United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant, v. TURNING STONE CASINO RESORT, Respondent.	OSHRC Docket No. 04-1000

DECISION AND REMAND

Before**:** RAILTON, Chairman, ROGERS and STEPHENS, Commissioners.

BY THE COMMISSION:

After the Occupational Safety and Health Administration ("OSHA") inspected a kitchen at Turning Stone Casino Resort ("Turning Stone"), the Secretary issued a citation for two serious violations of hand-protection standards, and one other-than-serious documentation violation. Turning Stone contested the citation, and after the Secretary filed a complaint, moved to dismiss the complaint for lack of subject matter jurisdiction. Administrative Law Judge Marvin Bober granted the dismissal motion, holding that applying the Occupational Safety and Health Act, 29 U.S.C. §§ 651-678 ("the Act") to Turning Stone would violate three treaties between the Oneida Indian Nation ("the Nation") and the United States. For the reasons that follow, we reverse the judge and remand for further proceedings.

Background

Turning Stone is a casino wholly owned and operated by the Nation, that is located in New York on the Nation's reservation. More than 85% of its 3,000 employees

are non-Indian, and the casino is a major tourist attraction in New York. It is legally operated pursuant to the Indian Gaming Regulatory Act ("IGRA"), which provides a statutory basis for Indian gaming in order to promote tribal economic development and self-sufficiency. 25 U.S.C. § 2702. All of Turning Stone's revenues go to fund the Nation's government and programs.

In support of dismissal, Turning Stone argued: (1) Congress intended that the Act not apply to Indian tribes; (2) treaties between the Nation and the United States precluded applying the Act; (3) applying the Act to the Nation would "touch upon exclusive rights of self-governance in purely intramural matters"; and (4) Executive Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 9, 2000), required the Secretary to engage in government-to-government consultation, before or in place of adversarial enforcement. The judge rejected all but one of Turning Stone's arguments, and granted the dismissal motion based on his finding that applying the Act to Turning Stone would abrogate various treaties. Both parties have petitioned the Commission for review of the judge's findings.[1]

Discussion

In concluding that the Act did not apply to Turning Stone, the judge followed the analysis set out in *Federal Power Commission v. Tuscarora Indian Nation (Tuscarora)*, 362 U.S. 99 (1960) and *Donovan v. Coeur d'Alene Tribal Farm (Coeur d'Alene)*, 751 F.2d 1113 (9th Cir. 1985). In *Tuscarora* the Supreme Court stated the principle that federal statutes of general applicability apply to "Indians and their property interests." *Tuscarora*, 362 U.S. at 116. Courts have since referred to this statement as the "*Tuscarora* presumption" or "*Tuscarora* rule." *See, e.g., NLRB v. Chapa De Indian*

[1] Turning Stone also moved on December 28, 2004 to consolidate the case with *Secretary v. Akwesasne Mohawk Casino*, 20 BNA OSHC 2091 (No. 01-1424, 2005). The Commission did not rule on the motion before issuing a decision in *Akwesasne* on January 6, 2005. Turning Stone acknowledges that consolidation is no longer possible, and that the resolution of *Akwesasne* has no bearing on this case. Therefore, we deny the motion as moot.

Health Program, 316 F.3d 995, 998-99 (9th Cir. 2003) ("*Tuscarora* rule")*; NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1203 (10th Cir. 2002) ("*Tuscarora* presumption"). The rule was adopted by the Second Circuit in *Reich v. Mashantucket Sand & Gravel (Mashantucket)*, 95 F.3d 174 (2d Cir. 1996).

Circuit courts have identified the following exceptions to application of the *Tuscarora* rule:

> (1) the law [of general applicability] 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."

Coeur d'Alene, 751 F.2d at 1116 (quoting *United States v. Farris*, 624 F.2d 890, 893-94 (9th Cir. 1980)); *Mashantucket*, 95 F.3d at 177; *Fla. Paraplegic Ass'n, Inc. v. Miccosukee Tribe of Indians*, 166 F.3d 1126, 1129 (11th Cir. 1999); *Smart v. State Farm Ins. Co.*, 868 F.2d 929, 932-33 (7th Cir. 1989). It is undisputed that the Act does not directly address Indian tribes.

