

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 12-17780

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellant;

v.

PEABODY WESTERN COAL COMPANY,
Defendant-Appellee;

NAVAJO NATION,
Rule 19 Defendant-Appellee;

KEVIN K. WASHBURN and SALLY JEWELL,
in their official capacities as Assistant Secretary of the Interior
for Indian Affairs, and as 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

ANSWERING BRIEF OF DEFENDANT-APPELLEE
PEABODY WESTERN COAL COMPANY

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CORPORATE DISCLOSURE STATEMENT

Peabody Energy Corporation, a publicly traded company, wholly owns Peabody Investments Corp. which in turn wholly owns Peabody Holding Company, LLC which owns 100% of Peabody Western Coal Company's stock.

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STATEMENT OF JURISDICTION

Peabody Western Coal Company (“Peabody”) agrees with the EEOC’s jurisdictional statement except that it does not believe that 42 U.S.C. §1981a: i) provided a grant of jurisdiction to the district court; or ii) played any role in this case after this Court’s most recent decision. *EEOC v. Peabody Western Coal Co.*, 610 F.3d 1070 (9th Cir. 2010).

ISSUES FOR REVIEW

1. Did the district court correctly grant summary judgment where the EEOC has not rebutted the Department of the Interior’s authority under the Indian Mineral Leasing Act and principles of federal Indian law to approve tribe-specific employment preferences as a political classification beyond the scope of Title VII?
2. May the district court’s decision granting summary judgment be affirmed on the independent, alternative basis that §703(i) of Title VII, properly construed, preserves employment preference programs, both Indian and tribe-specific, in effect at the time of its enactment?
3. Is the EEOC’s 1988 Policy Statement interpreting §703(i) entitled to any deference as it relates to tribe-specific employment preferences in tribal mineral leases approved by the Department of the Interior?
4. Can the EEOC shift the burden of proof to the defendants when the legal issue before the court is whether Title VII applies to this matter and where the

facts that the EEOC asserts defendants have the burden to prove are irrelevant to the remaining claim for prospective injunctive and declaratory relief?

5. Did the district court act within its discretion when it denied the EEOC's eleventh-hour motion to supplement the record with information the EEOC had in its possession when it filed the action, but inexplicably failed to file with any of its four substantive briefs filed on remand since 2010?

STATEMENT OF CASE

A. Nature of the Case

This Court has previously found that Peabody is “caught in the middle of a dispute not of its own making” and is subject to “profoundly unfair” risks of mutually contradictory enforcement. *EEOC v. Peabody Western Coal Co.*, 610 F.3d 1070, 1080 (9th Cir. 2010) (“*Peabody IV*”). This Court has stated twice that the two contending agencies have forced Peabody into a position “between the proverbial rock and a hard place.” *EEOC v. Peabody Western Coal Co.*, 400 F.3d 774, 780 (9th Cir. 2005) (“*Peabody II*”); *Peabody IV*, 610 F.3d at 1078. These findings remain applicable today. For the first time, however, this Court can address the merits of the legal dispute between the EEOC and Interior at the heart of this case with all parties present. Peabody, like other similarly situated employers, does not know what federal law requires of it. The EEOC claims its

view of federal employment law governs; Interior claims its view of federal Indian law governs. And the two are incompatible.

On the EEOC's second appeal, this Court analyzed the posture of the parties under Rules 19 and 14 and dismissed the EEOC's claims for damages tied to Peabody's 1997 employment conduct. 610 F.3d at 1084, 1087. This Court so ruled because it found that Peabody could not seek indemnification from Interior for the damages the EEOC sought even though Interior, through its statutory lease approval function, had imposed on Peabody the tribal employment preference obligation that gave rise to the EEOC's claims. *Id.* at 1083-84. This Court then held that, for the remaining part of the case, Peabody could avoid "the possibility of inconsistent verdicts" via a third-party impleader against Interior. *Id.* at 1084-85, 87. This holding limited the scope of the remand proceedings now on appeal to the EEOC's claim for prospective relief.

The district court held the tribal preferences in Interior-approved IMLA leases are not "unlawful national origin discrimination but a political classification and thus not within the scope of Title VII." ER-18. The EEOC now seeks to reverse summary judgment with new arguments that any "political classification" must be grounded strictly in tribal membership and in its 1997 hiring decisions Peabody discriminated by failing to determine the applicants' tribal membership. Specifically, the EEOC claims

that Peabody advanced a position during the EEOC investigation (that it used an ‘Indian preference’) that is wholly inconsistent with the position Peabody advances in this litigation (that its conduct is justified by the Navajo preference in the leases) demonstrates the pretextual nature of Peabody’s assertion that it does not discriminate in violation of Title VII.

Op.Br. 46 n.9. As explained in the Argument below, the EEOC’s new focus on determining tribal membership and its new claim of pretext – neither of which it asserted below – do not defeat summary judgment.

The EEOC’s summary judgment exhibits¹ demonstrate that, in the 1997 employment decisions leading to the charges here, Peabody represented that it was an Indian Preference employer. Peabody received applications for employment from both Navajo and non-Navajo Native Americans. On all three occasions, Peabody hired Navajo Native Americans; but, in making those decisions, Peabody hired the most qualified applicants. In fact, two of those hired scored higher on the primary qualification test – operating the equipment required in the job – than the charging parties. ER-348-49, 352-53. In the third case, the charging party was not deemed sufficiently qualified to be tested or interviewed, and he submitted his complete application only after the testing for the open positions had been conducted. ER-350-51.

¹ The EEOC lodged these documents with its response to Interior’s motion for summary judgment. ER-345-55. These documents were not part of the EEOC’s last-minute submission. Citations to “ER-___” are to the excerpts of records filed with the EEOC’s opening brief.

Peabody's conduct is the product of the agencies' nearly 25-year failure to resolve their dispute over the conflict between federal employment and federal Indian law. With the inter-agency legal dispute joined on remand, however, Peabody briefed the merits of the legal argument. The EEOC has alleged that Peabody violated Title VII by discriminating against non-Navajo Native Americans, contending the lease preference provisions² violate Title VII. Based on the hiring facts described above, Peabody denied the allegations of discrimination but has argued that, if a court found otherwise, there was no violation of Title VII as the preferences reflect a political classification beyond the scope of Title VII. This is not pretextual conduct. Rather, Peabody has simply and repeatedly framed the legal dilemma it faces because the two agencies impose conflicting demands.

With the required parties joined, this Court can declare which agency prevails in the dispute over the legality of tribal employment preferences in Interior-approved tribal leases. There is no pretext in Peabody taking the legal position that its lease provisions are lawful in the face of the EEOC's claims. As this Court declares the unified rule of law that governs employers like Peabody, it will do so having previously affirmed the dismissal of the EEOC's claims for damages. No claim of factual dispute about Peabody's conduct in 1997 prevents

² Peabody's leases with the Navajo and Hopi have tribe-specific employment preferences.

this Court from resolving the inter-agency dispute and prospectively declaring the relative rights of the parties.

B. Procedural History and Disposition Below

The EEOC filed this action in 2001 against Peabody. This Court's and the prior district court decisions describe the procedural history through June 2010. *EEOC v. Peabody Coal Co.*, 214 F.R.D. 549 (D. Ariz. 2002) (“*Peabody I*”); *EEOC v. Peabody Western Coal Co.*, 400 F.3d 774 (9th Cir. 2005) (“*Peabody II*”); *EEOC v. Peabody Western Coal. Co.*, 99 FEP Cas. (BNA) 40 (D. Ariz. 2006) (“*Peabody III*”); and *Peabody IV*, 610 F.3d 1070. Following *Peabody IV*, the Supreme Court denied Peabody's and the Navajo Nation's petitions for certiorari and the EEOC's conditional cross-petition. 132 S.Ct. 91 (2011).

On remand, the EEOC filed its Second Amended Complaint, and the Navajo Nation and Peabody answered. Peabody filed a third-party complaint under Rule 14 against the Assistant Secretary of the Interior for Indian Affairs and the Secretary of the Interior (together “Interior” or “the Secretary”). ER-669. Relying on the principles underpinning this Court's suggested third-party action, Peabody also asserted counterclaims against the EEOC seeking prospective injunctive relief if the district court ultimately concluded that Interior's view of tribe-specific preferences was correct. *Id.* Interior answered the third-party complaint, while the

EEOC moved to dismiss the counterclaims. SER-18.³ The district court dismissed the counterclaims without prejudice, ruling that judgment in Peabody's favor on the primary claims would effectively grant Peabody the relief against the EEOC it sought via counterclaim. ER-146, 149.

Interior filed a motion for summary judgment. Interior's motion reasoned that it could not be liable to Peabody because Peabody was not liable to the EEOC on the underlying Title VII claim. Peabody and the Navajo Nation joined that portion of Interior's motion and, by August 24, 2012, each party had filed two briefs on Interior's motion. All four parties' filings contained exhibits and statements of fact related to their respective summary judgment arguments. The EEOC's statement of facts did not suggest there was any fact dispute material to summary judgment about the events related to Peabody's 1997 hiring decisions. ER-339-43.

In September, the court scheduled oral argument on October 11, 2012. The day before argument, the EEOC filed a motion to supplement the record. This motion appended a 2012 declaration from a former EEOC investigator purporting to authenticate her notes from interviews she conducted with former Peabody employees in 1999. ER-105-139. The morning of the argument, the district court denied the EEOC's motion to supplement, finding that the EEOC had ample prior

³ Citations to "SER-__" are to Peabody's Supplemental Excerpts of Record filed with this brief.

opportunities to submit the interview notes and that the material was irrelevant to a case limited to prospective injunctive relief. ER-23. Following argument, the court granted the dispositive motions, dismissing the EEOC's claims against Peabody with prejudice and dismissing Peabody's third-party claims without prejudice. ER-22. After entry of final judgment, the EEOC filed this appeal.

