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THE 1988 CHAPMAN ADDRESS

OKLAHOMA INDIAN LAW—CASES OF THE LAST DECADE AND OPPORTUNITIES FOR THE NEXT DECADE

Reid Peyton Chambers*

Beginning in 1984, the University of Tulsa College of Law has hosted a Chapman Distinguished Professor of Law. This position was made possible through the generosity of the Chapman Foundation and has attracted noted scholars in various areas of law. James W. Ely, Jr. of Vanderbilt University College of Law served as the first Visiting Distinguished Chapman Professor of Law in 1984-1985. Walter Ray Phillips, the Joseph Henry Lumpkin Professor of Law at the University of Georgia followed Professor Ely in 1985-1986. In 1987, Peter C. Maxfield, Professor of Law and former Dean of the University of Wyoming followed Professor Phillips. Professor Richard Delgado of the University of California at Davis succeeded Professor Maxfield in 1987-1988. This year, Reid Peyton Chambers became the fifth Chapman Distinguished Professor of Law, and delivered the following address:

* * *

Dean Walwer, thank you for your too-kind introduction. I am honored both by it, and by the size and composition of this splendid audience. Many former colleagues from my days in government, and many present colleagues in teaching are here. I thought that by now all of you had tired of hearing me speak on Indian law issues. And I

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thought anybody else would have stayed home rather than hear a Washington lawyer suggest how to deal with Oklahoma Indian legal problems. So I appreciate all of you being here, and I welcome questions or comments, because many of you in the room are dealing with the problems that I am going to talk about.

I am not going to go over, of course, each of the baker's dozen of cases in the past decade (it is a baker's dozen because the *Burnett* case really is two cases, one in federal court and one in state court) dealing with questions of tribal governmental authority of Oklahoma tribes and the state's jurisdiction over Oklahoma Indians.¹ Let me summarize their teachings, however.

Three of these cases deal with Indian bingo. Everyone here knows, for example, that the Creek Nation operates a very successful bingo hall here in Tulsa, out on 81st Street and Riverside Drive. The Creek Nation's right to operate this hall free from state regulation is vindicated by one of my baker's dozen of cases.²

Bingo is a four billion dollar-a-year business in the United States. That is more money than is spent on the four largest professional sports taken all together in America: hockey, football, baseball, and basketball.

1. *State v. Littlechief*, 573 P.2d 263 (Okla. Crim. App. 1978) (Kiowa Trust land is "Indian country"; thus, state has no jurisdiction to prosecute crime on that land under Public Law 280 or otherwise); *Harjo v. Kleppe*, 420 F. Supp. 1110 (D.D.C. 1976), *aff'd sub nom. Harjo v. Andrus*, 581 F.2d 949 (D.C. Cir. 1978) (Secretary of the Interior ordered to assist Creek Nation in establishing new constitution); *Logan v. Andrus*, 457 F. Supp. 1318 (N.D. Okla. 1978) (case declaring authority of Osage tribal government); *C.M.G. v. State*, 594 P.2d 798 (Okla. Crim. App.) *cert. denied*, 444 U.S. 992 (1979) (Chilocco Indian School is "Indian country"; no state jurisdiction); *Cheyenne-Arapaho Tribes v. State of Oklahoma*, 618 F.2d 665 (10th Cir. 1980) (Cheyenne-Arapaho Tribe has jurisdiction exclusive of state to regulate hunting and fishing on trust allotments and tribal trust land); *Ahboah v. Housing Auth. of the Kiowa Tribe of Indians*, 660 P.2d 625 (Okla. 1983) (state court has no jurisdiction over forcible entry and detainer actions against lessees in housing project on Kiowa trust lands); *State v. Burnett*, 671 P.2d 1165 (Okla. Crim. App. 1983); *United States v. Burnett*, 777 F.2d 593 (10th Cir. 1985) *cert. denied*, 476 U.S. 1106 (1986) (restricted Osage allotment is "Indian country," and state has no jurisdiction over crime committed by or against an Indian on it); *State ex rel. May v. Seneca-Cayuga Tribe*, 711 P.2d 77 (Okla. 1985) (state jurisdiction limited over bingo hall on Quapaw tribal lands); *Indian Country, U.S.A., Inc. v. Oklahoma ex rel. Okla. Tax Comm'n*, 829 F.2d 967 (10th Cir. 1987) *cert. denied*, 108 S. Ct. 2870 (1988) (tribal lands of Creek Nation are "Indian country," and state cannot regulate or tax the gross receipts of bingo games played upon them); *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439 (D.C. Cir. 1988), *cert. denied*, 109 S. Ct. 795 (1989) (Creek Nation has authority to establish tribal court); *Oklahoma ex rel. Okla. Tax Comm'n v. Graham*, 822 F.2d 951 (10th Cir. 1987), *rev'd per curiam*, 109 S. Ct. 1519 (1989) (suit by state for collection of cigarette and bingo taxes may not be removed from state court to federal court; Chickasaw Nation immune from suit); *State v. Brooks*, 763 P.2d 707 (Okla. Crim. App. 1988) *cert. denied*, — U.S. — (Apr. 17, 1989). (information insufficient to support state court jurisdiction to enforce state cigarette tax on sales to non-Indians by Indian smokeshop located on restricted Creek allotment).

