NO. 07-35633

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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ELAINE L. CHAO, Secretary of Labor,
United States Department of Labor,

Plaintiff-Appellee,

v.

PAUL MATHESON, an individual d/b/a
BABY ZACK'S SMOKE SHOP
and
NICK MATHESON, an individual,

Defendants-Appellants.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

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# BRIEF FOR THE SECRETARY OF LABOR

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

---

BRIEF FOR THE SECRETARY OF LABOR

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## STATEMENT OF JURISDICTION

The district court had jurisdiction over this case under the Fair Labor Standards Act of 1938 ("FLSA" or "Act"), 29 U.S.C. 217, and 28 U.S.C. 1331 (federal question jurisdiction) and 28 U.S.C. 1345 (suits commenced by an agency or officer of the United States). This Court has jurisdiction over an appeal from the final decision of the district court under 28 U.S.C. 1291.

The district court issued an Order granting the Secretary of Labor's ("Secretary") Motion for Summary Judgment on June 25, 2007. The final Judgment of the court was entered on July 6, 2007. See Fed. R. Civ. P. 54(a). The Defendants-Appellants filed a timely Notice of Appeal on August 3, 2007.

## STATEMENT OF THE ISSUE

Whether the district court correctly held that the FLSA recordkeeping and overtime provisions apply to Paul Matheson, d/b/a Baby Zack's Smoke Shop, and Nick Matheson, who are tribal members who operate a retail business on tribal land which employs, and sells to, both tribal and non-tribal members.

## STATEMENT OF THE CASE

### A. Nature of the Case and Course of Proceedings

This case arises under the FLSA, as amended, 29 U.S.C. 201 et seq. The United States Department of Labor, Wage and Hour Division, investigated Baby Zack's Smoke Shop for the period covering December 1, 2003 through December 31, 2005, and determined that the employers had failed to keep adequate records and pay overtime compensation to its employees for hours worked in excess of 40 in a workweek. On June 28, 2006, the Secretary filed a complaint under sections 16(c) and 17 of the FLSA, 29 U.S.C. 216(c), 217, in the United States District Court for the Western District of Washington against Paul Matheson d/b/a Baby Zack's Smoke Shop, Cathy Matheson, and Felicia

Matheson.[1] ER 24-30. The complaint alleged violations of the overtime and recordkeeping provisions of the FLSA, 29 U.S.C. 207, 211(c), 215(a)(2), and 215(a)(5). ER 27-28.

Specifically, the Secretary sought a judgment pursuant to 29 U.S.C. 216(c) against Baby Zack's[2] for unpaid overtime compensation due its employees. ER 28. Additionally, the Secretary requested that the court permanently enjoin Baby Zack's from violating the FLSA in the future pursuant to 29 U.S.C. 217, and to enjoin it from continuing to withhold unpaid overtime compensation due its employees, plus pre-judgment interest. ER 28-29. Finally, the Secretary sought an order "granting such other and further relief as may be necessary and appropriate." ER 29.

Baby Zack's filed an Answer on December 19, 2006, asserting, inter alia, that its business is not covered by the FLSA because the business is located on property owned by the Puyallup Tribe and the owners are tribal members. ER 15-16; see also ER 6 (clerk's docket no. 20). On January 18, 2007, the Secretary filed an Amended Complaint, naming Nick Matheson as a

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[1] The district court granted the Secretary's motion to dismiss the complaint against Cathy and Felicia Matheson. See ER 16 n.2. References to the Excerpts of Record filed with this Court by Defendants-Appellants on October 15, 2007 will be abbreviated by the designation "ER" followed by the page number.

[2] Hereinafter, references to Baby Zack's includes Paul Matheson, Nick Matheson, and Baby Zack's Smoke Shop.

defendant. ER 7 (clerk's docket no. 25). On March 6, 2007, the parties filed a Stipulation of Facts. ER 31-36. A second Stipulation of Facts was filed by the parties on April 5, 2007. ER 37-38.

The Secretary filed a Motion for Summary Judgment on April 6, 2007. Baby Zack's filed a Response on April 24, 2007. On June 25, 2007, the district court issued an Order granting the Secretary's Motion for Summary Judgment. ER 10-14. The district court entered Judgment in favor of the Secretary on July 6, 2007. ER 15-23. Baby Zack's filed a timely Notice of Appeal on August 3, 2007. ER 1-2.

