only protects tribes from liability, but also from having to engage in costly pretrial discovery, motion practice, and trials. See Martinez, 436 U.S. at 64-65 & n.19; Tamiani Partners v. Miccosukee Tribe, 63 F.3d 1030, 1050 (11th Cir. 1995); see generally Note, In Defense of Tribal Sovereign Immunity, 95 Harv. L. Rev. 1058, 1073 & nn.91-92 (1982).

United States v. Washington, 641 F.2d 1368, 1371 (9th Cir. 1981) (administrative agencies have no power to abrogate treaty right of an Indian tribe), cert. denied, 454 U.S. 1143 (1982); Timpanogos Tribe v. Conway, 286 F.3d 1195, 1203 (10th Cir. 2002) (same), and EEOC's attempted use of Rule 19 to diminish or defeat them is inconsistent with the Rules Enabling Act.

VI. THE NATION PRESERVES ITS ALTERNATIVE ARGUMENTS FOR DISMISSAL.

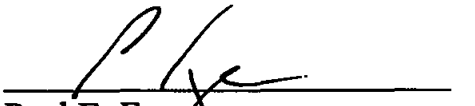
The Nation preserves its alternative grounds for dismissal not ruled on or rejected below. Judicial economy would be disserved by requiring appellees to put forth every conceivable alternative ground for affirmance, especially where, as here, the grounds relied on by the District Court are so strong. See, e.g., Crocker v. Piedmont Aviation, Inc., 49 F.3d 735, 741 (D.C. Cir. 1995), cert. denied, 516 U.S. 865 (1995). If this Court reverses and these alternative grounds for dismissal eventually fail, the Nation also preserves all arguments and defenses to the EEOC's claim on the merits.

CONCLUSION

The judgment of the District Court should be affirmed.

Respectfully submitted,

FRYE LAW FIRM, P.C.



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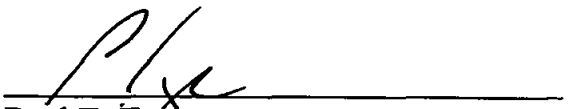
CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Fed. R. App. P. 32(a)(7)(B). This brief contains 13,992 words. See Fed. R. App. P. 32(a)(7)(B)(i). The brief was prepared using Corel Word Perfect 10 word processing system, in 14-point proportionately-spaced Times New Roman type for both text and footnotes. See Fed. R. App. P. 32(a)(5).



Paul E. Frye

INDEX TO TREATIES, STATUTES AND REGULATIONS

TREATY WITH THE NAVAHO, 1849.

Sept. 9, 1849.

9 Stat., 974.
Ratified Sept. 9, 1850.
Proclaimed Sept. 24, 1850.

THE following acknowledgements, declarations, and stipulations have been duly considered, and are now solemnly adopted and proclaimed by the undersigned; that is to say, John M. Washington, governor of New Mexico, and lieutenant-colonel commanding the troops of the United States in New Mexico, and James S. Calhoun, Indian agent, residing at Santa Fé, in New Mexico, representing the United States of America, and Mariano Martinez, head chief, and Chapitone, second chief, on the part of the Navajo tribe of Indians:

Navaho under jurisdiction of the United States.

I. The said Indians do hereby acknowledge that, by virtue of a treaty entered into by the United States of America and the United Mexican States, signed on the second day of February, in the year of our Lord eighteen hundred and forty-eight, at the city of Guadalupe Hidalgo, by N. P. Trist, of the first part, and Luis G. Cuevas, Bernardo Couto, and Mgl Atristain, of the second part, the said tribe was lawfully placed under the exclusive jurisdiction and protection of the Government of the said United States, and that they are now, and will forever remain, under the aforesaid jurisdiction and protection.

Perpetual peace to exist.

II. That from and after the signing of this treaty, hostilities between the contracting parties shall cease, and perpetual peace and friendship shall exist; the said tribe hereby solemnly covenanting that they will not associate with, or give countenance or aid to, any tribe or band of Indians, or other persons or powers, who may be at any time at enmity with the people of the said United States; that they will remain at peace, and treat honestly and humanely all persons and powers at peace with the said States; and all cases of aggression against said Navajoes by citizens or others of the United States, or by other persons or powers in amity with the said States, shall be referred to the Government of said States for adjustment and settlement.

Laws now in force regulating trade and peace to be binding upon the Navaho.

III. The Government of the said States having the sole and exclusive right of regulating the trade and intercourse with the said Navajoes, it is agreed that the laws now in force regulating the trade and intercourse, and for the preservation of peace with the various tribes of Indians under the protection and guardianship of the aforesaid Government, shall have the same force and efficiency, and shall be as binding and as obligatory upon the said Navajoes, and executed in the same manner, as if said laws had been passed for their sole benefit and protection; and to this end, and for all other useful purposes, the government of New Mexico, as now organized, or as it may be by the Government of the United States, or by the legally constituted authorities of the people of New Mexico, is recognized and acknowledged by the said Navajoes; and for the due enforcement of the aforesaid laws, until the Government of the United States shall otherwise order, the territory of the Navajoes is hereby annexed to New Mexico.

The Navaho to deliver to the United States murderer or murderers of M. Garcia.

IV. The Navajo Indians hereby bind themselves to deliver to the military authority of the United States in New Mexico, at Santa Fé, New Mexico, as soon as he or they can be apprehended, the murderer or murderers of Micente Garcia, that said fugitive or fugitives from justice may be dealt with as justice may decree.

Captives and stolen property to be delivered to United States, by the 9th Oct., 1850.

V. All American and Mexican captives, and all stolen property taken from Americans or Mexicans, or other persons or powers in amity with the United States, shall be delivered by the Navajo Indians to the aforesaid military authority at Jemez, New Mexico, on or before the 9th day of October next ensuing, that justice may be meted out to all whom it may concern; and also all Indian captives and stolen property of such tribe or tribes of Indians as shall enter into a similar reciprocal treaty, shall, in like manner, and for the same purposes, be turned over to an authorized officer or agent of the said States by the aforesaid Navajoes.

Citizens of the United States committing outrages upon Navahos to be subjected to the penalties of law.

VI. Should any citizen of the United States, or other person or persons subject to the laws of the United States, murder, rob, or otherwise maltreat any Navajo Indian or Indians, he or they shall be arrested and tried, and, upon conviction, shall be subjected to all the penalties provided by law for the protection of the persons and property of the people of the said States.

Free passage through their territory.

VII. The people of the United States of America shall have free and safe passage through the territory of the aforesaid Indians, under such rules and regulations as may be adopted by authority of the said States.

Military posts and agencies to be established.

VIII. In order to preserve tranquility, and to afford protection to all the people and interests of the contracting parties, the Government of the United States of America will establish such military posts and agencies, and authorize such trading-houses, at such time and in such places as the said Government may designate.

The United States to adjust territorial boundaries.

IX. Relying confidently upon the justice and the liberality of the aforesaid Government, and anxious to remove every possible cause that might disturb their peace and quiet, it is agreed by the aforesaid Navajoes that the Government of the United States shall, at its earliest convenience, designate, settle, and adjust their territorial boundaries, and pass and execute in their territory such laws as may be deemed conducive to the prosperity and happiness of said Indians.

Donations, presents, and implements to be given.

X. For and in consideration of the faithful performance of all the stipulations herein contained by the said Navajo Indians, the Government of the United States will grant to said Indians such donations, presents, and implements, and adopt such other liberal and humane measures, as said Government may deem meet and proper.

To be binding after signed, and to receive a liberal construction.

XI. This treaty shall be binding upon the contracting parties from and after the signing of the same, subject only to such modifications and amendments as may be adopted by the Government of the United States; and, finally, this treaty is to receive a liberal construction, at all times and in all places, to the end that the said Navajo Indians shall not be held responsible for the conduct of others, and that the Government of the United States shall so legislate and act as to secure the permanent prosperity and happiness of said Indians.

In faith whereof, we, the undersigned, have signed this treaty, and affixed thereunto our seals, in the valley of Cheille, this the ninth day of September, in the year of our Lord one thousand eight hundred and forty-nine.

J. M. Washington, [L. S.]
Brevet Lieutenant-Colonel Commanding.
James S. Calhoun, [L. S.]
Indian Agent, residing at Santa Fe.
Mariano Martinez, Head Chief, his x mark, [L. S.]
Chapitone, Second Chief, his x mark, [L. S.]
J. L. Collins.
James Conklin.
Lorenzo Force.
Antonio Sandoval, his x mark.
Francisco Josto, Governor of Jemez, his x mark.

Witnesses—
H. L. Kendrick, Brevet Major U. S. Army.
J. N. Ward, Brevet First Lieutenant Third Infantry.
John Peck, Brevet Major U. S. Army.
J. F. Hammond, Assistant Surgeon U. S. Army.
H. L. Dodge, Captain commanding Eut. Regulars.
Richard H. Kern.
J. H. Nones, Second Lieutenant Second Artillery.
Cyrus Choice.

John H. Dickerson, Second Lieutenant First Artillery.
W. E. Love.
John G. Jones.
J. H. Simpson, First Lieutenant Corps Topographic Engineers.

Treaty of 1868

TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE NAVAJO TRIBE OF INDIANS

(Concluded June 1, 1868; Ratification advised July 25, 1868; Proclaimed August 12, 1868)

(15 Stat. 667)

ANDREW JOHNSON,
President of the United States of America,

To all and singular to whom these presents shall come, greeting:

WHEREAS a treaty was made and concluded at Fort Sumner, in the territory of New Mexico, on the first day of June, in the year of our Lord, one thousand eight hundred and sixty-eight, by and between Lieutenant-General W.T. Sherman and Samuel F. Tappan, commissioners, on the part of the United States and Barboncito Armijo, and other chiefs and headmen of the Navajo tribe of Indians, on the part of said Indians, and duly authorized thereto by them, which treaty is in the words and figures following, to wit:

ARTICLES of a treaty and agreement made and entered into at Fort Sumner, New Mexico, on the first day of June, one thousand eight hundred and sixty-eight, by and between the United States, represented by its commissioners, Lieutenant-General W.T. Sherman and Colonel Samuel F. Tappan, of the one part, and the Navajo Nation or tribe of Indians, represented by their chiefs and head-men, duly authorized and empowered to act for the whole people of said nation or tribe, (the names of said chiefs and headmen being hereto subscribed,) of the other part, witness:

ARTICLE I. From this day forward all war between the parties to this agreement shall forever cease. The Government of the United States desires peace, and its honor is hereby pledged to keep it. The Indians desire peace, and they now pledge their honor to keep it.

If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person

or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also to reimburse the injured persons for the loss sustained.

If bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States and at peace therewith, the Navajo tribe agree that they will, on proof made to their agent, and on notice by him, deliver up the wrongdoer to the United States, to be tried and punished according to its laws; and in case they wilfully refuse so to do, the person injured shall be reimbursed for his loss from the annuities or other moneys due or to become due to them under this treaty, or any others that may be made with the United States. And the President may prescribe such rules and regulations for ascertaining damages under this article as in his judgment may be proper; but no such damage shall be adjusted and paid until examined and passed upon by the Commissioner of Indian Affairs, and no one sustaining loss whilst violating, or because of his violating, the provisions of this treaty or the laws of the United States, shall be reimbursed therefor.

ARTICLE II. The United States agrees that the following district of country, to wit: bounded on the north by the 37th degree of north latitude, south by an east and west line passing through the site of old Fort Defiance, in Canon Bonito, east by the parallel of longitude which, if prolonged south, would pass through old Fort Lyon, or the Ojo-de-oso, Bear Spring, and west by a parallel of longitude about 109° 30' west of Greenwich, provided it embraces the outlet of the Canyon-de-Chelly, which canon is to be all included in this reservation, shall be, and the same is hereby, set apart for the use and occupation of the Navajo tribe of Indians, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit among them; and the United States agrees that no persons except those herein so authorized to do, and except such officers, soldiers, agents, and employees of the Government, or of the Indians, as may be authorized to enter upon Indian reservations in discharge of duties imposed by law, or the orders of the President, shall ever be permitted to pass over, settle upon, or reside in, the territory described in this article.

ARTICLE III. The United States agrees to cause to be built, at some point within said reservation, where timber and water may be convenient, the following buildings: a warehouse, to cost not exceeding twenty-five hundred dollars; an agency building for the residence of the agent, not to cost exceeding three thousand dollars; a carpenter-shop and

blacksmith-shop, not to cost exceeding one thousand dollars each; and a schoolhouse and chapel, so soon as a sufficient number of children can be induced to attend school, which shall not cost to exceed five thousand dollars.

ARTICLE IV. The United States agrees that the agent for the Navajos shall make his home at the agency building; that he shall reside among them, and shall keep an office open at all times for the purpose of prompt and diligent inquiry into such matters of complaint by or against the Indians as may be presented for investigation, as also for the faithful discharge of other duties enjoined by law. In all cases of depredation on person or property he shall cause the evidence to be taken in writing and forwarded, together with his finding, to the Commissioner of Indian Affairs, whose decision shall be binding on the parties to this treaty.

ARTICLE V. If any individual belonging to said tribe, or legally incorporated with it, being the head of a family, shall desire to commence farming, he shall have the privilege to select, in the presence and with the assistance of the agent then in charge, a tract of land within said reservation, not exceeding one hundred and sixty acres in extent, which tract, when so selected, certified, and recorded in the "land-book" as herein described, shall cease to be held in common, but the same may be occupied and held in the exclusive possession of the person selecting it, and of his family, so long as he or they may continue to cultivate it.

Any person over eighteen years of age, not being the head of a family, may in like manner select, and cause to be certified to him or her for purposes of cultivation, a quantity of land, not exceeding eighty acres in extent, and thereupon be entitled to the exclusive possession of the same as above directed.

For each tract of land so selected a certificate containing a description thereof, and the name of the person selecting it, with a certificate endorsed thereon, that the same has been recorded, shall be delivered to the party entitled to it by the agent, after the same shall have been recorded by him in a book to be kept in his office, subject to inspection, which said book shall be known as the "Navajo Land-Book."

The President may at any time order a survey of the reservation, and when so surveyed, Congress shall provide for protecting the rights of said settlers in their improvements, and may fix the character of the title held by each.

The United States may pass such laws on the subject of alienation and descent of property between the Indians and their descendants as may be thought proper.

ARTICLE VI. In order to insure the civilization of the Indians entering into this treaty, the necessity of education is admitted, especially of such of them as may be settled on said agricultural parts of this reservation, and they therefore pledge themselves to compel their children, male and female, between the ages of six and sixteen years, to attend school; and it is hereby made the duty of the agent for said Indians to see that this stipulation is strictly complied with; and the United States agrees that, for every thirty children between said ages who can be induced or compelled to attend school, a house shall be provided, and a teacher competent to teach the elementary branches of an English education shall be furnished, who will reside among said Indians, and faithfully discharge his or her duties as a teacher.

The provisions of this article to continue for not less than ten years.

ARTICLE VII. When the head of a family shall have selected lands and received his certificate as above directed, and the agent shall be satisfied that he intends in good faith to commence cultivating the soil for a living, he shall be entitled to receive seeds and agricultural implements for the first year, not exceeding in value one hundred dollars, and for each succeeding year he shall continue to farm, for a period of two years, he shall be entitled to receive seeds and implements to the value of twenty-five dollars.