STATEMENT OF FACTS

A. History Of The Leases At Issue

In 1938, Congress enacted the Indian Mineral Leasing Act of 1938 (“IMLA”), 25 U.S.C. §§396a-396g. The purposes of IMLA were threefold – to make uniform the law relating to the leasing of tribal lands for mining; to harmonize tribal mineral leasing matters with the new authority and autonomy vested in tribes by the Indian Reorganization Act of 1934;⁴ and to ensure that Indians received the greatest return from their property. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 767 (1985); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 187 (1982). These purposes were to be implemented subject to the requirement that tribes could only enter into leases “with the approval of the Secretary.” 25 U.S.C. §396a.

Until after World War II, there was relatively little natural resource development on the Navajo and Hopi reservations. In fact, in 1948, Interior

⁴ 25 U.S.C. §§461 *et seq.*

reported to Congress on the economic challenges facing the two tribes, suggesting coal mining might “provide a living for a substantial number of Navajos.” ER-566, 571. Congress then passed the Navajo-Hopi Rehabilitation Act of 1950, which appropriated public funds for projects supporting economic development on the two reservations. One such project was to study tribal coal and other mineral resources. 25 U.S.C. §631(3). The results of Interior’s studies suggested that tribal “coal could be profitably mined” on the two reservations. *See Austin v. Andrus*, 638 F.2d 113, 114 (9th Cir. 1991).

In 1961, the Navajo Nation and Peabody’s predecessor in interest executed, and Interior approved, an IMLA prospecting permit authorizing Peabody to delineate commercial coal deposits on the Black Mesa area of the Navajo reservation. ER-202, 213-241. The prospecting permit contained an employment preference for members of the Navajo Nation and granted Peabody the option of acquiring a lease in the form attached to the permit, which contained a more detailed tribe-specific employment preference. *Id.* at 216 (permit), 231 (draft lease). In 1964, the Navajo Nation and Peabody entered into a mining lease, known as the 8580 Lease, which contained the employment preference in the lease form attached to the permit. ER-476.⁵ Also in 1964, Peabody executed with the

⁵ The 8580 Lease provides:

Navajo Nation and the Hopi Tribe, and Interior approved, another prospecting permit for land adjoining the 8580 Lease, in which both tribes had 50% mineral interests. This prospecting permit, like the 1961 permit, contained a tribal employment preference for both tribes and attached the form of lease Peabody would acquire should prospecting lead to mine development. ER-204-207, 243-266. In 1966 Peabody entered into a separate lease with each tribe, again with Interior's approval: (1) the 9910 Lease with the Navajo Nation; and (2) the 5743 Lease with the Hopi Tribe. ER-506, 520-21 (9910 Lease); ER-271-274 (5743 Lease). Those leases covered each tribe's mineral interest in these lands, part of what was formerly known as the Joint Use Area.⁶

The 9910 Lease also contained a tribe-specific employment preference for members of the Navajo Nation, but extended the preference to members of the Hopi Tribe. The Hopi-Peabody 5743 Lease contained a reciprocal preference for members of the Hopi Tribe, providing for its extension to members of the Navajo Nation.

“Lessee agrees to employ Navajo Indians when available in all positions for which, in the judgment of Lessee, they are qualified, and to pay prevailing wages to such Navajo employees and to utilize services of Navajo contractors whenever feasible. Lessee shall make a special effort to work Navajo Indians into skilled, technical and other higher jobs in connection with Lessee's operations under this Lease.” ER-489.

⁶ See *Clinton v. Babbitt*, 180 F.3d 1081, 1084 (9th Cir.1999) (describing the Joint Use Area); see also 25 U.S.C. §640d-6.

Interior's approval of the foregoing lease transaction occurred both before and after the effective date of Title VII. Since then, the Navajo Nation and Peabody have amended the 8580 and 9910 Leases three times. Interior approved those amendments in 1987, 1999, and most recently 2011. ER-208-209; ER-540. None of the amendments affected the tribe-specific employment preferences.⁷ ER-208-09, 539.

The parties negotiated, and Interior approved, the prospecting permits and leases under IMLA.⁸ IMLA vests the Secretary with expansive powers over mineral leasing on tribal lands. In addition to the requirement that Interior approve each lease – and thus amendments to each lease – IMLA also directed: “All operations under any . . . lease issued pursuant to [IMLA]” . . . “shall be subject to the rules and regulations promulgated by the Secretary of the Interior.” 25 U.S.C. §396d. *See Pawnee v. United States*, 830 F.2d 187, 89 (Fed. Cir. 1987) (under IMLA, “[the Secretary] determines whether to consent to a lease and *the terms of the lease.*”) (emphasis added).

Interior's initial IMLA regulations required that mineral leases “must be

⁷ The agreements to amend the leases have contained language similar to the 2011 amendments: “Except as expressly modified by this Lease Amendment Agreement, the Coal Leases and all of their provisions, as amended, shall continue in full force and effect.” ER-539.

⁸ The Supreme Court ruled in *United States v. Navajo Nation* that the 8580 and 9910 Leases were entered into and approved by Interior pursuant to IMLA. 556 U.S. 287, 298 (2009).

upon forms prescribed by the Secretary.” 25 C.F.R. §186.30 (1938); *see* 22 F.R. 10588 (1957) (issuing 25 C.F.R. §171.30). In substance, that language has never changed.⁹ From at least 1957 until 1977, Interior used a form for solid mineral leasing on tribal lands that it issued in October 1957.¹⁰ Interior’s prescribed form of lease when Peabody and the Navajo Nation entered into the prospecting permits and leases in 1961, 1964 and 1966 contained this preference:

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

ER-291 (emphases added). The Navajo-specific preference in the 8580 and 9910

⁹ 24 F.R. 7949 (1959) (issuing 25 C.F.R. §171.30 and making non-substantive changes in the command to used prescribed lease forms). From 1959 through 1996 the substance of this rule did not change. 47 F.R. 13326, 13327 (1982) (redesignating §171.30 as §211.30). In 1996, §211.30 was renumbered as § 211.57, and a sentence added that the provisions of form leases could be changed with the approval of the Secretary. 61 F.R. 35634 (1996). Today, the rule still provides that leases shall be “on forms, prescribed by the Secretary.” 25 C.F.R. §211.57 (2013).

¹⁰ *See Natural Resources Law on American Indian Lands* (Rocky Mountain Mineral Law Foundation, 1977). ER-276-92. The treatise’s appendix lists the then-current mining contract forms and their date of issuance. ER-283. The Preface to the treatise thanks named Interior employees for providing the forms published in the appendix. ER-282.

Leases closely tracks this form language. *See* note 5 *supra*.

On remand in 2006, the EEOC engaged in discovery regarding the Leases. It deposed Stewart Udall, Secretary of the Interior when the 8580 and 9910 Leases were drafted and approved. Udall's deposition confirmed that Interior insisted on inclusion of the tribal employment preferences in the 8580 and 9910 Leases.¹¹

B. The EEOC's Investigation

In 1998, three individuals filed charges with the EEOC claiming Peabody discriminatorily denied them employment because they were not Navajo. ER-345-47. Peabody submitted position statements denying the allegations of national origin discrimination and explaining its defenses. Two of the three charging parties scored lower on job-related tests operating the required equipment, and the highest-scoring candidates on those tests were hired. As to charging party Mariano, he previously worked for Peabody at the mine for nearly 14 years. Applying to return, he had the second-highest score on the hiring test, but Peabody hired the higher scoring candidate. ER-348-49. As to charging party Koshiway, he was one of seven candidates selected for testing, but he ranked fourth on the test, and the highest ranking candidate was hired. ER-352-53. As to charging party

¹¹ Secretary Udall testified that he believed the tribal preferences flowed from the express statutory provision for tribal preferences in the Navajo-Hopi Rehabilitation Act of 1950, 25 U.S.C. §633. The legislative history of the 1950 Act supports Secretary Udall's testimony. S. Rep. No. 81-550 at 6 (1949). Peabody's exhibits, however, demonstrate Interior's tribal preference practice under IMLA.

Sahu, Peabody explained first, not all applicants for vacant positions are interviewed or tested and that the company had determined to test other, better qualified applicants, and second, that the company had completed the testing of qualified candidates before Mr. Sahu submitted his complete application. ER-350-51.

Peabody acknowledged that the persons hired for the three positions were Navajo, but advised the EEOC that the test scores (in the cases of Mariano and Koshiway) and assessment of skills and late application (in the case of Sahu) explained Peabody's decisions to hire others.

During the EEOC investigation, Peabody also made the EEOC aware of the intractable dilemma it faced regarding the hiring preferences. Peabody described itself publicly as an American Indian preference employer, but it also provided to the EEOC the 8580 and 9910 Leases, with their tribe-specific preference provisions and Interior approvals, and advised that the 1999 lease amendments were awaiting approval from then Secretary of the Interior Bruce Babbitt. SER-16-17. There is no evidence in the record that, notwithstanding receiving the Interior-approved leases, the EEOC consulted Interior about the obvious inter-agency conflict they disclosed. After conciliation failed, the EEOC filed its lawsuit against Peabody.

SUMMARY OF ARGUMENT

The third trip to the district court allowed the EEOC and Interior to litigate their conflicting legal positions on tribe-specific employment preferences in mineral leases on tribal lands. The tribe-specific employment preferences in this case appear in leases that Peabody entered into before and after the effective date of Title VII. Under IMLA, Interior prescribed mineral lease forms and the solid mineral lease form contained a tribe-specific preference. *See* text and note 6 *supra*. Interior approved these leases and has approved three sets of amendments to the leases. The Navajo Nation views tribal preferences in its leases of tribal lands as critical to its economic development and efforts at self-governance. As such, Interior's blessing of the tribal preferences reflects a government-to-government decision and, under *Morton v. Mancari*,¹² such preferences are political classifications beyond the scope of Title VII. Further, *Dawavendewa II*¹³ recognized that tribe-specific preferences could be justified. Here, Congress vested broad rule-making authority in Interior as well as the authority to approve all leases. Using that authority, Interior through its use of form leases has developed a program of approving tribe-specific preferences in solid mineral leasing. 25 U.S.C. §396d; 25 C.F.R. §211.57. Finally, under *Mancari*, Title VII

¹² 417 U.S. 535 (1974).