B. Statement of Facts[3]

Baby Zack's is a retail business located in Milton, Washington, wholly within the boundaries of the Puyallup Reservation. ER 32. The business sells tobacco products and sundry items to the general public. Id. The products sold by the business have been shipped by third parties from outside the State of Washington, and are handled by the employees of the business. Id. The employees sometimes processed credit and debit card transactions, communicating electronically or by

[3] The Statement of Facts is based on the stipulations of fact filed with the district court, which the court incorporated into its decision by reference. ER 16, 31-38. The stipulation of facts left only one issue remaining: the applicability of the FLSA. ER 10.

telephone with banks and credit card companies located outside of Washington. Id.

Paul Matheson, the owner of the business, is an enrolled member of the Puyallup Tribe. ER 32. Paul Matheson and his son-in-law Nick Matheson (also a tribal member) were employers of the employees working for the business. ER 16, 32-33, 37. In each of the years 2004 and 2005, the business had an annual gross volume of sales made or business done of not less than $500,000. ER 32.

The Secretary performed an audit of Baby Zack's records covering the period of December 1, 2003 through December 31, 2005. ER 31. During the time of the audit, Baby Zack's employed both enrolled tribal members and non-Indian employees. ER 38. Baby Zack's did not pay overtime compensation to its employees during the relevant time period. ER 33. The Secretary computed back wages owed to 61 employees and former employees in the amount of $31,339.27. ER 34-36.

C. District Court Decision

The district court ruled in favor of the Secretary, concluding that the FLSA applies to the Mathesons, "who are members of a Native American tribe doing business on tribal land," and to their business, Baby Zack's Smoke Shop. ER 10, 16. In granting summary judgment to the Secretary, the district court relied on this Court's decision in Donovan v. Coeur

d'Alene Tribal Farm, 751 F.2d 1113 (9th Cir. 1985). The district court determined that the FLSA, like the Occupational Safety and Health Act ("OSH Act"), 29 U.S.C. 651 et seq., that was at issue in Coeur d'Alene, is a statute of "general applicability," which is silent with respect to its application to Native Americans. The court considered whether such silence should be interpreted as "an expression of intent to exclude tribal enterprises from the scope of [the FLSA]," but concluded that "'a general statute in terms applying to all persons includes Indians and their property interests.'" ER 11 (quoting Coeur d'Alene, 751 F.2d at 1115) (emphasis added).

The district court recognized that while "the general principle suggests that the tribe is subject to the FLSA," this Court in Coeur d'Alene noted three exceptions to the general rule which would preclude the Act's application: (1) "the law touches 'exclusive rights of self-governance in purely intramural matters'"; (2) "the application of the law to the tribe would 'abrogate rights guaranteed by Indian treaties'"; or (3) "there is proof 'by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations.'" ER 11 (quoting Coeur d'Alene, 751 F.2d at 1116, quoting in turn United States v. Farris, 624 F.2d 890, 893-94 (9th Cir. 1980), cert. denied, 449 U.S. 1111 (1981)).

The district court considered the employers' assertion that the first two exceptions apply to them (they did not raise the third). First, the court rejected the employer's argument that the regulation of the payment of wages to employees working in a tribal business is a "purely intramural [tribal] matter[]." ER 12. The district court concluded that the employer's argument was contrary to this Court's interpretation of the tribal self-government exception. "To accept [Plaintiff's argument] would bring within the embrace of 'tribal self-government' all tribal business and commercial activity. Our decisions do not support an interpretation of such breadth." Id. (quoting Coeur d'Alene, 751 F.2d at 1116) (Court's alteration). The district court concluded that "for the same reason the 'purely intramural' exception did not preclude the application of OSHA safety regulations to a tribal farm [in Coeur d'Alene], it does not preclude application of the FLSA to the [Defendants'] tribal business in this case." ER 12.

The district court further concluded that the second exception did not apply here.[4] The court stated that "[t]his case . . . does not turn on whether or not a tribal law

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[4] Baby Zack's argued that the 1854 Treaty of Medicine Creek reserved to the tribe the right to exclude non-tribal members and precluded the forfeiture of Indian land. See Treaty with Nisquallys, Etc., 1854 ("Treaty of Medicine Creek"), art. 2, 10 Stat. 1132.

conflicts with or is preempted by the FLSA. Despite defendant[s'] claim to the contrary, this is not a case involving the tribal sovereign's effort to govern or regulate economic activity on tribal land, and the effectiveness of a federal statute to contradict the tribal law." ER 13. Therefore, Baby Zack's reliance on NLRB v. Pueblo of San Juan, 276 F.3d 1186 (10th Cir. 2002) (holding that the National Labor Relations Act does not preempt a tribal right-to-work ordinance) was misplaced. As the district court noted: "Specifically not at issue in [Pueblo of San Juan] was the claim made here, that a generally applicable federal statute simply does not apply to private businesses on tribal land." ER 13. The district court thus determined that Baby Zack's argument that "the FLSA conflicts with the tribe's treaty right to exclude non tribal members is incorrect." ER 14.

