No. 19-3373

**UNITED STATES COURT OF APPEALS**
**FOR THE EIGHTH CIRCUIT**

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Eugene Scalia, Secretary of Labor,

Petitioner,

vs.

Red Lake Nation Fisheries, Inc.,

Respondent.

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

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# RED LAKE NATION FISHERIES' BRIEF

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## SUMMARY OF THE CASE

This case involves the applicability of the Occupational Safety and Health Act ("OSH Act" or "Act") – a federal statute that exempts federal and state governments and makes no mention of Indian tribes in the statutory text or legislative history – to the Red Lake Nation Fisheries, Inc. ("Fisheries"). The Fisheries is a wholly owned and operated government entity of the Red Lake Band of Chippewa Indians ("Red Lake" or "Tribe"), a federally recognized sovereign Indian tribe which along with its members enjoys an unrestricted right to catch and sell fish commercially.

The Secretary seeks to have this Court construe silence in the OSH Act to impinge on tribal sovereignty in direct conflict with Supreme Court precedent and Congress' plenary and exclusive authority over Indian affairs. The Secretary's threatened enforcement of the OSH Act to the Fisheries violates Red Lake's fishing rights, inherent sovereign authority to enforce its own workplace safety and health regulations, and right to exclude nonmembers from its Reservation.

In the proceedings below, the Administrative Law Judge ("ALJ") correctly dismissed the citations and notification of penalty brought against the Fisheries. The ALJ's decision is consistent with this Court's precedent and fundamental principles of Indian law and properly recognizes Red Lake's sovereign authority to regulate the Fisheries and right to exclude nonmembers from its Reservation.

The Fisheries requests 30 minutes for oral argument.



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## CORPORATE DISCLOSURE STATEMENT

The Fisheries is not publicly traded and is wholly owned and operated by the Tribe.



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## JURISDICTIONAL STATEMENT

The Fisheries does not object to the Secretary's Jurisdictional Statement.



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## STATEMENT OF ISSUES

**I. Whether the unrestricted right to catch and sell fish held by Red Lake and its members prohibits the application of the OSH Act in the absence of a clear intent by Congress to abrogate or restrict such fishing rights.**

*EEOC v. Fond du Lac Heavy Equip. & Constr. Co.*, 986 F.2d 246 (8th Cir. 1993);

*United States v. Brown*, 777 F.3d 1025 (8th Cir. 2015);

*United States v. White*, 508 F.2d 453 (8th Cir. 1974);

*United States v. Dion*, 476 U.S. 734 (1986).

**II. Whether the application of the OSH Act impermissibly affects Red Lake's right to self-government in a strictly internal matter in the absence of a clear intent by Congress for the Act to apply to Indian tribes.**

*EEOC v. Fond du Lac Heavy Equip. & Constr. Co.*, 986 F.2d 246 (8th Cir. 1993);

*Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978);

*Iowa Mut. Ins. Co. v. LaPlante,* 480 U.S. 9 (1987);

*United States v. Dion*, 476 U.S. 734 (1986).

**III. Whether Red Lake's inherent sovereign right to exclude nonmembers from the Red Lake Reservation precludes OSHA inspectors from entering the Reservation without authorization by the Tribe.**

*Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982);

*Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832);

*EEOC v. Fond du Lac Heavy Equip. & Constr. Co.*, 986 F.2d 246 (8th Cir. 1993);

*Nord v. Kelly*, 520 F.3d 848 (8th Cir. 2008).

**IV. Whether Congress exercised its plenary power over Indian tribes pursuant to the Indian Commerce Clause in the enactment of the OSH Act.**

*Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989);

*Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831);

*Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782 (2014);

*United States v. Lara*, 541 U.S. 193 (2004).



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## STATEMENT OF THE CASE

### I. Factual Background

#### A. Red Lake Tribe and Reservation History

The Red Lake Band of Chippewa Indians is a federally recognized Indian tribe that occupies lands located in the State of Minnesota. 85 Fed. Reg. 5462, 5465 (Jan. 30, 2020). The Red Lake Reservation is one of seven Chippewa reservations in Minnesota. *See Leech Lake Band of Chippewa Indians v. Herbst*, 334 F. Supp. 1001, 1003 (D. Minn. 1971).

Through treaties with the United States, Red Lake secured a treaty-protected fishing right on territory ceded to the United States and established the Red Lake Reservation. On July 29, 1837, the Chippewa entered into a treaty with the United States, which ceded lands located in present-day Minnesota and Wisconsin. Treaty with the Chippewa, July 29, 1837, art. 1, July 29, 1837, 7 Stat. 536 ("1837 Treaty"). The 1837 Treaty expressly preserved and guaranteed the Chippewa tribes "[t]he privilege of . . . fishing" on territory ceded to the United States. *Id.* art. 5.

On October 2, 1863, the Red Lake and Pembina Bands of Chippewa Indians entered into a treaty with the United States in which the Bands ceded lands to the United States, and reserved lands for the Tribe. Treaty with the Chippewa, Red Lake and Pembina Bands, art. 2, Oct. 2, 1863, 13 Stat. 667 ("1863 Treaty").



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The 1863 Treaty provides that the lands not ceded to the United States constitute the Red Lake Reservation. *Id.* art. 6; *State of Minnesota v. Hitchcock*, 185 U.S. 373, 389 (1902) (noting that the 1863 Treaty's "effect was to leave the Indians in a distinct tract reserved for their occupation"). The establishment of the Red Lake Reservation implied that Red Lake members retained the right to hunt, fish, and gather on the Reservation. *See United States v. White*, 508 F.2d 453, 457 (8th Cir. 1974).

On April 12, 1864, the United States and the Red Lake and Pembina Bands of Chippewa Indians entered into a treaty that increased the annuity payments for the ceded territory. Treaty with the Chippewa, Red Lake and Pembina Bands, Apr. 12, 1864, 13 Stat. 689, art. 2 ("1864 Treaty"). Neither the 1863 Treaty nor the 1864 Treaty reference or restrict in any way the unfettered fishing rights of Red Lake and its members.

Red Lake has consistently—and successfully—resisted encroachment upon the sovereign right of its members to "make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220 (1959). In the late 19th century, when Congress allotted Indian reservations in an attempt to "assimilate Indians into American society and to open reservation lands to ownership by non-Indians," *Cass Cnty. Minn. v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 106 (1998), Red Lake successfully resisted allotment of any lands within the Red Lake Reservation. *See*



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*Chippewa Indians of Minn. v. United States*, 301 U.S. 358, 368 (1937) ("No allotments in severalty have as yet been made on this diminished reservation, because the Red Lake Indians have thus far opposed the present making of such allotments and the administrative officers have not as yet considered it practicable to make them."). To this day, no allotments have been made at Red Lake, and the Reservation remains fully intact.

Furthermore, through Public Law 280, Minnesota was granted criminal and civil jurisdiction on "[a]ll Indian country within the State, *except the Red Lake Reservation*." 18 U.S.C. § 1162(a) (emphasis added); *see also Nord v. Kelly*, 520 F.3d 848, 858 (8th Cir. 2008) (Murphy, J., concurring) ("As part of its retention of significant sovereignty, [Red Lake] was only one of three to resist the extension of state criminal and civil jurisdiction to cover claims involving Indians.").

**B. Red Lake Fishing History**

Since time immemorial, Red Lake members have depended on the natural freshwaters of Red Lake itself for sustenance and economic livelihood. Fish has continuously been a major food supply for Red Lake members who have "always fished to feed their families." ANTON TREUER, WARRIOR NATION: A HISTORY OF THE RED LAKE OJIBWE 211 (2005). Fishing is deeply intertwined within the Red Lake culture and "synonymous with life" for Red Lake members. BRENDA J. CHILD, MY

GRANDFATHER'S KNOCKING STICKS: OJIBWE FAMILY LIFE AND LABOR ON THE RESERVATION 38 (2014).

The right to fish at Red Lake has been both a cultural activity and source of economic prosperity for tribal members. Fishing has been "consistently organized and managed by the [Red Lake] community for generations." *Id.* at 40. The day-to-day life of many Red Lake members has "revolved around fishing activities – making nets, maintaining boats, observing weather, setting nets or spearing fish, removing fish from nets and preserving fish, or in later years bringing it in for marketing." *Id.* at 85.

In terms of the inherent value of fishing on Red Lake, it has been documented that "[t]he fishing industry is without question the greatest sustaining asset of the Red Lake Band of Chippewa Indians." HISTORICAL REVIEW OF THE RED LAKE INDIAN RESERVATION 89 (Erwin F. Mittelholtz & Rose Graves eds., 1957). Following its establishment, the Fisheries "became, and remains, one of Red Lake's distinguished and successful modern cultural and economic developments." TREUER at 211.

