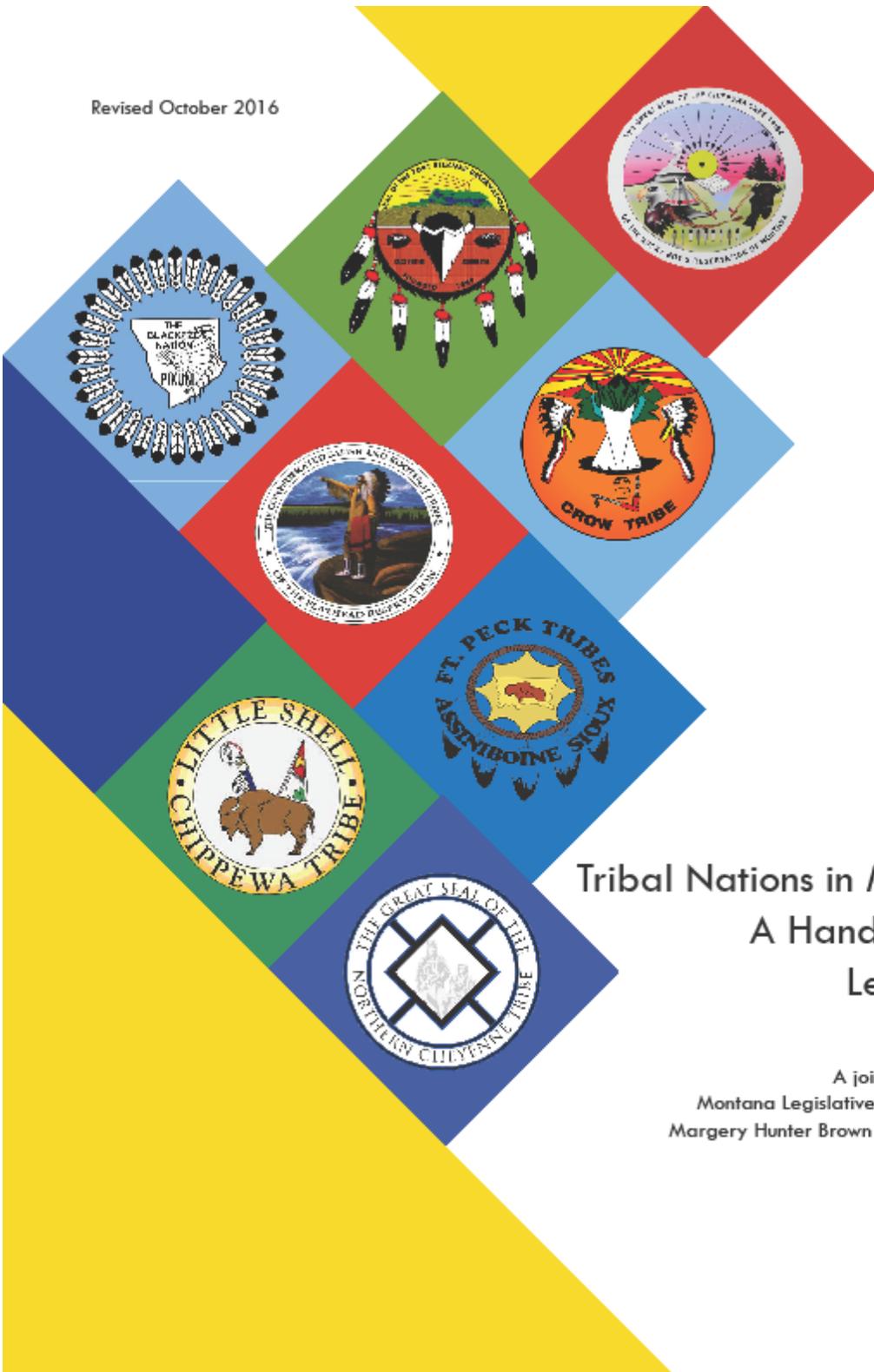


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Tribal Nations in Montana: A Handbook for Legislators

A joint publication by:
Montana Legislative Services Division
Margery Hunter Brown Indian Law Clinic



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ACKNOWLEDGEMENTS

In 1995, *The Tribal Nations of Montana: A Handbook for Legislators* (Handbook) was published by the Montana Legislative Council’s Committee on Indian Affairs, the predecessor to the present-day State-Tribal Relations Committee (STRC). Members of the committee included Representatives Bob Gervais (Chairman), Jay Stovall, Rolph Tunby, and Carley Tuss and Senators Jeff Weldon (Vice Chairman), Del Gage, Ethel Harding, and Barry “Spook” Stang. Staff contributors included committee attorney Eddy McClure, committee researcher Connie Erickson, and researchers Susan Fox and Stephen Maly.

In the following preface, original to the 1995 publication, the Committee on Indian Affairs describes the Handbook’s purpose as primarily educational. The committee believed that “accurate information provides a strong foundation for mutual respect and mutually rewarding relationships between people with different traditions, beliefs, and world views who nevertheless share common rights of citizenship and common aspirations for the state as a whole.”

The Handbook was among the first references of its kind in the United States and became a resource for interested parties across the country.

This year marks the Handbook’s first update since 1995. This publication is a joint project between the Montana Legislative Services Division (LSD) and the Margery Hunter Brown Indian Law Clinic (Law Clinic) at the Alexander Blewett III School of Law at the University of Montana.

Law Clinic contributors include co-directors Monte Mills and Maylinn Smith and students Kathryn Ore, Michael Trosper, and Courtney Damron.

LSD contributors include STRC research analyst Hope Stockwell, STRC attorney Laura Sankey, research analyst Rachel Weiss, and executive director Susan Fox. Trista Hillman-Glazier designed the publication’s cover. Josh Gillespie, Tammy Stuart, and Cyndie Lockett provided invaluable IT support.

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The online version of this publication includes links to additional information and resources.

PREFACE

This preface was written in 1995 by the Committee on Indian Affairs for the original Handbook. While now outdated in some instances, it is included to preserve the publication's history and reflect the spirit in which the Handbook was developed.

“American Indians have a permanent place in the history, politics, culture, and economic development of the western states. In Montana, Indians from at least a dozen tribal groups compose the state's largest and fastest growing ethnic minority. Only Arizona and New Mexico contain more reservations than Montana's seven. The Indian nations of Montana are a living legacy. They are diverse in their history and cultural traditions. They remain relatively isolated in geographic terms, but not in other aspects. Indians in Montana have benefited from economic and social changes brought about by technology, education, commercial development, and other factors of modernization, but they have also suffered from the corrosive effects that these same changes have had on traditional ways of life. Indians and non-Indians are challenged by history and present circumstances to find common ground on which to build a happy and prosperous future for all Montana citizens.

“The Montana Legislature and various state government agencies have the opportunity to honor, and in some cases to help fulfill, binding commitments made to Indians in times past by Congress and the federal government. The 1972 Montana Constitution carried forward the 1889 provision from The Enabling Act explicitly acknowledging Congress's absolute control and jurisdiction over all Indian land, including state authority to tax the land, and forever disclaiming title to lands owned or held by or reserved for an Indian or for Indian tribes. Article X, section 1(2), of the 1972 Montana Constitution recognizes “the distinct and unique cultural heritage of the American Indians” and commits the state in its educational goals to “the preservation of their cultural integrity.” Montana is alone among the 50 states in having made an explicit constitutional commitment to its Indian citizens.

“Our hope is that the Handbook will contribute to harmonious relations between the Indian minority and the non-Indian majority of Montana citizens.”

“State-tribal relations in Montana have been marked by periodic successes and recurrent misunderstandings. Indian and non-Indian people have coexisted in relative peace in Montana for the past century. The splendid Charles M. Russell painting in the House Chamber of the Capitol entitled “Lewis and Clark Meeting the Flathead Indians at Ross' Hole” symbolizes the coming together of disparate people under a much celebrated Big Sky some 75 years before Montana became part of the United States. The surrender of Sioux Chief Sitting Bull after General Custer's defeat at the fateful Battle of the Little Bighorn in 1876 and the capture of Chief Joseph and the Nez Perce in the Bears Paw Mountains in 1877 marked the end of sporadic warfare between white settlers and indigenous peoples on the high plains. These events set the stage for the establishment of Indian reservations and the granting of U.S. (and state) citizenship in 1924 under the 14th amendment to the U.S. Constitution.

“While both the federal constitution and the Montana Constitution, a panoply of federal and state laws, and numerous works of art and literature manifest a shared sense of purpose and belonging,



there are still many instances of intercultural conflict that can cause hard feelings and lead to further alienation between citizens of different ancestry. At Montana State University's centennial celebration in the spring of 1994, the president of Little Big Horn Tribal College, Janine Pease Windy Boy, warned her audience about the potential for bitter clashes between the dominant and minority culture groups in Montana. We were mindful of that possibility while preparing this document. Our hope is that the Handbook will contribute to harmonious relations between the Indian minority and the non-Indian majority of Montana citizens.

“The purpose of the Handbook is primarily educational--to raise the general level of knowledge and awareness of Indian nations among legislators, state government personnel, and other interested citizens of Montana, especially teachers and students. The Handbook is not intended to be an exhaustive study of federal Indian law, nor is it intended to answer all questions relating to issues impacting Indians or tribes in Montana. We hope to offset myths and misconceptions with pertinent facts. We believe that accurate information provides a strong foundation for mutual respect and mutually rewarding relationships between people with different traditions, beliefs, and world views who nevertheless share common rights of citizenship and common aspirations for the state as a whole. There are numerous examples of formal and informal agreements between state government and tribal authorities, but there are also significant issues that remain unresolved and that warrant informed discussion.

“The Handbook does not take a partisan approach, nor does it include or advocate a specific legislative agenda. The Handbook is modeled after a 1993 document published by the Minnesota House of Representatives entitled Indians, Indian Tribes and State Government.¹ We have chosen to combine short narrative sections with a question and answer format, similar to the one used in Jack Utter's American Indians: Answers to Today's Questions.

“The Handbook is divided into different subject areas for easy reference. The authors recognize that this method of organizing information has its advantages and disadvantages. While topical arrangements offer convenience, they also slight an important reality: the interconnectedness of almost all issues affecting the Indian nations of Montana and the other states. For example, questions of jurisdiction permeate many aspects of federal, state, and tribal relations, even though the subject of jurisdiction itself is explained only once in the Handbook. It is increasingly clear that economic development is closely linked to the governance of natural resources and environmental protection, but these subjects are dealt with in separate sections. We trust that readers will take the somewhat artificial separation of issue areas into account and realize how politics, economics, education, and culture are interconnected for Indians and non-Indians alike.

“A note on usage: We believe most Indian people prefer to be identified by their tribal affiliation when addressed as individuals or as a tribal group. For example, unless one is talking about all of the Indians in Montana, it is preferable to distinguish between Blackfeet, Assiniboine, Crow, and the others. Throughout the Handbook, we've chosen to use the term "Indian" rather than the term "Native American" when referring to the racially and politically distinct population in general terms.”

-The Committee on Indian Affairs, March 1995

¹ Indians, Indian Tribes and State Government, Research Department, Minnesota House of Representatives, February 1993.

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Tribal Nations in Montana

Indian tribes and their people have lived in Montana since time immemorial. Their cultures, governments, justice systems, and ways of life existed long before the arrival of Lewis and Clark in the first decade of the 19th century. From first contact until the present-day, tribes in what is now the State of Montana have maintained their unique cultural identity, preserved their traditions, and exercised their own sovereign authority.

The combination of "tribal" and "nation" best encapsulates essential aspects of both the historical and contemporary identity of Indian communities in Montana. In the 1800s, the federal government entered into treaties with tribal nations, pursuant to which the tribes reserved certain lands and rights, many of which exist to this day. Even after formal treaty-making ended in 1871, the federal government agreed to reserve certain lands as homelands for tribes, whether through executive order or Congressional action. As a result of treaties and other reservations, there are now 11 principal tribal groups living on seven federally recognized reservations in Montana. (See map on page 9 for locations). Some reservations are inhabited by more than one tribal group. For example, the Confederated Salish, Pend d'Oreille, and Kootenai share the Flathead Reservation; the Gros Ventre and Assiniboine cohabit the Fort Belknap Reservation; and the Assiniboine and Sioux both reside on the Fort Peck Reservation.

"The combination of demographic data and historical facts leads us to a conclusion of sorts at the outset of this handbook: American Indians are very much a part of Montana's social fabric, political culture, and economic future."

-The Committee on Indian Affairs, March 1995

In each of these cases, the reservation population consists of fragments of larger tribal nations. For example, there are 33 bands of Assiniboine Indians, two of which are represented on the Fort Peck Reservation, where each of the seven primary bands of the Sioux nation are also represented. The Rocky Boy's Reservation was originally inhabited by members of the Chippewa and Cree Tribes. However, because of extensive intermarriage over the years, the tribal rolls list members only as "Chippewa Crees." In 1935, the Chippewa Crees adopted a tribal constitution for the "Chippewa Cree Tribe," officially recognizing the coming together of the two tribes into one. Montana is also home to the Little Shell Chippewa Tribe, often referred to as "Landless Indians." Although a distinct tribal group recognized by the state, the Little Shell are not yet a federally recognized tribe.

Tribal nations are distinctive in several respects. They are based primarily (although not exclusively) on ethnic heritage and are racially distinct from other minority groups in Montana and the United States. Most important from a legislative standpoint, tribal nations have a unique status in the U.S. federal system. Indians are not only an ethnic minority; they are also members of sovereign tribal nations, the authority of which is subject only to overriding federal authority. Indian nations in Montana are governed by tribal governments that are empowered to determine who is and is not a member of the nation. Each of the tribal governments in Montana has established its own criteria for enrollment and membership.

Indian Population

According to the 2010 census, the American Indian and Alaska native population in Montana was 62,555 persons, approximately 6.3% of the total population of the state. Of students enrolled in Montana's K-12 schools, 11.6% are Indian. While Montana's overall population increased 9.7% from 2000 to 2010, the Indian population increased by 11.6%.

These numbers are only one method of determining the number of Indians in the state. The numbers do not necessarily match the number of persons who appear on tribal rolls or the number of persons that tribes or federal or state agencies consider to be Indian. The concept of race as used by the U.S. Bureau of the Census reflects self-identification. The data for race represents self-classification by people according to the race with which they most closely identify.

On the seven reservations in Montana, the American Indian and Alaska Native population ranges from 25% of the total population on the Flathead Reservation to 97% on the Rocky Boy's Reservation.

Population in Montana by Reservation, 2010

Reservation	American Indian/Alaska Native Population	Total Population	Percentage American Indian/Alaska Native
Blackfeet	8,944	10,405	86%
Crow	5,322	6,847	78%
Flathead	7,042	28,359	25%
Fort Belknap	2,704	2,851	95%
Fort Peck and Trust Lands	6,715	10,021	67%
Northern Cheyenne	4,402	4,785	92%
Rocky Boy's and Trust Lands	3,221	3,323	97%

Source: U.S. Bureau of the Census

Although the Indian population in Montana is highly concentrated in a few counties, as shown on the following page, American Indians and Alaska Natives reported living in all but Petroleum County during the 2010 census.

Redistricting

The 15th amendment to the U.S. Constitution has, since 1870, guaranteed the right to vote to all citizens, regardless of race, color, or the previous condition of servitude. That right was not clearly outlined or enforced until the Voting Rights Act of 1965, which was further amended in 1970, 1975, and 1982. The 1975 amendments extended protection against denial or abridgment of the right to vote to "language minority groups," including Indians, in addition to traditionally recognized minority groups that are identified by race or color.

When redistricting occurred following the 1990 census, it resulted in an increase in Montana legislative districts in which Indians composed more than 50% of the population: from a single House district to four House districts and one Senate district. Although the districts were composed of more than 50% Indians, a higher percentage of that population was under 18 years of age than in the total population.

The number of districts in which Indians make up the majority of the total population and the voting age population continued to increase in the 2000s when redistricting resulted in six House districts and three Senate districts. Those gains were maintained after the 2010 census.

Although the first election cycle after redistricting in the 1990s did not result in greater Indian representation in the Montana Legislature, redistricting in the 2000s did lead to an increase. A history of the number of Indians serving in the Legislature between 1989 and 2015 is depicted below.

