Tulsa Law Review

Volume 29
Issue 2 *Native American Symposia*

Winter 1993

Way Down Yonder in the Indian Nations, Rode My Pony Cross the Reservation from Oklahoma Hills by Woody Guthrie

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"WAY DOWN YONDER IN THE INDIAN NATIONS, RODE MY PONY CROSS THE RESERVATION!" FROM "OKLAHOMA HILLS" BY WOODY GUTHRIE

Kirke Kickingbird†

I. INTRODUCTION

"Way down yonder in the Indian Nations, rode my pony cross the reservation, in those Oklahoma hills where I was born. . . ." So begins one of the 1,000 songs written by balladeer Woody Guthrie. The Indian Nations of which he writes are the Cherokee, Choctaw, Chickasaw, Creek and Seminole. The phrase refers to both the tribes themselves and the lands which they occupy.

An observer of the tribal-state conflicts in Oklahoma over the last century might conclude that the song seems to be based primarily on nostalgia rather than on any sense of legal reality. One of the areas of continual dispute in Indian law in Oklahoma revolves around the character of the Indian Nations, both the tribes and their land. These disputes have been particularly acute in the last three decades. An attorney for the Citizen Band of Potawatomi characterized the conflict as a "judicially-created war."[1]

Misinformed but conventional wisdom tells us that Oklahoma has no reservations except the Osage Reservation. This same font of wisdom tells us that contrary to the status of federally recognized tribes in other states, the state of Oklahoma has jurisdiction over tribal members and tribal and trust lands in Oklahoma. This broadcasting of conventional wisdom about the status of Indian government versus state authority continues despite the fact that federal court decisions

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1. *See* Michael Minnis, *Judicially-Suggested Harassment of Indian Tribes: The Potawatomis Revisit Moe and Colville*, 16 AM. INDIAN L. REV. 289 (1991).

for nearly two decades have not confirmed the misconception that tribal governments in Oklahoma have a status different from other tribes in the United States. In 1991, Chief Justice Rehnquist, writing for the United States Supreme Court in *Oklahoma Tax Commission v. Citizens Band of Potawatomi*,[2] confirmed the similarity of Oklahoma tribes with other tribes under federal Indian law. In 1993, in an opinion by Justice Sandra Day O'Connor, the United States Supreme Court in *Oklahoma Tax Commission v. Sac and Fox Nation*[3] reaffirmed the status of tribal governments in Oklahoma. In both cases, the Oklahoma Tax Commission had incorrectly argued that Oklahoma was not Indian Country. The comments which follow will attempt to clarify the status of Oklahoma tribes, by examining the perceptions of history, the Congress, the Indian Nations, and the federal courts. These comments will explore why Woody Guthrie and Chief Justice Rehnquist are of one mind about the Indian Nations' status, as evidenced by the opinion in *Citizens Band of Potawatomi.*

II. History of Oklahoma Indian Country

Perhaps in no other state has there been more confusion over who has jurisdiction in Indian Country than in the State of Oklahoma. This confusion arises from the convergence of highly charged historical, economic, and political events woven in a relatively short period of time (roughly 1830-1900). These events include: the federal policy of removal of Indians into what is now the state of Oklahoma; rapid industrial change caused by the coming of the railroad; a burgeoning cattle industry and the discovery of vast coal and petroleum resources; rapid population explosion; the division of the former Indian Territory into two territories prior to statehood; the extensive allotment of Indian lands using a variety of "legal" mechanisms; the acquiescence of federal officials in the exploitation of tribal resources while carrying out their trust obligation toward Indians; and poorly researched court decisions. Making matters worse, the federal and state laws concerning Oklahoma Indians are so numerous, particularly with respect to the Five Civilized Tribes and the Osage, that practically speaking it is no wonder that confusion exists over what the law states.[4]

Nevertheless, the same rule applies to Oklahoma as applies in other states; the federal government has primacy in Indian affairs.

2. 498 U.S. 505 (1991).
3. 113 S Ct. 1985 (1993).
4. Felix S. Cohen, Handbook of Federal Indian Law 425 (1982 ed.).

Unless the federal government has passed special legislation granting the state jurisdiction in Indian affairs[5] (as it did in the case of New York, Iowa, Kansas, Maine, Connecticut, Massachusetts and Texas with Public Law 280), only the federal government and the tribes have jurisdiction. Despite this general rule of law, Oklahoma has asserted a great deal of civil and criminal jurisdiction over tribes throughout the state, citing federal laws and the disestablishment of reservations by virtue of allotment as its authority.

It is ironic that the state that was to be the safe homeland of so many Indian Nations, a significant answer to the federal government's "Indian Problem," and which still boasts the largest Indian population of any state in the Union,[6] should have so little regard for tribal sovereignty. The success of the state in its efforts to control Indian land and property while the federal government looked the other way demoralized many tribal leaders. For this reason, it was not uncommon to hear representatives of Indian governments within the state resigned to state jurisdiction and extensive federal encroachment by virtue of Oklahoma tribes' "unique status." They say, "We don't have reservations in Oklahoma," or "We're not under the Indian Reorganization Act, but the state" and, finally, "We have allotments and a checkerboard situation in the state so we can't assert jurisdiction."

Fortunately many tribal leaders today realize that they are not so unique, and that, indeed, they share many problems with tribes throughout the United States who are successfully asserting jurisdiction. By reviewing both the real and imaginary bases for Oklahoma's

5. Act of July 2, 1948, ch. 809, 62 Stat. 1224 (codified at 25 U.S.C. § 232 (1988)) and Act of Sept. 13, 1950, ch. 947, 64 Stat. 845 (codified at 25 U.S.C. § 233 (1988)) (New York); Act of June 30, 1948, ch. 759, 62 Stat. 1161 (1948) and Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-1326, 28 U.S.C. § 1360 (1988)) (Iowa); Act of June 8, 1940, ch. 276, 54 Stat. 249 (1940) (codified as amended at 18 U.S.C. § 3243 (1988)) (Kansas); Maine Indian Claims Settlement Act of 1980, 25 U.S.C. §§ 1721, 1725 (1988); Mashantucket Pequot Indian Claims Settlement Act, 25 U.S.C. §§ 1751, 1755 (1988) (Connecticut); Wampanoag Tribal Council of Gay Head, Inc., Indian Claims Settlement Act of 1987, 25 U.S.C. § 1771, 1771(g) (1988) (Massachusetts); Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act, 25 U.S.C. § 1300(g) (1988); Act of May 31, 1946, ch. 279, 60 Stat. 229 (1946) (North Dakota). North Dakota's assumption of jurisdiction under federal statute was later held invalid by the North Dakota Supreme Court in State v. Lohnes, 69 N.W.2d. 508 (N.D. 1955), on the grounds that the disclaimer of state jurisdiction over Indian lands in the state's constitution precluded state assumption of jurisdiction without repeal of the disclaimer. The 1946 statute has since been treated as invalid by federal statute and tribal authorities.

6. According to the 1990 census, Oklahoma's Indian population is 252,420 which makes it the state with the largest Indian population. According to Barbara Warner, Executive Director of the Oklahoma Indian Affairs Commission, Oklahoma also has 36 federally-recognized tribes and three non-federally-recognized tribes. This is the largest number of tribal governments in one state in the lower 48 states.

assumption of jurisdiction over Indians, this article will show that Indian Country and Indian jurisdiction in Oklahoma are not figments of the historical past, but a reality which has been legally substantiated after many years of disputes. Today, Woody Guthrie, Justice Rehnquist and tribal leaders can saddle up and ride the Indian Nations reservation in those Oklahoma hills.

A. *Historical "Indian Country"*

The source of clarification about Indian Country in Oklahoma begins in the London offices of the Lords of Trade over two centuries ago. British Indian policy in North America aggravated the Ottawa Chief Pontiac to the point that he formed an alliance with the tribes in the Great Lakes and the Ohio River valley. Thus began a military campaign in May of 1763, in which Pontiac's forces captured and destroyed the line of British forts between Niagara and Detroit.[7]

One of the major points of controversy was the status of the land of the Indian Nations. The British crown responded to Pontiac upon recommendation of the Lords of Trade in October with the Royal Proclamation of 1763. It declared that the Indian Nations had the right to be protected in the peaceful possession of their lands. This protection was to be accomplished by establishing definite boundaries between the holdings of the Crown and the Indians, into which British colonial citizens could not lawfully pass without the Crown's permission. The lands west of the 13 colonies along the Atlantic coast were to be "Indian Country." This development of the concept of "Indian Country," which had been discussed for several months by British officials, affected the tribes that would eventually come to Oklahoma. The north-south boundary line of Indian Country followed the crest of the Appalachians and ran from the eastern end of Lake Ontario to the Gulf of Mexico in northwest Florida.[8] The boundary line of Indian Country was contiguous or inclusive of the eastern part of the lands of the Cherokee, Choctaws, Chickasaws, Creeks and Seminoles—the Five Civilized Tribes.

Consequently, the foundations of federal Indian law were laid down through the interaction of these Indian Nations and the United States in conflicts over land title and jurisdictional authority. Following the American Revolution the United States began to shape its

7. KIRKE KICKINGBIRD & LYNN KICKINGBIRD, INDIANS AND THE U.S. CONSTITUTION: A FORGOTTEN LEGACY 14 (1987).

8. P. CUMMINGS AND N. MICKENBERG, NATIVE RIGHTS IN CANADA 22-30 (2d ed. 1977).

own Indian policy. The process had started as early as 1778, with the Delaware Treaty, in which a treaty of peace and friendship and military alliance also included a proposal for a political alliance in which the Delaware would form an Indian state and send a representative to Congress.[9] The political stature of the tribes was highly regarded, as can be seen from this offer. Secretary of War Knox suggested that the Indian Nations be viewed as independent nations in his reports to President Washington.[10]

Like the British Crown, the colonial government chose to control Indian trade in lands and goods and the development of Indian policy. The scheme was set forth in both the Articles of Confederation and the U.S. Constitution in the Commerce Clause.[11] Because of the geographical location, political astuteness, economic influence and military power of the Five Civilized Tribes, United States Indian policy was concerned over relationships with these tribes, which formed a southern center of power. The evolution of the Indian Removal policy would eventually bring these tribes to Oklahoma. The passage of the Indian Removal Act of 1830[12] removed the emphasis on preserving the original Indian Country pursuant to United States treaty obligations and focused on removing the Indians of the southeast United States to areas west of the Mississippi.

B. *Removal Pressures and Policies*

Operating pursuant to the terms of the Louisiana Purchase, the United States concluded treaties with the Quapaw and other tribes in which the federal government bought and sold land in transactions that the United States hoped would result in a trade of lands in the Louisiana Territory for lands in the southeast part of the United States. But conflict in Indian Country continued because of the reluctance of the Indian governments to move westward. This conflict embroiled the Cherokees in litigation known as the Cherokee cases,

9. Treaty with the Delawares, Sept. 17, 1778, 7 Stat. 13. A century later one part of the Delawares would form an alliance with the Cherokee and become Cherokee citizens on April 8, 1867. *See* Act of Oct. 19, 1888, ch. 1211, 25 Stat. 608.

10. "The independent nations and tribes of Indians ought to be considered as foreign nations, not as the subjects of any particular state." Report from General Knox, Secretary of War, to the President of the United States (May 23, 1789), *in* I AMERICAN STATE PAPERS 53 (1832).

11. Kirke Kickingbird & Lynn Kickingbird, *"In Our Image. . ., After Our Likeness:" The Drive for Assimilation of Indian Court Systems*, 13 AM. CRIM. L. REV. 683 (1976).

