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By

Walter E. Stern

Daniel W. Long

Modrall, Sperling, Roehl, Harris & Sisk, P.A.

Albuquerque, New Mexico

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WALTER E. STERN

Mr. Stern is a shareholder in the Albuquerque, New Mexico office of Modrall, Sperling, Roehl, Harris & Sisk, P.A. His practice is concentrated in litigation, administrative practice, ADR, and business advice in the areas of natural resources, energy, Indian law, and public lands administration. Walter's practice includes experience representing private businesses in transactions and litigation with Indian tribes and other Native American groups around the west and across the country.

Walter has been active in the affairs of the Rocky Mountain Mineral Law Foundation, having served: as Secretary in 2003-2004, as a Trustee from 1997-2001 and 2003-2004; as a Member of the Executive Committee during 1999-2001 and 2003-2004; as Program Chair for the 47th Annual Institute in 2001; and most recently as Chair of the Foundation's Special Institutes Committee beginning late in 2002. He also has served as Chair of the Public Lands Committee (1995-97) of the American Bar Association section formerly known as "SONREEL". He has been listed in Best Lawyers in America, since 1995 in the Natural Resources and Environmental Law category.

A native Californian, Walter moved to New Mexico after receiving his undergraduate degree, a B.S. in Forestry (with honors), from the University of California at Berkeley, and his J.D. from Boston College Law School (*cum laude*).

DANIEL W. LONG

Mr. Long is a shareholder in the Albuquerque office of Modrall, Sperling, Roehl, Harris & Sisk, P.A. Dan represents many of the firm's natural resources clients on employment, Indian lands, and other issues, and represents a variety of other private and public entities doing business on Indian lands. He is licensed in the Navajo Nation and has defended employers before the Office of Navajo Labor Relations, the Navajo Nation Labor Commission, and the Navajo Nation Supreme

Court. In addition, he advises employers regarding the application of the Navajo Preference in Employment Act and other tribal employment rights ordinances. Dan is the 2005 Chair of the New Mexico Bar Association's Section on Natural Resources, Energy, and Environmental Law and currently serves on the Admissions Committee of the Navajo Nation Bar Association.

Dan received his undergraduate degree in Political Science and Business Economics from the University of California at Santa Barbara, with high honors, and received his J.D. from the University of Michigan, *cum laude*.

LABOR AND EMPLOYMENT ISSUES IN INDIAN COUNTRY: A NON-INDIAN BUSINESS PERSPECTIVE

Walter E. Stern and Daniel W. Long

Modrall, Sperling, Roehl, Harris & Sisk, P.A.

Albuquerque, New Mexico

I. Introduction.

Many employers operate on or near Indian lands or in "Indian Country" throughout the United States, but particularly in the Southwest and Rocky Mountain regions. Although most companies are cognizant of the additional operational issues that may arise on Indian lands (such as additional tax issues, additional permitting, the need to coordinate with the Bureau of Indian Affairs, etc.), it is also important to recognize that companies may be subject to different and sometimes conflicting employment laws and may face other challenges when operating on or near Indian reservations. Companies operating on Indian lands should be aware of specialized application of federal statutes, questions concerning the applicability of state laws, and particularly, the application of tribal laws that may impact their operations.

Many Indian tribes, pueblos and other groups have adopted tribal employment rights ordinances ("TEROs") to regulate employment and labor practices on Indian reservations across the United States. These TEROs vary significantly from Tribe to Tribe, and generalizations are dangerous. Specific analysis of any particular TERO or comparable tribal regulatory scheme is critical. However, there are a number of issues that arise when Indian tribes seek to impose such tribal regulation on businesses operating on or near Indian reservations.

This paper will provide a discussion of federal, state and tribal laws potentially applicable to businesses, tribes and tribal enterprises operating on or near Indian reservations or otherwise within the jurisdiction of an Indian tribe or tribes.

II. Applicability of Federal Employment and Labor Laws in Indian Country.

The range of federal employment and labor laws applicable to businesses can apply differently, in certain respects, to employers operating on or near Indian lands or reservations. This section of the paper addresses a series of federal statutes and the manner in which they may apply to non-Indian businesses on the one hand, and to Indian tribes, Pueblos or other Native American groups and their tribally-owned enterprises on the other hand.

A. Title VII of the Civil Rights Act and the “Indian Exemption” for Employment Preferences.

1. Applicability to private employers.

Title VII of the Civil Rights Act of 1964 and the related affirmative action obligations imposed by Executive Order 11246 (“E.O. 11246”) apply to businesses operating on or near Indian reservations. Title VII and E.O. 11246; however, provide an exemption to certain employers located “on or near” Indian reservations from charges of discrimination if those employers extend publicly announced employment preferences to Indians who also live “on or near” a reservation.

Of course, Title VII prohibits employers from discriminating on the basis of “race, color, religion, sex, or national origin.”¹ However, the so-called Title VII “Indian exemption” provides:

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 preferential treatment is given to any individual because he is an Indian living on or near a reservation.²

To comply with this provision, a private employer must: (a) be located on or an Indian reservation; (b) announce publicly its employment policy or practice concerning the application of an Indian employment preference; (c) offer the preference to Indians who live on or near a reservation. Although federal courts have held that application of this exemption should be determined on a case-by-case basis, the phrase “on or near” has been interpreted to mean on the reservation or within the distance surrounding the reservation that a person seeking employment could reasonably be expected to commute for a work day. In the Equal Employment Opportunity Commission (“EEOC”) Compliance Manual (1988), the EEOC expressed the view that an employer operating a facility 60 miles from an Indian reservation in Montana is “on or near” the reservation, and that a Native American living within 8 miles of that reservation and 52 miles from the employer’s facility is living “on or near” the reservation.³

In all other respects, Title VII and E.O. 11246 apply to private companies operating on or near Indian lands. For example, both Title VII and E.O. 11246 bar discrimination on the basis of gender on or near Indian lands.

At this time, as a matter of federal law and policy, the “Indian preference” exemption in Title VII and E.O. 11246 will **not** permit an employer to offer a preference for the members of a particular tribe over the members of other tribes. The federal EEOC’s policy and interpretation of the statutory “Indian exemption” permits application of a preference for “Indians” generally. The EEOC does not interpret the “Indian exemption” to allow employers to apply preferences in favor of the members of one tribe over the members of other tribes.⁴

The U.S. Court of Appeals for the Ninth Circuit considered this issue in *Dawavendewa v. Salt River Project Agricultural Improvement and Power Dist.*, 154 F.3d 1117 (9th Cir. 1998) (“*Dawavendewa I*”), and concluded that a tribal preference was not authorized under the Title VII exemption. In *Dawavendewa I*, the Salt River Project Agricultural Improvement and Power District (“Salt River Project” or “SRP”) entered

into a lease with the Navajo Nation allowing Salt River Project to operate a coal-fired electric generating station on Navajo trust lands on the Navajo Reservation. The lease provided in pertinent part that SRP must grant employment preferences to members of the Navajo Nation.⁵

Mr. Dawavendewa, a member of the Hopi Tribe, applied for a position with SRP and was refused employment, despite that he lived on or near the Navajo Reservation. Mr. Dawavendewa sued and argued that SRP's rejection of his application was unlawful discrimination under Title VII.

The United States District Court in Arizona dismissed the claim. The district court reasoned that the preference to Navajo tribal members was within the Title VII exemption for an "Indian" preference. The Ninth Circuit reversed.

According to the Court of Appeals, the purpose of the Title VII exemption was to compensate for the effects of past and present unjust treatment, not to authorize another form of discrimination against particular groups of Indians.⁶ The Court stated that discrimination on the basis of tribal membership constitutes "national origin" discrimination prohibited by Title VII.⁷ While Title VII does not define "national origin," the Ninth Circuit observed that both the legislative history of the Civil Rights Act and the U.S. Supreme Court "recognize that 'national origin' includes the country [or place] of one's ancestors."⁸ The court then concluded that a discrimination claim arises when "discriminatory practices are based on the place in which one's ancestors lived [and that] discrimination against Hopis [in favor of Navajo tribal members] constitutes national origin discrimination under Title VII."⁹ The Ninth Circuit gave deference to the EEOC's 1988 policy statement concerning the proper scope of the allowable preference, and the court's conclusion is consistent with the EEOC's Compliance Manual.

SRP also argued that the United States Supreme Court's decision in *Morton v. Mancari*, 417 U.S. 535 (1974), supported the use of tribal employment preferences. In *Morton v. Mancari*, the Court considered a Bureau of Indian Affairs ("BIA") employment preference policy that "applies only to members of 'federally recognized' tribes. This operates to exclude many individuals who are racially to be classified as 'Indians.' In this sense, the preference is political rather than racial."¹⁰ Thus, *Morton v. Mancari* involved preferences for all members of federally recognized tribes, not a preference arising from membership in a particular recognized tribe that might permit discrimination against a member of another recognized tribe. Also, in *Mancari*, the Court had commented favorably on the Title VII exemption permitting Indian preference by private employers.¹¹

The Ninth Circuit in *Dawavendewa I* rejected SRP's reliance on *Morton v. Mancari* and distinguished the Supreme Court's decision as having been based on principles of tribal self-governance that did not implicate the anti-discrimination purposes of Title VII.¹²

Ultimately, following additional analysis, the Ninth Circuit read the word "Indian" to mean "Indian," not "Indian or tribal member." To read the word "Indian" in the statute as "Indian or tribal member" would add words to the statute and would permit two forms of discrimination rather than the one form that Congress expressly authorized, according to the court.¹³

Thus, under *Dawavendewa I*, tribal preferences are invalid as a matter of federal law. To our knowledge, no other circuits have addressed this tribal vs. Indian preference issue.

After the Supreme Court denied certiorari in *Dawavendewa I*, the case was remanded to the federal district court. At that point, SRP argued that the lawsuit must be dismissed for failure to join the Navajo Nation as a necessary and indispensable party. The district court granted SRP's motion to dismiss on this basis, and that decision was upheld by the Ninth Circuit in *Dawavendewa v. Salt River Project*, 276 F.3d 1150 (9th Cir. 2002) ("*Dawavendewa II*").