The economic opportunities for tribal members derived from fishing are especially important in light of the high unemployment rate and sparse job market on the Red Lake Reservation. For many families in the Ponemah community on Red Lake—a remote community with few jobs available for tribal members—"fishing

continues to be the main income-producing activity from May till mid-November." CHARLES BRILL, RED LAKE NATION: PORTRAITS OF OJIBWE LIFE 21 (1992).[1]

### C. Red Lake Today

Presently, Red Lake and the Red Lake Reservation hold a unique legal status that is distinct from nearly all other Indian reservations in the United States. This Court has described the Red Lake Reservation as "perhaps the most insular and nonintegrated reservation in the United States; it has also preserved for the band an independence not experienced on other reservations." *Nord*, 520 F.3d at 857-58 (Murphy, J., concurring) (detailing the unique legal status of Red Lake "[i]n respect of the band's sovereignty and special history" and noting that it "is difficult to overstate the differences between the Red Lake Reservation and nearly all other Indian reservations").

The Red Lake Reservation holds the status of a "closed" reservation in which all land is held communally by Red Lake and its members. *United States v. Jackson*, 853 F.3d 436, 440 (8th Cir. 2017) (citing *Nord*, 520 F.3d at 858 & n.7 (Murphy, J., concurring)). As a closed reservation, Red Lake has the right to control who is allowed to enter the Red Lake Reservation. *Nord*, 520 F.3d at 858 (Murphy, J.,

[1] The Secretary incorrectly states that Ponemah is located outside the Red Lake Reservation. Secretary's Opening Brief ("Opening Br.") at 8. To the contrary, the Ponemah community is located entirely within the Red Lake Reservation.

concurring) ("At one time [Red Lake] required nonmembers working or engaging in business on the reservation to apply for passports.").

Red Lake has also "retained extensive sovereignty over its reservation, subject only to federal law which specifically addresses Red Lake and to preemptive federal criminal law." *Id.* "Unlike other tribes and reservations, . . . the Red Lake Band has retained its government to government relationship with the United States." *Id.* at 857-58.

**D. The Red Lake Tribal Council**

The Red Lake Constitution and Bylaws recognize the Red Lake Tribal Council as the governing body of the Tribe, which is composed of eleven elected representatives. Red Lake Const. art. IV, § 1; Appellant's Joint Appendix ("JA") 78. The Tribal Council's responsibility is to "promote justice, insure tranquility, encourage the general welfare, safeguard [the] interests and secure the blessings of freedom and liberty" of the Tribe and its members. *Id.* pmbl; JA 77.

Red Lake's jurisdiction extends to all land within the Red Lake Reservation and lands that may be acquired by or on behalf of the Tribe. *Id.* art. II; JA 77. The Tribal Council has authority to engage in "any business that will further the economic well-being" of Red Lake members and "enact ordinances to provide rules and regulations governing fishing, hunting and trapping on the Red Lake Reservation." *Id.* art. VII, §§ 3, 4; JA 82.

## E. The Red Lake Nation Fisheries

The Fisheries is a wholly owned and operated government entity chartered by the Tribal Council and organized under Red Lake tribal law. Samuel Strong Declaration ("Strong Decl.") ¶¶ 2, 6, 8; JA 88-89. Red Lake, Inc. is the parent company of the Fisheries. *Id.* ¶ 6; JA 88. All shares of Red Lake, Inc. are owned by the Red Lake Tribal Council for the benefit of Red Lake and its tribal members. Red Lake, Inc. Articles of Incorporation art. IV(B); JA 92.

The Red Lake, Inc. Board of Directors manages the company's business and affairs. *Id.* art. IX(A); JA 96. Members of the Board of Directors are appointed by the Red Lake Tribal Council, and all are Red Lake members. *Id.* art. IX(C); JA 96; Strong Decl. ¶ 5; JA 88.

Red Lake, Inc. is a "governmental instrumentality of the Red Lake Band . . . with its officers and employees having the responsibility of carrying out economic advancement functions" of Red Lake and its members. Red Lake, Inc. Articles of Incorporation art. V; JA 92. Red Lake, Inc. is "entitled to all of the privileges and immunities" of Red Lake. *Id.* at XIV(A); JA 100.

Red Lake, Inc.'s goals include enhancing the Tribe's self-sufficiency; creating and stimulating Red Lake's economy, including creating employment opportunities for Red Lake tribal members; generating profits for distribution to the Tribe's government and to promote the growth and continuity of Red Lake, Inc.; and



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generating tax and other revenue for use by the Tribe's government to provide services to the Red Lake community. *Id.* art. V(A)-(E); JA 93.

The Tribal Council established the Fisheries to provide employment opportunities for Red Lake tribal members and to promote the social, economic, and educational goals of the Tribe. Strong Decl. ¶ 8; JA 89. The Fisheries' employees harvest wild-caught fish from Red Lake, a natural freshwater lake composed of Upper Red Lake and Lower Red Lake. *Id.* ¶ 9; JA 89.

The Fisheries operates exclusively within the boundaries of the Red Lake Reservation, including all harvesting and processing of fish products. *Id.* ¶ 11; JA 89. The Fisheries employs only enrolled Red Lake members. *Id.* at ¶ 12; JA 89.

### F. OSHA Inspection and Citations

On March 23, 2018, agents of the Occupational Safety and Health Administration ("OSHA") conducted a site inspection of the Fisheries by entering the Red Lake Reservation without prior notice and approval from the Tribe. Citation and Notification of Penalty at 1; JA 5. On April 26, 2018, OSHA issued citations and notices of penalty, charging the Fisheries with OSH Act violations at its workplace located on the Red Lake Reservation. *Id.*; JA 5.

The "serious" citation alleged that on or about November 6, 2017, the Fisheries violated a safety standard codified at 29 C.F.R. § 1910.132(a) regarding personal protective equipment. *Id.* at 6; JA 10. This citation alleged that this



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regulation was violated on Lower Red Lake when the Fisheries did not require employees to wear, and employees did not wear, personal flotation devices "while performing tasks associated with gillnetting from a boat[.]" *Id.*; JA 10. The "other than serious" citation alleged that the Fisheries failed to timely report the deaths of employees in a work-related incident in violation of the reporting regulation codified at 29 C.F.R. § 1904.39(a)(1). *Id.* at 7; JA 11.

The Fisheries timely contested the citations and notification of penalty, thereby invoking review by the OSHA Review Commission ("Commission"). Compl. ¶ V; JA 2-3.

## II. The Administrative Proceedings Below

On July 18, 2018, the Secretary filed a complaint against the Fisheries. *Id.*; JA 1-3. The Secretary alleged that the Fisheries violated the OSH Act and requested that the Commission affirm the citations and notification of penalty. *Id.* ¶ VI; JA 3. On August 9, 2018, the Fisheries answered, denying the alleged violations. Answer at 1; JA 15. The Fisheries moved to dismiss the citations on the ground that the Secretary lacks authority to assert jurisdiction over it as a government entity wholly owned and operated by the Tribe on the Red Lake Reservation. Motion to Dismiss at 1; JA 19.

In response to the motion to dismiss, the Secretary proposed an analytical framework based on the Ninth Circuit's decision in *Donovan v. Coeur d'Alene*



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*Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985) ("*Coeur d'Alene*"), instead of providing an analysis under this Court's decision in *EEOC v. Fond du Lac Heavy Equipment & Construction Co.*, 986 F.2d 246 (8th Cir. 1993) ("*Fond du Lac*"). Response at 5-12; JA 116-123. In *Coeur d'Alene*, the Ninth Circuit began its analysis by recognizing that Indian tribes have the "inherent sovereign right to regulate the health and safety of workers in tribal enterprises." 751 F.2d at 1115. The court also acknowledged the question in the case was whether "Congress *intended* to exercise its plenary authority over Indian tribes." *Id.* (emphasis in original).

Despite the stated recognition of the primacy of tribal sovereignty, the Ninth Circuit in *Coeur d'Alene* failed to discern congressional intent of the OSH Act, and cited to the Supreme Court's decision in *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960) ("*Tuscarora*"), which states that it is "now well-settled by many decisions of the Court that a general statute in terms applying to all persons includes Indians and their property interests." *Id.* at 1115-16. The court even acknowledged that the language relied on in *Tuscarora* is dictum. *Id.* at 1115.

In determining its own rule concerning the presumption from congressional silence, the Ninth Circuit explained: "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



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treaties'; or (3) there is proof 'by legislative history or some other means that Congress intended the [law] not to apply to Indians on their reservations . . . ." *Id.* at 1116 (quoting *United States v. Farris*, 624 F.2d 890, 893-94 (9th Cir. 1980)).[2]

The Secretary contended that the *Coeur d'Alene* framework governs the question of whether the OSH Act applies to the Fisheries, and this Court's decision in *Fond du Lac* should have "no bearing" on the Commission's decision. Response at 8; JA 119. The Secretary also contended that Red Lake's treaty fishing rights do not bar the application of the OSH Act to the Fisheries and have "no bearing" in the case. Sur-Reply at 3-4; JA 186-87.

