UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 12-17780

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellant,
v.
PEABODY WESTERN COAL COMPANY
and NAVAJO NATION,
Defendants-Appellees;

and

KEVIN K. WASHBURN, Assistant Secretary for Indian Affairs, and
SALLY JEWELL, Secretary of the Interior,
Third-Party Defendants-Appellees.

On Appeal from a Judgment of the United States District Court
for the District of Arizona, Civil Action No. 2:01-cv-1050-JWS

BRIEF OF DEFENDANT-APPELLEE THE NAVAJO NATION

NAVAJO NATION DEPARTMENT
OF JUSTICE
Harrison Tsosie, Attorney General
Paul Spruhan, Assistant Attorney General
P. O. Drawer 2010
Window Rock, AZ 86515
928-871-6343

FRYE LAW FIRM, P.C.
Paul E. Frye
Lisa M. Enfield, of Counsel
10400 Academy Rd., NE
Suite 310
Albuquerque, NM 87111
505-296-9400

Attorneys for the Navajo Nation

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JURISDICTIONAL STATEMENT

The District Court had jurisdiction under 28 U.S.C. § 1331. This appeal under 28 U.S.C. § 1291 is timely.

STATEMENT OF THE ISSUES

1. Did the District Court abuse its discretion in denying EEOC's motion to supplement the record ("Motion") with the declaration and notes of a former employee when (1) the Motion was untimely under *Fed. R. Civ. P.* 6(c)(2) and unaccompanied by any showing of excusable neglect as required by *Fed. R. Civ. P.* 6(b)(1)(B), (2) the case had been pending for 12 years, (3) the materials were based on EEOC's *1999* investigative file, (4) the Motion was filed the day before the hearing on dispositive summary judgment motions, (5) such motions had been pending for six months, and (6) the materials were wholly irrelevant to any issue presented in EEOC's Complaint and any issue presented in the dispositive motions?

2. Did the District Court err in holding that a Navajo-specific employment preference in a lease of Navajo coal within the Navajo Reservation, drafted and required by the Secretary of the Interior consistent with a Navajo law effectuating a treaty right and under the Secretary's congressionally delegated authority, is a lawful political distinction outside the scope of Title VII?

STATEMENT OF THE CASE

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

In its original Complaint and two Amended Complaints and throughout litigation spanning over a decade, EEOC has claimed that, as a matter of law, Peabody's adherence to Navajo-specific employment preferences required in a coal lease, drafted and approved by the Secretary of the Interior under authority delegated by Congress and consistent with a Navajo law enacted pursuant to Treaty, is national origin discrimination prohibited by Title VII. Literally the afternoon before the hearing on the dispositive motions, EEOC sought to change the theory of its own case, based on documents from its 1999 investigative file. The new theory was that Peabody was inconsistently implementing the very preference EEOC asserts is unlawful.

EEOC's original Complaint, filed in 2001, asserted that Peabody's adherence to Navajo-specific hiring preference provisions in its federally drafted and approved lease of trust resources violates Title VII of the Civil Rights Act of 1964. EEOC characterized its claim as one based on Peabody's "discriminat[ion] against non-Navajo Native Americans on the basis of their national origin by failing to hire qualified non-Navajo Native Americans," and "instead hir[ing] members of the Navajo Nation for the open positions." NNRE 64-66, ¶¶ 1, 12; *see id.* at ¶¶ 6, 10, 17.

The District Court granted Peabody's motion for summary judgment on the grounds that EEOC presented a nonjusticiable political question and that EEOC could not join the Navajo Nation, an indispensable party. *EEOC v. Peabody Coal Co.*, 214 F.R.D. 549 (D. Az. 2002) ("*Peabody I*"). This Court reversed, holding that EEOC could join the Nation under *Fed. R. Civ. P.* 19 for the limited purpose of binding the Nation to any judgment but only if EEOC sought no affirmative relief against the Nation. *EEOC v. Peabody Western Coal Co.*, 400 F.3d 774 (9th Cir. 2005) ("*Peabody II*"), *cert. denied*, 546 U.S. 1150 (2006). Consistent with EEOC's Complaint, this Court observed that "[r]esolving whether and how Title VII applies is a matter of statutory interpretation" and that "[t]he issues here are entirely legal." 400 F.3d at 784.

After the Supreme Court denied review, EEOC amended its Complaint to name the Nation as a defendant. It again stated that its claim that Peabody "discriminate[s] against non-Navajo Native Americans on the basis of their national origin by failing to hire qualified non-Navajo Native Americans" and "instead hir[ing] members of the Navajo Nation for the open positions." NNRE 58-61 ¶¶ 1, 13; *see id.* ¶¶ 6, 11, 17. The Nation moved to dismiss for lack of subject matter jurisdiction because the Nation's sovereign immunity was not abrogated in Title VII, sovereign immunity implicates subject matter jurisdiction, and Rule 19 could not lawfully be used to expand the court's subject matter jurisdiction or abridge the Nation's immunity from

suit. The Nation also urged that EEOC's claim could not proceed in equity and good conscience without joinder of the Secretary of the Interior, whom EEOC could not join. The Nation's motion relied on extra-pleading materials, including declarations of former Secretary Stewart Udall and the Nation's economic development officials. NNRE 39-57.

EEOC requested multiple extensions of time to respond to the Nation's motion, and the District Court granted them all. Dkt. 90, 92, 95, 108, 109, 114. The District Court stated it would consider additional requests upon a proper showing, Dkt. 108 at 10, but EEOC never made any. Along with its extension motions, EEOC sought and was granted broad discovery on matters pertaining to leases of Navajo Reservation land. Dkt. 95, 108. EEOC propounded discovery on the Nation, Dkt. 111, to which the Nation responded, Dkt. 117. EEOC took Udall's deposition. NNRE 20. It sought no further discovery but instead filed 16 exhibits with its response to the Nation's motion. Dkt. 120.

The District Court converted the Nation's motion to one for summary judgment, ruled that EEOC sought injunctive relief against the Nation, and dismissed. *EEOC v. Peabody Western Coal Co.*, No. CV 01-01050-PHX-MHM, 2006 WL 2816603 at *5, *7 (D. Az. Sept. 30, 2006) ("*Peabody III*"). The District Court also concluded that Title VII prohibited EEOC from suing the Secretary, an indispensable

party. *Id.* at *12. The District Court credited Udall's unrebutted testimony that the tribe-specific employment preference provision of the Navajo and Hopi Rehabilitation Act of 1950 ("Rehabilitation Act"), 25 U.S.C. § 633, applies and authorizes Navajo-specific preferences in leases of Navajo minerals, and ruled that the Secretary needed to be joined because the Secretary administers as trustee Navajo Reservation land, drafted and approved the Peabody leases, retains the sole authority to cancel them for breach, approved all 326 other leases of Navajo trust land having Navajo employment preference requirements, and has a nation-wide policy of requiring or permitting tribe-specific preferences in all Indian mineral leases. *Id.* at *12-*17.

EEOC appealed. This Court observed that EEOC's Amended Complaint could be read to seek affirmative relief against the Nation but ruled that the District Court could disregard such a claim because the Nation would be bound by any injunction "only in the sense that it is res judicata as to the Nation, not in the sense that the injunction affirmatively requires the Nation to do something." *EEOC v. Peabody Western Coal Co.*, 610 F.3d 1070, 1080 (9th Cir. 2010) ("*Peabody IV*"), *cert. denied*, 132 S. Ct. 91 (2011). This Court also ruled that the Secretary was a required party under Rule 19(a). *Id.* at 1081-83. Recognizing that EEOC could not join the Secretary, this Court examined whether the action could proceed among the existing

parties or should be dismissed. It held that EEOC's claim against Peabody for an injunction could proceed, but that the claim for damages had to be dismissed, reasoning that Peabody and/or the Nation could implead the Secretary under *Fed. R. Civ. P.* 14(a) and the Administrative Procedure Act with respect to the claim for injunction but not for damages. *Id.* at 1084. This Court plainly sought the benefit of the Secretary's position on the legality of the hiring preference. *Id.* at 1087.

The Nation and Peabody petitioned for rehearing. These petitions were denied, and the Supreme Court denied review.

On remand, EEOC filed its Second Amended Complaint which reiterated its claim that Peabody "discriminated against . . . non-Navajo Native Americans on the basis of their national origin by failing to hire qualified non-Navajo Native Americans . . . because they were Native Americans who were not members of the Navajo Nation," and "instead hired members of the Navajo Nation." EEOCRE 687-91 ¶¶ 1, 13; *see id.* ¶¶ 6, 11, 17. The Nation refiled the entirety of its 2006 motion to dismiss to preserve all of its positions for possible *en banc* or Supreme Court review and again sought dismissal because the Peabody lease preferences did not violate Title VII. Dkt. 196. Peabody impleaded the Secretary and Assistant Secretary of the Interior and counterclaimed against EEOC. *See* EEOCRE 670.

The District Court granted EEOC's Motion to Dismiss Peabody's counterclaim,

EEOCRE 146, and denied the Nation's refiled motion to dismiss "without prejudice to renewal . . . in connection with the Secretary's explication of the preferences." NNRE 10. The Secretary moved for summary judgment as to Peabody's third-party complaint, EEOCRE 473, arguing that EEOC's Title VII claim against Peabody was meritless because a preference premised on tribal membership is a political distinction falling outside the scope of Title VII, not one of national origin. *See* NNRE 2. The Nation responded, concurred in the Secretary's position, and renewed its 2006 motion to dismiss. Dkt. 251. Both motions were fully briefed, and all parties relied on matters outside the pleadings. Both motions refuted EEOC's sole claim that the Navajo employment preferences were *per se* national origin discrimination.

