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JUDICIAL REWRITING OF INDIAN EMPLOYMENT PREFERENCES – A CASE COMMENT: *E.E.O.C. V. PEABODY WESTERN COAL COMPANY*, 400 F.3D 774 (9TH CIR. 2005)*

*Brendan O'Dell***

I. Introduction — Indian Preference Exemption of Title VII

Under Title VII of the Civil Rights Act of 1964, it is an unlawful employment practice for an employer to refuse to hire any individual on the basis of race or national origin.[1] However, Indian tribes, along with the United States and certain governmental agencies, are specifically exempt from the definition of employer.[2] This allows an Indian tribe to discriminate in its hiring practices by hiring or refusing to hire individuals on the basis of their race or national origin. Title VII provides specifically that:

> Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.[3]

As a result, Indian tribes and businesses operating on or near Indian reservations may give preference to Indians in their employment practices.

Both the Indian Exemption and the "on or near" the reservation exemption for businesses have been upheld by the Supreme Court and are clearly

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* Peabody Western Coal Company filed a petition for rehearing and rehearing en banc, which was denied on May 18, 2005. Peabody filed a petition for a writ of certiorari on September 15, 2005. The petition for a writ of certiorari was distributed for a conference vote on January 20, 2006. The petition was denied on January 23, 2006. *See* http://www.supremecourtus.gov/docket/05-353.htm (last visited Nov. 28, 2006).

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1. 42 U.S.C. § 2000e-2(a)(1) (2000). Title VII also prohibits discrimination on the basis of color, religion, or sex.
2. *Id.* § 2000e(b).
3. *Id.* § 2000e(b)(i).

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enshrined in federal law. In a unanimous decision, *Morton v. Mancari*,[4] the Supreme Court explained the legislative purpose behind the Indian Exemption as an indicia of "Congress' recognition of the longstanding federal policy of providing a unique legal status to Indians in matters concerning tribal or 'on or near' reservation employment."[5] At issue in that case was the Indian employment preference authorized by the Indian Reorganization Act of 1934,[6] which provided an employment preference for qualified Indians in the Bureau of Indian Affairs (BIA).[7] After the passage of the Equal Employment Opportunities Act of 1972,[8] non-Indian employees of the BIA brought a class action claiming that the Indian employment preference used by the BIA violated the Equal Employment Opportunities Act of 1972 and deprived the class members of property rights without due process of law in violation of the Fifth Amendment.[9] The Court held that the Indian hiring and employment preference was not invalidated by Congress with the passage of the 1972 Act. In stating its holding, the Court relied on four factors: (1) the Indian Exemption in Title VII, (2) two Indian preference laws passed within months of the 1972 Act, (3) historical exemption of Indian preference laws from Executive Orders forbidding employment discrimination in the federal government, and (4) the cannon barring repeals by implication.[10]

The contours of the Indian Exemption and the "on or near" exemption indicate that Indian tribes and businesses operating on or near a reservation may facially discriminate.[11] This would be consistent with the federal legislative purpose of the Indian Exemption in improving the employment situation of Indians in general.[12] Many tribes also have tribal affiliation employment

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4. 417 U.S. 535 (1974).
5. *Id.* at 547-48.
6. 25 U.S.C. § 472 (2000).
7. *Mancari*, 417 U.S. at 543.
8. 42 U.S.C. § 2000e-16(a) (2000).
9. *Mancari*, 417 U.S. at 539.
10. *Id.* at 547-49.
11. *See generally* Penobscot Nation v. Fellencer, 164 F.3d 706, 713 (1st Cir. 1999); Dille v. Council of Energy Res. Tribes, 801 F.2d 373, 374 (10th Cir. 1986); Wardle v. Ute Indian Tribe, 623 F.2d 670, 672 (10th Cir. 1980).
12. After the 1994 amendments to the ISDA, the statute now states:

> Notwithstanding subsections (a) and (b), with respect to any self-determination contract, or portion of a self-determination contract, that is intended to benefit one tribe, *the tribal employment or contract preference laws adopted by such tribe shall govern* with respect to the administration of the contract or portion of the contract.

25 U.S.C. § 450e(c) (2000) (emphasis added).

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preferences. In 1985, the Navajo Nation enacted the Navajo Employment Preference Act,[13] which requires that "all employers doing business within the territorial jurisdiction [or near the boundaries] of the Navajo Nation, or engaged in any contract with the Navajo Nation, shall give preference in employment to Navajos."[14] Tribal specific employment preferences are, however, in conflict with some of the policies behind the enactment of Title VII.

The Equal Employment Opportunity Commission (EEOC) took note of the conflict, between the Congressional policy of promoting Indian self-governance and the spread of discrimination in the form of tribal affiliation employment preferences, in a 1988 Policy Statement.[15] For those Indian tribes and employers situated on or near reservations where only one Indian tribe resides, the Indian Exemption will prove an advantage to the members of that tribe and that tribe alone. For those tribes and employees living near a reservation where more than one tribe share the reservation or where there are adjacent reservations, "[t]he potential inequities resulting from according a preference based on tribal affiliation are most clearly evident when these circumstances are contemplated."[16] The EEOC recognizes that its determination of enforcing Title VII against employers for using tribal employment preferences is limited to employers covered by Title VII and not "Indian tribes which are expressly exempt from the provisions of the Act under Section 701(b)(1)"[17] and thus the tribes, as employers, may continue to discriminate on the basis of tribal membership or affiliation. The EEOC's 1988 Policy Statement on Indian Preference Under Title VII and its conclusion that tribal affiliation or membership discrimination is not allowed under Title VII first became an issue a decade later in *Dawavendewa v. Salt River Project Agriculture Improvement and Power District*.[18]

The facts of *Dawavendewa I* are strikingly similar to those in *Peabody II*.[19] The Salt River Project Agricultural Improvement and Power District (Salt River) operates the Navajo Generating Station on reservation land leased from

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13. NAVAJO NATION CODE tit. 15, §§ 601-619 (2005).

