UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
One Lafayette Centre
1120 20th Street, N.W. — 9th Floor
Washington, DC 20036–3419

PHONE:
COM (202) 606–5100
FTS (202) 606–5100

FAX:
COM (202) 606–5050
FTS (202) 606–5050

SECRETARY OF LABOR, Complainant, v. MASHANTUCKET SAND & GRAVEL, Respondent.	OSHRC Docket No. 93-1985

DECISION

Before: WEISBERG, Chairman and MONTOYA, Commissioner.

BY THE COMMISSION:

The stipulated issue for adjudication is whether the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (the "Act" or "OSH Act") applies to the activities of Mashantucket Sand & Gravel ("MS&G") at worksites within the Mashantucket Pequot Indian Reservation in the State of Connecticut. Administrative Law Judge Robert A. Yetman granted MS&G's summary judgment motion and denied the Secretary's. He found that the Act did not apply because MS&G was engaged in intramural activities in furtherance of the Tribe's exclusive right of self-governance. For the reasons set forth below, we affirm the judge and find that the Act does not apply.

Background

On July 14, 1993, the Occupational Safety and Health Administration ("OSHA") issued a three-item serious citation with a total proposed penalty of $2000 and a two-item other than serious citation with no proposed penalties to MS&G for alleged violations occurring within the tribal reservation. MS&G contested the citations and proposed penalties, contending that the Act

has no application within its Reservation to a wholly-owned tribal business, and the case was submitted to the judge on cross-motions for summary judgment based on the following joint stipulation of facts:

1. The Mashantucket Pequot Tribe (herein the "Tribe") is a federally-recognized Indian tribe (as defined and included in the Bureau of Indian Affairs, Federal Register Volume 58, No. 202.).

2. The Tribe's reservation, known as the Mashantucket Pequot Indian Reservation, is located at the junction of the town[s] of Ledyard, North Stonington, and Preston in the State of Connecticut.

3. The Tribe has been engaged in the construction of buildings and other improvements on the Reservation and all alleged violations at issue in this case occurred on the Reservation and in connection with such construction.

4. Mashantucket Sand & Gravel is a tribally created business which is wholly-owned by the Tribe.

5. Mashantucket Sand & Gravel operates as an arm of the Tribe.

6. Mashantucket Sand & Gravel is not licensed to do business under state or federal laws;

7. Mashantucket Sand & Gravel does business exclusively on the Mashantucket Pequot Reservation. No sand and/or gravel is sold to individuals or to business entities located off the Reservation. No site work is performed off the Reservation.

8. Mashantucket Sand & Gravel does site work for construction of tribal housing, tribal offices, tribal road and utility construction and for construction of the continued expansions of Foxwoods High Stakes Bingo & Casino. Foxwoods is located wholly on the Tribe's Reservation.

9. Foxwoods High Stakes Bingo & Casino is the primary source of revenue for the Tribe. This revenue is used to support tribal government, the purchase of homes for tribal members, construction of a tribal Community Center, construction of tribal elderly housing, and other tribal or reservation construction projects that benefit tribal government and tribal members.

10. Mashantucket Sand & Gravel has approximately 100 employees and employs both Indian and non-Indians.

11. Mashantucket Sand & Gravel is managed solely by tribal members.

12. At the time of the alleged violations, the sole activities of the Mashantucket Sand & Gravel consisted of the removal and processing of sand, gravel and similar materials on the Reservation, excavation and other site work for roads, utilities and building sites on the Reservation and other activities directly associated therewith.

13. The Respondent does not contest the existence of the conditions/practices cited, the character of the citation(s) or items, or the appropriateness of the proposed penalties.

14. The sole issue for adjudication is whether the Occupational Safety and Health Act applies to the Respondent's activities at the cited work site, which is on the Tribe's reservation.

15. There is no treaty between the Tribe and the United States.

Discussion

The general rule is that a ''general statute in terms applying to all persons includes Indians and their property interests.'' *FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960). However, if a statute of general applicability is silent on the issue of its applicability to Indian tribes (as is the Act), it will not apply to them 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.''

Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1116 (9th Cir. 1985).

The only dispute here is whether MS&G's activities constitute ''purely intramural matters.'' MS&G does not satisfy the second and third exceptions because there is no treaty between the Mashantucket Pequot Tribe and the United States and there is nothing in the

legislative history of the Act indicating a Congressional intent to exclude tribal enterprises. *See Coeur d'Alene*, 751 F.2d at 1118.