At the outset, Turning Stone argues that despite courts' recognition of the *Tuscarora* rule, the correct rule is that tribal sovereignty with respect to conduct on reservations may be divested only by express language in a treaty or statute, and never by a statute that is silent as to Indians. We cannot agree. A majority of the circuits, including the Second Circuit, apply the *Tuscarora* rule unless one of the exceptions applies. We see no basis for rejecting that approach here. We now turn to whether any of the *Tuscarora* rule exceptions applied in this case. [2]

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[2] The parties disagree on whether the question of the Act's applicability raises an issue of subject matter jurisdiction or the merits. Turning Stone assumes the matter is jurisdictional and argues that the Secretary bore the burden of proof. The Secretary argues the issue is one of statutory coverage, and that Turning Stone bore the burden of proving that it was excepted from the Act's coverage. While we acknowledge the importance of not conflating subject matter jurisdiction with the merits, as well as the difficulties often presented in answering the question of how to characterize an issue, *see, e.g.*, *Nesbit v. Gears Unltd., Inc*., 347 F.3d 72, 79 (3d Cir. 2003); *Da Silva v. Kinsho Int'l*

I. The "purely intramural matters" exception

The judge concluded that Turning Stone's operations were not "purely intramural matters," described by the court in *Mashantucket* as generally involving "tribal membership, inheritance rules, and domestic relations." 95 F.3d at 179. The judge relied on his findings that Turning Stone is in the business of operating a casino; its activities are commercial and service-oriented, not governmental; 85% of its 3,000 employees are non-Indian; and, as a major tourist attraction in New York, its activities clearly affect interstate commerce. Turning Stone argues that applying the Act to it would infringe on purely intramural matters because tribal gaming is essentially governmental. Specifically, Turning Stone argues that (1) tribal gaming exists to promote tribal development and self-sufficiency, and is an "expression of retained tribal sovereignty"; (2) the Nation relies on casino revenues to fund its government and programs, and all revenues are used toward those ends; and (3) without the casino revenues, government programs would suffer.

We are not persuaded by Turning Stone's argument that the operation of casinos is "governmental" merely because gaming is illegal in most non-Indian areas. *Cf.*

Corp., 229 F.3d 358, 361-62 (2d Cir. 2000), it is not necessary to decide the correct characterization here because the result would be the same in either event. Assuming that the reach of the Secretary's authority to inspect Turning Stone raised a jurisdictional question (albeit perhaps of a different nature than the subject matter jurisdiction of a tribunal), *cf. Joel Yandell d/b/a TRIPLE L TOWER*, 18 BNA OSHC 1623, 1628 n.8, 1999 CCH OSHD ¶ 31,782, p. 46,537 n.8 (No. 94-3080, 1999) (whether Secretary properly issued citations to individual who had gone out of business raised issue of Secretary's "statutory jurisdiction," which was distinct from issue of Commission's subject matter jurisdiction); *EEOC v. Karuk Tribe Housing Auth*., 260 F.3d 1071, 1078-83 (9th Cir. 2001) (holding EEOC lacked "regulatory jurisdiction" over tribe in ADEA action after considering *Tuscarora* and exceptions), we conclude for the reasons given in this decision that the Secretary has proved by a preponderance of the evidence that she had statutory jurisdiction to inspect Turning Stone, and that the Commission thus had jurisdiction over the action, *see Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000) (plaintiff asserting jurisdiction has burden to prove by preponderance of evidence that jurisdiction exists). Assuming the question raises a merits issue, we conclude that Turning Stone failed to prove it was exempt from coverage under the Act.

Mashantucket, 95 F.3d at 181 (doing construction work on casino weighed against finding enterprise's activities intramural because of casino's direct effect on interstate commerce). Also, the fact that Turning Stone's revenues largely fund the tribal government is not dispositive. *See United States Dep't of Labor v. OSHRC (Warm Springs Forest Prods. Indus.,* hereinafter *"Warm Springs"),* 935 F.2d 182, 183-84 (9th Cir. 1991) (although stumpage payments from tribally owned and operated sawmill constituted largest source of income for tribal government, application of Act did not touch on tribe's exclusive rights of self-governance in purely intramural matters).

Finally, as the judge found, although Turning Stone is wholly owned and operated by the tribe, it hires Indian and non-Indian employees, its activities are commercial and service-oriented, and its activities affect interstate commerce. After considering these same factors, the court in *Mashantucket* concluded that the respondent's activities did not affect rights of self-governance in purely intramural matters. *See Mashantucket*, 95 F.3d at 175 (construction business wholly owned and operated by tribe, that hired Indian and non-Indians, conducted commercial and service-oriented activities, and performed work on a casino that affected interstate commerce). *See also Coeur d'Alene*, 751 F.2d at 1114-16 (farm was wholly owned and operated by tribe, it hired Indian and non-Indian employees, and it was essentially normal commercial farming enterprise). Accordingly, we affirm the judge's ruling that this exception to the *Tuscarora* rule did not apply.