ARTICLE VIII. In lieu of all sums of money or other annuities provided to be paid to the Indians herein named under any treaty or treaties heretofore made, the United States agrees to deliver at the agency house on the reservation herein named, on the first day of September of each year for ten years, the following articles, to wit:

Such articles of clothing, goods, or raw materials in lieu thereof, as the agent may make his estimate for, not exceeding in value five dollars per Indian-each Indian being encouraged to manufacture their own clothing, blankets, etc.; to be furnished with no article which they can manufacture themselves. And, in order that the Commissioner of Indian Affairs may be able to estimate properly for the articles herein named, it shall be the duty of the agent each year to forward to him a full and exact census of the Indians, on which the estimate from year to year can be based.

And in addition to the articles herein named, the sum of ten dollars for each person entitled to the beneficial effects of this treaty shall be annually appropriated for a period of ten years, for each person who engages in farming or mechanical pursuits, to be used by the Commissioner of Indian Affairs in the purchase of such articles as from time to time the condition and necessities of the Indians may indicate to be proper; and if within the ten years at any time it shall appear that the amount of money needed for clothing, under the article, can be appro-

priated to better uses for the Indians named herein, the Commissioner of Indian Affairs may change the appropriation to other purposes, but in no event shall the amount of this appropriation be withdrawn or discontinued for the period named, provided they remain at peace. And the President shall annually detail an officer of the Army to be present and attest the delivery of all the goods herein named to the Indians, and he shall inspect and report on the quantity and quality of the goods and the manner of their delivery.

ARTICLE IX. In consideration of the advantages and benefits conferred by this treaty, and the many pledges of friendship by the United States, the tribes who are parties to this agreement hereby stipulate that they will relinquish all right to occupy any territory outside their reservation, as herein defined, but retain the right to hunt on any unoccupied lands contiguous to their reservation, so long as the large game may range thereon in such numbers as to justify the chase; and they, the said Indians, further expressly agree:

1st. That they will make no opposition to the construction of railroads now being built or hereafter to be built across the continent.

2nd. That they will not interfere with the peaceful construction of any railroad not passing over their reservation as herein defined.

3rd. That they will not attack any persons at home or travelling, nor molest or disturb any wagon-trains, coaches, mules, or cattle belonging to the people of the United States, or to persons friendly therewith.

4th. That they will never capture or carry off from the settlements women or children.

5th. They will never kill or scalp white men, nor attempt to do them harm.

6th. They will not in the future oppose the construction of railroads, wagon-roads, mail stations, or other works of utility or necessity which may be ordered or permitted by the laws of the United States; but should such roads or other works be constructed on the lands of their reservation, the Government will pay the tribe whatever amount of damage may be assessed by three disinterested commissioners to be appointed by the President for that purpose, one of said commissioners to be a chief or head-man of the tribe.

7th. They will make no opposition to the military posts or roads now established, or that may be established, not in violation of treaties heretofore made or hereafter to be made with any of the Indian tribes.

ARTICLE X. No future treaty for the cession of any portion or part of the reservation herein described, which may be held in common, shall

be of any validity or force against said Indians unless agreed to and executed by at least three-fourths of all the adult male Indians occupying or interested in the same; and no cession by the tribe shall be understood or construed in such manner as to deprive, without his consent, any individual member of the tribe of his rights to any tract of land selected by him as provided in article [5] of this treaty.

ARTICLE XI. The Navajos also hereby agree that at any time after the signing of these presents they will proceed in such manner as may be required of them by the agent, or by the officer charged with their removal, to the reservation herein provided for, the United States paying for their subsistence en route, and providing a reasonable amount of transportation for the sick and feeble.

ARTICLE XII. It is further agreed by and between the parties to this agreement that the sum of one hundred and fifty thousand dollars appropriated or to be appropriated shall be disbursed as follows, subject to any condition provided in the law, to wit:

1st. The actual cost of the removal of the tribe from the Bosque Redondo reservation to the reservation, say fifty thousand dollars.

2nd. The purchase of fifteen thousand sheep and goats, at a cost not to exceed thirty thousand dollars.

3rd. The purchase of five hundred beef cattle and a million pounds of corn, to be collected and held at the military post nearest the reservation, subject to the orders of the agent, for the relief of the needy during the coming winter.

4th. The balance, if any, of the appropriation to be invested for the maintenance of the Indians pending their removal, in such manner as the agent who is with them may determine.

5th. The removal of this tribe to be made under the supreme control and direction of the military commander of the Territory of New Mexico, and when completed, the management of the Tribe to revert to the proper agent.

ARTICLE XIII. The tribe herein named, by their representatives, parties to this treaty, agree to make the reservation herein described their permanent home, and they will not as a tribe make any permanent settlement elsewhere, reserving the right to hunt on the lands adjoining the said reservation formerly called theirs, subject to the modifications named in this treaty and the orders of the commander of the department in which said reservation may be for the time being; and it is further agreed and understood by the parties to this treaty, that if any Navajo Indian or Indians shall leave the reservation herein described to settle elsewhere, he or they shall forfeit all the rights, privileges, and annuities conferred by the terms of this treaty; and it is further agreed

by the parties to this treaty, that they will do all they can to induce Indians now away from reservations set apart for the exclusive use and occupation of the Indians, leading a nomadic life, or engaged in war against the people of the United States, to abandon such a life and settle permanently in one of the territorial reservations set apart for the exclusive use and occupation of the Indians.

In testimony of all which the said parties have hereunto, on this the first day of June, one thousand eight hundred and sixty-eight, at Fort Sumner, in the Territory of New Mexico, set their hands and seals.

W. T. SHERMAN,
Lt. Gen'l, Indian Peace Commissioner.

S. F. TAPPAN,
Indian Peace Commissioner.

BARBONCITO, *Chief.*	his x mark
ARMIJO.	his x mark
DELGADO.	his x mark
MANUELITO.	his x mark
LARGO.	his x mark
HERRERO.	his x mark
CHIQUETO.	his x mark
MUERTO DE HOMBRE.	his x mark
HOMBRO.	his x mark
NARBONO.	his x mark
NARBONO SEGUNDO.	his x mark
GANADO MUCHO.	his x mark
COUNCIL:	
RIQUO.	his x mark
JUAN MARTIN.	his x mark
SERGINTO.	his x mark
GRANDE.	his x mark
INOETENITO.	his x mark
MUCHACHOS MUCHO.	his x mark
CHIQUETO SEGUNDO.	his x mark
CABELLO AMARILLO.	his x mark
FRANCISCO.	his x mark
TORIVIO.	his x mark
DESDENDADO.	his x mark
JUAN.	his x mark
GUERO.	his x mark
GUGADORE.	his x mark
CABASON.	his x mark
BARBON SEGUNDO.	his x mark
CABARES COLORADOS.	his x mark

Attest:

GEO. W. G. GETTY,
Col. 37th Inf'y, Bt. Maj. Gen'l U.S.A.

B. S. ROBERTS,
Bt. Brg. Gen'l U.S.A., Lt. Col. 3d Cavy.

J. COOPER MCKEE,
Bt. Lt. Col. Surgeon U.S.A.

THEO. H. DODD,
U.S. Indian Ag't for Navajos

CHAS. MCCLURE,
Bt. Maj. and C.S. U.S.A.

JAMES F. WEEDS,
Bt. Maj. and Asst. Surg. U.S.A.

J. C. SUTHERLAND,
Interpreter

WILLIAM VAUX,
Chaplain, U.S.A.

25 U.S.C. §§ 631-40

SUBCHAPTER XXI—NAVAJO AND HOPI TRIBES: REHABILITATION

CROSS REFERENCES

Indian Revolving Loan Fund, funds to be administered as, see 25 USCA § 1461.

§ 631. Basic program for conservation and development of resources; projects; appropriations

In order to further the purposes of existing treaties with the Navajo Indians, to provide facilities, employment, and services essential in combating hunger, disease, poverty, and demoralization among the members of the Navajo and Hopi Tribes, to make available the

resources of their reservations for use in promoting a self-supporting economy and self-reliant communities, and to lay a stable foundation on which these Indians can engage in diversified economic activities and ultimately attain standards of living comparable with those enjoyed by other citizens, the Secretary of the Interior is authorized and directed to undertake, within the limits of the funds from time to time appropriated pursuant to this subchapter, 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 Indian Reservations. Such program shall include the following projects for which capital expenditures in the amount shown after each project listed in the following subsections and totaling $108,570,000 are authorized to be appropriated:

(1) Soil and water conservation and range improvement work, $10,000,000.

(2) Completion and extension of existing irrigation projects, and completion of the investigation to determine the feasibility of the proposed San Juan-Shiprock irrigation project, $9,000,000.

(3) Surveys and studies of timber, coal, mineral, and other physical and human resources, $500,000.

(4) Development of industrial and business enterprises, $1,000,000.

(5) Development of opportunities for off-reservation employment and resettlement and assistance in adjustments related thereto, $3,500,000.

(6) Relocation and resettlement of Navajo and Hopi Indians (Colorado River Indian Reservation), $5,750,000.

(7) Roads and trails, $40,000,000; of which not less than $20,000,000 shall be (A) available for contract authority for such construction and improvement of the roads designated as route 1 and route 3 on the Navajo and Hopi Indian Reservations as may be necessary to bring the portion of such roads located in any State up to at least the secondary road standards in effect in such State, and (B) in addition to any amounts expended on such roads under the $20,000,000 authorization provided under this clause prior to amendment.

(8) Telephone and radio communication systems, $250,000.

(9) Agency, institutional, and domestic water supply, $2,500,000.

(10) Establishment of a revolving loan fund, $5,000,000.

(11) Hospital buildings and equipment, and other health conservation measures, $4,750,000.

(12) School buildings and equipment, and other educational measures, $25,000,000.

(13) Housing and necessary facilities and equipment, $820,000.

(14) Common service facilities, $500,000.

Funds so appropriated shall be available for administration, investigations, plans, construction, and all other objects necessary for or appropriate to the carrying out of the provisions of this subchapter. Such further sums as may be necessary for or appropriate to the annual operation and maintenance of the projects herein enumerated are also authorized to be appropriated. Funds appropriated under these authorizations shall be in addition to funds made available for use on the Navajo and Hopi Reservations, or with respect to Indians of the Navajo Tribes, out of appropriations heretofore or hereafter granted for the benefit, care, or assistance of Indians in general, or made pursuant to other authorizations now in effect.

(Apr. 19, 1950, c. 92, § 1, 64 Stat. 44; Aug. 23, 1958, Pub.L. 85-740, 72 Stat. 834.)

§ 632. Character and extent of administration; time limit; reports on use of funds

The foregoing program shall be administered in accordance with the provisions of this subchapter and existing laws relating to Indian affairs, shall include such facilities and services as are requisite for or incidental to the effectuation of the projects herein enumerated, shall apply sustained-yield principles to the administration of all renewable resources, and shall be prosecuted in a manner which will provide for completion of the program, so far as practicable, within ten years from April 19, 1950. An account of the progress being had in the rehabilitation of the Navajo and Hopi Indians, and of the use made of the funds appropriated to that end under this subchapter, shall be included in each annual report of the work of the Department of the Interior submitted to the Congress during the period covered by the foregoing program.

(Apr. 19, 1950, c. 92, § 2, 64 Stat. 45.)

§ 633. Preference in employment; on-the-job training

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. To the fullest extent possible, Indian workers on such projects shall receive on-the-job training in order to enable them to become qualified for more skilled employment.

(Apr. 19, 1950, c. 92, § 3, 64 Stat. 45.)

§ 634. Loans to Tribes or individual members; loan fund

The Secretary of the Interior is authorized, under such regulations as he may prescribe, to make loans from the loan fund authorized by section 631 of this title to the Navajo Tribe, or any member or association of members thereof, or to the Hopi Tribe, or any member or association of members thereof, for such productive purposes as, in his judgment, will tend to promote the better utilization of the manpower and resources of the Navajo or Hopi Indians. Sums collected in repayment of such loans and sums collected as interest or other charges thereon shall be credited to the loan fund, and shall be available for the purpose for which the fund was established.

(Apr. 19, 1950, c. 92, § 4, 64 Stat. 45.)

§ 635. Disposition of lands

(a) Lease of restricted lands; renewals

Any restricted Indian lands owned by the Navajo Tribe, members thereof, or associations of such members, or by the Hopi Tribe, members thereof, or associations of such members, may be leased by the Indian owners, with the approval of the Secretary of the Interior, for public, religious, educational, recreational, or business purposes, including the development or utilization of natural resources in connection with operations under such leases. All leases so granted shall be for a term of not to exceed twenty-five years, but may include

provisions authorizing their renewal for an additional term of not to exceed twenty-five years, and shall be made under such regulations as may be prescribed by the Secretary. Restricted allotments of deceased Indians may be leased under this section, for the benefit of their heirs or devisees, in the circumstances and by the persons prescribed in section 380 of this title. Nothing contained in this section shall be construed to repeal or affect any authority to lease restricted Indian lands conferred by or pursuant to any other provision of law.

(b) Lease, sale, or other disposition of lands owned in fee simple by Navajo Tribe

Notwithstanding any other provision of law, land owned in fee simple by the Navajo Tribe may be leased, sold, or otherwise disposed of by the sole authority of the Navajo Tribal Council, in any manner that similar land in the State in which such land is situated may be leased, sold, or otherwise disposed of by private landowners, and such disposition shall create no liability on the part of the United States.

(c) Transfer of unallotted lands to tribally owned or municipal corporations

The Secretary of the Interior is authorized to transfer, upon request of the Navajo Tribal Council, to any corporation owned by the tribe and organized pursuant to State law, or to any municipal corporation organized under State law, legal title to or a leasehold interest in any unallotted lands held for the Navajo Indian Tribe, and thereafter the United States shall have no responsibility or liability for, but on request of the tribe shall render advice and assistance in, the management, use, or disposition of such lands.

(Apr. 19, 1950, c. 92, § 5, 64 Stat. 46; June 11, 1960, Pub.L. 86-505, § 1; 74 Stat. 199.)

§ 636. Adoption of constitution by Navajo Tribe; method; contents

In order to facilitate the fullest possible participation by the Navajo Tribe in the program authorized by this subchapter, the members of the tribe shall have the right to adopt a tribal constitution in the manner herein prescribed. Such constitution may provide for the exercise by the Navajo Tribe of any powers vested in the tribe or any organ thereof by existing law, together with such additional powers as the members of the tribe may, with the approval of the Secretary of the Interior, deem proper to include therein. Such constitution shall be formulated by the Navajo Tribal Council at any regular meeting, distributed in printed form to the Navajo people for consideration, and adopted by secret ballot of the adult members of the Navajo Tribe in an election held under such regulations as the Secretary may prescribe, at which a majority of the qualified votes cast favor such adoption. The constitution shall authorize the fullest possible participation of the Navajos in the administration of their affairs as approved by the Secretary of the Interior and shall become effective when approved by the Secretary. The constitution may be amended from time to time in the same manner as herein provided for its adoption, and the Secretary of the Interior shall approve any amendment which in the opinion of the Secretary of the Interior advances the development of the Navajo people toward the fullest realization and exercise of the rights, privileges, duties, and responsibilities of American citizenship.

(Apr. 19, 1950, c. 92, § 6, 64 Stat. 46.)

§ 637. Use of Navajo tribal funds

Notwithstanding any other provision of existing law, the tribal funds now on deposit or hereafter placed to the credit of the Navajo Tribe of Indians in the United States Treasury shall be available for such purposes as may be designated by the Navajo Tribal Council and approved by the Secretary of the Interior.