On July 23, 2019, ALJ William Coleman issued a decision and order of dismissal to vacate the citations and notices of penalty brought against the Fisheries. ALJ Decision and Order; Appellant's Addendum ("Add.") 24. The ALJ determined that the decision was "the outcome that the Eighth Circuit would most likely reach if it were to adjudicate the issues presented." *Id.* at 2.

The ALJ concluded that this Court's decision in *Fond du Lac* 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." *Id.* at 13. The *Fond du Lac* Court held that the Age Discrimination in Employment Act

[2] *Farris* involved the application of a federal criminal statute of general application to individual Indians, rather than to tribes, tribal treaty rights, or sovereign powers.

(“ADEA”), a generally applicable federal statute, does not apply to a tribally-owned and operated equipment and construction company located on reservation that “occasionally did work off-reservation.” 986 F.2d at 248.

The Court further determined 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 federal regulation would interfere with “an intramural matter that has traditionally been left to the tribe’s self-government.” *Id.* at 249. In addition, the Court noted 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.* (emphasis added).

Applying *Fond du Lac*, the ALJ concluded that: (1) Red Lake has inherent authority to regulate workplace health and safety for a tribal enterprise that operates on its Reservation, (2) a “clear and plain congressional intent” is required for a statute of general application such as the OSH Act to affect that right of tribal self-government, 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 Fisheries’ workplace. Add. 13.



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The ALJ explained that the Ninth Circuit's application of the *Tuscarora* rule in *Coeur d'Alene* is "contradistinction" to this Court's application of *Tuscarora* in *Fond du Lac*. *Id.* at 15. The ALJ stated that the self-government exception to the *Tuscarora* rule applied by the Ninth Circuit is "narrower" than this Court's analytical framework applied in *Fond du Lac*. *Id.* at 17. "[T]he 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*." *Id.*

In contrast, the ALJ explained that *Fond du Lac* "requires simply that a tribe's right of self-government be 'affected' by federal regulation." *Id.* In applying the *Fond du Lac* framework, the ALJ determined that applying the OSH Act to the Fisheries would "dilute" Red Lake's sovereignty and "affect" the Tribe's inherent sovereign right to regulate the health and safety of workers on its Reservation. *Id.* at 17-18. In the absence of any congressional intent for the OSH Act to apply to Indian tribes, the ALJ concluded that this Court would likely vacate the citations and notification of penalty based on *Fond du Lac*. *Id.* at 18.

The ALJ also determined that the citations and notification of penalty must be dismissed on grounds that applying the OSH Act to the Fisheries' workplace would impermissibly abrogate Red Lake's inherent right to exclude nonmembers from its Reservation. *Id.* at 20. The ALJ explained that the power to exclude nonmembers

from the Reservation is an "inherent sovereign right" that is "independent" of any express treaty language that stipulates such a power to exclude. *Id.* at 21.

The ALJ stated that this Court in *Fond du Lac* endorsed the Tenth Circuit's proposition in *Donovan v. Navajo Forest Product Industries*, 692 F.2d 709, 712 (10th Cir. 1982) ("*Navajo Forest*") in that "a tribe's inherent sovereign right should be regarded no differently than if that identical right had been expressly stipulated in a treaty." *Id.* at 23 (citing *Fond du Lac*, 986 F.2d at 249 n.4). Accordingly, the ALJ concluded that application of the OSH Act "would impermissibly infringe" on Red Lake's inherent sovereign right to exclude nonmembers from its Reservation. *Id.* at 23.

Following the ALJ's dismissal of the citations and notification of penalty, the Secretary sought discretionary review of the ALJ's decision before the full OSHA Review Commission. Opening Br. at 5. The Commission declined review of the ALJ's decision, which became a final order. *Id.* at 6. The Secretary's petition for review in this Court followed.

## SUMMARY OF THE ARGUMENT

The Court should affirm the ALJ's decision for four reasons, any one of which is sufficient standing alone.

First, Red Lake and its members enjoy an unrestricted right to catch and sell fish commercially on the Red Lake Reservation. Red Lake holds the exclusive

jurisdiction to regulate fishing activities within the Red Lake Reservation. Red Lake's 1837 Treaty-protected fishing right affirms the right to catch and sell fish commercially without any restrictions. Clearly, the imposition of OSHA regulations to the Fisheries' activities is a restriction on the exercise of such rights. In the complete absence of any reference to Indian tribes in the OSH Act's text or its legislative history, there has been no abrogation of Red Lake's treaty-protected right to catch and sell fish.

Second, under *Fond du Lac*, Red Lake holds the inherent sovereign authority to adopt and enforce its own health and safety workplace regulations in its own forum. Furthermore, the regulation of the Fisheries is a strictly internal matter that should be left to the Tribe to manage without any federal interference. The Court should disregard the Secretary's request to adopt the Ninth Circuit's *Coeur d'Alene* framework, which this Court noted is "contra" to that in *Fond du Lac*.

Third, Red Lake holds the inherent sovereign right to exclude nonmembers from the Red Lake Reservation. Red Lake's inherent sovereign right to exclude nonmembers prohibits OSHA inspectors from entering the Red Lake reservation without authorization by the Tribe.

Finally, in enacting the OSH Act, Congress did not exercise its power, through the Indian Commerce Clause, to regulate Indian commerce. Instead, Congress



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merely exercised its foreign and interstate commerce powers, and did not invoke its Indian commerce power.

## STANDARD OF REVIEW

### I. Standard of Review

The applicability of the OSH Act to the Fisheries is a question of law which is reviewed de novo. *Marambo v. Barr*, 932 F.3d 650, 654 (8th Cir. 2019).

### II. Principles of Treaty and Statutory Interpretation

"Treaty analysis begins with the text," and treaties "are construed as they would naturally be understood by the Indians." *Herrera v. Wyoming*, 139 S. Ct. 1686, 1701 (2019) (citation omitted). A court is to "look beyond the written words to the larger context that frames the Treaty, including 'the history of the treaty, the negotiations, and practical construction adopted by the parties.'" *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999) (citation omitted). Treaties are to be interpreted "liberally, resolving uncertainties in favor of the Indians[.]" *United States v. Brown*, 777 F.3d 1025, 1031 (8th Cir. 2015) (citing *Mille Lacs*, 526 U.S. at 200).

Statutes, likewise, are to be "construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit[.]" *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985).



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## ARGUMENT

### I. Red Lake and its Members Enjoy an Unrestricted Right to Catch and Sell Fish Commercially that Cannot be Restricted or Abrogated in the Absence of a Clear and Plain Intent by Congress.

### A. Red Lake and its Members Hold an Unrestricted Right to Catch and Sell Fish on the Red Lake Reservation that is Regulated Exclusively by the Tribe.

"As a general rule, Indians enjoy exclusive treaty rights to hunt and fish on lands reserved to them, unless such rights were clearly relinquished by treaty or have been modified by Congress. . . . These rights need not be expressly mentioned in the treaty." *United States v. Dion*, 476 U.S. 734, 738 (1986); *see also* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 18.03[1], at 1158-59 (Nell Jessup Newton ed., 2012) [hereinafter "COHEN'S HANDBOOK"] ("Exclusive on-reservation hunting, fishing, and gathering rights are implied from the establishment of a reservation for the exclusive use of a tribe[.]").

The exclusive on-reservation fishing rights of Red Lake and its members are implied from the establishment of the Red Lake Reservation. *See White*, 508 F.2d at 457 (stating that "no reservation of the right to hunt and fish" was necessary to preserve "the right on the lands reserved or retained in Indian ownership" on the Red Lake Reservation). These exclusive fishing rights benefit Red Lake collectively and its tribal members individually. *See Dion*, 476 U.S. at 738 n.4; *Brown*, 777 F.3d at 1031. The "exclusive on reservation fishing rights of the Chippewa Indians protect

the rights to fish and to sell fish." *Brown*, 777 F.3d at 1032; *see also United States v. Good*, No. 13-072, 2013 WL 6162801, at *6 (D. Minn. Nov. 25, 2013) (holding that the fishing rights of Red Lake tribal members encompass the catch and sale of fish).

Red Lake's power to regulate fishing activities on the Red Lake Reservation is exclusive. *See, e.g.*, *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 330 (1983) (stating that "on the reservation the Tribe exercises exclusive jurisdiction over hunting and fishing by members of the Tribe"); COHEN'S HANDBOOK, § 18.03[2][a], at 1160 ("By virtue of their retained powers of self-government, tribes holding on-reservation hunting, fishing, and gathering rights also retain the power to regulate their members in the exercise of those rights."). The "privilege of fishing to the Chippewa . . . means that the tribe may regulate . . . fishing by tribe members on the reservation to the exclusion of other jurisdictions[.]" *United States v. Brown*, Nos. 13-68, 13-70, 2013 WL 6175202, at *7 (D. Minn. Nov. 25, 2013), *aff'd*, 777 F.3d 1025 (8th Cir. 2015).