Indians in the Montana Legislature, 1989 - 2015

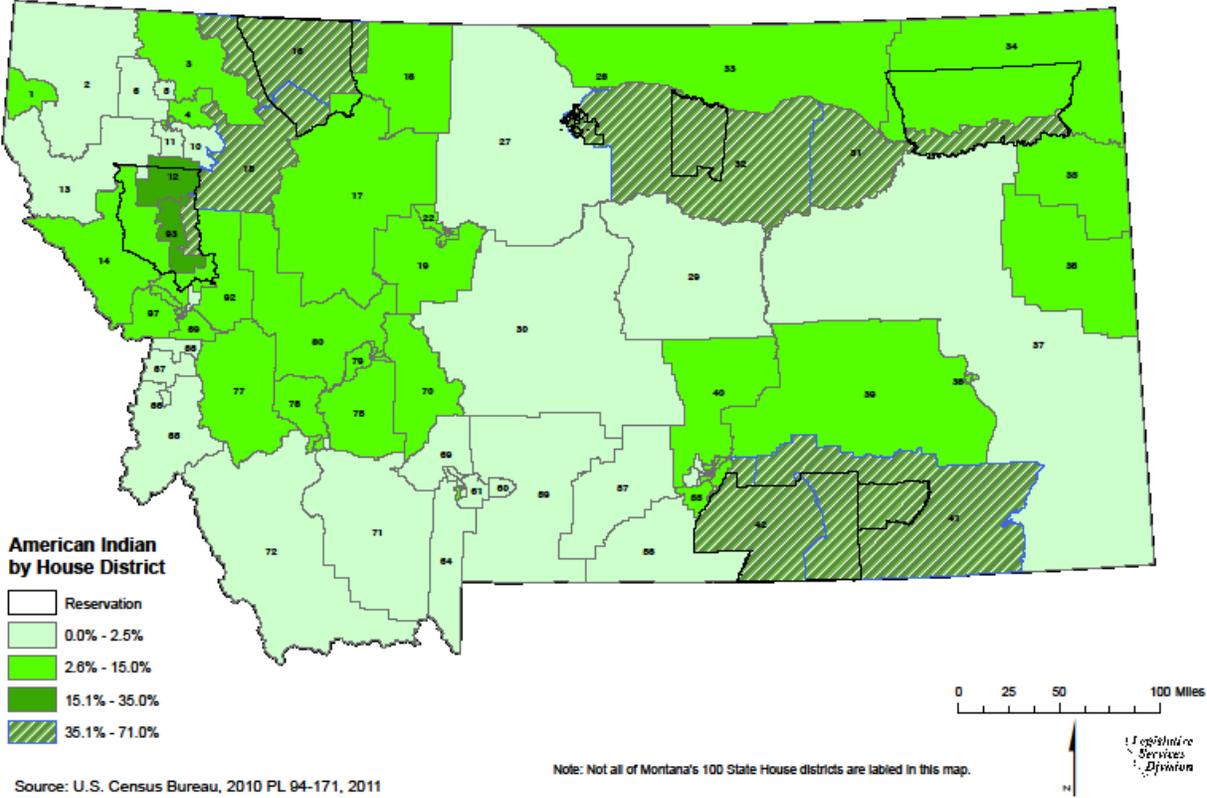
Session	Senate	House	Total	% of All Members
2015	3	5	8	5.30%
2013	3	5	8	5.30%
2011	3	5	8	5.30%
2009	3	6	9	6%
2007	3	7	10	6.60%
2005	2	6	8	5.30%
2003	1	6	7	4.60%
2001	1	4	5	3.30%
1999	0	2	2	1.30%
1997	0	2	2	1.30%
1995	0	1	1	0.60%
1993	0	2	2	1.30%
1991	0	2	2	1.30%
1989	0	1	1	0.60%

Indian Majority-Minority Legislative Districts, 2010 Census

Legislative District	Reservation	Counties	Any Part Indian Population	Percentage Total District Population	Percentage Voting Age Population	Percentage Voting Age Population (2000)
HD 15	Blackfeet and Flathead	Glacier, Pondera, Flathead, and Lake	6,159	64.16	58.59	51.92
HD 16	Blackfeet	Glacier	6,808	70.89	67.04	65.74
HD 31	Fort Peck	Roosevelt and Valley	6,845	69.58	62.47	59.56
HD 32	Fort Belknap and Rocky Boy's	Phillips, Blaine, Hill, and Chouteau	6,731	68.68	62.95	55.76
HD 41	Northern Cheyenne and Crow	Powder River, Rosebud, and Big Horn	6,098	63.53	56.81	57.3
HD 42	Crow	Big Horn and Yellowstone	5,913	61.59	54.82	55.2
SD 8	Blackfeet and Flathead	Glacier, Pondera, Flathead, and Lake	12,967	67.52	62.83	58.75
SD 16	Fort Peck, Fort Belknap, and Rocky Boy's	Blaine, Chouteau, Hill, Phillips, Roosevelt, and Valley	13,576	69.13	62.71	57.72
SD 21	Northern Cheyenne and Crow	Big Horn, Powder River, Rosebud, and Yellowstone	12,011	62.56	55.80	56.24

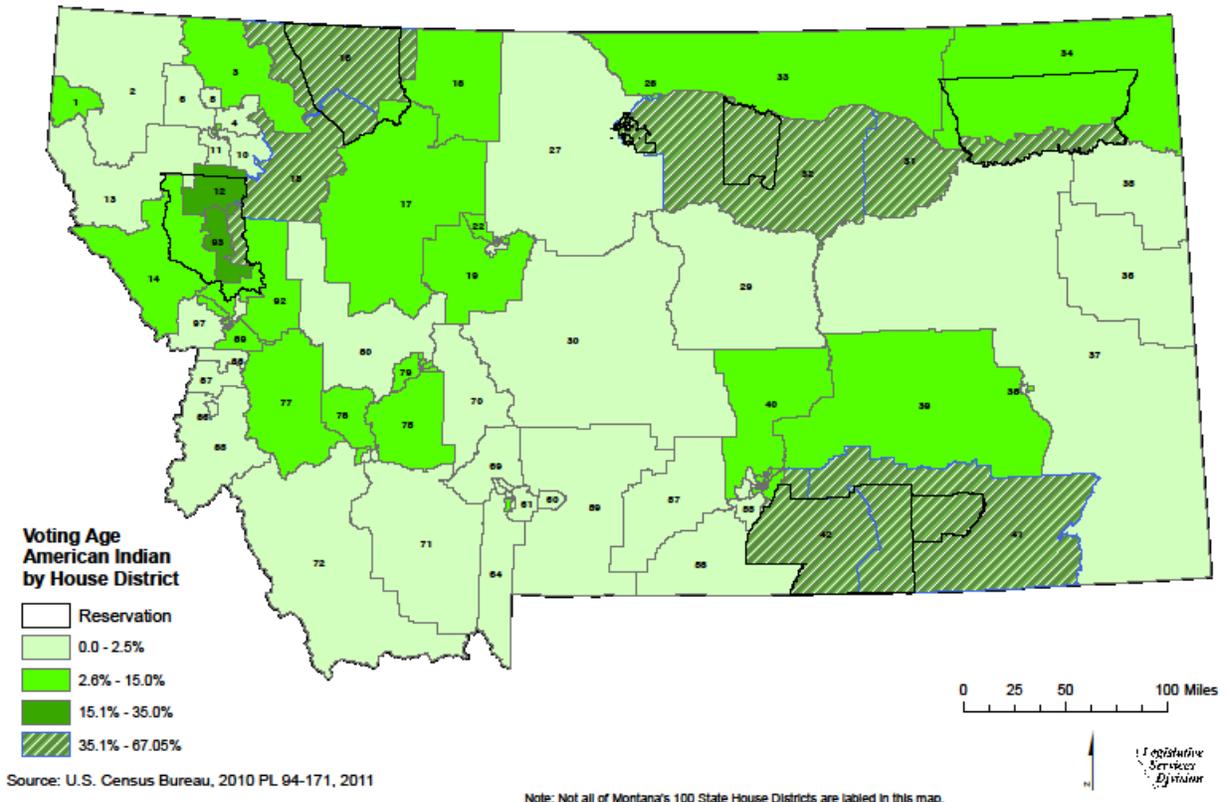
Source: Final Legislative Redistricting Plan (adopted 2/12/13) and Final Legislative Redistricting Plan (adopted 2/5/2003)

Percent American Indian by State House District



Source: U.S. Census Bureau, 2010 PL 94-171, 2011

Percent Voting Age American Indian by State House District



State-Tribal Relations

In 1951, the Montana Legislature created the position of Coordinator of Indian Affairs in recognition of the need to provide a way for American Indians to communicate with state government. The Legislature renamed the position in 2009 to the State Director of Indian Affairs. The Director serves as a spokesperson for Indian tribes and actively assists them in their efforts to work with state agencies.

The Director is appointed by the Governor from a list of five qualified Indian applicants agreed upon by the tribal councils. The Director serves on numerous advisory councils in order to represent Indians in those areas in which representation is needed. The Director also works with state agencies involved in state-tribal negotiations on issues such as tax-sharing agreements and gaming compacts.

In recognition of the need to provide a way for Indians to communicate their needs and concerns to the Legislature, the Legislature established the State-Tribal Relations Committee (5-5-229, MCA) in 2001. The first iteration of the committee was established in the late 1970s as a temporary committee to study issues of jurisdiction. The committee was re-established by the Legislature every two years until 1989, when it became a permanent committee of the Legislature known as the Committee on Indian Affairs, which first published this Handbook in 1995.

In 1999, the Legislature reorganized the interim committee structure, folding the Committee on Indian Affairs into the new Law, Justice, and Indian Affairs Committee (LJIAC). The LJIAC was selected to serve as the forum for state-tribal relations because many of the issues affecting state-tribal relations would most likely be addressed by the House and Senate Judiciary Committees. The membership of the LJIAC was drawn from these committees.

At the same time, the Coordinator of Indian Affairs circulated a proposal to create a Commission on Indian Affairs that would be attached to the Executive Branch. This proposal eventually became a study resolution assigned to the LJIAC, which ultimately recommended that the proposal be tabled because of a lack of general support. In its place, the LJIAC recommended that a separate State-Tribal Relations Committee (STRC) be created that would assume the LJIAC's state-tribal liaison responsibilities.

The STRC was established during the 2001 legislative session with the passage of Senate Bill No. 10. The committee is composed of eight members, equally divided between the House of Representatives and the Senate and between political parties. The committee is tasked with the following responsibilities:

- act as a liaison with tribal governments;
- encourage state-tribal and local government-tribal cooperation;
- conduct interim studies as assigned; and
- report its activities, findings, recommendations, and any proposed legislation to the legislature.

In recognition of the government-to-government relationship and to promote cooperation, the 1981 Legislature enacted the State-Tribal Cooperative Agreements Act² that authorizes public agencies, including cities, counties, school districts, and other agencies or departments of the state, to enter into cooperative agreements with Montana's tribal governments. In Fiscal Year 2015, nearly 550 agreements relating to a variety of governmental services were in place.³

² Title 18, chapter 11, part 1, MCA.

³ Bullock, Governor Steve, [Partners in Building a Stronger Montana, 2015 State-Tribal Relations Report](#), page 45.

Basic Principles of State-Tribal Relations

Indians are not just members of an ethnic minority group in Montana.

Indians are also members of distinct cultural nations that have existed since time immemorial and, as a result, maintain a special political and legal status that has been enshrined in the U.S. Constitution, bolstered by subsequent federal laws, and affirmed by the courts.

Tribal governments are not subordinate to state governments and are not bound by state laws.

State authority in Indian country is extremely limited. With rare exceptions, a state has jurisdiction within a reservation only to the extent that Congress has authorized state authority or where federal law, which generally must be interpreted in light of the federal government's trust responsibility to Indian tribes, does not otherwise preempt state law.

There is always a federal dimension to consider in formal state-tribal interactions.

The federal government, through Congress, exercises plenary, or absolute, power over Indian affairs. As a result of the way in which this authority has been exercised through various eras of Indian policy, the federal Department of the Interior, usually through the Bureau of Indian Affairs (BIA), is often involved in carrying out the federal government's role with regard to tribal matters.

Federal Indian policy is generally consistent in some aspects and remarkably inconsistent in others.

The history of federal Indian policy varies widely and the separation of powers allows the coexistence of contrasting views and contradictory decisions. Most recently, every U.S. President since President Nixon has espoused self-determination as a guiding principle and Congress generally encourages self-government while also, in some limited instances, prescribing in detail the manner in which tribes exercise their authority. Meanwhile, decisions of the federal courts, including the United States Supreme Court, consistently recognize tribal sovereignty while sometimes limiting and other times supporting various ways in which it is exercised.

The Indian nations in Montana are similar in some general respects, but distinct from each other in many important ways.

Although federal law defines "Indian country" to include all of the land within the boundaries of any reservation, each tribal nation is unique, with different priorities, values, cultural attributes, and economic circumstances. In addition, some reservations may now be home to more than one tribal group. The distinctions between different Indian nations in Montana need to be considered in discussions and negotiations between the state government and tribal governments.

Government-to-government relations are the norm, not the exception.

Just like the interactions between state governments or between a state government and the federal government, the protocol for state-tribal relations is important. The use of proper channels demonstrates the proper mutual respect and helps avoid misunderstanding and miscommunication.

History matters.

Throughout history, tribes have experienced dispossession, coercion, massacres, broken treaties, disingenuous overtures of peace and friendship, disrespect, and attempts to assert rights and usurp their powers in contravention of federal law and policy. Still, tribes retain and continue to exercise their inherent rights as sovereign governments, subject to those limitations imposed by the federal government, while also exercising time-honored and often centuries-old treaty rights. This historical context is often relevant to successful tribal relations.

Definitions of “Indian” and “Indian Tribe”

Who is an Indian?

There are many definitions of "Indian." In attempting to define the term, it is important to keep in mind the differences between tribal membership, federal law, and ethnological status. A person may not be considered an Indian ethnologically but may qualify for certain programs or services under a federal definition or may qualify for tribal membership under tribal enrollment rules.

Although federal law defines "Indian" in many different ways, there are two general qualifications for a person to be considered an Indian:

- 1) the person has some Indian blood; and
- 2) the person is recognized as an Indian by members of an Indian tribe or community.

Tribes, as self-governing entities, have the power to determine and define their membership. Membership can refer to the formal enrollment on the tribal roll of a federally recognized Indian tribe or to a more informal status as a recognized member of a tribal community. The eligibility standards for formal membership differ from tribe to tribe. Tribal enrollment is the best evidence of a person's Indian status because it is a common prerequisite for acceptance as a member of a tribal community.

What is the correct term to use when referring to American Indians?

This question has been the subject of much debate but, generally, it is best to use individual tribal affiliations whenever possible. If tribal affiliation is unknown, the terms "Indian," "American Indian," or "Native American" are acceptable. Generally, the body of law governing the federal-tribal relationship and the related, but limited, authority of states, is referred to as federal Indian law, and federal law primarily uses the term “Indian.”

Are Indians United States citizens?

Yes, although it was not until 1924 that U.S. citizenship was generally conferred on Indians. Before that time, some treaties or allotment acts had extended citizenship to individual Indians and members of certain tribes. Since 1924, all Indians born in the United States, or born to citizen parents who are outside the country at the time of birth, are U.S. citizens, with all of the attendant rights and responsibilities. Indians are also citizens of the states in which they reside. In addition, Indians are citizens or members of tribes. U.S. citizenship is not inconsistent with tribal membership, nor does U.S. citizenship affect the special relationship that exists between tribes and the federal government.

What is an Indian tribe?

There is no all-purpose definition of an Indian tribe; however, the general definition offered by William Canby, Jr., in [American Indian Law in a Nutshell](#), is helpful: “a group of Indians recognized as constituting a distinct and historically continuous political entity for at least some governmental purpose.” This definition generally tracks the standards by which the federal government, through the BIA, recognizes Indian tribes.

What is meant by "federal recognition" of an Indian tribe?

Federal recognition means the existence of a special relationship between the federal government and a particular tribe that confers specific benefits and services on that tribe as enumerated in various federal laws and United States Supreme Court decisions dating back nearly two centuries. Federal recognition also ensures a tribe’s place within the federal-tribal relationship, including

federal recognition of the inherent rights and powers of self-government but also the broad and overriding plenary power of Congress over Indian affairs.

Formal federal recognition is ultimately the prerogative of Congress and the President. A tribe may seek formal federal recognition of its status either directly from Congress or pursuant to the authority delegated by Congress to the Executive Branch, which has developed an administrative process for review of petitions filed by groups seeking such recognition. The administrative recognition procedure was reformed in 2015 in order to promote transparency, decrease delays, and simplify the process.

How many tribes in Montana have federal recognition?

There are 567 federally recognized Indian tribes in the United States. Seven federally recognized tribes are located in Montana. They include the Assiniboine and Sioux Tribes of the Fort Peck Reservation (Fort Peck Tribes); the Blackfeet Tribe; the Chippewa Cree Indians of the Rocky Boy's Reservation; the Confederated Salish and Kootenai Tribes of the Flathead Reservation (CSKT); the Crow Tribe; the Fort Belknap Indian Community; and the Northern Cheyenne Tribe. As their names demonstrate, separate ethnological tribes can be combined into one recognized tribe.

Are there any tribes in Montana not officially recognized by the federal government?

Yes, the Little Shell Chippewa Tribe. Composed of Chippewa and Cree Indians, the Little Shell were shut out of reservations in North Dakota and Montana for various reasons. Today, the tribe's members live all over Montana but have an elected tribal council and an executive office based in Great Falls. The Little Shell have been seeking federal recognition through the Department of the Interior since the 1970s and, more recently, the Little Shell have also sought recognition from Congress. As of fall of 2016, a bill that would federally recognize the Little Shell awaits a vote in the U.S. Senate.

There is no specific process for state recognition of tribes in Montana. In 2003, the Montana Supreme Court issued a ruling that stated the Little Shell was a tribe entitled to sovereignty.⁴ Governor Brian Schweitzer issued a declaration of state recognition in 2006.

Definitions of "Indian Country"

What is "Indian country"?

Indian country includes:

- 1) all land within the limits of an Indian reservation under the jurisdiction of the U.S. government;
- 2) all dependent Indian communities, such as the New Mexico Pueblos; and
- 3) all Indian allotments still in trust, whether they are located within reservations or not.⁵

The term includes land owned by non-Indians, as well as towns incorporated by non-Indians when they are located within the boundaries of an Indian reservation. Indian country generally defines the boundaries of tribal authority—it is within Indian country that the exercise of tribal sovereignty is strongest and state authority is most limited.

⁴ *Koke v. Little Shell Tribe of Chippewa Indians of Montana, Inc.*, 68 P.3d 814 (Mont. 2003).

⁵ 18 U.S.C. § 1151.

What is the difference between Indian country and an Indian reservation?

A reservation is an area of land "reserved" by or for an Indian band, village, or tribe (tribes) to live on and use. Reservations were created by treaty, by congressional legislation, or by executive order.

Since 1934, the Secretary of the Interior has had the responsibility of establishing new reservations or adding land to existing reservations.

Indian country is a broader term that encompasses reservations as well as dependent Indian communities and Indian allotments.

What is the ownership status of land within Indian country?

Just as states may include a variety of land types within their boundaries (e.g., federal, state, private), so too can Indian country. Although there are three primary categories of land tenure in Indian country (tribal trust, allotted trust, and fee title), Indian country may also include federally- and state-owned as well as other types of land.

Tribal trust lands are held in trust by the federal government for the use and benefit of a tribe for which the United States holds the legal title, and the tribe holds the beneficial interest. This is the largest category of Indian land. Notwithstanding its ownership status, a tribe's interest in tribal trust land is held communally by the tribe and such lands are managed by the tribal government with federal review and approval of certain transactions (e.g., leases, rights-of-way, etc.). Tribal members share in the enjoyment of the entire property without laying claim to individual parcels. Tribes may not convey or sell trust land without the consent of the federal government. Tribes may acquire additional land and have it placed into trust upon approval of the federal government.

Allotted trust lands are held in trust for the use of individual Indians. Again, the federal government holds the title and the individual holds the beneficial interest.