The District Court scheduled oral argument six months after the Secretary's motion was filed. Dkt. 268. Two weeks before argument it summarized the undisputed and important material facts. EEOCRE 142-45. These included the facts that Peabody's leases contain provisions requiring Peabody to give members of the Navajo Nation an employment preference, EEOCRE 143; *see* EEOCRE 489, 520-21 (Navajo preference provisions in Peabody leases); Navajo law has required since 1985 that employers on the Reservation "give preference to Navajo tribe members"; Interior both drafted and approved the leases provisions, and required inclusion of the hiring preference language; Interior has been approving mineral leases with tribe-

specific preferences since before the passage of Title VII; Interior has form mining contracts providing for tribe-specific preferences; and the Secretary approved amendments to the Peabody leases on December 9, 2011 with no change to the employment provisions during the pendency of EEOC's suit. EEOCRE 143-45.

The afternoon before argument, EEOC filed a Motion for Leave to Supplement the Record with a declaration of one of its employees and her 1999 interview notes. EEOCRE 105. This motion was untimely under *Fed. R. Civ. P.* 6(c)(2), and EEOC made no showing of excusable neglect as required by Rule 6(b)(1)(B). The materials were also irrelevant because they concerned not the claim asserted by EEOC that the Navajo preference is *per se* national origin discrimination but only Peabody's consistency in *implementing* that challenged preference.

The District Court denied EEOC's motion to supplement because it was untimely and irrelevant. EEOCRE 23. It held that the preference provisions were political distinctions falling outside of Title VII, granted the Nation's refiled motion (treated as one for summary judgment), granted the Secretary's Motion for Summary Judgment, and dismissed EEOC's complaint with prejudice. *Id.* at 22. EEOC appeals.

Statement of Facts

A. *Congress Has Treated the Navajo Nation Uniquely Concerning On-Reservation Employment.*

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"); *see United States v. Wheeler*, 435 U.S. 313, 324 n.20 (1978). The 1868 Treaty confirms the fundamental power of the Nation to exclude and the correlative power to condition the entry of nonmembers seeking to conduct business within Navajo territory. 1868 Treaty, Art. II (cited in *Williams v. Lee*, 358 U.S. 217 (1959)); *see generally Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 811-12 (9th Cir. 2011). In this case, both the United States and the Nation require such persons to hire qualified Navajo workers.

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. *See, e.g., Ramah Navajo School Bd. v. Bureau of Rev.*, 458 U.S. 832, 834 & n.1 (1982). Thus, when Interior 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.

In 1947 Congress appropriated $1.5 million to provide employment for Navajo

and Hopi Indians both on and off their reservations. Act of Dec. 19, 1947, Pub. L. 80-390, 61 Stat. 940. Two years later, Congress authorized a land exchange between the Nation and the State of Utah, providing 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. 81-302, 63 Stat. 695.

By the 1950s the Bureau of Indian Affairs had initiated an industrial development program designed to induce manufacturing companies to locate near reservations and hire Indians from those reservations. The first two projects under that program were focused on Navajo employment: a furniture plant at Gamerco, New Mexico, and an electronics plant in Flagstaff, Arizona. *E.g.*, EEOCRE 180. Both of these projects adopted Navajo-specific hiring preferences, and Interior reported to Congress about the success of these initiatives from a Navajo employment perspective. *See* EEOCRE 590 (excerpt from the 1958 *Navajo Yearbook*, provided to Congress under the Rehabilitation Act, 25 U.S.C. § 632).

In 1950 Congress took a unique and more comprehensive approach when it enacted the Rehabilitation Act. "For the first time, there [was] placed before the 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.

One focus of the Rehabilitation Act was the development of the Nation's natural resources, including specifically coal. 25 U.S.C. § 631; *Austin v. Andrus,* 638 F.2d 113, 114 (9th Cir. 1981). The Act authorized the Secretary to issue mineral leases. 25 U.S.C. § 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; 95 Cong. Rec. 9499-9501 (1949) (remarks of Rep. D'Ewart and Rep. Patten).

The Rehabilitation Act also required tribe-specific employment preferences on all projects under the Act "whenever practicable." 25 U.S.C. § 633. Consistent with the Secretary's position below, Interior has always construed the Rehabilitation Act as applying to business leases on the Navajo and Hopi reservations. *See* NNRE 39-40 (Udall Decl.); *First Mesa Consol. Villages v. Phoenix Area Dir.*, 26 IBIA 18, 27-28 & n.14 (1994); Dkt. 231, Ex. 3-5, 8-11 (examples of business leases approved by the Department under the Rehabilitation Act, all of which require Navajo employment preference). The Interior Department also withdrew federal land specifically to

"provide *off-reservation* employment for Navajo Indians" under the Rehabilitation Act. 22 Fed. Reg. 4417 (June 22, 1957) (emphasis added). From 1956 to 2001, both mineral and surface leases of Navajo land were deemed by Interior to be authorized by the Rehabilitation Act, among other statutes.[1]

Congress was aware that a robust Navajo economy would not be built in ten years. *E.g.*, S. Rep. No. 81-550 at 7. Thus, Congress has amended and repealed parts of the Rehabilitation Act both before and after the passage of Title VII in 1964,[2] but has left intact the provision authorizing tribe-specific preferences for the Navajo.

The Navajo situation was examined in depth again in 1975. United States Comm'n on Civil Rights, *The Navajo Nation: An American Colony* (1975); *see* NN Add. 61-76; EEOCRE 628-50. The Commission found that the Navajo were still "the poorest of America's poor." NN Add. 64. 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

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[1] *See* 19 Fed. Reg. 2393 (April 23, 1954) (codified at 25 C.F.R. § 171.30) (excepting leases for oil and gas and other minerals from general leasing regulations); 21 Fed. Reg. 2562 (April 19, 1956) (deleting exclusion for mineral leasing from the general leasing regulations promulgated under authority of, *inter alia*, the Rehabilitation Act); 66 Fed. Reg. 7068, 7112 (Jan. 22, 2001) (codified at 25 C.F.R. § 162.103) (excluding mineral leasing from general leasing regulations).

[2] Act of Aug. 23, 1958, Pub. L. 85-740, 72 Stat. 834; Act of June 11, 1960, Pub. L. 86-505 § 1, 74 Stat. 199; Act of Dec. 22, 1974, Pub. L. 93-531 § 26, 88 Stat. 1723; Act of Aug. 22, 1996, Pub. L. 104-193, tit. I § 110(u), 110 Stat. 2175.

apprentices be Navajo, *id.* at 71, 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," NN Add. 75; *accord id*. at 71. The Commission recommended that the Bureau of Indian Affairs ("BIA") "issue an unequivocal statement of its intent to enforce up to 100 percent Navajo preference in employment by Federal contractors on and near the reservation" and that the Secretary "put the full strength of that office behind tribal efforts to renegotiate inadequate preferential employment provisions of existing leases and contracts between the tribe and outside enterprises to reflect the Department of Labor opinion." NN Add. 74-75 (emphases deleted).

Interior 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 291 ¶ 19, and that form was still in use when the principal treatise on Indian mineral leasing was published in 1977. *See* EEOCRE 275-92. Interior's current general leasing regulations continue this policy of permitting tribe-specific employment preference nationwide. 77 Fed. Reg. 72,440, 72,446, 72,472 (Dec. 5, 2012) (promulgating 25 C.F.R. § 162.015).

B. *The Peabody Leases Were Negotiated and Drafted by Interior as the Centerpiece of the Resource Development Program Under the Rehabilitation Act.*

At the outset of this lawsuit, EEOC was presented with affidavits of Peabody witnesses showing that Interior drafted the leases. *Peabody I*, 214 F.R.D. at 555; Dkt. 41 (Sullivan Affid. ¶¶ 9, 26; Young Affid. ¶ 6). The declaration and deposition testimony of Secretary Stewart Udall, who oversaw the Peabody leases and related developments, confirms that the Peabody leases were negotiated and drafted by Interior and were the centerpiece of the Rehabilitation Act's resource development program. This Court itself has determined that the Rehabilitation Act provided the foundation for the Peabody leases. *Austin*, 638 F.2d at 114. In *Peabody IV*, this Court determined it was undisputed that Interior had drafted the leases and insisted on Navajo employment preferences. 610 F.3d at 1075, 1081, 1084.

Secretary Udall attested that as trustee for the Nation he was personally involved in the Peabody lease deliberations, 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, and the Department understood the Rehabilitation Act to permit, and the trust duty to require, Navajo-specific employment preferences for businesses locating on the Navajo Reservation. NNRE 39-40 (Udall Decl.). He also testified that

the Navajo preference provisions were one of the most significant provisions in the Peabody leases for which the Nation had bargained. *Id.* (Udall Decl. ¶¶ 4-7); NNRE 32 (Udall Dep. 43-45).

Negotiations for the Peabody leases were "done by Interior people" and the leases themselves were drafted by a team of people at the Department. NNRE 29, 34 (Udall Dep. 33, 51). Consistent with *Austin*, Udall testified that the Peabody leases were pursued under the Rehabilitation Act, which was "really a charter in effect for policies to enhance the economic future of both [the Navajo and Hopi] tribes," and covered any important economic development on the Navajo and Hopi Reservations. NNRE 31-32 (Udall Dep. 38, 44). Secretary Udall explained that the trust duty applied 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. NNRE 32. He testified that tribal resources were very important to Congress and that the Act's employment preferences applied specifically to the Peabody coal leases. NNRE 32, 36-37. "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." NNRE 32 (Udall Dep. 45). Secretary Udall explained that the Act "provided for special reasons . . . for the [tribe-specific

employment] preference on those reservations. . . . Congress wrote [the Rehabilitation Act] and it was my job to carry it out." NNRE 37 (Udall Dep. 63).

Notwithstanding any lease terms to the contrary, only the Secretary, and not the Nation, may cancel an Indian lease for noncompliance. *Peabody IV*, 610 F.3d at 1081; *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 (July 8, 1996) (promulgating 25 C.F.R. § 211.54, citing *Yavapai*). The Secretary's approval is required for any modification of lease terms. *Peabody IV*, 610 F.3d at 1081.