2. *Indian Country, U.S.A., Inc. v. Oklahoma ex rel. Okla. Tax Comm'n*, 829 F.2d 967 (10th Cir. 1987) *cert. denied*, 108 S. Ct. 2870 (1988).

Within the last ten years, Indian tribes have taken over at least ten percent of this lucrative national bingo market. They have done this chiefly through a legal stratagem. The stratagem basically relies on the legal proposition that states generally do not have jurisdiction over activities by an Indian tribe or an Indian individual on Indian lands. Most states permit bingo to be played but limit the prize money or frequency of bingo games at, say, the Legion Post or the Elks Club. These limits of state regulatory law do not apply when an Indian or Indian tribe operates bingo games on Indian lands. The Indian or tribe can decide to run more frequent games or can run games for much higher stakes—it doesn't have to comply with the state regulations. Those games are instead regulated by the tribe. Why is that?

Cases going back to the early days of the Republic establish that tribes are distinct political societies. As a distinct political society, a tribe has the right to make its own laws and be ruled by them; it and its members while within Indian country are not subject to the laws of the state in which it is located. The distinct political society concept goes back to the early treaties with the Indian tribes. After all, the United States only makes treaties with governments. In making treaties with the Indian tribes, early Supreme Court decisions by Chief Justice Marshall³ hold the United States recognized as a matter of federal law that Indian tribes had governmental authority and immunity from state jurisdiction. These decisions by Chief Justice Marshall, incidentally, involved the Cherokee Nation, now located in Oklahoma. Indeed, many of the most important Supreme Court Indian cases over the years have involved Oklahoma tribes and Indians.

The modern cases that we are considering in this past decade involving Oklahoma Indians essentially apply that principle. We have talked about the bingo cases. The bingo cases hold simply that tribes, not the state, can regulate bingo games on Indian lands. Some of the other recent cases deal with other governmental authorities of Oklahoma tribes. The majority of these cases, involving principally the Creek Nation and the Osage tribe, have required the Department of the Interior to recognize tribal governmental powers the Secretary had obstructed.⁴ Another controversy was with the State of Oklahoma, and the decision in that

3. *Worcester v. Georgia*, 31 U.S. (6 Pet) 515 (1832); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet) 1 (1831).

4. *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439 (D.C. Cir. 1988), *cert. denied*, 109 S. Ct. 795 (1989); *Harjo v. Kleppe*, 420 F. Supp. 1110 (D.D.C. 1976), *aff'd sub nom. Harjo v. Andrus*, 581 F.2d 949 (D.C. Cir. 1978); *Logan v. Andrus*, 457 F. Supp. 1318 (N.D. Okla 1978).

case vindicates the authority of the Cheyenne and Arapaho Tribes to regulate hunting and fishing on trust lands either owned by the tribe or owned by members of those two tribes.⁵

Other recent cases have prohibited exercise of state jurisdiction over crimes committed by Indians on Indian land, for example, on Kiowa trust allotments,⁶ Osage allotments restricted against alienation,⁷ and the Chilocco Indian School.⁸ If a crime is committed or if a housing authority wants to evict a tenant, those cases hold that state courts have no subject matter jurisdiction over Indians on these lands. As a result of these cases, a number of Oklahoma Indian tribes have now begun to set up their own courts. Federal jurisdiction is also expanded as state jurisdiction contracts.

