No. 19-3373

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

SECRETARY OF LABOR,
U.S. DEPARTMENT OF LABOR

Petitioner,

v.

RED LAKE NATION FISHERIES, INC.

Respondent.

On Petition for Review of Final Order of the Occupational Safety and Health Review Commission, OSCHRC No. 18-0934

BRIEF FOR THE SECRETARY OF LABOR

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SUMMARY OF THE CASE

This is an enforcement action under section 9 of the Occupational Safety and Health Act of 1970 ("OSH Act" or "the Act"), 29 U.S.C. § 658. On November 6, 2017, a fishing boat owned by Red Lake Nation Fisheries, Inc. ("the Fishery"), capsized in Lower Red Lake, Minnesota, and two employees on the boat drowned. The Fishery is a commercial entity established and operated by the Red Lake Indian Nation in Minnesota.

OSHA conducted an investigation and issued two citations and a notification of proposed penalties to the Fishery. It contested both citations and the proposed penalties and moved to dismiss on the grounds that the OSH Act does not apply to the Fishery because of its tribal status. An ALJ of the Occupational Safety and Health Commission agreed and dismissed the case. After the full Commission declined the Secretary's petition for discretionary review, the ALJ's decision became a final order and the Secretary filed a petition for review by this Court.

Oral argument is requested because the case involves an important issue of OSH Act coverage. Fifteen minutes should be allotted to each party.

STATEMENT OF JURISDICTION

1. *Agency jurisdiction.* The Occupational Safety and Health Review Commission ("the Commission") had jurisdiction over this enforcement proceeding pursuant to section 10(c) of the Occupational and Safety Health of 1970 ("OSH Act"). 29 U.S.C. § 659(c).

2. *Appellate jurisdiction.* This Court has jurisdiction pursuant to section 11(b) of the OSH Act, 29 U.S.C. § 660(b). In accordance with section 12(j) of the OSH Act, 29 U.S.C. § 661(j), an administrative law judge ("ALJ") of the Commission issued a decision and order which disposed of all the parties' claims on July 23, 2019, and the Commission docketed the ALJ's decision on August 7, 2019. The Secretary filed a petition for discretionary review. The Commission did not direct review, and the ALJ decision thus became a final order of the Commission on September 6, 2019,

by operation of law. 29 U.S.C. § 661(j). The Secretary filed a timely petition for review in this Court on November 4, 2019.

Oral argument is requested.

STATEMENT OF THE ISSUE

Whether Red Lake Nation Fisheries, Inc., a commercial enterprise owned and operated by the Red Lake Band of Chippewa Indians on the Red Lake Indian Reservation, is an "employer" within the meaning of the OSH Act, *see* 29 U.S.C. §§ 652(5), 654(a).

Apposite cases:

Federal Power Commission v. Tuscarora Indian Nation, 362 U.S. 99 (1960) (*Tuscarora*); *Menominee Tribal Enters. v. Solis*, 601 F.3d 669 (7th Cir. 2010) (*Menominee*); *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174 (2d Cir. 1996) (*Mashantucket*) ; *E.E.O.C. v. Fond du Lac Heavy Equip. & Constr. Co., Inc.*, 986 F.2d 246 (8th Cir. 1993) (*Fond du Lac*); and *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985) (*Coeur d'Alene*).

Apposite statutory provisions:

Sections 2(b), 3(4), 3(5), 4(a), and 5 of the OSH Act, 29 U.S.C. §§ 651(b), 652(4), 652(5), 653(a), and 654(a).

STATEMENT OF THE CASE

I. Nature of the Case and Procedural History

This is an enforcement action under section 9 of the Occupational Safety and Health Act of 1970 ("OSH Act" or "the Act"), 29 U.S.C. § 658. On November 6, 2017, a commercial fishing boat owned by Red Lake Nation Fisheries, Inc. ("the Fishery") capsized in Lower Red Lake, and two employees on the boat drowned. A. 193.[1] Their bodies were not located until March 21-22, 2018. The Fishery is a subsidiary of a corporation owned and operated by the Red Lake Band of Chippewa Indians on the Red Lake Indian Reservation in Minnesota. A. 88. The Eau Claire Area Office of the Occupational Safety and Health Administration ("OSHA") received a report from a medical examiner's office, and on March 23, 2018, OSHA officials entered the reservation to conduct an inspection under the Act. A. 193.

[1] References are to the appendix (A.).

On April 26, 2018, OSHA issued to the Fishery a citation alleging a serious violation of 29 C.F.R. § 1910.132(a) in that it failed to require the use of personal flotation devices, and a citation alleging an other-than-serious violation of 29 C.F.R. § 1904.39(a)(1) in that it failed to report the deaths of the two employees within eight hours. OSHA proposed a total penalty of $15,521. On May 11, 2019, the Fishery contested both citations and the proposed penalties. A. 193-94. The Secretary filed his complaint with the Occupational Safety and Health Review Commission ("Commission") on July 18, 2019. On August 8, 2019, the Fishery filed its answer and a motion to dismiss under Fed. R. Civ. P. 12(b)(1), arguing that OSHA lacked "jurisdiction" to conduct its inspection and issue citations to the Fishery. A.194. On July 23, 2019, an ALJ granted the Fishery's motion to dismiss, which he characterized as a motion for summary judgment, on the grounds that the OSH Act does not apply to the Fishery.

The Secretary sought discretionary Commission review of the ALJ's decision. A. 213-30. The Commission did not direct review,

and the ALJ decision became a final order of the Commission. 29 U.S.C. § 661(j). The Secretary then filed a petition for review.