14. *Id.* § 604.

15. Dawavendewa v. Salt River Project Agric. Improvement & Power Dist. (*Dawavendewa I*), 154 F.3d 1117, 1121 (9th Cir. 1998) (citing EEOC: *Policy Statement on Indian Preference Under Title VII*, 405 Fair Empl. Prac. Cas. (BNA) 6647, 6653-54 (May 16, 1988)).

16. *Id.*

17. *Id.*

18. *Id.*

19. See *infra* Part II for the facts in *EEOC v. Peabody Western Coal Co.* (*Peabody II*), 400 F.3d 774, 776 (9th Cir. 2005).

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the Navajo Nation.[20] The lease between Salt River and the Navajo Nation contains a Navajo employment preference clause similar to the Navajo employment preference clause in *Peabody*.[21] Dawavendewa, a member of the Hopi Tribe, applied for employment at the Navajo Generating Station but was not selected for employment, allegedly because he is not a member of the Navajo Nation.[22] Dawavendewa filed a Title VII national origin discrimination suit against Salt River but did not assert any claims of discrimination against the Navajo Nation or any tribal officials.[23] The District Court of Arizona dismissed the Title VII claim for a failure to state a claim upon which relief could be granted.[24] The Ninth Circuit reversed the Arizona court's decision, recognizing a claim for national origin discrimination based on tribal membership.[25]

The EEOC filed an *amicus* brief in support of Dawavendewa.[26] The EEOC stressed Title VII's focus on eradicating the "disparate treatment encountered by the individual"[27] and although there is an Indian Exemption to Title VII, the statute allows for preferencing an individual because he is Indian and not because of tribal membership. The problem of "'intragroup' discrimination is, if anything, even more pronounced in this context, given the extent to which each Indian tribe has its own separate identity."[28] The EEOC argued that each Tribe has its own separate identity and thus, discriminating against an Indian, because of his tribal membership constitutes national origin discrimination prohibited by Title VII.[29] Finally, the EEOC noted that Dawavendewa was not claiming discrimination by the Navajo Nation but rather by Salt River, which is an employer covered by Title VII.[30]

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20. *Dawavendewa I*, 154 F. 3d at 1118.
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.* at 1119.
25. *Id.* at 1125.
26. Brief for Equal Employment Opportunity Commission as Amicus Curiae, Dawavendewa v. Salt River Project Agric. Improvement & Power Dist. (*Dawavendewa I*), 154 F.3d 1117, 1121 (9th Cir. 1998) (No. 97-15803), 1997 WL 33546985.
27. *Id.* at 11.
28. *Id.* at 13-14.
29. *Id.* at 10.
30. *Id.* at 7. The Navajo Nation has a Navajo employment preference as a tribal ordinance. However, it is not the Navajo Nation that is attempting to enforce the ordinance, but rather a private non-Indian employer. The Ninth Circuit has addressed the question "whether a tribe possesses that authority to require a 'non-Indian' employer to comply with a tribal ordinance" but did not decide it in *Arizona Public Service Co. v. Aspaas*, 77 F.3d 1128, 1134-35 (9th Cir. 1995). Brief for Equal Employment Opportunity Commission, *supra* note 26, at 7 n.3.

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The court of appeals reversed the district court and remanded, holding that Salt River's Navajo employment preference "constitutes 'national origin' discrimination under Title VII and does not fall within the scope of the Indian Preference exemption."[31] In support of its conclusion that under Title VII, national origin discrimination based on tribal preference, is a claim for which relief may be granted, the court looked to a broad array of sources. Title VII fails to define the term "national origin." However, the court noted that the legislative history, Supreme Court precedent, and regulations implementing Title VII "provide that discrimination on the basis of one's ancestors' "place of origin" - not *nation* of origin - is sufficient to come within the scope of the statute."[32] Having determined that national origin covers the nation or "place of origin," the court analogized cases recognizing claims for national origin discrimination against individuals whose nation of origin no longer exists.[33] This concept of national origin covers Indian nations, as the former Chief Justice Marshall wrote: "The Indian nations had always been considered as distinct, independent, political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial. . . . The Cherokee nation, then is a distinct community, occupying its own territory, with boundaries accurately described . . . ."[34] For this reason, the court had no trouble concluding that "differential employment treatment based on tribal affiliation is actionable as 'national origin' discrimination under Title VII."[35]

In holding that national origin discrimination covers discrimination based on tribal membership, the court distinguished the Supreme Court's holding in *Morton v. Mancari* that tribal membership is a political affiliation rather than national origin or race.[36] In *Morton v. Mancari*, in addition to holding that the

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31. *Dawavendewa I*, 154 F.3d at 1124.

32. *Id.* at 1119. The court cited *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86 (1973), which noted that the term national origin refers to the country both in which a person was born and from which his or her ancestors came. *See* 29 C.F.R. § 1606.1 (1980) (stating that national origin discrimination includes discrimination "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").

33. *Dawavendewa I*, 154 F.3d at 1119-20; *see* Pejic v. Hughes Helicopters, Inc., 840 F.2d 667 (9th Cir. 1988) (recognizing Serbian as a nationality which is covered under Title VII); Roach v. Dresser Indus. Valve & Instr. Div., 494 F. Supp. 215 (W.D. La. 1980) (recognizing discrimination against "Cajuns" as national origin discrimination under Title VII although the colony of Acadia no longer exists).

34. *Dawavendewa I*, 154 F.3d at 1120 (citing Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559-61 (1832)).