Based on Federal Rule of Civil Procedure 19, the Ninth Circuit held that the Navajo Nation was a necessary party for three reasons. First, the court held that complete relief could not be accorded to *Dawavendewa* without the presence of the Navajo Nation.¹⁴ Complete relief could not be accorded because the Navajo Nation would not be bound by any judgment or injunction against SRP, and the Nation could continue to assert its lease rights to require SRP to apply a Navajo preference.¹⁵

Second, the court held that the Navajo Nation was necessary to the pending litigation because it has a legitimate interest in the subject matter of the action and disposition of the matter may impair its ability to protect that interest.¹⁶ The Ninth Circuit's decision, holds that "a party to a contract is necessary, and if not susceptible to joinder, indispensable to litigation seeking to decimate that contract." The argument is that *Dawavendewa*'s Title VII suit against SRP threatens the Navajo Nation's contractual rights with SRP. Further, the Ninth Circuit held that "a judgment rendered in the Nation's absence will impair its sovereign capacity to negotiate contracts and, in general, to govern the Navajo reservation."¹⁷

Third, the Ninth Circuit held that the Navajo Nation is a necessary party because the Salt River Project would be subject to multiple or inconsistent obligations if the lawsuit proceeded in the absence of the Navajo Nation.¹⁸

Next, the Ninth Circuit addressed whether the Navajo Nation can be joined in the lawsuit and concluded that Nation's immunity from suit precludes joinder.¹⁹ The court also held that *Dawavendewa* could not avoid application of sovereign immunity by naming tribal officials directly for alleged acts in excess of authority under federal statutes.²⁰ Therefore, since the Navajo Nation was a necessary party that could not be joined, the court concluded that the Navajo Nation was indispensable to the litigation and dismissed the case.²¹

The final part of the Ninth Circuit's decision notes that, if the EEOC had taken the lead in prosecuting the lawsuit instead of *Dawavendewa*, the private plaintiff, there may be no viable sovereign immunity defense, as the EEOC would be acting on behalf of the United States.²² This statement, unnecessary for the holding in *Dawavendewa*, is relevant to the next case we discuss, *EEOC v. Peabody Western Coal Company*, then pending in United States District Court for the District of Arizona. In that case, Peabody had requested a stay until the Ninth Circuit decided the indispensability issue in *Dawavendewa II*, arguing that the Navajo Nation might very well be an indispensable party in its case as well.

Alternatively, the Ninth Circuit noted also that a private party could pursue discrimination claims in tribal court initially. Then, assuming an adverse decision, the

private plaintiff could seek to use the tribal court's actions as justification to name tribal officials in a federal suit for acting in excess of the Tribe's authority as a matter of federal law.²³

The impact of the *Dawavendewa II* decision on the "Indian preference" analysis under Title VII is minimal. Analytically, the indispensability decision is separate from the holding that Title VII's Indian preference exemption does not permit tribal preferences. As a practical matter, however, the decision clarifies that suits alleging a violation of Title VII in this respect must be brought by the EEOC (or perhaps the Department of Justice, as discussed below) rather than by private parties, in order to avoid immunity from suit and indispensability problems.

This leads us to the next chapter in Title VII tribal preference litigation, *EEOC v. Peabody Western Coal Co.* In that case, the EEOC initiated a suit against Peabody Western Coal Company for granting tribal preferences to members of the Navajo Nation at its coal mines located "on or near" both the Hopi and Navajo Reservations.²⁴ Similar to the fact pattern in *Dawavendewa*, the *Peabody Western* case involves three non-Navajo Native American job applicants (two Hopi and one Otoe) who alleged that their applications were not accepted because they were not members of the Navajo Nation.

In *EEOC v. Peabody Western*, Peabody Western sought to dismiss arguing that the action really included claims against the Navajo Nation as well, and that the EEOC was not authorized to bring an action against that government under Title VII.²⁵ Under that statute, the EEOC is to refer matters to the Attorney General to pursue civil actions when the potential defendant is a government. In this case, the EEOC had not involved the Attorney General or the United States Department of Justice.

The district court, departing from the guidance the Ninth Circuit gratuitously provided in *Dawavendewa II*, held that the EEOC cannot effectively prosecute an alleged violation of Title VII when the defendant is in compliance with Navajo Preference in Employment Act. Relying on 42 U.S.C. § 2000e-5(f)(1), the district court stated that while the United States, acting through its Department of Justice, could join the Navajo Nation, the EEOC itself is not empowered to bring suit against governmental entities. In addition, the court found that the coal lease's tribal member employment preference provisions, similar to those in SRP's power plant lease, had been approved by the Department of the Interior, leading to a nonjustifiable political question.²⁶

On appeal, the Ninth Circuit decision reversed.²⁷ The Ninth Circuit held that the EEOC could join the Navajo Nation in the lawsuit, although the EEOC could not state any cause of action against the Navajo Nation under the terms of Title VII. According to the court, as an agency of the United States, the sovereign immunity of the Navajo Nation does not prevent the EEOC from joining the Navajo Nation.²⁸ Peabody Western has submitted a petition for a writ of certiorari to the United States Supreme Court, which is currently pending.

Following the Ninth Circuit's decision in *Peabody Western*, the EEOC recently brought a similar suit against Basha's grocery store in Tuba City, Arizona, located on the Navajo Reservation, contending that Basha's has violated Title VII by applying a Navajo tribal member preference. The EEOC has joined the Navajo Nation in this suit

as well. Currently, it appears that the Basha's case will be stayed pending the petition for certiorari in *Peabody Western*.

2. Applicability to tribes and tribal enterprises.

Title VII does not apply to tribal governments. 42 U.S.C. § 2000e(b) specifically excludes tribes from the definition of "employer" under Title VII.²⁹ As a result, tribes as employers are not only authorized to apply tribal preference, but are also not subject to Title VII's prohibition of discrimination based on other characteristics, such as gender.

B. National Labor Relations Act.

1. Applicability to private employers.

The National Labor Relations Act applies to private employers operating on or near Indian reservations.³⁰

2. Applicability to tribes and tribal enterprises.

This section of the paper considers primarily two important decisions, one issued by the United States Court of Appeals for the Tenth Circuit and the other issued by the National Labor Relations Board ("NLRB") itself. The decisions include lengthy analyses and reach opposite results. An understanding of these two decisions provides an excellent perspective on the question of the applicability of the National Labor Relations Act ("NLRA") to Indian tribes and tribal enterprises. In addition, the different analyses also highlight the broader conflict between the circuit courts regarding the application of federal statutes of general applicability to tribes under *Federal Power Comm'n v. Tuscarora*, 362 U.S. 99 (1960).

In *N.L.R.B. v. Pueblo of San Juan*, 276 F.3d 1187 (10th Cir. 2002), the Tenth Circuit consider the validity of a "right-to-work" ordinance prohibiting union security agreements adopted by the Pueblo of San Juan.³¹ The NLRB contended that the Pueblo ordinance violated the NLRA and was preempted by federal law.³² The Pueblo contended that its ordinance did not violate federal law under an exception permitting "states and territories" to enact right-to-work laws.³³ A three judge panel of the Tenth Circuit held that the Pueblo could be considered equivalent to a "state or territory" for purposes of the NLRA and that the Pueblo's ordinance did not violate the NLRA.

Subsequently, the Tenth Circuit accepted rehearing and withdrew the panel Opinion from publication. The Tenth Circuit's opinion on rehearing could have far-reaching impact not only on labor and employment regulation on Indian reservations, but also on the extent to which Indian tribes are subject to federal statutes of general application. As discussed below, there is a line of cases that stand for the proposition that federal statutes of general applicability apply with equal force to Indian tribes.³⁴

The specific issue addressed by both opinions is whether the Pueblo of San Juan has the authority to enact a "right-to-work" law, which prohibits employers and unions from entering into agreements requiring employees to maintain membership in or

pay dues to a union, called a "union security agreement." The NLRA permits union security agreements as a general matter:

Nothing in this subchapter or in any other statute of the United States shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirteenth day following the beginning of such employment or the effective date of such agreement, whatever is later.³⁵

However, a separate section of the NLRA provides an exception to this general proposition:

Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.³⁶

Reading these provisions together, "States or Territories" are specifically permitted to enact "right-to-work" laws that prohibit union security agreements.

The specific issue in *San Juan* was whether this exception for States and Territories also permits tribes or pueblos to enact right to work laws.³⁷ The court initially discounted authority holding that federal statutes of general applicability apply to Indians and tribes.³⁸ The Tenth Circuit distinguished these cases as addressing only tribes' "proprietary" interests, as opposed to tribes' "sovereign" interests.³⁹

Instead, the Tenth Circuit based its decision on general rules of construction that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit",⁴⁰ and that "Indian tribes retain attributes of sovereignty over both their members and their territory, to the extent that sovereignty has not been withdrawn by federal statute or treaty."⁴¹ The Tenth Circuit's reasoning was that the Pueblo of San Juan retained the sovereign authority to enact a right work statute, and the NLRA did not expressly divest the Pueblo of that authority.⁴² In fact, the court held that § 14(b) of the NLRA evidenced congressional intent **not** to pre-exempt other laws with respect to regulation of union security clauses.⁴³ As a result, the Court ruled that the Pueblo of San Juan's right to work ordinance was not inconsistent with or preempted by the NLRA.

The *San Juan* majority opinion suggests that, "[i]n order to find preemption of tribal laws. . . it is necessary to determine whether Congress intended to divest the [tribe] of its power as a sovereign" to enact tribal preference legislation.⁴⁴ According to *San Juan*, the burden to show congressional intent to divest a tribe or pueblo of such authority would be on the federal government or private litigant. With respect to the NLRA, the *San Juan* court held that the statute's silence as to the tribes was insufficient to constitute an implied preemption of tribal sovereign authority.⁴⁵ The court stated that, "[s]tatutes are entitled to the presumption of non-preemption."⁴⁶ Further, "[p]re-empting tribal laws divests tribes of their retained sovereign authority, running counter to the policy and not benefiting Indians."⁴⁷

Judge Murphy filed a thorough dissent. The dissent notes that federal statutes of general applicability, including OSHA and ERISA, have been held to apply to tribes in "sovereign" capacities.⁴⁸ Judge Murphy notes that, if the majority opinion is correct,

an Indian tribe, in almost every instance, could avoid application of a comprehensive, generally applicable federal statute by enacting an ordinance declaring the tribe to be exempt from the federal statute or which directly conflicts with the federal statute.⁴⁹

Judge Murphy continued, arguing in favor of the approach used by the Ninth Circuit and arguably applied in the past by the Tenth Circuit:

A federal statute of general applicability that is silent on the issue of applicability to Indian tribes will not apply to them if: (1) the law teaches exclusive rights of self-governance in purely intramural matters; (2) the application of the law to the tribe would abrogate rights guaranteed by Indian treaties; or (3) there is proof by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations. . . .⁵⁰

The Tenth Circuit had already considered related issues in *EEOC v. Cherokee Nation*, 871 F.2d 937 (10th Cir. 1989), and *Donovan v. Navajo Forest Products*, 692 F.2d 709 (10th Cir. 1982). In *Cherokee Nation*, the Tenth Circuit held that the Age Discrimination in Employment Act ("ADEA") did not apply to tribes as employers. The EEOC took the position that the ADEA was applicable to tribes because Congress had not expressly exempted tribes from the ADEA's definition of "employer" (as done in Title VII and the Americans With Disabilities Act). EEOC therefore sought to enforce an administrative subpoena against the Cherokee Nation. The Tenth Circuit noted that the relevant treaty provided that the Cherokee Nation had the right "to make and carry into effect all such laws as they may deem necessary for the government and protection of the persons and property within their own county"⁵¹ Because there was **no clear** indication of congressional intent to abrogate Indian sovereignty rights, the court concluded that the ADEA did not apply to the Cherokee Nation as an employer.⁵² Similarly, in *Navajo Forest Products*, the Tenth Circuit used a similar analysis to conclude that the Occupational Safety and Health Act was not applicable to the Navajo Nation as an employer based on Article II of the Treaty of 1868.⁵³

While the approach advocated by Judge Murphy is arguably more consistent with prior precedent in both the Ninth and Tenth Circuits, it appears that the *en banc* majority's analysis in *San Juan* now controls in the Tenth Circuit.