There is one particular question that has not yet been definitively decided: whether this principle of tribal authority and freedom from state jurisdiction established in western Oklahoma and elsewhere applies to restricted allotments of the Five Civilized Tribes in eastern Oklahoma. I believe this will be decided in favor of tribal authority in the same way as the other cases, but it has not been resolved. As to Oklahoma tribes other than the Five Tribes, it is clearly established, I think, now that the state does not have jurisdiction, and that there is federal and tribal jurisdiction.

These cases have upset the expectations within the state that prevailed before, say, the mid-1970's. Before this past decade, state officials generally thought that the state was entitled to more jurisdiction than these cases indicated. The state, however, lacked a firm basis for these now-upset expectations.

Congress passed a statute in the 1950's offering the opportunity to all states to take over federal criminal jurisdiction over Indian country and to try civil cases arising in Indian country. The statute is called Public Law 280.⁹ But it is clear that Oklahoma never availed itself of the opportunity offered by Public Law 280. Several cases in the baker's dozen have so held.¹⁰ In fact, the governor of Oklahoma believed in the

5. *Cheyenne-Arapaho Tribes v. Oklahoma*, 618 F.2d 665 (10th Cir. 1980).

6. *Ahboah v. Housing Auth. of the Kiowa Tribe of Indians*, 660 P.2d 625 (Okla. 1983); *State v. Littlechief*, 573 P.2d 263 (Okla. Crim. App. 1978).

7. *State v. Burnett*, 671 P.2d 1165 (Okla. Crim. App. 1983); *United States v. Burnett*, 777 F.2d 593 (10th Cir. 1985) *cert. denied*, 476 U.S. 1106 (1986).

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

9. 25 U.S.C. §§ 1321, 1322 (1982); *see also* 18 U.S.C. § 1162 (1982), 28 U.S.C. § 1360 (1982).

10. *State v. Littlechief*, 573 P.2d 263 (Okla. Crim. App. 1978); *Ahboah v. Housing Auth. of the Kiowa Tribe of Indians*, 660 P.2d 625 (Okla. 1983); *State v. Burnett*, 671 P.2d 1165 (Okla. Crim.

1950's—incorrectly as it turned out—that Oklahoma had residual jurisdiction of some kind over Indian lands in the state and therefore did not need to exercise the opportunity that Public Law 280 offered.¹¹

The basis for the governor's widely-shared concept that residual jurisdiction existed is very fuzzy. There are some early cases, particularly a case called *Ex parte Nowabbi*¹² in the 1930's, sustaining state jurisdiction based on statutes enacted close to statehood. But that case is clearly wrong as an analytical matter and has been basically disowned by some of the baker's dozen.¹³ There were also some statements in a United States Supreme Court case in the 1940's suggesting that the underlying principles of some Indian law decisions exempting Indians from state jurisdiction "do not fit the situation of the Oklahoma Indians" because tribal autonomy is less in Oklahoma than in other states.¹⁴ But there is no clear support for that observation, and other cases around the turn of the century show that the federal government, after statehood, continued to take jurisdiction over Indians on Indian lands. For example, federal Indian liquor laws were enforced in the state after statehood.¹⁵ There is thus no solid legal basis for the expectation, I think, that Oklahoma ever had general jurisdiction over Oklahoma Indians on Indian lands. Be that as it may, that was the widespread expectation in the state.

Before I leave the cases entirely, let me comment about a couple of aspects of them that I think are somewhat unusual, from my experience in practicing and teaching Indian law in other states.

First, these decisions are almost all unanimous. There are dissents in a few of the cases on some points, but the decisions are basically unanimous.