The Secretary entirely fails to acknowledge Red Lake's authority to regulate the Fisheries' activities carried out exclusively by Red Lake tribal members on the Red Lake Reservation in accordance with its own regulations. Clearly, the Secretary's threatened enforcement of the OSH Act impermissibly violates Red Lake's exclusive right to regulate fishing on its Reservation.



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### B. This Court's Precedent Affirms Red Lake's 1837 Treaty-Protected Right to Catch and Sell Fish Commercially.

A treaty is "essentially a contract between two sovereign nations." *Herrera*, 139 S. Ct. at 1699 (citation omitted). The exclusive and unrestricted fishing rights expressly reserved under the 1837 Treaty within the ceded territory illustrate how the "Chippewa would have understood similar broad rights to apply" on the Red Lake Reservation. *See Brown*, 777 F.3d at 1032. Fishing was essential to the survival and way of life of Indians throughout North America, and such activities "were not much less necessary to the existence of the Indians than the atmosphere they breathed." *Id.* (quoting *United States v. Winans*, 198 U.S. 371, 381 (1905)).

The 1837 Treaty between the United States and the Chippewa Indians expressly preserved and guaranteed the Chippewa a treaty-protected fishing right, which provided that:

> The privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and lakes included in the territory ceded, is guarantied [sic] to the Indians, during the pleasure of the President of the United States.

1837 Treaty, art. 5. The "privilege" of hunting and fishing is commonly referred to as a "usufructuary right" – the right to "live off the land," or "to make a modest living by hunting and gathering from the resources of the land." *United States v. Gotchnick*, 222 F.3d 506, 508 n.3 (8th Cir. 2000) (citing *United States v. Bresette*, 761 F. Supp. 658, 660 (D. Minn. 1991)). The area within the Red Lake Reservation

was not part of the territory ceded to the United States in 1837. *See* 1837 Treaty, art. 1. Neither the 1863 Treaty, which established the Reservation, nor the 1864 Treaty mention the fishing right preserved and guaranteed in the 1837 Treaty. Accordingly, the unrestricted fishing right remained fully intact.

The 1837 Treaty was signed by leaders of several bands of Chippewa Indians and representatives of the United States after extensive negotiation in which Chippewa leaders specifically expressed their desire to retain the right to fish on the ceded lands. The treaty negotiations documented Chippewa chief Ma-ghe-ga-bo's statement that, "Of all the country that we grant to you we wish to hold on to a tree where we get our living, & to reserve the streams where we drink the waters that give us life." *Brown*, 777 F.3d at 1028 (citation omitted).

Flatmouth, chief of the Pillager Band of Chippewa Indians, reiterated the importance of reserving usufructuary rights on the ceded lands:

> My Father. Your children are willing to let you have their lands, but they wish to reserve the privilege of making sugar from the trees, and getting their living from the Lakes and Rivers, as they have done heretofore, and of remaining in this Country. . . . You know we can not live, deprived of our Lakes and Rivers; . . . we wish to remain upon them, to get a living.

*Id.* Governor Henry Dodge of Wisconsin Territory, which in 1837 included all of the future State of Minnesota, explained to the Chippewa Indians that "I will agree that you shall have the free use of the rivers and the privilege of hunting on the lands



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you are to sell, during the pleasure of your great father." *Good*, 2013 WL 6162801, at *6; *Mille Lacs Band*, 526 U.S. at 176.

As reflected in the text of the 1837 Treaty, fishing rights were expressly reserved to the Chippewa Indians in the ceded territory. *Brown*, 777 F.3d at 1028. This Court interpreted that "[t]his history, text of the 1837 treaty, and evidence of the parties' understanding of it show that the treaty guaranteed a broad right to fish that includes [the] right to sell them." *Id.* at 1031. "Even if the 1837 treaty does not apply, the rights it protects are relevant because in this particular case the Chippewa would have understood similar broad rights to apply on the [Red Lake] Reservation." *Id.* at 1032.

In summary, the Chippewa Indians' understanding of the right to fish preserved under the 1837 Treaty exemplifies how integral fishing is to the Chippewa way of life, and the extent and reach of Red Lake's and its members' unrestricted right to catch and sell fish commercially.

**C. The OSH Act Does Not Abrogate or Limit Red Lake's Unrestricted Right to Catch and Sell Fish in the Absence of any Clear Congressional Intent.**

As a general principle, "Indians enjoy exclusive treaty rights to hunt and fish on lands reserved to them, unless such rights were clearly relinquished by treaty or have been modified by Congress." *Dion*, 476 U.S. at 738 (citation omitted); *White*, 508 F.2d at 456 ("[A] treaty will not be deemed to have been abrogated or modified



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by a later statute unless such purpose on the part of Congress has been clearly expressed."); *United States v. Winnebago Tribe of Neb.*, 542 F.2d 1002, 1005 (8th Cir. 1976) ("Rights secured by treaty will not be deemed to have been abrogated or modified absent a clear expression of congressional purpose[.]") (quoting *Menominee Tribe v. United States*, 391 U.S. 404, 413 (1968)). "The intention to abrogate or modify a treaty is not to be lightly imputed to the Congress." *Winnebago*, 542 F.2d at 1002 (citation omitted).

In *Fond du Lac*, this Court stated "areas traditionally left to tribal self-government, those most often the subject of treaties, have enjoyed an exception from the general rule that congressional enactments, in terms applying to all persons, includes Indians and their property interests." 986 F.2d at 248 (quoting *White*, 508 F.2d at 455). Here, the Secretary seeks to regulate Red Lake's longstanding practice of fishing within its Reservation—an "area[] traditionally left to tribal self-government" that is unquestionably "the subject of treaties."[3]

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[3] The Secretary argues that this Court should follow *Coeur d'Alene*, and acknowledges that the *Coeur d'Alene* framework provides an exception when "application of the law to the tribe would abrogate rights guaranteed by Indian treaties." Opening Br. at 21 (quoting *Coeur d'Alene*, 751 F.2d at 1116). But, the Secretary disregards his own acknowledgment when he argues that the Fisheries "has not identified any treaty right that would be infringed by the application of the OSH Act under these circumstances." *Id.* at 26. Red Lake's fishing rights would undoubtedly be infringed by the application of the OSH Act to the Fisheries.

Furthermore, in *Fond du Lac*, this Court explained that "[a] clear and plain intent to abrogate a treaty right may only be demonstrated by an 'express declaration' in the statute, by the 'legislative history,' and by 'surrounding circumstances.'" *Id.* (quoting *Dion*, 476 U.S. at 739). An act of Congress abrogates or modifies a specific treaty right only when there "is clear evidence that Congress actually considered the conflict between its intended action on the one hand and the Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." *Id.* at 250. This Court has consistently followed this rule in requiring a clear congressional intent to abrogate usufructuary rights in generally applicable federal statutes.

In *White*, this Court affirmed the dismissal of an indictment against a Red Lake member for violating the Bald and Golden Eagle Protection Act ("BGEPA"),[4] by shooting at a bald eagle on the Red Lake Reservation. *White*, 508 F.2d at 454. In determining that Red Lake had hunting rights, the Court explained that "[t]o affect those rights, then, by 16 U.S.C. § 668, it was incumbent upon Congress to expressly abrogate or modify the spirit of the relationship between the United States and the Red Lake Chippewa Indians on their native reservation." *Id.* at 457-58. As Congress had not acted, this Court concluded that the district court properly dismissed the indictment. *Id.* at 458-59.

[4] 16 U.S.C. § 668 *et seq.*



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In *Brown*, this Court affirmed the dismissal of indictments under the Lacey Act[5] against Chippewa Indians for netting fish for commercial purposes within the boundaries of the Leech Lake Reservation. *Brown*, 777 F.3d at 1027. The Court explained that the factual allegations against the defendants "relate to fishing within the Leech Lake Reservation." *Id.* at 1029. The Court rejected the United States' argument that prosecuting the defendants under the Lacey Act "does not implicate usufructuary rights" and examined the scope of fishing rights protected by the 1837 Treaty. *Id.* at 1030. The Court found that the "historical importance" of the usufructuary activities in Chippewa life and the 1837 Treaty negotiations "indicate that the Indians believed they were reserving *unrestricted* rights to hunt, fish, and gathering throughout a large territory." *Id.* at 1031 (emphasis added).

This Court in *Brown* determined that the "exclusive on reservation fishing rights of the Chippewa Indians protect the rights to fish and to sell fish." *Id.* at 1032. Since the alleged conduct fell within their fishing rights, the Court explained that "prosecution under the Lacey Act conflicts with those rights." *Id.* In the absence of any congressional intent to abrogate Chippewa fishing rights through the Lacey Act, this Court concluded that "the historic fishing rights of the Chippewa Indians bar th[e] prosecution of defendants for taking fish within the Leech Lake Reservation and selling them." *Id.*

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[5] 16 U.S.C. § 3372(a)(1).