During the assimilation period of the late 19th and early 20th century, Congress enacted the General Allotment Act of 1887, also known as the Dawes Act.⁶ The ultimate purpose of the Dawes Act was to break up tribal governments, abolish the reservations, and assimilate Indians into non-Indian society as farmers. To accomplish this goal, Congress decided to divide tribal lands into individual parcels, give each tribal member or household a parcel, and sell any "surplus" parcels to non-Indian farmers.

The result was a loss of 65% of Indian lands and the creation of a checkerboard pattern of tribal allotments and non-Indian owned fee lands within many reservations. (Maps demonstrating the checkerboard on the Flathead and Crow Reservations are included on pages 20 and 21.) While not all reservations were allotted, the effect was still devastating as tribes lost approximately 90 million acres (roughly the size of present-day Montana). The tribal land base declined from 138 million acres in 1887 to 48 million acres in 1934 when the allotment system was abolished.

The only reservation that was not allotted in Montana was the Rocky Boy's. The Fort Belknap and Northern Cheyenne were, but the surplus lands were not put up for sale to non-Indians. The Blackfeet Allotment Act was repealed 12 years after it was passed and the surplus lands were returned to the tribe. The Flathead Reservation was specifically allotted under the Flathead

⁶ 24 Stat. 388, as amended, 25 U.S.C. §§ 331 through 358

Allotment Act,⁷ which has been amended more than 80 times since 1904. The Fort Peck Reservation was allotted in 1908; surplus lands not allotted to individual Indians were opened to settlement by non-Indians in 1913.⁸ On the reservations that were allotted, much of the allotted lands passed out of Indian control through sale to non-Indians or through loss to taxation.

Fee lands are generally private property similar to any other privately-owned lands, owned by an Indian or non-Indian. An Indian tribe may also own lands in fee status within Indian country.

Other lands in Indian country can include those owned by federal, state, or local (nontribal) governments. For example, these lands may include such areas as national wildlife refuges and state parks.

What is the ownership status of land within Montana's seven reservations?

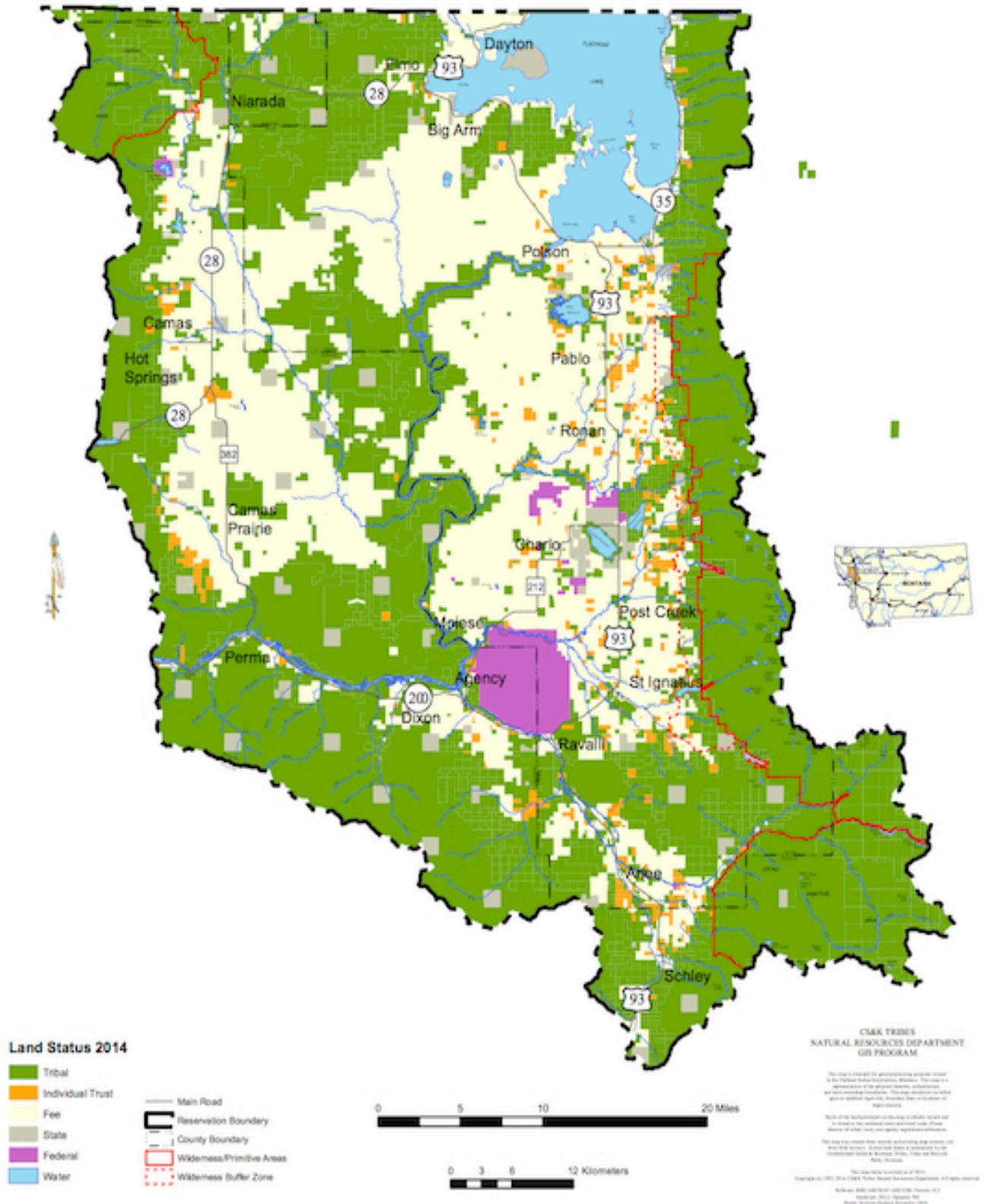
RESERVATION	TOTAL ACREAGE	% TRUST LANDS (tribal & individual)	% FEE LANDS (non-Indian federal & state)
Blackfeet	1.5 million	63	36
Crow	2.2 million	68	32
Flathead	1.3 million	56	32
Fort Belknap	697,617	97	3
Fort Peck	2.1 million	46	54
Northern Cheyenne	445,000	99	1
Rocky Boy's	122,259	100	0

Source: Montana Indians: Their History and Location, Division of Indian Education, Montana Office of Public Instruction, available at <http://opi.mt.gov/pdf/IndianEd/Resources/MTIndiansHistoryLocation.pdf> (last visited October 21, 2016).

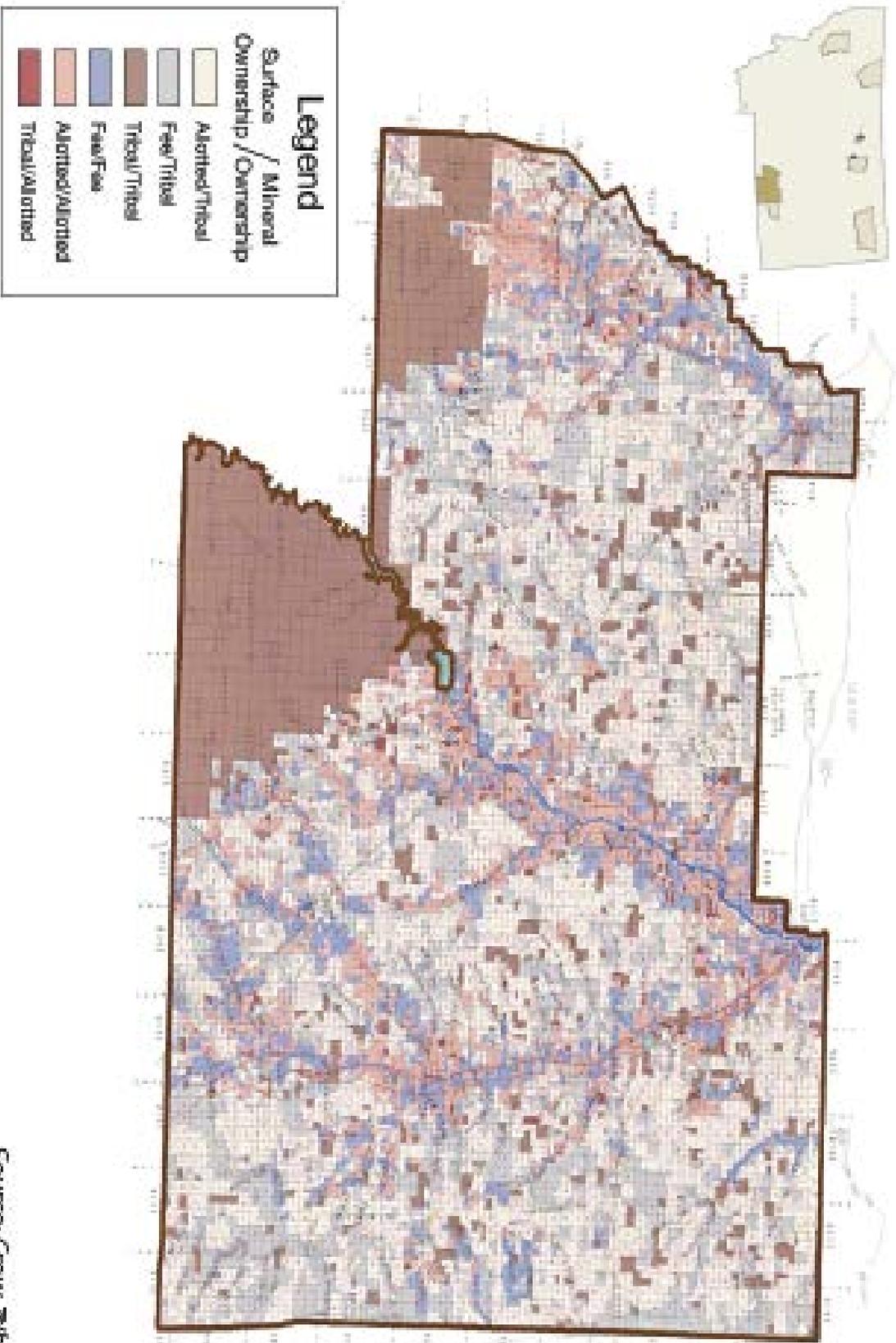
⁷ 33 Stat. 302 (1904)

⁸ 35 Stat. 558.

Flathead Reservation Land Status, 2014



The Crow Reservation, Montana



Source: Crow Tribe

Interpretation of Indian Law

Are the rules for interpreting Indian law different from those used to interpret other laws?

Yes. From the early 1800s, the United States Supreme Court, in numerous decisions, held that the federal government has a special **trust responsibility** toward Indian tribes.⁹ From this trust responsibility, the Court also developed and used a unique set of rules, commonly known as **canons of construction**, for interpreting or construing treaties, statutes, or executive orders that may affect Indian tribes and peoples.

The canons of construction seek to protect the unique legal and political status of tribes within the U.S. constitutional system and acknowledge the existence of the unequal bargaining positions that existed between the federal government and the tribes during treaty negotiations. In many cases, tribal negotiators did not speak or understand English and were, therefore, placed at a significant disadvantage during the negotiation process. Often, the federal government negotiated with individuals whom it had selected and who may not have been the authorized or traditional leaders of a particular tribe.

More importantly, the canons reflect a presumption, based on the federal trust responsibility, that an act of Congress was meant to protect tribes and Indian peoples. As a result, the canons assume that unless there is a "clear purpose" or an "explicit statement" to the contrary in treaties, statutes, or executive orders, Congress intended to preserve or maintain the rights of tribes.

Specifically, the canons provide that the treaties, statutes, orders, or agreements with Indian tribes are to be liberally construed in favor of Indians. If ambiguities exist, they are to be resolved in favor of Indians and the language of treaties is to be interpreted as it would have been understood by the tribe at the time that the treaty was entered.¹⁰

Can the abrogation of tribal rights be presumed under the canons of construction?

No. Generally, the canons of construction require clear Congressional intent or unequivocal language to abrogate (repeal) tribal rights or authorities. Without such a clear intent or statement, it is usually presumed that all tribal rights are retained.¹¹

Tribal Sovereignty

What is tribal sovereignty?

Tribal sovereignty is the right of Indian tribes to make their own laws and to have those laws govern conduct within Indian country. Tribal governmental authority is not qualitatively different from sovereign powers exercised by state and federal governments; however, the states and the federal government derive their sovereignty from the U.S. Constitution while tribal governments exercise an inherent sovereignty that existed before the founding of the United States.

Upon arrival, European nations claimed control of the "New World" where tribes had resided since time immemorial under the Doctrine of Discovery, a Papal-led concept increasingly

⁹ See, e.g., *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *Worcester v. Georgia*, 31 U.S. 515 (1832).

¹⁰ See Cohen, Felix, *Handbook of Federal Indian Law* (1982), pp. 221-225 for discussion of canons.

¹¹ *Menominee Tribe v. United States*, 391 U.S. 404 (1968).

repudiated by modern day Christian denominations. According to this doctrine, European nations recognized the inherent sovereignty of indigenous peoples through numerous treaties and agreements by and between various tribal governments and the British, French, and Dutch governments. After the American Revolution, the federal government continued this treaty-making practice, also thereby acknowledging the sovereign status of tribal governments. These treaties are the supreme law of the land under Article VI the U.S. Constitution.

The rights retained or reserved by tribal nations are frequently evaluated by the United States Supreme Court and addressed through Congressional actions. The foundational principles of the current body of law known as federal Indian law arose from three cases heard by the U.S. Supreme Court under Chief Justice John Marshall in the early 19th century. As a result of those cases, tribal sovereignty was recognized but limited by the federal government. For example, tribes could only sell their lands with approval of the federal government but otherwise retained the right to occupy and use the land.¹² Tribes were deemed “domestic dependent nations” to which the federal government has a fiduciary or “guardian-to-ward” relationship¹³ and state laws generally do not extend to Indian country without Congressional authorization.¹⁴

Though now nearly two centuries old, these basic concepts, inherent tribal sovereignty, the federal-tribal trust relationship, and the exclusion of state authority over tribal matters and territory, remain the foundations of federal Indian law.

If the U.S. Constitution prohibits discrimination based on race, why do Indians retain special rights not held by other citizens in the United States?

Indian tribes exercise sovereignty that predates the U.S. constitution and federal law. When the United States was founded, tribes were self-governing, sovereign nations whose powers were not extinguished by the U.S. constitution. The U.S. constitution and subsequent decisions of the United States Supreme Court may have subjected the tribes to federal power, but it did not extinguish tribal internal sovereignty or subject tribes to the powers of the states.¹⁵

Therefore, tribes are largely extra-constitutional and tribal affiliation or membership is a political, not just a racial, classification. As a result, different treatment of Indians and non-Indians is both allowed under the U.S. constitution and consistent with the history of federal Indian law.¹⁶ The United States did not enter into treaties with Indians because of their race, but rather because of their political status.

Were treaties necessary to grant certain powers to Indian tribes?

No. Many mistakenly believe that a treaty contains those rights that the federal government granted to a tribe. However, as recognized by both the United States and the Montana Supreme Courts, a treaty is not a grant of rights to the Indians, but instead is a grant of rights from Indians and a reservation by the Indians of any rights not granted.¹⁷

¹² Johnson v. McIntosh, 21 U.S. 543 (1823).

¹³ Cherokee Nation v. Georgia, 30 U.S. 1 (1831).

¹⁴ Worcester v. Georgia, 31 U.S.515 (1832).

¹⁵ The United States Constitution recognizes the unique status of Indian tribes in Article I, § 8, commonly referred to as the "Indian commerce clause", which grants Congress authority "[t]o regulate commerce with foreign nations, and among the several states, and with the Indians tribes". (emphasis added)

¹⁶ Morton v. Mancari, 417 U.S. 535 (1974).

¹⁷ United States v. Winans, 198 U.S. 371 (1905); State v. McClure, 127 Mont. 534, 268 P.2d 629 (1954); State ex rel. Greely v. Confederated Salish and Kootenai Tribes, 219 Mont. 76, 712 P.2d 754 (1985).

Indian treaties stand on essentially the same footing as treaties with foreign nations in that the Supremacy Clause of the U.S. Constitution requires that treaties take precedence over conflicting state law.¹⁸ Congress may abrogate tribal treaty rights but must clearly intend to do so.

What tribes lost with adoption of the U.S. Constitution was "external sovereignty" or the ability to interact with foreign nations. Similar to states, tribes retain sovereignty within tribal territories and retain the power of self-government with respect to their land and members.¹⁹

Does the U.S. government still make treaties with Indians?

No. Treaty negotiations with Indian tribes ended with an act of Congress in 1871.²⁰ However, the act did not impair or abolish existing treaty obligations. Since that time, treaty-like agreements with tribes have been made by congressional acts, executive orders, and executive agreements.

Can treaties with tribes be abrogated?

Yes. Congress maintains the plenary (absolute) power to unilaterally abrogate Indian treaties.²¹ Because many treaties often contained language stating that they would remain in effect "as long as the grass shall grow" or similar terms, many incorrectly believe that changes in terms must be mutually negotiated by the federal government and the tribes. That is not the case. Treaties, like international treaties, are similar to federal statutes. They can be repealed or modified by later Congressional action.

Can abrogation of treaties be implied by passage of other acts?

No. The trust relationship between the federal government and tribes weighs heavily against implied abrogation of treaties.²² It must be clear that Congress considered the conflict between its intended action and a treaty, and chose to resolve that conflict by abrogating the treaty.²³

Congress's power to abrogate a treaty does not free it from the duty to compensate for the destruction of a property right. Although an abrogation itself may be effective, a tribe may be entitled to compensation for the taking of a treaty right pursuant to the Fifth Amendment of the U.S. Constitution.²⁴

Can Montana unilaterally enact legislation affecting jurisdiction?

No. Congress, not the states, exercises plenary or absolute authority over the tribes. Only Congress can repeal treaties, eliminate reservations, or grant the states jurisdiction over Indians on reservations. The actions of the federal government are controlled by the rights guaranteed through the Bill of Rights and the Fourteenth Amendment of the U.S. Constitution.

¹⁸ United States Constitution, Article VI, § 2; *Worcester v. Georgia*, 31 U.S. 515 (1832). Treaties are the supreme law of the land and are superior to any conflicting laws of a state, including the police powers of a state. *U.S. v. Forty-Three Gallons of Whiskey*, 108 U.S. 491 (1883); *State v. McClure*, 127 Mont. 534, 268 P.2d 629 (1954).

