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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Equal Employment Opportunity Commission, Plaintiff, vs. Bashas' Inc., Defendant, and Navajo Nation, Rule 19 Defendant.	No. CV 05-2382-PHX-SMM **MEMORANDUM OF DECISION AND ORDER**

Pending before the Court is the Navajo Nation's Motion to Stay Proceedings Pending Resolution of Equal Employment Opportunity Commission v. Peabody Western Coal Co., CV-01-1050-PHX-MHM (the "Peabody Lawsuit"), on the grounds that it raises "analogous and in many instances identical legal issues to those pending in this lawsuit." (Dkt. 33 at 2.) The Equal Employment Opportunity Commission (the "EEOC") has filed a response in opposition to the Navajo Nation's request to stay the case, to which the Navajo Nation has replied. (Dkts. 34-35.) Recently, both parties filed supplemental authority, bringing to the Court's attention that the Peabody Lawsuit was recently dismissed by a judge of this Court and is now pending on appeal. (Dkts. 36-37.) After considering the arguments raised in the parties' briefs, the Court issues the following Order.

BACKGROUND

A. The Peabody Lawsuit[1]

Pursuant to two leases entered into by its predecessor in interest, Peabody mines coal on the Navajo Nation's reservation and on the Navajo portion of land set aside for joint use by the Navajo and Hopi Nations. EEOC v. Peabody Western Coal Co., 400 F.3d 774, 776 (9th Cir. 2005) (Peabody I). Both leases require that preference in employment be given to members of the Navajo Nation, although one lease provides that Peabody may "at its option extend the benefits of [the Navajo employment preference] to Hopi Indians." Id. Pursuant to the Indian Mineral Leasing Act of 1938 ("IMLA"), the Department of Interior (the "DOI") has approved both leases, as well as subsequent amendments and extensions. Id. If the lease terms are violated, the Navajo Nation and the DOI retain the power to cancel the leases after a notice and cure period. Id. at 777.

On June 13, 2001, the EEOC filed a Title VII action against Peabody claiming it engaged in prohibited national origin discrimination by implementing the Navajo employment preference contained in the mineral leases. (Dkt. 1.) Specifically, the EEOC alleged that Peabody had refused to hire non-Navajo Native Americans for positions for which they were otherwise qualified, in violation of Title VII, 42 U.S.C. §2000e-2(a)(1). (Id. at ¶¶1-17.) In addition, the EEOC alleged that Peabody had violated the record-keeping requirements of 42 U.S.C. §2000e-8(c). (Id. at ¶18.)

On March 29, 2002, Peabody moved for summary judgment and for dismissal of the action under Federal Rules of Civil Procedure 12(b)(7) and 12(b)(1). (Dkt. 38.) Peabody neither admitted nor denied that it had discriminated against non-Navajo Native Americans in violation of Title VII. (Id.) Instead, relying on Federal Rule of Civil Procedure 19, Peabody argued that the case should be dismissed because the Navajo Nation was a necessary and indispensable party that could not be joined because of the EEOC's inability

[1] All citations in this section are to the docket in the Peabody Lawsuit.

to bring an action against the Navajo Nation. (Dkt. 38.) In the alternative, Peabody argued that the issue of the legality of the employment preference provision in the leases was a nonjusticiable political question because the DOI had approved the mining leases. (Id.)

On September 26, 2002, the Honorable Mary H. Murguia agreed with Peabody and dismissed the entire action. (Dkts. 59-60.) Judge Murguia held that the Navajo Nation was a necessary and indispensable party that the EEOC could not join as a party to the case. (Dkt. 59 at 12-18.) In the alternative, Judge Murguia found the legality of the Navajo employment preference in the leases to be a nonjusticiable political question. (Id. at 18-23.) On November 21, 2002, the EEOC appealed Judge Murguia's decision. (Dkt. 61.)

