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

SECRETARY OF LABOR,

Complainant,

v.

RED LAKE NATION FISHERIES, INC.,

Respondent.

Docket No. 18-0934

APPEARANCES:

For the Complainant:

Brooke E. Worden, Esq.
Office of the Solicitor
U.S. Department of Labor
Chicago, Illinois

For the Respondent:

Joseph Plumer, Esq.
Plumer Law Office
Bemidji, Minnesota

BEFORE: William S. Coleman
Administrative Law Judge

DECISION AND ORDER OF DISMISSAL

The Respondent, Red Lake Nation Fisheries, Inc., is a commercial enterprise owned and operated by a federally recognized Indian tribe known as the Red Lake Band of Chippewa Indians. The Respondent is in the business of harvesting wild-caught fish from waters on the tribe's reservation, and then processing the fish and selling fish products to the general public. The Respondent operates within the boundaries of the tribe's reservation and employs only members of the tribe.

Following the drowning deaths of two of the Respondent's employees in Lower Red Lake in northern Minnesota in November 2017, the Occupational Safety and Health Administration (OSHA) cited the Respondent for two alleged violations of rules that had been promulgated pursuant to the Occupational Safety and Health Act of 1970 (the OSH Act, or Williams-Steiger Act).

The Respondent timely contested the citations and has now filed a motion to have the citations dismissed. The undersigned has treated this motion as a motion for summary judgment. For the reasons described below, the motion is granted on the grounds that the OSH Act does not give the Secretary of Labor the authority (1) to regulate the conditions of workplace health and safety at the Respondent's workplace, or (2) to enter the tribe's reservation to inspect the Respondent's workplace.

If this order becomes a final order pursuant to section 12(j) of the OSH Act, the United States Court of Appeals for the Eighth Circuit is the court to which the Secretary may file a petition for review pursuant to section 11(b) of the Act. 29 U.S.C. §§ 661(j) & 660(b). As discussed below, the outcome here is the outcome that the Eighth Circuit would most likely reach if it were to adjudicate the issues presented.

Background

Based on the record developed on the Respondent's motion, there is no genuine dispute of fact respecting the following matters.

The Respondent is a business enterprise named Red Lake Nation Fisheries, Inc. The Respondent is a subsidiary company of Red Lake, Inc. Red Lake, Inc. is wholly owned and operated by a federally recognized Indian tribe that is known as the Red Lake Band of Chippewa Indians (Red Lake Band). *See* Indian Entities Recognized and

Eligible to Receive Services from the United States Bureau of Indian Affairs, 83 Fed. Reg. 34863, 34865 (July 23, 2018). Both the Respondent and Red Lake, Inc. are corporations that were formed and organized under Red Lake Band tribal law. (Declaration of S. Strong).

Red Lake, Inc. is a governmental instrumentality of the Red Lake Band. All shares of Red Lake, Inc. are owned by the Red Lake Tribal Council for the benefit of the Red Lake Band and its recognized members. The officers and employees of Red Lake, Inc. are charged with carrying out economic advancement functions of the Red Lake Band and its members. The board of directors for Red Lake, Inc. manages its businesses and affairs, which includes the business of the Respondent. The members of the board are appointed by the Red Lake Band's Tribal Council, and all are enrolled members of the Red Lake Band. (Declaration of S. Strong).

The Respondent's business address is 19050 Minnesota Highway 1 East, Redby, Minnesota 56670, which is located on the Red Lake Indian Reservation. The Respondent was established to provide employment opportunities for members of the Red Lake Band and to promote the social, economic, and educational goals of the Red Lake Band Tribal Council. The Respondent engages in the commercial practice of harvesting wild-caught fish from waters on the reservation and processing the fish into fish products that it sells to the general public throughout the United States. The Respondent's operations of fish harvesting and processing fish products for commercial sale occur exclusively within the boundaries of the Red Lake Indian Reservation. The Respondent employs only enrolled members of the Red Lake Band. (Declaration of S. Strong).

The Respondent sells fish products directly to the general public through a public

website and by telephone. According to the Respondent's public website, the Respondent ships its fish products for next day delivery to locations "all over the United States" via a well-known commercial delivery service. The Respondent also sells fish products directly to the general public from a location on the reservation situated on Minnesota Highway 1. The Respondent also distributes its fish products to some retail outlets in the State of Minnesota for subsequent re-sale to the general public. (*See* Exhibits to Sec'y Response to Motion).