The district court concluded that since "Defendants are individuals operating a business on tribal land, employing non-tribal members and selling to non-tribal customers [and] [t]his case does not involve any effort on the part of the tribe to govern in this area[,]" the employers violated the FLSA when they failed to compensate their employees at the proper overtime rate (one and one-half times the regular rate) for hours worked

in excess of 40 in a workweek. ER 14, 16.[5] Thus, the court concluded that Paul Matheson and Nick Matheson were jointly and severally liable for overtime back wages in the amount of $31,339.27 owed to 61 current and former employees. ER 17. Furthermore, the court permanently enjoined the employers from violating the provisions of the FLSA by failing to properly compensate employees for their overtime work and by failing to keep and preserve the records required by section 11(c) of the FLSA, 29 U.S.C. 211(c), and the regulations at 29 C.F.R. 516.1. ER 17.[6]

## SUMMARY OF ARGUMENT

A retail business operated by tribal members on tribal land that employs, and sells to, both Indians and non-Indians is subject to the requirements of the FLSA, because the FLSA (which is silent as to Indians) is a statute of general applicability that neither interferes with any aspect of tribal self government nor abrogates any rights provided by a specific

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[5] As noted supra, the district court adopted the stipulated facts of the parties as the factual findings of the court; it was stipulated that Paul and Nick Matheson were employers within the meaning of section 3(d) of the FLSA, 29 U.S.C. 203(d).

[6] The district court also ordered that in the event that the Defendants failed to pay the back wages, "the Court shall appoint a Receiver." ER 18-19. Specifically, the court stated that it would select a Receiver from those provided by the Secretary or appoint a Receiver at its discretion. ER 19. Baby Zack's also challenges this part of the district court's Judgment. See infra.

provision of an existing treaty. The district court thus correctly held that the FLSA applies to Paul Matheson, Nick Matheson, and Baby Zack's Smoke Shop, thereby requiring the employers to comply with the overtime pay and recordkeeping requirements of the Act.

When a statute of general applicability such as the FLSA is silent in terms of its specific applicability to Indian tribes, this Court has held that the general rule is to include Indians within the scope of that statute. See Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1115-16 (9th Cir. 1985) This Court further held in Coeur d'Alene, 751 F.2d at 1116, that this general rule is subject to three exceptions, two of which Baby Zack's asserts should prevent the FLSA from applying in this case -- the "intramural government" exception and the "conflicting treaty" exception. Neither of these two exceptions applies to preclude the application of the FLSA to the employers here, who are tribal members operating a retail business on tribal land, employing both tribal members and non-tribal employees, and selling goods to non-tribal customers as well as to tribal customers. The operation of the retail business on tribal land in this case cannot be said to implicate any rights of tribal self-governance in purely intramural matters. And, Baby Zack's has not shown that applying the FLSA to the business here would abrogate any rights guaranteed by a treaty; the

Treaty of Medicine Creek, which Baby Zack's adduced in support of its argument, is devoid of any provision that conflicts with, or would preclude the application of, the FLSA.

## ARGUMENT

### THE FLSA, AS A STATUTE OF GENERAL APPLICABILITY, APPLIES TO PAUL MATHESON, D/B/A/ BABY ZACK'S SMOKE SHOP, AND NICK MATHESON, WHO ARE MEMBERS OF THE PUYALLUP INDIAN TRIBE AND WHO OPERATE A RETAIL SHOP ON TRIBAL LAND THAT EMPLOYS BOTH TRIBAL MEMBERS AND NON-TRIBAL MEMBERS, AND SELLS TO NON-INDIAN AS WELL AS INDIAN CUSTOMERS

#### A. Standard of Review

This Court reviews the district court's grant of summary judgment de novo. See Chao v. A-One Med. Servs., Inc., 346 F.3d 908, 914 (9th Cir. 2003), cert. denied, 541 U.S. 1030 (2004); Baldwin v. Trailer Inns, Inc., 266 F.3d 1104, 1111 (9th Cir. 2001). This Court has stated that it views the evidence in the most favorable light to the non-moving party, and determines whether there are any genuine issues of material fact and whether the district court properly applied the relevant legal principles. See A-One Med. Servs., 346 F.3d at 914.

The facts in this case have been stipulated to by the parties. Thus, this Court should address only whether the district court correctly applied the relevant substantive law in regard to the applicability of the FLSA.