The exact nature of the "intramural matters" required to establish the exception is not clearly indicated by the case law. Some courts have limited "purely intramural matters" to factors such as "conditions of tribal membership, inheritance rules, and domestic relations." *Coeur d'Alene*, 751 F.2d at 1116. *See e.g. Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978)(injunctive relief from a tribal ordinance granting tribal membership to children of Indian males who married outside the tribe but not to the children of female Indians marrying outside the tribe not available under the Indian Civil Rights Act) and *United States v. Quiver*, 241 U.S. 602 (1916)(Indian could not be prosecuted for adultery under federal law as the personal and domestic relations of Indians with each other are left to tribal customs and laws unless expressly regulated by Congress). Tribal business entities that differ from other commercial enterprises only by virtue of a tribal relationship generally have not met this exception. *U.S. Department of Labor v. OSHRC (Warm Springs Forest Products Industries)*, 935 F.2d 182 (9th Cir. 1991); *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985).

However, other courts have found that a tribe's right of self-governance prevails over the application of a federal statute even though the tribal entity was otherwise a normal commercial operation. In *EEOC v. Fond du Lac Heavy Equipment and Constr. Co.*, 986 F.2d 246, 249 (8th Cir. 1993), a tribal member seeking employment with a tribal company alleged discrimination because of his age. The Eighth Circuit concluded that the Age Discrimination in Employment Act did not apply to the tribal company -- located on reservation land but operating both on and outside the reservation -- because the federal regulations would affect the tribe's right of self-governance.

The nature of non-commercial activities has also been considered significant. In *Reich v. Great Lakes Fish and Wildlife Commission*, 4 F.3d 490, 495 (7th Cir. 1993), the Seventh Circuit found that the Fair Labor Standards Act ("FLSA") did not apply to law-enforcement employees and other employees exercising governmental functions because employees of state or local governments performing the same functions were given special consideration by the

FLSA. (Section 3(5) of the Act, 29 U.S.C. § 652(5), exempts the States and their political subdivisions from the Act's coverage).

Although MS&G bears some resemblance to the tribal farm in *Coeur d'Alene* and the tribal lumber mill in *Warm Springs* because the services and materials it provides can be supplied by a commercial enterprise, the similarities end there. Based on the stipulated record before us, MS&G has established that its activities are purely intramural. As the judge stated:

> The enterprise is a creation of the tribe, and the employees are employed by the tribe. Its work activity is confined to the reservation with no connection to any non-tribal business or other non-tribal entity. It sells no product or service. The raw materials used in its work activity are produced on the reservation. The work activity of the enterprise is confined solely to tribal projects authorized by the governing tribal council, and include such things as site work for the construction of tribal housing, tribal offices, tribal road and utility construction and the like. All of these projects are in furtherance of decisions made by the tribal council for the benefit of tribal members.

Thus, we agree with the judge that MS&G operates "as an arm of the tribe" doing site work exclusively for tribal projects on tribal lands. *See Great Lakes. Id.* We therefore find that application of the Act would touch on the Mashantucket Pequot tribe's "exclusive rights of self-governance in purely intramural matters" and that therefore the Act does not apply to MS&G.

Our conclusion is not affected by the Secretary's contention that certain of MS&G's activities -- particularly, doing site work for tribal casino extensions -- are not "purely intramural matters" because they affect interstate commerce. The Secretary cites us no case -- and we have found none -- that holds interstate commerce involvement automatically precludes a finding that the "intramural affairs" exception has been proven. In *Coeur d'Alene*, the Ninth Circuit determined that a farm selling produce in interstate commerce on the open market was not an aspect of tribal government, but in *Fond du Lac*, the tribal company sometimes worked outside the reservation and still qualified for the exception. In finding that the exception was established in *Great Lakes*, the Seventh Circuit distinguished cases such as *Coeur d'Alene* (farm enterprise) and *Smart v. State Farm Ins. Co.*, 868 F.2d 929, 935 n.5 (7th Cir. 1989)(tribe's ability to govern itself in intramural matters not affected by ERISA's coverage of group policy issued to an Indian tribal employer for tribal employees). It characterized those cases as

involving routine commercial activity unlike the case before it, involving tribal police, which it characterized as a governmental activity.

