United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR,

Complainant,

v.

AKWESASNE MOHAWK CASINO,

Respondent.

OSHRC Docket No. 01-1424

DECISION AND REMAND

Before: RAILTON, Chairman; STEPHENS and ROGERS, Commissioners.

BY THE COMMISSION:

Akwesasne Mohawk Casino ("AMC") is located in Hogansburg, New York, on the St. Regis Indian Reservation. The St. Regis Reservation straddles the St. Lawrence River and includes land in northern New York and in the Canadian provinces of Ontario and Quebec. AMC employs approximately 170 people, about half of whom are American Indian. Pursuant to a warrant approved by the United States District Court for the Northern District of New York, the Occupational Safety and Health Administration ("OSHA") inspected AMC and a warehouse used by AMC on March 26, 2001. As a result of the inspection, the Secretary of Labor ("the Secretary") issued two citations to AMC. AMC timely contested the citations, and on August 9, 2001 the Secretary filed a complaint with the Commission. On September 4, 2001, AMC filed a motion to dismiss the citations and complaint, alleging that OSHA lacks subject matter jurisdiction over its operations.

Before us on review is an order of Commission Administrative Law Judge Michael Schoenfeld in which he granted AMC's motion to dismiss the citations. The judge based his order on a finding that application of the Occupational Safety and Health Act, 29 U.S.C. § § 651-678 ("OSH Act"), to the working conditions at AMC would abrogate rights guaranteed by treaties between the United States and Indian tribes, concluding that AMC qualified for an exception to the rule that "...a general statute in terms applying to all persons includes Indians and their property interests." *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960).[1] The judge relied on two treaties cited by AMC: the Fort Stanwix Treaty of 1784, 7 Stat. 15, and the Canandaigua Treaty of 1794, 7 Stat. 44. Because we find those two treaties do not apply to the St. Regis Indians or the land upon which AMC is located, we remand this case for further proceedings.

I. Treaties

The treaties relied on by the judge were among a series of treaties the United States entered into with the Six Nations of the Iroquois Confederacy beginning in 1784.

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[1] This principle—that a federal statute of general applicability also applies to Indians—is commonly referred to as the "*Tuscarora* rule." *See, e.g., EEOC v. Karuk Tribe Housing Authority*, 260 F.3d 1071, 1081-82 (9th Cir. 2001); *Smart v. State Farm Insurance. Co*., 868 F.2d 929, 932 (7th Cir. 1989). However, many federal courts of appeals recognize the exceptions to that rule summarized in *Donovan v. Coeur d'Alene Tribal Farm*, where the Ninth Circuit held the *Tuscarora* rule does not apply 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 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...."

751 F.2d 1113, 1116 (9th Cir. 1985), *quoting United States v. Farris*, 624 F.2d 890, 893-94 (9th Cir. 1980). If one of the exceptions to the *Tuscarora* rule applies, the court will hold that a statute does not reach Indians unless Congress expressly applied the statute to them. *Id.* at 1116. The Second Circuit, in which the present case arises, has adopted *Coeur d'Alene*'s framework for determining whether the OSH Act applies to Indian tribes. *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174 (2d Cir. 1996).

At that time the Six Nations was comprised of the Mohawk, Onondaga, Seneca, Oneida, Cayuga, and Tuscarora tribes. *Onondaga Nation v. Thacher*, 189 U.S. 306 (1903). The Fort Stanwix Treaty of 1784 established western and southern boundaries for the lands of the Six Nations, and provided that the Six Nations "shall be secured in the peaceful possession of the lands" they inhabited east and north of those boundaries. The Fort Harmar Treaty of 1789, 7 Stat. 33, "renew[ed] and confirm[ed] all the engagements and stipulations entered into at the...treaty at Fort Stanwix," and extended the Fort Stanwix Treaty's protections to the Onondagas, Senecas, and Cayugas, three nations that had not signed that treaty in 1784. The Canandaigua Treaty of 1794 "acknowledge[d] the lands reserved to the Oneida, Onondaga and Cayuga Nations, in their respective treaties with the state of New York,"[2] and established a reservation for the Seneca Nation. That treaty also stated:

> The United States having thus described and acknowledged what lands belong to the Oneidas, Onondagas, Cayugas and Senekas, and engaged never to claim the same, nor to disturb them, or any of the Six Nations, or their Indian friends residing thereon and united with them, in the free use and enjoyment thereof: Now, the Six Nations, and each of them, hereby engage that they will never claim any other lands within the boundaries of the United States; nor ever disturb the people of the United States in the free use and enjoyment thereof.