II. The treaty rights exception

The judge agreed with Turning Stone that applying the Act to it would abrogate three treaties to which it is undisputed the Nation was a party. In particular, the Treaty of Canandaigua provides, in relevant part, as follows:

> Art. II.
>
> The United States acknowledge the lands reserved to the Oneida . . . in their respective treaties with the state of New-York, and called their reservations, to be their property; and the United States will never claim the same, nor disturb them . . . nor their Indian friends residing thereon and united with them, in the free use and enjoyment thereof: but the said

> reservations shall remain theirs, until they chose to sell the same to the people of the United States, who have the right to purchase.
>
> . . .
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> Art. IV.
>
> The United States having thus described and acknowledged what lands belong to the Oneidas . . . and engaged never to claim the same, nor to disturb them . . . or their Indian friends residing thereon and united with them, in the free use and enjoyment thereof: Now, the Six Nations, and each of them, hereby engage that they will never claim any other lands within the boundaries of the United States; nor ever disturb the people of the United States in the free use and enjoyment thereof.
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> . . .
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> Art. V.
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> . . .
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> And the Six Nations, and each of them, will forever allow people of the United States, a free passage through their lands, and the free use of the harbors and rivers adjoining and within their respective tracts of land, for the passing and securing of vessels and boats, and liberty to land their cargoes when necessary for their safety.
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> . . .
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> Art. VII.
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> Lest the firm peace and friendship now established should be interrupted by the misconduct of individuals, the United States and Six Nations agree, that for injuries done by individuals on either side, no private revenge or retaliation shall take place; but instead thereof, complaint shall be made by the party injured to the other: By the Six Nations or any of them, to the President of the United States . . . and by the Superintendent . . . to the principal chiefs of the Six Nations.

7 Stat. 44 (Nov. 11, 1794). Also, in two earlier treaties the United States had affirmed that the Oneidas were secured in the peaceful possession of their lands. *See* Treaty of Fort Stanwix, 7 Stat. 15 (Oct. 22, 1784); Treaty of Fort Harmar, 7 Stat. 33 (Jan. 9, 1789).

In reaching his decision, the judge considered treaty provisions analyzed in two cases, *Warm Springs*, 935 F.2d at 184 ("tract shall be set apart . . . and marked out for their exclusive use; nor shall any white person be permitted to reside upon the same without the concurrent permission of the agent and superintendent"), and *Donovan v.*

Navajo Forest Products Industries ("Navajo Forest Products"), 692 F.2d 709, 711 (10th Cir. 1982) ("no persons except those . . . authorized to enter upon Indian reservations in discharge of duties imposed by law, or the orders of the President, shall ever be permitted to pass over . . . the territory"). He concluded that the Treaty of Canandaigua was "even more far reaching" in its promise to leave the Six Nations alone and undisturbed on their lands than the treaty language in *Navajo Forest Products*, which the Tenth Circuit had found sufficient to bar application of the Act to a tribe.

On review, Turning Stone argues that (1) the treaty's promise of non-disturbance affirmed the Nation's right to use its property free of any outside disturbance; (2) the right to be free of outside disturbance was reinforced by the Nation's reciprocal promise to not disturb the people of the United States in their free use and enjoyment of their land; (3) Article VII showed that even as to serious misconduct the parties would not intrude onto each other's lands; and (4) the treaty gave the Nation more rights than the treaty at issue in *Navajo Forest Products*, in which the Tenth Circuit held that applying the Act to a tribal business would abrogate treaty rights. The Secretary argues that the treaty exception applies only where a specific right would be directly affected, and that the Canandaigua Treaty contained only a general right of exclusion guaranteeing the Nation's right to use its land subject to federal supervision. Given that the Second Circuit has not addressed the scope of the treaty-rights exception, we agree with the judge that *Warm Springs* and *Navajo Forest Products* are the most relevant cases on this issue. We disagree with the judge, however, as to the far-reaching nature of the treaty language.

Courts will not presume that Congress intended to abrogate a right guaranteed by a treaty when it passed a generally applicable law. *See, e.g., Warm Springs*, 935 F.2d at 184; *United States v. Farris*, 624 F.2d 890, 893 (9th Cir. 1980); *United States v. Winnebago Tribe of Neb.*, 542 F.2d 1002, 1005 (8th Cir. 1976). When interpreting Indian treaties, courts construe terms according to how Indians would have understood them, and resolve ambiguities in favor of the Indians. *See Washington v. Wash. State Commercial Passenger Fishing Vessel*, 443 U.S. 658, 675-76 (1979) (treaties must be construed in sense they would naturally be understood by Indians, and not according to

technical meanings assigned by lawyers); *Lazore v. Comm'r*, 11 F.3d 1180, 1184 (3d Cir. 1993) (ambiguities should be interpreted in favor of tribe).

