

LEGAL OPINION NO. 93-01

JURISDICTION OF THE CHEROKEE NATION
OVER CRIMINAL OFFENSES
WITHIN THE CHEROKEE NATION



PREPARED BY
THE CHEROKEE NATION OFFICE OF JUSTICE
SEPTEMBER 30, 1993

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September 30, 1993

Principal Chief Wilma Mankiller
Cherokee Nation
P.O. Box 948
Tahlequah, OK 74465

RE: Legal Opinion No. 93-01, Jurisdiction of the Cherokee Nation
over criminal offenses within the Cherokee Nation

Dear Principal Chief Mankiller:

This office has been requested to issue an opinion as to
whether the Cherokee Nation has jurisdiction over criminal activity
on Indian country within the Cherokee Nation.

I. Background of Cherokee Nation Right of Internal Self-
Governance

The territorial boundaries of the Cherokee Nation are
generally regarded as part or all of what is now the fourteen (14)
northeastern counties of the State of Oklahoma. See Treaties of
1828, 1833 and 1835, and the patent of 1838 and 1846 between the
United States of America and the Cherokee Nation. Jurisdiction
over this territory by the Cherokee Nation was established by
inherent sovereignty and preserved by terms of the various treaties
between the Cherokee Nation and the federal government. See Act of
Union dated July 12, 1839 and Constitution of September 6, 1839.

In 1906, at the time of Oklahoma statehood, the federal
government recognized that the government of the Cherokee Nation
was continued in "full force and effect for all purposes authorized
by law, until otherwise provided by law". See Act of
April 26, 1906, Session I. Chap 1876, 34 Stat. 822.

In 1987, in the case of Wheeler v. Swimmer, 835 F.2d 259 (10th
Cir. 1987), the U.S. Court of Appeals for the Tenth Circuit
affirmed the right of inherent sovereignty of the Cherokee Nation.
The Court held:

None of the provisions relied upon however, suggest that
the Cherokee Nation intended to surrender any of the
inherent rights of self governance reserved to all Indian

tribes. Nor do they suggest that the federal government intended to withdraw or any way abrogate that right. Further, a holding in the companion case [Wheeler 1] precludes any claim that the Cherokee Nation is to be treated as enjoying any fewer rights to internal self government than other tribes.

In a recent ruling in the United States District Court for the Northern District of Oklahoma, United Keetoowah Band of Cherokee Indians in Oklahoma v. Secretary of the Department of the Interior of the United States, Case No. C-90-608-B, Judge Brett ruled that:

Prior case law indicates that neither Congress, Secretary of the Interior, nor the Courts have made a distinction between the Cherokee Nation at the time of Oklahoma statehood and the current Cherokee Nation of Oklahoma. See, Wheeler v. Swimmer, 835 F.2d. 259 (10th Cir. 1987) (The Cherokee Nation still possesses an inherent right of self-government); Wheeler v. U.S. Department of Interior, 811 F.2d. 549, (10th Cir. 1987); and Groundhog v. Keeler, 442 F.2d. 674, 677 (10th Cir. 1971) (Cherokee tribal existence continues by virtue of Section 28, Act of April 26, 1906, 34 Stat. 137, 148).

See also, United Keetoowah Band v. Oklahoma Tax Commission, Slip Op. 4/28/93, Case No. 92-5070, (10th. Cir. 1993)

II. Criminal Prosecution Subject Matter Jurisdiction of the Cherokee Nation

Criminal prosecution is a fundamental right of self-government. This right of self-government by the Cherokee Nation was clearly acknowledged in the U.S. Supreme Court case of Talton v. Mayes, 163 U.S. 376 (1896). In Talton, the Court held that the Cherokee Nation was not bound by the requirements listed in the Bill of Rights of the U.S. Constitution since the Cherokee Nation's powers were not generated by the U.S. Constitution. The Court also affirmed that the Cherokee Nation did not violate due process rights under the fourteenth amendment because said amendment is only applicable to the states.

In 1898, Congress enacted what is commonly called the Curtis Act which abolished the Five Tribes' courts in Indian Territory. Act of June 28, 1898, Ch. 517, 30 Stat. 495, section 28. The Curtis Act was subsequently repealed by implication by the provisions of the Oklahoma Indian Welfare Act. Act of June 26, 1936, Ch. 831, 49 Stat. 1967. See also, Muscogee (Creek) Nation v. Hodel, 851 F.2d 1439 (D.C. Cir. 1988); and Harjo v Kleppe, 420 F. Supp. 1110 (D.C.D.C. 1976).

Congress enacted the Indian Civil Rights Act of 1968 (ICRA),

25 U.S.C.A. § 1301 et seq., which imposed most of the provisions of the Bill of Rights of the U.S. Constitution upon the tribes. In addition, the ICRA provides that Indian courts may only impose a sentence of one (1) year imprisonment and/or a five thousand (\$5,000.00) dollar fine in a criminal prosecution.

In October 1990, the Council of the Cherokee Nation enacted the Cherokee Nation Penal Code which provided for a modern penal code. See 21 CNCA 1992 § 1 et seq. In September 1992, the Council of the Cherokee Nation recodified its statutes including criminal law enacted prior to Oklahoma statute. See 25 CNCA 1992 § 6. The Cherokee Nation Penal Code provides the substantive law and assertion of criminal jurisdiction necessary for the Cherokee Nation to enforce its laws. Thus, the Cherokee Nation by virtue of its inherent sovereignty has established criminal subject matter jurisdiction by reaffirmance and enactment of a penal code.

The Cherokee Nation has concurrent jurisdiction with the federal government over the sixteen enumerated crimes listed in the Major Crimes Act, 18 U.S.C. § 1153. United Keetoowah Band v Oklahoma Tax Commission, Slip Op. 4/28/93, Case No. 92-5070, (10th Cir. 1993); Duro v. Reina, 110 S.Ct. 2053 (1990); and Indian Country U.S.A. v. Oklahoma Tax Comm'n, 829 F.2d 967 (10th Cir. 1987).

III. Criminal Personal Jurisdiction of the Cherokee Nation

The Cherokee Nation has criminal jurisdiction over federally recognized Indians who have committed a crime on Indian country within the Cherokee Nation. See U.S. v Rogers, 45 U.S. 567 (1846); Treaty of New Echota, 1835, 7 Stat. 478; Treaty of 1846, 9 Stat. 871; and Treaty of 1866, 14 Stat. 799, Ross v Neff, 905 F.2d 1349 (10th Cir. 1990), and U.S. v Sands 968 F.2d 1058 (10th Cir. 1992).

Congress enacted P.L. 102-137 (Act of Oct. 28, 1991, 105 Stat. 646) which provides that an Indian nation or tribe has jurisdiction over all Indians within its territory regardless of their tribal citizenship or affiliation. Hence, the Cherokee Nation has criminal personal jurisdiction over non-member Indians.

However, the Cherokee Nation has no criminal personal jurisdiction over non-Indians except for detention and removal from Indian country. U.S. v. McBratney, 104 U.S. 621 (1882), Oliphant v Suquamish, 435 U.S. 191 (1978).

IV. Criminal Territorial Jurisdiction of the Cherokee Nation

On November 13, 1990, the Council of the Cherokee Nation enacted Legislative Act 11-90 which recreated the Cherokee Nation District Court, defined jurisdiction and determined court procedures. Section 14 of the Act provides "that territorial

jurisdiction of the Cherokee Nation District Court shall extend to and include all Indian country also known as Cherokee country within the 14 county area of northeastern Oklahoma as defined by the treaties of 1828, 1833 and 1835, and the patent of 1838 between the United States of America and the Cherokee Nation and other such locations within the United States which qualify as Indian country." See 22 CNCA 1992 § 11 et seq.

The territorial jurisdiction of the Cherokee Nation has been affirmed in a series of federal cases. See United Keetoowah Band v Oklahoma Tax Commission, Slip Op. 4/28/93, Case No. 92-5070, (10th. Cir. 1993), United Keetoowah Band v Secretary of Interior, No. 90-C-608-B, (N.D. Okla. 5/31/91), United Keetoowah Band v Mankiller, No. 92-C-585-B, (N.D. Okla. 1/27/93). Thus, the Cherokee Nation has criminal territorial jurisdiction over Indian country within its territory.