(Apr. 19, 1950, c. 92, § 7, 64 Stat. 46.)

§ 638. Participation by Tribal Councils; recommendations

The Tribal Councils of the Navajo and Hopi Tribes and the Indian communities affected shall be kept informed and afforded opportunity to consider from their inception plans pertaining to the program authorized by this subchapter. In the administration of the program, the Secretary of the Interior shall consider the recommendations of the tribal councils and shall follow such recommendations whenever he deems them feasible and consistent with the objectives of this subchapter.

(Apr. 19, 1950, c. 92, § 8, 64 Stat. 46.)

§ 639. Repealed. Pub.L. 104–193, Title I, § 110(u), Aug. 22, 1996, 110 Stat. 2175

HISTORICAL AND STATUTORY NOTES

1996 Amendments

Section, Act Apr. 19, 1950, c. 92, 9, 64 Stat. 47; Oct. 30, 1972, Pub.L. 92–603, Title III, 303(c), 86 Stat. 1484; Dec. 30, 1973, Pub.L. 93–233, 19(a), 87 Stat. 974 related to additional Social Security payments to States after July 1, 1950.

Effective Date of Repeal

Repeal of this section by Pub.L. 104–193 effective July 1, 1997, with transition rules relating to State options to accelerate such date, rules relating to claims, actions, and proceedings commenced before such date, rules relating to closing out of accounts for terminated or substantially modified programs and continuance in office of Assistant Secretary for Family Support, and provisions relating to termination of entitlement under AFDC program, see section 116 of Pub.L. 104–193, set out as a note under section 601 of Title 42, The Public Health and Welfare.

§ 640. Repealed. Pub.L. 93–531, § 26, Dec. 22, 1974, 88 Stat. 1723

HISTORICAL AND STATUTORY NOTES

Section, Act Apr. 19, 1950, c. 92, § 10, 64 Stat. 47, established the Joint Committee on Navajo-Hopi Indian Administration, with the function of making a continuous study of the programs for the administration and rehabilitation of the Navajo and Hopi Indians.

Effective Date of Repeal

Section 26 of Pub.L. 93–531 provided in part that the repeal of this section is effective as of the close of business December 31, 1974.

42 U.S.C. § 2000e(b)

For the purposes of this subchapter—

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

(i) Businesses or enterprises extending preferential treatment to Indians

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.

(f) Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master

(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. 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. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

42 U.S.C. § 2000e-5(f)(2)

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(c) Execution, retention, and preservation of records; reports to Commission; training program records; appropriate relief from regulation or order for undue hardship; procedure for exemption; judicial action to compel compliance

Every employer, employment agency, and labor organization subject to this subchapter shall (1) make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed, (2) preserve such records for such periods, and (3) make such reports therefrom as the Commission shall prescribe by regulation or order, after public hearing, as reasonable, necessary, or appropriate for the enforcement of this subchapter or the regulations or orders thereunder. The Commission shall, by regulation, require each employer, labor organization, and joint labor-management committee subject to this subchapter which controls an apprenticeship or other training program to maintain such records as are reasonably necessary to carry out the purposes of this subchapter, including, but not limited to, a list of applicants who wish to participate in such program, including the chronological order in which applications were received, and to furnish to the Commission upon request, a detailed description of the manner in which persons are selected to participate in the apprenticeship or other training program. Any employer, employment agency, labor organization, or joint labor-management committee which believes that the application to it of any regulation or order issued under this section would result in undue hardship may apply to the Commission for an exemption from the application of such regulation or order, and, if such application for an exemption is denied, bring a civil action in the United States district court for the district where such records are kept. If the Commission or the court, as the case may be, finds that the application of the regulation or order to the employer, employment agency, or labor organization in question would impose an undue hardship, the Commission or the court, as the case may be, may grant appropriate relief. If any person required to comply with the provisions of this subsection fails or refuses to do so, the United States district court for the district in which such person is found, resides, or transacts business, shall, upon application of the Commission, or the Attorney General in a case involving a government, governmental agency or political subdivision, have jurisdiction to issue to such person an order requiring him to comply.

§ 2072. Rules of procedure and evidence; power to prescribe

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

(Added Pub.L. 100–702, Title IV, § 401(a), Nov. 19, 1988, 102 Stat. 4648, and amended Pub.L. 101–650, Title III, §§ 315, 321, Dec. 1, 1990, 104 Stat. 5115, 5117.)

Chapter 3. Control of Businesses within the Navajo Nation

Subchapter 1. General Provisions

Section
401. Privilege of doing business—Authority to grant, deny or withdraw
402. Businesses presently operating within the Navajo Nation
403. Conditions for continuation
404. Revocation; modification or alteration of privilege

Subchapter 1. General Provisions

§ 401. Privilege of doing business—Authority to grant, deny or withdraw

The Navajo Nation Council, in order to promote the further economic development of the Navajo people, and in order to clearly establish and exercise the Navajo Nation's authority to regulate the conduct and operations of business within the Navajo Nation, hereby declares that the Navajo Nation has the sole and exclusive authority to grant, deny, or withdraw the privilege of doing business within the Navajo Nation, except where such authority is withdrawn from the Navajo Nation by the Constitution and applicable laws of the United States.

History

CMY-33-70, § 1, May 12, 1970.

§ 403. Conditions for continuation

The grant of the privilege of doing business within the Navajo Nation contained in 5 N.N.C. § 402 is conditioned upon the business' compliance with the applicable laws of the Navajo Nation and upon the continuing effect or validity of prior leases, permits, or contracts authorizing the business to enter upon lands subject to the jurisdiction of the Navajo Nation.

History

CMY-33-70, § 3, May 12, 1970.

Chapter 7. Navajo Preference in Employment Act

Section
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§ 601. Title

This Act shall be cited as the Navajo Preference in Employment Act.

§ 602. Purpose

A. The purposes of the Navajo Preference in Employment Act are:

1. To provide employment opportunities for the Navajo work force;
2. To provide training for the Navajo People;
3. To promote the economic development of the Navajo Nation;
4. To lessen the Navajo Nation's dependence upon off-Reservation sources of employment, income, goods and services;
5. To foster the economic self-sufficiency of Navajo families;
6. To protect the health, safety, and welfare of Navajo workers; and
7. To foster cooperative efforts with employers to assure expanded employment opportunities for the Navajo work force.

B. It is the intention of the Navajo Nation Council that the provisions of this Act be construed and applied to accomplish the purposes set forth above.

§ 603. Definitions

A. The term "Commission" shall mean the Navajo Nation Labor Commission.

B. The term "employment" shall include, but is not limited to, the recruitment, hiring, promotion, transfer, training, upgrading, reduction-in-force, retention, and recall of employees.

C. The term "employer" shall include all persons, firms, associations, corporations, and the Navajo Nation and all of its agencies and instrumentalities, who engage the services of any person for compensation, whether as employee, agent, or servant.

D. The term "Navajo" means any enrolled member of the Navajo Nation.

E. The term "ONLR" means the Office of Navajo Labor Relations.

F. The term "probable cause" shall mean a reasonable ground for belief in the existence of facts warranting the proceedings complained of.

G. The term "territorial jurisdiction" means the territorial jurisdiction of the Navajo Nation as defined in 7 N.N.C. § 254.

H. The term "counsel" or "legal counsel" shall mean: (a) a person who is an active member in good standing of the Navajo Nation Bar Association and duly authorized to practice law in the courts of the Navajo Nation; and (b) for the sole purpose of co-counseling in association with a person described in Clause (a), an attorney duly authorized, currently licensed and in good standing to practice law in any state of the United States who has, pursuant to written request demonstrating the foregoing qualifications and good cause, obtained written approval of the Commission to appear and participate as co-counsel in a particular Commission proceeding.

I. The term "necessary qualifications" shall mean those job-related qualifications which are essential to the performance of the basic responsibilities designated for each employment position including any essential qualifications concerning education, training and job-related experience, but excluding any qualifications relating to ability or aptitude to perform responsibilities in other employment positions. Demonstrated ability to perform essential and basic responsibilities shall be deemed satisfaction of necessary qualifications.

J. The term "qualifications" shall include the ability to speak and/or understand the Navajo language and familiarity with Navajo culture, customs and traditions;

K. The term "person" shall include individuals; labor organizations; tribal, federal, state and local governments, their agencies, subdivisions, instrumentalities and enterprises; and private and public, profit and non-profit, entities of all kinds having recognized legal capacity or authority to act, whether organized as corporations, partnerships, associations, committees, or in any other form.

L. The term "employee" means an individual employed by an employer.

M. The term "employment agency" means a person regularly undertaking, with or without compensation, to procure employees for an employer or to obtain for employees opportunities to work for an employer.

N. The term "labor organization" or "union" means an organization in which employees participate or by which employees are represented and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours or other terms and conditions of employment, including a national or international labor organization and any subordinate conference, general committee, joint or system board, or joint council.

O. The term "petitioner" means a person who files a complaint seeking to initiate a Commission proceeding under the Act.

P. The term "respondent" means the person against whom a complaint is filed by a petitioner.

Q. The term "Act" means the Navajo Preference in Employment Act.

§ 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. Preference in employment shall include specific Navajo affirmative action plans and timetables for all phases of employment to achieve the Navajo Nation goal of employing Navajos in all job classifications including supervisory and management positions.

2. Within 90 days after the later of: (a) the effective date of this § 604(A)(2); or (b) the date on which an employer commences business within the territorial jurisdiction of the Navajo Nation, the employer shall file with ONLR a written Navajo affirmative action plan which complies with this Section and other provisions of the Act. In any case where a labor organization represents employees of the employer, the plan shall be jointly filed by the employer and labor organization. Any such associated labor organization shall have obligations under this Section equivalent to those of the employer as to employees represented by such organization. Failure to file such a plan within the prescribed time limit, submission of a plan which does not comply with the requirements of the Act, or failing to implement or comply with the terms of a conforming plan shall constitute a violation of the Act. In the event of a required joint plan by an employer and associated labor organization, only the noncomplying party shall be deemed in violation of the Act, as long as the other party has demonstrated a willingness and commitment to comply with the Act.

3. Subject to the availability of adequate resources, ONLR shall provide reasonable guidance and assistance to employers and associated labor organizations in connection with the development and implementation of a Navajo affirmative action plan. Upon request, ONLR shall either approve or disapprove any plan, in whole or in part. In the event of approval thereof by ONLR, no charge shall be filed hereunder with respect to alleged unlawful provisions or omissions in the plan, except upon 30 days prior written notice to the employer and any associated labor organization to enable voluntary correction of any stated deficiencies in such plan. No charge shall be filed against an employer and any associated labor organization for submitting a non-conforming plan, except upon 30 days prior notice by ONLR identifying deficiencies in the plan which require correction.

B. Specific requirements for Navajo preference:

1. All employers shall include and specify a Navajo employment preference policy statement in all job announcements and advertisements and employer policies covered by this Act.

2. All employers shall post in a conspicuous place on its premises for its employees and applicants a Navajo preference policy notice prepared by ONLR.

3. Any seniority system of an employer shall be subject to this Act and all other labor laws of the Navajo Nation. Such a seniority system shall not operate to defeat nor prevent the application of the Act, provided, however, that nothing in this Act shall be interpreted as invalidating an otherwise lawful and bona fide seniority system which is used as a selection or retention criterion with respect to any employment opportunity where the pool of applicants or candidates is exclusively composed of Navajos or of non-Navajos.

4. The Navajo Nation when contracting with the federal or state governments or one of its entities shall include provisions for Navajo preference in all phases of employment as provided herein. When contracting with any

federal agency, the term Indian preference may be substituted for Navajo preference for federal purposes, provided that any such voluntary substitution shall not be construed as an implicit or express waiver of any provision of the Act nor a concession by the Navajo Nation that this Act is not fully applicable to the federal contract as a matter of law.

5. All employers shall utilize Navajo Nation employment sources and job services for employee recruitment and referrals, provided, however, that employers do not have the foregoing obligations in the event a Navajo is selected for the employment opportunity who is a current employee of the employer.

6. All employers shall advertise and announce all job vacancies in at least one newspaper and radio station serving the Navajo Nation; provided, however, that employers do not have the foregoing obligations in the event a Navajo is selected for the employment opportunity who is a current employee of the employer.

7. All employers shall use non-discriminatory job qualifications and selection criteria in employment.

8. All employers shall not penalize, discipline, discharge nor take any adverse action against any Navajo employee without just cause. A written notification to the employee citing such cause for any of the above actions is required in all cases. Provided, that this Subsection shall not apply to Division Directors, or to other employees and officials of the Navajo Nation who serve, pursuant to a specific provision of the Navajo Nation Code, at the pleasure of the Navajo Nation Council, the standing committees of the Navajo Nation Council, the President of the Navajo Nation, the Speaker of the Navajo Nation Council, the Chief Justice of the Navajo Nation, or those persons employed pursuant to 2 N.N.C. §§ 281(C) and 1009.

9. All employers shall maintain a safe and clean working environment and provide employment conditions which are free of prejudice, intimidation and harassment.

10. Training shall be an integral part of the specific affirmative action plans or activities for Navajo preference in employment.

11. An employer-sponsored cross-cultural program shall be an essential part of the affirmative action plans required under the Act. Such program shall primarily focus on the education of non-Navajo employees, including management and supervisory personnel, regarding the cultural and religious traditions or beliefs of Navajos and their relationship to the development of employment policies which accommodate such traditions and beliefs. The cross-cultural program shall be developed and implemented through a process which involves the substantial and continuing participation of an employer's Navajo employees, or representative Navajo employees.

12. No fringe benefit plan addressing medical or other benefits, sick leave program or any other personnel policy of an employer, including policies jointly maintained by an employer and associated labor organization, shall discriminate against Navajos in terms or coverage as a result of Navajo cultural or religious traditions or beliefs. To the maximum extent feasible, all of the foregoing policies shall accommodate and recognize in coverage such Navajo traditions and beliefs.

C. Irrespective of the qualifications of any non-Navajo applicant or candidate, any Navajo applicant or candidate who demonstrates the necessary qualifications for an employment position:

1. Shall be selected by the employer in the case of hiring, promotion, transfer, upgrading, recall and other employment opportunities with respect to such position; and

2. Shall be retained by the employer in the case of a reduction-in-force affecting such class of positions until all non-Navajos employed in that class of positions are laid-off, provided that any Navajo who is laid-off in compliance with this provision shall have the right to displace a non-Navajo in any other employment position for which the Navajo demonstrates the necessary qualifications.

3. Among a pool of applicants or candidates who are solely Navajo and meet the necessary qualifications, the Navajo with the best qualifications shall be selected or retained, as the case may be.

D. All employers shall establish written necessary qualifications for each employment position in their work force, a copy of which shall be provided to applicants or candidates at the time they express an interest in such position.

§ 605. Reports

All employers doing business or engaged in any project or enterprise within the territorial jurisdiction of the Navajo Nation or pursuant to a contract with the Navajo Nation shall submit employment information and reports as required to ONLR. Such reports, in a form acceptable to ONLR, shall include all information necessary and appropriate to determine compliance with the provisions of this Act. All reports shall be filed with ONLR not later than 10 business days after the end of each calendar quarter, provided that ONLR shall have the right to require filing of reports on a weekly or monthly schedule with respect to part-time or full-time temporary employment.