II. Statement of Facts

A. Statutory Background

Congress enacted the OSH Act 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). The OSH Act authorizes the Secretary to establish occupational safety and health standards and requires employers to comply with them. *Id.* §§ 651(b)(3), 654(a)(2), 655. An "employer" is defined as "a person engaged in a business affecting commerce who has employees, but does not include the United States (not including the United States Postal Service) or any State or political subdivision of a State." *Id.* § 652(5).

The Act further defines several of the terms used in the definition of an "employer." A "person" is "one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any organized group of persons." 29 U.S.C.

§ 652(4). A "State" includes "a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, and the Trust Territory of the Pacific Islands." *Id.* § 652(7). The term "commerce" is defined as "trade, traffic, commerce, transportation, or communication among the several States, or between a State and any place outside thereof, or within the District of Columbia, or a possession of the United States…, or between points in the same State but through a point outside thereof." *Id.* § 652(3). And an "employee" is "an employee of an employer who is employed in a business of his employer which affects commerce." *Id.* § 652(6).

Employers who violate OSH Act requirements are subject to citation and penalties. 29 U.S.C. § 659. Employers may contest citations and penalties before the Commission. *Id.* §§ 659, 661. The Secretary and any person aggrieved by a decision of the Commission may petition for review in the appropriate court of appeals. *Id.* § 660.

Shortly after the enactment of the OSH Act, the Department of Labor issued a statement of policy "regarding the coverage of employers" under the Act. 37 Fed. Reg. 929, 929 (Jan. 21, 1972).

The statement observed that the OSH Act "contains no special provisions with respect to different treatment in the case of Indians." *Id.* at 930. Accordingly, the Department concluded that, as a general matter and "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." *Id.*; *see* 29 C.F.R. § 1975.4(b)(3).

B. The Fishery

The Fishery is a commercial fishing enterprise that operates on the Red Lake Indian Reservation in Minnesota. It harvests wild-caught fish from Red Lake and sells the fish and various fish-related products to the general public. A. 189-90; A. 89; A. 126-31. The Fishery sells its products to the public via its website and a toll-free number, as well as at the Fishery's plant on the Red Lake Indian Reservation. A. 192; A. 129. The Fishery also distributes its products to retail outlets outside of the reservation for sale to the public, including in stores in Bemidji, Prior Lake, and Ponemah, Minnesota.

A. 192; A. 126-27. According to its website, the Fishery is FDA-approved, accepts all major credit cards, and offers overnight shipping via FedEx. A. 132-33. The website states that the Fishery sells its fish "to America," including the military, and that it competes with other national fisheries. A. 134-37.

The Fishery is a subsidiary of Red Lake, Inc., a corporation formed under tribal law by the governing body of the Red Lake Band, the Tribal Council. A. 77-86; A. 92; A. 190-91. Shares of Red Lake, Inc., are owned by the Tribal Council for the benefit of the Tribe and its members. A. 191; A. 92. The Fishery's employees are all members of the Tribe. A. 191; A. 89.

C. The ALJ's Decision

The ALJ granted the Fishery's motion to dismiss, which he characterized as a motion for summary judgment because of its reliance upon documents outside the pleadings. The ALJ rejected the Fishery's contention that the statutory exemption for State employers, *see* 29 U.S.C. § 652(5) and (7), also applied to tribal employers. A. 194-95. He concluded, however, that the OSH Act should not be read

to apply to the Fishery under the reasoning of this Court's decision in *EEOC v. Fond du Lac Heavy Equipment and Construction Co., Inc.*, 986 F.2d 246 (8th Cir. 1993) (*Fond du Lac*).

Fond du Lac involved a discrimination claim under the Age Discrimination in Employment Act (ADEA) brought by a tribal applicant for employment against a tribal construction company. Like the OSH Act, the ADEA does not contain any express provision exempting from its coverage Indian tribes or tribal commercial enterprises. To determine whether the ADEA applied, this Court began from what it described as the "general rule," 986 F.2d at 248, of *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99 (1960), in which the Supreme Court had 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," *id.* at 120. This Court viewed that general rule as subject to certain exceptions, including in "areas traditionally left to tribal self-government." *Fond du Lac*, 986 F.2d at 248 (citation and internal quotation marks omitted). And the Court found that the ADEA claim at issue in *Fond du Lac* involved

intramural considerations of a tribal member's age by a tribal employer, such that subjecting the tribal employer to the ADEA would interfere with the tribe's authority to govern itself. *Id.* at 249.

Here, the ALJ concluded that *Fond du Lac* forecloses application of the OSH Act to the Fishery for two reasons. First, the ALJ understood *Fond du Lac* to establish that what the ALJ termed "the *Tuscarora* rule" was subject to an exception for tribal self-government that goes beyond merely tribal regulation of intramural matters and that extends to the "sovereign right" to regulate the health and safety of workers in tribal enterprises. A. 204; A. 205. Applying this broad view of the scope of the self-government exception, the ALJ predicted that this Court would likely conclude that application of the OSH Act to the Fishery would impede that specific right of self-government. A. 206 (citing *Fond du Lac*, 986 F.2d at 249). Finding no clear and plain congressional intent to make the OSH Act apply to Indians, the ALJ concluded that this Court would hold that the OSH Act does not apply to the Fishery. A. 206.