V. Definition of Indian Country

Federal statute, 18 U.S.C. § 1151, provides for three types of Indian country.

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means

- a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation,
- b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and
- c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

From this definition, this office has identified at least eleven (11) types of land which may be Indian country. Nine (9) of these identifications are classified as dependent Indian communities pursuant to 18 U.S.C. § 1151 (b). See Appendix A for a detailed listing, description and legal authority for each.

VI. States do not have Criminal Jurisdiction over Indians in Indian Country

The State of Oklahoma has no criminal jurisdiction over Indians in Indian country within the Cherokee Nation. Ross v. Neff, 905 F.2d 1349 (10th Cir. 1990); Indian Country U.S.A. v. Oklahoma Tax Comm'n, 829 F.2d 967 (10th Cir. 1987); May v. Seneca-

Cayuga Tribe of Oklahoma, 711 P.2d 77, 81 (Okla. 1986); Cravatt v. State, 825 P.2d 277 (Okla. Crim. App. 1992); State v. Klindt, 782 P.2d 401 (Okla. Crim. App. 1989), U.S. V. Sands, 968 F.2d 1058, (10th Cir. 1992).

One aspect of the federal criminal statutory scheme in Indian country is Public Law 280, which is codified at 18 U.S.C. § 1360 with related provisions at 25 U.S.C. §§ 1321, 1323. Public Law 280 gave particular states criminal jurisdiction over all or specified parts of Indian country in certain states. This statute provided a mechanism whereby other states could assume criminal jurisdiction over Indian country. However, Oklahoma was not one of the states enumerated in the law and did not acted to assume jurisdiction under Public Law 280. In a case arising out of Osage County, the Tenth Circuit Court recognized that Oklahoma had not acted to assume jurisdiction over Indian country within the state and, therefore, did not have criminal jurisdiction within Indian country. United States v. Burnett, 777 F.2d 593 (10th Cir. 1985), cert. denied, 476 U.S. 1106 (1986).

The Indian Civil Rights Act of 1968 (ICRA), 82 Stat.77, 25 U.S.C.A. § 1301 et seq., amended Public Law 280 to: 1) require that a tribe give its consent before a state can assume criminal jurisdiction over its territory; and 2) allow retrocession of criminal jurisdiction back to the tribes from the states who took over such criminal jurisdiction under Public Law 280.

The State of Oklahoma has also argued in several cases that certain federal statutes passed between 1898 and 1906 conferred criminal jurisdiction upon Oklahoma over members of the Five Civilized Tribes. See Indian Country, U.S.A. v. Oklahoma Tax Comm'n, 829 F.2d 967 (10th Cir. 1987), cert. denied, 487 U.S. 1218 (1988). However, this notion has been rejected several times and most recently rejected in United States v. Sands, 968 P.2d 1058 (10th Cir. 1992).

VII. Conclusion

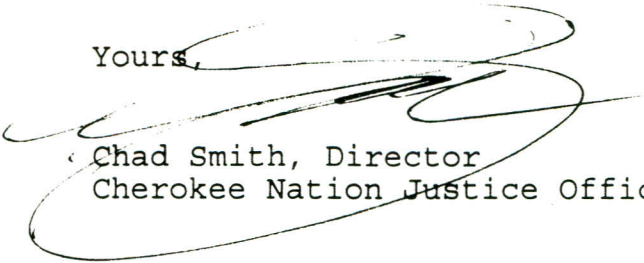
Therefore, it is the opinion of this office that the Cherokee Nation has criminal jurisdiction over all members and citizens of federally recognized tribes and nations for crimes occurring in Indian country within the Cherokee Nation territory. However, criminal jurisdiction is concurrent with the federal government as to certain enumerated crimes found in the Major Crimes Act, 18 U.S.C. § 1153.

The combination of crimes and parties over which the Cherokee Nation has jurisdiction can best be understood by the matrix appearing as Appendix C and other following appendices.

This opinion applies only to criminal jurisdiction. However, it should be noted that criminal jurisdiction is more restrictive

than jurisdiction in cases involving juveniles, child welfare,
civil cases of action and other regulated activities.

Yours,



Chad Smith, Director
Cherokee Nation Justice Office

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APPENDIX "A"
AREAS BELIEVED TO BE INDIAN COUNTRY

The areas listed below as examples are not conclusive and may change in status at any time.

(1) **Restricted Individual Allotments.** These sites are too numerous and scattered to list and the status of many would take an exhaustive title opinion to determine. However, each of the Cherokee Nation licensed smoke shops would be restricted or trust land. See Exhibit 1, List of Cherokee Nation licensed smokeshops

(2) **Individual Trust Land Held by USA.** These sites are too numerous and scattered to list and the status of many would take an exhaustive title opinion to determine.

(3) **Cherokee Nation Land in Trust with USA.** These sites are too numerous and scattered to list.

(4) **Unallotted Cherokee Nation Land.** Arkansas Riverbed and other small tracts.

(5) **Housing Authority- Restricted Donated Land.** Restricted land donated to the Cherokee Nation Housing Authority for Mutual Help homes. These sites are too numerous and scattered to list.

(6) **Housing Authority- Restricted Land with Lease.** Restricted land leased to the Cherokee Nation Housing Authority for Mutual Help homes. These sites are too numerous and scattered to list.

(7) **Housing Authority- Cherokee Nation Trust Land.** Cherokee Nation trust land on which the Cherokee Nation Housing Authority built individual Mutual Help homes. For cluster sites see Exhibit 2.

(8) **Dependent Indian Community- Cherokee Nation fee land.** W. W. Keeler Complex, Cherokee National Capitol Building, Cherokee Nation Supreme Court Building. Cherokee Nation National Jail. See Exhibit "3".

(9) **Dependent Indian community- Federal Indian land within Cherokee Nation.** Sequoyah Indian School, Claremore Indian Hospital, Hastings Hospital, etc. See Exhibit "3".

(10) **Dependent Indian community- Individual fee land.** Strokes Smith Stomp Grounds.

(11) **Dependent Indian community- Housing Authority Purchase/ Acquisition Sites.** Bell community. See Exhibit 2.

Exhibit "1"
Identification of Smokeshops
as Indian Country

SITE NAME	LEGAL DISCRIPTION	LAND STATUS
ADAIR COUNTY		
Bunch Smokeshop	Sec 23 T15N R25E	Restricted
Native American	Sec 20 T16N R25E	Leased/Restricted
Stilwell Smokeshop	L7 BL7 Ross McA-Wlms Add.	Restricted
CHEROKEE COUNTY		
Blackhaw Smokeshop	Sec 35 T18N R22E	Restricted
Cherokee Tobacco Sales	Sec 32 T17N R22E	Lease/Trust
Trotting Fox Smokeshop	Sec 18 T15N R2E	Trust
CRAIG COUNTY		
Pipestone Tobacco #1	Sec 28 T25N R19E	Trust
DELAWARE COUNTY		
Dry Creek Smokeshop	Sec 10 T21N R23E	Restricted
Frank's Smokeshop	Sec 6 T22N R23E	Lease/Restricted
Lil Indians	L14 BL9 Creekmore Add	Lease/Restricted
Ticket's Smokeshop	Sec 24 T20N R23E	Restricted
MAYES COUNTY		
Big Daddy's Smokeshop	Sec 17 T20N R21E	Restricted
Cherokee Hills	Sec 12 T21N R17E	Lease/Restricted
Seven Clan	Sec 13 T19N R20E	Lease/Restricted
Spavinaw Creek	Sec 10 T22N R21E	Lease/ Restricted
OTTAWA COUNTY		
Arrowhead Smokeshop	Sec 5 T27N R2E	Restricted
Hwy 60 Smokeshop	Sec 24 T26N R22E	Lease/Restricted
ROGERS COUNTY		
Catoosa Bingo Outpost	L2-3B12, L1-3 BL1 Port Pl Add	Trust
Cherokee Smokeshop	Sec 36 T20N R17E	Lease/Restricted
169 Smokeshop	Sec 11 T24N R15E	Lease/Restricted
Oupon Ahlung Smokeshop	L6-7 BL3 WE Chambers Add	Lease/Restricted
Pipe's Indian Smokeshop	L3 BL61 Sec 8 T21N R16E	Lease/Restricted