In contrast, the NLRB has now adopted the Ninth Circuit's approach in analyzing the applicability of the NLRA to tribes as employers. In a reversal of prior NLRB decisions, on May 28, 2004, the NLRB held that the NLRA may apply to tribes as employers, even when a tribe is operating on reservation land. Previous NLRB decisions had held the NLRA applicable to tribal enterprises only when such enterprises are operating outside of the tribe's reservation. The NLRB's decision opens many tribal casinos and other tribal enterprises to possible unionization under the NLRA.

In *San Manuel Indian Bingo and Casino and Hotel Employees & Restaurant Employees International Union, AFL-CIO, CLC and Communication Workers of America AFL-CIO, CLC, Party in Interest and State of Connecticut, Intervenor*, 341 NLRB No. 138, 2004 NLRB LEXIS 286 (May 28, 2004), the NLRB considered a casino operated by the San Manuel Band of Serrano Mission Indians on the San Manuel Indian Reservation in San Bernardino County, California. The casino is wholly owned and operated by the tribe and is located entirely within the San Manuel reservation.

The Band had enacted its own labor relations ordinance. The Hotel Employees and Restaurant Employees International Union ("HERE") alleged that the casino was supporting the Communications Workers of America Union ("CWA") in violation of the NLRA and filed an unfair labor practice charge against the casino. The casino and Band asserted that the NLRB lacked jurisdiction over its operations.

In *San Manuel*, the NLRB reviewed its own precedent concerning its jurisdiction over tribes as employers. In *Fort Apache*, 226 NLRB 503 (1976), the Board concluded that an Indian mining company located on Indian land was not within the meaning of "employer" under the NLRA because the tribal enterprise was a "governmental entity" analogous to "political subdivisions" excluded from the definition of employer in § 2(2) of the NLRA. Similarly, in *Southern Indian*, 290 NLRB 436 (1988), a health clinic operated by a consortium of Indian tribes on a reservation was held to be excluded from section 2(2)'s definition of employer.

Outside reservation land, however, the NLRB has held that tribally-owned enterprises are subject to the NLRA. In *Sac & Fox*, 307 NLRB 241 (1992), the Board held that a tribal corporation involved in a commercial venture (manufacture of chemical resistant suits) off the reservation was subject to the NLRA. The Board's reasoning in *Sac & Fox* was expressly based on the location of the tribe's operation off the reservation.

The Board's decision in *San Manuel* expressly reassesses the analysis used in these prior Board decisions. The core of the Board's analysis is the language in § 2(2) of the NLRA, which provides that the NLRA does not apply to:

The United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act . . . or any labor organization (other than when acting as an employer).⁵⁴

The Board noted that § 2(2), on its face, does not expressly exclude application of the NLRA to Indian tribes. Tribes are clearly not the United States, or States, or political subdivisions thereof. The Board noted that the holding *N.L.R.B. v. Pueblo of San Juan*, 276 F.3d 1186, 1192 (10th Cir. 2002), is inconsistent with this conclusion. The Board described *San Juan* as concluding that tribes are not States or political subdivisions thereof, but nonetheless holding that the Pueblo of San Juan's right to work ordinance was not preempted by the NLRA.⁵⁵ Citing Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(b), which specifically excludes tribes from the definition of "employer," the Board noted that Congress knew how to exclude Indian tribes when it wanted to do so. The Board rejected its prior analysis that the location of the employer at issue (on or off the reservation) was relevant to the NLRA's definition of employer and the exclusions listed in § 2(2). The Board therefore held: (1) the NLRA does not explicitly exempt Indian tribes, wherever they operate; (2) the law does not support implicit exemptions or exceptions by analogy based on a tribal employer's location or any other factor. Prior Board precedent to the contrary was expressly overruled.

The NLRB then considered as a separate question whether Federal Indian policy requires that the Board decline jurisdiction. In examining the nature of Federal Indian policy, the Board turned to the rule stated in *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99 (1960), as applied by *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985). Under the Board's *Tuscarora*

analysis, statutes of general applicability are applicable to tribes and Indians unless (1) the law touches exclusive rights of self-government in purely intramural matters; (2) the application of the law would abrogate treaty rights; or (3) there is proof in the statutory language or legislative history that Congress did not intend the law to apply to Indian tribes. Finding none of these factors present in the case before it, the Board concluded that Federal Indian policy did not preclude application of the NLRA to tribes as employers.⁵⁶

The Board's majority opinion distinguished cases such as *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987), and *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), on the basis that these cases "have protected Indian sovereignty in cases involving tribal justice systems and tribal tax authority, which the courts have found to be critical to tribal self-government." The Board held that *Tuscarora* is applied to assess the applicability of regulatory schemes that do not implicate such critical self-governance issues.

Fundamental to the Board's discussion of Federal Indian policy is the Board's distinction between governmental and commercial activities. Unlike a tribal tax, in the Board's analysis, the Band's operation of a casino (which employs many non-Indians and caters to non-Indians) is commercial in nature and therefore subject to *Tuscarora*.

The Board dismissed the Band's argument that its inherent right to exclude nonmembers from its reservation precludes the Board's jurisdiction. Without significant discussion, the Board apparently concluded that the federal government's interest in the application of generally applicable laws under *Tuscarora* outweighed the Band's inherent authority to exclude outsiders from the reservation. It is unclear whether the existence of a treaty specifically reserving such rights to a tribe would impact the Board's analysis. As suggested above, some treaties expressly preserve tribes' power to exclude non-members.

Finally, the Board assessed "whether policy considerations militate in favor of or against the assertion of the Board's discretionary jurisdiction," in an attempt to "accommodate the unique status of Indians in our society and legal culture." The Board concluded that strong policy considerations existed regarding application of the NLRA to tribes. According to the Board, the error in prior cases was in using such policy considerations to warp the clear language in § 2(2). Rather, the Board concluded that the determination of whether to assert jurisdiction should involve a case-by-case balancing of the tribal conduct, entity, or enterprise at issue. In the Board's analysis, where the conduct is in the nature of a commercial enterprise, employing significant numbers of non-Indians, and catering to non-Indian customers, "the special attributes of their sovereignty are not implicated." Therefore, application of the NLRA would serve the policies of the Act in such circumstances while doing little harm to tribes' attributes of sovereignty.

On the other hand, when tribes are acting with regard to the particularized sphere of traditional tribal or governmental functions, the Board should defer to the tribes by declining to assert its "discretionary jurisdiction." While the Board recognized that this approach may lack predictability, "the process of litigation will mark the contours in due time" and referred generally to the body of law differentiating governmental functions from proprietary functions.

Turning to the facts before it, the Board concluded that the tribe's operation of the casino is not an exercise of self-governance or a governmental function, regardless of the fact that the revenue generated will be used to address the tribe's intramural needs. Since the casino is a commercial enterprise, employing non-Indians and catering to non-Indians, the Board held that the policy considerations favor assertion of the Board's discretionary jurisdiction.

An extensive dissent was submitted in *San Manuel* by Board Member Peter C. Schaumber. The dissent challenges the assumptions made by the Board's majority, particularly with respect to the application of *Tuscarora*. The dissent argues that the Board deviates from *Tuscarora* by over-emphasizing the analysis used in *Coeur d'Alene*.

The dissent also raises an interesting issue regarding the nature of the tribal conduct regulated by the NLRA. The majority opinion distinguishes *San Juan* as a case that related to the Pueblo of San Juan's authority to enact a tribal ordinance regulating the employment relationship, while the *San Manuel* case involved tribal operation of a commercial enterprise.

As the dissent noted, however, the San Manuel Band had a comprehensive tribal labor relations ordinance regulating labor relations at the casino. The Band's ordinance provides rights to self-organization, collective bargaining, to engage in other concerted activities for mutual aid and protection, and to refrain from any of these activities. The ordinance provides for the primacy of tribal law, ordinances, personnel policies, and tribal customs and traditions regarding Indian preference, promotion, seniority, layoffs and retention. Strikes are allowed only when the parties reach impasse and have exhausted dispute resolution procedures, and strike-related picketing is prohibited on Indian lands. As a result, the application of the NLRA to the San Manuel Band would require preemption of the tribal ordinance.

As noted by the dissent, the existence of the comprehensive labor relations ordinance places the San Manuel case squarely in conflict with the Tenth Circuit's decision in *NLRB v. Pueblo of San Juan*,⁵⁷ where the court reached a different conclusion with respect to the way in which the NLRA applies to tribal entities. In *San Juan*, the court considered the authority of the Pueblo of San Juan to enact a "right to work" law; that is, a law that prohibits union security clauses in collective bargaining agreements, so that employees may work at unionized employers without joining the union themselves. The NLRA includes a general prohibition against such right to work ordinances, but then specifically permits States and their political subdivisions to enact right to work ordinances. As a result, the question posed in *San Juan* was whether the Pueblo of San Juan could similarly enact a right to work ordinance by analogy; that is, did Congress intend for tribes to be included in the phrase "States and their political subdivisions" for purposes of granting authority to enact right to work laws. This is **not** exactly the same inquiry faced in *San Manuel*; however, it is very similar, as § 2(2) of the NLRA (at issue in *San Manuel*) excludes the United States, States and their political subdivisions from the definition of "employers" subject to the Act.

In a companion case to *San Manuel*, *Yukon Kuskokwim Health Corp.*, 341 NLRB No. 139 (May 28, 2004), the NLRB held that policy considerations required that the NLRB not exercise jurisdiction over an Indian Self-Determination Act contractor that was performing traditional governmental functions. On September 30, 2005, the NLRB

issued a substantive ruling on the unfair labor practices alleged in *San Manuel* and affirmed its 2004 jurisdictional decision as part of that opinion. News reports indicate that appeals of the NLRB's decisions will be filed in federal courts.

Shortly after the *San Manuel* jurisdiction decision was issued in 2004, a bill was introduced in the 108th Congress (H.R. 4680) seeking to overturn the result through amendment of the NLRA, but the bill was referred to committee and no vote was taken. In the 109th Congress, H.R. 16 is pending. That bill seeks to include the phrase "or any business owned and operated by an Indian tribe and located on its Indian lands" in Section 2(2) of the NLRA, thereby excluding these entities from the scope of the NLRA.

Because the *San Manuel* decision has potentially significant impacts on the operation of tribal casinos as well as on the nature of the sovereignty exercised by tribes generally, further development of these issues is anticipated. Tribal employers and those doing business with them will need to carefully consider the potential application of the NLRA to their operations. Given the fundamental inconsistencies between *San Manuel* and the approach in *Pueblo of San Juan*, the Tenth Circuit's approach will likely be an important part of challenges to the *San Manuel* decision. Within the Tenth Circuit, this conflict will place employers potentially affected by *San Manuel* in an uncertain position with respect to whether tribes or tribal employers should be considered analogous to states or territories for purposes of the NLRA.