As a second and independent ground for his ruling, the ALJ concluded that this Court would rely upon *Fond du Lac* to hold that application of the OSH Act to the Fishery would interfere with the Tribe's inherent authority to exclude non-members from the Tribe's reservation. A. 209-211. The judge reasoned that *Fond du Lac* contains a citation to *Donovan v. Navajo Forest Prod. Indus.*, 692 F.2d 709, 712 (10th Cir. 1980) (*NFPI*), in which the Tenth Circuit held that enforcing the OSH Act against a Navajo tribal entity would abrogate a treaty provision limiting the entry of federal government officials. Although there is no counterpart provision in the treaties forming the Red Lake Indian Reservation, the ALJ pointed to a separate statement in *Fond du Lac* endorsing the proposition that a tribe's inherent sovereign rights should be treated no differently than identical treaty rights. For these reasons, the ALJ found that this Court would more likely than not follow the lead of the Tenth Circuit and conclude that enforcement of the OSH Act against the Fishery impermissibly infringes on the tribe's inherent right to exclude outsiders. A. 211.

SUMMARY OF ARGUMENT

The OSH Act applies to the Fishery. The Fishery is an "employer" within the meaning of the Act, and the Act does not contain any express exemption for tribal employers. Although it may be appropriate to construe a generally applicable federal statute that does not include an express exemption for Indian tribes or their commercial enterprises to nonetheless be inapplicable to a particular tribe or a tribal enterprise in some circumstances, the weight of authority makes clear that no such exception applies in this case. In particular, although some courts of appeals have declined to apply general federal statutes to tribal employers when doing so would encroach upon exclusive rights of tribal self-government, that exception would not encompass tribal activities of a commercial nature, such as the Fishery's activities here.

The ALJ erred in concluding that this Court's prior decision in *Fond du Lac* supports or compels interpreting the OSH Act not to apply to the Fishery. *Fond du Lac* involved what this Court perceived as a purely intramural matter concerning the consideration of a tribe

member's age by a tribal enterprise, and this Court emphasized that its ruling was limited to the narrow facts of the case. But the application of OSHA standards to working conditions in the commercial Fishery is not an intramural matter of tribal self-government, and the Fishery has not identified any tribal tradition or custom comparable to the one this Court relied on in *Fond du Lac*. More broadly, application of the OSH Act to the Fishery does not interfere with the Tribe's sovereign authority to establish and operate commercial enterprises for the benefit of the Tribe and its members. But if the Tribe chooses to engage in commerce, it does so subject to Congress's authority to regulate commerce—including specifically Congress's regulation of workplace health and safety in the OSH Act.

The ALJ also erred in relying on *Fond du Lac* to conclude that application of the OSH Act to the Fishery would impermissibly infringe on the tribe's inherent right to exclude non-members from the reservation. The question of the tribe's inherent right to exclude federal inspectors was not at issue in *Fond du Lac*. The Tribe contends that its inherent authority to exclude non-members extends

to excluding OSHA inspectors. With the exception of the Tenth Circuit, however, all the courts of appeals to have considered the matter have rejected such sweeping claims to immunity from OSHA regulation for tribal employers. The Tenth Circuit's outlier decision rested primarily on specific treaty language regarding a different tribe's right to limit the entry of federal officials—language that is notably absent from the treaties creating the Red Lake Indian Reservation. To the extent the Tenth Circuit recognized an inherent tribal right to exclude OSHA inspectors, its decision was mistaken.

ARGUMENT

I. Standard of Review

The applicability of the OSH Act to the Fishery is a question of law on which this Court's review is *de novo*. *United States v. Behrens*, 644 F.3d 754, 755 (8th Cir. 2011).

II. The Fishery is an "Employer" Within the Meaning of the OSH Act

A. The Fishery Satisfies the Statutory Definition of an "Employer"

In ascertaining the meaning of a federal statute, this Court "begin[s] [its] inquiry into the intended meaning of the statute with the language of the statute itself." *Haug v. Bank of America, N.A.*, 317 F.3d 832, 835 (8th Cir. 2003). Here, the plain language of the OSH Act encompasses the Fishery.

As explained above, the OSH Act requires "[e]ach employer" to comply with the occupational safety and health standards established under the Act. 29 U.S.C. § 654(a). The Act defines an "employer" as any "person engaged in a business affecting commerce who has employees," except that the term does not include "the United States … or any State or political subdivision of a State." *Id.* § 652(5). And the term "person," in turn, includes an "association, corporation, … or any organized group of persons." *Id.* § 652(4).

The Fishery is a corporation organized under tribal law. A. 88. Accordingly, the Fishery is a "person" as defined in the OSH Act. It

is also an "employer" as defined in the OSH Act because it is a person engaged in a business affecting commerce—specifically, the interstate sale of commercially harvested fish, including through the Fishery's website and toll-free number for delivery throughout the United States—and it has one or more employees. A. 127-36; A. 89; *cf.* 29 U.S.C. § 652(3) and (6) (definitions of "commerce" and "employee").

The OSH Act exempts from the term "employer" the United States itself, as well as "any State or political subdivision of a State." 29 U.S.C. § 652(5). As the ALJ correctly recognized, however, *see* A. 194-95, that exception does not apply to Indian tribes or tribal enterprises. The Act defines the term "State" to include the fifty States, the District of Columbia, and certain U.S. territories. 29 U.S.C. § 652(7). Thus, corporate entities established and operated by a State or local government are generally "not within the definition of employer, and, consequently, not subject to the Act as an employer," 29 C.F.R. § 1975.5(b), although the Act contemplates that States may adopt health and safety standards under a plan approved

by OSHA that covers the employees of such entities, *see* 29 U.S.C. § 667(6).

There are no comparable exceptions in the text of the OSH Act for Indian tribes or tribal enterprises. And the ordinary inference to be drawn when Congress includes certain express exceptions in a statute "is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth." *United States v. Johnson*, 529 U.S. 53, 58 (2000); *see also Hillman v. Maretta*, 569 U.S. 483, 496 (2013) (explaining that, "'[w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent'") (quoting *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980)).