On June 3, 2005, the Ninth Circuit Court of Appeals reversed and remanded Judge Murguia's decision. Peabody, 400 F.3d at 778-85. The Court of Appeals found the Navajo Nation is a necessary and indispensable party that can be joined under Rule 19 of the Federal Rules of Civil Procedure. The Ninth Circuit held,

> *where the EEOC asserts a cause of action against Peabody and seeks no affirmative relief against the [Navajo] Nation, joinder of the [Navajo] Nation under Rule 19 is not prevented* by the fact that the EEOC cannot state a cause of action against it. Because the EEOC is an agency of the United States, the [Navajo] Nation cannot object to joinder based on sovereign immunity . . . . We therefore hold that joinder of the Nation is feasible.

Id. at 778 (emphasis added). The Ninth Circuit emphasized, however, that "[j]oinder of the Nation does not, and cannot, create any substantive rights that the EEOC may enforce against the Nation." Id.[2]

On June 17, 2005, the EEOC filed an Amended Complaint naming Peabody as a defendant and joining the Navajo Nation as a Rule 19 defendant. (Dkt. 67.) The Amended

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[2] Although not pertinent to the instant Motion to Stay, the Ninth Circuit also held the EEOC's claim is not precluded as a nonjusticiable political question. Id. at 785.

Complaint seeks monetary relief against Peabody and a "permanent injunction enjoining Peabody . . . and all persons in active concert or participation with it, from engaging in discrimination on the basis of national origin." (Id. at ¶A.)

On February 17, 2006, the Navajo Nation filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction, Lack of Personal Jurisdiction, Insufficiency of Process, Failure to State a Claim, Lack of Capacity, Failure to Exhaust Tribal Remedies, and Failure to Join the United States as an Indispensable Party. (Dkt. 89.) On May 18, 2006, Judge Murguia granted the EEOC's request to conduct discovery regarding specific matters raised in the Navajo Nation's Motion to Dismiss, including the Secretary of the Interior's involvement in the drafting and formulations of the mineral leases. (Dkt. 108.) On September 30, 2006, Judge Murguia converted the Navajo Nation's Motion to Dismiss to a Motion for Summary Judgment and dismissed the case on four alternative bases, two of which directly impact the instant Motion to Stay. (Dkt. 142.)

First, Judge Murguia determined that the Navajo Nation is a necessary and indispensable party that cannot feasibly be joined because the EEOC's Amended Complaint seeks affirmative relief directly from the Navajo Nation. (Id. at 9-12.) Emphasizing that the Ninth Circuit "restricted its holding regarding the feasibility of joinder of the Navajo Nation to instances where no affirmative relief is sought against it," Judge Murguia determined that "the Amended Complaint filed after the Ninth Circuit's ruling belies the notion that the EEOC is not seeking any affirmative relief against the Navajo Nation." (Id. at 10.) In particular, the Court focused on the Amended Complaint's request for "a permanent injunction enjoining Peabody . . . and all person in active concert or participation with it, from engaging in discrimination on the basis of national origin," which clearly includes the Navajo Nation. (Id.) The affirmative relief sought by the EEOC, the Court noted, is contrary to Title VII's express exemption of Indian tribes from Title VII suits. See id. at 781; see also 42 U.S.C. §2000e(b) ("an Indian tribe is specifically exempt from the definition of employer, and thus Title VII does not apply to Indian tribes when they act as employers.").

Second, in addition to running "afoul of proper procedural requirements [under Title VII] when asserting a suit against a government respondent," Judge Murguia determined that the EEOC's request for affirmative relief against the Navajo Nation is contrary to the Rules Enabling Act. Id. at 12-13. She also found the request for affirmative relief to be inconsistent with the Ninth Circuit's holding in Peabody I that "'[j]oinder of the Nation does not, and cannot, create any substantive rights that the EEOC may enforce against the Nation,'" because such affirmative relief "is inconsistent with the EEOC's substantive rights against the Navajo Nation." Id. at 13, quoting Peabody I, 400 F.3d at 783.

On November 27, 2006, the EEOC filed a Notice of Appeal. (Dkt. 145.)