35. *Id.*

36. *Id.*

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Indian employment preference had not been overruled by the Equal Employment Opportunity Act of 1972, the Supreme Court held that Indian employment preference in the BIA did not violate the Due Process clause because of the unique BIA interest in employing Indians generally.[37] The Supreme Court made it clear that the Indian employment preference in the BIA was related to Indian self-governance, closely tailored only to employment in Indian services, based primarily on the political affiliations of Indians as tribal members.[38] Based on the fact that *Morton v. Mancari* did not involve a claim of discrimination based on particular tribal membership and did not involve a Title VII discrimination claim, the Ninth Circuit distinguished the holding that tribal membership was a political affiliation from its holding that tribal membership qualified as national origin under Title VII.[39]

The issue before the Court of Appeals was whether Title VII prohibited intragroup discrimination based on tribal membership or simply allowed discrimination for or against Indians as a protected group.[40] In its holding that discrimination based on tribal membership was not protected by the Indian Exemption, the court of appeals agreed with the EEOC's position in its amicus brief, that

> the Indian Preference exemption is to authorize an employer to grant preferences to *all* Indians . . . to permit the favoring of Indians over *non*-Indians . . . [not] to permit employers to favor members of one Indian tribe over another, let alone favor them over all other Indians.[41]

II. Procedural Background — E.E.O.C. v. Peabody Western Coal Company

A. Statement of Facts

Peabody Western Coal Company (Peabody) operates coal mines on the Navajo and Hopi reservations in northeastern Arizona.[42] Peabody's coal mines are in operation pursuant to leases entered into with the tribes by Peabody's predecessor-in-interest, Sentry Royal Company (Sentry).[43] Sentry had entered into two leases with the Navajo Nation. The first lease, entered into in 1964,

37. *Id.*
38. Morton v. Mancari, 417 U.S. 535, 554 (1974).
39. *Dawavendewa I*, 154 F.3d at 1120.
40. *Id.* at 1119.
41. *Id.* at 1122.
42. EEOC v. Peabody Western Coal Co. (*Peabody II*), 400 F.3d 774, 776 (9th Cir. 2005).
43. *Id.*

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allowed Sentry to mine on the Navajo reservation, and the second lease, entered into in 1966, allowed for Sentry to mine on "the Navajo portion of land set aside for joint use by the Navajo and Hopi Nations."[44] Both of the leases contain a clause requiring Peabody to give preference in employment to members of the Navajo Nation. The 1964 lease provides in part that Peabody "agrees to employ Navajo Indians when available in all positions for which, in the judgment of [Peabody], they are qualified and that [Peabody] shall make a special effort to work Navajo Indians into skilled, technical, and other higher jobs in connection with [Peabody's] operations under this lease."[45] The 1966 lease contains a similar provision with an allowance for Peabody to extend the Navajo employment preference to members of the Hopi Nation.[46] The language of the Navajo employment preference clause has remained unchanged and Peabody has not chosen to extend the employment preference to the members of the Hopi Nation.[47] The two leases, as well as subsequent amendments and extensions, were approved by the Department of Interior (DOI) pursuant to the Indian Mineral Leasing Act of 1938 (IMLA).[48] Should the terms of the leases be violated, the Navajo Nation and the DOI have the power to cancel the leases after notice and a period to cure.[49]

On June 13, 2001, this action was filed by the EEOC in the District Court for the District of Arizona, claiming that Peabody unlawfully discriminated on the "basis of national origin by implementing the Navajo employment preference."[50] The EEOC claims that Peabody refused to hire non-Navajo Native Americans, Delbert Mariano and Thomas Sahu, members of the Hopi Tribe, and Robert Koshiway, a member of the Otoe Tribe (now deceased), in favor of members of the Navajo Nation.[51] The EEOC contends that this conduct is in violation of Title VII, 42 U.S.C. § 2000e-2(a)(1), which prohibits employers from discriminating against applicants because of their national origin.[52]

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44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.* at 776-77.
50. *Id.* at 777.
51. EEOC v. Peabody Western Coal Co. (*Peabody I*), No. 01-1050, 2002 U.S. Dist. LEXIS 26483, at *2-3 (D. Ariz. Sept. 26, 2002), *overruled by Peabody II*, 400 F.3d 774 (9th Cir. 2005).
52. *Peabody II*, 400 F.3d at 777. The EEOC complaint also alleges that Peabody failed to maintain records of applicants in violation of 42 U.S.C. § 2000e-8(c), which requires employers to "make and keep such records relevant to the determinations of whether unlawful employment

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In February 2002, Peabody moved for summary judgment and dismissal of the action.[53] Peabody argued that the Navajo Nation was a "necessary and indispensable party" to the suit which could not be joined, thus Federal Rule 19 of Civil Procedure (Rule 19) mandated dismissal.[54]

B. District Court Decision — Peabody I

The district court ruled in favor of the defendant, Peabody, on a Rule 56 motion for summary judgment on the grounds that "the Navajo Nation is a necessary and indispensable party to this litigation and its joinder is not feasible under Rule 19(b) because the EEOC is not empowered to bring this action against the tribe,"[55] and the case presented a "nonjusticiable political question."[56]

Title VII does not cover employers that are a "government, governmental agency, or political subdivision," thus, the Navajo Nation, as a sovereign government, is exempt from the statute.[57] The district court rejected the EEOC's argument that this limiting language applies only to a "respondent government"[58] and not to non-employer Indian tribes. In a plain meaning analysis of the statute, the district court held that only the Attorney General, and not the EEOC, is authorized to join the Navajo Nation because it would be a case "involving a government."[59] The EEOC is not empowered to "name the Indian tribes as defendants in a lawsuit alleging Title VII violations, no matter what their role,"[60] which precludes the EEOC from joining the Navajo Nation under Rule 19. After a brief discussion of why the Navajo Nation was an indispensable party to the litigation, the district court held that it was proper to dismiss the action.[61]

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practices have been or are being committed." This paper focuses on the joinder issue under Rule 19, thus, does not address the EEOC's record-keeping claim. It suffices to note that the court in *Peabody II* vacated summary judgment on the EEOC's record keeping claim because the district court did not address the issue in granting summary judgment to Peabody.

53. *Id.* at 778.

