Mary Jo O'Neill, AZ Bar # 005924
Andrea G. Baran, MO Bar # 46520
James Driscoll-MacEachron, AZ Bar # 027828
D'Ontae D. Sylvertooth, NM Bar # 142994
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Phoenix District Office
3300 North Central Avenue, Suite 690
Phoenix, Arizona 85012
Telephone: (602) 640-5043
E-mail: mary.oneill@eeoc.gov
andrea.baran@eeoc.gov
james.driscoll-maceachron@eeoc.gov
d'ontae.sylvertooth@eeoc.gov

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Equal Employment Opportunity Commission,

Plaintiff,

v.

Peabody Western Coal Company d/b/a Peabody Coal Company,

Defendant,

-and-

Navajo Nation,

Rule 19 Defendant.

Peabody Western Coal Company,

Third-Party Counterplaintiff,

v.

Larry J. Echo Hawk, in his official capacity as the Assistant Secretary for Indian Affairs of the United States of

Case No. CV01-1050-PHX-JWS

EEOC'S RESPONSE TO THIRD PARTY DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

America, and Kenneth L. Salazar, in his Official capacity as the Secretary of the Interior of the United States of America,

Third-Party Defendants,

-and-

P. David Lopez, in his official capacity as the General Counsel of the Equal Employment Opportunity Commission and Jacqueline A. Berrien, in her Official capacity as the Chair of the Equal Employment Opportunity Commission,

Counterdefendants.

The Secretary of the Interior's motion for summary judgment argues that the EEOC's claims against Peabody Western Coal Company ("Peabody Coal") must be dismissed because, in Interior's view, Title VII does not prohibit Peabody Coal's tribal preference for hiring Navajos over other qualified Indians. Interior offers this interpretation of Title VII without any expertise in interpreting Title VII, and more importantly, without any congressional authority to enforce or interpret Title VII. The EEOC, the Ninth Circuit, and other agencies have recognized that Title VII prohibits discrimination based upon tribal affiliation, and Interior has offered no legal authority that makes Title VII inapplicable to Peabody Coal's conduct. Summary judgment is therefore inappropriate on the EEOC's claims.

The EEOC filed this action charging Peabody Coal with national origin discrimination for refusing to hire non-Navajo Native Americans.[1] Title VII prohibits national origin discrimination. 42 U.S.C. § 2000e-2(a). EEOC regulations define national origin to include discrimination based upon an individual's place of origin or his or her ancestor's place of origin. 29 C.F.R. § 1606.1. Title VII also addresses preferences for 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.

42 U.S.C. 2000e-2(i) (emphasis added) ("Indian Preference exemption"). This provision permits general Indian preferences: preferences for Indians as opposed to non-Indians.

The Indian Preference exemption does not permit tribal preferences: preferences for Indians from one tribe at the expense of Indians from another tribe. "[E]xtension of an employment preference on the basis of tribal affiliation is in conflict with and violates Section 703(i) of Title VII." Equal Employment Opportunity Comm'n, No. 915.027, Policy Statement on Indian Preference under Title VII (May 16, 1988), *available at* http://www.eeoc.gov/policy/docs/indian_preference.html (last visited June 15, 2012) ("1988 Policy Statement"). The purpose of the exemption is "to encourage the extension of employment opportunities to *Indians generally*, without allowing discrimination among Indians of different tribes." *Id.* (emphasis added). The express language of the

[1] The EEOC also brought a recordkeeping claim, which it continues to preserve.

exemption—permitting a preference for "*any* individual because he is an Indian"—indicates "Congress did not intend to permit tribal distinctions among Indians otherwise qualifying for such preferential treatment."[2] *Id.* Adopting Interior's interpretation would contravene the text and purpose of the exemption.

In *Dawavendewa v. Salt River Project Agric. Improvement and Power Dist.*, 154 F.3d 1117, 1121 (9th Cir. 1998) ("*Dawavendewa I*"), the Ninth Circuit held that an allegation of a tribal preference states a claim for national origin discrimination. The Ninth Circuit gave deference to the EEOC's position in its 1988 Policy Statement. In keeping with the 1988 Policy Statement, the Ninth Circuit observed:

> While [Title VII] exempts the hiring of Indians from the force of the anti-discrimination in employment provisions, it does so in order to compensate for the effects of past and present unjust treatment, not in order to authorize another form of discrimination against particular groups of Indians—tribal discrimination. . . . The purpose of the Indian Preferences exemption is to authorize an employer to grant preferences to *all* Indians (who live on or near a reservation)—to permit the favoring of Indians over *non*-Indians. The exemption is not designed to permit employers to favor members of one Indian tribe over another, let alone to favor them over all other Indians.

Id. at 1121-1122 (emphasis in original). Interior's interpretation, if adopted, would condone precisely the type of discrimination that so concerned the Ninth Circuit.

The EEOC filed this lawsuit because Peabody Coal violated Title VII by refusing to hire Native Americans because they were not Navajo. Peabody Coal and the Navajo Nation have repeatedly sought to dismiss the EEOC's claims, but the Ninth Circuit has

---

[2] The 1988 Policy Statement also cites regulations from the Department of Labor and Interior, both of which prohibited discrimination based on tribal affiliation.

twice ordered the litigation to proceed. Full fact discovery has not yet begun, but, in its most recent decision, the Ninth Circuit permitted the defendants to implead Interior so Interior could provide its position on Peabody Coal's tribal preference. *EEOC v. Peabody Western Coal Company*, 610 F.3d 1080, 1087 (9th Cir. 2010) ("*Peabody IV*").

Interior is now part of this litigation, but its motion provides little new factual or legal authority for Peabody Coal's tribal preference. Indeed, Interior's motion is most remarkable for the positions it does not take. While this Court reserved judgment on the Navajo Nation's arguments regarding the Navajo-Hopi Rehabilitation Act of 1950, Order and Opinion, Dkt. No. 237, at 5, Interior provides no new information regarding that statute. Interior does not join the Navajo Nation and Peabody Coal in arguing that the preference provision in the Navajo-Hopi Rehabilitation Act, 25 U.S.C. § 633, justifies Peabody Coal's tribal preference. In fact, Interior states, as an uncontested fact, that Interior approved the Peabody Coal leases "pursuant to the Indian Mineral Leasing Act." Third Party Defendants' Statement of Uncontested Material Facts ¶ 3; *see also United States v. Navajo Nation*, 556 U.S. 287, 298 (2009). Interior also does not argue that the Indian Mineral Leasing Act authorizes Peabody Coal's tribal preference. Given Interior's role in implementing these statutes, the absence of these arguments from Interior's motion for summary judgment is significant.