12. Act of May 28, 1830, ch. 148, 4 Stat. 411.

Cherokee Nation v. Georgia[13] and *Worcester v. Georgia*,[14] which still form the cornerstone for federal Indian law today. Chief Justice Marshall in *Cherokee Nation* determined that Indian Nations were "domestic, dependent nations," rather than foreign nations as Secretary of War Knox had suggested. One of the primary principles which arose from these cases was the exclusion of state jurisdiction from Indian Country unless Congress had granted such authority. Although *Cherokee Nation* and *Worcester* helped to define the rights of tribal governments, the law could not help the Cherokee overcome the incredible political pressure created by the covetousness of Georgia's citizens for the rich Cherokee lands. This desire reached frenzied proportions with the discovery of gold in the Cherokee Indian Country.[15]

When the Reverend Samuel Worcester won the battle to exclude the jurisdictional authority of the state of Georgia from Cherokee country in the state's criminal prosecution against him, the victory did not win the war. The Union was in fragile condition from the tug of war between the powers of the state government and the power of the federal government. Federal control of Indian affairs was merely one part of this struggle. Failure to carry out the decision in *Worcester v. Georgia* is generally attributed to President Jackson's defiance. It is considered *de rigueur* to cite this statement attributed to Andrew Jackson at this point, "John Marshall has made his decision, now let him enforce it."[16] But Worcester and the Cherokee Nation feared the consequences of seeking a writ of execution to enforce their victory. The conflict of state sovereignty versus federal supremacy threatened to shatter the Union. South Carolina had passed legislation to "nullify" a federal tariff. In the Cherokee assessment of the situation, if Jackson sent troops to enforce taxes and side with the Indians against the state, a civil war was likely to follow. Without the federal government, the Cherokee would have no ally powerful enough to fend off

13. 30 U.S. (5 Pet.) 1 (1831).

14. 31 U.S. (6 Pet.) 515 (1832).

15. "Before the 1849 California gold rush the center of gold mining in the United States was at Dahlonega, Georgia, where the national government founded a mint." J. LEITCH WRIGHT, THE ONLY LAND THEY KNEW 38 (1981).

16. *See* Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 406 (1993); Allison M. Dussias, *Geographically-Based and Membership-Based Views of Indian Tribal Sovereignty: The Supreme Court's Changing Vision*, 55 U. PITT. L. REV. 1, 16 (1993); Girardeau A. Spann, *Expository Justice*, 131 U. PA. L. REV. 585, 602 (1982).

the southern states. The stage was set for the departure of the tribes from their ancestral homelands.[17]

The Choctaw were forced west in 1831, the Creeks in 1836, the Chickasaw in 1837, the Cherokee in 1838-39, in the bitter "Trail of Tears," and the Seminole in 1842. Oklahoma, or the Indian Territory as it was then called, was now the quintessential Indian Country. It was now the home of the Indian Nations about which Woody Guthrie sang.[18]

The status and stature of the Five Civilized Tribes in Oklahoma came from their level of political organization. The wild tribes of the Western Plains derived their influence from force of arms. The Indian Removal Policy and the Reservation Policy focused on the transfer of many tribes to Oklahoma and settling disputes between newcomers and the Plains tribes. The resulting trials and tribulations had the effect of reinforcing tribal political identity for the tribes who would survive.

The political stature of those tribes in Indian Country was manifested by treaty provisions related to the Oklahoma tribes sending delegates to Congress.[19] The political identity of the Indian nations became so focused in the mid-1800s that it was proposed that Oklahoma become an all-Indian state.[20] However, new policy changes transformed the federal government's focus to forced allotment, solving America's Indian problem by making all Indians become farmers.[21]

The Plains tribes' limited military power was sufficient to oppose United States aggression and force one last series of treaty negotiations with the Great Peace Commission in 1867 and 1868. The Five Civilized Tribes had their strength diminished through the impact of the Civil War, but their lands, governments and political identity remained largely intact and strong in the decades following the war. That strength amazed most Americans. Recognition of tribal government powers was manifested in *Ex Parte Crow Dog*,[22] which confirmed that Indians charged with intra-racial crimes such as homicide

17. *See* WILLIAM G. MCLOUGHLIN, CHEROKEE RENASCENCE IN THE NEW REPUBLIC 428-447 (1986) ("Chapter 21. The Missionaries and the Supreme Court, 1829-1833").

18. JOHN W. MORRIS, ET AL., HISTORICAL ATLAS OF OKLAHOMA 23 (3d ed. 1986).

19. "Whenever Congress shall authorize the appointment of a Delegate from said Territory, it shall be the province of said council to elect one from among the nations represented in the council." Treaty with the Choctaw and Chickasaw of Apr. 28, 1866, art. 8, § 9, 14 Stat. 769.

20. JERALD C. WALKER, THE STATE OF SEQUOYAH 5 (1985).

21. AMERICAN INDIAN POLICY REVIEW COMMISSION 1977 FINAL REPORT VOL. 1 65-66.

22. 109 U.S. 556 (1883).

were not under the jurisdiction of the federal government, but under tribal laws and judicial systems.

Indian governmental authority was reaffirmed in *Talton v. Mayes*,[23] which confirmed that the Cherokee Nation, in criminal prosecutions of its citizens was not bound by U.S. constitutional standards.

Ultimately, the political cohesiveness and land ownership of the Indian nations stood in the way of westward expansion and economic opportunity. The result was new assaults on the tribes' political identity. The federal government's policy choices took the form of the General Allotment Act, intended to allot reservation lands and disperse them to tribal members, making them farmers. In Oklahoma, the allotment policy emerged by Congressional establishment of the Dawes Commission, which set out to dismantle the reservations of the Five Civilized Tribes and terminate their tribal governments.[24] The Oklahoma tribes, through magnificent efforts to maintain their rights, later successfully resisted termination but not the forced allotment of 1880-1910.

With their efforts to resist allotment, the tribes of Oklahoma's Indian Country were still forging in outlines of federal Indian law. In *Lonewolf v. Hitchcock*,[25] Kiowa tribal members unsuccessfully challenged Congressional acceptance of an alleged vote of three-quarters of the male members of the Kiowa, Comanche and Apaches to allot their reservation. The Supreme Court upheld Congress' plenary power over Indian affairs and tribal property and refused to examine the alleged fraudulent circumstances behind the allotment agreement. The validity of the tax laws of Oklahoma tribes was upheld in *Buster & Jones v. Wright*.[26]

C. *Oklahoma Prior to Statehood*

The territory which is now the state of Oklahoma was ceded to the United States by the French in the Louisiana Purchase of 1803. This agreement, however, did not give the United States legal title to the land occupied by the Indians. For this title, the United States

23. 163 U.S. 376 (1896).

24. *See generally* D.D. OTIS, THE DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS (1973).

25. 187 U.S. 553 (1903). *See* BLUE CLARK, *LONEWOLF V. HITCHCOCK* (1994).

26. 82 S.W. 855 (1904). *See also* Choate v. Trapp, 114 P. 517 (1911) (ruling that even a decade into the 20th century the Oklahoma tribes were able to stop Congress from exercising plenary power in shortening the tax exemption period for Indian allotments).

would have to negotiate with the various Indian tribes through treaties.[27] At the time of the Purchase there were relatively few tribes occupying the territory. The Wichitas, Querechos, Caddos and Quapaws were the original inhabitants of the area, along with the Kiowas, Comanches, and the Pawnees.

Soon the area, which became generally known as "Indian Territory," became the homeland of more than 30 Indian nations. As a result of increasing expansionist pressures from the white population, the fledgling federal government adopted a policy of forcible removal of Indian tribes from their aboriginal homelands in the Southeast and the Great Lakes region. Indian Territory was to be their home; a place where they might grow and advance, free from the pressures of white settlement; a place where their tribal governments might remain intact; a place which was to remain their's forever "under the most solemn guarantees of the United States."[28]

1. Treaties

The legal mechanism for the removal was treaties. The first removal treaty was made on July 8, 1817, between the Cherokee Nation and the United States.[29] The most famous of the tribes to be removed to Indian Territory were the Cherokee, Creek, Choctaw, Chickasaw and Seminole Tribes of the Southeast which, because of their cultural "advancement" and political sophistication, became popularly known as the Five Civilized Tribes.[30]

The Removal Policy was preceded by treaties with other tribes already occupying Indian Territory. These included the treaty with the Quapaw in 1818[31] and the Treaty with the Osages in 1825.[32] Although removal treaties were signed with tribes of the Great Lakes region prior to 1860[33] it was not until after the Civil War that the next major period of Indian removal to Oklahoma took place.[34] By 1883, a

27. Treaty of Apr. 30, 1803, art. IV, 8 Stat. 206.

28. LAWRENCE F. SCHMECKEBIER, THE OFFICE OF INDIAN AFFAIRS 93 (1927). *See also* KIRKE KICKINGBIRD ET AL., INDIAN TREATIES 13-14 (1980).

29. Treaty with the Cherokees, 7 Stat. 156 (1818).

30. ANGIE DEBO, THE ROAD TO DISAPPEARANCE 99 (1967).

31. Treaty with the Quapaws, 7 Stat. 176 (1818).

32. Treaty with the Osages, 7 Stat. 240 (1825).

33. *See, e.g.*, Treaty with the Quapaws, Act of May 13, 1833, 7 Stat. 424; Treaty with the Iowa and Sac and Fox, Act of Sept. 17, 1836, 7 Stat. 511; and Treaty with the Wyandotte, Act of Mar. 17, 1842, 11 Stat. 581.

34. *See* Treaty with the Delawares, 14 Stat. 793 (July 4, 1866); Treaty with the Sauk and Fox, 14 Stat. 495 (Feb. 18, 1867); Treaty with the Seneca, Shawnee and Quapaw, etc., 15 Stat. 513 (Feb. 23, 1867); Treaty with the Potawotami, 15 Stat. 531 (Feb. 27, 1867). After the Act of Mar.

total of 25 Indian reservations had been established in the Indian Territory for 37 tribes.[35]

The treaties and agreements made with the various tribes between 1817, and 1883, settled rights to property and governmental control. The chief element of governmental control is jurisdiction. Without question, the United States guaranteed to the tribes jurisdiction over their lands and people in Indian Country.

In the Treaty with the Choctaw, completed September 27, 1830,[36] the federal government pledged in addition to substantial amounts of land:

> [J]urisdiction and government of all the persons and property that may be within their limits west, so that no Territory or State shall ever have the right to pass laws for the government of the Choctaw Nation . . . and that no part of the land granted to them shall ever be embraced in any Territory or State.

Similar provisions may be found in the removal treaties of other tribes. In the Treaty with the Creeks and Seminoles of 1856, the United States guaranteed the tribes' rights "secured in the unrestricted right of self-government, and full jurisdiction over persons and property, within their respective limits."[37] And in the Treaty of

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3, 1871, 16 Stat. 566, which ended the Senate's treaty-making with the tribes, agreements were made with various tribes. Thus, by the Act of June 5, 1872, 17 Stat. 288, a reservation was established for the Osage Tribe in Indian Territory following the sale of their Kansas reserve. (The Osages had removed to Indian Territory pursuant to the Act of July 15, 1870, 16 Stat. 362, and settled upon a reservation there. However, this reserve had mistakenly included lands belonging to the Cherokees and the 1872 Act was intended to confirm the Osage rights in the territory actually occupied.) This same act also provided for the Kaw Tribe of Kansas to settle upon portions of the Osage reservation. The Act of Apr. 10, 1876, and the Act of May 25, 1881, 21 Stat. 422, established a reservation within Indian Territory for the Ponca Tribe. This act also authorized the Secretary of Interior to secure a reservation for the Otoe-Missouria tribes in Indian Territory. Such a reservation was established by Executive Order dated June 25, 1881. Separate executive orders of August 15, 1883, set aside reservations for the Iowa and Kickapoo Tribes.

35. In what is now roughly eastern Oklahoma (after 1890 the reduced Indian Territory), Congress established, in addition to the respective territorial domains of the Five Civilized Tribes, the following seven reservations: Modoc, Ottawa, Peoria (occupied by Kaskasis, Miami, Peoria, Piankashaw, and Wea Tribes), Quapaw, Seneca, Shawnee, and Wyandotte. *See* COMMISSIONER OF INDIAN AFFAIRS, 1906 ANNUAL REPORT 456-457. In what is now roughly called western Oklahoma the following reservations were established: Potawatomi Reservation (occupied by Absentee Shawnee and Citizen Band of Potawatomi); the Kiowa, Comanche and Apache Reservation; the Wichita Reservation (occupied by the Caddo, Delaware and Wichita Tribes); the Cheyenne and Arapaho Reservation; the Iowa Reservation; the Kansas or Kaw Reservation; the Kickapoo Reservation; the Osage Reservation; the Otoe-Missouria Reservation; the Pawnee Reservation; the Ponca Reservation; the Sac & Fox Reservation; and the Tonkawa or Oakland Reservation.