EEOC presented no evidence to contradict the affidavits presented by Peabody in 2002, Secretary Udall's unequivocal and consistent testimony, the testimony of the Navajo records custodians, this Court's observations in *Austin* in 1981, or this Court's determinations in *Peabody IV* regarding the Secretary's role in and statutory authority underlying the Peabody leases, the Secretary's policy to promote tribe-specific preferences in leasing reservation land, and the Secretary's consistent policy to permit or require Navajo-specific preference in leases of Navajo trust land.

C. *The Department of the Interior, Department of Labor, Commission on Civil Rights, and EEOC Itself Have Approved Navajo-Specific Employment Preferences.*

There is no dispute that Interior has approved leases with tribal employment preferences both before and after the passage of Title VII. NN Add. 67 n. 157 (100

such leases as of 1975); EEOCRE 307 (uranium lease), 318 (vanadium), 322 (copper), 326 (vanadium), 335 (Interior form lease for sand, gravel, pumice, defining "Indian employment" as tribe-specific), EEOCRE 283, 291 ¶ 19 (1957 Interior form lease for oil and gas, in effect through at least 1977, defining "Indian labor" as tribe-specific). For the Navajo Nation alone, there are 326 such leases. NNRE 41-55.

Interior regulations have prescribed lease forms which contain tribe-specific employment preferences. EEOCRE 286 ¶ m, 291 ¶ 19; 25 C.F.R. § 211.57 (2011). Tribe-specific employment preferences are not limited to mineral leases, *see* 77 Fed. Reg. 72,440, 72,446, 72,472 (Dec. 5, 2012) (promulgating 25 C.F.R. § 162.015), nor is Interior alone in implementing or approving Navajo-specific hiring preferences.

EEOC itself approved the adoption of a Navajo tribal employment preference provision by a private company located on the Navajo Reservation. In 1972, at the request of the Nation and Interior, EEOC investigated that company's employment practices and held a series of meetings culminating in an agreement known as the "August 1, 1972 Navajo Preferential Employment Program." EEOCRE 602. EEOC accepted the terms of the conciliation agreement, which provided that the agreed-upon Navajo-specific preference did *not* violate Title VII. *Id.* at 603, 616 (conciliation agreement); *see* NN Add. 68-69.

In 1973, the United States Department of Labor informed the Navajo Nation

that it could, consistent with Title VII, append to federally-assisted construction contracts bid conditions that required the hiring of an all-Navajo workforce. EEOCRE 618-27. The Labor Department even stated that it would have no objection "to even stronger language" than that in the Nation's draft provision. *Id*. at 620.

The 1975 report of the United States Commission on Civil Rights found that at least 100 leases of Navajo land included a Navajo employment preference provision. NN Add. 67 n.157, 72. It reported that Navajo-specific employment guidelines "were approved by the Solicitor's Office of the Department of Labor as a legal interpretation of Navajo rights under Title VII of the Civil Rights Act of 1964." *Id.* 71. It applauded the EEOC for brokering a conciliation agreement with the Salt River Project and its contractors requiring Navajo employment preferences. *Id.* 67-70. As stated above, *supra* at 13, the Commission recommended that the BIA enforce up to 100 percent Navajo preference in federal contracts and the Secretary to assist forcefully the Nation in strengthening the Navajo preference provisions in existing agreements with private businesses as the Nation, with the approval of the Department of Labor, was including in all new agreements "in accord with Title VII." NN Add. 74-75 (emphases omitted).

D. *All Leases of Navajo Land Require Tribal Preference in Employment.*

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 on trust lands in a Reservation the size of West Virginia, are typically approved under both the Rehabilitation Act and the 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. Dkt. 231 Ex. 1-11. All 326 business leases on the Navajo Reservation require Navajo-specific hiring preference, and Interior approved them all. NNRE 41-55; *accord Peabody I*, 214 F.R.D. at 562 (Secretary approved Navajo employment preference provision in Peabody leases in 1999); Interior's Statement of Uncontested Material Fact No. 7, EEOCRE 659 (same in 2011).

These lease approvals also conform to Navajo law. A Navajo law enacted in 1970 pursuant to the Nation's power to exclude requires both compliance with Navajo law and also the continuing validity of leases for one to conduct business on the Reservation. 5 N.N.C. §§ 401, 403 (2005) (NN Add. 21). In 1985, the Nation supplemented federal efforts to ensure Navajo hiring preferences by codifying its employment preference guidelines in the Navajo Preference in Employment Act

("NPEA"), 15 N.N.C. §§ 601-19 (2005) (NN Add. 22-26). Although Navajo employment on the Reservation has improved since 1950, it still hovers around 50%. NNRE 57.

The NPEA requires that employers doing business within the territorial boundaries of the Navajo Nation give preference in employment to Navajos. 15 N.N.C. § 604(A)(1) (2005) (NN Add. 24). "Navajo" is defined as any enrolled member of the Navajo Nation. *Id.* § 603(D) (NN Add. 23).

SUMMARY OF THE ARGUMENT

The District Court did not abuse its discretion in denying EEOC's motion to supplement the record, which was filed the afternoon before the hearing on dispositive motions and thus untimely under Rule 6(c)(2), was unaccompanied by any showing of excusable neglect as required by Rule 6(b)(1)(B), contradicted the allegations of EEOC's Complaint and Amended Complaints, and sought to interject factual matter that was wholly irrelevant to the claim litigated by EEOC for twelve years. This case, as framed by EEOC's complaints and the parties' briefing over that period, concerns the legal question of whether the tribe-specific hiring preference in the Peabody leases reflects a lawful political distinction or an illegal *per se* national origin discrimination, not whether Peabody's implementation of that preference, assuming its validity, was imperfect. Consequently, over one-third of EEOC's

argument (EEOC Br. 44-57) predicated on these rejected materials and this new, unpled theory is irrelevant to this case and should be rejected.

On the only issue properly advanced by EEOC, the record establishes that the hiring preference in the Peabody leases is based on a political distinction and is thus outside the ambit of Title VII. EEOC's dogged reliance on the first *Dawavendewa* opinion of this Court, *Dawavendewa v. Salt River Proj. Ag. Impr. & Power Dist.*, 154 F.3d 1117 (9th Cir. 1998) ("*Dawavendewa I*"), *cert. denied*, 528 U.S. 1098 (2000), is misplaced. The lease preference is precisely what the *second Dawavendewa* opinion of this Court contemplated as potentially lawful. *See Dawavendewa v. Salt River Proj. Ag. Impr. & Power Dist.*, 276 F.3d 1150, 1157-59 (9th Cir.) ("*Dawavendewa II*"), *cert. denied*, 537 U.S. 820 (2002).

The Secretary of the Interior, the Department of Justice, and the Solicitor General have consistently taken the position that tribe-specific hiring preferences in a lease of tribal trust land, approved by the Secretary, and in furtherance of a tribal law enacted pursuant to a fundamental right confirmed in a treaty with the United States, is a political preference not prohibited by Title VII. The Labor Department and EEOC itself approved Navajo-specific preferences after Title VII was enacted. The District Court's holding on this issue should be affirmed.

ARGUMENT

I. STANDARD OF REVIEW; TREATY AND STATUTORY CONSTRUCTION.

A. Denial of EEOC's Untimely Motion to Supplement Is Reviewed for Abuse of Discretion.

The District Court's denial of EEOC's untimely motion to supplement the record on summary judgment is reviewed for abuse of discretion. *See In re Veritas Software Corp. Sec. Litig.*, 496 F.3d 962, 973-74 (9th Cir. 2007). Under this standard, this Court reverses 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), and may affirm on any basis supported by the record, *Meaux v. Northwest Airlines*, 490 Fed. Appx. 58, 60 (9th Cir. 2012).

B. The Grant of Summary Judgment Is Reviewed *De Novo*.

A grant of summary judgment is reviewed *de novo*, viewing the record in the light most favorable to the non-moving party and determining whether there are any genuine issues of material fact and whether the district court correctly applied the law. *Jackson v. City of Bremerton*, 268 F.3d 646, 650 (9th Cir. 2001). Material facts are those which may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Because EEOC raises no genuine issue on whether the

Navajo hiring preference is a political distinction outside the ambit of Title VII, this Court need only determine the correctness of the lower court's legal conclusion that it is, and may affirm on any basis supported by the record. *See USA Petroleum Co. v. Atlantic Richfield Co.*, 13 F.3d 1276, 1279 (9th Cir. 1994).

C. The Applicable Treaties, Statutes and Rules Must Be Construed in Favor of the Navajo Nation.

Indian treaties and statutes intending to benefit the tribes should be generously construed to comport with federal policy of encouraging tribal independence and tribal notions of sovereignty. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 152 (1982); *Artichoke Joe's Calif. Grand Casino v. Norton*, 353 F.3d 712, 729 (9th Cir. 2003), *cert. denied*, 543 U.S. 815 (2004). Ambiguous provisions in federal statutes are to be interpreted in favor of tribes, and doubtful expressions of legislative intent must be resolved in their favor. *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985); *Artichoke Joe's*, 353 F.3d at 730.

Only Congress may abrogate treaty rights of Indian nations, and its intent to do so must be expressed with clarity because "Indian treaty rights are too fundamental to be easily cast aside." *United States v. Dion*, 476 U.S. 734, 739 (1986). Thus, federal statutes of general applicability do not abrogate treaty rights, and executive agencies such as EEOC have no power to abrogate any fundamental rights of an Indian tribe. *United States v. Washington*, 641 F.2d 1368, 1371 (9th Cir. 1981), *cert.*

denied, 454 U.S. 1143 (1982); *Timpanogos Tribe v. Conway*, 286 F.3d 1195, 1203 (10th Cir. 2002); *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1117 (9th Cir. 1985) (court presumes that Congress does not intend to abrogate rights guaranteed by Indian treaties when it passes laws of general applicability). Without a clear and express indication of congressional intent, courts must tread lightly in considering abrogation of a fundamental right of an Indian tribe. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978). The Nation's treaty-confirmed right to exclude and to condition the entry of nonmembers seeking to enter to do business is one such fundamental right. *See supra* at 9.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN REJECTING EEOC'S UNTIMELY MOTION TO SUPPLEMENT AND ITS ATTEMPT TO ADVANCE AN ENTIRELY NEW CLAIM.