B. <u>The FLSA Is a Statute of General Applicability That Is Presumed to Apply to Indians on Reservations and Their Property Rights</u>

1. The Supreme Court repeatedly has affirmed that tribes possess only "quasi-sovereign" status at the sufferance of Congress. <u>See</u>, <u>e.g.</u>, <u>Montana v. United States</u>, 450 U.S. 544, 563-64 (1981); <u>Washington v. Confederated Tribes of Colville Indian Reservation</u>, 447 U.S. 134, 154 (1980); <u>Oliphant v. Suquamish Indian Tribe</u>, 435 U.S. 191, 207-12 (1978); <u>United States v. Wheeler</u>, 435 U.S. 313, 322-23, 327-28, 331 (1978); <u>Lone Wolf v. Hitchcock</u>, 187 U.S. 553, 565-66 (1903); <u>United States v. Kagama</u>, 118 U.S. 375, 383-85 (1886); <u>see also</u> Felix S. Cohen, <u>Handbook of Federal Indian Law</u> 282 (1988 ed.). Tribes have been divested of those elements of sovereignty "'inconsistent with the overriding interests of the National Government.'" <u>New Mexico v. Mescalero Apache Tribe</u>, 462 U.S. 324, 332 (1983) (quoting <u>Colville</u>, 447 U.S. at 153); <u>see</u> <u>Merrion v. Jicarilla Apache Tribe</u>, 455 U.S. 130, 147 n.13 (1982). As this Court has stated, "Unlike the states, Indian tribes possess only a limited sovereignty that is subject to complete defeasance." <u>Donovan v. Couer d'Alene Tribal Farm</u>, 751 F.2d 1113, 1115 (9th Cir. 1985).

2. The FLSA is a statute of general applicability and broad remedial purpose. <u>See</u> <u>Snyder v. Navajo Nation</u>, 382 F.3d 892, 894-95 (9th Cir. 2004) (citing <u>Rutherford Food Corp. v.</u>

McComb, 331 U.S. 722, 727 (1947)). Congress enacted the FLSA to protect workers from "substandard wages and oppressive working hours." Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 739 (1981); see 29 U.S.C. 202(a), (b) (congressional finding that "the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers" adversely affects commerce, and thus it is the policy, "through the exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power"). The provisions of the Act are broadly construed "to apply to the furthest reaches consistent with Congressional direction." Klem v. County of Santa Clara, Cal., 208 F.3d 1085, 1089 (9th Cir. 2000).

In the same vein, this Court has broadly interpreted the term "employer." Thus, the FLSA provides that "no employer shall employ any of his employees . . . for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which

he is employed." 29 U.S.C. 207(a)(1). Under the Act, an "[e]mployer" is "any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. 203(d). The definition of "employer" under the FLSA is to be given an "expansive interpretation" in order to effectuate the Act's broad remedial purposes. Real v. Driscoll Strawberry Assocs., Inc., 603 F.2d 748, 754 (9th Cir. 1979); see Lambert v. Ackerly, 180 F.3d 997, 1011-12 (9th Cir. 1999) ("We have held that the definition of 'employer' under the FLSA is not limited by the common law concept of 'employer,' but is to be given an expansive interpretation in order to effectuate the FLSA's broad remedial purposes.") (internal quotation marks and citation omitted), cert. denied, 528 U.S. 1116 (2000); cf. Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 326 (1992) (the term "employee" under the FLSA, unlike under ERISA (which does not define "employ" to mean "suffer or permit to work," as does the FLSA), "cover[s] some parties who might not qualify as such under a strict interpretation of traditional agency law principles").

3. The Supreme Court has consistently held that "a general statute in terms applying to all persons includes Indians and their property interests." Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 116 (1960); see United States v. Smiskin, 487 F.3d 1260, 1263 (9th Cir. 2007) ("Federal laws of

general applicability are presumed to apply with equal force to Indian tribes."); United States v. Farris, 624 F.2d 890, 893 (9th Cir. 1980) ("federal laws generally applicable throughout the United States apply with equal force to Indians on reservations"), cert. denied, 449 U.S. 1111 (1981). Indeed, this Court has stated that "[m]any of our decisions have upheld the application of general federal laws to Indian tribes; not one has held that an otherwise applicable statute should be interpreted to exclude Indians." Coeur d'Alene, 751 F.2d at 1115 (gathering cases). As this Court further stated in Coeur d'Alene, "we have not adopted the proposition that Indian tribes are subject only to those laws of the United States expressly made applicable to them." Id. at 1116. Thus, the FLSA, a comprehensive statute of general applicability, is necessarily presumed to apply to Indians.

