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ATTORNEY GENERAL OPINION NO. 88-5

TO: Gary F. Arnold, Executive Director
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Per Request for Attorney General's Opinion

QUESTIONS PRESENTED:

1. Does the Idaho Industrial Commission have authority to enforce the provisions of Idaho Code § 72-301 requiring employers to secure payment of workers' compensation benefits against Indian employers doing business within a reservation?

2. Would the answer to Question 1 be different if the employer were a partnership with a non-Indian partner or a corporation with non-Indian shareholders, officers or directors?

CONCLUSIONS:

1. Federal law authorizes the application of state workers' compensation laws to all United States territory within a state, including Indian reservations. Accordingly, the Idaho Industrial Commission has the authority to enforce the requirements of Idaho Code § 72-301 against Indian employers doing business within a reservation; however, the doctrine of sovereign immunity precludes the Idaho Industrial Commission from bringing an action against a tribal government or a tribally-owned business.

2. The status of an employer as a partnership with a non-Indian partner or a corporation with non-Indian shareholders,

officers or directors does not change the conclusion that the employer is subject to state workers' compensation laws. Therefore, the Idaho Industrial Commission has the authority to enforce the requirements of Idaho Code § 72-301 against such employers.

ANALYSIS:

All employers within the legislative jurisdiction of the state of Idaho are required to comply with the state's workers' compensation laws unless otherwise specifically exempted from coverage. See Idaho Code §§ 72-102, 72-203, and 72-212. Since federal lands do not generally come within the legislative jurisdiction of a state, state workers' compensation laws would not apply to employers doing business on federal lands absent specific federal legislation providing otherwise. The same rule applies to Indian reservations because those lands are held by the United States in trust for a particular Indian tribe. Thus, the relevant inquiry is whether Congress has granted such jurisdiction to the states.

Because neither existing state nor federal law provided workers' compensation coverage for nonfederal employees working on federal property, Congress passed a law in 1936 to fill this gap. See 40 U.S.C.A. § 290 (1978) and related legislative history at S.R. No. 2294, 74th Congress, 2d Session. The law extends application of a state's workers' compensation laws to all lands owned or held by the United States within the exterior boundaries of a state by providing as follows:

> Whatsoever constituted authority of each of the several States is charged with the enforcement of and requiring compliance with the State workmen's compensation laws of said States and with the enforcement of and requiring compliance with the orders, decisions, and awards of said constituted authority of said States shall have the power and authority to apply such laws to all lands and premises owned or held by the United States of America by deed or act of cession, by purchase or otherwise, which is

> within the exterior boundaries of any State, and to all projects, buildings, constructions, improvements, and property belonging to the United States of America, which is within the exterior boundaries of any State, in the same way and to the same extent as if said premises were under the exclusive jurisdiction of the State within whose exterior boundaries such place may be.
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> For the purposes set out in this section, the United States of America hereby vests in the several States within whose exterior boundaries such place may be, insofar as the enforcement of State workmen's compensation laws are affected, the right, power, and authority aforesaid: *Provided, however,* That by the passage of this section the United States of America in nowise relinquishes its jurisdiction for any purpose over the property named, with the exception of extending to the several States within whose exterior boundaries such place may be only the powers above enumerated relating to the enforcement of their State workmen's compensation laws as herein designated: *Provided further,* That nothing in this section shall be construed to modify or amend subchapter I or chapter 81 of Title 5 [the United States Employees' Compensation Act].

40 U.S.C.A. § 290 (1978). This statutory provision operates of its own force without the necessity of any legislative action by a state. Capetola v. Barclay White Co., 139 F.2d 556, 559 (3rd Cir. 1943), cert. denied, 321 U.S. 799, 64 S.Ct. 939, 88 L.Ed. 1087 (1944).

Since 1960 and the Supreme Court's decision in Federal Power Commission v. Tuscarora Indian Nation, 362 U.S. 99, 80 S.Ct. 543, 4 L.Ed.2d 584 (1960), the courts have consistently held that

federal laws of general application throughout the United States apply with equal force to Indians on reservations and their property interests. As is frequently the case, however, this general rule is subject to certain exceptions. A federal statute of general applicability will not apply to the activities or property interests of Indians on reservations where: (1) Congress expressed an intent that the law not apply to Indians on their reservations; (2) application of the law would abrogate treaty rights guaranteed to Indians; or (3) the law concerns rights of tribal self-governance in purely intramural matters. Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1116 (9th Cir. 1985).