The Respondent maintains a public website from which it markets its fish products to the general public. That website contains the following promotional and informational representations:

- "Our mission is to sustainably manage, harvest, and prepare superior quality wild fish products, inspired by our Native American culture, and deliver them directly to your doorstep."
- "We only sell what tribal fisherman catch on Red Lake."
- "We still fish in the traditional ways, using the wisdom of our elders that was handed down from generation to generation. Our fish are wild-caught by tribal fishermen, employing local knowledge and ancestral practices to deliver high quality fish products in the most natural way."
- "It is our goal to bring you the quality fish products that you would expect from a world class fishery. Red Lake Industries have been featured in quality restaurants and grocery stores throughout the nation. Although we are not as well known as some larger established fisheries, our product remains the freshest and most delicious that can be found on the market. Our fish is hand-harvested, hand-processed and fresh shipped every day…. Our world class products stand in the forefront of the aquatic food industry."
- "We are FDA approved and under regulations we are not allowed to take back fish that has been out of our control."

(Exhibits to Sec'y Response to Motion).

On November 6, 2017, a boat operated by the Respondent's employees capsized while on Lower Red Lake on the Red Lake Indian Reservation, resulting in the drowning deaths of two employees who had been working on board. Their deaths were not confirmed until their bodies were recovered in March 2018. On March 23, 2018, an official from the OSHA area office located in Eau Claire, Wisconsin, conducted OSHA inspection number 1303745 at the Respondent's location in Redby, Minnesota, on the Red Lake Indian Reservation.[1]

As a result of that inspection, on April 26, 2018, the OSHA area office issued to the Respondent a one-item serious citation and a one-item "other than serious" citation, with proposed monetary penalties for each alleged violation.

The serious citation alleged that on or about November 6, 2017 the Respondent had violated a safety standard regarding personal protective equipment that is codified at 29 C.F.R. § 1910.132(a) when the Respondent did not require employees to wear, and employees did not wear, personal flotation devices "while performing tasks associated with gillnetting from a boat, such as but not limited to a 20 ft. Hewescraft Open Fisherman." The citation directed the Respondent to abate the violation by a specified date.

The "other than serious" citation alleged that the Respondent had failed to timely report the deaths of employees in a work-related incident in violation of the reporting

[1] Minnesota has a federally approved "state plan" for the regulation of workplace health and safety, but the state plan excepts "[a]ny establishment owned or operated by an Indian tribe … within an Indian reservation." *See* 29 C.F.R. § 1952.8 (referring to www.osha.gov/dcsp/osp/stateprogs/minnesota.html for "several notable exceptions" to the Minnesota state plan).

regulation codified at 29 C.F.R. § 1904.39(a)(1). The citation states that this violation was corrected during the inspection on March 23, 2018.

Discussion

The Respondent timely contested the citations and proposed penalties, thereby invoking the jurisdiction of the independent Occupational Safety and Health Review Commission (Commission) pursuant to section 10(c) of the OSH Act. 29 U.S.C. § 659(c). The Secretary then filed a formal complaint pursuant to the Commission's rules of procedure, wherein the Secretary re-asserted the violations and proposed penalties that had been alleged in the original citations. The Respondent then filed its answer to the complaint, wherein it denied the alleged violations. The Respondent also filed a motion to dismiss the citations on the ground that the Secretary "lacks authority under the [OSH Act] to assert jurisdiction over the [Respondent], which is a government enterprise wholly owned and operated by the Red Lake Band of Chippewa Indians," which "is a federally recognized Indian tribe."

The Respondent's memorandum in support of the motion presents three independent arguments for granting the motion, the first two of which are meritorious. The first argument is grounded in the Red Lake Band's right of self-governance with respect to regulation of the conditions of workplace health and safety, and the second argument is grounded in the Red Lake Band's inherent right to exclude non-members from its reservation.[2]

[2]The Respondent's third argument in support of dismissal is that Congress intended to exempt tribal governments from coverage under the OSH Act just as Congress had exempted state governments from coverage by defining the term "employer" as used in the Act *not* to "include … any State." 29 U.S.C § 652(5). Nothing

Standard of Review

The Respondent's motion to dismiss identifies rule 12(b)(1), Fed. R. Civ. P., as providing grounds for dismissal because of "lack of subject-matter jurisdiction."[3] But the motion does not actually present an issue of "subject-matter jurisdiction" as that term is used in Rule 12(b)(1). Subject matter jurisdiction pertains to a tribunal's "statutory or constitutional power to adjudicate the case." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998); *see also Carlisle v. United States*, 517 U.S. 416, 434–35 (1996) (Ginsburg, J. concurring) (defining "subject matter jurisdiction" as the "authority [of the court] to adjudicate the type of controversy involved in the action," quoting Restatement (Second) of Judgments § 11 (1982)).

The Respondent has not argued that the *Commission* lacks subject matter jurisdiction to adjudicate this case, which necessarily involves adjudicating whether the OSH Act applies to the Respondent. The Commission itself appears to have concluded that the OSH Act gives it the authority to adjudicate a contested citation that the Secretary has issued to a tribal employer. The Commission has vacated citations issued to tribal enterprises when it has concluded that the OSH Act did not apply, and it has adjudicated the merits of such citations when it has concluded that the OSH Act did

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in the text of section 652(5) reflects any congressional intent that tribal governments be exempted from coverage of the OSH Act along with state governments. The third argument asserted in support of the motion to dismiss lacks merit and is denied without further elaboration.

