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NO.
STATE OF NEBRASKA
OFFICIAL
SEP 12 1994
DEPT. OF JUSTICE

DATE: September 9, 1994

SUBJECT: Authority of the State Electrical Division to enforce the requirements of the State Electrical Act on Indian lands

REQUESTED BY: State Electrical Board

WRITTEN BY: Don Stenberg, Attorney General
Joe Loudon, Assistant Attorney General

You requested our opinion on whether the licensing and inspection requirements of Neb.Rev.Stat. §§ 81-2101 to 81-2145 (1987 & Cum. Supp. 1992 & Supp. 1993) (hereinafter referred to as the Act) apply to either Indian-owned land within an Indian reservation or to non-Indian-owned land within the reservation. Therefore, your question concerns two classes of persons residing on-reservation, namely Indians on Indian-owned land and non-Indians on land patented in fee to non-Indians. We assume that you seek to go onto Indian reservations to inspect electrical wiring to determine whether the wiring conforms to state law and to enforce compliance where it is substandard.

Indian-owned Land

"When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable." ***White Mountain Apache Tribe v. Bracker***, 448 U.S. 136, ___, 100 S.Ct. 2578, 2584, 65 L.Ed.2d 665, ___ (1980). In ***California v. Cabazon Band of Mission Indians***, 480 U.S. 202, ___, 107 S.Ct. 1083, 1087, 94 L.Ed.2d 244, ___ (1987), the Court stated: "'[T]ribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the

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States.' [Citation omitted.] It is clear, however, that state laws may be applied to tribal Indians on their reservations if Congress has expressly so provided." "The modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power." ***McClanahan v. State Tax Commissioner of Arizona***, 411 U.S. 164, ____, 93 S.Ct. 1257, 1262, 36 L.Ed.2d 129, ___ (1976) (citations omitted) (footnote omitted). ***See also Robinson v. Sigler***, 187 Neb. 144, 187 N.W.2d 756 (1971) (the inherent police power of the states applies both to Indians and to Indian country, except to the extent that the federal government has preempted the field, and therefore the federal government may withdraw from the field and turn jurisdiction back to the state when it chooses to do so).

The question, therefore, arises whether Congress authorized the State of Nebraska to enforce the Act on Indian reservations located within the state. There are two federal statutes which merit discussion. Public Law 280 (PL-280) was enacted by Congress in 1953. In § 2(a) of PL-280, amended and codified at 18 U.S.C.A. § 1162 (West 1984), the federal government granted criminal jurisdiction to the State of Nebraska over Indian country located within the state. By resolution, the Nebraska Legislature retroceded criminal jurisdiction, with a limited restriction, to the Omaha Tribe, ***see*** LR 37, 80th Legis., Neb. Legis. J. v.1, p. 1467 (1969), and to the Winnebago Tribe, ***see*** LR 303, 89th Legis., 2nd Sess., Neb. Legis. J. v.1, p. 91 (1986). Even had the retrocession of criminal jurisdiction not occurred, we do not believe that the State may enforce the Act under the cession of criminal jurisdiction under PL-280. The Act seeks to regulate conduct, not prohibit it. Therefore, the Act is not criminal in nature, but regulatory. ***See Cabazon***, 480 U.S. at ___, 107 S.Ct. at 1088-89, 94 L.Ed.2d at ___ (adopting a prohibitory/regulatory test to determine whether a state has authority under § 2 of PL-280).

Section 4(a) of PL-280, amended and codified at 28 U.S.C.A. § 1360 (West 1993), provides:

> Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:
>
> . . .

Nebraska . . . All Indian country within the State.

On at least two occasions, the U.S. Supreme Court has discussed the grant of "civil" jurisdiction under PL-280. In ***Cabazon***, 480 U.S. at ___, 107 S.Ct. at 1087, 94 L.Ed.2d at ___, the Court asserted, "In ***Bryan v. Itasca County*** . . . , we interpreted § 4 [of PL-280] to grant States jurisdiction over private civil litigation involving reservation Indians in state courts, but not to grant general civil regulatory authority." The ***Cabazon*** Court further stated that "when a State seeks to enforce a law within an Indian reservation under the authority of Pub.L. 280, it must be determined whether the law is . . . civil in nature, and applicable only as it may be relevant to private litigation in state court." ***Id.*** at ___, 107 S.Ct. at 1088, 94 L.Ed.2d at ___. The Court, in ***Bryan v. Itasca County***, 426 U.S. 373, ___, 96 S.Ct. 2102, 2109, 48 L.Ed.2d 710, ___ (1976), declared that "the primary intent [of § 4 of PL-280] was to grant jurisdiction over private civil litigation involving reservation Indians in state court."

Cabazon and ***Bryan*** instruct that PL-280 granted the state authority over matters relevant to private civil litigation. The Act is a general civil regulatory scheme and does not pertain to civil causes of action brought by or against Indians. We, therefore, conclude that the State may not regulate, pursuant to PL-280, electrical wiring installations on Indian reservations.

