No. 09-2806

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MENOMINEE TRIBAL ENTERPRISES,

Petitioner,

v.

UNITED STATES DEPARTMENT OF LABOR

Respondent.

On Petition for Review of a Final Order of the Occupational Safety and Health Review Commission

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BRIEF FOR THE SECRETARY OF LABOR

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DECEMBER 2009

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STATEMENT OF JURISDICTION

The jurisdictional statement of the petitioner, Menominee Tribal Enterprises ("MTE"), is incorrect.

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

2. *Appellate jurisdiction.* This Court has jurisdiction pursuant to section 11(a) of the OSH Act, 29 U.S.C. § 660(a). In accordance with section 12(j) of the OSH Act, 29 U.S.C. § 661(j), an administrative law judge ("ALJ") of the Commission issued a decision and order which disposed of all the parties' claims on April 14, 2009, and the Commission docketed the ALJ's decision on April 27, 2009 (A.2-5; R.2:23).[1] MTE and the Menominee Indian Tribe of Wisconsin ("the Tribe"), an intervenor in the ALJ proceeding, filed a

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[1] Record references to the proceeding below and listed in the Certified List of the Occupational Safety and Health Review Commission (August 21, 2009) are cited by page number of the appendix prepared by MTE ("A._"), or by the volume number and document number and/or the page number of the record ("R_:[_]:_"). "Ex." refers to an exhibit.

petition for discretionary review with the Commission on May 4, 2009 (R.2.24). The matter was not directed for review. Consequently, the ALJ's decision became the final order of the Commission by operation of law on May 27, 2009. *See* section 12(j) of the OSH Act, 29 U.S.C. § 661(j) (R.2:25). On July 14, 2009, MTE and the tribe filed a timely petition for review with this Court. 29 U.S.C. § 660(a).

STATEMENT OF ISSUE

The issue is whether the OSH Act, designed "…to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources…" (section 2(b) of the OSH Act, 29 U.S.C. § 651(b)), applies to an Indian tribal business.

STATEMENT OF THE CASE

This is an enforcement action under section 9 of the OSH Act, 29 U.S.C. § 658. On January 23, 2008, the Secretary of Labor ("Secretary"), acting through the Occupational Safety and Health Administration ("OSHA"), charged MTE with multiple violations of the OSH Act. (R.1:1). MTE contested the citations (R.1:2). The ALJ granted the Tribe's petition for leave to intervene in the proceedings.

(R. 1:9). The parties stipulated as to the existence of the violations, their character and the amount of the penalty. However, MTE moved for summary judgment on the grounds that the OSH Act did not apply to it because of its status as an Indian tribal enterprise (R.1:10). The ALJ denied MTE's motion for summary judgment and thereafter issued a decision and order affirming the citations and assessing the proposed penalties (A.2-12).

MTE and the Tribe filed a petition for discretionary review with the Commission (R.2:24). 29 U.S.C. § 661(j). Review was not directed (A.1). MTE and the Tribe then filed a petition for review with this Court. 29 U.S.C. § 660(a). Thereafter, the Tribe moved to dismiss its appeal. This Court granted the motion and issued a mandate only with respect to the Tribe.

STATEMENT OF FACTS

A. *Statutory background*

Congress enacted the OSH Act to "assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." 29 U.S.C. § 651(b). As this Court stated, the Act was passed in order to reduce the substantial burdens placed on interstate commerce

because of work-related injuries and illnesses. *Anning-Johnson Company v. OSHRC*, 516 F.2d 1081, 1084 (7th Cir. 1975).

The OSH Act authorizes the Secretary to establish occupational safety and health standards and requires employers to comply with them. 29 U.S.C. §§ 651(b)(3), 654(a)(2), 655. An "employer" is defined as "…a person engaged in a business affecting commerce who has employees, but does not include the United States (except the United States Postal Service) or any State or political subdivision of a State." 29 U.S.C. § 652(5). A "person" is "…one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any organized group of persons." 29 U.S.C. § 652(4). An "employee" is "…an employee of an employer who is employed in a business of his employer which affects commerce." 29 U.S.C. § 652(6).

Employers who violate OSH Act requirements are subject to citation and penalties. 29 U.S.C. §§ 659(a), (b). Penalties may range up to $7000 for violations that, as here, are characterized as "serious." 29 U.S.C. § 666(k). Employers may contest citations and penalties before the Commission, 29 U.S.C. § 659, 661, and, if

aggrieved by a Commission decision, may petition for review in the courts of appeals. 29 U.S.C. § 660.

