No. 19-3373

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Secretary of Labor, U.S. Department of Labor,

Petitioner,

vs.

Red Lake Nation Fisheries, Inc.,

Respondent.

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

AMICUS CURIAE SHAKOPEE MDEWAKANTON SIOUX COMMUNITY'S BRIEF IN SUPPORT OF RESPONDENT

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CORPORATE DISCLOSURE STATEMENT

Amicus Curiae Shakopee Mdewakanton Sioux Community ("SMSC" or the "Community") is a federally recognized Indian tribe and is not a corporation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

FEDERAL STATUTES

FEDERAL REGULATIONS

OTHER AUTHORITIES

IDENTITY, INTEREST, AND AUTHORITY TO FILE

The Shakopee Mdewakanton Sioux Community ("SMSC" or the "Community") is a federally recognized Indian tribe with a reservation located within the boundaries of the State of Minnesota. 85 Fed. Reg. 5462, 5465 (Jan. 30, 2020). The SMSC has a direct interest in the issues before this Court because it depends on precedent set by this Court in *EEOC v. Fond du Lac Heavy Equipment and Construction Co., Inc.* holding that it has the inherent sovereign right to maintain regulatory control over its on-reservation activity, both commercial and non-commercial. 986 F.2d 246, 249 n.3 (8th Cir. 1993).

The SMSC is not a resource-rich tribe and has no treaty-based usufructuary rights. Rather, it provides for its well-being and that of its members via a diverse series of successful sovereign enterprises on its reservation. The SMSC's enterprises run the gamut from Mdewakanton Public Safety, which includes "a full-time, professional fire and ambulance department;" to the South Area Water Treatment Plant; to its Organics Recycling Facility; to Mazopiya and the Wozupi Tribal Gardens, a natural food store and organic farm; to Playworks, which features "a large indoor play area, child care and early education;" to Dakotah!

Sport and Fitness, "[a] full-service, family-friendly health and wellness center;" to Mystic Lake Casino Hotel, a world class casino hotel and entertainment venue.[1]

To establish and maintain its successful enterprises, the SMSC has worked cooperatively with federal agencies including the Occupational Safety and Health Administration ("OSHA") to ensure the health and safety of its employees. The SMSC files this brief to ensure that it can continue to work cooperatively with OSHA on these important issues. The SMSC and other tribes should not have their inherent sovereign rights diminished. Instead, using a model like the one that the SMSC and OSHA have successfully used in the past, OSHA should continue to work cooperatively with tribes to assist them in regulating workplace safety on the reservation–thereby maintaining both workplace safety standards and tribal sovereignty.

The SMSC seeks leave to file this brief as an amicus under Fed. R. App. P. 29(a)(2). Both parties to this case have agreed not to object to SMSC seeking leave to file this brief.

[1] Mdewakanton Public Safety, Shakopee Mdewakanton Sioux Community, https://shakopeedakota.org/enterprises/mdewakanton-public-safety (last visited May 26, 2020); Economic Impact and Enterprises, Shakopee Mdewakanton Sioux Community, https://shakopeedakota.org/economy/smsc-prior-lake-businesses (last visited May 26, 2020).

Pursuant to Fed. R. App. P. 29(a)(4)(E), the undersigned counsel hereby certifies that no party's counsel authored this brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting this brief, and no person (other than the SMSC, its members, or its counsel) contributed money that was intended to fund preparing or submitting this brief.

SUMMARY OF THE ARGUMENT

In support of the national policy to encourage self-determination among Indian tribes, the federal government is encouraged to, and in some circumstances, required to, consult with tribes and enter into intergovernmental agreements with them. OSHA and the SMSC have twice followed an intergovernmental protocol proposed by the SMSC to avoid clashes over which of them has jurisdiction over workplace health and safety issues on the SMSC Reservation near Prior Lake, Minnesota. That protocol is similar in practice to OSHA's cooperative agreements with other federal agencies and with State governments. And it shows that OSHA has an available avenue by which it can work with Indian tribes to promote health and safety at tribally owned workplaces without infringing upon tribal sovereignty.