C. Application of the FLSA to the Retail Business Run by the Mathesons on the Reservation in this Case Does Not Interfere with the Tribe's Self-Governance in Purely Intramural Matters and Does Not Abrogate Rights Guaranteed by any Existing Treaty

1. Where, as here, a statute of general applicability is silent regarding its applicability to Indian tribes, this Court has enumerated three exceptions to the presumption of applicability:

> (1) the law touches "exclusive rights of self-governance in purely intramural matters"; (2) the application of the law to the tribe would "abrogate

> rights guaranteed by Indian treaties"; or (3) there is proof "by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations . . . ."

Coeur d'Alene, 751 F.2d at 1116 (quoting Farris, 624 F.2d at 893-94). If any of the exceptions applies, "Congress must expressly apply a statute to Indians before we will hold that it reaches them." 751 F.2d at 1116 (emphasis in original). On appeal, Baby Zack's relies only on the first two of these exceptions to support its contention that the overtime and recordkeeping requirements of the FLSA do not apply here. Baby Zack's does not argue that the legislative history of the FLSA evinces any congressional intent to exclude tribal enterprises from the scope of its coverage. Therefore, the third exception is not at issue in this case.

2. Baby Zack's specifically argues that the Puyallup Tribe has exclusive jurisdiction (i.e., to the exclusion of the FLSA) over a retail business owned by a tribal member that is located on land within the reservation and sells goods to the general public, because the operation of the store involves self-governance in purely intramural matters. (Appellants' Br. 4-6). This Court, however, rejected a similar argument in Coeur d'Alene. In that case, a tribal farm that employed non-Indians as well as Indians, and sold its produce in interstate commerce, asserted that the OSH Act interfered with its rights of tribal

self-government. This Court observed that "all tribal business and commercial activity" does not fall within the ambit of "tribal self-government." Coeur d'Alene, 751 F.2d at 1116. Rather, "the tribal self-government exception is designed to except purely intramural matters such as conditions of tribal membership, inheritance rules, and domestic relations from the general rule that otherwise applicable federal statutes apply to Indian tribes." Id. (citing Farris, 624 F.2d at 893); see Montana, 450 U.S. at 564 ("Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members."); United States Dep't of Labor v. OSHRC, 935 F.2d 182, 184 (9th Cir. 1991) (application of OSH Act to saw mill owned and operated by tribe, and which employed non-Indians, did not touch on tribe's right of self-governance); see also Snyder, 382 F.3d at 895 (not limiting intramural exception to those matters listed in Coeur d'Alene).

This Court's decision in Coeur d'Alene made clear that:

> The operation of a farm that sells produce on the open market and in interstate commerce is not an aspect of tribal self-government. Because the Farm employs non-Indians as well as Indians, and because it is in virtually every respect a normal commercial farming enterprise, we believe that its operation free of federal health and safety regulations is neither profoundly intramural . . . nor essential to self-government.

751 F.2d at 1116 (internal quotation marks and citation omitted). The same rationale applies to the applicability of a federal wage statute to a retail store on a reservation that is open to the public; there is no aspect of tribal self-government involved.

Baby Zack's contends that NLRB v. Pueblo of San Juan, 276 F.3d 1186 (10th Cir. 2002), holds that "treaty tribes are excluded from all federal laws affecting Indian employers." (Appellants' Br. 5.) Baby Zack's has misconstrued the Tenth Circuit's decision. The issue in the Pueblo of San Juan case was whether the National Labor Relations Act ("NLRA") preempted the Indian tribal government from enacting a right-to-work ordinance prohibiting agreements containing union-security clauses for companies engaged in commercial activity on tribal lands (covering any employees, irrespective of whether they are tribal members). The National Labor Relations Board had sought a declaratory judgment and injunctive relief barring the application of the ordinance. The Tenth Circuit concluded that the NLRA did not preempt the tribal government from enacting the right-to-work ordinance.

There is no tribal ordinance at issue in this case; rather, the only issue in the instant case is whether the FLSA applies, in the first instance, to the tribal employers' retail operation. Indeed, as this Court recognized, the Tenth Circuit

in Pueblo of San Juan noted at the outset that "'the general applicability of federal labor law is not at issue,'" NLRB v. Chapa De Indian Health Program, Inc., 316 F.3d 995, 998 (9th Cir. 2003) (quoting 276 F.3d at 1191), whereas that is precisely the issue in the present case. In Chapa, this Court held that a financially independent, nonprofit tribal organization, which contracted to provide services to the tribe as well as to others, and operated outside of a reservation, was subject to the NLRA (which this Court noted was a statute of general applicability) because the commercial nature of the labor relations involved placed the activity outside the ambit of the "intramural matters" exception. See 316 F.3d at 998-1000.