54. *Id.*

55. *Peabody I*, 2002 U.S. Dist. LEXIS 26483, at *18.

56. *Id.*

57. 42 U.S.C. § 2000e(b) (2000).

58. *Peabody I*, 2002 U.S. Dist. LEXIS 26483, at *23.

59. 42 U.S.C. § 2000e-5(f)(1) (stating that "[i]n the case of a respondent which is a government, governmental agency, or political subdivision . . . the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court").

60. *Peabody I*, 2002 U.S. Dist. LEXIS 26483, at *30.

61. *Id.* at *34.

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In an alternative holding, the district court determined that the EEOC's position concerning the Navajo employment preference language in the lease is at direct odds with that of the Secretary, creating a nonjusticiable political question.[62] The district court held that Peabody had presented credible evidence showing that the original Navajo employment preference language in the lease was required by the Secretary as a "condition of the leases."[63] Moreover, even if the lease language had not been expressly required by the Secretary, the district court determined that the BIA had a policy of "requiring or at least approving Navajo Employment Preference provisions in Coal Leases executed by private companies with the Navajo Nation."[64] Because the EEOC asked the court to invalidate the DOI approved Navajo employment preference language in the lease, the court, citing *Baker v. Carr*,[65] held that this would require an initial policy determination not appropriate for judicial discretion and that any determination would show a lack of respect for either the EEOC or the Secretary and would be a cause for embarrassment between the departments.[66]

C. Court of Appeals — Peabody II

The court of appeals reversed in *Peabody II* and held that "where the EEOC asserts a cause of action against Peabody and seeks no affirmative relief against the Nation, joinder of the Nation under Rule 19 is not prevented by the fact that the EEOC cannot state a cause of action against it."[67] Furthermore, because the EEOC is an agency of the United States, the Navajo Nation cannot assert sovereign immunity to block the EEOC's motion for joinder.[68]

The court of appeals agreed with the district court that the Navajo Nation is a necessary party to the suit.[69] Should the EEOC prevail on its discrimination claim, "declaratory and injunctive relief could be incomplete unless the Nation is bound by res judicata . . . [which] will preclude the Nation from bringing a collateral challenge to the judgment."[70] The court noted that where an Indian tribe has been found to be an indispensable party, "sovereign immunity has

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62. *Id.* at *42-43.

63. *Id.* at *42.

64. *Id.*

65. *Id.* at *43 (citing Baker v. Carr, 369 U.S. 186 (1962)).

66. *Id.* at *42.

67. EEOC v. Peabody Western Coal Co. (*Peabody II*), 400 F.3d 774, 778 (9th Cir. 2005).

68. *Id.* The court also reversed the district court's ruling that the case involved a nonjusticiable political question. *Id.* at 784.

69. *See id.* at 780; Dawavendewa v. Salt River Project Agric. Improvement & Power Dist. (*Dawavendewa II*), 276 F.3d 1150, 1159 (9th Cir. 2002).

70. *Peabody II*, 400 F.3d at 780.

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required dismissal of the case." [71] However, "even when Congress has not specifically abrogated tribal immunity"[72] an Indian tribe may not assert sovereign immunity to "act as a shield against the United States."[73] The EEOC is an agency of the United States and therefore tribal immunity does not apply to Title VII suits brought by the EEOC. The court rejected Peabody's argument that Title VII expressly prohibits the EEOC from stating a direct claim against the Navajo Nation, and should be prohibited from joining the Nation under Rule 19.[74] The court held that joining the Nation under Rule 19 for the "sole purpose"[75] of effectuating complete relief between the parties and not to seek any affirmative relief from the Nation is consistent with the Ninth Circuit, First Circuit, and Supreme Court's reading of joinder under Rule 19.[76]

The court of appeals also reversed the district court's ruling that the issue presented a nonjusticiable political question. The test for a political question is based on the six factors laid down by the Supreme Court in *Baker v. Carr*.[77] The six factors are:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision

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71. *Id.* at 781 (citing *Dawavendewa II*, 276 F.3d at 1163; American Greyhound Racing, Inc. v. Hull, 305 F.3d 1015, 1027 (9th Cir. 2002)).

72. *Peabody II*, 400 F.3d at 781.

73. *Id.* (quoting United States v. Yakima Tribal Court, 806 F.2d 853, 861 (9th Cir. 1986); United States v. Red Lake Band of Chippewa Indians, 827 F.2d 380, 382 (8th Cir. 1987)).

74. *Id.*

75. *Id.* at 783.

76. *See id.* at 781; *see also* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 356 (1977) (holding that although the union was not liable for discrimination, it must remain in the litigation so that complete relief may be afforded the victims of the employer's discrimination); Nat'l Wildlife Fed'n v. Espy, 45 F.3d 1337, 1344 (9th Cir. 1995) (holding that private parties can be joined alongside agencies in suits brought to enforce National Environmental Policy Act and Food, Agriculture, Conservation and Trade Act of 1990 although these statutes do not authorize causes of action against private parties); EEOC v. Union Independiente de la Autoridad de Acueductos, 279 F.3d 49, 52 (1st Cir. 2002) (condoning without comment the EEOC's joinder of a Puerto Rican governmental employer "to ensure that complete relief . . . was available").

77. 369 U.S. 186, 217 (1962).