The Tenth Circuit has indicated that in its view treaty language granting a tribe a right of exclusion is sufficient to bar OSHA inspection, relying heavily on the inherent sovereignty and right of self-government possessed by Indians. *Navajo Forest Products,* 692 F.2d at 711-13 (treaty recognized "principles of tribal sovereignty and self-government" that Navajos had not voluntarily relinquished). The Ninth Circuit rejected *Navajo Forest Products* in *Coeur d'Alene*, to the extent the Tenth Circuit relied on principles of sovereignty and self-government not in a treaty, *see* 751 F.2d at 1117 n.3, and also in *Warm Springs*, to the extent it relied on a general right of exclusion in the treaty, *see* 935 F.2d at 185-86. The Ninth Circuit indicated that the rule against applying generally applicable federal statutes in derogation of treaty rights applies only where a treaty *specifically* covers a subject, and that general language granting a tribe "exclusive use" of their land is not sufficient to bar OSHA from entering reservation land to conduct inspections. *Warm Springs*, 935 F.2d at 184-87 (refusing to give general exclusion provision a "broad effect").

In *Warm Springs*, the treaty at issue stated that the land "shall be set apart . . . surveyed and marked out for their exclusive use . . . [and no] white person [shall] be permitted to reside upon the same without the concurrent permission of the agent and superintendent." 935 F.2d at 184. After interpreting the treaty in accordance with customary canons of construction applicable to Indian treaties, the court found that the treaty granted only a general right of exclusion. *Id*. at 185. The court viewed this general right of exclusion as essentially identical to the "inherent sovereign right" of exclusion that all Indians possess independent of treaties. Given that this inherent right was insufficient to bar application of the Act in *Coeur d'Alene*, the court concluded the "identical right" should not change the outcome simply because it was contained in a treaty. *Id*. at 186. We are persuaded by the Ninth Circuit's reasoning. We believe the Tenth Circuit's analysis fails to take into account the extent to which Indian tribal sovereignty is dependent on and subordinate to the federal government. *See*

Mashantucket, 95 F.3d at 178-79 (tribes' inherent sovereignty is dependent and subordinate to federal government and may be limited by statutes that are silent as to Indians).

The Treaty of Canandaigua directs that the United States will not "disturb" the Indians in their "free use and enjoyment" of their reservation. The treaty does not contain any specific right against regulation by OSHA or any other entity, or even against non-Indian entry onto the reservation. We find that the Treaty of Canandaigua afforded Respondent no more than a general right of exclusion that under the reasoning of *Warm Springs* did not prohibit applying the Act to Turning Stone. 935 F.2d at 186.

We note that Turning Stone provided no evidence suggesting a particular purpose behind the treaty, or a unique understanding of the language on the part of the Nation, that would affect our construction of the plain language of the treaty. Further, we do not find that other parts of the Treaty of Canandaigua, or the Fort Stanwix and Fort Harmar treaties, evidence a stronger right to exclude on the part of the Nation. Thus, we conclude that OSHA's entry onto the reservation would not abrogate these treaties, and we reverse the judge's decision on this issue.

III. The congressional intent exception

The Commerce Clause grants Congress the authority to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. Similarly, the Act states that Congress exercised "its powers to regulate commerce among the several States and with foreign nations and to provide for the general welfare." 29 U.S.C. § 651(b). Turning Stone argued below that by leaving out the language "and with the Indian Tribes" in invoking its constitutional powers, Congress manifested its intent that the Act not apply to Indian tribes. The judge disagreed, as do we. Both the Second and Ninth Circuits have considered the issue and concluded that there is no indication that Congress intended to exclude Indian tribes from the Act's applicability, *see Mashantucket*, 95 F.3d at 177 (Second Circuit); *Coeur d'Alene*, 751

F.2d at 1118 (Ninth Circuit), and no circuit has held to the contrary.[3] Accordingly, we affirm the judge's finding that this exception to the *Tuscarora* rule did not apply.[4]

IV. Executive Order

Finally, Turning Stone has preserved its argument that the Secretary was required to comply with Executive Order No. 13175. We agree with the judge that the Executive Order created no enforceable rights. Executive orders are generally not privately enforceable, *see Zhang v. Slattery*, 55 F.3d 732, 747 (2d Cir. 1995) (superseded by statute on other grounds, *see Chen v. United States*, 195 F.3d 198, 201 (4th Cir. 1999)), and Order No. 13175 explicitly states that it is not enforceable, *see* Fed. Reg. at 67252 (Sec. 10).