Nor do we find any basis for the Secretary's claim that MS&G has failed to prove the "intramural affairs" exception because the stipulated record here does not reveal the extent of its casino extension site work activities.[1] The Secretary has not established that MS&G's performance of site work for the casino extensions makes the exception unavailable to MS&G. Moreover, besides doing site work for extensions to the casino, MS&G did site work for the "construction of tribal housing, tribal offices, tribal road and utility construction." Site work was therefore a primary, on-reservation work activity of MS&G as an arm of the tribe. That it sometimes did such work for a casino extension does not diminish its claim to the intramural affairs exception.

MS&G's employment of an unspecified number of non-Indians does not affect our finding here. In *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 147 (1982), the U.S. Supreme Court held that "Indian sovereignty is not conditioned on the assent of a non-member; to the contrary, the non-member's presence and conduct on Indian lands are conditioned by the limitations the tribe may choose to impose." In *Coeur d'Alene*, 751 F.2d at 1115, the Ninth Circuit stated that -- absent its being modified or extinguished by Congress -- "[n]o one doubts that the Tribe has the inherent sovereign right to regulate the health and safety of workers in tribal enterprises."

We agree with Judge Yetman that the regulation at 29 C.F.R. § 1975.4(b)(3)[2] does not

---

[1] In his reply brief, the Secretary has asked us to take official notice of an item in the Federal Register and two newspaper advertisements. We decline. The record is stipulated. Moreover, the documents are not relevant to our decision.

[2] Section 1975.4(b)(3) provides:

> **§ 1975.4 Coverage.**
>
> . . . .
>
> (b) *Clarification as to certain employers--*
>
> . . . .
>
> (3) *Indians*. The Williams-Steiger Act contains no special provisions with respect to different treatment in the case of Indians. It is well settled that under statutes of general application, such as the Williams-Steiger Act, Indians are treated as

(continued...)

require that we find the Act applicable here. In *Navajo Forest Products Industries ("NFPI")*, 8 BNA OSHC 2094, 2098, 1980 CCH OSHD ¶ 24,822, p. 30,587 (No. 76-5013, 1980), *aff'd*, 692 F.2d 709 (10th Cir. 1982), the Commission determined that the regulation simply reiterates the general rule from *Tuscarora* and provides no additional guidance in situations where, as there, Indian treaty rights would be impaired or, as alleged here, the tribal entity is engaged in "purely intramural matters." We find no support for the Secretary's contention that, by this provision, Congress expressly applied the Act to Indians and acknowledged that the Secretary has construed the Act as applicable to Indian enterprises.

We also adopt the judge's reasoning disposing of the Secretary's claim that language in the Indian Self-Determination and Education Assistance Act, 25 U.S.C.A. § 450a-n, enacted in 1975, expressly applied the Act to Indians. That language: "[n]othing in this section shall be construed as contravening the Occupational Safety and Health Act of 1970 . . . as amended." 25 U.S.C. § 450m, does not, as the judge stated, "confer jurisdiction where jurisdiction does not exist in the first instance. To do so would abrogate the inherent sovereignty rights retained by Indian tribes which have been consistently recognized by the Courts." We do not read the Self-Determination Act provision to independently confer jurisdiction of the OSH Act over Indians -- and the Secretary cites no cases suggesting that it does. By making this determination, we do not render the provision meaningless, however, because, as we have discussed, the OSH Act has been found applicable to certain Indian commercial enterprises. *See Coeur d'Alene* and *Warm Springs*.

---

[2](...continued)

any other person, unless Congress expressly provided for special treatment. "FPC v. Tuscarora Indian Nation," 362 U.S. 99, 115-118 (1960); "Navaho Tribe v. N.L.R.B.," 288 F.2d 162, 164-165 (D.C. Cir. 1961), cert. den. 366 U.S. 928 (1961). Therefore, provided they otherwise come within the definition of the term "employer" as interpreted in this part, Indians and Indian tribes, whether on or off reservations, and non-Indians on reservations, will be treated as employers subject to the requirements of the Act.

Order

We therefore find that MS&G has established that it qualified for the ''intramural affairs'' exception. We affirm the judge's actions in granting MS&G's summary judgment motion and denying the Secretary's summary judgment motion. The citations and proposed penalties are vacated.