C. Other Federal Employment Statutes.

This section addresses certain other federal employment or labor laws. Other federal employment and labor statutes are likely to apply to private, non-Indian businesses operating in Indian country with the same force and effect as they apply elsewhere. Although there are arguments that some federal employment acts may not apply to private employers operating on Indian lands, generally, employers should operate as though such statutes do apply. There are splits in authority as to whether some of these federal employment statutes of general applicability apply to Indian tribes as employers. Other statutes, such as the Americans with Disabilities Act, which prohibits discrimination on the basis of disability, specifically exclude Indian tribes from the definitions of "employers" subject to the Act.⁵⁸

1. Occupational Safety and Health Act.

One of the most important cases interpreting *Tuscarora* is *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985), in which the Ninth Circuit addressed whether the Occupational Safety and Health Act ("OSHA")⁵⁹ applied to a tribal farm wholly owned and operated by the Coeur d'Alene Indian Tribe.⁶⁰ The farm was a commercial enterprise employing both Indians and non-Indians and was operated similarly to other farms in the area.⁶¹ The court held that under *Tuscarora*, federal statutes of general applicability are applicable to tribes unless (1) the law touches "exclusive rights of self-governance in purely intramural matters"; (2) the application of the law to the tribe would "abrogate rights guaranteed by Indian treaties"; or (3) there is proof "by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations."⁶² Concluding that the tribal farm was not an aspect of self-government, the court held that the application of OSHA did not touch exclusive rights of self-governance in purely intramural matters, and therefore applied OSHA to the farm.⁶³

The analysis in *Coeur d'Alene* was also applied by the Second Circuit to permit the application of OSHA to a tribally-owned commercial sand and gravel business in *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 180 (2d Cir. 1996). The court concluded that the sand and gravel operation was of a commercial and service nature, rather than governmental.⁶⁴

In the Tenth Circuit, however, OSHA was held not to apply to a tribal business manufacturing wood products in *Donovan v. Navajo Forest Products Indus.*, 692 F.2d 709, 712 (10th Cir. 1982). The Tenth Circuit premised its decision on the existence of a specific treaty right protecting self-governance rights of the Navajo Nation.⁶⁵ The court distinguished *Tuscarora* because it did not involve treaty rights.⁶⁶

2. Age Discrimination in Employment Act.

A similar split in circuits exists regarding the application of the Age Discrimination in Employment Act ("ADEA")⁶⁷ to tribes as employers. Consistent with its approach in *Coeur d'Alene*, in *EEOC v. Karuk Tribe Housing Authority*, 260 F.3d 1071 (9th Cir. 2001), the Ninth Circuit held that the ADEA did not apply to a tribal Housing Authority because the role of tribal housing was integrally related to self-governance.⁶⁸ Notably, *Karuk* expressly rejects the argument that the ADEA's application to tribes should be assumed because Congress used Title VII as a model for the ADEA, but chose not to exempt tribes from the ADEA's definition of "employer."⁶⁹

Using a different approach, but reaching the same result, the Tenth Circuit in *EEOC v. Cherokee Nation*, 871 F.2d 937 (10th Cir. 1989), held that the ADEA did not apply to the Cherokee Nation Department of Health and Human Services because of rights of self-governance guaranteed by the Cherokee Treaty.⁷⁰ The court held that the *Tuscarora* analysis was inapplicable in treaty rights cases.⁷¹ Based on the existence of treaty rights (and arguably on other "inherent attributes of sovereignty"), the court held that the ADEA's silence could not result in its application to the Cherokee Nation.⁷²

Applying a standard similar to *Cherokee Nation*, the Eighth Circuit in *EEOC v. Fond du Lac Heavy Equipment and Constr. Co.*, 986 F.2d 246 (8th Cir. 1993), held that the ADEA did not apply to a tribally-owned construction company that did work both on and off the reservation.⁷³ The *Fond du Lac* court stated the applicable rule as "[t]his general rule in *Tuscarora*, however, does not apply when the interest sought to be affected is a specific right reserved to the Indians."⁷⁴ The court found a specific tribal right in self-government inherent in the tribe's "quasi-sovereignty,"⁷⁵ and therefore held that the ADEA did not apply in light of its silence as to application to tribes.

3. Fair Labor Standards Act.

Using a straight-forward application of *Coeur d'Alene*, the Ninth Circuit held in *Snyder v. Navajo Nation*, 371 F.3d 658 (9th Cir. 2004), that law enforcement officers of the Navajo Nation Division of Public Safety are not entitled to the protections of the Fair Labor Standards Act ("FLSA"). While FLSA is a law of general applicability, tribal law enforcement is a traditional governmental function and is appropriate to exempt from the scope of the FLSA as intramural.⁷⁶

The other reported circuit court decision regarding the FLSA's application to tribes is less clear. In *Reich v. Great Lakes Indian Fish and Wildlife Commission*, 4 F.3d 490 (7th Cir. 1993), the court ultimately held that the United States Department of Labor did not have regulatory jurisdiction over the Commission, which was an entity formed by 13 Chippewa Indian tribes to protect native game and fish rights.⁷⁷ The court's decision appeared to rest on the nature of the game warden employees' positions as akin to law enforcement officers, a governmental function.⁷⁸ The court's opinion, however, also left a number of undecided issues.⁷⁹

4. Employment Retirement Income Security Act.

The Employment Retirement Income Security Act ("ERISA") has been held to apply to Indian tribal enterprises. In *Smart v. State Farm Ins. Co.*, 868 F.2d 929 (7th Cir. 1989), the Seventh Circuit held that ERISA governed a group health policy issued to a tribal employer for tribal employees at a health center on reservation land owned and operated by the Bad River Band of the Chippewa Tribe. Similarly, in *Lumber Industry Pension Fund v. Warm Springs Forest Products*, 939 F.2d 683 (9th Cir. 1991), the Ninth Circuit held that ERISA was applicable to a tribal pension plan for employees of a lumber mill located on the reservation owned and operated by the Warm Springs Tribe.⁸⁰

Both the Seventh and Ninth Circuits rejected arguments that application of ERISA would interfere with rights of self-governance. In *Lumber Industry Pension Fund*, the Ninth Circuit held that self-governance was not infringed where a tribe's decision-making power is not usurped.⁸¹ Treaty rights were not a significant issue in either *Smart* or *Lumber Industry*.

Complicating the analysis of whether ERISA applies to tribal governments specifically and tribal plans is the exemption within ERISA for "governmental plans." Even assuming ERISA would apply to a tribe as an employer, tribes may be entitled to treatment as a governmental plan under ERISA. A governmental plan is defined by ERISA as "a plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing." Although tribal governments are not listed as a type of governmental plan, many tribal plans are considered governmental plans and thus are exempt from most of ERISA.

The Pension Benefit Guarantee Corporation (PBGC) is part of the Department of Labor. Defined benefit plans subject to Title IV of ERISA must pay premiums to the PBGC as part of the PBGC's guarantee to pay benefits to employees should the employer become bankrupt or go out of business. The PBGC opined in PBGC Opinion Letter 81-3 that a retirement plan sponsored by the Confederated Tribes of the Colville Reservation for its employees was exempt from ERISA as a governmental plan and thus did not owe premiums to the PBGC.

The Eastern District of Washington relied on this PBGC letter when the issue of ERISA coverage was raised in *Colville Confederated Tribes v. Somday*, 96 F. Supp. 2d 1120 (E.D. Wash. 2000). In that case the court determined that the retirement plan was a "governmental plan" and thus exempt from many of ERISA's restrictions. It gave deference to the PBGC's opinion.

However, the PBGC issued a second opinion letter dealing with tribal plans, and based on the facts involved, found that ERISA did apply to a tribal plan. In the 1989 letter, the PBGC distinguished its earlier letter based on the activity involved. In the 1981 letter, the tribe was acting in its aspect as a government. However, the 1989 letter involved a factory that was located off-reservation, with most of the employees and customers being non-Indian.⁸²

III. Applicability of State Employment and Labor Laws in Indian Country.

As a general rule, state labor and employment laws, including unemployment compensation, do not apply to employers operating solely on Indian reservations. See *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 208 (1987).

An important exception to the general rule is state workers' compensation laws, which apply on Indian reservations (although not to tribes as employers) by Act of Congress. In 40 U.S.C. § 290, Congress provided that States have the authority to apply workers' compensation laws to all lands owned or held by the United States which is within the exterior boundaries of the State to the same extent as if such lands were under the exclusive jurisdiction of the State. Specifically, 40 U.S.C. § 290 provides in pertinent part:

Whatsoever constituted authority of each of the several States is charged with the enforcement of and requiring compliances with the State workmen's compensation laws of said States . . . shall have the power and authority to apply such laws to all lands and premises owned or held by the United States . . . in the same way and to the same extent as if said premises were under the exclusive jurisdiction of the State within whose exterior boundaries such place may be.

This statute has been interpreted to apply to Indian reservations and was applied to permit application of state workers' compensation exclusivity provisions on an Indian reservation in *Begay v. Kerr-McGee Corp.*, 682 F.2d 1311, 1319 (9th Cir. 1982).

The Navajo Supreme Court, however, has held that the Arizona workers' compensation exclusivity provision does not necessarily bar a suit in tribal court by an injured Navajo worker who had received workers' compensation benefits from Arizona.⁸³ The Navajo Supreme Court held that while 40 U.S.C. § 290 allowed the Arizona Industrial Commission to award benefits to an employee injured on the job, it did not preclude the Navajo Nation courts from exercising jurisdiction over a subsequent personal injury suit over the same injuries.⁸⁴ The court held, however, that:

The Navajo Nation courts should not permit personal injury suits as a 'supplement' to state workers' compensation awards unless it is clear that the compensation received under the workers' compensation regime is substantially different from what Navajo common law would consider adequate..⁸⁵

Thus, the Court identified a "delicate balancing test" weighing the Navajo Nation's interest in justice and adherence to custom and tradition on one hand and state interests in the integrity of its workers' compensation program.⁸⁶

Analytically, assertion of jurisdiction by Navajo Nation courts does not appear to be supported, as the benefit award provisions of a workers' compensation statute should not be severable from the exclusivity provisions of that statute. The Navajo Nation should not have it both ways: if workers' compensation benefits are awardable, they should be an exclusive remedy; or conversely, if the exclusivity provisions are unenforceable, benefits should not be awardable. It does not appear that any other tribal courts have interpreted 40 U.S.C. § 290 in a similar fashion, but such interpretations may be more likely after *Nez*.

While state labor and employment laws generally do not apply on Indian reservations, such laws will apply near Indian reservations. This difference can create issues for employers who are voluntarily applying a publicly-announced preference for Indians living on or near an Indian reservation. While this practice is permissible under federal law,⁸⁷ state anti-discrimination laws may not include comparable Indian preference exemptions.⁸⁸ Resolution between state and federal approaches on this issue remains an open question.