With respect to the first exception, neither the legislative history of 40 U.S.C.A. § 290 (1978) nor the circumstances surrounding its passage indicate any congressional intent to exclude Indian reservations from those federal lands to which the statute applies. Moreover, application of state workers' compensation laws to all federal lands, including Indian reservations, is consistent with the strong public policy of providing benefits for workers disabled by industrial accidents and fills a gap in the workers' compensation field by furnishing protection against the death or disability of those working on federal property. Both federal and state courts have already recognized that section 290 authorizes application of state workers' compensation laws to all United States territory within a state, including Indian reservations. Begay v. Kerr-McGee Corp., 682 F.2d 1311, 1319 (9th Cir. 1982); Johnson v. Kerr-McGee Oil Industries, Inc., 129 Ariz. 393, 631 P.2d 548, 551 (Ariz. App. 1981), appeal dismissed for want of substantial federal question Johnson v. Kerr-McGee Oil Industries, Inc., 454 U.S. 1025, 102 S.Ct. 560, 70 L.Ed.2d 469 (1981); White Mountain Apache Tribe v. Industrial Commission of Arizona, 144 Ariz. 129, 696 P.2d 223, 227 (Ariz. App. 1985).

The second exception that must be considered is whether application of the state's workers' compensation laws to tribal members on a reservation would abrogate treaty rights guaranteed to a tribe. This exception applies only to matters specifically covered in treaties, such as fishing and hunting rights. For the exception to apply here, a treaty would need to include language either exempting a tribe from federal laws of general applicability throughout the United States or precluding

application of a state's workers' compensation laws to that tribe. See United States v. Farris, 624 F.2d 890, 893 (9th Cir. 1980), cert. denied, 449 U.S. 1111, 101 S.Ct. 919, 66 L.Ed.2d 839 (1981).

Because we have not been asked to construe the questions presented in light of a treaty with a particular Indian tribe, we can only generally assess whether the treaty abrogation exception would bar application of Idaho's workers' compensation laws to Indian reservations within this state. We are of the opinion that the courts would not construe application of section 290 as abrogating tribal rights of self-governance secured by treaty. This opinion is based primarily on the rationale of Johnson v. Kerr-McGee Oil Industries, Inc. where the Arizona court considered whether application of section 290 abrogated the Navajos' right of self-governance secured by the treaty of June 1, 1868, 15 Stat. 667. In finding no interference with treaty rights, the court stated:

> The Workmen's Compensation Act eliminates litigation and places on business the burden of caring for injured employees, or, when killed, their dependents. [Citation omitted.] The act provides security for members of the employee's family as well as the employee during periods of disability. [Citation omitted.] It also provides the procedure by which claims arising out of industrial accidents may be promptly resolved. [Citation omitted.] The Workmen's Compensation Act does not conflict with the treaty nor with tribal rights under the treaty. Cf. Navajo Tribe v. National Labor Relations Board, 288 F.2d 162 (D.C. Cir. 1961), affirmed [cert. denied] 366 U.S. 928, 81 S.Ct. 1649, 6 L.Ed.2d 387 (1961) (the provisions of the National Labor Relations Act are applicable to businesses and business operations existing on the Navajo reservation).

631 P.2d at 551. The U.S. Supreme Court was presented with an appeal in the Johnson case and summarily dismissed the appeal for want of a substantial federal question. Summary decisions of the Supreme Court are considered decisions on the merits that bind lower federal courts until later doctrinal developments indicate to the contrary. Additionally, as discussed below, we do not believe that application of state workers' compensation laws to tribal members on a reservation abrogates treaty-guaranteed rights of tribal self-government because establishing a procedure for addressing industrial-related death or disability claims is not a necessary incident of self-government.

The third exception bars application of a statute of general applicability where the federal statute in question would affect tribal rights of self-governance in purely intramural matters. Stated somewhat differently, this exception focuses on whether the law in question improperly infringes upon or frustrates tribal self-government. See Williams v. Lee, 358 U.S. 217, 220, 79 S.Ct. 269, 270, 3 L.Ed.2d 251, 254 (1959).

The Court of Appeals for the Ninth Circuit has stated that the tribal self-government exception is designed to except only those purely intramural matters essential to reservation government. See United States v. Farris, 624 F.2d at 893; Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d at 1116. Conditions required for tribal membership, inheritance rules and rules governing domestic relations are examples of matters considered by the courts to be of a purely intramural nature. With regard to whether workers' compensation claims could be considered a purely intramural matter, the Ninth Circuit has said:

> The language of 40 U.S.C. § 290 unambiguously permits application of state worker's compensation laws to all United States territory within the state. Claims by Indians against non-Indian employers are not matters of "self-governance in purely intramural matters" sufficient to avoid the rule that Indians are subject to such federal laws of general application [citation omitted], and the exercise of state jurisdiction over such claims does

> not, even minimally, infringe upon or frustrate tribal self-government.

Begay v. Kerr-McGee Corp., 682 F.2d at 1319.

In reaching this conclusion, it is important to note that the Ninth Circuit was not presented with a situation where the tribal governing body for the reservation in question had enacted a comprehensive workers' compensation scheme. Although some tribal entities may voluntarily elect to obtain industrial insurance or participate in a state workers' compensation program, see Tibbetts v. Leech Lake Reservation Business Committee, 397 N.W.2d 883, 888-89 (Minn. 1986); and White Mountain Apache Tribe v. Industrial Commission of Arizona, 696 P.2d at 228, we are not aware of any tribal government that has adopted a comprehensive workers' compensation scheme. This opinion does not consider the questions presented in the context of a duly enacted tribal workers' compensation ordinance.

