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American Indians, Indian Tribes, and State Government

Research Department
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Research Department

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Indians, Indian Tribes, and State Government

Fifth Edition

This guidebook discusses major issues involved in the relationship between Indian tribes, Indians, and state government, including criminal and civil jurisdiction, control of natural resources, gaming and liquor regulation, taxation, health and human services, and education.

American Indians, Indian Tribes, and State Government is a cooperative project by legislative analysts in the Research Department of the Minnesota House of Representatives. General questions regarding American Indians can be directed to Mary Mullen. Topical questions should be addressed to the analyst who covers that subject.

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Contents

Introduction

This publication introduces Minnesota legislators to the major legal issues involved in the relationship between Indian* tribes, Indians, and state government. It is not intended to be a comprehensive or in-depth treatment of the subject.

The publication begins with some basic data on Indians in Minnesota today. Map 1 shows the locations of tribal reservations. Map 2, Figure 1, and Appendix I present population information from the 2010 Decennial Census and the Census Bureau's American Community Survey from the years 2007 to 2011. Appendix II presents demographic and other information for each reservation in Minnesota.

Part One defines terms and explains concepts that are necessary for understanding the basic nature of state and federal power relative to Indians and Indian tribes.

Part Two contains a series of papers on specific legal issues relevant to policymakers. The topics are:

- Criminal Jurisdiction in Indian Country
- Civil Jurisdiction in Indian Country
- Gaming Regulation in Indian Country
- Liquor Regulation in Indian Country
- Control of Natural Resources in Indian Country
- Environmental Regulation in Indian Country
- Taxation in Indian Country
- Health and Human Services for Indians
- Education Laws Affecting Indian Students

Appendix III explains the ability of the U.S. Bureau of Indian Affairs to acquire land in trust for tribes.

Appendix IV lists the eleven tribal courts in Minnesota and the court and court of appeals for the Minnesota Chippewa Tribe. The Minnesota Chippewa Tribe is a federally recognized tribal government that provides unified leadership and services to the six member tribes: Bois Forte, Fond du Lac, Grand Portage, Leech Lake, Mille Lacs, and White Earth.

* The term "Indian" was given to the indigenous people of North America by the European explorers when they first encountered the New World, mistakenly thinking they had reached the Indies. Individuals have different preferences for the term used to describe indigenous people in the United States, including American Indian, Native American, or by the names they call themselves in their own languages. The main groups of Indians in Minnesota are the Dakota and the Chippewa, also referred to as Ojibwe or Anishinabe. This publication generally follows the convention used in nearly all federal and state laws, referring collectively to all the indigenous people of North America and Minnesota as "Indians." In certain instances the term "American Indian" in conjunction with Alaskan Natives is used as that is the term used in some state laws and the U.S. Census for indigenous people to identify themselves.

Population of Indians in Minnesota

Minnesota has 12 federally recognized Indian reservations:

Anishinaabe Bands (Chippewa/Ojibwe)[1]

- Bois Forte (Nett Lake)
- Fond du Lac
- Grand Portage
- Leech Lake
- Mille Lacs
- Red Lake
- White Earth

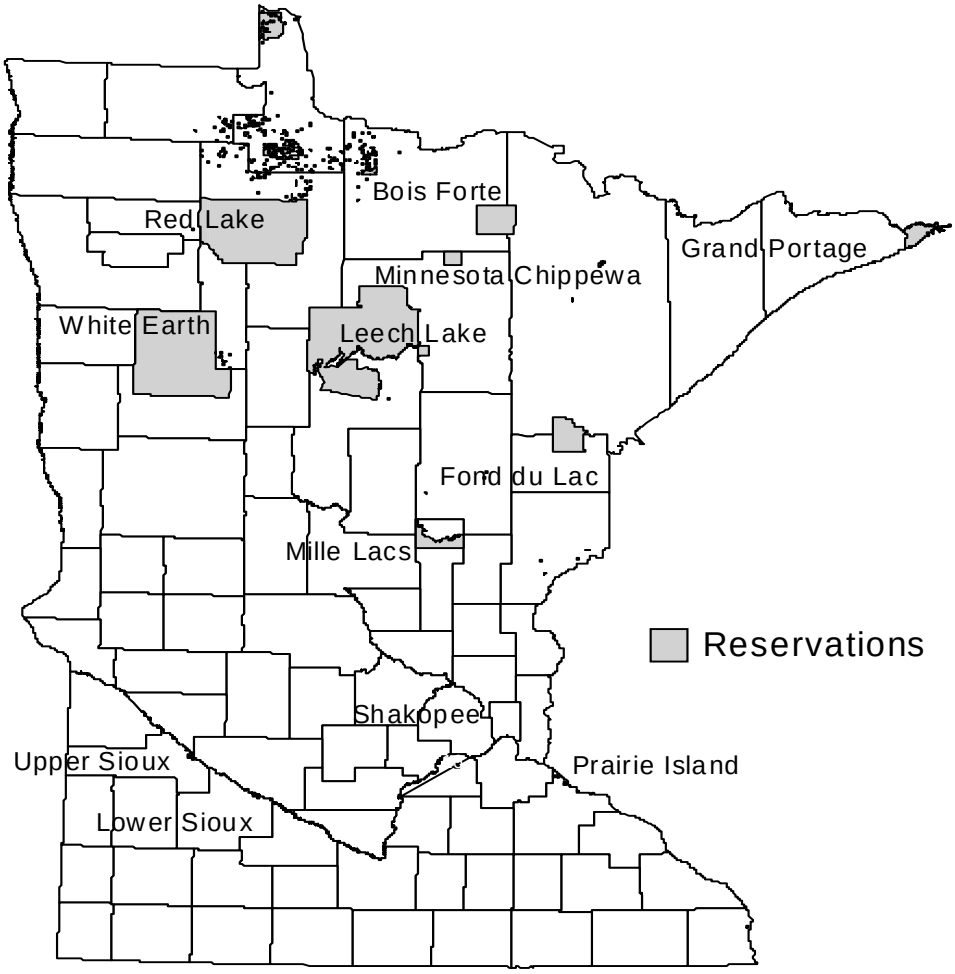
Dakota Communities (Sioux)[2]

- Lower Sioux
- Prairie Island
- Shakopee-Mdewakanton
- Upper Sioux

Map 1 shows the location of these reservations.

As of the 2010 Decennial Census, there were 101,900 "American Indian and Alaska Native persons,"[3] representing approximately 1.9 percent of the population. This number includes persons who identified themselves solely as American Indian and Alaska Native, and persons who identified themselves as more than one race, including American Indian and Alaska Native.[4]

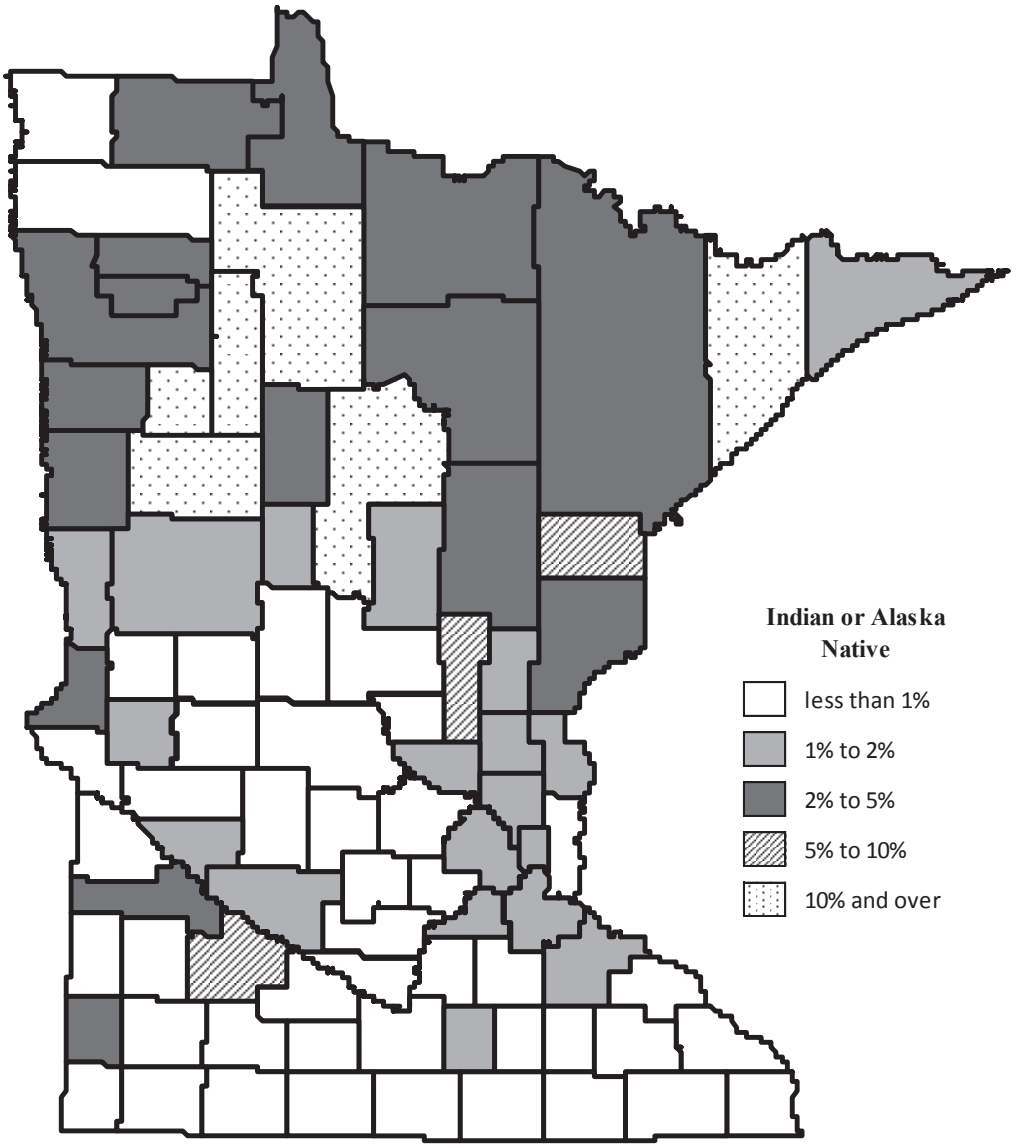
Map 1: Minnesota Indian Reservations



This map shows the twelve federally recognized tribes in Minnesota including the location of the Minnesota Chippewa Tribe.

Map 2: Indians as a Percent of County Population

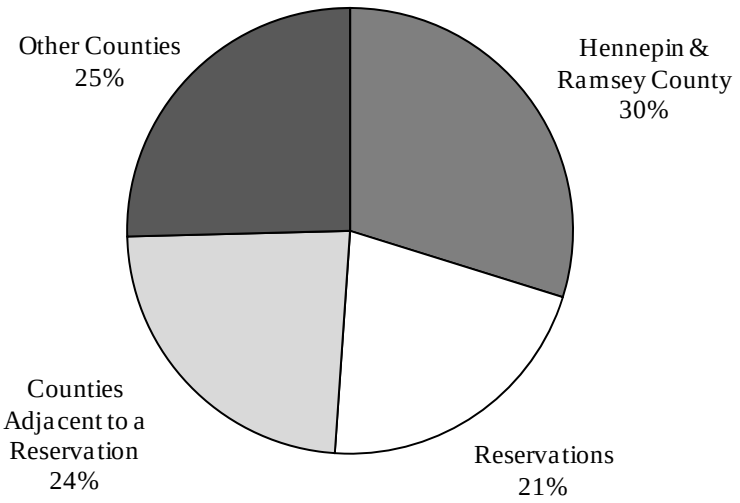
Map 2 shows what percentage of each county's total population is Indian. The table in Appendix I details Indian population by county.



Source: U.S. Census Bureau, 2010 Decennial Census

Figure 1: Where the Minnesota Indian Population Lives

Figure 1 shows where Indians in Minnesota lived in 2010 according to the Decennial Census. About 21 percent of the Minnesota Indian population lived on reservations. Approximately 24 percent of the population lived in a county in which the reservation is located, referred to as the "adjacent county" in Figure 1.[5] Slightly more than 30 percent of the Minnesota Indian population lived in Hennepin or Ramsey County. Finally, nearly 25 percent of the Minnesota Indian population lived elsewhere in the state.



Source: U.S. Census Bureau, 2010 Decennial Census

Appendix II provides information specific to each reservation, including information regarding tribal enrollment, land, casinos, tribal colleges, and demographic data from the 2010 Decennial Census and the Census Bureau's American Community Survey from 2007 to 2011.

ENDNOTES

[1] There is also the Minnesota Chippewa tribe, which is a federally recognized tribal government for six member tribes: Bois Forte, Fond du Lac, Grand Portage, Leech Lake, Mille Lacs, and White Earth.

[2] The Dakota reservations in Minnesota call themselves communities, which stems from the original Dakota Community, established in 1851. The current locations were established by federal congressional action in 1886. See the Indian Affairs Council website for more information, http://mn.gov/indianaffairs/tribes.html.

[3] The census enumeration combines these two ethnic groups together and, using census data, we are unable to separate them. However, it is safe to conclude that in Minnesota nearly all of these persons are American Indians.

[4] Beginning with the 2000 census, the federal government changed the standards governing the categories used to collect and present federal data on race and ethnicity. In addition to the five race groups (White, Black or African American, American Indian and Alaska Native, Asian, and Native Hawaiian and other Pacific Islander), the

standards permit respondents to select one or more races.

[5] For the purposes of this analysis, counties considered adjacent to reservations include Aitkin, Becker, Beltrami, Carlton, Cass, Chippewa, Clearwater, Cook, Crow Wing, Goodhue, Hubbard, Itasca, Kanabec, Koochiching, Lake of the Woods, Mahnomen, Marshall, Mille Lacs, Morrison, Pennington, Pine, Polk, Redwood, Renville, Roseau, Scott, St. Louis, and Yellow Medicine.

Part One: Terms and Concepts

Definition of "Indian"

Federal law defines "Indian" in a variety of ways for different purposes and programs. The U.S. Census counts individuals as American Indians who identify themselves as "American Indian or Alaskan Native."

A crucial distinction is the differences among (1) tribal membership, (2) federal legal definitions, and (3) ethnological status or Indian ancestry.

An individual may qualify under ethnological standards as an Indian because that person has Indian ancestry, but may not be a recognized member of a tribe or may not be recognized as an Indian for various federal legal purposes.

As a general rule, an Indian is a person who meets two qualifications: (1) has some Indian blood; and (2) is recognized as an Indian by members of his or her tribe or community.[1]

To have Indian blood, some of the individual's ancestors must have lived in North America before its discovery by Europeans. Many statutory and common law references to "Indian" refer to an individual's status as a member of an Indian tribe, although not every legal definition of "Indian" requires membership in a tribe.

Tribes have the power to determine their membership.

Court decisions have held that determining tribal membership is a fundamental and basic power of tribes.[2] This includes the power to set rules to determine membership and to remove individuals from membership rolls. While a tribe has the ability to determine its own membership, federal benefits and the application of state and federal laws do not always require a tribe's recognition. Minnesota tribes have different rules for determining their membership.

Individual tribes have varying blood requirements for enrollment, with the result that the general requirement of "some" blood may be substantially increased for persons seeking to establish status as members of certain tribes. Certain federal statutes require some degree of ancestry as well. Some tribes require one-fourth tribal blood, while some require as much as five-eighths.

The Minnesota Chippewa Tribe (MCT), which encompasses six of the 11 federally recognized tribes in Minnesota, requires that a member: (1) is at least one-fourth MCT blood; (2) is an American citizen; (3) applies for enrollment within a year of birth; (4) has a parent who is a member of the tribe; and (5) not be a member of another tribe. The governing body of the MCT makes the determination, and there is an appeal process through the Bureau of Indian Affairs.[3]

Formal enrollment is a relatively recent concept in Indian law. Some Indian tribes historically treated all participating members of their community as tribal members and were therefore willing to incorporate into the tribal community non-Indians who married tribal members. The requirement of formal tribal rolls can be traced to the allotment policy—the process of allotting tribal lands to individual tribal members.

Coexisting with this concept of tribal membership is an actual tribal community composed of

persons who are not all enrolled tribal members, but who nevertheless fully participate in the social, religious, and cultural life of the tribe if not its political and economic processes. Formal rolls have a limited purpose so many tribes have informal rolls. Although some statutes provide benefits to formally enrolled members of federally recognized tribes, many of the benefits accorded Indians under various statutes are available to Indians more broadly defined.[4] However, an Indian who is a member of a terminated tribe will not be considered an Indian under most federal laws, but may still receive benefits that are provided by the federal government to all American Indians.[5]

The modern congressional trend is to define the term "Indian" broadly to include both formal and informal membership, as well as requiring a certain degree of Indian blood. Federal courts have generally deferred to congressional determinations of who is an Indian in recognition of Congress's broad power to regulate Indian affairs, which includes the power to determine which entities and people come within the scope of that power.[6]

In 1924, Congress conferred citizenship upon all Indians born within the United States.[7]

American Indians were granted citizenship in the 1924 Citizenship Act,[8] but this did not include American Indians born before 1924 or outside the country until the Nationality Act of 1940[9] was passed. Prior to this, some Indians were considered citizens under the Dawes Act of 1887[10] if they were considered civilized, generally meaning assimilated into an Anglo-European culture. This status as citizens of the United States and of the individual states in which they reside does not affect the special relationship between the tribes and the federal government.[11]

ENDNOTES

[1] Cohen's Handbook of Federal Indian Law § 3.03[1], at 171 (Nell Jessup Newton ed., 2012).

[2] *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 fn. 32 (1978). Furthermore, a person regarded as a member by the tribe may not be so regarded by the Secretary of the Interior, who claims the authority to determine membership for purposes of distributing property rights. *See* BIA Manual, Release 83-4, Part 8, *Enrollment*, § 8.2 (1959), http://www.bia.gov/cs/groups/xraca/documents/text/idc010108.pdf. The Department of the Interior has requested that this portion of the BIA Manual be updated to the new Indian Affairs Manual but that has not yet been completed. Congress has the power to determine tribal membership, at least when tribal rolls are to be prepared for the purpose of determining rights to tribal property, and federal statutory membership provisions can be reviewed by federal courts.

[3] Revised Constitution of the Minnesota Chippewa Tribe, Article II, http://www.mnchippewatribe.org/pdf/constitution_revised.pdf.

[4] As a result, the Bureau of Indian Affairs often relies on informal rolls to determine which Indians are entitled to receive federal services, as opposed to those entitled to receive distributions. *See* BIA Manual, Release 83-4, Part 8, *Enrollment*, § 8.5 (1959). In certain cases, Indians organized as an identifiable group of Indians but not as a tribe have been able to sue for benefits when they were unable to organize as a tribe or unrepresented by a tribe in the litigation. *See Wolfchild v. United States*, 62 Fed. Cl. 521 (2004), *Osage Tribe of Indians of Oklahoma v. U.S.*, 85 Fed.Cl. 162 (2008).

[5] Cohen's Handbook of Federal Indian Law § 3.03[1], at 172 (Nell Jessup Newton ed., 2012).

[6] Cohen's Handbook of Federal Indian Law § 3.03[5], at 183 (Nell Jessup Newton ed., 2012).

[7] Citizen Act of 1924, ch. 233, 43 Stat. 253, codified at 8 U.S.C. § 1401(b). Several treaties and earlier statutes, such as the General Allotment Act, had already conferred citizenship on many Indians.

[8] Pub. L. No. 68-175 (1924).

[9] Pub. L. No. 76-853 (1940).

[10] 25 U.S.C.A. § 331 (1887), also known as the General Allotment Act, provided citizenship to Indians who accepted allotted land and were considered to be civilized, generally having abandoned traditional Indian culture and lived separate from their tribe.

[11] *Winton v. Amos*, 255 U.S. 373 (1921); *United States v. Nice*, 241 U.S. 591 (1916).

Definition of "Indian Tribe"

Recognition under federal and state law provides tribes and the members of those tribes certain benefits and services. Recognition has come from congressional or executive action that, for example, created a reservation for the tribe, negotiated a treaty with the tribe, or established a political relationship with the tribe, such as providing services through the Bureau of Indian Affairs (BIA).

As with the definition of "Indian," the legal status of tribes must be distinguished from ethnological definitions.

Federal recognition of tribes does not necessarily follow ethnological divisions. For example, the federal government has combined separate ethnological tribes into one "legal" tribe or divided one ethnological tribe into separate legal tribes.

In general, the Indian Commerce Clause of the U.S. Constitution authorizes Congress[1] to determine which groups of Indians will have recognized tribal status.

The courts generally will not question congressional or executive action in recognizing a tribe. Courts, however, will order the executive to honor tribal status for a particular purpose where it has been judged to have been the intent of Congress.[2] Courts will also not allow the federal government to confer tribal status arbitrarily on a group that has never displayed the characteristics of a distinctly Indian community.[3]

Department of the Interior regulations provide an administrative procedure for tribes seeking recognition.[4] Petitioners must be acknowledged as a tribe if they meet all of the following criteria:

(a) The petitioner has been identified as an American Indian entity on a substantially continuous basis since 1900;

(b) A predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present;

(c) The petitioner has maintained political influence or authority over its members as an autonomous entity from historical times until the present;

(d) The group must provide a copy of its present governing documents and membership criteria;

(e) The petitioner's membership consists of individuals who descend from a historical Indian tribe or tribes, which combined and functioned as a single, autonomous political entity;

(f) The membership of the petitioning group is composed principally of persons who are not members of any acknowledged North American Indian tribe; and

(g) Neither the petitioner nor its members are the subject of congressional legislation that has expressly terminated or forbidden recognition.[5]

Federal statutes before 1934 rarely defined the term "Indian tribe." The recent congressional trend is to define the term "tribe" in particular statutes. Enrolled membership in a tribe is considered a political status, not a racial or ethnic determination.[6]

Congress can also terminate federal supervision of a tribe. This eliminates the tribe's special relationship with the federal government. The terminated tribe retains its sovereignty to the extent consistent with the act terminating its status. No recognized tribes in Minnesota have been terminated.