[3] The Commission's Rules of Procedure provide that in the absence of a different rule in the Commission's rules, proceedings before the Commission are conducted "in accordance with the Federal Rules of Civil Procedure." 29 C.F.R. § 2200.2(b); 29 U.S.C. § 661(g). There being no specific Commission rule regarding the presentation of certain defenses by motion at the pleading stage, Rule 12 of the federal rules provides the procedure for the Respondent's motion.

apply. *See*, *Navajo Forest Prod. Indus.*, 8 BNA OSHC 2094 (No. 76-5013, 1980) (OSH Act not applicable), *aff'd* 692 F.2d 709 (10th Cir. 1982); *Coeur d'Alene Tribal Farm*, 11 BNA OSHC 1705 (No. 78-6081, 1983) (consolidated) (OSH Act not applicable), *rev'd*, 751 F.2d 1113 (9th Cir. 1985); *Mt. Adams Furniture Co.*, No. 88-2239, 1991 WL 232785, at *1 (OSHRC, Nov. 6, 1991) (OSH Act applicable); *Mashantucket Sand & Gravel*, 17 BNA OSHC 1391 (No. 93-1985, 1995) (OSH Act not applicable), *rev'd*, 95 F.3d 174 (2d Cir. 1996); *Akwesasne Mohawk Casino*, 20 BNA OSHC 2091 (No. 01-1424, 2005) (OSH Act applicable); *Turning Stone Casino Resort*, 21 BNA OSHC 1059 (No. 04-1000, 2005) (OSH Act applicable).

Rather than presenting an issue of the Commission's subject matter jurisdiction, the motion to dismiss presents the issue whether the OSH Act applies to the cited activities of a tribal commercial enterprise operating on the tribe's reservation. *See Mashantucket Sand & Gravel*, 17 BNA OSHC at 1391 (defining the issue in terms of whether the OSH Act applies to the tribal enterprise at worksites within a reservation).

Thus, although the Respondent's motion is nominally asserted pursuant to federal rule 12(b)(1), the motion is more properly regarded as seeking dismissal under federal rule 12(b)(6) for "failure to state a claim upon which relief can be granted." Rule 12(b)(6) provides the more appropriate ground for seeking dismissal because if the OSH Act does not apply to the Respondent, the citations that OSHA issued to the Respondent under the OSH Act would be a nullity, and the allegations of the complaint would fail to state claims upon which relief could be granted.

Because matters outside the pleadings have been presented and considered in connection with the deemed Rule 12(b)(6) motion to dismiss, Rule 12(d) of the federal

rules requires that the motion be treated as a motion for summary judgment under federal rule 56.

The Commission's rules of procedure expressly provide that motions for summary judgment in matters before the Commission are governed by Federal Rule of Civil Procedure 56. Commission Rule 40(j), codified at 29 C.F.R. § 2200.40(j).[4] Rule 56(a) provides that a party is entitled to summary judgment upon a showing "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Rule 56 "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The Commission summarized the oft-described standard for evaluating a motion for summary judgment as follows in *Ford Motor Co.*, 23 BNA OSHC 1593, 1593-94 (No. 10-1483, 2011):

> In reviewing a motion for summary judgment, a judge is not to decide factual disputes. *Gallo v. Prudential Residential Servs.*, 22 F.3d 1219, 1224 (2d Cir. 1994). Rather, the role of the judge is to determine whether any such disputes exist. *Id.* When determining if there is a genuine factual dispute, the fact finder must resolve all ambiguities and draw all reasonable inferences in favor of

[4] The Commission's Rules of Procedure were recently revised with an effective date of June 10, 2019. Rules of Procedure, 84 Fed. Reg. 14554 (April 10, 2019) (to be codified at 29 C.F.R. pt. 2200). Citations herein to the Commission's rules in the C.F.R. are intended to reflect the ultimate codification of those rules in the 2020 edition of the C.F.R. Until such actual codification, the current revised rules are posted on the Commission's website (www.oshrc.gov) and may also be found at 84 Fed. Reg. 14554-579.

> the non-moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962); *Tufariello v. Long Island R.R. Co.*, 458 F.3d 80, 83 (2d Cir. 2006). Thus, not only must there be no genuine dispute as to the evidentiary facts, but there must also be no controversy as to the inferences to be drawn from them. *Schwabenbauer v. Bd. of Educ. of City Sch. Dist. of City of Olean*, 667 F.2d 305, 313 (2d Cir. 1991). [internal footnotes omitted.]