Reliance on intergovernmental agreements to address health and safety issues at SMSC's workplaces is appropriate considering that the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (the "OSH Act" or "Act"),

does not, and should not, apply to tribal enterprises. The text of the OSH Act nowhere mentions tribal employers, Indians, or the Indian Commerce Clause; instead, it invokes Congress' powers to regulate interstate and foreign commerce—powers that are entirely separate from the Indian Commerce Clause. Congress' decision not to invoke its powers over Indians and Indian tribes undermines the Secretary's case here and is a clear indication that the OSH Act does not apply to tribes.

Further, a decision by this Court based on the delineation of Congress' distinct powers under Article I of the Constitution is consistent with the Supreme Court's only decision discussing Indians and statutes of general applicability, *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99 (1960).[2] However, *Tuscarora* is not directly applicable to this case because it involved a statute that addressed Indians and Indian tribes in its text—not a statute that was silent on Indians, such as the OSH Act.

Regardless, this case can be quickly dispatched based on this Court's prior holding in *EEOC v. Fond du Lac Heavy Equipment and Construction Co., Inc.*, 986 F.2d 246 (8th Cir. 1993), which appropriately recognizes and protects tribes'

[2] *Tuscarora* will always be principally remembered for the conclusion to Justice Black's dissent: "I regret that this Court is to be the governmental agency that breaks faith with this dependent people. Great nations, like great men, should keep their word." 362 U.S. at 142.

right to self-governance and self-determination in the context of tribal employers. Under *Fond du Lac*, because Congress did not clearly and expressly make the OSH Act applicable to Indians or Indian tribes, the OSH Act does not apply to the respondent Red Lake Nation Fisheries, Inc. ("Fisheries") and the Administrative Law Judge's decision must be affirmed.

BACKGROUND

CONSULTATION AND INTERGOVERNMENTAL AGREEMENTS ARE THE PREFERRED METHOD OF ADVANCING TRIBAL SELF-DETERMINATION AND FEDERAL REGULATORY GOALS

For the past fifty years, the United States' policy toward Indian tribes has been to encourage self-determination.[3] To further that policy, the federal government consults with tribes in many circumstances and encourages intergovernmental agreements between tribes and federal agencies, and state and local governments. *See* Cohen's Handbook of Federal Indian Law § 6.05 (Nell Jessup Newton ed., 2017) (hereinafter "Cohen's Handbook") (explaining that "[a]lthough Congress has never adopted general legislation authorizing tribal-state agreements, it has demonstrated its support for particular types of jurisdictional agreements in legislation such as the Indian Child Welfare Act (ICWA) and the

[3] *See* President Richard Nixon, Special Message on Indian Affairs (July 8, 1970) www.ncai.org/attachments/Consultation_IJaOfGZqlYSuxpPUqoSSWIaNTkEJEPXxKLzLcaOikifwWhGOLSA_12%20Nixon%20Self%20Determination%20Policy.pdf.

Indian Gaming Regulatory Act (IGRA)" (footnotes omitted)). These intergovernmental agreements promote a tribe's ability to "make [its] own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220 (1959). They "create a stable legal environment conducive to economic development," and have been utilized "in a wide array of subject areas, including enforcement of judgments, education, environmental control, child support, law enforcement and criminal justice, taxation, hunting and fishing, and zoning." Cohen's Handbook § 6.05 (footnotes omitted). They also encourage government-to-government negotiation, joint decision making, and an end to paternalistic decision making by the United States on behalf of tribes and their members. *See* Note, Intergovernmental Compacts in Native American Law: Models for Expanded Usage, 112 Harv. L. Rev. 922, 923 (1999) (negotiating cooperative agreements with other governments helps tribes "preserve their heritage, exercise self-governance, and define the legitimate functions of their sovereign governmental entities").

In the spirit of such joint decision making and tribal self-determination, President William Clinton issued Executive Order 13084, which required federal agencies to "explore and, where appropriate, use consensual mechanisms for

developing regulations, including negotiated rulemaking" on issues related to tribal self-government. 63 Fed. Reg. 27655, 27656 (May 19, 1998).[4]

Federal regulations now specifically require that tribes with gaming facilities have policies in place to govern the health and safety of their facilities by requiring them to submit to the Chairman of the National Indian Gaming Commission, along with each license for a gaming facility, an attestation that they "ha[ve] determined that the construction and maintenance of the gaming facility, and the operation of that gaming, is conducted in a manner which adequately protects the environment and the public health and safety," meaning that they "ha[ve] identified and enforce[] laws, resolutions, codes, policies, standards or procedures applicable to each gaming place, facility or location that protect the environment and the public health and safety, including standards, under a tribal-state compact or Secretarial procedures." 25 C.F.R. § 559.4 (2015). The SMSC has a Gaming Ordinance in place to "[e]nsure that the construction and maintenance of all Gaming Enterprises, and the operation of Gaming conducted at those facilities, shall at all times protect