36. 7 Stat. 333.

37. *See* Article XV of the Treaty with the Creeks and Seminoles, 11 Stat. 699, 704 (Aug. 7, 1856).

1867, with the Potawotamis, who were removing from Kansas to Oklahoma, the United States pledged that the reservation established by the treaty "shall never be included within the jurisdiction of any State or Territory. . . ."[38]

2. Self-Government

Prior to the Organic Act of 1890, division of Indian Territory into Oklahoma Territory and Indian Territory, the tribes of the region were completely self-governing and exercised many of their sovereign powers. They had formal governments that made and enforced laws. They had law enforcement services to the extent that they were needed. They had courts or judicial forums to decide disputes.[39] They had extensive educational systems and otherwise provided for the general welfare of their membership.[40]

Except for the establishment in 1844 of a United States District Court in the Western District of Arkansas at Fort Smith, Arkansas, which had nominal jurisdiction over non-Indians in Indian Territory,[41] the tribes enjoyed and had exclusive jurisdiction over their people and territory.

3. An Indian State

Without a doubt the land which was subsequently to become Oklahoma had the largest number of Indian tribes and spawned the largest Indian population than any other state or territory in the Union. Indeed, the removal policy gave new life to the idea of an Indian state, which had been mentioned in the first United States treaty with an Indian tribe, the Treaty with the Delaware.[42] As a result of these treaties the Five Civilized Tribes "were indeed constituted as the sovereign autonomy established in lieu of a prospective State."[43] In fact it was said that the lands comprising this Indian Territory stood "in an entirely different relation to the United States from

38. Treaty with the Potawatomis, Feb. 27, 1867, art. III, 15 Stat. 531, 532.

39. In many cases, however, their own constitutions limited the jurisdiction of their courts to tribal citizens. *See, e.g.*, Creek Constitution (Oct. 12, 1867).

40. Hearings Before the Committee on Indian Affairs on S. 2047, 74th Cong., 1st. Sess., 10 (1935).

41. Jeanette W. Ford, *Federal Law Comes to Indian Country*, 58 THE CHRON. OF OKLA. 432 (1980-81). This court was most likely established to keep the removed tribes as content as possible and to fulfill treaty obligations to protect the Indians from whites.

42. *See* Treaty with the Delawares, 7 Stat. 13 (1778).

43. Choctaw Nation v. Oklahoma, 397 U.S. 620, 638 (1970).

other Territories, and that for the most purposes it is to be considered as an independent country."[44]

Attempts at some kind of intertribal government began almost immediately upon the arrival of the various tribes to their new home. A number of general councils were held to discuss a confederacy-type government.[45] Believing that an intertribal type government would forestall the establishment of a territorial government,[46] an international council inaugurated by the Creeks was held in 1859, to adopt a code of international laws.[47] Treaties signed with the Five Civilized Tribes after the Civil War endorsed the idea of an Indian State and proposed the establishment of an intertribal council of Indian nations.[48] With the influx of white settlers during the last three decades of the 19th century, it rapidly became clear to the tribes that the new territory or state would not be governed by an independent intertribal body.

4. The Population Shifts

Despite the relatively crowded quarters and the dramatic and sudden change of lifestyle foisted upon the many Indian Nations through removal and containment, jurisdictional disputes among the tribes within Indian Territory seem to have been at a minimum during the first 30 years after removal began. However, with the coming of the railroad in the 1870's and the news of the fabulous mineral wealth of the Territory, a dramatic population shift occurred that was to have a far-reaching effect on the Indian Nations. Indeed, the jurisdictional disputes and the resultant legal confusion concerning Indians within the Territory increased in direct proportion to the influx of white settlers coming to the Territory to partake of its land and wealth. Many settlers had modest dreams to become tenant farmers, stock growers, merchants, or to work the railroads or the mines. Others were clearly adventurers. Some were desperadoes. Regardless of their goals and aspirations, they all required Indian lands and resources to fulfill their dreams.

Small companies and giant corporations, the likes of Union Pacific Railroad and Standard Oil Company, also swarmed into Indian

44. Atlantic & Pacific R.R. Co. v. Mingus, 165 U.S. 413, 435-36 (1897).
45. Curtis L. Nolen, *The Okmulgee Constitution: A Step Toward Indian Self-Determination*, 58 THE CHRON. OF OKLA. 264 (1980).
46. *Id.* at 265-66.
47. *Id. See also* GRANT FOREMAN, A HISTORY OF OKLAHOMA 41-53 (1942).
48. *Id.* at 265.

Territory.[49] These migrations caused a three-way competition for the Indians' resources.

In the 1870's they built the railroads. The strategically located Indian Territory would provide the much needed trade and transport link between the Gulf of Mexico and the industrialized northern states.

In the 1880's the corporations backed monopolistic cattle companies. The grazing of cattle had been the primary mainstay of the Five Civilized Tribes' economies during the 1850's and 1860's. Although greatly diminished by non-Indian depredations during the Civil War, when some $300,000 of cattle were literally stolen, the tribes' cattle herds still would have had economic potential in the years to come had it not been for the drastic partitioning of lands caused by the railroads. When individual corporations proposed monopolistic leasing practices under which the tribe would enjoy regular and substantial incomes, most of the tribes made such leases. Soon these large companies literally leased millions of acres at a time. This extensive leasing caused consternation among many of the Indians and outraged the small-time ranchers.[50]

While oil had been discovered in the 1850's in the Choctaw Nation, it was not until the next decade that its commercial possibilities became apparent to the general public. Nor was it until the 1890's that extensive development and exploitation of oil and gas resources in Indian Territory began to soar. Competition among the corporations, settlers and Indians followed a similar pattern to that of the cattle industry, only this time the financial stakes were even higher. And, as with the railroads and the cattle industry, more and more people and corporations swooped into the territory, upsetting the tribal balance of power by sheer numbers.

By 1889, there were over 170,000 people in Indian Territory; the ratio of non-Indian to Indian was three to one.[51] This fact, combined with the rapacious politics of the powerful corporations and the growing unrest of the white settlers, sounded the death knell of the strong central tribal governments in the eastern part of the state.

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49. CRAIG H. MINER, THE CORPORATION AND THE INDIAN 14, 145, 173 (1976).

50. *See generally* MINER, *supra* note 49 (discussing the effects of big business economics on tribal government).

51. Michael F. Doran, *Population Statistics of Nineteenth Century Indian Territory*, 53 THE CHRON. OF OKLA. 511 (1975-76).

The history provided by this period is pertinent to this discussion of the evolution of United States law regarding the jurisdictional powers of Indian nations within Oklahoma, for it provides a rationale for the numerous and confusing laws which were passed by Congress. It is important to remember that those laws, for the most part, affected only the tribes in whose territory the corporations played a major role, primarily the Five Civilized Tribes and the Osages.

D. *Oklahoma and Indian Territories*

As mentioned previously, the idea of turning Indian Territory into a state had been discussed for decades - first to create an Indian Territory or state, and later as a regular state. It was not until the whites outnumbered the Indians three to one, however, that legislative plans began to get serious. They began with demands for law and order which under the constitutions of the various tribes could not be provided for non-Indians. The tribes had no interest in asserting jurisdiction over the whites because the latter had squatted and established towns illegally on tribal lands. The tribes continually petitioned for the federal government's assistance in removing the whites pursuant to treaty requirements, but got little help. Gradually the demands shifted to individual ownership of lands.

As might be expected, the white settlers were neither happy with their inability to exercise political control over Indian Territory, nor were they content to continue squatting on communally held Indian lands. As their numbers grew, so too did their demands that the communal ownership of tribal lands and tribal governments be abolished in favor of both individual ownership and the political reorganization of the Territory into a state.

1. Enter Federal Courts

In the various treaties with the Indians the United States agreed to protect them from crimes and depredations committed by U.S. citizens.[52] It became increasingly difficult to provide such protection with the shift in white population, and Indian Territory became a haven for criminals and outlaws. In response to demands placed by both the Indians and the white settlers, Congress passed a series of laws which guaranteed the federal government limited criminal and civil jurisdiction over non-Indians in Indian Territory.

52. *See* GILBERT L. HALL, THE FEDERAL-INDIAN TRUST RELATIONSHIP 73, app. A (1981) (listing all treaties and such provisions).

In 1883, Congress authorized the United States District Court of Kansas to assume authority over the northern half of the western part of Indian Territory and the U.S. District Court of the Northern District of Texas authority over the southern half.[53] Two years later, in 1885, Congress passed the Major Crimes Act which further expanded the jurisdiction of federal courts nationwide, by giving them jurisdiction over seven major crimes committed by Indians.[54] On March 1, 1889, Congress passed legislation[55] creating a United States District Court at Muskogee in Indian Territory to facilitate enforcement of the Major Crimes Act.[56] This court dealt with non-Indians and Indians who had been indicted for murder, manslaughter, rape, assault, arson, burglary and larceny. The tribes maintained exclusive jurisdiction over Indians involved in crimes not covered by the Major Crimes Act.

2. Creation of a Territorial Government

We have seen that prior to 1890, the land which now constitutes the State of Oklahoma was generally known as Indian Territory. Despite its name, the United States had not established a formal territorial government there. The governments of the various tribes were the primary governments of the region, with the United States assisting to a certain extent with law enforcement support.

By the Organic Act of Congress of May 2, 1890,[57] Congress created two territories out of Indian Territory: *Oklahoma Territory* which consisted of a little more than the western half of the Indian Territory and a diminished *Indian Territory*. The Act established a formal territorial government in Oklahoma Territory. Expecting to establish a state government once the allotment of Indian lands took place, Congress did not establish a formal territorial government for Indian Territory. Instead, Indian Territory was to be governed directly by Congress and to continue under the jurisdiction of the federal court in Muskogee, which operated under the laws of Arkansas. A special committee on the Five Civilized Tribes was established by Congress for this purpose.

53. *See* Ford, *supra* note 41, at 433.

54. Act of Mar. 3, 1885, ch. 341, 23 Stat. 362, 385 (as amended by 18 U.S.C. §§ 1153, 3242 (1988)).

55. 25 Stat. 783.

56. Ford, *supra* note 41, at 434.

57. 26 Stat. 81.

The Organic Act succeeded in establishing a system of government and courts for the non-Indians who had poured into Indian Territory during the 1880's. The legislative history of the Act points to endorsement by the tribes in the Territory, including the Five Civilized Tribes who were called upon for comment during the drafting of the legislation.

> [A]ll the people in those Territories (now Oklahoma Territory and diminished Indian Territory) are entitled to that protection which just laws and local courts alone can give. The Indians are especially interested in the suppression of lawlessness in their midst. While they are amenable to their tribal laws and courts, yet there can be no security to their persons or property so long as they are in contact with the criminal classes of all other nationalities, who commit crimes and depredations and in many cases escape without punishment.[58]

The 1890 Organic Act had little effect on the tribes in the new Oklahoma Territory. It did, however, affect the powers of the tribes in Indian Territory by expanding the jurisdiction of the federal government to cases involving Indians of different tribes.

> [T]he court established by said act [of March 1, 1989] shall . . . have and exercise within the limits of the Indian Territory jurisdiction in all civil cases in the Indian Territory, except cases over which the tribal courts have exclusive jurisdiction.[59]

This provision was to be the first in a series affecting the jurisdictional powers of the tribal governments in Indian Territory, particularly those of the Five Civilized Tribes.