§ 606. Union and employment agency activities; rights of Navajo workers

A. Subject to lawful provisions of applicable collective bargaining agreements, the basic rights of Navajo workers to organize, bargain collectively, strike, and peaceably picket to secure their legal rights shall not be abridged in any way by any person. The right to strike and picket does not apply to employees of the Navajo Nation, its agencies, or enterprises.

B. It shall be unlawful for any labor organization, employer or employment agency to take any action, including action by contract, which directly or indirectly causes or attempts to cause the adoption or use of any employment practice, policy or decision which violates the Act.

§ 607. Navajo prevailing wage

A. Definitions. For purposes of this Section, the following terms shall have the meanings indicated:

1. The term "prevailing wage" shall mean the wage paid to a majority (more than fifty percent (50%)) of the employees in the classification on similar construction projects in the area during a period not to exceed 24 months prior to the effective date of the prevailing wage rate set hereunder; provided that in the event the same wage is not paid to a majority of the employees in the classification, "prevailing wage" shall mean the average of the wages paid, weighted by the total number of employees in the classification.

2. The term "prevailing wage rate" shall mean the rate established by ONLR pursuant to this Section.

3. The term "wage" shall mean the total of:

a. The basic hourly rate; and

b. The amount of: (a) contributions irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a bona fide fringe benefit fund, plan or program for the benefit of employees; and (b) costs to the contractor or subcontractor which may be reasonably anticipated in providing bona fide fringe benefits to employees pursuant to an enforceable commitment to carry out a financially responsible plan or program which was communicated in writing to the employees affected. The types of fringe benefits contemplated hereunder include medical or hospital health care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing; unemployment benefits; life insurance, disability insurance, sickness insurance, or accident insur-

ance; vacation or holiday pay; defraying costs of apprenticeships or other similar programs; or other bona fide fringe benefits.

4. The term "area" in determining the prevailing wage means the geographic area within the territorial jurisdiction of the Navajo Nation; provided that in the event of insufficient similar construction projects in the area during the period in question, "area" shall include the geographic boundaries of such contiguous municipal, county or state governments as ONLR may determine necessary to secure sufficient wage information on similar construction projects.

5. The term "classifications" means all job positions in which persons are employed, exclusive of classifications with assigned duties which are primarily administrative, executive or clerical, and subject to satisfaction of the conditions prescribed in §§ 607(E)(7) and (8), exclusive of "apprentice" and "trainee" classifications as those terms are defined herein.

6. "Apprentice" means: (a) a person employed and individually registered in a *bona fide* apprenticeship program registered with the U.S. Department of Labor, Employment and Training Administration, Bureau of Apprenticeship and Training, or with an Apprenticeship Agency administered by a state or Indian Tribe and recognized by the Bureau; or (b) a person in the first 90 days of probationary employment as an apprentice in such an apprenticeship program, who is not individually registered in the program, but who has been certified by the Bureau of Apprenticeship and Training or a state or Tribal Apprenticeship Agency (where appropriate) to be eligible for probationary employment as an apprentice.

7. "Trainee" means a person: (a) registered and receiving on the job training in a construction occupation under a program which has been approved in advance by the U.S. Department of Labor, Employment and Training Administration, as meeting its standards for on-the-job training programs and which has been so certified by that Administration; or (b) employed and/or receiving on-the-job training under a public employment or work experience program which is approved and funded by the Navajo Nation.

8. The term "construction" shall mean all activity performed under a contract which relates to: (a) the building, development, rehabilitation, repair, alteration or installation of structures and improvements of all types, including without limitation buildings, bridges, dams, plants, highways, sewers, water mains, powerlines and other structures; (b) drilling, blasting, excavating, clearing and landscaping, painting and decorating; (c) transporting materials and supplies to or from the site of any of the activities referred to in (a) or (b) by employees of the contractor or subcontractor; and (d) manufacturing or finishing materials, articles, supplies or equipment at the construction site of any of the foregoing activities by employees of the contractor or subcontractor.

9. The term "contract" shall mean the prime construction contract and all subcontracts of any tier thereunder entered into by parties engaged in commercial, business or governmental activities (whether or not such activities are conducted for profit).

B. Establishment of wage rates.

1. For all construction reasonably anticipated to occur in the area on a regular basis, ONLR shall establish a general prevailing wage rate for each classification within specified types of construction. ONLR shall define classifications and types of construction in accordance with guidelines generally recognized in the construction industry. In all cases where construction is contemplated for which prevailing wage rates have not been set, the contract letting entry shall submit to ONLR a written request for a project prevailing wage scale. Such request shall be submitted not less than 60 days prior to the scheduled date for bid solicitation and shall include detailed information on the anticipated construction classifications, nature of the project and completion plans. ONLR shall use its best efforts to provide a project prevailing wage scale for each classification involved in the project construction within 60 days after receipt of a request therefor.

2. In setting prevailing wage rates, ONLR shall conduct such surveys and collect such data as it deems necessary and sufficient to arrive at a wage determination. Wage data may be collected from contractors, contractors' associations, labor organizations, public officials and other sources which reflect wage rates paid in classifications on types of construction in the area, including the names and addresses of contractors and subcontractors; the locations, approximate costs, dates and types of construction; the number of workers employed in each classification on the project; and the wage rates paid such workers. Wage rate data for the area may be provided, and considered in making wage determinations, in various forms including signed statements, collective bargaining agreements and prevailing wage rates established by federal authorities for federally-assisted construction projects.

3. Any classification of workers not listed in a prevailing wage rate and which is to be used under a construction contract shall be classified in conformance with the prevailing wage determination issued and applicable to the project; provided that an additional classification and prevailing wage rate therefor will be established in the event each of the following criteria are satisfied:

a. The work performed by the proposed classification is not performed by a classification within the existing prevailing wage scale;

b. The proposed classification is utilized in the area by the construction industry; and

c. The wages set for the proposed classification bear a reasonable relationship to the wage rates contained in the existing scale for other classifications.

4. Subject to the prior written approval thereof by the Director of ONLR, a general prevailing wage rate shall be effective on the date notice of such rate is published in a newspaper in general circulation in the Navajo Nation. The notice shall contain the following information:

(1) The fact a prevailing wage rate has been set and approved in writing by the Director of ONLR;

(2) The type of construction for which the rate was established;

(3) The effective date, described as the date of publication of the notice or other specified date;

(4) The address and telephone number of ONLR; and

(5) A statement that ONLR will provide a copy of the full wage determination on request, and respond to any reasonable questions regarding such determination or its application.

a. General prevailing wage rates shall continue in effect until such time as any modifications are adopted.

b. A prevailing wage rate for a particular project shall be effective on the date of issuance to the requesting party of a written wage determination approved by the Director of ONLR. The wage determination shall continue in effect for the duration of the project; provided that any such determination may be modified by ONLR in the event the period of time from the effective date of the determination to the date bids are solicited exceeds 180 days and the estimated date of completion of the project is more than one year after the effective date of the determination.

c. Project and general wage determinations may be modified from time to time, in whole or in part, to adjust rates in conformity with current conditions, subject to the special conditions applicable to project determinations. Such modifications become effective upon the same terms and conditions which are applicable to original determinations.

d. Fringe benefits. The fringe benefit amount of wages reflected in a prevailing wage rate shall be paid in cash to the employee, and shall not be deducted from such employee's wages, unless each of the following conditions is satisfied:

(1) The deduction is not contrary to applicable law;

(2) A voluntary and informed written consent authorizing the deduction is obtained from the employee in advance of the period in which the work is to be done and such consent is not a condition either for the obtaining or continuing employment;

(3) No profit or other benefit is obtained as a result of deduction, directly or indirectly, by the contractor, subcontractor or any person affiliated with them in the form of a commission, dividend or other consideration; and

(4) The deduction serves the convenience and interests of the employee.

C. No contract-letting entity, contractor or subcontractor shall proceed with a construction contract subject to this Section in the absence of a contractual requirement for payment of prevailing wages pursuant to a specified wage determination issued by ONLR. Violation of this obligation shall render the contract-letting entity, and the employer contractor or subcontractor, jointly and severally liable for the difference between wages actually paid and the prevailing wage rate, together with interest thereon (or if no prevailing wage rates have been set, such wage rate as may be issued by ONLR during the course, or after the completion, of the construction project).

1. Failure by any employer, contractor or subcontractor to pay prevailing wages shall render such employer liable for the difference between the amount of wages actually paid and the prevailing rate, together with interest thereon.

2. Any deduction of fringe benefits by an employer contractor or subcontractor in violation of § 607(C) shall render such employer liable for the amount of such deduction, together with interest thereon.

3. Upon written request of ONLR, a contract-letting entity or contractor, as the case may be, shall withhold from any monies payable on account of work performed by an employer contractor or subcontractor under a construction contract such sums as may be determined by ONLR as necessary to satisfy any liabilities of such contractor or subcontractor for unpaid prevailing wages or wrongful deduction of fringe benefits.

4. If following a hearing under § 611 a contract-letting entity (other than the Navajo Nation), contractor or subcontractor is found to have willfully violated this Section the Commission may enter a debarment order disqualifying such party from receiving any contract, or subcontract thereunder, with the Navajo Nation for a period not to exceed three years.

5. The liabilities described in this § 607(C) shall not foreclose the Commission from awarding such other relief or imposing such other civil penalties as may be appropriate following a hearing conducted under § 611.

D. Exemptions. This Section shall not apply to:

1. A contract associated with a construction activity which relates to the provision of architect, engineer, legal or consultant services, or, except as provided under § 607(A)(8)(d), the manufacturing or furnishing of materials or performance of services and maintenance work by persons not employed by a prime contractor or any of its subcontractors.

2. A construction contract relating to a project having a total cost of two thousand dollars ($2,000) or less.

3. A construction contract which is let by a natural person who is an owner or person legally authorized to let such contract, for such person's personal, family or household purposes.

4. A construction contract to the extent the work thereunder is performed by employees of the owner, or employees of the person or entity legally authorized to let the prime contract.

5. A construction contract for a project receiving federal financial assistance to the extent the prevailing wage is set by federal authorities pursuant to the Davis-Bacon Act, 40 U.S.C., § 276a *et seq.*,[1] (as amended), or other federal law applicable to such project.

6. A construction contract to the extent such contract requires payment of wages pursuant to a wage scale established under a collective bargaining agreement between any contractor or subcontractor and a labor organization.

7. With the exception of the provisions of § 607(C), an apprentice, provided that the apprentice is paid not less than: (a) the basic hourly rate prescribed in the registered program for the apprentice's level of progress,

expressed as a percentage of the applicable journeyman rate specified in the prevailing wage rate; and (b) the fringe benefit amount prescribed in the registered program or, if not specified, the fringe benefit amount set in the prevailing wage rate for the applicable journeyman classification. An apprentice who is not enrolled in a registered program (within the meaning of § 607(A)(6)), shall be paid wages in an amount of not less than the level prescribed for the applicable journeyman classification specified in the prevailing wage rate.

E. With the exception of the provisions of § 607(C); a trainee provided that the trainee is paid not less than: (a) the basic hourly rate prescribed in the approved program for the trainee's level of progress, expressed as a percentage of the applicable journeyman rate specified in the prevailing wage rate; and (b) the fringe benefit amount prescribed in the approved program or, if not specified and as to federally approved programs only, the fringe benefit amount set in the prevailing wage rate for the applicable journeyman classification. A trainee who is not enrolled in an approved program (within the meaning of § 607(A)(7)), shall be paid wages in an amount not less than the level prescribed for the applicable journeyman classification specified in the prevailing wage rate.

§ 608. Health and safety of Navajo workers

Employers shall, with respect to business conducted within the territorial jurisdiction of the Navajo Nation, adopt and implement work practices which conform to occupational safety and health standards imposed by law.

§ 609. Contract compliance

A. All transaction documents, including without limitation, leases, subleases, contracts, subcontracts, permits, and collective bargaining agreements between employers and labor organizations (herein collectively "transaction documents"), which are entered into by or issued to any employer and which are to be performed within the territorial jurisdiction of the Navajo Nation shall contain a provision pursuant to which the employer and any other contracting party affirmatively agree to strictly abide by all requirements of this Act. With respect to any transaction document which does not contain the foregoing provision, the terms and provisions of this Act are incorporated therein as a matter of law and the requirements of the Act shall constitute affirmative contractual obligations of the contracting parties. In addition to the sanctions prescribed by the Act, violation of the Act shall also provide grounds for the Navajo Nation to invoke such remedies for breach as may be available under the transaction document or applicable law. To the extent of any inconsistency or conflict between a transaction document and the Act, the provision of the transaction document in question shall be legally invalid and unenforceable and the Act shall prevail and govern the subject of the inconsistency or conflict.

B. Every bid solicitation, request for proposals and associated notices and advertisements which relate to prospective contracts to be performed within the territorial jurisdiction of the Navajo Nation shall expressly provide that the contract shall be performed in strict compliance with this Act. With respect to any such solicitation, request, notice or advertisement which does not contain the foregoing provision, the terms and provisions of this Act are incorporated therein as a matter of law.

§ 610. Monitoring and enforcement

A. Responsible Agency. Compliance with the Act shall be monitored and enforced by ONLR.

B. Charges.

1. Charging Party. Any Navajo may file a charge ("Individual Charge") claiming a violation of his or her rights under the Act. ONLR, on its own initiative, may file a charge ("ONLR Charge") claiming a violation of rights under the Act held by identified Navajos or a class of Navajos, including a claim that respondent is engaging in a pattern of conduct or practice in violation of rights guaranteed by the Act. An Individual Charge and ONLR Charge are collectively referred to herein as a "Charge".

2. Form and Content. A Charge shall be in writing, signed by the charging party (which shall be the Director of ONLR in the case of an ONLR Charge), and contain the following information:

a. The name, address and any telephone number of the charging party;

b. The name and address or business location of the respondent against whom the Charge is made.

c. A clear and concise statement of the facts constituting the alleged violation of the Act, including the dates of each violation and other pertinent events and the names of individuals who committed, participated in or witnessed the acts complained of;

d. With respect to a Charge alleging a pattern or practice in violation of the Act, the period of time during which such pattern or practice has existed and whether it continues on the date of the Charge;

e. The specific harm sustained by the charging party in the case of an Individual Charge or the specific harm sustained by specified Navajos or a class of Navajos with respect to an ONLR Charge; and

f. A statement disclosing whether proceedings involving the alleged violation have been initiated before any court or administrative agency or within any grievance process maintained by the respondent, including the date of commencement, the court, agency or process and the status of the proceeding.

g. ONLR shall provide assistance to persons who wish to file Individual Charges. Notwithstanding the foregoing provisions, a Charge shall be deemed sufficient if it contains a reasonably precise identification of the charging party and respondent, and the action, pattern or practice which are alleged to violate the Act.

3. Place of Filing. Individual Charges may be filed in any ONLR office. An ONLR Charge shall be filed in ONLR's administrative office in Window Rock.

4. Date of Filing. Receipt of each Individual Charge shall be acknowledged by the dated signature of an ONLR employee which shall be deemed the date on which the Individual Charge is filed. The date on which an ONLR Charge is signed by the ONLR Director shall be deemed the date of filing for such Charge.

5. Amendment. A Charge may be amended by filing, in the office where the Charge was first submitted, a written instrument which sets forth the amendment and any portions of the original Charge revised thereby. To the extent the information reflected in the amendment arose out of the subject matter of the original Charge, the amendment shall relate back and be deemed filed as of the filing date of such Charge. Any portion of the amendment which does not qualify for relation back treatment shall constitute a new Charge.