7 Stat. 44, Article 4.[3]

Subsequent to the Canandaigua Treaty, the United States entered into two treaties that addressed the St. Regis Indians specifically. The St. Regis Reservation itself was

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[2] On May 13, 2002, the Secretary filed a motion requesting that the Commission take official notice of four treaties between the Six Nations and New York State that were incorporated by reference in the Canandaigua Treaty and two maps of New York, apparently to preempt any claim by AMC that the St. Regis Reservation falls within the boundaries described in those treaties. Because AMC has not made such an argument, it is unnecessary to take official notice of the treaties and maps at this time. Accordingly, we deny the motion.

[3] Articles 2 and 3 of the Canandaigua Treaty contain similar language.

established by a 1796 treaty with the Seven Nations of Canada ("Seven Nations Treaty"), 7 Stat. 55, which reserved a "tract equal to six miles square...to be applied to the use of the Indians of the village of St. Regis." An 1838 treaty with the New York Indians ("New York Indians Treaty"), 7 Stat. 550, provided for payment to the St. Regis and other Indians if the tribes moved to the Territory of Wisconsin. Article 4 of the treaty guaranteed that in their "new homes" the Indians would have "the right to administer their own laws[] subject...to the legislation of the Congress of the United States[] regulating trade and intercourse with the Indians." That treaty did not provide the same guaranty with respect to the Indians' present homes, however.

II. Discussion

The question whether the St. Regis Indians and their reservation are covered by the Fort Stanwix and Canandaigua treaties was addressed at length by the Court for Franklin County, New York in *People v. Boots*, 434 N.Y.S.2d 850 (Franklin Co. Ct. 1980). The St. Regis Indians are residents of, and their reservation is located in, Franklin County. In *Boots*, the court considered an argument by a Mohawk resident of the St. Regis Reservation that pursuant to the terms of the Canandaigua Treaty the courts of New York lack criminal jurisdiction over the reservation and its residents. The court found it was the settled law of the state that the Seven Nations Treaty of 1796 and not the Canandaigua Treaty governed the rights of Indians on the St. Regis Reservation. The court relied on historical evidence for its conclusion that, although most of the St. Regis Indians are ethnically Mohawk, historically the St. Regis Tribe was part of the Seven Nations of Canada, not the Six Nations of the Iroquois Confederacy. The court further found that, although in 1888 the Six Nations adopted the St. Regis Indians as "keepers of the eastern door" after the Mohawks lost that status by moving to Ontario, the "symbolic actions of the Iroquois Grand Council" were insufficient to bring the St. Regis Indians within the Canandaigua Treaty. *Id.* For these reasons, the court rejected the defendant's arguments, finding that the 1796 treaty, not the 1794 Canandaigua Treaty with the Six Nations, applied to the St. Regis Reservation. Although the court did not address the 1784 Fort Stanwix Treaty specifically, its conclusions regarding the St. Regis Indians'

historical status as members of the Seven Nations of Canada, rather than the Six Nations of the Iroquois Confederacy, strongly supports a finding that the St. Regis Indians were not parties to that treaty either. The reasoning and careful analysis used by the Franklin County Court are very persuasive, and we find ourselves in agreement.

AMC claims, however, that *Boots* is based on a misreading of the New York Court of Appeals' decision in *St. Regis Tribe of Mohawk Indians v. State of New York*, 5 N.Y.2d 24 (1958), *cert denied*, 359 U.S. 910, where the court found the 1796 Seven Nations Treaty applicable to the St. Regis Indians but did not discuss the Fort Stanwix and Canandaigua treaties or find those treaties inapplicable. We disagree. The court in *Boots* did not rely solely on *St. Regis* for its finding that the Canandaigua Treaty does not apply to the St. Regis Indians. *Boots* contains an extensive review of the historical evidence relating to the St. Regis Indians and their relationship with the Six Nations. Thus, AMC is wrong to the extent it argues *Boots* rests on a misreading of *St. Regis*.