IV. Applicability of Tribal Employment and Labor Laws in Indian Country.

Many tribes and pueblos have enacted their own employment-related laws intended to be applicable to private employers. The primary purposes of most such tribal employment rights ordinances ("TEROs") is to provide an Indian or tribal preference in employment and provide other security to tribal members employed on the reservation. As a threshold issue, tribes must have jurisdiction over a company before imposing TERO requirements. As with other tribal regulation of non-Indians, such jurisdiction must be premised on the factors described in *Montana v. United States*, 450 U.S. 544, 565-66 (1981), as clarified by subsequent cases.⁸⁹

In many cases where a company is operating on tribal land, the company's contact with the tribe will be sufficient for the tribe to impose its own employment laws. In *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311 (9th Cir. 1990), *cert. denied*, 499 U.S. 943 (1991), for example, the Ninth Circuit held that FMC's mineral leases on lands owned by the Tribes or individual Indians satisfied the test established in *Montana*,⁹⁰ stating that tribal jurisdiction was appropriate where there are "consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.".⁹¹ The court noted, however, that "at some point the commercial relationship becomes so attenuated or stale that *Montana's* consensual relationship requirement would not be met."⁹² Depending on the nature and extent of an employer's contracts with a tribe or its members, an employer may be subject to tribal jurisdiction and tribal employment laws.⁹³

Where a tribe has jurisdiction to impose employment regulation, employers must consider the specific obligations at issue and the source of such obligations. Employment obligations may arise not only through tribal ordinance or statute, but also through contracts between an employer and a tribe. For example, in both *Dawavendewa* and *Peabody Western*, described more fully at Part II, A.1., *supra*, the obligation to apply to tribal employment preference favoring Navajos arose from **both** the applicable TERO and the underlying lease executed between the employer and the Navajo Nation.⁹⁴ In *Peabody Western*, in fact, the employer argued that the Department of the Interior's approval of the lease (and therefore its implicit approval of a tribal preference) created a nonjustifiable political question between branches of government, a contention rejected by the Ninth Circuit.⁹⁵ It is nonetheless important

for employers doing business on Indian lands to recognize the source of employment preference obligations because of the potentially different defenses and/or remedies that may apply.

The obligations imposed by TEROs vary widely among tribes. Many tribes began considering TEROs in the late 1970s and early 1980s. In conjunction with the Equal Employment Opportunity Commission (“EEOC”), an organization called the Council for Tribal Employment Rights issued a publication in 1977 entitled, *Indian Employment Rights: A Guide to Tribal Action* (“Guide”), authored by attorney Daniel S. Press. In many respects, the development of tribal employment law can be traced back to this publication, which strongly advocated for the creation of Tribal Employment Rights Offices to enforce and monitor employers’ compliance with tribal employment regulations. The Guide offered step-by-step instructions for tribes to impose obligations on employers and create a TERO office to administer the program.

The Guide suggests four components of a strong Indian preference program: (1) setting numerical goals for Indian employment; (2) reviewing the job qualifications used by reservation employers; (3) establishing a tribal hiring hall; and (4) establishing trainee requirements. These components are still reflected in many TEROs today.

A. Setting Goals for Indian Employment.

The Guide suggested establishing specific goals for Indian employment for each employer doing business on Indian lands and memorializing such goals in a Compliance Plan that could be enforced on the employer. In practice, TERO offices have used this concept to require specific percentages for “Indian” employment for all employers, for individual employers, or for specific job classifications used by individual employers. In TEROs using this approach, an employer typically has an obligation to meet with the TERO office at least annually to review goals, compliance, and under-utilized portions of the tribal workforce. Frequently, the Compliance Plan developed by the TERO office, rather than the ordinance itself, is the document used to measure compliance and/or violations.

A number of tribes have eliminated the concept of requiring that employers meet a specific percentage requirement of Indian employment in order to remain in compliance. Arguably, this approach is consistent with the Guide’s recommendations to increase applicable percentages until a trained workforce is available. For example, under the Navajo Preference in Employment Act (“NPEA”), the obligation to apply a Navajo preference continues until the workforce is 100% Navajo, although an employer is not required to maintain specific percentages of Indian employment at any point. In virtually every TERO, Indians (or tribal members) are to be given preference in a layoff situation.

Many tribes have also abandoned or modified the “Indian” preference described in the Guide in favor of a preference favoring members of a specific tribe.⁹⁶ Some tribes have taken this approach specifically, such as the NPEA, while other tribes have created tiered preferences for “local Indians” and then for “Indians” generally. One example of such a TERO is that enacted by the Shoshone-Bannock Tribes, which arguably required a four-tiered preference: (1) tribal members; (2) local Indians (i.e. Indians living within the exterior boundaries of the reservation); (3) non-local

Indians; and (4) non-Indians. Any TERO which relies on a distinction between members of federally-recognized tribes will raise concerns under the *Dawavendewa* analysis, but TERO requirements that use residence as a proxy may provide tribes with additional arguments as to their validity.

B. Reviewing Job Qualifications.

Most TEROs make a concerted effort to eliminate non-essential job qualifications. Many TEROs follow the Guide's recommendation that employers are prohibited from using job qualification criteria which bar Indians from employment unless such criteria are required by "business necessity." Under some TEROs, this requirement has been defined to be those qualifications essential to the performance of basic responsibilities of the job and specifically excluding the ability to do other jobs.⁹⁷

Employers may be required to justify specific qualifications as job-related if they tend to disqualify Indian applicants.

C. Establishing Tribal Hiring Halls.

Many tribes continue to maintain "tribal hiring halls" from which open positions must be hired if possible. Under the Moapa Band of Paiute TERO, for example, the TERO office has a given period of time to refer a qualified employee (48-72 hours) before an employer may hire from other sources, and this type of provision is commonly included in other TEROs as well. The Guide suggests this referral process and strongly emphasizes the need for TERO offices to perform data collection to permit such timelines to be met. In practice, this requirement has appeared to be difficult for TERO offices given often limited resources. One alternative is to permit Indian hiring from any source but prohibiting non-Indian hiring unless the tribal hiring hall is consulted first.

Here, both with respect to Indian preference (instead of seniority) and the tribal hiring hall (instead of the union hiring hall) the interests of the tribe are pitted directly against the interests of a labor union. This is one of the most difficult areas for employers to deal with because existing collective bargaining agreements often do not contemplate Indian employment obligations. TERO offices are reluctant to deal directly with labor unions, preferring instead to work only through the employer.⁹⁸ A TERO office's insistence on terms contrary to an existing collective bargaining agreement potentially creates incentive for an employer to argue that the TERO is preempted by federal labor law.

There is an argument that the NLRA should preempt inconsistent obligations imposed by tribal TERO laws. One argument for preemption might be that a tribal employment ordinance that requires a tribal preference should be preempted as an intrusion on the collective bargaining process under *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), and/or *Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976). The basic premise of this argument would be that the tribal employment preference statute intrudes on the collective bargaining process by prescribing the employees that the employer must hire (or lay off) in a particular situation.⁹⁹

A counter-argument might be that such regulation provides protections to individual union and nonunion workers alike, and thus "neither encourage[s] nor discourage[s]"

the collective bargaining processes that are the subject of the NLRA.”¹⁰⁰ Resolution of this issue remains an open question to our knowledge.

D. Establishing Trainee Requirements.

The training requirements imposed by many TEROs play a particularly important role in the early history of tribal employment programs. Often, TEROs couple specific levels of hiring with training programs so that in later years, there will be enough trained employees to take advantage of increased employment opportunities. Training programs are often tied to employee recruitment and advertising as well. TERO offices that create specific Compliance Plans for employers typically include minimum levels for Indian or tribal member trainees as well. The Council for Tribal Employment Right Guide suggests that tribes require a set level of positions for on-the-job training as well.

While many TEROs share these and other similar elements, it is important to recognize that each tribe is different politically and culturally and that each faces different needs. As a result, the specific terms of TEROs will vary widely and even where common terms exist, interpretations may also vary widely.

V. The Navajo Preference in Employment Act and Common Law: A Case Study.

This section examines the Navajo Nation’s tribal employment rights ordinances as a brief case study, reviewing the history of Navajo Nation employment regulation, the current provisions of the Navajo Preference in Employment Act (“NPEA”), and the manner in which the NPEA continues to evolve through Navajo Nation common law.

A. History of Navajo Employment Regulation.

The Navajo Tribe.¹⁰¹ was a leader in many respects in the development of tribal employment ordinances. As early as 1958, the Navajo Tribe began regulation in the employment arena, enacting a right-to-work law and premising its authority to do so on Article II of the Treaty of 1868,¹⁰² which authorizes the tribe to exclude any non-member, except a Federal employee, from the Navajo Indian Reservation. The tribal resolution also prohibited union organization activities.¹⁰³

In 1972, the Navajo Nation created the Office of Navajo Labor Relations (also known as the Division of Equal Opportunity and Employment) and charged it with, among other things: ensuring that employers doing business with the Navajo Nation are giving preferential treatment to the employment of Navajo Indians who reside on or near the Navajo Nation; establishing Navajo hiring halls; enforcing preference obligations in contracts; establishing training programs; hearing complaints concerning the failure of persons to comply with preference obligations and generally “to do all things necessary or appropriate” to accomplish preferential employment of Navajo Indians within the Navajo Nation.¹⁰⁴

Thirteen years later, the Navajo Nation Council was apparently disappointed with the impact of the existing TERO provisions: “[t]oo many instances occur where employers doing business within or near the boundaries of the Navajo Nation or engaged in any contract with the Navajo Nation, fail to provide notice or ensure job

opportunities to Navajo workers.”¹⁰⁵ The Council therefore adopted the first version of the Navajo Preference in Employment Act (“NPEA”), effective August 1, 1985.¹⁰⁶

The NPEA underwent significant revision in 1990 (*id.*) and the Navajo Nation Supreme Court has recently suggested that further clarification by the Council may be appropriate.¹⁰⁷ Nonetheless, the NPEA today is an example of a TERO that has evolved beyond its initial drafts into a relatively comprehensive code governing employment on the Navajo Nation.

B. Current Provisions of the NPEA.

1. Purposes.

The Navajo Nation Council provides seven purposes underlying the current NPEA; interestingly, the first six of them were included in the 1985 version of the statute, while the last enumerated purpose was added in 1990:

- To provide employment opportunities;
- To provide training to the Navajo People;
- To promote economic development;
- To lessen the Navajo Nation’s dependence on off-Reservation sources of employment, income, goods, services;
- To foster self-sufficiency of Navajo families;
- To protect health, safety, welfare of Navajo workers;
- To foster cooperative efforts with employers to assure expanded employment opportunities.

15 N.N.C. § 602 (2005).

2. Overview.

The NPEA attempts to accomplish these purposes by establishing the following major initiatives. The NPEA provides a preference in all aspects of employment for enrolled members of the Navajo Nation and provides that adverse action may only be taken against Navajo employees for “just cause.” The NPEA requires employers to submit a written affirmative action to the ONLR. The ONLR is also tasked with establishing wage rates on construction projects and investigating alleged violations of the NPEA. The ONLR, in its discretion, may choose to prosecute employers for NPEA violations, or may issue a right to sue letter to the complainant. The statute also establishes the Navajo Nation Labor Commission as a forum to hear NPEA disputes.