B. The Instant Case: EEOC v. Bashas' Inc. and Navajo Nation, Rule 19 Defendant[3]

On August 17, 2005, two months after the EEOC filed its Amended Complaint in the Peabody Lawsuit, the EEOC filed a substantively identical Complaint against Bashas' Inc., joining the Navajo Nation as a Rule 19 defendant. Like the Amended Complaint in the Peabody Lawsuit, the Complaint at issue here alleges that Bashas' engaged in prohibited national origin discrimination by implementing Navajo employment preference provisions contained in leases allowing Bashas' to operate a supermarket on land owned by the Navajo Nation. (Dkt. 1.) The EEOC alleges that Bashas' has refused to hire non-Navajo Native Americans for positions for which they were otherwise qualified, in violation of Title VII, 42 U.S.C. §2000e-2(a)(1). (Id. at ¶¶1-19.) In addition, the EEOC alleges that Bashas' has violated the record-keeping requirements of 42 U.S.C. §2000e-8(c). (Id. at ¶20.) Significantly, like the Amended Complaint in the Peabody Lawsuit, the EEOC seeks monetary relief against Bashas' and a "permanent injunction enjoining Bashas' . . . and all persons in active concert or participation with it, from engaging in discrimination on the basis of national origin." (Id. at ¶A.)

[3] The citations in this section of the Order are to the docket in the instant case.

As in the Peabody Lawsuit, the Navajo Nation has filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction, Lack of Personal Jurisdiction, Insufficiency of Process, Failure to State a Claim, Lack of Capacity, Failure to Exhaust Tribal Remedies, and Failure to Join the United States as an Indispensable Party. (Dkt. 24.) In response, the EEOC filed a Motion to Continue in Order to Engage in Discovery. (Dkt. 25.) The Navajo Nation then filed the instant Motion to Stay Proceedings. (Dkt. 33.)

DISCUSSION

The Navajo Nation argues that the instant case should be stayed pending a final decision on the propriety of Judge Murguia's decision in the Peabody Lawsuit because "no showing of possible damage has been made by any party" and "disposition of the Peabody Lawsuit is extremely likely to contribute to a decision of the legal issues (and any factual issues relating to jurisdiction) pending before this Court" and "should, at a minimum, significantly narrow the issues to be addressed." (Dkts. 33 at 2-3; 35 at 2.) The EEOC contends the Motion to Stay should be denied because the Navajo Nation seeks "an indefinite stay" "that undoubtedly will be years-long." (Dkt. 34 at 1-2.) For a number of reasons, including that the Peabody Lawsuit is currently pending on appeal, the Court finds that the instant case should be stayed.

The United States Supreme Court recognized long ago that "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." See Landis v. North American Co., 299 U.S. 248, 254-55 (1936). As an offshoot of its inherent power to control the docket, this Court has broad discretion to grant or deny stays in order to "'coordinate the business of the court efficiently and sensibly.'" Landis, 299 U.S. at 255; see also CMAX, Inc. v. Hall, 300 F.2d 265, 268 (9th Cir. 1962) ("A district court has inherent power to control the disposition of the causes on its docket in a manner which will promote economy of time and effort for

itself, for counsel, and for litigants. The exertion of this power calls for the exercise of a sound discretion."). The party seeking a stay "must make out a clear case of hardship or inequity in being required to go forward" with litigation only where "there is . . . a fair possibility that the stay . . . will work damage to some one else." See Landis, 299 U.S. at 255. The moving party must also evaluate the public interest, including the judiciary's interest in efficiency, economy, and fairness. See CMAX, Inc., 300 F.2d at 268-69.

For two reasons, the Court concludes that a stay of this action is appropriate until the Court of Appeals rules on Judge Murguia's decision dismissing the Peabody Lawsuit.