Stuart E. Weisberg
Stuart E. Weisberg
Chairman

Velma Montoya
Velma Montoya
Commissioner

Dated: September 20, 1995

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

Phone: (202) 606-5100
Fax: (202) 606-5050

SECRETARY OF LABOR, Complainant,	:	
v.	:	Docket No. 93-1985
MASHANTUCKET SAND & GRAVEL, Respondent.	:	

NOTICE OF COMMISSION DECISION

The attached decision by the Occupational Safety and Health Review Commission was issued on September 20, 1995. **ANY PERSON ADVERSELY AFFECTED OR AGGRIEVED WHO WISHES TO OBTAIN REVIEW OF THIS DECISION MUST FILE A NOTICE OF APPEAL WITH THE APPROPRIATE FEDERAL COURT OF APPEALS WITHIN 60 DAYS OF THE DATE OF THIS DECISION.** See Section 11 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660.

FOR THE COMMISSION

Dated: September 20, 1995

Ray H. Darling, Jr.
Executive Secretary

Docket No. 93-1985

NOTICE IS GIVEN TO THE FOLLOWING:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Ave., N.W.
Washington, D.C. 20210

Albert H. Ross, Esq.
Regional Solicitor
Office of the Solicitor, U.S. DOL
One Congress Street
P. O. Box 8396
Boston, MA 02114

Patrice H. Kunesh
Mashantucket Pequot Tribe
P.O. Box 3060
Indiantown Road
Mashantucket, CT 06339

Robert A. Yetman
Administrative Law Judge
Occupational Safety and Health
Review Commission
Room 420
McCormack Post Office and Courthouse
Boston, MA 02109-4501

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
One Lafayette Centre
1120 20th Street, N.W. — 9th Floor
Washington, DC 20036-3419

PHONE:
COM (202) 606-5100
FTS (202) 606-5100

FAX:
COM (202) 606-5050
FTS (202) 606-5050

SECRETARY OF LABOR
Complainant,
v.
MASHANTUCKET SAND & GRAVEL
Respondent.

OSHRC DOCKET
NO. 93-1985

NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on May 17, 1994. The decision of the Judge will become a final order of the Commission on June 16, 1994 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before June 6, 1994 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
Occupational Safety and Health
Review Commission
1120 20th St. N.W., Suite 980
Washington, D.C. 20036-3419

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210

If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr. /SKA

Date: May 17, 1994

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 93-1985

NOTICE IS GIVEN TO THE FOLLOWING:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Ave., N.W.
Washington, D.C. 20210

Albert H. Ross, Esq.
Regional Solicitor
Office of the Solicitor, U.S. DOL
One Congress Street, 11th Floor
P.O. Box 8396
Boston, MA 02114

Henry J. Sockbeson, Esq.
214 Indiantown Road
Box 3060
Ledyard, CT 06339 3060

Robert A. Yetman
Administrative Law Judge
Occupational Safety and Health
Review Commission
McCormack Post Office and
Courthouse, Room 420
Boston, MA 02109 4501

00109807594:01

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
JOHN W. McCORMACK POST OFFICE AND COURTHOUSE
ROOM 420
BOSTON, MASSACHUSETTS 02109-4501

PHONE:
COM (617) 223-9746
FTS (617) 223-9746

FAX:
COM (617) 223-4004
FTS (617) 223-4004

SECRETARY OF LABOR, Complainant, v. MASHANTUCKET SAND & GRAVEL, Respondent.	OSHRC DOCKET NO. 93-1985

Appearances:

David L. Baskin, Esq.
Office of the Solicitor
U.S. Department of Labor
Boston, MA
For Complainant

Henry J. Sockbeson, Esq.
Tribal Attorney
Mashantucket Pequot Tribe
Ledyard, CT
For Respondent

Before: Administrative Law Judge Robert A. Yetman

DECISION AND ORDER

This proceeding arises under §10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §651, *et seq.*, ("Act") to review citations issued by the Secretary pursuant to §9(a) of the Act and a proposed assessment of penalty thereon issued pursuant to §10(a) of the Act. The matter has been presented upon cross-motions for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure.