3. Applicability.

Like many other employment-related statutes, the NPEA includes a broad definition of the term “employer:”

The term “employer” shall include all persons, firms, associations, corporations, and the Navajo Nation and all of its agencies and instrumentalities, who engage the services of any person for compensation, whether as employee, agent, or servant.¹⁰⁸

This definition expressly includes the Navajo Nation as an employer, which contrasts with the primary focus of many other TEROs on private employers doing business on the reservation. A significant number of the NPEA cases heard by the Navajo Nation Labor Commission and the Navajo Nation Supreme Court are cases against the tribe or tribal entities. This has an interesting impact on Navajo Nation Department of Justice attorneys, as they frequently have to defend the Navajo Nation against NPEA claims, but also may be required to prosecute NPEA claims on behalf of the ONLR.

The NPEA also applies to labor unions and employment agencies, which are prohibited from taking action that directly or indirectly causes a violation of the NPEA.¹⁰⁹ While this is fairly typical of TEROs, the NPEA also specifically preserves the “basic rights of Navajo workers to organize, bargain collectively, strike, and peaceably picket to secure their legal rights.”¹¹⁰ While the rights to strike and picket do not apply to Navajo Nation employees, this recognition of collective bargaining is a far cry from the Navajo Tribe’s prohibition against union organizing in 1958. In fact, some employees of the Navajo Nation have organized on a limited basis and are in the process of negotiating a collective bargaining agreement with the Navajo Nation under this provision.

The Navajo Nation Supreme Court has interpreted the definition of “employer” broadly. In *Largo v. El Paso Natural Gas Co.*, 7 Nav. R. 147, 149-150 (1995), the Court held that the actual relations of the parties determined status as an “employer” under the NPEA. In that case, El Paso Natural Gas did not directly engage the services of the Plaintiffs; rather, El Paso set certain standards that had to be met before contractors’ employees could be approved to work on El Paso’s welding projects. The Court held that El Paso had ultimate oversight and control over the welders’ work and that by retaining control over testing, it was a “gatekeeper for employment.” Because El Paso was held to be the contractor’s “agent” for testing and hiring purposes, the Court concluded that El Paso was an “employer” under the NPEA.

There have also been several recent decisions that relate to the applicability of the NPEA to employers outside the Navajo Nation. In *Cabinets Southwest, Inc. v. Navajo Nation Labor Commission*, No. SC-CV-46-03 (February 10, 2004), the Navajo Nation Supreme Court dealt with Cabinets Southwest, Inc., a subsidiary of the Navajo Housing Authority. Cabinets Southwest was incorporated under Navajo Nation law, its articles of incorporation state that it will abide by Navajo law, and its articles of incorporation were approved by NHA resolution. Cabinets entered into a lease with the Navajo Nation for a parcel of land located outside the territorial jurisdiction of the Navajo Nation but owned in fee by the Navajo Nation. After terminating two employees, Cabinets argued that the NPEA did not apply to it because it acted outside the territorial jurisdiction of the Navajo Nation. Rejecting this claim, the Navajo Nation Supreme Court held that the NPEA applied to Cabinets’ operations on its lease outside the Navajo Nation.

In *Jackson v. BHP World Minerals*, No. SC-CV-36-00 (October 7, 2004), the Navajo Nation Supreme Court held that the Navajo Nation Labor Commission properly exercised its jurisdiction over an off-reservation employment relationship that also had significant contact with the Navajo Nation. In *Jackson*, an employee applied for employment with an employer that was hiring for operations both inside and outside the exterior boundaries of the Navajo Nation. After submitting his application at a mine on the Navajo Nation, he underwent training and was administered a drug test

on the Navajo Nation. Subsequently, he began employment at a mine located outside the territorial jurisdiction of the Navajo Nation. Shortly after Mr. Jackson began work, the results of his drug test came back positive for marijuana, and his employment was terminated. Mr. Jackson filed a charge with the ONLR and subsequently filed a Labor Commission Complaint. After hearing, the Labor Commission concluded that it had jurisdiction over the case, but that Mr. Jackson had been terminated for just cause.

On appeal, the Navajo Nation Supreme Court referenced the jurisdiction test established in *Pacificorp v. Mobil Oil*, No. SC-CV-27-01 (November 24, 2003): "if there is a 'sufficient nexus to activity on tribal land within the Navajo Nation, the cause of action arises there for purposes of the Navajo Nation's jurisdiction.'" In *Jackson*, the Court held that there was a sufficient nexus to employment activity within the Navajo Nation because hiring and training occurred within the Navajo Nation. Moreover, the cause of Mr. Jackson's termination – the failed drug test – occurred on the Navajo Nation. Based on these facts, the Navajo Nation Supreme Court concluded that the Labor Commission properly exercised jurisdiction over the termination. The Court expressly premised jurisdiction on the activities on the Navajo Nation and made no finding whatsoever as to whether the mine where Jackson began work was within the territorial jurisdiction of the Navajo Nation or was a "Dependent Indian Community" for jurisdiction purposes.

4. Navajo preference.

The NPEA provides that Navajo candidates or employees who demonstrate the "necessary qualifications" for positions receive preference in all aspects of employment.¹¹¹ Clearly, the developments in *Dawavendewa and Peabody Western* (see Part II.A.1., *supra*) have the potential to impact the validity of this tribal preference required by the NPEA. The NPEA does not provide a preference of any type to Indians generally. In contrast, many other TEROs provide a primary preference for tribal members, but also provide a secondary preference for Indians.

The term "necessary qualifications" means job-related qualifications essential to the performance of basic responsibilities of the job, including essential education, training, and job-related experience, but expressly *excluding* the ability to perform other jobs.¹¹² An employer is permitted to compare the qualifications of candidates only in a pool of either all Navajo employees or all non-Navajo employees. In fact, in such situations, the NPEA requires employers to select the employee with the "best qualifications."¹¹³ In contrast to practice under many other TEROs (and, indeed, most other employment statutes), the Navajo Nation Labor Commission may be willing to second-guess employer's judgment regarding the Navajo employee with the "best qualifications."¹¹⁴

Based on the terms of the statute, it appears that the employee has the burden to demonstrate that s/he has the necessary qualifications for a position, as the preference runs to any Navajo employee "who demonstrates" the necessary qualifications. Several Navajo Nation Supreme Court cases have clarified the application of the "necessary qualifications" factor. In *Largo v. Gregory & Cook*, A-CV-11-93 (2/17/95), the Court held that "[t]he NPEA does not mandate that preference be given when a Navajo does not meet a position's minimum qualification requirements," and that "the NPEA does not require employers to hold positions open until unqualified candidates become qualified." As a result, the Navajo employees in

that case were not entitled to preference because they did not demonstrate the necessary qualifications for the positions at issue.

More recently, in *Silentman v. Pittsburg and Midway Coal Mining Co.*, SC-CV-12-2000 (6/25/03), the Navajo Nation Supreme Court confirmed the employee's burden to demonstrate necessary qualifications, holding, "a Navajo must first show he or she has the necessary qualifications for retention or hiring before being compared to other employees." Further, where an employee's performance of a position has been unsatisfactory, the employee will have a difficult time demonstrating that s/he possesses the necessary qualifications for the position, as the Court noted that, "Evidence suggested that Silverman was not able to perform at an acceptable level as a production supervisor."

Note that "Navajo" is defined by the NPEA to be an enrolled member of the Navajo Nation. This term is relevant because a number of the rights provided by the NPEA run directly to "Navajo" employees rather than to employees generally. The Navajo Nation Supreme Court, however, has suggested that the equal protection clause of the Navajo Nation Bill of Rights may require application of some provisions of the NPEA to all employees on the Navajo Nation, not just Navajo employees.¹¹⁵

Non-Navajos who are legally married to a Navajo receive a secondary employment preference; that is, they receive preference over other non-Navajos, but not over other Navajo employees or applicants. A spousal preference is a common requirement in other TEROs as well. There is no Title VII exemption permitting such spousal preferences, and it appears likely that spousal preferences would be invalidated if considered by a federal court with appropriate jurisdiction.

5. No adverse action without just cause.

The NPEA provides that employers shall not penalize, discipline, discharge, nor take any adverse action against any Navajo employee without just cause.¹¹⁶ The term "just cause" is broad, and it "encompasses a wide range of employer justifications for adverse action."¹¹⁷ Just cause means fair reasons, supported by the facts, for taking action against the employee.¹¹⁸

The Navajo Nation Supreme Court has also recently held that "ordinarily a violation of a clear rule set out in a personnel manual for which termination is a result of non-compliance is "just cause."¹¹⁹ Contracts for a specific term of employment are generally permissible under the NPEA and expiration of a term contract does not require demonstration of "just cause."¹²⁰

Written notification to the employee citing the just cause for any adverse action is also required by the NPEA.¹²¹ While the NPEA specifically requires "just cause" only for an adverse action against Navajo employees, the Navajo Nation Supreme Court has suggested that equal protection requires that all employees on the Navajo Nation are provided such protection.¹²²

6. Working environment.

The NPEA specifically requires employers to "maintain a safe and clean working environment and provide employment conditions which are free of prejudice,

intimidation, and harassment."¹²³ While the obligation to provide a safe, clean working environment has not been fully clarified, the potential for expansion in this area may exist.

In practice, the ONLR relies heavily on employers' obligation to provide employment conditions which are free of prejudice, intimidation, and harassment. The ONLR appears to use this provision as a "catch-all" for allegations not covered by other specific provisions of the NPEA. The consequence is particularly negative for employers because employers bear the burden of proof to demonstrate that violations of the NPEA did not occur.

7. Burden of proof.

The NPEA was enacted with a "clear and convincing" burden of proof on the employer to show compliance. In *Manygoats v. Cameron Trading Post*, No. SC-CV-50-98 (January 14, 2000) ("*Manygoats I*"), the Navajo Nation Supreme Court held that there was no governmental interest in support of the use of the clear and convincing standard and therefore its use violated due process of law under the Navajo Nation Bill of Rights.¹²⁴ The Court therefore required that the Labor Commission use a preponderance of the evidence standard.

In the same opinion, the Navajo Nation Supreme Court held that the allocation of the burden of proof to the employer to show just cause did not offend due process because "it is more logical to put the burden on the party taking the employment action."¹²⁵ On appeal after remand in *Manygoats II*, the Court affirmed this rationale, quoting the United States Supreme Court for the proposition that, "In every case the onus probandi [or burden of proof] lies on the party who wishes to support his case by a particular fact which lies more peculiarly within his knowledge, or of which he is supposed to be cognizant."¹²⁶

The Navajo Nation Supreme Court's analysis of the burden of proof issue is noteworthy. While the Court is clearly correct that under Anglo-Saxon common law, the burden of proof often followed the party with the best access to information, the vast majority of employment-related claims today (whether under common law or statutory law) require that the plaintiff, or party seeking relief, bear the burden of proof. Moreover, the burden of proof analysis in *Manygoats II* rests entirely on an analysis of which party has better access to the facts. Given the NPEA's requirement that adverse actions be supported by written just cause, it seems entirely reasonable in just cause cases to require the employer to bear the burden of proof.¹²⁷ However, the same justification does not seem to carry the same weight in some other situations under the NPEA.