B. *Description of the Tribe and Tribal Business*

1. History of the Tribe

The Menominee Indian Tribe of Wisconsin is a federally recognized Indian tribe (A.8; 73 FR 18,553, 18,555 (April 4, 2008)). The Tribe inhabited the state of Wisconsin long before European settlers reached North America. *United States v. Long*, 324 F.3d 475, 482 (7th Cir. 2003). In 1854 the Tribe entered into a treaty with the United States which gave it a reservation in Wisconsin. Treaty of Wolf River, Art. 2, 10 Stat. 1064; *Long*, 324 F.3d at 477. In 1954 Congress enacted the Menominee Termination Act, Pub. L. No. 399, 68 Stat. 250, codified at 25 U.S.C. §§ 891-902 (1954) (A.63-69) ("Termination Act"). The Termination Act was aimed "to provide for the orderly termination of Federal supervision over the property and members of the Menominee Tribe of Wisconsin." *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 408 (1968). The Termination Act caused the federal government to cede to the State of Wisconsin its power of supervision over the Tribe and reservation lands. *Long*, 324 F.3d at 481. In 1973 Congress

enacted the Menominee Restoration Act ("Restoration Act"), 25 U.S.C. §§ 903-903f, which repealed the Termination Act and restored the rights of the Tribe which existed before the enactment of the Termination Act. *Long*, 324 F.3d at 481-82. The purpose of the restoration was to put the Tribe on the same footing as other Indian tribes. *Long*, 324 F.3d at 482.

2. History of the Sawmill

The Tribe began lumbering the reservation in the late 1800's (R.2:13, Ex. 2, p. MROK004102). In 1908 Congress passed the LaFollette Act, Pub. L. 74-60, 35 Stat. 51 (1908), which required the Secretary of the Interior to erect and operate sawmills and to employ members of the Tribe to operate them. [Section 2 of the LaFollete Act.]. A sawmill was built in 1908 (R.2:13, Ex. 2, p. MROK004102). During the period when the Termination Act was in effect, the forest and the sawmill were operated by Menominee Enterprises, Inc. ("MEI"), a corporation organized under Wisconsin law (A.73-103).

The Restoration Act provided for the reacquisition of most of MEI's assets by the Secretary of the Interior. The assets were to be taken in the name of the United States in trust for the Tribe. This

transfer was to become effective only after the Secretary of the Interior negotiated a plan with MEI, the plan was submitted to Congress, and neither House of Congress disapproved it within sixty days. 25 U.S.C. § 903d. On April 22, 1975 the Secretary of the Interior, the Tribe, and MEI submitted to Congress the "Plan for Transfer of all of the Assets of Menominee Enterprises, Inc., a Wisconsin Corporation, Pursuant to Sections 6(a) and 6(b) of the Menominee Restoration Act" (Restoration Plan) and the "Management Plan of Menominee Enterprises, a Tribal Enterprise of the Menominee Indian Tribe of Wisconsin" (Management Plan), which includes the Trust and Management Agreement (R.1:10, Ex. B; and A.16-62). The Congress took no action.[2] The Restoration Plan states that the assets of MEI will be operated as a tribal enterprise (R.1:10, Ex. B, p. 10). Likewise, the Management Plan states the assets shall be managed and operated as a tribal enterprise. The stated duties of the tribal enterprise, among other things, are to "...manufacture, market, sell, and distribute timber,

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[2] Article XII of the Tribal Constitution states that Congress approved the Management Plan on March 14, 1975 (R.1:12, Ex. B, p.26). In light of the fact that the plan was submitted to Congress on April 22, 1975 this statement is obviously erroneous.

forest products, and related products". (A.21-22). The Tribe later adopted a constitution. Under Article XII of the Tribal Constitution the Tribal Legislature affirmed the Management Plan. (R.2:16:4-5; R.1:12, Ex. B, p. 26).

The Restoration Plan and the Management Plan have various provisions dealing with the authority of the Tribe and the tribal enterprise. The Restoration Plan states in paragraph I.1: "The Tribe should be accorded maximum self-determination within the confines which have been imposed by law upon the Secretary [of the Interior]" (R.1:10, Ex. B, p. 5). It also provides in paragraph II.A.1: "In addition, the Tribe will have full authority over the tribal business" (R.1:10, Ex. B, p. 8).