SEQUOYAH COUNTY

Broken Arrow Smokeshop	Sec 26 T11N R25E	Lease/Restricted
Roland Bingo Outpost	Sec 23 T11N R26E	Trust
Sequoyah Tobacco Sales	N 100ft Boohur Add R36E	Restricted
Vann's Iron-Post	L4 Sec 31 T12N R25E	Restricted

SITE NAME**LEGAL DESCRIPTION****LAND STATUS****TULSA COUNTY**

Five Tribes	Sec 1 T20N R12E	Lease/Restricted
Lewis Street Smokeshop	Sec 17 T20N R13E	Lease/Restricted
Peace Pipe	Sec 18 T20N R13E	Lease/Restricted
Pipestone Tobacco #2	Sec 13 T21N R12E	Lease/Restricted

WASHINGTON COUNTY

Indian Smokeshop	Sec 19 T26N R14E	Lease/Restricted
Lenape Smokeshop	Sec 9 T27N R13E	Lease/Restricted
OuPon Ahlung	Sec 16 T24N R13E	Lease/Restricted

Exhibit "2"
Identification of Housing Authority Cluster Sites
as Indian Country

ADAIR COUNTY

NAME OF SITE	LEGAL	LAND STATUS	TYPE	INDIAN COUNTRY
BELL	SEC 32 T15N R26E	TRIBAL	MH	YES
BLACKARDS	SEC 24 T16N R25E	PURCHASED	MH	NO
BUSHYHEAD HEIGHTS (5)	SEC 31 T18N R26E	PURCHASED	LR	NO
CARLA HEIGHTS	SEC 3 R15N R25E	PURCHASED	MH	NO
CHERRY TREE I	SEC 29 T15N R25E	TRIBAL	MH	YES
CHERRY TREE NEW	SEC 29 T15N R25E	TRIBAL	MH	YES
DOGWOOD	SEC 34 T16N R25E	PURCHASED	MH	NO
DUNCANVILLE	SEC 32 T15N R26E	PURCHASED	MH	NO
FAIRFIELD	SEC 23 T16N R25E	PURCHASED	MH	NO
HOGNER HEIGHTS	SEC 3 T15N R25E	PURCHASED	LR	NO
KILLER MT SCT 5	SEC 28 T14N R25E	DONATED	MH	YES
LYON SWITCH	SEC 14 T15N R24E	TRIBAL	MH	YES
LYON SWITCH	SEC 23 T15N R24E	TRIBAL	MH	YES
MARYETTA	SEC 32 T15N R26E	PURCHASED	MH	NO
MOLLOW HOLLOW	SEC 9 T14N R24E	TRIBAL	MH	YES
PLAINVIEW ADDITION	SEC 3 T15N R24E	PURCHASED	LR	NO
PLAINVIEW ADDITION	SEC 3 T15N R24E	PURCHASED	MH	NO
SQUYRES COUNTY ESTATES	SEC 2 T15N R25E	PURCHASED	MH	NO
STAND ADDITION	SEC 29 T15N R25E	TRIBAL	MH	YES
STANDPIPE	SEC 10 T15N R25E	PURCHASED	MH	NO

CHEROKEE COUNTY

NAME OF SITE	LEGAL	LAND STATUS	TYPE	INDIAN COUNTRY
ARNOLD PRICE	SEC 33 T18N R22E	PURCHASED	MH	NO
BIRDTAIL ADDITION	SEC 34 T17N R22E	TRIBAL	LR	YES
CHEROKEE CLUSTER (9)	SEC 30 T16N R22E	PURCHASED	MH	NO
CROSSLIN HEIGHTS	SEC 25 T16N R21E	PURCHASED	MH	NO
DRY CREEK	SEC	PURCHASED	MH	NO
GRANDVIEW I	SEC 18 T17N R22E	PURCHASED	MH	NO
GRANDVIEW II	SEC 18 T17N R22E	PURCHASED	MH	NO
GRANDVIEW TEN	SEC 18 T17N R22E	PURCHASED	MH	NO
INDIAN MEADOWS	SEC 10 T16N R22E	PURCHASED	MH	NO

JACK BROWN HEIGHTS	SEC 4 T16N R22E	PURCHASED	LR	NO
LEON DANIELS	SEC 32 T17N R22E	PURCHASED	LR	NO
LENA HEIGHTS (10)	SEC 34 T17N R22E	PURCHASED	MH	NO
LOST CITY	SEC 2 T17N R20E	PURCHASED	MH	NO
MCSPADDEN HEIGHTS	SEC 19 T16N R22E	PURCHASED	MH	NO
MAHANEY ADDN	SEC 34 T17N R22E	PURCHASED	MH	NO
NORTHEASTERN ESTATES	SEC 27 T17N R22E	PURCHASED	MH	NO
PHIL ROGERS ADDITION	SEC 33 T18N R22E	PURCHASED	MH	NO
PLAINVIEW MEADOWS	SEC 25 T17N R20E	PURCHASED	MH	NO
PROCTOR HEIGHTS 1&2	SEC 4 T16N R22E	PURCHASED	LR	NO
PRAIRIE WINDS	SEC 17 T22N R22E	PURCHASED	MH	NO
ROCKY FORD	SEC 12 T12N R22E	PURCHASED/TRIBAL	MH	YES
ROSS SWIMMER ADDITION	SEC 4 T16N R22E	PURCHASED	LR	NO
SOUTH CEDAR PARK	SEC 33 T17N R22E	PURCHASED	MH	NO
WARD PROPERTY	SEC 25 T16N R21E	PURCHASED	MH	NO
WELLING SITES	SEC 1 T16N R22E	TRIBAL	MH	YES
WOODALL (20)	SEC 1 T15N R22E	PURCHASED	MH	NO
WOODLAND	SEC 3 T16N R22E	PURCHASED	MH	NO

CRAIG COUNTY

NAME OF SITE	LEGAL	LAND STATUS	TYPE	INDIAN COUNTRY
BUFFINGTON HEIGHTS	SEC 10 T25N R20E	PURCHASED	LR	NO

DELAWARE COUNTY

NAME OF SITE	LEGAL	LAND STATUS	TYPE	INDIAN COUNTRY
CHEROKEE HEIGHTS OLD	SEC 34 T20N R23E	PURCHASED	MH	YES
CHOPPER HEIGHTS	SEC 5 T14N R24E	PURCHASED	MH	NO
HELEN ACRES	SEC 18 T24N R24E	PURCHASED	MH	NO
KENWOOD (4 SETS)	SEC 9 T21N R23E	TRIBAL	MH	YES
KENWOOD (5)	SEC 8 T21N R22E	TRIBAL	MH	YES
OAKHILL	SEC 15 T22N R24E	TRIBAL	MH	YES
OAKWOOD	SEC 22 T25N R24E	PURCHASED	MH	NO
OAKWOOD 2ND	SEC 22 T25N R24E	PURCHASED	MH	NO
PRICE ADDN (Jay, OK)	SEC	PURCHASED	MH	NO
FASON SUMMERFIELD HEIGHTS	SEC 1 T22N R23E	PURCHASED	LR	NO
PERRY GRISSOM ADDITION	SEC 12 T25N R24E	TRIBAL (SENECA)	MH	YES

ROBERT SWIMMER 2	SEC 41 T22N R23E	PURCHASED	LR	NO
SEQUOYAH	SEC 28 T20N R23E	PURCHASED	MH	YES
WHITEWATER	SEC 27 T24N	PURCHASED	MH	NO