Application of the OSH Act to the Fishery is also supported by Congress's statement of the purposes of the OSH Act set forth in the Act itself. Congress enacted the OSH Act for the "fundamental purpose" of "'assur[ing] so far as possible every working man and woman in the Nation safe and healthful working conditions.'" *Chao*

v. Mallard Bay Drilling, Inc., 534 U.S. 235, 245 n.9 (2002) (quoting 29 U.S.C. § 651(b)). To leave the employees of tribal commercial entities bereft of the protections of federal health and safety standards would be contrary to the Act's statement of purpose.

B. There Is No Implicit Exception from the OSH Act for a Commercial Enterprise Like the Fishery

1. In *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99 (1960), the Supreme Court observed that "it is now well settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests." *Id.* at 116; *see also id.* at 120 (stating that "general Acts of Congress apply to Indians as well as to all others in the absence of a clear expression to the contrary"). The Department of Labor relied on those observations to conclude in 1972 that Indian tribes generally should be "treated as any other person" under the OSH Act, "unless Congress expressly provided for special treatment." 37 Fed. Reg. 929, 930 (Jan. 21, 1972) (citing *Tuscarora*, 362 U.S. at 115-18). The Department has since then followed a general policy of treating Indian commercial

entities as subject to the OSH Act, "provided they otherwise come within the definition of the term 'employer.'" *Id.*; *see* 29 C.F.R. § 1975.4(b)(3).

2. The courts of appeals that have addressed the application of the OSH Act to Indian commercial enterprises have generally relied on that language in *Tuscarora*, while recognizing that the Act should not be read to apply to particular tribal entities in certain circumstances. The leading case is *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985), in which the Ninth Circuit held that the OSH Act applied to a commercial farm owned by a tribe and employing primarily (though not exclusively) members of a tribe, *see id.* at 1116. The Ninth Circuit adopted the Supreme Court's statement in *Tuscarora* about the applicability to Indian tribes of federal laws that contain no express exception for tribes as a presumptive "general rule." *Ibid.* But the court recognized three exceptions to that rule, drawn from prior circuit precedent:

> 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.

Ibid. (brackets and internal quotation marks omitted).

The court of appeals found none of those exceptions applicable in *Coeur d'Alene* itself. The court noted that the tribal enterprise sold produce on the open market and was "in virtually every respect a normal commercial farming enterprise." 751 F.2d at 1116. The court emphasized that the farm's commercial aspect distinguished it from tribal entities that undertake quintessentially intramural tribal activities, which Congress should be presumed not to have intended to regulate. *Ibid.* The court also concluded that the OSH Act itself does not contain any indication that Congress intended to exclude commercial tribal enterprises from the Act's scope. *See id.* at 1118. In a later case, the Ninth Circuit followed a similar course in concluding that the OSH Act applied to a commercial sawmill owned and operated by an Indian tribe on the tribe's reservation. *See Dep't*

of Labor v. *OSHRC* (*Warm Springs Forest Prods. Indus.*), 935 F.2d 182, 183 (9th Cir. 1991).

The Ninth Circuit has also applied the *Coeur d'Alene* framework to a variety of other federal statutes. *See, e.g., Pauma v. NLRB*, 888 F.3d 1066, 1076 (9th Cir. 2018) (National Labor Relations Act), *cert. denied*, 139 S. Ct. 2614 (2019); *CFPB v. Great Plains Lending, LLC*, 846 F.3d 1049, 1053-54 (9th Cir. 2017) (Consumer Financial Protection Act); *Confederated Tribes & Bands of Yakama Indian Nation v. Alcohol & Tobacco Tax & Trade Bureau*, 843 F.3d 810, 814 (9th Cir. 2016) (Anti-Injunction Act); *Snyder v. Navajo Nation*, 382 F.3d 892, 895 (9th Cir. 2004) (Fair Labor Standards Act); *NLRB v. Chapa de Indian Health Program, Inc.*, 316 F.3d 995. 998-99 (9th Cir. 2003) (National Labor Relations Act); *EEOC v. Karuk Tribe Housing Auth.*, 260 F.3d 1071, 1078-80 (9th Cir. 2001) (Age Discrimination in Employment Act).

3. The Second and Seventh Circuits, as well as the Commission, have followed similar approaches in determining whether the OSH Act applies to particular tribal enterprises.

In *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174 (2d Cir. 1996), the Second Circuit adopted the *Coeur d'Alene* framework as "the appropriate test to determine whether a statute, silent as to Indians, applies to tribes," and the court held the OSH Act applicable to a construction firm owned and operated by a tribe, with Indian and non-Indian employees, that was engaged in construction exclusively on the tribe's reservation. *Id.* at 175, 179-82.

In *Menominee Tribal Enterprises v. Solis*, 601 F.3d 669 (7th Cir. 2010), the Seventh Circuit held the OSH Act applicable to a commercial sawmill owned by a tribe. The court of appeals began with a presumption that the OSH Act applies to tribal enterprises, while recognizing three exceptions that are similar to the three exceptions recognized in *Coeur d'Alene*. *See id.* at 670-71 (stating that generally applicable federal statutes apply to tribal entities unless application of the statute (1) "would interfere with tribal governance," (2) "would clash with rights granted Indians by other statutes or by treaties with Indian tribes," or (3) would be inconsistent with "persuasive evidence that Congress did not intend … that the statute

would apply to Indians"); *cf. Reich v. Great Lakes Indian Fish & Wildlife Com'n*, 4 F.3d 490, 495-96 (7th Cir. 1993) (*Great Lakes*) (finding the Fair Labor Standards Act inapplicable to game warden police employed by Indian tribes because the police were "exercising governmental functions"); *Smart v. State Farm Ins. Co.*, 868 F.2d 929, 932-933 (7th Cir. 1989) (finding the Employment Retirement Income Security Act (ERISA) applicable to tribal health center), *superseded by statute*, Pub. L. No. 109-280, § 906(a)(2)(A), 120 Stat. 780, 1051 (2006) (amending ERISA to address tribal entities expressly).