Based upon the rationale of Johnson v. Kerr-McGee and Begay v. Kerr-McGee set forth above, we believe that where state workers' compensation laws have been applied to bar an otherwise valid tort action brought by an Indian employee, the same laws can also be applied to an Indian employer, particularly where the claimant is a non-Indian employee. While an argument could be made that a work related claim arising between a tribal member employee and a tribal member employer is an intramural matter, it is unlikely a court would find that workers' compensation laws that apply to all employers and employees, regardless of their ethnic status, concern a purely intramural matter or are somehow essential to tribal self-government. Moreover, it is unlikely a court would find that tribal interests in self-government would change significantly or somehow be improperly infringed upon or frustrated simply because a tribal member is an employer rather than an employee.

Improper infringement on tribal interests in self-government is also unlikely where the state can demonstrate a legitimate interest in seeing that all employees are covered by industrial insurance. The requirement that employers comply with state workers' compensation laws is designed to place the burden of caring for injured employees, or their dependent families, on

business to avoid the likelihood that these individuals would be unable to provide for themselves during the period of the injured employee's disability. This requirement furthers the valid public purpose of avoiding a "no insurance" situation.

Although we believe the rationale of Johnson v. Kerr-McGee and Begay v. Kerr-McGee applies to all employers on a reservation, the doctrine of sovereign immunity will preclude an action to enforce otherwise applicable workers' compensation laws against an Indian tribe or a tribally-owned business unless either Congress or the tribe has unequivocally provided for a waiver of sovereign immunity. Section 290 alone does not waive tribal sovereign immunity. Tibbetts v. Leech Lake Reservation Business Committee, 397 N.W.2d at 886; White Mountain Apache Tribe v. Industrial Commission of Arizona, 696 P.2d at 228. We are not aware of any other congressional action that could be construed as waiving tribal sovereign immunity for purposes of enforcing a state's workers' compensation laws against a tribe or tribally-owned business. Further, there is no case law addressing claims by either non-Indian or Indian employees against Indian employers other than a tribe or tribally-owned enterprise.

Because we conclude that none of the three exceptions discussed above will bar application of section 290, it is our opinion that Idaho workers' compensation laws apply to all employers doing business on a reservation; however, because of the tribes' sovereign immunity, neither tribal governments nor tribally-owned enterprises are subject to suit.

In response to the second question presented, it is our opinion that the status of an employer as a partnership with a non-Indian partner or a corporation with non-Indian shareholders, officers or directors does not change the conclusion that the employer is subject to state workers' compensation laws. Therefore, the Idaho Industrial Commission may enforce the requirements of Idaho Code § 72-301 against such employers.

AUTHORITIES CONSIDERED:

1. Federal Statutes

40 U.S.C.A. § 290 (1978).

2. Idaho Statutes

Idaho Code § 72-102 (Supp. 1988).
Idaho Code § 72-203.
Idaho Code § 72-212 (Supp. 1988).
Idaho Code § 72-301 (Supp. 1988).

3. Federal Cases

Begay v. Kerr-McGee Corp., 682 F.2d 1311, 1319 (9th Cir. 1982).

Capetola v. Barclay White Co., 139 F.2d 556, 559 (3rd Cir. 1943), cert. denied, 321 U.S. 799, 64 S.Ct. 939, 88 L.Ed. 1087 (1944).

Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1116 (9th Cir. 1985).

Federal Power Commission v. Tuscarora Indian Nation, 362 U.S. 99, 80 S.Ct. 543, 4 L.Ed.2d 584 (1960).

Navajo Tribe v. National Labor Relations Board, 288 F.2d 162 (D.C. Cir. 1961), cert. denied, 366 U.S. 928, 81 S.Ct. 1649, 6 L.Ed.2d 387 (1961).

United States v. Farris, 624 F.2d 890, 893 (9th Cir. 1980), cert. denied, 449 U.S. 1111, 101 S.Ct. 919, 66 L.Ed.2d 839 (1981).

Williams v. Lee, 358 U.S. 217, 220, 79 S.Ct. 269, 270, 3 L.Ed.2d 251, 254 (1959).

4. States Cases

Johnson v. Kerr-McGee Oil Industries, Inc., 129 Ariz. 393, 631 P.2d 548, 551 (Ariz. App. 1981), appeal dismissed for want of substantial federal question Johnson v. Kerr-McGee Oil Industries, Inc., 454 U.S. 1025, 102 S.Ct. 560, 70 L.Ed. 2d 469 (1981).

Tibbetts v. Leech Lake Reservation Business Committee, 397 N.W.2d 883, 888-89 (Minn. 1986).

White Mountain Apache Tribe v. Industrial Commission of Arizona, 144 Ariz. 129, 696 P.2d 223, 227-28 (Ariz. App. 1985).

5. Other Authorities

U.S. Senate Report No. 2294, 74th Congress, 2nd Session.

DATED this 7th day of October, 1988.

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ANALYSIS BY:

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