MAYES COUNTY

NAME OF SITE	LEGAL	LAND STATUS	TYPE	INDIAN COUNTRY
CHEROKEE HEIGHTS (HWY 69-A)	SEC	TRIBAL/PURCHASED	LR	YES
DEERTRAIL	SEC 11 T21N R20E	PURCHASED	MH	NO
EMBRY ADDITION CHOTEAU	SEC 26 T20N R18E	PURCHASED	MH	NO
JOHNNY CHOPPER (LOCUST GROVE)	SEC	PURCHASED	LR	NO
KENDRICK (1-3)	SEC 18 T21N R19E	PURCHASED	MH	NO
KENNEDY INGRAM	SEC 21 T20N R20E	PURCHASED	MH	NO
LOCUST GROVE	SEC 22 T20N R18E	PURCHASED	MH	NO
SPAVINAW Y KNIGHTS (SUBDIVISIONS IN SALINA)	SEC	PURCHASED	MH	NO
WILLARD STONE	SEC 22 T20N R20E	PURCHASED	LR	NO

MUSKOGEE COUNTY

LAND SITE	LEGAL	LAND STATUS	TYPE	INDIAN COUNTRY
ALEXANDER ADDITION	SEC 29 T12N R19E	PURCHASED	MH	NO
FT.GIBSON (5)	SEC	PURCHASED	MH	NO
HOUSTON JOHNSON HEIGHTS	SEC 21 T12N R19E	PURCHASED	LR	NO
PORUM	SEC CITY OF PORUM	PURCHASED	MH	NO
WHEELER ESTATES	SEC 11 T10N R19E	PURCHASED	LR	NO

NOWATA COUNTY

LAND SITE	LEGAL	LAND STATUS	TYPE	INDIAN COUNTRY
RIDER ADDITION	SEC 30 T26N R16E	PURCHASED	MH	NO
WAUHILLAU HEIGHTS	SEC 25 T26N R15E	PURCHASED	LR	NO

OTTAWA COUNTY

LAND SITE	LEGAL	LAND STATUS	TYPE	INDIAN COUNTRY
JOE SMITH PROPERTY	SEC 6 T28N R24E	PURCHASED	MH	NO
MIAMI URBAN RENEWAL	CITY OF MIAMI	PURCHASED	MH	NO
MINERAL HEIGHTS ADDI.	CITY OF PITCHER	PURCHASED	MH	NO
OAK DALE	SEC 16 T28N R24E	PURCHASED	LR	NO

ROGERS COUNTY

NAME OF SITE	LEGAL	LAND STATUS	TYPE	INDIAN COUNTRY
CLAREMORE (20)	SEC	PURCHASED	MH	NO
KELLY HEIGHTS	SEC 16 T1N R16E	PURCHASED	MH	NO
WILL ROGERS SR.CITIZEN	SEC	PURCHASED	LR	NO

SEQUOYAH COUNTY

NAME OF SITE	LEGAL	LAND STATUS	TYPE	INDIAN COUNTRY
GORE	SEC 7 T12N R21E	PURCHASED	MH	NO
GUNTER RIDGE (MULDROW)	SEC	PURCHASED	MH	NO
JODA NELSON	SEC 8 T12N R21E	PURCHASED	MH	NO
JONES SITES (3)	SEC 11 T12N R25E	PURCHASED	MH	NO
MARBLE CITY	SEC 30 T13N R24E	PURCHASED	MH	NO
MARBLE CITY (11)	SEC 30 T13N R24E	PURCHASED	MH	NO
SUMMER CIRCLE (SALLISAW)	SEC	PURCHASED	MH	NO
TOWN OF VIAN (BLOCK 35 TRACT 1-6)	SEC	PURCHASED	MH	NO
VIAN CLUSTER	SEC 3 T12N R22E	PURCHASED	MH	NO
WHITMIRE (4)	SEC 15 T13N R22E	PURCHASED	MH	NO

WASHINGTON COUNTY

LAND SITE	LEGAL	LAND STATUS	TYPE	INDIAN COUNTRY
KEELER ADDITION	SEC	PURCHASED	LR	NO

SEC - SECTION
T - TOWNSHIP
R - RANGE
MH - MUTUAL HELP
LR - LOW RENT

Exhibit "3"

**Dependent Indian Communities
and Miscellaneous Indian Country Sites**

Cherokee Nation Fee Land- Dependent Indian Communities

1. W.W. Keeler Complex, Tahlequah
2. Cherokee Nation Capitol Building, Tahlequah
3. Cherokee Nation Supreme Court Building, Tahlequah
4. Cherokee Nation National Jail, Tahlequah
5. John Ketcher Youth Shelter, Tahlequah
6. Cherokee Nation Industries, Stilwell
7. Sam Hider Clinic, Jay

Cherokee Nation Trust Land- Facilities

1. Cherokee Nation Complex, Stilwell
2. Cherokee Nation Ranch
3. Cherry Tree Head Start, Cherry Tree
4. Belfonte Community Building, Belfonte
5. Bull Hollow Community Building, Bullhollow
6. Cherokee Nation Bingo Outpost, Roland
7. Chilocco land

Federal Enclave- Dependent Indian Community

1. Claremore Indian Hospital, Claremore
2. Hastings Indian Hospital, Tahlequah
3. Wilma Pearl Mankiller Clinic, Stilwell
4. Redbird Smith Clinic, Sallisaw

APPENDIX "B"
AREAS NOT BELIEVED TO BE INDIAN COUNTRY

Housing Authority Sites

- (1) Low Rent Housing Sites. See Exhibit "2"
- (2) Housing Authority Purchase/Acquisition Sites. See Exhibit "2".
- (3) Unrestricted Donated Land.

Other

- (4) United Keetoowah Band Fee Simple Smoke Shop Sites
(See United Keetoowah Band v. Oklahoma Tax Commission No. 92-5070, 10th Cir. 1993)

APPENDIX "C"

VICTIM-DEFENDANT TABLE OF JURISDICTION

Victim	Defendant	
	Indian	Non-Indian
Indian	Major-Federal Minor-Cherokee Nation	Federal
Non-Indian	Federal/Cherokee Nation	State
No-Victim/ Consensual	Federal/Cherokee Nation	Federal/State

CRIMINAL JURISDICTION IN INDIAN COUNTRY

<u>Def</u>	<u>Victim</u>	<u>Crime</u>	<u>Jurisdiction</u>	<u>Authority</u>
I*	I	Major	Federal Tribe(?)	MCA inherent
I*	I	Minor	Tribe	inherent
I*	non-I	Major	Federal Tribe(?)	MCA inherent
I*	non-I	Minor	Tribe Federal	inherent GCA (only if tribe does not prosecute)
I*	none	v'less	Tribe Federal(?)	inherent GCA (only if tribe does not prosecute)
non-I*	I	All	Federal	GCA
non-I*	non-I	All	State	McBratney
non-I*	none	v'less	State	McBratney

Public Law 280 States

<u>Def</u>	<u>Victim</u>	<u>Crime</u>	<u>Jurisdiction</u>	<u>Authority</u>
I*	anyone	All	State Tribe?	PL 280 inherent
non-I*	anyone	All	State	PL 280

* Tribal jurisdiction is inherent over both members (Wheeler; Crow Dog) and non-member Indians (ICRA).

* Tribal jurisdiction does not exist over any non-Indian defendant (Oliphant).