A. EEOC's Motion Was Properly Rejected Below as Untimely and Irrelevant.

1. The District Court Did Not Abuse Its Discretion in Rejecting EEOC's Untimely Motion, Which Was Unsupported by Any Claim of Excusable Neglect.

EEOC's motion was filed the afternoon before argument on summary judgment. EEOC sought to supplement the record with the declaration of its employee, Lori Barreras, and her interview notes taken in *1999*. Its motion violated Rule 6(c)(2), which requires that such affidavits must be filed at least seven days prior to the hearing. The Motion made no showing that its tardy filing was the

product of excusable neglect, as required by Rule 6(b)(1)(B). EEOC only urged that the declaration would not be unfairly prejudicial because the parties could address the new facts at argument the next day. EEOCRE 108. The new materials signaled an about-face: instead of arguing that the Navajo hiring preference in Peabody's leases is unlawful as a strictly legal matter, EEOC was attempting to show as a factual matter that in 1999 Peabody was not consistently abiding by the very lease requirement EEOC assails as unlawful.

In denying the Motion, the District Court observed that the case had been pending since 2001, the Secretary's summary judgment motion had been pending for six months, the Nation's dispositive motion had already been fully briefed in an earlier stage of the litigation and had been refiled four months before EEOC filed its Motion, the parties had ample time to develop the record and fully respond to the issues raised, the information related to activities from 1998 and earlier, and it was available to EEOC when it prepared and filed its brief. EEOCRE 23. Observing also that the information was not relevant because EEOC could not recover damages, the District Court denied EEOC's request as untimely.

The untimeliness of the Motion was sufficient grounds to deny it. *Wood v. Santa Barbara Chamber of Commerce, Inc.*, 705 F.2d 1515, 1519 (9th Cir. 1983), *cert. denied*, 465 U.S. 1081 (1984). EEOC had the burden of showing excusable

neglect. *See Veritas*, 496 F.3d at 973-74. EEOC did not even attempt to do so, and that failure also compels affirmance. *Wood*, 705 F.2d at 1519 (affirming rejection of late-filed affidavit under Rule 6 where movant made no showing of excusable neglect); *Manzano v. California Dep't of Motor Veh.*, 467 Fed. Appx. 683, 685 (9th Cir. 2012) (no excusable neglect under Rule 6 when neither motion below nor appellate brief contended that any of the excusable neglect factors were satisfied). Requiring basic compliance with Rule 6 surely cannot constitute an abuse of discretion.

To show excusable neglect, EEOC was required to show that its eleventh-hour and allegedly "potentially outcome-determinative" proffer of its own notes, EEOC Br. 57, held no danger of prejudicing Peabody, the Secretary, and the Nation; address the length of the delay and the potential impact on the proceedings; demonstrate its good faith in bringing the Motion; and, most critically, justify the reason for the delay and state whether it was in EEOC's reasonable control. *Veritas*, 496 F.3d at 973. It is little wonder why EEOC did not attempt this exercise; it would have been futile. *See, e.g., Veritas, supra* (affirming rejection of untimely filing notwithstanding short length of delay and lack of prejudice to other parties when the stated reason for delay did not constitute "a compelling showing of good cause"). Indeed, if EEOC truly thought that the 1999 materials were outcome determinative, its attempt to interject

them into the proceedings less than a day before argument on dispositive motions would call into question EEOC's good faith in bringing the Motion, the final *Veritas* factor. *See SEC v. Platforms Wireless Int'l Corp.*, 617 F.3d 1072, 1100-01 (9th Cir. 2010); *Celle v. Filipino Reporter Ent., Inc.*, 209 F.3d 163, 175-76 (2d Cir. 2000) (rejecting attempt to "ambush" trial court with belated objections).

2. The District Court Also Correctly Ruled that EEOC's 1999 Notes Are Irrelevant.

The court below also correctly ruled that the Barreras affidavit and her 1999 notes are irrelevant to any claim that EEOC has made in this case. Indeed, EEOC apparently attempts to shift its claim from one attacking the validity of the Navajo-specific hiring preference to one attacking Peabody's implementation of it, *i.e.*, that Peabody was lax in verifying that the applicants it hired were actually members of the Navajo Nation. EEOC's newly minted theory is inconsistent with the claim EEOC has pursued for 12 years, this Court's reasoning for requiring the Nation and the Secretary to be joined, the two remands of this Court, and the claim that all parties briefed on summary judgment below.[3] *See, e.g., Peabody II*, 400 F.3d at 784 (whether and how Title VII applies is matter of statutory interpretation; "[t]he issues

[3] *See, e.g., supra* at 2-3, 6; EEOCRE 687-91, ¶¶ 1, 6, 13, 17. That claim is the only one EEOC has briefed. *E.g.*, Dkt. 42 at 11 (EEOC's claim "presents only a matter of statutory interpretation"); Brief of EEOC as Appellant, No. 02-17305 (9th Cir. Mar. 7, 2003), at 5 ("Peabody's leases require that it discriminate . . . by giving preference to [Navajo] tribal members"), NNRE 72; Dkt. 213 at 2, 16, 28.

here are entirely legal"); *Peabody IV*, 610 F.3d at 1087 (remanding for consideration of the Secretary's position on the "legality of the employment preferences"). It would make absolutely no sense for this Court to have required joinder of the Navajo Nation and the Secretary if EEOC's real claim is not that the Navajo hiring preference in the Peabody leases is unlawful, but only that Peabody is not consistently abiding by it.

Having been alerted to the District Court's recitation of the undisputed material facts, EEOCRE 142-45, and likely concerned with the Secretary's persuasive defense of the preference requirement in the Peabody leases, EEOC simply tried to raise a new, unpled, claim the day before argument on dispositive motions. The District Court's rejection of that tactic on relevancy grounds was an eminently sound exercise of its wide discretion. *See Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 988 (9th Cir. 2007) (rejecting attempt to interject new theory of employer liability "for the first time in opposition to a summary judgment motion").

As the District Court noted, EEOC is precluded by *Peabody IV* from obtaining any damages from Peabody. EEOCRE 23. EEOC's contention that Peabody's assertedly imperfect implementation of the Navajo-specific hiring preference could affect the terms and duration of an *injunction*, EEOC Br. 54, broadly misses the mark. First, requiring Peabody by injunction to rigorously enforce the Navajo-specific hiring preference would be directly contrary to EEOC's only claim, that this very

preference violates Title VII. Second, even if EEOC's hypothetical claim for an injunction on Peabody's inconsistent implementation of the preference were part of *this* case, EEOC's implicit assumption that it would be entitled to an injunction based on Peabody's alleged actions *over thirteen years ago* is unsound. EEOC would not only have to prevail on the merits of that hypothetical claim, but it would need to prove, among other things, that, absent an injunction, it would be substantially, immediately and irreparably injured and that an injunction, more than a decade after the alleged inconsistent application of the preference, is necessary. *See, e.g., Montana v. BNSF Ry. Co.*, 623 F.3d 1312, 1317 n.3 (9th Cir. 2010). Whether EEOC could make such a showing on its hypothetical claim is at best speculative. *See Peabody IV*, 610 F.3d at 1084 ("Peabody's only sin, if indeed it was sin, was to comply with an employment preference provision inserted in its lease at the insistence of the Secretary.").

EEOC's Motion was untimely, was unsupported by any showing of excusable neglect, and sought to interject facts unrelated to its claim. The District Court's rejection of EEOC's hail-Mary was logical, plausible, consistent with Rule 6, supported by the record, and therefore well within its discretion.[4] *See United States*

[4] If EEOC's Motion is construed as implicitly seeking to amend the pleadings, its rejection was also a sound exercise of the District Court's discretion. *See Wood*, 705 F.2d at 1519-20.

v. Redlightning, 624 F.3d 1090, 1110 (9th Cir. 2010) (explicating abuse of discretion test), *cert. denied*, 131 S.Ct. 2944 (2011).

B. EEOC's Attempt to Raise a New Claim on Appeal Should Be Rejected.

Having failed to properly assert below its new theory that Peabody was not consistently granting to qualified Navajos hiring preferences, EEOC cannot rely on that theory on appeal. EEOC provided no argument or authority below on that theory. Its argument here on that point, EEOC Br. 44-57, should therefore be disregarded.

An issue is waived on appeal if the argument was not raised sufficiently for the trial court to rule on it. *Ruiz v. Affinity Logistics Corp.*, 667 F.3d 1318, 1322 (9th Cir. 2012). However, this Court may, but need not, consider such issues under three circumstances: (1) in an exceptional case to prevent a miscarriage of justice, (2) when a new issue arises on appeal because of a change in the law, and (3) if the issue is purely one of law and the factual record is either irrelevant to the new claim or has been fully developed. *Id*. Because none of the exceptions applies, the only question is whether EEOC raised the issue sufficiently for the District Court to rule on it. EEOC's last-minute proffer of the Barreras materials from 1999 did not do so.

First, it is improper for a plaintiff to change its claim from a *per se* claim of discrimination in an opposition to a motion for summary judgment. *Soremekun*, 509 F.3d at 987-88. Even if that limitation were overlooked, EEOC's failure to raise the

issue, even tangentially, in its briefing below precludes consideration of it on appeal. *See, e.g., Conservation Northwest v. Sherman*, 715 F.3d 1181, 1188 (9th Cir. 2013) (rejecting argument "buried in the middle of a section" of district court brief where district court never ruled on the issue); *United States v. $22,474.00*, 246 F.3d 1212, 1218 (9th Cir. 2001) (declining to consider argument to which proponent made only a vague reference, unsupported by any argument, in district court brief).