Federal recognition provides certain benefits to Indian tribes.

The federal trust responsibility for Indian land and many of the federal services and benefits are gained through federal recognition of an Indian tribe, and the termination of federal status generally removes many benefits and protection to tribes. The BIA identifies 566 federally recognized American Indian and Alaska Native tribes and villages.[7] Some tribes can receive benefits as a state recognized tribe or non-profit and some federal programs provide benefits to individual Indians, the definition of which changes depending on the program and statute.[8]

ENDNOTES

[1] U.S. Const. art. I , § 8. Congress has occasionally delegated this power to the executive branch.

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

[3] *United States v. Sandoval*, 231 U.S. 28, 46 (1913).

[4] 25 C.F.R. § 83.

[5] 25 C.F.R. § 83.7.

[6] Cohen, at 181.

[7] U.S. Department of the Interior, Bureau of Indian Affairs, http://www.bia.gov/FAQs/.

[8] The U.S. Government Accountability Office has found that of approximately 400 nonfederally recognized tribes, 26 tribes received funding from 24 government funds. This is mostly based on their status as either a state-recognized tribe or as a nonprofit entity. GAO, "Indian Issues: Federal Funding for Non-Federally Recognized Tribes," April 1, 2012, http://www.gao.gov/assets/600/590102.pdf.

Indian Lands and Territories

Indian land is generally considered "Indian country"—the area in which the tribe's power of self-government applies and state powers are restricted. The land tenure—the ownership status of land within Indian country—is an issue that greatly affects the use and sale of Indian lands. For information on criminal and civil jurisdiction, see the "civil jurisdiction" and "criminal jurisdiction" sections in Part Two starting on page 28.

Indian country is a crucial concept of Indian law.

Whether or not an area is considered tribal land will determine if the tribe, the state, or the federal government has jurisdiction for different purposes. It is generally within these areas that tribal sovereignty applies and state power is limited.[1] "Indian country" can include reservations, fee lands within the reservation, easements within reservations, any land held in trust for a tribe or individual Indian, and lands statutory designed by the federal government to be included in Indian country.[2]

Federal law generally[3] defines Indian country as consisting of three components:

- Indian reservations
- Dependent Indian communities[4]
- Indian allotments[5]

Only Congress may decide to abandon the status of lands considered Indian country. Settlement by non-Indians does not withdraw land from Indian country status. Even land owned in fee simple by non-Indians, as well as towns incorporated by non-Indians, are still within Indian country if they are within the boundaries of a reservation or a dependent Indian community.

Indian country is legally established by congressional action, treaty provisions, or executive action.

In some instances Congress defined the boundaries of reservations by legislation, while in others Congress authorized the executive branch to do so. In 1934, Congress delegated broad responsibility to the Secretary of the Interior to establish new reservations or add area to existing reservations. Land outside of a reservation that is purchased in trust for a tribe must be proclaimed a reservation by the Secretary of the Interior to acquire Indian country status.[6]

As will be discussed within individual sections in Part Two, Indian country status is important to determine criminal and civil jurisdiction, the power to impose state taxes, and to exercise other state powers. The definition of Indian country is important for land ownership and tenure considerations as well.

Land tenure or landownership in Indian country falls in several basic categories:

- Tribal trust lands
- Allotted trust lands
- Fee lands

Tribal trust lands are held in trust by the federal government for a tribe's use. The federal government, as the trustee of the tribal lands, has a fiduciary duty to manage the land for the benefit of the tribe.

This is the largest category of Indian land. Tribally owned trust land is held communally by the tribe in undivided interest, and individual members simply share in the enjoyment of the entire property with no claim to a particular piece of land. The tribe is treated as a single entity that owns the undivided beneficial interest. The tribe cannot convey or sell the land without the consent of the federal government.

The Secretary of the Interior must approve conveyance of tribal lands to the United States in trust for the tribe. Federal regulations require publication of notice of pending transfers in trust, at least 30 days before the transfers take effect. This regulation was promulgated in response to the decision in *South Dakota v. United States Department of Interior*[7] to provide a procedure for judicial review of the secretary's decision to accept a transfer of land in trust. For a discussion of the issue and the criteria accepting trust transfers see Appendix III.

Allotted trust lands are held in trust for the use of an individual Indian (or his or her heirs). The federal government holds the legal title and the individual (or his or her heirs) holds the beneficial interest.

In 1887, Congress enacted the General Allotment Act,[8] which divided up some Indian reservations and allotted the partitioned land to individual Indians. The land was to be held in trust by the federal government for a period of years (originally 25 years), until the beneficial owner could show that he was competent to own the land in fee. In Minnesota, the Nelson Act of 1889 implemented the allotment process.[9] Many of the allotments passed out of trust status and are now no longer owned by Indians. Although some land passed legitimately at the expiration of the "trial period" to Indian ownership, most passed out of trust status and out of Indian hands through fraud and tax sales.[10] In 1934, with the passage of the Indian Reorganization Act (IRA), the trust status of the remaining allotments was extended indefinitely.[11] The IRA also allowed no more Indian land to be allotted. As a result, a significant amount of allotted land remains in trust today.

Fee lands are held by an owner, whether Indian or non-Indian, in fee simple absolute. Fee land within Indian country owned by non-Indians generally does not enjoy the sovereign immunity protection enjoyed by trust land, such as exemption from taxation.[12]

Other lands are held in Indian country by federal, state, and local (nontribal) governments. The federal government holds some land in fee simple absolute with no obligation toward Indians regarding the land. These include, for example, national forest lands, which are wholly owned by the federal government but may be located within Indian country. The state or local governments similarly may own lands such as state parks, state natural and scenic areas, state

forest land, and county parks located within Indian country.

Land owned by Indians from the allotment period has been the source of litigation and congressional action.

In 2004, Congress passed the American Indian Probate Reform Act (AIPRA).[13] This law was intended to curb the fractionation of Indian allotments caused by the General Allotment Act of 1884. Prior to AIPRA the land was divided up between the owner's heirs, but the interest was undivided so eventually many tracts of land had hundreds of owners as tenants in common, and the land continues to be divided between each owner's heirs in federal BIA probate cases.[14] AIPRA attempts to curb some of the fractionation by encouraging trust land owners to write a will and also devising new inheritance laws when no decedents have a will.

For many years the Department of the Interior was accused of mismanaging Indian trust land and assets. A large class action suit, *Cobell v. Salavar*,[15] was filed against the federal government to address the mismanagement of Indian trust land. The resulting settlement in 2009 provided Indians throughout the country a settlement award as owners and heirs to trust land or Individual Indian Money Accounts.[16] The settlement also requires funding for trust land reform, purchase and consolidation of fractionated Indian lands, and an Indian Education Scholarship Fund.

ENDNOTES

[1] Certain tribal powers—for example, the ability to take game and fish, or harvest native crops "off-reservation"—may apply outside of the area of Indian country under specific treaties or statutes.

[2] Indian country is the term that has been used consistently since 1948 (see 18 U.S.C. § 1151) codifying the definition of Indian country based on previous case law. *Cf. Mustang Production Co. v. Harrison*, 94 F.3d 1382 (10th Cir. 1996) *cert. den.* 520 U.S. 1139 (1997) (tribal power to impose severance tax applies to allotments, even though the reservation was disestablished).

[3] 18 U.S.C. § 1151. Section 1151 defines Indian country for purposes of criminal jurisdiction as including these three components, and in certain federal court decisions, extended to civil jurisdiction. *See DeCoteau v. Dist. County Court*, 420 U.S. 425 (1975); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

[4] In order to qualify as a dependent Indian community, lands that are neither reservations nor allotments must meet two qualifications: (1) they must be set aside by the federal government for use by Indians as Indian lands; and (2) they must be under federal superintendence. *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 527 (1998) (holding lands on a disestablished reservation were not part of a dependent Indian community, preventing the tribe from imposing tribal taxes).

[5] *United States v. Pelican*, 232 U.S. 442 (1914) (lands created out of diminished reservations and held in trust by federal government, including allotted land, were Indian country).

[6] 25 U.S.C. § 467.

[7] 69 F.3d 878 (8th Cir. 1995) *vacated* 117 S. Ct. 286 (1996). In this case, the Court of Appeals held the underlying federal statute authorizing transfer of lands to the federal government was an unconstitutional delegation of legislative power. The Secretary of the Interior responded by promulgating a regulation requiring notice of

proposed transfers in trust, thereby allowing judicial review of decisions to accept transfers in trust. The Supreme Court granted certiorari and vacated the lower court judgment with instructions to remand the matter to the Secretary of the Interior. The Eight Circuit later reversed its decision, *South Dakota v. U.S. Dept. of Interior*, 423 F.3d 790 (8th Cir. 2005), and other federal courts have supported the position that the delegation of the power to take land into trust is a constitutional delegation of power.

[8] 25 U.S.C. §§ 331 et. seq. This is commonly referred to as the Dawes Act.

[9] 25 Stat. § 642. No allotment occurred on the Red Lake Reservation in northern Minnesota, and thus the reservation land is held entirely by the tribe.

[10] For example, only about 6 percent of the original acreage of the White Earth Reservation remains in Indian control. E. Peterson, *That So-Called Warranty Deed: Clouded Land Titles on the White Earth Indian Reservation in Minnesota*, 59 N.D.L. Rev. 159, 163 (1983).

[11] 25 U.S.C. § 462.

[12] *See County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992) and discussion on taxation, page 62.

[13] 25 U.S.C. §§ 2201-2221 AIPRA is an amendment to the Indian Land Consolidation Act.

[14] The Indian Land Tenure Foundation website has many useful resources on fractionation and AIPRA, http://www.iltf.org/land-issues/fractionated-ownership.

[15] 573 F.3d 808 (D.C. Ct. App. 2009).

[16] The Indian Trust Settlement website provides information for the *Cobell* settlement, http://www.indiantrust.com/faq.

Tribal Sovereignty: Limits on State Power

Indian tribes have a special legal status derived from their status as sovereign nations under the U.S. Constitution and federal law. When the United States was founded, the tribes were self-governing, sovereign nations. Their powers of self-government and sovereign status were not fully extinguished. While the establishment of the United States subjected the tribes to federal power, it did not eliminate their internal sovereignty or subordinate them to the power of state governments.[1] The U.S. Supreme Court has ruled that tribes lost their "external sovereignty," that is, they were no longer able to deal with foreign nations. However, they still retain their sovereignty within their tribal territories.[2] The tribes retain the powers of self-government over their lands and members.

An important tenet of federal policy has been to protect the self-government rights and sovereignty of tribes.

Chief Justice Marshall characterized the federal-tribal relationship as one of "domestic dependent nations" to whom the federal government had essentially a fiduciary relationship.[3] One element of this fiduciary relationship has been to preserve tribes' status as self-governing entities within their territories, including protection from state interference.[4] For example, Chief Justice Marshall described the situation as follows:

> The Cherokee nation * * * is a distinct community * * * in which the laws of Georgia can have no force * * * but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress.[5]

As Congress has inconsistently accorded importance to sovereignty and tribal self-government, federal Indian affairs policy has varied significantly over the years. Assimilation policies at times downplayed the importance of tribal sovereignty. However, tribal sovereignty has been, and continues to be, an important theme of federal policy.

Under the Indian Commerce Clause, Congress has plenary authority over Indian affairs and tribes.

The Constitution gives Congress complete authority over Indian tribes, including the powers to repeal treaties, eliminate reservations, and grant states jurisdiction over particular tribes. The role of the Indian Commerce Clause and the scope of federal powers is widely debated and often litigated.[6]

Tribal sovereignty and tribes' right of self-government are the important touchstones that affect tribal relations with state government.

The U.S. Supreme Court has stated variously that Indian relations are the exclusive concern of Congress[7] and also provided that state's rights do not end at the border of a reservation.[8] In any case, generally state power over tribal territory is limited to those powers that Congress has delegated to it, or which have not been preempted by the exercise of federal or tribal law.

Sovereign Immunity

As an adjunct of tribal sovereignty, the courts have held that tribes and tribal organizations are protected by the doctrine of sovereign immunity.

The English common law doctrine of sovereign immunity prohibits a plaintiff from bringing a lawsuit against the "sovereign" (i.e., the government). In America, the doctrine was traditionally applied to foreign nations and the states, although more recent cases and legislation have curtailed its scope.

Since the 1940s, the courts have held that Indian tribes and tribal businesses are immune from lawsuits under the doctrine.[9] Application of the doctrine reflects both the special sovereign status of tribes and the goal of protecting tribal resources. Certain federal laws have abrogated the sovereign immunity of tribes including the Indian Gaming Regulatory Act, Indian Civil Rights Act, Indian Depredation Act, Indian Self-Determination Act, and the Bankruptcy Code.[10]

Unless it is waived, sovereign immunity prevents assertion of contract, employment, tort, and other legal claims against tribes and tribal businesses.

The Supreme Court has construed the sovereign immunity of Indian tribes and organizations broadly. Sovereign immunity:

- applies to tribal government and extends to tribal business organizations, including for-profit business entities;
- applies to off-reservation activities;
- applies when damages or declaratory relief is sought; and
- applies unless it is expressly waived.[11]

Under sovereign immunity, patrons of tribal businesses who are injured (e.g., a gambler at a tribal casino who slips and falls) will be unable to sue the business to recover for the injuries unless the tribe has waived sovereign immunity for such a cause of action. Similarly, contractors also will be unable to recover unless the tribe has consented to the suit. The doctrine generally extends to tribal officials and employees.[12]

The Supreme Court has explained that the doctrine of tribal sovereign immunity "developed almost by accident."[13] The doctrine has been retained by the Court on the theory that Congress wanted to promote tribal self-sufficiency and economic development. The Court has recognized arguments against sovereign immunity for tribes, nevertheless, the Court has indicated it defers to Congress to make changes in the doctrine since "Congress is in a position to weigh and accommodate the competing policy concerns and reliance interests."[14]

Tribal sovereign immunity can be waived by an act of Congress or by a clear action taken by the tribe. The Supreme Court has ruled that Congress may set aside tribal immunity if it "unequivocally" expresses that purpose.[15] If Congress does not subject a tribe to suit, the tribe itself can agree to be sued by clearly waiving its sovereign immunity.[16] The Supreme Court has indicated that while a waiver must be unambiguous, it need not use the words "sovereign immunity."[17] For example, a contract containing an agreement to arbitrate is a waiver of immunity from suit in state court for purposes of judicial enforcement of the award.[18]

The 11th Amendment prevents tribes from being sued for damages in federal courts and prevents tribes from suing states in federal court.

The 11th Amendment to the U.S. Constitution has been construed by the U.S. Supreme Court to bar suits by tribes against the states based on sovereign immunity.[19] On the one hand, the court has ruled that the 11th Amendment prevents a state from suing an Indian tribe in federal court unless the tribe expressly consents or Congress abrogates the tribe's sovereign immunity. [20] On the other hand, the Supreme Court has ruled that Congress lacks the power under the Indian Commerce Clause to eliminate a state's 11th Amendment immunity from being sued by a tribe in federal court.[21] A state may, of course, waive this immunity. It must do so by "the most express language or by such overwhelming implication from the text as will leave no room for any other reasonable construction."[22]

The Court's reasoning in these cases is that tribes could not have agreed to surrender their sovereign immunity because they were not parties to the Constitutional Convention that drafted the 11th Amendment; for the same reason, the states would not have given up their immunity to being sued by tribes.[23]

ENDNOTES

[1] The special status of Indian tribes is recognized in the language of the Constitution. For example, Congress was given authority "*[t]o regulate commerce with* foreign nations, and among the several states, and with *the Indian tribes.*" U.S. Const. art. I § 8 (emphasis added). This provision is commonly called the "Indian Commerce Clause." The Indian Commerce Clause has generally been held to vest power over Indian affairs exclusively in the federal government. *See, e.g., County of Oneida v. Oneida Indian Nation of New York State,* 470 U.S. 226 (1985).

[2] These basic principles of Indian law were established initially in *Worcester v. Georgia*, 31 U.S. 515 (1832).

[3] *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *see generally* the discussion in Cohen § 4.01[1], at 206-211.

[4] Id.

[5] *Worcester v. Georgia*, 31 U.S. 515, 561 (1832), cited in Cohen, *supra* note 3, at 235 (1982).

[6] See discussion in Cohen, § 4.01[1][a], at 209 and Id., footnote 25.

[7] *County of Oneida v. Oneida Indian Nation of New York State*, 470 U.S. 226, 234 (1985).

[8] *Nevada v. Hicks*, 533 U.S. 353, 361 (2001).

[9] *United States v. U.S. Fidelity & Guaranty Co*., 309 U.S. 506 (1940) is the first Supreme Court case.

[10] Cohen, §7.05[1][b], at 640-643.

[11] *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc*., 523 U.S. 751 (1998), *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d1269 (9th cir. 1991). This contrasts with the general trend to limit the sovereign immunity of foreign nations and states. It has been observed by both courts and commentators that applications of the sovereign immunity of tribes would not similarly extend to states. *See, e.g., In re Greene*, 980 F.2d 590, 598-600 (9th Cir. 1992), *cert. denied Richardson v. Mount Adams Furniture*, 510 U.S. 1039 (1994) (Rymer, J., concurring); Thomas McLish, Note, *Tribal Sovereign Immunity: Searching for Sensible Limits,* 88 Colum. L. Rev. 173, 179-80 (1988).

[12] See Cohen 7.05[1][a], at 638-629. See also *Young v. Duenas*, 272 P.3d 8513 (2012), cert denied *Young v. Fitzpatrick*, Docket No. 11-1485 (2013). The circuit court found that law enforcement authorities acted within the scope of authority of the tribe and were protected by sovereign immunity even where they were trained and cross deputized with state and other law enforcement.

[13] *Kiowa Tribe, supra* note 11, 523 U.S. at 756.

[14] Id., 523 U.S. at 759.

[15] *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418 (2001) (citation omitted).

[16] *C & L Enterprises, Inc, supra* note 15, 532 U.S. at 418 (citation omitted).

[17] Id., 532 U.S. at 420 (citation omitted).

[18] Id., 532 U.S. at 422. The Minnesota courts have held that express language, such as a "sue or be sued" clause, is sufficient to waive immunity. *See, e.g., Duluth Lumber and Plywood Co. v. Delta Development, Inc.*, 281 N.W.2d 377 (1979) (included in tribal ordinance). The federal circuit courts have split on the issues around tribal sovereign immunity, specifically whether "sue and be sued" clauses waive immunity and whether or not sovereign immunity extends to tribal employees in certain circumstances. *See, e.g., Ramey Construction Co. v. Apache Tribe*, 673 F.2d 315 (10th Cir. 1982); *Parker Drilling Co. v. Metlakatla Indian Community*, 451 F. Supp. 1127 (D. Alaska, 1978); *Comstock Oil & Gas Inc. v. Alabama and Coushatta Indian Tribes of Texas*, 261 F.3d 567 (5th Cir. 2001). In June 2013, the U.S. Supreme Court took up issues surrounding sovereign immunity on the 6th Circuit Appeals Court decision in *Michigan v. Bay Mills Indian Community*, U. S. Supreme Court No. 12-515.

[19] *Blatchford v. Native Village of Noatake*, 501 U.S. 775, 779 (1991).

[20] *Oklahoma Tax Commission v. Citizen Band of Potawatomi Indian Tribe*, 498 U.S. 505, 509-510 (1991).

[21] *Seminole Tribe of Florida v. State of Florida*, 517 U.S. 44 (1996).

[22] *Santee Sioux Tribe of Nebraska v. State of Nebraska*, 121 F.3d 427, 430 (8th Cir. 1997) citing *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 241 (1985).

[23] *Blatchford, supra* note 19, 501 U.S. at 782.

Public Law 280

In 1953, Congress enacted a law, commonly referred to as Public Law 280, which created criminal and adjudicatory civil jurisdiction in certain states over acts committed in Indian country. Although the scope of Public Law 280 has since been narrowed by congressional amendment and case law, its enactment remains a major event in the evolution of federal policy regarding Indian tribes and their relationship with state governments, particularly in Minnesota.

The federal law, as originally enacted, granted to the states of Wisconsin, Oregon, California, Minnesota, and Nebraska criminal and civil jurisdiction over individual Indians in most Indian lands[1] located within state boundaries.

Under a 1958 amendment, Alaska was granted similar criminal and civil jurisdiction. In addition, Public Law 280 originally contained a mechanism under which certain other states could choose to assert full or partial civil or criminal jurisdiction over Indian lands without the consent of the affected Indians or their tribes. This mechanism was changed in 1968 when Congress amended the law prospectively to prohibit additional states from asserting jurisdiction over Indians without their consent. The 1968 amendments also permitted states to "retrocede" or grant back jurisdiction acquired under Public Law 280 to an Indian tribe; however, retrocession had to be initiated by the state and approved by the federal government.[2] Public Law 280 has been considered controversial both by the affected states and tribes. Tribes felt that tribal sovereignty required their approval of the grant of jurisdiction to states and states felt that the requirement that they assume jurisdiction was unfair given the federal government provided no funding to the states.