APPENDIX "E"

Narrative Identifying Types of Indian Country

A. Established Indian Country

- (1) **Restricted Individual Allotments.**
- (2) **Individual Trust Land Held by USA.**
- (3) **Cherokee Nation Land in Trust with USA.**
- (4) **Unallotted Cherokee Nation Land.** Example: Arkansas Riverbed.
- (5) **Housing Authority- Restricted Donated Land.** These are Mutual Help Occupancy (MHO) home sites where the occupant donated restricted land to the Housing Authority by a deed transaction. This factual case is identical with Housing Authority of the Seminole Nation v. Harjo, 790 P.2d 1098, (Okla. 1990), wherein the Oklahoma Supreme Court held the subject tract was Indian country. There are approximately 600 units under this and a similar category where the land donated was not restricted land.
- (6) **Housing Authority- Restricted Land with Lease.** These are MHO home sites where the occupant executes a long term lease with the Housing Authority and receives a lease back after construction of the home. This factual case is identical with Ahboah v Housing Authority of the Kiowa Tribe, 660 P.2d 625 (Okla. 1983), wherein the Oklahoma Supreme Court held the subject tract was Indian country.
- (7) **Housing Authority- Cherokee Nation Trust Land.** These are MHO home sites located on land held in trust for the Cherokee Nation by the federal government and generally are cluster sites. This factual situation is similar to Ross v. Neff, 905 F.2d 1349 (10th Cir. 1990) in which the Tenth Circuit U.S. Court of Appeals held the land was Indian country.
- (8) **Dependent Indian Community- Cherokee Nation fee land with substantial federal contacts.** This is Cherokee Nation fee land where there are substantial federal contacts, historical context, and/or demonstrated federal preemption to evidence a dependent Indian community. Example: Cherokee Nation W.W. Keeler Complex, Cherokee National Capitol Building.
- (9) **Dependent Indian community- Federal Indian land within Cherokee Nation.** These are tracts that are owned by the federal government but the function of the tract is

exclusively for the benefit of Indians. Example: Sequoyah High School, Claremore Indian Hospital. See CMG v State, 594 P.2d 798 (Okl. Crm. 1979).

(10) **Dependent Indian community- Individual fee land.** These sites can only be evaluated on a case by case basis. Example: Strokes Smith Stomp Grounds.

(11) **Dependent Indian community- Housing Authority Purchase/Acquisition Sites.** These are cluster projects where the Housing Authority purchases land for the individual MHO or the project and includes the land cost in the MHO payment. These sites are in well-established Indian communities and may be part of projects that combine restricted or trust land with fee simple land. Example: Bell community.

B. Areas which are not Indian Country

(1) **Low Rent Housing Sites.** These are sites where the Housing Authority manages public low rent housing for persons of all races and the land is held by the Housing Authority. Example: Bushyhead Heights. See Eaves v. State, 795 P.2d 1060 (Okl. Cr. 1990) rehearing 800 P.2d 251 (Okl. Cr. 1990).

(2) **Housing Authority Purchase/Acquisition Sites.** These are cluster projects where the Housing Authority purchases land for the individual MHO or the project and includes the land cost in the MHO payment. These sites are not in established Indian communities. Example: Vian Cluster, Vian, Oklahoma.

(3) **Donated Land-Unrestricted.** These are MHO homes where the occupant donated unrestricted land to the Housing Authority by a deed transaction. There is no definitive law on this fact situation. However, it will be very difficult for the Housing Authority to distinguish these MHO homes from those located on Donated Land-Restricted.

(4) **Federal Enclaves.** These sites were acquired by the federal government under specific federal provisions statutorily providing for federal, state or concurrent federal-state jurisdiction. These sites would not have a historical context or relationship between the Cherokee Nation and the federal government and may not be set aside primarily for the use of Indians. For example, these sites would include the Muskogee Area BIA office in the federal building in Muskogee, Oklahoma.

II. Victim-Defendant Criteria

A. Crime by an Indian against an Indian.

1. **Major Crimes-** Federal courts have jurisdiction under the Major Crimes Act, 18 U.S.C. § 1153. The Cherokee Nation would have concurrent jurisdiction for major crimes not prosecuted by the federal government, however the maximum penalty by the tribe would be one year incarceration and a \$5,000 fine pursuant to 25 U.S.C. 1302.

The Major Crimes are: 1) Murder, 2) manslaughter, 3) kidnapping, 4) maiming, 5) rape, 6) involuntary sodomy, 7) carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, 7) assault with intent to commit rape, 8) incest, 9) assault with intent to commit murder, 10) assault with a dangerous weapon, 11) assault resulting in serious bodily injury, 12) arson, 13) burglary, 14) robbery, and 15) a felony under section 661 of this title 18 United State Code within Indian country.

2. Other than Major Crimes-

a. Cherokee Nation members are victim and defendant- The Cherokee Nation would have exclusive jurisdiction.

b. Other Indians are the victim and/or defendant- The Cherokee Nation has jurisdiction over all Indians within Cherokee country pursuant to P.L. 102-137 (Act of Oct. 28, 1991, 105 Stat. 646).

B. Crimes by an Indian against an Non-Indian.

1. **Major Crimes-** Federal government has jurisdiction pursuant to the Major Crimes Act, 18 U.S.C. § 1153. The Cherokee Nation has concurrent jurisdiction pursuant to Cherokee Nation Legislative Act # 11-90 Section 13, 11/13/90, 22 CNCA 1992 § 11 et seq.

2. **Other Crimes-** Federal government has jurisdiction pursuant to the General Crimes Act, 18 U.S.C. § 1152. The Cherokee Nation has concurrent jurisdiction pursuant to Cherokee Nation Legislative Act # 11-90 Section 13, 11/13/90, 22 CNCA 1992 § 11 et seq.

3. **Law Applied-** Federal government applies state law pursuant to the Assimilative Crimes Act, 18 U.S.C. § 13, except where federal statute specifies application of federal law, e.g. assault on federal officer. For crimes within the jurisdiction of the Cherokee Nation, the Cherokee Nation applies its law.

C. Crimes by Non-Indian Against an Indian.

1. **Jurisdiction of All Crimes-** Federal government pursuant to General Crimes Act, 18 U.S.C. § 1152.

2. **Law Applied-** State law will be applied by the Federal government pursuant to Assimilative Crimes Act, 18 U.S.C. § 13.

D. **Crimes by Non-Indian against an Non-Indian**
State court has jurisdiction pursuant to U.S. v. McBratney, 104 U.S. 621 (1882).

E. **"Victimless" and "Consensual" Crimes by an Indian.**
Cherokee Nation Court jurisdiction.

F. **"Victimless" and "Consensual" Crimes by a Non-Indian.**

State and Federal Concurrent jurisdiction. The federal government has jurisdiction under the General Crimes Act, 18 U.S.C. § 1152 and applies state law under the Assimilative Crimes Act, 18 U.S.C. § 13. The state has concurrent jurisdiction pursuant to U.S. v. McBratney, 104 U.S. 621 (1882).

APPENDIX "F"
CASE LAW

Trust and Restricted Allotments

(1) **Restricted Osage allotment land is Indian country.** State v. Burnett, 671 P.2d. 1165 (Okla. Crim. App. 1983). In a criminal case, the Oklahoma Court of Criminal Appeals held that trust allotments or restricted allotments are Indian country since the United States possesses a supervisory control over the land citing United States v. Ramsey, 271 U.S. 467 (1926) and United States v. Pelican, 232 U.S. 442 (1914). The controlling factor was "federal supervisory control over the land."

(2) **Cherokee Nation land held in trust by U.S. Government is Indian country.** Ross v. Neff, 905 F.2d 1349 (10th Cir. 1990). The 10th Circuit U.S. Court of Appeals held that land held in trust for the Cherokee Nation is Indian country.

(3) **Kiowa trust allotment is Indian country.** State v. Littlechief, 573 P.2d. 263 (Okla. Crim. App. 1978). In a criminal case, the Oklahoma Court of Criminal Appeals adopted a ruling of the United States District Court, Western District which held the subject tract was Indian country pursuant to DeCoteau v. District Court, 420 U.S. 425 (1975).

(4) **Kiowa trust allotment long term leased to Kiowa Housing Authority and leased back to beneficial Indian owners is Indian country.** Ahboah v. Housing Authority of the Kiowa Tribe, 660 P.2d 625 (Okla. 1983). In a housing eviction case the Oklahoma Supreme Court held that the state court had no jurisdiction over the trust allotment.

(5) **Five Tribes allotment is Indian country.** Cravatt v. State, 825 P.2d 277 (Okla. Crim. App. 1992). The Oklahoma Court of Criminal Appeals held that a restrict allotment of the Five Tribes was Indian country. Also see U.S. V. Sands, 968 F.2d 1058, (10th Cir. 1992).

