NEBRASKA DEPARTMENT OF JUSTICE

Opinion No. 24-003 — May 17, 2024

OPINION FOR THE COUNTY ATTORNEY
OF THURSTON COUNTY

Jurisdiction Over Crimes Committed by Non-Indian Offenders in Indian Country

Summary: Public Law 280 professed to grant Nebraska jurisdiction to prosecute crimes in Indian country. The Legislature later acted to retrocede this jurisdiction to the federal government. We conclude that this law and the Legislature's retrocession do not affect Nebraska's authority to prosecute non-Indians committing crimes with Indian victims in Indian country.

You have asked whether your office has jurisdiction to prosecute crimes committed by non-Indians against Indians on the Omaha or Winnebago Reservations despite the Nebraska Legislature's retrocession of that jurisdiction under a 1953 law called Public Law 280. We conclude that Nebraska has the inherent sovereign power to prosecute such crimes.

The United States Supreme Court's 2022 decision in *Oklahoma v. Castro-Huerta*, 597 U.S. 629 (2022), concluded that Oklahoma may prosecute crimes committed by non-Indians against Indians in Indian country. The Supreme Court began with the necessary premise that States have inherent sovereign authority to prosecute crimes within their borders, including in Indian country, unless preempted by federal law. The Supreme Court held that the States are presumed to have jurisdiction in Indian country, and that Public Law 280's ostensible grant of jurisdiction to other States did not preempt Oklahoma's inherent authority. Unlike Oklahoma, this statute

professed to grant Nebraska jurisdiction and the Legislature later acted to retrocede this jurisdiction to the federal government. We conclude that this law and the Legislature's retrocession do not affect Nebraska's ability to prosecute crime.

I.

Because your question turns on how Public Law 280 affects Nebraska's criminal jurisdiction, we begin with a background on that law and its history in Nebraska.

In 1953, there was "legal uncertainty" over States' jurisdiction to prosecute crimes in Indian country. *Castro-Huerta*, 597 U.S. at 649. Congress removed that uncertainty by enacting a law that provided Nebraska and five other states (not including Oklahoma) with jurisdiction to prosecute crimes in Indian country. Pub. L. No. 280, 67 Stat. 588 (1953) (codified as amended in 18 U.S.C. § 1162; 25 U.S.C. § 1321). That law, called Public Law 280, clarified that six enumerated States have "exclusive jurisdiction" over matters in Indian country. 18 U.S.C. § 1162(a). Fifteen years later, Congress amended Public Law 280 to give those states the opportunity to retrocede this exclusive jurisdiction subject to federal approval. 25 U.S.C. § 1323.

The Nebraska Legislature has retroceded this jurisdiction three times. First, in 1969, the Nebraska Legislature adopted Resolution 37, which retroceded Nebraska's Public Law 280 jurisdiction, excepting motor vehicle crimes, for all Indian country in Thurston County. L.R. 37, Legislative Journal, 80th Leg., 1st sess. 1467–68 (1969). The retrocession included both the Omaha and Winnebago Indian Reservations. The next year, the federal government stated it accepted the retrocession of jurisdiction over the Omaha Reservation but not the Winnebago Reservation. *See* 35 Fed. Reg. 16,598 (1970). In

1971, the Nebraska Legislature responded with Legislative Resolution 16, which canceled its retrocession of jurisdiction because of the United States's partial rejection of Nebraska's retrocession. L.R. 16, Legislative Journal, 82nd Leg., 1st sess., 274–75 (1971).

The Legislature's second retrocession followed in 1986. Resolution 57 retroceded Nebraska's exclusive jurisdiction over the Winnebago Reservation. *See* L.R. 57, Legislative Journal, 89th Leg., 2nd Sess. 302–03 (1986). The federal government accepted Nebraska's retrocession of exclusive jurisdiction in the Winnebago Reservation. *See* 51 Fed. Reg. 24,234 (1986). Finally, in 2001, the Legislature retroceded its exclusive jurisdiction over the Santee Sioux Reservation. L.R. 17, Legislative Journal, 97th Leg., 1st sess., 2358–59 (2001). In 2006, the federal government accepted that retrocession. *See* 71 Fed. Reg. 7,994 (2006).

II.