Public Law 280 provided that certain aspects of civil jurisdiction are not provided to states and subsequent case law has further specified which areas are excluded from the state's jurisdiction.

Public Law 280 grants civil jurisdiction over individual Indians, not tribes, and allows civil causes of action between Indians that arise in Indian country to be tried in state courts.[3] Additionally, Public Law 280's grant of civil jurisdiction applies only to state laws of "general application." This means that a law of local or limited application, such as a zoning ordinance, may not be applied to Indian country under Public Law 280. Not all property rights are covered by Public Law 280's grant of criminal or civil jurisdiction. For example, the law does not affect trust or restricted real or personal property, including water rights. Moreover, Public Law 280 does not affect the supremacy of the federal-tribe relationship with regard to treaties, agreements, or federal statutes. Some of the important rights preserved by the law are preexisting tribal rights with respect to hunting, trapping, and fishing.

The scope of jurisdiction granted by Public Law 280 has been limited by several Supreme Court decisions. First, in *Bryan v. Itasca County*,[4] the Court ruled that states could not tax an Indian's property located on federal trust lands, saying that if Congress had intended Public Law 280 to give the states general civil regulatory power, including the power of taxation, over reservation Indians, it would have expressly said so.

In *California v. Cabazon Band of Mission Indians*,[5] the Court ruled that California could not enforce its gambling laws in Indian country because these laws were regulatory in nature, not criminal. If the state generally prohibits a type of conduct, it falls within Public Law 280's grant of criminal jurisdiction; however, if the state generally permits the conduct at issue, subject to regulation, it is a civil/regulatory law and Public Law 280 does not authorize its enforcement on an Indian reservation. The application of these two cases has produced some divergent results as different jurisdictions have interpreted civil regulatory and criminal prohibitions differently.

Public Law 280 did not end concurrent tribal jurisdiction over civil and criminal cases.

Public Law 280 did not end the tribe's inherent civil and criminal jurisdiction. The tribe can have civil jurisdiction over tort and contract cases, civil regulatory jurisdiction, and criminal jurisdiction even when the state also has jurisdiction. The Indian Civil Rights Act[6] does not prevent a criminal from being prosecuted twice when a person is tried by two separate sovereigns, and this has been upheld by the U.S. Supreme Court.[7] Public Law 280 ultimately ended federal criminal jurisdiction in those states, however the 2010 Tribal Law and Order Act[8] allows the tribe to request federal jurisdiction be reinstated in order to improve law enforcement and decrease crime in Indian country. In certain situations, this would allow the federal government, the state, and the tribe to all have concurrent criminal jurisdiction. Federal jurisdiction was authorized for White Earth in 2013 under the Tribal Law and Order Act (page 29 of this guidebook discusses criminal jurisdiction in Indian county).

ENDNOTES

[1] The Red Lake Reservation was excluded from this grant of jurisdiction in Minnesota.

[2] In 1973, the state of Minnesota retroceded its criminal jurisdiction over the Bois Forte Reservation.

[3] 28 U.S.C. § 1360(a) (1953).

[4] 426 U.S. 373 (1976).

[5] 480 U.S. 202 (1987).

[6] 25 U.S.C. § 1302(a)(3).

[7] *United States v. Wheeler*, 435 U.S. 313 (1978).

[8] Public Law 111-211, The Tribal Law and Order Act, amended sections of the Indian Civil Rights Act and Public Law 280.

Special Rules for Interpreting Indian Law

The Supreme Court, in a series of decisions dating from the early 19th century, has held that the federal government has a special trust responsibility with the Indian tribes.[1] These trust principles have developed in several ways. One important result is that the Court has developed a special set of rules or **"canons of construction"** for construing treaties, statutes, and executive orders affecting Indian tribes and peoples. These rules of construction or interpretation are important in shaping the development of the law and, in particular, in establishing and protecting the rights of the tribes and their members.

The canons of construction initially grew out of rules for construing treaties with tribes.

They represent, in part, an acknowledgment of the unequal bargaining positions of the federal government and the tribes in negotiating these treaties. More importantly, the canons reflect the view, arising from the fundamental trust relationship, that the actions of Congress are presumed to be for the benefit and protection of the tribes and Indian peoples. Therefore, the canons assume that Congress—absent a "clear purpose" or an "explicit statement"—intended to preserve or maintain the tribal rights.[2]

The canons are expressed in various ways.

In general, they provide that treaties, statutes, executive orders, and agreements are to be construed liberally in favor of establishing or protecting Indian rights and that ambiguities are to be resolved in favor of Indians.[3] For example, unless Congress clearly indicated, or an agreement or treaty specifically stated otherwise, it is presumed that tribal hunting, fishing, and water rights are retained.[4] As another example, it is presumed that Congress did not intend to abrogate tribal tax immunities, unless it "manifested a clear purpose" to do so.[5] Another formulation is that treaties are to be construed as Indians understood them.[6]

Recent U.S. Supreme Court cases may suggest reduced importance for the canons.

Although the canons of construction have long been a key element of Indian law,[7] in some recent cases the Supreme Court has retreated from using the canons to protect the interests of Indians.[8] The Supreme Court stated in *Chicksaw Nation v. the United States*, that canons are not mandatory rules and that canons favoring tribes may be offset by canons promoting other values.[9] Cases such as these suggest some movement away from the strict adherence to the canons as a cornerstone of the Indian law protection for Indian interests.

ENDNOTES

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

[2] *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999).

[3] *See generally* Cohen, §2.02[1], at 113-114.

[4] *See, e.g., Menominee Tribe v. United States*, 391 U.S. 404 (1968).

[5] *See, e.g., Bryan v. Itasca County* 426 U.S. 373, 392-93 (1976).

[6] *Mille Lacs Band of Chippewa Indians v. Minnesota*, 526 U.S. 172, 196 (1999).

[7] *See* Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law* 119 Harv. L. Rev. 431, 445-46 (2005) (describing the role the canons play, including allowing the Court "to defang" statutes to protect Indian interests).

[8] *See, e.g., Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 527 (1998) (ignoring canons in construing Alaskan Native Settlement Act); *Hagen v. Utah*, 510 U.S. 399 (1994) (clear statement requirement apparently ignored in diminishing the boundaries of a reservation); *Montana v. United States*, 450 U.S. 544 (1981) (Indian treaty rights to a river bed granted title to the state using water law doctrine instead of Indian law canons of construction).

[9] *Chickasaw Nation v. United States*, 534 U.S. 84, 93 - 94 (2001) ("Moreover the canon that assumes Congress intends its statutes to benefit the tribes is offset by the canon that warns us against interpreting federal statutes as providing tax exemptions unless those exemptions are clearly expressed."); *see* Graydon Dean Luthey, Jr., *Chickasaw Nation v. United States: The Beginning of the End of the Indian-Law Canons in Statutory Cases and The Start of the Judicial Assault on the Trust Relationship?* 27 Am. Indian L. Rev. 553 (2003).

Minnesota Indian Affairs Council

The Indian Affairs Council is created by statute to make recommendations on legislation that is important to tribal governments and Indian organizations and improve services between the state and Indian communities.[1] It operates to advise the legislature and the executive branch on policies and services relating to Indians. It also serves as a liaison between national, state, and local units of government and the Indian population in Minnesota. The council also operates programs to enhance economic opportunities for American Indians and protect cultural resources.[2] The Indian Affairs Council is made up of the 11 tribal chairs or their designees, a member of the governor's official staff, the Commissioners of Education, Human Services, Natural Resources, Human Rights, Employment and Economic Development, Corrections, Minnesota Housing Finance Agency, Iron Range Resource and Rehabilitation Board, Health, Transportation, Veterans Affairs, and Administration, or their designees. There is an ombudsperson for American Indian families working with the Indian Affairs Council on issues related to American Indians in the child protection system (see page 84 for more details).

ENDNOTE

[1] Minn. Stat. § 3.922.

[2] For more information on what the Indian Affairs Council does see the website, http://mn.gov/indianaffairs/aboutus.html.

Part Two: Background Papers

Criminal Jurisdiction in Indian Country

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Criminal jurisdiction in Indian country is a complex issue. Federal, state, and tribal government all have a role—sometimes exercising exclusive authority and sometimes having concurrent authority. Determining the entity that has jurisdiction depends on a number of factors including where the incident took place, what type of law was violated, and whether either the perpetrator or the victim was a member of an Indian tribe.

Constitutional basis for determining jurisdiction. The fundamental legal basis for determining which level of government has jurisdiction over crimes committed in Indian country is located in article I, section 8, of the U.S. Constitution. According to this constitutional provision, Congress has the power to regulate commerce with foreign nations, among the states, and with Indian tribes. Based on this language, the Supreme Court declared that Indian tribes are domestic dependent nations subject to the plenary power of Congress and that Congress, therefore, has the power to determine, through law and treaty, who has criminal jurisdiction over crimes committed in Indian country.[1]

Pursuant to its plenary constitutional power, Congress has enacted a number of statutes defining and redefining criminal jurisdiction in Indian country. Some of these laws were prompted by historical changes in the relationship between the federal government and the Indian tribes; others were enacted in response to Supreme Court rulings on jurisdictional issues.

Federal Criminal Jurisdiction

Assimilative Crimes Act provisions. The federal government has jurisdiction over federal crimes of nationwide application no matter where the incident occurred. Federal authority to investigate federal crimes relating to drug trafficking or terrorism, for example, is the same in Indian country as it is everywhere else in the state.

The Federal Enclaves Act. Also known as the General Crimes Act or the Indian Country Crimes Act, applies specific federal criminal laws to lands owned by the federal government. These areas are known as "federal enclaves" and include places like military installations and national parks. In 1816, Congress enacted a jurisdictional law[2] providing that, with certain exceptions, federal criminal laws apply in Indian country to the same extent that they apply in other federal enclaves.

In 1825, Congress enacted a second jurisdictional statute known as the Assimilative Crimes Act. This act provides that state criminal laws not otherwise included in the federal criminal code are incorporated into federal law by reference and apply in federal enclaves.[3] Many years later, the Supreme Court ruled that this law applies in Indian country.[4] Thus, the criminal laws applicable to Indian country and subject to federal jurisdiction include both federal enclave crimes as well as state crimes not otherwise included in the federal criminal code.

However, the scope of these jurisdictional statutes is sharply limited by two statutory exceptions

and one judicially created exception. First, the statutes exempt offenses committed by one Indian against the person or property of another Indian.[5] Second, the statutes exempt offenses over which criminal jurisdiction has been conferred on a particular tribe by treaty. Third, according to Supreme Court cases, the statutes do not apply to crimes committed in Indian country by a non-Indian against another non-Indian. Instead, state court is the proper forum for prosecuting such a crime.[6]

In short, federal jurisdiction under the Enclave and Assimilative Crimes Acts extends only to crimes in which an Indian is involved either as a defendant or as a victim.

Major Crimes Act. Federal criminal jurisdiction over intra-Indian crimes began in 1885 by the passage of the Major Crimes Act.[7] According to this federal law, the federal government has jurisdiction to prosecute certain enumerated crimes[8] when committed on Indian land by an Indian. Unlike the Enclave and Assimilative Crime Acts, federal jurisdiction under the Major Crimes Act does not depend on the race of the victim; rather, it covers major crimes committed in Indian country by an Indian against the person or property of another Indian or other person. Today, the Major Crimes Act is the primary federal jurisdictional statute for major offenses committed by Indians on Indian lands.[9]

Federal jurisdiction in Minnesota. Minnesota is one of six states subject to Public Law 280 that transferred criminal jurisdiction to the state for many purposes. There are two primary exceptions to this rule in Minnesota, when crimes are committed by or against Indians on the Red Lake or Bois Forte (Nett Lake) Reservations. Jurisdiction over crimes committed on these two reservations generally resides with the federal government, although the tribal government has concurrent jurisdiction. The other main exception to this rule relates to offenses committed by Indians in Indian country that, while technically crimes, have a civil or regulatory nature or purpose (a more detailed explanation of this exception is given below).

"Indian country" is the term used in federal law for the jurisdictional territory of tribal governments. *See* 18 U.S.C. §1151. Federal law defines it as Indian reservations, dependent Indian communities, and Indian allotments. Status as Indian country does not depend upon the trust status or ownership of land. See the discussion under "Indian Lands" in Part One.

The following charts illustrate the level of government that has criminal jurisdiction over various types of offenses committed in Indian country in Minnesota. Where two jurisdictions have concurrent jurisdiction, the Supreme Court has ruled that when tried by separate sovereigns, double jeopardy does not apply.[10]

Criminal Jurisdiction on MN Reservations other than Red Lake, Bois Forte, White Earth

Victim	Indian Offender	Non-Indian Offender
Indian	State and Tribe[11]	State*
Non-Indian	State and Tribe[12]	State*
Other: License Offenses; Status Offenses; Government Victim	State or Tribe	State

*The Violence Against Women Act (VAWA) exceptions, which allow tribes to prosecute domestic violence crimes, are explained in the tribal jurisdiction section below.

Criminal Jurisdiction on Red Lake and Bois Forte Reservation

Victim	Indian Offender	Non-Indian Offender
Indian	Federal (major crimes only) or Tribe (major and minor crimes)	Federal
Non-Indian	Federal (major crimes only) or Tribe (major and minor crimes)	State
Other: License Offenses; Status Offenses; Government Victim	Tribe	State

Criminal Jurisdiction on White Earth Reservation

Victim	Indian Offender	Non-Indian Offender
Indian	State and Federal and Tribe	State and Federal
Non-Indian	State and Federal and Tribe	State and Federal
Other: License Offenses; Status Offenses; Government Victim	State or Tribe	State

State Criminal Jurisdiction

Non-Indian offenses. As mentioned earlier, the Supreme Court ruled in a series of cases beginning in the late 19th century that all states have criminal jurisdiction over crimes committed on Indian lands where both the perpetrator and the victim are non-Indians.[13] The Court's reasoning was twofold. First, it reasoned that states have inherent power over Indian lands within their borders as a consequence of their admission into the union without an express disclaimer of jurisdiction. Second, it reasoned that the nonward status of both the perpetrator and the victim divests the federal government of any jurisdiction over the matter.

Public Law 280. While federal criminal jurisdiction is applicable on the Red Lake and Bois Forte Reservations and applies to many Indian reservations throughout the nation, it is the exception within the state of Minnesota. Due to changes in Indian policy enacted by Congress during the 1950s, Minnesota, along with five other states, was required to assume complete criminal jurisdiction and limited civil jurisdiction over most Indian reservations located within its boundaries.[14] Under Public Law 280, Minnesota's criminal jurisdiction extends to all Indian reservations within the state except the Red Lake Reservation.

Public Law 280 also permitted states to "retrocede" or give up all or part of the criminal jurisdiction over Indian lands that they assumed under the law.[15] In 1973, at the request of the Nett Lake (Bois Forte) band of Ojibwe, the Minnesota Legislature retroceded its criminal jurisdiction over the Bois Forte Reservation, thereby returning the reservation to federal criminal jurisdiction.[16]

Tribal Law and Order Act. A federal law enacted in 2010 permits a tribe subject to Public Law 280 to request the U.S. Department of Justice to reassume federal criminal jurisdiction over the tribe's lands. The White Earth reservation is the only reservation in Minnesota where the Department of Justice has agreed to reassume jurisdiction. Federal jurisdiction over White Earth is concurrent to the state and tribal jurisdiction. The state's and tribe's jurisdiction are not altered by the presence of federal jurisdiction on White Earth.[17]

In sum, federal jurisdiction does not apply to Indian reservations in Minnesota except for crimes committed on the White Earth, Red Lake, or Bois Forte Reservations, unless the crime is one of general applicability as indicated on page 29. The state has jurisdiction over the majority of crimes in Indian country in Minnesota.

As discussed below, the authority granted to the state of Minnesota under Public Law 280 is not comprehensive. Under that law, Minnesota does not have the authority to prosecute offenses that are "civil/regulatory" in nature or purpose.[18]

Public Law 280: The Criminal/Prohibitory and Civil/Regulatory Distinction

The breadth of criminal jurisdiction conferred on states by Public Law 280 is limited by the Supreme Court's ruling in *California v. Cabazon Band of Mission Indians*.[19] This case limited the authority of California to enforce certain gambling laws in Indian country. The Supreme Court ruled that the state could not do so because these gambling laws were regulatory in nature, not criminal. In its decision, the Court outlined the following test for determining whether a law was criminal/prohibitory or civil/regulatory:

> [I]f the intent of a state law is generally to prohibit certain conduct, it falls within Pub. L. 280's grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and Pub. L. 280 does not authorize its enforcement on an Indian reservation. The shorthand test is whether the conduct at issue violates the State's public policy.[20]

Thus, Public Law 280's grant of criminal jurisdiction over Indian land to states like Minnesota is limited to conduct that violates the general criminal laws of the state and does not include laws

that merely regulate conduct, even if violations of such regulatory laws are subject to criminal penalties.[21]

In December 1997, the Minnesota Supreme Court articulated a two-step test for applying the *Cabazon* test to determine whether a particular Minnesota law is civil/regulatory or criminal/prohibitory.[22]

Step one. The first step of this state test relates to the question of whether the scope of the conduct at issue is to be defined broadly (i.e., driving) or narrowly (i.e., drinking and driving). The answer to this question is important because it often will determine whether the conduct generally is prohibited by state law or is merely regulated by it. The Minnesota Supreme Court stated that the reviewing court must focus on the broad conduct unless the narrow conduct presents substantially different or heightened public policy concerns. If the latter is the case, then the court must focus on the narrow conduct.

Step two. The second step of the state test applies the *Cabazon* test to the conduct at issue, as it is defined under step one. This step requires the reviewing court to decide whether state law generally permits the conduct or not; that is, whether the conduct violates the state's public criminal policy. If the answer to this question is clearly yes, the law is civil/regulatory. If the answer is clearly no, the law is criminal/prohibitory. If the answer is unclear, the court must look to the following factors in deciding the issue:

- The extent to which the activity directly threatens physical harm to persons or property, or invades the rights of others
- The extent to which the law allows for exceptions and exemptions
- The blameworthiness of the actor
- The nature and severity of the potential penalties for a violation of the law

Using this test, the Minnesota Supreme Court ruled that the state law prohibiting the consumption of alcohol by individuals under the age of 21 is criminal/prohibitory and, therefore, the state has jurisdiction to enforce it on Indian land.[23] The Minnesota Supreme Court also indicated, in *dicta*, that the laws prohibiting drunk driving and careless or reckless driving are likewise criminal/prohibitory.[24]

In contrast, the Minnesota Supreme Court also used its two-part test to rule that the state lacks jurisdiction to enforce many traffic-related violations against Indians on Indian land.

The following table highlights criminal and civil offenses as deemed by Minnesota courts.

Criminal/Prohibitory	Civil/Regulatory
▸ Marijuana possession (more than a small amount)[25] ▸ Obstruction of legal process[26] ▸ Driving after cancellation as inimical to public safety (cancelled due to multiple DWI offenses)[27] ▸ Driving after revocation (revoked because of DWI)[28] ▸ Fifth-degree assault[29] ▸ Disorderly conduct[30] ▸ Underage drinking[31]	▸ Driving after suspension (suspended for failure to pay child support)[32] ▸ No proof of insurance/No insurance[33] ▸ Driving after revocation (revoked for failure to provide proof of insurance)[34] ▸ Expired registration[35] ▸ No driver's license/Expired driver's license[36] ▸ Speeding (petty misdemeanor) [37] ▸ Failure to wear seatbelt[38] ▸ No child restraint seat[39] ▸ Failure to yield to an emergency vehicle[40] ▸ Predatory offender registration[41]

Civil commitment of Indian sex offenders. The Minnesota Supreme Court has ruled that Indians can be civilly committed as sexually dangerous persons under state statute.[42] The court's ruling in *In re Johnson* would appear to violate Public Law 280 because Minnesota courts have consistently ruled that civil commitment is a civil, and not a criminal, matter.[43] However, the court relied on a provision in Public Law 280 that grants states "jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country…." Under this provision, "civil laws that are of general application to private persons…shall have the same force and effect within such Indian country as they have elsewhere within the State." Relying on this language, the court concluded that the state's sex offender civil commitment law creates "civil causes of action" that are subject to Public Law 280's express grant of civil jurisdiction to the state.

Tribal Jurisdiction

Tribes retain concurrent criminal jurisdiction. Any crime not covered under the Major Crimes Act or through Public Law 280, is a crime the tribe still retains jurisdiction over. There are a number of exceptions to this depending on whether or not the perpetrator and the victim are members of the tribe or nonmember Indians. If an Indian band has a criminal code of its own and its provisions do not overlap the state or federal criminal code, the band may enforce that code against tribal members on lands over which the band has jurisdiction. The perpetrator need not be a member of the tribe that is asserting jurisdiction; as long as both the parties are Indians, the tribe may assert jurisdiction over crimes committed on the tribe's lands.[44] Second, the Indian Civil Rights Act[45] limits the punishment these tribes may impose to a maximum of one-year imprisonment and/or a maximum $5,000 fine. As a practical matter, this often means that the tribes often only prosecute minor crimes (misdemeanors and gross misdemeanors) committed on their lands.