[4] While OSHA has maintained that the OSH Act reaches tribal entities as "employers," it has also recognized that there are exceptions to the application of the Act and that it has an obligation to "assure that [its] actions do not interfere in governmental functions which are integral to tribal sovereignty." *See* U.S. Dep't of Labor, Occupational Safety and Health Administration, Standard Interpretation 1975.4(b)(3), OSH Act Applicability to Tribal Land Workplaces and Employers (Mar. 12, 1998) https://www.osha.gov/laws-regs/standardinterpretations/1998-03-12-1.

the environment, the public health and welfare, and the sovereignty of the Shakopee Mdewakanton Sioux Community, and that such Gaming shall comply with all applicable Tribal, Federal, and State laws," which ordinance has been approved by the National Indian Gaming Commission.[5]

SMSC HAS HAD GOVERNMENT-TO-GOVERNMENT INTERACTIONS WITH THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION FOR MORE THAN 20 YEARS

OSHA and the SMSC have historically avoided jurisdictional clashes over health and safety issues by engaging in a government-to-government relationship. After receiving notification from OSHA of a complaint related to a business on the SMSC's reservation in the 1990s, the SMSC proposed a protocol to address complaints to OSHA concerning SMSC business enterprises. The multi-step protocol outlined the following steps:

1. Upon receipt of a complaint regarding the SMSC, one of its governmental entities, or any entity located on its lands, OSHA provides a written copy of the complaint to the SMSC Business Council (the SMSC's elected executive body).

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[5] Shakopee Mdewakanton Sioux Community, Amended and Restated Gaming Ordinance, at 2 (Sept. 10, 2013) https://www.nigc.gov/images/uploads/gamingordinances/shakopeemdewakanton-2013.09.27%20Letter%20to%20Tribe%20fr%20NIGC%20re%20Ordinance%20approval%20-%20Shakopee.pdf.

2. The SMSC immediately investigates the complaint and takes any corrective action that is determined to be necessary.

3. The SMSC prepares a report of the investigation and any corrective action taken, if any, including any policies and procedures adopted to ensure that the situation does not occur again. A copy of the report is provided to OSHA.

4. OSHA may review the report prepared by the SMSC and contact the SMSC Business Council with questions, comments or suggestions for further action.

5. If, after such consultation, OSHA believes that further action may be necessary to fully correct the situation, it may notify the SMSC Business Council in writing of the reasons and request a mutually acceptable date for OSHA to conduct its own inspection of the complaint.

6. Based on its inspection, OSHA provides the SMSC with a copy of its report on the investigation.

While OSHA and the SMSC did not formalize this protocol in an intergovernmental agreement, the parties have abided by it twice, in a joint effort to maintain workplace safety in connection with OSHA's receipt of workplace complaints on the reservation, first in 1999 and then again in 2010. Most recently, in 2010, OSHA notified the SMSC of a complaint stating that employees of Mystic

Lake Casino Hotel were being exposed to excessive noise without a hearing conservation program. The SMSC engaged a contractor to conduct noise dosimetry testing and forwarded the results and a description of its efforts to address the matter to OSHA.

In both instances, OSHA closed its complaint after the SMSC issued its report and took the corrective actions that it deemed necessary. In closing the 2010 complaint related to employees' exposure to allegedly excessive noise, OSHA Area Director Hysell wrote to then Tribal Chairman Stanley Crooks, "[w]e appreciate your prompt response to these allegations, and your interest in the safety and health of your employees."

ARGUMENT

I. INTERGOVERNMENTAL AGREEMENTS ARE SUITABLE ALTERNATIVES TO COMMAND-AND-CONTROL REGULATION FOR GOVERNMENTAL EMPLOYERS

By their nature, governmental employers are fundamentally different than private employers. Among other differences, governmental employers have an inherent interest in the health and safety of their members and employees and are not focused solely on maximizing profit.