The Management Plan states in paragraph 14e: "e. Involvement of the United States. The United States of America shall have no authority in regard to the operation of this management plan, except as specifically provided in the Trust and Management Agreement. The duties and obligations of the Secretary of Interior of the United States, pursuant to Section 9 of the Trust and Management Agreement, shall apply to the tribal enterprise" (A.49).

The Trust and Management Agreement, attached to the Management Plan, states in paragraph 8: "The Tribe shall manage, operate, and control the tribal business… The Secretary [of the Interior] shall have no authority in regard to the management of the tribal business, except as specifically provided in this agreement" (A.39-40).

3. Operations of MTE

At all relevant times MTE was engaged in a business affecting interstate commerce in that it handled goods or materials which had been moved in interstate commerce (R.2:16:3; R.1:4:V; R.1:5). Its activities were typical of commercial sawmill operations (R.2:15:3). According to MTE's 2005 Annual Report, MTE's "primary objective" is "to operate in a businesslike manner" (A.8; R.2:15, Ex. 2, p. MROK004102). MTE is "committed to adding value to the trees we harvest and to furnishing more opportunities for profitable operations" (A.8; R.2:13; R.2:15, Ex. 2, p. MROK004104). MTE generated $16.5 million in lumber sales revenue in 2003, $17.9 million in 2004, and $19.8 million in 2005 (A.8-9; R.2:15, Ex. 2, p. MROK004113).

MTE sells its products to non-Indian customers outside Wisconsin (A.8; R.2:15:2). For example, one of its customers is Gibson USA, which has a factory in Nashville, Tennessee (R.2:15:2). According to MTE's 2005 Annual Report, it is a "...world class provider of quality wood products" (R.2:15, Ex. 2, p. MROK004104).

MTE complies with general federal regulatory requirements. It submitted information for 2006 to the Bureau of Labor Statistics for its Survey of Occupational Injuries and Illnesses (R.2:15:2, Ex.1). The submission of this information is required by 29 C.F.R. § 1904.42, an OSHA regulation. The 2005 Annual Report states that MTE's sprinkling of logs received the approval of the Environmental Protection Agency (R.2:15, Ex. 2, p. MROK004104).

C. *Procedural history*

On July 26, 2007 through July 31, 2007 OSHA inspected MTE's worksite in Neopit, Wisconsin (R.2:15:1). As a result of this inspection, on January 23, 2008, OSHA issued to MTE a citation for six serious violations of OSHA standards, a citation for three other-than-serious violations of OSHA standards, and notifications of proposed penalties totaling $10,800. The citations for serious violations included alleged violations for failure to provide fall

protection; failure to perform a hazard assessment to determine the need for personal protective equipment; failure to provide personal protective equipment for employees working with or near live electrical connections; failure to comply with the lockout/tagout standard; and failure to comply with machine guarding requirements. (R.1:1). MTE contested the citations and notification of proposed penalties (R.1:2).

In proceedings before the ALJ, the parties stipulated that the only contested issue was the question whether the OSH Act applied to MTE (R.1:9). MTE moved for summary judgment, arguing that the Secretary "lacked jurisdiction" over MTE based on language in the Restoration and Management Plans, and the Trust and Management Agreement attached to the Management Plan. (R.1:10). MTE also argued that OSHA had no jurisdiction over it because the Restoration Act had restored the Tribe as a sovereign. (Ibid.).

D. *The judge's decision*

The ALJ denied MTE's motion for summary judgment (A.6-12). He held that the OSH Act is a statute of general applicability presumptively applicable to Indians under the rule established in *Federal Power Commission v. Tuscarora Indian Nation,* 362 U.S. 99

(1960) unless: 1) the Act touches exclusive rights of self-governance in purely intramural matters; 2) the Act's application to the tribe would abrogate rights guaranteed by Indian treaties; or 3) there is proof by legislative history or some other means that the Congress intended that the Act not apply to Indians on their reservations. [3] (A.7) (citing *Smart v. State Farm Insurance Co.*, 866 F.2d 929, 932 (7th Cir. 1989). The judge then determined that none of the *Tuscarora* exceptions applied to the Menominee Tribe under the facts of this case.