The unpled claim that EEOC seeks to initiate in this Court was not sufficiently raised and preserved below. EEOC cannot properly raise new issues on appeal to secure a reversal of the District Court's summary judgment determination. *BankAmerica Pension Plan v. McMath*, 206 F.3d 821, 825 (9th Cir. 2000). EEOC had over a decade to prepare and pursue its claim, and it is not entitled to make a new one in this appeal.

III. SUMMARY JUDGMENT IN FAVOR OF THE DEFENDANTS SHOULD BE AFFIRMED.

A. EEOC Obtained All the Discovery It Sought.

EEOC peppers its briefs with complaints about the "sparse" record and its failure to have adequate discovery. EEOC's position is frivolous.

The Nation's dispositive motion was originally filed and fully briefed in 2006. *See* Dkt. 89, 119, 120, 132. Because all parties, including EEOC, submitted factual materials outside the pleadings, the District Court converted the Nation's motion into

one for summary judgment and granted it in *Peabody III*. Prior to that ruling, the District Court granted several EEOC motions seeking extensions of time to respond and for discovery. *See supra* at 4.

EEOC's motion for a second extension was based entirely on its counsel's affidavit which averred 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 . . ." Dkt. 95 Ex.1 ¶ 6. It adverted to the Nation's showing that other leases of Navajo land require Navajo hiring preference. *Id.* It stated that discovery "might include a deposition of Stewart Udall" and others involved in the negotiation of the Peabody leases. *Id.* ¶ 7. EEOC offered no other justification for its motion.

The District Court *granted* EEOC's motion to engage in discovery on *all* matters identified by EEOC. Dkt. 108. Then, EEOC immediately filed *another* motion for extension for discovery, arguing that "initial written discovery, and the deposition of Stewart Udall, may reveal that additional depositions are necessary" regarding the role of the Secretary. Dkt. 109 at 3. The District Court granted that motion, too. Dkt. 114.

EEOC took Secretary Udall's deposition, delving not only into his personal

role in negotiating, drafting and approving the leases, but also into the effect of the preference on non-Navajo Indians. NNRE 26-29, 34-37. EEOC also propounded interrogatories seeking the names of others involved in the negotiations. Peabody and the Nation provided those names, but EEOC did not notice any of their depositions. *See* Dkt. 116, 117; *cf.* Dkt. 115 (reflecting notice of Udall deposition). Nor did EEOC take depositions of the Nation's records custodians who attested that all 326 federally approved leases of the Nation's land included Navajo hiring requirements, and EEOC affirmatively rejected the Nation's offer to send it copies of those leases. NNRE 12-19. Moreover, although the District Court stated that it would grant additional motions for extensions by EEOC for good cause, Dkt. 108 at 10, EEOC did not request further extensions, filed no Rule 56(d) motion or motion to compel, and responded to the Nation's motion with 16 exhibits and without a whisper that its presentation was hindered by inadequate discovery. *See* Dkt. 120. EEOC obtained all the discovery it sought.

Even though it had urged to this Court in its prior appeal that the District Court abused its discretion in denying it adequate opportunity for discovery, EEOC Br. as Appellant, No. 06-17261 (9th Cir. July 25, 2007), at 23 (NNRE 70), EEOC sought *no* discovery on remand, either on the Nation's renewed motion or the Secretary's summary judgment motion. It filed no Rule 56(d) affidavit. Rather, EEOC filed

seven additional exhibits in its 2011 responses to the defendants' dispositive motions without any indication that its presentation was hampered by lack of discovery. *See* Dkt. 213, 254.

The assertion that the District Court abused its discretion by "never permitt[ing]" discovery, EEOC Br. 11, is simply reckless. Having been granted all the discovery it sought and having filed no Rule 56(d) affidavit, EEOC cannot meet its burden to show that the District Court abused its discretion in ruling on the dispositive motions. *See Weinberg v. Whatcom County*, 241 F.3d 746, 751 (9th Cir. 2001); *British Airways Board v. Boeing Co.*, 585 F.2d 946, 954 (9th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979); *see also Second Amendment Fdn. v. United States Conference of Mayors*, 274 F.3d 521, 525 (D.C. Cir. 2001) ("To get discovery . . . one must ask for it."). Even if the trial court *had* denied discovery, EEOC's challenge fails to make the required "clearest showing that denial of discovery result[ed] in actual and substantial prejudice." *Martel v. County of Los Angeles*, 56 F.3d 993, 995-96 (9th Cir.) (*en banc*) (citation omitted), *cert. denied*, 516 U.S. 944 (1995).

B. Defendants Have No Burden to Disprove an Element of a Claim that EEOC Has *Never* Made in Order to Prevail on the Claim that EEOC Actually Brought.

This Court should reject EEOC's view that defendants must disprove an element of a claim that EEOC has never made in order to prevail on summary

judgment on the claim that EEOC actually brought. Whether Peabody "actually based its hiring decisions on Navajo tribal membership," EEOC Br. 50, is hardly a "pivotal element" of the defendants' defense, as EEOC contends, *id.* 17. Rather, Peabody's consistency in adhering to the Navajo hiring preference is *irrelevant* to the claim brought by EEOC that the Navajo hiring preference is *per se* unlawful national origin discrimination under Title VII.

For over a decade of litigation, EEOC has correctly and consistently characterized its three complaints as presenting only a question of statutory interpretation: whether the Navajo hiring preference is national origin discrimination prohibited by Title VII. *See supra* at 27 & n.3. Defendants addressed that sole issue and EEOC lost. Defendants did not address below, and need not address here, a supposed element of a claim that EEOC has *not* brought, *i.e.*, that Peabody was lax in its implementation of the very preference requirement that EEOC assails as unlawful.

Two opinions of this Court recognize that "[t]he issues [raised by EEOC] are entirely legal." *Peabody II*, 400 F.3d at 784; *accord id.* at 776 ("The [EEOC] filed this action against [Peabody] for maintaining a Navajo hiring preference at the mines that Peabody leases from the Navajo Nation."); *Peabody IV*, 610 F.3d at 1075 ("EEOC filed this suit against Peabody . . . alleging that Peabody was unlawfully

discriminating on the basis of national origin by implementing the Navajo employment preferences contained in the leases . . ."); *id.* at 1080. This Court ordered the joinder of the Nation because "the Nation is a signatory to lease provisions that the [EEOC] challenges under Title VII," *Peabody II*, 400 F.3d at 780, not because Peabody was *violating* that challenged provision. Similarly, joinder of the Secretary was required because "[i]f the Secretary is not joined, he will be unable to defend his interest in the legality of the lease provisions," *Peabody IV*, 610 F.3d at 1081-82, not because Peabody was alleged to have imperfectly implemented them.

EEOC did not bring a pretextual disparate treatment claim based on Peabody's alleged inconsistent implementation of Navajo hiring preference. Instead, it has claimed that the explicitly Navajo-specific hiring preference is a form of *per se* discrimination. Therefore, the burden-shifting rules of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), referenced in EEOC's Brief, at 46 n.9, are inapt. *See Healey v. Southwood Psychiatric Hosp.* 78 F.3d 128, 131-32 (3d Cir. 1996). Summary judgment was properly granted on the claim of *per se* discrimination that EEOC did bring, and EEOC cannot properly argue for reversal of the summary judgment on its *per se* claim by asserting on appeal, however obliquely, either pretextual discrimination or a disparate impact claim. *See Soremekun*, 509 F.3d at 988; *McMath*, 206 F.3d at 825; *Healey*, 78 F.3d at 131; *Reidt v. County of*

Trempealeau, 975 F.2d 1336, 1341 (7th Cir. 1992) (rejecting plaintiff's change of theory on appeal from claim alleging facially discriminatory policy to disparate impact claim).

C. All Material Facts Are Undisputed.

The District Court held that the defendants were entitled to summary judgment because the Navajo preference provision is a political classification outside the scope of Title VII. *See* EEOCRE 18, 21. The Nation, Peabody, and the Secretary filed statements of fact going to that dispositive issue. EEOCRE 192; Dkt. 266 (Peabody); EEOCRE 435 (Navajo); EEOCRE 656 (Secretary). EEOC did not controvert any of these facts with admissible evidence, as required by *Fed. R. Civ. P.* 56(c)(2), and they are thus uncontested under *Fed. R. Civ. P.* 56(e)(2).

EEOC "disputed as incomplete" or as "unknown" a few of the facts asserted by defendants. *See, e.g.*, EEOCRE 432-33. Such cryptic remarks do not create a genuine issue of fact. *See Soremekun*, 509 F.3d at 984, and cases cited therein; *British Airways*, 585 F.2d at 953-54. Nor did EEOC's Statement of Facts create any dispute as to a material fact. Rather, EEOC focused on Peabody's inconsistent hiring practices in the 1990s, which are immaterial to the validity of the Navajo-specific hiring preference in the Peabody leases as a legal matter.[5]

[5] *See* EEOCRE 341-42 ¶¶ 3-9, 354-86; Dkt. 265 at 9 n.4 (Nation's objections to EEOCRE 354-86 as unauthenticated hearsay and irrelevant). EEOC also

The District Court signaled its view of the facts in its September 26, 2012 Order. EEOCRE 142-45. After allowing all parties to comment, the District Court found, *inter alia*, that the Peabody leases require it to prefer Navajo Indians, the NPEA has required since 1985 employers to prefer members of the Navajo Nation, the employment preference provision is standard in all leases of Navajo trust land, all such leases have been approved by the Interior Department, the Secretary not only approved the Peabody leases but also drafted them in conformity with Navajo wishes and his trust obligations, the Secretary has the authority to cancel the leases for breach and must approve any amendments to them, the Secretary has approved amendments to the Peabody leases as recently as 2011 without changing the preference provision, Interior has approved mining leases with tribe-specific employment preferences like the ones here since before the passage of Title VII, and Interior's form mineral leases contain tribe-specific employment preferences. EEOCRE 4-7.