The Sixth and Eleventh Circuits have also applied the *Coeur d'Alene* framework in concluding that other federal statutes are applicable to particular commercial tribal enterprises. *See NLRB. v. Little River Band of Ottawa Indians Tribal Government*, 788 F.3d 537, 547-48 (6th Cir. 2015) (National Labor Relations Act);[2] *Florida*

[2] In *NLRB v. Soaring Eagle Casino & Resort*, 791 F.3d 648 (6th Cir. 2015), a later panel of the Sixth Circuit follow *Little River Band* as the law of the circuit but criticized "the *Coeur d'Alene* framework." *Id.* at 675; *see id.* at 670-75. The *Soaring Eagle* panel would have instead looked to the Supreme Court's decision in *Montana v. United States*, 450 U.S. 544 (1981), to resolve whether a generally applicable federal

Paraplegic, Ass'n, Inc. v. Miccosukee Tribe of Indians of Fla., 166 F.3d 1126, 1129 (11th Cir. 1999) (Americans with Disabilities Act).

Finally, the OSHRC has followed the *Coeur d'Alene* framework to find the OSH Act applicable to a tribal commercial enterprise (specifically, a casino). *Turning Stone Casino Resort*, 21 BNA OSHC 1059, 1061-1062 (No. 04-1000, 2005) (*Turning Stone*).

4. Under the *Coeur d'Alene* framework that has been applied by the courts of appeals in OSH Act cases, no sound basis exists to exempt the Fishery from the scope of the Act. The Fishery operates as a normal commercial entity in the sale of fish products on the open market. The Fishery employs only members of the Tribe. A. 89. But it sells its products to the general public in interstate commerce, and it does not materially differ from the tribal entities that have been held to be subject to the OSH Act by the courts of appeals and the

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statute applies to a tribal enterprise. *See Soaring Eagle*, 791 F.3d at 664-67. *Montana*, however, addressed the scope of an Indian tribe's authority to regulate non-members' activities on tribal lands—not the presumptive reach of *Congress's* regulation of interstate commerce, including commerce by Indian commercial enterprises.

Commission under the *Coeur d'Alene* framework in prior cases. The Fishery also has not identified any treaty right that would be infringed by the application of the OSH Act under these circumstances. Consistent with the weight of authority described above, this Court should conclude that the Fishery is an "employer" subject to federal regulation under the OSH Act.

III. This Court's Decision in *Fond du Lac* Does Not Support Exempting the Fishery from Coverage under the Act

The ALJ held that this Court's decision in *Fond du Lac* is dispositive on the issue of the OSH Act's coverage of the Fishery, and rules out such coverage on two independent grounds. First, according to the ALJ, *Fond du Lac* recognized Indian tribes' inherent sovereign right to regulate the health and safety of the workers in tribal enterprises, and concluded that application of the OSH Act would impermissibly infringe on the exercise of that authority. A. 201-206. Second, the ALJ predicted that this Court would adopt the Tenth Circuit's reasoning in *Donovan v. Navajo Forrest Prod. Indus*., 692 F.2d 709 (10th Cir. 1982) *(NFPI*), and rule that the entry of OSHA

inspectors onto the reservation would impermissibly infringe upon the Tribe's sovereign right to exclude non-members. A. 207-211.

Neither conclusion is persuasive. As demonstrated below, the ALJ's view of a self-government exception—*i.e.*, the scope of tribal activities that both qualify as governmental and are presumptively beyond the scope of generally applicable federal law, absent clear evidence that Congress meant to regulate the activity—is unduly broad and would swallow what this Court has called "the general rule in *Tuscarora*." *Fond du Lac*, 986 F.2d at 248. Nothing in *Fond du Lac* supports that approach. In particular, *Fond du Lac* does not support the ALJ's view that a federal statute "affecting" workplace safety and health infringes upon tribal self-government in the sense relevant to determining whether a particular tribal undertaking is exempt from a federal statute. Nor does *Fond du Lac* suggest that the Tribe has an inherent right to exclude OSHA inspectors.

A. Applying the OSH Act to the Fishery Would Not Interfere With Tribal Self-Government

1. Any tribal self-government exception does not apply to commercial activities

Although it may be appropriate to read some generally applicable federal statutes not to apply to certain activities of an Indian tribe when doing so would interfere with the tribe's self-government, any such exception does not extend to *commercial* activities. Otherwise, an Indian tribe could always assert that federal regulation is inconsistent with the tribe's sovereign authority to set its own regulatory standards for commercial enterprises. In *Coeur d'Alene*, the Ninth Circuit persuasively explained why this theory must be rejected:

> The Farm's argument proves far too much. To accept it would bring within the embrace of "tribal self-government" all tribal business and commercial activity. Our decisions do not support an interpretation of such breadth. For example, if the right to conduct commercial enterprises free of federal regulation is an aspect of tribal self-government, so too, it would seem, is the right to run a tribal enterprise free of the potentially ruinous burden of federal taxes. Yet our cases make clear that federal taxes apply to reservation activities even without a "clear" expression of congressional intent. *See, e.g., Confederated Tribes of Warm Springs Reservation of*

> *Oregon v. Kurtz*, 691 F.2d 878 (9th Cir.1982), *cert. denied*, 460 U.S. 1040 (1983).