¹³ *Dawavendewa v. Salt River Project*, 276 F.3d 1150, 1158 (9th Cir. 2002).

did not repeal by implication Interior's authority under IMLA to prescribe and approve tribal preferences.

Peabody also makes the alternative argument that Senator Mundt's statement in the legislative history about §703(i), as interpreted by this Court in *Malabed*,¹⁴ demonstrates that Congress intended to preserve all preference programs then in existence. The presence of Interior and the Navajo Nation distinguish this case from *Dawavendewa v. Salt River Project*, 154 F.3d 11 (9th Cir. 1998) ("*Dawavendewa I*"). The history of the Navajo-Peabody leases, fully consistent with the history of Interior's IMLA rules and form leases, together show that, at the time of Title VII's enactment, Interior had a tribal employment preference program in effect under IMLA.

Peabody submits that, both as to the district court's ruling that these preferences are beyond the scope of Title VII, and the alternative argument that §703(i) preserved this preference program, the EEOC's reliance on *Dawavendewa I* fails. Moreover, *Dawavendewa I* has been cabined by subsequent rulings of this Court, and it never addressed either of the primary arguments in this case. Similarly, both as to the district court's ruling on "beyond the scope," and the alternative §703(i) argument, the EEOC's plea for deference to the 1988 Policy Statement's interpretation that §703(i) prohibits tribal preferences also fails.

¹⁴ *Malabed v. North Slope Borough*, 335 F.3d 864, 871-72 (9th Cir. 2003).

With respect to the EEOC's argument regarding the burden of proof, the EEOC's argument is misguided in four ways. First, Peabody's 1997 conduct is irrelevant to this case as shaped in 2010 by this Court; the remanded case dealt only with the legal issue and prospective injunctive relief to bind the parties and ensure a uniform rule of law on tribal preferences. Second, the EEOC, facing summary judgment, has improperly changed its theory of the case by seeking to inject a fact dispute at the last hour. Third, the EEOC's burden-of-proof argument depends on the political classification issue being an affirmative defense. It is not; it is the EEOC's burden to show Title VII applies to tribal preference provisions in mineral leases under IMLA. Fourth, the EEOC misapplies the pretext question in its opening brief; no evidence challenges the veracity of the reasons Peabody offered for its 1997 hiring decisions.

Finally, a host of reasons demonstrate that the district court did not abuse its discretion in denying the EEOC's request to supplement the record on the day before oral argument. The EEOC offered no justification for its late request, the request violates Rule 6 of the Federal Rules of Civil Procedure as well as local rules. Further, EEOC had this evidence since the case's inception, and it did not seek to file a Rule 56(d) motion. Last, the evidence itself is inadmissible hearsay. Fed. R. Evid. 801(d)(2).

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT THE TRIBAL EMPLOYMENT PREFERENCES ARE BEYOND THE SCOPE OF TITLE VII.

Peabody endorses and adopts Interior’s presentation that tribal employment preferences, contained in tribal leases approved by Interior under the provisions of federal law governing Indian lands and resources, constitute a “political classification” that is beyond the scope of Title VII. As suggested by this Court, Peabody impleaded Interior to “allow the court to consider the arguments of the Secretary on the legality of the [lease] employment preferences before issuing a final ruling.” 610 F.3d at 1087. With this impleader, Peabody seeks a uniform prospective declaration of the relative rights of the parties, ending the threat of inconsistent enforcement from the two agencies.

Peabody provides here its perspectives on Interior’s position and the inter-agency legal dispute.

A. *Dawavendewa I* Does Not Determine This Case.

The EEOC argues, as it did below, that this Court’s first decision in *Dawavendewa v. Salt River Project*, 154 F.3d 1117 (9th Cir. 1998), *cert. denied*, 528 U.S. 1098 (2000) (“*Dawavendewa I*”) controls this case. Claiming factual similarity to that case, the EEOC further presses that *Dawavendewa I* disposed of the *Morton v. Mancari*-based and §703(i) arguments pressed by defendants below. The EEOC’s position fails to account for either the Solicitor General’s views – in a

brief filed on behalf of the EEOC – or this Court’s second decision in

Dawavendewa, both of which constrain the EEOC’s reliance on *Dawavendewa I*.

This Court put it best:

In *Dawavendewa I*, we held only that a hiring preference policy based on tribal affiliation, as described in the complaint, stated a claim upon which relief could be granted. 154 F.3d at 1124. As pointed out by the Solicitor General’s amicus brief, however, we did not address the merits of the Nation’s proffered legal justifications in defense of the challenged hiring preferences.

Dawavendewa v. Salt River Project, 276 F.3d 1150, 1158 (9th Cir. 2002), *cert. denied*, 537 U.S. 820 (2002) (“*Dawavendewa II*”). This Court’s markers in *Dawavendewa II* limiting *Dawavendewa I* apply fully in this case. This Court limited the import of *Dawavendewa I* in part by mentioning the absent Navajo Nation. The absence of Interior in *Dawavendewa I* further limits its import. Here, the Navajo Nation and Interior have articulated the legal justifications for tribal employment preferences. As Interior noted to the district court, this Court “would have had no reason to insist on Interior [on remand] ‘provid[ing] its position on Peabody Coal’s tribal preference’ if [this Court] had already concluded that the preference could not stand.” ECF No. 264 at p.15.

Interior’s position in this case that tribal preferences are beyond the scope of Title VII was not addressed by this Court in *Dawavendewa I*. Similarly, *Dawavendewa I* contains no treatment of the long-standing history of Interior’s administration of preference programs in connection with the leasing of tribal land,

subject to the approval of Interior, for economic development. More specifically, *Dawavendewa I* did not involve tribal mineral leasing; thus, the evidence of the IMLA program of tribe-specific employment preferences in solid mineral leasing was wholly absent there.

B. IMLA Authorized Interior To Require Tribe-Specific Employment Preferences as a Condition for its Approval of the 8580 and 9910 Leases.

In attacking the district court’s ruling, the EEOC argues that “congressional authority cannot be found in or inferred from” IMLA that would “authorize the Secretary to direct or permit private companies to engage in conduct that would ordinarily violate Title VII.” Op.Br. 39. IMLA did not expressly direct or require tribe-specific hiring preferences. But the EEOC’s argument that Interior’s approval of the lease provisions here lacked Congressional authorization and was tantamount to “Interior directing private companies to ignore Title VII” ignores the record of Interior’s administration of IMLA since 1938 and sidesteps the legal issues. Op.Br. 30, 38-40. The legal and factual grounding for the 8580 and 9910 Leases is now developed. With IMLA, Congress provided the uniform structure for mineral leasing of tribal lands, giving tribes more authority over leasing lands held in trust for them by the United States. Congress also retained in the Secretary an unqualified approval function, together with unqualified authority to issue regulations that govern “[a]ll operations under any ... lease issued” under IMLA.

25 U.S.C. §§396a, 396d.

Since 1938, Interior has maintained regulations under IMLA that have provided that the tribal mineral leases be on forms prescribed by Interior. The undisputed record shows, at least from 1957 to 1977, Interior's solid mineral lease forms have required lessees, such as Peabody, to give employment preference to members of the lessor tribe. ER-276-92. That practice is wholly consistent with the three stated primary purposes of IMLA;¹⁵ the EEOC has never argued the contrary. The record is clear, straight-forward, and undisputed that, before Title VII, IMLA authorized and Interior implemented tribal preferences, and the Navajo-Peabody Leases exemplify that authority and practice.

The EEOC hardly contested this proof of the IMLA program that led to the Navajo-Peabody Leases. The EEOC did not object to the leases and their amendments. It disputed the authenticity and admissibility, on hearsay grounds, of the treatise and Interior's form lease, the court overruled those objections, and the EEOC has not appealed those rulings. ER-7 n.15. Accordingly, those objections have been waived. *Castanich v. Department of Soc. & Health Servs.*, 627 F.3d 1101, 1105 n.7 (9th Cir. 2010).¹⁶ The EEOC disputed the characterization of former Secretary Udall's testimony regarding Interior's role in prescribing and

¹⁵ See text at p. 8, *supra*.

¹⁶ See SER-87-91 for a discussion of evidentiary issues on remand.

approving the leases with tribe-specific preferences, but offered no evidence creating a genuine issue of material fact regarding his testimony. ER-186-91.

More importantly for purposes of reviewing a grant of summary judgment, the EEOC never proffered any facts that present a genuine issue of material fact regarding the legal issue whether Title VII applies to the political classification created by Interior's approval of tribe-specific hiring preferences. The EEOC has the burden of proof to show that Title VII applies and renders the alleged employment conduct illegal. On an issue where the nonmoving party, here the EEOC, has the ultimate burden of proof, the moving parties can prevail "by pointing out that there is an absence of evidence to support the non-moving party's case." *Soremkun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007).¹⁷

The record below showed that Interior prescribed and approved, and even drafted, mineral leases containing tribe-specific hiring preferences and that such preferences are political classifications outside the scope of Title VII. NNRE-35.¹⁸ The EEOC's failure to controvert this proof justified the court's grant of summary judgment. On remand since 2010, the EEOC submitted four merits briefs on the

¹⁷ The EEOC cites *Soremkun*, but the EEOC's quotation from that decision omits the ruling Peabody cites here, the very next sentence in the *Soremkun* decision. Op.Br. 18.