EEOC does not challenge any of these factual determinations but now claims that it is confused by the meaning of the phrase "Navajo Indians" in the Peabody leases and whether this means "members of the Navajo Tribe." EEOC Br. 21 n.5. That supposed confusion, not raised in the District Court, is specious. EEOC's

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complained about a lack of discovery, Dkt. 263-1 ¶¶ 22-26, but never filed a Rule 56(d) affidavit.

Complaint and Amended Complaints all allege that the leases compel Peabody to "hire[] *members of the Navajo Nation* for the open positions." NNRE 66 ¶ 12, 60 ¶ 13; EEOCRE 690 ¶ 13 (emphasis added). The NPEA, which EEOC seeks to invalidate, is expressly predicated on membership in the Navajo Nation. NN App. 23 (reproducing 15 N.N.C. § 603(D) (2005)). This matter surely has not confused either this Court or the District Court, which have recognized that EEOC's claim is based on membership in the Nation. *See Peabody II*, 400 F.3d at 776 ("Both leases contain provisions requiring that preference in employment be given to members of the Navajo Nation."); *Peabody III*, 2006 WL 2816603 at *4 (same). EEOC expressly argued below, for example, "that discrimination *based on tribal affiliation* is prohibited discrimination." EEOCRE 82; *accord* NNRE 72 (Br. of EEOC as Appellant, No. 02-17305, at 5 (defining tribal affiliation as tribal membership)).

Preference based on Navajo tribal membership is the basis of EEOC's claim and the basis of all briefing and decisions to date. EEOC failed to raise a genuine issue of material fact in response to the defendants' submissions. The District Court's reliance on these undisputed facts was entirely proper.

D. Summary Judgment Was Properly Granted to Defendants on the Legality of the Preference.

The District Court correctly ruled that a Secretarially-approved hiring preference for on-Reservation employment based on membership in a federally

recognized tribe with a treaty guaranteeing the tribe the right to exclude nonmembers raises a political distinction. Title VII prohibits discrimination only on the bases of "race, color, religion, sex or national origin." 42 U.S.C. § 2000e-2(a)(1). Political preferences are not prohibited by Title VII, and judgment against EEOC was properly entered. And even if this Court were to determine that Title VII applies, other grounds for affirmance are amply supported by the record.

1. The Navajo Preference Provisions Reflect Political Distinctions Not Proscribed by Title VII.

EEOC claims that a distinction based on tribal membership is a form of national origin discrimination. EEOC confuses "national origin" with citizenship or membership in a body politic. It claims that its suit challenges national origin discrimination but actually alleges only that the charging parties were members of the Hopi or Otoe tribes and that members of the Nation were hired instead.

"The term 'national origin' . . . refers to the country where a person was born, or more broadly, the country from which his or her ancestors came." *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 88 (1971). By definition, all Native Americans are from the United States. Preferences based on membership in discrete "quasi-sovereign" entities of the United States, whether one of the 500-plus tribes or the 50

states,[6] do not implicate national origin, but citizenship. *E.g., United States v. Mazurie*, 419 U.S. 544, 557 (1975); *Morton v. Mancari*, 417 U.S. 535, 551-55 (1974); *Roberts v. Hagener*, 287 Fed. Appx. 586, 586-87 (9th Cir. 2008). Notwithstanding the frequent correlation between national origin and citizenship, Title VII does not preclude discrimination based on citizenship. *Fortino v. Quasar Co.*, 950 F.2d 389, 393 (7th Cir. 1991) (Posner, J.).

Mancari rejected the pan-Indian preference urged by EEOC. The preference challenged in *Mancari* was "granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities." 417 U.S. at 554; *see also United States v. Antelope*, 430 U.S. 641, 646 (1977) (special treatment of Indians is not granted to people who originated in a certain place, but to members of "political communities"). EEOC reads *Mancari* as if the Court approved racial hiring preferences, *i.e.*, for all "Indians." EEOC Br. 22, 28, 30. That is precisely the opposite of what *Mancari* did. *Mancari* recognized that the political employment preference it was approving *excludes* many persons who may be otherwise classified as Indians. 417 U.S. at 553 n.24.[7]

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[6] *See, e.g., Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907) (state is "quasi-sovereign"); *Santa Clara Pueblo*, 436 U.S. at 71 (tribes are "quasi-sovereign nations," not foreign countries).

[7] To have ruled otherwise could have violated constitutional rights of persons of other races. *Mancari*, 417 U.S. at 554.

The *Mancari* Court approved the employment preference not because it favored all Indians, but because it did not. The fact that the *Mancari* preference ran to members of tribes is what made it a political preference not prohibited by Title VII. The determination of membership is a political prerogative of each tribe. *Santa Clara Pueblo*, 436 U.S. at 72 n.32. The political preference that EEOC challenges is not proscribed by Title VII, and dismissal of EEOC's action is proper on this basis alone.

2. Title VII Did Not Abrogate Treaty Rights and Expressly Preserved Longstanding Tribe-Specific Preference Programs.

Other grounds for affirmance are amply supported in the record. As the Department of Justice explained in response to an inquiry on the preceding Title of the 1964 Civil Rights Act, "Indians have a special status under the Constitution and treaties. Nothing in title VI is intended to change that status . . ." 110 Cong. Rec. 13,380 (1964); *see Mancari*, 417 U.S. at 554-55. The Nation's unique status includes a treaty-based right to exclude. *Williams*, 358 U.S. at 221.

EEOC's attempt to have its interpretation of Title VII trump such a treaty-based right fails on several levels. First, only Congress may abrogate such a right by an explicit and clear law, and EEOC has no power to abrogate any fundamental right of the Nation. *See supra* at 23-24. Title VII does not even purport to abrogate tribal sovereign attributes. The Nation retains all aspects of tribal sovereignty not withdrawn by treaty or statute or by necessary implication. *Wheeler*, 435 U.S. at 323.

Thus, Title VII cannot properly be read as diluting the Nation's power to exclude and condition entry of nonmembers seeking to conduct business on tribal land on their agreement to comply with Navajo law and with lease terms requiring hiring of qualified Navajo workers. *See Dawavendewa II*, 276 F.3d at 1158 ("In appropriate situations, federal law yields out of respect for treaty rights or the federal policy fostering tribal self-governance.").

Title VII also expressly preserves employment preferences such as the tribe-specific preferences reflected in IMLA form leases and in the Rehabilitation Act. As the United States urges, Section 703(i) of Title VII, 42 U.S.C. § 2000e-(2)(i), does not apply to this case. *See, e.g.*, Dkt. 264, Br. at 18 (Section 703(i)'s "exception is not directly at issue because the challenged conduct falls outside of Title VII's prohibition on national origin discrimination in the first instance"). However, even if it applied, Section 703(i) would protect reservation employers from liability under Title VII if they give hiring preference to Indians under a publicly announced policy.

Section 703(i) preserves "any publicly announced employment practice . . . 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). EEOC contends that this provision (a) preserves only programs that have generic "Indian" preferences, and (b) prohibits Indian nations and the Secretary of the Interior from imposing tribe-specific

hiring preferences in leases of the particular tribe's Reservation in conformity with tribal laws and the tribe's right to exclude. Neither contention is correct.

Senator Mundt sponsored § 703(i) to assure Indians "the continued right to protect and promote their own interests and to benefit from Indian preference programs now in operation or later to be instituted." 110 Cong. Rec. 13,702 (1964); *see Mancari*, 417 U.S. at 546 n.20. The programs "now in operation" included several statute-based programs with Navajo-specific preferences and Interior's mineral leasing program requiring tribe-specific hiring preferences. *See supra* at 9-13. Those "later to be instituted" include the Navajo Nation's preference requirements approved by the Department of Labor, EEOC, and the Commission on Civil Rights; Interior's approval of over 300 business site leases and right-of-way agreements of Navajo land with Navajo-specific hiring preference provisions; and Interior's approval of countless similar agreements on other reservations. *Id.* at 16-17. There is no evidence that Congress thought it was upsetting decades of tribe-specific hiring preference programs or that it was preserving only the subset of "Indian preference programs now in operation" that benefited Indians as an undifferentiated mass. Especially where a tribe-specific preference conforms with federal leasing regulations and policy, tribal laws, and treaty guarantees, tribe-specific preferences are properly protected by section 703(i).

EEOC would pit section 703(i) of Title VII directly against IMLA, and the Rehabilitation Act, which permit tribe-specific hiring preferences and formed the bases for the Peabody leases. *See United States v. Navajo Nation*, 537 U.S. 488, 495 (2003) (IMLA); *Austin*, 638 F.2d at 114 (Rehabilitation Act). The Nation sees no inconsistency. Section 703(i) protects businesses located on or near reservations that give Indian workers preference pursuant to publicly announced policies. *See Yashenko v. Harrah's NC Casino Co.*, 352 F.Supp. 2d 653, 654-55 (W.D.N.C. 2005), *aff'd*, 446 F.3d 541 (4th Cir. 2006). That provision supplements, rather than detracts from, other statutes that promote Navajo labor, such as the Rehabilitation Act, or provide for tribe-specific preferences generally, such as the form lease prescribed by Interior's IMLA regulations, and regulations promulgated under the general Long-Term Leasing Act, 25 U.S.C. § 415. *See* 25 U.S.C. § 396a; 25 C.F.R. § 211.57 (2011) (requiring use of IMLA form leases); EEOCRE 291 ¶ 19 (form lease); 77 Fed. Reg. at 72,446, 72,472 (promulgating 25 C.F.R. § 162.015). These various statutes and regulations may and should be read harmoniously. *See, e.g., Mancari*, 417 U.S. at 550-51; *Peabody III*, 2006 WL 2816603 at *11 (Title VII and the Rehabilitation Act can be read together harmoniously). EEOC's position that these other statutes and regulations were implicitly repealed contravenes the "cardinal rule . . . that repeals by implication are not favored" and that statutes should be construed in a manner which

comports with tribal sovereignty. *See Mancari*, 417 U.S. at 549; *Lujan-Armendariz v. INS*, 222 F.3d 728, 743-46 (9th Cir. 2000).[8]

Thus, even if this Court determines that the Peabody preference is not a political one outside the scope of Title VII, it should affirm on the alternative grounds that Title VII did not abrogate the Nation's fundamental right to exclude and condition entry of nonmembers and that Title VII preserves tribe-specific preference programs such as those in place to benefit the Navajo both before and after passage of Title VII.