Interior advances a different argument entirely. Relying on the Supreme Court's decision in *Morton v. Mancari*, 417 U.S. 535 (1974), Interior argues that Peabody Coal's tribal preference is based upon a political classification that falls outside Title VII's prohibitions. Interior's argument ignores the limited scope of *Mancari* and the Ninth

Circuit's rejection of this argument in *Dawavendewa I*. While Interior attempts to downplay the EEOC's 1988 Policy Statement and *Dawavendewa I*, those authorities contemplate that tribal preferences such as Peabody Coal's fall within Title VII. Those authorities reflect an awareness of tribal employment ordinances and lease agreements, but ultimately conclude that discrimination based on tribal affiliation constitutes national origin discrimination. This conclusion is supported not only by the text of Title VII, but also by agency practices stretching back more than thirty years.

Given the absence of legal authority supporting Interior's position, the force of the Ninth Circuit's analysis in *Dawavendewa I*, the deference due to the EEOC's position, and the existence of bans on tribal affiliation discrimination amongst multiple federal agencies, the EEOC respectfully requests that this Court deny Interior's motion to the extent that it seeks summary judgment on the EEOC's underlying claims and allow full fact discovery to begin.

I. Summary Judgment Standard

A motion for summary judgment may be granted only when "there are no genuine issues as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In resolving the motion, the court is required to view the evidence in the light most favorable to the non-moving party. *Lyons v. England*, 307 F.3d 1092, 1103 (9th Cir. 2002). The non-movant's evidence is to be believed, and all justifiable inferences are to be drawn in its favor. *Dufay v. Bank of Am. N.T. & S.A. of Ore.*, 94 F.3d 561, 564 (9th Cir. 1996). The Ninth Circuit defines the moving party's burden of production on summary judgment as follows:

> [A] moving party without the ultimate burden of persuasion at trial . . . may carry its initial burden of production by either of two methods. The moving party may produce evidence negating an essential element of the nonmoving party's case, or, after suitable discovery, the moving party may show that the nonmoving party does not have enough evidence of an essential element of its claim or defense to carry its ultimate burden of persuasion at trial.

Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Companies, Inc., 210 F.3d 1099, 1106 (9th Cir. 2000). "If a moving party fails to carry its initial burden of production, the nonmoving party has no obligation to produce anything, even if the nonmoving party would have the ultimate burden of persuasion at trial." *Id.* at 1102-03.

II. Tribal preference is a form of national origin discrimination.

Peabody Coal's tribal preference, regardless of the origin of the preference, is a form of national origin discrimination under Title VII. Tribal preference falls within the definition of national origin set forth in Title VII and EEOC regulations. Further, the Ninth Circuit has directly addressed this question in *Dawavendewa I* and concluded that tribal preference states a claim of national origin discrimination.

Title VII prohibits discrimination based on national origin. 42 U.S.C. § 2000e-2. The EEOC "defines national origin discrimination broadly as including, but not limited to, the denial of equal employment opportunity because of an individual's, or his or her ancestor's, place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group." 29 C.F.R. § 1606.1. The EEOC specifically used the term "place of origin" to avoid any implication that national origin

required a reference to a sovereign nation.[3] 45 Fed. Reg. 85632, 85633 (Dec. 29, 1980); *see also Pejic v. Hughes Helicopters, Inc.*, 840 F.2d 667, 673 (9th Cir. 1988) ("Given world history, Title VII cannot be read to limit "countries" to those with modern boundaries, or to require their existence for a certain time length before it will prohibit discrimination."); *Roach v. Dresser Indus. Valve and Instrument Div.*, 494 F. Supp. 215, 218 (W.D. La. 1980) (holding that discrimination against an individual of Cajun ancestry constitutes national origin discrimination).

Giving preference to Navajos over all other persons is a form of national origin discrimination. "National origin discrimination also includes discrimination against anyone who does not belong to a particular ethnic group . . . ." Cari M. Dominguez, Chair, Equal Employment Opportunity Commission, II EEOC Compliance Manual § 13 (2002), *available at* http://www.eeoc.gov/policy/docs/national-origin.html (last visited June 18, 2012). Courts agree that discrimination based on lack of membership in a national origin group constitutes national origin discrimination. *See Coghlan v. Am. Seafoods Co. LLC*, 413 F.3d 1090, 1094 (9th Cir. 2005) (defining plaintiff's protected class as "non-Norwegian-born workers"); *Akouri v. State of Florida Dep't of Transp.*, 408 F.3d 1338, 1348 (11th Cir. 2005) (holding that statement "they are all white and

[3] The EEOC also made clear that "it is not necessary to show that the alleged discriminator knew the particular national origin group to which the complainant belonged. To prove a national origin claim, it is enough to show that the complainant was treated differently than others because of his or her foreign accent, appearance or physical characteristics." 45 Fed. Reg. 85632, 85633 (Dec. 29, 1980).

they are not going to take orders from you, especially if you have an accent" is direct evidence of national origin discrimination).

The Ninth Circuit found that tribal preference stated a claim of national origin discrimination in *Dawavendewa I*. 154 F.3d at 1120. After reviewing relevant case law and EEOC regulations, the Ninth Circuit stated that "a claim arises when discriminatory practices are based on the place in which one's ancestors lived." *Id.* at 1119. The Ninth Circuit then examined the history of Indian nations, and stated that "discrimination in employment on the basis of membership in a particular tribe constitutes national origin discrimination." *Id.* at 1120.

Peabody Coal refused to hire non-Navajo Native Americans. This falls within the ambit of Title VII, the EEOC regulations, and *Dawavendewa I*. In light of these authorities, Interior cannot successfully argue that tribal preference does not violate Title VII's prohibition on national origin discrimination.

III. Peabody Coal's tribal preference is not a political classification.

There is no merit to Interior's argument that Peabody Coal's tribal preference is a political classification under *Morton v. Mancari* and that, as such, it falls outside Title VII. *Mancari* addressed a different situation entirely, and the involvement of Interior and the Navajo Nation does not save Peabody's argument.

A. *Mancari* does not support Peabody Coal's tribal preference.

Interior improperly relies on *Mancari* to support its political classification argument. *Mancari* observed that a Bureau of Indian Affairs ("BIA") employment preference for Indians generally—not a preference for Indians from a specific tribe—

was "political rather than racial in nature." 471 U.S. at 554 & n.24. Peabody Coal's tribal preference, on the other hand, is a preference for Navajos specifically. This critical distinction undermines any reliance on *Mancari* to argue that Peabody Coal's preference is a political classification.

Interior emphasizes the use of the word tribal in *Mancari*, but Interior fails to note that *Mancari* at no point discusses or requires an affiliation with a specific tribe. To the contrary, it repeatedly places the BIA's Indian preference in the context of general Indian preferences. *See* 417 U.S. at 541 ("Since that time, Congress repeatedly has enacted various preferences of the general type here at issue.") (citing general Indian preferences); *id.* at 544 ("[I]t was explicitly determined that gradual replacement of non-Indians with Indians within the Bureau was a desirable feature"); *id.* at 549 n.23 (discussing Executive Orders and regulations with general Indian preferences). Where *Mancari* discusses tribal Indians, it does so in the context of describing Indians with active tribal relations. *See id.* at 543 & n.15; 417 U.S. at 552; *compare United States v. Antelope*, 430 U.S. 641, 647 n.7 (1977) ("[R]espondents are enrolled members of the Coeur d'Alene Tribe and thus not emancipated from tribal relations."); *United States v. Nice*, 241 U.S. 591, 597-98 (1916).