751 F.2d at 1116.

The Second Circuit echoed these points in *Mashantucket*. The court recognized there that, although tribes have a right to regulate conduct affecting tribal "political integrity, economic security, or health and welfare," it does not follow that a federal statute that touches on those subjects infringes upon tribal sovereignty in the requisite sense. 95 F.3d at 178-79. "This is too grandiose a notion of tribal sovereignty," the court explained, for tribal sovereignty "is dependent on and subordinate to the federal government." *Id.* at 178 (citing *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 154 (1980)). While a tribe may rely on its inherent authority to adopt regulations governing its commercial enterprises, this does not mean that the tribe's broad sovereign power "essentially preempts the application of a federal regulatory scheme which is silent on its application to Indians." *Ibid.*

Courts have identified certain kinds of self-government activities by a tribe that would justify reading a federal statute not to apply, including issues of tribal membership *Roff v. Burney*, 168 U.S. 218 (1897)), inheritance rules (*Jones v. Meehan*, 175 U.S. 1 (1899)), and domestic relations (*United States v. Quiver*, 241 U.S. 602 (1916)). See *Florida Paraplegic*, 166 F.3d at 1129; *Mashantucket*, 95 F.3d at 179; *Coeur d'Alene*, 751 F.2d at 1116. These are matters of personal status in which rights and obligations are based on being a tribal member, or on being an heir, spouse, or child of a tribal member. These issues thus implicate a tribe's ability to "maintain traditional customs and practices." *San Manuel Indian Bingo and Casino v. NLRB*, 475 F.3d 1306, 1314 (D.C. Cir. 2007) (finding the NLRA applicable to a tribal casino without relying on *Coeur d'Alene*).

Courts have also concluded that an implicit self-government exception also could also include other governmental activities, such as the work of tribal police (*Snyder*, 382 F.3d at 895), and tribal game wardens (*Great Lakes*, 4 F.3d at 495), as well as tribal member employees of a housing authority that functions as an arm of the tribe

in a governmental capacity (*Karuk Tribe Housing Auth.*, 260 F.3d at 1080). *See Little River Band*, 788 F.3d at 552; *Menominee*, 601 F.3d at 671; *Florida Paraplegic*, 166 F.3d at 1129; *Mashantucket*, 95 F.3d at 180; *cf. San Manuel*, 475 F.3d at 1313 (general federal law will not apply to "the traditional acts governments perform").

However, the weight of authority in the courts of appeals demonstrates that any implicit exception from generally applicable federal statutes in cases in which application of the statute would infringe upon tribal self-government does not encompass *commercial* activities by tribal enterprises. *See Pauma*, 888 F.3d at 1076-1077 (NLRA applies to tribal casino because it is a business entity that happens to be operated by a tribe); *Great Plains*, 846 F.3d at 1055 (Consumer Financial Protection Act applies to tribal lending entities "engaged in the business activity of small-dollar lending over the Internet, reaching customers who are not members of the Tribes"); *Little River Band*, 788 F.3d at 547-548 (NLRA applies to a tribal casino because of its commercial activities); *Menominee*, 601 F.3d at 671 (OSH Act applies to a tribal sawmill because it "is just a sawmill,

a commercial enterprise"); *Florida Paraplegic*, 166 F.3d at 1129 (determining that ADEA public accommodation provision applies to tribal restaurant and gaming facility, a commercial enterprise, and noting agreement with majority of circuits that tribal business enterprises acting in interstate commerce do not fall under "self-governance" exception); *cf. San Manuel*, 475 F.3d at 444 (NLRA applies to tribal casino because it "is virtually identical to scores of purely commercial casinos across the country").

The Fishery is no different. It is a commercial business that sells food—fish, in particular—to the public nationwide via its website and toll-free number and at several stores in Minnesota, including off-reservation retail locations. A. 126-37. Notwithstanding the Tribe's control over the Fishery and the tribal economic development goals that the Fishery serves, at bottom the Fishery is a business that competes with non-Indian enterprises and thereby affects interstate commerce. A. 192; A. 126-137. The Fishery is thus materially indistinguishable from the commercial farm in *Coeur d'Alene*, which also sold food—grain and lentils—to the

public on the open market and in interstate commerce. 751 F.2d at 1114, 1116. Because the Fishery's fish-catching and distribution operations are commercial in nature and not materially different from non-tribal commercial fishing and distribution operations, the Secretary's enforcement of OSHA standards for the protection of the Fishery's workers would not infringe upon the Tribe's authority to govern its internal affairs.

The fact that all of the Fishery's employees are members of the tribe (A. 191) does not detract from its commercial character and thus does not furnish a basis for an implicit exemption from the OSH Act. *Menominee*, 601 F.3d at 673-74 (despite lack of non-Indian employees, "it is equally the case that the sawmill is not part of the Menominee's governance structure; it is just a sawmill"). Similarly, the tribe's harvesting of fish within the confines of its own reservation (A. 191) is not dispositive. *Mashantucket*, 95 F.3d at 180 (rejecting tribe's argument that "its endeavors [are] intramural because it works exclusively on its own reservation"). Because the Fishery is

commercial in nature, an exception for governmental activities does not apply.