On July 14, 1993, the Secretary issued citations to Mashantucket Sand and Gravel (hereinafter "Sand and Gravel") alleging that serious and other than serious violations

occurred at Respondent's worksite located at Ledyard, Connecticut during the period March 11, 1993 to May 13, 1993 and proposed a penalty of $2,000 for the serious violations. No monetary penalty was proposed for the other than serious violations. A timely notice of contest was filed by Sand and Gravel and, on August 27, 1993, the Secretary filed a complaint with this Commission incorporating the alleged violations set forth in the citations. Respondent answered the complaint by *inter alia*, denying that it is an employer within the meaning of Section 3(5) of the Act and asserting the following affirmative defense:

> The Mashantucket Sand & Gravel is wholly owned by the Mashantucket Pequot Tribe and is an arm of the tribal government.
>
> At the time of citation the activities cited occurred on the Mashantucket Pequot Reservation.
>
> The Occupational Safety and Health Act of 1970 (84 Stat. 1590) has no application within the Mashantucket Pequot Indian Reservation as applied to a wholly owned tribal business. As such, the Occupational Safety and Health Review Commission is without jurisdiction to hear an alleged violation or impose a penalty on Respondent.

The case has been submitted by the parties by cross-motions for summary judgment based upon the following joint stipulation of facts:

1. The Mashantucket Pequot Tribe (herein the "Tribe") is a federally recognized Indian tribe (as defined and included in the Bureau of Indian Affairs, Federal Register Volume 58, No. 202.)
2. The Tribe's reservation, known as the Mashantucket Pequot Indian Reservation, is located at the junction of the town of Ledyard, North Stonington and Preston in the State of Connecticut.
3. The Tribe has been engaged in the construction of buildings and other improvements on the Reservation and all alleged violations at issue in this case occurred on the Reservation and in connection with such construction.
4. Mashantucket Sand & Gravel is a tribally created business which is wholly owned by the Tribe.
5. Mashantucket Sand & Gravel operates as an arm of the Tribe.
6. Mashantucket Sand & Gravel is not licensed to do business under state or federal laws.

7. Mashantucket Sand & Gravel does business exclusively on the Mashantucket Pequot Reservation. No sand and/or gravel is sold to individuals or to business entities located off the Reservation. No site work is performed off the Reservation.

8. Mashantucket Sand & Gravel does site work for construction of tribal housing, tribal offices, tribal road and utility construction and for construction of the continued expansions of Foxwoods High Stakes Bingo & Casino. Foxwoods is located wholly on the Tribe's Reservation.

9. Foxwoods High Stakes Bingo & Casino is the primary source of revenue for the Tribe. This revenue is used to support tribal government, the purchase of homes for tribal members, construction of a tribal Community Center, construction of tribal elderly housing, and other tribal or reservation construction projects that benefit tribal government and tribal members.

10. Mashantucket Sand & Gravel has approximately 100 employees and employs both Indians and non-Indians.

11. Mashantucket Sand & Gravel is managed solely by tribal members.

12. At the time of the alleged violations, the sole activities of the Mashantucket Sand & Gravel consisted of the removal and processing of sand, gravel and similar materials on the Reservation, excavation and other site work for roads, utilities and building sites on the Reservation and other activities directly associated therewith.

13. The Respondent does not contest the existence of the conditions/practices cited, the character of the citation(s) or items, or the appropriateness of the proposed penalties.

14. The sole issue for adjudication is whether the Occupational Safety and Health Act applies to the Respondent's activities at the cited work site, which is on the Tribe's reservation.

15. There is no treaty between the Tribe and the United States.

At oral argument, counsel for Respondent stated that the employees of Sand and Gravel are employed and paid by the Tribe (oral argument, Tr. 7).

Complainant contends and Respondent concedes for purposes of this case that the Act is a statute of general application and applies to Indians, as well as to other persons. *FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 80 S. Ct. 543. Thus, it has been held that the Act does apply to commercial activities carried on by an Indian tribe even if carried on within the boundaries of its reservation *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d, 1113 (9th Cir, 1984); *U.S. Department of Labor v. OSHRC (Warm Springs Forest Products Industries)*, 935 F.2d, 182 (9th Cir., 1991). In *Coeur d'Alene*, the Court applied the established principle that a general statute such as the Occupational Safety and Health Act applies to all persons including Indians and their property interests and, more specifically, to a commercial enterprise wholly owned and operated by a Native-American Indian tribe. In that case, the Tribe was organized under federal law, but without any formal treaty with the United States government. The Tribe owned and operated a farm producing products which were sold on the open market within and outside the State of Idaho. Quoting Judge Choy in *United States v. Farris*, 624 F.2d, 890 (9th Cir. 1980), *cert. denied,* 449 U.S. 1111, 101 S. Ct. 919, the Court stated:

> Federal laws generally applicable throughout the United States apply with equal force to Indians on reservations. (citation omitted). Many of our decisions have upheld the application of general federal laws to Indian tribes; not one has held that an otherwise applicable statute should be interpreted to exclude Indians." 751 F.2d at 1115.