¹⁹ *Worcester v. Georgia*, 31 U.S. 515 (1832).

²⁰ In 1871, Congress passed a rider to an Indian appropriations act, providing: "No Indian nation or tribe ... shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty...." 25 U.S.C.A. § 71.

²¹ *United States v. Winans*, 198 U.S. 371, 380-381 (1905).

²² *Menominee Tribe v. United States*, 391 U.S. 404 (1968).

²³ *United States v. Dion*, 476 U.S. 734, 738-740 (1986); see also *Seneca Nation of Indians v. Brucker*, 262 F.2d 27 (D.C. Cir. 1958), cert. denied, 360 U.S. 909 (1959).

²⁴ *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980); but in *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955), the Court held that rights based solely on aboriginal title are not compensable. The Court explicitly distinguished property rights based solely on aboriginal rights, which are not compensable, from treaty rights based on congressional acts, which are compensable. Id. at 277-278, 288-289; see also *United States v. Creek Nation*, 295 U.S. 103 (1935).



Tribal Governance

How do Indian tribes govern themselves?

Though each tribe is unique, many tribal governments are organized in much the same way as state and municipal governments. Legislative authority is vested in an elected body often referred to as a tribal council, although it can be known by other names, such as business committee or executive board. Council members are elected either by district or at large. In some instances, the members are nominated by district but are elected at large. The council governs the internal affairs of the tribe; however, tribal resolutions and ordinances may be subject to review by the Secretary of the Interior.

Executive authority is exercised by a presiding officer often called the Chairman. The Chairman can be elected either at large or by the members of the council. The duties of the Chairman are generally not spelled out in the tribal constitution or bylaws. Therefore, the role of the Chairman typically depends on the governing structure of the tribe.

Tribal governments also have court systems. Tribal court systems can vary from a highly structured system with tribal prosecutors, tribal defenders, and an appellate system to a simpler judicial system that operates on a part-time basis. Tribal judges can be popularly elected or appointed by the tribal council. Tribal judges generally are not attorneys, but some tribes require preparation for office by administering judicial qualification examinations and all tribal court judges receive judicial training while in office.

Are modern tribal governments based on traditional governance structures of the Indian tribes?

Generally not, but it depends on the tribe. Many modern tribal governmental structures have their origin in the Indian Reorganization Act (IRA) of 1934.²⁵ Prior to the arrival of the Europeans, tribal governments varied from highly formalized, as represented by the Iroquois League, to less formal, as represented by the tribes of the Great Basin deserts. However, there were certain common characteristics: the integration of the political with the religious, the importance of the tribe over the individual, and consensus decision-making.

With displacement and the confinement of tribes on reservations and the establishment of the Indian agent system by the federal government, traditional tribal governance structures were forcibly suppressed. In 1934, the federal government passed the IRA in an attempt to re-establish tribal self-government, but based it on a western European model. The BIA drew up a standard constitution that established a representative form of government that tribes were free to adopt; almost three-fourths did. These standard constitutions had limited expressions of historic tribal governing principles. As a result, most tribes that adopted IRA constitutions have revised them over the years to reflect individual tribal concerns and to exercise greater autonomy; however, many tribal constitutions retain a number of the original IRA-era provisions.

²⁵ 25 U.S.C. § 461, et seq.

One result of the IRA was the creation of a single tribal government for more than one Indian tribe, because, in some instances, the federal government placed more than one tribe on a single reservation. An example in Montana is the placement of the Gros Ventre and Assiniboine together on the Fort Belknap Reservation. The IRA did not allow for separate governments for each. In order to retain some cultural identity, some tribal governments made constitutional provisions for elected representatives of each tribe to serve on the tribal council. The Fort Belknap Indian Community goes a step further and requires that candidates for chairman and vice chairman to run as a team, with one being Gros Ventre and the other Assiniboine.

Are there any tribes that did not reorganize under the IRA?

Yes. Approximately 30% of the tribes in the United States chose not to. The most notable exceptions are the Navajos and the Pueblos. In Montana, the Crow Nation rejected the IRA in favor of a general council form of government where each enrolled tribal member has a vote if the member attends the general council meeting. The general council elects the tribal officers who are responsible for the day-to-day operation of the tribal government. The Crow Nation amended its constitution in 2001 to establish a three branch system of government modeled after the federal government. The general council now meets biannually to receive information from the Executive and Legislative Branches. The Fort Peck Tribes also rejected the IRA and operated with a general council form of government until 1960 when a representative tribal council was established.

What types of activities do tribal governments engage in today?

Tribal governments engage in a range of activities similar to those of any other government: defining conditions of membership, regulating domestic relations of members, prescribing rules of inheritance for reservation property not in trust status, levying taxes, regulating property under tribal jurisdiction, controlling conduct of members by tribal ordinance, administering justice, conducting elections, developing tribal health and education programs, managing tribal economic enterprises, managing natural resources, enacting environmental protection, and maintaining intergovernmental relations at the federal, state, and local levels.

Links to the constitutions and codes of each tribe in Montana are available at <http://indianlaw.mt.gov>.

Culture and Language

Culture is the characteristics and knowledge of particular groups of people, defined by everything from language, religion, food, social habits, music and arts.

After European settlement, Indian culture was beset by a number of federal policies developed to renounce and punish participation in traditional ways, most notably religion and language use. As a result, many traditions that tribes historically practiced publicly are now practiced in the recesses of tribal society.

Notwithstanding federal policies, tribes continued to fight for greater cultural freedoms. Since the 1960's, this resulted in the establishment of a number of new federal policies and laws based on religious freedom



and the inherent right to perform cultural practices. While many cultural attributes were lost, tribes increasingly find ways to bring back and practice their traditions.

Each of the tribes in Montana has unique and dynamic traditions, ceremonies, and customs that are practiced on a daily, cyclical, or event-specific basis. Many are practiced in solitude, primarily through prayer and ceremony, or in large community gatherings such as feasts and powwows. These traditions and ceremonies guide Indians' interactions with living and non-living things.

One of the most prominent expressions of Indian culture is language. Each of the tribal nations in Montana has its own languages; five have more than one. There are 14 languages total. Efforts are underway to reverse catastrophic language loss and perpetuate the languages that, perhaps more than anything, underscore a tribe's very existence.

How are cultural values expressed and passed down?

The histories, cultures, traditions, and ceremonies of each of the tribes were passed down primarily through storytelling over hundreds of generations. Some individual tribal stories are so sacred and powerful that they are treated with special respect and accompanied by ceremony. An example are the creation stories, often recited in a ritual way. Creation stories explain how the people first came into being and how the sun, moon, stars, rainbows, sunsets, sky, thunder, lakes, mountains, and other natural occurrences came to be. Other tribal stories explain the origin of certain landmarks, plants, and animals. Many of the stories provide information on illness and healing among others things.

Some of the sacred stories may only be told at certain times of the year or under certain circumstances. Each tribe has its own unique way of "carrying" its history, culture, traditions, and ceremonies. These stories and ceremonies are carried by specific individuals in the community and are kept within tribal and family circles.

Tribes and tribal traditions are also tied closely to the natural and spiritual environment. Connections with animals such as horses, buffalo, eagle, and fish, among others, provide spiritual wholeness and sustained health. Additionally, each tribe has a set of sacred sites associated with its relationships with the environment and its history that are critically important to the tribe's past, present, and future. For some tribes, certain ceremonies are practiced at sacred sites. Tribal members in Montana consistently prioritize their connection and engagement with these sacred places as they provide spiritual, personal, and community balance.

Can non-Indians participate in tribal cultural events?

There are opportunities for the public to participate in cultural events. Powwows, for example, are hosted by individual tribes and showcase traditional singing and an array of tribal dances with dancers adorned in a diverse set of cultural regalia specific to tribes, bands, and families.

Modern day powwows serve as a central point for tribes from across Montana and the U.S. and Canada to share new dances, songs, and regalia styles. Dancers and drum groups compete for prize money provided by the host tribe and its powwow committees. Traveling from powwow to powwow to compete and participate is a popular tradition. There are often honorees or guests that host special dances honoring those who have passed away or have passed a major life milestone.



The powwow season in Montana usually starts with the Montana State University American Indian Council Powwow in Bozeman in April. This is an important event for students to showcase their dancing and cultural talents and is well attended by youth and their families from all of the colleges and universities throughout Montana. Powwows such as the Arlee Celebration, Crow Fair, North American Indian Days in Browning, the Northern Cheyenne 4th of July Powwow, and the Rocky Boy Celebration are featured in Montana, among many others. Powwows typically run through the end of October.

Tribal rodeos, Indian relays, and stick game are also often associated with powwows. Rodeos and relays continue the tradition of horsemanship and horse culture for Montana tribes. Stick game is a popular gambling game between two teams hiding bones. Stick game songs are used to provoke the opposing team to incorrectly guess where the bones are hidden. These have become popular tourist and local events in Montana.

What about arts and crafts?

Cultural values have been expressed for millennia through arts and crafts. Those particular to Montana tribes are star quilt making, a variety of beadwork, regalia art work, basketry, painting, ledger art, and a variety of forms of painting, sculptures, music, and dance. In addition to being valued and purchased by the public, the production of many of these arts and crafts is done for spiritual reasons and to honor loved ones. Star quilts are important in giveaways honoring graduates and marking significant life events. They are also associated with and used for healing.

What is the current health of Indian languages in Montana?

For more than 40 years, tribal nations have worked to stem the loss of Indian languages in their communities. Even so, language use has rapidly declined. Historically, U.S. policymakers believed Indian languages were harmful to the development of the country and rapid assimilation of Indians into mainstream culture. Public and religious leaders used boarding and residential schools to remove Indian culture and languages from young children. This resulted in historical trauma that continues to impact today's generations. Some older generations still teach their children and grandchildren to not speak their language. As a result, only a fraction of Indian communities speak their own language today.

In some tribes, there are only a handful of proficient speakers remaining and most are over the age of 60. As speakers die, so does the opportunity to transfer language. The Kootenai Tribe of the Flathead Nation has approximately five remaining fluent speakers and the youngest is in his sixties. In terms of fluency, the Crow language is the healthiest in Montana with about 22% fluency in tribal communities. But at the current rate of loss, the Crow can expect fewer than 50 speakers in 2035. The Little Shell Chippewa Tribe is already there. Traditionally speaking three languages (Cree, Chippewa, and Michif), the Little Shell do not have any fluent speakers left. Other tribes in the state have between approximately 40 and 500 speakers.

Why are Indian languages important to Montana?

Indian languages in the state are Montana languages. Before the mid-1850s, the history and stories that are unique to Montana can only be found in the languages that were spoken at that time. Stories regarding distinct Montana places, events, and people are embedded in Indian languages.



This information extends the written history of the state and provides a broader lens in which to chronicle Montana's past.

Language is also an important vehicle for Indians to express their identity and perpetuate their cultural uniqueness. For most of the tribes in Montana, traditional knowledge can only be fully understood in their own language because there is not an easy way to translate into English. Many of the ceremonies and traditions cannot be practiced without the language. There is an extensive body of research that suggests that Indians and students who are immersed in their culture perform better academically, have higher self-esteem, and lead more productive and happy lives.

What efforts are underway to sustain and perpetuate Indian languages in tribal communities?

In the 1970's, the BIA and private donors established funding to preserve Indian languages in the United States. Each of the tribes in Montana, in some capacity, participated. English to Indian language dictionaries were established or updated and many traditional stories were translated and bound for preservation purposes. While important, these funding and preservation activities were not sufficient to stem the velocity of language loss.

Tribal colleges became key stakeholders, offering language classes and culture camps. Tribal colleges in Montana continue to help perpetuate languages. Tribal governments also increased their efforts, utilizing language nests (immersion retreats), immersion camps, elders and culture committees, immersion schools, and culture camps. However, the frequency and breadth of these activities did not result in more fluent speakers.

In 2013, the Legislature established the [Montana Indian Language Preservation Program](#)²⁶ and provided funding to support tribes' efforts to preserve and perpetuate their languages. Primarily used to create tools and materials that increase access to languages, the program has begun to turn the tide on language loss. Montana tribes created an expansive array ranging from mobile phone applications, comprehensive websites, and radio productions to a host of curricula, language archives, guides, and books.²⁷ Additionally, tribes engaged in new avenues of instruction including social media lessons of the day, immersion courses, weekly language classes, and language classes in Head Start.

The tradition of modernizing Indian languages continues. Groups of proficient speakers meet to establish new Indian words to accommodate changes in society including new technologies like the cell phone, computers, and the Internet.

Tribal youth leaders are increasingly interested in learning their language thanks in part to the Indian Education for All curricula in Montana's public schools. Larger numbers of young people sign up for summer language camps, hunting camps, and after school programs. Additionally, young people gain access to language through websites, social media, and the new mobile phone applications. Tribal leaders believe youth participation in language learning is a good sign for the future.

²⁶ 20-9-537, MCA.

²⁷ A collection of language preservation program products is archived in the Montana Historical Society and available to the public

Education

Who is responsible for the education of Indian students?

As U.S. citizens and citizens of the state in which they reside, Indian students are entitled to participate in public education programs. However, prior to their being granted citizenship in 1924, Indian students attended schools operated by the U.S. Department of Interior – Indian Affairs.

The Bureau of Indian Education (BIE), a branch of Indian Affairs, continues to oversee a total of 183 elementary, secondary, residential, and peripheral dormitories in 23 states. Of those, 130 are operated by the tribes under Public Law 93-638 (Indian Self-Determination and Education Assistance Act) or Public Law 100-297 (Tribally Controlled Grant Schools Act). The remaining 53 schools are operated by the BIE. There are two tribally operated BIE grant schools in Montana: Two Eagle River School in Pablo and the Northern Cheyenne Tribal School in Busby.

Over the years, responsibility for Indian education shifted from federal to state and tribal governments. Today, the vast majority of Indian students attend state public schools. In 2016, less than 2% of Indian students in Montana attended a tribally controlled BIE grant school.

The number of Indian students in Montana is increasing every year. For the 2015-2016 school year, 14% of Montana's students (20,401) reported American Indian/Alaska Native as at least one of their races.

Almost 45% of Indian students attend a school physically located within a reservation. Of 821 public schools in Montana:

- 61 report that 75% to 100% of their student population is Indian;
- 18 report that 50% to 75% of their student population is Indian; and
- 32 report that 25% to 50% of their student populations is Indian.

If Indian students attend public schools, but Indian trust land is exempt from property taxation, how are public school districts that encompass Indian reservations financed?

The federal government created several programs to reimburse public school districts for the cost of educating Indian children, including the Johnson-O'Malley Act (JOM), the Educational Agencies Financial Aid Act, and the School Facilities Construction Act.

The JOM²⁸ provides funding for special programs that benefit Indian students, such as special language classes, homeschool coordinators, teacher aides, and summer programs; use of JOM funds for the general operating expenses of a school district is severely restricted. Although the JOM itself does not distinguish between on- and off-reservation Indians, the regulations give priority to programs serving Indians living on or near reservations.

²⁸ 25 U.S.C. 1808(a)(1)(B).



The Educational Agencies Financial Aid Act,²⁹ often referred to as Public Law 81-874, provides funding to school districts that have large blocks of tax-exempt federal land within their boundaries. This includes military installations as well as Indian reservations. Public Law 81-874 funds are used for general operating expenses, such as textbooks, equipment, and salaries, but may not be used for construction. School construction funds are available through the School Facilities Construction Act.³⁰

Are there other federal programs that benefit Indian students?

Yes. The Indian Education Act (IEA) of 1972, as amended, assists school districts in developing programs designed to meet the special educational and culturally related academic needs of Indian students. Grants can be used for bilingual and bicultural programs, special health and nutrition services, remedial instruction, guidance and counseling services, early childhood programs, and special education programs benefiting disabled and gifted and talented Indian children. The IEA also makes funds available for fellowships in graduate and professional programs, as well as for adult education programs.

In 1994, Congress reauthorized the IEA as part of the Elementary and Secondary Education Act³¹ of 1965 (ESEA), a piece of civil rights legislation intended to protect economically and educationally disadvantaged children. Most Indian students are eligible to participate in Title I (compensatory education) programs created by the ESEA.

The IEA was further revised with the enactment of the No Child Left Behind Act of 2001, which was replaced by the Every Student Succeeds Act of 2015 (ESSA).³² Under the ESSA, states and local education agencies are required to engage in meaningful consultation with tribes or tribal organizations in developing state plans for Title I grants. Such consultations must occur prior to making any decisions that impact opportunities of Indian students in programs, services, or activities funded by the ESSA. Funds awarded under the ESSA may be used to fund Indian language immersion programs in public schools. Additionally, the ESSA enables tribes to enter into cooperative agreements with states and local education agencies to run and operate ESSA programs on tribal lands. It also allows the BIE to apply for all discretionary funding within the ESSA. Previously, certain funds were available to states but not the BIE.

What is the role of tribes in the area of Indian education?

Education is a central focus of the tribes on all of the reservations in Montana. Each tribal government has an education department whose mission is to provide and promote quality educational opportunities for all tribal members from early childhood through adulthood. Some of the educational services provided by Montana tribes, either through federal contracts and grants or through tribal resources, include Head Start, guidance and counseling services, native language and culture programs, monetary allowances for college students, career opportunity fairs, and tribally operated colleges.

²⁹ 20 U.S.C. 236 through 245.

³⁰ 20 U.S.C. 631 through 647.

³¹ 20 U.S.C. 2701, et seq.

³² 20 U.S.C. §6301.



The federal policy of Indian self-determination also led to the encouragement of schools operated by tribes or by Indian organizations, rather than by the state or federal government. To foster this policy, the federal government provides financial assistance to Indians administering their own schools in much the same manner as it assists public school districts. This includes the JOM, IEA, ESEA, ESSA, and school construction. The federal government also assists tribal colleges through the Tribally Controlled Community Colleges and Universities Assistance Act of 1978³³ by providing grants for the operation and improvement of these colleges.

Are there any tribally controlled colleges?

Across the nation, there are 37 tribal colleges and universities. Montana has the most of any state with seven, one located on each reservation. These are the Aaniiih Nakoda College (formerly Fort Belknap College), Blackfeet Community College, Chief Dull Knife College, Fort Peck Community College, Little Big Horn College, Salish Kootenai College, and Stone Child College.