First, the general rules governing stays of pending litigation militate in favor of staying this proceeding because no showing of possible damage resulting from a stay has been demonstrated by either non-moving party. See Landis, 299 U.S. at 255 (absent a showing that there is at least "a fair possibility that the stay . . . will work damage to some one else," there is no requirement that the party requesting a stay demonstrate a "clear case of hardship or inequity" to warrant the granting of the requested stay). Bashas' does not oppose the Navajo Nation's Motion to Stay, and the EEOC's claims of potential damage are vague and generalized, at best. See dkt. 34 at 8. The EEOC's assertion that a stay will damage "the class of non-Navajos who have applied or will apply for work with Bashas'" (id.) is conclusory and unsubstantiated. Because the EEOC fails to specify the number of non-Navajos who will be impacted by a stay, its assertion is far too abstract to consider. Moreover, the instant case is not a class action. Therefore, the EEOC's reference to a "class of non-Navajos" is inaccurate.

Similarly, the EEOC's assertion that a stay will make it "more difficult to locate witnesses and potential class members" (id.) does not demonstrate damage because that effect is attendant to litigation generally. At most, a stay would (to some extent) prolong the litigation. However, as the Navajo Nation points out, "[t]he Navajo preference in employment provisions contained in the Bashas' lease are contained in hundreds of other *federally-approved* leases between the Navajo Nation and various business entities that

choose to do business on the Navajo reservation." (Dkt. 35 at 3.) Therefore, a stay of the instant case will not jeopardize the EEOC's ability to challenge the Navajo employment preference provisions. There is thus very little substance to these claims of potential harm.

The EEOC also complains that a stay of the proceedings long enough for final resolution of the Peabody Lawsuit will impede "[t]he Commission's ability to fully prosecute Bashas'." (Dkt. 34at 8.) The EEOC seems to imply that such a course of action would be somehow unfair, but fails to explain precisely why. If the EEOC's point is that the effect of a stay might be to narrow and sharpen the issues in this action by permitting all parties to more carefully tailor their arguments in light of the outcome in the Peabody Lawsuit, that point counsels entry — rather than denial — of the requested stay. See generally CMAX, 300 F.2d at 269 ("It may be that CMAX will be prejudiced by the delay in the sense that evidence will be obtained, or rulings made, as a result of the Board proceedings, which will adversely affect the claims which CMAX asserts in the district court. But this is not the kind of prejudice which should move a court to deny a requested postponement.").

More importantly, the EEOC cannot paint this as a case where the effect of the requested stay would be to "compel[ ][it] to stand aside while a litigant in another [case] settles the rule of law that will define the rights of both," because the EEOC is a party to both the Peabody Lawsuit and this case. See Landis, 299 U.S. at 255; CMAX, 300 F.2d at 269 n. 8 (flatly rejecting a plaintiff's attempt to invoke the above-quoted statement from Landis in opposition to a request for a stay of litigation pending the outcome of administrative proceedings, stating "[T]hat observation [from Landis] is not applicable in the case [at bar] ... because [the plaintiff] is a litigant in the [administrative] proceedings and will have its say before administrative findings and conclusions are entered.").

Finally, the Court rejects the EEOC's general assertions of harm flowing from any postponement of the instant litigation because the EEOC is the appellant in the Peabody Lawsuit. Rather than quickly appealing Judge Murguia's decision dismissing the Peabody Lawsuit, the EEOC waited 56 days to file a notice of appeal. See CV-01-1050-PHX-MHM,

dkts. 143, 145. Moreover, although the EEOC timely appealed Judge Murguia's decision, it did not move to expedite that appeal, even though it was then aware that the Navajo Nation's Motion to Stay was pending in the present case. Indeed, the EEOC filed its supplemental brief on the stay issue in this case *before* it filed a notice of appeal in the Peabody Lawsuit. If the EEOC had requested an expedited appeal, this Court would be more willing to credit its vague assertions of harm. Given that the EEOC opted *not* to seek expedited review, and waited almost the full sixty day period to file an appeal, however, its vague assertions of generalized harm are not well-taken.