Moreover, the Court did not adopt "the proposition that Indian tribes are subject only to those laws of the United States expressly made applicable to them." *Id* at 1116. Thus, federal laws of general application, such as the Act in question, apply to Indian tribes and Indian reservations. *See also; Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667-669, 94 S. Ct. 772, 777-778 (1974).

There are three exceptions to the general principle stated above. These exceptions have been defined as follows:

> 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 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 . . . ." *Farris*, 624 F.2d at 893-94. In any of these three situations, Congress must *expressly* apply a statute to Indians before we will hold that it reaches them.

Coeur d'Alene Tribe Farm, 751 F.2d. at 1116.

The Occupational Safety and Health Act is silent regarding its applicability to Indian tribes. Respondent, therefore, asserts that the Act is not applicable herein because the activities of Sand and Gravel constitute "purely intramural matters", and the application of the Act to its activities would deny the tribe of its exclusive right of self-governance.[1] Respondent argues that the facts establish that Sand and Gravel is "a part of tribal government" (oral argument, Tr. 6), and its activities are exclusively devoted to executing political decisions of the tribal council relating to "projects within the tribe that benefit the tribe" (oral argument, Tr. 7). Sand and Gravel "works solely on public projects." *Id.* The issue, therefore, is whether the activities of Sand and Gravel constitute the exercise of exclusive rights of self-governance in purely intramural activities. If answered in the affirmative, the Act may not be applied to these activities. *U.S. Department of Labor v. OSHRC (Warm Springs Forest Products Industries),* 935 F.2d 182, 184 (9th Cir. 1991).

In *United States v. Wheeler*, 435 U.S. 313; 98 S. Ct. 1079, the Supreme Court stated that Indian tribes are "unique aggregations possessing attributes of sovereignty over both their members and their territory." *Ibid* at 323, 98 S. Ct. at 1086. The Court noted that through specific treaties and statutes, Indian tribes lost many of the attributes of sovereignty. However, the Court distinguished between those inherent powers retained by the tribes and those divested:

> The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relationship

---

[1] Respondent concedes that the second exception is not applicable here because no treaty exists between the tribe and the United States. Moreover, as conceded by Respondent, there is nothing in the legislative history of the Act indicating a Congressional intent to exclude tribal enterprises. *Donovan v. Coeur d'Alene Tribal Farm,* 751 F.2d at 1118.

> between an Indian tribe and non-members of the tribe.*Id.*.. . . "But the powers of self-government. . . are of a different type. They involve only the relations among members of the tribe." *Id.*

The Court concluded that "... Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute or by implication as a necessary result of their dependent status" *Id.* In *Santa Clara v. Martinez*, 436 U.S. 49, 98 S. Ct. 1670, 1675-76 (1978), the Supreme Court summarized the status of Indian tribes as follows:

> Indian tribes are "distinct, independent political communities, retaining their original natural rights" in matters of local self-government. . . . Although no longer "possessed of the full attributes of sovereignty," they remain a "separate people, with the power of regulating their internal and social relations.". . . They have power to make their own substantive law in internal matters, . . . and to enforce that law in their own forums.

See also Secretary of Labor v. Navajo Forest Products Industries, 1980 CCH OSHD ¶24,822 *aff'd Donovan v. Navajo Forest products Industries*, 692 F.2d 709 (10th Cir. 1982). Examples of sovereignty rights retained by Indian tribes are the determination of tribal membership, the regulation of domestic relations among members and rules of inheritance *See United States v. Farris,* 624, F.2d 890, 893 (9th Cir. 1980).

In *Montana v. United States*, the Supreme Court stated:

> A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, *or the health or welfare of the tribe. (Emphasis supplied)*

450 U.S. 544, 565, 101 S. Ct. 1245, 1258 (1981). The Court of Appeals for the Ninth Circuit has stated that "[no] one doubts that [Indians have] the *inherent* sovereign right to regulate the health and safety of workers. . ." *Emphasis supplied. Donovan v. Coeur d'Alene, supra* at 1115. More recently, the Eighth Circuit concluded that the Age Discrimination in Employment Act, a statute of general applicability, did not apply in a dispute involving a member of a tribe and the tribe as an employer. The Court concluded that subjecting that employment relationship to federal control would dilute the inherent sovereignty of the tribe.