In this case, the regulation of the Fisheries' operations, including the catch and sale of fish exclusively by tribal members on the Red Lake Reservation, falls squarely within the scope of Red Lake's protected fishing rights. *See Brown*, 777 F.3d at 1032; *United States v. Dion*, 752 F.2d 1261, 1265 (8th Cir. 1985) (en banc), *rev'd in part on other grounds*, 476 U.S. 734 (1986) (stating that precedent affirms that "*Indians are entitled to fish commercially* in the exercise of both their on- and off-reservation treaty fishing rights, *where commercial fishing was traditionally practiced by the Indians*") (emphasis in original).

Like the Lacey Act, the OSH Act does not purport to abrogate or modify treaty rights in any manner. As a general congressional enactment, the OSH Act does not mention Indian tribes in the statutory text or its legislative history. *See* 29 U.S.C. § 651, *et seq.*; Add. 15. While Congress may impose restrictions or regulations on the usufructuary activities of Red Lake and its tribal members on the Red Lake Reservation through its exercise of its plenary authority over Indian affairs, it can only do so through a clear congressional intent to abrogate or limit such exclusive fishing rights. *See Fond du Lac*, 986 F.2d at 248; *Brown*, 777 F.3d at 1031; *White*, 508 F.2d at 456; *Dion*, 476 U.S. at 739-40.

In the absence of any clear intent by Congress to abrogate or restrict usufructuary rights belonging to Indian tribes, the OSH Act may not be properly construed to apply to the Fisheries' operations. *See White*, 508 F.2d at 457-58



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(explaining that it is "incumbent upon Congress to expressly abrogate or modify the spirit of the relationship between the United States and Red Lake Chippewa Indians on their native reservation"). Clearly, Congress has not acted to restrict the fishing rights of Red Lake members, nor has Congress determined that the OSH Act shall apply to restrict treaty-protected fishing rights.

The Secretary's apparent position that congressional silence in the OSH Act may somehow be construed in a "backhanded way" of abrogating Red Lake's exclusive usufructuary right to catch and sell fish must be rejected. *See White*, 508 F.2d at 458 (quoting *Menominee Tribe*, 391 U.S. at 412). In the absence of any express reference to treaty rights or fishing privileges in the text of the OSH Act or its legislative history, the Secretary cannot reasonably claim that the OSH Act *sub silentio* diminished the fishing rights of the tribal member employees of the Fisheries on the Red Lake Reservation.

Rather than pointing to any clear and compelling congressional intent for the OSH Act to apply to Indian tribes, the Secretary asserts only that there are no "exceptions in the text of the OSH Act for Indian tribes or tribal enterprises." App. Br. at 18. This argument is directly contrary to this Court's longstanding precedent establishing that "areas traditionally left to tribal self-government," such as treaty-protected rights, are exempt from general congressional enactments. *Fond du Lac*, 986 F.2d at 248 (quoting *White*, 508 F.2d at 455); *see also Winnebago*, 542 F.2d at

1005 (stating that this rule as articulated by this Court in *White* is "controlling authority").

Accordingly, the Secretary's argument is completely without support in the OSH Act, and is contrary to the applicable rules of statutory construction. This Court should construe the OSH Act in such a manner that it does not limit or restrict Red Lake's exclusive right to regulate fishing activities on the Red Lake Reservation.

## II. Red Lake Has Inherent Sovereign Authority to Regulate Its Own Health and Safety Standards Consistent with *Fond du Lac*.

The ALJ correctly applied this Court's prior decision in *Fond du Lac* to determine whether application of the OSH Act to the Fisheries "would impermissibly infringe on the Red Lake Band's right of self-governance." Add. 13. The Secretary asks this Court to apply nonbinding precedent from the Ninth Circuit's decision in *Coeur d'Alene* and courts that have adopted the *Coeur d'Alene* framework.

However, this Court is bound by its own precedent. *See Solis v. Summit Contractors, Inc.*, 558 F.3d 815, 828 (8th Cir. 2009) ("We are bound by [a prior] decision unless the en banc court or the Supreme Court reaches a different result."). This Court correctly rejected the invitation to adopt the *Coeur d'Alene* framework and noted that its holding is "contra" to that in *Fond du Lac*. 986 F.2d at 249 n.3.



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### A. Application of the OSH Act to the Fisheries Would Impermissibly Infringe on Red Lake's Inherent Right of Self-Governance.

In *Fond du Lac*, this Court determined that the general rule of applicability does not apply when a tribe's "specific right of self-government would be affected" by the application of the federal statute to the tribe. 986 F.2d at 249. This Court acknowledged the long-standing rule that a tribe has the power to "make their own substantive law in internal matters and to enforce that law in their own forums." *Id.* (citing *Santa Clara Pueblo*, 436 U.S. at 55-56). For a statute of general applicability to apply to the tribe when it affects the right to self-government, this Court requires a "clear and plain" congressional intent. *Id.* In determining whether such a "clear and plain" intent exists, the Court looks for an "explicit statement by Congress," or "clear and reliable evidence in the legislative history" of the statute. *Id.* at 249-50 (quoting *Dion*, 476 U.S. at 739).

The Secretary incorrectly asserts that the "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." Opening Br. at 33. The Secretary misconstrues this Court's framework in *Fond du Lac* to determine whether a generally applicable federal statute may apply to Indian tribes.[6] The OSH Act, like

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[6] The Secretary incorrectly contends that 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)." Opening Br. at 38. *Fortune Bay* involved the enforcement of a pre-complaint subpoena to produce certain documents to determine



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the ADEA at issue in *Fond du Lac*, is a federal statute entirely silent on its application to Indian tribes. *See* Add. 15.

Undoubtedly, as the ALJ concluded below, Red Lake holds the inherent sovereign right to regulate the health and safety of the Fisheries' workers on the Red Lake Reservation. Add. 17-18. An important aspect of Red Lake's sovereign authority concerns its sovereignty over both its members and territory. *See United States v. Mazurie*, 419 U.S. 544, 557 (1975) ("[I]t is an important aspect of this case that Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and territory.").[7]

Application of the OSH Act to regulate the activities of the Fisheries would "affect" Red Lake's right of self-government and inherent sovereign right to regulate the health and safety of workers. *See Fond du Lac*, 986 F.2d at 249. Therefore, in the absence of a "clear and plain" intent by Congress for the OSH Act to apply to Indian tribes, the Secretary may not properly seek to enforce OSHA standards on the Fisheries. *See id.*

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whether a casino was an "employer" within the meaning of the NLRA. 688 F. Supp. at 862. The district court distinguished *Fond du Lac* on the grounds that it was "not a pre-complaint subpoena enforcement action but a fully litigated case decided on the merits." *Id.* at 882. The district court's decision in *Fortune Bay* is neither persuasive nor binding on the Court in this case.

[7] Notably, in *Coeur d'Alene*, the Ninth Circuit also recognized that: "No one doubts that the Tribe has the inherent sovereign right to regulate the health and safety of workers in tribal enterprises." 751 F.2d at 1115.



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The OSH Act is completely silent in the text of the statute and its legislative history regarding Indian tribes. In the decision below, the ALJ correctly stated that: "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." Add. 18. As this Court explained, "we do not find that a clear and plain intention of Congress should be extrapolated from the omission of the phrase 'an Indian tribe' from the definition of 'employer' . . . ." *Fond du Lac*, 986 F.2d at 251.

Accordingly, this Court should determine that Red Lake retains the inherent sovereign right to regulate the health and safety of the Fisheries workplace, and the OSH Act does not abrogate or limit this right.

**B. Regulation of the Fisheries is a Strictly Internal Matter that Should be Left to the Tribe to Manage Internally.**

In *Fond du Lac*, this Court determined that the dispute between a tribal employer and tribal member applicant at the business wholly owned and operated by the Fond du Lac Tribe was a "strictly internal matter." 986 F.2d at 249. This Court explained that: "Subjecting such an employment relationship between the tribal member and his tribe to federal control and supervision dilutes the sovereignty of the tribe." *Id.* Federal regulation of such an internal dispute "interferes with an intramural matter that has traditionally been left to the tribe's self-government." *Id.*



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Similarly, the regulation of the Fisheries' workplace safety and health standards is a strictly internal matter. The Fisheries' workplace is operated exclusively by Red Lake tribal members and located entirely within the boundaries of the Red Lake Reservation. Strong Decl. ¶¶ 11-12; JA 89. The harvesting and processing of wild caught fish by the Fisheries' employees is an activity that is deeply intertwined in Red Lake's culture and traditions and has been "consistently organized and managed by the [Red Lake] community for generations." CHILD at 40.