Second, the federal and state courts are basically in agreement in these cases. Cases often go to the United States Supreme Court when there are disagreements between state and federal courts. Because of the broad level of agreement in Oklahoma federal and state courts on Indian jurisdictional issues to date, the United States Supreme Court has only

App. 1983); *United States v. Burnett*, 777 F.2d 593 (10th Cir. 1985) *cert. denied*, 476 U.S. 1106 (1986); *State ex rel. May v. Seneca-Cayuga Tribe*, 711 P.2d 77 (Okla. 1985); *Indian Country, U.S.A., Inc. v. Oklahoma ex rel. Okla. Tax Comm'n*, 829 F.2d 967 (10th Cir. 1987) *cert. denied*, 108 S. Ct. 2870 (1988).

11. Letter from Governor Johnston Murray to Orme Lewis, Assistant Secretary of the Interior (Nov. 18, 1953).

12. *Ex parte Nowabbi*, 60 Okla. Crim. App. 111, 61 P.2d 1139 (1936).

13. *E.g.*, *State ex rel. May v. Seneca-Cayuga Tribe*, 711 P.2d 77, 81, n.17 (Okla. 1985).

14. *Oklahoma Tax Comm'n v. United States*, 319 U.S. 598, 603 (1943).

15. *E.g.*, *United States v. Wright*, 229 U.S. 226 (1913); *Ex parte Webb*, 225 U.S. 663 (1912). See generally F. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW*, p. 778-79 and n.85 (1982 ed.).

been involved in one of those cases. In *Oklahoma ex rel. Oklahoma Tax Commission v. Graham*,¹⁶ the state sued a tribal enterprise of the Chickasaw Nation in state court claiming jurisdiction to tax Indian bingo, motel, and smokeshop operations. The case was decided on a fairly technical ground—whether, when it was sued in state court by the Tax Commission, the Nation could remove the case to federal court. The Supreme Court decided that the case could not be removed to federal court since there was no federal question on the face of the petition. The state in its brief suggested that the Court address broader issues, but the Court's decision simply turned on the propriety of removing the case at a preliminary stage.

Finally, these cases basically apply general principles of federal Indian law to Oklahoma tribes. History teaches that a lot of these Indian law principles developed in cases involving Oklahoma tribes. Let me illustrate this point. The Supreme Court in recent years has taken four, maybe five, Indian cases a year—about forty cases a decade. Very few of these modern cases have involved Oklahoma tribes. In preparing this lecture, I learned that during the two decades on either side the century—in other words, 1890 to 1900 and 1900 to 1910—there were about as many cases involving Indian law decided by the United States Supreme Court as there were in the 1970's and 1980's. More than half of those cases came from Oklahoma. And between 1910 and 1920, there were over one hundred Indian decisions by the United States Supreme Court, roughly *two and one-half times as many* as are being decided in the present decade. About two-thirds of those cases came from Oklahoma! So the Indian law principles now being applied in Oklahoma in the late 1970's and 1980's in this baker's dozen of cases that I am discussing actually apply principles that were confirmed and developed in cases involving Oklahoma Indians around the turn of the century or before.

Let me now turn to the opportunities presented by these cases as I see them. The cases provide an opportunity for Oklahoma Indian tribes to engage in conscious planning, to develop legal and political strategies that chart the extent to which they want to exercise tribal governmental powers, and to decide which exercises of state authority they wish to resist.

Government is a burden as well as an opportunity. The fact that a

16. 822 F.2d 951 (10th Cir. 1987), *rev'd per curiam*, 109 S. Ct. 1519 (1989).

tribe could exercise governmental powers does not mean that it necessarily has to exercise every possible power—say to regulate drinking water standards or tax personal property on Indian lands. Some powers may cost more to exercise or produce more administrative headaches than they are worth. Tribes in Oklahoma can also decide to reach cooperative agreements with the state or with the federal government—over regulation of hunting and fishing, or on law enforcement activities. There are almost forty tribes in Oklahoma. My colleague, Professor Dennis Bires, recently reminded me of Justice Brandeis's view that in the federal system the states act as laboratories, experimenting with different ways to solve practical problems and make policies. No state is like another, nor is any single tribe a clone of another. Each Oklahoma tribe can be a laboratory in planning how to exercise its powers.

Bingo is an example. Bingo makes a lot of money—it also brings a lot of problems. Not every tribe will want to run bingo games. So it is by no means certain just from the fact that the tribe can exercise an authority, or can take advantage of a legal strategy, that it necessarily will want to do so.