Castro-Huerta recently held that Oklahoma had jurisdiction to prosecute a non-Indian for child neglect where the victim was an Indian and the crime was committed in Indian Country. 597 U.S. at 633. In reaching this conclusion, the Court's analysis proceeded in several steps. The Court began by establishing that "Indian county is part of a State's territory and that, unless preempted, States have jurisdiction over crimes committed in Indian country." *Id.* at 638. It then proceeded to consider whether any Act of Congress preempted Oklahoma's jurisdiction. First, the Court concluded that the General Crimes Act, which gave the federal government jurisdiction to prosecute crimes in Indian country, did not preempt state jurisdiction. *Id.* at 638–47. Second, the Court held that the negative implication of Public Law 280's grant of jurisdiction to other States did not preempt Oklahoma's jurisdiction. *Id.* at 648–49. Having concluded that no law

preempted State jurisdiction, the Court proceeded to consider whether a State's exercise of such jurisdiction would unlawfully infringe upon tribal self-government. Applying *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980), the Court held that a State's prosecution of a non-Indian for a crime committed in Indian country with an Indian victim would not offend tribal self-government.

We are aware of no distinction between Oklahoma and Nebraska that could lead to a different result for Nebraska under either the General Crimes Act or *Bracker*.[1] However, unlike Oklahoma, Public Law 280 ostensibly granted Nebraska jurisdiction, after which the Nebraska Legislature retroceded that jurisdiction to the federal government. Thus, we confine our analysis to whether that distinction deprives Thurston County of the power that Oklahoma possesses to prosecute non-Indians for crimes with Indian victims in Indian country.

We conclude that neither Public Law 280's purported grant of authority to Nebraska nor the Legislature's attempted retrocession of that authority changed Nebraska's inherent authority to prosecute these crimes. *Castro-Huerta* held that "Public Law 280 does not preempt any preexisting or otherwise lawfully assumed jurisdiction that States possess to prosecute crimes in

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[1] As was the case with the Oklahoma Enabling Act in *Castro-Huerta*, the Nebraska Enabling Act does not preempt the State's jurisdiction over Indian country. We see nothing in the Nebraska Enabling Act suggesting that the State was divested of jurisdiction to prosecute crimes within Indian country. *See* Enabling Act for Nebraska, 13 Stat. 47 (1864), *reprinted in* 4 Francis Newton Thorpe, The Federal and State Constitutions, Colonial Charters, and Other Organic Laws 2343 (1909); Admission of Nebraska, 14 Stat. 391 (1867), *reprinted in* 4 Francis Newton Thorpe, The Federal and State Constitutions, Colonial Charters, and Other Organic Laws 2346 (1909).

Indian country." 597 U.S. at 647. Indeed, even before *Castro-Huerta*, the Supreme Court had held that "[n]othing in the language or legislative history of Pub. L. 280 indicates that it was meant to divest States of pre-existing and otherwise lawfully assumed jurisdiction." *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C.*, 467 U.S. 138, 150 (1984). Nebraska, like Oklahoma, had jurisdiction to prosecute crimes before Public Law 280. The negative implication of that statute did not preempt Oklahoma's jurisdiction, and we see no reason to conclude that Congress's explicit grant of authority to Nebraska and five other States paradoxically wiped away those States' inherent authority. Nothing in the statute's text permits that inference, and such a result would clearly contradict Congress's purpose in enacting the statute.

To be sure, this may mean that Public Law 280 is wholly superfluous. And one may argue that result would violate the long-accepted canon of interpretation that statutes should be construed to avoid superfluity. *Dean v. State*, 288 Neb. 530, 541, 849 N.W.2d 138, 148 (2014). However, *Castro-Huerta* addresses and rejects the possibility that this surplusage problem means that Public Law 280 preempted States' inherent prosecutorial authority. 597 U.S. at 648–49. As the Court explained, when Congress enacted Public Law 280 in 1953, "[t]he scope of the States' authority had not previously been resolved by [the Supreme Court]" except for cases of non-Indian on non-Indian crimes. *Id.* at 649. "Congressional action in the face of such legal uncertainty cannot reasonably be characterized as unnecessary surplusage." *Id.* In addition, the Court noted that Public Law 280 covers more than non-Indian on Indian crimes, and so it may not have been superfluous. *Id.* at 648. The Court suggested that in granting jurisdiction to States over crimes committed by Indians, Public Law 280 may have granted States jurisdiction to prosecute some crimes that, while

inside the States' inherent authority, would still have to withstand balancing against principles of tribal self-government under *Bracker*. *Id.* (citing *Bracker*, 448 U.S. at 142–43). Regardless, we see no reason to conclude that Public Law 280 preempted Nebraska's jurisdiction to prosecute non-Indians for crimes with Indian victims that were committed in Indian country.