6. Time Limitation. A Charge shall be filed within one year after accrual of the claim which constitutes the alleged violation of the Act. The date of accrual of a claim shall be the earlier of:

a. The date on which the charging party had actual knowledge of the claim; or

b. Taking into account the circumstances of the charging party, the date on which the charging party should reasonably have been expected to know of the existence of the claim; provided, however, that a Charge relating to a continuing, or pattern or practice, violation of the Act shall be filed within one year after the later of:

(1) The date of termination of such violation, pattern or practice; or

(2) The date of accrual of the claim to which the Charge relates. Failure to file a Charge within the time limitations prescribed herein shall bar proceedings on the related claim before the Commission or in any court of the Navajo Nation; provided, however, that nothing herein shall be interpreted as foreclosing proceedings before any Navajo court or administrative body (other than the Commission) on any claim which also arises under applicable common, statutory or other law independent of this Act.

7. Notice to Respondent. Within 20 days after a Charge is filed, ONLR shall serve a copy thereof on respondent; provided, however, that if in ONLR's judgment service of a copy of the Charge would impede its enforcement functions under the Act, ONLR may in lieu of a copy serve on respondent a notice of the Charge which contains the date, place and summary of relevant facts relating to the alleged violation, together with the identity of the charging party unless withheld for the reason stated above. Service of any amendment to the Charge shall be accomplished within 20 days after the amendment is filed. Failure of ONLR to serve a copy of a Charge or notice thereof within the prescribed time period shall not be a ground for dismissal of the Charge or any subsequent proceedings thereon.

8. Withdrawal of Charge.

a. ONLR may, in its discretion, withdraw any ONLR Charge upon written notice thereof to respondent and each person identified in the Charge whose rights under the Act were alleged to have been violated. Any person receiving notice of withdrawal or any other person who asserts a violation of his or her rights as a result of the violation alleged in the withdrawn ONLR Charge may file an Individual Charge which, if filed within 90 days after the issuance date of ONLR's withdrawal notice, shall relate back to the filing date of the ONLR Charge.

b. Any charging party may, in his or her discretion, withdraw an Individual Charge by filing a written notice of withdrawal with the ONLR office where the Charge was submitted, with a copy thereof filed with the ONLR administrative office in Window Rock. ONLR shall, within 20 days after receiving the notice, transmit a copy to the respondent. Within 90 days after receipt of the withdrawal notice, ONLR may

file an ONLR Charge relating in whole or part to the violations alleged in the withdrawn Individual Charge. Any filing of an ONLR Charge within the prescribed time period shall relate back to the filing date of the withdrawn Charge.

9. Overlapping Charges. Nothing herein shall be construed as prohibiting the filing of any combination of Individual Charges and an ONLR Charge which, in whole or part, contain common allegations of violations of the Act.

10. Informants. Irrespective of whether a person is otherwise eligible to file an Individual Charge, any such person or an organization may in lieu of filing a Charge submit to ONLR written or verbal information concerning alleged violations of the Act and may further request ONLR to file an ONLR Charge thereon. In addition to other limitations on disclosure provided in § 610(M) and in the absence of the written consent of the informant, neither the identity of the informant nor any information provided by such informant shall be disclosed to the respondent, agents or legal counsel for the respondent, or the public, either voluntarily by ONLR or pursuant to any discovery or other request for, or order relating to, such information during the course of any judicial or non-judicial proceeding, including a proceeding before the Commission or any subsequent appeal or challenge to a Commission or appellate decision; provided, however, that in the event the informant is called as a witness by ONLR at a Commission proceeding involving the information provided by the informant:

a. The informant's name may be disclosed, but his or her status as an informant shall remain privileged and confidential and shall not be disclosable through witness examination or otherwise; and

b. With the exception of the witness status as an informer, information provided by the informant is disclosable in accordance with the procedures outlined under § 610(M).

C. Investigation of Charges.

1. ONLR shall conduct such investigation of a Charge as it deems necessary to determine whether there is probable cause to believe the Act has been violated.

2. Subpoenas.

a. The Director of ONLR shall have the authority to sign and issue a subpoena compelling the disclosure by any person evidence relevant to a Charge, including a subpoena ordering, under oath as may be appropriate:

(1) The attendance and testimony of witnesses;

(2) Responses to written interrogatories;

(3) The production of evidence, including without limitation books, records, correspondence or other documents (or lists or summaries thereof) in the subpoenaed person's possession, custody or control, or which are lawfully obtainable by such person; and

(4) Access to evidence for the purposes of examination and copying. Neither an individual charging party nor a respondent shall have a right to demand issuance of a subpoena prior to the

initiation of any proceedings on the Charge before the Commission, in which event subpoenas are issuable only pursuant to the procedures governing such proceedings.

b. Service of the subpoena shall be effected by one of the methods prescribed in § 610(O). A subpoena directed to a natural person shall be served either on the person at his or her residence or office address or, in the case of personal delivery, at such residence or office either on the person subpoenaed or on anyone at least 18 years of age (and in the case of office service, a person who is also an employee of such office). Service of a subpoena directed to any other person shall be addressed or delivered to either the statutory agent (if any) of such person or any employee occupying a managerial or supervisory position at any office of the person maintained within or outside the territorial jurisdiction of the Navajo Nation. Personal service may be performed by a natural person at least 18 years of age, including an employee of ONLR.

c. The subpoena shall set a date, time and place for the attendance of a witness, or production of or access to evidence, as the case may be, provided that the date for compliance shall be not less than 30 days after the date on which service of the subpoena was effected.

d. Any person served with a subpoena intending not to fully comply therewith shall, within five business days after service, serve on the Director of ONLR a petition requesting the modification or revocation of the subpoena and identifying with particularity each portion of the subpoena which is challenged and the reasons therefor. To the extent any portion of the subpoena is not challenged, the unchallenged parts shall be complied with in accordance with the terms of the subpoena as issued. The ONLR Director shall issue and serve on petitioner a decision and reasons therefor within eight business days following receipt of the petition, and any failure to serve a decision within such period shall be deemed a denial of the petition. In the event the Director's decision reaffirms any part of the subpoena challenged in the petition, the Director may extend the date for compliance with such portion for a period not to exceed 10 business days. Any petitioner dissatisfied with the decision of the ONLR Director shall either:

(1) Comply with the subpoena (with any modifications thereto reflected in the Director's decision); or

(2) Within five business days following receipt of the Director's decision or the date such decision was due, file a petition with the Commission (with a copy concurrently served on the ONLR Director) seeking modification or revocation of the subpoena and stating with particularity therein each portion of the subpoena challenged and the reasons therefor. A copy of the ONLR Director's decision, if any, shall be attached to the petition.

e. In the event a person fails to comply with a served subpoena, ONLR may petition the Commission for enforcement of the subpoena. For purposes of awarding any relief to petitioner, the Commission may issue any order appropriate and authorized in a case where it is estab-

lished that a Commission order has been violated. A copy of the petition shall be concurrently served on the non-complying person.

f. Beginning on the first day of non-compliance with a subpoena served on a respondent, or any employee or agent of respondent, until the date of full compliance therewith, there shall be a tolling of all periods of limitation set forth in this Section.

D. Dismissal of Charges.

1. Individual Charges. ONLR shall dismiss an Individual Charge upon reaching any one or more of the following determinations:

a. The Individual Charge, on its face or following an ONLR investigation, fails to demonstrate that probable cause exists to believe a violation of the Act has occurred;

b. The Individual Charge was not filed within the time limits prescribed by § 610(B)(6);

c. The charging party has failed to reasonably cooperate in the investigation of, or attempts to settle, the Individual Charge;

d. The charging party has refused, within 30 days of receipt, to accept a settlement offer agreed to by respondent and approved by ONLR, which accords substantially full relief for the harm sustained by such party; or

e. The Charge has been settled pursuant to § 610(G).

2. ONLR Charges. ONLR shall dismiss an ONLR Charge upon determining that:

a. No probable cause exists to believe a violation of the Act has occurred;

b. The Charge was not filed within the time limits prescribed by § 610(B)(6); or

c. The Charge has been settled pursuant to § 610(G).

3. Partial Dismissal. In the event a portion of a Charge is dismissable on one or more of the foregoing grounds, only such portion of the Charge shall be dismissed and the remainder retained by ONLR for final disposition.

4. Notice. Written notice of dismissal, stating the grounds therefor, shall be served on respondent and the individual charging party in the case of an Individual Charge or, in the case of an ONLR Charge, on the respondent and any person known to ONLR who claims to be aggrieved by the violations alleged in such Charge. Such notice shall be accompanied by a right to sue authorization pursuant to § 610(H).

E. Probable Cause Determination. Following its investigation of a Charge and in the absence of a settlement or dismissal required under § 610(D), ONLR shall issue written notice of its determination that probable cause exists to believe a violation of the Act has occurred or is occurring. Such notice shall identify each violation of the Act for which probable cause has been found, and copies thereof shall be promptly sent to the respondent, the charging party in the case of an Individual Charge, and, in the case of an ONLR Charge, each person identified by ONLR whose rights are believed to have been violated.

any probable cause determination shall be based on, and limited to, the evidence obtained by ONLR and shall not be deemed a judgment by ONLR on the merits of allegations not addressed in the determination.

F. Conciliation. If, following its investigation of a Charge, ONLR determines there is probable cause to believe the Act has been or is being violated, ONLR shall make a good faith effort to secure compliance and appropriate relief by informal means through conference, conciliation and persuasion. In the event there is a failure to resolve the matter informally as to any allegations of an Individual Charge for which probable cause has been determined, ONLR shall either issue the notice prescribed in § 610(H) or initiate a Commission proceeding under § 610(I) concerning unresolved allegations. A successful resolution of any such allegation shall be committed to writing in the form required under § 610(G). Nothing herein shall be construed as prohibiting ONLR from initiating or participating in efforts to informally resolve a Charge prior to issuance of a probable cause determination.

G. Settlement.

1. Settlement agreements shall be committed to writing and executed by respondent, the individual charging party if any and, in the case of any Charge, by the Director of ONLR. Refusal of an individual charging party to execute a settlement agreement subjects the Individual Charge to dismissal under the conditions set forth in § 610(D)(1)(d). Settlement agreements may also be signed by those aggrieved persons identified as having a claim with respect to an ONLR Charge.

2. Settlement agreements hereunder shall be enforceable among the parties thereto in accordance with the terms of the agreement. Any member of a class of persons affected by the settlement who is not a signatory to the agreement shall have the right to initiate proceedings before the Commission pursuant to the procedure in § 610(H)(2)(a)(3).

3. Each settlement agreement shall provide for the dismissal of the Charge to the extent the violations alleged therein are resolved under the agreement.

4. Any breach of a settlement agreement by respondent shall present grounds for filing a Charge under this Section. A charging party asserting a claim for breach may either seek:

a. Enforcement of that portion of the settlement agreement alleged to have been breached; or

b. In the case of a material breach as to any or all terms, partial or total rescission of the agreement, as the case may be, and such other further relief as may have been available in the absence of settlement. A Charge asserting a breach of a settlement agreement with respect to any original allegation in the Charge covered by such agreement shall, for purposes of all time limitations in this Section, be deemed to arise on the accrual date of the breach.

H. Individual Right to Sue.

1. Individual Charges.

a. Prior to the expiration of 180 days following the date an Individual Charge was filed, ONLR, by notice to the individual charging party, shall authorize such individual to initiate a proceeding before the Commission in accordance with the procedures prescribed in § 610(J), if:

(1) The Individual Charge has been dismissed by ONLR pursuant to § 610(D)(1);

(2) ONLR has issued a probable cause determination under § 610(E), there has been a failure of conciliation contemplated by § 610(F), and ONLR has determined not to initiate a Commission proceeding on behalf of the individual charging party; or

(3) Notwithstanding the absence of a probable cause determination or conclusion of conciliation efforts, ONLR certifies it will be unable to complete one or both of these steps within 180 days after the date on which the Individual Charge was filed.

b. After the expiration of 180 days following the date an Individual Charge was filed, the individual charging party shall have the right to initiate a proceeding before the Commission irrespective of whether ONLR has issued a notice of right to sue, made a probable cause determination, or commenced or concluded conciliation efforts.

2. ONLR Charges.

a. Prior to the expiration of 180 days following the date an ONLR Charge was filed, ONLR, by notice to any person known to it who claims to be aggrieved by the allegations presented in such Charge, shall authorize such person to initiate a proceeding before the Commission in accordance with the procedures prescribed in § 610(J), if:

(1) The ONLR Charge has been dismissed by ONLR pursuant to § 610(D)(2);

(2) ONLR has issued a probable cause determination under § 610(E), there has been a failure of conciliation contemplated by § 610(F), and ONLR has determined not to initiate a Commission proceeding on the Charge;

(3) ONLR has entered into a settlement agreement under § 610(G) to which such aggrieved person is not a party; or

(4) Notwithstanding the absence of a probable cause determination or conclusion of conciliation efforts, ONLR certifies it will be unable to complete one or both of these steps within 180 days after the date on which the ONLR Charge was filed.

b. After the expiration of 180 days following the date an ONLR Charge was filed and *prior* to the date on which ONLR commences a Commission proceeding, any person claiming to be aggrieved by the allegations presented in such Charge shall have the right to initiate a proceeding before the Commission irrespective of whether ONLR has issued a notice of right to sue, made a probable cause determination or commenced or concluded conciliation efforts.

3. Content of Notice. A notice of right to sue shall include the following information:

a. Authorization to the individual charging party or aggrieved person to initiate a proceeding before the Commission pursuant to and within the time limits prescribed by § 610(J);

b. A summary of the procedures applicable to the institution of such proceeding, or a copy of the Act containing such procedures;

c. A copy of the Charge; and

d. A copy of any written determination of ONLR with respect to such Charge.

4. ONLR Assistance. Authorization to commence Commission proceedings hereunder shall not prevent ONLR from assisting any individual charging party or aggrieved person in connection with Commission proceedings or other efforts to remedy the alleged violations of the Act.

I. ONLR Right to Sue.

1. Individual Charges. ONLR shall have the right to initiate proceedings before the Commission based on the allegations of an Individual Charge with respect to which ONLR has issued a probable cause determination under § 610(E) and there has been a failure of conciliation contemplated by § 610(F). ONLR shall have such right notwithstanding that the individual charging party has a concurrent right to sue hereunder which has not been exercised. ONLR's right to sue shall continue until such time as the individual charging party commences a Commission proceeding and, in that case, shall be revived in the event the proceeding is dismissed or concluded for reasons unrelated to the merits. Initiation of Commission proceedings by ONLR shall terminate the right to sue of an individual charging party, subject to revival of such right in the event the proceeding is dismissed or concluded for reasons unrelated to the merits. Nothing herein shall be construed as foreclosing ONLR from exercising its right to intervene in a Commission proceeding under § 610(L).

2. ONLR Charges. ONLR shall have the right to initiate proceedings before the Commission based on the allegations of an ONLR Charge with respect to which ONLR has issued a probable cause determination under § 610(E) and there has been a failure of conciliation contemplated by § 610(F). ONLR shall have such right notwithstanding that a person claiming to be aggrieved as a result of the allegations in the ONLR Charge has a concurrent right to sue hereunder which has not been exercised. In the event an aggrieved person first initiates a Commission proceeding in an authorized manner, ONLR's right to sue shall only expire as to such person and shall revive in the event the aggrieved person's proceeding is dismissed or concluded for reasons unrelated to the merits. Nothing herein shall be construed as foreclosing ONLR from exercising its right to intervene in a Commission proceeding under § 610(L).