He found the intramural affairs exception inapplicable because MTE's logging and sawmill operations were commercial in nature (A.10-11). He found the treaty rights exception inapplicable because MTE failed to show that any treaty was implicated. (A.11-12). The judge noted that while MTE and the Tribe argued that application of the OSH Act to MTE would violate the provision of the Management Plan generally barring the United States from

[3] In his Findings of Fact, the ALJ stated: "Respondent is a Wisconsin Corporation…" (A.8). The Secretary agrees with MTE that this is incorrect. The business was a Wisconsin corporation during the time when the Termination Act was in effect (A.76-77). However, its assets were transferred to the United States in trust for the Tribe; the assets are now operated as a tribal enterprise (R.1:10. Ex. B, p. 8).

managing MTE, the Management Plan was not a treaty. *Ibid.* In any event, the judge found that the exclusion language of the Management Plan cited by MTE was insufficient to bar the application of the OSH Act to MTE. *Ibid.* Finally, the ALJ held that the third exception to the *Tuscarora* rule did not apply because there was no indication in the legislative history of the OSH Act that Congress intended to exclude Indians from coverage. (A.12) (citing *Turning Stone Casino Resort*, 21 BNA OSHC 1059 (No. 04-1000, 2005).

On April 14, 2009 the ALJ issued a decision and order affirming all the citations and proposed penalties (A.2-4). MTE and the Tribe filed a petition for discretionary review, but the Commission declined review. The ALJ's decision became a final order of the Commission on June 3, 2009 (A.1). This appeal followed.

SUMMARY OF ARGUMENT

The OSH Act applies to MTE, an Indian tribal business. The Act broadly applies to employers throughout the United States, i. e. persons engaged in business affecting interstate commerce who have employees, except the United States (excluding the Postal

Service), States, and their political subdivisions. 29 U.S.C. § 652 (5). General federal laws apply to Indians. *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960). The OSH Act is such a law. There are three exceptions to this rule. 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 general law touches exclusive rights of governance in purely intramural matters; (2) the application of the general law to the tribe would abrogate rights guaranteed by Indian treaties or statutes; or (3) there is proof by legislative history or some other means that Congress intended that the general law not apply to Indians on their reservations. *Smart v. State Farm Insurance Co.*, 868 F.2d 929, 932-34 (7th Cir. 1989). None of these exceptions apply here. The first exception is not being urged before this Court and the other ones do not apply. The argument based on the second exception, dealing with statutory and treaty rights, should be rejected. MTE's argument that the case falls within this exception because of the Restoration Act is to no avail. First, this argument was not raised in its petition for discretionary review filed with the Commission, and therefore should not be considered by this Court.

29 U.S.C. § 660(a). Second, even if this Court considers this argument, no language in the Restoration Act exempts MTE from the OSH Act. Furthermore, the provisions of the Restoration Plan and the Management Plan cited by MTE do not trigger the application of the second exception to the *Tuscarora* rule. First, neither the Restoration Plan or the Management Plan is a treaty or statute. Second, even they were, these provisions do not exempt MTE from the OSH Act.

MTE may not avail itself of the third exception to the *Tuscarora* rule. MTE argues in connection with this exception that the legislative history of the Restoration Act and the Restoration Plan indicated that Congress did not intend that the OSH Act apply to MTE. First, MTE did not argue that the third exception applies in its petition for discretionary review, and therefore this Court should not consider this argument. Second, even if this Court considers this argument, the contention is baseless. The third exception to the *Tuscarora* rule relates to the legislative history of the general federal law sought to be applied. The courts and the Commission have held that there is no indication in the legislative

history of the OSH Act that Congress intended that the Act not apply to Indians on their reservations.

ARGUMENT

I. *Standard of review*

The issue before this Court is one of statutory interpretation. Therefore, this Court reviews the issue *de novo. Gaffney v. Riverboat Services of Indiana*, 451 F.3d 424 (7th Cir. 2006), *cert. denied*, 549 U.S. 1111 (2007).

II. *The OSH Act Applies to MTE.*

A. *The ALJ used the proper test for determining whether the OSH Act applied to MTE.*

The ALJ correctly relied on the test for the applicability of general federal laws to Indians (A.2, 10). The basic principle of that test is the holding of *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960) that a general federal statute applies to Indians. *Smart v. State Farm Insurance Co.*, 868 F.2d 929, 932 (7th Cir. 1989) ("*Tuscarora* presumes that when Congress enacts a statute of general applicability, the statute reaches everyone within federal jurisdiction not specifically excluded, including Indians and Tribes."). MTE agrees that under this basic

principle, considered alone, the OSH Act would apply to it (MTE Br. 19).[4] *See Reich v. Great Lakes Indian Fish and Wildlife Commission*, 4 F.3d 490, 495 (7th Cir. 1993) ("*Great Lakes*") (dictum stating that other general federal statutes, such as the OSH Act, have been applied to Indian tribal businesses, such as those engaged in lumbering, citing *U.S. Dep't of Labor v. OSHRC and Warm Springs Forest Products Industries,* 935 F.2d 182 (9th Cir. 1991)) (*"Warm Springs"*)).