This emphasis on *any* tribal affiliation, of course, is at the heart of *Mancari*. *Mancari* used membership in *any* federally recognized tribe to distinguish a general Indian preference from racial discrimination. 417 U.S. at 553-54 & n.24. "The preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by

the BIA in a unique fashion." *Id.* at 554. The Court was not confronted with any form of national origin discrimination. It dealt with claims that Indians were being preferred over non-Indians, not that Indians from one tribe received a preference over other Indians. *Compare Dawavendewa I*, 154 F.3d at 1122 ("The exemption is not designed to permit employers to favor members of one Indian tribe over another, let alone to favor them over all other Indians."). It simply does not follow from *Mancari* that tribal preferences receive the same protection as general Indian preferences.

The relevant statutes and regulations only further emphasize this point. The statute at issue in *Mancari* defines Indian as "*all persons of Indian descent* who are members of *any recognized Indian tribe* now under Federal jurisdiction." 25 U.S.C. § 479 (emphasis added).[4] Interior also acknowledges that an "Indian preference is a hiring preference for Indians in general." 25 C.F.R. § 170.914. A preference that advances Indians from one tribe at the expense of other Indians does not advance the interests of Indians generally. Instead, it would permit discrimination in favor of a "formal subset of the favored class." *Dawavendewa I*, 154 F.3d at 1122.

Further, Interior ignores the fact that the Ninth Circuit already addressed *Mancari* and rejected the argument that it protects tribal preferences:

> [Defendant] relies on *Morton v. Mancari*, 417 U.S. 535, 552-554, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974) for the proposition that employment preferences based on tribal affiliation are based on *political affiliation* rather than national origin and are thus outside the realm of Title VII. . . .

[4] *See also* 18 U.S.C. § 1159(c)(1) (defining "Indian" as "any individual who is a member of an Indian tribe"); 25 U.S.C. § 305e(a)(1)(A) (defining "Indian" in pertinent part as "a member of an Indian tribe"); 25 U.S.C. § 450b(d) (same); 25 U.S.C. § 1903(3) (same).

> However, *Morton* did not involve a claim of discrimination on the basis of membership in a particular tribe. In fact, in *Morton* no claim was made of *any* violation of Title VII. *Morton* simply held that the employment preference at issue, though based on a racial classification, did not violate the Due Process clause because there was a legitimate non-racial purpose underlying the preference: the unique interest the Bureau of Indian Affairs had in employing Native Americans, or more generally, Native Americans' interests in self-governance-interests not present in this case. For these reasons, *Morton* does not affect our conclusion that discrimination in employment on the basis of membership in a particular tribe constitutes national origin discrimination.

Dawavendewa I, 154 F.3d at 1120. As discussed below, the Ninth Circuit was aware in *Dawavendewa I* that a tribal ordinance required the tribal preference, *id.* at 1119, but it nonetheless found *Mancari* completely inapposite.[5] Interior cannot now resurrect an argument the Ninth Circuit rejected more than ten years ago.

Additionally, Interior's arguments ignore the effect of the preference on Indians from other tribes. *Mancari* allowed a general Indian preference because it was "reasonably and directly related to a legitimate, nonracially based goal": "the fulfillment of Congress' unique obligation toward *the Indians*." *Mancari*, 417 U.S. at 554-55 (emphasis added). Race is not at issue here—tribal affiliation is. And the choice to implement a preference based on tribal affiliation rather than an Indian preference is based on national origin. It is not linked to Congress's obligation toward Indians as a group. Peabody Coal's tribal preference directly and negatively affects non-Navajo Indians who would otherwise be eligible for a general Indian preference or a position in

[5] And, as discussed below, the reference to self-governance does not alter this analysis. Not only was the Ninth Circuit aware of the Navajo ordinance, self-governance does not accurately describe tribal laws that govern the relationship a non-Navajo private employer has with non-Navajos.

the absence of any preference. Peabody Coal's tribal preference harmed Indians such as Delbert Mariano (Hopi), Thomas Sahu (Hopi), and Robert Koshiway (Otoe), for whom the EEOC brought this action. This negative effect on non-Navajo Indians reinforces the tribal preference's fundamental link to national origin and separates the tribal preference from Congress's obligation to Indians.

B. Interior and Navajo Nation's involvement does not create a political classification.

At various points in its motion, Interior suggests that the involvement of Interior and the Navajo Nation transforms what is otherwise national origin discrimination into a political classification. That argument again ignores Title VII, as numerous cases have held that third party preference is not a defense to Title VII.

EEOC guidance clearly states "employers may not rely on coworker, customer, or client discomfort or preference as the basis for a discriminatory action." II EEOC Compliance Manual § 13, *available at* http://www.eeoc.gov/policy/docs/national-origin.html (last visited June 18, 2012). The Ninth Circuit also adopted this rule. *Lam v. University of Hawai'i*, 40 F.3d 1551, 1560 n.13 (9th Cir. 1994) ("The existence of such third party preferences for discrimination does not, of course, justify discriminatory hiring practices."); *see also Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1276-77 (9th Cir. 1981). Other courts agree that reliance on third parties does not justify discrimination. *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385 (5th Cir. 1971); *Ames v. Cartier, Inc.*, 193 F.Supp.2d 762 (S.D.N.Y. 2002); *cf. Rosenfeld v. S. Pacific Co.*, 444 F.2d 1219, 1225-26 (9th Cir. 1971) (state statute did not provide defense to

Title VII); EEOC Decision No. 72-0697, 1971 Lexis 26 (Dec. 27, 1971) (accommodating racially discriminatory policies of other nations violated Title VII).

To allow Peabody Coal carte blanche to discriminate simply because it was instructed or allowed to do so by third parties (such as the Navajo Nation or Interior) would undermine Title VII's prohibition on national origin discrimination—regardless of the identity of the third party. And neither of the third parties involved here has the authority or the expertise to instruct Peabody Coal on the proper application of Title VII, much less to offer Peabody Coal an unfettered pass to violate Title VII.

III. Peabody Coal's tribal preference is not protected by Title VII's Indian Preference exemption.

Title VII's Indian Preference exemption provides no support for Interior's position. The Indian Preference exemption permits general Indian preferences, not tribal preferences—whether a tribal ordinance or lease is involved or not.

The EEOC and the Ninth Circuit have both stated that the Indian Preference exemption does not authorize tribal preferences. The 1988 Policy Statement concluded that the exemption demonstrated Congress's intent "to encourage the extension of employment opportunities to Indians generally, without allowing discrimination among Indians of different tribes." 1988 Policy Statement. It further found that the Indian Preference exemption refers to a preference given to *any* individual because he or she is an Indian and thus did not "permit tribal distinctions among Indians otherwise qualifying for such preferential treatment." *Id.* The Ninth Circuit agreed with these conclusions. *See Dawavendewa I*, 154 F.3d at 1121-22.