¹⁸ "NNRE-__" refers to the Navajo Nation Record Excerpts filed with its appellate brief.

inter-agency legal dispute.¹⁹ Had the EEOC believed further discovery was necessary to respond to the merits, the EEOC could have filed a Rule 56(d) motion. It did not.

C. While *Dawavendewa I* Considered a *Mancari*-Based Argument, That Decision Did Not Consider the Tribal Interests in Self-Government That Are Present Here.

The EEOC's claims that *Dawavendewa I* decided the issues in this case fail for an additional reason. *Dawavendewa I* never had occasion to consider Interior's arguments grounded in the political classification principle upheld in *Morton v. Mancari*, 417 U.S. 535 (1974). As the EEOC notes, *Dawavendewa I* and the district court in this case identified the differences between the general all-Indian employment preference used by the Bureau of Indian Affairs at issue in *Mancari*, and a tribe-specific preference imposed on a private employer in a tribal contract for the use of tribal resources. The EEOC concludes that the district court in this case "failed to appreciate the significance of this distinction." Op.Br. 25. To the contrary, the district court here correctly framed the significance of the distinction, explaining that each tribe is a quasi-sovereign entity and the federal government has a distinct relationship with each tribe. More narrow tribal preferences, the

¹⁹ The Navajo Nation filed a motion to dismiss before Interior filed its motion for summary judgment. That motion led to the EEOC, Peabody, and the Navajo each submitting two substantive briefs and exhibits. ER-661. The district court denied the Navajo's motion without prejudice to renewing those merits arguments when Interior had presented its brief on tribal preferences. ER-668. After Interior filed, the EEOC submitted two additional briefs.

district court explained, strengthen both tribal self-government and economic self-sufficiency, and political reasons justify their inclusion in the Navajo's leases. ER-18, 19.

Aside from the difference in the two types of preferences, the *Dawavendewa I* court also distinguished *Mancari* by noting the Bureau of Indian Affairs' preference reflected "Native Americans' interests in self-governance," but those interests were not present in that case. 154 F.3d at 1120. Here, both Interior and the Navajo Nation, not parties in *Dawavendewa I*, have shown in several ways that IMLA's operative purposes are to strengthen both tribal self-governance and economic development.

First, Congress intended with IMLA, consistent with the purposes of the Indian Reorganization Act, to empower and advance tribal self-governance, enabling tribes to take a more active role in leasing their natural resources, subject to the Secretary's statutory roles of lease approval and governing regulations. Second, the record of the Navajo Nation's regular and extensive use of tribal preference provisions in leasing its property amply demonstrates that its tribal interest in economic development includes employment benefits for its members. NNRE-41-55. The district court recognized this distinguishing factor, finding that the tribe-specific preferences here "foster tribal self-government and self-sufficiency." ER-18.

The EEOC also argues that the Bureau of Indian Affairs (“BIA”) jobs at issue in *Mancari* were political, that is, jobs implementing the interactions between the United States government and all tribes, so the logic of *Mancari* should not apply here. Op.Br. 28. But a simpler, better distinction describes when the federal government must employ an all-Indian preference, as in *Mancari*, or may employ tribe-specific preferences as here. A job with the BIA necessarily entails serving all 500-plus federally recognized Indian tribes. Given its responsibilities as the principal agent for the federal government in administering programs pertaining to members of all recognized tribes, BIA never proposed a preference for a single tribe in allocating appropriations and resolving competing claims among all tribes. But when it comes to a tribe’s interest in development of its own natural resources, and Interior’s statutory role in approval of such leases, a tribe-specific preference reflects the political relationship between that tribe and the federal government and Interior’s endorsement of a political decision by that sovereign entity as to who benefits from the development of that tribe’s natural resources. A tribe’s decision, with Interior’s approval, to require non-Indian employers to prefer the lessor tribe’s members is thus a political classification made in the government-to-government relationship between Interior and the lessor tribe.

The EEOC does not expressly contend that, prior to Title VII’s enactments, Interior lacked the authority to require, or approve, tribal employment preferences

under IMLA. Such an argument would be untenable. The EEOC's claim, without stating it here, is this: "[t]he Secretary's inclusion of a tribal-specific hiring preference in its standard mineral lease forms, although lawful prior to 1964, became unlawful when Title VII went into effect in July 1965." SER-94-95 (excerpt of EEOC's 2007 appeal brief). Without expressing it, the EEOC continues to argue that Title VII repealed *pro tanto* all pre-existing authority Congress vested in Interior for the administration of the federal government's relationship with tribes. The EEOC's position, if accepted, would supplant the employment conditions that a tribe and Interior agreed serve the tribe's best interests in the development of that tribe's natural resources and its reservation economy.

Did Congress in enacting Title VII repeal Interior's authority under IMLA to approve or require tribal employment preferences? The district court answered "no" to that question, ruling implied repeals are disfavored. ER-21.

By overlooking IMLA's expansive grant of rulemaking and approval authority to Interior, the EEOC avoids discussing *Mancari's* repeal-by-implication holding. But the uncontested facts remain: Interior's practice of approving tribal preferences in IMLA mineral leases began before Title VII and continued without alteration after its passage. Thus, *Morton v. Mancari's* holding on implied repeals applies here. The Supreme Court, in evaluating whether Title VII implicitly

repealed the all-Indian BIA hiring preference, ruled:

There is nothing in the legislative history [of Title VII], however, that indicates affirmatively any congressional intent to repeal the [earlier] preference. . . .

This is a prototypical case where an adjudication of repeal by implication is not appropriate. . . .

[T]he only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable.... [T]his is not the case here. A provision aimed at furthering Indian self-government by according an employment preference ... for qualified members of the governed group can readily co-exist with a general rule prohibiting employment discrimination on the basis of race. Any other conclusion . . . ignores both the history and the purposes of the [earlier] preference and the unique legal relationship between the Federal Government and tribal Indians.

Furthermore, the Indian preference statute is a specific provision applying to a very specific situation. . . . [Title VII], on the other hand, is of general application. . . . [A] specific statute will not be controlled or nullified by a general one.

417 U.S. at 550-51 (citation omitted).

Three reasons the Supreme Court used in *Mancari* to reject the argument of repeal by implication apply with equal force here. First, as developed further in Part II below, this Court has confirmed that the legislative history of Title VII reveals Congress intended to preserve existing preference programs and their underlying authority, not to repeal them. Second, the statutes involved here, Title VII and IMLA, are not irreconcilable. Indeed, a later statute will not be held to have “implicitly repealed an earlier statute unless there is a clear repugnancy between the two.” *Muller v. Lujan*, 928 F.2d 207, 211 (6th Cir. 1991). Third, the

later statute, Title VII, applies to most private employers, while the IMLA authority that the EEOC intimates was repealed by implication has limited application to employers entering tribal mineral leases.

II. THE JUDGMENT BELOW MAY BE AFFIRMED ON THE ALTERNATIVE GROUND THAT THE EEOC HAS ERRONEOUSLY INTERPRETED §703(i).

The EEOC treats *Dawavendewa I* as having held that §703(i) cannot and does not exempt the tribe-specific preference at issue here from the national origin discrimination prohibitions of Title VII. Peabody argued in district court that when §703(i) is interpreted consistent with its stated purpose – as declared by the sponsor of the amendment that became §703(i) – the tribal preferences in this case are covered by the §703(i) exemption and do not violate Title VII. Rather, they implement a preference program in effect at the time Title VII was enacted.

Section 703(i) provides:

Nothing in this subchapter [Title VII] shall apply to any business or enterprise on or near an Indian reservation with respect to 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). The EEOC erroneously interpreted this exemption in its Policy Statement. The EEOC acknowledged in the Policy Statement, “[t]he Indian preference exception provided in §703(i) is stated in general terms. That section neither expressly authorizes nor prohibits a distinction among Indians based on

tribal membership.” SER-5. When a statutory provision is silent on the issue being addressed, a key step in its proper interpretation is to evaluate the legislative history of the provision. *Mount Graham Red Squirrel v. Madigan*, 954 F.2d 1441, 1453-56 (9th Cir. 1992). The 1988 Policy Statement fails here; it never examines the legislative history that speaks directly to this question. Section 703(i) was an amendment offered by Senator Mundt, who explained the amendment “will assure our American Indians of 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. 13702 (June 13, 1964). The only legislative history discussed in the Policy Statement and *Dawavendewa I* is Senator Humphrey’s reference to the high unemployment rate among reservation Indians. 154 F.3d at 1123 n.10.²⁰

Not until after the *Dawavendewa* saga did this Court revisit §703(i). When it did, this Court identified Senator Mundt’s explanation as the key to its proper interpretation. *Malabed v. North Slope Borough*, 335 F.3d 864, 871-72 (9th Cir. 2003). In *Malabed*, this Court concluded that the function of §703(i) was the

²⁰ The Policy Statement cites to Senator Humphrey’s statement in the section addressing the meaning of the term Indian reservation – one of four issues addressed in the statement. SER-3,7.

preservation of existing and future Indian preference programs.²¹ *Malabed* further impeaches the 1988 Policy Statement because it frames the question the EEOC never asked – in light of its stated purpose, what preference programs were in effect that §703(i) preserved? Failing to ask this question, the EEOC took its next step in the wrong direction – it never consulted with Interior to inquire what preference programs Interior was implementing either in 1964, or in 1988 when the EEOC was framing its Policy Statement, that Congress sought to preserve.

The summary judgment record below shows the existence of the preference program for mineral leasing under IMLA. At the time the leases were negotiated, Interior directed parties to use a form that contained tribal preferences. This program continues without modification to date. *See* text and note 9, *supra*; ER-539.