Tribal jurisdiction over nonmember Indians. It was a long-held belief that an Indian tribe retained sovereign powers unless specifically removed by federal statute or relinquished by treaty. However, in 1978 in the *Oliphant* case the Supreme Court further limited tribal powers and ruled that, absent congressional authority, tribes may not exercise criminal jurisdiction over crimes committed against Indians on Indian land by non-Indians.[46] The effect of this ruling is

that jurisdiction over such crimes resides with the federal government or, if Public Law 280 applies, with the state government. Tribes do have jurisdiction over nonmember Indians through an update to the Indian Civil Rights Act.[47]

The Violence Against Women Act and tribal jurisdiction over crimes of domestic violence. As part of the Violence Against Women Reauthorization Act of 2013, Congress gave Indian tribes the option of exercising criminal jurisdiction over Indian or non-Indian perpetrators for acts of domestic violence, dating violence, and protection order violations that occur on the tribe's land. This special jurisdiction is concurrent with federal and state jurisdiction.

The tribe may not exercise special domestic violence criminal jurisdiction over an offense that occurs outside the tribe's land or if neither the perpetrator nor victim is an Indian. Furthermore, the participating tribe's jurisdiction over non-Indian perpetrators is limited to those with sufficient ties to the tribe—defined as a defendant residing or working on the tribe's land or in a relationship with a tribe member or Indian residing on the tribe's land.[48]

A tribe cannot begin prosecuting under this authority until March 7, 2015, unless it requests and is granted an earlier start date by the U.S. Attorney General. The attorney general may grant the request only if the attorney general concludes that the tribe's criminal justice system fully protects a defendant's rights under federal law.[49]

Law enforcement authority. The tribal law enforcement agencies on the Red Lake and Bois Forte Reservations are funded and administered by the federal Bureau of Indian Affairs. Tribal police officers are professional officers trained at the Indian Police Academy in Utah.[50]

The Minnesota Legislature has granted law enforcement authority to all tribes in Minnesota to allow tribal police officers to operate in the community in coordination with local state law enforcement. The 1991 Minnesota Legislature granted certain law enforcement powers to the Mille Lacs Band of Ojibwe Indians. Although the state did not retrocede its criminal jurisdiction over land located within the Mille Lacs Reservation or trust lands, it did grant to the band concurrent law enforcement jurisdiction, with the Mille Lacs County sheriff's department, over the following:

- All persons in the geographical boundaries of the band's or tribe's trust lands
- All tribal members within the boundaries of the reservation
- All persons within the boundaries of the reservation who commit or attempt to commit a crime in the presence of a band peace officer

The sheriff of the county in which the violation occurred is responsible for receiving persons arrested by the band's peace officers, and the Mille Lacs County attorney is responsible for prosecuting such violators.[51]

The Minnesota Legislature granted similar law enforcement authority to the Lower Sioux Indian Community (in Redwood County) in 1997 and the Fond Du Lac Band of Lake Superior Chippewa in 1998.[52] The state extended law enforcement authority to all other qualifying tribal peace officers in 1999.[53]

ENDNOTES

[1] See *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *Johnson v. McIntosh*, 21 U.S. 543 (1823). *See also* the discussion in Part One, pages 23 to 24.

[2] 18 U.S.C. § 1152.

[3] 18 U.S.C. § 13.

[4] *Williams v. United States*, 327 U.S. 711 (1946).

[5] This policy was changed with respect to certain major crimes with enactment of the Major Crimes Act in 1885.

[6] *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).

[7] 18 U.S.C. § 1153. This law was passed in response to a Supreme Court ruling that the federal courts lack jurisdiction to prosecute an Indian who had already been punished by his tribe for killing another Indian. *Ex Parte Crow Dog*, 109 U.S. 556 (1883). The punishment meted out by the tribe—restitution to the victim's family—was viewed by many non-Indians as an insufficient punishment for the crime of murder and Congress responded by granting the federal courts jurisdiction over violent crimes committed on Indian reservations.

[8] 18 U.S.C. § 1153 - Offenses committed within Indian country: "(a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, a felony assault under section 113, an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States."

[9] Insofar as the Major Crimes Act covers offenses committed by an Indian against the person or property of a non-Indian, it overlaps the jurisdiction conferred on the federal courts by the Enclave and Assimilative Crimes Acts. This overlap has created some legal confusion and uncertainty, particularly with respect to the applicability of the Assimilative Crimes Act to Major Crimes Act prosecutions. For a discussion of this issue, see Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 Ariz. L. Rev. 503, 520-52 (1976).

[10] *United States v. Wheeler*, 435 U.S. 313 (1978).

[11] In 2000 the U.S. Department of Justice issued a memorandum to clarify whether or not tribes retain concurrent criminal jurisdiction in Public Law 280 states. See "Concurrent Tribal Authority Under Public Law 83-280" Office of Tribal Justice, United States Department of Justice, November 9, 2000. Based on previous court decisions and current practices by tribes, the DOJ determined that tribes do retain criminal jurisdiction in Public Law 280 states. It does appear that the restrictions of the Major Crimes Act to the criminal jurisdiction of tribes also apply to tribes in Public Law 280 states.

[12] See footnote 11.

[13] *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).

[14] 18 U.S.C. § 1162. The other states that were required to assume criminal jurisdiction over Indian reservations within their boundaries are Alaska, California, Nebraska, Oregon, and Wisconsin. Public Law 280 also authorized other states to assume criminal jurisdiction over Indian lands at their discretion. While the original law did not require the consent of Indian tribes to such state assumptions of jurisdiction, the law was amended in 1968 to require tribal consent to any future state decisions to assume jurisdiction. *See also* the discussion in Part One, pages 23 to 24.

[15] For a discussion of Public Law 280, retrocession, and the law's applicability to cooperative police agreements between local and tribal authorities under Minnesota Statutes, section 626.93, see *State v. Many Penny*, 682 N.W.2d 143 (Minn. 2004).

[16] Laws 1973, ch. 625.

[17] Pub. L. No. 111-211 (Tribal Law and Order Act of 2010 - 25 U.S.C. § 2801, et seq.).

[18] *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

[19] 480 U.S. 202 (1987).

[20] 480 U.S. at 209 (1987). This case ultimately led to Congress's enactment in 1988 of the Indian Gaming Regulatory Act, which provides a federal regulatory scheme to govern various forms of gambling on Indian reservations. 25 U.S.C. §§ 2701-2721.

[21] 480 U.S. at 211 (1987).

[22] *State v. Stone*, 572 N.W.2d 725 (Minn. 1997); *see also State v. Robinson*, 572 N.W.2d 720 (Minn. 1997).

[23] *State v. Robinson*, 572 N.W.2d 720 (Minn. 1997).

[24] *State v. Stone*, 572 N.W.2d 725 (Minn. 1997).

[25] *State v. LaRose*, 673 N.W.2d 157 at 164 (Minn. App. 2003).

[26] Id.

[27] *State v. Busse*, 644 N.W.2d 79 (Minn. 2002).

[28] *State vs. Losh*, 755 N.W.2d 736 (Minn. 2008).

[29] *State v. Judkins* C8-98-1038, C2-98-1069 (Minn. App. May 4, 1999), *unpublished opinion.*

[30] *State v. Reese*, No. CX-97-984 (Minn. App. March 3, 1998), 1998 WL 113982, *unpublished opinion.*

[31] *State v. Robinson*, 572 N.W.2d 720, 724 (Minn. 1997).

[32] *State v. Aune*, No. C2-99-143 (Minn. App. August 31, 1999), 1999 WL 672678, *unpublished opinion.*

[33] *State v. Stone*, 572 N.W.2d 725 (Minn. 1997); but *see State v. Davis*, 773 N.W.2d 66 (Minn. 2009) (exception to general rule that state traffic laws are not enforceable on reservations against Indians).

[34] *State v. Johnson*, 598 N.W.2d 680 (Minn. 1999).

[35] *State v. Stone*, 572 N.W.2d 725 (Minn. 1997); but *see State v. Davis*, 773 N.W.2d 66 (Minn. 2009) (exception to general rule that state traffic laws are not enforceable on reservations against Indians).

[36] Id.

[37] Id.

[38] Id.

[39] Id.

[40] *State v. Robinson*, 572 N.W.2d 720 (Minn. 1997).

[41] *State v. Jones*, 700 N.W.2d 556 (Minn. App. 2005).

[42] *In re Johnson*, 800 N.W.2d 134 (Minn. 2011).

[43] *See In re Linehan IV*, 594 N.W.2d 867, 870-72 (Minn. 1999).

[44] Congress has affirmed tribal authority over crimes committed against Indians by nonmember Indians. Congress did so in response to the Supreme Court's ruling in *Duro v. Reina*, 495 U.S. 676 (1990), that tribes lack the power to prosecute such cases. Pursuant to its plenary power over the Indian tribes under the Constitution, Congress amended the Indian Civil Rights Act to affirm the inherent right of tribes to assert criminal jurisdiction over this and other types of intra-Indian offenses. 25 U.S.C. § 1301.

[45] 25 U.S.C. § 1302.

[46] *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). After passage of 25 U.S.C. 1301, which recognized the "inherent powers" of Indian tribes to exercise jurisdiction over members of other tribes, *Oliphant* was called into question by *United States v. Lara*, 541 U.S. 193 (2004). The court did not find *Oliphant* controlling in

that case, which dealt with the issue of whether trying an Indian defendant in federal court for assaulting a police officer, after he had already been tried in a tribal court for the same offense, constituted double jeopardy. The Court held that it did not, because, after 25 U.S.C. 1301, the authority of the tribe and the federal government to prosecute the offense came from two "separate sovereigns."

This holding was found to be consistent with *Oliphant*, although *Oliphant* had held that the tribe's authority to prosecute nonmembers was part of the tribal sovereignty that was divested by treaties and by Congress; *Lara* held that, after 25 U.S.C. 1301, this authority was inherent in the tribe. The Court found the two cases consistent because 25 U.S.C. 1301 had modified the tribe's status, which Congress was constitutionally permitted to do.

[47] See Indian Civil Rights Act, 25 U.S.C. 1301, Public Law 102-137, this was Congress' response to a Supreme Court decision, *Duro v. Reina*, 495 U.S. 676 (1990), which ruled that tribal courts did not have jurisdiction over nonmember Indians who committed crimes on the reservation.

[48] 25 U.S.C. § 1304 (2013).

[49] Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 908, 127 Stat. 54, 125-26.

[50] Ebbott, Elizabeth. *Indians in Minnesota.* 4th ed., ed. Judith Rosenblatt. Minneapolis: University of Minnesota Press, 1985.

[51] Minn. Stat. § 626.90.

[52] Minn. Stat. §§ 626.92; 626.91.

[53] Minn. Stat. § 626.93.

Civil Jurisdiction in Indian Country: State Courts and State Laws; Tribal Courts and Tribal Codes

by Mary Mullen (651-296-9253)

Tribal courts and state courts in Minnesota have concurrent jurisdiction over civil matters.[1] Federal Public Law 280 granted specific states, including Minnesota, civil jurisdiction over individuals on Indian lands, with certain exceptions. By the express terms of Public Law 280, Minnesota state civil jurisdiction does not apply to the Red Lake Reservation.[2] In 1968, the act was amended to allow states with civil jurisdiction over Indian country to retrocede (give back) that jurisdiction to the federal government. Minnesota retroceded jurisdiction over the Bois Forte Reservation.[3]

It is important to note that Public Law 280 specifically addresses state court jurisdiction over actions involving Indians, not Indian tribes. Case law discussed on page 17 of this publication reviews the sovereign immunity of tribes and tribal organizations from state and federal court actions.

The grant of jurisdiction has certain exceptions. Public Law 280 provides that state civil laws of general application apply to causes of action between Indians, or to which Indians are parties, and which arise in Indian country; except as those laws affect trust or restricted real or personal property including probate matters and water rights. There has been litigation under Public Law 280 to clarify what constitutes a civil law of general application for purposes of allowing the state to have jurisdiction over actions involving individuals in Indian country. Courts have held that state civil regulatory laws are not included in the grant of state jurisdiction over Indian lands. For example, a state traffic regulation that is civil rather than criminal in nature has been held not applicable to Indian country.[4] *Bryan v. Itasca County*[5]determined that the Public Law 280 gave states concurrent jurisdiction where there had previously been none but did not provide for state taxation and state civil regulation over the tribes.

Because Public Law 280 requires a state law to be of statewide application in order to apply in Indian country, no local ordinance applies in Indian country.[6]

Congress authorized the creation of tribal courts when it passed the Indian Reorganization Act of 1934,[7] which recognized the right of Indian tribes to adopt their own code of laws. When Public Law 280 was enacted in 1953, it had the effect of slowing tribal court development. This occurred when the BIA concluded it no longer needed to fund tribal courts in Minnesota and the other Public Law 280 states. Tribal court development accelerated after Congress passed the Indian Child Welfare Act in 1978 because the act gave tribal courts jurisdiction over disputes involving Indian children both within and outside Indian country.

"Indian country" is the term used in federal law for the jurisdictional territory of tribal governments. *See* 18 U.S.C. §1151. Federal law defines it as Indian reservations, dependent Indian communities, and Indian allotments. Status as Indian country does not depend upon the trust status or ownership of land. See the discussion under "Indian Lands" in Part One.

However, the Minnesota Chippewa Tribe was not able to develop its own courts until 1994. Before that time, the Department of the Interior took the position that the tribal constitution did not allow the bands to create their own courts. The current 12 tribal courts in Minnesota are listed in Appendix IV.

Tribal courts blend traditional tribal dispute resolution approaches with many due process elements taken from the federal Constitution. Although the Supreme Court has held that the Bill of Rights and the 14th Amendment do not apply to tribal powers of local self-government,[8] the federal Indian Civil Rights Act of 1968[9] requires tribes to include various due process provisions. In addition, as tribal operations have greater impact on non-Indians, tribal courts have adopted more elements of American due process in part so that their decisions will be recognized by state and federal court systems.

There is extensive case law on whether tribal court or state court has jurisdiction over particular cases. The Supreme Court has explained that tribal courts are not courts of general jurisdiction because tribal court authority does not exceed a tribe's legislative authority.[10] A tribe's inherent power does not exceed what is needed to protect self-government or to control internal relations. Thus, "Indian tribes retain their inherent power [to punish tribal offenders,] to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members…"[11] Tribal courts also have "considerable control over nonmember conduct on tribal land."[12] However, tribal land ownership alone is not enough to support jurisdiction over nonmembers when a considerable off-reservation state interest is balanced against a minimal interference with tribal self-government.[13]

Unless a treaty, federal statute, or administrative decision provides otherwise, Indian tribes and tribal courts have only limited authority over activities of nontribe members on non-Indian fee lands within Indian country.[14] The Supreme Court has recognized exceptions that give a tribal court sole jurisdiction in such a dispute if it involves (1) non-Indians in "consensual relationships with [a] tribe or its members through commercial dealing, contracts, leases, or other arrangements,"[15] or (2) "conduct that threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[16]

State court must be available to an Indian who invokes its jurisdiction against a non-Indian, even if the dispute arises in Indian country.[17] State courts may take jurisdiction of civil actions arising in Indian country and involving only tribal members if there is no tribal court,[18] if the tribal court lacks jurisdiction of the subject under its tribal law,[19] or if an Indian party is found to have voluntarily submitted to state court jurisdiction by filing a petition there.[20] If the state court has concurrent jurisdiction with a tribal court over a dispute, the state court may decide to hear the case if a combination of factors are present[21] or may decline jurisdiction for public policy reasons.[22]

Many states are addressing the issue of full faith and credit for tribal court and state court decisions. The full faith and credit clause of the federal Constitution requires each state to recognize the acts, records, and judicial proceedings of other states.[23] The clause is necessary to allow a federal system to function, so that litigation does not go on endlessly. It does not apply to tribal courts either by its express terms or by case law or federal legislation. However, the concept has become an issue among state court systems as tribal courts have been established

around the country. Since tribal courts have increased in sophistication and are handling larger numbers of cases, many state court systems want to formalize their relationships. States have varied in whether the legislative or judicial branch has taken the lead in addressing the matter.

In states where the issue of giving effect to tribal court decisions has been addressed by statute, full faith and credit may be granted to all tribal court judgments,[24] only judgments in certain kinds of cases,[25] or only judgments where specified conditions are met.[26]

Some state courts have ruled that giving full faith and credit to tribal court decisions is within the court's inherent judicial authority under the doctrine of comity.[27] Comity is a judicial concept that grows out of the respect one court has for another court's authority and jurisdiction. It also seeks to promote efficiency by preventing multiple proceedings on the same matter.

Finally, the most common way states have dealt with full faith and credit for tribal court decisions is by court rule. For example, North Dakota adopted a rule drafted by the State Court Committee on Tribal and State Court Affairs. The Minnesota Supreme Court adopted two rules on state court recognition of tribal court orders. Recognition is mandatory if required by federal or state statute, for example the federal Violence Against Women Act requires recognition of an order for protection that is issued by a tribal court.[28] Recognition is granted in Minnesota if, among other factors, a tribal court is a court of record, has an appellate process, has contempt powers, and grants full faith and credit to state court judgments.[29]

ENDNOTES

[1] *Native Village of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548, 559-62 (9th Cir. 1991).

[2] 28 U.S.C. § 1360.

[3] 40 Fed. Reg. 4026 (1975).

[4] *Confederated Tribes of Colville Reservation v. State of Washington*, 938 F. 2d 146 (9th Cir. 1991), *cert. denied* 503 U.S. 997, 112 S. Ct. 1704 (1992). *See also* the discussion of *State v. Robinson*, 572 N.W.2d 720 (Minn. 1997), in the section on Criminal Jurisdiction in Indian Country, pages 28 to 37.

[5] 426 U.S. 373 (1976).

[6] *Segundo v. City of Rancho Mirage*, 813 F.2d 1387 (9th Cir. 1987) (after remand on another issue), 873 F.2d 1277 (9th Cir. 1989).

[7] 25 U.S.C. §§ 461-79.

[8] *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56, 98 S.Ct. 1670, 1676 (1978) (citation and footnote omitted).

[9] 25 U.S.C. §§ 1301-1303.

[10] *Nevada v. Hicks*, 533 U.S. 353, 367-68, 121 S. Ct. 2304, 2314 (2001).

[11] *Strate v. A-1 Contractors*, 520 U.S. 438, 459, 117 S. Ct. 1404, 1416 (1997).

[12] Ibid., 520 U.S. at 454, 117 S. Ct. at 1413.

[13] *Nevada v. Hicks*, 533 U.S. 353, 362-65, 121 S. Ct. 2304, 2311-13 (2001).

[14] *Strate*, supra note 11.

[15] *Montana v. United States*, 450 U.S. 544, 565 101 S. Ct. 1245, 1258 (1981). *See, Cohen v. Little Six, Inc.*, 543 N.W.wd 376 (Minn. App. 1996), affirmed without opinion 561 N.W.2d 889 (Minn. 1997), *cert. denied* 524 U.S. 903, 118 S.Ct. 2059 (1998).

[16] Ibid., 450 U.S. at 566.

[17] *Three Affiliated Tribes v. Wold Engineering*, 467 U. S. 138 (1984) *(Wold I)*, 476 U.S. 877 *(Wold II). But see Neadeau v. American Family Mutual Insurance Company*, 1993 WL 302127 (Minn. App. unpublished opinion) *pet. for rev. denied* (Minn. September 21, 1993) (affirmed state court decision that it lacked jurisdiction over action by tribe member against corporation).

[18] *Becker County Welfare Department v. Bellcourt*, 453 N.W.2d 543 (Minn. App. 1990) *pet. for review denied*, May 23, 1990.

[19] *Desjarlait v. Desjarlait*, 379 N.W.2d 139 (Minn. App. 1985), *pet. for rev. denied* (Minn. Jan. 31, 1986).

[20] Ibid.

[21] *Granite Valley Hotel Limited Partnership v. Jackpot Junction Bingo and Casino*, 559 N.W.2d 135 (Minn. App. 1997) (contract between tribe and nontribal business was performed off reservation, tribe explicitly waived sovereign immunity and consented to state court jurisdiction, and court did not need to interpret tribal documents to resolve the issues). *Cf Klammer v. Lower Sioux Convenience Store*, 535 N.W.2d 379 (Minn. App. 1995) (dispute arose on Indian reservation and tribe did not explicitly waive sovereign immunity or consent to state court jurisdiction).

[22] *In re Custody of K.K.S.*, 508 N.W.2d 813, 816-817 (Minn. App. 1993), *pet. for rev. denied* (Minn. January 27, 1994) (state court declined jurisdiction to avoid possible conflicting custody decrees when it was not inconsistent with federal law).

[23] U.S. Const. art. IV, § 1, cl. 1.

[24] Wis. Stat. Ann. § 806.245.

[25] Ark. Code Ann. 9-15-302 (tribal court orders for protection order).

[26] Okla. Stat. tit. 12, § 728 (recognizing tribal court judgments if tribal court reciprocates on state court judgments); Wyo. Stat. Ann. § 5-1-111.

[27] *Jim v. CIT Financial Services Corp.*, 87 N. M. 362, 533 P.2d 751 (1975); *Mexican v. Circle Bear*, 370 N.W. 2d 737 (S.D. 1985) (superseded by statute in SDCL 1-1-25).

[28] General Rules of Practice for the District Courts, Rule 10.01. Recognition is discretionary with the state court in all other cases; a rule outlines factors the court may consider in exercising this discretion.

[29] General Rules of Practice for the District Court, Rule 10.02. The Minnesota Court of Appeals has ruled that not all ten factors must be discussed and that the merits of the tribal court decision cannot be factor in deciding to recognize the decision. *Shakopee Mdewakanton Sioux (Dakota) Gaming Enter. v. Prescott*, 779 N.W.2d 320 (Minn. App. 2010).