Many tribal colleges are similar to community colleges in that they offer 2-year associate degrees and certificate programs in a number of areas and serve both Indian and non-Indian students. However, some, including Salish Kootenai College, offer baccalaureate degrees in a number of areas.

How are tribal colleges funded?

The majority of funding for tribal colleges comes from federal sources. Tribal colleges are reimbursed by the federal government for a portion of their costs for Indian “beneficiary” students, those who are enrolled in a federally recognized tribe or the immediate descendent of an enrolled member, but not for nonbeneficiary students. While federal law authorizes \$8,000 in federal funding per Indian student, the actual disbursement is subject to appropriation.³⁴ In 2016, tribal colleges received \$6,718 per beneficiary student.³⁵

Montana is one of the few states that provides funding to its tribal colleges, and it does so in the form of a reimbursement for the education of resident nonbeneficiary students.³⁶ To be eligible, a tribal college’s student body must be at least 51 percent Indian and the college must be accredited. The college also must enter a contract or agreement to provide the Board of Regents with information about the eligibility of its nonbeneficiary students and to ensure that the content and quality of its courses are consistent with Montana University System standards. Montana currently reimburses eligible tribal colleges \$3,280 per nonbeneficiary student.

What does the State of Montana do to foster Indian education?

Article X, section 1, of the Montana Constitution states:

(2) The state recognizes the distinct and unique cultural heritage of the American Indians and is committed in its educational goals to the preservation of their cultural integrity.

³³ 25 U.S.C. 1801 through 1852.

³⁴ 25 U.S.C. 1808(a)(1)(B).

³⁵ Stockwell, Hope, [Tribal Colleges in Montana: Funding and Economic Impacts](#), July 13, 2016, page 4.

³⁶ 20-25-428, MCA.



The state has implemented a number of policies designed to address this commitment. School districts with a significant Indian enrollment may require certified personnel to take instruction in American Indian studies.

In 1999, the Legislature passed a law commonly known as “Indian Education for All”.³⁷ It encourages every Montanan to learn about the distinct and unique heritage of American Indians in a culturally responsive manner. Montana’s tribal nations and the state of Montana, including the Board of Public Education, the Office of Public Instruction, and the Office of Higher Education, jointly developed action plans to implement the law. These plans were subsequently approved by the Board of Education, which includes the K-12 Board of Public Education and the Board of Regents, and included the following commitments:³⁸

- Provide opportunities for all students to gain an awareness and understanding of the unique culture, heritage, and contemporary issues of American and Montana Indians;
- Provide educational personnel and leadership training and supportive service;
- Support strategies to promote recruitment and retention of Indian teachers;
- Provide a model curriculum and recommended supportive resources; and
- Provide guidance in professional development.

Indian Education for All has been integrated in Montana social studies, science, reading and math standards. In 2005, the Legislature appropriated funds for school districts and educational organizations to develop accurate and appropriate resource materials and to design and deliver relevant professional development. These resources were then offered to other schools for replication.

Indian Education For All also provides a mechanism for tribes to undertake the telling of their own histories, in their own ways and with their own voices. Governor Brian Schweitzer proposed an initiative that provided funding for tribal colleges to develop, publish, and disseminate tribal histories for the development of curriculum and instruction. The two-year project yielded a wealth of information and resources in the form of publications and videos.

In 2013, the Legislature created the Montana Indian Language Preservation Program³⁹ to support the efforts of tribes to preserve and perpetuate Indian languages. In 2015, the Legislature authorized the Cultural Integrity Commitment Act,⁴⁰ which provides funding to promote innovative, culturally relevant, Indian language immersion programs in public schools with the goal of raising student achievement, strengthening families, and preserving and perpetuating Indian language and culture throughout Montana.

³⁷ 20-1-501, MCA.

³⁸ Fleming, Walter and Lance Foster, [History and Foundation of American Indian Education](#), 2012-2013, page 53.

³⁹ 20-9-537, MCA.

⁴⁰ 20-7-1402, MCA, et seq.

Health and Human Services

Who is the primary provider of health care for Indians?

The primary provider of health care for Indians is the Indian Health Service (IHS), located within the U.S. Public Health Service, which is part of the Department of Health and Human Services. The IHS is composed of 12 geographic area offices, covering 34 states. These areas are subdivided into 136 geographic Health Service Delivery Areas. Except for Alaska, the delivery areas are generally centered around an Indian reservation, including the area surrounding the reservation. Medical care is provided through small hospitals, health centers, clinics, and Urban Indian Health Centers within the delivery areas.

The IHS provides medical care either through direct services at IHS facilities or through contract services. The IHS also contracts with tribes so that tribes can manage and administer the delivery of healthcare services on their own reservations. The IHS prefers that eligible Indians use available IHS facilities first for their health care needs. If additional health care is required, the IHS may contract with a local health care facility or private practitioner to provide the necessary services. IHS funding for contract care services is deficient and the funding shortage often results in Indians not receiving the contract care that they need. For many years, IHS funding was limited to priority (life or limb) care.

Where funding is available, IHS pays for about 70% of the health care costs incurred by an eligible Indian. The remaining 30% comes from other sources, including private insurance and entitlement programs. In the case of contract health care costs, the IHS is the payer of last resort after federal, state, local, or private health payment programs are applied.

Who is eligible to receive services from the IHS?

A person of Indian descent belonging to the Indian community served by local facilities and programs is eligible to receive health care services from the IHS, either directly from an IHS facility or from an IHS-contract facility. A person of Indian descent who does not reside within a delivery area is ineligible for contract care. This means that an off-reservation tribal member must travel to an IHS facility on a reservation in order to receive medical care.

Under certain circumstances, some non-Indians may receive care at an IHS facility. For example, a non-Indian woman who is pregnant with an eligible Indian's child may receive care during the pregnancy and for 6 weeks following the birth. In remote areas where the only available medical care is at an IHS facility, an ineligible non-Indian may receive medical treatment on a fee-for-service basis, if the tribe approves. The IHS may also provide medical services to non-Indian members of an eligible Indian household if the medical officer in charge determines medical care is necessary to control acute infectious diseases or a public health hazard. However, service to non-Indians, in this instance, may not interfere with the delivery of services to eligible Indians.



Are Indians eligible for other government health care programs, such as Medicaid, Medicare, or Veterans Benefits Administration health benefits?

As U.S. citizens, Indians are entitled to the same health care programs available to non-Indian citizens, regardless of an Indian's IHS eligibility.

What health care services are provided by tribes?

Tribes are eligible to contract with IHS to assume management and oversight responsibility for health care services on their reservation. Nationally, tribal efforts to assume such responsibility are often complicated by federal funding shortages and the failure of the federal government to comply with the terms of those contracts. Nonetheless, more and more tribes are taking over in order to provide health services to their members and others in the community as they see fit.

Many tribes also rely on Community Health Representatives (CHRs). CHRs are Indian paraprofessional health care providers who make home visits, monitor medication, follow up on hospital stays, and educate tribal members on good health practices and disease prevention, incorporating traditional Indian concepts whenever appropriate. CHRs are selected, employed, and supervised by their tribes. CHR programs are tribally administered. Other types of programs that tribes operate through IHS contracts include chemical dependency and substance abuse, sanitation and environmental health, mental health, family planning, and nutrition.

In addition to contracted services, some tribes operate their own tribally-funded programs, such as renal dialysis.

What IHS services are available in Montana?

The IHS area office in Billings is responsible for administering IHS programs in Montana and Wyoming.

The three IHS hospitals in Montana are on the Blackfeet, Crow, and Fort Belknap Reservations. The hospital at Crow Agency also serves the Northern Cheyenne Reservation. In addition, there are satellite clinics on the Crow, Blackfeet, and Fort Belknap Reservations.

There are IHS clinics on the Blackfeet, Crow, Flathead, Fort Belknap, Fort Peck, and Northern Cheyenne Reservations. The Chippewa Cree Tribe of the Rocky Boy's Reservation and the CSKT assumed responsibility from the IHS to run the formerly-federal health clinics on their reservations.

Does the IHS provide health care services off a reservation, other than contracted care?

Yes. In 1976, Congress passed the Indian Health Care Improvement Act (IHCIA) to, among other objectives, address the health and medical needs of the large number (over 50% of the total Indian population) of Indians residing in the nation's urban areas. Urban Indian health programs are generally operated by the urban Indian community under contract with the IHS. These programs also receive funding from other federal sources, as well as state and private sources and generally consist of outpatient care, preventive services, and health education. The IHCIA was reauthorized and updated as part of the Affordable Care Act, enacted in 2010.



There are currently five urban Indian health programs in Montana. They are located in Helena, Billings, Missoula, Butte, and Great Falls.

What health care services do states provide to Indians?

Medicaid is the only general health program that the states provide to their citizens. Other state-operated specialized health programs include chemical dependency and substance abuse and mental health. Indians are eligible for Medicaid and the other programs to the same extent as other citizens. Many counties and cities offer free health services in certain situations and Indians have an equal right to receive them. The IHS contracts with some state and local health care facilities to provide health services to Indians.

What social service programs does the federal government administer for Indians?

The BIA operates general assistance and aid to dependent children of Indians who live on a reservation or near a reservation and who maintain close social and economic ties with the tribe. However, these programs are designated a "last resort". In order to receive aid, an Indian must prove ineligibility for similar assistance from state, local, or other federal welfare agencies or reside in an area where comparable assistance is not available.

Tribal organizations are eligible to participate in the U.S. Department of Agriculture's commodity food program.

What social service programs do the states administer for Indians?

Most social service programs administered by states are funded primarily by the federal government. The two most important are the food stamp program and programs created by the Social Security Act of 1935: Aid to Families with Dependent Children, Supplemental Security Income, and Child Welfare Services. Indians are entitled to participate in these programs to the same extent as all other citizens.

Many states and some local governments operate their own assistance programs that are not federally funded. Indians are eligible for this assistance to the same extent as other citizens. Indians cannot be forced to seek assistance from a federal program before qualifying for state or local government programs.

What social service programs do the tribes administer?

Tribes may operate federal assistance programs on their reservations including the food stamp and the commodity food programs. Tribes are also authorized to administer the BIA assistance programs. Some tribally funded social services include burial expenses, emergency assistance, food and clothing distribution, and assistance with utility bills.

Indian tribes also have substantial authority regarding foster care placement and adoption of Indian children under the Indian Child Welfare Act of 1978.⁴¹

⁴¹ 25 U.S.C. 1901 through 1963.

Indian Child Welfare Act

The Indian Child Welfare Act (ICWA) of 1978⁴² is a federal law that protects Indian children and preserves the integrity of Indian tribes by restricting state courts' powers to place Indian children in non-parental custody, whether the placement is voluntary or involuntary on the part of the parents.

Why was the ICWA enacted?

The ICWA was enacted to stem the high rate of removal of Indian children from their families and their placement in non-Indian foster care, adoptive homes, and institutions. The ICWA does not apply to custody in a divorce proceeding or to the placement of a juvenile for an act that, if committed by an adult, would be a crime. The purpose of the ICWA is to protect Indian children and to promote the stability and security of Indian tribes and families.

How does the ICWA work?

The most important provision of the ICWA is the determination of jurisdiction in child custody proceedings. If the Indian child resides on a reservation, the tribal court on that reservation has jurisdiction. If the Indian child resides off the reservation, the state court shall, upon petition by either parent, the Indian custodian, or the Indian tribe, transfer the case to the tribal court. The state court may retain jurisdiction if either parent objects to the transfer, if the state court finds good cause for retaining jurisdiction, or if the tribal court declines the transfer. If the state court retains jurisdiction, the Indian custodian and the Indian tribe have the right to intervene in the court proceeding at any point.

Other important provisions of the ICWA include:

- notification to the Indian custodian and Indian tribe of any involuntary state court proceeding involving an Indian child;
- accordance of full faith and credit by state and federal courts to tribal laws and tribal court decisions involving Indian child custody;
- establishment of preferences for an Indian child's extended family or Indian home and institutions in adoptive or foster care placements; and
- authorization for agreements between states and Indian tribes regarding the care and custody of Indian children and jurisdiction over child custody proceedings.

Who is an "Indian child" for purposes of the ICWA?

According to the ICWA, an Indian child is an unmarried person under the age of 18 who either is a member of an Indian tribe or is eligible for membership and is the biological child of a member.

Are there any limitations to ICWA?

The Supreme Court has limited the rights of parents petitioning for custody of an Indian child when the parent has never had custody of the Indian child such as with abandonment before the child is born.⁴³

⁴² 25 U.S.C. §§ 1901, et seq.

⁴³ *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013).

Civil Jurisdiction in Indian Country

Jurisdiction is the general authority of a government to exercise power over persons or property. Civil jurisdiction is divided between **regulatory/legislative** and **adjudicatory** authority. Civil regulatory/legislative authority is a government's general authority to regulate persons or property through zoning, licensing, taxation, traffic laws, and other methods, while civil adjudicatory authority concerns the power of a court to decide cases, including child custody and probate, and impose order.

Early in U.S. history, the question of jurisdiction in Indian country was answered by the United States Supreme Court in 1832 quite simply: **State laws can have no force in Indian country without the approval of Congress.**⁴⁴ This test was simple and entirely geographic.

Over time, however, the United States Supreme Court gradually retreated from the absolute exclusion of state authority in Indian country, particularly when non-Indians are involved. As a result, the Court now generally relies upon parallel tests to determine which state laws can be enforced in Indian country without congressional consent: **the infringement test and the federal preemption test.** Additionally, a state law affecting reservation activities must be viewed against a "backdrop" of tribal sovereignty, a tribe's inherent right to be self-governing. These tests and the factors and analysis required to apply them are complex, confusing, and sometimes inconsistently considered by various courts. Thus, determining who may exercise civil jurisdiction in Indian country is often difficult.

Does a tribe have exclusive civil jurisdiction over all people and land within the boundaries of a reservation?

No. The United States Supreme Court has increasingly limited tribal authority over non-Indians and non-Indian owned land within Indian country. In fact, the Court has held that, as a general matter, the "inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe" unless one of the following exceptions to this general rule exist:

- (1) a tribe may regulate the actions of **non-Indians** who enter consensual relations with the tribe or its members, such as commercial dealings, contracts, leases, and other arrangements;⁴⁵ and
- (2) a tribe may regulate the conduct of **non-Indians** on **fee land** within its reservation when the conduct threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe.⁴⁶

A state may regulate **non-Indians** and **lands held by non-Indians on reservations** unless:

- the regulation is prohibited by federal law or the federal regulatory scheme, including tribal regulations; or

⁴⁴ *Worcester v. Georgia*, U.S. 515, 561 (1832).

⁴⁵ *Morris v. Hitchcock*, 194 U.S. 384 (1904).

⁴⁶ *Montana v. United States*, 450 U.S. 544, 565 (1981). However, see *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989), in which the Court ruled that the Yakima Nation's zoning of non-Indian owned fee land within a substantially checkerboarded area of the reservation is impermissible. Tribal zoning was upheld when there was little non-Indian ownership and when lands were important to the tribe's culture and natural resources.

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- the exercise of state jurisdiction, in the absence of federal law, interferes with the right of the tribe to govern itself.⁴⁷

How have the courts defined the civil adjudicatory authority of tribes?

In Indian law cases, one must first determine which court, state or tribal, has the authority to "adjudicate" or decide the particular matter. Tribes have exclusive civil adjudicatory authority under two circumstances:

- 1) when a non-Indian plaintiff brings a claim against a tribal member defendant for conduct occurring within the tribe's reservation boundaries; and
- 2) when a tribal member plaintiff brings a claim against a tribal member defendant for conduct occurring within the tribe's reservation boundaries.

While both the United States and Montana Supreme Courts previously stated that civil jurisdiction over the activities of non-Indians on reservations presumptively lies in tribal court unless limited by Congress,⁴⁸ more recent United States Supreme Court cases have imposed additional limitations on the civil adjudicatory authority of tribes. Under these cases, a tribe's civil adjudicatory authority does not exceed its civil regulatory/legislative authority. In other words, tribes generally do not have civil adjudicatory authority over non-Indians, unless:

- 1) the non-Indian enters consensual relations with the tribe or its members; or
- 2) the non-Indian's conduct within its reservation threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe.

Notably, the United States Supreme Court decided to narrowly construe these exceptions, and also suggested that land ownership is no longer a dispositive element in determining the necessity of an exercise of tribal civil adjudicatory authority over non-Indians.

What is the infringement test, and how is it applied?

In 1959, the United States Supreme Court modified its earlier absolute test and ruled that without congressional authority, a state may not infringe "on the right of reservation Indians to make their own laws and be ruled by them".⁴⁹ This principle, commonly known as the "**infringement test**", protects the inherent right of tribes to be self-governing and applies in subject areas where federal legislation is absent.

Therefore, if Congress is silent on an issue, the question of which government has jurisdiction will be determined by focusing on the inherent sovereign authority retained by the tribes and on whether state action has infringed on that authority.

What constitutes federal preemption, and how is it applied?

If Congress passes legislation regulating a particular subject matter, the issue of which government has jurisdiction is determined by applying what is known as the "**preemption test**." If a state enacts legislation to regulate a matter that is already heavily regulated by the federal

⁴⁷ *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983).

⁴⁸ *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9, 18 (1987); *Milbank Mutual Insurance Co. v. Eagleman*, 218 Mont. 58, 705 P.2d 1117, 1120 (1985).

⁴⁹ *Williams v. Lee*, 358 U.S. 217, 220 (1959).

government, the court will evaluate or "balance" the interests of the state against the federal and tribal interests and make a **"particularized inquiry into the nature of the state, federal and tribal interests at stake."**⁵⁰ Because the test depends on the facts and circumstances of a particular case, results can vary from case to case, from state to state and from issue to issue.⁵¹

May a non-Indian avoid tribal court by taking a civil complaint directly to federal court?