Recognizing this fundamental distinction, the definition of "employer" under the OSH Act does not include "the United States (not including the United States Postal Service) or any State or political subdivision of a State." 29 U.S.C. § 652(5)

(2018). Instead, the OSH Act provides that each federal agency head must "establish and maintain an effective and comprehensive occupational safety and health program which is consistent with the standards promulgated under . . . this title." 29 U.S.C. § 668 (2018).

OSHA also works with states to cooperatively provide workplace safety on a voluntary basis. Twenty-two states have "OSHA-approved workplace safety and health programs . . . covering both private sector and state and local government workers," and six states have such plans "covering only state and local government workers."[6] Such "State Plans" "are monitored by OSHA and must be at least as effective as OSHA in protecting workers and in preventing work-related injuries, illnesses and deaths."[7]

State Plans and programs established by federal agency heads are examples of the cooperative, government-to-government system OSHA uses to work with other governmental entities to regulate workplace safety. A similar type of cooperative, voluntary relationship can (and does) work well for OSHA and federally recognized Indian tribes, as evidenced by the government-to-government relationship between OSHA and the SMSC.

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[6] State Plans, Occupational Safety and Health Administration, https://www.osha.gov/stateplans (last visited May 26, 2020).

[7] *Id.*

While tribal governments are not specifically exempted from the definition of "employer" in the OSH Act, they, like their state and local counterparts, have an inherent interest in the health and safety of their members and employees. *See* 29 U.S.C. § 652(5) (2018) (defining "employer" under the OSH Act to exclude the United States, States, and political subdivisions of States, but not to exclude Indian tribes). As OHSA's government-to-government working relationship with the SMSC shows, OSHA recognizes that regulating workplace safety in a governmentally owned and operated workplace is a sovereign concern of the operating government. Indian tribes should not be treated like private employers. *See supra* Background.

Other circuits have acknowledged that cooperative arrangements between tribes and other governmental bodies can be used effectively as a vehicle to assign responsibility to tribal, local, state, or federal governments for on-reservation activities. In *Oneida Tribe of Indians of Wisconsin v. Village of Hobart*, the Village of Hobart unlawfully assessed stormwater management fees on parcels of land owned by the tribe. 732 F.3d 837, 841 (7th Cir. 2013). The Seventh Circuit stated that because the Oneida Tribe and the Village had both been delegated authority under the Clean Water Act to enforce stormwater regulations on their respective land, which was commingled in a checkerboard fashion, a cooperative arrangement between the two governments could have resolved the friction between them. *Id.*

As the court explained, "[the Village] doesn't deny the feasibility of cooperative arrangements between it and the tribe, which has signed cooperative service agreements with other government bodies in the area. So Hobart loses its case against the tribe." *Id.*

Given the proven availability of functioning government-to-government alternatives to federal command-and-control regulation, and OSHA's history of a collaborative, government-to-government relationship with the SMSC, there is no reason to believe that operating under the Eighth Circuit's *Fond du Lac* precedent has systematically lowered workplace safety standards at SMSC's enterprises, as compared to tribal enterprises operating in the Ninth Circuit under *Coeur d'Alene*. *Compare EEOC v. Fond du Lac Heavy Equipment and Construction Co., Inc.*, 986 F.2d 246, 249 (8th Cir. 1993) (upholding the principle that federally recognized Indian tribes have an "implicit right to self-governance" and holding that the Age Discrimination in Employment Act (the "ADEA") does not apply to tribal businesses), *with Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985) (holding that if the right to "tribal self-government" were to prevent the application of the OSH Act, it would exempt all tribal business and commercial activity, and that therefore this exception to application of statutes of general applicability should only "except purely intramural matters such as conditions of tribal membership, inheritance rules, and domestic relations"). Instead, *Fond du*

Lac has permitted governments to work together, maintaining both workplace safety and respect for tribal sovereignty.

II. CONGRESS IN THE OSH ACT DID NOT EXERCISE ITS PLENARY POWER UNDER THE INDIAN COMMERCE CLAUSE

Congress's power to regulate commerce is "divided into three distinct classes—foreign nations, the several states, and Indian tribes." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 18 (1831). As detailed in the Fisheries' brief, the OSH Act contains no clear and plain intent by Congress to limit tribal rights using its powers under the Indian Commerce Clause. Rather, in enacting the OSH Act, Congress specifically found that workplace health and safety issues "impose a substantial burden upon, and are a hindrance to, interstate commerce" and that it was Congress' purpose "through the exercise of its powers to regulate commerce among the several States and with foreign nations" to assure health and safety in the workplace. 29 U.S.C. § 651(a), (b) (2018). This reliance on its power to regulate interstate and foreign commerce explains why Congress excluded the United States, States, and political subdivisions of States from its definition of "employer." *Id.* § 652(6). It also provides an explanation for why the Act did not address Indian tribes at all.