AMC asserts that the Seven Nations rejoined their Six Nations kin in a 1760 declaration of unity. Even if this is true, it does not alter the fact that the United States dealt with the Six and Seven Nations separately in the treaties of 1794 and 1796, and that the St. Regis Indians were clearly considered part of the Seven Nations in 1796. *Boots* indicates the St. Regis Indians were eventually adopted by the Six Nations as "keepers of the eastern door," but their "adoption" apparently did not take place until 1888. Moreover, if the St. Regis Indians were adopted to *succeed* the Mohawks as "keepers of the eastern door" in 1888, this implies the St. Regis Tribe was not considered part of the Six Nations prior to that year.

AMC cites several cases in which courts allegedly found the St. Regis Indians are "Mohawks" for purposes of the Fort Stanwix and Canandaigua treaties, including *Lazore v. C.I.R.*, 11 F.3d 1180 (3d Cir. 1993), *United States v. Brown*, 824 F.Supp. (S.D. Ohio 1993), and *Oneida Indian Nation v. New York*, 194 F. Supp. 2d 104, 116 (N.D.N.Y. 2002). There is no indication, however, that in any of these cases the court directly considered that issue. The first two cases, which involve St. Regis or Mohawk Indians, seem to simply assume the St. Regis Indians are "Mohawks" for purposes of treaties with

the Six Nations; neither case specifically addresses that issue. The last case involves an Oneida Indian land claim, and simply identifies the St. Regis Indians as members of the Iroquois Confederacy, without stating when the tribe entered the Confederacy. Because *Boots* specifically addressed the St. Regis Indians' status in the context of the Canandaigua Treaty and reviewed the historical evidence rather extensively, we give more weight to the court's finding that the St. Regis Indians are not "Mohawks" for purposes of that treaty. Although *Boots* did not address whether the St. Regis Indians are "Mohawks" for purposes of the Fort Stanwix Treaty, the court's analysis supports a negative finding on that issue as well.

We also conclude that, even if the St. Regis Indians could be considered "Mohawks" for purposes of treaties with the Six Nations, there is insufficient evidence Mohawks signed either the Fort Stanwix or Canandaigua treaties. The *Boots* court found that Mohawks never signed the latter treaty: "[A]lthough unlike the [Fort Harmar] Treaty of 1789 the [Canandaigua] Treaty of 1794 does not specifically exclude the Mohawks *unless* they signed it, the fact remains that they were not present during its negotiation, despite repeated invitations, and they did *not* sign it." 434 N.Y.S. 2d at 856-57 (emphases in original). The Fort Stanwix Treaty likewise was not signed by the Mohawks at its inception, as evidenced by language in the Fort Harmar Treaty specifically exempting the Mohawks unless within six months they declared their assent to the earlier treaty. 7 Stat. 33, Articles 1 and 4.

Nor do we find any indication in WILLIAM FENTON, THE GREAT LAW AND THE LONGHOUSE: A POLITICAL HISTORY OF THE IROQUOIS CONFEDERACY 615, 619-20, 630, 701 (1998), which AMC cites to us, that Mohawks signed the Fort Stanwix and Canandaigua treaties. Although some of the cited pages suggest that Mohawk representatives attended the negotiations that preceded the Fort Stanwix and Canandaigua Treaties, they do not show the Mohawks signed or otherwise assented to those treaties. AMC also cites *Lazore* and *Brown*, but the courts in those cases seem to have simply assumed the treaties applied to the Mohawks; neither case addresses the treaty signing issue.

Further, we find no basis for concluding the "free use and enjoyment" rights guaranteed by Articles 2, 3 and 4 of the Canandaigua Treaty attach to Mohawk lands. Quite simply, Articles 2, 3 and 4 refer to "lands [that] belong to the Oneidas, Onondagas, Cayugas and Senekas," and only to those lands. We find nothing in the treaty language suggesting these articles also refer to Mohawk lands. AMC is essentially asking the Commission to insert the word "Mohawks" in Articles 2 through 4. However, courts are bound by the unambiguous words of a treaty, and cannot rewrite them. *Oregon Dept. of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 774 (1985). AMC suggests the United States would not have intended for different rights to attach to lands of different members of the Six Nations, but the historical record indicates the United States sometimes dealt with members differently, if only because at times certain nations were considered "friendly" and others "hostile" to federal and state interests. *See Oneida*, 860 F.2d at 1165-66. Another reason the Canandaigua Treaty does not contain any reference to Mohawk lands is suggested in *Boots*, 434 N.Y.S.2d at 857, which notes that the Mohawks appear to have physically abandoned New York State between the American Revolution and 1794, with many tribal members moving to Ontario.