No. Although the question of whether a tribe has the power to compel a non-Indian to submit to the civil jurisdiction of the tribal court is a "federal question," courts have consistently held that a non-Indian must first exhaust tribal court remedies.⁵² This requirement is often referred to as the **exhaustion requirement**. In other words, when the tribal court determines it has the authority to adjudicate a civil case, the defendant must wait until the completion of all tribal court proceedings and appeals before challenging the tribal court's civil adjudicative authority in federal court. Federal court will then only review the tribal court's determination of jurisdiction. As a result, should the federal court determine the tribal court did not have authority to adjudicate the case, the civil case would then have to be raised again in either federal or state court, depending on the circumstances. Courts believe this exhaustion policy supports Congress's commitment to tribal self-determination and encourages tribal courts to explain to parties the precise basis for accepting jurisdiction.

The United States Supreme Court has defined four exceptions to the exhaustion requirement (application of one of these exceptions means that the federal court will review the tribal court's determination of jurisdiction prior to the tribal court's adjudication rather than after):

- 1) when the assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith;
- 2) when the tribal action patently violates express jurisdictional prohibitions;
- 3) when exhaustion is futile because of the lack of an adequate opportunity to challenge the court's jurisdiction; or
- 4) no federal grant authorizes tribal governance of nonmembers' conduct on non-Indian owned land.

⁵⁰ White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980). Montana has applied its own test that appears to combine and require application of both the infringement and preemption tests. The Montana test used to determine whether the state has jurisdiction over reservation Indians requires a court to determine whether: (1) the assertion of subject matter jurisdiction by Montana's administrative and judicial tribunals is preempted by federal law; and (2) the assertion of subject matter jurisdiction by Montana's administrative and judicial tribunals would unlawfully infringe on [a tribe's] right to make its own laws and be ruled by them. See First, Jr. State ex rel. LaRoche, 247 Mont. 465, 470, 808 P.2d 467 (1991).

⁵¹ The Court can, and has, changed its mind on issues. In 1988, Montana's tax on coal produced on the Crow Reservation was invalidated because, among other things, the Court believed that a state would interfere with the tribe's taxing authority and, if taxes were imposed by both governments, would interfere with federal policies supporting tribal self-sufficiency and economic development. See Crow Tribe of Indians v. Montana, 819 F.2d 895 (9th Cir. 1987), aff'd, 484 U.S. 997 (1988). In 1989, however, the Court allowed New Mexico to impose a severance tax on oil and gas although the tribe was already taxing the same resource production. In Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989), the Court stated that no proof existed that double taxation rendered the resource unmarketable, nor was federal regulation so comprehensive as to preempt the state's tax. See also Burlington Northern R.R. Co. v. Blackfeet Tribe, 924 F.2d 899 (9th Cir. 1991), cert. denied, 112 S. Ct. 204 (1991), in which the Court ruled that sustaining a tribal tax that creates double taxation may be unfair but legal.

⁵² National Farmers Union Insurance Co. v. Crow Tribe of Indians, 471 U.S. 856-857 (1985).

Taxation

Like questions of civil and criminal jurisdiction, the rule of law today regarding Indian taxation may not be the rule tomorrow. Indian taxation questions are generally settled in courts of law, especially the United States Supreme Court, which often rely on fact-specific considerations. Therefore, it is impossible to make definitive statements about what is or is not allowed in the area of Indian taxation because a court decision in one instance regarding taxation may not apply to another similar instance. Nonetheless, the following provides some general concepts for consideration.

Do Indians pay federal taxes?

Yes. Indians are subject to the federal income tax and other federal taxes like everyone else. However, there are exceptions. Individual Indians do not pay taxes on income derived directly from that Indian's trust resources, such as an individual allotment (land held in trust by the United States for the individual Indian(s)). Tribal governments are generally exempt from federal taxation in the same manner as state and local governments.

Income derived from land that has been removed from trust and on which a fee patent has been issued is taxable. Reinvestment income is also taxable, even if the original investment was derived from nontaxable income.

May states levy taxes on Indians or Indian tribes?

Generally, states cannot tax tribes or individual Indians on their reservation. However, the United States Supreme Court has allowed states to collect **property taxes** on fee simple real estate owned by a tribe or by an individual Indian.⁵³

Indians on a reservation are also exempt from **personal property taxes**. However, a state can charge a registration fee on an automobile owned by an Indian on a reservation, but cannot levy a personal property tax on the automobile.

States may not impose **income taxes** on Indians who work and live on their reservation. However, states may impose income taxes on tribal members who live on their reservation but work outside its boundaries or work on their reservation but live outside its boundaries.

States cannot assess a **sales tax** on transactions entered into by Indians on their reservation or on products manufactured by the tribe or produced with tribal resources. However, states can require tribal businesses to collect, for the state, excise taxes within a reservation for transactions with nonmembers and non-Indians.⁵⁴ If a state requires tribes to collect a state excise tax, the interest of the state in collecting the excise tax must not be preempted by federal law or interfere with tribal sovereignty.⁵⁵

⁵³ *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992).

⁵⁴ *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980).

⁵⁵ *White Mountain Apache v. Bracker*, 448 U.S. 136 (1980).



State attempts to tax tribal governments directly are per se invalid; however, tribes may still be responsible for bearing the economic burden of a state tax levied upon a tribal contractor. In one recent case, the United States Supreme Court upheld a state tax imposed on an off-reservation non-Indian distributor even though the distributor passed the cost of the state excise tax directly to a tribally-owned business. In that case, the United States Supreme Court analyzed the relevant state tax law to determine whether the tax was actually on the tribe, and therefore invalid, before deciding that it was not.⁵⁶

Can a state refuse to provide services to reservation Indians because they are exempt from most state taxation?

No. Indians are state citizens and are entitled to the full rights and privileges as a result of that citizenship. Exemptions from taxation are based on federal statutes and treaties that protect Indians and their property and that pre-empt state law.

Do non-Indians on reservations pay state taxes?

Generally, yes. If the subject matter of the tax is not preempted by federal law and if the tax does not substantially interfere with tribal sovereignty. For example, state taxes upon non-Indian businesses doing work for a tribe in Indian country may be both pre-empted by federal law and interfere with tribal sovereignty. Courts usually analyze these situations on a case-by-case basis and have interpreted both the pre-emption of state taxes and the extent of tribal sovereignty in these areas narrowly. Therefore, most non-Indians have to pay most state taxes on a reservation.

Can an Indian tribe tax its members?

Yes. The power to levy taxes is an inherent right of any government. Tribal governments can impose the same taxes on its citizens as federal and state governments can. Tribal governments are generally reluctant to levy taxes against tribal members and some tribal constitutions prohibit or limit tribal taxation. However, because the right to tax has not generally been exercised by Indian tribes does not mean that the right does not exist.

Can an Indian tribe tax nonmembers, including non-Indians, residing on its reservation?

Yes. If non-Indians enter a reservation for the purpose of engaging in economic activity, they are subject to tribal taxation. Some non-Indians may argue that tribal taxation constitutes "taxation without representation" because non-Indians are not eligible to vote in tribal elections. However, there are numerous instances in which people pay state or federal taxes but cannot participate in elections--for example, residents of one state who pay sales taxes on purchases in another state or legal immigrants who pay state and federal income taxes. A person's ineligibility to participate in elections does not deprive a government of the right to tax that person.

Can a state and an Indian tribe both impose a tax on the same activity?

The United States Supreme Court upheld a New Mexico state tax on oil and gas produced from tribal lands by a non-Indian company, even though the company was also paying tribal taxes on the same activity. Therefore, dual taxation is allowable, even though it may result in significantly higher costs of business for those subject to both state and tribal taxes and, therefore, have a

⁵⁶ *Wagon v. Prairie Band of Potowatomi Nation*, 546 U.S. 95 (2005).

negative effect on the tribe's ability to attract businesses or other commercial activity.⁵⁷

Because of the increasing complexity of jurisdictional questions within reservations, the Montana Legislature passed the State-Tribal Cooperative Agreements Act in 1981. In 1993, the Legislature amended the Act to explicitly provide for cooperative tax agreements to alleviate the risk of double taxation within reservations.

Currently, all of the federally recognized tribes in Montana have various tax agreements with the state covering tobacco, alcohol, motor fuel, and, in one instance, oil and natural gas taxes. Under these agreements the tribes receive a per capita share of the statewide taxes generated annually based on the number of enrolled tribal members living on a reservation.

Economic Development

For centuries, tribes have engaged in economic and business activities, developing comprehensive trade associations, transportation routes, and offering a variety of products to neighboring tribes and later to non-Indians. Tribes carry on these traditions today, although in a different context. As discussed earlier, each of the federally recognized tribes in Montana has a reservation. Each is unique and offers a variety of economic opportunities including coal mining, timber production, farming, ranching, and many others. Each tribe has a unique perspective and set of priorities for using natural resources, human capital, and cultural assets for economic development. With memberships ranging from approximately 5,000 to 18,000 and reservation land ranging from 123,000 to 2.5 million acres, economic development is markedly different across tribal communities.

What is the typical makeup of a tribal economy and what are the unemployment rates?

The majority of employment on reservations in Montana is in the public sector, notably the tribal and federal governments; approximately 75% of employment opportunities are public while 25% are private. This lack of economic diversity puts pressure on the public sector. Uncertain and inconsistent federal funding makes economic planning, growth, and sustainability challenging for tribes.

Unemployment rates on reservations are often two to three times higher than their surrounding areas. Unemployment on all of the reservations improved between 2014 and 2015 except on Fort Peck where it remained at just about 6%⁵⁸ due to the decline in oil and gas development, which affected unemployment rates in surrounding areas as well. In 2015, unemployment rates for Indian country ranged from 5.3% on the Flathead Reservation to 12.1% at Rocky Boy's.⁵⁹ The figures do not include discouraged workers who have given up on seeking employment.

⁵⁷ *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989).

⁵⁸ Montana Department of Labor and Industry, State of Montana Labor Day Report, September 6, 2016, page 38.

⁵⁹ *Ibid.*



The median age of Indians in Montana is 26.6 compared to 40 for the state population. Combined with the fact that the Indian population is the fastest growing population in Montana, tribal economies and communities strive to balance the advantage of an increased labor force with the infrastructure and training needed to accommodate the population. The underdeveloped private sector is an opportunity for growth that Indian entrepreneurs and tribal enterprises are taking more advantage of.

What natural resource assets do the tribes have?

Each tribe has a variety of natural resources that are or could be developed. Margins on traditional assets such as coal and timber commodities diminished in the past 20 years; however, renewable energy resources have been and will continue to play a larger role in tribal portfolios. The Selis, Ksanka, and Qlispe Project Dam in Polson became the first tribally-owned hydroelectric plant in September 2015 with the purchase and transfer of the Kerr Dam from NorthWestern Energy to the Confederated Salish and Kootenai Tribes. The dam is managed by Energy Keepers, Inc., a tribal corporation. Other renewable energy resources that have a potential for development are biomass, wind, and solar.

Other assets include irrigated and non-irrigated rangeland. Tribal populations in Montana continue to be largely agrarian and recent court settlements spurred economic activity in agriculture-related businesses:

- [The Keepseagle Settlement](#) (*Keepseagle v. Vilsack*) resulted in a \$680 million settlement plus \$80 million in debt relief. It provides compensation to Indian farmers and ranchers against whom the U.S. Department of Agriculture Farm Loan Program discriminated.
- The [Cobell Trust Settlement](#) (*Cobell v. Salazar*) resulted in \$3.4 billion going to class action plaintiffs with \$1.9 billion allocated for land buy-back activities. All of the tribes in Montana except the Chippewa Cree of the Rocky Boy's Reservation and the Little Shell Chippewa Tribe participated in this settlement.

Additionally, the Montana Legislature approved [reserved water rights compacts](#) for all of the federally recognized tribes in Montana. Discussed in more detail in the Natural Resources section of this Handbook, the compacts provide for the equitable division and apportionment of water rights between the state, its people, and the tribes. The compacts determine availability of water for commercial and irrigator use, allow for economic development under conditions of legal certainty, facilitate an adjudication process, and organize water administration.

How do businesses operate on tribal lands?

A Tribal Employment Rights Ordinance or Office (both known as TERO) is an important monitoring, regulatory, and enforcement program established by individual tribal governments to oversee all aspects of employment, contracting, and business activities on a reservation. TERO requirements differ by tribal government, establishing Indian preference in contracting (where applicable) and facilitating employment of tribal members in projects on or near reservations. Large public infrastructure projects such as public use facilities and road construction partner with TERO offices to ensure compliance with TERO regulations.

Tribes oversee a regulatory environment that can foster favorable business conditions such as



zoning and some permitting (including environmental) and assessments that follow federal rather than state requirements. Generally, federal approval, through the BIA, is required for leases of tribal trust lands and the granting of rights-of-way across those lands although recent changes in federal law and regulations allow for expanded tribal authority in these areas. For example, the Helping Expedite and Advance Responsible Tribal Homeownership Act of 2012⁶⁰ allows tribes to develop their own leasing regulations which, upon BIA approval, will govern the review and approval of leases without the need for BIA approval of each individual lease.

Tribal business enterprises incorporated under Section 17 of the Indian Reorganization Act have the same tax status as the tribe and are not subject to federal income taxes for income derived on or off the reservation.⁶¹ Also, any land that is in tribal trust lowers the cost of doing business as improvements made upon it are likely exempt from state taxation. Reservations also qualify for federal New Market Tax Credits of up to 39% of the total investment and business and building depreciation schedules can be twice the normal rate if located on tribal land.

Section 17 corporations have a board of directors who are selected by tribal councils and maintain an arms-length distance from tribal government. Tribal enterprises and their boards strike a balance between operational efficiency (higher revenue margins) and employment directives (job creation).

What economic development activities do tribal governments participate in?

Each tribal government in Montana has tribally-chartered companies that have unique tax and federal contracting advantages. Many participate in the federal [Small Business Administration's 8\(a\) Disadvantaged Business Program](#), which provides managerial, technical, and contractual assistance. These tribal enterprises work in a variety of industries and diverse markets ranging from telecommunications and construction to global defense services and electronics engineering.

Tribal enterprises are growing to be the biggest employers in the reservations' private sector. Tribal enterprises in Montana have from two to 450 employees and collectively generate upwards of \$500 million in revenue per year. Examples include:

- S&K Technologies (CSKT), along with its subsidiaries, employs over 400 individuals and provides services such as maintenance and repair orders for U.S. allies' military planes, corrosion engineering for military vehicles, and supply chain management and logistical services for a variety of defense projects.
- Island Mountain Development Corporation (Fort Belknap Indian Community) employs over 120 local tribal members in the construction, short-term loan, real estate, and ranching companies under its umbrella.
- Northern Cheyenne Development Corporation launches and grows small businesses in the Northern Cheyenne community. NCDC owns and operates convenience stores in Lame Deer and Ashland. It also operates a tire and lube shop in Lame Deer and built a business incubator facility with ten offices.

⁶⁰ 25 U.S.C. § 415.

⁶¹ Office of Indian Energy & Economic Development, [Tribal Business Structure Handbook](#), 2008 Edition, I-5.



In addition to leveraging tribal enterprises, tribal governments assemble and grow the capacity of their traditional economic development offices. These offices identify and access grant programs, provide grant writing and community planning, and often coordinate training for entrepreneurs and existing business owners.

What other types of economic development occur on reservations?

Tribes have seen consistent growth in the tourism industry, especially with international visitors and within the travel corridors to Yellowstone and Glacier National Parks. The Blackfoot Tribe vertically integrated its recreational properties under a Parks and Natural Resources Department to capitalize on the overflow of tourists at Glacier who are looking for campgrounds, water adventures, fishing, hunting, and photography guide services, hiking, cultural, historical, and edutainment activities, and explorations of distinct Blackfoot/Piikuni art.

At Little Big Horn Battlefield National Monument, Apsaalooke Tours, a tribal entity on the Crow Reservation, provides tours from the Crow perspective while the privately-run Indian Battle Tours provides a memorable experience for guests. The CSKT, meanwhile, are planning to revive and expand Camas Bathhouse in Hot Springs as a hot springs retreat.

Both soft and hard manufacturing businesses are providing cultural goods that reflect the values of Indian country such as the proliferation of privately-owned star quilt manufacturers. S&K Electronics and Fort Peck Tech Services serve the electronic manufacturing and oil industries.

Between 2007 and 2016, state [Indian Equity Fund](#) grants supported 149 start-up or expanding owner/operators and small businesses on reservations by providing equity for a variety of activities including the purchase of new equipment and the development of new product lines. Up to \$320,000 in grants are available in 2017.

Additionally, the state-run [Native American Business Advisor Program](#) and the federal [Small Business Development Center](#) offer locally-based, in-depth technical assistance and counseling services to emerging and established businesses on reservations.

What is the role of tribal colleges and universities in economic development?

Tribal colleges are the primary entity for preparing the reservation workforce with new hard and soft skills, basing their traditional academic and skill-based certificate programs on the specific needs of their communities. Many tribal colleges offer apprenticeship programs with local businesses. Community members can earn a variety of industry certificates for immediate entry into the workforce. There are a few baccalaureate degrees but a majority of the programs are associate degrees that allow graduates to transition into jobs or transfer to the Montana University System. A large portion of students graduate with degrees and certificates in health, education, business, and science-based fields.

In addition to preparing the local workforce, tribal colleges are key contributors to the local economy, employing more than 1,000 individuals and adding revenue to the tribal economy. In



the 2013-2014 academic year, tribal colleges in Montana spent more than \$80 million; salary outlays account for about 10%.⁶²

What is the impact of tribal gaming?

As discussed in the next section of this Handbook, each federally recognized tribe in Montana has gaming operations. Compared to other states, tribal gaming revenues in Montana generate relatively small revenues, but provide significant employment opportunities on the reservations.

Gaming continues to be an economic and workforce priority for many tribes. The focus for most has shifted to identifying and attracting new markets given their location in rural parts of Montana with small populations. Tribes that experience higher traffic, such as Blackfeet and the CSKT, enhanced and expanded their gaming activities in hopes of attracting new customers and increasing revenue and employment opportunities.

How do tribal business laws impact economic development?

Each tribe has its own set of rules, regulations, and policies to protect tribal business owners and to attract business investment. Tribes allow for the creation, incorporation, administration, and recognition of businesses, enterprises, and organizational entities. Several tribes adopted the Uniform Commercial Code and Model Secured Tribal Transaction Act, as well as constitutional reforms, to create regularity for and confidence in business transactions conducted on reservations.

What are the biggest challenges for tribal economic development?

Indian country faces a broad set of challenges. Like many parts of rural Montana, access to high speed internet is limited or nonexistent, limiting entrepreneurs' opportunity to participate in e-commerce and larger markets.