Gaming Regulation in Indian Country

by Andrew Biggerstaff (651-296-8959)

Indian Gaming Regulatory Act

The right of Indian tribes to own and operate casinos outside of state regulation was first recognized by the United States Supreme Court in 1987 in *California v. Cabazon Band of Mission Indians*. One year later, in 1988, the Indian Gaming Regulatory Act (IGRA) was passed by Congress to balance the concerns surrounding state regulation and tribal sovereignty. This law reaffirms the right of Indian tribes in any state to conduct on Indian land the forms of gambling that the state allows for non-Indians, while also limiting the ability of those Indian tribes to operate games not otherwise present in the state. Instead of being bound by state law in these operations, Indian gambling is subject to either federally approved tribal ordinances or negotiated tribal-state compacts, depending on the types of gambling involved.

The 1988 federal law was not a radical change in policy but rather an attempt to regularize and codify a series of federal court decisions in the 1970s and 1980s that recognized the rights of Indian tribes to conduct gambling free of state regulation.

Under the federal law, gambling can be conducted on "Indian land." Federal law defines Indian land as land that is either:

- part of a federally recognized Indian reservation; or
- off a reservation but held in trust for an Indian tribe by the federal government, or under the jurisdiction of an Indian governing body.

As this definition points out, it is not necessary for land to be actually part of a reservation for gambling to be conducted on it. In theory, an Indian tribe could buy land anywhere in a state and operate a casino on it by transferring it to the Secretary of the Interior in trust for the tribe. However, such a designation of Indian trust land for gambling purposes also requires the concurrence of the state governor. In recent years, Congress has considered proposals to further limit the lands eligible for gaming, but none of the proposed legislation has passed thus far.

Federal law provides for three distinct types of gambling on Indian land and provides separate regulatory mechanisms for each.

Class I gambling, which includes traditional Indian ceremonial games, is controlled exclusively by the tribes.

"Indian country" is the term used in federal law for the jurisdictional territory of tribal governments. *See* 18 U.S.C. § 1151. Federal law defines it as Indian reservations, dependent Indian communities, and Indian allotments. Status as Indian country does not depend upon the trust status or ownership of land. See the discussion under "Indian Lands" in Part One.

Class II gambling consists of bingo, keno, pull-tabs, punchboards, and nonbanking card games (games where players play against each other rather than against the house). Class II gambling is governed by a tribal ordinance that must meet federal guidelines and be approved by the National Indian Gaming Commission (NIGC).

Class III gambling consists of common casino games such as roulette, craps, chemin de fer, baccarat, and banking card games such as blackjack. The term also includes all mechanical or electronic gambling machines such as slot machines and video poker devices. Class III gambling is conducted under a compact that each tribe negotiates with the government of the state in which it is located. Compacts can specify which party has civil and criminal jurisdiction over gambling enforcement. The compacts can apply those state laws to class III gambling that each party believes necessary for regulation.

An Indian tribe does not have complete authority to conduct any type of gambling it wishes. The state must already permit a type of gambling for any non-Indian before it can be conducted on Indian land. The non-Indian gambling need not be commercial or profit-making; gambling by nonprofit organizations for charitable purposes, or even private social betting, can provide a basis for Indians to claim the right to conduct comparable forms of gambling.

States' Roles

States have limited rights to regulate or prohibit Indian gambling. Under IGRA, a state cannot *prohibit* Indian gambling if it is a type of gambling that the state allows for non-Indians. The states' right to *control* Indian gambling is also sharply limited under federal law.

The states have no role in regulating bingo and other class II games except that only those class II games that are legal for non-Indians in a state may be conducted by tribes in that state. If a state allows blackjack, slot machines, and other class III games for non-Indians, the state cannot refuse to negotiate a compact with an Indian tribe that requests it. Under the federal law, a state's refusal to negotiate gives the tribe the right to go to federal court to seek a court order requiring further negotiations. If further negotiations still fail to result in a compact, each side must submit a proposal to a court-appointed mediator who selects the proposal that is the more consistent with the federal law. A state that objects to the mediator's decision may appeal to the Secretary of the Interior. At that point the secretary prescribes the compact, taking into consideration the mediator's decision, state law, and federal law. Thus, a state's refusal to negotiate in good faith does not prevent a compact from being written, but can result in the state's being eliminated from the process of writing the compact.

A 1996 Supreme Court decision (*Seminole Tribe of Florida v. State of Florida*)[1] invalidated the provisions of the IGRA that allow tribes to sue states that are not negotiating in good faith towards a tribal-state compact. Although the case prohibits tribal suits against states, it does not eliminate tribal rights to conduct gambling that a state authorizes for non-Indians. If a state fails to negotiate in good faith, tribes will still be able to go to the Department of the Interior for a final ruling on the terms of a compact.

States cannot tax Indian gambling. The federal law specifically prohibits states from imposing taxes or fees on Indian gambling, except for fees that the tribe agrees to. These fees are intended to compensate the state for its costs in performing inspections and other regulation under the tribal-state compact. In other words, states cannot raise general revenue by taxing Indian gambling. This does not prohibit states from requiring tribes to pay a share of gambling proceeds to the state in return for a state concession, such as a guarantee of tribal monopoly on some forms of gambling. Several states have such revenue-sharing arrangements with tribes within their borders. Recent case law has implicitly placed barriers on the ability of governments to charge certain fees to tribes seeking to operate gambling facilities. IGRA requires that the tribe have "sole proprietary interest" in the gaming such that any large payment to the government may be closely scrutinized by the NIGC.[2]

Income earned by employees at Indian casinos is taxable if the employee is a non-Indian. Income earned at an Indian casino by tribal members is nontaxable by the state.

Minnesota's tribal-state compacts allow blackjack and slot machines. The class III games permitted under compacts between Minnesota Indian tribes and the state are blackjack and video games of chance. The compacts provide for inspection and approval of machines by the state Department of Public Safety, licensing of casino employees, standards for employees (no prior felony convictions, etc.), machine payout percentages, and regulation of the play of blackjack. In addition, if off-track betting on horse racing is ever permitted in Minnesota (the law authorizing it was declared unconstitutional by the state supreme court) there could be one Indian off-track betting establishment for each non-Indian establishment in the state.

Under the blackjack compacts, Minnesota Indian tribes are obligated to pay the state a total of approximately $150,000 each year to assist the state in administering the compacts. However, the Minnesota compacts do not require tribes to pay a share of gambling proceeds to the state.

These compacts are in effect until renegotiation. Both types of compacts (video games and blackjack) provide that they remain in effect until the two parties renegotiate them. Either party can request a renegotiation at any time.

There is no agreement on the outcome of Indian gambling if Minnesota were to prohibit gambling by non-Indians. The federal law says that if a state allows a form of gambling by any person for any purpose, Indians in that state have the right to conduct that form of gambling. It makes no mention of what happens if a state repeals that authorization after a compact is negotiated.

In Minnesota, the state and the Indian tribes hold opposing views of what would happen if the state were to prohibit a form of gambling for non-Indians that a compact authorizes for Indians. The state takes the position that a repeal of a gambling form for non-Indians would mean that Indians would lose their rights to that form, while each tribe believes that a legislative action would not affect the validity of the compacts. In the blackjack compacts, each party states its position but does not attempt to impose it on the other party. If either the state or a tribe wanted to have the issue finally decided it would almost certainly end up in the federal courts.

In fact, the Minnesota Legislature has already repealed the law on which the video game

compact was based. The law legalized and licensed "video games of chance" without allowing betting on them. At the time the law was repealed, the legislature also said that the repeal was not intended to affect the validity of tribal-state compacts that authorized video machines. The state has therefore passed up, at least for the time being, its chance to test whether a legislative repeal would affect Indian gambling.

Casino Revenues

It is difficult to know how much money Minnesota's Indian casinos take in. Indian casinos are not required to report their revenues or earnings to any state agency, so exact figures are unavailable. Recent estimates indicate that $10 billion or more is wagered at Minnesota tribal casinos annually,[3] and that net gaming revenue at Minnesota Indian gaming facilities amounts to between $1 billion and $2 billion in per year.[4]

Casinos in Minnesota

Minnesota currently has 17 Indian casinos. Initially, this was more tribal casinos than other states. There are several reasons for this:

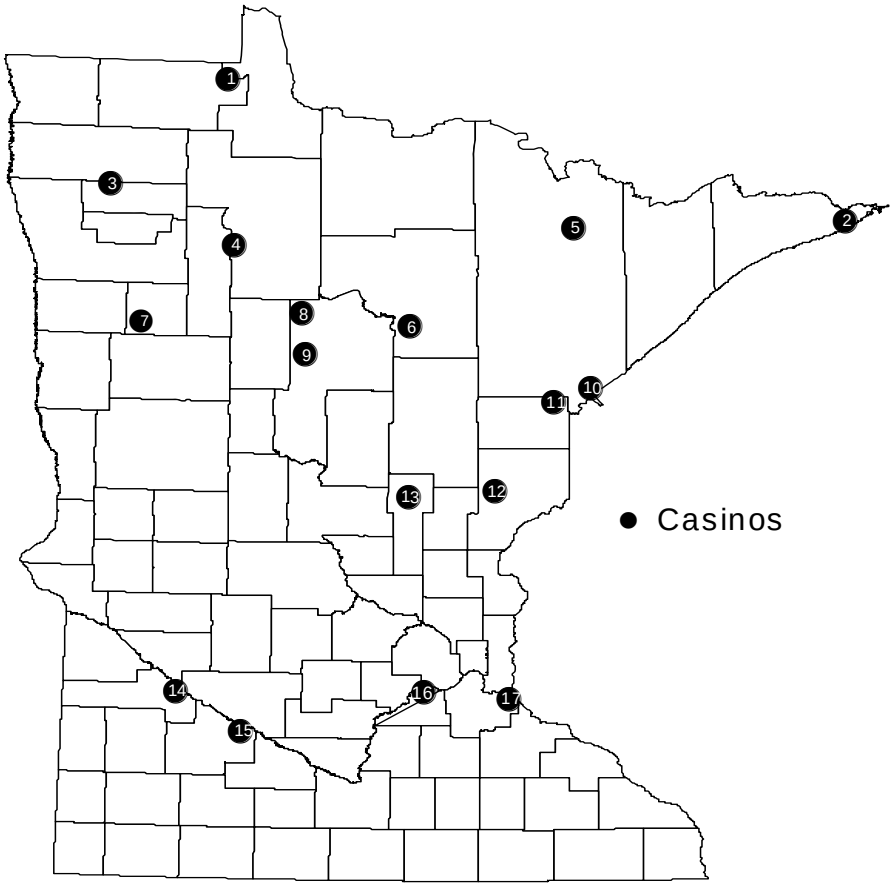
- Minnesota tribes were involved in legal gambling operations several years before the passage of the 1988 federal act. These activities were permitted under federal court decisions upholding Indian sovereignty. Although these operations were on a much smaller scale than today's casinos, they laid an economic base for rapid expansion after passage of the federal act.

- Several Indian tribes have benefited from their reservations being located close to the metropolitan area, close to the Canadian border, or in prime tourism areas. According to the Minnesota Indian Gaming Association, an estimated 17 percent of casino patrons are non-Minnesotans.

- Minnesota was far ahead of other state governments in beginning and completing the compact negotiation process.

- Minnesotans have demonstrated an enthusiasm for legal gambling, as the state's billion-dollar charitable gambling industry indicates. This created a ready market for casino gambling and gave tribes the confidence to take risks in opening and expanding casinos.

Map 3: Location of Casinos



Casinos

1. Seven Clans Warroad Casino
2. Grand Portage Lodge and Casino
3. Seven Clans Thief River Falls Casino
4. Seven Clans Red Lake Casino and Bingo
5. Fortune Bay Resort Casino
6. White Oak Casino
7. Shooting Star Casino Hotel
8. Palace Casino Hotel
9. Northern Lights Casino
10. Fond-du-Luth Casino
11. Black Bear Casino
12. Grand Casino Hinckley
13. Grand Casino Mille Lacs
14. Prairie's Edge Casino Resort
15. Jackpot Junction Casino Hotel
16. Little Six Casino
    Mystic Lake Casino Hotel
17. Treasure Island Resort and Casino

ENDNOTES

[1] *Seminoe Tribe of Florida v. State of Florida*, 517 U.S. 44 (1996).

[2] *City of Duluth v. Fond du Lac Band,* 702 F.3d 1147 (8th Cir. 2013).

[3] Minnesota State Lottery, Gambling in Minnesota: An Overview, January 2013.

[4] Minnesota State Lottery, Gambling in Minnesota: An Overview, January 2013, page 5.

Liquor Regulation in Indian Country

by Patrick McCormack (651-296-5048)

Federal law prohibits the possession of alcoholic beverages in and introduction of alcoholic beverages into Indian country. However, it also makes an important exception to this prohibition. Sale and possession of alcoholic beverages in Indian country is legal if it conforms with **both** state law **and** Indian tribal ordinance. This means that an establishment can sell alcoholic beverages within a reservation only if both state and tribal law allow it.

State Law on Alcoholic Beverages

Prior to 1985, liquor establishments in Indian country were in the same situation as liquor establishments elsewhere in the state: in order to legally sell alcoholic beverages it was necessary to obtain a retail license from the city or county in which the establishment was located. In 1985, the legislature enacted a special provision[1] that dealt specifically with licenses in Indian country. This law is intended to adopt a system of "dual recognition," whereby the state recognizes licenses issued in Indian country by an Indian tribe if the tribe recognizes licenses in Indian country issued by cities or counties.

Tribal licenses. The state law recognizes the validity of licenses issued by an Indian tribe to a tribal member or tribal entity for establishments located in Indian country. A tribal government issuing a tribal license must notify the state Department of Public Safety. On receipt of the notification, the department must issue the licensee a retailer's identification card, also called a "buyer's card." All retailers must have this card in order to purchase alcoholic beverages from Minnesota-licensed beer and liquor wholesalers.

An establishment that is owned by a tribal member or tribal entity and has a tribal license is not required to obtain a retail license from the city or county in which it is located.

City and county licenses. Cities and counties may issue retail alcoholic beverage licenses to establishments that are in Indian country and also within the city or county. Under the "effective date" section of the 1985 state law, these licenses must be recognized by the Indian tribe that has jurisdiction over the territory, in order for that same tribe to have its own licenses recognized under state law. These licenses are intended to be issued to non-Indians who do business on reservations; Indian tribal members who own liquor establishments on reservations could apply for a local license if they wish, but they do not have to if they already have a tribal license.

"Indian country" is the term used in federal law for the jurisdictional territory of tribal governments. *See* 18 U.S.C. §1151. Federal law defines it as Indian reservations, dependent Indian communities, and Indian allotments. Status as Indian country does not depend upon the trust status or ownership of land. See the discussion under "Indian Lands" in Part One.

State liquor laws. Minnesota liquor laws, such as the laws prohibiting sales to minors and prescribing days and hours of sale, are criminal laws and may therefore be enforced on Indian reservations. However, neither the state nor a local unit of government has the authority to suspend or revoke a tribal license for a violation of any law or regulation. Licenses issued by cities or counties in Indian country may be revoked or suspended by the issuing authority and, in some cases, by the state.

Liquor liability. The state "dram shop" law, which makes liquor sellers liable for damages if they cause intoxication that later leads to an injury, is a civil law that applies in Indian country as a result of the federal government's Public Law 280. However, its only application would be to individuals, Indian or non-Indian, who operate liquor establishments. Tribal government entities that have licenses (whether issued by tribes or by local governments) are generally immune from lawsuits under the doctrine of tribal sovereign immunity, which has been upheld on several occasions by Minnesota and federal courts.[2]

Summary

The present Minnesota law on alcoholic beverages in Indian country represents a "live and let live" approach. In order to avoid disputes between local governments and Indian tribes that might otherwise have conflicting jurisdiction over the same establishments, state law provides for mutual recognition of authority that at the same time avoids duplication of regulatory effort.

ENDNOTES

[1] Minn. Stat. § 340A.4055 (1992).

[2] *See* discussion in Part One, pages 21 to 22.

Control of Natural Resources in Indian Country

by Janelle Taylor (651-296-5039)

The U.S. Supreme Court and the Minnesota Supreme Court have consistently upheld Indians' rights to hunt and fish free of state regulation on Indian reservations. These rights were implicitly included in reservation grants because of the important role these activities play in Indian life and culture. The rights can only be eliminated by very specific treaty language or congressional action expressing an intent to do so.

Three significant agreements have been ratified by statute, and a fourth agreement was reached as a separate federal land settlement act involving the state and certain Chippewa bands. The first ratification occurred in 1973 with the agreement between the Leech Lake Band of Ojibwe and the state Department of Natural Resources.[1] The original agreement exempted band members from state law on hunting, fishing, trapping, bait-taking, and wild rice gathering on the Leech Lake Reservation. It also included the creation of special licenses and fees for hunting, fishing, trapping, or bait-taking by non-Chippewas on the reservation. This latter provision was amended to provide that the Leech Lake band receive a payment equal to 5 percent of all revenue from licenses sold in the state for fishing, hunting, trapping, and bait-taking. This amendment eliminated the special license fee.

Authority for a similar agreement between the state and the White Earth Band of Ojibwe was passed in 1980.[2] The White Earth band would have received 2.5 percent of all revenue from licenses sold in the state for fishing, hunting, trapping, and bait-taking. The legislature authorized an agreement with White Earth in 1980, but it never has been completed.[3]

A separate state law was enacted in 1984 in an effort by the state to work with Congress to reach a settlement over disputed lands within the White Earth Reservation. The Department of Interior had proclaimed that landowners' titles to 100,000 acres on the reservation were not valid and that those lands belonged to Indian allottees or their heirs.

In response, Congress passed the White Earth Land Settlement Act of 1986 (WELSA), Pub. Law No. 99-264. The state agreed to transfer 10,000 acres to the United States to be held in trust for the band. The state also agreed to provide an increased land base to the White Earth band in return for having the titles cleared. A list of lands covered by WELSA was published in the Federal Register. The state also agreed to provide technical assistance needed by the Department of the Interior to administer the settlement.

"Indian country" is the term used in federal law for the jurisdictional territory of tribal governments. *See* 18 U.S.C. §1151. Federal law defines it as Indian reservations, dependent Indian communities, and Indian allotments. Status as Indian country does not depend upon the trust status or ownership of land. See the discussion under "Indian Lands" in Part One.

In 1988, the so-called 1854 Treaty Area Agreement was ratified in statute over natural resource rights with the Grand Portage, Bois Forte, and Fond du Lac bands of Chippewa.[4] The Fond du Lac band voted to opt out of the state agreement in 1989. Each year since then, the remaining two bands received approximately $1.6 million each to forego some of their treaty rights. The Fond du Lac band entered into litigation with the state over its rights under the 1854 treaty and has litigated the extent of its rights under an 1837 treaty; those claims were consolidated with the Mille Lacs case discussed below.

1837 Treaty and Mille Lacs Band Lawsuit

The Mille Lacs Band of Ojibwe filed a lawsuit in 1990 to assert its hunting, fishing, and gathering rights in the 1837 treaty-ceded territory, which includes most of Mille Lacs Lake. The state responded by proposing an out-of-court settlement in which the Mille Lacs band would agree to prohibit commercial fishing in Mille Lacs Lake in exchange for a single payment of $10 million and several thousand acres of land. The settlement was taken to the legislature for ratification, but was rejected.

A trial took place in 1994 and Judge Murphy found that the band retained rights to hunt, fish, and gather under the 1837 treaty in the 1837-ceded territory.[5] The court also ruled that the band has the right to commercially harvest natural resources, except timber, and to adopt its own conservation code to regulate its members. Finally, harvest of natural resources by the band under the 1837 treaty may only be regulated by the state for conservation, public safety, and public health concerns. The Fond du Lac band and six Wisconsin bands of Chippewa were allowed to join the lawsuit in 1995.[6]

Judge Davis issued a final decision in a second phase of this trial in January 1997.[7] This decision made the case ready for appeal. The extent of state regulation and allocation of the natural resources in the ceded territory affected by the 1837 treaty were determined in this phase. Key elements of this decision were:

- Band members may harvest game and fish resources pursuant to their band code. A court-approved stipulation includes a detailed conservation code for band members outlining the regulations for fish and game harvest; an order that protects threatened and endangered species; regulations prohibiting harvest in state parks and scientific areas; band fisheries and wildlife harvest plans for the years 1997-2001; and a provision authorizing Department of Natural Resources (DNR) conservation officers to enforce the band code.

- Band members may only exercise treaty harvest rights on public lands and a very few acres of other lands open to public hunting by law. State trespass law applies to private lands within the ceded territory.

- Treaty harvest begins as soon as a band has adopted the regulations in the stipulation and deputized state conservation officers to enforce the code. It may be regulated by the state only for conservation, public safety, or public health concerns.

- The court made no allocation of the resources between the bands and the state.[8] The court affirmed the bands' five-year harvest management plan, which limited the amount of harvest each year. Some examples of the 1997 limit are 40,000 pounds of walleye on Mille Lacs Lake (out of an average 450,000 pounds) and 900 deer. In 2002, the walleye limit for band members rose to 353,000 pounds; for nonband members it was 370,000 pounds.

The phase-two decision in the Mille Lacs lawsuit was appealed by the state, nine counties, and several landowners in the Mille Lacs area. The Eighth Circuit Court of Appeals affirmed the lower court rulings in all respects.

The case was then appealed to the U.S. Supreme Court, and in 1999, the Court ruled that the 1837 treaty rights continue to exist. In a closely divided opinion of five to four, the Supreme Court affirmed the lower court rulings. The majority opinion rejected the state's arguments that the 1837 rights had been revoked by Executive Order in 1850 and that a later treaty in 1855 sought to extinguish the rights previously granted.[9]

Court decisions in other states have recognized the existence of Indian rights in similar cases. In Wisconsin, under previous litigation, the federal court ruled that Chippewa bands there retained their rights under the same 1837 treaty. The court determined in that case that the Wisconsin bands were entitled to 50 percent of the annual harvestable surplus of game and fish in a large geographical area of the state.