However, charting a course to decide how to exercise its governmental power presents a marvelous opportunity for each tribe to make its own determination as to its governmental structure and authority. These cases give each tribe that opportunity; some Oklahoma tribes have not always believed they had it.

Oklahoma tribal leaders today seem well aware of the fact that they have serious planning to do in the next few years in terms of charting out just what they want to achieve, what authorities they want to exercise, and what sorts of state authority they want to resist. They know that any cooperative agreements with the state will need to proceed on the basis of the state's awareness that these cases provide broad tribal authority and broad Indian exemptions from state jurisdiction. Oklahoma tribes will be able to bargain from positions of strength. And, if the state does determine that it will continue on the initial course it has chosen of opposing exercises of tribal authority, tribes must be prepared to commission the kind of careful and thorough legal and historical research necessary to vindicate their rights. It is usually too late to do that when someone else has taken the offensive, framed a case against tribal interests, or—worst of all—when a case has already been tried, a record developed, and the matter is sitting before a court of appeals.

The other opportunity, I think, is the state's. The state can profit

from the experience of other states that have had to deal with Indian problems. It is not at all unusual for a state to have an expectation that it has jurisdiction over Indian lands within the state dashed. For example, New York for many years thought, again without any firm legal basis, that New York had jurisdiction over Indian land within the state. Gerald Gunther, as a young professor at Columbia, wrote a classic article in the 1950's analyzing the error in this supposition.¹⁷ This is a road that has been travelled before.

So far, Oklahoma has reacted the way most other states reacted—Washington during the fishing rights controversy,¹⁸ Maine during the land claim,¹⁹ New York to jurisdictional problems—with something of a knee-jerk. The state is concerned, in effect, that Indian governmental authority affects state sovereignty and must be resisted with court battles, commissioning legal and historical research, writing briefs, and hiring experts. This kind of automatic reaction has not profited other states, and Oklahoma would be wise to reconsider it.

Some of those other states had more serious problems confronting them than Oklahoma now faces. New York, in addition to an Oklahoma-type jurisdictional conflict, is faced with a number of land claims where Indian tribes claim that their title to land within the state has never been validly taken.²⁰ Tribes in that state are asserting, in fact, that they own lands occupied by large numbers of non-Indians, whom the tribes claim under this theory to be trespassers. This occurred too in Maine; the Maine Indian land claim was finally settled by Congress in 1980,²¹ where three tribes in Maine were claiming about two-thirds of Maine.

Oklahoma faces, as far as I can see, nothing of this magnitude or nature. So far, although some expectations are being unsettled, this is a conflict of less intensity than those which I have just described. The state

17. Gunther, *Governmental Power and New York Indian Lands—A Reassessment of a Persistent Problem of Federal State Relations*, 8 BUFFALO L. REV. 1 (1958).

18. *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 696, n.36 (1979) (“The state’s extraordinary machinations in resisting the [1974] decree have forced the district court to take over a large share of the management of the state’s fishery in order to enforce its decree. Except for some desegregation cases [citations omitted], the district court has faced the most concerted official and private efforts to frustrate a federal court witnessed in this century. . . .” 573 F.2d at 1126”).

19. *E.g.*, *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975).

20. *E.g.*, *County of Oneida, New York v. Oneida Indian Nation*, 471 U.S. 1062 (1985).

21. 25 U.S.C. §§ 1721-1735 (1982).

is not going to lose land titles. The controversy will concern who prosecutes crimes, whether tribes can run bingo games or enterprises on particular Indian lands without full compliance with state law, and the like. Those, I think, are controversies that can be reasonably worked out by reasonable people.

My basic, perhaps novel suggestion is that the development of tribal governmental authority should actually be looked upon by the State of Oklahoma as an opportunity to deal with a problem that has not been effectively dealt with before. Although Oklahoma Indians are said by some to benefit from the economy of the state more than tribes in many other western states, nonetheless significant social difficulties and economic impoverishment exist. These are very significant problems that have not been effectively dealt with in the state. The resurgence of tribal authority presents an opportunity for the state to deal with these problems in cooperation—rather than in conflict—with the tribes.