In the Appropriations Act of 1897,[60] Congress made most laws passed by the tribal councils subject to presidential approval. The Act also drastically infringed upon the jurisdictional powers of the Five Tribes:

> That on and after January first, eighteen hundred and ninety-eight, the United States Courts in said Territory shall have *original and exclusive jurisdiction and authority to try and determine all civil causes in law and equity* thereafter instituted and *all criminal causes for the punishment of any offense* committed after January first, eighteen hundred and ninety-eight by any person in said Territory. [A]nd the laws of the United States and the State of Arkansas in force in the Territory shall apply to all persons therein, *irrespective*

58. H.R. REP. No. 66, 51st Cong., 1st Sess., 3-4 (1890).
59. 26 Stat. 81, 93.
60. 30 Stat. 62.

> *of race*, said courts exercising jurisdiction thereof as now conferred upon them in the trial of like causes. . . .[61]

And so the federal territorial courts obtained jurisdiction over all controversies in Indian Territory regardless of who was involved.

On June 28, 1898, Congress passed what is known as the Curtis Act,[62] named after Charles Curtis, a mixed-blood Kaw and member of Congress. This piece of legislation was the most devastating to the governments of the Five Civilized Tribes. In short the Act:

(1) provided for the compulsory allotment of tribal lands to those determined by the Dawes Commission to be entitled to a place on the final rolls;[63]

(2) ratified in 1895 a decision of a federal territorial court that towns in the territory had the right to establish municipal governments under Arkansas law;[64] and

(3) made the civil law of the tribe unenforceable in the federal courts and abolished the tribal courts.[65]

Further Congressional acts pushed the tribes closer to the dissolution of their governments and total assimilation. The Act of March 3, 1901, "made every Indian in Indian Territory" a citizen of the United States.[66] By agreement[67] or statute[68] provisions were made for the termination of the tribal governments by March 4, 1906, when it was felt that all Indian lands would be allotted. Subsequent acts extended the time frame.[69] In 1906, when Congress stated that all allottees would be under the exclusive jurisdiction of the United States, the Indians in Indian Territory were specifically excluded.[70] Congress then passed the legislation which made the chiefs of the Five Civilized

61. 30 Stat. 62, 83 (emphasis added).

62. Act of June 28, 1898, ch. 517, 30 Stat. 495.

63. *Id.* § 14.

64. *Id.* at 499.

65. *Id.* at 504, § 28.

66. 31 Stat. 1447.

67. *See* Act of June 28, 1898, 30 Stat. 495, 512 (Choctaw-Chickasaw Agreement); Act of Mar. 1, 1901, 31 Stat. 861, 872 (Creek Agreement); Act of July 1, 1902, 32 Stat. 716, 725 (Cherokee Agreement).

68. *See* Act of Mar. 3, 1903, 32 Stat. 982, 1008 (Seminoles). *See also* Act of Apr. 26, 1906, 34 Stat. 137 (providing for final disposition of the affairs of the Five Civilized Tribes). *But see* Joint Resolution of Congress of Mar. 2, 1906, 34 Stat. 822 (providing for the continuance "in full force and effect for all purposes" of tribal existence and government of the Five Civilized Tribes until the distribution of tribal property was completed).

69. *See, e.g.*, Act of May 27, 1908, ch. 199, 35 Stat. 312; Act of Apr. 12, 1926, ch. 517, 44 Stat. 239; Act of May 10, 1928, 45 Stat. 495; Act of May 24, 1928, ch. 733, 45 Stat. 733; Act of Jan. 27, 1933, ch. 23, 47 Stat. 777.

70. Act of May 8, 1906, ch. 2348, 34 Stat. 182.

Tribes removable by the President, and provided for the sale of buildings owned by the Indian governments.[71]

During this period the Secretary of Interior and his agents began to play a strong role in the governance of the Five Tribes. But the governments were never dissolved. Under the most dire circumstances they amazingly survived and continue to thrive this day. And the "bureaucratic imperialism" meted out to them by the Department of the Interior has been curtailed in the 1970's by court decisions.[72]

E. *Statehood Realized*

The Oklahoma Indian reservations and allotments were dismissed as Indian Country in the terminology that followed statehood in 1907. In the legislation that formed the federal territorial government in Oklahoma and provided Oklahoma with statehood, Congress specifically reserved federal authority over Indian affairs.

Despite these statutory provisions, the pronouncement that there were no Indian reservations in Oklahoma was broadcast far and wide after statehood. It derives perhaps from the provision in the Oklahoma constitution that makes Osage County identical to the boundaries of the Osage Reservation. Whatever the source of its origins, the view that there were no reservations in Oklahoma was undoubtedly influenced by the allotment process in Oklahoma and the attempts to terminate the Five Civilized Tribes.

The activities of Congress with respect to the Five Civilized Tribes during the previous decade cleared the way for the creation of a new state. The Act of June 16, 1906[73] made possible the admission into the Union of both Indian Territory and Oklahoma Territory as the State of Oklahoma. According to the Enabling Act, the laws of the Territory of Oklahoma were to extend over the entire State until changed by the Constitution of the legislature of the State. It should be noted that the Act expressly provides that federal jurisdiction over Indian affairs should continue and that Indian property rights should not be impaired:

> Provided, that nothing contained in the said constitution shall be construed to limit or impair the rights of persons or property pertaining to the Indians of said Territories (so long as such rights shall

71. Act of Apr. 26, 1906, ch. 1876, 34 Stat. 137.

72. *See* Harjo v. Kleppe, 420 F. Supp. 1110, (D.D.C. 1976) (coining the phrase "bureaucratic imperialism") *aff'd sub nom.*, Harjo v. Andrus, 581 F. 2d. 949 (D.C. Cir. 1978).

73. 34 Stat. 267.

> remain unextinguished) or to limit of affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property or other rights by treaties, agreement, law or otherwise, which it would have been competent to make if this Act had never been passed.[74]

Article 1, Section 3 of the Oklahoma Constitution provided:

> The people inhabiting the State do agree and declare that they forever disclaim all right and title in or to any unappropriated public lands lying within the boundaries thereof, and to all land lying within said limits owned or held by any Indian, tribe, or nation that until the title to any such public land shall have been extinguished by the United States the same shall be and remain subject to the jurisdiction, disposal and control of the United States.

On November 16, 1907, Oklahoma became a state pledging that it would never interfere with the sovereign rights of Indian tribes or the federal government in carrying out its legal responsibilities to the Indians.[75]

1. Two Bodies of Law

United States law permits only the tribes or the United States to exercise jurisdiction within Indian Country except where Congress has granted authority to a state through specific legislation.[76] In the case of Oklahoma, there has been no such general grant of authority. Both the state enabling act and the state constitution clearly disclaim jurisdiction over Indian affairs. Despite the disclaimers, however, Oklahoma's new congressional delegation almost immediately began campaigning for repeal of federal laws protecting Indian rights.[77] Again their attempts were focused on the Five Civilized Tribes and to some extent the Osages. While the legislators never succeeded in dismantling the governments of the Five Tribes, they did succeed in obtaining state jurisdiction over many civil matters concerning property and taxation.

Because of the numerous laws passed by the Congress concerning the Five Civilized Tribes and the Osages, it has become common practice to consider the tribes of Oklahoma to be governed by two bodies

74. *Id.*

75. Act of Mar. 4, 1907, 34 Stat. 1286. *See* Hearings Before the Committee on Indian Affairs on H.R. 6234, 74th Cong., 1st Sess., 71-72 (1953) (describing the general condition existing in Oklahoma at the time of its admission to the Union).

76. United States v. Mazurie 419 U.S. 544 (1975); McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 172 (1973).

77. *See* WAREN K. MOOREHEAD, THE AMERICAN INDIAN 142 (1914).

of Indian Law. John Collier, Commissioner of Indian Affairs under President Franklin Roosevelt, described the two bodies as "one affecting the Five Tribes and largely the Osages, the other affecting the tribes of the West; and who had mostly come from the plains area."[78]

In recent years there has been a tendency to distinguish between the laws of the eastern part of the state (former Indian Territory) and the laws of the western part of the state (former Oklahoma Territory). We will see however, that this gross generalization led legal myths seriously affecting both the civil and criminal jurisdiction of most of the tribes of Oklahoma. It is indeed more correct to make the distinction along the lines that John Collier did in 1935, for we will see that most of the special laws pertaining to Indians in Oklahoma affect the Osages (in former Oklahoma Territory) and the Five Civilized Tribes (in former Indian Territory), but do not affect the other tribes of either Oklahoma Territory *or* Indian Territory. Over the years, state and federal administrators and judges have erroneously applied the laws affecting the Five Civilized Tribes or the Osages to other tribes in the state.

Part of the confusion arises from the laws concerning the Five Civilized Tribes which were passed during the territorial period (1890-1906). In 1897, Congress granted to the federal governments territorial courts "original and exclusive jurisdiction and authority to try and determine all civil cases. . ." and most criminal cases in Indian Territory "irrespective of race."[79] In so doing, Congress substantially prevented tribal governments in Indian Territory from asserting jurisdiction over such matters as taxation, descent and distribution, and criminal justice. A year later, Congress further infringed upon the governmental powers of the Five Civilized Tribes by passing the Curtis Act, which among other things made the civil law of the tribes unenforceable in the federal courts and abolished the tribal court.[80] Subsequent statutes and agreements made prior to statehood, however, modified and/or qualified these acts with respect to each of the Five Civilized Tribes.[81]

At statehood an important event took place which should have a far-reaching effect on the jurisdictional powers of the tribes of former

78. Hearings Before the Senate Committee on Indian Affairs on S. 2047, 74th Cong., 1st Sess., 10-11 (1935).

79. Appropriations Act of June 7, 1897, 30 Stat. 62, 83.

80. 30 Stat. 495 (1898).

81. *See supra* notes 67 and 68.

Indian Territory. By the Enabling Act of June 16, 1906[82] provision was made for admission to the Union of both the Territory of Oklahoma and the Indian Territory together as the State of Oklahoma. Each of the territories had a distinct body of local laws. Those in the Indian Territory had been put in force by Congress, while those in Oklahoma Territory had been enacted by the territorial legislature. Deeming it better that the new state should come into the Union with a uniform body of laws, Congress provided that the "laws in force in the Territory of Oklahoma, as far as applicable, shall extend over and apply to said State until changed by the legislature thereof,"[83] and that "all laws in force in the Territory of Oklahoma at the time of the admission of said State into the Union shall be in force throughout said State, except as modified or changed by this act or by the constitution of the State."[84]

It appears, therefore, that the Enabling Act necessitated the replacement of the laws passed by Congress concerning the Indians of the former Indian Territory from 1890 until statehood. Perhaps this is why less than a year later Congress began to pass special laws concerning taxation, alienation of property and distribution affecting the Five Civilized Tribes, subject matter which had already been covered by the previous legislation, but in this case was granted specifically to the courts of the new State.[85] All the laws passed by Congress concerned civil matters, and therefore, it is also reasonable to believe that the limitations on criminal jurisdiction placed on the tribes by the 1897 Act were no longer relevant.

2. Special Laws Affecting the Five Civilized Tribes and the Osages

Felix Cohen's *Handbook of Federal Indian Law,* the major treatise on the subject, begins its separate chapter "Special Laws Relating to Oklahoma" with the following: "The laws governing the Indians of Oklahoma are so voluminous that analysis of them would require a

82. 34 Stat. 267. *See* Jefferson v. Fink, 247 U.S. 288, 292 (1918) (summarizing the Enabling Act).

83. Act of June 16, 1906, 34 Stat. 267, § 13.

84. *Id.* at § 21.