EEOC v. Fond du Lac Heavy Equipment and Construction, 986 F.2d 246 (8th Cir. 1993). In *Reich v. Great Lakes Indian Fish and Wildlife Commission*, 4F.3d 490 (7th Cir. 1993), the Court held that game wardens employed by the tribe were engaged in a governmental activity and the application of the Fair Labor Standards Act similarly violated the inherent sovereignty of the tribe. On the other hand, in those instances where employment statutes of general application were applied to tribes, the tribes were engaged in business or commercial activities not of a governmental nature. *Smart v. State Farm Ins. Co.,* 868 F.2d at 933-36; *Donovan v. Coeur d'Alene Tribal Farm,* 751 F.2d 1113 (9th Cir. 1985); *U.S. Dept. of Labor v. OSHRC,* 935 F.2d 182 (9th Cir. 1991); *Lumber Industry Pension Fund v. Warm Springs Forest Products Industries,* 939 F.2d 683 (9th Cir. 1991).

Based upon the facts agreed upon by the parties, it is clear that Sand and Gravel is engaged solely in governmental activities. The enterprise is a creation of the tribe, and the employees are employed by the tribe. Its work activity is confined to the reservation with no connection to any non-tribal business or other non-tribal entity. It sells no product or service. The raw materials used in its work activity are produced on the reservation. The work activity of the enterprise is confined solely to tribal projects authorized by the governing tribal council, and include such things as site work for the construction of tribal housing, tribal offices, tribal road and utility construction and the like. All of these projects are in furtherance of decisions made by the tribal council for the benefit of tribal members. The facts compel the conclusion that Sand and Gravel, as an arm of the tribe, performs activities which normally are performed by a governmental highway department or a department of public works. Thus, it is concluded that Sand and Gravel, at the time of the inspection, was engaged in purely intramural activities and the application of the Act to those activities would deny the tribe of its exclusive right of self-governance.[2] *United States*

---

[2] The stipulation of the parties indicates that the tribe operates a casino on its reservation from which it derives most of its income. The casino is clearly a business enterprise, and Sand and Gravel performs "site work" for the expansion of the casino. It is not known, however, what percentage of its total work activity relates to the casino or whether such activity is closely related and directly essential to the business activities of that enterprise. Based upon the stipulation, it is concluded that Sand and Gravel is engaged primarily in governmental activities of a non-commercial nature.

v. Wheeler, supra; Donovan v. Coeur d'Alene Tribal Farm, supra. See also: Donovan v. Navajo Forest Products Industries, 692 F.2d 709 (10th Cir. 1982).

The Secretary asserts that he has addressed the issue of coverage of the Act on Indian reservations by issuing a regulation[3] and that regulation is entitled to deference by this Commission. The same argument was raised in *Secretary of Labor v. Navajo Products Industries*, 1980 OSDH, CCH ¶24,822. In that case, the Commission stated:

> The Secretary's regulation simply reiterates the *Tuscarora* rule; it does not address the question whether *Tuscarora* applies in a situation where Indian treaty rights would be impaired. Thus, the regulation provides no additional guidance in resolving the issues presented in this case.

Similarly, the cited regulation does not address the issue, notwithstanding the application of *FPC v. Tuscarora, supra*, of an Indian Respondent engaged in purely intramural matters. The Secretary urges, however, that any ambiguity in the regulation should be resolved in favor of the Secretary's interpretation of that regulation *Martin v. OSHRC (CF&I Steel Corp)*, 499 U.S. 144, 111 S. Ct 1171 (1991). In *Martin*, the Court stated that, when presented with two *reasonable* but conflicting interpretations of an ambiguous regulation, the Commission must defer to the Secretary's interpretation. The Court stated:

> The Act charges the Secretary with responsibility for setting and enforcing workplace health and safety standards. The Secretary establishes these standards through the exercise of rulemaking powers. If the Secretary (or the Secretary's designate) determines upon investigation that an employer is failing to comply with such a standard, the Secretary is authorized to issue

---

[3] 29 C.F.R. 1975.4(b)(3) provides:

> The Williams-Steiger Act contains no special provisions with respect to different treatment in the case of Indians. It is well settled that under statutes of general application, such as the Williams-Steiger Act, Indians are treated as any other person, unless Congress expressly provided for special treatment. "FPC v. Tuscarora Indian Nation," 362 U.S. 99, 115-118 (1960); "Navajo Tribe v. N.L.R.B.," 288 F.2d 162, 164-165 (D.C. Cir. 1961), cert. den. 366 U.S. 928 (1961). Therefore, provided they otherwise come within the definition of the term "employer" as interpreted in this part, Indians and India tribes, whether on or off reservations, and non-Indians on reservations, will be treated as employers subject to the requirements of the Act.