Interior attempts to limit both the 1988 Policy Statement and *Dawavendewa I* by arguing that they address only an employer's unilateral decision to use a tribal preference. Interior is mistaken. Both the 1988 Policy Statement and *Dawavendewa I* contemplated situations such as those Interior describes.

The 1988 Policy Statement specifically addresses preferences based on tribal ordinances. In describing the issue presented, it states, "The issue arises, for example, where an employer located on or near a specific Indian tribe's reservation wishes to accord a preference restricted to members of that tribe either on its own initiative or *in compliance with a tribal ordinance requiring that a preference be given to members of the tribe*." 1988 Policy Statement (emphasis added). The policy concludes that tribal preference discriminates against Indians from other tribes based on their national origin. *Id.* It makes no exception for tribal preference based on tribal ordinances, and there is nothing in the 1988 Policy Statement to suggest such a distinction.

Interior also unduly limits *Dawavendewa I*. The Ninth Circuit understood that it did not confront a unilaterally created tribal preference. It stated that the Salt River Project had "entered into a lease agreement with the Navajo Nation" and that the lease required Salt River Project "grant[] employment preferences to members of the Navajo tribe living on the reservation, or, if none are available, to other members of the Navajo tribe." *Dawavendewa I*, 154 F.3d at 1118. The Ninth Circuit further observed, "This preference policy is consistent with Navajo tribal law. *See* 15 Navajo Nation Code § 604 (1995)." *Id.* The Ninth Circuit nonetheless held that discrimination based on tribal affiliation is a form of national origin discrimination. *Id.* at 1121. It made no exception

for circumstances—such as those in *Dawavendewa I*—where the tribal preference was based on a lease or tribal ordinance.

Dawavendewa v. Salt River Project Agricultural Improvement and Power Dist., 276 F.3d 1150, 1158-59 (9th Cir. 2002) ("*Dawavendewa II*") does not alter this analysis. *Dawavendewa II* does not state that the court in *Dawavendewa I* had been unaware of either the lease or the tribal ordinance. *Dawavendewa I*, in contrast, clearly noted the existence of a lease and a tribal ordinance. *Dawavendewa I*, 154 F.3d at 1118. It also addressed amendments to another statute—the ISDEAA—that expressly allowed "tribal employment or contract preference laws adopted by such tribe" to apply in a narrow set of federal contracts. *Id.* at 1122 & n.11. The Ninth Circuit noted that Congress had amended the original ISDEAA, which allowed "preferences [to] 'be given to Indians,'" when it decided to permit tribal preference in this subset of federal contracts. *Id.* (quoting 25 U.S.C. § 450(b)). The Ninth Circuit concluded that the ISDEAA amendments showed "when Congress wishes to allow tribal preferences, it adopts an appropriate amendment to the applicable statute." *Id.* at 1123.

As demonstrated above, Peabody's tribal preference constitutes national origin discrimination. And the 1988 Policy Statement and *Dawavendewa I* establish that the Indian Preference exemption does not protect Peabody's actions. Accordingly, Interior has not demonstrated that Peabody Coal is not liable as a matter of law. Summary judgment is therefore inappropriate.

IV. Congress did not intend to exempt tribal preferences from Title VII.

There is also no merit to Interior's various arguments that Congress intended to protect tribal preferences. The Ninth Circuit held in *Dawavendewa I* that the Indian Preference exemption Congress included in Title VII does not protect tribal preferences. And neither the legislative history nor any other act of Congress indicates that Congress intended to protect tribal preferences from Title VII or that Congress has since impliedly exempted tribal preferences from Title VII. The text of Title VII, the 1988 Policy Statement, and *Dawavendewa I* provide the best evidence of the scope of Title VII, and these authorities establish that tribal preference violates Title VII.

A. *Dawavendewa I* already held that Congress did not intend to protect tribal preferences.

In *Dawavendewa I*, the Ninth Circuit "examine[d] the language and purpose of [Title VII's] statutory exemption." 154 F.3d at 1121. It observed, "The term 'Indian' is generally used to draw a distinction between Native Americans and all others." *Id.* (citation omitted). It further observed that "the statute exempts the hiring of Indians from the force of the anti-discrimination in employment provisions, [but] it does so in order to compensate for the effects of past and present unjust treatment." *Id.* The Ninth Circuit therefore held that the Indian Preference exemption did not protect tribal preferences. *Id.* at 1122. Interior ignores this binding law of this circuit, which clearly states that the Indian Preference exemption only protects general Indian preferences.

B. Title VII's legislative history does not indicate that Congress intended to protect tribal preferences.

Title VII's legislative history likewise does not support Interior's position. Interior argues that Congress was aware of Interior's tribal preferences before it passed Title VII and that Congress exempted tribal preference programs from Title VII. This ignores *Dawavendewa I*, and it ignores the paucity of information regarding either Congress's awareness of tribal preferences or Congress's intent. *See Dawavendewa I*, 154 F.3d at 1122 n.10 ("The legislative history on this exemption is sparse."). Interior points to nothing in Title VII's legislative history that shows Congress was aware of tribal preferences when it passed Title VII and that Congress specifically exempted tribal preferences from Title VII. Further, to the extent that Interior argues that Congress enacted Title VII knowing Interior approved leases containing tribal preferences, Interior also fails to present any evidence in support of its assertion. Interior's statement of facts provides no evidence regarding leases with tribal preference provisions other than the leases between Peabody Coal and the Navajo Nation and no evidence that Interior approved leases with tribal preference provisions prior to the inclusion of the Indian Preference exemption in Title VII.

Contrary to Interior's assertions, the best evidence of Congress's intent is the express language of Title VII. And, as the Ninth Circuit has already held, that language supports the EEOC's interpretation of Title VII. *Dawavendewa I*, 154 F.3d at 1121-22. Nothing in the legislative history contradicts the Ninth Circuit's interpretation of the exemption. The few references to the Indian Preference exemption in the legislative

history refer to general Indian preferences. *See* 110 Cong. Rec. 13,702 (1964) (remarks of Sen. Mundt); 110 Cong. Rec. 12,723 (1964) (remarks of Sen. Humphrey); 110 Cong. Rec. 12,819 (remarks of Sen. Dirksen). There are no references to tribal preferences.[6] As the Ninth Circuit observed, the term Indian generally differentiates between Indians and non-Indians. *Dawavendewa I*, 154 F.3d at 1121; *see also* I Cohen's Handbook of Federal Indian Law § 3.03 (collecting definitions of the term Indian). Interior also adopts this understanding of the term Indian. 25 C.F.R. § 170.914 ("Indian preference is a hiring preference for Indians in general.").