85. *See, e.g.*, Act of May 27, 1908, 35 Stat. 312. *See also* Act of Apr. 26, 1906, 34 Stat. 137, passed less than six months after statehood, which stated that the laws of Oklahoma concerning descent and distribution should be applicable to the lands allotted to members of the Five Civilized Tribes. For all intents and purposes, the courts of the former Indian Territory had already been granted such jurisdiction by virtue of the Act of June 7, 1897, 30 Stat. 62, 83, and the Act of Apr. 28, 1904, 33 Stat. 573.

treatise in itself."[86] In fact, three treatises have already been written on the topic.[87] Most of the special laws relate to the enrollment and property of the Five Civilized Tribes, the headrights, competency, wills and leasing for the Osages, and taxation and alienation for both. In some cases the laws place a heavy federal presence over subject matter which would generally be left to a tribal governing body to determine; in other cases they concern the extensions of federal protections or grant a limited jurisdiction to state courts over specific matters such as probate.[88]

Needless to say, the search for a general rule concerning any of the Five Tribes or the Osages is impossible. In every case one must study relevant congressional statutes and court decisions, as well as tribal allotment agreements. One common feature of the treatment of both the Five Tribes and the Osages by federal legislation is the restriction of trust protections to allottees or holders of "headrights"[89] who are one-half or more Indian blood,[90] a restriction which has not been made for other tribes. Despite these restrictions, however, there is currently a great deal of trust land and property held by the governments collectively and members individually of the Five Civilized Tribes and Osages.[91]

In view of the large volume of laws passed concerning these tribes, it is no wonder that a great deal of confusion exists. In fact, it is quite possible that no one is clear on what the law is - not the state, not the federal government, not the tribes. Sections of many of the statutes expire, while other sections supersede or are superseded by laws which do not always cover identical circumstances. The individual agreements made between the United States and each of the tribes during the 1890's and early 1900's make the legal situation different for each tribe. Moreover, statutes and court decisions which attempt to sift through the confusion tend to reflect the federal Indian policy

86. COHEN, *supra* note 4, at 425.

87. *See* LAWRENCE MILLS, OKLAHOMA INDIAN LAND LAWS (2d ed. 1924); SAMUEL T. BLEDSOE, INDIAN LAND LAWS (2d ed. 1913); W.F. SEMPLE, OKLAHOMA LAND TITLES ANNOTATED (1952).

88. *See* COHEN, *supra* note 4, at 779-97.

89. A headright is a per capita share of all tribal funds from sale and leasing of land and royalty receipts from oil and gas or other mineral development.

90. *See, e.g.*, Act of Feb. 27, 1925, 43 Stat. 1008 (Osages); Act of May 27, 1908, 34 Stat. 312; Act of Jan. 27, 1933, 47 Stat. 777 (Five Civilized Tribes).

91. The Cherokee Tribe has 17,718 acres of trust land; the Chickasaws have 96,309 acres; the Choctaw have 144,402 acres; the Creeks have 4,061 acres; the Seminoles have 35,763 acres; and the Osages have 217,639 acres of trust land. *See* G. HALL, THE FEDERAL INDIAN TRUST RELATIONSHIP 91 (Washington, D.C. 1981).

at the time of the decision rather than a strict interpretation of the law, thus causing a general inconsistency in the treatment of the subject matter.[92]

3. Jurisdictional Powers of Other Tribes in Oklahoma

The situation for the rest of the tribes in Oklahoma is much clearer. These tribes enjoy many areas of exclusive jurisdiction and share concurrent jurisdiction with the federal government over other matters, including perhaps major crimes.

It is commonly felt that because of the special laws passed during the territorial period with respect to Indians generally in "Indian Territory,"[93] the tribes of the Quapaw Agency, by virtue of their occupation of territories within the former Indian Territory, did not have jurisdictional authority over civil and criminal matters.[94] We have seen that Congress passed laws granting the state courts specific jurisdiction over certain civil matters of the Five Civilized Tribes and the Osages at statehood. It did not pass similar laws affecting the tribes of the Quapaw Agency. Therefore, it appears that Oklahoma's laws did not apply to these tribes. Unfortunately, in 1956 and 1957, the Wyandotte, Peoria, and Ottawa tribes of this agency fell victim to the federal termination policy,[95] and at the point that they were no longer protected by trust status by the United States Government, state jurisdiction took hold. Nevertheless, it could be argued that in areas where they shared concurrent jurisdiction with the United States government they also shared concurrent jurisdiction with the state. The Oklahoma Indians Restoration Act of 1977[96] reinstated federal recognition to these three tribes.

a. Criminal Jurisdiction

The same rule which applies to "Indian Country" throughout the nation applies to "Indian Country" within Oklahoma - the United

92. An illustration of the confusion which apparently existed among members of the Congress regarding restrictions pertaining to alienation of property by members of the Five Civilized Tribes is that the Act of May 24, 1928, 45 Stat. 733, amended sec. 4 of the Act of May 10, 1928, 45 Stat. 495, passed only two weeks earlier.

93. *See* Appropriations Act of June 7, 1897, 30 Stat. 62.

94. The Quapaw Agency serviced the following tribes: Quapaw, Seneca, Ottawa, Wyandotte, Modoc, Cayuga, Peoria and Miami.

95. Act of Aug. 1, 1956, 70 Stat. 893 (Wyandotte); Act of Aug. 2, 1956, 70 Stat. 937 (Peoria); Act of Aug. 3, 1956, 70 Stat. 963 (Ottawa). Termination for all three tribes was to become effective in 1959.

96. Pub. L. No. 95-281, 92 Stat. 246 (codified at 25 U.S.C. §§ 861-861(c) (1988)).

States has reserved the right of jurisdiction over major crimes committed in Indian Country regardless of the political status of the parties involved. With respect to lesser crimes it appears that the tribes retain jurisdiction over crimes committed against one member of the tribe by another. In cases involving a non-Indian against an Indian, generally the United States retains jurisdiction. In cases between two non-Indians either the state or the United States courts may have jurisdiction.

These rules seem to apply to Indian tribes on both sides of the state even though the state and federal courts have often tried to make distinctions between the tribes of former Indian Territory and those of the former Oklahoma Territory. This topic will be discussed further in the next section. This distinction often rests on the jurisdiction conferred on the federal court at Muskogee in 1897. But again, it appears that by virtue of the stipulations in Oklahoma's Organic Act that the laws of the Territory of Oklahoma would supersede those of Indian Territory, Congress would have had to specifically grant to the state jurisdiction over criminal matters involving Indians. Congress never did so.

Perhaps the major impediment to the assertion of tribal jurisdiction over criminal matters within the state is that the tribes lack adequate systems for law enforcement and forums in which criminal cases can be heard.[97] This situation is slowly but surely changing, because the courts and federal agencies in recent years have clarified the confusion surrounding tribal criminal and civil jurisdiction, in favor of the tribes.[98]

4. State Assertion of Jurisdiction over Indians

Despite the legal principles set forth by Federal Indian Law and despite Oklahoma's own constitutional disclaimer about asserting jurisdiction over Indians in the absence of a specific grant by Congress, the state has successfully asserted *de facto* jurisdiction over many matters involving Indians, including crimes.

97. The resource issue is addressed in part through the provision of Courts of Indian Offenses. *See* 58 Fed. Reg. 54,412 (Oct. 21, 1993) for a current listing of the Courts of Indian Offenses in Oklahoma Territory. The U.S. Congress passed the Indian Tribal Justice Act, P.L. 103-176, which became law on December 3, 1993, and authorized approximately $58,000,000 for the support of tribal courts. The actual support provided depends on the amount Congress actually appropriates for the support of the tribal courts.

98. *See* United States v. Littlechief, CR-76-207-D (W.D. Okla. Nov. 7, 1977) (opinion reprinted at 573 P.2d 264). *See also* C.M.G. v. State of Oklahoma, 594 P.2d 798 (Okla. Cr. App. 1979) *cert. denied.*, 444 U.S. 992 (1979).

It is unclear when Oklahoma formalized its policy of claiming jurisdiction over Indian lands but, it is unquestioned that the state pursues such a policy.[99] The basis for such assertion has been unfounded assumptions and poorly reasoned court decisions.[100] Oklahoma's ability to assert jurisdiction over Indians has been enhanced by acquiescent federal administrators and the confusing, voluminous body of law affecting the Five Civilized Tribes and Osages.

Even when there have been specific questions raised about the status of tribal lands and Indian allotments in Oklahoma, the results have been ignored. For approximately the first half of the 20th century Osage land was perceived to be Indian Country,[101] while various other Indian lands in Oklahoma were not perceived in the same fashion.[102]

The Indian governments and tribal citizens in Oklahoma continued to have the perception that Oklahoma held its Indian Country identity. In this respect they were not alone. Congress had specifically continued to recognize the powers of the governments of the Five Civilized Tribes as the century began. Congress has continued to refer to lands in Oklahoma as reservations in legislation returning certain areas to tribal ownership. Also, with the exception of a Congressional act in 1904, affecting the Otoe-Missouria and the Ponca Tribes,[103] no one can point to legislation disestablishing reservations in Oklahoma. As further evidence Congress operated on the presumption that Oklahoma reservations continued to exist, you find in 1946, Congress returning lands "for the use and benefit of the Indians of the Cheyenne and Arapaho Reservation in Oklahoma. . ."[104] and for "the Indians of the Kiowa, Comanche, and Apache Indian Reservation. . . ."[105] In December of 1946, the Secretary of the Interior

99. Op. Okla. Att'y Gen. 78-176.

100. *See* Ex parte Nowabbi, 61 P.2d 1139 (Okla. Crim. App. 1936) *overruled by*, State v. Klindt, 782 P.2d 401 (Okla. Crim. App. 1989). *See also* Tooisgah v. United States, 186 F.2d 93 (10th Cir. 1950); COHEN, *supra* note 4, at 777 n. 81.

101. United States v. Ramsey, 271 U.S. 467 (1926).

102. *See* Ex Parte Nowabbi, 61 P.2d 1139 (Okla. Crim. App. 1936) *overruled by*, State v. Klindt, 782 P.2d 401 (Okla. Crim. App. 1989). *See also* Tooisgah v. United States 186 F.2d 93 (10th Cir. 1950).

103. *See* Act of Apr. 21, 1904, 33 Stat. 217-218. Although there is reference to abolishment of reservation lines, the provision for reservation of lands for the common use of the tribes would seem to indicate Congress intended that a diminished reservation should continue to exist. The abolishment of reservation lines is directed to the reservation that existed prior to allotment.

104. Act of Aug. 10, 1946, ch. 947, 60 Stat. 976.

105. Act of June 24, 1946, ch. 467, 60 Stat. 305.

restored certain Red River lands to and made them a "part of the existing Kiowa, Comanche and Apache Indian Reservation. . . ."[106]

Additional congressional legislation and reports during the 1950's refer to Indian lands within Oklahoma as reservations. In 1952 Congress authorized a massive compilation of information on American Indians at the beginning of the termination era. The object of termination was the withdrawal of recognition of tribal governments and suspension of services for health, education and welfare services. The purpose of the termination policy was to end tribal existence. The rationale was that the death of the tribes would make Indians first-class citizens. The model for this survey was the Domesday Survey of England in 1066.[107] While it can be disputed whether or not the original Domesday survey had any relationship to a final day of reckoning,[108] it is clear the Indian Domesday survey had a final judgment for Indian tribes as its purpose.

It was in this Indian Domesday survey that the House Committee on Indian Affairs under the heading "Kiowa Indians" and the subheading, "Kiowa and Comanche Reservation, Okla." stated that, "[t]here were 388 Apache, 2,694 Comanche and 2,696 Kiowa Indians on this reservation in 1950."[109] Adjoining the Kiowa and Comanche Reservation to the north is the land of the Wichita, Caddo and Delaware Tribes which the report names as the "Wichita Reservation, Okla." The report states that "[t]here were 1,184 Caddo, 165 Delaware and 460 Wichita Indians on this reservation in 1950."[110] This House report made similar references to the "Cheyenne and Arapaho Reservation, Okla." and recited the population statistics, "There were 3,102 Cheyennes and Arapahoes on this reservation in 1950."[111] Some ambiguity is created on the next page where there are references to both a "former reservation" and a "reservation."[112]

Similar references to reservations in 1950, are made for 18 other tribes in Oklahoma. The Domesday Indian survey notes reservations for the following tribes: Absentee Shawnee,[113] Citizen

106. 12 Fed. Reg. 849 (1947).