The consideration of the methods and techniques for fishing used by the Fisheries and the health and safety of the tribal member employees "should be allowed to be restricted (or not restricted) by the tribe in accordance with its culture and traditions." *Fond du Lac*, 986 at 249. In addition, federal regulation of the Fisheries' own health and safety workplace standards directly "interferes with an intramural matter than has traditionally been left to the tribe's self-government." *Id.*

As indicated by the significant independence and control that Red Lake has retained over its members and territory, the Tribe has a substantial interest in regulating the Fisheries' health and safety standards without interference from the federal government. *See Nord*, 520 F.3d at 858 (Murphy, J. concurring) (noting that Red Lake has "preserved for the band an independence not experienced on other reservations"). As such, the regulation of the Fisheries is a strictly internal matter



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that should be left to be managed internally by Red Lake and its members without any federal interference.

### C. The Secretary's Reliance on Language from *Tuscarora* is Misguided and Inconsistent with Supreme Court Precedent.

The Secretary references a Department of Labor policy, which cites *Tuscarora* for the proposition that Indian tribes "generally should be 'treated as any other person' under the OSH Act, 'unless Congress expressly provided for special treatment." Opening Br. at 19-20 (citing 29 C.F.R. § 1975.4(b)(3)).[8] The ALJ correctly explained that this policy statement "simply reiterates the *Tuscarora* rule," and "provides no additional guidance in resolving the issues presented in this case." Add. 11 (citation omitted).

Furthermore, the Supreme Court's decision in *Tuscarora* is inapposite, and the Secretary's reference to dictum in the opinion serves no purpose in this case. In

[8] Notwithstanding its publication in the Code of Federal Regulations, the policy articulated at 29 C.F.R. Part 1975 was not promulgated through notice-and-comment rulemaking and "contains only interpretive rules and general statements of policy." Department of Labor, *Part 1975—Coverage of Employers Under the Williams-Steiger Occupational Safety and Health Act of 1970*, 37 Fed. Reg. 929 (Jan. 21, 1972). Consequently, the Secretary's interpretation is not entitled to deference from this Court. *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000) ("[I]nterpretations contained in policy statements . . . do not warrant *Chevron*-style deference," but instead "are 'entitled to respect' under our decision in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), but only to the extent that those interpretations have the 'power to persuade,' *ibid.*") (internal citations omitted). For the reasons articulated in this Brief, the Secretary's policy pronouncement is unpersuasive, and should not be permitted to bootstrap the application of the OSH Act to Red Lake's treaty-protected fishing rights and sovereign powers.



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*Tuscarora*, the Supreme Court did not interpret congressional silence to limit or restrict tribal rights. Rather, the Court concluded that the Federal Power Act ("FPA") authorized the condemnation of land owned by the Tuscarora Indian Nation for the purpose of constructing a reservoir and hydroelectric facility on the Niagara River. 362 U.S. at 123-24.

At issue in the case was whether Tuscarora's land, owned in fee simple, qualified as a "reservation" under the terms of the FPA. *Id.* at 110. If the land was a "reservation," the FPA required a finding that the license (and therefore the condemnation of land to facilitate the license) would not interfere with the purpose of the reservation. *Id.* at 110-11. If not, Tuscarora's land could be condemned without any additional process. *Id.* The Court, however, held that the Tuscarora lands in question were not part of a reservation. *Id.* at 111-14.

The Court in *Tuscarora* analyzed the FPA's plain language and its legislative history and concluded that Congress's intent was clear; any lands other than those owned by the United States were not included in the definition of "reservation." *Id.* at 111-13. First, the Court stated: "The plain words of this definition seem rather clearly to show that Congress intended the term 'reservations,' . . . to embrace only 'lands and interests in lands owned by the United States.'" *Id*. at 111. Next, the Court reviewed the congressional record and found it replete with evidence supporting the conclusion that "reservations" meant lands owned by the United States. *See id*. at

112-13. The Court, after this extensive contemplation of the FPA's text and legislative history, concluded that "[t]his analysis of the plain words and legislative history of the Act's definition of 'reservation' and of the plan and provisions of the Act leaves us with *no doubt* that Congress . . . intended to and did confine 'reservations,' including 'tribal lands embraced within Indian reservations', to those located on lands 'owned by the United States.'" *Id*. at 114 (emphasis added).

Only after the Court's conclusion about Congress's clear intent did it address the question of whether, notwithstanding the FPA's language and history, the Court should nonetheless carve out an exception for Tuscarora's fee lands. *See id*. at 115-16. In that context the Court stated: "[I]t 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.

In support of this proposition, the Court cited only to decisions upholding federal or state taxes imposed on *individual Indians*. *See id*. at 116-17. The *Tuscarora* Court's language—"all *persons* includes Indians and their *property interests*"—as well as the context and supporting authority indicate that the Court was stating nothing other than the unsurprising proposition that when Indians earn income or own property on terms identical to non-Indians, they are subject to the same strong tax law presumptions of applicability as anyone else. *See id*. (emphasis added).



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*Tuscarora*'s approach was wholly consistent with the requirement of clear and plain congressional intent to limit or restrict tribal rights. The FPA was not silent with respect to the definition of Indian reservation lands, and therefore, *Tuscarora* sheds no light on how the Supreme Court would interpret a statute that had not contemplated its effects on tribes, one way or another. Since the case was decided in 1960, the Supreme Court has never applied the so-called *Tuscarora* rule to decide whether a statute should be interpreted to interfere with or abrogate tribal rights. In fact, the Court has employed the opposite presumption in determining whether a federal statute abrogates Indian rights. The Supreme Court has cited and applied the "clear congressional intent" rule in many Indian law cases since 1960, including two cases involving statutes of general applicability.

In *United States v. Dion*, the Court addressed whether the BGEPA abrogated a tribal member's right to hunt eagles within the boundaries of his reservation. 476 U.S. 734, 735-36 (1986). The BGEPA prohibits the taking of eagles throughout the country, and the tribal member relied on a reserved treaty right to hunt and fish rather than an explicit treaty term. *Id.* at 736-37. The Court required "clear evidence that Congress actually considered the conflict between its intended action on the one hand, and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." *Id.* at 739-40. The Court found sufficient evidence in the BGEPA's text and legislative history, including a provision allowing tribes and tribal

members to apply for special permits to take eagles for religious purposes, to conclude that Congress did have the requisite clear intent. *See id*. at 740-45.

In *Iowa Mutual Insurance Co. v. LaPlante,* 480 U.S. 9 (1987), the question was whether the federal diversity statute, 28 U.S.C. § 1332, which authorizes federal court jurisdiction over non-federal question cases when the parties are citizens of different states, applied to a case filed in tribal court by a tribal member against a non-Indian defendant. 480 U.S. at 11. The diversity statute, like the OSH Act, does not mention tribes. *Iowa Mutual* involved the issue of whether a tribal court could hear a case against a non-Indian. The Court did not decide that precise question, opting instead to remand the case to the district court for consideration of whether the parties should exhaust their remedies in tribal court. *See id*. at 19-20.

Importantly, the Court rejected the argument that the diversity statute applied to oust tribal court jurisdiction automatically, even in a case involving a non-Indian: The diversity statute "makes no reference to Indians and nothing in the legislative history suggests any intent to render inoperative the established federal policy promoting tribal self-government." *Id*. at 17. The Court concluded that: "In the absence of any indication that Congress intended the diversity statute to limit the jurisdiction of the tribal courts, we decline petitioner's invitation to hold that tribal sovereignty can be impaired in this fashion." *Id*. at 18.



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*Dion* and *Iowa Mutual*, along with many other Indian law cases decided since 1960, have looked for specific evidence of congressional intent before applying federal statutes of general applicability to tribal member activities on reservation land. "Not only has the Supreme Court conspicuously refrained from approving [*Tuscarora*], but the 'doctrine' is exactly 180—degrees backwards. It presumes intent to limit tribal sovereignty when Congress is silent, even though congressional silence is traditionally, and still, has been deemed insufficient to authorize limitation." *NLRB v. Little River Band of Ottawa Indians Tribal Gov't*, 788 F.3d 537, 565 (6th Cir. 2015) (McKeague, J., dissenting) (citing *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 790 (2014)). *Tuscarora* is a "house of cards" that "usurps Congress's power, ignores Supreme Court precedent, . . . and, not least of all, impermissibly intrudes on tribal sovereignty." *Id.* As such, this Court should not consider the *Tuscarora* dictum in deciding this case.

## III. Red Lake's Inherent Sovereign Right to Exclude Nonmembers Bars OHSA Inspectors from Entering the Red Lake Reservation Without Authorization from the Tribe.

The ALJ correctly highlighted that "a hallmark of Indian sovereignty is the power to exclude non-Indians from Indian lands." Add. 21 (citing *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141 (1982); *see also Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832) (stating that persons were allowed to enter Cherokee land only "with the assent of the Cherokees themselves, or in conformity with

treaties, and with the acts of congress"). A tribe "needs no grant of authority from the federal government to exercise the inherent power of exclusion from tribal territory, either as a government or as a landowner." COHEN'S HANDBOOK § 4.01[2][e], at 221.