However, as the ALJ recognized, there are three exceptions to the *Tuscarora* rule (A.7-8). A federal rule of general applicability that is silent on the issue of applicability to Indian tribes will not apply to them if: (1) the general law touches exclusive rights of self-governance in purely intramural matters; (2) the application of the general law to the tribe would abrogate rights guaranteed by Indian treaties or statutes; or (3) there is proof by legislative history or some other means that Congress intended the general law not apply to Indians on their reservations. *Smart*, 868 F.2d at 932-33, citing *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985). *Accord*, *Reich v. Mashantucket Sand & Gravel*, 95 F.3d

[4] "MTE Br." refers to MTE's opening brief filed with this Court.

174, 177 (2nd Cir. 1996); *Warm Springs*, 935 F.2d at 184; *Turning Stone Casino Resort*, 21 BNA OSHC 1059, 1061 (No. 04-1000, 2005). MTE no longer argues that its case falls within the first exception to the *Tuscarora* rule, but contends only that the case falls within the second and third exceptions (MTE Br. 19-21).

B. *This Court should reject MTE's argument that the second exception to the Tuscarora rule applies here.*

1. MTE argues that the second exception applies because the Restoration Act does not indicate that upon restoration, the Menominee would be subject to federal regulation. (MTE Br. 19-20). This argument should be rejected on numerous grounds. First, this Court lacks authority to consider the argument because it was not raised in MTE's petition for discretionary review filed with the Commission (R.2:24). Section 11(a), of the OSH Act, 29 U.S.C. § 660(a), provides in pertinent part: "No objection that has not been urged before the Commission shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." Under this provision if a party fails to make an argument in its petition for discretionary review that argument will not be considered by this Court absent

extraordinary circumstances. *Globe Contractors, Inc. v. Herman*, 132 F.3d 367, 370-71 (7th Cir. 1997).

MTE's petition for discretionary review raised four arguments challenging the ALJ's ruling that the OSH Act applied to MTE's commercial logging and sawmill operations: (1) the OSH Act is not a law of general applicability, (2) the intramural affairs exception applies, (3) the rule of comity applies, and (4) the ALJ failed to consider the effect of the Restoration and Management Plans (R.2.24.1-3). The petition did not address the Restoration Act. MTE made an argument about the Restoration Act in its brief in support of its motion for summary judgment (R.1:10). It could have raised the same argument in its petition for discretionary review, but failed to do so. The Restoration Act was not modified since its passage in 1973. There has been no case law interpreting the Restoration Act with respect to the applicability of general federal law to the Tribe or MTE between the filing of the petition for discretionary review and the filing of MTE's petition for review with this court. *See Globe Contractors*, 132 F.3d at 371 (substantive change of law between the time of the filing of the petition for discretionary review with the Commission and the time of filing of

the petition for review with this Court constitutes extraordinary circumstances). MTE does not allege that exceptional circumstances excuse its failure to present its argument to the Commission.

2. Even if this Court considers MTE's Restoration Act argument, MTE may not avail itself of this exception on the basis of the Restoration Act's text. There is nothing in the provisions of the Restoration Act which in any way exempts MTE from the OSH Act. MTE notes the following language at 25 U.S.C. § 903d:

> (a) Extension; laws applicable
>
> Notwithstanding the provisions of the Act of June 17, 1954 (68 Stat. 250; 25 U.S.C. 891-902), as amended, or any other law, Federal recognition is hereby extended to the Menominee Indian Tribe of Wisconsin and the provisions of the Act of June 18, 1934 (48 Stat. 984; 25 U.S.C. 461 et seq.), as amended, are made applicable to it.
>
> (b) Repeal of provisions terminating Federal supervision; reinstatement of tribal rights and privileges
>
> The Act of June 17, 1954 (68 Stat. 250; 25 U.S.C. 891-902), as amended, is hereby repealed and there are hereby reinstated all rights and privileges of the tribe or its members under Federal treaty, statute, or otherwise which may have been diminished or lost pursuant to such Act.