Despite this accepted use of the term Indian, Interior suggests that Senator Mundt, the sponsor of the Indian Preference exemption, meant to include tribal preferences in the language he introduced to exempt Indian preferences. But nothing in Senator Mundt's comments supports such an understanding. Senator Mundt stated that the exemption was intended to allow Indians "to benefit from *Indian preference programs* now in operation or later to be instituted." 110 Cong. Rec. 13,702 (emphasis added). He did not refer to any tribal preference programs.

Interior argues, however, that Senator Mundt was aware of tribal preferences when he proposed the exemption. But the sources Interior cites for this point are extrinsic to the legislative history, and there is no evidence that Senator Mundt, much

---

[6] Interior's citation to Attorney General Katzenbach's letter in the legislative history of Title VI fails for the same reason. In a letter addressing Title VI's effect on federal programs, Attorney General Katzenbach included programs that benefit Indians in a list of exempted programs. He noted that "[p]rograms of assistance to Indians are also omitted." 110 Cong. Rec. 13,380. He did not refer to tribal preferences or any other program that would disadvantage one tribe at the expense of another.

less Congress at large, was aware of them. *See Morton v. Ruiz*, 415 U.S. 199, 230 (1974) ("[T]here is nothing in the legislative history to show that the Manual's provision was brought to the subcommittees' attention, let alone to the entire Congress."). Interior refers to a program that Senator Mundt sponsored for skills and training, but that program involved employment of Indians generally. *See* Pub. L. 85-186, 71 Stat. 468, 486 (1957) ("The industrial enterprise will employ *Indians* . . . .") (emphasis added). Interior's other citations do not establish any direct connection to Senator Mundt, much less any evidence that the Congress that passed Title VII was aware of them. Thus, even ignoring *Dawavendewa I*, Interior has not produced evidence of a legislative intent to exempt tribal preference programs. What the legislative history reveals is that Senator Mundt said that the Indian Preference exemption should protect Indian preferences, and the term Indian is widely understood to refer to Indians generally—not to specific tribes. To the extent that the legislative history provides any evidence of the scope of the Indian Preference exemption, it indicates the exemption only protects general Indian preferences.

C. Congress has not adopted Interior's position on tribal preferences.

Interior further argues that Congress ratified Interior's approval of tribal preferences in mineral leases because Congress never amended the Indian Mineral Leasing Act to reject those preferences. This argument fails. The question here is the proper interpretation of Title VII—not the interpretation of the Indian Mineral Leasing Act. And Congress has not amended the relevant sections of Title VII, nor suggested in any other way that it incorporated Interior's interpretation into Title VII. *Compare*

Dawavendewa I, 154 F.3d at 1123 ("The fact that Congress felt the need to pass the 1994 Amendment [of the ISDEAA] only bolsters the contention that general Indian preference policies were not intended to allow distinctions among different tribes."). Where Congress has not re-enacted a statute, the rule Interior cites simply does not apply. *See Ward v. CIR*, 784 F.2d 1424, 1430 (9th Cir. 1986) ("For the legislative reenactment doctrine to apply, Congress would have to have reenacted I.R.C. § 612 subsequent to 1970."); *Dutton v. Wolof and Abramson*, 5 F.3d 649, 655 (3d Cir. 1993) (repealing one section of a statute insufficient to trigger legislative reenactment doctrine). Even if the question were the proper interpretation of the IMLA, the relevant sections of the IMLA also have not been amended.[7] *See* 25 U.S.C. § 396a.

Further, there is no indication that Congress knew Interior approved tribal preferences in leases. Interior has failed to offer any evidence of its practice of approving leases with tribal preferences. Absent such evidence, there is no basis for this Court to assume Congress was aware of a practice not reflected in any statute or regulation. Thus, Interior's ratification argument fails—even if the relevant sections of either statute had been amended. *See Brown v. Gardner*, 513 U.S. 115, 121 (1994) (stating that there must be evidence of Congressional awareness); *SEC v. Sloan*, 436 U.S. 103, 119-20 (1978) ("We are extremely hesitant to presume general congressional

[7] Congress amended 25 U.S.C. § 396f to allow the Indian Mineral Leasing Act to apply to the Papago Indian Reservation in Arizona in 1955, and Congress added 25 U.S.C. 396g to approve subsurface storage of oil and gas in 1956. The Indian Mineral Development Act of 1982 does not appear to amend the IMLA. *See United States v. Navajo Nation*, 537 U.S. 488, 509 (2003) (treating the IMDA as a separate statute). And nothing in the IMDA indicates Congress passed the IMDA to protect tribal preferences.

awareness . . . based only upon a few isolated statements in the thousands of pages of legislative documents."); *United States v. Board of Comm'rs*, 435 U.S. 110, 134 (1978) (requiring evidence that Congress agreed with agency's interpretation); *Micron Technology, Inc. v. United States*, 243 F.3d 1301, 1311-12 (Fed. Cir. 2001) ("[T]his presumption . . . requires that Congress be aware of the existence of the agency's interpretation"); *Isaacs v. Bowen*, 865 F.2d 468, 473-74 (2d Cir. 1989) ("Mere reenactment is insufficient. It must also appear that Congress expressed approval of the agency interpretation.").

Interior also suggests that Congress acquiesced in Interior's approval of tribal preference provisions. Congressional acquiescence requires "overwhelming evidence" that Congress was aware of the agency practice. *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 170 (2001); *see also Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 493 (9th Cir. 2007). Interior has not provided any evidence, much less overwhelming evidence, that Congress was aware of the tribal preference provisions in leases Interior approved.

To the contrary, Congress has expressly articulated when it believes a tribal preference would further self-governance. In the Indian Self-Determination and Education Assistance Act ("ISDEAA"), Congress created a narrow exception permitting tribal preference ordinances to govern in contracts between a tribe and two federal agencies regarding programs or services provided to the tribe by federal law—and then only in instances where the contract benefits only one tribe. *See* 25 U.S.C. §§ 450(b)(j), 450e(c). Congress did not provide for tribal preference in any other contracts entered

into under that statute. *See* 25 U.S.C. § 450e(b). These contracts also expressly exclude contracts with private parties. *Demontiney v. United States*, 255 F.3d 801, 807 (9th Cir. 2001). The Ninth Circuit found this narrow statutory permission for tribal preference strengthened the EEOC's position that tribal preferences violate Title VII: "The fact that Congress now requires a narrowly-defined set of contracts to honor local tribal preference policies . . . shows us that when Congress wishes to allow tribal preferences, it adopts an appropriate amendment to the applicable statute." *Dawavendewa I*, 154 F.3d at 1123. If Congress at any point wanted to permit tribal preferences under Title VII, it would have expressly amended Title VII as it did the ISDEAA.

IV. Agency policy and practice indicates tribal preference is not protected or permissible.

Interior suggests that three historical documents support their interpretation of Title VII. Yet these documents fail to accurately represent the views of least two of the agencies involved. And the documents fail to present a complete portrait of discrimination based on tribal affiliation, as they fail to address the effect of tribal preferences on Indians from other tribes. In presenting these arguments, Interior also minimizes the significance of the EEOC's 1988 Policy Statement and the EEOC's role as the agency enforcing Title VII.