There are two treaties that clearly apply to the St. Regis Indians, the 1796 Seven Nations Treaty and the 1838 New York Indians Treaty. We are unable to find any language in the Seven Nations Treaty or the New York Indians Treaty guaranteeing rights that would be abrogated by application of the OSH Act to AMC. *See Oregon Dept. of Fish & Wildlife v. Klamath Indian Tribe, supra*. The former treaty reserved land "to be applied to the use of the Indians of the village of St. Regis," but did not guarantee any specific rights in connection with the land. The latter treaty guaranteed the St. Regis and other New York Indians certain rights in the "new homes" to which they were expected to move, but did not offer that same guaranty with respect to the Indians' present homes.

III. Conclusion

We find that application of the OSH Act to the working conditions at AMC would not abrogate rights guaranteed by any treaty that applies to the St. Regis Indians or their reservation. Accordingly, we remand for further proceedings consistent with this order.

SO ORDERED.

/s/_____
W. Scott Railton
Chairman

/s/_____
James M. Stephens
Commissioner

/s/_____
Thomasina V. Rogers
Commissioner

Dated: January 6, 2005

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. AKWESASNE MOHAWK CASINO, Respondent.	OSHRC DOCKET No. 01-1424

ORDER

The issue in this case, one of first impression before the Commission, is whether the application of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651, *et seq.* (the Act), to Respondent's casino operations would "abrogate rights guaranteed" by treaties between the St. Regis Mohawk Tribe (the Tribe) and the United States. Having concluded that it would, Respondent's motion must be granted.

Pursuant to a warrant approved by the United States District Court for the Northern District of New York, investigators from the Occupational Safety and Health Administration (OSHA) of the U.S. Department of Labor conducted a safety and health inspection at the Akwesasne Mohawk Casino (the Casino) and a warehouse three miles away used by the Casino. Both are on reservation lands and are owned and operated by the Tribe.[1] As a result of the inspection, OSHA issued citations and a notification of proposed penalty to Respondent. Respondent timely contested. On August 9, 2001, the Secretary filed a complaint with the Commission seeking an order affirming the citation and proposed penalties. Respondent replied by filing a motion to dismiss the citation and complaint alleging a lack of subject matter jurisdiction. The Secretary opposed the motion and Respondent filed a reply to the Secretary's opposition.

[1] In approving OSHA's warrant application, the court determined that it had jurisdiction and that the inspection sought was reasonable under both the Constitution and the Act. (Resp. Motion, Ex. 8). While not empowered to review the issuance of the inspection warrant, the Commission may independently assess its jurisdiction. See, *Sarasota Concrete Co.*, 9 BNA 1608, 1611-12 (No. 78-5264, 1981), *aff'd*, 693 F.2d 1061 (11th Cir., 1982). (The Commission is statutorily competent to determine the constitutionality of OSHA inspections.)

Respondent moves to dismiss the citation and complaint on the grounds that the Act does not apply to Indian tribes where 'the application of the law to the tribe would abrogate rights guaranteed by Indian treaties...." Respondent relies on the holding in *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174 (2d Cir. 1996) (*Mashantucket*), as a framework for analysis of the facts of this case The court in that case concluded that:

> A federal statute of general applicability that is silent on the issue of applicability to Indian tribes [such as the Act] 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 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 177, citing *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985).