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> already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[78]

Of the six factors, the district court had ruled that the "third, fourth and sixth *Baker* factors were implicated by the EEOC's claim."[79] The court of appeals held that, although the "EEOC is challenging a lease that the DOI has approved, the district court was not called upon to make an 'initial policy determination' [implicating the third *Baker* factor]"[80] because determining "whether and how Title VII applies is a matter of statutory interpretation"[81] and only involves applying previously determined congressional policy determinations. Furthermore, being asked to rule upon the legality of the DOI's lease does not implicate the fourth *Baker* factor, as courts "regularly review the actions of federal agencies to determine whether they comport with applicable law."[82] Finally, the court of appeals held that the sixth *Baker* factor was not implicated by the mere existence of a "controvers[y] between departments of the federal government."[83]

III. Statutory Background

A. Coal Lease Agreements and Navajo Preference in Employment Act

It is unclear whether the Navajo Nation, Sentry, or the Secretary is responsible for the language in the coal leases requiring a Navajo employment preference. However, the district court made a factual finding, initially disputed by the EEOC, that the Secretary had required the Navajo employment preference.[84] Based on the testimony of Peabody's former general counsel and the general policies of the Secretary and the Bureau of Indian Affairs, the court held that there was ample evidence that the Secretary "required the Navajo Employment Preference as a condition of the leases."[85]

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78. *Id.*

79. *Peabody II*, 400 F.3d at 784.

80. *Id.*

81. *Id.*

82. *Id.* (citing Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230 (1986) (holding that when a determination requires applying traditional rules of statutory construction, the political question doctrine does not bar a challenge to the Secretary of Commerce)).

83. *Id.*

84. EEOC v. Peabody Western Coal Co. (*Peabody I*), No. 01-1050, 2002 U.S. Dist. LEXIS 26483, at *42 (D. Ariz. Sept. 26, 2002), *overruled by Peabody II*, 400 F.3d 774.

85. *Id.*; *see* Response Brief for Appellee at 41, EEOC v. Peabody Western Coal Co. (*Peabody I*), No. 01-1050, 2002 U.S. Dist. LEXIS 26483 (D. Ariz. Sept. 26, 2002) ("The

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Nonetheless, the Indian Mineral Leasing Act (IMLA) requires that lands within an Indian reservation or otherwise under federal jurisdiction "may, with the approval of the Secretary of the Interior, be leased for mining purposes, by authority of the tribal council or other authorized spokesmen for such Indians,"[86] and the Secretary shall "perform any and all acts and make such rules and regulations as may be necessary for the purpose of carrying the provisions of [the IMLA] into full force and effect."[87] Due to the fact that the Secretary approved the lease language, including the Navajo employment preference, it must be assumed that the Secretary deemed that by including the Navajo employment preference, the interests of the Indians have been served.

Contemporaneously with the Navajo employment preference provisions of the lease agreements, the Navajo Tribal Council approved the employment preference[88] which is in accord with the Navajo Preference in Employment Act (NPEA).[89] The NPEA states that "[a]ll employers doing business within the territorial jurisdiction [or near the boundaries] of the Navajo Nation, or engaged in any contract with the Navajo Nation, shall [g]ive preference in employment to Navajos."[90] Given the strong interest of the Navajo Nation in promoting employment on the reservation, in particular among members of the Navajo Nation, it is clear that the Secretary would see fit to include or approve of the inclusion of a Navajo employment preference in any lease agreement between the Navajo Nation and third party contractors.

B. Rule 19, Title VII and the Navajo Nation

In order to ensure complete relief to the plaintiff, Federal Rule 19 of Civil Procedure (Rule 19)determines whether a party to an action is indispensable.[91] Rule 19 requires that any person who is amenable to service and whose joinder will not deprive the court of subject matter jurisdiction shall be joined provided "(1) in the person's absence complete relief cannot be accorded among those already parties," or (2) the person has an interest relating to the action and

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language included in the leases that is at issue between [Peabody] and the Navajo Nation regarding the preferential employment of Navajos was not only originally drafted by the Secretary of the Interior, but the Secretary of the Interior *required* that the language be included.").

86. 25 U.S.C. § 396 (2000).

87. *Id.*

88. Resolution of the Navajo Tribal Council (Dec. 11, 1968) (No. CD-108-68).

89. NAVAJO NATION CODE tit. 15, §§ 601-619 (1995).

90. *Id.* § 604.

91. Dawavendewa v. Salt River Project Agric. Improvement & Power Dist. (*Dawavendewa II*), 276 F.3d 1150, 1154 (9th Cir. 2002).

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adjudication of the action in the person's absence may "(i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring" inconsistent obligations as a result of the claimed interest. [92] If a party is determined indispensable under Rule 19(a) then the court shall determine "whether in equity and good conscience the action should proceed among the parties" before the court, or whether the action should be dismissed.[93]

As interpreted by the Ninth Circuit, the inquiry under Rule 19 involves first determining whether a party is necessary, that is, whether in that party's absence, complete relief can be granted to the plaintiff.[94] The alternative inquiry is whether the party "claims a legally protected interest in the subject of the suit" such that adjudicating the claim in its absence will (1) "impair or impede its ability to protect that interest;" or (2) put the plaintiff at risk of "multiple or inconsistent" legal obligations connected with that interest.[95]

Prior to *Peabody*, the most recent case in the Ninth Circuit addressing a Rule 19 joinder issue involving an Indian tribe was *Dawavendewa II*, the continuation of *Dawavendewa I*. *Dawavendewa I* was remanded by the court of appeals and on remand the district court held that the Navajo Nation was a necessary and indispensable party to the litigation and dismissed the action. On appeal, the court discussed the lease agreement, which required Salt River to apply the Navajo employment preference. If Dawavendewa prevailed on his Title VII claim and received injunctive relief in the form of employment at the Navajo Generating Station, Salt River would be forced to choose between upholding the terms of the lease agreement and refusing to hire Dawavendewa in violation of the injunction or hiring him, and not enforcing the Navajo employment preference, in direct violation of the terms of the lease.[96] Accordingly, the court held that the Navajo Nation was a necessary party.[97]

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92. FED. R. CIV. P. 19(a).

93. *Id.* at 19(b).

94. Shermoen v. United States, 982 F.2d 1312, 1317 (9th Cir. 1992). *But see* Hines v. Grand Casino of La., 140 F. Supp. 2d 701, 705 (W.D. La. 2001) (holding in a Title VII sex discrimination claim against a casino owned by the Tunica-Biloxi Indians of Louisiana "implicit in Rule 19 is the requirement that the plaintiff have a viable cause of action against the party to be joined as a defendant"). Because Title VII exempts Indian Tribes from the definition of "employer," the tribe may not be joined. The court allowed the Title VII claim to proceed against the casino without the Tribe's participation.