> a citation and to assess the employer a monetary penalty. *Citations omitted.*

111 S. Ct. at 1174.

The Court concluded:

> Although the Act does not expressly address the issue, we now infer from the structure and history of the statute that the power to render authoritative interpretations of OSH Act regulations is a "necessary adjunct" of the Secretary's powers to promulgate and to enforce national health and safety standards. The Secretary enjoys readily identifiable structural advantages over the Commission in rendering authoritative interpretations of OSH Act regulations. Because the Secretary promulgates these standards, the Secretary is in a better position than is the Commission to reconstruct the purpose of the regulations in question.

Id. at 1176.

Martin, supra, resolved the issue of whether the Secretary's or the Commission's reasonable interpretation of ambiguous safety and health standards promulgated by the Secretary should prevail. The issue here, however, deals with fundamental jurisdictional questions: (1) did Congress confer OSHA coverage over Indian tribes engaged in intramural activities and (2) does the Secretary or the Commission have primary jurisdiction to determine questions of OSHA coverage. In *Marshall v. Able Contractors*, the Ninth Circuit stated:

> Generally the [Secretary] should make the initial determination of its own jurisdiction. *State of Cal. ex rel. Christensen v. F.T.C.,* 549 F.2d 1321 (9th Cir. 1977). Primary jurisdiction to determine questions of OSHA coverage is lodged in the statutorily created organ for hearing appeals of OSHA violation citations, the Occupational Safety and Health Review Commission. *Matter of Restland Memorial Park*, 540 F.2d 626 (3rd Cir. 1976), 573 F.2d 1055, 1057, (9th Cir. 1978), *cert. denied,* 439 U.S. 826.

Although the Secretary, by regulation, has concluded initially that the Act applies to Indian tribes, he failed to address the exceptions to that general principle. *See Coeur d'Alene Tribal Farm, supra.* Thus, even by applying the principles set forth in *Martin*, the Secretary's interpretation is inconsistent with the findings of numerous courts that, in many

instances involving Indian tribes, OSHA coverage does not exist. Moreover, based upon the facts of this case, it is concluded that the Secretary's determination of jurisdiction is unreasonable and erroneous.

Finally, the Secretary's reliance upon Section 109 of the Indian Self-Determination and Education Assistance Act, Pub. L. 93-638, 25 U.S.C.A. 450(a)-450(n) (Indian Act To Assert Coverage) in this matter is misplaced. That section merely states:

> Nothing in this section shall be construed as contravening the Occupational Safety and Health Act. . .

That language does not confer jurisdiction where jurisdiction does not exist in the first instance. To do so in this case would abrogate the inherent sovereignty rights retained by Indian tribes which have been consistently recognized by the Courts. I, therefore, to the extent that the statute is relevant to this discussion, decline to place such a broad interpretation upon that clause.

Findings of Fact

Findings of fact relevant and necessary to a determination of all issues have been made above. Fed. R. Civ. P. 52(a). All proposed findings of fact inconsistent with this decision are hereby denied.

Conclusions of Law

1. Respondent, at all times material to this proceeding was a federally recognized Indian tribe.
2. At all times material to this proceeding, Respondent and its employees were engaged in intramural activities in furtherance of its exclusive right of self-governance.
3. The Occupational Safety and Health Act does not apply to federally recognized Indian tribes engaged in intramural activities in furtherance of their exclusive right of self-governance.
4. At all times, material to this proceeding, the activities of Respondent were not covered by the Occupational Safety and Health Act.

Order

1. Respondent's Motion for Summary Judgment is GRANTED, and Complainant's Cross-Motion for Summary Judgment is DENIED.
2. The citations and proposed penalties are DISMISSED.

ROBERT A. YETMAN
Judge, OSHRC

DATED: May 4, 1994
BOSTON, MASSACHUSETTS