As this Court has explained, a "tribe's traditional and undisputed power to exclude persons[] from tribal land . . . gives it the power to set conditions on entry to that land." *Attorney's Process & Investigation Servs. v. Sac & Fox Tribe of Miss. in Iowa*, 609 F.3d 927, 940 (8th Cir. 2010), *cert. denied*, 131 S. Ct. 1003 (2011) (citations omitted); *see also Merrion*, 455 U.S. at 144 (stating that the power to exclude nonmembers includes the power to "place conditions on entry, on continued presence, or on reservation conduct").

In *Merrion*, the Supreme Court explained that the Jicarilla Apache Tribe, whose reservation was created by an executive order that contained no express language restricting entry on reservation lands, possessed the inherent sovereign right to exclude non-Indians from Indian lands. 455 U.S. at 141. The Court rejected the argument that Congress impliedly diminished aspects of tribal sovereignty by explaining that it must "tread lightly in the absence of clear indications of legislative intent." *Id.* at 149 (citation omitted).

In 1983, in *Secretary of Labor v. Coeur d'Alene Tribal Farm*, the OSHA Review Commission applied the principles enumerated in *Merrion* (which was

decided just the year before) to conclude that the Coeur d'Alene Tribe's inherent sovereign power to exclude non-Indians bars the application of the OSH Act to a tribally owned and operated farm. 11 BNA OSHC 1705, 1983 WL 23795, at *5 (Nos. 78-6081-82, 1983). The Commission explained that "it is also of no consequence that no treaty or other writing specifically grants the Coeur d'Alene tribe the right to exclude outsiders from its reservation." *Id.* In finding no congressional intent to "override" the tribe's inherent sovereign right to exclude non-Indians, the Commission concluded that the OSH Act could not be applied to the tribally owned farm.[9] *Id.* Notably, OSHA's position in *Coeur d'Alene* was to respect the tribe's right to exclude non-Indians, including federal inspectors, in conformity with *Merrion*.

Similarly, the Tenth Circuit has determined that the Supreme Court's decision in *Merrion* overruled the *Tuscarora* (dicta) statement that general federal laws apply to Indians and their property interests because a tribe's right to exclude non-Indians is an inherent sovereign power. *Navajo Forest*, 692 F.2d at 713. The court stated that absent some expression of congressional intent, it "shall not permit divestiture of the tribal power to manage reservation lands so as to exclude non-Indians from entering thereon . . . ." *Id.* at 714. This Court in *Fond du Lac* acknowledged that there is no

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[9] On appeal, the Ninth Circuit overturned the Commission's decision because it was that court's view that the right to exclude needed to be memorialized in a treaty. 751 F.2d at 1117.

distinction between a tribe's inherent sovereign right and that identical right expressly included in a treaty. *See Fond du Lac*, 986 F.2d at 249, n.4.

In this case, the Secretary's contention that Red Lake does not have the inherent sovereign authority to exclude OSHA inspectors from the Red Lake Reservation is directly contrary to *Merrion* and to OSHA's original position on the inherent sovereign right to exclude as expressed before the OSHA Review Commission in the *Coeur d'Alene* case. As an essential attribute of its sovereign authority, Red Lake holds the right to exclude nonmembers from the Red Lake Reservation independently of any treaty right. *See United States v. Wheeler*, 435 U.S. 313, 323 (1978) ("Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute[.]").

Red Lake has traditionally exercised the right to exclude, including controlling who is allowed to enter the Red Lake Reservation and in the past required nonmembers "working or engaging in business on the reservation to apply for passports." *Nord*, 520 F.3d at 858 (Murphy, J., concurring). In the absence of any congressional intent, the OSH Act does not restrict or limit Red Lake's inherent sovereign right to exclude nonmembers from the Red Lake Reservation.[10] Therefore,

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[10] The Secretary fails to distinguish between statutes that expressly permit federal regulation over tribal businesses located on reservation land and those that are entirely silent. For instance, the Indian Gaming Regulatory Act expressly provides that an independent federal regulatory agency "shall inspect and examine all premises located on Indian lands" where gaming is conducted. 25 U.S.C. §



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the Court should determine that Red Lake's inherent sovereign right to exclude non-Indians bars OSHA inspectors from entering the Red Lake Reservation without authorization by the Tribe.

## IV. Congress Did Not Exercise Its Indian Commerce Power in Enacting the OSH Act.

This case calls for construction of the OSH Act in light of its silence as to its application to Indian tribes and tribal governmental enterprises. The Secretary asserts that the Fisheries is an "employer" as defined in the OSH Act, which expressly excludes most federal and state governments but says nothing about Indian tribes, and infers from this silence that Congress intended no such exclusion for tribal governments.[11] Opening Br. at 18. However, the Secretary overlooks a critical clue in the OSH Act's text: Congress expressly invokes its authority to regulate interstate

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2706(b)(2). The Secretary also makes no mention of voluntary intergovernmental agreements between tribes and federal agencies, which are much more suitable alternatives to command-and-control for tribal governmental employers. This includes voluntary food inspections at tribal workplaces for approval by the Food and Drug Administration. The Secretary also mistakenly cites to *Florida Paraplegic, Association, Inc. v. Miccosukee Tribe of Indians of Florida* in which the Eleventh Circuit applied the *Coeur d'Alene* framework to conclude that the Americans with Disabilities Act required a restaurant and casino owned by a tribe to be accessible to disabled persons. 166 F.3d 1126, 1130 (11th Cir. 1999). Not only is *Florida Paraplegic* irrelevant to the right to exclude federal inspectors from reservation land, but it relies on nonbinding Ninth Circuit precedent.

[11] Congress framed the OSH Act to cover private sector employers, not governments or governmental entities. 29 U.S.C. § 652(5). Supreme Court precedent establishes the "proposition that Indian tribes within 'Indian country' are a good deal more than 'private, voluntary organizations[.]'" *Mazurie*, 419 U.S. at 557.

commerce and foreign commerce, but says nothing about regulating Indian commerce. 29 U.S.C. § 651(b). This fact undermines the Secretary's assumptions concerning congressional silence and demonstrates why this Court should affirm the decision below.

### A. Congress' Authority to Regulate *Indian Commerce* is Separate and Distinct from its Authority to Regulate Interstate Commerce and Foreign Commerce.

The Commerce Clause of the U.S. Constitution authorizes Congress to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. As the Supreme Court has explained: "The objects, to which the power of regulating commerce might be directed, are divided into three distinct classes—foreign nations, the several states, and Indian tribes. When forming this article, the convention considered them as entirely distinct." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 18 (1831); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 191-92 (1989) ("[T]he Commerce Clause draws a clear distinction between 'States' and 'Indian Tribes.'").

The Secretary's assertion that Congress' use of its interstate commerce power in the OSH Act to regulate Indian commerce completely ignores the textual and conceptual distinctions between these two powers. The Supreme Court has rejected a correlation between the Interstate and Indian Commerce Clauses. The "central function of the Indian Commerce Clause is to provide Congress with plenary power



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to legislate in the field of Indian affairs." *Cotton Petroleum*, 490 U.S. at 192. In contrast, "the Interstate Commerce Clause is concerned with maintaining free trade among the States even in the absence of implementing federal legislation[.]" *Id.*

The Supreme Court has further explained that it is "well established that the Interstate Commerce and Indian Commerce Clauses have very different applications." *Id.* Specifically, the "extensive case law that has developed under the Interstate Commerce Clause, moreover, is premised on a structural understanding of the unique role of the States in our constitutional system that is not readily imported to cases involving the Indian Commerce Clause." *Id.*

### B. In the OSH Act, Congress Exercised Only its Interstate and Foreign Commerce Authority, *Not Indian Commerce* Authority.

In the OSH Act, Congress declared that it was acting pursuant to "its powers to regulate commerce *among the several States and with foreign nations* and to provide for the general welfare." 29 U.S.C. § 651(b) (emphasis added).[12] But nowhere in the OSH Act or its legislative history did Congress indicate it was exercising its authority to regulate Indian commerce. The OSH Act's definition of "commerce" focuses on interstate commerce:

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[12] *See also* 29 U.S.C. § 651(a) (finding that workplace injuries and illnesses "impose a substantial burden upon, and are a hinderance to, *interstate* commerce") (emphasis added); *id.* § 651(b)(3) (authorizing the Secretary "to set mandatory occupational safety and health standards applicable to businesses affecting *interstate* commerce") (emphasis added).

> The term "commerce" means 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 (other than the Trust Territory of the Pacific Islands), or between points in the same State but through a point outside thereof.

29 U.S.C. § 652(3). The OSH Act's legislative history further evidences Congress' intent to enact the statute under the Interstate Commerce Clause: "This bill applies to all *employment performed in a business affecting commerce among the states* . . . ." S. Rep. No. 91-1282, at 5199 (1970) (emphasis added); *id.* at 5202 ("Under this section Congress finds that personal injuries and illnesses arising out of work impose a substantial burden upon *interstate commerce*[.]") (emphasis added).