3. Any Mancari *Challenge to the Preference Would Be Meritless.*

Mancari concerned an equal protection challenge to a federal statute. By contrast, EEOC did not (and could not) bring an equal protection claim against the Secretary, the Nation, or Peabody. Because the Navajo hiring preference is a political one and because political preferences fall outside Title VII, no further analysis is required to resolve this appeal.

Nonetheless, the District Court reached the issue of whether the political preference is "rationally tied to legitimate, nonracially based goals," EEOCRE 19, and EEOC asserts that the Navajo hiring preference does not satisfy that standard but

[8] Interior's current regulatory definition of "Indian preference" in a program that allows for tribal preference in employment, *see* 25 C.F.R. § 170.913, has no bearing on whether Title VII abrogated the Nation's treaty rights. *See* EEOC Br. at 34.

that an "Indian" preference would. EEOC Br. 26-29. EEOC is wrong. Classifications that are "reasonably and rationally designed to further [tribal] self-government" and "rationally tied to the fulfillment of Congress' unique obligations toward the Indians" survive constitutional scrutiny. *Mancari*, 417 U.S. at 553-55. As the Secretary urged below, these tests are satisfied here.

a. The Navajo Hiring Preference is Rationally Designed to Further Navajo Self-Government.

The key to *Mancari* is the Court's consideration of "Indian tribes," "tribal Indians," "tribal or reservation-related employment," and "federally recognized Indian tribes," 417 U.S. at 541-43, 548, 551; that the preference furthers the trust obligation owed to "Indian tribes," *id.* at 541-42; and that the contrary argument ignored the unique relationship between the Federal Government and "tribal Indians," *id.* at 551. Adoption of EEOC's view that Title VII preserves racial preferences for Indians generally would be antithetical to *Mancari*'s observation that so construing statutes would call into question an entire Title of the United States Code, which includes some sections benefiting all tribes and others that provide benefits for particular tribes. *See id.* at 553.

In negotiating and drafting the Peabody leases, the Secretary was promoting Navajo self-government. The leases deal with the Navajo Nation's most valuable natural resource, held in trust for the Nation by the United States and located within

the Navajo Reservation. Peabody's hiring preference provisions also honor the treaties that confirm the Nation's right to exclude and Navajo laws that implement that guarantee.

The Nation's treaty-based, "traditional and undisputed" power to exclude includes the power to set conditions on entry, and "regulatory power goes hand in hand with the power to exclude," *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 335 (2008) (citation omitted); *Water Wheel*, 642 F.3d at 808; *see supra* at 9. That regulatory power permits the Navajo Nation to enact and enforce labor regulations, such as the NPEA, within the Reservation. *See NLRB v. Pueblo of San Juan*, 276 F.3d 1186 (10th Cir. 2002) (*en banc*). The Nation needs "no grant of authority from the federal government in order to exercise this power [of exclusion]." *Ortiz-Barraza v. United States* 512 F.2d 1176, 1179 (9th Cir. 1975).

EEOC cannot point to any Act of Congress that withdraws these sovereign prerogatives, much less one that does so clearly and unambiguously. Title VII surely does not. Indeed, the policies of the NPEA and the lease provisions that reflect them are policies repeatedly endorsed by Congress, the Department of Labor, the Secretary of the Interior, and the EEOC itself. *See supra* at 16-18. Congress, the Nation, and these federal agencies have all seen Navajo-specific preferences as an appropriate way to tackle the debilitating unemployment on the Navajo Reservation.

EEOC's suit would 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. EEOC "challenges the Nation's ability to secure employment opportunities and income for the reservation – its fundamental consideration for the lease," *id.* – the very interests that Secretary Udall expressly sought to promote, NNRE 30-32, 40. These are fundamental political interests of the Navajo Nation. EEOC's lawsuit threatens the validity of not just the Peabody leases but also the other 326 business leases approved by the Secretary. *Dawavendewa II*, 276 F.3d at 1156. These leases are the foundation of the modern Navajo economy.

EEOC makes the question-begging argument that Navajo sovereignty is not at stake because the Nation cannot force Peabody to "violate applicable federal law," citing one irrelevant case. EEOC Br. 42-43 (citing *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989) (concerning zoning of non-Indian land within an opened reservation)). The Nation has never asserted that it can force anyone to violate applicable federal law. Rather, the Nation, the Secretary, and Peabody have each demonstrated that the Peabody hiring preference is lawful, and the District Court agreed.

b. The Hiring Preference Furthers the Government's Unique Oligations to the Navajo Nation.

Navajo sovereignty predates that of the United States, *see McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 (1973), as a self-governing political community possessing the full attributes of sovereignty, *National Farmers U. Ins. Co. v. Crow Tribe*, 471 U.S. 845, 851 (1985); *Wheeler*, 435 U.S. at 322-23. The Constitution gives Congress the power to regulate commerce with the tribes and permits treaty-making with them. U.S. Const. art. I, § 8, cl. 3; art. II, § 3, cl. 2. Indian tribes have a unique status under federal law, which imposes special obligations on the United States, *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831), dominated by a distinctive obligation of trust, *United States v. Mitchell*, 463 U.S. 206, 225 (1983). The first Treaty with the Navajo Tribe imposes a duty to "legislate . . . to secure the permanent prosperity and happiness" of the Navajo, 1849 Treaty, Art. XI, providing a basis in positive law for the rule that ambiguities in statutes must be construed in favor of the Nation, *see Blackfeet*, 471 U.S. at 766.

This special relationship safeguards and promotes tribal autonomy and economic self-sufficiency. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216-17 (1987). Modern federal policy seeks to permit tribes to "assume a greater degree of self-government, both politically and economically." *Mancari*, 417 U.S. at 542.

Congress has passed laws to foster Navajo self-government and economic self-sufficiency. Congress appropriated funds to provide employment specifically for Navajos and Hopis in 1947 and mandated Navajo hiring preferences in a 1949 law authorizing a land exchange with Utah. *See supra* at 9-10. Navajo hiring preferences were imposed in a BIA-initiated industrial development plan, and BIA reported periodically to Congress on the effectiveness of that program. *Id.* at 10. Congress mandated Navajo hiring preferences more generally in the 1950 Rehabilitation Act, 25 U.S.C. § 633, and the Secretary has consistently construed the Rehabilitation Act as applicable to both business site and mineral leases (including the Peabody leases) on the Navajo Reservation. *See id.* at 10-12 & n.1, 14-16; *Austin*, 638 F.2d at 114. In implementing those laws and the policies animating them, the Secretary has required Navajo hiring preferences in all 326 leases of Navajo trust land.

In particular, the Peabody leases were the "centerpiece" of the development program under the Rehabilitation Act, and the Navajo hiring requirement was one of the most significant provisions bargained for. NNRE 39, 32. These leases have been repeatedly amended with the required approval of the Secretary, *see Peabody IV*, 610 F.3d at 1074-75; EEOCRE 7, and all of those approvals left undisturbed the Navajo hiring preference provisions, *see, e.g.*, EEOCRE 535, just as Congress has left undisturbed the Navajo and Hopi hiring preference requirement in the Rehabilitation

Act while amending that Act in 1958, 1960, 1974 and 1996.[9] *See supra* at 12 n.2. More generally, the Secretary's form mineral lease prepared in 1957 under authority delegated in IMLA prescribes tribe-specific hiring preferences, and that form lease was still in use long after passage of Title VII. *See* EEOCRE 281, 283, 286 ¶ m (prospecting permit), 291 ¶ 19 (mineral lease).

Requiring Navajo hiring preferences in a Reservation where unemployment is a staggering 48%, NNRE 57, furthers the Government's trust role to protect the Nation's property, contractual, and sovereignty interests, *see HRI, Inc. v. EPA*, 198 F.3d 1224, 1245 (10th Cir. 2000). Navajo self-sufficiency is supported by its members' benefiting from employment opportunities on the Reservation.

The Navajo hiring preference also promotes the general trust relationship because it involves resources held in trust for the Nation. Developing those resources to benefit the Nation and its members accords with the Nation's equitable title to those resources and supports the Nation's economic development and self-sufficiency by extracting those trust resources. In addition, the Nation has determined that conditioning the entry of nonmembers on their agreement to prefer qualified Navajo

[9] These leases concern only the Navajo Nation's trust assets and those of no other tribe, and the District Court properly rejected EEOC's attempt to inject the Hopi people into the fray. EEOCRE 5 n.2. The Hopi Tribe has the ability to insist on Hopi hiring preferences on their land, and Udall testified in response to an EEOC hypothetical question regarding possibly competing preferences in different parts of the Peabody mine that it was "a detail I never got into." NNRE 35 (Udall Dep. 55).

citizens in hiring decisions is an appropriate exercise of its treaty rights. Federal support of that treaty-based right is consistent with the United States' government-to-government relationship with the Nation and with the federal role in assuring the "permanent prosperity and happiness" of the Navajo in their own land.

EEOC "doubts" that the trust relationship has relevance here, but those doubts are based on a misreading of *Navajo Nation*, 537 U.S. 488. That case confirmed the existence of the general trust relationship, *see id*. at 501, 506, but held that the approval of the Peabody leases did not impose compensable fiduciary duties under the rigorous standards of the Indian Tucker Act, 28 U.S.C. § 1505, *id*. at 507-08. EEOC's supposition that the Secretary generally rubber-stamps leases of tribal trust lands, EEOC Br. 36-37, 39, ignores the Secretary's personal involvement in *these* leases, *see supra* at 14-16, and is inconsistent with settled law and Interior practice, *see, e.g., Aniker v. Gunsburg*, 246 U.S. 110, 119 (1918) (explaining reason for federal approval requirement); *Kenai Oil & Gas, Inc. v. Department of Interior*, 671 F.2d 383, 387 (10th Cir. 1982) (Interior must take "Indians' best interests into account when making any decision involving leases on tribal lands"); 25 C.F.R. §§ 211.1(a), 211.3 (2011) (defining "in the best interest of the Indian mineral owner"); 61 Fed. Reg. 35,634, 35,640 (1996) (expressly relying on *Kenai* in promulgating Indian mineral leasing regulations); *Mobil Oil Co. v. Albuquerque Area Director, BIA*, 18

IBIA 315, 329-30 (1990).