Respondent does not claim that the Act, if applied, would impact on any "exclusive rights of self-governance in purely intramural matters." Further, Respondent agrees that there is nothing in the legislative history of the Act showing "that Congress intended the law not to apply to Indians on their reservations." Respondent correctly points out that the *Mashantucket* decision is distinguished from this case by the crucial fact that treaties exist between the United States and the Tribe which owns and operates this casino. Thus, the *Mashantucket* decision is binding only to the extent that it sets out the appropriate analytical framework for reaching a decision in this matter.[2]

Whether the application of the Act "would abrogate rights guaranteed by the Indian treaties" requires an assessment of the language of the treaties in this case and the application of precedent teaching how to construe such provisions.[3]

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[2] Indeed, the *Mashantucket* court, after setting out the *Coeur d'Alene* analysis, noted that the Act is silent as to Indians and that the Mashantucket Pequot Tribe had no treaties with the federal government. The court warned in very specific language that the rest of its decision concerned itself "only with the first exception." The heart of the court's analysis thus is applicable only to those instances where there is a question of whether the law sought to be applied to an Indian tribe touches on "exclusive rights of self-governance in purely intramural matters." *Mashantucket,* 95 F.3d at 177. Such is not the case here.

[3] See, the Supreme Court's basic canons of Indian treaty construction. William C. Canby, Jr., *American Indian Law*, p. 100 (3d ed. 1998) and cases cited therein.

There are two treaties controlling.[4] The Treaty of Fort Stanwix of 1784, after describing the geographical boundaries of "the lands of the Six Nations," provided that the Indians "shall be secured in the peaceful possession of the lands...." Treaty of Fort Stanwix of 1784, 7 Stat. 15, at Art. III. (Respondent's Motion, Ex. 11). The Treaty of Cananadaigua of 1794 restored additional land to the Six Nations and stated that:

> [T]he United States will never claim the same nor disturb them or either of the Six Nations, nor their Indian friends residing thereon and united with them in the free use and enjoyment thereof: but the said reservations shall remain theirs, until they choose to sell the same to the people of the United States....

Treaty of Canandaigua of 1794, 7 Stat 44, at Art. II. (Respondent's Motion, Ex.11).

In addition to the renunciation of any future claims or disturbances against the Six Nations' interests in the lands or those "residing thereon" by the United States, the rights guaranteed by the above treaties are those of "peaceful possession of the lands,"and "free use and enjoyment" until the Six Nations choose to sell to the United States.

Treaty provisions were at issue in both *Donovan v. Navajo Forest Products Indus.*, 8 BNA OSHC 2094 (No. 76-5013), *aff'd*, 692 F.2D 709 (10th Cir. 1982) (*Navajo Products)* and *Department of Labor v. OSHRC (Warm Springs Forest Products Indus.)*, 935 F.2d 182 (9th Cir. 1991) (*Warm Springs*). The courts in those two cases applied the principle that as a general proposition, application of the Act to an Indian enterprise engaging in a business affecting interstate commerce (as a casino surely does) does not interfere with the rights of sovereignty granted to the Indian tribes by virtue of their treaties. The treaties in those cases, however, provided essentially that the reservation lands would be set apart for the exclusive use of the Indian tribes therein and that those tribes had the right to exclude non-Indians from those lands. See, *Mt. Adams Furniture Co.*, 1991 OSAHRC LEXIS 164, (No. 88-2239, 1991) (Decision and Remand Order), n. 1. In this case, the express treaty rights conferred upon the Six Nations by the Treaties of Fort Stanwix of 1784 and Fort Cananadaigua of 1794 are far-reaching in comparison to those at issue in *Navajo Products* and *Warm Springs*, supra. The treaties at issue here go further than assuring the Six Nations' interest in their

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[4] A third treaty cited by Respondent, The Treaty of Fort Harmar of 1789, cannot be considered controlling because the Tribe was not a party.

lands but they also promised unbridled control over how that land is used. In essence, the treaties vowed that the United States would leave the Six Nations alone regarding their activities on their own lands. In this regard, the fact that the Casino is a tribal, not an individual, enterprise sways heavily in their favor. The solemn promises of 1784 and 1794 are paramount to the 1970 goals of the Act.

The argument of the Secretary that the right of self-government, implicit in every Indian treaty, does not include the right to ignore general federal statues may be well and good. It is not controlling, however, where, as here, the sought-after application of federal law would serve to abrogate rights specifically promised by treaty.

Accordingly, Respondent's Motion to Dismiss the Citation and Complaint for Lack of Subject Matter Jurisdiction is GRANTED.

/s/
Michael H. Schoenfeld
Judge, OSHRC

Dated: November 26, 2001
Washington, D.C.