95. *Dawavendewa II*, 276 F.3d at 1155.

96. *Id.* at 1155-56.

97. *Id.* at 1156.

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Under the alternative inquiry, the court noted that the Navajo Nation had a "legally protected interest in its contact rights with [Salt River]."[98] Navajo Nation bargained for and entered into a lease agreement with Salt River which included a Navajo employment preference. The benefit to the Nation is in the form of employment for its members and without the lease containing a Navajo employment preference, the "Navajo Nation leadership would never have approved this lease agreement."[99] In explaining the contours of the legally protected rights under the lease agreement with Salt River, the court noted that the economic interest of the Navajo Nation under the lease "may be grievously impaired by a decision rendered in [the Navajo Nation's] absence."[100] Furthermore, a judgment rendered in the absence of the Navajo Nation would impact the Navajo Nation's ability to negotiate contracts with third parties, undercutting the Nation's sovereign interest in self-governance.[101] The Navajo Nation's economic and sovereign interest would be implicated if the claim was adjudicated without the Navajo Nation joined as a party making the Navajo Nation a necessary party under Rule 19(a)(2)(I).[102]

Once the Ninth Circuit held that the Navajo Nation was a necessary party, it made an inquiry into whether the Navajo Nation could feasibly be joined as a party. After pronouncing that the Navajo Nation was a necessary and indispensable party to the litigation enjoying sovereign immunity from suit by Dawavendewa, the court noted that Dawavendewa had a number of other options, one of which is filing an action in conjunction with the EEOC. The court stated that "because no principle of law differentiates a federal agency such as the EEOC from the United States itself, tribal sovereign immunity does not apply in suits brought by the EEOC,"[103] leaving the door open for the EEOC and the representative plaintiffs in the *Peabody* case.

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98. *Id.* (citing Lomayaktewa v. Hathaway, 520 F.2d 1324, 1325 (9th Cir. 1975) (holding that the Hopi Tribe was a necessary and indispensable party to a claim brought by an individual challenging the terms of a lease between the Hopi Tribe and Peabody on the grounds that the Tribe was a signatory to the lease)).

99. *Id.* at 1157.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 1163 (citing EEOC v. Karuk Tribe Hous. Auth., 260 F.3d 1071 (9th Cir. 2001)) (internal quotations omitted).

IV. Discussion

A. Political Question Issue in Peabody II

The political question doctrine is about not adjudicating issues that the Constitution reserves for either the legislative or the executive branch. Under the U.S. Constitution, Congress is empowered to "regulate commerce . . . with the Indian tribes."[104] The DOI is, among its other duties, charged with dealing with Indian affairs. The creation of the DOI and its incorporation of the present BIA is not constitutionally reserved for the executive branch, but rather, spawned by an act of Congress.

Likewise, the EEOC is not an executive agency but rather an independent commission, created by Congress with the passage of Title VII, charged with interpretation and enforcement of Title VII and other federal anti-discrimination acts.[105]

With respect to the Ninth Circuit's decision determining that the Navajo employment preference in the Peabody lease and EEOC's claim of national origin discrimination does not give rise to a political question, the court is correct. The regulation of Indian affairs and the abolition of discrimination via enforcement of Title VII both have their constitutional genesis in the legislative branch. Although the executive branch is responsible for appointing the Secretary of the DOI and the Commissioners of the EEOC, the appointment power was legislated by Congress and their appointments are by and with the advice and consent of the Senate.[106] Conflicts which arise between independent commissions and executive agencies in the carrying out of Congress' legislative will do not give rise to a political question, but rather call for judicial oversight. As the *Peabody II* court noted, the EEOC is simply asking the court to determine the strictures of Title VII, as it applies to Peabody; a task of statutory interpretation involving "simply implementing policy determinations Congress has already made."[107] Should the result of the judicial intervention be deemed inappropriate, Congress is well within its power to remedy the problem it was responsible for legislatively creating.

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104. U.S. CONST. art. I, § 8.
105. *See* 42 U.S.C. §§ 2000e-4 to -5 (2000).
106. *Id.* § 2000e-4(a).
107. EEOC v. Peabody Western Coal Co. (*Peabody II*), 400 F.3d 774, 784 (9th Cir. 2005).

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B. Interference with Tribal Sovereign Power and DOI Drafted Lease Provision

The court in *Peabody II* and the EEOC both acknowledge that the EEOC cannot assert a claim against the Navajo Nation as a respondent under Title VII, but the court nonetheless held that the EEOC may join the Navajo Nation if the "sole purpose" of the joinder is to effectuate full relief between the parties.[108] The court did not address with any certainty what "full relief" might entail. The court opined about the necessity of joining the Navajo Nation as a party to prevent Peabody, should the EEOC prevail, from being subject to a collateral attack on any possible injunction against using the Navajo employment preference in hiring, as required by the lease agreement.[109] It appears then that the Ninth Circuit believes, should the EEOC prevail, that the Navajo employment preference provision of the lease agreement between Peabody and the Navajo Nation should be invalidated, removing the Navajo employment preference from the lease.

From an anti-discrimination standpoint, and from the standpoint of the representative plaintiffs in *Peabody II*, the preferable relief would be removal of the Navajo employment preference from the lease agreement, falling back on the general "on or near the reservation" exemption allowing general preferencing of Indians in employment in its stead. This would facilitate the goals of Title VII's prohibition on national origin discrimination in general and would be consistent with Congress' intent of fighting relatively high unemployment of Indians living on or near a reservation, in including the Indian Exemption in Title VII. However, this solution runs contrary to two other interests in the case: (1) the tribal sovereign power of the Navajo Nation and (2) the approval of the lease language and the Navajo employment preference by the Secretary.