The only counter in the EEOC's opening brief to Peabody's proof of this IMLA tribal preference program is its quotation from counsel for Interior at oral argument, stating Interior does not compel a tribe to contract for tribal employment preferences if that tribe does not insist on them. Op.Br. 8. The comment from counsel is not evidence and cannot be used by the EEOC to argue against the grant of summary judgment. *Lane v. Norton*, 523 F.3d 1128, 1140 (9th Cir. 2008)

²¹ *Malabed* reviewed a different section of the 1988 Policy Statement than is at issue here, and rejected the EEOC's interpretation of Title VII in that section. Peabody submits that *Malabed* correctly identified Senator Mundt's statement of the purpose of §703(i) as the key piece of legislative history. It is here, too.

(“attorney’s statements at oral argument are insufficient to defeat a summary judgment motion”). Nor does counsel’s comment pertain to or dispute the record pertaining to the execution and approval of these leases in the 1960s. The Navajo insisted on tribal preferences and, as Secretary Udall testified, Interior required them.

Even if this comment is to be considered, the existence of flexibility in Interior’s program would not undermine the existence of the program itself. First, Senator Mundt’s use of the word “program” – rather than “statute” or “requirement” – permits tribal preference practices not compelled by legislative language. One tribe may insist on a tribal employment preference while another may not for whatever reasons.²² That flexibility further demonstrates the government-to-government decision on tribal preferences is a political classification between the tribe and Interior. Flexibility in the program is salutary; it does not undermine Interior’s authority under IMLA to publish rules and lease forms that establish the default, or presumption, that a tribal preference will be in the lease unless the leasing tribe opts otherwise.

The district court concluded that, if Congress sought to prohibit tribe-specific employment preference, it would require a far more explicit showing of Congress’ intent than is reflected in §703(i). ER-20. In the briefing below,

²² See note 9 *supra*, the current IMLA regulation expressly provides for revision of form provisions in the approval of leases.

designed specifically to allow the EEOC to respond to Interior, Peabody, and the Navajo Nation's arguments, the EEOC made no attempt to show that it ever sought to determine what preference programs and underlying authority were embraced by Senator Mundt's explanation of the §703(i) exemption. The Senator's stated intention was to preserve programs "now in operation or later to be instituted."

The record documents that in 1964 the federal government was implementing a variety of tribal preference programs. On the tribe-specific side, from 1957 to 1977, the Secretary's form for solid mineral leases under IMLA contained a provision requiring the lessee to implement an employment preference for members of the lessor tribe. In fact, the record shows all three coal mines on Navajo Nation mineral leases contain the Navajo preference language. SER-29-30 (describing two other coal mining leases on the Navajo lands). Similarly, in the Navajo-Hopi Rehabilitation Act of 1950, Congress directed that Navajo and Hopi tribal hiring preferences should be included in contracts implementing that law. The Navajo Nation also demonstrated the existence of a tribal preference program with respect to business leases of Navajo land under 25 U.S.C. §415, another statute requiring Interior's approval of tribal leases. NNRE-41-45. These preference programs were in place at the time of the adoption of Title VII, and they

reflect the federal government's long history of approving tribal preferences in the implementation of legislation governing tribal land and resource development.²³

Senator Mundt's statement informs how the key phrase in §703(i), that "preferential treatment is given to any individual because he is an Indian," must be read. That phrase, as a matter of standard English usage, authorizes a tribal preference, where preference is being given to an "individual" Indian because of that individual's membership in the tribe on whose reservation the employment is occurring and whose land the employer has leased. In fact, Congress routinely defines "Indian" politically, not racially, as a person who is a member of a recognized tribe. *See e.g.*, 25 U.S.C. §450(b), §1903. A preference for an individual because he is a member of the lessor tribe is not a "non-Indian" preference; it is obviously an Indian preference.

Further, it is inconsistent with this legislative history to claim that §703(i) or the balance of Title VII outlawed a whole class of existing preference programs (tribal preferences) while protecting another class (all-Indian). If anything, the history shows otherwise. For example, the Oglala Sioux supported §703(i)

²³ *See Cohen's Handbook of Federal Indian Law*, at 160-61, n.135-140. For examples of other Congressionally-approved tribal preferences, *see* 33 Stat. 352, 354 (Crows); 33 Stat. 1016, 1017 (Shoshones); 34 Stat. 547 (Menominee). Shortly before Title VII's enactment, Interior republished an edited version of Cohen's treatise and made the same point: Congress adopted both tribal and all-Indian preferences. *Federal Indian Law*, at 535-36, n.30-31 (U.S.G.P.O. 1958). SER-8-15.

because it “entitled *our* Indian reservation [not all Indians] to preferential treatment.” SER-107.

Senator Mundt’s description of his amendment provides a unified, consistent framework for the relationship between Title VII and Interior’s existing preference programs. Section 703(i) left the IMLA preference program, including the Peabody-Navajo lease provisions, in effect and enforceable, exempted from the non-discrimination requirements of Title VII. The district court did not expressly rule on this argument for summary judgment, but Peabody submits that, on this alternative, more narrow basis the district court’s judgment may be affirmed.

III. THIS COURT NEED NOT DEFER TO THE 1988 POLICY STATEMENT, WHERE THE EEOC NEVER CONSIDERED THE ISSUE IN THIS CASE, IGNORED THE RELEVANT LEGISLATIVE HISTORY, AND FAILED TO CONSIDER THE LEGAL POSITION OF A SISTER AGENCY.

The EEOC claims that the district court “failed to accord proper deference to the EEOC’s longstanding interpretation of Title VII as reflected in the EEOC’s 1988 policy statement on Title VII’s Indian preference exemption.” Op.Br. 32. While the district court acknowledged the EEOC is “entitled to deference regarding Title VII and its obligations” under that statute, the court correctly recognized that at the same time Interior is owed deference in construing its authority under federal Indian law as regards the validity of the terms of an Interior drafted and approved IMLA lease. ER-13. For support, the district court cited two

Supreme Court cases that reiterate the holdings of *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). ER-13.²⁴

Ultimately, the district court disposed of the EEOC's claim for deference by explaining that the 1988 Policy Statement did not "address the specific issue in this case." ER-20, 21. The district court is correct; the Policy Statement utterly failed to consider Interior's long-standing implementation of federal Indian law through approval of tribe-specific hiring preferences. The EEOC's Policy Statement stated the "issue arises" when an employer accords a tribal preference "either on its own initiative or in compliance with a tribal ordinance." SER-5. The Policy Statement did not acknowledge the existence of the situation present here.

The EEOC renews on this appeal its argument that the issue of tribal preferences must be resolved in its favor because this Court gave the Policy Statement "due weight" in *Dawavendewa I*.²⁵ That phrase does not constrain this Court here. The *Dawavendewa I* court referenced, but did not apply, the *Skidmore* factors in evaluating the Policy Statement. Plus, this Court's holdings in *Dawavendewa II* and *Malabed* have undermined how much "weight" may be due. With Peabody having established the existence of the IMLA preference program

²⁴ The district court cited *United States v. Mead Corp.*, 533 U.S. 218 (2001) and *Bragdon v. Abbott*, 524 U.S. 624 (1998).

²⁵ 154 F.3d at 1121. The Ninth Circuit cited *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 256 (1991); that decision in turn quotes *Skidmore v. Swift & Co.*

that Senator Mundt’s amendment preserved, even less “weight” is due the Policy Statement. And finally, the “due weight” the EEOC seeks for its views of federal employment law is completely offset by the “due weight” Interior rightly demands be afforded its position that the Navajo-Peabody lease preferences are simply beyond the scope of Title VII. The conventional deference analysis the EEOC demands for its views is simply inappropriate in an inter-agency legal dispute the EEOC never acknowledged when interpreting “its” statute in the 1988 Policy Statement.

The EEOC simply disagrees with the district court’s conclusion: the court, according to the EEOC, should not have favored Interior’s alleged long-term practice of approving leases with tribe-specific preferences over the EEOC’s Policy Statement. Op.Br. 38. For support, the EEOC cites two cases from the D.C. Circuit. In both cases, however, the court found that the agency’s practice violated express statutory mandates. For example, in *Connecticut Light & Power Co.*, the appellate court found the federal agency, the FERC, was not abiding by the express provisions of the organic act that created the administrative agency. *Conn. Light & Power Co. v. Fed. Energ Reg. Comm.*, 627 F.2d 467, 473 (D.C. Cir. 1980). Here, Interior, a department within the Executive Branch, is not violating any express statutory mandate. Indeed, even the EEOC acknowledged that §703(i) was silent on the question here – how Title VII affects tribal preferences? SER-5

(“Title VII . . . is silent on the issue of tribal affiliation.”).

The Policy Statement’s authority is even weaker because it does not have the force and effect of law; it was not issued through rulemaking or an adjudication under the Administrative Procedure Act. Unlike other federal administrative agencies, Congress did not grant the EEOC the authority to promulgate substantive rules and regulations to implement Title VII.²⁶ *Arabian American Oil Co.*, 499 U.S. at 257-58. Even the EEOC’s Guidelines on National Origin Discrimination, do not mention Indian or tribal preferences or discrimination on the basis of tribal affiliation. 29 C.F.R. §§1606 *et seq.* Like the EEOC interpretation at issue in *Arabian American Oil*, the EEOC’s Policy Statement was not contemporaneous with the enactment of the statute and was not issued until nearly 24 years after passage of the statute. 499 U.S. at 257-58.

Skidmore deference applies when an agency’s interpretation is reasonable, is consistent with its earlier pronouncements, and reflects a thorough consideration of the issues, such that the agency’s interpretation has the power to persuade.