That leaves the question of whether the Legislature's retrocessions of Public Law 280 jurisdiction and the federal government's acceptance of some of those retrocessions changed the State's jurisdiction. They did not. By their terms Nebraska's retrocessions limited themselves to the jurisdiction received under Public Law 280. The Legislature's first retrocession resolution stated: "[T]he State of Nebraska hereby retrocedes to the United States all jurisdiction over offenses committed by or against Indians in the areas of Indian country located in Thurston County, Nebraska, *acquired by the State of Nebraska pursuant to Public Law 280 of 1953* . . . ." L.R. 37, Legislative Journal, 80th Leg., 1st sess. 1467 (1969) (emphasis added). Nebraska's retrocessions in 1986 and 2001 employed similar language. *See* L.R. 57, Legislative Journal, 89th Leg., 2nd Sess. 302–03 (1986), and L.R. 17, Legislative Journal, 97th Leg., 1st sess., 2358–59 (2001).

Nebraska's retrocessions did not give up any of the State's inherent authority. Nor could they have. Congress only authorized retrocessions of "the criminal or civil jurisdiction . . . acquired by [a] State pursuant to [Public Law 280]." 25 U.S.C. § 1323. Thus, we do not see how the federal government's acceptance of the Legislature's retrocession resolutions could have changed Nebraska's inherent authority. Nothing in Public Law 280 nor the resolutions adopted by the Legislature pursuant to that Act altered the State's inherent jurisdiction to prosecute

crimes committed by non-Indians against Indians in Indian country.[2]

III.

The State has the inherent authority to prosecute non-Indians who commit crimes in Indian country with Indian victims. Neither Public Law 280 nor the resolutions retroceding jurisdiction to the federal government altered Nebraska's inherent sovereign power.

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[2] As a result of *Castro-Huerta*, the conclusion we reach today is inconsistent with at least five previous opinions of this office. *See* Neb. Op. Att'y Gen. No. 02-009 (Mar. 25, 2002) (maintaining that the State's jurisdiction had been preempted by federal law and that jurisdiction is not delegated "without a specific federal statute delegating jurisdiction to the states," which Public Law 280 provided); Neb. Op. Att'y Gen. No. 122, 1985 WL 168607 (July 30, 1985) (recognizing federal statutory preemption of state criminal jurisdiction); Neb. Op. Att'y Gen. No. 96046 (May 31, 1996) (same); Neb. Op. Att'y Gen. No. 48, 1985 WL 168524 (March 28, 1985) (same); Neb. Op. Att'y Gen. No. 94055 (July 21, 1993) (same). This Opinion supersedes any prior Attorney General Opinion to the extent it conflicts with our conclusion today.

Relatedly, previous opinions of this office have concluded or assumed that the Legislature's retrocessions were valid. Neb. Op. Att'y Gen. No. 48, 1985 WL 168524 (Mar. 28, 1985); Neb. Op. Att'y Gen. No. 122, 1985 WL 168607 (July 30, 1985); Neb. Op. Att'y Gen. No. 94072 (Sept. 9, 1994); Att'y Gen. Op. No. 94-055 (July 25, 1994); Neb. Op. Att'y Gen. No. 35 (Aug. 14, 2000); Neb. Op. Att'y Gen. No. 92097, 1992 WL 473476 (July 27, 1992). Because it is not necessary to our analysis, we do not consider whether the retrocessions are invalid because the Legislature retroceded jurisdiction through resolutions that were not presented to the Governor. *See* Neb. Const. art. IV, § 15; *Bauer v. Lancaster Cnty. Sch. Dist. 001*, 243 Neb. 655, 660, 501 N.W.2d 707, 711 (1993).