More broadly, applying the OSH Act to the Fishery is consistent with an appropriate respect for tribal sovereignty. While the Tribe unquestionably has inherent sovereignty to establish and operate the Fishery (and other commercial enterprises formed for the benefit of the Tribe and its members), it does so subject to Congress's exercise of its paramount power to regulate the commerce in which the Tribe has chosen to participate. The Supreme Court has made the very same point with respect to a commercial undertaking by a State. *See California v. Taylor*, 353 U.S. 553, 568 (1957) (explaining that, in choosing in its "sovereign capacity" to operate an interstate railroad carrier, California "subject[ed] itself to the commerce power so that Congress can make it conform to federal safety requirements").

2. This Court's decision in Fond du Lac *did not signal a sharp departure from the consensus view of any self-governance exception.*

The ALJ erred in concluding that this Court's decision in *Fond du Lac* requires a contrary result. A. 201-06. *Fond du Lac* involved a

claim under the Age Discrimination in Employment Act (ADEA) by a tribal member against a tribal construction business. Although this Court acknowledged what it described as "the general rule in *Tuscarora*" that federal statutes that do not expressly exempt Indian tribes presumptively apply to tribes and their property interests, *Fond du Lac*, 986 F.2d at 248, the Court found that the specific issue of considering age as a basis for differentiating among tribal members was a matter of internal tribal self-governance. The Court explained:

> The 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. Likewise, disputes regarding this issue should be allowed to be resolved internally within the tribe. Federal 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.

Id. at 249. The Court therefore found "that the ADEA does not apply to *the narrow facts of this case.*" *Id.* at 251 (emphasis added).

The application of OSHA standards to the working conditions for employees in a commercial enterprise is not a private or intramural

matter between the tribe and a member analogous to what this Court perceived to be the character of the dispute in *Fond du Lac*. Crucially, the internal considerations of tribal custom and tradition that the Court found relevant to age-related matters are wholly absent in the case at bar. The record contains no evidence that regulation of worker safety and health would be contrary to any established tribal custom or practice—even assuming that such evidence would be relevant to application of the OSH Act—or involves any uniquely internal governmental function. To the contrary, this case concerns the working conditions of employees of a commercial enterprise engaged in interstate commerce. One of the reasons Congress passed the OSH Act was to create a level playing field in interstate commerce, ensuring that an employer could not gain a commercial advantage by failing to protect employees. *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 521 & n.38 (1981). Accordingly, the holding in *Fond du Lac* that application of the ADEA would have infringed tribal self-government on the facts of that case is inapposite here.

In reaching a contrary conclusion, the ALJ relied not on the actual holding of *Fond du Lac* but rather on speculation about how this Court would translate that case to the OSH Act context—noting, in particular, that the *Fond du Lac* decision includes a negative ("*but contra*") citation to *Coeur d'Alene*, 986 F.2d at 249 & n.3. The ALJ predicted that this Court would reject the Ninth Circuit's approach in *Coeur d'Alene* and hold that there is a broader tribal self-government exception applicable to any matter that infringes upon the tribe's "inherent sovereign right to regulate the health and safety of workers in tribal enterprises." A. 204-06.

The ALJ's reasoning was unsound. In *Fond du Lac*, this Court did not address the issue of the application of the OSH Act to non-governmental commercial operations such as those of the Fishery. Accordingly, the decision's "*but contra*" citation to *Coeur d'Alene* cannot be interpreted as binding circuit precedent on the issue of the OSH Act's applicability to the Fishery. Rather, the *Fond du Lac* decision's reference to *Coeur d'Alene* presumably signaled disagreement with the Ninth Circuit's statement that the self-

government exception is limited "purely to intramural matters such as the conditions of tribal membership, inheritance rules, and domestic relations." *Fond du Lac*, 986 F.2d at 249 n.3. But even if the Ninth Circuit conceived of the implicit tribal-self-government exception unduly narrowly in *Coeur d'Alene*, the ALJ was wrong to conclude that an exception for governmental activities would apply in these circumstances. That exception is intended to preserve tribal autonomy when acting in a governmental capacity, in the absence of a clear statement from Congress, and thus not to place tribal commercial enterprises beyond the scope of what Congress intended to be comprehensive federal health and safety regulation of work places. As the Second Circuit has recognized, a view of tribal sovereignty as expansive as the one the ALJ embraced here would wrongly elevate tribal authority over federal law. *Mashantucket*, 95 F.2d at 178-79.

The ALJ's understanding of *Fond du Lac* is also inconsistent with the reasoning of *NLRB v. Fortune Bay Resort Casino*, 688 F. Supp. 2d 858 (D. Minn. 2010). In that case, the federal district court in Minnesota, bound by the precedents of this Court, enforced a

subpoena issued by the National Labor Relations Board under the National Labor Relations Act—a general federal labor law like the OSH Act—to a commercial tribal enterprise, a casino. The magistrate's report and recommendation, which the court adopted, distinguished *Fond du Lac*, in part, on the ground that that decision dealt with "the ADEA, not the NLRA, and the two statutes are not similar in scope, language, purpose, or enforceability." *Id.* at 882.

For these reasons, the applicability of the OSH Act to the Fishery does not touch upon an intramural matter traditionally left to tribal self-government, unlike the ADEA claim by a tribal member against a tribal enterprise in *Fond du Lac*. Due respect for the right of tribal self-government in intramural matters does not support exempting the Fishery from the OSH Act.

B. The Tribe Does Not Have Inherent Authority to Exclude OSHA Inspectors from Its Reservation

The ALJ also incorrectly held that the OSH Act does not apply to the Fishery because application of the Act would impermissibly infringe on the Tribe's inherent right to exclude non-members from

the reservation. The ALJ predicted that this Court would follow the reasoning set out in a portion of the Tenth Circuit's decision in *NFPI*, regarding Indian tribes' inherent authority to exclude non-members from a reservation. A. 209-11. The ALJ's analysis is unsound.