Late in 2002, in order to avoid a possible court dispute between the Ojibwe bands and the state, a mediated agreement on fishing was reached. The agreement began in 2003 and included a new five-year walleye management plan for Mille Lacs Lake including less restrictive fishing regulations for nonband anglers, penalties for the state and anglers for exceeding the safe walleye harvest quota in 2002, and a cap on future walleye limits. Harvest levels continue to be established through the multiyear management plans established by the 1837 Ceded Territory Fisheries committee, which includes tribal and state biologists. In 2013, the bands voluntarily reduced the limit for band members to 71,250 pounds to help address walleye population issues in Mille Lacs Lake.

ENDNOTES

[1] Minn. Stat. §§ 97A.151, 97A.155.

[2] Minn. Stat. § 97A.161.

[3] See Minnesota Statutes 2012, section 97A.161. On reservations, i.e., Leech and White Earth, harvest rights are implicit unless clear language in federal law says they are not. The sections below addressing the 1837 and 1854 treaties pertain to ceded territories; i.e., Indian lands ceded to the federal government pursuant to a treaty. In ceded territories, bands retain no harvest rights, or anything else, unless explicitly stated. Ceded territories are not Indian country. In Minnesota, only the 1837 and 1854 treaties have language reserving harvest rights in the respective

ceded territories. Harvest rights in ceded territories are unrelated to harvest rights on reservations. The White Earth land claims issues do not deal with harvest rights.

[4] Minn. Stat. § 97A.157.

[5] *Mille Lacs Band of Chippewa Indians v. Minnesota*, 861 F.Supp. 784 (D.Minn. 1994).

[6] Both the 1837 and 1854 treaty lawsuits were litigated in two phases. Phase I dealt with the question of whether the treaty harvest rights are valid, and Phase II dealt with defining those rights, i.e., who harvests what, when, where, and how. It was Phase I of the Mille Lacs case (1837 treaty) that was appealed to the U.S. Supreme Court. Phase II was resolved partially by stipulated settlement. In the Fond du Lac case (1854 treaty), the federal district court found the treaty harvest right valid (Phase I). The parties currently are negotiating Phase II.

[7] *Mille Lacs Band v. Minnesota*, 952 F.Supp. 1362 (D.Minn. 1997).

[8] Initial harvest allocations were agreed to by the parties as part of a separate Phase II stipulation.

[9] *Minnesota v. Mille Lacs Band*, 524 U.S. 915, 118 S.Ct. 2295 (1998) (certiorari granted); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 119 S.Ct. 1187 (1999) (judgment affirmed).

Environmental Regulation in Indian Country

by Bob Eleff (651-296-8961)
by Janelle Taylor (651-296-5039)

In the century following the establishment of the reservation system after the Civil War, environmental regulation of tribal members in Indian country was meager. Federal and state environmental statutes were few. What little regulation that occurred emanated from tribal law or from the application of state laws governing public nuisance, refuse disposal, and the like. During the past 40 years, as the federal government and the states enacted many of the environmental statutes operating today, the issue of which laws—state, federal, or tribal—apply in Indian country and which governing body administers them has been clarified by a series of court decisions.

Federal and tribal environmental regulatory laws apply to tribal members in Indian country; the jurisdiction of state laws is limited. Federal environmental statutes apply in Indian country, but federal policy is to cede regulatory authority to tribes that wish to **administer** these laws on tribal lands, provided the tribes meet certain criteria. This tribal authority may only be applied to those provisions of environmental laws expressly designated by Congress. Tribes retain authority to enact and administer their own environmental laws in the absence of corresponding federal laws, provided they are at least as stringent as any corresponding federal laws. Tribes are treated similar to states in these respects. Tribal jurisdiction extends to non-Indians under certain conditions.

The authority of state environmental laws over tribal members in Indian country is quite narrow, being restricted to statutes that prohibit certain acts, such as the sale or use of specific pesticides or chemicals in packaging or products. State statutes that are regulatory in nature—that permit certain actions but govern **how** they are to be carried out—are not applicable to tribal members in Indian country, but are applicable to non-Indians in certain circumstances.

Federal Environmental Regulations and Indian Lands

Courts have ruled for many years that federal laws apply to Indians, although this was not the case earlier. Federal primacy with respect to Indian lands derives from the constitutional powers granted to Congress to regulate commerce with Indian tribes and to enter into treaties with them.[1] This is not to say that all federal laws automatically governed in Indian country. In fact, in an 1894 decision, the Supreme Court said, "Under the Constitution of the United States,

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as originally established…General Acts of Congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them."[2] However, by 1960, the Court declared that "it is now well settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests."[3]

The trend toward greater tribal self-government began in the 1970s. In 1970, President Nixon announced a national policy aimed at tribal self-determination, a principle eventually embodied in the Indian Self-Determination and Education Assistance Act passed by Congress in 1975. In 1983, President Reagan gave further impetus to this trend in a statement on Indian policy, noting that despite passage of the act:

> major tribal governmental functions[, including]…developing and managing tribal resources . . [,] are frequently carried on by federal employees. The federal government must move away from this surrogate role which undermines the concept of self-government. This Administration intends to restore tribal governments to their rightful place among the governments of this nation and to enable tribal governments…to resume control over their own affairs.[4]

The following year, the Environmental Protection Agency (EPA) articulated its policy regarding the operation of federal environmental programs on Indian lands.

> EPA recognizes Tribal Governments as sovereign entities with primary authority and responsibility for the reservation populace. Accordingly, EPA will work directly with Tribal Governments as the independent authority for reservation affairs, and not as political subdivisions of states or other governmental units…[T]he agency will assist interested Tribal Governments in developing programs and preparing to assume regulatory and program management responsibilities for reservation lands.[5]

Federal Delegation of Authority to Indian Tribes

Tribes may administer certain federal environmental programs. Many of the core environmental laws enacted during the 1970s and 1980s expressly provided that EPA could delegate authority to qualified states to administer regulatory programs, such as inspecting facilities, issuing permits, determining compliance, and enforcing against violators. Between 1986 and 1995, Congress amended those laws to allow a similar delegation to Indian tribes, but only with respect to certain authorities, as reflected in the partial list below:[6]

- **Clean Water Act**: Planning and receiving federal funding for the construction of wastewater treatment plants; establishing water quality standards; monitoring and inspecting facilities for compliance; issuing and enforcing permits containing pollution limits; controlling pollution from "nonpoint" sources
- **Safe Drinking Water Act**: Establishing and enforcing drinking water standards; protecting water wellhead areas from contamination; regulating the injection of fluids into the ground (e.g., from nonresidential septic systems)

- **Clean Air Act**: Issuing and enforcing permits limiting emissions; designating air quality areas

- **Comprehensive Environmental Response, Compensation and Liability Act**: Removing hazardous wastes from contaminated lands or pursuing agreements with others to do so; submitting priorities for cleanups to EPA; consulting with the EPA on cleanup methods

- **Federal Insecticide, Fungicide and Rodenticide Act**: Cooperating with the EPA to train and certify pesticide applicators and to enforce the act

Tribes seeking delegation of authority must meet certain conditions. In reviewing a tribe's application for delegation of authority under these laws, the EPA must ensure that a tribe satisfies criteria established by Congress. For example, the Safe Drinking Water Act requires that: (1) the tribe has a governing body possessing substantial governmental powers and performing substantial duties; and (2) the functions to be exercised are within the tribe's jurisdiction;[7] and (3) the tribe is reasonably expected to be capable of carrying out those functions in a manner consistent with the purposes of the act.[8]

Tribes are also eligible to receive federal financial and technical assistance to help carry out their environmental responsibilities. The purposes of the Indian Environmental and General Assistance Program Act of 1992 are to "provide general assistance grants to Indian tribal governments…to build capacity to administer environmental regulatory programs that may be delegated by the Environmental Protection Agency," and to "provide technical assistance in the development of multimedia programs…"[9]

Some Minnesota tribes have been granted "treatment as state" status by the EPA. This designation authorizes tribes to administer the following federal programs:

- In 1999, both the Upper and Lower Sioux Indian Communities were granted authority to administer programs under section 402 of the Toxic Substances Control Act to accredit those who train workers in proper lead paint abatement practices, as well as to certify that such workers have completed requisite training.[10] Both tribes have also signed a memorandum of understanding with the EPA to enforce the work practice standards developed by the agency to insure proper lead paint removal from buildings.

- The Grand Portage and Fond du Lac Bands of Chippewa were delegated authority by the EPA, in 1996 and 1998, respectively, to set, monitor, and enforce water quality standards under section 303 of the Clean Water Act.[11] The Grand Portage band has signed a memorandum of understanding with the EPA and the Minnesota Pollution Control Agency (PCA) regarding its establishment of water quality standards for the shore waters of Lake Superior that allows both the tribe and the agency to retain separate jurisdiction to set standards, but ensures that those standards will be identical.[12]

- The Fond du Lac and Leech Lake bands of Chippewa received authority from the EPA in 2004 and 2007, respectively, to be treated as states with respect to two Clean Air Act

programs. The tribes will receive notice of any draft air pollution permits the state issues for sources located within a 50-mile radius of reservation boundaries, so that they may review and comment on the permit. The tribes are also qualified to receive federal air program grants at a 5 percent reduced match rate, the same rate as states.[13, 14]

Tribal Environmental Regulations in Indian Country

Like states, Indian tribes may enact and enforce their own environmental regulations in subject areas where no federal law exists or if their laws are at least as stringent as corresponding federal laws. Indian tribes have inherent sovereign authority to regulate tribal members on the reservation,[15] although these powers may be limited, modified, or eliminated by Congress.[16]

A tribe may also regulate the activities of non-Indians on the reservation. A 1981 Supreme Court decision recognized that tribes have authority to enforce their civil regulations against non-Indians within the reservation if expressly authorized by federal law or treaty. The decision also stated that a tribe has inherent power to exercise civil authority over nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its 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.[17]

State Environmental Regulations in Indian Country

State jurisdiction over tribal members in Indian country with respect to environmental law has been limited by Congress and the courts. Minnesota's role in applying its environmental laws to tribal members in Indian country is governed by Public Law 280, enacted by Congress in 1953, which transferred federal criminal jurisdiction in Indian country to six states, including Minnesota, and allowed other states discretion to assume such authority.[18] However, many of Minnesota's environmental laws are not criminal; they are civil laws that permit certain actions, but establish procedures, limits, and conditions governing them. The U.S. Supreme Court has ruled that Public Law 280 does not apply to such civil/regulatory laws, but only to criminal/prohibitory laws.[19] The test it established to distinguish between these two categories is whether the law intends to prohibit conduct that violates a state's public policy or to regulate conduct otherwise permitted. As one publication declared, "This distinction eludes clear definition and has generated considerable litigation."[20] For more on Public Law 280, see pages 21 and 22.

In general, state environmental laws that flatly prohibit certain actions and impose civil or criminal penalties on violators are more likely to be judged to be applicable on Indian lands. Among such laws enacted in Minnesota are the following:

Prohibitions on sales, distribution, or use of certain types of products or products containing certain chemicals or materials	
Material	**Minnesota Statute**
Pesticides containing chlordane, heptachlor, or more than 1 part per million TCDD	§§ 18B.11; 18B.115
Packaging materials containing intentionally introduced lead, cadmium, mercury, or hexavalent chromium	§ 115A.965
Products placed on a "prohibited" list by the Listed Metals Advisory Committee that contain lead, cadmium, mercury, or hexavalent chromium	§ 115A.9651
Coal tar sealants used on asphalt paving	§ 116.202
Mercury thermometers	§ 116.92
Toys, games, and apparel containing mercury	§ 116.92
Mercury manometers used on dairy farms	§ 116.92
Beverages in a plastic and metal can	§ 325E.042
Beverages or motor oil containers held together by connected rings made of nondegradable plastic	§ 325E.042
Devices impairing operation of a motor vehicle emissions control system	§ 325E.091
Alkaline manganese batteries containing more than .025% mercury by weight	§ 325E.125
Button cell nonrechargeable batteries containing more than 25 mg of mercury	§ 325E.125
Dry cell batteries containing a mercuric oxide electrode	§ 325E.125
Certain products containing CFCs	§ 325E.38
Sweeping compounds containing petroleum oil	§ 325E.40
Tents and sleeping bags that are not durably flame resistant	§ 325F.04
Children's toys or articles posing a toxic hazard	§ 325F.08
Unsafe infant cribs	§ 325F.171
Bottles or cups containing bisphenol-A used to dispense food to a child	§ 325F.173
Containers containing bisphenol-A that store formula or food intended to be consumed by a child	§ 325F.174
Children's products containing formaldehyde	§ 325F.177

Prohibition of activities that may pollute water	
Activity	**Minnesota Statute**
Discharging a marine toilet into waters of the state	§ 86B.325
Constructing/operating a depository for hazardous/nuclear waste that may pollute potable water	§ 115.065

Prohibitions on placing certain items in solid waste, in a solid waste processing or disposal facility	
Item	**Minnesota Statute**
Waste tires	§ 115A.904
Lead acid batteries	§ 115A.915
Certain dry cell batteries	§ 115A.9155
Rechargeable battery, battery-pack, or product containing them	§ 115A.9157
Motor vehicle fluids or filters	§ 115A.916
Yard wastes, except for reuse, composting, or co-composting	§ 115A.931
Mercury or instruments containing mercury	§ 115A.932
Fluorescent or high-intensity discharge lamps	§ 115A.932
Telephone directories	§ 115A.951
Major appliances	§ 115A.9561
Electronic products containing a cathode-ray tube	§ 115A.9565

Prohibition of miscellaneous activities	
Activity	**Minnesota Statute**
Selling/distributing an adulterated or misbranded pesticide	§§ 18B.12; 18B.13
Certain fertilizer-handling activities	§ 18C.201
Selling/distributing a misbranded or adulterated fertilizer, plant amendment or soil amendment	§§ 18C.225; 18C.231
Operating a motorboat in excess of noise limits	§ 86B.321
Delivering unprocessed mixed municipal solid waste to a substandard disposal facility	§ 115A.415
Littering on public or private lands or waters	§§ 115A.99; 609.68

Activity	Minnesota Statute
Sending/accepting residential lead-paint waste for incineration in a mixed municipal solid waste incinerator	§ 116.88
Throwing solid waste from a motor vehicle	§ 169.421
Operating a motor vehicle emitting visible air contaminants	Minn. Rules part 7023.0105

With respect to non-Indians, states have authority to regulate their activities on an Indian reservation unless preempted by federal law. In a 1983 decision, the Supreme Court expanded the concept of federal preemption of state authority on reservations, stating: "State jurisdiction is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the State interests at stake are sufficient to justify the assertion of State authority."[21]

Summary

Federal regulatory environmental statutes apply on Indian lands. Tribal law applies in the absence of federal statutes, or where tribal law is more stringent than corresponding federal law. Qualified tribes may administer several federal environmental programs designated by Congress or the EPA, and are eligible to receive federal financial and technical assistance for that purpose. The federal government retains authority to implement and enforce federal laws in Indian country where a tribe is not delegated to do so.

State laws that prohibit certain polluting activities and that impose civil or criminal penalties for violations are likely to apply in Indian country to the same extent as in the rest of the state. State regulatory environmental statutes do not apply on Indian lands. The distinction between these two categories is not, however, a settled area of law.

ENDNOTES

[1] U.S. Const., art. I, § 8, cl. 3, and art. II, § 2, cl. 2, respectively.

[2] *Elk v. Wilkins*, 112 U.S. 94 (1894), at 99-100.

[3] *Federal Power Commission v. Tuscorora Indian Nation*, 362 U.S. 99 (1960), at 116.

[4] "American Indian Policy," January 24, 1983, pp. 2, 4, http://epa.gov/Indian/pdfs/reagan83.pdf#search%22reagan%20 indian%20/policy%201983%22.

[5] U.S. Environmental Protection Agency, *EPA policy for the administration of environmental programs on Indian reservations*, November 8, 1984, p. 2, http://www.epa.gov/region6/6pd/pd-u-sw/reser.htm.

[6] In the case of the Clean Water Act (33 U.S.C. § 1377(e)), the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA, the Superfund law governing hazardous waste cleanup, 42 U.S.C. § 9626), and the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA, 7 U.S.C. § 136u), Congress specified which authorities could be delegated to tribes. With respect to the Safe Drinking Water Act (42 U.S.C. §§ 300h-1(e) and 300j-11) and the Clean Air Act (42 U.S.C. § 7601(d)), Congress authorized the EPA to make that determination.

[7] Although courts have held that tribal authority does not extend to nonmembers in all cases, the Supreme Court ruled in 1981 that "A tribe may regulate . . . the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its 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." [Citations omitted] *Montana v. United States*, 450 U.S. 544 (1981), at 565-566.

[8] 42 U.S.C. § 300j-11(b).

[9] 42 U.S.C. § 4368b(b).

[10] U.S. Environmental Protection Agency, "Lead-based paint activities in target housing and child-occupied facilities; authorization of the Upper Sioux community's and Lower Sioux community's lead-based paint activities program," *Federal Register*, vol. 64, no. 130 (July 8, 1999), pp. 36870-36871, www.epa.gov/fedrgstr/EPA-TOX/1999/July/Day-08/t17316.htm.

[11] Fond du Lac band of Lake Superior Chippewa, *Water quality standards of the Fond du Lac reservation, Ordinance #12/98, as amended*, www.epa.gov/waterscience/standards/wqslibrary/tribes/chippewa.pdf; *Grand Portage reservation water quality standards, Final draft*, May 24, 2005, www.epa.gov/waterscience/ standards/wqslibrary/tribes/grand-portage-band.pdf.

[12] Interview with Luke Jones, Director, Indian Environmental Office, U.S. Environmental Protection Agency, Region V, October 3, 2006.

[13] U.S. Environmental Protection Agency, *Region 5 Air: Weekly activity report*, January 23, 2004, www.epa.gov/Region5/air/hot/04-01-23.htm; email from Barbara Mack, Project Officer for Minnesota Tribes, Indian Environmental Office, U.S. Environmental Protection Agency, Region V, November 22, 2013.

[14] There are additional formal mechanisms of cooperation between tribes and the EPA that do not involve a formal delegation of authority. For example, the EPA, PCA, and the Mille Lacs band of Chippewa have entered into a memorandum of understanding among the three parties that allows EPA to implement the program, but permits the tribe and the PCA to make informal referrals to EPA for enforcement action. (Minnesota Pollution Control Agency, *Legislative fact sheet: Mille Lacs memorandum of understanding*, January 14, 2000, www.pca.state.mn.us/hot/legislature/factsheets/mlmou-00.pdf)

EPA also employs a mechanism called a DITCA (Direct Implementation Tribal Cooperative Agreement) whereby tribes receive compensation to perform certain EPA functions. For example, the Bois Forte band conducts outreach and education activities under the federal lead program, while the Fond du Lac and Mille Lacs bands inspect certain facilities during construction to insure compliance with the agency's storm water standards. Jones, interview.

[15] *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

[16] *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), at 141.

[17] *Montana v. United States*, 450 U.S. 544 (1981) at 557, 565-566.

[18] Public Law 280 excluded the Red Lake Reservation from its provisions. President Eisenhower expressed "grave doubts" about signing this legislation without a provision requiring tribal consent for states to assume such authority. In 1968, an amendment to that effect was enacted. No tribe has since given such consent. Carole Goldberg and Duane Champagne, "Is Public Law 280 fit for the twenty-first century? Some data at last," *Connecticut Law Review*, vol. 38, no. 4 (Spring 2006), pp. 697-729, at 707, www.connecticutlawreview.org/archive/vol38/spring2 /Goldberg.pdf.

[19] *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), at 209-10.

[20] U.S. Department of Justice, Office of Justice Programs, *Public Law 280 and law enforcement in Indian country – research priorities*, December 2005, p. 6, www.ncjrs.gov/pdffiles1/nij/209839.pdf.

[21] *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983), at 334.

Taxation in Indian Country

by Joel Michael (651-296-5057)

This chapter discusses (1) state tax immunities that arise from the special status of Indian tribes and territory, and (2) tribal governments' power to impose taxes. The principal focus is on tax immunities. Tax immunities affect the state's ability to tax income, property located in, and transactions occurring in tribal territories. However, the tribal power to tax is also important, because it can result in a double tax burden if both state and tribal taxes apply to the same property, income, or transaction. In addition, imposition of tribal taxes may preempt state taxes.

Two general principles apply:

(1) The federal laws establishing Indian country and their twofold purposes—preserving tribal sovereignty and providing economic support for Indian communities—preempt the state's ability to tax tribal members, lands, and some activities within Indian country.

(2) The tribes as sovereign governments, conversely, have the power to tax property, individuals, and transactions within their territories.

These two general principles become less clear when applying state or tribal taxes to specific situations that involve non-Indians, commercial activities between tribes or tribal members and non-Indians, and properties owned by non-Indians or fee properties on reservations. A further complication arises from the way some state taxes are collected. Some taxes are imposed at the distributor or wholesaler level (e.g., excise taxes on cigarettes, tobacco products, alcoholic beverages, and highway fuels). These individuals or entities are typically non-Indian businesses located outside of Indian territory. However, part or all of the burden of the tax may fall on tribes or Indians who are immune from state tax.