The second statute pertinent to our discussion is 25 U.S.C.A. § 231 (West 1983). Section 231 provides:

> The Secretary of the Interior, under such rules and regulations as he may prescribe, shall permit the agents and employees of any State to enter upon Indian tribal lands, reservations, or allotments therein (1) for the purpose of making inspection of health and educational conditions and enforcing sanitation and quarantine regulations . . . .

We discern two major obstacles to using this statute as authority to enforce the Act. First, it is unclear whether electrical wiring would be considered a "health condition" under the statute's terms. One could argue that wiring inspections would serve to protect building occupants from the hazards associated with faulty wiring and, thus, protect their health. It seems to us that it could be more persuasively argued that by the use of the term "health," Congress intended to prevent illness and sickness. The use of the terms "and enforcing sanitation and quarantine regulations" supports this latter contention. There is scant case law interpreting 25 U.S.C.A. § 231, and we found none supporting state authority to inspect electrical wiring. We think it more

plausible that if Congress intended to permit the type of inspection at issue here, it would have included the term "safety" in the list of inspections authorized.

Secondly, and perhaps more importantly, no regulations were ever promulgated under this statute. The Interior Department's interpretation of this provision has been as follows:

> Although the statute says that the Secretary "shall" permit state inspection and enforcement, the longstanding position of the Interior Department is that the statute does not compel the Secretary to allow state inspection or enforcement. Thus the statute authorizes only those state activities allowed by secretarial regulations.

Thomsen v. King County, 694 P.2d 40, 44 (Wash. Ct. App. 1985) (citation omitted).

In our opinion, it is clear that PL-280 does not authorize the state to enforce the Act on Indian-owned land within the boundaries of a reservation. We also conclude that 25 U.S.C.A. § 231 does not authorize state regulatory jurisdiction over electrical wiring installations on reservations.

The absence of an express statutory delegation of authority does not end the analysis. In ***Cabazon***, 480 U.S. at ___, 107 S.Ct. at 1091, 94 L.Ed.2d at ___, the U.S. Supreme Court stated:

> Our cases, however, have not established an inflexible ***per se*** rule precluding state jurisdiction over tribes and tribal members in the absence of express congressional consent. "[U]nder certain circumstances a State may validly assert authority over the activities of nonmembers on a reservation, and . . . in exceptional circumstances a State may assert jurisdiction over the on-reservation activities of tribal members."

Accord New Mexico v. Mescalaro Apache Tribe, 462 U.S. 324, 103 S.Ct. 2378, 76 L.Ed.2d 611 (1983).

The task at hand is to determine whether the regulation of the installation of electrical wiring on reservations is one of those exceptional circumstances. "[T]here is no rigid rule by which to resolve the question whether a particular state law may be applied to an Indian reservation or to tribal members." ***White Mountain Apache Tribe v. Bracker***, 448 U.S. 136, ___, 100 S.Ct. 2578, 2583, 65 L.Ed.2d 665, ___ (1980).

State jurisdiction is preempted . . . if it interferes or is incompatible with federal and tribal interest reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority." [Citation omitted.] The inquiry is to proceed in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its "overriding goal" of encouraging tribal self-sufficiency and economic development.
Cabazon, 480 U.S. at ___, 107 S.Ct. at 1092, 94 L.Ed.2d at ___.

After setting forth the above rule, the ***Cabazon*** Court engaged in a balancing of the federal, tribal, and state interests implicated by the state law. There is some question whether the Court, before balancing the interests involved, engages in a backdrop analysis whereby the inquiry is focused on broad notions of Indian sovereignty and self-determination. ***Compare*** Barsh, ***Is There Any Indian Law Left? A Review of the Supreme Court's 1982 Term***, 59 Wash. L. Rev. 863, 866-67 (1984) (the Court engages only in a balancing test) ***with*** Royster & Fausett, ***Control of the Reservation Environment: Tribal Primacy, Federal Delegation, and the Limits of State Intrusion***, 64 Wash. L. Rev. 581, 602-03 (1989) (the current preemption analysis begins with a determination of the "backdrop" of tribal sovereignty) (hereinafter Royster & Fausett). This question of the backdrop inquiry may amount to nothing more than "a tempest in a teapot" in this case. Since in this case there is no independent federal legislation on the very subject sought to be regulated as there was in ***Cabazon***, the backdrop inquiry collapses into the balancing of the federal, tribal, and state interests.

Before turning to the balancing of interests, it is important to note, however, that the ***Cabazon*** Court departed from ***Rice v. Rehner***, 463 U.S. 713, 103 S.Ct. 3291, 77 L.Ed.2d 961 (1983). In ***Rice***, the Court conceived of tribal sovereignty quite narrowly, requiring that a tribe have a tradition of self-governance in the limited field sought to be regulated by the state. In this case, this would require an inquiry into whether a tribe had a tradition of regulating electrical wiring. However, in ***Cabazon***, the Court did not use such a narrow focus but, instead, viewed tribal sovereignty broadly. The ***Cabazon*** Court considered tribal sovereignty in terms of self-determination and economic development.