In *NFPI*, the Tenth Circuit held that the OSH Act did not apply to a commercial enterprise owned by a tribe. But the court principally relied on the express language of a treaty between the United States and the Navajo Nation prohibiting the entry of federal officials other than those "authorized to enter Indian reservations in discharge of duties imposed by law." 692 F.2d at 711. The Tenth Circuit went on to state that Indian tribes have a right to exclude non-members, including federal officials, that exists independent of any treaty rights. The court found that *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141 (1982), limited, or by implication, overruled the statement in *Tuscarora* that general federal laws apply to Indians and their property interests, because *Merrion* stated that an Indian tribe's power to exclude non-Indians from tribal lands is an inherent attribute of sovereignty. *NFPI*, 692 F.2d at 713. Because the OSH Act

contains no express indication of intent to override the tribe's inherent right of exclusion, the court of appeals stated that the Act is inapplicable to the Navajo tribal sawmill. *Id.* at 713-14.

That discussion was dicta because the court of appeals had already determined that specific treaty language supported the Navajos' claimed right to exclude federal OSHA inspectors. And nothing in *Fond du Lac* suggests that this Court would embrace those dicta. As explained above, *Fond du Lac* instead considered the narrow question of whether federal regulation of the consideration of age in employment of a tribal member would infringe upon tribal self-government, given tribal customs and traditions regarding age. That case did not rely on any claim of an inherent tribal right to exclude federal officials from a reservation. And here, unlike in *NFPI*, the Tribe has not pointed to any specific treaty language stating that the Tribe has a right to control or limit the entry of federal officials onto the reservation.

Moreover, as a matter of first principles, this Court should reject the *NFPI* dicta regarding inherent tribal authority to exclude

federal officials. No other court of appeals outside the Tenth Circuit has endorsed that aspect of *NFPI* in the OSH Act context. As the Ninth Circuit in *Coeur d'Alene* pointed out, the Tenth Circuit's expansive reading of *Merrion* ignored the very different context in which the issue of tribal sovereignty arose in *Merrion,* as compared to an OSHA enforcement case. *Merrion* addressed a tribe's inherent power to tax non-Indians who enter reservations for commercial purposes in the *absence* of any general federal statute affecting the tribe's powers in this area. *Coeur d'Alene*, 751 F.2d at 1117 (discussing *Merrion*, 455 U.S. at 149-52). The Ninth Circuit emphasized that *Merrion* did not consider Congress's ability to modify the tribe's inherent powers of exclusion through statutes of general applicability such as the OSH Act. *See ibid.* ("Unlike the Secretary [of Labor] in this case, the non-Indian petitioners in *Merrion* could point to no statute that even appeared to modify the tribe's sovereign power to tax or exclude.").[3] *Merrion* also did not

[3] As explained above, the application of the OSH Act to the Fishery would not interfere with the Tribe's inherent authority to establish or

discuss the entry of federal officials onto reservations or the presumptive applicability of general federal laws to tribes on which this Court and other courts have relied.

All the other courts of appeals to have considered the issue, as well as the Commission, have ruled that a tribe's general right to exclude non-members does not include a right to bar the entry of OSHA inspectors performing their duties under federal law. *See Menominee*, 601 F.3d at 674; *Warm Springs*, 935 F.2d at 186 (citing *California v. Cabazon Band of Mission Native Americans*, 480 U.S. 202, 214 n.16 (1987) (noting that federal officials may enter reservations to enforce gambling laws)).

As the court in *Menominee* observed, if a tribe's inherent authority to exclude non-members included the authority to exclude federal officials discharging their duties under federal law, and if that putative inherent authority were a sufficient basis for reading

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operate enterprises engaged in interstate commerce. But when the Tribe does so, it acts subject to Congress's authority to regulate commerce. *See* p. 28, *supra*.

generally applicable federal regulatory statutes not to apply to tribal commercial enterprises on a reservation, then tribes would be free to disregard virtually all federal regulation of commercial businesses on a reservation. *See* 601 F.3d at 674. That logic would suggest, for example, that tribes could bar federal inspections necessary to protect the health and safety not only of tribal members but of people outside reservations, such as inspections of fish and other food by the Food and Drug Administration (FDA). *See* 21 U.S.C. § 374 (a)(1). And it could mean that tribal casinos that serve the general public would be free to disregard federal prohibitions on discriminating among customers on the basis of race or disability. 42 U.S.C. §§ 2000a(a), 12182; *see Florida Paraplegic*, 166 F.3d at 129 (holding that the ADA applies to a tribal casino). This Court should reject that implausible result.

In conclusion, this Court, following the lead of the Ninth and Seventh Circuits, should rule that a tribe's general right to exclude non-members does not encompass a right to bar the entry of federal officials, including OSHA inspectors, performing their duties under

federal law, and thus that the Tribe's authority to exclude non-members from the Red Lake Indian Reservation does not preclude the application of the OSH Act to the Fishery. Nothing in *Fond du Lac* requires or even suggests a contrary conclusion.

CONCLUSION

For the reasons set forth above the court should vacate and reverse the ALJ decision and remand the case to the Commission for further proceedings.

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CERTIFICATE OF SERVICE, COMPLIANCE WITH WORD LIMITS, FONT AND FONT SIZE, AND LACK OF VIRUSES

I hereby certify that on this 13th day of March, 2020, a copy of the Secretary's Opening Brief was filed electronically via the Court's CMF/ECF Electronic Filing System, providing service on the following counsel:

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I also certify that the brief, consisting of 9, 291 words, does not exceed the word limit, that it was typed in Times New Roman, Font Size 14, and that it is virus-free.

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