The Navajo Nation, notwithstanding the lease agreement, has the NPEA,[110] which requires that "all employers doing business within the territorial jurisdiction [or near the boundaries] of the Navajo Nation, or engaged in any

108. *Id.* at 783 (citation omitted).

109. *Id.* at 780 ("The judgment will not bind the Navajo Nation in the sense that it will directly order the Nation to perform, or refrain from performing, certain acts . . . [but] the Nation could possibly initiate further action to enforce the employment preference against Peabody, even though that preference would have been held illegal in this litigation. Peabody would then be, like the defendant in *Dawavendewa II*, between the proverbial rock and a hard place -- comply with the injunction prohibiting the hiring preference policy or comply with the lease requiring it.") (internal citations and quotations omitted).

110. NAVAJO NATION CODE tit. 15, §§ 601-619 (1995).

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contract with the Navajo Nation, shall give preference in employment to Navajos."[111] Even if the Navajo employment preference clause of the lease agreement were severed, the NPEA would require Peabody to give preference in employment to Navajos regardless of the illegality of the lease provision, because Peabody is engaged in mining operations within the territorial jurisdiction of the Navajo Nation. The NPEA is enforceable against Peabody in Navajo Tribal Court. In 1990, the Ninth Circuit, in *FMC v. Shoshone-Bannock Tribes*,[112] applied *Montana v. United States*[113] to hold that Indian tribes could enforce tribal employment "preferential hiring laws against non-Indian businesses."[114] Under the holding in *Montana*, there are two circumstances in which Indian tribes retain inherent sovereign power over non-Indians on their reservations:

> [1] A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. [2] A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.[115]

Peabody is subject to tribal jurisdiction under the first *Montana* factor. It is clear that Peabody is, as the Ninth Circuit noted, "between the proverbial rock and a hard place . . ."[116] Unless the injunction also covers the NPEA, which seems doubtful as the NPEA has not been raised as an issue in this case, the Navajo Nation could seek to enforce the NPEA against Peabody.[117]

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111. *Id.* § 604.

112. 905 F.2d 1311 (9th Cir. 1990).

113. 450 U.S. 544 (1981).

114. *Shoshone-Bannock Tribes*, 905 F.2d at 1314-15.

115. *Id.* at 1314 (citing *Montana*, 450 U.S. at 565-66 (citations omitted)).

116. EEOC v. Peabody Western Coal Co.(*Peabody II*), 400 F.3d 774, 780 (9th Cir. 2005) (citations omitted).

117. Indeed, it appears that the Nation may have already gone down this road. The district court judge in *Peabody I* noted that "[w]hile this lawsuit has been pending, Peabody Coal has been subject to legal action by the Navajo Nation seeking to enforce the Navajo Preference in Employment Act, 15 NNC § 601, et seq," EEOC v. Peabody Western Coal Co. (*Peabody I*), No. 01-1050, 2002 U.S. Dist. LEXIS 26483, at *15 (D. Ariz. Sept. 26, 2002), *overruled by Peabody II*, 400 F.3d 774. However, it is unclear from this brief quotation, which is all the district court affords us, whether the suit has been brought in federal court or in tribal court and whether it has been resolved.

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Should the EEOC prevail, the Navajo Nation, being joined in the suit, would be prohibited by res judicata from collaterally attacking any injunction against the Navajo employment preference. Peabody, on the other hand, would be enjoined from discriminating on the basis of tribal membership based on the lease provision. The Navajo Nation would be barred from enforcing the lease provision against Peabody because of the federal injunction. Being barred from enforcing the lease provision would have the same effect as rewriting Navajo Nation law, removing the NPEA altogether. This appears to be the result desired by the EEOC. The EEOC has specifically requested as much in its initial complaint, praying that the district court: "Grant a permanent injunction enjoining Peabody, its officers, successors, assigns and all persons in active concert or participation with it, from engaging in discrimination on the basis of national origin."[118] As the *Peabody I* court observed, "the EEOC suggests, however, that the Navajo Nation is free *only* to require that a private company such as Peabody Coal operating on their reservations adopt hiring preferences for all Native Americans living on or near the reservations, but *not* to adopt hiring preferences applicable to Navajos only."[119]

The decision of the Ninth Circuit in *Peabody II*, should the EEOC prevail on its Title VII claim on remand, sets the stage for a form of *de facto* federal judicial rewriting of the Navajo Nation Code. Due to the precarious financial and employment situation on the Navajo reservation, it would be impossible for the Nation to refuse to do business with non-Indian employers. The only viable option would be to rescind the NPEA or amend the NPEA to include a preference for all Indians, rather than just for Navajos. This result would run contrary to the notion of Indian self-determination and undercut the authority and autonomy of the Navajo Nation in running its own affairs and managing in a manner that is most appropriate for its own members.

In the passage of Title VII, Congress carved out a small number of very important exemptions. One of these exemptions is the Indian Exemption, exempting Indian tribes from the definition of employer for the purposes of Title VII.[120] Although Congress may not have contemplated this exemption allowing intragroup discrimination as in *Peabody*, Congress did intend to allow the Indian tribes to be self-determinative. One component of self-determination is the power to legislate and to enforce such legislation on tribal lands. In this case, the Navajo Nation has determined that it is in the best interests of its members to enforce the NPEA on the reservation in order to promote

118. *Id.* at *37.
119. *Id.* at *38.
120. 42 U.S.C. § 2000e(b) (2000).