Dependent Indian Community

(6) **Chillocco Indian School is Indian Country.** C.M.G. v. State, 594 P.2d. 798 (Okla. Crim. App. 1979). In a juvenile delinquency case, the Court of Criminal Appeals cited United States v. Celestine, 215 U.S. 278 (1909), stating that Indian country is "country to which the Indians retained the right of use and occupancy, involving-under certain

restrictions-freedom of action and of enjoyment in their capacity as district people, unless by virtue of some reservation express at the time of extinguishment of such title, and clearly appearing..." and that one must look at "the scope and purpose of the act creating it, and the nature of the title, use and occupancy, how held, exercised, and enjoyed." In United States v. Martine, 442 F.2d 1022 (10th Cir. 1971) the 10th Circuit U.S. Court of Appeals used criteria of "the nature of the area in question, the relationship to the inhabitants of the area to Indian Tribes and to the federal government, and the established practice of government agencies toward the area. In United States v. Mazurie, 419 U.S. 544 (1975) the U.S. Supreme Court held the fee land held by non-Indians adjacent to Wind River Shoshone reservation was a dependent Indian community where the Indian population was predominantly Indian.

(7) Seminole restricted allotment deeded to Seminole Housing Authority is Indian country. Housing Authority of the Seminole Nation v. Harjo, 790 P.2d 1098 (Okla. 1990). In a housing eviction case, the Oklahoma Supreme Court held the subject tract was a dependent Indian community. The Court cited United States v. South Dakota, 665 F.2d 837 (8th Cir. 1981) for the criteria in determining whether a location is a dependent Indian community pursuant to 18 U.S.C. § 1151 (b):

(1) [W]hether the United State has retained 'title to the lands which it permits the Indians to occupy' and 'authority to enact regulations and protective laws respecting this territory,'

(2) 'the nature of the area in question, the relationship of the inhabitants of the area to Indian tribes and to the federal government, and the established practice of government agencies toward the area,'

(3) whether there is 'an element of cohesiveness... manifested either by economic pursuits in the area, common interests, or needs of the inhabitants as supplied by that locality.' and

(4) 'whether such land have been set apart for the use, occupancy and protection of dependent Indian peoples.'

The Court held that although the allotment had been deeded that superintendence of the property continued during the duration of the MHO Agreement. Fact questions identified in Harjo include:

(A) Types of federal superintendence include:

1. Housing Authority controls all legal aspects of the land and is subject to extensive federal regulation; Housing

Authority receives all of its funding from federal government;

2. Housing Authority is a creation of the Cherokee Nation i.e. Principal Chief appoints commissioners who are subject to approval of the Cherokee Nation council;

3. Federal government requires cooperative agreements with local municipalities and counties for location of projects;

4. Successor of the property is subject to federal restrictions;

(B) Nature of area includes:

5. Blood quantum of person;

6. Membership in tribe;

7. Tribal Government relationship to Housing Authority;

8. Federal (IHS, HUD and BIA) and Tribal government providing development cost and services including: testing of water, water wells rural water hook-up, roads, sewage lagoon, septic tanks, and utility hook-ups;

9. Other family MHO houses in area;

10. Indian Health services for area including CHR, clinics, and hospitals;

11. Tribal programs including vocational training, commodity food distribution, manpower, head start;

12. JOM and Title V funds to local schools in behalf of Indian students;

13. Impact Aid to county;

14. Housing Authority In Lieu of Taxes Payment;

15. No local property taxes assessed by County Assessor;

16. Housing Authority policy to keep homes within family by MHO agreement;

17. Indian preference in construction;

18. Annual inspections of home by Housing Authority

19. History of placing homes in established Indian communities;

20. Housing authority administer Comprehensive Improvement Assistance Program to correct construction defects after annual inspections;

(C) Cohesiveness of Area includes:

21. Pattern of families geographically together;

22. Number of Indians on former original allotment;
Number of Indians in area

23. Character as a homestead;

24. Indian churches and ceremonial grounds;

25. Use of native language by occupants;

26. On-going native community (matrilineal society);

27. Number of years and extent of occupancy in area;

28. Cultural activities, stomp grounds, medicine springs,

- arts and crafts;
- 29. Social activities;
- 30. Traditional gathering areas, i.e. blackberries, huckleberries, pecans, wishy, fishing, hunting, salt licks, wild onions, etc.
- 31. Indian cemeteries;
- 32. Tribal recognition of communities;
- 33. Historical significance of communities;

(D) Set apart for use of dependent Indian peoples:

- 34. Purpose of exchanged deed i.e. sole purpose of securing federal housing or some other reason;
- 35. Occupant's eligibility to put land in trust after pay-off of MHO;
- 36. Overall plan of tribal self-determination, continued existence and preserving individual allotment;
- 37. Recognition of tribal territory i.e. present and historical boundaries, services areas recognized by federal and state governments etc.;

NOT INDIAN COUNTRY

(8) Ceded land is not Indian country.

Ellis v. State, 286 P.2d 326 (Okla. Crim. App. 1963), cert. denied, 376 U.S. 945 (1964). In a criminal case, the Oklahoma Court of Criminal Appeals held that the State had jurisdiction over an Indian who had committed a crime on ceded land. The lands were formerly in the Cheyenne-Arapaho reservation.

(9) Osage Tribal Housing Project.

Eaves v. State, 795 P.2d 1060 (Okla. Cr. 1990) rehearing 800 P.2d 251 (Okla. Cr. 1990). In a criminal case, the Oklahoma Court of Criminal Appeals held the Housing project acquired from a non-Indian was not a dependent Indian community and that the State had jurisdiction.

- (1) The subject tract was an allotment that was sold to a non-Indian which was acquired by the Osage Tribal Housing Authority;
- (2) The Housing Authority was a state chartered corporation it was subject to state jurisdiction;
- (3) The State and the City of Pawhuska considered the tract to be under their jurisdiction from origin;
- (4) The City and State have provided all essential services;
- (5) The federal government merely subsidizes selective programs;
- (6) The tribal council has not enacted a code or ordinances for criminal prosecution;
- (7) The federal prosecutor has never attempted to exercise jurisdiction.

(10) United Keetoowah Band acquired fee land

In United Keetoowah Band v Oklahoma Tax Commission, Slip Op. 4/28/93, Case No. 92-5070, (10th. Cir. 1993), the United Keetoowah Bank acquired fee land for smoke shop purposes without it being place in trust by the Secretary of Interior. The U.S. Court of Appeals held that mere acquisition of fee land does not create Indian country.

FILED
United States Court of Appeals
Tenth Circuit

JAN 1 1990

ROBERT L. MOECKER
Clerk

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

RONNIE ROSS,

Plaintiff-Appellant,

v.

No. 88-1404

RUSSELL NEFF, in his Official
Capacity as Sheriff of Adair County,
Oklahoma; BILLY JACK McLEMORE,
individually and in his Official
Capacity; and COUNTY OF ADAIR,
OKLAHOMA, a political subdivision
of the State of Oklahoma,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Oklahoma
(D.C. No. 87-185-C)

Submitted on the briefs:

Joseph C. Self of Sexton Law Firm, Fort Smith, Arkansas, for
Plaintiff-Appellant.

Mark Green of Green and Green, Muskogee, Oklahoma, for Defendant-
Appellee.

Before LOGAN, MOORE, and ANDERSON, Circuit Judges.

LOGAN, Circuit Judge.

Plaintiff Ronnie Ross brought two separate Fourth Amendment based claims against the defendants Deputy Billy Jack McLemore, Sheriff Russell Neff and Adair County, Oklahoma, pursuant to 42 U.S.C. § 1983.¹ In one, Ross alleges that defendants violated Ross' rights when McLemore illegally arrested him on Indian Tribal Trust land, because Oklahoma peace officers have no jurisdiction in Indian country. Second, Ross asserts an independent constitutional claim based on McLemore's alleged use of excessive force in making the arrest. He argues that the county was party to both violations: the first because it was its custom or policy to allow officers to make arrests in Indian country; and the second because of its failure to train and supervise McLemore and its custom and policy allowing its deputies access to and use of firearms.