107. "There is a real need for a Domesday survey of Indian affairs." H.R. REP. No. 2503, 82d Cong., 2d Sess. 149 (1952).

108. C.R. LOVELL, ENGLISH CONSTITUTIONAL AND LEGAL HISTORY 65 n.5 (1962).

109. H.R. REP. No. 2503, 82d Cong., 2d Sess. 834 (1952).

110. *Id.* at 740.

111. *Id.* at 752.

112. *Id.* at 753.

113. *Id.* at 722.

Potawatomie,[114] Eastern Shawnee,[115] Iowa,[116] Kaw,[117] Kickapoo,[118] Miami,[119] Osage,[120] Otoe and Missouri,[121] Ottawa,[122] Pawnee,[123] Peoria,[124] Quapaw,[125] Ponca,[126] Sac and Fox,[127] Seneca-Cayuga,[128] Tonkawa,[129] and Wyandotte.[130] An alphabetical listing of reservations is made in the report and additional names of Oklahoma tribes with reservations appear in the following list: Alabama-Quassarte Tribal Town, Kialegee Tribal Town, Thlopthlocco Tribal Town.[131]

With respect to the Five Civilized Tribes the Indian Domesday survey reports that they have no reservations. The land holdings of these tribes are reported as "areas."[132]

The Indian Domesday survey provided a summary regarding federal, state and tribal jurisdiction.[133] This section of the report emphasized the same principles that had existed since the Cherokee cases. States do not have jurisdiction within Indian Country unless Congress has granted such authority to states by appropriate legislation. In Table XII.—"Data on reservation law and order" there is no entry next to the line for Oklahoma except footnote 11 which states the following:

> State handles all law and order problems and finances same on county basis. State jurisdiction exercised on Osage Reservation and all reservations under the Southern Plains Agency is subject to court attack due to absence of congressional authority.[134]

The United States Congress took steps to follow up on the recommendations of the Indian Domesday survey recommendations about transfer of jurisdiction over Indian reservations to the states.

114. *Id.* at 924.
115. *Id.* at 962.
116. *Id.* at 823.
117. *Id.* at 829.
118. *Id.* at 833.
119. *Id.* at 854.
120. *Id.* at 885.
121. *Id.* at 891.
122. *Id.* at 893.
123. *Id.* at 905.
124. *Id.* at 907.
125. *Id.* at 935.
126. *Id.* at 916.
127. *Id.* at 947.
128. *Id.* at 959.
129. *Id.* at 994.
130. *Id.* at 1024.
131. *Id.* at 687, 698, 712.
132. *Id.* at 745, 753, 777, 793, 952.
133. *Id.* at 183.
134. *Id.* at 109.

This transfer was accomplished through Public Law 83-280,[135] the most widely known and denounced federal Indian legislation since allotment. Passed in 1953, P.L. 280 ushered in the "termination" phase of federal Indian affairs. It mandated that Wisconsin, Oregon, California, Minnesota, and Nebraska assert criminal and civil jurisdiction in Indian country and provided a mechanism whereby other states could assume permanent jurisdiction over Indian nations.

The law applied to most Indian land within the boundaries of those five states. However, the power given to these states did not include the power to tax, regulate, or decide the ownership or use the Indian property.

As noted, the statute also authorized states other than the "mandatory" states listed above to assume civil and criminal jurisdiction over Indian territory by making appropriate changes in their state constitutions or laws. However, in 1968 the law was amended, requiring states to obtain the consent of Indian tribes before assuming jurisdiction.

During 1953, when P.L. 280 was being considered by the states, Oklahoma passed up its opportunity to legally assert jurisdiction over Indian lands. At that time, Governor Johnston Murray, in a letter to Assistant Secretary of the Interior, Orme Lewis, claimed Oklahoma had no need to assume jurisdiction under P.L. 280 because the state already had civil and criminal jurisdiction over all tribal governments:

> When Oklahoma became a State, all tribal governments within its boundaries became merged in the State and the tribal codes under which the tribes were governed prior to Statehood were abandoned and all Indian tribes, with respect to criminal offenses and civil causes, came under State jurisdiction.[136]

This hopeful though unfounded belief of Governor Murray became Oklahoma's final comment on Indian jurisdiction for many years. Federal officials, in turn, looked the other way, until recent court decisions unequivocally proved the Governor wrong.[137]

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135. Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (codified as 18 U.S.C.A. § 1162 (1988); 28 U.S.C.A. § 1360 (1988)).

136. Letter dated November 18, 1953, from Johnston Murray, Governor of Oklahoma, to Orme Lewis, Assistant Secretary of the Interior: Op. Okla. Att'y Gen. 78-176 p. 469. Civil jurisdiction of the Courts of Indian Offenses in disputes where the tribe or a member is a defendant and where the cause of action arose in Indian Country was acknowledged by the Oklahoma Attorney General. Op. Okla. Att'y Gen. 85-94.

137. *E.g.*, United States v. Littlechief, CR-76-207-D (W.D. Okla. Nov. 7, 1977) (opinion reprinted at 573 P.2d 264); C.M.G. v. State of Oklahoma, 594 P.2d 798 (Okla. Cr. App. 1979) *cert. denied.*, 444 U.S. 992 (1979).

Under P.L. 280 as amended in 1968,[138] the state of Oklahoma would have to accomplish three things in order to assume jurisdiction under the law: (1) amend the state's constitution, specifically Article 1, Section 3, by a statewide vote; (2) amend present state laws to apply to Indian Country; and (3) obtain the consent of each tribe located in Oklahoma. Considering the last requirement, it is highly unlikely that the state will ever be successful.

After 1950 and until 1977, Oklahoma exercised all aspects of civil and criminal jurisdiction over Indian lands. It was not until 1977, that the jurisdiction of Oklahoma was once again challenged. The State of Oklahoma and the federal government were attempting to prosecute an Indian for a crime committed on a trust allotment. The U.S. District Court for the Western District of Oklahoma in the case of *United States v. Littlechief*,[139] held that a trust allotment upon which a homicide occurred was defined as Indian Country and, thus, the state of Oklahoma was without jurisdiction. The proper jurisdiction was in the federal court. The court in *Little Chief* cited the Supreme Court case of *DeCoteau v. District County Court*[140] where the Court announced:

> It is common ground here that Indian conduct occurring on the trust allotments is beyond the State's jurisdiction, being instead the proper concern of tribal or federal authorities.[141]

Immediately following this ruling, the Oklahoma Court of Criminal Appeals held that the order issued by a federal court was binding on the State of Oklahoma since it involved the construction and application of federal law.[142]

As a result of this decision, the Oklahoma Indian Affairs Commission asked the Oklahoma Attorney General for an opinion concerning state jurisdiction on trust allotments. The 1978 opinion stated that Oklahoma possessed no jurisdiction to prosecute crimes and offenses defined by the Major Crimes Act[143] committed by an Indian against an Indian upon trust allotments.[144]

A year later, in 1979, the state received another blow to its efforts to assert jurisdiction over Indian lands. At the Chilocco Indian School

138. Act of April 11, 1968, ch. 102, 82 Stat. 77 (current version at 25 U.S.C. 1301 *et. seq* (1970)).
139. CR-76-207-D (W.D. Okla. Nov. 7, 1977) (opinion reprinted at 573 P.2d 264).
140. 420 U.S. 425 (1975).
141. *Id.* at 428.
142. State v. Littlechief, 573 P.2d 263 (Okla. Crim. App. 1978).
143. Act of March 3, 1885, ch. 341, 23 Stat. 385 (codified at 18 U.S.C. § 1153).
144. Op. Okla. Att'y Gen. 78-176.

a homicide was committed, and Oklahoma immediately claimed to have jurisdiction because the crime was not committed on an Indian allotment. The Oklahoma Court of Criminal Appeals, however, concluded that the land met the definition of a "dependent Indian community," and was therefore within the exclusive jurisdiction of the federal government.[145]

In view of the fact that much confusion existed for so many years, it is highly likely that state, federal and tribal officials alike are still operating under the poorly reasoned assumptions made by the federal and state agencies and courts for so many years. For this reason, the following survey highlights the most popular assumptions which have proved to be myths.

II. False Assumptions Regarding Indian Country

A. *Equal Footing Assumption*

The State of Oklahoma from time to time has advanced the argument that when Oklahoma was admitted:

> [T]o the Union upon an equal footing with the Original states, it thereby acquired full and complete jurisdiction over all persons and things within its boundaries, including the Indians, except to the extent that the federal government expressly retained or asserted paramount jurisdiction over them as guardian and ward.[146]

Several of the original 13 states had advanced the proposition that because they had control of Indian affairs prior to the adoption of the Articles of Confederation or the Constitution of the United States, they as original states had special rights to administer Indian affairs within their borders, the Constitution of the United States notwithstanding. The type of rationale quoted above was intended to justify the jurisdiction of western states in Indian affairs. The quote is correct but the conclusion is wrong. The original states, once in the Union, had committed Indian affairs to the federal government and retained no special rights to deal with Indians within their borders. States entering the Union after the original 13 (such as Oklahoma) likewise committed the control of Indian affairs to the central government. The Supreme Court of the United States made this clear in *Oneida*

145. C.M.G. v. State of Okla., 594 P.2d 798 (Okla. Crim. App. 1979) *cert. denied*, 444 U.S. 992 (1979).

146. Tooisgah v. United States, 186 F.2d 93, 96 (10th Cir. 1950).

Indian Nation of New York v. County of Oneida, New York.[147] The Supreme Court in *Oneida* quoted with approval from *United States v. Forness*,[148] that "state law does not apply to the Indians except as far as the United States has given its consent." The Court in *Oneida* went on to state:

> There being no federal statute making the statutory or decisional law of the State of New York applicable to the reservations, the controlling law remained federal law; and absent federal statutory guidance, the governing rule of decision would be fashioned by the federal court in the mode of the common law.[149]

The Oklahoma Enabling Act[150] and other sources[151] make clear the state of Oklahoma has neither been granted nor accepted authority over Indian tribes within the Oklahoma's borders.

B. *"Tribal Governments have been Abolished" Assumption*

A fairly frequent assumption by state administrators and courts is that the allotment policy and various acts implementing it abolished the tribal governments and, therefore, the tribes cannot assert jurisdiction over anything. The assumption is most frequently associated with the Five Civilized Tribes but has been applied to other tribes as well. For example, in the poorly reasoned case *Tooisgah v. United States*[152] involving members of the Apache Tribe, the court noted that in Section 6 of the General Allotment Act of 1887[153] Congress undoubtedly "intended to dissolve the tribal government. . . ."[154] In 1975, the Supreme Court in *DeCoteau v. District County Court*,[155] found that neither the General Allotment Act nor individual allotment agreements and statutes limited tribal self-government.

Also cited as an abolishment of tribal governments is the Curtis Act,[156] which in 1898 abolished tribal courts for the Five Civilized Tribes, and the Act of April 26, 1906 entitled, "An Act to provide for

147. "The rudimentary proposition that Indian title is a matter of federal law and can be extinguished only with federal consent applies in all of the States including the original 13." Oneida Indian Nation of New York v. County of Oneida, New York, 414 U.S. 661, 670 (1974).
148. 125 F.2d 928 (2nd Cir. 1942) *cert. denied*, 316 U.S. 694 (1942).
149. *See Oneida*, 414 U.S. at 674.
150. Act of June 16, 1906, ch. 3335, 34 Stat. 267.
151. *See* H.R. REP. No. 2503, 82d Cong., 2d Sess. (1952). *See also* United States v. Pawnee Business Council, 382 F. Supp. 54, 56 (N.D. Okla. 1974).
152. 186 F.2d. 93 (10th Cir. 1950).
153. Act of Feb. 8, 1887, ch. 119, § 6, 24 Stat. 388, 390 (codified at 25 U.S.C.A. § 349 (1970)).
154. *Tooisgah*, 1866 F.2d at 97-98.
155. 420 U.S. 425 (1975).
156. Act of June 27, 1898, ch. 517, 30 Stat. 495.

the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory."[157] Without question the legislative history of the acts passed by Congress concerning the Five Civilized Tribes during the territorial period appear to conform with the idea that Congress indeed intended to abolish tribal governments. The fact remains, however, that the effort was not successful. Congress itself began to pass laws to extend the activities of the tribal governments of the Five Civilized Tribes. What is more, with or without the consent of Congress, the Five Civilized Tribes continued to exist and operate.