Conclusion

We affirm the judge's decision regarding congressional intent, whether application of the Act would interfere with purely intramural matters, and the effect of the Executive Order. We reverse the judge's findings as to the effect of the three treaties, and the Treaty of Canandaigua in particular, because we conclude that they did not grant the

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[3] In any event, since the casino's activities clearly affect interstate commerce, the fact that Congress, in enacting the Act, may not have exercised its Constitutional authority to "regulate Commerce . . . with the Indian Tribes" is of no moment here. *See Navajo Tribe v. NLRB*, 288 F.2d 162 (D.C. Cir. 1961) (Congress need not cite all its powers when reliance on single power sufficient).

[4] Turning Stone also argues on review that the scope of the Act should be considered in light of the IGRA, which gave tribes the exclusive right to regulate their casinos. *See* 25 U.S.C. § 2701(5) (tribes have exclusive right to regulate "gaming activity" on Indian lands). We agree with the Secretary that the Act and IGRA regulate different things, namely, workplaces and gaming, and we do not believe that the IGRA prohibits OSHA from regulating casino workplaces. Finally, Turning Stone argues it is "significant" that the Act excludes states and their political subdivisions from its coverage. *See* 29 U.S.C. § 652(5). Finding no basis for equating tribes with states, we reject this argument as well.

Nation a sufficiently specific right that would be abrogated by OSHA's entry onto the reservation to inspect Turning Stone's kitchens. Accordingly, we find that on the facts of this case the Act applies to Turning Stone, and we remand the case to the judge for further proceedings.

_____/s/_____
W. Scott Railton
Chairman

_____/s/_____
James M. Stephens
Commissioner

_____/s/_____
Thomasina V. Rogers
Commissioner

Dated: April 18, 2005

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR,	:	
	:	
Complainant,	:	
	:	
v.	:	OSHRC DOCKET NO. 04-1000
	:	
TURNING STONE CASINO RESORT,	:	
	:	
Respondent.	:	

Appearances:	Evanthia Voreadis, Esquire U.S. Department of Labor New York, New York For the Complainant.	Peter D. Carmen, Esquire Mackenzie Hughes LLP Syracuse, New York For the Respondent.
Before:	G. Marvin Bober Administrative Law Judge	

DECISION AND ORDER

This matter is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* ("the Act"), for the purpose of determining whether Respondent's motion to dismiss the Secretary's citation and complaint for lack of subject matter jurisdiction should be granted. Respondent contends that, because Turning Stone Casino Resort ("Turning Stone") is wholly owned and operated by the Oneida Indian Nation ("the Nation"), the Act does not apply to Turning Stone.

The Occupational Safety and Health Administration ("OSHA") conducted an inspection of Turning Stone, located in central New York, on December 8, 2003. As a result of the inspection, OSHA issued the subject citation to Respondent on May 4, 2004. Respondent contested the citation, and the Secretary filed her complaint. On July 30, 2004, Respondent filed its motion to dismiss, and on September 30, 2004, the Secretary filed an opposition to the motion.

Discussion

As indicated above, Respondent contends that OSHA has no jurisdiction in this matter because Turning Stone is wholly owned and operated by the Nation. Respondent offers four specific reasons for its position. These are set out below along with my findings as to each.

I. Congress intended that the Act not apply to Indian tribes.

The Commerce Clause of the Constitution empowers Congress "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8. The Act, on the other hand, states as follows:

> The Congress declares it to be its purpose and policy, through the exercise of its powers to regulate commerce among the several States and with foreign nations and to provide for the general welfare, to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources....

29 U.S.C. § 651(b).

Respondent asserts that the fact that the phrase "and with the Indian Tribes" was left out of the Act establishes that Congress intended the Act to not apply to Indian tribes. The relevant case law does not support Respondent's assertion.

The issue of the applicability of statutes that do not address Indian tribes specifically was decided by the Supreme Court almost 45 years ago. In 1960, the Court held that a statute of general applicability applies to Indians and their property interests. *Federal Power Comm. v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960). Courts of Appeals have followed this rule and have found general federal laws applicable to Indian tribes. *See, e.g., Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 176-77 (2d Cir. 1996); *United States v. Funmaker*, 10 F.3d 1327, 1330-31 (7th Cir. 1993); *Smart v. State Farm Ins. Co.*, 868 F.2d 929, 932-34 (7th Cir. 1989); *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985). These Courts have also found that a statute of general applicability that is silent as to whether it applies to Indian tribes will not apply if:

> (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." *Id.*

The Ninth Circuit, in the *Coeur d'Alene* decision noted above, addressed whether the Act applied to Indian tribes. The Court found the Act was a statute of general applicability and that it was silent as to whether it applied to Indian tribes. *Coeur d'Alene*, 751 F.2d at 1115-16 (9th Cir. 1985). The Court then addressed the three exceptions set out *supra* and found that none of them was met. The Court noted there was no treaty involved, and it found that the operation of the tribal farm was not an aspect of tribal self-government having to do with purely intramural matters; it also found, in regard to the third exception, that there was no indication in the legislative history of the Act of "any congressional desire to exclude tribal enterprises from the scope of its coverage." *Id*. at 1116-18. *See also U.S. DOL v. OSHRC*, 935 F.2d 182, 187 (9th Cir. 1991). The Second Circuit, in the *Mashantucket* decision noted above, also addressed whether the Act applied to Indian tribes. It adopted the reasoning and analysis used in *Coeur d'Alene* and found that none of the three exceptions was met in the case before it. The Court noted there was no treaty involved and that the Act was silent as to Indian tribes, eliminating the second and third exceptions; as to the first, the Court found that application of the Act would not "interfere with tribal self-governance over purely intramural matters." *Mashantucket*, 95 F.3d at 177, 182 (2d Cir. 1996). *Mashantucket* was decided in the Second Circuit, where this case arose, and it is therefore controlling here.[1] Respondent's first assertion is rejected.

II. Applying the Act to the Nation is precluded by specific treaties between the Nation and the United States.

Respondent asserts that it meets the second exception set out in the *Coeur d'Alene* and *Mashantucket* decisions, in that the application of the Act in the circumstances of this case would abrogate rights guaranteed by Indian treaties.

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[1]The other Circuit Court that has addressed this issue is the Tenth Circuit. *Donovan v. Navajo Forest Products Indus.*, 692 F.2d 709 (10th Cir. 1982). There, the Court did not follow the approach of the Ninth and Second Circuits, finding that, "[a]bsent some expression of such legislative intent ... we shall not permit divestiture of the tribal power to manage reservation lands so as to exclude non-Indians from entering thereon merely on the predicate that federal statutes of general application apply to Indians just as they do to all other persons ... unless Indians are expressly excepted therefrom." *Id*. at 714. However, as noted above, the Second Circuit's decision in *Mashantucket* is controlling on the issue discussed in this section.

Respondent points out that the Oneida Indian Nation, a federally-recognized tribe that resides on lands in Oneida and Madison Counties in central New York, is one of the six nations of the Haudenosaunee or Iroquois Confederacy (hereinafter, "the Six Nations"). Respondent also points out that following the Revolutionary War, the United States entered into three treaties with the Six Nations, which, as noted above, included the Oneida Indian Nation.[2] *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 230-31 (1985).

The Treaty of Fort Stanwix, 7 Stat. 15 (Oct. 22, 1784), after setting out the boundaries of the lands of the Six Nations, promised that the Six Nations "shall be secured in the peaceful possession of the lands they inhabit." *Id*. at Art. 3. The Treaty of Fort Harmar, 7 Stat. 33 (Jan. 9, 1789), reaffirmed this promise. *Id*. at Art. 1. The Treaty of Canandaigua, 7 Stat. 44 (Nov. 11, 1794), once more affirmed the promise of the United States, and stated, in Article 2, as follows:

> The United States acknowledges the lands reserved to the Oneida, Onondaga and Cayuga Nations, in their respective treaties with the State of New York, and called their reservations, to be their property; and the United States will never claim the same, nor disturb them or either of the Six Nations, nor their Indian friends residing thereon and united with them, in the free use and enjoyment thereof: but the said reservations shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase.

The Treaty of Fort Stanwix promises the Six Nations the "peaceful possession" of their lands, while the Treaty of Canandaigua, besides giving up any future claims against the land, also promises to not disturb the Six Nations in the "free use and enjoyment" of their lands. I find the language of these treaties compelling, and especially that of the Treaty of Canandaigua, for the following reasons.

Two Circuit Courts have considered treaty provisions in cases addressing the applicability of the Act to Indian enterprises on reservation lands. *See DOL v. OSHRC and Warm Springs Forest Prod.*, 935 F.2d 182 (9th Cir. 1991) ("*Warm Springs*"); *Donovan v. Navajo Forest Prod. Indus.*, 692 F.2d 709 (10th Cir. 1982) ("*Navajo Forest*").