Of particular interest here are two NPEA provisions that are frequently raised in ONLR charges: the requirement that "all employers use non-discriminatory job qualifications and selection criteria in employment,"¹²⁸ and the requirement that "all employers shall maintain a safe and clean working environment and provide employment conditions which are free of prejudice, intimidation, and harassment."¹²⁹ These provisions are unlike the just cause provision because there is usually no discrete act (the adverse action) taken by an employer for which justification is required. Rather, a Petitioner may allege that the entirety of his or her working conditions are harassment or prejudicial, without elaboration. In these situations, the employer does not have superior access to the facts; frequently, exactly the opposite

is true – only the employee knows what acts or omissions s/he believes are harassment or prejudicial, while the employer is left trying to guess what the Charge is actually about.¹³⁰ The analysis in *Manygoats II* suggests that the Navajo Nation Supreme Court may be sensitive to this concern and may entertain arguments regarding the appropriate burden of proof in situations where the facts are *not* more readily accessible by the employer.

8. Employer notice provisions.

The NPEA requires all employers to include a Navajo employment preference policy in all job announcements and advertisements.¹³¹ A description of NPEA rights approved by the ONLR also must be posted in every employer's workplace.¹³² Employers are also required to have written statements of the necessary qualifications required for each employment position in its workforce, a copy of which shall be provided to applicants or candidates at the time they express an interest in such position.¹³³ Many other TEROs include similar provisions, which may stem partly from the early emphasis on job qualifications in the Council for Tribal Employment Rights Guide to Tribal Action.

9. Affirmative Action plan.

Another NPEA requirement that may have its genesis in early TEROs is the requirement for all employers to file a written Navajo affirmative action plan with the ONLR within 90 days of commencing business within the Navajo Nation.¹³⁴ The ONLR has recently placed increased emphasis on affirmative action plans. If a union is involved, the NPEA requires that "the plan shall be jointly filed by the employer and the labor organization."¹³⁵ The stated purpose of affirmative action plans is to provide timetables for all phases of employment to achieve the tribal goal of employing Navajos in all job classifications, including supervisory and management positions.¹³⁶ Affirmative action plans must include goals, timelines, a workforce analysis, a plan to permit Navajo workers to obtain necessary qualifications, and an assessment of positions and classifications in which Navajos are being under utilized.¹³⁷

10. Investigation and prosecution of NPEA charges.

Similar to proceedings under Title VII and other laws administered by the EEOC, aggrieved parties must first exhaust their administrative remedies by filing a Charge with the ONLR. The ONLR has broad investigatory powers, and will make a determination as to whether there is probable cause to believe that a violation of NPEA has occurred.

After investigation, the ONLR may choose to prosecute a Charge further or it may issue a right to sue letter to the aggrieved party. Either the ONLR or the aggrieved party can file a Complaint before the Navajo Nation Labor Commission alleging violations of the NPEA. The Labor Commission is a quasi-judicial body which is authorized to hold hearings under the procedures generally described by §§ 610 and 611 of the NPEA and by Rules of Procedures for Proceedings before the Navajo Nation Labor Commission. The Labor Commission has broad remedial powers, including authority to award back and front pay, reinstatement, civil penalties for intentional violations, costs and fees if "respondent's position was not substantially justified."¹³⁸ A decision by the Labor Commission may be appealed directly to the

Navajo Nation Supreme Court, which reviews cases using a “substantial evidence” standard.¹³⁹

11. Establishment of wage rates.

The NPEA also authorizes the ONLR to establish prevailing wage rates for job classifications on construction projects. ONLR is required to conduct surveys and collect data as deemed necessary to arrive at a wage determination.¹⁴⁰ The NPEA specifically exempts certain types of projects, including those worth less than \$2,000, projects for personal, family, or household purposes, projects subject to the Davis-Bacon Act,¹⁴¹ and contracts subject to a wage rate set by collective bargaining agreement.¹⁴²

12. Polygraphs.

The NPEA provides that no person shall request or require any employee or prospective employee to take a polygraph exam as a condition of employment or discharge an employee for failing to take such an exam.¹⁴³ While this protection is not limited to Navajo employees, state and federal employees are excluded.¹⁴⁴

C. Incorporation of Navajo Nation Customary Law.

Employers doing business on or near Indian lands must also be cognizant that tribal laws are subject to change through judicial interpretation, in a similar manner to the development of Anglo-Saxon common law. One of the most interesting developments in this respect is increased reliance on tribal traditions and customs governing relationships and dispute resolution. In particular, the Navajo Nation Supreme Court’s recent employment law decisions draw heavily from traditional law to guide the future course of the NPEA. This development on the Navajo Nation is supported by not only the Navajo Nation Supreme Court, but also by the Navajo Nation Council’s Resolutions requiring that statutes be interpreted consistent with Navajo Common Law (or *Diné bi Beenahaz’áanii*).¹⁴⁵

The emphasis on traditional Navajo relationships is perhaps most evident in *Kesoli v. Anderson Security Agency*, SC-CV-01-05 (October 12, 2005), in which a security company supervisor (Kesoli) was terminated for shouting at his subordinates.¹⁴⁶ Kesoli argued that his employer, Anderson, did not have “just cause” to terminate his employment.¹⁴⁷ Anderson argued that it had no choice but to terminate Kesoli’s employment, because his conduct in shouting at his subordinates could constitute “harassment” for which Anderson could be liable under the NPEA.¹⁴⁸ Anderson suggested a broad definition of “harassment” to mean “all forms of conduct that unreasonably interfere with an individual’s work performance or create an intimidating, hostile, or offensive working environment.”¹⁴⁹

The Navajo Nation Supreme Court used traditional law to resolve Kesoli’s claims. First, the court held that (lacking other guidance from the NPEA) that Anderson’s suggested definition of harassment was consistent with the NPEA and with *Diné bi Beenahaz’áanii* (Navajo Common Law). The court held that “words are sacred and never frivolous in Navajo thinking,” a concept that finds support in other Navajo cases as well.¹⁵⁰

The Navajo Nation Supreme Court further held that, as a supervisor, Kesoli was in the position of a *naat'áanii*, or respected leader. As *naat'áanii*, Kesoli had an obligation to conduct himself thoughtfully and carefully in accordance with the Navajo principle of *házhó'ógo*, which requires patience, respect, and clear communication between human beings, particularly when matters are heated.¹⁵¹ The court held that Anderson had set up mechanisms to deal with disputes between employees that allowed employees to “talk things out” in accordance with the Navajo principle of *k'é*¹⁵², but that Kesoli failed to utilize them. Therefore, Kesoli’s conduct in shouting at his subordinates constituted “just cause” sufficient for termination.¹⁵³

When viewed through an Anglo (or *bilagáana*) lens, the standards interpreted into the NPEA through the *Kesoli* decision are remarkable. At a minimum, *Kesoli* incorporates standards regarding the appropriate role of a supervisor (supervisors are held to a higher standard because they are *naat'áanii*), appropriate workplace communication (based on *házhó'ógo*, requiring clarity, patience, and respect), the importance of the spoken word (words are sacred and never frivolous), and the importance of dispute resolution mechanisms to restore harmony in the workplace (though the larger concept of *k'é*). The words in the NPEA do not and cannot express these standards. Nonetheless, as parts of fundamental Navajo law, they are as present in the NPEA as the requirement that employers provide a Navajo preference in employment.

Other recent cases decided by the Navajo Nation Supreme Court similarly reflect the importance of Navajo Common Law. For example, the Navajo Common Law emphasis on keeping one’s promises in a contract means that both employer and employee are expected to fulfill their obligations under a contract;¹⁵⁴

the principle of *k'é* suggests that parties to an employment dispute should have the opportunity to talk things out;¹⁵⁵

under Navajo Fundamental Law, an employment applicant was justified in relying on the offer of employment made by a school’s Executive Director, who was *naat'áanii* within the school;¹⁵⁶

and violation of a clear rule in a personnel manual may constitute “just cause” unless in violation of Navajo Fundamental Law.¹⁵⁷

The overriding lesson with respect to TEROs generally and with respect to this brief case study specifically is no news to practitioners in Indian country. Every tribe is different – politically, culturally, historically – and the rules applicable to one tribe are unlikely to apply in the same way to other tribes. Even where the TEROs enacted by different tribes have their genesis in the same model TERO, the wide variety of circumstances faced by tribes have taken TEROs in different directions. Moreover, even if the literal terms of each TERO were similar, tribal tradition and culture are likely to result in different interpretations. Perhaps the best advice to lawyers dealing with such situations is to act in accordance with the Navajo principle of *házhó'ógo* and attempt to communicate as clearly, patiently, and respectfully as possible.

V. Conclusion.

Current application of federal, tribal and state employment and labor laws to business enterprises operating on or near Indian Reservations result, in some areas,

in a certain lack of predictability. This uncertainty arises, at least in part, from a lack of judicial or agency interpretation of statutes and from differing results or analysis where there have been judicial or agency interpretations. Tribal and business interests are well advised to communicate about these matters to minimize the risks of misunderstandings as the interpretation, application and development of employment and labor laws proceed. In addition, tribal and business representatives should carefully document agreements and understandings reached between them.

ENDNOTES

1. 42 U.S.C. § 2000e-2(a).
2. 42 U.S.C. § 2000e-2(i).
3. EEOC Compliance Manual, § 604.10(d); ¶ 2084.
4. See EEOC Compliance Manual (1988).
5. 154 F.3d at 1118.
6. *Id.* at 1121-22.
7. *Id.* at 1119.
8. *Id.*
9. *Id.*
10. *Id.* at 554, n. 24.
11. *Id.* at 548.
12. *Dawavendewa I*, 154 F.3d at 1120-1123.
13. *Id.* at 1122.
14. *Dawavendewa II*, 276 F.3d at 1155.
15. *Id.*
16. *Id.*
17. *Dawavendewa II*, 276 F.3d at 1157.
18. *Id.*
19. *Id.* at 1159.
20. *Id.*

21. *Id.* at 1163.
22. *Id.* at 1162-63.
23. *Id.* at 1163, n. 12.
24. Illustrating the difficult position faced by employers, Peabody Western was, at essentially the same time, also responding to an investigation by the Office of Navajo Labor Relations alleging that it had violated the Navajo Preference in employment act by failing to apply a tribal preference.
25. 42 U.S.C. § 2000e-5(f)(1).
26. *See EEOC v. Peabody Western Coal Co.*, 214 F.R.D. 549 (D. Ariz. 2002).
27. *See* 400 F.3d 774 (9th Cir. 2005).
28. *Id.*
29. *See Duke v. Absentee Shawnee Tribe of Oklahoma Housing Authority*, 199 F.3d 1123 (10th Cir. 1999); *Pink v. Modoc Indian Health Project, Inc.*, 157 F.3d 1185 (9th Cir. 1998) (involving a non-profit tribal corporation); *Dille v. Council of Energy Resource Tribes*, 801 F.2d 373 (10th Cir. 1986).
30. *See Navajo Tribe v. N.L.R.B.*, 288 F.2d 162, 164 (D.C.Cir. 1961) (“Congress has enacted a national labor policy, superseding the local policies of the states and the Indian tribes”); *see also N.L.R.B. v. Pueblo of San Juan*, 276 F.3d 1187, 1191 (10th Cir. 2002) (“the general applicability of federal labor law is not at issue”).
31. *San Juan*, 276 F.3d at 1189.
32. *Id.* at 1197.
33. *Id.*
34. *See, e.g., Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960); *Donovan v. Coeur d'Alene Tribal Farm*, 752 F.2d 1113, 1116 (9th Cir. 1985).
35. 29 U.S.C. § 158(a)(3) (NLRA § 8(a)(3)).
36. 29 U.S.C. § 164(b) (NLRA § 14(b)).
37. *San Juan*, 276 F.3d at 1191.
38. *Id.* at 1198-1200, *citing Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960), and *Phillips Petroleum Co. v. EPA*, 803 F.2d 545, 555-56 (10th Cir. 1996).
39. *San Juan*, 276 F.3d at 1199.