Whether the OSH Act applies to the workplace of a tribal employer presents "a question of law reviewed de novo." *Dep't of Labor v. OSHRC* (*Warm Springs Forest Prods. Indus*.), 935 F.2d 182, 183 (9th Cir. 1991); *San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306, 1312 (D.C. Cir. 2007) (considering de novo whether the National Labor Relations Act [NLRA] applies to a tribal enterprise, and noting that because the NLRB's "expertise and delegated authority does not relate to federal Indian law, we need not defer to the Board's" interpretation of the NLRA); *Soaring Eagle Casino & Resort v. NLRB*, 791 F.3d 648, 655 (6th Cir. 2015) (analyzing de novo whether a tribe's inherent sovereignty rights prevent application of the NLRA to a tribal commercial enterprise); *NLRB v. Little River Band of Ottawa Indians Tribal Gov't* (*Little River Band*), 788 F.3d 537, 543 (6th Cir. 2015) (ruling that "federal Indian law and policy are areas over which the [agency] has no particular expertise, and so we need not defer to the [agency's] conclusions with respect to them").

The Commission likewise considers this question of law de novo, without any deference to the Secretary of Labor's interpretation of the OSH Act.[5] *Martin v. OSHRC*

[5] In 1972 the Secretary promulgated an interpretive regulation, codified at 29 C.F.R. § 1975.4(b)(3), that declares that tribal employers are subject to the requirements of the OSH Act. As authority for that declaration, the regulation cites to the Supreme

(*CF & I Steel Corp.*), 499 U.S. 144, 154 (1991) (concluding "that Congress intended to delegate to the Commission the type of nonpolicymaking adjudicatory powers typically exercised by a *court* in the agency-review context").

Applicable Circuit Court of Appeals Precedent

In adjudicating whether the OSH Act applies to a tribal enterprise, the Commission applies the precedent of the court of appeals for the circuit in which it is highly probable that a petition for review would be filed. *Mt. Adams Furniture Co.*, No. 88-2239, 1991 WL 232785, at *1 (OSHRC, Nov. 6, 1991) (applying dispositive Ninth

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Court's decision in *Federal Power Commission v. Tuscarora Indian Nation* (*Tuscarora*), 362 U.S. 99, 116 (1960), where the Court stated "that a general statute in terms applying to all persons includes Indians and their property interests." Section 1975.4(b)(3) provides:

> (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 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 Indian tribes, whether on or off reservations, and non-Indians on reservations, will be treated as employers subject to the requirements of the Act.

The Commission in *Navajo Forest Products Industries*, 8 BNA OSHC 2094, 2098 (No. 76-5013, 1980), *aff'd*, 692 F.2d 709 (10th Cir. 1982), considered this interpretive regulation and noted that it "simply reiterates the *Tuscarora* rule," and "provides no additional guidance in resolving the issues presented in this case." This assessment of the regulation's import is consistent with the Commission's duty to address the issue de novo. *See also Little River Band*, 788 F.3d at 543 (ruling that a "reviewing court does not owe *Chevron* deference to an agency construction if the agency adopts the construction on the basis of a judicial opinion and not on the basis of policy considerations regarding the statute it administers").

Circuit precedent on issue of whether the OSH Act applied to a tribal enterprise, while noting extant Commission and judicial precedent that was contrary to that dispositive Ninth Circuit precedent); *see also Dana Container, Inc.*, 25 BNA OSHC 1776, 1792 n.10 (No. 09-1184, 2015), *aff'd*, 847 F.3d 495 (7th Cir. 2017) (noting that the Commission generally applies the precedent of the circuit court of appeals to which it is "highly probable" that the matter will be appealed, even though that precedent may differ from the Commission's precedent); *Hensel Phelps Constr. Co.*, 26 BNA OSHC 1773, 1778 (No. 15-1638, 2017) (ALJ) (vacating a citation upon applying controlling Fifth Circuit precedent that was contrary to Commission precedent), *rev'd*, 909 F.3d 723 (5th Cir. 2018) (determining that the 37-year-old controlling Fifth Circuit precedent on which the ALJ had relied in vacating the citation was in conflict with subsequent case law, resulting in the court disregarding that precedent and reversing and remanding the matter to the Commission), *on remand*, 2019 WL 1500063 (O.S.H.R.C.A.L.J., Feb. 20, 2019) (affirming the citation that the ALJ had originally vacated).

