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July 1, 1988

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THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Dear Ms. Michael:

This letter is in response to your inquiry concerning whether Idaho's public works contractors licensing requirements apply to Indian-owned firms that seek to work on highway construction projects administered by the Idaho Transportation Department (ITD). According to the letter from ITD that accompanied your inquiry, some Indian-owned firms have questioned whether they need to comply with state licensing requirements before they can qualify to contract for highway public works projects located partially or wholly within the exterior boundaries of Indian reservations.

The ITD letter indicated that funding for a particular highway project may be provided by state funds, federal funds, or federal funds with state-match funds. The letter also indicated that the Indian owners of the firms interested in participating in ITD administered public works projects may be members of and reside on the particular reservation where a project is being constructed, may reside elsewhere in the state or may reside out of state. The facts provided to us do not indicate that either the federal government or any tribal government has placed any special conditions or restrictions on ITD's administration of public works projects carried on within the exterior boundaries of an Indian reservation.

As you know, Idaho Code § 54-1902 makes it unlawful for any person to enter into a contract with the state, or political subdivisions of the state, for the construction of any public works

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without first obtaining the appropriate public works contractors license unless such person is specifically exempted from complying with the provisions of the Public Works Contractors Act ("the Act"). The licensing requirements apply to subcontractors as well as primary contractors. The Act defines "person" as "any individual, firm, copartnership, corporation, association or other organization, or any combination thereof acting as a unit." See Idaho Code § 54-1901. In defining what is meant by the term "person" the Act does not make any distinction based upon ethnic status. Accordingly, an Indian-owned firm comes within the Act's definition of "person."

The only persons exempted from the Act's licensing requirements are authorized representatives of specified governmental entities, court officials, public utilities, and licensed architects, civil engineers and land surveyors when acting solely in their professional capacity. See Idaho Code § 54-1903. Thus, the plain language of the statute requires an Indian-owned firm to comply with the Act's licensing requirements. This is the case regardless of whether the firm is owned by a member of the Indian tribe within whose reservation a project is being constructed. Similarly, absent special conditions or restrictions imposed by the federal government on the use of federal funds, consideration of the source of funding for a particular project does not change the conclusion that the Act's licensing requirement applies to Indian-owned firms.

In addition to the specific exemptions excepting certain persons from complying with the Act, there are also several types of public works projects that are not subject to the Act. See generally Idaho Code § 54-1903. Any person contracting for such projects would not have to comply with the licensing requirements. One such exemption relevant to your inquiry applies to "any construction, alteration, improvement or repair carried on within the limits and boundaries of any site or reservation, the title to which rests in the federal government." See Idaho Code § 54-1903(f).

The statutory language describing the scope of the exemption set forth in Idaho Code § 54-1903(f) appears to be ambiguous as to whether the exemption applies to all public works projects carried out within the exterior boundaries of a federal reservation or site regardless of who holds title to the land on which a project is located, or only those projects within such reservations or sites that are located on lands where the federal government holds

title. Where such statutory ambiguities exist, there are rules of statutory construction which a court will apply to resolve the ambiguity.

Generally, in interpreting exceptions to the operation or application of a law, courts will strictly or narrowly construe a statutory exception. See 73 Am. Jur. 2d Statutes § 313 (1974). This is particularly true where the statute to which the exception or exemption applies is one that promotes the public welfare. Another rule of construction relevant to resolving the ambiguity created by Idaho Code § 54-1903(f) is that a legislature is presumed to have included every part of a statutory provision for a reason. See 73 Am. Jur. 2d Statutes § 250 (1974). Accordingly, significance and effect should be given to every phrase, if possible. Consistent with this rule, courts ordinarily will not construe one part of a statute in a manner which renders another part of no effect.

Taken together, these rules of statutory construction support the conclusion that the exception in Idaho Code § 54-1903(f) should apply only to those public works projects that are carried out within the exterior boundaries of sites or reservations and are located on lands to which the federal government holds title. To conclude otherwise would give no effect to the last phrase included in the statutory exemption and would result in an unnecessarily broad exception to the requirements of the Act. Moreover, the phrase "the title to which rests in the federal government" can only be read to modify or qualify what is meant by "site or reservation." See id. at § 229. While we believe that the likely judicial construction of this statutory provision would limit the exemption to only those lands to which the federal government holds title, we recognize that a statutory ambiguity exists and that it would be helpful if the Idaho legislature would clarify the intended scope of this exemption.

In summary, Indian-owned firms are subject to the public works licensing requirements imposed by the Idaho Public Works Contractors Act the same as any other person. Based upon the exemption set forth in Idaho Code § 54-1903(f), a public works contractors license is not required for public works projects performed on lands within an Indian reservation that are held in trust by the United States for an Indian tribe or a member of an Indian tribe, or where title to the land is otherwise held by the federal government. We do not believe a court would construe this statutory exemption to apply to public works projects carried out

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on lands within a federal reservation or site where title is not held by the federal government. The exemption applies to both Indian- and non-Indian-owned firms. This guideline does not consider issues of preemption that may arise by virtue of special conditions or limitations imposed by the federal government or any tribal government on highway public works activities that are carried out within the exterior boundaries of a particular reservation.

Should you have any questions concerning our response to your inquiry, please let me know.

Sincerely,

Merrilee Caldwell

MERRILEE CALDWELL
Deputy Attorney General