In the 1976 circuit court decision in *Harjo v. Kleppe*,[158] the court found that, "[W]hile under the Curtis Act of 1898 the Creek Nation lost much of its authority in a territorial sense. . . the tribal government remained authoritative, in legal contemplation, as to matters of tribal organization and management, including the control of tribal funds."[159] What is more, agreements made with the Five Civilized Tribes subsequent to the Curtis Act guaranteed to the tribes the maximum self-government consistent with congressional objectives.[160] Indeed, Section 28 of the Five Tribes Act,[161] "continue[d] the tribal existence and tribal governments of the Five Tribes in full force and effect for all purposes authorized by law."[162]

Section 26 of the Curtis Act declaring tribal laws unenforceable in the federal courts would appear to apply only to those laws passed by the tribe at that time and did not apply to subsequent laws.[163] The ability of the tribes to enact laws was not abolished, nor was their ability to establish courts.[164] See, for example, the Agreement with the Seminole passed only days after the Curtis Act on July 1, 1898,[165] which said, "and the courts of said nation shall retain all of the jurisdiction which they now have, except as herein transferred to the courts of the United States."

157. Act of Apr. 26, 1906, ch. 1876, 34 Stat. 137.

158. 420 F. Supp. 1110 (D.D.C. 1976).

159. *Id.* at 1111.

160. *See generally* Act of Mar. 1, 1901, ch. 676, 31 Stat. 861; Treaty with the Creeks and Seminoles, 11 Stat. 699 (Aug. 7, 1856).

161. Act of Apr. 26, 1906, ch. 1876, 34 Stat. 137.

162. Harjo v. Kleppe, 420 F. Supp. 1110, 1112 (D.D.C. 1976).

163. *See* Morris v. Hitchcock, 194 U.S. 384, 393 (1904). *See also* COHEN, HANDBOOK OF FEDERAL INDIAN LAW 429 (1942 ed.); COHEN, *supra* note 4, 781.

164. *See* Hays v. Barringer, 168 F. 221 (8th. Cir. 1909) (holding that the courts of the Five Civilized Tribes retained limited jurisdiction subsequent to the Curtis Act and this is supported by provisions made in individual agreements between the tribes and the United States government).

165. 30 Stat. 567.

The whole argument concerning the intent of federal policy would seem to have been cleared by the passage of the Indian Reorganization Act[166] and the Oklahoma Indian Welfare Act[167] in 1934 and 1936, respectively. These acts not only heralded the end to the allotment policy but affirmed and recognized the sovereignty of tribal governments. And although the Indian Reorganization Act (IRA) did not apply specifically to the tribes of Oklahoma, it has been incorporated by reference into the Oklahoma Indian Welfare Act (OIWA) as indicated by the following statement by the Solicitor for the Department of the Interior, Martin White:

> The powers which may be granted to an Indian tribe under the Indian Reorganization Act of June 18, 1934, have been incorporated by reference . . . into the Oklahoma Indian Welfare Act.[168]

Thus the OIWA and the IRA formally sanctioned the reassertion of judicial powers and the reorganization of the court systems of the Five Civilized Tribes. However, because of mounting distrust of the federal government on the part of the tribes after the devastating allotment period, most tribes did not organize under the OIWA,[169] and virtually no tribal constitutions or charters provide for assertion of police or judicial powers, unlike tribal constitutions in other parts of the United States.[170] Tribes throughout Oklahoma have too narrow a view of their existing sovereign powers.

In any event, only Congress or the tribe can limit the exercise of the tribe's sovereign power. The state has no jurisdiction over tribal governmental matters[171] and in most cases involving internal matters of the tribe, the federal government has chosen not to interfere.

C. *"Reservations have been Disestablished" Assumption*

Perhaps the assumption which has affected most seriously the assertion of jurisdiction by tribal governments and at the same time adversely affected tribal governmental operations[172] is that reservation

166. Act of June 18, 1934, ch. 576, 48 Stat. 984 (codified at 25 U.S.C. §§ 416 *et. seq.* (1970)).
167. Act of June 26, 1936, ch. 576, § 12, 49 Stat. 1967 (codified at 25 U.S.C. § 503 (1970)).
168. 61 Interior Dec. 82, 83 (1952).
169. *See* HALL, THE FEDERAL INDIAN TRUST RELATIONSHIP 116 (1981) (listing only 10 tribes as having organized under OIWA).
170. COHEN, *supra* note 4, at 455.
171. *See* United States v. Pawnee Business Council, 382 F.Supp. 54 (N.D. Okla. 1974); Ware v. Richardson, 347 F. Supp. 344 (W.D. Okla. 1972).
172. When the American Indian Policy Review Commission was holding field hearings in Oklahoma during 1975-76, it became evident that the confusion over reservation status had harmful effects on tribal government operations particularly with respect to being considered

boundaries within the state of Oklahoma were disestablished by the General Allotment Act and subsequent agreements and/or statutes. This assumption has been promoted in numerous court decisions[173] and during periods of history accepted as fact by both state and federal officials. The question became particularly relevant during the period from 1936 to 1948 when the operating definition of "Indian Country" was "within the limits of any reservation."[174] Thus, if one could argue successfully that the allotment of Indian lands disestablished reservations, it was felt that tribal jurisdiction would thereby be eliminated and the state would have cause to assume jurisdiction. In 1948, Congress saw a need to clarify the definition of Indian Country to:

> [A]ll Indian allotments, the Indian title to which have not been extinguished, including rights-of-way running through the same... and all dependent Indian communities within the border of the United States whether within the original or subsequently acquired territory thereof and whether within or without the limits of a state. . . .[175]

This expanded definition of Indian Country made arguments concerning whether or not reservations existed within Oklahoma irrelevant to most state attempts to assert jurisdiction over Indian territory. Nevertheless, the existence of reservations may prove useful to other aspects of tribal existence and governmental operations.[176]

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eligible for federal program funds outside the Bureau of Indian Affairs. For example, the tribes in Oklahoma were generally not considered eligible for the following programs because of their "nonreservation status": school construction programs, Title II and Title IV of the Comprehensive Employment Training Act, and Law Enforcement Assistance Administration funds. AMERICAN INDIAN POLICY REVIEW COMMISSION, 1977 FINAL REPORT 521.

173. *See* United States v. Okla. Gas & Elec. Co., 318 U.S. 206 (1943); Ellis v. Page, 351 F.2d 250 (10th Circ. 1965); Tooisgah v. United States, 186 F.2d 93 (10th Cir 1950); *see also* COHEN, *supra* note 4, at 775-76 n.64.

174. The Tenth Circuit stated that according to section 1151 of title 18 of the United states Code, at the time the crime in question was committed in 1942, the phrase, "Within any Indian reservation under the jurisdiction of the United States government" indicated a congressional disposition to restrict federal jurisdiction to organized reservations lying within a state. Tooisgah v. United States, 186 F.2d 93, 99 (10th Cir. 1950).

175. *See* Act of June 25, 1948, ch. 648, § 21, 62 Stat. 757 (current version at 18 U.S.C. 1151 (1988)).

176. The Congressionally-authorized American Indian Policy Review Commission reported that: "It has long been assumed uncritically by both federal and state authorities that the initial reservation boundaries no longer exists for jurisdictional purposes as a result of the allotment process. As a corollary misconception, it has also been assumed that Indian tribes within the state possess few, if any, residual powers of self-government." *See* AMERICAN INDIAN POLICY REVIEW INSTITUTE, 1976 FINAL REPORT 383. The AIPRC further states that "there is a definite need to clarify jurisdictional relationships of the tribes which includes a clear recognition that Oklahoma tribes do enjoy reservation status." *Id.* at 120.

The only legislation passed by Congress disestablishing reservations in Oklahoma concerned the Otoe, Missouria and the Ponca.[177] Congress never passed any other legislation disestablishing reservations in Oklahoma. Indeed, federal legislation and reports during the 1950's refer to Indian lands within the state as "reservations."[178] Moreover, the Supreme Court decision in *DeCoteau*[179] points to the fact that the allotment acts passed during the territorial era did not extinguish reservation boundaries.

The status of Indian reservations in Oklahoma is confirmed by a February 23, 1972 certification from the Anadarko Area Director, Sidney Carney, which states:

> I hereby certify that all Indian land, individually or tribally owned in the State of Oklahoma for which the U.S. Government, U.S. Department of Interior, Bureau of Indian Affairs, is the trustee . . . does constitute duly established and existing Indian reservations in the State of Oklahoma of the respective tribes and . . . said reservations are recognized and substantiated by this office.[180]

D. *"Allotments do not constitute Indian Country" Argument*

Allotment was and still is a mechanism for the state of Oklahoma to assume even more jurisdiction over Indian lands. Under the allotment policy, tribal lands were taken out of common ownership and allotted to individual Indians with the title being held in trust by the United States for a period of 25 years. The right to sell these lands was restricted, with a stated purpose of protecting the Indians. Surplus Indian lands not allotted were opened to white settlement and, thus, to state jurisdiction by the Oklahoma land runs of 1889 and 1906.

At the end of the trust period, the allotments to individual Indians would convert to title in fee simple, the Indian owners would become citizens, subject to state civil and criminal jurisdiction. Federal jurisdiction over these lands was to be exclusive until the trust period

177. Act of Apr. 21, 1904, ch. 1402, 33 Stat. 189, 218.

178. *See* H.R. REP. No. 2503, 82d Congress, 2d Sess., 415, 416, 420, 834, 836, 1235 and 1238 (1953).

179. After the Supreme Court decision in DeCoteau v. District Court, 420 U.S. 425, 445 (1975), the question of reservation disestablishment must be decided on the basis of careful study of each reservations' surrounding circumstances and legislative history with respect to the intent of Congress to continue reservation status. *See also* Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977); Mattz v. Arnett, 412 U.S. 481 (1973); Seymour v. Superintendent, 368 U.S. 351 (1962). *See also* COHEN, *supra* note 4, at 41-44.

180. KIRKE KICKINGBIRD ET. AL., INDIAN JURISDICTION 77 (1983).

expired, according to the Burke Act, an amendment to the Allotment Act of 1906.[181]

Although a careful reading of the General Allotment Act and the Burke Act would readily point to the fact that federal jurisdiction over allotments would remain as long as trust status and restrictions on alienation remained, there was a great deal of confusion at the time of statehood. It was felt that allottees would become subject to state jurisdiction as soon as trust or restricted patents were issued.[182] In 1915 the point was clarified by the U.S. Supreme Court in *United States v. Nice.*[183] The Court said that the United States had clearly intended to retain jurisdiction over allotments until the allottee has been vested with fee simple patents.

The 1926 case of *United States v. Ramsey*[184] concerning criminal jurisdiction on an Osage allotment clearly stated that Osage allotments constituted Indian Country for jurisdictional purposes. Other court decisions in subsequent years reached similar conclusions.[185]

In view of the above judicial history and the refinement of the definition of Indian Country it is amazing that as late as the 1970's the State of Oklahoma was still pursuing the issue.

III. The Rediscovery of Indian Country in Oklahoma

There has never been legislation specifically abolishing the boundaries of the reservations in Indian Territory.[186] In 1978, the *Littlechief*[187] case and the Chilocco case[188] confirmed that Indian Country still existed on tribal and allotted lands in western Oklahoma. Since then other cases have confirmed that Indian Country exists on tribal and allotted or restricted lands in eastern Oklahoma.[189]

181. Act of May 8, 1906, ch. 2348, 34 Stat. 183. It should be noted that the Five Civilized Tribes were excluded from the provisions of the Burke Act. The decision in *Ex Parte Nowabbi* relied on this exclusion as an indication of an express intent of Congress to confer jurisdiction on the state. A careful study of the circumstances surrounding the exclusion points to different reasoning and thus the decision in *Nowabbi* is incorrect. Indeed the Court's holding in United States v. Pelican, 232 U.S. 442, 450-451 (1914), that an allotment retains the Indian country status of the tribal lands from which it was made, was applicable to the Five Tribe's allotments. *See* Cohen, *supra* note 4, at 778 n.84.