Skidmore & Swift & Co., 323 U.S. 134, 140 (1944); *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581, 600 (2004) (no deference is due if the EEOC is clearly wrong). Or, as the Supreme Court put it more recently, if the EEOC’s

²⁶ That structural limitation tellingly is not present in the other statute implicated by this case; IMLA contains a broad grant of authority to the Secretary to promulgate the rules and regulations to govern all operations under leases issued under that statute. 25 U.S.C. §396d.

guidance lacks persuasive power, then *Skidmore* deference does not apply.

University of Texas Southwestern Med. Ctr. v. Nassar, 186 L.Ed.2d 503 (2013).

Here, the EEOC's 1988 Policy Statement comes nowhere close to showing it is persuasive or meeting the *Skidmore* standard. As Peabody demonstrated in Part II *supra*, the EEOC's failure to identify and apply the controlling legislative history establishes that the Policy Statement fails a *Skidmore* analysis. Further, Interior has shown that in the 1970s the EEOC did not view tribal preferences as unlawful, even approving Navajo-specific hiring preferences in a settlement agreement. ER-608, 614, 618.

To bolster its case for deference, the EEOC notes the Policy Statement references two federal regulations. The EEOC implies it merely embraced what other federal agencies were doing with tribal preferences. The regulation under the Indian Self-Determination Act ("ISDA"), however, permitting an Indian preference no longer exists. In fact, since the issuance of the 1988 Policy Statement, Congress has amended the ISDA expressly to permit tribe-specific preference provisions in ISDA contracts. The EEOC suggests that the 1994 ISDA amendment was to "authorize tribe-specific employment preferences." Op.Br. 31 (emphasis added). The legislative history, however, suggests that Congress included this provision to resolve a dispute between the Bureau of Indian Affairs

and the Indian Health Service over what the language of ISDA authorized.²⁷ S. Rep. 374, 103d Cong., 2d Sess. at 12 (1994).

Similarly, the EEOC's invocation of the OFCCP regulations is weak authority at best. In a point Peabody made before the district court, the Federal Register reveals little commentary about the decision by the Labor Department's Office of Federal Contract Compliance to adopt a regulation proscribing discrimination on the basis of tribal affiliation. 41 F.R. 26229 (1976) (proposed rule was to parallel §703(i) of Title VII); 41 F.R. 40340 (1976) (same); 42 F.R. 3454, 3455 (1977). The proposed provision attracted few comments at the hearings held in Atlanta, Chicago, Los Angeles, and New York. 42 F.R. 3454 (1977). And, other than the now amended ISDA provision and Title VII's §703(i), the Labor Department cited no legal support for its position. *Id.*

The EEOC expresses concern that, should the district court's political classification holding be affirmed, Interior's general business site leasing authority under 25 U.S.C. §415 creates an exception that would swallow the EEOC's tribal preference prohibition. Op.Br. 36. But, the EEOC's Policy Statement may be better viewed as the rule that applies when the tribal preferences do not arise in the context of Interior's oversight and approval in tribal land and resource use

²⁷ While the *Dawavendewa I* court noted that there was no indication that the 1994 amendment was a clarifying amendment, the decision does not cite this legislative history. 154 F.3d at 1123 n.12.

programs. The district court saw the Policy Statement as applying to “situations where an employer discriminates against members of a particular tribe without oversight or approval by the federal government.” ER-21. In bringing this suit to apply its Policy Statement to an issue the statement did not address, the EEOC sought to extend its prohibition to employment conduct Interior sanctioned under federal Indian law. The district court determined that the EEOC’s position never extended into Interior’s domain; its ruling makes no “exception.” In sum, the EEOC’s concerns about what it may have wrought by pursuing this case do not alter the reasons why the judgment of dismissal should be affirmed.

IV. THE EEOC HAS THE ULTIMATE BURDEN OF PROOF TO SHOW TITLE VII APPLIES HERE.

In its opening brief, the EEOC makes new and surprising arguments against summary judgment. Claiming defendants offered no evidence that Peabody made hiring decisions on the basis of tribal membership, and that its day-before-hearing proffer of evidence confirms that, the EEOC suggests Interior and the Nation’s summary judgment motions cannot be sustained. Op.Br. 45-46. But the EEOC has turned this issue on its head in four discrete ways.

A. Even if Admissible, the EEOC’s New Evidence is Irrelevant to the Remaining Issues in This Case.

The EEOC claims that its eve-of-hearing “evidence” showed that Peabody did not use the fact of tribal membership in the three underlying hiring decisions.

The EEOC is attempting to refashion its case at the eleventh hour. To defeat summary judgment, the EEOC argues over what Peabody may or may not have done in the 1997 hiring decisions, even though the case is now limited to an action for prospective injunctive relief, implementing the resolution of the legal issue whether Interior or the EEOC prevails in the inter-agency dispute.

The EEOC's attacks on Peabody's 1997 employment conduct in this appeal proceed on the flawed premise this is the same case the EEOC filed in 2001, rather than the limited-issue remand this Court ordered. In its 2010 decision, this Court carved the EEOC's claims into two clearly separated fractions. 610 F.3d at 1080-87. As to the fraction of the EEOC's claims for which this Court held Peabody was not entitled to corresponding indemnification relief from Interior, this Court affirmed the district court's judgment of dismissal in *Peabody III*. As to the fraction of the EEOC's claims for which this Court held Peabody could secure corresponding relief – in declaratory and injunctive form – from Interior, this Court reversed the judgment of dismissal. Only this latter fraction of the case remained for the district court to adjudicate because the viability of a Peabody third-party claim under the Administrative Procedure Act against Interior allows the court to

render a judgment binding both agencies, and thus enables Peabody to end the risk of being subjected to inconsistent verdicts.²⁸

The EEOC argues that, because Peabody's employment officials "could just tell if someone was 'Navajo'" (Op.Br. 53), and because these officials allegedly used "being Navajo" as their touchstone (Op.Br. 45-50) – they were engaged in discrimination against non-Navajo Native Americans. But proof of these allegations pertains to the fraction of the case that this Court dismissed. Whether the EEOC could prove these characterizations of Peabody's conduct, and whether Peabody could disprove them, is no longer at issue. Disputing these facts has no bearing on the district court's prospective declaration of the relative rights of the contending agencies. The resolution of what federal law requires of Peabody in these circumstances will bind Peabody, the Navajo, and the future conduct of both federal agencies.

The parties' views of the 1997 hiring facts could have utility to this Court only to the extent they might assist this Court in framing its prospective declaration of the relative rights. The EEOC's effort to lodge new evidence, and its argument that defendants did not prove Peabody employed tribal membership as its

²⁸ As this Court explained, "if the district court were to hold that the Navajo employment preference provision violates Title VII, the district court would almost certainly grant an injunction requiring Peabody to ignore the provision in making its employment decisions." 610 F.3d at 1084. The dispute being resolved in the case that remains is whether Title VII invalidated the tribal employment preference provisions in Peabody's Interior-approved tribal leases. 610 F.3d at 1083.

touchstone, both fail to defeat summary judgment, as they seek to continue litigating the dismissed fraction of the case.²⁹

Regarding framing prospective relief, the EEOC's legal position that tribal membership must be the criterion for a proper political classification is not in dispute. Peabody does not dispute it; no party disputed this in the district court. There is no evidence in this record that any party has ever considered the lease phrase that Peabody "prefer Navajo Indians" to mean anything other than "prefer members of the Navajo Nation." Indeed, under federal law and Navajo law, to be a Navajo Indian, one must necessarily be a member of the Navajo Nation. 25 U.S.C. §450(b); 1 N.N.C. §701. The definition of a political classification that is beyond the scope of Title VII is a legal issue not tied to determining Peabody's conduct in 1997.

B. The EEOC's Last-Minute Evidence Reflects an Improper Change in the Theory of its Case.

This Court directed the district court to decide a legal issue: are the Interior-approved tribal preferences in the leases violative of Title VII? Up until the day before the hearing, the EEOC's briefs were focused on that legal issue. The EEOC

²⁹ The EEOC asked in its Second Amended Complaint for instatement relief, presumably for Mr. Mariano, the only surviving charging party. EEOC waived that request for relief by failing to ask for it in the first ten years of the lawsuit. But it is also beyond the scope of relief authorized by this Court's June 2010 decision, as Peabody cannot seek any form of indemnification from Interior for an order to hire someone.

tried, the day before oral argument on the summary judgment, to inject a fact dispute into this case about whether Peabody actually relied on tribal membership in making its hiring decisions. Until that submission, the EEOC had consistently asserted that Peabody was favoring members of the Navajo Nation over other non-Navajo Native Americans. None of the EEOC's three complaints and none of its briefs suggested the EEOC believed Peabody was engaged in illegal national origin discrimination because it was not using tribal membership as its basis for hiring. NNRE-58, 64. Such a change in theories, in the face of a fully briefed summary judgment motion, cannot be used to circumvent summary judgment. *Employers Ins. Co. of Wausau v. Oakdale Heights Mgmt. Corp.*, 2012 U.S. Dist. LEXIS 82094 * 8-9 (E.D. Cal. June 13, 2012) (to allow opponent to change its evidentiary showing after movant had filed reply would give a second opportunity to oppose the summary judgment motion).