Section 11(b) of the OSH Act permits the Secretary to "obtain review … of any final order of the Commission … in the court of appeals for the circuit in which the alleged violation occurred or in which the employer has its principal office." 29 U.S.C. § 660(b). The alleged violations occurred in the state of Minnesota, and the Respondent's office is in Minnesota. Minnesota is in the geographic region of the United States Court of Appeals for the Eighth Circuit, so under section 11(b) the Secretary may file a petition for review of a final order of the Commission in this matter only in that court. The role of the Commission is thus to adjudicate the issues here in a manner consistent with controlling precedent of the Eighth Circuit. *Mt. Adams Furniture Co.*,

1991 WL 232785.

Impermissible Infringement on Right of Tribal Self-Governance

The Eighth Circuit's decision in *EEOC v. Fond du Lac Heavy Equipment & Construction Co.* (*Fond du Lac*), 986 F.2d 246 (8th Cir. 1993), is dispositive on the issue whether the application of the OSH Act to the Respondent would impermissibly infringe on the Red Lake Band's right of self-governance. The court in *Fond du Lac* held that the Age Discrimination in Employment Act (ADEA) impermissibly affected a tribe's right to self-governance with respect to a tribe member who was alleging that a tribe-owned equipment and construction company that was located on the reservation and that occasionally did work off the reservation had denied him employment because of his age.

Applying the principles of *Fond du Lac* leads to the conclusions here that (1) the Red Lake Band has inherent authority to regulate workplace health and safety for a tribal commercial enterprise that operates on the tribe's reservation, (2) for a statute of general application such as the OSH Act to affect that right of tribal self-government requires evidence of a clear and plain congressional intent to do so, and (3) because there is no affirmative evidence of any such clear and plain congressional intent, the Eighth Circuit would likely hold that the OSH Act does not apply to the Respondent's workplace.

The court in *Fond du Lac* commenced its analysis with the general observations that Indian tribes "possess inherent powers of a limited sovereignty," *id.* at 248 (quoting *United States v. Wheeler*, 435 U.S. 313, 322 (1978)), and remain a "separate people, with the power of regulating their internal and social relations," *id.* (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978)), but that "Congress has plenary authority to

limit, modify or eliminate the powers of local self-government which the tribes otherwise possess." *Id.* (quoting *Santa Clara Pueblo*, 436 U.S at 56). The court then described the principles it would apply for determining whether Congress has exercised its plenary authority to affect a tribe's inherent powers of local self-government. The court's description included recognition of the general rule stated by the Supreme Court in *Tuscarora*:

> The Supreme Court has stated that "general acts of Congress apply to Indians as well as to all others in the absence of a clear expression to the contrary." *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 120 (1960). This general rule in *Tuscarora*, however, does not apply when the interest sought to be affected is a specific right reserved to the Indians. *United States v. Winnebago Tribe of Nebraska*, 542 F.2d 1002, 1005 (8th Cir.1976). Specific Indian rights will not be deemed to have been abrogated or limited absent a "clear and plain" congressional intent. *United States v. Dion*, 476 U.S. 734, 738 (1986) (citations omitted); *Winnebago Tribe*, 542 F.2d at 1005 (citations omitted). A clear and plain intent may be demonstrated by an "express declaration" in the statute, by the "legislative history," and by "surrounding circumstances." *Dion*, 476 U.S. at 739.

Id.

The court in *Fond du Lac* stated that "consideration of a tribe member's age by a tribal employer should be allowed to be restricted (or not restricted) by the tribe in accordance with its culture and traditions," and that "[f]ederal regulation of the tribal employer's consideration of age in determining whether to hire the member of the tribe to work at the business located on the reservation interferes with an intramural matter that has traditionally been left to the tribe's self-government." *Fond du Lac*, 986 F.2d at 249.

The Eighth Circuit concluded that "the tribe's specific right of self-government would be affected," by "[s]ubjecting an employment relationship between the tribal member and his tribe to federal control and supervision," so that the *Tuscarora* presumption of general applicability did not apply. *Id.* Since the *Tuscarora* presumption did not apply, the Eighth Circuit searched for "clear and plain" congressional intent to apply the ADEA to the Indian tribes. Finding no such intent in either the text of the ADEA or in its legislative history, the court concluded that Congress did not intend the ADEA to apply to the tribal employer.

The OSH Act, like the ADEA at issue in *Fond du Lac*, is a statute of general applicability that is silent on its applicability to Indian tribes, and thus is subject to the *Tuscarora* presumption of applicability unless an exception to the application of that presumption applies. *Donovan v. Coeur d'Alene Tribal Farm* (*Coeur d'Alene*), 751 F.2d 1113, 1115 (9th Cir. 1985).

The Ninth Circuit's application of the *Tuscarora* rule in *Coeur d'Alene* is in contradistinction to the Eighth Circuit's application of *Tuscarora* in *Fond du Lac*. Although the Ninth Circuit in *Coeur d'Alene* ultimately concluded that the OSH Act applied to the tribal commercial farm involved there, the court acknowledged at the outset that an Indian tribe "has the inherent sovereign right to regulate the health and safety of workers in tribal enterprises." *Id.* Nevertheless, the Ninth Circuit held that the tribe's "operation of a farm that sells produce on the open market and in interstate commerce is not an aspect of tribal self-government," so that the application of the OSH Act to the tribal farm did not touch on a tribe's "exclusive rights of self-governance in purely intramural matters," and thus the OSH Act was not excepted from the *Tuscarora*

rule. *Id.* at 1116.