Tribal immunity may make it practically impossible for the state to collect taxes on transactions in Indian country. The converse situation arises where the tax burden falls on non-Indians, who are not immune from the state tax, but the collection obligation falls on a tribal business. In this situation, the legal immunity of the tribal business may make it practically impossible to collect the tax obligation. For example, the Supreme Court has held that purchases by non-Indians from tribal businesses in Indian country are subject to sales tax.[1] However, the tribe is immune from lawsuits and most of the standard legal collection mechanisms used by the state to collect its taxes.[2]

Congress may authorize states to impose taxes within Indian country. In some instances, federal law specifically authorizes state taxation of property or activities within Indian country.[3] These grants are read narrowly under the general principle that Indian laws and treaties are to be

"Indian country" is the term used in federal law for the jurisdictional territory of tribal governments. *See* 18 U.S.C. §1151. Federal law defines it as Indian reservations, dependent Indian communities, and Indian allotments. Status as Indian country does not depend upon the trust status or ownership of land. See the discussion under "Indian Lands" in Part One.

construed liberally and ambiguities are to be resolved in the favor of Indians. Indian tax immunities are generally only lifted when Congress has indicated "a clear purpose" to do so.[4]

Numerous Supreme Court cases have established a complex set of rules governing state and tribal authority to tax Indians and activities in Indian country. The authority to impose state taxes in Indian country has been, and continues to be, frequently litigated. The Supreme Court regularly has before it issues of the application of state taxes to transactions or property in Indian country, although in recent terms the Court seems to be taking fewer Indian law cases.

Given the multiplicity of types of taxes and ways in which they are collected, the issues and rules can be complex and confusing. To provide a simplified guide to these rules, the tables in this chapter display the legal authority to apply state or tribal taxes to tribal members, to Indians who are not tribal members, to non-Indians, and to property in Indian country. The "yes-no" answers given in the tables, in many instances, oversimplify complex constitutional or statutory issues. Therefore, these entries should be viewed with some caution. The notes to the tables provide case authority for the rules outlined in the tables and give some flavor of the complexity involved.

Income Taxation

States, in general, may not tax the income of tribes or income of an enrolled member that is derived from Indian country[5] sources. States, however, may tax the income of enrolled members from sources outside of Indian country or the income of other Indians. States also may tax the reservation income of Indians who are not members of the tribe. Although tribal governments generally do not do so, they have the authority to impose income taxes on reservation income of tribal members. Tribal governments may also, in some limited circumstances, be able to tax reservation source income of nonmembers. These income tax rules are listed in Table 1 and its notes. References in the table to "Indian country" refer to the tribe's reservation, allotments, and dependent community; in other words, it is specific to the applicable tribe, not all of Indian country. References in Table 1 to individuals who are "in" or "outside" of Indian country refer to the place of their residency.

Table 1
Authority to Impose Income Taxes

	Governmental Unit Imposing Tax		
Subject of Tax	Federal	State	Tribal[6]
Tribe			
Indian country source income	Waived[7]	No	N.A.
Non-Indian country income	Waived[8]	Yes[9]	N.A.
Passive income	Waived[10]	No	N.A.
Tribal member[11] in Indian country			
Indian country source income	Yes	No[12]	Yes
Non-Indian country income	Yes	Unclear[13]	Probably yes[14]
Passive income	Yes	Unclear[15]	Probably yes[16]
Tribal member outside Indian country			
Indian country source income	Yes	Yes[17]	Probably yes[18]
Non-Indian country income	Yes	Yes	Probably yes[19]
Passive income	Yes	Yes	Probably yes[20]
Nonmember Indian in Indian country			
Indian country source income	Yes	Probably yes[21]	Unclear[22]
Non-Indian country income	Yes	Yes	No[23]
Passive income	Yes	Yes	No[24]
Nonmember Indian outside Indian country			
Indian country source income	Yes	Yes[25]	No[26]
Non-Indian country income	Yes	Yes	No
Passive income	Yes	Yes	No
Non-Indian in Indian country			
Indian country source income	Yes	Yes	Unclear[27]
Non-Indian country income	Yes	Yes	No[28]
Passive income	Yes	Yes	No[29]
Non-Indian outside Indian country			
Indian country source income	Yes	Yes	No[30]
Non-Indian country income	Yes	Yes	No
Passive income	Yes	Yes	No

Sales and Excise Taxes

States may not impose sales and excise taxes on sales or use of goods among tribes, tribal businesses, and tribal members in Indian country; but Indian country sales between tribes or tribal members and nonmembers are subject to state tax. States may tax sales transactions involving nonmembers in Indian country, and tribes have an obligation to collect these taxes on behalf of the states. But the doctrine of sovereign immunity prevents states from using the courts to enforce this obligation on tribes, tribal businesses, and tribal members. Tribal governments may, and occasionally do, impose sales and excise taxes on general sales or specific goods, such as cigarettes or alcoholic beverages. These rules are presented in Table 2.

Table 2
Authority to Impose Sales & Excise Taxes on Transactions in Indian Country

Tax/Transaction	**Entity Legally Subject to Tax**		
	Tribe	Indian[31]	Non-Indian[32]
State Taxation			
Cigarette excise tax	No[33]	No[34]	Yes[35]
Severance tax on minerals			
Leases under pre-1938 law[36]	Yes	Yes	Yes
Leases under post-1938 law[37]	No	No	Yes[38]
General sales tax	No[39]	No[40]	Yes[41]
Motor vehicle license	No	No	No[42]
Gross receipts of contractor with tribe	N.A.	No	No[43]
Alcohol excise[44]	No	No	Yes
Motor fuel sales to Indian retailer in Indian country	N.A.	N.A.	No[45]
Motor fuel sales to non-Indian distributor for ultimate sale in Indian country	Yes[46]	Yes[47]	Yes[48]
Tribal Taxation			
Cigarette excise	N.A.	Yes[49]	Yes[50]
Alcohol excise	N.A.	Yes[51]	Yes[52]
General sales	N.A.	Yes[53]	No[54]
Oil and gas severance	N.A.	Yes[55]	Yes[56]

Property Taxation

Indian trust lands, whether held in trust for the tribe or allotted for individual tribal members, are exempt from ad valorem property taxation. By contrast, fee lands, whether owned by the tribe or an individual member, are generally taxable.

Indian lands generally can be divided into trust lands and allotted or fee lands. Trust lands are held by the federal government "in trust" either for the tribe or an individual Indian. They are exempt from state and local taxation, based on their status as federal government property. Fee lands are owned directly by the tribe or individual Indians who can sell or transfer them. The property taxation of fee lands, held by tribal governments or individual Indians within reservations, was not always clear. Before 1992 in Minnesota, tribally owned lands were generally treated as exempt from taxation. In 1992, the U.S. Supreme Court held in *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*[57] that fee lands allotted to individual Indians were subject to state and local ad valorem property taxes. After this decision, the Minnesota Department of Revenue advised counties that fee lands were generally taxable. As a result, most counties began taxing fee lands. However, questions remained as to whether the tax status depended upon the specific terms of the allotment act and whether it authorized state taxation. These questions were largely resolved by a 1998 decision in *Cass County v. Leech Lake Band of Chippewa Indians.* The Supreme Court held that the alienability of the lands was of "central significance."[58] The decision, thus, makes it clear that essentially all fee lands in Minnesota are subject to property tax. Tribes will need to have their land transferred in trust to the federal government to be exempt from property taxes.[59]

The Minnesota property tax applies to very little personal property, other than certain utility property and manufactured homes. Other states, however, extend their property taxes to more personal property, particularly business property such as equipment and inventory. In early cases, the Supreme Court upheld the power of states to tax the personal property on non-Indians located in Indian country, even if the property was used under leases granted by the Indians.[60] (Personal property owned by tribes or individual members and held on the reservation is exempt.[61]) Since the early cases decided around the turn of the 20th century, the Supreme Court has not decided a personal property case. The lower courts, following Supreme Court cases on nonproperty taxes, have used a preemption analysis.[62] The issue typically is whether the state personal property tax is preempted by a specific federal statute, such as the Indian Trader Statutes, the Indian Gaming Regulatory Act, or Indian Reorganization Act, or whether it is preempted under general preemption issues under a sort of balancing test that compares state and local interests with tribal interests. Treaties and laws enacted by specific tribes may also be relevant to whether state and local property taxation is preempted or not. Lower federal court decisions vary in their results.[63] A recent administrative rule adopted by the BIA may increase the likelihood of preemption.[64]

Although most tribal governments do not impose property taxes on properties, they do have this authority.

Table 3 outlines the rules governing real property taxation.

Table 3
Real Property Taxation

Type of Property	Entity Imposing Tax: State[65]	Tribal
Trust land		
Tribal	No[66]	N.A.
Allotted to individual Indian	No[67]	Yes[68]
Fee land – on reservation		
Tribally owned	Yes[69]	N.A.
Owned by enrolled Indian	Yes[70]	Yes[71]
Owned by nonenrolled Indian	Yes	No[72]
Owned by nonIndian	Yes	No[73]
Tribal fee land – off reservation	Yes[74]	N.A.

Table 4 displays the amount of tax-exempt Indian trust lands by county for the three most recent tax-exempt abstracts (1998, 2004, and 2010). The table shows the dollar amounts of exempt market value and the percentage that this value comprises of taxable market value for each county. The total value of exempt Indian land has increased significantly over this period, growing from $527 million in 1998 to $1.9 billion in 2010. However, the amount of this value relative to the taxable values has declined from 1.7 percent in 1998 to 1.4 percent in 2010.

Scott County has the highest amount of tax-exempt value ($368 million) with Carlton County second ($307 million). Scott County is home to the Mystic Lake Casino, the largest tribal casino in Minnesota. However, the $368 million amount is still less than 3 percent of Scott County's taxable market value. Indian trust lands are relatively the highest in Mahnomen County (20.4 percent), reflecting the county's low tax base and the fact that Indian lands comprise a large portion of the county.[75] Carlton County (at 12 percent) is the only other county where Indian lands exceed 10 percent of taxable market value. The 2010 data is now about three years old (based on January 2010 values).

Table 4
Tax-Exempt Indian Trust Land Relative to Taxable Market Value (TMV) by County 1998, 2004, and 2010

County	1998 Value	% of TMV	2004 Value	% of TMV	2010 Value	% of TMV
Aitkin	$3,047,000	0.4%	$3,221,100	0.2	$7,742,800	0.2
Becker	18,533,100	1.5	37,388,600	1.5	68,924,700	1.5
Beltrami	9,324,500	1.0	17,991,700	1.0	30,468,300	1.0
Carlton	65,788,700	6.7	96,025,100	5.6	307,209,200	12.0
Cass	91,598,900	5.2	241,144,100	6.3	232,393,700	3.5
Clearwater	3,484,500	1.1	8,502,300	1.8	18,789,200	2.4
Cook	33,486,100	6.9	66,654,000	6.8	97,068,600	5.4
Crow Wing	34,000	0.0	82,700	0.0	261,500	0.0

County	1998 Value	% of TMV	2004 Value	% of TMV	2010 Value	% of TMV
Dakota	-	0.0	-	0.0	1,100	0.0
Goodhue	27,560,700	1.1	33,197,800	0.8	44,471,300	0.8
Houston	293,500	0.0	566,700	0.0	1,001,100	0.1
Itasca	5,528,600	0.3	8,370,500	0.2	35,785,100	0.6
Koochiching	4,700	0.0	32,200	0.0	32,200	0.0
Lake of the Woods	10,731,400	6.3	31,550,200	11.3	39,190,200	7.9
Mahnomen	25,732,900	13.9	46,355,400	17.5	103,326,200	20.4
Mille Lacs	48,887,000	6.9	75,526,600	5.0	175,430,100	8.3
Pennington	417,500	0.1	10,191,200	2.0	17,409,800	2.1
Pine	49,604,600	5.5	64,441,600	3.3	128,817,900	4.3
Pipestone	-	0.0	16,700	0.0	-	0.0
Redwood	37,005,000	3.5	62,472,200	4.4	74,949,600	2.8
Roseau	1,717,300	0.3	2,435,000	0.4	4,993,800	0.5
St. Louis	22,206,900	0.4	47,048,200	0.4	97,127,000	0.6
Scott	70,029,200	1.7	249,354,900	2.4	368,283,400	2.7
Yellow Medicine	2,653,100	0.4	21,825,400	2.4	22,582,100	1.2
TOTAL	**$527,719,000**	**1.7%**	**$1,124,444,000**	**1.9%**	**$1,877,060,700**	**1.4%**

Source: Department of Revenue, 1998, 2004, and 2010 exempt abstracts

Local governments have expressed concern about the potential loss of property tax base as profits from Indian gaming enterprises are used to acquire lands that are then transferred into trust and exempted from property tax.

Large-scale Minnesota tribal gaming enterprises have been in operation for about two decades.[76] By most accounts, these enterprises have proven to be financially successful. An independent consultant estimated the total gaming revenues of Minnesota tribes to be $1.4 billion in 2010.[77] The success of Indian casinos has provided some tribes with resources to begin repurchasing lands on reservations that passed from Indian ownership under the allotment policy of the late 19th and early 20th centuries. Some tribes have made reacquiring these lands a priority.

Local government officials from areas that include reservations have expressed concerns about this practice.[78] Since trust lands are exempt from property taxation, transfers into trust status could significantly reduce local tax bases. Many of the areas of the state containing Indian reservations already have relatively low property tax bases. However, so far significant numbers of transfers have not shown up in property tax data. Between the 2004 and 2010 exempt abstracts, the number of acres (as opposed to the value of the land and improvements) of exempt Indian lands increased by 3,133 acres, just slightly less than a 1 percent increase in acreage. However, the process of transferring property into trust can be notoriously slow and the effects of reinvesting casino profits in reservation lands may not yet be showing up.

In-lieu Payments

Some tribal governments make in-lieu payments to help pay for local services. Although trust lands are exempt from taxation, some tribal governments make in-lieu payments to cities and counties to offset the cost of providing local services. Based on a survey of local governments conducted by House Research in 2006, these in-lieu payments totaled a little more than $6 million in 2005. However, that total included a $5 million payment by the Fond du Lac Band of the Lake Superior Chippewa to the city of Duluth under an agreement related to its casino in Duluth. Under that agreement, the band paid the city 19 percent of the gambling revenues from the casino.[79] Since the survey was done, the band (in 2009) ceased making payments to the city. The National Indian Gaming Commission (NIGC), the federal entity that regulates Indian gaming, determined in 2011 that this agreement violated federal law. The federal courts held that the NIGC determination effectively invalidated the agreement and eliminated the requirement for the band to pay a share of casino profits to the city.[80]

Tax Agreements with Tribes

Minnesota and some other states have entered into tax agreements with tribes to provide for collection of state taxes and distribution of the revenues. The twin difficulties outlined at the beginning of this chapter—(1) the impracticality of the state collecting state tax legally owed by non-Indians for transactions in Indian country, and (2) the potential for illegally imposing state tax on immune tribal members or businesses—has led to agreements between tribal governments and the state. These agreements attempt to preserve the tribes' and tribal members' immunities, while collecting the state tax legally owed by nontribal members and dividing these revenues between the state and the tribes.

The Minnesota Department of Revenue has entered agreements with ten of the 11 Minnesota tribal governments. (No agreement applies to Prairie Island.) The agreements cover the following taxes:

- Sales and use taxes
- Cigarette and tobacco products taxes
- Alcoholic beverage excise taxes (i.e., the taxes on liquor, wine, and beer)
- Motor fuels taxes (e.g., the gas tax)

These agreements all follow a similar pattern. The taxes are paid at the regular state rate to the Department of Revenue. The department, in turn, refunds part of the taxes to the tribal government. These refunds have two basic components:

- A **per capita payment** intended to refund the tax paid by members living on (or adjacent to) the reservation. Under federal law, these transactions are exempt from tax.

- A **revenue sharing payment** dividing the tax paid by nonmembers on the reservation equally between the tribal government and the state. The agreements also refund half of the sales tax paid by members on their off-reservation purchases.

Table 5 lists the per capita amounts by tax type for each tribal government. Table 6 describes the formulas used to calculate revenue sharing agreements by tax types. These formulas are generally the same for all of the tribal governments.

In 2001, the legislature authorized the Department of Revenue to enter into agreements with tribes to collect state fees for on-reservation activities and to provide for refund or sharing of the proceeds of the fees.[81] Under this authority, the department has entered agreements with nine of the 11 Minnesota tribes (except Leech Lake and Prairie Island, which also does not have a tax agreement) to reimburse the tribes for the fees that the state imposes on cigarettes—the health impact fee and the fee imposed on nonsettlement cigarettes. For calendar year 2012, when agreements with six of the nine tribes were in effect, the per capita amount was $54.89. The health impact fee was repealed by the 2013 Legislature as a part of an increase in the cigarette tax.[82]

The 2013 Legislature increased the cigarette excise tax by $1.60 per pack of 20. This should significantly increase payments for cigarette and tobacco taxes under the agreements. Since tribal governments are, in effect, both cigarette vendors and recipients of the agreement payments based on their cigarette sales, they could set their retail cigarette prices to absorb some of the state tax so their market share increases. This could increase their revenues, if holding down the price of the cigarettes they sell increases their total sales by enough to offset the state's retention of one-half of the tax. It remains to be seen whether any of the Indian governments will pursue this type of business practice as a result of the 2013 tax increase.

Table 5
Per Capita Distributions to Tribal Governments Under State Tax Agreements
Effective for payment in CY 2012

Tribal Government	Sales & Use	Cigarette & Tobacco	Alcoholic Beverage	Motor Fuels*
Bois Forte Band	$72.12	$54.89	$15.10	$77.14
Fond du Lac Band	68.51	54.89	15.10	77.14
Grand Portage Band	69.59	54.89	15.10	55.63
Leech Lake Reservation Tribal Council	125.51	54.89	15.10	77.14
Lower Sioux Indian Community	33.10	54.89	15.10	55.68
Mille Lacs Band	64.17	54.89	15.10	54.89
Prairie Island Community	No tax agreement			
Red Lake Band	120.24	54.89		Entire amount
Shakopee Mdewakanton Indian Community	21.94	54.89	15.10	55.63
Upper Sioux Indian Community	42.07	54.89	15.10	55.68
White Earth	120.25	54.89	15.10	77.14

* In addition, tax paid by tribal government on its purchases is refunded.
Source: Minnesota Department of Revenue

Table 6
Revenue Sharing Under State-Tribal Tax Agreement
Formulas to Calculate Tribal Governments' Share
Calendar Year 2012

Tax Type	Formula
Sales & Use	(Sales tax paid for on-reservation sales + tax paid off-reservation by members - per capita refund) ÷ 2
Cigarette & Tobacco	(Cigarette excise tax for on-reservation sales - per capita refund) ÷ 2
Alcoholic Beverage	(Alcoholic beverage excise tax for on-reservation sales - per capita refund) ÷ 2
Motor Fuels	(Tax paid for on-reservation sales - per capita refund - tax paid by tribal government) ÷ 2

Source: Minnesota Department of Revenue

Table 7 lists the amount of payments made to the ten tribal governments for calendar year 2012 collections by tax type. The actual payments made in 2012 were larger since they reflected payments made for refund of cigarette fees (the 75 cents per pack health impact fee) collected in prior years.

Table 7
Payments to Tribal Governments Under State Tax Agreements
Calendar Year 2012

Tribal Government	Sales & Use	Cigarette & Tobacco Tax	Cigarette Fees	Alcoholic Beverage	Motor Fuels	Total
Bois Forte Band	$728,279	$168,403	$137,751	$49,910	$248,390	$1,332,733
Fond du Lac Band	1,176,132	269,023	399,703	49,115	392,359	2,226,332
Grand Portage Band	283,164	44,372	69,126	7,736	309,225	713,623
Leech Lake Reservation Tribal Council	2,827,279	0	0	170,732	1,405,638	4,403,649
Lower Sioux Indian Community	627,618	102,332	201,705	20,600	138,704	1,090,959
Mille Lacs Band	1,444,254	235,945	303,821	40,904	213,448	2,238,372
Red Lake Band	1,261,614	556,255	550,961	76,461	587,589	3,032,880
Shakopee Mdewakanton Indian Community	1,741,991	326,499	615,100	35,513	453,173	3,172,276
Upper Sioux Indian Community	271,741	54,889	93,630	7,534	84,754	512,548
White Earth	2,823,441	551,040	324,265	151,538	1,106,433	4,956,717
Total	$13,185,513	$2,308,758	$2,636,062	$610,043	$4,939,713	$23,680,089

Source: Minnesota Department of Revenue

State Aid to Casino Counties

The state pays aid to most counties with Indian gaming casinos. Under this aid program, the state pays 10 percent of its share of the taxes paid under the agreement to the county government. If the tribe has casinos in two counties, the payments are divided equally between the two counties. The Mille Lacs Band has casinos in both Mille Lacs and Pine counties. As a result, each county receives 5-percent shares (one-half of the otherwise applicable 10 percent). This aid program was enacted in 1997; the legislature has made several changes in the program since it was enacted, in particular expanding the counties that qualified for aid.[83] In 2003, the legislature modified the aid program to allow counties with casinos not subject to tax agreements (Goodhue) to receive 5 percent of the excise tax revenues generated from activities located in the county.[84]

Table 8 below shows the amount of aid paid in fiscal years 2011, 2012, and 2013 by county. Total aid in 2013 equaled $851,839 with the largest payment, $236,418, being made to Scott County. Three counties with tribal casinos, Beltrami, Pennington, and Roseau, did not receive payments because taxes paid under the agreements with the tribes did not generate revenues for the state.