J. Initiation of Commission Proceedings. Proceedings before the Commission shall be initiated upon the filing of a written complaint by a petitioner with the Commission.

1. Complaints shall satisfy each of the following conditions:

of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

2. Charge, Records and Information.

a. Prior to the institution of Commission proceedings thereon, and in the absence of the written consent of the persons concerned, ONLR shall not disclose as a matter of public information any Charge, response thereto, any statements or other information obtained in the course of its investigation of the Charge, except that nothing herein shall prevent earlier disclosure of such information by ONLR in its discretion:

(1) To charging parties or their attorneys, respondents or their attorneys, witnesses or other interested persons where the disclosure is deemed by ONLR to be necessary for securing a resolution of the Charge, including appropriate relief therefor; or

(2) To employees or representatives of the Navajo Nation or employees or representatives of federal, state or local authorities who have a governmental interest in the subject matter of the Charge; or

(3) To persons for the purpose of publishing data derived from such information in a form which does not reveal the identity of charging parties, aggrieved persons, respondents or persons supplying the information.

b. Except as otherwise provided herein, any person to whom a permissible disclosure is made hereunder shall be bound to maintain the confidentiality of such information from further disclosure and shall use the information solely for the purpose for which it was disclosed.

2. Privileged Information. Neither ONLR, charging parties, aggrieved persons, respondents, witnesses or persons supplying information in connection with a Charge shall be compelled, either before or after commencement of Commission proceedings, to disclose any information which represents the opinions or conclusions formed by ONLR during the course of its investigation of a Charge, or any information which is protected by the attorney-client privilege, the informer's privilege referred to in § 610(B)(10), or any other absolute or limited privilege recognized under the laws of the Navajo Nation. To the extent justice requires, the Commission may, balancing the rights of parties and affected persons, prohibit or limit the disclosure of any other information for good cause shown, including a showing that disclosure would impede enforcement of the Act, jeopardize rights guaranteed thereunder, or cause annoyance, embarrassment, oppression or undue burden or expense to parties or affected persons.

N. Non-retaliation. It shall be unlawful for any employer, labor organization, joint labor-management committee involved in apprenticeship or other matters relating to employment, employment agency or other person to, directly or indirectly, take or attempt to induce another person to take, any action adversely affecting:

1. The terms and conditions of any person's employment or opportunities associated with such employment;

2. An applicant's opportunity for employment;

3. The membership of an employee or applicant for employment in a labor organization; or

4. Any other right, benefit, privilege or opportunity unrelated to employment, because such person has opposed an employment practice subject to this Act or has made a charge, testified, or assisted or participated in any manner in an investigation, proceeding or hearing under the Act.

O. Service of Documents. Service of any notice, determination or other document required to be transmitted under this Section shall be accomplished by personal delivery or certified mail, return receipt requested.

a. The petitioner is authorized to file the Complaint under the terms and conditions prescribed by this Section;

b. The underlying Charge was filed within the time limits prescribed in § 610(B)(6); and

c. The complaint was filed within 360 days following the date on which the underlying Charge was filed.

2. Upon motion of respondent and a showing that any one or more of the foregoing conditions has not been satisfied, the Commission shall dismiss the complaint; provided, however, that no complaint shall be dismissed under (b) above as to any allegation of a pattern of conduct or practice in violation of the Act to the extent such pattern or practice continued to persist during the time limits prescribed in § 610(B)(6); and provided further that, in the absence of dismissal or conclusion of Commission proceedings on the merits, nothing herein shall be construed as prohibiting the refiling of a Charge alleging the same or comparable pattern or practice violations of the Act which continued to persist during the time limits prescribed in § 610(B)(6) for refiling such Charge.

K. Preliminary Relief. Prior to the initiation of Commission proceedings on a Charge and notwithstanding the failure to satisfy any precondition to such proceedings, either ONLR, an individual charging party or aggrieved person may, upon notice to respondent, petition the Commission for appropriate temporary or preliminary relief in the form of an injunction or other equitable remedy on the ground that prompt action is necessary to carry out the purposes of the Act, including the preservation and protection of rights thereunder. Nothing herein shall be construed as foreclosing a petition which seeks comparable relief subsequent to the commencement of Commission proceedings.

L. Intervention in Commission Proceedings. Within three business days after the date on which any complaint, or petition pursuant to § 610(K), is filed with the Commission, other than a complaint or petition filed by ONLR, the Commission shall cause copies thereof to be sent to the ONLR Director and the Attorney General of the Navajo Nation. ONLR shall have an unconditional right to intervene in the Commission proceeding initiated by such complaint or petition upon the timely application by motion accompanied by a pleading setting forth the claims for which intervention is sought.

M. Confidentiality.

1. Conciliation. In the absence of written consent of the persons concerned, statements or offers of settlement made, documents provided or conduct by participants in conciliation efforts under § 610(F) shall not be admissible in any Commission or other proceeding relating to the Charge which is the subject of conciliation, to prove liability for or invalidity of the Charge or the amount or nature of relief therefor; provided, however, that nothing herein shall be construed as requiring the exclusion of such evidence merely because it was presented in the court of conciliation if:

a. The evidence is otherwise discoverable; or

b. The evidence is offered for another purpose, including without limitation, proving bias or prejudice of a witness, negativing a contention

§ 611. Hearings

A. The Commission shall schedule a hearing within 60 days of the filing of a written complaint by a petitioner with the Commission. The hearing shall be held at a location designated by the Commission.

1. Notice. The Commission shall issue a notice of hearing. The time and place of the hearing shall be clearly described in the notice. The notice shall also set forth in clear and simple terms the nature of the alleged violations and shall state that: (a) the violations may be contested at a hearing before the Commission; and (b) any party may appear by counsel and cross-examine adverse witnesses.

2. Upon application by a party to the Commission or on the Commission's own motion, the Commission may issue subpoenas compelling the disclosure by any person evidence relevant to the Complaint, including a subpoena ordering, under oath as may be appropriate:

a. The attendance and testimony of witnesses;

b. Responses to written interrogations;

c. The production of evidence; and:

d. Access to evidence for the purpose of examination and copying.

3. The Commission is authorized to administer oaths and compel attendance of any person at a hearing and to compel production of any documents.

4. In the event a party does not make an appearance on the day set for hearing or fails to comply with the rules of procedure set forth by the Commission for the conduct of hearings, the Commission is authorized to enter a default determination against the non-appearing and/or non-complying party.

B. Burden of proof. In any compliance review, complaint proceeding, investigation, or hearing, the burden of proof shall be upon the respondent to show compliance with the provisions of this Act by a preponderance of the evidence.

C. Hearing. The Commission shall conduct the hearing in a fair and orderly manner and extend to all parties the right to be heard.

1. The Commission shall not be bound by any formal rules of evidence.

2. The respondent shall have the opportunity to answer the complaint and the parties shall have the right to legal counsel, to present witnesses, and to cross-examine adverse witnesses.

3. The Commission shall issue its decision by a majority vote of a quorum present which shall be signed by the Chairperson of the Commission.

4. Copies of the decision shall be sent to all parties of record in the proceeding by certified mail, return receipt.

5. Records of the proceeding shall be recorded. Any party may request a transcript of the proceeding at their own expense.

6. The decision of the Commission shall be final with a right of appeal only on questions of law to the Navajo Nation Supreme Court.

§ 612. Remedies and sanctions

A. If, following notice and hearing, the Commission finds that respondent has violated the Act, the Commission shall:

1. Issue one or more remedial orders, including without limitation, directed hiring, reinstatement, displacement of non-Navajo employees, back-pay, front-pay, injunctive relief, mandated corrective action to cure the violation within a reasonable period of time, and/or, upon a finding of intentional violation, imposition of civil fines; provided that liability for back-pay or other forms of compensatory damages shall not accrue from a date more than two years prior to the date of filing of the Charge which is the basis for the complaint.

2. In the case of an individual suit initiated pursuant to § 610(H), award costs and attorneys' fees if the respondent's position was not substantially justified.

3. Refer matters involving respondent contracts, agreements, leases and permits to the Navajo Nation Attorney General for appropriate action.

B. In the absence of a showing of good cause therefor, if any party to a proceeding under this Act fails to comply with a subpoena or order issued by the Commission, the Commission may impose such actions as are just, including without limitation any one or more of the following:

1. In the case of non-compliance with a subpoena of documents or witnesses:

a. An order that the matters for which the subpoena was issued or any other designated facts shall be deemed established for the purposes of the proceeding and in accordance with the claim of the party obtaining the order;

b. An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence; or

c. An order striking pleading or parts thereof, or staying further proceedings until the subpoena is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.

2. In the case of non-compliance by a party or non-party with a Commission subpoena of documents or witnesses or with any other order of the Commission:

a. An order holding the disobedient person in contempt of the Commission and imposing appropriate sanctions therefor, including a civil fine; or

b. An order requiring the disobedient person to pay the reasonable costs and/or attorneys fees caused by the non-compliance.

C. The person or party in whose favor a Commission's decision providing for remedial action is entered shall have the right to seek legal and/or equitable relief in the District Courts of the Navajo Nation to enforce the remedial action; provided that the Commission itself shall have the right to seek legal and/or equitable relief in the District Courts of the Navajo Nation to enforce civil fines or sanctions imposed by the Commission against a person or party. In both instances the Attorney General of the Navajo Nation shall have an unconditional right to intervene on behalf of the Navajo Nation. Any attempted enforcement of a Commission order or decision directing payment of money by the Navajo Nation or any of its governmental entities shall, with respect to the extent of any liability be governed by the Navajo Sovereign Immunity Act, 1 N.N.C. § 551 *et seq.*, as amended.

§ 613. Appeal and stay of execution

A. Any party may appeal a decision of the Commission to the Navajo Nation Supreme Court by lodging a written notice of appeal, in the form prescribed by the Navajo Rules of Civil Appellate Procedure and within 10 days after receipt of the Commission's decision.

B. In the absence of a stipulation by the parties approved by the Commission, a stay of execution of the decision from which the appeal is taken shall only be granted upon written application of the appellant to the Commission and an opportunity for response by appellee. The application for a stay shall be filed within the period prescribed for appeal in Subsection (A) hereof. No stay shall be issued unless the appellant presents a clear and convincing showing that each of the following requirements have been satisfied:

1. Appellant is likely to prevail on the merits of the appeal;

2. Appellant will be irreparably harmed in the absence of a stay;

3. Appellee and interested persons will not be substantially harmed by a stay;

4. The public interest will be served by a stay; and

5. An appeal bond or other security, in the amount and upon the terms prescribed by Subsection (C) below, has been filed with and approved by the Commission; provided that no appeal bond shall be required of ONLR, the Navajo Nation or any governmental agency or enterprise of the Navajo Nation.

C. The appeal bond shall be issued by a duly authorized and responsible surety which shall obligate itself to pay to appellee, or any other person in whose favor an award is made by the Commission decision, the amounts specified or described in the bond upon conclusion of the appeal and failure of appellant, following written demand by appellee, to satisfy the foregoing obligations.

1. The amount or nature of liability assumed by the surety shall be specified in the bond and shall include:

a. The total amount of all monetary awards made in the Commission decision, together with such interest thereon as may be prescribed in the Commission's decision;

b. Costs of appeal and attorneys' fees incurred by appellee in defending the appeal and which may be awarded to appellee by the Navajo Nation Supreme Court;

c. Damages sustained by appellee or other recipients of a Commission award for delay in satisfaction of the Commission decision caused by the appeal; and

d. Such other amount or liability reasonably required to be secured to protect the interests of the appellee or other award recipients.

2. The bond shall provide that the surety submits to the jurisdiction of the Commission and the Courts of the Navajo Nation, and irrevocably appoints the Commission as the surety's agent upon whom any papers affecting the surety's liability on the bond may be served. The surety's liability may be enforced on motion of the appellee filed with the Commission, with copies thereof served on the surety and appellant.

3. In lieu of posting an appeal bond, appellant may, with the approval of the Commission, post a cash bond and undertaking in the amount and upon the terms which are required above with respect to an appeal bond.

4. No appeal bond or cash bond and undertaking, nor the liabilities of the surety or appellant thereunder, shall be exonerated or released until all amounts and liabilities prescribed therein have been fully paid and satisfied.

D. Within three business days following the filing with the Navajo Nation Supreme Court of any appeal from a Commission proceeding, the Clerk of such Court shall, in all cases other than those in which ONLR is not either the appellant or appellee, cause copies of the notice of appeal and all other documents filed in connection therewith to be sent to the ONLR Director and the Attorney General of the Navajo Nation. ONLR shall have an unconditional right to intervene and participate as amicus in the appeal proceedings upon timely application therefor by motion lodged with the Navajo Nation Supreme Court. ONLR's right of participation shall be coextensive with that of the parties to the appeal, including the right to file opening, answering and reply briefs, and the right to present oral argument to the Court.

§ 614. Non-Navajo spouses

A. When a non-Navajo is legally married to a Navajo, he or she shall be entitled to preference in employment under the Act. Proof of marriage by a valid marriage certificate shall be required. In addition, such non-Navajo spouse shall be required to have resided within the territorial jurisdiction of the Navajo Nation for a continuous one year period immediately preceding the application for Navajo preference consideration.

B. Upon meeting the above requirements, such consideration shall be limited to preference in employment where the spouse would normally be in a pool of non-Navajo workers. In this instance, Navajo preference would place the non-Navajo spouse in the applicant pool of Navajos for consideration. However, preference priority shall still be given to all Navajo applicants who meet the necessary job qualifications within that pool.

C. Non-Navajo spouses having a right to secondary preference under this Section shall also have and enjoy all other employment rights granted to Navajos under the Act, it being understood that Navajos retain a priority right with respect to provisions of the Act concerning preferential treatment in employment opportunities.

§ 615. Polygraph test

A. No person shall request or require any employee or prospective employee to submit to, or take a polygraph examination as a condition of obtaining employment or of continuing employment or discharge or discipline in any manner an employee for failing, refusing, or declining to submit to or take a polygraph examination.

B. For purposes of this Section, "polygraph" means any mechanical or electrical instrument or device of any type used or allegedly used to examine, test, or question individuals for the purpose of determining truthfulness. This provision shall not apply to federal or state government employees.

§ 616. Rules and regulations

The Human Services Committee of the Navajo Nation Council is authorized to promulgate rules and regulations necessary for the enforcement and implementation of the provisions of this Act. The Commission is hereby delegated the authority to adopt and implement, on its own initiative and without any approval, rules of procedure and practice governing the conduct of proceedings under § 611 of the Act, provided that such rules are consistent with the provisions of the Act.

§ 617. Prior inconsistent law repealed

All prior Navajo Nation laws, rules, regulations, and provisions of the Navajo Nation Code previously adopted which are inconsistent with this Act are hereby repealed.

§ 618. Effective date and amendment of the Act

A. The effective date of this Act shall be 60 days after the passage of the Act by the Navajo Nation Council and shall remain in effect until amended or repealed by the Navajo Nation Council.

B. Any amendment or repeal of the Act shall only be effective upon approval by the Navajo Nation Council, and shall not be valid if it has the effect of amending, modifying, limiting, expanding or waiving the Act for the benefit or to the detriment of a particular person.