A. The EEOC's 1988 Policy Statement receives deference.

To the extent that Interior's motion frames this dispute as agencies offering competing interpretations of Title VII, administrative law dictates that the EEOC's position carry more weight. Interior argues that Peabody Coal's tribal preference is not

national origin discrimination—in fact, that it is not within the scope of Title VII at all. The EEOC, meanwhile, has made clear since 1988 that tribal preference constitutes national origin discrimination under Title VII. This Court should give appropriate deference to the EEOC's position.

There is no basis for deferring to Interior's interpretation of Title VII because, unlike the EEOC, Interior has no authority to enforce Title VII. "[C]ourts do not owe deference to an agency's interpretation of a statute it is not charged with administering or when an agency resolves a conflict between its statute and another statute." *Ass'n of Civilian Technicians, Silver Barons Chapter v. FLRA*, 200 F.3d 590, 592 (9th Cir. 2000). Agencies other than the EEOC do not receive deference for their interpretation of Title VII and EEOC regulations. *See IRS, Fresno Serv. Ctr. v. FLRA*, 706 F.2d 1019, 1023 (9th Cir. 1983) ("The Authority's interpretation of the provisions involved here extends beyond its designated area of responsibility and ventures into discrimination in federal employment, a field Congress explicitly has delegated to the EEOC.").

The EEOC's interpretation of Title VII, on the other hand, is entitled to deference. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975) (EEOC Guidelines "constitute '(t)he administrative interpretation of the Act by the enforcing agency,' and consequently they are 'entitled to great deference.'" (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-434 (1971)). And the Ninth Circuit has given deference to the EEOC on this issue: "We give the EEOC's Policy Statement due weight, and for reasons we make clear in the discussion which follows, we agree with

its conclusion that the Indian Preferences exemption does not allow discrimination based on tribal affiliation."[8] *Dawavendewa I*, 154 F.3d at 1121.

B. Other agencies also bar tribal preference as a form of discrimination.

The EEOC is not the only agency to ban discrimination based upon tribal affiliation. Other agencies also prohibit discrimination based upon tribal affiliation, undermining Interior's position that tribal affiliation discrimination is permissible.

Like the EEOC, the Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP"), which regulates federal contractors, prohibits discrimination based upon tribal affiliation. OFCCP regulations require contracts to include the following term: "Contractors or subcontractors extending such a preference shall not, however, discriminate among Indians on the basis of religion, sex, or tribal affiliation." 41 C.F.R. § 60-1.5(a)(7). When OFCCP adopted this regulation in 1977, it received several comments regarding tribal contracts offering a tribal preference. OFCCP responded as follows:

> To allow a tribal contractor to use the permissive Indian preference to discriminate against members of other Tribes would frustrate one of our basic objectives—to encourage the employment of American Indians generally. This purpose would be hindered were we to allow disparate treatment based on tribal affiliation. Further, we have not been referred to any specific provisions in the Executive Order or in other legislation which would suggest such separate treatment for tribal contractors.

[8] While the Ninth Circuit referred to the EEOC Guidelines regarding the Indian Preferences exemption, in doing so it adopted the EEOC's position that tribal preference is a form of national origin discrimination. *See Dawavendewa I*, 154 F.3d at 1119 & n.5 (relying on EEOC regulations defining national origin discrimination in determining that tribal preference constitutes national origin discrimination).

42 Fed. Reg. 3454, 3455(1977).

OFCCP's response demonstrates several weaknesses in Interior's position. The OFCCP, like the EEOC, understands its mandate as "encourag[ing] the employment of American Indians generally." *Compare* 1988 Policy Statement ("Congress intended to encourage the extension of employment opportunities to Indians generally . . . ."). The OFCCP was also unaware of any statute or Executive Order providing for tribal preference. At the very least, OFCCP's observation creates a disputed issue of fact as to whether Interior's practice of tribal preference was as widely known as Interior asserts.

OFCCP's position also provides direct support for the EEOC. OFCCP adopted the same distinction between permissible Indian preferences and impermissible tribal preferences, and OFCCP adopted its policy with Title VII in mind. OFCCP stated that its rules on Indian preference "are consistent with Section 703(i) of the Civil Rights Act of 1964 . . . ." 42 Fed. Reg. 3454, 3455 (1977).

Other agencies have similarly drawn a distinction between Indian preferences and tribal preferences. The Federal Highway Administration bars tribal preference based on a statute that permits Indian preference consistent with Title VII. 23 U.S.C. § 140(d); 23 C.F.R. § 635.117 ("Indian preference shall be applied without regard to tribal affiliation or place of enrollment."). The Department of Housing and Urban Development stated that Indian Housing Authorities ("IHAs") could not implement

tribal preferences.[9] 24 C.F.R. § 905.204 (1990) ("Alternate methods that provide for local tribal preference will not be approved. HUD will, however, consider for approval alternate methods that provide for local resident Indian preference . . . ."); *see also* 24 C.F.R. § 905.165(c)(4) (1994) ("[I]n no case may an IHA authorize or provide a preference for Indians . . . based on particular tribal affiliation or membership."). HUD later stated "IHAs and Tribal governments may not use local Tribal preferences . . . ." 57 Fed. Reg. 28240-01, 28242 (June 24, 1992).

These examples demonstrate the difference between Indian preference and tribal preference, and that other agencies, under comparable circumstances, have concluded that tribal preferences are not permissible. These agencies' positions that tribal preference constitutes impermissible discrimination undermine Interior's argument that there is a uniform understanding that tribal preference is permissible.[10]

C. Interior's examples of past agency practice carry little weight.

Interior cites three documents from the early 1970s in support of its position. None provides significant insight into the meaning of Title VII. Indeed, it is unclear what force Interior attributes to these documents. Interior provides no evidence that Congress was aware of the documents Interior now cites or that these documents in any way provide insight into the application of Title VII to Peabody Coal's tribal preference.

---

[9] HUD's position remained constant until Congress passed the Native American Housing Assistance and Self-Determination Act of 1996. *See* 63 Fed. Reg. 12334-01 (Mar. 12, 1998).

[10] Interior prohibited tribal preferences in many contracts under the ISDEAA until Congress amended the ISDEAA in 1994. *See, e.g.*, 48 C.F.R. § 1452.204-71 (1987).

Interior cites an unsigned EEOC conciliation agreement from 1972, attached as an exhibit to a U.S. Commission on Civil Rights hearing, for the proposition that the EEOC considered tribal preferences are permissible. But the agreement is unsigned, and any historical statements indicating the EEOC found the agreement acceptable are hearsay and lack foundation. As there appears to be no method for this conciliation agreement to be admissible evidence, it is not properly before this Court on summary judgment. *See* Fed. R. Civ. P. 56(c)(2).