I certainly understand why a state resists a land claim where some tribe is claiming two-thirds of the state—all would admit that this is easy to understand. But I have never understood the resistance that states almost automatically have to tribal governmental authority. This reflex reaction ignores the very substantial benefits of an active tribal government to the state.

For example, one benefit to a state of an Indian tribe aggressively asserting its tribal governmental authority is that it brings more federal dollars into the state. The federal government has all kinds of programs to support Indian tribal governments. Those programs provide benefits all over the country—why not in Oklahoma? If the federal government were proposing to build a military base or a road program in the State of Oklahoma, the senators and congressmen and other political leaders of this state would be eager to support that. An Indian tribe operating within the state promises this and more. It means both bringing more federal dollars into the state and employing some of the more impoverished citizens in the state in jobs associated with that program. The multiplier effect at work on these dollars is going to produce economic development in the state. This is something that ought to be supported.

As another example, consider law enforcement. Why should the State of Oklahoma resist tribal and federal law enforcement on the Five Tribes' restricted allotments in eastern Oklahoma, or on Indian lands in western Oklahoma? That would produce federal law enforcement dollars for law enforcement personnel that would not be there otherwise.

Those law enforcement personnel can be cross-deputized—state, tribal, federal—and the result will be more law enforcement personnel to deal with crime problems in isolated rural areas of the state where there are not enough personnel now. To be sure, the officers may initially have to consult a tract book to find out whether to take the criminal defendant to a tribal court or to a state court—but with cross-deputization that is not an issue at the enforcement level. The major issue, I think, is really to solve the crimes committed in these areas, and the means is to get more personnel involved in it.

Similarly with bingo. Bingo puts a lot of money into Oklahoma that ultimately gets into the general Oklahoma economy. More money is received by tribes from Indian bingo than *all* mineral leasing on *all* Indian reservations—about twice as much in fact. Three or four times as much profit is received from Indian bingo as from Indian timber operations, five or six times as much as from Indian farming and grazing leases. Bingo is a big money-maker.

Why shouldn't the principle that brought this benefit to Oklahoma tribes and Oklahoma be expanded into other areas, and be applauded by the state? Why shouldn't the concept that Indian tribes, for example, can run businesses and be free of state taxation, be supported by the state as an economic development incentive, rather than opposed as a problem for the state? If a tribe owns the business, even if it contracts with a non-Indian company to manage it, then the business is not subject to any state taxes. If state taxes are a significant component of the business' cost, this provides an attractive incentive for a business to locate on Indian lands. Tax incentives of some sort probably ought to be provided as a matter of policy for minority business or businesses in depressed areas, in any event. But these advantages are there for the taking.

I suggest that the State of Oklahoma ought to be trying to attract business into Indian areas with these kind of incentives. This legal situation just happens to provide an opportunity, it seems to me, to react creatively to an economic development problem that is very real in the state. The alternative is going to be bitter litigation. The alternative may not be over one hundred Indian cases in any decade in the Supreme Court, with sixty-five coming from Oklahoma. I don't suppose that will ever happen again, like it did from 1910 to 1920. I think the Indian tribes are likely to win most of those legal battles if the state wants to fight. That has been the experience elsewhere, and this litigation is very costly. For example, the State of Wyoming has spent over seven million dollars in legal fees to

try to win a water case against two Indian tribes in that state. The tribes didn't spend anything like that, but they too had legal fees and expenses. The tribes have, so far, won the case; it is now before the Supreme Court. I think that is not a very useful expenditure of state resources.

In concluding, I suppose it is odd for a lawyer to be encouraging you not to get involved in litigation. We lawyers love and thrive on cases. Maybe it just shows that I have been a professor too long now and have become absent-minded these three splendid months I have enjoyed in your midst. But the kind of litigation which has resulted elsewhere has not been an entirely satisfactory way of solving these problems. Consider, if you will, that the term "problem" may be a misnomer, a reflection not of an accurate conclusion, but of one failure to tally the plus side of the ledger. If so, the real problem is the lost opportunity which this limited perspective has cost us all. Profiting from the experience of other states, I urge Oklahoma to think about dealing with this kind of Indian problem differently, in a way that benefits everyone. Therein lies your opportunity.