C. The EEOC Applies *Nissan Fire* and *Adickes* Incorrectly.

Assuming evidence regarding Peabody's 1997 conduct has any relevance to the remaining fraction of the case, the dispositive motions posed a simple question. Could the EEOC establish that Title VII rendered illegal and unenforceable the Interior-approved tribe-specific preference provisions? The position pressed by Interior, the Navajo Nation, and Peabody – that such preferences are a political classification beyond the scope of Title VII – is not an affirmative defense for

which the moving parties had the ultimate burden of persuasion (and proof) at trial. Rather, the ultimate burden of persuasion (and proof) remained on the EEOC as the plaintiff to show that Title VII rendered the lease preference illegal. Peabody acknowledges that, as the moving parties, the defendants had an initial burden of production and the burden of persuasion on the motion for summary judgment. *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc.*, 210 F.2d 1099, 1102 (9th Cir. 2000). But the defending parties here did not have the “burden of proof on a particular issue at trial,” as the EEOC contends. Op.Br. 45. The defending parties would only have that burden with respect to any affirmative defenses. *Payan v. Aramark Mgmt. Servs., L.P.*, 495 F.3d 1119, 1122-23 (9th Cir. 2007). As framed by the defending parties, and by the district court, contending that tribal preferences are beyond the scope of Title VII as a political classification is not an affirmative defense.³⁰

The moving parties here met their initial burden of production as the

³⁰ Peabody agrees with Interior that the structure of Title VII, as reflected in §701(b) and §703(i), shows the whole issue of Indian or tribal preferences is beyond the scope of Title VII. Peabody argued below and pursues in Part II above the position that adherence to the lease provisions fits within the exception to the national origin discrimination prohibition in §703(i), properly construed. With respect to this argument, Peabody acknowledges that a factual defense based solely on §703(i) would be an affirmative defense. However, even if the evidence regarding Peabody’s 1997 conduct has any relevance to the remaining fraction of the case, the EEOC’s new-on-appeal “dispute” about that conduct does not counter Peabody’s proof of the IMLA preference program. Evidence of that program constituted Peabody’s §703(i) defense.

evidence showed the nonmoving party, the EEOC, lacked evidence that Title VII applied and negated an essential element of the EEOC's claim that Title VII even applied here. Defendants met that initial production burden here; thus, the portions of the *Nissan Fire* and *Adickes*³¹ decisions – about summary judgment where the moving party fails to carry its initial burden of production – have no application here. Further, there was no genuine issue of material fact about the evidence submitted by the defending parties. Accordingly, the district court properly granted summary judgment.

By trying to recast their untimely evidence as going to the defending parties' affirmative defenses with its accompanying burdens of proof at trial, the EEOC pushes this Court to take a path under *Adickes* that the Supreme Court has rejected. In particular, the EEOC wants this Court to reverse the grant of summary judgment because no defending party submitted evidence that "Peabody actually relied on applicants' tribal membership status in making employment decisions." Op.Br. 45. In doing so, the EEOC demands evidence from the moving parties that would show an *absence* of a genuine issue of material fact. The Supreme Court has cautioned, however, that "*Adickes* should not be construed to mean that the moving party has the burden to produce evidence showing the absence of a genuine issue of material fact . . . with respect to an issue on which the nonmoving party bears

³¹ *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 153-61 (1970).

the burden of proof.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986) (to do otherwise would add burdens to the moving party not present or intended by Rule 56).

D. The EEOC’s New Evidence Does Not Show Pretext.

Compounding its errors, the EEOC wrongly suggests its late-submitted evidence shows pretext under employment law principles. A party shows pretext when it produces evidence showing that the reason an employer offers for the alleged discriminatory decision is false or the supervisor harbored some discriminatory animus. *Bradley v. Harcourt, Brace & Co.*, 104 F.3d 267, 270 (9th Cir. 1996). Peabody’s reasons for not hiring the charging parties – those hired had better qualifications – have never been impeached. The EEOC has flipped its own position – from asserting Peabody used the tribal lease preference to violate Title VII to now asserting Peabody engaged in national origin discrimination because it made its decisions on the basis of “knowing” who was Navajo – but it has never shown the original Peabody response to the EEOC to be false or indicative of the hiring supervisor’s animus, as *Bradley* requires.

The very case the EEOC cites on hiring pretext underscores this point. In *Raad v. Fairbanks North Star Borough*, this Court considered a claim of hiring discrimination where the evidence showed the plaintiff was “substantially more qualified than the applicant who received the position.” 323 F.3d 1185, 1194 (9th

Cir. 2003) (the “pronounced difference” in qualifications “demonstrate[s] a genuine factual dispute” as to whether the employer’s reasons for the hiring decision were pretextual). The *Raad* decision does not help the EEOC; it has made no claim that the charging parties’ qualifications were superior to the qualifications of the selected applicants.

V. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO CONSIDER EVIDENCE THE EEOC SUBMITTED THE DAY BEFORE THE HEARING.

A. The District Court Properly Refused to Consider the Evidence on the Ground that It Was Untimely.

One day before the hearing on the dispositive motions, the EEOC moved to supplement the record with new evidence – Ms. Barreras’ 2012 Declaration and her 1998 interview notes – and the district court denied the motion as untimely. ER-23, 105-39. A district court’s decision to exclude evidence as untimely is reviewed for abuse of discretion. *Fleischer Studios, Inc. v. A.V.E.L.A., Inc.*, 654 F.3d 958, 966 (9th Cir. 2011). The Ninth Circuit “review[s] a district court’s legal conclusions *de novo* and its factual findings for clear error.” *M.R. v. Dreyfus*, 697 F.3d 706, 725 (9th Cir. 2012). The Ninth Circuit’s first step is to determine “whether the trial court identified and applied the correct legal rule to the relief requested.” *Id.* (citation omitted). The Ninth Circuit then “look[s] to whether the trial court’s findings were “illogical, implausible, or without support in inferences that may be drawn from the facts in the record.” *Id.* (citation omitted); *see also*

United States v. Redlightning, 624 F.3d 1090, 1110 (9th Cir. 2010) (applying this two-step framework and recognizing that the Ninth Circuit has done so in various contexts).³²

Although the district court did not expressly identify a rule that it used to deny the EEOC's motion as untimely, the court applied the correct legal standard. Under Fed. R. Civ. P. 6(c)(2), "[a]ny affidavit supporting a motion must be served with the motion" and "any opposing affidavit must be served at least 7 days before the hearing, unless the court permits service at another time." The EEOC violated that rule's deadline. *See* ECF Nos. 271-73.

Under the Federal Rules of Civil Procedure, motions made to extend a deadline after a deadline has passed may be granted "for good cause . . . if the party failed to act *because of excusable neglect*." Fed. R. Civ. 6(b)(1) (emphasis added). The EEOC implies that the district court was required to accept the late-filed Barreras Declaration and interview notes absent prejudice to the other parties, *see* Op.Br. 52, 56, but cites no authority for that rule. Rather, Rule 6(b)(1) requires the district court to find "as a substantive matter that there was indeed 'cause' for

³² The EEOC imports a Second Circuit case and seeks to apply that Circuit's review framework. *Zervos v. Verizon New York, Inc.*, 252 F.3d 163,169 (2d Cir. 2001); *see also* Op.Br. 53-57. This framework is substantively the same as the Ninth Circuit's framework, but the EEOC misapplies the *Zervos* test by failing to identify, much less apply, the legal standard that governs the EEOC's motion to supplement or the standard that governs the district court's evidentiary rulings.

the late filing, and that the failure to file on time ‘was the result of excusable neglect.’” *Lujan v. Nat’l Wildlife Federation*, 497 U.S. 871, 897 (1990); *see also Fleischer Studios*, 654 F.3d at 966. The district court thus applied the correct legal standard in excluding the late-filed declaration as untimely without addressing prejudice to the other parties.³³

In addition, the district court’s application of the correct legal standard was correct for two separate reasons. First, the EEOC did not even argue, much less demonstrate, that it had good cause to supplement the record the day before the hearing or that its failure to submit the Barreras Declaration in accordance with Rule 6(c)(2) was excusable neglect. ER-105-09. As the Supreme Court held in *Lujan*, a district court has no obligation to consider late-filed evidence where, as here, the proponent of the evidence had failed to satisfy the requirements of Rule 6(b):

Perhaps it is true that the District Court could have overcome all the obstacles we have described – apparent lack of a motion, of a showing, and of excusable neglect – to admit the affidavits at issue here. But the proposition that it was *compelled* to receive them – that it was an abuse of discretion to *reject* them – cannot be accepted.

Lujan, 497 U.S. at 898. The Ninth Circuit has expressly followed this rule. *See Fleischer Studios*, 654 F.3d at 966 (quoting *Lujan* and finding that the district court

³³ Even if the district court did not sufficiently identify the legal standard, the Ninth Circuit may affirm on any ground supported by the record. *See, e.g., In re Roman Catholic Archbishop*, 661 F.3d 417, 428 (9th Cir. 2011).

did not abuse its discretion in refusing to consider late-filed evidence because the movant failed “to show cause why its neglect was excusable”).³⁴ Because the EEOC failed to comply with Rule 6(b)(1) when it moved to supplement the record, the district court’s exclusion of the evidence was not an abuse of discretion.

Second, the district court’s factual findings are fully supported by the record. The district court found that “the parties have had ample time to develop the record as needed and respond fully to the issues raised [by the dispositive motions]” and that the information the EEOC sought to submit “was available to the EEOC at the time it prepared its briefing on these motions” and in fact was known to the EEOC since 1999. ER-23. The district court based these findings on the facts that: (1) “[t]his case has been pending since 2001”; (2) the motion for summary judgment had been pending for approximately six months; and (3) the motion to dismiss had been pending for approximately four months and was “a renewed motion that the parties [had] previously briefed.” ER-23. Because these findings are fully supported by the procedural history of this case and the substance of the Barreras Declaration, the district court did not abuse its discretion in excluding the Barreras Declaration and her notes as untimely. *See M.R.*, 697 F.3d at 725.

³⁴ As in *Fleischer Studios*, the EEOC’s motion to supplement also failed to comply with the local rules of the U.S. District Court for the District of Arizona, which require that all facts material to a motion for summary judgment be set forth in a separate statement of facts or controverting statement of facts, and that each such fact contain “a reference to the specific admissible portion of the record supporting the party’s position if the fact is disputed.” LRCiv 56.1.