In any event, the1972 conciliation agreement does not reflect the EEOC's policy on this issue. Conciliation agreements are not regulations, guidance, or any other form of binding agency policy. They are not vetted by the Commission or the Office of General Counsel. *See* 29 C.F.R. § 1601.24 (delegating conciliation authority to District Directors); EEOC Compliance Manual Vol. 1, § 60. They only resolve the specific dispute between the employer and the aggrieved individual(s), and they are not available to the public. *See* 42 U.S.C. § 2000e-5(b). Thus, even assuming the EEOC's District Director signed this conciliation agreement, it does not reflect Commission policy.[11]

The letter from the Department of Labor similarly lacks persuasive force. Issued by an Acting Assistant Solicitor, it is not a final, formal agency position. When the Department of Labor did formally address the question of tribal preference less than five years later, it banned discrimination based on tribal affiliation. 42 Fed. Reg. 3454, 3455 (1977). In doing so, it explicitly considered and rejected tribal preference in light of

[11] When the EEOC formally confronted the issue of tribal preferences, it issued the 1988 Policy Statement as formal guidance that clearly prohibited tribal preferences.

Title VII, reasoning that a tribal preference frustrates federal policy to "encourage the employment of American Indians generally." *Id.* This rationale is in stark contrast to the Acting Assistant Solicitor's letter, which wholly failed to consider the effect of a tribal preference on Indians from other tribes.

Interior also cites a report from the U.S. Commission on Civil Rights. However, the Commission's report did not address the effect of tribal preferences on Indians from other tribes. The report focused exclusively on the Navajo Nation, and the hearings culminating in the report took place in Window Rock, Arizona on the Navajo reservation. *See* Third Party Defendant's Exhibit 12, at 6-7. There is also no evidence that the Commission heard from any non-Navajo Indians regarding the tribal preferences. A report that focused solely on the Navajo Nation without regard to non-Navajo Indians and without discussion of the distinction between Indian preferences and tribal preferences casts no light on the application of Title VII to tribal preferences.

V. Interior's reliance on Indian law ignores the specific nature of this action.

Interior recites general principles of Indian law in framing its motion, but those principles fit poorly here. The EEOC agrees that Indian tribes are domestic dependent nations that possess attributes of sovereignty over their members and their territory. That is not in dispute. What is in dispute here is whether Title VII, a generally applicable federal law, prohibits a non-Indian employer from refusing to hire non-Navajo Native Americans. Applying Interior's principles of Indian law here to cabin the scope of Title VII and justify Peabody Coal's discrimination against Indians from other tribes would stretch those principles to situations they were never intended to reach.

In its efforts to place Peabody Coal's tribal preference in the context of federal Indian law, Interior emphasizes Congress's relationship with the Navajo Nation, the Navajo Nation's interest in self-sufficiency, and the involvement of Navajo mineral resources. But Interior paints an incomplete picture. Congress is also aware of its relationship with other tribes. For example, the Hopi, like the Navajo, were subject to "hunger, disease, poverty, and demoralization." Navajo-Hopi Rehabilitation Act, 64 Stat. 44, 44 (1950). And, with the Rehabilitation Act, Congress acted to remedy the plight of the Hopi as well as that of the Navajo. *See, e.g.*, 25 U.S.C. § 631. Interior also relies on Navajo economic self-sufficiency, but ignores the fact that utilizing a tribal preference rather than a general Indian preference causes economic harm to non-Navajo Indians, such as the Hopi. Interior cannot rely on the Rehabilitation Act to justify discrimination against Hopis. *See also Dawavendewa I*, 154 F.3d at 1121-22 ("[The Indian Preference exemption] compensate[s] for the effects of past and present unjust treatment, not in order to authorize another form of discrimination against particular groups of Indians."). And, while mineral resources are involved, nothing in the Indian Mineral Lease Act governs or was intended to govern employment relationships or tribal preferences. *See Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 178-79 (1989); *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 767 n.5 (1985). Interior's arguments thus do not shed any light on Title VII's application to Peabody Coal's tribal preference.

The proper legal principle to apply here—where a non-Indian corporation such as Peabody Coal is doing business in Indian country—is the rule that generally applicable

federal laws apply to non-Indians. *See Navajo Tribe v. N.L.R.B.*, 288 F.2d 162, 164 (D.C. Cir. 1961) (applying the National Labor Relations Act to a non-Indian company on the Navajo reservation); *United States v. Farris*, 624 F.2d 890 (9th Cir. 1980) superseded by statute, Indian Gaming Regulatory Act of 1988, Pub. L. No. 100-497, 102 Stat. 2467 (applying generally applicable federal law to non-Indians without further analysis); *see also United States v. Fiander*, 547 F.3d 1036, 1039-42 (9th Cir. 2008) (stating that treaty right exempted tribal member from statute of general applicability but did not exempt non-Indian co-conspirators). Title VII is a generally applicable law. *See N.L.R.B. v. Chapa De Indian Health Program, Inc.*, 316 F.3d 995 (9th Cir. 2003) (collecting statutes of general applicability such as the NLRA, OSHA, and ERISA). As such, it applies to non-Indians such as Peabody Coal, and neither the Navajo Nation nor Interior can excuse Peabody from complying with Title VII.

Interior suggests that applying Title VII to Peabody Coal's tribal preference would limit the Navajo Nation's sovereignty. Interior fails to recognize, however, that Peabody Coal is neither an arm of the Navajo Nation nor a part of an Indian tribe. The only relevant exception for non-Indians in Title VII is the Indian Preference exemption, and, as discussed above, it does not shield Peabody Coal's conduct.

Even if Peabody Coal were somehow able to rely on defenses based in Indian law, "[f]ederal laws of general applicability are presumed to apply with equal force to Indians. There are only three exceptions to this general principle." *United States v. Baker*, 63 F.3d 1478, 1484 (9th Cir. 1995) (citations omitted). The exceptions to

generally applicable laws would not protect Peabody Coal even if they applied here.[12] The Ninth Circuit describes the exceptions as follows:

> A federal statute of general applicability that is silent on the issue of applicability to Indian tribes will not apply to them if: (1) the law touches "exclusive rights of self-governance in purely intramural matters"; (2) the application of the law to the tribe would "abrogate rights guaranteed by Indian treaties"; or (3) there is proof "by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations."

Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1116 (9th Cir. 1985) (quoting *Farris*, 624 F.2d at 893-94). None of these exceptions excuses Peabody Coal from complying with Title VII's prohibition against national origin discrimination.