Perhaps the biggest barrier is the chronic shortage of commercial capital. It is extremely difficult to leverage trust land for collateral for commercial loans. Additionally, approximately 70% of Indians are unbanked or under-banked and experience low or no credit.

A lack of available storefronts, manufacturing facilities, and commercial buildings is also a challenge. In most tribal communities, available buildings and infrastructure are owned by the tribal government or federal agencies and used for tribal programs. Business owners are left to try to launch their businesses from their homes or take them off the reservation (or not launch them at all). In addition, a lack of housing makes it difficult to attract outside development and grow employment.

“Brain drain,” where local talent leaves the reservation and doesn’t return, is also a problem. Higher compensation is often available off the reservation as well as access to reliable health care, adequate housing, and more affordable goods and services. This phenomenon creates unique challenges in the makeup of leadership in many tribal communities.

⁶² Montana Legislative Services Division for the State-Tribal Relations Committee, [MUS Units and Tribal Colleges 2013-2014](#), May 2016.

What steps might be taken to improve the business climate in Indian country?

A number of steps could be taken to improve and enhance business in Indian country. As a general matter, many leading commentators have emphasized the need for such solutions to be tribally-driven in order to maximize the chances for success. Therefore, while the following presents some broad concepts, their successful utilization depends upon whether each tribe and tribal government believes them appropriate for their own community:

- Increasing the number of successful small businesses to provide needed goods and services so reservation residents do not have to travel great distances for products. These businesses would expand and diversify the tribal economy.
- Improving tribal tourism infrastructure. There is significant opportunity to attract international visitors to Montana for genuine experiences in Indian communities.
- Diversification in industries related to e-commerce.
- Improving access to commercial capital such as increasing the number of [Native American Community Development Financial Institutions](#) that provide banking services, financial literacy programs, and alternative lending. Increasing the depth of relationships between Montana lenders and tribal communities, strengthening the legal infrastructure supporting tribal business and lending activities, and educating non-tribal businesses about those laws and policies would also help.
- Increasing the number of college graduates, participation in apprenticeship programs, and providing additional technical assistance for budding entrepreneurs would help put the large, available work force in Indian country to work.

While there are severe and chronic issues in Indian economic and business development, a spirit of entrepreneurship and a new sense of hope has surfaced in the last ten years. Tribal governments and individual tribal members are eager to change their economic realities and are prepared to take the next steps towards economic sustainability and self-determination.

Gaming

What is the Indian Gaming Regulatory Act?

The Indian Gaming Regulatory Act (IGRA) is a federal law enacted in 1988 for the regulation of gambling in Indian country.⁶³

Why was the IGRA passed?

Beginning in the late 1970s, some Indian tribes instituted high-stakes bingo games on their reservations as a means of generating revenue for the operation of tribal programs. As the success of these tribes' endeavors spread, more tribes turned to gambling as a solution for the economic hardships suffered by many Indians; however, questions and uncertainty soon arose as state governments began to challenge tribal gaming operations over what types of gambling were legal and who was responsible for regulating Indian gambling. These questions and concerns led to a

⁶³ 25 U.S.C. 2701 through 2721.



series of court cases that limited state regulation of Indian gambling.⁶⁴ In response to these questions and concerns, the federal government enacted the IGRA to codify these court decisions and to provide a legislative basis for the operation and regulation of Indian gaming.

The purposes of the IGRA are:

- 1) to establish the National Indian Gaming Commission;
- 2) to promote economic development, self-sufficiency, and strong tribal governments;
- 3) to shield tribes from organized crime; and
- 4) to ensure fairness to operators and players.

How does the IGRA work?

The IGRA divides gambling into three classifications. Class I gaming includes social and traditional games played in conjunction with tribal ceremonies, powwows, or celebrations. Class I games are regulated exclusively by Indian tribes and are not subject to the IGRA.

Class II games include bingo, lotto, pull tabs, punch boards, tip jars, and certain card games, if the games are allowed by the state in which the Indian lands are located. The tribes and the National Indian Gaming Commission share jurisdiction over Class II games. The tribe must adopt an ordinance authorizing the games, and the Commission must approve the ordinance.

Class III games include all types of games that are not Class I or Class II and that are permitted by the state. The usual casino games, such as blackjack and other house-banked card games, as well as slot machines, and horse and dog racing are considered Class III games. Class III games are regulated by a compact negotiated between the state and a tribe.

How do state-tribal gaming compacts work?

Before a tribe may operate Class III games, the tribe must request that the state enter into negotiations for a gaming compact. The compact can cover such provisions as the application of criminal and civil laws of the state and the tribe, assessment by the state for costs related to regulation, taxation by tribes to defray regulation costs, remedies for breach of contract, and any other subjects related to gaming. Once the compact is concluded, it is submitted to the Secretary of the Interior for approval.

What happens if the state fails to negotiate?

As originally enacted, the IGRA provided a cause of action for tribes to bring a suit in federal court if a state did not negotiate a compact in good faith. In one such challenge, however, the United States Supreme Court determined that Congress could not constitutionally waive the immunity of a state from suit in the IGRA. Therefore, the remedies available to a tribe under the IGRA are limited and the balance between tribes and states sought by the IGRA as originally enacted has been modified. Now, tribes may appeal to the Secretary of the Interior for assistance in securing a compact but cannot pursue a legal action to force the state to negotiate unless the state has waived its immunity from suit.

⁶⁴ Oneida Tribe of Indians v. Wisconsin, 518 F. Supp. 712 (W.D. Wis. 1981).

What is the status of state-tribal gaming compacts in Montana?

The Fort Peck Tribes concluded the first gaming compact with the state in 1992. Since that time, each of the seven federally recognized tribes in Montana has had a compact with the state at some point; however, as of 2016, five state-tribal compacts are in effect (Fort Peck, Rocky Boy's, Crow Nation, Fort Belknap, and Northern Cheyenne).

For more information, see <https://dojmt.gov/gaming/state-tribal-gaming-compacts>.

Natural Resources and Environmental Regulation

The seven reservations in Montana comprise approximately 8.3 million acres or 9% of the land area in the state. The physical resources under tribal government jurisdiction are diverse and vary considerably in value. Resource policy is a major area of decision-making for tribal governments. It may also involve state-tribal negotiation and cooperation over such matters as quantification of water rights and fish and wildlife management.

Natural Resources

How do tribes view natural resources?

As described in the Culture and Language section of this Handbook, many tribal cultures and religious practices emphasize the importance and centrality of the natural world. As a result, many tribes maintain a sacred and strong connection to their reservation lands and resources as homelands and the base of their existence. In addition, because present-day reservation boundaries often do not align with historical and traditional tribal homelands, many tribes continue to maintain such connections with landscapes, wildlife, and places far beyond their own reservations. Thus, decisions about whether and how natural resources should be utilized, managed, and accessed often have policy and cultural implications for tribes that are unique and distinct from the non-Indian public.

In addition, as discussed in the Economic Development and Taxation sections of this Handbook, tribes can be limited to relying upon the natural resources of their reservation as a source of revenue and economic development. The balancing of these interests often presents challenges for tribal governments seeking to protect and preserve their homelands while also providing for their people.

What avenues do tribes have to pursue development of mineral resources?

For most of the 20th century, the predominant way minerals were extracted from tribal lands was to lease the lands to outsiders for development under a leasing process controlled by federal



agencies. In 1982, the Indian Mineral Development Act (IMDA)⁶⁵ strengthened tribal control of mineral development by allowing tribes to negotiate directly with corporations and other partners. While IMDA allows tribes a much more active role, they remain subject to federal oversight and control. The BIA retains final approval of any arrangements involving minerals extraction on Indian lands.

In 2005, the Indian Tribal Energy Development and Self-Determination Act⁶⁶ authorized tribes to create Tribal Energy Resource Agreements (TERAs). Unlike the IMDA, once a TERA is approved by the BIA a tribe may undertake mineral development on its lands without obtaining separate BIA approval for each lease and business agreement. To enter into a TERA, there is an extensive application process to ensure a tribe's capacity to meet the terms including an environmental review process and procedures for constructing energy deals. For a variety of reasons, no tribe has yet entered a TERA.

What avenues do tribes have to pursue development of solar and wind energy resources?

Tribes have somewhat limited avenues to pursue solar and wind energy development. Prior to recent legislative and administrative developments, tribes had to navigate complicated and sometimes contradictory federal statutes to develop solar and wind resources.

The Helping Expedite and Advance Responsible Tribal Ownership Act (HEARTH Act) of 2012⁶⁷ amended the Indian Long-Term Leasing Act of 1955 to establish a simpler process for tribes to approve surface land leases on tribal trust lands. Under the HEARTH Act, once their tribal leasing regulations are approved by the BIA, tribes may negotiate and enter into leases without further federal approval.

The BIA recently adopted regulations⁶⁸ to give tribes another avenue to pursue surface leases for wind and solar energy. The regulations allow for short-term leases to evaluate wind resources and long-term leases for wind and solar development. Both are subject to BIA approval to ensure the lease is in the best interests of the tribe or individual Indian landowners.

Environmental Regulations

What role does Montana have in environmental regulation in Indian country?

States possess no jurisdiction over environmental regulation in Indian country because Congress has not approved such authority. The state's role is limited by the primacy of federal law and the trust relationship that the federal government has with tribal governments. However, because practical considerations of environmental management require cooperation between the tribal, state, and federal governments, compacting processes exist for the management of ecosystems and natural resources crossing governmental boundaries. Examples of such collaborative

⁶⁵ 25 U.S.C. §§ 2101-2108.

⁶⁶ 25 U.S.C. §§ 3501-3506.

⁶⁷ 25 U.S.C. § 415.

⁶⁸ 25 C.F.R. §§ 162.501-599.



management in Montana include the Peoples Way Partnership project, which provided for monitored wildlife crossings along Highway 93 on the Flathead Reservation.

Who is responsible for enforcing federal environmental laws in Indian country?

Congress authorized the Environmental Protection Agency (EPA) to delegate to states the authority to monitor and enforce federal environmental laws in the non-Indian setting. Since the 1980s, the EPA can also recognize tribal governments as the appropriate authority to perform some of these functions in Indian country. For example, the EPA's "treatment [of tribes] as states" (or TAS) delegations under the Clean Air Act allow tribes to redesignate air quality standards for their reservations and to implement, maintain, and enforce reservation air quality standards.

Similarly, although the EPA's recognition of tribal authority under the Clean Water Act historically required a jurisdictional analysis, recent rule changes by the EPA have allowed for the delegation of the EPA's authority to tribes for the establishment of water quality standards as well as most other purposes and programs under that Act. Similar TAS provisions exist in the Safe Drinking Water Act.

See the EPA's tribal program homepage for more: <https://www.epa.gov/tribal>

Have any tribes in Montana been approved for TAS status?

Yes, a number of tribes in Montana assumed responsibility for environmental protection through the TAS provisions of various federal acts, primarily the Clean Air Act and Clean Water Act. For example, the Fort Peck Tribes, the Confederated Salish and Kootenai Tribes, the Blackfeet, and the Northern Cheyenne all administer water quality standards under the Clean Water Act. See <https://www.epa.gov/wqs-tech/epa-approvals-tribal-water-quality-standards>.

Who is responsible for managing pollution problems on Indian reservations in Montana?

The federal government has fiduciary obligations regarding Indian natural resources, as well as primary responsibility for pollution prevention and cleanup in Indian country. Unlike the Clean Air Act and Clean Water Act, the federal Resource Conservation and Recovery Act,⁶⁹ which was intended to reduce or eliminate the threats posed by the generation and storage of hazardous waste, does not include a TAS provision. Tribal administration and enforcement agencies still generally work closely with federal agencies in these instances and tribal governments are increasingly involved in combating pollution and managing their resources through comprehensive planning and enforcement systems.

Water Rights

What is the "Winters Doctrine", and how does it apply in Montana?

Water law in the West is generally based on the prior appropriation principle, which holds, in simple terms, "first in time, first in right" to water usage. Treaty rights to land and water resources are retained and reserved to the tribes as sovereign entities.

⁶⁹ 42 U.S.C. §§ 6901-6992.



In 1908, the United States Supreme Court held in *Winters* that when Congress established Indian reservations, it also reserved enough water to fulfill the purposes of the reservation. As such, a tribe's water use may be expanded over time to meet the needs of the tribe. The priority date for Indian reserved water rights is the date on which the reservation was established or, if the tribe can establish that its use is an aboriginal use that has continued, then the priority date is time immemorial. Another important principle of the *Winters* decision, and one that distinguished Indian water rights from others, is that Indians have vested water rights whether they are used or not—nonuse of the reserved water rights does not lead to their forfeiture.

Under the 1952 McCarran Amendment,⁷⁰ state courts have jurisdiction to adjudicate Indian water rights held in trust by the United States. In a 1983 decision, the United States Supreme Court reaffirmed its position that most Indian water rights disputes must be adjudicated in state courts. This provided impetus to negotiations between the state and several of the Indian nations in Montana.

What is the role of the Reserved Water Rights Compact Commission in relation to Indian water rights?

The [Reserved Water Rights Compact Commission](#) was created by the Montana Legislature in 1979 for the purpose of concluding agreements with tribal governments (as well as with federal agencies with reserved water rights) and minimizing the loss of rights to non-Indian claimants. Eighteen reserved water right compacts have been negotiated and ratified by the Legislature, including with the seven federally recognized tribes in Montana.

The state entered into a compact with the **Assiniboine and Sioux Tribes of the Fort Peck Reservation** in 1985.⁷¹ The Fort Peck Tribes waived their reserved rights claims in return for consumptive rights to specified quantities of water from the Missouri River and several of its tributaries. Under the compact, the water may be used for any purpose. A limited amount may be marketed to non-Indians off the reservation, subject to state law. The tribal government is authorized to promulgate water codes, subject to the approval of the Secretary of the Interior. The Fort Peck compact is unique in that it was the first one negotiated by the Compact Commission and the first of its kind in the United States. The compact did not require ratification or approval by Congress and was approved by the Legislature in 1985. The [Montana Water Court](#) issued its final decree incorporating the terms of the compact in August 2001.

After a decade, negotiations between the Commission and **Northern Cheyenne Tribe** were successfully completed in 1991.⁷² The Northern Cheyenne compact provides water for domestic, agricultural, and economic development use on the tribe's reservation. It further protects the rights of other water users on the Tongue River and Rosebud Creek and its tributaries. The Legislature approved the compact in 1991 and Congress ratified it in September 1992.

In 1997, the Commission and **Chippewa Cree Tribe of the Rocky Boy's Reservation** completed a compact that provides water for consumption and economic development on the

⁷⁰ 43 U.S.C. § 666(a).

⁷¹ 85-20-201, MCA.

⁷² 85-20-301, MCA.



reservation while also protecting the rights of local and downstream water users.⁷³ The Legislature approved the compact in 1997 and it was ratified by Congress in 1999.

A compact with the **Crow Nation** was passed by the Legislature in 1999.⁷⁴ This compact protects water rights for well and spring development for domestic use, livestock consumption, and emergency use. It was ratified by Congress in November 2010.

The Legislature approved a compact with the **Fort Belknap Indian Community** in 2001.⁷⁵ The compact protects water rights for domestic use, livestock and irrigation use, and emergency use for public health and safety. A bill to ratify the compact was introduced in the 112th and 113th Congresses.

In 2009, after two decades of negotiations between the Commission and **Blackfeet Nation**, the Legislature approved a compact that provides for water and economic development for the Blackfeet and protects the rights of local and downstream water users on the Milk River.⁷⁶ Legislation to ratify the compact has been introduced in each Congress since 2010 and similar legislation remains pending as of 2016.

The Legislature most recently approved a compact with the **Confederated Salish and Kootenai Tribes of the Flathead Reservation**.⁷⁷ After more than a decade of negotiations to resolve the tribe's reserved water rights, the Legislature approved the compact in 2015. The parties are currently working on getting the compact ratified by Congress.

For more information, see: <http://dnrc.mt.gov/divisions/reserved-water-rights-compact-commission>.

Hunting and Fishing

Do tribes retain hunting and fishing rights?

Yes. On-reservation hunting and fishing rights are reserved treaty rights. Additionally, depending on the language of each tribe's treaty, some tribes retain and continue to exercise hunting and fishing rights in areas beyond their reservation boundaries but within their traditional and historical homelands.

Are non-Indians required to obtain tribal licenses to hunt and fish in Indian country?

Yes. A tribe has power to license hunting and fishing by non-Indians on reservation lands held in trust for the tribe or individual Indians.⁷⁸ Indians may hunt and fish in Indian country without

⁷³ 85-20-601, MCA.

⁷⁴ 85-20-901, MCA.

⁷⁵ 85-20-1001, MCA.

⁷⁶ 85-20-1501, MCA.

⁷⁷ 85-20-1901, MCA.

⁷⁸ *Montana v. United States*, 450 U.S. 544 (1981); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983).



having to obtain a state permit but are subject to regulation and licensing by the tribe.

In *Montana v. United States*,⁷⁹ the United States Supreme Court held that tribes have no power to regulate non-Indian hunting and fishing on fee lands owned by non-Indians within the reservation. Nevertheless, the Court acknowledged that tribes may retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within the reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Tribes may impose licensing requirements for on-reservation hunting and fishing by non-Indians for the purpose of conservation and management of wildlife. On the Flathead Reservation, however, the CSKT historically managed fish and wildlife resources throughout the reservation, including both non-Indian and Indian hunting and fishing. As early as 1936, the tribal government established regulations, sold permits, employed professional biologists, technicians, and game wardens, and spent hundreds of thousands of dollars on resource and wildlife management activities, habitat improvement, law enforcement, and research. In 1990, the Tribes and the state entered into an historic agreement under the State-Tribal Cooperative Agreements Act to cooperatively manage bird hunting and fishing on the Flathead Reservation. The Tribes remain generally responsible for regulating both Indian and non-Indian hunting and fishing there. The agreement simplified regulations and licensing requirements for hunters and anglers and established a framework to cooperatively manage fish and game bird resources on the reservation.

Criminal Jurisdiction in Indian Country

Every government exercises a power, called criminal jurisdiction, to prohibit certain behavior within its borders by enacting criminal laws and punishing those who violate them. Like civil jurisdiction, criminal jurisdiction in Indian country is complex and depends upon a number of factors, including the location of an alleged crime, the identity of the persons involved, and the type of crime alleged.