The Ninth Circuit in *Coeur d'Alene* applied circuit precedent that described three exceptions to the *Tuscarora* rule, the first of which the court branded as "aspects of tribal self-government" exception. In the Ninth Circuit, the self-government exception to *Tuscarora* applies to a statute that "touches 'exclusive rights of self-governance in purely intramural matters.'" *Id.* (quoting *United States v. Farris*, 624 F.2d 890, 893 (9th Cir. 1980)). The Ninth Circuit stated that this exception was "designed to except purely intramural matters such as conditions of tribal membership, inheritance rules, and domestic relations." In holding that the OSH Act applied to the tribal commercial farm, the Ninth Circuit stated that the operation of the farm "free of federal health and safety regulations is 'neither profoundly intramural ... nor essential to self-government.'" *Id.*, quoting *Farris* at 893.

The Eighth Circuit would likely agree with the Ninth Circuit that Indian tribes have "the inherent sovereign right to regulate the health and safety of workers in tribal enterprises," *Coeur d'Alene*, 751 F.2d at 1115, but would likely disagree with the Ninth Circuit's conclusion that application of the OSH Act to a commercial tribal enterprise that operates on a reservation and employs only members of the tribe does not touch upon a tribe's "exclusive rights of self-government in purely intramural matters." *Id.* at 1116. Indeed, the Eighth Circuit in *Fond du Lac* cited *Coeur d'Alene* as being "contra" to its conclusion that the *Tuscarora* presumption did *not* operate to make the ADEA applicable to the tribal enterprise there "[b]ecause the tribe's specific right of self-government would be *affected*" thereby. *Fond du Lac*, 986 F.2d at 249 (emphasis added).

The self-government exception to the *Tuscarora* rule employed by the Ninth

Circuit in *Coeur d'Alene* is narrower than the Eighth Circuit's corresponding "sovereignty" or "self-government" exception applied in *Fond du Lac*, and therein lies a critical difference in how the Eighth and Ninth circuits apply the *Tuscarora* presumption with respect to the self-government exception. The analytical framework that the Eighth Circuit employed in *Fond du Lac* requires simply that a tribe's right of self-government be "affected" by federal regulation. *Fond du Lac*, 986 F.2d at 249. In contrast, the Ninth Circuit's "tribal self-government" exception applied in *Coeur d'Alene* excepts only "purely intramural matters such as conditions of tribal membership, inheritance rules, and domestic relations from the general rule" of *Tuscarora*. *Coeur d'Alene*, 751 F.2d at 1116; *accord, Smart v. State Farm Ins. Co.,* 868 F.2d 929, 935 (7th Cir. 1989) (stating that "[a] statute of general application will not be applied to an Indian Tribe when the statute threatens the Tribe's ability to govern its intramural affairs, but not simply whenever it merely affects self-governance as broadly conceived"); *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 178 (2d Cir. 1996) (stating that the "tribes' retained sovereignty reaches only that power 'needed to control ... internal relations[,] ... preserve their own unique customs and social order[, and] .... prescribe and enforce rules of conduct for [their] own members,'" quoting *Duro v. Reina*, 495 U.S. 676, 685–86 (1990)); *cf. San Manuel Indian Bingo & Casino v. N.L.R.B.*, 475 F.3d 1306, 1311-15 (D.C. Cir. 2007) (applying an analytical framework that differs from the frameworks employed in either *Coeur d'Alene* or in *Fond du Lac* for determining whether the *Tuscarora* presumption applies).

So, since the Eighth Circuit would likely agree with the Ninth Circuit that Indian tribes have "the inherent sovereign right to regulate the health and safety of workers in

tribal enterprises," *Coeur d'Alene*, 751 F.2d at 1115, the Eighth Circuit would apply its broad self-government exception to the *Tuscarora* presumption, and consequently likely conclude that the *Tuscarora* presumption does not apply because application of the OSH Act to the Respondent, like the application of the ADEA in *Fond du Lac*, would "dilute" that aspect of the Red Lake Band's sovereignty and would "affect" that "specific right of self-government." *Fond du Lac*, 986 F.2d at 249.

Upon concluding that *Tuscarora's* general rule of applicability does not apply, the Eighth Circuit would conclude that the OSH Act applied only upon finding "a clear and plain congressional intent" to make the OSH Act apply to the Indian tribes. *Id.* That inquiry requires "some affirmative evidence of congressional intent, either in the language of the statute or its legislative history." *Id.* 986 F.2d at 250, citing *United States v. Dion*, 476 U.S. 734, 739–40 (1986). Absent such affirmative evidence of congressional intent, the Eighth Circuit would determine that the OSH Act does not apply to the Respondent.