The purely intramural self-governance exception protects "self-governance in purely intramural matters." *Id.* The Ninth Circuit defines intramural matters to include matters "such as conditions of tribal membership, inheritance rules, and domestic relations." *Id.*; *see also Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 181 (2d Cir. 1996) ("In general, tribal relations with non-Indians fall outside the normal ambit of tribal self-government"). While the Ninth Circuit has not limited the exception to only those enumerated matters, it "allow[s] such exemptions only in those rare circumstances

---

[12] In *Dawavendewa II*, the Ninth Circuit considered the possibility that the Navajo Nation may raise the exceptions to generally applicable laws. 276 F.3d 1150, 1158-59 (9th Cir. 2002). However, the Court did not address the substance of those exceptions; it only stated that they were not properly before the court. *Id.* at 1159 ("Without the aide[sic] of supporting precedent, we reject Dawavendewa's invitation to ignore the Nation's plausible legal defenses."). The Ninth Circuit itself acknowledged that the exceptions applied to "situations in which statutes of general applicability do not apply to *Native Americans on tribal lands*." *Id.* at 1158 (emphasis added). Here, it is Peabody Coal—a non-Native American corporation—whose actions are the subject of this lawsuit.

where the immediate ramifications of the conduct are felt primarily within the reservation by members of the tribe and where self-government is clearly implicated." *Snyder v. Navajo Nation*, 382 F.3d 892, 895 (9th Cir. 2004) (exempting tribal police officers from FLSA because their work was not commercial).

Peabody Coal's tribal preference is not a purely intramural matter like tribal membership, inheritance, or domestic relations. Peabody Coal is a non-Indian corporation, and Peabody's exclusion of non-Navajo Native Americans does not involve a matter of Navajo self-governance. As the Ninth Circuit explained, "Preferential employment of Navajo Indians on a privately-owned facility, while certainly helpful to the tribe's employment problems, has little to do with increasing the tribe's capacity for self-governance." *Dawavendewa I*, 154 F.3d at 1123 (explaining why the ISDEAA does not protect private employment tribal preferences); *see also Chapa de Indian Health Program, Inc.*, 316 F.3d at 1000 (holding purely intramural self-governance exception did not apply to non-Indian corporation that served non-Indians). Therefore, the purely intramural self-governance exception does not apply, regardless of whether Peabody Coal acted based on a tribal ordinance.

The treaty rights exception also does not apply. Interior relies on the Navajo Nation's right to exclude, but that right is not directly implicated here. The EEOC does not seek to invalidate the Navajo Nation's tribal ordinance—only Peabody's actions are

at issue in this lawsuit.[13] And Title VII does not abrogate the right to exclude. Applying Title VII to Peabody Coal does not remove the Navajo Nation's right to exclude non-Navajos from its land; at most, it forestalls the Navajo Nation from enforcing a tribal preference requirement as a condition of Peabody Coal's entry on tribal land. *See Peabody IV*, 610 F.3d at 1079-80. This is not the type of abrogation needed to justify an exemption from generally applicable federal law. *See Solis v. Matheson*, 563 F.3d 425, 435 (rejecting application of treaty right to the FLSA because "there is nothing in the Medicine Creek Treaty directly on point discussing employment or wages and hours").[14] For example, the Seventh Circuit rejected the argument that a treaty right "to hunt, fish, and gather" exempted tribal warden-policeman because the treaty did not mention any "system for enforcing these rights, let alone any reference to the terms of employment of those hired to enforce it." *Reich v. Great Lakes Indian Fish and Wildlife Comm'n*, 4 F.3d 490. 493 (7th Cir. 1993). The Ninth Circuit has also held that a treaty right to exclude does not bar the application of federal law on tribal land.[15] *U.S. Dept. of*

---

[13] The Navajo Nation is only joined to give res judicata effect to any eventual judgment against Peabody. *Peabody IV*, 610 F.3d at 1079-80. The EEOC seeks no affirmative relief from the Navajo Nation.

[14] In *Solis*, the Ninth Circuit noted the absence of a tribal ordinance on the subject. 563 F.3d at 434. However, the Ninth Circuit did not hold that the existence of such an ordinance would satisfy the self-governance exception, and the cases cited above indicate that an ordinance that covers conduct by non-Indians against non-Indians does not fall within this exception.

[15] The Ninth Circuit specifically rejected the argument that the right to exclude prevented OSHA inspectors from entering tribal land, but the Ninth Circuit phrased the question to include the application of OSHA to a tribal business. See *Occupational Safety & Health Review Comm'n*, 935 F.2d at 185 ("The central question in this case is whether the general right of exclusion contained in this Treaty is sufficient to bar application of the

Labor v. Occupational Safety & Health Review Comm'n, 935 F.2d 182, 185-86 (9th Cir. 1991).

The legislative history exception also does not apply. Title VII reaches conduct on reservations. The Indian Preference exemption permits an Indian preference on and near reservations, indicating that Title VII otherwise applies. Similarly, Title VII exempts tribes from the definition of employer. These provisions, taken together, clearly indicate that Congress determined that, except for the actions of tribes as employers and for general Indian preferences, Title VII applies on reservations.

Title VII therefore applies to Peabody Coal's tribal preference. None of the exceptions that would apply to Indian tribes protects Peabody Coal's conduct, and, as discussed above, Title VII bars tribal preferences. Federal Indian law does not address or alter this result.

VI. Conclusion

Peabody Coal's tribal preference is a form of national origin discrimination under Title VII because it differentiates between Navajos and non-Navajo Native Americans based on their (or their ancestors') place of origin. Once discovery begins, the evidence may well demonstrate that Peabody Coal used proxies for national origin such as facial features and surnames to implement its preference. But discovery has not yet begun, and the evidence Interior offers does not justify summary judgment. Interior has not shown

---

Occupational Safety and Health Act to the Warm Springs mill."); *id.* at 187 ("Were we to construe the Treaty right of exclusion broadly to bar application of the Act, the enforcement of nearly all generally applicable federal laws would be nullified").

that the preference is a political classification rather than national origin discrimination. As such, the EEOC requests that this Court deny Interior's motion for summary judgment on the EEOC's claims and allow discovery to begin.

RESPECTFULLY SUBMITTED this 18th day of June, 2012.

MARY JO O'NEILL
Regional Attorney

ANDREA G. BARAN
Supervisory Trial Attorney

s/ James Driscoll-MacEachron
JAMES DRISCOLL-MACEACHRON
Trial Attorney

D'ONTAE D. SYLVERTOOTH
Trial Attorney

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Phoenix District Office
3300 N. Central Ave., Suite 690
Phoenix, AZ 85012

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I certify that on this 18th day of June, 2012, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

Paul E. Frye
Lisa M. Enfield
Frye Law Firm, P.C.
10400 Academy N.E., Suite 310
Albuquerque, NM 87111

Louis Denetsosie
Attorney General
Navajo Nation Department of Justice
P.O. Box 2010
Window Rock, Navajo Nation, AZ 86515

Attorneys for Rule 19 Defendant, the Navajo Nation

John F. Lomax, Jr.
Kathryn Hackett King
Snell & Wilmer, L.L.P.
400 East Van Buren Street
Phoenix, Arizona 85004-2202

Attorneys for Defendant Peabody Western Coal Co.

Edward J. Passarelli
Assistant Section Chief
Kristofor R. Swanson
Trial Attorney
U.S. Department of Justice
Env't & Natural Resources Division
Nature Resources Section
P.O. Box 663
Washington, DC 20044-0663

Attorneys for Third-Party Defendants Salazar and Echo Hawk

s/Robert Wisniewski
Robert Wisniewski