The power to regulate commerce with foreign nations does not include the power to regulate commerce with Indian tribes. As the Supreme Court has stated and as the Fisheries explained in its brief, "when Congress acts with respect to the

Indian tribes, it generally does so pursuant to its authority under the Indian Commerce Clause, or by virtue of its superior position over the tribes, not pursuant to its authority under the Interstate Commerce Clause." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 155 n.21 (1982). The fact that Congress specifically invoked its power to regulate two of the three constitutional classes of commerce, while failing to mention Indian tribes or Congress' power to regulate commerce with the Indian tribes at any point, indicates that it did not intend the OSH Act to limit the right of Indian tribes to regulate their members and employees on their reservations. As the general rule of statutory interpretation *expressio unius exclusio alterius* informs, if a set of terms are understood to go hand in hand, as are the three classes of commerce which Congress has the power to regulate, an abridgment of the set indicates that the excluded term was meant to be excluded. *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 81 (2002).

This interpretation of the OSH Act, and the conclusion that it does not apply to tribal employers, does not conflict with the Supreme Court's holding in *Federal Power Comm'n v. Tuscarora Indian Nation*. 362 U.S. 99 (1960). In *Tuscarora*, the Supreme Court held that, under the Federal Power Act, Congress had the ability, pursuant to its power to regulate interstate commerce, to permit the condemnation of land owned by the Tuscarora Indian Nation in fee. *Id.* at 118. Indian-owned fee land, if not located on a reservation, is often treated like private land owned by a

non-Indian citizen. The Supreme Court held that Congress had separately acted under the Property Clause to authorize the taking of federal land, including land owned by the United States in trust for Indian tribes, under the Federal Power Act. *Id.* at 123-24. Having found that the authority for both actions was expressed in the statute, the court confirmed that the federal government could take the Indian-owned land at issue pursuant to the Interstate Commerce Clause. *Id.*

Tuscarora's analysis of the sources of congressional power to take property depending upon the type of property that was at issue is consistent with the argument advanced by the Fisheries in this case; namely, that Congress in the OSH Act did not act pursuant to the principal source of power that would permit it to regulate tribes and tribal businesses: the Indian Commerce Clause.[8] The analysis in *Tuscarora* is also consistent with later Supreme Court decisions which have reinforced the distinction between Congress' power under the Interstate Commerce Clause and its power under the Indian Commerce Clause.[9]

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[8] Unlike the Federal Power Act at issue in *Tuscarora*, there is no exercise by Congress of its power under the Property Clause in the OSH Act. There is also no suggestion that Congress passed the OSH Act pursuant to its overall plenary authority over Indian tribes.

[9] *See Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 165 (1989) (concluding that the Interstate Commerce and Indian Commerce Clauses are distinctly applied, and that Indian tribes do not constitute "States" for tax apportionment purposes); *Michigan v. Bay Mills Indian Community*, 572 U.S. 782,

(continued on next page)

Moreover, *Tuscarora* fails to provide guidance on the interpretation of a statute which makes no mention of Indian tribes (like the OSH Act), because the Federal Power Act laid out specific requirements for "tribal lands embraced within Indian reservations." *Id.* at 110-11. The context in which *Tuscarora* was decided, later Supreme Court precedent, and this Court's decision in *Fond du Lac*, support a measured reading of *Tuscarora*'s dicta regarding the circumstances under which statutes of general applicability are applicable to Indian tribes, and a finding that here, Congress did not intend to regulate Indian tribal employers in the OSH Act.

III. THE EIGHTH CIRCUIT'S INTERPRETATION OF *TUSCARORA* IN *FOND DU LAC* SHOULD NOT BE REVISITED

This Court has already addressed the issue of when a statute of general applicability such as the OSH Act applies to Indian tribes in *EEOC v. Fond du Lac Heavy Equipment and Construction Co., Inc.*, 986 F.2d 246, 248 (8th Cir. 1993). The Court can easily dispatch with this case under the framework set out in *Fond du Lac* and avoid altering precedent that tribal governments and the federal government have been relying on in this circuit for 27 years. While the Secretary attempts to distinguish *Fond du Lac* on its facts, the tribal rights which this Court found would be infringed upon in *Fond du Lac* mirror those that would be

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800 (2014) (stating that it is solely Congress' responsibility to limit tribal sovereignty).

infringed upon here. The Administrative Law Judge was correct to find that, based upon *Fond du Lac*, this Court would predictably find that the OSH Act did not apply to the Fisheries.