The trial court directed a verdict in favor of the county. After an initial trial ending in a mistrial, Deputy McLemore

¹ Although the pleadings and briefs are far from clear, we think plaintiff's complaint and later pleadings may be fairly read to state two separate causes of action. Ross premises his claims, at least in part, on the Due Process Clause of the Fourteenth Amendment. Because the Supreme Court has recently made clear that excessive force claims that are based on objections to an arrest should be analyzed under the specific provisions of the Fourth Amendment, rather than more general "substantive due process" provisions, see Graham v. Connor, 109 S. Ct. 1865, 1870-71 (1989), we will analyze Ross' claims under the Fourth Amendment as made applicable to the states through the Fourteenth Amendment.

The suits against McLemore and Adair County Sheriff Russell Neff in their official capacities we consider to be simply suits against the county. See Varela v. Jones, 746 F.2d 1413, 1418 (10th Cir. 1984) ("[W]e treat suits against city officials in their official capacities as suits against the city."). Accordingly, we make no further mention in this opinion of Sheriff Neff except as a witness, and the discussion of McLemore, except when he is acting as representative of the county, relates to the suit against him in his individual capacity only.

eventually prevailed on a jury verdict.² The central issue on appeal is whether the district court erred as a matter of law in holding that McLemore was acting within his jurisdiction when he arrested Ross. This holding, of course, entirely removed Ross' \$ 1983 claim based on the allegedly extra-jurisdictional arrest from the jury's consideration. We conclude that the court did err. We hold, however, that McLemore was entitled to qualified immunity on this claim, and that the court's error did not taint the jury verdict on the excessive force claim. Furthermore, the directed verdict in favor of the county on the excessive force claim was proper. Accordingly, we remand only the extra-jurisdictional arrest claim against the county for trial.³

I

Background Facts

Plaintiff Ross, a Cherokee Indian, spent most of the day of July 4, 1986, with friends and relatives at the W.W. Keller Ballpark (a/k/a Greasy Ballpark) in Adair County, Oklahoma. The Greasy Ballpark is located on Cherokee Indian Tribal Trust land. The land was then under a five-year lease, approved by the local office of the Bureau of Indian Affairs, to the South Greasy Community Park Association. The record does not reflect whether

² Our review of this case is hampered by gaps in the record, including a failure of the parties to designate transcripts from the second trial. Because the only issue on appeal arising out of the excessive force claim deals with the trial court's refusal to instruct the jury that McLemore was outside his jurisdiction when he made the arrest, we are able to resolve the case without reference to the second trial transcript.

³ The parties waived oral argument; therefore, the case was submitted on the briefs.

the Association is a tribal organization, although its president, Mose Killer, is a Cherokee Tribe member.

Sometime in the early evening of July 4, 1986, Killer called the Adair County Sheriff's Department to request that the police "make an appearance" at the park. III R. 56. He testified that he was concerned that some people were driving too quickly down the driveway to exit the ballpark grounds; he was also concerned about traffic on the driveway being blocked by persons loitering and drinking beer at the ballpark after the end of the day's activities.

Deputy McLemore reported to the ballpark, where he attempted to arrest Ross for public intoxication. The evidence is disputed whether Ross resisted arrest. We need not resolve the factual conflict, however, to decide the legal question at issue.⁴ In any event, an altercation occurred during which McLemore shot Ross in the leg, which later required amputation.

II

Jurisdiction to Arrest

The deputy's jurisdiction to arrest is an issue of law which we review de novo. See, e.g., In re Tri-State Equipment, Inc., 792 F.2d 967, 970 (10th Cir. 1986).

⁴ The record before us does not reflect whether Ross was charged with or convicted of public intoxication or resisting arrest, or whether he was even formally arrested. The Supreme Court has recently held, however, that the intentional use of deadly force to stop a suspect constitutes a seizure for the purpose of Fourth Amendment analysis. See Brower v. Inyo, 109 S. Ct. 1378, 1381 (1989). Therefore, we will analyze this case as though Ross had been formally arrested.

Land held in trust for Indian use, like the Greasy Ballpark, is "Indian country" as that term is defined in 18 U.S.C. § 1151. United States v. John, 437 U.S. 634, 648-49 (1978); Cheyenne-Arapahoe Tribes v. Oklahoma, 618 F.2d 665, 668 (10th Cir. 1980). Indian country is subject to exclusive federal or tribal criminal jurisdiction "[e]xcept as otherwise expressly provided by law." 18 U.S.C. § 1152. Congress has granted general criminal jurisdiction to some states over Indian country within their borders, see, e.g., 18 U.S.C. §§ 1162 (various states), 3243 (Kansas), but no such provision has been made for Oklahoma. Congress has also provided, now in 25 U.S.C. § 1321, "a statutory method by which a state, with the consent of the tribe, can assume jurisdiction over Indian country." United States v. Burnett, 777 F.2d 593, 597 (10th Cir. 1985). Oklahoma, however, has not acted to assume jurisdiction by this method. See Citizens Band Potawatomi Indian Tribe v. Oklahoma Tax Commission, 888 F.2d 1303, 1307 (10th Cir. 1989); Burnett, 777 F.2d at 597; State v. Klindt, 782 P.2d 401, 403 (Okla. Crim. App. 1989). If there has been no express delegation of jurisdiction to the state, a fortiori, there has been no grant of local jurisdiction. Because the state of Oklahoma has neither received by express grant nor acted pursuant to congressional authorization to assume criminal jurisdiction over this Indian country, Adair County, its sheriff, and its subordinate police officers had no jurisdiction to arrest Ross at the Greasy Ballpark. See United States v. Baker, 894 F.2d 1144, 1146 (10th Cir. 1990) (county district court exceeded its

authority in issuing search warrant for property within Indian country).

Defendants argue that, despite the plain language of 18 U.S.C. § 1152, a state may assert criminal jurisdiction over Indians in Indian country whenever such action would not undermine tribal or federal interests. On numerous occasions the Supreme Court has stated that "even on reservations, state laws may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law." Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973) (citing cases). Such statements, however, have uniformly been made in civil cases, in connection with a determination that paramount federal law does not expressly exclude state jurisdiction. See, e.g., Williams v. Lee, 358 U.S. 217, 220 (1959) ("Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.") (emphasis added). Congress has provided, however, for exclusive federal jurisdiction over crimes committed by Indians in Indian country, through the broad reach of 18 U.S.C. §§ 13 (allowing federal enforcement, on federal enclaves, of state and local laws, such as the public intoxication ordinance involved here), 1152, and 1153. There is no question but that 18 U.S.C. § 13 would allow federal enforcement of the local ordinance against public intoxication involved in this case. See In re Denetclaw, 83 Ariz. 299, 320 P.2d 697, 700-01 (1958). The "borrowing" provision of this act, however, does not grant states

independent authority to enforce their own laws over Indians on Indian land. See Cohen's Handbook of Federal Indian Law 379-80 (R. Strickland ed. 1982) (hereinafter Cohen); United States v. New Mexico, 590 F.2d 323, 329 (10th Cir. 1978), cert. denied, 444 U.S. 832 (1979). The Supreme Court has expressly stated that state criminal jurisdiction in Indian country is limited to crimes committed "by non-Indians against non-Indians . . . and victimless crimes by non-Indians." Solem v. Bartlett, 465 U.S. 463, 465 n.2 (1984).

Defendants also urge this court to recognize state criminal jurisdiction over the Greasy Ballpark, lest the park become "a land in which there is no law." Brief of Appellees at 4 (quoting statement of trial judge, IV R. at 247). We cannot tell from the record whether either the federal government or the Cherokee tribe have officers who police this Indian country. But even if both the federal government and the Cherokee tribe have abdicated responsibility for law enforcement at the Greasy Ballpark, this void does not empower Oklahoma or Adair County to assume general criminal jurisdiction simply because it is the nearest police authority. Avenues to extended jurisdiction must come from the legislature, not from the courts and not from the fiat of county governments.