MTE Br. 19-20. The purpose of these provisions of the Restoration Act was to place the Menominee back in the position they held

before the Termination Act. They were to be placed on the same footing as other tribes newly recognized by Congress as well as those tribes whose federal supervision was never terminated. *United States v. Long*, 324 F.3d 475, 482 (7th Cir. 2003). Thus, contrary to MTE's argument (MTE Br. 20), there is no indication that the termination and subsequent restoration of federal supervision of the Tribe granted the Tribe some special status entitling it to exemption from general federal laws. Certainly, such special status cannot be inferred from the Restoration Act's *silence* concerning federal regulation. MTE Br. 20 (noting that Congress "could easily have expressed that the restored rights would be subject to federal regulation."). Therefore, just as the sawmill owned and operated by the Confederated Tribes of Warm Springs, pursuant to a corporate charter approved by the Secretary of the Interior, is subject to the OSH Act, *Great Lakes*, 4 F.3d at 495, *Warm Springs,* 935 F.2d at 183-87, the sawmill owned and operated by the Menominee Tribe pursuant to the Tribal Constitution (R.1:12, Ex. A, p. 26) is also subject to the OSH Act. General language, such as the provisions of treaties establishing reservations within the exclusive sovereignty of the tribe, is

insufficient to effect the exemption from general federal laws urged by MTE; the second exception requires specific language which would be compromised by the application of the general law. *Smart,* 868 F.2d at 934-35.

Furthermore, the Restoration Act's lack of any exemption from the OSH Act is made clear by an express exemption from taxation in the former statute. Section 6 of the Restoration Act, 25 U.S.C. § 903d(b), provided that the transfer of assets from Menominee Enterprises, Incorporated, the Wisconsin corporation, to the United States in trust for the Tribe, as well as the assets themselves, were to be free from federal, state, and local taxation. This express exemption from taxation implies the exclusion of exemptions from other general federal laws. *See TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001) ("'Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied in the absence of evidence of a contrary legislative intent.'"); *In re: Globe Building Materials, Inc.*, 463 F.3d 631, 635 (7th Cir. 2006) ("…*expressio unius est exclusio alterius*"). In other words, when Congress wants to grant an exemption from general federal laws for Indians, it knows how to do it. *Cf. Kimbrough v.*

United States, 552 U.S. 85, 103 (2007) (inference about appropriate length of criminal sentence should not be drawn from congressional silence; Congress has shown that it knows how to direct sentencing practices in express terms).

3. MTE also suggests that the second exception to the *Tuscarora* rule could apply on the basis of the Restoration Plan and the Management Plan (MTE Br. 5, 15-17). It contends that because these plans were submitted to both of Houses of Congress and were not disapproved any abrogation of these plans by the OSH Act falls within the second exception to the *Tuscarora* principle (MTE Br. 20). This contention is without merit. The second exception only applies if application of the general law would abrogate rights guaranteed by Indian treaties or statutes. *Smart*, 868 F.2d at 934. Neither the Restoration Plan nor the Management Plan is a treaty or a statute.

As the ALJ ruled and MTE has conceded, the Management Plan is not a treaty (A.11; MTE Br. 20). Neither is the Restoration Plan. A treaty is made by the President with the concurrence of two-thirds of the Senate. U.S. Const. art. II, § 2. Neither the Restoration Plan nor the Management Plan is the product of such a process. Both documents are agreements between the Secretary of

the Interior and the Tribe which were merely submitted to both Houses of Congress pursuant to 25 U.S.C. § 903d(b); neither House took any action (R.1:10, Ex. B; MTE Br. 15).

Likewise, neither the Restoration nor Management Plans are statutes. In order for a document to become a statute it must be passed by both Houses of Congress and be signed by the President or be approved by two thirds of each House after a Presidential veto. U.S. Const. art. I, § 7. None of those actions occurred here (MTE Br. 19).[5]

4. Even if any abrogation of the Restoration Plan or the Management Plan would fall within the second exception to the *Tuscarora* rule, none of the provisions of these plans would be abrogated by the application of the OSH Act to MTE's operations. The second exception requires that application of the general law to a tribe or its enterprise be inconsistent with a specific right in the document. *Smart*, 868 F.2d at 935. Provisions of a document which "...simply convey land within the exclusive sovereignty of the Tribe..." are insufficient. *Ibid.* This lack of specificity is one of the

[5] *See Antoine v. Washington*, 420 U.S. 194, 197-205 (1975) (effect given to agreement between the United States and tribe because it was enacted into law by Congress).

reasons the ALJ properly rejected MTE's argument based on the second exception (A.11).