Baby Zack's further argues that "San Juan aligns with the later United States Supreme Court case of United States v. Lara, [541 U.S. 193, 200, 204 (2004)], holding that tribes possess inherent power to control events that occur on the tribe's own land and that Indian tribes are domestic dependent nations with sovereignty over its members." (Appellants' Br. 5). In Lara, the Supreme Court held that "Congress does possess the constitutional power to lift the restrictions on the tribes' criminal jurisdiction over nonmember Indians as the statute [25 U.S.C. 1301(2)] seeks to do." 541 U.S. at 200. This case is clearly of no help to Baby Zack's because it interprets congressional action as enlarging the tribe's own powers of

self-government to exercise criminal jurisdiction over all Indians, including nonmembers. See 25 U.S.C. 1301(2). The FLSA, as we have noted, grants no similar authority to tribes but, rather, applies to tribal and non-tribal employers.

Baby Zack's also cites EEOC v. Fond du Lac Heavy Equipment & Construction, Co., 986 F.2d 246, 249 (8th Cir. 1993), to support its view that federal law does not apply to the employment of a tribal member by an Indian employer on the reservation because "it is an internal tribal matter." (Appellants' Br. 9). In Fond du Lac, the Eighth Circuit (with a dissent) held that the Age Discrimination in Employment Act of 1964 ("ADEA"), 29 U.S.C. 621 et seq., a statute of general applicability, does not apply to an employment discrimination action involving an Indian job applicant, an Indian employer, and employment on the reservation, absent clear congressional intent. 986 F.2d at 249. The court determined that "[f]ederal regulation of the tribal employer's consideration of age in determining whether to hire the member of the tribe to work at the business located on the reservation interferes with an intramural matter that has traditionally been left to the tribe's self-government." Id.

The Eighth Circuit's decision in Fond du Lac, which is not binding on this Court, is distinguishable. Baby Zack's is a retail business owned by a tribal member (and located on tribal

land) that employs and sells goods to non-Indians, while "[t]he dispute [in Fond du Lac] is between an Indian applicant and an Indian tribal employer[,] [t]he Indian applicant is a member of the tribe, and the business is located on the reservation." 986 F.2d at 249. Thus, the Eighth Circuit concluded "that the ADEA does not apply to the narrow facts of this case." Id. at 251 (emphasis added).

Baby Zack's additionally relies on this Court's decision in Snyder v. Navajo Nation, supra, to support its argument that the FLSA does not apply. (Appellants' Br. 8-9). In Snyder, this Court determined that the FLSA did not apply to law enforcement officers of the Navajo Nation Division of Public Safety, because law enforcement was a purely intramural matter within the meaning of Coeur d'Alene. See 382 F.3d at 894-95; see also Reich v. Great Lakes Indian Fish & Wildlife Comm'n, 4 F.3d 490, 495 (7th Cir. 1993) (holding that law-enforcement employees of Indian agency were exempt from FLSA). In applying the Coeur d'Alene test, this Court emphasized in Snyder that "[w]hile we have not cabined the intramural exception to those listed in Coeur d'Alene Tribal Farm [conditions of tribal membership inheritance rules, and domestic relations], we have been careful to allow such exemptions only in those rare circumstances where the immediate ramifications of the conduct are felt primarily within the reservation by members of the tribe and where self-

government is clearly implicated." 382 F.3d at 895. This Court further observed in Snyder that in the Chapa case, supra, "as have other circuits, we were careful to distinguish between what is a governmental function and what is primarily a commercial one." Id. (citing Chapa, 316 F.3d at 999-1000; Reich v. Mashantucket Sand & Gravel, 95 F.3d 174, 180-81 (2d Cir. 1996) (the employment of non-Indians "weighs heavily against [a] claim that [a company's] activities affect rights of self-governance in purely intramural matters")). In accordance with these principles, this Court concluded that "[t]ribal law enforcement clearly is a part of tribal government and is for that reason an appropriate activity to exempt as intramural." 382 F.3d at 895. By contrast, Baby Zack's cannot establish that there is any relationship between its purely commercial activity and any aspect of tribal self-government. See Florida Paraplegic Ass'n v. Miccosukee Tribe of Indians, 166 F.3d 1126, 1129 (11th Cir. 1999) (the Tribe's restaurant and gaming facility is a commercial enterprise open to non-Indians, and does not relate to the governmental functions of the Tribe).