In *Warm Springs*, the Ninth Circuit considered the following treaty provision to determine whether applying the Act would abrogate rights guaranteed by Indian treaties:

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[2]These three treaties are included as Exhibits 1, 2 and 3 to Respondent's memorandum of law in support of its motion to dismiss.

> All of which tract shall be set apart, and, so far as necessary, surveyed and marked out for their exclusive use; nor shall any white person be permitted to reside upon the same without the concurrent permission of the agent and superintendent.

935 F.2d at 184. The Court concluded that the foregoing provided a right of general exclusion that was insufficient to bar application of the Act; in so finding, the Court stated that the "conflict must be more direct to bar the enforcement of statutes of general applicability." *Id*. at 186-87.

In *Navajo Forest*, the Tenth Circuit considered the treaty passage set out below to decide if application of the Act would abrogate rights guaranteed by Indian treaties:

> [T]he United States agrees that no persons except those herein so authorized to do, and except such officers, soldiers, agents and employees of the government, or of the Indians, as may be authorized to enter upon Indian reservations in discharge of duties imposed by law, or the orders of the President, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article.

692 F.2d at 711. The Court stated that the above language made it clear that "the United States Government agreed to leave the Navajos alone on their reservation to conduct their own affairs with a minimum of interference from non-Indians, and then only by those *expressly* authorized to enter upon the reservation." *Id*. at 711-12 (emphasis in original).The Court then stated that "[t]hat, in our view, is the plain, unambiguous meaning of the Navajo treaty language contained in Article II, *supra*." *Id*. at 12. The Court went on to conclude that applying the Act to the subject Indian enterprise "would constitute abrogation of Article II of the Navajo Treaty." *Id*.

I agree with the Ninth Circuit's decision that the treaty language in that case set out a right of general exclusion that was not sufficient to bar the application of the Act. However, I also agree with the Tenth Circuit's decision that applying the Act in that case would have abrogated the treaty provision that promised "to leave the Navajos alone on their reservation to conduct their own affairs with a minimum of interference from non-Indians, and then only by those *expressly* authorized to enter upon the reservation."

As I read it, the language in the Treaty of Canandaigua is even more far reaching than the treaty language involved in *Navajo Products*; in essence, the Treaty of Canandaigua promised to leave the Six Nations alone on their lands and to not disturb them in their activities on those lands. I have considered the Secretary's arguments to the contrary and her assertion that *Navajo Products* was wrongly decided. Regardless, I agree with Respondent, and I find that the application of the Act under

the circumstances of this case would abrogate the rights set out in the three treaties involved, and, in particular, the rights specified in the Treaty of Canandaigua.[3]

III. Applying the Act to the Nation would touch upon exclusive rights of self-governance in purely intramural matters.

Respondent notes that the Nation relies mainly on its casino revenues for its governmental funding and programs and that the income from the casino's gaming activities is utilized to operate the government and its programs. Respondent also notes that the Nation has used this income to fund health care, housing, cultural, employment and land reacquisition programs and that without this income very few tribal government programs would be possible. Respondent asserts that utilizing the Act to supplant the Nation's own regulatory process is a clear interference with the authority of the Nation to govern in intramural matters.

The facts of this case are similar to those in *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174 (2d Cir. 1996), discussed *supra.* There, Mashantucket Sand & Gravel ("MSG"), a construction business wholly owned and operated by a federally-recognized Indian tribe called the Mashantucket Pequot ("the Tribe"), was inspected and cited by OSHA. The Tribe contested the citation, and the issue before the Second Circuit was whether MSG's activities were governmental activities of a purely intramural nature such that they met the first exception to the application of a general federal statute, as set out in *Coeur d'Alene*, 751 F.2d at 1115-16 (9th Cir. 1985).

In deciding *Mashantucket*, the Court noted that "purely intramural matters" generally involve matters such as tribal membership, inheritance rules, and domestic relations. 95 F.3d at 179. The Court also noted that MSG employed about 100 people, both Indian and non-Indian, that it worked as an "arm" of the Tribe, and only on construction projects on the reservation, and that the Tribe's governing body decided the priority of MSG's projects. MSG excavated building sites, assisted in building roads and tribal homes, and performed work related to the continuing expansion of the

[3]In so finding, I have noted the decision of another Commission Judge in *Secretary of Labor v. Akwesasne Mohawk Casino*, No. 01-1424, that reached a conclusion very similar to the one I reach here. The employer's motion to dismiss in *Akwesasne* was granted on November 14, 2001, and that case is currently pending before the Commission.