A close examination of the provisions of the plans cited by MTE reveals that none are specific enough to invoke the second exception. Paragraph I.1 of the Restoration Plan states: "The Tribe should be accorded maximum self-determination within the confines which have been imposed by law upon the Secretary of the Interior" (R.1:10, Ex. B, p. 5). This language about self-determination is similar to the broad language of the Chippewa treaty in *Smart* which simply conveyed land within the "exclusive sovereignty of the Tribe" and was not specific enough to trigger the second exception to the *Tuscarora* rule. *Ibid.* Just as this language in the Chippewa treaty was insufficient to invoke the second exception in *Smart*, similar broad language about self-determination is insufficient to invoke this exception here. Moreover, paragraph I.1 of the Restoration Plan provides that the self-determination must be exercised within the confines imposed by law upon the Secretary of the Interior. Under the Restoration Act, with respect to the tribal business the Secretary of the Interior was only authorized to negotiate with the Tribe a plan for the transfer of the business to

the United States in trust for the Tribe. 25 U.S.C. § 903d. As noted on p. 22, *supra*, the only exemptions from general federal law set forth in the Restoration Act are tax exemptions. 25 U.S.C. § 903d. No provision of the Restoration Act authorizes the Secretary of the Interior to exempt the tribal business from the OSH Act. Likewise, paragraph II.A.1. of the Restoration Plan and the paragraphs of the Management Plan cited by MTE contain general language about the authority of the tribal business to conduct its operations. The language is analogous to the broad language in the Chippewa treaty which this Court in *Smart* considered insufficiently specific to confer an exemption for the Tribe from a general federal employment law. *Smart*, 868 F.2d at 935. These provisions must be read in light of the history of the sawmill on the Menominee reservation. As MTE states, in 1908 the Bureau of Indian Affairs constructed the sawmill on the Menominee reservation and thereafter managed it until the Termination Act was passed (MTE Br. 12; R.1:10, Ex. B, pp. 46-48). During the termination period the Menominees through MEI, a corporation organized under Wisconsin law, operated the sawmill without control by the BIA (R.1:10, Ex. B, pp. 4, 9, 46). One of the main purposes of the

Restoration Plan and the Management Plan was to provide that the sawmill would continue to be operated by the Menominees, not the BIA (R.1:10, Ex. B, pp. 46-48; A.21, 49, 59, 60). There is nothing in these plans, however, about the tribal enterprise being free of regulation by OSHA.

In particular, paragraph II.1.A. of the Restoration Plan provides that "…the Tribe will have full authority over the tribal business" (R.1:10, Ex. B, p.8). This language only grants the Tribe the same kind of autonomy over the affairs of the business that any businessperson has over the affairs of his business, not freedom from governmental regulation. The distinction between controlling and regulating a company was made clear by the Supreme Court in *Banton v. Belt Line Ry. Co.*, 268 U.S. 413, 421 (1925) when it stated: "…subject to reasonable *regulation* in the public interest, the *management and right to control* the business policy of the company belong to its owners … (emphasis added). *Cf. Thomas v. Kennedy*, 130 A.2d 97, 104 (Pa. 1957) (provision in trust agreement granting trustees of pension fund "full authority" over pension payments not equivalent to absolute discretion; authority must be exercised subject to stated purposes of fund).

Similarly, the provisions of the Management Plan cited by MTE (MTE Br. 7-8, 17, 19) only provide that the Tribe, not the Federal Government, will manage the business; they say nothing about regulation by federal agencies. Paragraph 14e of the Management Plan provides: "e. Involvement of the United States. The United States of America shall have no authority in regard to the operation of this management plan, except as specifically provided in the Trust and Management Agreement" (A.49). Paragraph 8 of the Trust and Management Agreement, attached to the Management Plan, provides: "The Tribe shall manage, operate, and control the tribal business.... The Secretary [of the Interior] shall have no authority in regard to the management of the tribal business, except as specifically provided in this agreement" (A.59-60). The management, operation, and control of a business is distinct from regulation by a governmental agency. *Cf. Reves v. Ernst & Young*, 507 U.S. 170, 184-86 (1993) (auditing of business by outside accountants not operation or management of business for purpose of liability under Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962(c)); *Banton*, 268 U.S. at 421 (distinction between regulation of company by a governmental agency and

management and control of a company). The distinction between regulation and management of a company by the Federal Government can be seen when one considers Federal Prison Industries, a government corporation which employs federal prisoners to manufacture various products. On the one hand, the Federal Government does manage that business. 18 U.S.C. §§ 4121, 4122. On the other hand, OSHA does not manage, but rather regulates, MTE, a manufacturer of wood products, when it sets occupational safety and standards for it, inspects it, and issues citations and proposed penalties against it when it violates the OSH Act, as the agency does with respect to other businesses throughout the United States.