There is no such congressional intent expressed in text of the OSH Act, and no part of the OSH Act's legislative history has been identified that reflects a congressional intent that the OSH Act apply to the Indian tribes. The absence of affirmative evidence of a clear and plain congressional intent that the OSH Act apply to the Indian tribes would likely cause the Eighth Circuit to conclude that the Act does not apply to the Respondent's workplace. Therefore, in this case the Eighth Circuit would likely vacate the citations upon concluding, based on the principles employed in *Fond du Lac*, that the OSH Act does not apply to the cited work operations of the Respondent.

It is not necessary to develop a fuller evidentiary regarding the extent to which the

federal regulation of the conditions of health and safety at the Respondent's workplace would affect the Red Lake Band's right of self-government. *Cf. Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (noting that a court should act with caution in granting summary judgment and may deny summary judgment "where there is reason to believe that the better course would be to proceed to a full trial"). Although the Eighth Circuit's decision in *Fond du Lac* appears to be grounded in part on tribal culture and traditions respecting age, the dissenting judge noted that there was no evidentiary record before the court on the impact of the ADEA on tribal culture or traditions. *Id.* at 251 (Wollman, J., dissenting) (noting "there is no evidence that Indian tribes have any long-standing cultural practices that favor the employment of younger rather than older members of the tribe"). The decision in *Fond du Lac* thus strongly suggests that the Eighth Circuit would not undertake to assess the extent to which federal regulation of the conditions of workplace health and safety of a tribal employer would affect a tribe's right to self-government, but would rather conclude that any federal regulation that "affects" that area of tribal sovereignty would require affirmative evidence that Congress had a "clear and plain" intent to limit, modify, or eliminate the tribe's inherent sovereign right to regulate the health and safety of workers in tribal enterprises. While the factual record developed on the present motion is scant, it nonetheless compels the conclusion that the Respondent is entitled to judgment as a matter of law on the ground that the OSH Act is not applicable to the Respondent because the Act "affects" the Red Lake Band's right of self-governance with respect to conditions of workplace health and safety. On the record established on the Respondent's motion, therefore, there is no genuine dispute as to any material fact (or as to the inferences to be drawn therefrom), and the Respondent is

entitled to judgment as a matter of law.[6]

Impermissible Infringement on
Right to Exclude Non-Members from the Reservation

The Respondent's second independent argument in support of its motion is that application of the OSH Act to its workplace would impermissibly abrogate the Red Lake Band's inherent right to exclude non-members from the Red Lake Indian Reservation. (Resp't Mem. at 20-27).

The Red Lake Indian Reservation was established by a treaty with the United States made in 1863. The 1863 treaty contains a description of the lands that the tribe ceded to the United States. The geographic area of the Red Lake Indian Reservation became those lands that the Red Lake Band then owned and claimed that the Red Lake Band did *not* through that treaty "cede, sell and convey to the United States all their right, title and interest." *1863 Treaty with the Chippewa—Red Lake and Pembina Bands*, art. 2, 13 Stat. 667 (1863); *State of Minnesota v. Hitchcock*, 185 U.S. 373, 389 (1902) (noting that article 6 of the 1863 treaty refers to the lands that the tribe was *not* ceding to the United States in the treaty as "the reservation," and that the treaty's "effect was to leave the Indians in a distinct tract reserved for their occupation"); *United States v. White*, 508

[6] As discussed earlier, the Secretary may file a petition for review of the Commission's final order in this matter only in the Eighth Circuit. 29 U.S.C. § 660(b). If a court of appeals other than the Eighth Circuit had been the court in which it were highly probable that a petition for review would be filed, then the development of a fuller evidentiary record regarding the *extent* to which the OSH Act would affect the Red Lake Band's right of self-government, or affect its culture and traditions, may have been deemed necessary. (*See* cases from other circuits cited in this part of the Discussion). Given the limited evidentiary material that has been filed in connection with the Respondent's motion to dismiss, review by other courts of appeal might have counseled against granting summary judgment for the Respondent on the "self-government" exception to *Tuscarora* at this early stage of Commission proceedings.

F.2d 453, 456–57 (8th Cir. 1974) (noting that "[u]pon a review of the tribal history of the Red Lake Band of Chippewa Indians, it is clear that a tract of land was 'reserved' in a treaty for their occupation; that the occupied lands were thereafter regarded by the United States as constituting the Red Lake Reservation; and that the Red Lake bands were recognized as the sole owners by right of original Indian occupancy" [internal citations and footnotes omitted]).

No provisions of the 1863 treaty (or of an 1864 treaty that amended it [13 Stat. 689 (1864)]) state expressly that the Red Lake Band has the right to exclude non-members from the reservation.[7] Nevertheless, "a hallmark of Indian sovereignty is the power to exclude non-Indians from Indian lands." *Merrion v. Jicarilla Apache Tribe* (*Merrion*), 455 U.S. 130, 141 (1982). This power to exclude non-members from the reservation is an "inherent sovereign right" that is "independent" of any express treaty language that stipulates such a power to exclude. *Warm Springs Forest Prods. Indus.,* 935 F.2d at 186.