Foxwoods Casino, located on the reservation and the principal source of income for the Tribe.[4] *Id.* at 175. The Court held against MSG for three reasons. First, it found that despite the taking of orders from the Tribe's governing body, MSG was in the construction business and its activities were of a commercial and service character, not a governmental character. Second, the Court found that MSG's employment of non-Indians weighed heavily against its claim because, generally speaking, tribal relations with non-Indians fell outside the normal ambit of tribal self-government. Third, the Court found that MSG's construction work on the casino had a direct effect on interstate commerce. *Id.* at 180-81. The Court concluded that these three factors, taken together, resulted in a "mosaic that is distinctly inconsistent with the portrait of an Indian tribe exercising exclusive rights of self-governance in purely intramural matters."[5] *Id.* at 181.

Based on the foregoing, and on the facts of this case, I conclude that applying the Act to the Nation will not affect exclusive rights of self-governance in purely intramural matters. Turning Stone is in the business of operating a casino, and its activities are of a commercial and service character, not a governmental character. Further, Turning Stone has close to 3,000 employees, 85 percent of which are non-Indians. Finally, Turning Stone, a casino resort that attracts millions of visitors a year and is one of the top tourist attractions in New York State, clearly has a direct effect on interstate commerce. *See* Resp. Memo of Law, Exh. 7, pp. 2-6. Respondent's assertion is rejected.

IV. Executive Order No. 13175 requires government-to-government consultation that should occur before adversarial enforcement.

Executive Order No. 13175 ("the Order"), 65 Fed. Reg. 67249, signed by President Clinton on November 6, 2000, is titled "Consultation and Coordination with Indian Tribal Governments."[6] The Order sets out the federal government's commitment "to establish regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications" and "to strengthen the United States government-to-government relationships

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[4]The casino site was the object of the OSHA inspection.

[5]In so finding, the Court cited to several other Circuit Court decisions that had reached similar conclusions.

[6]On April 30, 2004, President Bush signed Executive Order No. 13336, 69 Fed. Reg. 25295, which refers to and essentially affirms the Order; thus, the Order is still in effect.

with Indian tribes." The Order states that "[t]he United States recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination" and that "[a]gencies shall respect Indian tribal self-government and sovereignty" and "honor tribal treaty and other rights." *Id.* §§ 2(c), 3(a). The Order also states that the Federal Government shall, as to Federal statutes and regulations administered by Indian tribal governments, "grant Indian tribal governments the maximum administrative discretion possible."*Id*. § 3(b). Finally, the Order states that, when undertaking to formulate and implement policies that have tribal implications, agencies shall: (1) encourage Indian tribes to develop their own policies to achieve program objectives; (2) where possible, defer to Indian tribes to establish standards; and (3) in determining whether to establish Federal standards, consult with tribal officials as to the need for Federal standards and any alternatives that would limit the scope of Federal standards or otherwise preserve the prerogatives and authority of Indian tribes."*Id*. § 3(c).

Respondent notes that it has sought intergovernmental cooperation in this matter and has addressed and resolved the issue that initiated the OSHA inspection. Respondent further notes that OSHA, rather than following the consultation and collaboration approach required by the Order, has sought adversarial enforcement of the Act. Respondent asserts that OSHA's failure to adhere to the Order requires dismissal of the citation and complaint. I disagree.

First, Section 10 of the Order, entitled "Judicial Review," clearly states that it (the Order) provides no right "enforceable at law by a party against the United States, its agencies, or any person." Second, a Second Circuit decision, *Zhang v. Slattery*, 55 F.3d 732 (2d Cir. 1995), states that there is generally no private right of action to enforce obligations imposed on executive branch officials by executive orders. Even more significant, *Zhang* goes on to state that "Executive Orders cannot be enforced privately unless they were intended by the executive to create a private right of action." *Id.* at pp. 747-48. As *Zhang* also points out, "it is not the role of the federal courts to administer the executive branch." *Id*. at p. 748. Given these statements, and the one in the Order itself, I find that OSHA's failure to follow the Order provides no basis for dismissing the Secretary's citation and complaint. Moreover, I have considered the cases cited by Respondent, and they do not persuade me of Respondent's position in this matter. *See Building and Constr. Trades Dept. v. Allbaugh*, 295 F.3d 28 (D.C. Cir. 2002); *Western Airlines v. Port Authority,* 817 F.2d (2d Cir. 1987). Respondent's assertion is accordingly rejected.

ORDER

For the reasons set out in Section II of this decision, Respondent's motion to dismiss the Secretary's citation and complaint for lack of subject matter jurisdiction is GRANTED.

So ORDERED.

/s/

G. MARVIN BOBER
JUDGE, OSHRC

Dated: November 1, 2004
Washington, D.C.