Thus, application of the OSH Act to MTE would not abrogate these provisions of the Restoration Plan and the Management Plan. Furthermore, the Government's trust responsibility to MTE, as set forth in the Restoration Plan (R.1:10, Ex. B, p. 24) and the Management Plan (A. 49, 60), is not breached by application of the OSH Act. *Cf. Department of the Interior and Bureau of Indian Affairs v. Klamath Water Users Protective Association*, 532 U.S. 1, 15-16 (2001) (Government's trust responsibility to tribe not

breached when under Freedom of Information Act, 5 U.S.C. § 552, Government releases information provided by Tribe); *Osage Tribal Council v. United States Department of Labor*, 187 F.3d 1174, 1183-1184 (10th Cir. 1999) (Government's trust responsibility to tribe not breached when anti-retaliation provision of Safe Drinking Water Act, 42 U.S.C. § 300j-9(i)(1)(C), applied to tribe).

C. *This Court should reject MTE's argument that the third exception to the Tuscarora rule applies here.*

1. MTE argues that its case falls within the third exception to the *Tuscarora* rule (MTE Br. 8, 20-21). This Court should not consider this argument because it also was not raised in MTE's petition for discretionary review. *See* 29 U.S.C. § 660(a); *Globe Contractors, Inc. v. Herman*, 132 F.3d 367, 370 (7th Cir. 1997) and discussion in Part B 1. above. MTE has shown no extraordinary circumstances justifying its failure to make this argument in its petition for discretionary review.

2. Even if this Court considers MTE's argument that the third exception to the *Tuscarora* rule applies here, the argument is baseless. The third exception applies where there is proof by legislative history or some other means that that Congress did not

intend the general law to apply to Indians on their reservations. MTE argues that the third exception applies because, as it understands the legislative history of the Restoration Act and the Restoration Plan, this legislative history indicates a congressional intent to exempt MTE from the OSH Act (MTE Br. 8, 20-21). However, the relevant legislative history is that of the general federal statute sought to be applied – in this case, the OSH Act. *Cf. Smart*, 868 F.2d at 932-33, 936. In *Smart* the court analyzed whether there was evidence of congressional intent to exclude Indians from the general statute sought to be applied there, the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.*, and found no such evidence. *Id.* at 936. The courts of appeals and the Commission have held that there is no proof by legislative history or some other means that Congress intended that the OSH Act not apply to Indians. *Mashantucket Sand & Gravel*, 95 F.3d at 177; *Warm Springs*, 935 F.2d at 187; *Coeur d'Alene*, 751 F.2d at 1118; *Turning Stone Casino Resort*, 21 BNA OSHC at 1064.

Finally, MTE does not rely on the presence of legislative history so much as its absence. MTE Br. at 20-21("Nothing in the legislative history of the Restoration Act or Restoration Plan

indicates that Congress intended that [MTE] would be subject to federal regulation."). The absence of proof that Congress intended OSH Act coverage of Indians is not proof of an intent to exclude them from coverage. *Coeur d'Alene*, 751 F.2d at 1114-15. Nor does the language of the Restoration Act or Plan demonstrate an intent to exclude Indians from OSHA coverage. And as we have explained in Parts B 2. and 3. above, the purpose of these provisions was to place the Menominee on the same footing as other tribes newly recognized by Congress – not to exempt them from statutes to which they would otherwise be subject.

CONCLUSION

For the foregoing reasons, this Court should hold that the OSH Act applies to MTE and affirm the final decision and order of the Commission.

Respectfully submitted.

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December 28, 2009

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I hereby certify that on this 28th day of December 2009, two copies of the foregoing *Brief for the United States Department of Labor* were served by overnight mail, postage prepaid, upon the counsel listed below. I also certify that I provided counsel listed below with a .pdf copy of the document via e-mail.

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