C. Any amendment to the Act, unless the amendment expressly states otherwise, shall be effective 60 days after the passage thereof by the Navajo Nation Council.

D. The time limits prescribed in § 610 relating to filing a Charge and subsequent proceedings thereon were added by amendment adopted by the Navajo Nation Council subsequent to the effective date of the original Act. Notwithstanding an actual accrual date for any alleged violation of the Act which is prior to the effective date of the amendment which added the time limits in § 610 hereof, such alleged violation shall be deemed to accrue on the effective date of the foregoing amendment for purposes of all time limits set forth in § 610.

§ 619. Severability of the Act

If any provision of this Act or the application thereof to any person, association, entity or circumstances is held invalid, such invalidity shall not affect the remaining provisions or applications thereof.

Rule 19. Joinder of Persons Needed for Just Adjudication

(a) **Persons to be Joined if Feasible.** 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 person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. 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.

(b) **Determination by Court Whenever Joinder not Feasible.** If a person as described in subdivision (a)(1)–(2) hereof cannot be made a party, 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 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 the 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.

(c) **Pleading Reasons for Nonjoinder.** A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a)(1)–(2) hereof who are not joined, and the reasons why they are not joined.

(d) **Exception of Class Actions.** This rule is subject to the provisions of Rule 23.

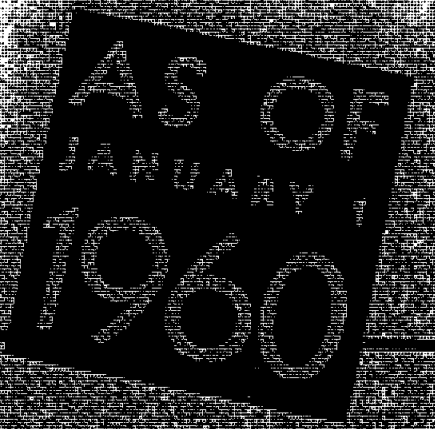
(As amended Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1987, eff. Aug. 1, 1987.)

CUMULATIVE POCKET SUPPLEMENT

TO THE . . . CODE

OF FEDERAL REGULATIONS

Title 25—Indians



For changes on and after January 1, 1960, see the daily issues of the Federal Register

SUBCHAPTER P—MINING

Part 171—Leasing of Tribal Lands for Mining

HOW TO ACQUIRE LEASES

HOW TO ACQUIRE LEASES

§ 171.2 *Leases to be made by tribes.* Indian tribes, bands or groups may, with the approval of the Secretary of the Interior or his authorized representative, lease their land for mining purposes. No oil and gas lease shall be approved unless it has first been offered at an advertised sale in accordance with § 171.3. Leases for minerals other than oil and gas shall be advertised for bids as prescribed in § 171.3 unless the Commissioner grants to the Indian owners written permission to negotiate for a lease. Negotiated leases, accompanied by proper bond and other supporting papers, shall be filed with the Superintendent of the appropriate Indian Agency within 30 days after such permission shall have been granted by the Commissioner to negotiate the lease. The appropriate Area Director is authorized in proper cases to grant a reasonable extension of this period prior to its expiration. The right is reserved to the Secretary of the Interior to direct that negotiated leases be rejected and that they be advertised for bids. All leases shall be approved by the Secretary of the Interior or his duly authorized representative.

[23 F. R. 9393, Dec. 4, 1958]

§ 171.3 *Sale of oil and gas leases.* (a) At such times and in such manner as he may deem appropriate, after being authorized by the tribal council or other authorized representative of the tribe, the superintendent shall publish notices at least thirty days prior to the sale, unless a shorter period is authorized by the Commissioner of Indian Affairs, that oil and gas leases on specific tracts, each of which shall be in a reasonably compact body, will be offered to the highest responsible bidder for a bonus consideration, in addition to stipulated rentals and royalties. Each bid must be accompanied by a cashier's check, certified check, or postal money order, payable to the payee designated in the invitation to bid, in an amount not less than 25 percent of the bonus bid. Within 30 days after notification of being the successful bidder, said bidder must remit the balance of the bonus, the first year's rental, and his share of the advertising costs, and shall file with the superintendent the lease in completed form. The superintendent may, for good and sufficient reasons, extend the time for the completion and submission of the lease form, but no extension shall be granted for remitting the balance of moneys due. If the successful bidder fails to pay the full consideration within said period, or fails to file the completed lease within said period or extension thereof, or if the lease is disapproved through no fault of the lessor or the Department of the Interior, 25 percent of the bonus bid will be forfeited for the use and benefit of the Indian lessor.

[Paragraph (a) amended, 23 F. R. 7068, Sept. 12, 1958]

* * * * *

RENTS AND ROYALTIES

§ 171.14a Suspension of operations and production on leases for minerals other than oil and gas.

The Secretary of the Interior or his authorized representative, after obtaining the consent of the tribe, may authorize suspension of operating and producing requirements on mining leases for minerals other than oil and gas whenever during the primary term of the leases, it is considered that marketing facilities are inadequate or economic conditions unsatisfactory. Applications by lessees for relief from all operating and producing requirements on such mineral leases shall be filed in triplicate, in the office of the Regional Mining Supervisor of the Geological Survey and a copy thereof filed with the Superintendent. Complete information must be furnished showing the necessity for such relief. Suspension of operations and production shall not relieve the lessee

from the obligations of continued payment of the annual rental or the minimum royalty.

[24 F.R. 9510, Nov. 26, 1959]

§ 171.25 Fees.

Unless otherwise authorized by the Secretary of the Interior or his authorized representative, each lease, mining permit, sublease, or assignment shall be accompanied at the time of filing by a fee of $10. Such fee will not be required on sand and gravel permits issued to States, counties, or other municipal bodies. (25 U.S.C. 413)

[24 F.R. 7949, Oct. 2, 1959]

§ 171.26 *Assignments and overriding royalties.* * * *

(d) Agreements creating overriding royalties or payments out of production on oil and gas leases shall not be considered as interests in the leases as such term is used in this section. Agreements creating overriding royalties or payments out of production are hereby authorized and the approval of the Department of the Interior or any agency thereof shall not be required with respect thereto, but such agreements shall be subject to the condition that nothing in any such agreement shall be construed as modifying any of the obligations of the lessee, including, but not limited to, obligations for diligent development and operation, protection against drainage, compliance with oil and gas operating regulations (30 CFR Part 221), and the requirement for departmental approval before abandonment of any well. All such obligations are to remain in full force and effect, the same as if free of any such royalties or payments. The existence of agreements creating overriding royalties or payments out of production, whether or not actually paid, shall not be considered as justification for the approval of abandonment of any well. Nothing in this paragraph revokes the requirement for approval of assignments and other instruments which is required in this section, but any overriding royalties or payments out of production created by the terms of such assignments or instruments shall be subject to the condition stated above. Agreements creating overriding royalties or payments out of production need not be filed with the Superintendent unless incorporated in assignments or instruments required to be filed pursuant to this section.

CODIFICATION: In § 171.26 the headnote was amended to read as set forth above, and paragraph (d) was added, 23 F. R. 9758, Dec. 18, 1958.

§ 171.30 Forms.

Leases, assignments, and other instruments shall be on forms prescribed by the Secretary of the Interior or his authorized representative and may be obtained from the superintendent or other officer having jurisdiction over the lands.

[24 F.R. 7949, Oct. 2, 1959]

§ 211.30 Forms.

Leases, assignments, and other instruments shall be on forms prescribed by the Secretary of the Interior or his authorized representative and may be obtained from the superintendent or other officer having jurisdiction over the lands.

[24 FR 7949, Oct. 2, 1959. Redesignated at 47 FR 13327, Mar. 30, 1982]

faithful performance of the covenants and conditions of the lease.

(b) No lease or interest therein or the use of such lease shall be assigned, sublet, or transferred, directly or indirectly, by working or drilling contract, or otherwise, without the consent of the Secretary.

(c) Assignments of leases, and stipulations modifying the provisions of existing leases, which stipulations are also subject to the approval of the Secretary, shall be filed with the superintendent within five (5) working days after the date of execution. Upon execution of satisfactory bonds by the assignee the Secretary may permit the release of any bonds executed by the assignor. Upon execution of satisfactory bonds the assignee accepts all the assignor's responsibilities and prior obligations and liabilities of the assignor (including but not limited to any underpaid royalties and rentals) under the lease.

(d) Agreements creating overriding royalties or payments out of production shall not be considered as interests in the leases as such provision is used in this section. Agreements creating overriding royalties or payments out of production, or agreements designating operators are hereby authorized and the approval of the Secretary shall not be required with respect thereto, but such agreements shall be subject to the condition that nothing in such agreements shall be construed as modifying any of the obligations of the lessee, including, but not limited to, obligations imposed by requirements of the MMS for reporting, accounting, and auditing; obligations for diligent development and operation, protection against drainage and mining in trespass, compliance with oil and gas, geothermal, and mining regulations (25 CFR part 216; 43 CFR parts 3160, 3260, 3480, and 3590; and those applicable rules found in 30 CFR chapter II, subchapters A and C) and the requirements for Secretarial approval before abandonment of any oil and gas or geothermal well or mining operation. All such obligations are to remain in full force and effect, the same as if free of any such overriding royalties or payments. The existence of agreements creating overriding royalties or payments out of production, whether or not actually paid, shall not be considered as justification for the approval of abandonment of any oil and gas or geothermal well or mining operation. Nothing in this paragraph revokes the requirement for approval of assignments and other instruments which is required in this section, but any overriding royalties or payments out of production created by the provisions of such assignments or instruments shall be subject to the condition stated in this section. Agreements creating overriding royalties or payments out of production, or agreements designating operators shall be filed with the superintendent unless incorporated in assignments or instruments required to be filed pursuant to this section.

§211.54 Lease or permit cancellation; Bureau of Indian Affairs notice of noncompliance.

(a) If the Secretary determines that a permittee or lessee has failed to comply with the terms of the permit or lease; the regulations in this part; or other applicable laws or regulations; the Secretary may:

(1) Serve a notice of noncompliance specifying in what respect the permittee or lessee has failed to comply with the requirements referenced in this paragraph, and specifying what actions, if any, must be taken to correct the noncompliance; or

(2) Serve a notice of proposed cancellation of the lease or permit. The notice of proposed cancellation shall set forth the reasons why lease or permit cancellation is proposed and shall specify what actions, if any, must be taken to avoid cancellation.

(b) The notice of noncompliance or proposed cancellation shall specify in what respect the permittee or lessee has failed to comply with the requirements referenced in paragraph (a), and shall specify what actions, if any, must be taken to correct the noncompliance.

(c) The notice shall be served upon the permittee or lessee by delivery in person or by certified mail to the permittee or lessee at the permittee's or lessee's last known address. When certified mail is used, the date of service shall be deemed to be when the notice is received or five (5) working days

after the date it is mailed, whichever is earlier.

(d) The lessee or permittee shall have thirty (30) days (or such longer time as specified in the notice) from the date that the notice is served to respond, in writing, to the official or the Bureau of Indian Affairs office that issued the notice.

(e) If a permittee or lessee fails to take any action that is prescribed in the notice of proposed cancellation, fails to file a timely written response to the notice, or files a written response that does not, in the discretion of the Secretary, adequately justify the permittee's or lessee's actions, then the Secretary may cancel the lease or permit, specifying the basis for the cancellation.

(f) If a permittee or lessee fails to take corrective action or to file a timely written response adequately justifying the permittee's or lessee's actions pursuant to a notice of noncompliance, the Secretary may issue an order of cessation of operations. If the permittee or lessee fails to comply with the order of cessation, or fails to timely file an appeal of the order of cessation pursuant to paragraph (h), the Secretary may issue an order of lease or permit cancellation.

(g) Cancellation of a lease or permit shall not relieve the lessee or permittee of any continuing obligations under the lease or permit.

(h) Orders of cessation or of lease or permit cancellation issued pursuant to this section may be appealed under 25 CFR part 2.

(i) This section does not limit any other remedies of the Indian mineral owner as set forth in the lease or permit.

(j) Nothing in this section is intended to limit the authority of the authorized officer or the MMS official to take any enforcement action authorized pursuant to statute or regulation.

(k) The authorized officer, MMS official, and the superintendent and/or area director should consult with one another before taking any enforcement actions.

§211.55 Penalties.

(a) In addition to or in lieu of cancellation under §211.54, violations of the terms and conditions of any lease, or the regulations in this part, or failure to comply with a notice of noncompliance or a cessation order issued by the Secretary, or, in the case of solid minerals the authorized officer, may subject a lessee or permittee to a penalty of not more than $1,000 per day for each day that such a violation or noncompliance continues beyond the time limits prescribed for corrective action.

(b) A notice of a proposed penalty shall be served on the lessee or permittee either personally or by certified mail to the lessee or permittee at the lessee's or permittee's last known address. The date of service by certified mail shall be deemed to be the date when received or five (5) working days after the date mailed, whichever is earlier.

(c) The notice shall specify the nature of the violation and the proposed penalty, and shall specifically advise the lessee or permittee of the lessee's or permittee's right to either request a hearing within thirty (30) days from receipt of the notice or pay the proposed penalty. Hearings shall be held before the superintendent and/or area director whose findings shall be conclusive, unless an appeal is taken pursuant to 25 CFR part 2.

(d) If the lessee or permittee served with a notice of proposed penalty requests a hearing, penalties shall accrue each day the violations or noncompliance set forth in the notice continue beyond the time limits prescribed for corrective action. The Secretary may issue a written suspension of the requirement to correct the violations pending completion of the hearings provided by this section only upon a determination, at the discretion of the Secretary, that such a suspension will not be detrimental to the lessor and upon submission and acceptance of a bond deemed adequate to indemnify the lessor from loss or damage. The amount of the bond must be sufficient to oover the cost of correcting the violations set forth in the notice or any disputed amounts plus accrued penalties and interest.

(e) Payment in full of penalties more than ten (10) days after a final decision imposing a penalty shall subject the

Regulatory Flexibility Act

The Secretary, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this rule before publication and by approving it certifies that this rule does not have a significant economic impact on a substantial number of small entities. The rule eliminates a single adjustment factor for PHAs that has been rendered inapplicable because of other regulatory changes and HUD does not anticipate a significant economic impact on a substantial number of small entities resulting from this elimination.

Federalism

The General Counsel, as the Designated Official under section 6(a) of Executive Order 12612, Federalism, has determined that the policies contained in this rule will not have substantial direct effects on States or their political subdivisions, or the relationship between the Federal government and the States, or on the distribution of power and responsibilities among the various levels of government. The rule eliminates a single adjustment factor that has become obsolete. The rule does not create any new significant requirements of its own. As a result, the rule is not subject to review under the Order.

Family Impact

The General Counsel, as the Designated Official under Executive Order 12606, The Family, has determined that this rule does not have potential for significant impact on family formation, maintenance, and general well-being, and, thus, is not subject to review under the Order. The rule only involves the removal of a single, obsolete adjustment factor for management assessment of PHAs.

List of Subjects in 24 CFR Part 901

Administrative practice and procedure, Public housing, Reporting and recordkeeping requirements.