Thus, the district court was correct in concluding that the intramural self-government exception does not apply. The operation of a purely commercial business located on a reservation that employs non-tribal members and sells goods, such as tobacco and sundry items, to the general public does not

implicate tribal self-government. See Lumber Indus. Pension Fund v. Warm Springs Forest Prods. Indus., 939 F.2d 683, 685 (9th Cir. 1991) (self-government exception to presumption that general statute includes Indians did not preclude application of ERISA to tribally owned and operated sawmill).[7]

3. Baby Zack's further asserts that the requirements of the FLSA do not apply to it on the basis of the second Coeur d'Alene exception, i.e., that application of the FLSA would "abrogate rights guaranteed by Indian treaties," specifically, the Treaty of Medicine Creek of 1854. (Appellants' Br. 9-15). Baby Zack's thus appears to be relying on the principle that "it is presumed that Congress does not intend to abrogate rights guaranteed by Indian treaties when it passes general laws, unless it makes specific reference to Indians." Farris, 624 F.2d at 893.

Baby Zack's first argues that Article 11 of the Treaty of Medicine Creek is relevant because it states that "[t]he said

[7] To the extent that Baby Zack's is challenging the Secretary's authority to conduct an audit of the business's employees' time records on the reservation (Appellants' Br. 2), this Court rejected an analogous argument in Coeur d'Alene. In that case, the tribal farm argued that "the Tribe's right to exclude non-Indians, including OSHA inspectors, from its reservation is a 'fundamental aspect' of tribal sovereignty that cannot be infringed without a clear expression of congressional intent." Coeur d'Alene, 751 F.2d at 1116-17. However, this Court stated that it has "never employed this 'fundamental aspect of sovereignty' formulation of the tribal self-government exception to the general rule that federal statutes ordinarily apply to Indians, and we decline to do so now." Id. at 1117.

tribes and bands agree to free all slaves now held by them, and not to purchase or acquire others hereafter." (Appellants' Br. 9) (quoting Treaty). It infers from this language that "[t]he practice of workers albeit in a crude form was addressed." (Appellants' Br. 9). But, as this Court has stated, the presumption that Congress does not intend to abrogate rights guaranteed by treaties when it passes general laws, unless it specifically refers to Indians, "applies only to subjects specifically covered in treaties, such as hunting rights; usually, general federal laws apply to Indians." Farris, 624 F.2d at 893. The language in the treaty concerning the freeing of all slaves by the tribes cannot by any conceivable reading be said to specifically cover the payment of required wages by a retail business located on a reservation.

Baby Zack's also argues that Article 2 of the Treaty of Medicine Creek, which provides in relevant part, "nor shall any white man be permitted to reside upon the [reservation] without permission of the tribe and the superintendent or agent," somehow comes within the second exception. (Appellants' Br. 10) (quoting Treaty). Baby Zack's argues that this Treaty language should be construed to not "freely allow[ ] federal employee[s] to go onto the Puyallup Reservation" to investigate violations of the FLSA. (Appellants' Br. 10.) This Court discounted a similar argument in United States Dep't of Labor v. OSHRC,

supra. There, an Indian tribe that operated a sawmill alleged that an 1855 Treaty barred the application of the OSH Act to its business. Specifically, the Tribe asserted that the entry of OSHA inspectors onto reservation land violated their right to exclude non-Native Americans from the reservation. OSHRC, 935 F.2d at 184. The treaty language in OSHRC is virtually identical to that of the Treaty of Medicine Creek with respect to excluding non-Indians. Compare Treaty of Tribes of Middle Oregon, 1855, art. 1, 12 Stat. 963, with Treaty of Medicine Creek, art. 2, 10 Stat. at 1132. In OSHRC, this Court construed the term "reside" broadly, under the canons of construction applicable in Indian law, to set forth a general right of exclusion. 935 F.2d at 185. Nevertheless, this Court held that the general right of exclusion was not sufficient to bar application of the OSH Act to the saw mill. Id. at 185-86. In the words of this Court: "[W]e do not find the conflict between the Tribe's right of general exclusion and the limited entry necessary to enforce the Occupational Safety and Health Act to be sufficient to bar application of the Act to the Warm Springs mill. The conflict must be more direct to bar the enforcement of statutes of general applicability." Id. at 186-87. Similarly, since the application of the FLSA would not abrogate the Tribe's general right of exclusion, as set forth in Article 2 of the Treaty of Medicine Creek, 10 Stat. at 1132, and does

not conflict with any other specific treaty right, the second Coeur d'Alene exception does not bar the application of the FLSA to Baby Zack's.[8]