In sum, the EEOC has advanced only vague and generalized claims of potential harm to support its opposition to the Navajo Nation's requested stay and has failed to quantify or substantiate those claims in any fashion. The extent of any potential harm it may suffer is thus entirely unclear – if, indeed, there is any potential for harm at all. The Court therefore concludes that the EEOC will not suffer any undue hardship if a stay is granted until the Ninth Circuit issues its mandate in determining the propriety of Judge Murguia's dismissal of the Peabody Lawsuit.

The second reason a stay is appropriate here is because, in addition to demonstrating specific financial harm it would suffer if a stay were not granted (see dkt. 33 at 7-8), the Navajo Nation has shown that the Court of Appeals' decision in the Peabody Lawsuit is extremely likely to be dispositive of, or at least narrow, the legal issues before this Court. See CMAX, 300 F.2d at 268 (in evaluating request for stay, court is to weigh the potential effect on "the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay").[4]

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[4] Nevertheless, a case may properly be stayed pending the outcome of the "lead" case even where the "lead" case may not be potentially dispositive of the case sought to be stayed. That is, even where the "lead" case may, at most, streamline the issues in the case sought to be stayed. See, e.g., Landis, 299 U.S. at 256 (noting that, even though "every question of fact and law" in the case sought to be stayed might not be decided in the "lead" case, "in all likelihood [the 'lead' case] will settle many and simplify them all"); Leyva v. Certified Grocers of

The Navajo Nation contends the central issues in both the Peabody Lawsuit and the instant case are substantially similar and thus the Ninth Circuit's decision could have a major impact on whether or not the instant case continues at all. This Court agrees that a decision by the Ninth Circuit in the Peabody Lawsuit will have important precedential value. The active Complaints, pending and previously pending motions, and case histories in this case and the Peabody Lawsuit demonstrate that the Ninth Circuit's decision will substantially contribute to this Court's decision of several pending legal issues, including jurisdiction, failure to state a claim, and the EEOC's request to engage in discovery. See Dkts. 24-25. Indeed, given that the Amended Complaint dismissed in the Peabody Lawsuit and the Complaint pending in the present case are substantively identical, disposition of the Peabody Lawsuit by the Court of Appeals will, at a minimum, significantly narrow the issues to be decided here. Thus, staying the instant case until the Ninth Circuit rules on Judge Murguia's decision dismissing the Peabody Lawsuit will avoid or decrease significant costs to all parties, further important interests in judicial efficiency, aid in the resolution of important legal issues pending before this Court, and avoid piecemeal litigation of common issues.

The Court is not persuaded by the EEOC's argument that, although both cases "involve the same unlawful practice – the defendants' [alleged] discrimination against non-Navajo job applicants – fundamental factual differences make the limited discovery obtained by the Commission in [the Peabody Lawsuit] irrelevant to the discovery the Commission anticipates it will need to adequately respond to the Motion to Dismiss." Dkt. 37 at 2. Any factual differences are irrelevant to the Navajo Nation's request for a stay, which is predicated on the existence of *common legal issues* – i.e., whether the Navajo Nation is a necessary and indispensable party, whether the Complaint violates the Rules Enabling Act and Title VII requirements, and whether the EEOC has stated a claim. See 36 at ¶3. As

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California, Ltd., 593 F.2d 857, 863-64 (9th Cir. 1979) (stay pending outcome of another case is appropriate even where the other proceedings are not "necessarily controlling of the action" that is stayed).

explained above, supra at 4-5, neither the first nor second bases of Judge Murguia's decision to dismiss the Peabody Lawsuit resulted from discovery conducted by the EEOC in Peabody. Rather, both bases resulted from Judge Murguia's decision that the Amended Complaint improperly requested affirmative relief from the Navajo Nation in the form of injunctive relief enjoining the Nation from enforcing its Navajo employment preference provisions. (Dkt. 142 at 9-13, 24.) The Complaint at issue in the present case is substantively identical to the Amended Complaint filed in the Peabody Lawsuit and contains the exact same request for affirmative relief against the Navajo Nation. See Dkt. 1 at ¶A (requesting injunctive relief enjoining the Nation from requiring and enforcing its Navajo employment preference provisions). Judge Murguia determined that the EEOC's request for affirmative relief against the Navajo Nation is inconsistent with (i) the Ninth Circuit's decision in Peabody I; (ii) the Rules Enabling Act; (iii) Title VII's exemption for Indian tribes; and (iv) the feasibility of joining the Navajo Nation to the instant case. See 01-1050-PHX-MHM, Dkt. 142 at 9-13, 24. Thus, this Court flatly rejects the EEOC's assertion that "in the case currently before this Court, there is no matter . . . that might cause the Commission to dismiss its lawsuit or that would streamline the issues." (Dkt. 34 at 6-7.)