Accordingly, part 901 of title 24 of the Code of Federal Regulations is amended as follows:

PART 901—PUBLIC HOUSING MANAGEMENT ASSESSMENT PROGRAM

1. The authority citation for part 901 continues to read as follows:

Authority: 42 U.S.C. 1437d(j) and 3535(d)

2. In § 901.10, paragraph (b)(4) is revised to read as follows:

§ 901.10 Indicators.

* * * * *

(b) * * *

(4) *Energy Consumption.* The annual energy consumption. This indicator has a weight of x1.

(i) Grade A: Annual energy consumption, as compared to the average of the three years' rolling base consumption, has not increased.

(ii) Grade B: Annual energy consumption, as compared to the average of the three years' rolling base consumption, has not increased by more than 3%.

(iii) Grade C: Annual energy consumption, as compared to the average of the three years' rolling base consumption, has increased by greater than 3% and less than or equal to 5%.

(iv) Grade D: Annual energy consumption, as compared to the average of the three years' rolling base consumption, has increased by greater than 5% and less than or equal to 7%.

(v) Grade E: Annual energy consumption, as compared to the average of the three years' rolling base consumption, has increased by greater than 7% and less than or equal to 9%.

(vi) Grade F: Annual energy consumption, as compared to the average of the three years' rolling base consumption, has increased by more than 9%.

* * * * * *

Dated: June 27, 1996.

Kevin Emanuel Marchman,

Acting Assistant Secretary for Public and Indian Housing.

[FR Doc. 96-17257 Filed 7-5-96; 8:45 am]

BILLING CODE 4210-33-P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

25 CFR Parts 211 and 212

RIN 1076-AA82

Leasing of Tribal Lands for Mineral Development and Leasing of Allotted Lands for Mineral Development

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Final rule.

SUMMARY: The Bureau of Indian Affairs (BIA) of the Department of the Interior (Department) is promulgating regulations revising and updating regulations in 25 CFR Parts 211 and 212 that govern mineral leasing on tribal and allotted Indian lands respectively. The intent of these regulations is to ensure that Indian mineral owners, both tribes and individual owners, desiring to have their resources developed are assured that they will be developed in a manner that maximizes their best economic interests and minimizes any adverse environmental or cultural impact resulting from such development. Further, these regulations recognize Federal government reorganization, enacted legislation, and prevailing administrative practice in the 58 years since these regulations were first promulgated.

EFFECTIVE DATE: August 7, 1996.

FOR FURTHER INFORMATION CONTACT: Richard N. Wilson (303) 231-5070 or Pete C. Aguilar (303) 231-5070.

SUPPLEMENTARY INFORMATION: These final rules are published in the exercise of the authority delegated by the Secretary of the Interior (Secretary) to the Assistant Secretary for Indian Affairs by 209 DM 8. The principal authors of these rules are Richard N. Wilson and Pete C. Aguilar, both in the Division of Energy and Mineral Resources, Golden, Colorado.

This final rulemaking revises and updates the mineral leasing of tribally-owned minerals governed by the Act of May 11, 1938 (25 U.S.C. 396a), and the mineral leasing of allotted lands governed by the Act of March 3, 1909, as amended, (25 U.S.C. 396). The 1938 Act permits Indian tribes to elect whether they wish to offer their mineral resources for lease by competitive bidding, or enter into negotiations with prospective lessees if bids are not satisfactory. The Act of 1909 permits individual Indian mineral owners to offer their mineral resources for lease by competitive bidding under the aegis of the Secretary.

This is the first comprehensive revision of general BIA regulations governing mineral leasing of Indian lands since 1938. In the intervening period Congress has enacted many laws applicable to Indian mineral leases, including the National Environmental Policy Act of 1969 and the Federal Oil and Gas Royalty Management Act of 1982. There have also been major changes in Federal Indian policy, as reflected in the Indian Self-Determination Act of 1975 and recent amendments thereto. This revision is the product of many years of consultation with Indian tribal leaders. It is intended to update, streamline and clarify the procedures for Indian mineral leasing and administration, consistent with the Federal government's role as trustee for these mineral resources and with the modern Federal policy of self-determination. Indeed, they largely reflect current BIA practice and procedure, and are intended in part to eliminate the confusion often fostered by the existing,

pursuant to these regulations, has authority to cancel the lease itself. Therefore, § 211.54 does not provide the BIA with authority that overlaps over the authority of OSM.

(106) One tribal commenter asks that a procedure be added for tribes to report any non-compliance which they may observe.

Response: Because of the close working relationship between the tribes and the BIA agency and area offices, it has been determined that a formal regulatory procedure for tribes to share lease compliance information with the BIA is not necessary. Information of any type and in any format from tribes concerning lease compliance by lessees is always welcomed by the Department.

(107) One tribal commenter asks that tribes be granted a larger independent right to cancel a lease for non-compliance.

Response: The request for tribal authority to cancel leases is not included in final regulations. The mineral lease approved by the Secretary concerns lands which the Department has a statutory obligation to protect. The Secretary will review any and all information an Indian mineral owner may have concerning whether or not a lease should be cancelled but the final decision to cancel must remain with the Secretary. See *Yavapai-Prescott Indian Tribe* v. *Watt*, 707 F.2d 1072 (9th Cir. 1983), cert. denied 464 U.S. 1017.

(108) One tribal commenter asks that a time limit be imposed on the Secretary to issue a decision with regard to a lease cancellation.

Response: The request for a time limit for issuance of a decision on cancellation of a lease is not included in final regulations. The factors to be considered and the unique nature of most lease cancellation actions makes a time deadline for action by the Secretary inappropriate.

(109) One tribal commenter suggests that proposed § 211.54(a) be expanded to include the enabling of the noncompliance and cancellation processes in the event the Secretary determines that a lessee or permittee has failed to comply with applicable tribal laws and regulations, and mining or reclamation plans.

Response: Section 211.54(a) is rewritten in the interest of simplification and to clarify that § 211.54 is enabled in the event of noncompliance with lease provisions, these regulations, or other applicable rules and regulations. Although BLM and OSM are primarily responsible under those agencies' regulations for enforcement of mining and reclamation plans, under some circumstances it may be appropriate for BIA officials to issue notices of non-compliance for violations of such plans. Tribal administrative and judicial remedies will often be the appropriate means for redressing violations of tribal laws and regulations. But the revised language of this regulation leaves open the possibility of enforcement under this Part when an alleged violation raises mixed issues of Federal and tribal law.

(110) One commenter suggests that service by certified mail should be deemed to occur seven (7) rather than five (5) days after the date of mailing (in both §§ 211.54 and 211.55) to be consistent with MMS regulations regarding constructive service of official correspondence.

Response: In the interest of consistency the date of service is deemed to be five (5) working days after the date of mailing in final regulations.

(111) One commenter states that in proposed § 211.54 there is no provision for a hearing before the Secretary prior to lease cancellation and that denial of the right to a hearing is the denial of the right to due process that exists in present regulations and that this right should be restored.

Response: Section 211.54 is rewritten in final regulations to clarify noncompliance and cancellation procedures. Final regulations provide lessees and permittees adequate time for response to notices of noncompliance, orders of cessation, and notices of proposed cancellation or of cancellation. Hearings may be requested in the responses of lessees and permittees to notices and orders and the rights of lessees and permittees under 25 CFR Part 2 (§ 211.58) are not abridged. The suggested provisions are not included at § 211.54.

(112) One commenter states that in proposed § 211.54 reference is made to an "order of cessation" and it is not clear what an order of cessation is or how it differs from a notice of noncompliance. Another commenter states that BIA does not define a "cessation order."

Response: Section 211.54 is rewritten in final regulations to clarify noncompliance and cancellation procedures.

(113) Several industry commenters object to proposed § 211.55 and request that it be removed for a number of reasons. First, several commenters challenge the authority of the Department to impose civil penalties. Second, the $1,000.00 per day limit is challenged as unduly high. Finally, even though the commenters maintain that the Secretary lacks authority to impose civil penalties, the commenters object to the civil penalties as duplicative of other civil penalties which the Secretary has authority to impose.

Response: The proposed civil penalties provision is not new. The current regulations contain § 211.22 that provides for a $500.00 per day civil penalty for violations of terms of the lease, regulations or orders. Section 211.22 has been contained in the leasing regulations for unallotted lands for many years. The proposed revisions to this section do two things. First, the dollar limit for a violation is updated to accord with current penalty limits contained in other Departmental regulations (see 43 CFR § 3162 and § 3163.2). In fact this dollar figure is conservative when compared to the $5,000.00 per violation per day limit contained in the Bureau of Land Management's regulations. The second change provides lessees and permittees with additional due process procedures to ensure that no penalty is unfairly imposed. The Department believes that the broad authority granted to the President by Congress to regulate Indian affairs (see 25 U.S.C. §§ 2 and 9), the longstanding administrative interpretation of these statutes as granting authority to assess penalties, and the unique responsibilities imposed on the Secretary to protect Indian trust resources support this section. However, in response to industry comments a provision has been added to this section in final rules to clarify that no penalty may be assessed under this section for a violation over which the BLM, OSM, or MMS have either statutory or regulatory authority to assess a penalty. This will ensure that this section does not duplicate any other penalty provision and that no duplicative penalties will be issued.

(114) Five industry commenters express concern that the language in proposed § 211.56 is not adequate to protect the rights of the data owner and more specifically that there are no requirements on the part of the Indian mineral owner to protect the confidentiality of the data provided to them. Three Indian commenters felt that the proposed regulation is too weak, because it does not provide specifically for submittal of collected data to the Indian mineral owner.

Response: The concern regarding the lack of confidentiality requirements on the part of the Indian mineral owner is best considered at the time of negotiation between the Indian mineral owner and the proponent of the permit. Therefore, no specific change is made in final regulation with respect to this item. Section 211.56 is rewritten to

existing leases, which stipulations are also subject to the approval of the Secretary, shall be filed with the superintendent within five (5) working days after the date of execution. Upon execution of satisfactory bonds by the assignee the Secretary may permit the release of any bonds executed by the assignor. Upon execution of satisfactory bonds the assignee accepts all the assignor's responsibilities and prior obligations and liabilities of the assignor (including but not limited to any underpaid royalties and rentals) under the lease.

(d) Agreements creating overriding royalties or payments out of production shall not be considered as interests in the leases as such provision is used in this section. Agreements creating overriding royalties or payments out of production, or agreements designating operators are hereby authorized and the approval of the Secretary shall not be required with respect thereto, but such agreements shall be subject to the condition that nothing in such agreements shall be construed as modifying any of the obligations of the lessee, including, but not limited to, obligations imposed by requirements of the MMS for reporting, accounting, and auditing; obligations for diligent development and operation, protection against drainage and mining in trespass, compliance with oil and gas, geothermal, and mining regulations (25 CFR part 216; 43 CFR parts 3160, 3260, 3480, and 3590; and those applicable rules found in 30 CFR chapter II, subchapters A and C) and the requirements for Secretarial approval before abandonment of any oil and gas or geothermal well or mining operation. All such obligations are to remain in full force and effect, the same as if free of any such overriding royalties or payments. The existence of agreements creating overriding royalties or payments out of production, whether or not actually paid, shall not be considered as justification for the approval of abandonment of any oil and gas or geothermal well or mining operation. Nothing in this paragraph revokes the requirement for approval of assignments and other instruments which is required in this section, but any overriding royalties or payments out of production created by the provisions of such assignments or instruments shall be subject to the condition stated in this section. Agreements creating overriding royalties or payments out of production, or agreements designating operators shall be filed with the superintendent unless incorporated in assignments or instruments required to be filed pursuant to this section.

§ 211.54 Lease or permit cancellation; Bureau of Indian Affairs notice of noncompliance.

(a) If the Secretary determines that a permittee or lessee has failed to comply with the terms of the permit or lease; the regulations in this part; or other applicable laws or regulations; the Secretary may:

(1) Serve a notice of noncompliance specifying in what respect the permittee or lessee has failed to comply with the requirements referenced in this paragraph, and specifying what actions, if any, must be taken to correct the noncompliance; or

(2) Serve a notice of proposed cancellation of the lease or permit. The notice of proposed cancellation shall set forth the reasons why lease or permit cancellation is proposed and shall specify what actions, if any, must be taken to avoid cancellation.

(b) The notice of noncompliance or proposed cancellation shall specify in what respect the permittee or lessee has failed to comply with the requirements referenced in paragraph (a), and shall specify what actions, if any, must be taken to correct the noncompliance.

(c) The notice shall be served upon the permittee or lessee by delivery in person or by certified mail to the permittee or lessee at the permittee's or lessee's last known address. When certified mail is used, the date of service shall be deemed to be when the notice is received or five (5) working days after the date it is mailed, whichever is earlier.

(d) The lessee or permittee shall have thirty (30) days (or such longer time as specified in the notice) from the date that the notice is served to respond, in writing, to the official or the Bureau of Indian Affairs office that issued the notice.

(e) If a permittee or lessee fails to take any action that is prescribed in the notice of proposed cancellation, fails to file a timely written response to the notice, or files a written response that does not, in the discretion of the Secretary, adequately justify the permittee's or lessee's actions, then the Secretary may cancel the lease or permit, specifying the basis for the cancellation.

(f) If a permittee or lessee fails to take corrective action or to file a timely written response adequately justifying the permittee's or lessee's actions pursuant to a notice of noncompliance, the Secretary may issue an order of cessation of operations. If the permittee or lessee fails to comply with the order of cessation, or fails to timely file an appeal of the order of cessation pursuant to paragraph (h), the Secretary may issue an order of lease or permit cancellation.

(g) Cancellation of a lease or permit shall not relieve the lessee or permittee of any continuing obligations under the lease or permit.

(h) Orders of cessation or of lease or permit cancellation issued pursuant to this section may be appealed under 25 CFR part 2.

(i) This section does not limit any other remedies of the Indian mineral owner as set forth in the lease or permit.

(j) Nothing in this section is intended to limit the authority of the authorized officer or the MMS official to take any enforcement action authorized pursuant to statute or regulation.

(k) The authorized officer, MMS official, and the superintendent and/or area director should consult with one another before taking any enforcement actions.

§ 211.55 Penalties.

(a) In addition to or in lieu of cancellation under § 211.54, violations of the terms and conditions of any lease, or the regulations in this part, or failure to comply with a notice of noncompliance or a cessation order issued by the Secretary, or, in the case of solid minerals the authorized officer, may subject a lessee or permittee to a penalty of not more than $1,000 per day for each day that such a violation or noncompliance continues beyond the time limits prescribed for corrective action.

(b) A notice of a proposed penalty shall be served on the lessee or permittee either personally or by certified mail to the lessee or permittee at the lessee's or permittee's last known address. The date of service by certified mail shall be deemed to be the date when received or five (5) working days after the date mailed, whichever is earlier.

(c) The notice shall specify the nature of the violation and the proposed penalty, and shall specifically advise the lessee or permittee of the lessee's or permittee's right to either request a hearing within thirty (30) days from receipt of the notice or pay the proposed penalty. Hearings shall be held before the superintendent and/or area director whose findings shall be conclusive, unless an appeal is taken pursuant to 25 CFR part 2.

(d) If the lessee or permittee served with a notice of proposed penalty requests a hearing, penalties shall accrue each day the violations or noncompliance set forth in the notice

CERTIFICATE OF SERVICE

I hereby certify that 15 true and correct copies of the foregoing Brief of Defendant-Appellee the Navajo Nation were filed with the Court and 2 copies were served on opposing counsel of record by Federal Express, next-day delivery, and addressed as follows, this 20th day of September, 2007:

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