Interior's long-standing practice of requiring and supporting Navajo hiring preferences is rational and reasonably related to its general trust duties and to the special government-to-government relationship it has with the Nation. Such support for Navajo self-government, economic self-sufficiency, and self-determination would satisfy any constitutional challenge under *Mancari*.

IV. NEITHER *DAWAVENDEWA I* NOR A 1988 EEOC POLICY STATEMENT PROVIDES SUBSTANTIAL SUPPORT FOR EEOC'S POSITION.

EEOC's reliance on *Dawavendewa I* ignores *Dawavendewa II*. *Dawavendewa I* observed only that "discrimination on the basis of tribal affiliation *can* give rise to a 'national origin' claim under Title VII." 154 F.3d at 1120 (emphasis added).

Dawavendewa II specifically emphasized that neither *Dawavendewa I* nor any other court had considered whether "any legal justification, such as treaty rights or the federal policy encouraging self-governance" permits tribe-specific preferences. 276 F.3d at 1158 n.7. These considerations implicate the preservation of the independent, quasi-sovereign status of tribes, the federal trust obligation, and the "great respect owed to the remaining sovereignty of tribes." *Morris v. Tanner*, 288 F.Supp. 2d 1133, 1142 (D. Mont. 2003) (on remand to determine if statute made racial or political classifications), *aff'd*, 160 Fed. Appx. 600 (9th Cir. 2005), *cert.*

denied, 549 U.S. 972 (2006). This is quite a different inquiry than that required under traditional discrimination law, which is "founded on an aversion to disadvantage based on involuntary, immutable characteristics." *Id.* at 1141. Tribal membership is not involuntary or immutable. *See* 1 N.N.C. § 705 (2005) (concerning renunciation of membership).

Thus, this Court has not decided "even implicitly, the merits of EEOC's Title VII suit against Peabody," *Peabody II*, 400 F.3d at 784, and has insisted that the Secretary be joined so that Interior's position on the lawfulness of the leases can be considered, *Peabody IV*, 610 F.3d at 1087. There would have been no need to do so if this Court had already concluded that the preference was unlawful. In addition, EEOC's reading of *Dawavendewa I* contradicts EEOC's own representations to the Supreme Court, on *three* separate occasions, where the Solicitor General stated that there has been no determination of whether tribe-specific preferences are political classifications outside the scope of Title VII. *See* Dkt. 264 (attaching briefs). EEOC is bound by the representations it has made to the Supreme Court in *Dawavendewa I* and in this case. *See* 28 U.S.C. §§ 518(a), 519.

Interior, not EEOC, is entitled to deference in determining whether its consistent policy and practice of requiring tribe-specific hiring preferences in leases of a particular tribe's land is based on a lawful political classification. That

determination involves consideration of matters at the core of Interior's mission: consideration of treaty rights, the trust relationship, conveyances of tribal resources, tribal sovereign attributes, and the federal/tribal government-to-government relationship. *See generally Nevada v. United States*, 463 U.S. 110, 127 (1983). Congress expressly entrusted Interior with the supervision of public business relating to Indians, 43 U.S.C. § 1457, "the management of all Indian affairs and of all matters arising out of Indian relations," 25 U.S.C. § 2, and the leasing of tribal minerals under rules the Secretary may promulgate, 25 U.S.C. §§ 396a, 396d, 635(a). No other statutory authorization is required for the Secretary to act administratively in discharging his trust. *United States v. Eberhardt*, 789 F.2d 1354, 1359-60 (9th Cir. 1986); *Udall v. Littell*, 366 F.2d 668, 672 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1007 (1967). The District Court correctly concluded that Interior, not EEOC, is entitled to deference in this case. EEOCRE 12-13.[10]

EEOC's 1988 Policy Statement is entitled to no deference in the context of this litigation. EEOC has no expertise in federal Indian law. Congress delegated to Interior, not EEOC, authority over Indian affairs and Indian leases. The Policy

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[10] EEOC miscontrues the discussion of 25 U.S.C. § 450e(c) in *Dawavendewa I*. EEOC Br. at 31. The Court only observed that the amendment did not affect its interpretation of § 703(i), not that the Secretary is unable to discharge fully his trust duties without specific congressional directives. *Dawavendewa I*, 154 F.3d at 1123 n.13.

Statement speaks in generalities and does not consider whether an employer complying with an Interior-drafted and -approved lease of tribal trust resources consistent with tribal laws enacted in furtherance of treaty guarantees reflects a political classification falling outside Title VII. It was issued "in a factual and legal vacuum." *Malabed v. North Slope Borough*, 42 F.Supp. 2d 927, 935 (D. Ak. 1999), *aff'd*, 335 F.3d 864 (9th Cir. 2003). It does not address tribe-specific preferences in leases of tribal trust resources in conformity with tribal law, treaty provisions, and federal policy, but, if it did and were construed to disapprove such preferences, it would still fail because it lacks any thoroughness, reasoning, or consistency with the prior EEOC *endorsement* of Navajo-specific preferences in this very context. *See Vance v. Ball State Univ.*, No. 11-556, 133 S.Ct. 2434 (June 24, 2013), slip op. at 9 n.4; *University of Texas Southwestern Med. Ctr. v. Nassar*, No. 12-484, 133 S.Ct. 2517 (June 24, 2013), slip op. at 2; *supra* at 17 (concerning EEOC's endorsement of Navajo-specific employment preferences in its conciliation role).[11]

Nassar rejected as unpersuasive longstanding EEOC positions, set forth in an EEOC manual, because of their generic treatment, failure to address specifics, and

[11] The regulations cited by EEOC do not bolster its Policy Statement. EEOC Br. at 32-33 (citing 41 C.F.R. § 60-1.5(a)(6) (1987); 48 C.F.R. § 1452.204-71 (1987)). If "Indian" preference could not generally be understood to include preferences for members of specific tribes, there would be no need to explicitly exclude "tribal affiliation" from the regulations.

circular reasoning, *Nassar*, slip op. at 22, and because of the difficulties those positions posed for weeding out dubious claims on summary judgment, *id.* at 18-19. The EEOC Policy Statement, issued without even consultation with the Secretary (much less APA notice and comment), suffers from the same infirmities.

In addition, *Vance* gave no deference to an EEOC administrative definition it characterized as a "study in ambiguity." *Vance*, slip op. at 21, 23. EEOC's promotion of a generic Indian (*i.e.*, racial) preference raises similar problems of ambiguity and inefficient judicial administration. In contrast to the straightforward determination of whether a person is a member of a federally recognized tribe as a political matter, there is no generally applicable definition of "Indian." *United States v. State of Washington*, 476 F.Supp. 1101, 1103 (W.D. Wash. 1979), *aff'd*, 641 F.2d 1368 (9th Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982). Under EEOC's race-based approach, courts would have to struggle with whether a person could be considered an Indian based on self-identification or perception by others as an Indian or by physical appearance, accents, or cultural characteristics. This is not a theoretical matter; such individuals would come within the parameters EEOC itself relies on. Dkt. 253 at 7 (quoting 29 C.F.R. § 1606.1), 8 n.3 (quoting 45 Fed. Reg. 85632, 85633 (Dec. 29, 1980)); EEOC Br. 21, 55; *see Perkins v. Lake County Dep't of Util.*, 860 F.Supp. 1262, 1273 (N.D. Ohio 1994).

One cannot reasonably attribute to Congress, in *preserving* preference programs benefiting Indians – including several Navajo-specific preferences enacted and reviewed by Congress – an intent to substitute for those straightforward political preferences a system where EEOC and the courts would have to decide the complex and controversial "biological question of race" and weigh evidence of a complainant's hair style, physical characteristics, accent, self-identification, and "relation . . . to a white or Indian community," *Perkins*, 860 F.Supp. at 1273-74, which would often preclude resolving on summary judgment even the threshold matter of whether the complainant is an Indian.

V. THE NATION PRESERVES ITS PRIOR PROCEDURAL ARGUMENTS.

This Court has ruled against the Nation on its non-amenability to joinder under Rule 19, where EEOC is unable to state a claim against the Nation, and the inapplicability of Rule 14 to join the Secretary, where Title VII does not permit contribution or indemnification and no damages are available. The Nation preserves its procedural arguments for possible further review. *See Peabody II*, 400 F.3d at 782 (acknowledging split in circuits on Rule 19 issue); *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981) (impleader under Rule 14 is improper if applicable statute confers no right of contribution); *Northwest Airlines, Inc. v. Transport Workers U. of Am.*, 451 U.S. 77, 90-99 (1981) (Title VII confers no right

of contribution).

VI. CONCLUSION

The Judgment of the District Court should be affirmed.

Respectfully submitted,

FRYE LAW FIRM, P.C.

s/ Paul E. Frye

Paul E. Frye
Lisa M. Enfield, Of Counsel
10400 Academy Rd. NE, #310
Albuquerque, NM 87111
tel.: 505-296-9400
fax: 505-296-9401

STATEMENT OF RELATED CASES

Appellee Navajo Nation is unaware of any related cases within the meaning of Ninth Circuit Rule 28-2.6 that are pending in this court.

s/ Paul E. Frye

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, 865 words, excluding the parts of the brief exempted by *Fed. R. App. P.* 32(a)(7)(B)(iii). The brief was prepared using Corel Word Perfect X3 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) and 32(a)(6).

s/ Paul E. Frye

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 17, 2013. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Paul E. Frye