Finally, Baby Zack's contends that the Puyallup Tribal Judicial Code "applies to disputes involving tribal members 'and those who have dealings on the reservation.'" (Appellants' Br. 12). As best one can infer from the text of the brief and the citations contained therein, Baby Zack's seems to be stating that an August 27, 1988 Agreement between the Puyallup Tribe of Indians and various government entities (including the United States) does not in any way nullify the Tribe's Judicial Code.[9] Specifically, subsection f on page 19 of the Agreement[10] states that "[n]otwithstanding any other provision of this Agreement, application of the criminal law, family law and the Tribe's

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[8] Baby Zack's also cites Article 10 of the Treaty of Medicine Creek (Appellants' Br. 10), which states that the United States will establish and support for a period of 20 years an agricultural and industrial school, and provide a smithy and carpenter's shop, "to instruct the Indians in their respective occupations." Treaty of Medicine Creek, 10 Stat. at 1134. This provision is totally irrelevant to the applicability of the FLSA in this case.

[9] "This Agreement establishes a framework for cooperation and a mutually beneficial future for the community." ("Agreement between the Puyallup Tribe of Indians, local Governments in Pierce County, the State of Washington, the United States of America, and certain private property owners" -- attached to Appellants' Br. A-2).

[10] Only a fragment of the document is attached to Appellants' brief as part of an Addendum, A-2; it does not form part of the record in this case.

authority over its members and other Indians remains unchanged." (Appellants' Br. Add. 2).

As an initial matter, Baby Zack's presents this particular argument for the first time on appeal. Therefore, this Court should consider the argument waived. See Reich v. Gonzales, 500 F.3d 850, 868-69 (9th Cir. 2007); International Union of Bricklayers & Allied Craftsman Local Union No. 20 v. Martin Jaska, Inc., 752 F.2d 1401, 1404 (9th Cir. 1985). Further, that portion of the proffered Agreement, which is not a part of a Treaty, does not set out (or refer to) any rights that application of the FLSA would abrogate. See MacArthur v. San Juan County, 497 F.3d 1057, 1067 (10th Cir. 2007) ("Despite the fact that the Navajo Nation retains control over its self-government, '[i]t is true that the exercise of the powers of self-government, as in all other matters, the Navajo Tribe, like all Indian Tribes, remains subject to ultimate federal control.'") (quoting United States v. Wheeler, 435 U.S. at 327).

D. The District Court's Appointment of a Receiver in the Event Baby Zack's Fails to Pay Back Wages is a Remedy That is Within That Court's Equitable Power

Finally, Baby Zack's challenges the district court's Judgment with regard to the appointment of a receiver if the back wages are not paid. Contrary to Baby Zack's bare allegations, the Court does not derive its authority "out of thin air." (Appellants' Br. 12.) The Secretary's Complaint

requested the court to order "such other and further relief as may be necessary and appropriate." ER 29. This request for relief necessarily encompasses any equitable relief that the court, in its discretion, believes is appropriate. Indeed, the district court has inherent equitable authority to craft such a remedy in enforcing the FLSA. See, e.g., Mitchell v. Robert De Mario Jewelry, Inc., 361 U.S. 288, 290-91 (1960) (citing Porter v. Warner Holding Co., 328 U.S. 395 (1946)); accord United States v. Alisal Water Corp., 431 F.3d 643, 654 (9th Cir. 2005), cert. denied, 547 U.S. 1113 (2006). Similarly, there is no merit to Baby Zack's claim that, contrary to the terms of the Treaty of Medicine Creek, "[t]he judgment entered in this case divested the Indian tribe of the inherent right to regulate collection from members." (Appellants' Br. 13). This argument fails to address the applicability of the FLSA to the business at issue here, and the resulting Judgment entered ordering that back wages be paid because of violations of the overtime provisions of the FLSA.

## CONCLUSION

For the foregoing reasons, this Court should affirm the district court's decision holding that the requirements of the FLSA apply to Baby Zack's and ordering the employer to pay overtime compensation due to its current and former employees.

Respectfully submitted,

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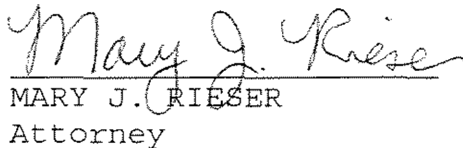

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DATED: NOVEMBER 29, 2007

Respectfully submitted,

By: [signature]
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I hereby certify that two copies of the Brief for the Secretary of Labor have been served on this 29th day of November 2007 by U.S. Mail, postage prepaid, on the following:

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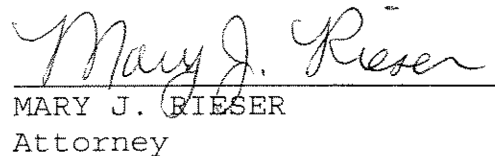

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