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employment and create job opportunities for the members of the Nation. The importance of on reservation employment opportunities has been noted by commentators:

> One reason that so many Tribal members work for Tribal employers is that federal law [including Title VII] permits Indian Tribes to initiate Indian preference policies that allow Tribes to grant a hiring and employment preference to Indians. This preference extends to businesses operating on or near an Indian reservation. Many Tribes also extend a preference to Tribal Members over non-Member Indians.[121]

The consequence of non-immunity from suit for sovereign choices relating to employment and employment preferences is an invasion of the Nation's sovereign interest in self-governance.[122] Because of the consequences of an injunction against the Navajo employment preference clause in the lease for the NPEA, it appears that the EEOC is in fact seeking some form of affirmative relief against the Navajo Nation, abolition of NPEA, and the Ninth Circuit has sanctioned this end-run on the Indian Exemption in Title VII under the guise of an innocuous Rule 19 joinder.

The second interest affected by this decision is that of the Secretary, who approved the terms of the lease agreement between Peabody and the Navajo Nation. The district court made a factual finding that the Secretary expressly required the Navajo employment preference language to be included in the lease as a condition of approval.[123] Regardless of the accuracy of the district court's finding, the Secretary approved of the lease agreement which included the Navajo employment preference clause. This indicated that the Secretary, although not charged with interpreting Title VII and the contours of national origin discrimination, made the determination that it was in the best interests of the Navajo Nation to have a Navajo employment preference clause in the lease.

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121. Matthew L.M. Fletcher, *Tribal Employment Separation: Tribal Law Enigma, Tribal Governance Paradox, and Tribal Court Conundrum*, 38 U. MICH J.L. REFORM 273, 284 (2005).

122. *Id.* at 317-18 ("Sovereign immunity prevents depletion of valuable common resources and protects against litigation interfering with the operation of the Tribe.").

123. EEOC v. Peabody Western Coal Co. (*Peabody I*), No. 01-1050, 2002 U.S. Dist. LEXIS 26483, at *15 (D. Ariz. Sept. 26, 2002), *overruled by* EEOC v. Peabody Western Coal Co.(*Peabody II*), 400 F.3d 774 (9th Cir. 2005).

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C. A Possible Legal Defense on Remand

It is important to note that the merits of the EEOC's Title VII claim against Peabody and the Navajo Nation have yet to be tested in court. The court in *Dawavendewa I*, held that a plaintiff alleging tribal membership discrimination could state a claim of national origin discrimination under Title VII for which relief could be granted. The court did not pass on the merits of Dawavendewa's claim. Dawavendewa's case was later dismissed by the court of appeals in *Dawavendewa II*, leaving the issue of the merits unresolved. On remand, Peabody and the Navajo Nation have the opportunity to test a defense against the discrimination claim in order to preserve the NPEA.

In appropriate cases, federal law will yield to treaty rights or federal policy of Indian self-governance. As expressed by the Supreme Court in *Choctaw Nation v. Oklahoma*, "[t]he Indian Nations did not seek out the United States and agree upon an exchange of lands in an arm's-length transaction."[124] One of the consequences flowing from this is that the Supreme Court has often held that treaties with the Indians should be interpreted "liberally in favor of the Indians," such that any doubtful expressions in them should be resolved in their favor.[125] The 1868 Navajo Treaty,[126] which established the Navajo Nation's territory and the right to exclude individuals, has been used as a shield against federal law successfully before in federal court. In *Donovan v. Navajo Forest Prods. Indus.*,[127] the Tenth Circuit held that the Navajo Nation had not relinquished its sovereign power under the 1868 Navajo Treaty nor had Congress intended to abrogate the treaty with the passage of OSHA.[128] As a result, the court held that the treaty barred the application of OSHA to the tribal owned Navajo Forest Products Industries.[129]

Peabody and the Navajo Nation might be able to assert the 1868 Treaty as a defense against the EEOC's attack on the NPEA. It is clear from the Indian Exemption in Title VII that Congress did not intend to abrogate tribal immunity in the passage of the Act. Congress' intent in including the Indian Exemption and the "on or near the reservation" exemption in Title VII relates to tribal self-

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124. 397 U.S. 620, 630 (1970).

125. Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 200 (1999); *see also* Alaska Pac. Fisheries v. United States, 248 U.S. 78, 89 (1918).

126. Navajo Treaty, U.S.-Navajo Tribe, June 1, 1868, 15 Stat. 667.

127. 692 F.2d 709 (10th Cir. 1982).

128. *Id.* at 712.

129. *Id. But see* Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1118 (9th Cir. 1985) (holding that absent a federal treaty between the Coeur d'Alene Tribe and the United States, OSHA regulations do apply to a tribally owned and operated farm).

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governance. Peabody and the Navajo Nation might be able to argue that self-governance in accordance with the 1868 Navajo Treaty should take precedent over Title VII's ban on national origin discrimination and allow the Navajo Nation to provide for its people. The Navajo Nation has expressed this sentiment before: "As a sovereign nation, it was necessary to bargain water, coal, land, and the environment for jobs for Navajo people. Without Navajo preference in hiring in the lease agreement, the Navajo Nation leadership would never have approved this lease agreement."[130]

V. Conclusion

The battle in *Peabody II* is over but the dust has yet to settle. Peabody has filed a petition for a writ of certiorari, which will be considered in conference by the Supreme Court on January 20, 2006. Yet, should the result stand as is, it is clear that the EEOC is seeking to nullify the NPEA. If the EEOC should prevail on its claim, it will succeed in obtaining an injunction against the NPEA. Should the EEOC fail, the fight might continue, either in the appellate courts or again with the next test case brought by the EEOC to strike down the NPEA or other tribes' tribal employment preference laws. If Congress is serious about providing a level playing field for the Indian tribes and assuring their right to self-governance, then Congress must intervene by extending the Indian Exemption to tribal employment preferences, in accordance with local tribal law, used by non-tribal employers on or near the reservation.

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130. Brief of the Navajo Nation as Amicus Curiae November 9, 2006 Supporting Defendant-Appellee, Dawavendewa v. Salt River Project Agric. Improvement & Power Dist. (*Dawavendewa II*), 276 F.3d 1150, 1153 (9th Cir. 2002) (No. 00-16787), 2001 WL 34095334.

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