Likewise, although the EEOC is correct that "any ruling by Judge Murguia in [the Peabody Lawsuit] will have no precedential effect on this Court" because "[t]he decisions of one district court are not binding on another," this Court finds Judge Murguia's decision extremely persuasive on pure legal issues identical to issues in the instant case. Moreover, the fact that both this Court and Judge Murguia answer to the Ninth Circuit Court of Appeals is a compelling reason to stay the instant case while the Ninth Circuit determines the propriety of Judge Murguia's ruling. Given Judge Murguia's persuasive decision on pure issues of law, the Court will not, at this time, permit the EEOC to require the Navajo Nation to engage in costly discovery pertinent to factual issues presented in the Nation's Motion to Dismiss. In addition, the Court finds that considerations of judicial economy would not be

served by allowing the EEOC to conduct discovery in the present case before the Ninth Circuit Court of Appeals issues its mandate in the Peabody Lawsuit.

CONCLUSION

This Court has the discretion to stay the instant case pending a decision from the Ninth Circuit Court of Appeals on the propriety of Judge Murguia's dismissal of the Peabody Lawsuit. In addition to demonstrating that a stay will neither harm nor prejudice the EEOC, the Navajo Nation has advanced sufficient justifiable reasons why the Court should exercise its discretion to immediately stay this proceeding.

Because the Court concludes that the Ninth Circuit's decision ruling on the propriety of Judge Murguia's dismissal of the Peabody Lawsuit will most likely be helpful in resolving the legal issues set forth in the Navajo Nation's Motion to Dismiss, it declines to rule on that motion at this time. In addition, the Court finds that it would be unfair to require the Navajo Nation to stand on the Motion to Dismiss currently filed, rather than being provided the opportunity to file a new Motion to Dismiss after the Ninth Circuit issues its decision. Therefore, as set forth below, the Court will deny the Navajo Nation's Motion to Dismiss without prejudice and with leave to file a revised or the same motion within 20 court days after the issuance of the Ninth Circuit's mandate in the Peabody Lawsuit. Accordingly,

IT IS HEREBY ORDERED GRANTING the Navajo Nation's Motion to Stay Proceedings Pending Resolution of E.E.O.C. v. Peabody Western Coal, Co., CV–01-1050-PHX-MHM. (Dkt. 33.) All proceedings in the instant case are **STAYED** pending the issuance of the Ninth Circuit's mandate in E.E.O.C. v. Peabody Western Coal Co., Court of Appeals No. 06-17261 (Dist. Ct. No. CV-01-1050-PHX-MHM).

IT IS FURTHER ORDERED that the Navajo Nation's Motion to Dismiss for Lack of Subject Matter Jurisdiction, Lack of Personal Jurisdiction, Insufficiency of Process, Failure to State a Claim, Lack of Capacity, Failure to Exhaust Tribal Remedies, and Failure to Join the United States as an Indispensable Party is **DENIED WITHOUT PREJUDICE TO RE-FILING** the same or a revised motion within twenty (20) court days after the Ninth

Circuit's mandate issues in E.E.O.C. v. Peabody Western Coal Co., Court of Appeals No. 06-17261 (Dist. Ct. No. CV-01-1050-PHX-MHM). (Dkt. 24.) If the Navajo Nation elects to re-file the same Motion to Dismiss, it may do so by filing a notice of re-filing with the Court within the twenty day period.

DATED this 13th day of December, 2006.

Stephen M. McNamee
United States District Judge