The Fisheries' activities involve quintessential *Indian commerce*. The Fisheries is a wholly owned and operated governmental entity of Red Lake and organized under tribal law. Strong Decl. ¶¶ 2, 6, 8; JA 88-89. All employees are Red Lake tribal members and all workplace activities take place on the Red Lake Reservation. *Id.* at ¶¶ 11-12; JA 89. Any "commerce" between the Fisheries and the United States and its citizens is undoubtedly Indian commerce. However, neither the OSH Act nor its legislative history provide any evidence whatsoever that Congress intended that the Act would regulate *Indian commerce*.

Canons of statutory construction, both general and specific to Indian law, favor an interpretation that would bar the application of the OSH Act to Indian commerce. "A standard axiom of statutory interpretation is *expressio unius est*



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*exclusio alterius*, or the expression of one thing excludes others not expressed." *Watt v. GMAC Mortg. Corp.*, 217 F.3d 781, 783 (8th Cir. 2006) (citing *Jama v. INS*, 329 F.3d 630, 634 (8th Cir. 2003), *aff'd sub nom.*, *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 341 (2005)). This canon "depends on identifying a series of two or more terms or things that should be understood to go hand in hand, which is abridged in circumstances supporting a sensible inference that the term left out must have been meant to be excluded." *Chevron USA, Inc. v. Echazabal*, 536 U.S. 73, 81 (2002). The Commerce Clause establishes three distinct classes of commerce—Foreign, Interstate, and Indian—as an "associated group or series," *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 159 (2003) (quoting *United State v. Vonn*, 535 U.S. 55, 65 (2002)), that are a "classic and well known triumvirate." *See Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 232 (2011).

In invoking only its foreign and interstate commerce powers, Congress signaled that it did not intend to regulate Indian commerce in the OSH Act. Congress understands how to invoke its Indian commerce power to regulate or restrict tribal sovereignty, and the OSH Act indicates that it did not intend to do so. Specifically, the Supreme Court has observed that "[w]hen 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*



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*to its authority under the Interstate Commerce Clause*." *Merrion*, 455 U.S. at 155 n.21 (emphasis added).[13]

This canon also sheds light on the Act's failure to list tribal governments among those excluded from the definition of "employer." If Congress, invoking only its interstate and foreign commerce powers, never intended to regulate Indian commerce through the OSH Act, then it makes perfect sense that Congress would not go out of its way in the definition of "commerce" to exclude tribal governments when it never intended to regulate tribal governments in the first place.

Moreover, "[w]hen interpreting a statute, [the court] must consider the statute in light of judicial concepts existing before it . . . was enacted." *Estate of Wood v. C.I.R.*, 909 F.2d 1155, 1160 (8th Cir. 1990). "[I]t is proper to consider that Congress acts with knowledge of existing law, and that 'absent a clear manifestation of contrary intent, a newly-enacted or revised statute is presumed to be harmonious with existing law and its judicial construction.'" *Id.* (citation omitted).

Prior to the enactment of the OSH Act, it was understood that tribes and their members hold the sovereign right to "make their own laws and be ruled by them." *Williams*, 358 U.S. at 220. It was also well-established that "the power of regulating

[13] Although the Secretary does not invoke the *expressio unius est exclusio alterius* canon by name, he nevertheless makes the same argument in asserting that the OSH Act's express exceptions for federal and state governments implies that there is no exception for tribal governments. Opening Br. 17.

commerce" is "divided into three distinct classes—foreign nations, the several states, and Indian tribes." *Cherokee Nation*, 30 U.S. (5 Pet.) at 18. In the absence of any clear congressional intent, the OSH Act should be construed to be harmonious with this existing law, and that Congress did not invoke its power under the Indian Commerce Clause when it enacted the OSH Act.

In addition, Indian law canons of statutory construction strongly favor a construction that would bar application of the OSH Act to Indian commerce. A well-established canon of Indian law provides that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Blackfeet Tribe*, 471 U.S. at 766; *Oneida Cnty. v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985) ("The canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians."); *see also Merrion*, 455 U.S. at 152 ("[I]f there [is] ambiguity . . . the doubt would benefit the tribe, for 'ambiguities in federal law have been construed generously in order to comport with . . . traditional notions of sovereignty and with the federal policy of encouraging tribal independence.'") (citation omitted).

This canon applies to federal statutes that are silent as to their applicability to tribes. *See EEOC v. Cherokee Nation*, 871 F.2d 937, 939 (10th Cir. 1989) (stating that where "there is no *clear* indication of congressional intent to abrogate Indian sovereignty rights (as manifested, *e.g.*, by the legislative history, or the existence of



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a comprehensive statutory plan), the court is to apply the special canons of construction to the benefit of Indian interests.") (emphasis in original).

Furthermore, construing the OSH Act as applicable to the Fisheries would violate what the Supreme Court has identified as "an enduring principle of Indian law: Although Congress has plenary authority over tribes, courts will not lightly assume that Congress in fact intends to undermine Indian self-government." *Bay Mills*, 572 U.S. at 790. The Supreme Court has explained that because tribes retain "all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence . . . is that the sovereign power . . . remains intact." *Iowa Mut.*, 480 U.S. at 18.

The Secretary acknowledges that the Fisheries is wholly owned and operated by the Tribe, for the benefit of the Tribe, and employs only the Tribe's members. Opening Br. at 9. The Fisheries is a subsidiary of Red Lake, Inc., a "governmental instrumentality of the Red Lake Band . . . with its officers and employees having the responsibility of carrying out economic advancement functions of the Red Lake Band and its recognized members." Red Lake, Inc., Articles of Incorporation art. V, JA 92. Nevertheless, the Secretary would interpose himself between the Tribe and its employees without any textual evidence that Congress authorized him to do so.

The OSH Act does not in any way implicate Congress' power to "legislate in respect to Indian tribes." *United States v. Lara*, 541 U.S. 193, 200 (2004). Because



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Congress did not invoke the Indian Commerce Clause in enacting the OSH Act, there is no constitutional basis for the Secretary to enforce the OSH Act to Indian commerce and the Fisheries' workplace activities.

### C. Principles of Judicial Restraint and Deference Should be Accorded to Congress' Authority to Legislate in the Area of Indian Affairs.

Principles of judicial restraint point to deferring to Congress to legislate in the area of Indian affairs on matters involving tribal sovereignty. "Judicial deference to the paramount authority of Congress in matters concerning Indian policy remains a central and indispensable principle of the field of Indian law." *Bay Mills*, 572 U.S. at 803 (citing COHEN'S HANDBOOK, § 2.01[1], at 110). The Supreme Court has consistently exercised judicial restraint and deferred to Congress' plenary power over Indian affairs in cases involving the absence of congressional intent to limit tribal sovereign authority.[14]

Moreover, the Supreme Court has explained that it "does not revise legislation" even under circumstances where "the text as written creates an apparent anomaly as to some subject it does not address." *Bay Mills*, 572 U.S. at 794. The Supreme Court has also instructed that it "has no roving license . . . to disregard clear

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[14] *See, e.g.*, *Bay Mills*, 572 U.S. at 800 ("The special brand of sovereignty the tribes retain—both its nature and its extent—rests in the hands of Congress."); *Wheeler*, 435 U.S. at 323 ("But until Congress acts, the tribes retain their existing sovereign powers."); *Santa Clara Pueblo*, 436 U.S. at 60 ("[A] proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent.").

language simply on the view that . . . Congress 'must have intended something [different]." *Id.* There are many examples in which Congress has enacted or amended legislation to restrict or relax restrictions on tribal sovereign authority. *See* COHEN'S HANDBOOK § 5.02[3], at 392-95. For instance, Congress has amended legislation pursuant to its Indian commerce power to modify the metes and bounds of inherent tribal sovereign authority. *See Lara*, 541 U.S. at 214 (affirming Congress' exercise of power under the Indian Commerce and Treaty Clauses to amend the Indian Civil Rights Act to "recognize and affirm" tribes' inherent sovereign authority to prosecute nonmember Indians).

Given that the OSH Act exempts states and the federal government from its definition of employer, there are valid reasons to exercise judicial restraint and defer to Congress on the applicability of the Act to tribal governmental entities such as the Fisheries. In light of the OSH Act's failure to invoke the Indian commerce power or to address its applicability to tribes, this Court should defer to Congress' plenary and exclusive authority over Indian affairs and construe the Act as inapplicable to the Fisheries.



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## CONCLUSION

For the foregoing reasons, this Court should affirm the administrative decision below.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(A), and it also complies with Fed. R. App. P. 32(a)(7)(B) because the brief contains 12,374 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016, Times New Roman, Font Size 14.

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

Dated: May 18, 2020 *<u>/s/ Joseph Plumer</u>*



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**CERTIFICATE OF SERVICE**

I hereby certify that on May 18, 2020, I electronically filed the foregoing brief 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/ Joseph Plumer*