182. *In re* Heff, 197 U.S. 488 (1905).

183. 241 U.S. 601 (1915).

184. 271 U.S. 467 (1926).

185. *See, e.g.*, United States v. Pelican, 232 U.S. 442 (1914); United States v. Celestine, 215 U.S. 278 (1909).

186. American Indian Policy Review Commission 1977 Final Report 519.

187. Oklahoma v. Littlechief, 573 P.2d 263 (Okla. Crim. App. 1979).

188. C.M.G. v. Oklahoma, 594 P.2d 798 (Okla. Crim. App. 1979).

189. *See* Oklahoma Tax Comm'n v. Potawatomi Indian Tribe, 498 U.S. 505 (1991).

Despite the popular saying that there are no reservations in Oklahoma except the Osage Reservation, there is no legal basis for this assertion. In fact federal cases have reached a contrary conclusion. A 1980 case, *Cheyenne-Arapaho Tribes v. Oklahoma*,[190] held that land of that western Oklahoma tribe is an Indian reservation. Additionally, with the discovery of Indian Country in 1978, tribes in western Oklahoma moved to establish courts and law enforcement systems. Tribes in eastern Oklahoma are currently engaged in the same effort since the decision in *Creek Nation v. Hodel*.[191]

However, the tribal hold on recognition of Indian Country seemed tenuous even after the decisions in *Littlechief* and the Chilocco case. Oklahoma continued its challenge to tribal status in Oklahoma and at the same time the Oklahoma tribes mounted challenges of their own in the federal court arena.

The most surprising challenge to Indian Country status came from arms of the tribal governments themselves. In 1983, the Oklahoma Supreme Court turned back a challenge to the characterization of Indian allotments in Oklahoma as Indian Country by the Kiowa Housing Authority. In *Ahboah v. Kiowa Housing Auth.*,[192] the tribal housing officials sought possession and forcible entry and detainer against the tenants of two houses located on Indian allotments. In holding that the state courts lacked jurisdiction, the Oklahoma Supreme Court identified these Indian trust allotments as retaining their character as Indian Country.

One of the contentions of the Kiowa Housing Authority was that the tribe did not have a reservation still in existence. The Oklahoma Supreme Court answered in the following manner:

> Individual trust allotments have long been recognized as Indian Country, whether within or without continuing reservation boundaries. The test, as articulated by the Supreme Court, is whether the land in question have been "validly set apart for the use of the Indians as such, under the superintendence of the Government. . . ." Extensive federal regulation of the leasing of allotments, even to non-Indian lessees, shows Congressional intent that the leased allotments remain Indian Country.[193]

The end of the 1980s brought about a flurry of decisions that had an impact upon the characterization of the Indian trust lands in

190. 618 F.2d 665 (10th Cir. 1980).
191. 851 F.2d 1439 (D.C. Cir. 1988) *cert. denied*, 488 U.S. 1010 (1988).
192. 660 P.2d 625 (Okla. 1983).
193. *Id.* at 628-29 (citations omitted).

Oklahoma as Indian Country. The results of these cases would have sent Woody Guthrie to the barn to saddle up for his ride across the reservation.

Tribal governments in Oklahoma, like those around the rest of the nation, began to look for methods to finance their governmental operations in the 1980s. Since the mid-1960s traditional methods of funding for tribal governments had been to seek grants and contracts from agencies such as the Bureau of Indian Affairs, Administration for Native Americans (DHHS), the Department of Education, or the Department of Labor. However, through the development of tribal enterprises, tribes hoped to expand their source of income to meet the requirements of increased levels of services, and in some instances to maintain the status quo. One of the more profitable areas for tribes has been the establishment of bingo halls.

The Creek Nation contracted with Indian Country, U.S.A., to operate a large tribal bingo hall. Oklahoma attempted to tax and regulate the bingo hall and related activities, contending that the Creek Nation lands were not Indian Country or a reservation. *Indian Country, U.S.A. v. Okla. Tax Comm.* reached the Tenth Circuit Court of Appeals, where the contentions about the existence of Indian Country and reservations in Oklahoma were addressed:

> In summary, the Mackey site [on which the bingo hall was located] is part of the original treaty lands still held by the Creek Nation, with title dating back to treaties concluded in the 1830s and patents issued in the 1850s. These lands historically were considered Indian country and still retain their reservation status within the meaning of 18 U.S.C. § 1151(a). The district court thus correctly concluded that in many respects the "Mackey site is the purest form of Indian Country; . . . set apart for the use and benefit of the Creek Nation."[194]

If the Mackey site had not been a sand bar on the banks of the Arkansas River, Woody Guthrie could have strummed his guitar and started riding.

Since 1936, the allotted lands of the Five Civilized Tribes have been regarded as subject to state jurisdiction as a result of the *Nowabbi* decision. The events set in motion by the *Littlechief* decision continued to move eastward into the Indian Nations like red wine spilled on a white table cloth. Indian Country moved into eastern

194. 829 F.2d 967, 976 (10th Cir. 1987).

Oklahoma in the Oklahoma Supreme Court's *State ex rel. May v. Seneca-Cayuga*[195] decision in 1985. The process was completed in *State v. Klindt.*[196]

It is a view that the Oklahoma Supreme Court has continued to emphasize. Later, the Court reiterated, "Indian Country is Indian Country - regardless of whether it is located on a reservation or on trust lands."[197] In the same opinion the court referenced Congress' reminder with respect to state jurisdiction when it suspended *Duro v. Reina*[198].

> Unless authority to exercise jurisdiction in Indian country is delegated to the states by the Federal government and assumed by the states, as has been done in eleven states pursuant to the provision of Public Law 83-280, states do not have jurisdiction in Indian country.[199]

The Oklahoma State Tax Commission changed its geographical focus from eastern Oklahoma to central Oklahoma by attempting to impose taxes on the Citizens Band of Potawatomi.

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195. 711 P.2d 77 (Okla. 1985).

196. There, the court stated:

> We now turn to the question of whether the trial court abused its discretion in dismissing the causes against appellee for lack of jurisdiction. The State bases its arguments for jurisdiction on Ex Parte Nowabbi, 60 Okl.Cr. 111, 61 P.2d 1139 (1936). In Nowabbi, this Court held that the state court had jurisdiction to prosecute a Choctaw Indian for murdering a Choctaw Indian on the victim's restricted allotment. The Court reached this result by concluding that a 1906 amendment to the General Allotment Act precluded Indian Country jurisdiction in the so-called Indian Territory which is now eastern Oklahoma.
>
> The holding in Nowabbi is inconsistent with the Oklahoma Supreme Court's holding in Seneca-Cayuga. In Seneca-Cayuga, the Court held that a tribal allotment to the Quapaw and Seneca-Cayuga Tribes is Indian Country even though that land is located in eastern Oklahoma. Under Nowabbi the land could not have been "Indian Country" because the Nowabbi court held that allotted lands which were located in what had been "Indian Territory" before statehood were not "Indian Country" under federal law. We resolve this inconsistency in favor of the holding in Seneca-Cayuga. There is ample evidence to indicate that the Nowabbi Court misinterpreted the statutes and cases upon which it based its opinion. Furthermore, the 1948 Federal Indian Country statutes have attempted to extinguish doubts in favor of federal jurisdiction in an attempt to make a uniform rule. Nowabbi is hereby overruled.

State v. Klindt, 782 P.2d 401, 403-04 (Okla. 1985).

197. Oklahoma Tax Comm'n v. City Vending of Muskogee, Inc., 1192 Okla. LEXIS 158, 63 O.B.A.J. 2287 (Okla. 1992).

198. 495 U.S. 676 (1990). Congress' response to the Supreme Court's decision in *Duro*, which limited tribal jurisdiction to members only, not to members of other tribes, was to attach a rider to a defense appropriations act, expanding tribal powers of self-government to exercise criminal jurisdiction over all Indians. *See* Defense Appropriations Act of 1991, Pub. L. No. 101-938, § 8077 (b)-(d) (1990).

199. *Id.*

On February 26, 1991, the U.S. Supreme Court decided *Oklahoma Tax Commission v. Citizen Band of Potawatomie.*[200] In that case Oklahoma asserted that it could assert tax jurisdiction on tribal trust property because it was not a reservation. The Supreme Court rejected Oklahoma's contention in that part of the opinion of which the following is an excerpt:

> The State contends that the Potawatomis' cigarette sales do not, in fact, occur on a "reservation." Relying upon our decisions in *Mescalero Apache Tribe v. Jones*, Oklahoma argues that the tribal convenience store should be held subject to State tax laws because it does not operate on a formally designated "reservation," but on land held in trust for the Potawatomis. Neither *Mescalero* nor any other precedent of this Court has ever drawn the distinction between tribal trust land and reservations that Oklahoma urges. In *United States v. John*, we stated that the test for determining whether land is Indian Country does not turn upon whether that land is denominated "trust land" or "reservation." Rather, we ask whether that land has been "validly set apart for the use of the Indians as such, under the superintendence of the Government."
>
> *Mescalero* is not to the contrary; that case involved a ski resort outside of the reservation boundaries operated by the tribe under a 30 year lease from the Forest Service. We said that "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." Here, by contrast, the property in question is held by the Federal Government in trust for the benefit of the Potawatomies. As in *John*, we find that this trust land is "validly" set apart and thus qualifies as a reservation for tribal immunity purposes.[201]

The Oklahoma Tax Commission attempted to impose income taxes and motor vehicle taxes on members of the Sac and Fox Nation, and the resulting litigation was appealed to the U.S. Supreme Court. The Tax Commission argued that *McClanahan v. Arizona State Tax Commission*[202] should not apply to the Sac and Fox Nation because the reservation had been disestablished. Neither the District Court or Court of Appeals addressed the "disestablishment" argument. In this 1993 decision, Justice Sandra Day O'Connor did apply *McClanahan* in her opinion although the case was remanded for additional factual determinations. The breadth of the opinion's characterization of the

200. 498 U.S. 505 (1991).

201. *Id.* at 507.

202. 411 U.S. 164 (1973).

type of land on which the state's taxing authority did not apply obviously was intended to preclude further disputes by the Oklahoma Tax Commission. The opinion noted that:

> The residence of a tribal member is a significant component of the *McClanahan* presumption against state tax jurisdiction. But our cases make clear that a tribal member need not live on a formal reservation to be outside the State's taxing jurisdiction; it is enough that the member live in "Indian Country." Congress has defined Indian Country broadly to include formal and informal reservations, dependent Indian communities, and Indian allotments, whether restricted or held in trust by the United States.[203]

In her concluding paragraph, Justice O'Connor reiterated the lack of state authority to tax:

> Absent explicit congressional direction to the contrary, we presume against a state's having the jurisdiction to tax within Indian country, whether the particular territory consists of a formal and informal reservation, allotted lands, or dependent Indian communities.[204]

While the decision didn't provide a definitive answer to the question of reservation status in Oklahoma, it stated that treatment of the tribes and their members would be the same as if it were a reservation under the broad rubric of "Indian country." The Court obscured the issue further by its creation of a new category of "informal reservation" whose definition is sure to be the focus of future litigation.

The United States Supreme Court has now made the same point as the Oklahoma Supreme Court - Indian Country is Indian Country. If you will listen carefully, you can hear old Woody Guthrie playing his guitar as he lights out across the Indian reservations in the Indian Nations. And look, there, among the Oklahoma hills. That's not a masked rider and faithful Indian companion. It's Bill Rehnquist and Sandy O'Connor riding across those Oklahoma formal and "informal" reservations.

203. Oklahoma Tax Comm'n v. Sac and Fox Nation, 113 S. Ct. 1985, 1991 (1993).
204. *Id.* at 1993.