What federal statutes impact criminal jurisdiction in Indian country?

The following federal statutes, discussed further in this section, may impact criminal jurisdiction in Indian country:

- 1) the Indian Civil Rights Act;
- 2) the General Crimes Act;
- 3) the Assimilative Crimes Act;
- 4) the Major Crimes Act;
- 5) Public Law 83-280;
- 6) the Indian Civil Rights Act;
- 7) the Tribal Law and Order Act; and
- 8) the Violence Against Women Act.

⁷⁹ See 450 U.S. at 566.

What powers does a tribe generally retain over criminal jurisdiction in Indian country?

As sovereign nations, tribes retain the power to exercise concurrent jurisdiction over all crimes committed by an Indian against the person or property of another Indian in Indian country. Tribes also have exclusive authority over all crimes committed by Indians and not listed in the Major Crimes Act, unless Congress has otherwise limited such authority, such as by authorizing concurrent state jurisdiction (e.g., P.L. 280).

Does a tribe have criminal jurisdiction over a non-Indian committing a crime in Indian country?

Generally, no. In 1978, the United States Supreme Court ruled that, absent congressional authority, tribes may not exercise criminal jurisdiction over crimes committed by non-Indians in Indian country. Therefore, jurisdiction over crimes committed by non-Indians resides either with the federal or state government, depending on the type of crime committed and the identity of the victim. On the Flathead Reservation, the state exercises jurisdiction over all crimes committed by non-Indians as a result of P.L. 280.

However, there are exceptions. As discussed below, a tribe may choose to exercise special domestic violence criminal jurisdiction over certain non-Indian perpetrators pursuant to the provisions of the Violence Against Women Act reauthorization of 2013.

Furthermore, tribes retain the power to exclude, or banish, non-Indians from Indian country as long as no federal law grants the non-Indian the right to be there. Notably, if a rightfully excluded non-Indian refuses to stay out of Indian country, the tribe must rely on the federal government to enforce the banishment.

Does a tribe have criminal jurisdiction over nonmember Indians committing a crime in Indian country?

Generally, yes. In response to a 1978 United States Supreme Court ruling, Congress amended the Indian Civil Rights Act to expressly recognize the inherent powers of a tribe to exercise criminal jurisdiction over *all* Indians, whether or not they were members. The Court subsequently upheld the amendment.

Does the Bill of Rights of the U.S. Constitution apply to the tribes?

No. Tribes predate the U.S. Constitution and do not derive their authority from it. They are not subject to the constitutional limitations that the Fifth Amendment places on the federal government. Tribes are not considered states and are not subject to the Fourteenth Amendment's restrictions on state action. Furthermore, tribes are not constrained by the other provisions of the Bill of Rights.

In 1968, Congress passed the Indian Civil Rights Act (ICRA), which requires that tribal governments provide many of the same rights as the U.S. Constitution's Bill of Rights, including the right to due process. The ICRA does not, however, include all of the rights provided by the Bill of Rights. For example, the ICRA does not include the right of the accused to have counsel provided for his or her defense.



Notwithstanding the ICRA's limitation on tribal governments, individual Indians have the same civil rights, and recourse to federal courts, as non-Indian citizens.

Does a criminal defendant's constitutional right against double jeopardy protect him/her from prosecution by both a tribe and the federal government?

No. Since the source of power to punish offenders is an inherent part of tribal sovereignty, rather than a grant of federal power, a criminal defendant's constitutional right against double jeopardy does not foreclose prosecution in both federal and tribal court.

General Crimes and Assimilative Crimes Acts

Under federal law, there are criminal offenses, such as an assault on a federal officer, that are applied nationally without regard to the location of the offense. The federal government has exclusive jurisdiction over these crimes, whether they occur in Indian country or elsewhere. In addition to these crimes, federal criminal law contains references to crimes that apply to those areas under the sole and exclusive jurisdiction of the U.S. government, such as army bases and national parks. These areas are known as "**federal enclaves.**"

In 1817, Congress enacted a jurisdictional statute, the General Crimes Act,⁸⁰ which was also known as the Federal Enclaves Act, providing that with certain exceptions, federal criminal laws apply in Indian country to the same extent that they apply in other federal enclaves. The General Crimes Act was originally passed to permit punishment of all crimes committed by non-Indians in Indian territory, as well as some crimes committed by Indians against non-Indians. At the time, such crimes were assumed to be beyond the reach of state or tribal law. Today, the General Crimes Act's primary function is to provide for prosecution of crimes by non-Indians against Indians and of non-major crimes by Indians against non-Indians.

In 1825, Congress enacted a second jurisdictional statute known as the Assimilative Crimes Act⁸¹ providing that state criminal laws not otherwise included in the federal criminal code are incorporated into federal law by reference and made applicable to federal enclaves. The Assimilative Crimes Act thus provides the substantive law for certain defendants who are charged with a federal offense and tried in federal court, but the crime is defined and the sentence is prescribed by state law.

Does the Assimilative Crimes Act apply to Indian country?

Yes. In 1946, the United States Supreme Court ruled that the Assimilative Crimes Act applies in Indian country.⁸² Under this ruling, the criminal laws applicable to Indian country and subject to federal jurisdiction include both federal enclaves crimes and state crimes not otherwise included in the federal criminal code. The Assimilative Crimes Act is relevant because it is one of the general laws of the United States that is extended to Indian country by the General Crimes Act.

Are there any exceptions to the General Crimes and Assimilative Crimes Acts?

Yes. The General Crimes Act does not apply to:

- 1) offenses committed by one Indian against the person or property of another Indian;

⁸⁰ 18 U.S.C. § 1152.

⁸¹ 18 U.S.C. § 13.

⁸² *Williams v. United States*, 327 U.S. 711 (1946).

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- 2) offenses that have already been punished under local law of the tribe;
 - 3) offenses over which criminal jurisdiction is or may be secured to a particular tribe by treaty; and
 - 4) according to the United States Supreme Court,⁸³ crimes committed in Indian country by a non-Indian against another non-Indian (these cases are within the jurisdiction of state courts).

The General Crimes Act extends only to crimes in which an Indian is involved as either a defendant or a victim.

Major Crimes Act

In 1885, Congress reversed its prior policy of not asserting federal criminal jurisdiction over Indian versus Indian crimes and passed the Major Crimes Act.⁸⁴ The Act came in response to an 1883 United States Supreme Court ruling⁸⁵ in which the Court ordered federal officials to release an Indian who murdered another Indian and had already been punished by his Tribe because the government did not have jurisdiction over reservation crimes committed by one Indian against another.

Congress thus passed the Major Crimes Act, giving the federal government jurisdiction over seven major crimes when committed by an Indian against the person or property of any other person in Indian country. The Major Crimes Act has been amended several times and now covers more than 30 offenses. Unlike the General Crimes Act, **the Major Crimes Act applies only to Indians**. Today, the Major Crimes Act is the primary federal jurisdictional statute for major offenses committed by Indians in Indian country.

Public Law 83-280

The years between 1953 and 1968 were known as the "termination" era of federal Indian policy. During this period, Congress's goal was to assimilate Indians into non-Indian society and reduce or eliminate the federal government's unique relationship with Indian tribes.

During this time and in response to a perceived need to strengthen law enforcement on some Indian reservations, Congress enacted Public Law 83-280, commonly referred to as P.L. 280.⁸⁶ The act mandated that, initially, five states would assume criminal jurisdiction over most of the reservation lands within their borders.⁸⁷ Alaska became the sixth mandatory state in 1958. Reservations that were considered to have well-functioning law enforcement in these six states were exempted from P.L. 280. Montana was not included in the "mandatory" states.

⁸³ *United States v. McBratney*, 104 U.S. 621 (1881); *Draper v. United States*, 164 U.S. 240 (1896); *New York ex rel. Ray v. Martin*, 326 U.S. 496 (1946).

⁸⁴ 18 U.S.C. § 1153.

⁸⁵ *Ex Parte Crow Dog*, 109 U.S. 556 (1883). In *Crow Dog*, the Supreme Court ruled that federal courts lacked jurisdiction to prosecute an Indian who had already been punished by the tribe for killing another Indian. The punishment given by the tribe, restitution to the victim's family, was viewed by many non-Indians as an insufficient punishment for the crime of murder. Congress responded by granting the federal courts jurisdiction for violent crimes committed on Indian reservations.

⁸⁶ Public Law 280, 67 Stat. 588 (1953).

⁸⁷ The "mandatory" states include all Indian country in California and Nebraska; all Indian country in Minnesota, except the Red Lake Reservation; all Indian country in Oregon, except the Warm Springs Reservation; and all Indian country in Wisconsin, except the Menominee Reservation.

P.L. 280 authorized the other 44 states, at their option, to assume the same jurisdiction that mandatory states had received.⁸⁸ Of the 44 "optional states," only 10 took steps to assume jurisdiction under P.L. 280.

Between 1953 and 1968, states were allowed to assume jurisdiction unilaterally. Most tribes strongly opposed P.L. 280 when passed because they feared that optional states could increase their jurisdiction at will. In response to these tribal concerns, Congress amended P.L. 280 in 1968 to require tribal consent for any state assumption of jurisdiction and to authorize the United States to accept a "retrocession" or the return of jurisdiction acquired by a state under P.L. 280.

Did Montana participate in P.L. 280?

Yes. In 1963, the Montana Legislature passed legislation that allowed the state to assume P.L. 280 jurisdiction over the CSKT.⁸⁹ The legislation also allowed the state to assume jurisdiction over other Indian tribes if those tribes requested it.⁹⁰ The bill also provided a method for tribes to withdraw their approval to P.L. 280 jurisdiction.

Did a Montana tribe consent to be subject to P.L. 280?

Yes, but only one. The CSKT supported the legislation enacted in 1963. In 1965, the CSKT enacted a tribal ordinance defining the scope and terms under which the tribes agreed to come under P.L. 280 jurisdiction.⁹¹ Governor Tim Babcock then issued a proclamation providing for state assumption of jurisdiction as defined in the tribal ordinance.⁹²

In 1993, at the request of the CSKT, the Legislature enacted Senate Bill No. 368 that allowed for **partial retrocession** from P.L. 280.⁹³

In September of 1994, the CSKT entered into a memorandum of agreement, pursuant to the State-Tribal Cooperative Agreements Act, with the state, Flathead, Lake, Missoula, and Sanders Counties, and the cities of Hot Springs, Ronan, and St. Ignatius to implement Senate Bill No. 368, allowing the tribes to reassume exclusive jurisdiction over misdemeanor crimes committed by Indians and providing for continued concurrent state-tribal jurisdiction over felony crimes committed by Indians.

The tribes' resolution to withdraw from P.L. 280 provides for cooperation between state, tribal, and local law enforcement agencies and includes language allowing continued state misdemeanor criminal jurisdiction in limited areas such as a guilty plea entered in state court, pursuant to a plea

⁸⁸ Ten option states accepted jurisdiction under P.L. 280. Only Florida accepted the full jurisdiction given mandatory states. The other nine, including Montana, undertook partial jurisdiction. The ten "optional" states included Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, South Dakota, Utah, and Washington.

⁸⁹ 2-1-301 through 2-1-306, MCA.

⁹⁰ 2-1-302, MCA.

⁹¹ Ordinance 40-A (revised) was enacted by the Tribal Council of the CSKT in 1965. The ordinance authorized the state to assume concurrent jurisdiction over tribal members for all criminal laws and eight areas of civil law: compulsory school attendance, public welfare, insanity, care of the infirm, aged, and afflicted, juvenile delinquency and youth rehabilitation, adoption (with tribal court approval), abandoned, dependent, neglected, orphaned, or abused children, and operation of motor vehicles on public roads.

⁹² The proclamation states: "By the power vested in me, as Governor of the State of Montana, I, Tim Babcock, hereby proclaim that criminal and civil jurisdiction of the State of Montana and its subdivisions does extend to The Confederated Salish and Kootenai Tribes as expressed in their approved Ordinance No. 40-A (Revised), and I further declare that sixty days from the date of October 8, 1965, such criminal and civil jurisdiction as previously described shall be in full force and effect."

⁹³ 2-1-306, MCA.



bargain agreement that reduces a felony crime to a misdemeanor, or in the case of a conviction in state court on a lesser included offense in a felony trial. For felonies committed by Indians on the Flathead Reservation, both the state and tribes retain concurrent jurisdiction, but either may transfer prosecution to the other if consideration of the factors specifically outlined in the agreement warrants transfer.

The other six tribal governments in Montana have never been subject to P.L. 280.

Tribal Law and Order Act

Congress passed the Tribal Law and Order Act (TLOA) in 2010 to respond to high crime rates and inadequate criminal justice measures in Indian country. Through the TLOA, Congress sought to address these issues by strengthening tribal law enforcement agencies, encouraging greater coordination between tribal and federal law enforcement efforts, supporting tribal self-governance and jurisdiction, increasing federal accountability in Indian country, and providing protections against domestic and sexual violence, drug trafficking, and substance abuse.

The TLOA further amended the ICRA to reduce limitations on tribes' sentencing authority. Prior to the passage of the TLOA, tribal courts could impose a sentence of not more than one year in jail and a fine of \$5,000 for any one offense. The TLOA increased that to three years' imprisonment and up to a \$15,000 fine, or both, for qualifying crimes provided the tribe met the TLOA's other requirements. Additionally, the TLOA also amended P.L. 280 to allow tribes to request a resumption of federal criminal jurisdiction pursuant to the General Crimes Act, Assimilative Crimes Act, and Major Crimes Act.

Is a tribe required to participate in the TLOA?

No. A tribe may choose to exercise the enhanced sentencing authority and take on the additional procedural burdens set out by the TLOA.

Are there limitations to enhanced tribal court sentencing authority under the TLOA?

Yes. In order to impose a lengthier sentence under the TLOA, a tribe must ensure that the following protections are in place:

- 1) the defendant is provided, at the tribe's expense in cases of indigence, effective assistance of counsel at least equal to that under the U.S. Constitution;
- 2) the defense counsel must be licensed by any jurisdiction that applies appropriate licensing standards, ensures competency, and has rules of professional responsibility;
- 3) the defendant must not be subjected to excessive bail, excessive fines, or cruel and unusual punishment;
- 4) the presiding judge must have sufficient legal training for a criminal proceeding and be licensed to practice law in the U.S.;
- 5) all of the tribe's criminal laws, rules of evidence, and rules of procedure must be publicly available; and
- 6) the tribe must maintain a record of criminal proceedings.

Is there a maximum number of years of imprisonment a tribe may impose?

Yes. Sentences may include a combination of incarceration and community corrections, such as probation. However, under no circumstance can a sentence for an individual crime exceed three

years or the total sentence for one prosecution exceed nine years.

Who may be subject to an enhanced sentence under the TLOA?

To be subject to the enhanced sentencing authority, a defendant accused of a criminal offense must either have previously been convicted of the same or comparable offense by any jurisdiction in the United States or is being prosecuted for an offense comparable to an offense that would be punishable by more than one year of imprisonment in a federal or state court.

Violence Against Women Act

High rates of domestic and sexual violence against Indian women gained significant national attention in recent years. Although likely underreported, recent studies suggest the annual rate of rape and sexual assault among Indian women is over twice as high as the general population. In 2013, Congress amended the Violence Against Women Act (VAWA), originally enacted in 1994, to aid in efforts to protect Indian women from domestic violence, dating violence, and criminal violations of protection orders. The amendments restored tribal criminal jurisdiction over non-Indian perpetrators of specific crimes against Indian victims.

Is a tribe required to participate in the VAWA?

No. A tribe may choose to participate and meet certain requirements prior to exercising jurisdiction over non-Indian defendants under the VAWA.

Does the VAWA change the federal government's criminal jurisdiction in Indian Country?

No. The VAWA does not change the federal government's authority to prosecute crimes in Indian Country.

Are there any limitations to a tribe's criminal jurisdiction over a non-Indian under the VAWA?

Yes. Tribal criminal jurisdiction over non-Indians under the VAWA is limited to crimes of domestic violence, dating violence, and criminal violations of protection orders. Tribal criminal jurisdiction over non-Indians does not extend to crimes committed outside of Indian country, crimes involving a non-Indian perpetrator and non-Indian victim, crimes involving two strangers (including sexual assaults), crimes committed by a person without sufficient ties to a tribe, and child or elder abuse that does not involve a violation of a protection order.

A tribe's authority under the VAWA depends on several factors. In addition to protecting the rights of the non-Indian perpetrator under the ICRA, a tribe must also protect a non-Indian defendant's rights by providing:

- effective assistance of counsel;
- free, appointed, licensed attorneys for indigent defendants;
- law-trained tribal judges licensed to practice law;
- publicly available tribal criminal laws and rules; and
- recorded criminal proceedings.

A tribe must also include a fair cross-section of the community in jury pools and inform non-Indian defendants detained by a tribal court of their right to file a federal habeas corpus petition.

Quick Reference Chart

Federal, State, and Tribal Jurisdiction in Indian Country

Identity of Perpetrator	Identity of Victim	Major Crimes as defined by the Major Crimes Act	All Other Crimes
Indian	Indian	Federal* and Tribal	Tribal
Indian	Non-Indian	Federal* and Tribal	Federal* and Tribal
Non-Indian**	Indian	Federal* (pursuant to the Indian Country Crimes Act because the Major Crimes Act applies only to Indian defendants)	Federal*
Non-Indian	Non-Indian	State	State
Indian	Victimless/Consensual	N/A	Tribal
Non-Indian	Victimless/Consensual	N/A	State

* Under Public Law 83-280, states may assume federal jurisdiction within Indian country. In Montana, the CSKT consented to P.L. 280 jurisdiction in 1963. The CSKT have since reassumed exclusive jurisdiction over misdemeanor crimes committed by Indians and concurrent state-tribal jurisdiction over felony crimes committed by Indians. The other six tribal governments in Montana have never been subject to P.L. 280.

** The Violence Against Women Act allows tribes the option to assume federal jurisdiction over non-Indian perpetrators for specific crimes (domestic violence, dating violence, and criminal violations of protective orders). However, in order to exercise such additional authority, tribes must provide certain procedural guarantees.



Acronym List

To be completed...