The Ninth Circuit in *Coeur d'Alene* rejected the tribal employer's argument that the tribe's inherent right to exclude non-members (including OSHA inspectors) from the "reservation is a 'fundamental aspect' of tribal sovereignty that cannot be infringed

[7] Had there been such an express treaty provision to exclude non-members, there is authority that holds that a statute in derogation of such a treaty right would not be deemed to abrogate the treaty provision absent clear and express congressional intent to do so. *Donovan v. Navajo Forest Prod. Indus.*, 692 F.2d 709, 712 (10th Cir. 1982); *contra Dep't of Labor v. OSHRC* (*Warm Springs Forest Prods. Indus*.)*,* 935 F.2d 182, 186-87 (9th Cir. 1991) (concluding that "the conflict between the Tribe's [treaty] right of general exclusion and the limited entry necessary to enforce" the OSH Act was not sufficient to bar application of the Act to the tribal employer, and that "[w]ere we to construe the Treaty right of exclusion broadly to bar application of the [OSH] Act, the enforcement of nearly all generally applicable federal laws would be nullified").

without a clear expression of congressional intent." *Id.* at 1117. The tribal employer in *Coeur d'Alene* argued that the Supreme Court's decision in *Merrion* had *sub silentio* overruled *Tuscarora* "at least to the extent that *Tuscarora* allows Congress to silently or implicitly infringe sovereign tribal rights to exclude non-Indians from tribal lands." *Id.* In rejecting that argument, the Ninth Circuit distinguished *Merrion* on its facts. *Id.*

In contrast, the Tenth Circuit in *Donovan v. Navajo Forest Prod. Indus.* (*Navajo Forest*), 692 F.2d 709, 712 (10th Cir. 1982), reached a contrary conclusion regarding the effect of *Merrion* on *Tuscarora*'s general rule. In part II of the *Navajo Forest* opinion, in what appears to be an alternative holding, the court ruled that "*Merrion*, in our view, limits or, by implication, overrules *Tuscarora* …, at least to the extent of the broad language relied upon by the Secretary contained in *Tuscarora*." *Navajo Forest*, 692 F.2d at 713. Part II of opinion then concluded that absent some expression of congressional intent, a statute of general application such as the OSH Act could not be deemed to abrogate an Indian tribe's inherent right to exclude non-members from the reservation:

> The United States retains legislative plenary power to divest Indian tribes of any attributes of sovereignty. *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903). Absent some expression of such legislative intent, however, 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 (in this case "employers") unless Indians are expressly excepted therefrom. We believe that *Merrion* … settled that issue in favor of the tribes.

692 F.2d at 714.

The Eighth Circuit in *Fond du Lac* cited *Navajo Forest* with approval, although

that approval appears to have been related to part I of that opinion (in which the Tenth Circuit ruled that the OSH Act was not applicable because its application would be in derogation of an express treaty provision limiting the right of entry to the reservation). *Fond du Lac*, 986 F.2d at 249. The Eighth Circuit in *Fond du Lac* appeared not to comment on part II of the Tenth Circuit's opinion in *Navajo Forest*. However, the court in *Fond du Lac* endorsed the proposition that in determining whether an exception to the *Tuscarora* rule applies, a tribe's inherent sovereign right should be regarded no differently than if that identical right had been expressly stipulated in a treaty. *Fond du Lac*, 986 F.2d at 249, n.4. Part II of the Tenth Circuit's opinion in *Navajo Forest* employs the same logic.

The Eighth Circuit's jurisprudence on the application of the *Tuscarora* rule thus appears very similar to the jurisprudence of the Tenth Circuit. That similarity suggests strongly that the Eighth Circuit is more likely than not to follow part II of the Tenth Circuit's opinion in *Navajo Forest*. If the Eighth Circuit were to do so, then it would conclude that the OSH Act does not apply to the Respondent on the ground that the Act impermissibly infringes on the Red Lake Band's inherent right to exclude non-members from its reservation.

For these reasons, there is no genuine dispute as to any material fact, and the Respondent is entitled to judgment as a matter of law on the ground that application of the OSH Act to the Respondent would impermissibly infringe on the Red Lake Band's inherent right to exclude non-members from its reservation.

ORDER

For the reasons stated above, the citations as re-alleged in the Secretary's complaint fail to state claims upon which relief can be granted, and the Respondent is entitled to judgment as a matter of law. Fed. R. Civ. P. 56.

The citations and proposed penalties arising out of OSHA inspection number 1303745 are vacated, and the Secretary's complaint, which re-alleges those citations and proposed penalties, is dismissed.

/s/_____
WILLIAM S. COLEMAN
Administrative Law Judge

DATED: August 6, 2019