As reflected in federal law, there is a federal interest in promoting self-government and self-determination. ***See Mescalaro***, 462 U.S. at ___, 103 S.Ct. at 2387, 76 L.Ed.2d at ___ n. 17 (the intent and purpose of the Indian Reorganization Act of 1934 was to rehabilitate the economic life of Indians and to give them a chance to develop initiative destroyed by a century of oppression and

paternalism and that the Indian Civil Rights Act of 1968 reflected Congress' intent to promote the well-established federal policy of furthering Indian self-government).

The tribal interest parallels the federal interest outlined above. Furthermore, the state's regulation of electrical wiring will affect a tribe in other ways. For example, with some exceptions, installation of electrical wiring may be performed by only licensees of the State Electrical Board. § 81-2108. This could be detrimental to the economic well-being of tribal members who perform electrical work, but who are not licensed by the board. Also, if an installation is not in compliance with minimum standards set forth in the National Electric Code, condemnation and disconnection of the installation may be ordered. § 81-2127. This would have an obvious effect on Indian landowners.

It seems to us that the State of Nebraska has an interest in ensuring safe and reliable electrical service for its citizens. Obviously, the prevention of damage to life and property resulting from electrocution or fires is a weighty consideration. One might assume that the State's interest here would coincide with a tribe's interest.

Despite the state's strong interest, for several reasons, we cannot say that the Act may be enforced against Indian landowners residing on a reservation. Because not a single case could be found factually in point, we are left with the broad principles enunciated by the U.S. Supreme Court as a guide. The analysis employed by the Court does not lend itself to simple or predictable results. It must also be kept in mind the Court's observations that no rigid rule applies in this area and that state regulation is allowed only in exceptional circumstances. If tribal sovereignty and the tribes' right to make their own rules and be governed by them have any vitality as ***Cabazon*** suggests, it is difficult to conclude that state regulation is permissible in this instance. While we are not aware of any tradition of the tribe in regulating this type of activity or of any tribal ordinance or code concerning electrical wiring, ***Cabazon***, as stated, emphasized the right to self-governance, not tribal activity in a particularized area. If the state may regulate in this area, it is difficult to conceive of an area where the State may not regulate, the end result being an erosion of Indian sovereignty. Therefore, we cannot advise you that you may enforce the Act as to Indian land on a reservation.

Non-Indian-owned Land

In ***Montana v. United States***, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981), the Crow Tribal Council passed a resolution

prohibiting hunting and fishing within the reservation by anyone who was not a member of the Tribe. The State of Montana continued to assert its authority to regulate hunting and fishing by non-Indians within the reservation. Thus, the case resolved the question: When does a tribe have exclusive jurisdiction over the on-reservation activities of non-Indians? Although the issue in ***Montana*** was phrased in terms of the tribe's, not the State's, authority to regulate the activities of non-Indians on lands within the reservation owned in fee simple by non-Indians, the case is apparently read for the proposition that if the tribe does not possess exclusive jurisdiction over such activities, the State may regulate in the area. ***See Thomsen v. King County***, 694 P.2d 40 (Wash. Ct. App. 1985) (the Court in ***Montana*** upheld state regulation). ***See also***, Royster & Fausett, at 606-07 (discussing ***Montana*** in the context of whether a state has jurisdiction over non-natives on non-native land).

The ***Montana*** Court expressed the general proposition "that the inherent sovereign powers of an Indian tribe do not extend to activities of nonmembers of the tribe." ***Id.*** at ___, 101 S.Ct. at 1258, 67 L.Ed.2d at ___. Absent express congressional delegation, tribes may retain inherent sovereign power in two instances to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. The Court held:

> A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. [Citations omitted.] A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. [Citations omitted.]

Id. at ____, 101 S.Ct. at 1258, 67 L.Ed.2d at ____.

It is first noted that we have found no express delegation to any Nebraska tribe of the power to regulate electrical wiring of nonmembers of the tribe. Turning to the question of whether there is a consensual relationship which would give rise to tribal authority to regulate, we do not believe that a non-native landowner is considered to have entered into a consensual relationship solely by virtue of his or her status as a landowner within reservation boundaries. ***See Brendale v. Confederated Tribes & Bands of Yakima***, 492 U.S. 408, 109 S.Ct. 2994, 106 L.Ed.2d 343 (1989) (plurality). In formulating our answer, we have assumed

that the non-native landowners have not entered into a consensual relationship with the tribe or its members. That is, they have not leased the land from a tribe or tribal member and have not contracted with a tribal member to install electrical wiring. Therefore, the first ***Montana*** exception is inapplicable.

As no tribal ordinance, resolution, or ordinance has been brought to our attention and nothing suggests that the electrical wiring of non-Indians is a threat to a tribe's political security, the political integrity of the tribe should not be threatened by state regulation of the electrical wiring of non-Indians within the reservation. Although the economic security of some tribal members who perform electrical wiring may be jeopardized, this would appear to have little effect on the economic security of a tribe as a whole. Inspection of wiring of non-Indians obviously would not affect the health or welfare of the tribe.

Regulating the electrical wiring on non-Indian land owned by nonmembers of a tribe does not appear to imperil any tribal interest, and, under ***Montana***, the State would seem to have the authority to do so. We, therefore, conclude that the State may apply the Act to non-Indians residing on land not owned by the tribe or tribal members.

Sincerely,

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