In In re Denetclaw, a somewhat similar case, the Arizona Supreme Court addressed the issue of whether the state could enforce traffic ordinances against Indians on highways within the boundaries of the reservation. The Denetclaw court held that, pursuant to 18 U.S.C. § 13, "federal jurisdiction over offenses,

either felonies or misdemeanors, committed by an Indian in Indian country is exclusive and not concurrent with state jurisdiction."

320 P.2d at 700. The court, therefore, discharged the Indian defendant because the state lacked jurisdiction to make the traffic stop. The court recognized the "jurisdictional gap" that was being left but stated,

"[w]e are bound to follow the law as we find it irrespective of the apparent 'void' this will leave in safeguarding the rights of the traveling public. At present the State Highway Patrol and Sheriff's deputies are, insofar as we know, the only agencies patrolling county and state highways that cross Indian lands . . . It is further well known that the federal officers neither police nor attempt to prosecute traffic violations by Indians on our highways under the Assimilative Crimes Act, although unquestionably the federal courts would have jurisdiction over such offenses. . . . We might ask what procedure is left to remove drunk and reckless Indian drivers from state highways lying on the reservation and punish them for traffic violations? The answer appears to be the tribal policeman and the tribal courts. . . . We are uninformed as to whether any Navajo tribal ordinances are in effect that cover such offenses."

Id. at 701. Accord C.M.G. v. State, 594 P.2d 798, 804 (Okla. Crim. App. 1979).

Accordingly, the district court erred in concluding that state authorities have criminal jurisdiction over the ballpark.

III

We must now consider the consequences of the district court's error with respect to each of Ross' § 1983 claims and each of the defendants herein.

Illegal Arrest--Qualified Immunity⁵

We have implied that an arrest made outside of the arresting officer's jurisdiction violates the Fourth Amendment to the Constitution and is therefore actionable pursuant to 42 U.S.C. § 1983 under the appropriate circumstances. Smith v. City of Oklahoma City, 696 F.2d 784 (10th Cir. 1983). We now so hold expressly.⁶ A warrantless arrest executed outside of the arresting officer's jurisdiction is analogous to a warrantless arrest without probable cause. See Karr v. Smith, 774 F.2d 1029, 1031 (10th Cir. 1985) (warrantless arrest without probable cause is constitutionally invalid); Hinshaw v. Doffer, 785 F.2d 1260, 1266 (5th Cir. 1986) (same). Absent exigent circumstances, such an arrest is presumptively unreasonable. Michigan v. Summers, 452 U.S. 692, 700 (1981).⁷

⁵ The issue of good faith immunity was not briefed on appeal, and therefore arguably was not preserved for our consideration. We consider the issue, however, because the district court made specific legal holdings with regard to qualified immunity and charged the jury with respect to McLemore's qualified immunity defense, and we may affirm the court below on any grounds supported by the record. Colorado Flying Academy, Inc. v. United States, 724 F.2d 871, 880 (10th Cir. 1984).

⁶ We do not in this opinion intend to cast doubt upon the constitutional validity of extra-jurisdictional arrests made by police officers in "hot pursuit."

⁷ Our decision is not undermined by the fact that McLemore was technically an invitee of Mose Killer at the time he made the arrest. McLemore was clearly acting in his capacity as a deputy sheriff when he made the arrest. There is no evidence that Mose Killer had the authority to extend the jurisdiction of Adair County into Indian trust land by cross-deputizing county officers. See Blatchford v. Sullivan, ___ F.2d ___, No. 87-1547, slip op. at 14 n.5 (10th Cir. May 30, 1990); United States v. Reid, 517 F.2d 953, 963 (2d Cir. 1975) (noting that local sheriffs may be cross-deputized by the Indian tribes).

Police officers, however, sued in their individual capacity are entitled to qualified immunity when they could not reasonably have known that their challenged actions violated the law. Anderson v. Creighton, 483 U.S. 635, 639 (1987) ("[W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action . . . assessed in light of the legal rules that were 'clearly established' at the time it was taken." (citations deleted)).

At the time Ross was arrested, the law regarding the jurisdiction of local police officers on Indian Tribal Trust land in Oklahoma was not clearly established. Broad language in Supreme Court opinions, some of which we have quoted above, gave the appearance of allowing state intervention when it was determined that such intervention would not compromise tribal or federal interests. See Mescalero Apache Tribe, 411 U.S. at 148; Organized Village of Kake v. Egan, 369 U.S. 60, 67-68 (1962); Williams, 358 U.S. at 220. See also Cohen at 277-78 ("[S]tate laws otherwise preempted because of interference with tribal self-government may apply" in Indian country not near settled Indian communities). Although we have discussed above why these cases are not applicable to the issue of state criminal jurisdiction, the question was confused enough at the time of trial that the district court, after its own research on the matter, thought that the county sheriff's office could enforce state law at the Greasy Ballpark: "I conclude frankly that the officer had a right to be there, and . . . it is undisputed that they believed completely

that they had that right, and the law is so unsettled that the qualified privilege should be applied." IV R. 252-53. "I don't think that these lands are outlaw lands and that you've got to call the FBI before anybody can do anything on them . . . I don't think that's the status of these lands." Id. at 261.

Taking these factors into consideration, we hold as a matter of law that a reasonable county officer, executing the law at the time Ross was arrested, would not have known that he was prohibited from making an arrest in the Greasy Ballpark. Therefore, McLemore is entitled to qualified immunity and cannot be held liable for his extra-jurisdictional arrest of Ross, *per se*. The issue of his liability for use of excessive force, of course, is a separate matter.

Regardless of the state of the law at the time the arrest took place, however, the qualified immunity defense is not available to the county. Owen v. City of Independence, 445 U.S. 622, 638 (1980); Valdez v. City and County of Denver, 878 F.2d 1285, 1287 n.2 (10th Cir. 1989). The county can be held liable, of course, only for constitutional deprivations resulting from county "custom or policy." Oklahoma City v. Tuttle, 471 U.S. 808, 817 (1985). The sheriff testified that he had no policy with respect to the Indian country, because he was not aware of any Indian trust land in the county. III R. 66. Nevertheless, he clearly believed the arrests were legal; his testimony would permit the jury to find a custom or policy to allow county officers to make arrests at the Greasy Ballpark. Therefore, the directed verdict in the county's favor was error, and this claim

must be remanded for trial.

B

Excessive Force

Ross' action against defendants for use of excessive force in effecting the arrest is separate and distinct from the issue of the legality of the arrest per se. The issue of McLemore's use of excessive force was submitted to the jury, which found in his favor. Ross argues that the jury should have been instructed that McLemore was acting outside of his jurisdiction at the time he effected the arrest. Under the circumstances of this case, we fail to see how McLemore's lack of jurisdiction would affect the issue of the appropriate use of force in executing the arrest.

The use of force in effecting an arrest is to be evaluated under the standard enunciated by the Supreme Court in Graham v. Connor, 109 S. Ct. 1865 (1989). The objective standard laid out by the Supreme Court requires that a court weigh all circumstances known to the officer, or which he reasonably should have known at the time of the arrest, in evaluating his use of force. Id. at 1872. Because we have held that a reasonable officer would not have known that he lacked jurisdiction for arrests at the Greasy Ballpark, and because no evidence was introduced that McLemore in fact knew that he lacked jurisdiction, the lack of jurisdiction was not a circumstance for the jury to consider in evaluating Ross' excessive force claim.

The district court's directed verdict in favor of the county necessarily included the excessive force claim. The county can be held liable only for deprivations of constitutional rights

resulting from "custom or policy." Oklahoma City v. Tuttle, 471 U.S. at 817. Ross made no showing of a policy or custom of improper training, supervision or use of arms. Therefore, the directed verdict in favor of Adair County on this claim was proper.

C

Accordingly, the decision of the district court is AFFIRMED in part, REVERSED in part, and REMANDED for retrial of the \$ 1983 extra-jurisdictional arrest claim against Adair County. On remand, the county may not be held liable for the consequences of the alleged excessive force.