In *Fond du Lac*, the EEOC brought an age discrimination claim under the ADEA against a tribal construction company. *Id.* at 247-48. The company was located on the reservation but conducted business both on and off of the reservation. *Id.* at 248.

This Court in *Fond du Lac* acknowledged the dicta in *Tuscarora* about acts of general applicability applying to Indians but stated that general acts do not apply "when the interest sought to be affected is a specific right reserved to the Indians." *Id.* Included among those reserved rights is the tribes' "power to make their own substantive law in internal matters and to enforce that law in their own forums." *Id.* at 249 (quotation omitted). If such a right is affected, "the general rule of applicability does not apply," and a statute of general applicability "does not apply to the [tribe] absent a clear and plain congressional intent." *Id.* Holding that the tribal rights recognized by this test are broader than just tribal membership, inheritance rules, and domestic relations—and refusing to distinguish between commercial and non-commercial endeavors—the Court rejected the Ninth Circuit's narrow test in *Coeur d'Alene* for identifying tribal rights requiring

heightened evidence of congressional intent before the application of general laws to tribes could occur. *Id.* at 249 n.3.

In assessing whether tribal rights would be infringed upon if the ADEA were applied to the tribe, the *Fond du Lac* court reasoned as follows:

> The facts in this case reveal that this dispute involves a strictly internal matter. The dispute is between an Indian applicant and an Indian tribal employer. The Indian applicant is a member of the tribe, and the business is located on the reservation. Subjecting such an employment relationship between the tribal member and his tribe to federal control and supervision dilutes the sovereignty of the tribe. 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.

Id. at 249.[10] Finding no clear and plain intent suggesting Congress intended the ADEA to apply to Indian tribes, the Court held that it did not. *Id.* at 250. In so holding, the Court cited favorably to the United States Court of Appeals for the Tenth Circuit's decision in *Donovan v. Navajo Forest Products Indus.*, 692 F.2d 709 (10th Cir. 1982), holding that the OSH Act was inapplicable to tribal employers, the issue presented again here. *Fond du Lac*, 986 F.2d at 249.

Here, as in *Fond du Lac*, OSHA is attempting to regulate a tribal business located on its reservation and a business relationship between tribal members and

[10] The Court found the employer-employee relationship between the tribe and its member employee to be "a strictly internal matter" even though the construction equipment business at issue operated at times off the reservation in general commerce. *EEOC v. Fond du Lac Heavy Equipment*, 986 F.2d at 248-49.

their tribe. Under the standard set in *Fond du Lac*, this is a "strictly internal matter." OSHA regulation "interferes with an intramural matter that has traditionally been left to the tribe's self-government." *Id.* at 249. Consequently, the OSH Act does not apply to tribes absent clear and plain intent from Congress.

As the Secretary knows, there is no clear and plain expression from Congress that it intended the OSH Act to apply to Indian tribes—whether it be in the statute itself or in the legislative history. *See* Br. for the Secretary of Labor at 19-26, Mar. 13, 2020 (relying on *Tuscarora* and *Coeur d'Alene* to argue that the OSH Act should apply to Indian tribes notwithstanding its silence regarding them). Under *Fond du Lac*, the OSH Act, therefore, does not apply and the Administrative Law Judge was correct to quash the notices of violation issued by the agency.

The Court should reject the Secretary's attempt to dilute tribal sovereignty in the absence of congressional intent to do so and affirm the decision of the Administrative Law Judge that the OSH Act does not apply to the Fisheries.

CONCLUSION

For the reasons stated above, the Administrative Law Judge's decision should be affirmed.

Dated: May 26, 2020

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CERTIFICATE OF COMPLIANCE

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The undersigned also certifies that this brief has been scanned for viruses and is virus-free.

Dated: May 26, 2020

/s/Richard A. Duncan

CERTIFICATE OF SERVICE

I hereby certify that on May 26, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

/s/ Richard A. Duncan

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