"Tribal" vs. "Indian" Employment Preference.

The Conflict: Ever since the Ninth Circuit Court of Appeals held tribal member employment preference violates Title VII of the Civil Rights Act of 1964 and its provision allowing certain preferences for Indians,[i] employers and Tribes have struggled to accommodate Tribes' desires to enhance employment for their own members without violating federal law. On October 18, 2012, the U.S. District Court for the District of Arizona addressed this issue and concluded that Title VII did not prohibit tribal member preference where required by a lease of tribal lands that has been approved by the Secretary of the Interior or his delegate acting pursuant to federal laws governing Indian land leasing.[ii] *EEOC v. Peabody Western* addressed a lease between Peabody Western and the Navajo Nation, which was approved by the Department of the Interior ("DOI") and requires a preference for Navajo Nation members in employment over all other Indians and non-Indians. Title VII expressly provides that a preference for Indians (of any federally recognized tribe) living "on or near a reservation" is lawful.[iii] Supported by *Dawavendewa,* the Equal Employment Opportunity Commission ("EEOC") has long asserted the position that an employment preference for members of one tribal nation over members of other tribes and non-Indians represents unlawful discrimination based on national origin.

The Decision: U.S. District Court Judge Sheffield departed from blanket application of the EEOC's policy position, relying on the preference being required in a lease approved by DOI and a record reflecting DOI's approval of hundreds of Navajo Nation leases containing tribal member preference. That record, the case holds, transformed the tribal member preference into a "political classification,"[iv] not one based on national origin. The District Court concluded that the political classification was enforceable because it promotes Navajo "economic self-sufficiency," tribal "economic development," and, by enforcing the tribe's policy reflected in the lease, tribal "self-governance."[v] Tension remains between *EEOC v. Peabody Western* and *Dawavendewa*, because *Dawavendewa* also involved a preference included in a federally-approved lease of tribal lands. However, unless this recent decision is appealed and reversed, it affords tribes and employers comfort in addressing tribal member employment preferences.

Related Issues: The case did not consider the Navajo Preference in Employment Act, which also requires a Navajo member preference in employment. We address a recent Navajo Nation Supreme Court decision interpreting that Act in another note in this issue.

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i. *Dawavendewa v. Salt River Project Agricultural Improvement & Power Dist.*, 154 F.3d 117, 1120 (9th Cir. 1998).
ii. *Equal Employment Opportunity Comm'n v. Peabody Western Coal Co.*, No. 2:01-cv-050 JWS (Op. & Order, October 18, 2012) ("*EEOC v. Peabody Western*").
iii. 42 U.S.C. § 2000e-2(i).
iv. Citing *Morton v. Mancari*, 417 U.S. 535, 552 (1974), which concerned employment preference for Native Americans, not members of specific tribes, within the Bureau of Indian Affairs, a federal agency.
v. Slip Op. at 19.