40. *Citing Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985).
41. *Citing Iowa Mutual Ins. Co. v. La Plante*, 480 U.S. 9, 14 ((1987), *San Juan*, 276 F.3d at 1195.
42. *Id.* at 1198.
43. *Id.*
44. *See San Juan*, 276 F.3d at 1192.
45. *Id.* at 1198.
46. *Id.* at 1195, *citing Maryland v. Louisiana*, 451 U.S. 725, 746 (1981).
47. *San Juan*, 276 F.3d at 1195.
48. *Id.* at 1203-04.
49. *Id.* at 1205.
50. *Id.* at 1202, *quoting Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985).
51. *Cherokee Nation*, 871 F.2d at 938 n.2.
52. *Id.* at 939.
53. *Navajo Forest Products*, 692 F.2d at 714.
54. 29 U.S.C. § 152(2).
55. *San Manuel*, 2004 NLRB LEXIS 286, *16, n. 10.
56. *See also NLRB v. Chapa De Indian Health Program, Inc.*, 316 F.3d 995, 999-1000 (9th Cir. 2003).
57. 276 F.3d 1186 (10th Cir. 2002).
58. *See* 42 U.S.C. § 12111(5)(B)(i); *but see Florida Paraplegic Ass'n, Inc. v. Miccosukee Tribe of Indians of Florida*, 166 F.3d 1126, 1133 note 17 (11th Cir. 1999) (exclusion from anti-discrimination provisions of ADA does not exempt tribes from application of reasonable accommodation provisions of ADA).
59. 29 U.S.C. §§ 651-678 (1982).
60. 751 F.2d at 1114.
61. *Id.*

62. *Id.* at 1116, citing *United States v. Faris*, 624 F.2d 890, 893-94 (9th Cir. 1980), *cert. denied* 449 U.S. 1111 (1981). Of course, this is the same test used by the NLRB in *San Manuel*; see Part II.B.2, *supra*.

63. 751 F.2d at 1116; see also *United States Dep't of Labor v. Occupational Safety and Health Review Comm'n*, 935 F.2d 182, 184 (9th Cir. 1991) (OSHA applied, as operation of tribal lumber mill was not self-governance in purely intramural matters).

64. 95 F.3d at 180.

65. 692 F.2d at 712.

66. *Id.*

67. 29 U.S.C. §§ 621-34.

68. 260 F.3d at 1080 (Housing Authority is not simply a business entity, but rather "occupies a role quintessentially related to self-governance").

69. *Id.* at 1081-82.

70. 871 F.2d at 938.

71. *Id.* at note 3.

72. *Id.* at 939.

73. 986 F.2d at 251.

74. *Id.* at 248; see also note 4 at 249.

75. *Id.* at 249.

76. 371 F.3d at 661.

77. 4 F.3d at 492.

78. *Id.* at 495-96.

79. Among the issues left unaddressed by Judge Posner's opinion are whether the Commission was a "tribe" for purposes of the analysis, whether the Commission had standing to assert the treaty rights of the Chippewa tribes, and whether the employees at issue were actually engaged in self-governance in intramural matters. The court also appeared to suggest that the Commission employees should be treated similarly to law enforcement officers of state and local governments, although such employees are in fact subject to the FLSA. *Id.* at 492-93.

80. *Id.* at 939.

81. *Lumber Indus.*, 939 F.2d at 685.

82. See PBGC Opinion Letter 89-9.
83. *Nez v. Peabody Western Coal Co., Inc.*, No. SC-CV-28-97 (September 22, 1999).
84. Slip Op., pp. 5, 7.
85. Slip Op. at 8.
86. *Id.*
87. See Part II.A.1., *supra*.
88. For example, A.R.S. § 41-1463 provides such an exemption in Arizona, but no comparable provision appears to exist in New Mexico.
89. See *Nevada v. Hicks*, 533 U.S. 353 (2001).
90. 450 U.S. 565.
91. FMC, 905 F.2d at 1314.
92. *Id.* at 1315; *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 654-657 (2001).
93. Compare *Arizona Public Service Co. v. Aspaas*, 77 F.3d 1128, 1134-35 (9th Cir. 1996).
94. *Dawavendewa I*, 154 F. 3d at 1118, n. 2 and accompanying text; *Peabody Western*, 400 F. 3d at 776.
95. *Peabody Western*, 400 F.3d at 785.
96. Despite the holding in *Dawavendewa*, see Part II.A.1., *supra*, that a tribal preference violates Title VII, note that a preference for members of certain tribes finds some support in *Morton v. Mancari*, 417 U.S. 535, 554 n. 24 (1974), where the Supreme Court justified BIA employment preference as a “political” distinction based on membership in federally recognized tribes.
97. See 15 Navajo Nation Code (“N.N.C.”) Section 603(1).
98. Interestingly, this reluctance may also be traced to the Council for Tribal Employment Rights Guide, which suggests tribes take a hard line dealing with employers, but that “[t]ribal governments have no direct authority over unions.” While this recommendation may not be entirely accurate, tribes have often taken the approach suggested by the Guide: “The real issue is who is stronger and who can put more pressure on the employer – the tribe or the union. In the past, the unions have usually come out on top. But the tribe has greater legal power, and if it uses that power wisely, it can have the upper hand.”

99. Compare *Golden State Transit v. City of Los Angeles*, 475 U.S. 608, 618-19 (1986); *United States Chamber of Commerce v. Bragdon*, 64 F.3d 497, 502 (9th Cir. 1995); *Cannon v. Edgar*, 33 F.3d 880, 884 (7th Cir. 1994).

100. *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 20 21 (1987), quoting *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 754 55 (1985).

101. Beginning in 1969, the Navajo Tribal Code uses the term "Navajo Nation". See 1 Navajo Tribal Code § 301 (1977). In this paper, we have used "Navajo Tribe" before 1969 and "Navajo Nation" after 1969.

102. 15 Stat. 667.

103. *Id.*; compare *Navajo Tribe v. National Labor Relations Board*, 288 F.2d 162, 164 (D.C. Cir. 1961), holding that the Navajo Tribe could not enjoin the National Labor Relations Board from conducting a Union representation election on the Navajo Reservation.

104. 15 N.T.C. § 204 (1977).

105. Resolution of the Navajo Nation Council, CAU-63-85 (August 1, 1985).

106. *Id.*

107. See *Smith v. Navajo Nation Department of Head Start*, SC-CV-50-04 (September 21, 2005), n. 1.

108. 15 N.N.C. § 603(C).

109. See 15 N.N.C. § 606(B).

110. 15 N.N.C. § 606(A).

111. 15 N.N.C. § 604(C).

112. 15 N.N.C. § 603(I).

113. 15 N.N.C. § 604(C)(3).

114. See *Stago v. Wide Ruins Community School, Inc.*, No. SC-CV-63-99 (August 29, 2002), ¶ 13.

115. See *Manygoats v. Atkinson Trading Co.*, SC-CV-62-2000 (August 12, 2003); see also *Staff Relief, Inc. v. Polacca*, SC-CV-86-98 (August 18, 2000).

116. 15 N.N.C. § 604(B)(1).

117. *Smith v. Red Mesa Unified School District No. 27*, No. SC-CV-04-94 (May 25, 1995).

118. *Dilcon Navajo Westerner/True Value Store v. Jensen*, No. SC-CV-52-98 (May 26, 2000), ¶ 43.

119. *Smith v. Navajo Nation Department of Head Start*, SC-CV-50-04 (September 21, 2005).

120. *Sells v. Rough Rock Community School*, SC-CV-32-04 (March 16, 2005), note 1 and accompanying text.

121. 15 N.N.C. § 604(B)(8).

122. *See Manygoats v. Atkinson Trading Co.*, SC-CV-62-2000 (August 12, 2003) ("*Manygoats II*").

123. 15 N.N.C. § 604(B)(8).

124. *Manygoats I*, ¶ 59.

125. *Manygoats I*, ¶ 53.

126. *Manygoats II*, ¶ 50, quoting *Concrete Pipe and Products of California v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 626 (1993) (which in turn quotes *W. Bailey, Onus Propandi 1* (1886)).

127. The only state to have passed similar legislation is Montana, where the general rule is that termination of employment requires just cause. In Montana, the employer also bears the burden of proof on the existence of just cause.

128. 15 N.N.C. § 604(B)(7)

129. 15 N.N.C. § 604(B)(9)

130. Note that this situation might also be remedied through § 610(B)(2)(c), which requires that Charges include "a clear and concise statement of the facts constituting the alleged violation of the Act." Nonetheless, with respect to each issue raised, the burden of proof still forces employers to first make the argument for the employee and then to refute it, with little opportunity for discovery.

131. 15 N.N.C. § 604(B)(1).

132. 15 N.N.C. § 604(B)(2).

133. 15 N.N.C. § 604(D).

134. 15 N.N.C. § 604(A)(2)

135. *Id.*

136. Resolution of the Human Services Committee of the Navajo Nation Council, HSCN-28-02, Part I.

137. *Id.* at Parts IV-V.
138. 15 N.N.C. § 612(A).
139. *See Jackson v. BHP World Minerals*, SC-CV-36-00 (October 7, 2004), ¶ 29.
140. *See generally* 15 N.N.C. § 607.
141. 40 U.S.C. §§ 276(a) *et seq.*
142. 15 N.N.C. § 607(D).
143. 15 N.N.C. § 615.
144. *Id.*
145. *See Tso v. Navajo Housing Authority*, SC-CV-10-02 (August 26, 2004), note 1.
146. *Kesoli*, slip op. at 1.
147. *Id.* at 2.
148. *Id.* at 4.
149. *Id.*
150. *Id.* at p. 5, *see also Office of Navajo Labor Relations ex rel. Bailon v. Central Consolidated School Dist. No. 22*, SC-CV-37-00, slip op. at 4-5 (June 23, 2004).
151. *Kesoli* at 6; *see also Navajo Nation v. Rodriguez*, SC-CR-03-04 (December 16, 2004), slip op. at 10.
152. *K'é* might roughly be translated as harmony through proper relationships.
153. *Kesoli* at 6.
154. *Sells v. Rough Rock Community School*, SC-CV-32-04 (March 16, 2005).
155. *Taylor v. Dilcon Community School*, SC-CV-73-04 (October 7, 2005).
156. *Goldtooth v. Naa Tsis'Aan Community School, Inc.*, SC-CV-14-04, (July 18, 2005).
157. *Smith v. Navajo Nation Department of Head Start*, SC-CV-50-04 (September 21, 2005).