



April 9, 2010

**GENERAL MEMORANDUM 10-047**

Occupational Safety and Health Act Applies to Tribal Business

On March 24, 2010, the United States Court of Appeals for the Seventh Circuit held that a sawmill owned by Menominee Tribal Enterprises ("which has no substantial existence apart from the Tribe") on the Menominee reservation is subject to the Occupational Safety and Health Act (OSHA), 29 U.S.C. §§ 651 *et seq.*<sup>1</sup> The Department of Labor had cited and fined the Tribe for violations of OSHA, a Federal statute intended "[t]o assure safe and healthful working conditions for working men and women." The Tribe took the position that it was not subject to OSHA and should not have to pay fines if it fails to comply with OSHA.<sup>2</sup> The Court of Appeals (Court) disagreed, finding that none of the exceptions to OSHA jurisdiction argued by the Tribe applied.

OSHA is considered to be a statute of "general applicability," which is a statute that applies generally to a class of persons, property, or groups. These statutes typically do not mention tribes in their text or legislative history. Different courts use different approaches to determine whether statutes of general applicability apply to Indian tribes. For example, the Tenth and Eighth Circuit Courts of Appeals require specific statutory language or clear legislative intent before holding that such statutes apply to Indian tribes. *See, e.g., Donovan v. Navajo Forest Products Industries*, 692 F.2d 709 (10<sup>th</sup> Cir. 1982) (regarding the Occupational Safety and Health Act); *E.E.O.C. v. Fond du Lac Heavy Equip. and Constr. Co.*, 986 F.2d 246 (8<sup>th</sup> Cir. 1993) (regarding the Age Discrimination in Employment Act). The Ninth, Second and Seventh Circuits, however, presume that general statutes apply to Indian tribes if the statutes do not invade retained tribal sovereignty, or rights conferred by treaty or statute. *See Cohen's Handbook of Federal Indian Law*, § 2.03 (2005 Ed.).

The presumption that statutes of general applicability apply to Indian tribes can be traced to *FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960) (*Tuscarora*), which stated in dictum "it is now well settled by many decisions of this Court that a general statute in terms of applying to all persons includes Indians and their property interests."<sup>3</sup> *Tuscarora*, which dealt with property and not tribal sovereignty, has been interpreted by many courts to hold that statutes of general applicability apply to tribes. The Ninth Circuit, in *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9<sup>th</sup> Cir. 1985), developed the practice of presuming the statutes apply to tribes with limited exceptions: A statute of general applicability will be held inapplicable to Indians only if (1) it would interfere with tribal governance, or (2) it would clash with the rights

<sup>1</sup> *Menominee Tribal Enterprises v. Solis*, No. 09-2806 (7<sup>th</sup> Cir. Mar. 24, 2010).

<sup>2</sup> The Tribe did note that it makes every effort to comply with OSHA.

<sup>3</sup> Prior to *Tuscarora*, courts generally followed *Elk v. Wilkins*, 112 U.S. 94(1884) which stated that "[g]eneral acts of Congress do not apply to Indians, unless so expressed as to clearly manifest an intention to include them."

granted Indians by other statutes or by treaties with Indian tribes, or (3) there is persuasive evidence that Congress did not intend by its silence that the statute would apply to Indians.

The Seventh Circuit Court of Appeals, which heard the case involving the question of OSHA's applicability to Menominee Tribal Enterprises, follows the *Tuscarora* approach and the Ninth Circuit's *Coeur d'Alene* exceptions. The Court presumed OSHA applies to the Tribe and then found without much discussion that the first and third *Coeur d'Alene* exceptions were inapplicable because "the sawmill is just a sawmill, a commercial enterprise." If a court finds interference with tribal governance, it is more likely to do so when the statute is applied to tribes in their governmental rather than commercial capacity.

The Court did evaluate the second *Coeur d'Alene* exception, where a statute is inapplicable if it clashes with the rights guaranteed by other statutes or treaties. The Court reviewed the Menominee's Treaty of 1856 and found the language was not directed to establishing an exemption from Federal regulation. The Court also found that the Management Plan of Menominee Enterprises, which was developed on the restoration of the Tribe to Federal recognition, is not a statute granting rights to Menominee Enterprises, and even if the Plan could be viewed as a statute or treaty, it does not exempt the sawmill from Federal statutes of general applicability, such as OSHA. The Court further noted that the sawmill products are sold in interstate commerce in competition with sawmills that are owned by non-Indian enterprises and that "[e]xempting a sawmill owned by an Indian tribe from the obligations of OSHA seems hardly necessary to implement the Restoration Act or Management Plan let alone ... any treaty."

In examining the few other cases that address whether OSHA should be applied to Indian tribes, the Court found no support for the Menominee's claim for exemption. It found that the sawmill is not part of the Tribe's governance structure, such that it would be exempt under the rationale discussed in *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 182 (2d Cir. 1994) (where the court held that a tribally owned construction business building a tribal casino on tribal land and which was operated to support government social services was subject to OSHA because the enterprise operated in interstate commerce and employed nonmembers). The Court discussed the exemption in *Donovan v. Navajo Forest Products Industries*, 692 F.3d 709, 711 (10th Cir. 1982), where treaty language regulating who may enter the Navajo reservation was found to bar enforcement of the Federal laws in question on the reservation, and found nothing similar in the Treaty of 1856. The Court denied the Tribe's petition for review and held that the sawmill and related commercial enterprises of the Tribe are subject to OSHA.

If you have any questions about this case, please contact us at the information below.

###

Inquiries may be directed to:  
Starla Roels ([sroels@hobbsstrauss.com](mailto:sroels@hobbsstrauss.com)) or  
Tonya Davis ([tdavis@hobbsstrauss.com](mailto:tdavis@hobbsstrauss.com)).