B. The District Court Also Correctly Determined That the Proffered Evidence Was Irrelevant.

The district court also excluded the Barreras Declaration and notes on the separate ground that “the information is not relevant.” ER-23. This Circuit “review[s] a district court’s decision to admit evidence under an abuse of discretion standard” and will not reverse unless the Court is “‘convinced firmly that the reviewed decision lies beyond the pale of reasonable justification under the circumstances.’” *Boyd v. City & Cnty. of San Francisco*, 576 F.3d 938, 943 (9th Cir. 2009) (citation omitted); *Redlightning*, 624 F.3d at 1116. In addition to demonstrating that the district court abused its discretion in finding the Barreras Declaration irrelevant, the EEOC “must show that the error was prejudicial.” *Boyd*, 576 F.3d at 943; *McEuin v. Crown Equip. Corp.*, 328 F.3d 1028, 1032 (9th Cir. 2003) (“To reverse on the basis of an evidentiary ruling, this Court must conclude both that the district court abused its discretion and that the error was prejudicial.”).

Evidence is relevant if it “has any tendency to make a fact [that is of consequence in determining the action] more or less probable than it would be without the evidence.” Fed. R. Evid. 401. As the proponent of the evidence, the EEOC bears the burden of establishing that these statements are admissible. *City of Long Beach v. Standard Oil Co.*, 46 F.3d 929, 937 (9th Cir. 1995). In its motion to supplement, the only argument the EEOC made regarding the relevance of the

Barreras evidence was that the evidence is allegedly “relevant to whether Indian preference at issue in this case was based on national origin, as alleged by the EEOC, or by tribal membership, as claimed by Navajo Nation and Third-Party Defendants.” ER-106.

The district court rejected the claim that the Barreras evidence was relevant, finding it not relevant first, because the EEOC seeks only prospective injunctive relief and second, because “[t]here is no reason to believe the pre-1999 practices shed light on contemporary practices.” ER-23. This first finding was correct as developed in Part IV.A. above, because evidence of Peabody’s 1997 conduct became irrelevant with this Court’s 2010 decision dismissing part of the case. Prospective injunctive relief, the remanded part of the case, will be governed by the resolution of the inter-agency dispute. In this light, the district court’s ruling that the 1997 information was not relevant could not possibly be seen as an abuse of discretion.

Moreover, “[t]he trial court is to determine, under all of the circumstances, whether testimony is too remote to have probative value. That decision will not be overturned by [the Ninth Circuit] unless there is an obvious abuse of discretion.” *Hill v. Roller*, 615 F.2d 886, 891(9th Cir. 1980). The district court’s finding that evidence regarding pre-1999 practices is too remote to be probative of Peabody’s

contemporary practices and pending claim for prospective injunctive relief was not an obvious abuse of discretion.

To the extent the EEOC articulates in its opening brief new or expanded theories regarding the alleged relevance of the Barreras evidence, the EEOC has waived those arguments by not raising them below. *Greger v. Barnhart*, 464 F.3d 968, 973 (9th Cir. 2006). Finally, even if the district court erred in its determination that pre-1999 practices are not relevant, the ruling should nevertheless be affirmed because the admission of the Barreras evidence would not have changed the outcome.³⁵ See e.g., *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 695 F.3d 946, 952 n.2 (9th Cir. 2012) (affirming the district court's evidentiary rulings on summary judgment because the ruling was not outcome-determinative).

C. Several Additional Reasons Exist To Exclude The Barreras Declaration.

Even if the district court had abused its discretion in excluding the Barreras Declaration on timeliness and relevance grounds, the district court's ruling should nevertheless be affirmed because: (1) the pertinent portions of the Barreras

³⁵ Even assuming that the remarks of the former employees were admissible, the statements contain no admission that alters Peabody's position. Nothing suggests that either former official's action, if any was attributable to him, in the three cases was driven by any consideration other than who was most qualified. That these officials, one of whom was Navajo, acknowledged that they thought they could tell which applicants were Navajo or Hopi is of no perceptible evidentiary value that a decision was made on that basis.

Declaration are inadmissible hearsay; (2) Peabody would have been prejudiced by its late admission; and (3) the EEOC failed to comply with Fed. R. Civ. P. 56(d).

1. The Pertinent Portions of the Barreras Declaration Are Inadmissible Hearsay.

The Barreras Declaration was executed on October 10, 2012 and attaches notes from two interviews Ms. Barreras allegedly conducted in 1999. ER-111-39. Both the declaration and its attached notes contain Ms. Barreras' account of statements allegedly made by Peabody representatives regarding Peabody's hiring practices. *Id.* Because the EEOC seeks to use this evidence to prove the truth of the matters asserted therein, *see* Op.Br. 51, the EEOC has the burden of demonstrating that the notes and each of the statements allegedly made by Peabody representatives "qualif[ies] under some exemption or exception to the hearsay rule."³⁶ *United States v. Arteaga*, 117 F.3d 388, 396 n.12 (9th Cir. 1997).

The first set of hearsay statements the EEOC seeks to admit are in paragraphs 7 and 10-12 of the Barreras Declaration, where Ms. Barreras purports to summarize alleged statements made by two former Peabody employees, Jerry Antone and Anthony Baca. ER-113-14. In its motion to supplement, the EEOC argued that these statements are excluded from hearsay under Fed. R. Evid. 801(d)(2). ER-108. As set forth above, however, a statement is not excluded from

³⁶ Although the declaration is also hearsay, declarations are admissible at the summary judgment stage. *See* Fed. R. Civ. P. 56(c)(1)(A).

hearsay under Rule 801(d)(2)(D) unless the statement is made *during the existence* of the agency or employment relationship. Antone and Baca were former employees at the time of Ms. Barreras' interviews – a point her declaration admits. ER-107. The EEOC has thus failed to demonstrate that either Antone or Baca was an agent of Peabody at the time he made the statements upon which the EEOC seeks to rely, so the statements must be excluded as inadmissible hearsay.

The EEOC also seeks to admit the interview notes attached as an exhibit to the Barreras Declaration. In its motion to supplement, the EEOC argued that the notes are admissible under Fed. R. Evid. 803(6) as records of a regularly conducted activity. However, “a document prepared for purposes of litigation is not a business record because it is lacking in trustworthiness.” *Paddack v. Dave Christensen, Inc.*, 745 F.2d 1254, 1259 (9th Cir. 1984) (citation omitted); *see also Jordan v. Binns*, 712 F.3d 1123, 1135 (7th Cir. 2013). Because Ms. Barreras prepared the interview notes to investigate charges of discrimination in anticipation of possible litigation, the notes are not admissible under Rule 803(6). Moreover, to the extent Ms. Barreras' notes contain alleged statements of Antone and Baca, such statements are inadmissible for the same reasons the statements in paragraphs 7 and 10-12 of the Barreras Declaration are inadmissible. Namely, those statements were not made while Antone and Baca were agents of Peabody; therefore, they cannot be admissions by a party opponent.

2. The EEOC Sought to Use Evidence it Had Never Disclosed to Peabody.

The evidence the EEOC sought to inject in the last moments of this case appears nowhere else in the record assembled over 12 years. The Court must know that, soon after being served with this lawsuit, Peabody sought to obtain, via a Freedom of Information Act request, the information the EEOC had gathered during its investigation. The EEOC “denied in its entirety” Peabody’s request. *See* Request for Judicial Notice, filed with this brief (emphasis in the original). Yet, the EEOC now seeks to use *against* Peabody its inability to submit rebuttal evidence. Op.Br. 53. Because the EEOC did not submit this evidence until the day before the hearing and because the district court refused to consider it, Peabody obviously did not have an opportunity to speak with Barreras, Antone, or Baca regarding the content of her declaration and the underlying interviews. The district court’s exclusion of the Barreras evidence should therefore be affirmed on the alternative ground that its admission would have been prejudicial to Peabody.

3. The EEOC Failed to Comply With Fed. R. Civ. P. 56(d).

Under Rule 56(d), if a party opposing a motion for summary judgment believes that it needs additional time to obtain evidence, the party must “show[] by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition.” The EEOC did not invoke Rule 56(d) in its response to the motion for summary judgment. ER-428-30; ECF No. 253. Because the EEOC

did not ask the district court to stay consideration of the motion for summary judgment in order to obtain the Barreras Declaration or any other related evidence, the district court was not required to consider the evidence before entering summary judgment. *Carpenter v. Universal Star Shipping, S.A.*, 924 F.2d 1539, 1547 (9th Cir. 1991).

CONCLUSION

Peabody respectfully requests this Court to put this saga to an end by affirming the district court's decision. Having now heard from the EEOC, Interior, and the Navajo Nation, this Court can declare a rule that binds all parties concerned and most importantly provides a uniform rule of law prospectively. The tribe-specific preferences in Peabody's IMLA leases: are a lawful political classification that is beyond the scope of Title VII and, alternatively, are lawful under §703(i) when that provision is read consistent with the stated intention of its author, to preserve preference programs in effect when Title VII was enacted.

RESPECTFULLY SUBMITTED this 17th day of July 2013.

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Appellee Peabody Western Coal Company states that it is aware of no related cases pending in this Court.

CERTIFICATE OF COMPLIANCE

1. Defendant-Appellee's Answering Brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) as it contains 13,937 words, excluding those parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. Defendant-Appellee's Answering Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) as it is proportionally spaced and the text and footnotes are in 14-point Times New Roman.

By s/ John F. Lomax, Jr.
John F. Lomax, Jr.

Dated July 17, 2013

CERTIFICATE OF SERVICE

I hereby certify that, on the 17th day of July 2013, I filed Defendant-Appellee Peabody Western Coal Company's Answering Brief with the Clerk of Court, the U.S. Court of Appeals for the Ninth Circuit, using the Court's electronic case filing (ECF) system, with electronic copies being provided this date to all counsel of record registered with the ECF in this case.

By s/ John F. Lomax, Jr.
John F. Lomax, Jr.