Table 8
State Aid to Counties with Casinos
Fiscal Years 2011-13

County	Tribe	County Payment		
		FY 2011	FY 2012	FY 2013
Carlton	Fond du Lac	$35,454	$30,164	$38,607
Cass	Leech Lake	77,327	59,861	75,427
Cook	Grand Portage	44,217	52,239	47,417
Goodhue*	Prairie Island	269,341	60,778	67,510
Itasca	Leech Lake	77,327	59,861	75,427
Mahnomen	White Earth	101,775	103,669	78,900
Mille Lacs	Mille Lacs	54,437	43,307	49,300
Pine	Mille Lacs	54,437	43,307	49,300
Redwood	Lower Sioux	60,623	57,389	66,732
St. Louis	Fond du Lac	35,454	30,164	38,607
Scott	Shakopee	166,237	140,687	236,418
Yellow Medicine	Upper Sioux	25,093	22,437	28,194
Total		$1,001,722	$703,861	$851,839

*Fiscal year 2011 payment = $71,308 regular payment + $198,033 for previous years' underpayments.
Source: Minnesota Department of Revenue

ENDNOTES

[1] *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980).

[2] See *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991). In *Potawatomi Indian Tribe* the court stated that the tribe had an obligation to collect the state cigarette excise tax for on-reservation sales to nonmembers. However, if it failed to do so, the tribe was immune from suit by the state to enforce this obligation to collect. In response to the state's complaint that it had a "right without a remedy," the court suggested three options for the state to enforce its tax collection obligation: (1) seizing untaxed cigarettes off the reservation, (2) assessing wholesalers who sell unstamped cigarettes to Indian tribes, or (3) entering agreements with the tribe for collection of the tax.

Another option for cigarette excise taxes may be to use the federal Contraband Cigarette Trafficking Act, 18 United States Code, sections 2341 to 2346. Under this law, the federal government can seize cigarettes that do not bear state tax stamps. Unlike state government entities, federal agencies can enter on Indian lands to enforce legal process. *See Grey Poplars Inc. v. One Million Three Hundred Seventy-One Thousand One Hundred Assorted Brands of Cigarettes*, 282 F.3d 1175 (9th Cir. 2002) (holding the federal government can use the Contraband Cigarette Trafficking Act to seize cigarettes in Indian country for the failure to have state tax stamps on cigarettes for sale to nonmembers).

[3] See, e.g., *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992) (Burke Act, one of several "allotment" acts, provided that allotted lands would be free from restrictions on taxation) and federal law authorizing state taxation of mineral production described in note 35.

[4] See, e.g., *Bryan v. Itasca County*, 426 U.S. 373 (1976), and the discussion in Part One, page 23. However, as with any canon of construction, it may be honored as much in the breach as in the observance. *See, e.g., Chickasaw Nation v. United States*, 534 U.S. 84 (2001) where the court stated, "Nonetheless, these canons do not determine how to read this statute. For one thing, canons are not mandatory rules. * * * And other circumstances evidencing congressional intent can overcome their force." The court concluded based on legislative history and other reasons to construe the statute against the interests of the Indian tribe.

[5] See the discussion in Part One, page 13, of what constitutes Indian country. In Minnesota, Indian country so far appears to be limited to the territory of the reservation and trust lands. However, it could extend to dependent Indian communities and Indian allotments, as defined under federal law. *Dark-Eyes v. Commissioner of Revenue Services*, 887 A.2d 848 (Conn. 2006) (rejecting a tribal member's claim for an income tax exemption on the grounds that her home, located outside of the formal reservation, was not within a dependent Indian community).

[6] There is no good source of data on the number or types of taxes imposed by tribes, either in Minnesota or nationally. The conventional wisdom is that tribes exercise the power to tax in very few circumstances. References to tribal taxes in the case law seem to be becoming more common. *See Wagon v. Prairie Potawatomi Nation*, 546 U.S. 95 (2005); *Oklahoma Tax Commission v. Sac and Fox Nation*, 508 U.S. 114, 118, *rehearing denied* 509 U.S. 933 (1993) (opinion notes tribe imposed tribal earnings or income tax on members and a motor vehicle excise tax); *Thompson v. Crow Tribe of Indians*, 962 P.2d 577 (Mont. 1998) (suit by non-Indian business to extinguish tribal tax liens barred by tribe's sovereign immunity); and cases cited and discussed in notes 22 and 68.

[7] See Indian Tribal Governmental Tax Status Act of 1982, Pub. L. No. 97-473, 96 Stat. 2608, codified as amended at 26 U.S.C. § 7871 and scattered sections of 26 U.S.C. This act treats Indian tribes like states and local governments for certain federal tax purposes, including tribal issuance of tax-exempt bonds to finance governmental projects. Under the act, tribal income, including commercial or business revenues of a tribe, is not subject to federal taxation.

[8] See note 7.

[9] If an Indian tribe undertakes to operate a business outside of Indian country, it may be subject to state taxation. *See Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973) (gross receipts tax on off-reservation Indian-owned ski resort valid).

[10] See note 7.

[11] The "tribal member" is used through the tables to refer to natural individuals. Corporations with members as shareholders raise separate issues that are not addressed. Corporations generally are not allowed to be members of most tribes. However, some tribal governments provide for chartering of tribal corporations. Some courts have held that corporations, even though exclusively owned by tribal members, do not qualify for the tax immunities that would be available if the natural individuals who own the corporation carried on the activities. Other courts have extended the immunity to corporations that are exclusively owned by tribal members. *Compare Baraga Products, Inc. v. Commissioner of Revenue*, 971 F. Supp. 294 (D. Mich. 1997), *aff'd* 156 F.3d 1228 (6th Cir. 1998) (immunities do not apply to corporation) *with Flat Center Farms, Inc. v. State*, 49 P.3d 578 (Mont. 2002) (corporation wholly owned by tribal members and operating exclusively on reservation exempt from business license tax). It may make a difference if the tribe chartered the corporation. *Id.* at 586 (basis for concurring opinion).

[12] See *Oklahoma Tax Commission v. Sac and Fox Nation*, 508 U.S. 114, *rehearing denied* 509 U.S. 933 (1993) (state income tax may not be applied to earnings of tribal members who live in and earn the income in Indian country); *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973) (states lack power to tax income of tribal members earned on the tribe's reservation); *Bryan v. Itasca County*, 426 U.S. 373 (1976) (Pub. L. 280 is not a grant of regulatory or taxing jurisdiction over Indian reservations).

[13] States may assume jurisdiction over individual Indians once off the reservation. *See Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973) (absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the state). *Littlewolf v. Girard*, 607 N.W. 2d 464 (2000) (income from winning lottery ticket purchased on-reservation, but cashed off reservation held taxable). Traditionally, it has been assumed that the state's ability to tax this income was based on traditional jurisdictional sourcing concepts. That is, if the income was earned for work in the state, it would be taxable because the activity (work) was in-state. However, if the state did not have jurisdiction over the income generating activity (e.g., the performance of services), it could not tax income. *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Zeuske*, 145 F. Supp. 2d 969 (D. Wis 2000) (income earned from personal service performed in another state not taxable) is consistent with that premise. A recent case in which the 8th Circuit allowed Minnesota to impose its income tax on the pension of a reservation Indian that was earned outside of Minnesota (in Ohio) and otherwise had no connection with Minnesota casts doubt on that premise. *Fond du Lac Band of Lake Superior Chippewa v. Frans*, 649 F.3d 849 (8th Cir. 2011). The court held that Minnesota's taxing authority was based on residency principles. There is no direct support for this conclusion in the Supreme Court cases and final resolution will depend upon the Supreme Court resolving the issue. (The taxpayer did not petition for certiorari.) This also becomes important for reservation Indians with income from intangibles and from tangible property located outside of the state. The theory of the court in *Fond du Lac Band* suggest the state of residency could tax that income, contrary to conventional wisdom.

[14] Tribes have always been assumed to have power to tax their own members. The court, for example, recognized this in *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134, 147 – 48 (1980) (cigarette excise tax).

[15] The usual basis for state authority to tax this income is residency. *See* 2 Hellerstein & Hellerstein, *State Taxation* § 20.03 for a general discussion. Traditionally it was assumed that the state could not make this assertion for a tribal member who is a resident of the reservation. *See Lac du Flambeau Band of Lake Superior Chippewa Indians v. Zeuske*, 145 F. Supp. 969 (D. Wis 2000) where the state sought to tax a member who was a resident of the reservation on earnings from another state. The court held that the state could not tax this income: "Congress has never authorized the states to tax tribal members living on reservations solely because of their residence within the taxing state; without such authorization, Wisconsin has no legal right to tax Jackson or any other tribal member similarly situated." *Id.* at 977. As discussed in note 13, the decision in *Fond du Lac Band* is contrary and suggests that states may rely on residency as a basis for taxation. This principle would seem to apply with equal force to an effort to tax income from intangibles. The direct issue regarding intangibles has apparently never been litigated. *See* H. Duncan, *Federation of Tax Administrators: Issues in State-Tribal Taxation* (report prepared for NCSL, State-Tribal Tax Issues Conference, Washington, D.C., Oct. 23, 1991). By contrast, passive income earned from real or tangible property located outside of the reservation likely could be taxed by the state in which the property is

located under standard sourcing principles. Whether it could also be taxable by the state of residency will depend upon how the Supreme Court resolves the conflict between the *Lac du Flambeau Band* and *Fond du Lac Band*.

[16] The court has held generally that tribal governments have taxing powers as sovereigns. *See, e.g., Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) (severance tax on oil and gas) ("The power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management. * * * [I]t derives from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction," at 137). As discussed in note 22, this broad language has been called into question by *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001), regarding the authority to tax non-Indians in some contexts.

[17] *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450 (1995) (earnings of tribal members living outside of Indian country held subject to state taxation, even though employer was tribe). Specific treaties or federal laws may, however, provide exemptions. *Cf. Oklahoma Tax Commission v. Sac and Fox Nation*, 508 U.S. 114, *rehearing denied* 509 U.S. 933 (1993). *Brun v. Commissioner of Revenue,* 549 N.W.2d 91 (Minn. 1996), upheld the imposition of the Minnesota state income tax on on-reservation earnings of tribal members who lived off the reservation. *Cf. Jefferson v. Commissioner of Revenue,* 631 N.W. 2d 391 (2001), *cert. denied* 535 U.S. 930, *rehearing denied* 535 U.S. 1071 (2002) (Indian Gaming Regulatory Act did not preempt state's power to tax per capita payments made from gaming operations to a member living outside of Indian country).

[18] See note 16.

[19] See note 16.

[20] See note 16.

[21] The U.S. Supreme Court has not addressed this issue, but it has been litigated in several state courts. In *Topash v. Commissioner of Revenue*, 291 N.W.2d 679 (Minn. 1980), the Minnesota Supreme Court held that an enrolled member of another tribe living on the reservation was exempt from state income tax on the income earned on the reservation. The court reserved the question whether this rule applied to an Indian who is not an enrolled member of any tribe. The continued validity of *Topash* is called into question by the decision in *Washington v. Confederated Tribes of the Colville Indian Reservation.* 447 U.S. 134 (1980). In *Colville* the Court held, in the context of sales, cigarette excise, and personal property taxes, that immunity from state taxes extended only to members of the tribe and that other Indians were subject to taxes to the same extent as non-Indians. This rule may apply in the context of individual income taxation, but it is not completely clear. The Minnesota Supreme Court has stated: "Our reasoning in *Topash* is specifically refuted by the Supreme Court's decision in *Colville* where the Court reached the opposite result. *See Colville, 447 U.S. at 161*. Because Supreme Court cases conflict with part of our decision in *Topash* we conclude that *Topash* is no longer controlling on this issue [the distinction between member and nonmember Indians]." *State v. RMH*, 617 N.W. 2d 55, 64 (2000). *RMH* involved enforcement of traffic laws under Public Law 280, but the reasoning of the case certainly calls into serious question the continued validity of *Topash* as applied to income taxes. The Wisconsin and New Mexico Supreme Courts have both concluded that the state may impose income taxes on nonmember Indians living on the reservation. *See New Mexico Taxation and Revenue Dept. v. Greaves* 864 P.2d 324 (1993); *LaRock v. Wisconsin Department of Revenue,* 621 N.W.2d 907 (2001).

[22] This specific question has not been addressed as it applies to income taxation. Although the courts have generally upheld tribes' power to tax, it seems unlikely in light of recent decisions that there are many circumstances in which a tribe could impose income taxes on nonmembers. The Supreme Court has stated that the inherent sovereignty of tribes (and hence their power to tax) is limited to "their members and their territory." *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 651 (2001). In *Atkinson Trading Co.* the Court held that a tribal hotel occupancy tax could not be applied to a hotel within the borders of the reservation, but owned by a nonmember and located on non-Indian fee land. The tribe could extend its taxing power beyond its "territory and members" only if either of two conditions were met: (1) The nonmember had entered a consensual relationship with the tribe, such as commercial dealings, contracts, and so forth; or (2) the conduct "threatens or has some direct effect on the political integrity, the economic security, or health or welfare of the tribe." *Id.* at 651, citing *Montana v. United States*, 450 U.S. 544 (1981) (tribe had no jurisdiction over non-Indian hunting and fishing on non-Indian lands within the

reservation when no significant tribal interest was shown). Prior decisions upholding tribal taxes on nonmembers appear to fit into these exceptions. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980), upheld the imposition of a tribal cigarette tax on nontribal purchasers, indicating that federal courts had long acknowledged the power of tribes to tax non-Indians entering the reservation to engage in economic activity. The purchasers had consensual dealings with the tribe or tribal businesses. In *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), the Court held that the power of exclusion was sufficiently broad to support a tribal severance tax applied to a non-Indian lessee who mined oil and gas on the reservation. Given this, it seems unlikely that the Court would uphold an income tax on nonmembers unless they at least lived on trust or tribal land. Moreover, it may also be necessary to have a "consensual relationship" with the tribe or a tribal business (e.g., work for the tribe or have a commercial relationship with the tribe or a tribal business). Since none of the Minnesota tribes impose income taxes, this is largely an academic issue.

[23] See note 22.

[24] See note 22.

[25] See note 17.

[26] See note 22.

[27] See note 22.

[28] See note 22.

[29] See note 22.

[30] See note 22.

[31] Refers to enrolled members of the tribe, since the Supreme Court generally has treated Indians who are not enrolled members of the governing tribe as non-Indians for tax immunity purposes. *See Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980). As discussed in note 11, the table entries are limited to describing the rules applicable to natural individuals. Corporations, whether organized under state law or tribal law, may raise special issues.

[32] This includes Indians who are not enrolled members of the tribe governing the reservation in which the transaction occurs. *See* note 31.

[33] "If the legal incidence of an excise tax rests on a tribe or tribal members for sales made inside Indian country, the tax cannot be enforced absent clear congressional authorization." *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450, 458 (1995) (legal incidence of motor fuels tax on tribe and members living in Indian country invalid); *Oklahoma Tax Commission v. Sac & Fox Nation*, 508 U.S. 114, *rehearing denied* 509 U.S. 933 (1993) (same for motor vehicle excise tax); *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976) (same for cigarette excise tax).

[34] See note 33.

[35] See *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980) (state may not collect sales and cigarette taxes from Indian retailers located on reservation land who sell to tribal members. However, state may collect taxes on sales to non-Indians and nonmember Indians residing on the reservation); *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991) (immunity precluded the state from taxing sales of goods to tribal members, but the state was free to collect taxes on sales to nonmembers); *Oklahoma Tax Commission v. City Vending of Muskogee, Inc.*, 835 P.2d 97 (Okla. 1992) (state may validly collect cigarette tax from wholesaler who sold cigarettes to Indian retail outlets located on reservation land that resold the cigarettes to nontribal members as well as). In *Judybill Osceola v. Florida Dept. of Revenue*, 893 F.2d 1231 (11th Cir. 1990), *cert. denied*, 498 U.S. 1025 (1991) plaintiff Indian brought a class action suit seeking refunds of sales and franchise taxes collected by the state for goods and services purchased off the reservation but delivered or taken to her residence on the reservation. The court found that the state's law provided a "plain, speedy, and efficient remedy for any alleged constitutional violations," and the Tax Injunction Act barred the plaintiff from challenging the state tax in federal court. The court further declined to extend the act's instrumentality exception (which permits Indian tribes or tribal governing bodies to bring suit in federal court for unlawful state

exactions) to individual Indians.

[36] Two federal laws, passed by Congress in 1924 and 1927, specifically consent to state taxation of certain mineral production on Indian reservation lands. *See* Act of May 29, 1924, ch. 210, 43 Stat. 244, codified at 25 U.S.C. § 398; Act of Mar. 3, 1927, ch. 299 § 3, 44 Stat. 1347, codified at 25 U.S.C. § 398c. These laws were, in effect, superseded by a 1938 mineral leasing act. Act of May 11, 1938, ch. 198, 52 Stat. 347, codified at 25 U.S.C. §§ 396a-396g. The Interior Department makes leases under the new law and interprets the earlier tax consents to be inapplicable. See, generally, Cohen's Handbook of Federal Indian Law, 700-01, 1123-5 (2012 edition) for a discussion of these issues.

[37] *Montana v. Blackfeet Tribe*, 471 U.S. 759 (1985) (in the absence of an explicit provision, a state may not tax royalties from mineral leases on trust land, and since the 1939 Indian Mineral Leasing Act contained no such authorization, the royalties after 1938 are not taxable by a state). *See also* discussion in note 35.

[38] *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989) (state may impose severance tax on non-Indian severance of oil and gas from reservation trust land).

[39] See note 33.

[40] See note 33.

[41] *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980). *See* discussion in note 35.

[42] See *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) (federal government's regulation of the harvesting of timber for tribal lands is comprehensive and sufficiently pervasive to preclude state taxes on non-Indian logging company). The court also noted that the state's interest in raising revenue was weak because it provided no service benefiting the tribal roads, and the roads at issue were built, maintained, and policed exclusively by the federal government, the tribe, and its contractors.

[43] See *Ramah Navajo School Board. v. Bureau of Revenue*, 458 U.S. 832 (1982) (federal law preempts state tax on gross receipts of a non-Indian contractor hired by a tribe to build a school on the reservation, where the construction was federally funded, regulated, and subject to approval of the BIA).

[44] Although the authors found no cases specifically dealing with alcohol excise taxes, the rules applicable to cigarette excise taxes should apply as well. See the table entries above and notes 33 and 35.

[45] *Oklahoma Tax Commission v. Chickasaw* Nation, 515 U.S. 450 (1995) (motor fuel tax where legal incidence on tribe is invalid). There has been extensive litigation over the taxation of motor fuels. The court in *Chickasaw Nation* explicitly declined to decide whether the Hayden-Cartwright Act authorized state taxation of motor fuels, because the issue had not been briefed and argued in the lower courts. Two state courts and one federal court have decided that the act does not authorize state motor fuel taxation of Indian retailers in Indian country. *Coeur D'Alene Tribe of Idaho v. Hammond*, 384 F.3d 674 (9th Cir. 2004), *cert. denied* 543 U.S. 1187 (2005): *Pourier v. South Dakota Dept. of Revenue*, 658 N.W.2d 395 (2003), *vacated in part* 674 N.W.2d 314, *cert. denied* 541 U.S. 1064 (2004); *Goodman Oil Co. of Lewiston v. Idaho State Tax Commission*, 28 P.3d 996 (Id. 2001), *cert. denied* 122 S. Ct. 1068 (2002). The state of Kansas has been involved in protracted litigation over its taxation of motor fuels sold on Indian reservations. The state initially lost under a holding, following *Chickasaw Nation*, that the legal incidence of its tax was on the retailer (i.e., the tribal business) and was therefore invalid. *Kaul v. State*, 970 P.2d 60 (Kan. 1998), *cert. denied* 528 U.S. 812 (1998). The Kansas Legislature amended the statute to shift the legal incidence of the tax to the distributor. The revised tax was upheld against a challenge by tribes. *Sac and Fox Nation of Missouri v. Pierce*, 213 F. 3d 566 (10th Cir. 2000), *cert. denied* 531 U.S. 1144 (2001). However, efforts to enforce the revised Kansas tax against tribal businesses have been enjoined in federal court. *Winnebago Tribe of Nebraska v. Stovall*, 341 F.3d 1202 (D. Kan. 2002) (upholding preliminary injunction to enjoin jeopardy assessments, seizure of tribal distributor's property, and so forth). *See* also the discussion in note 46.

[46] *Wagon v. Prairie Potawatomi Nation*, 546 U.S. 95, 126 S. Ct. 676 (2005) upheld a Kansas motor fuel tax with legal incidence on the non-Indian distributor with ultimate sale to an Indian retailer located in Indian country. *Potawatomi Nation* held that the interest balancing test (weighing the state's versa the tribe's interest) applied only "to *on-reservation* transactions between a nontribal entity and a tribe or tribal member * * *." *Id.*, 126 S.Ct. at 687.

The Court reached this result despite the fact that the Kansas law allowed distributors to deduct sales made to the United States and retailers located in other states (that would be subject to those state's motor fuel taxes). Note that the result is the opposite, if the legal incidence of the tax is on the retailer. *Coeur D'Alene Tribe of Idaho v. Hammond*, 384 F.3d 674 (9th Cir. 2004), *cert. denied* 543 U.S. 1187 (2005) and discussion in note 45.

[47] See note 46.

[48] See note 46.

[49] See note 14.

[50] See *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980) (upholding imposition of a tribal cigarette tax on nontribal purchasers).

[51] See note 14.

[52] This result follows from the reasoning of *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980).

[53] See note 14.

[54] Table entry assumes non-Indian retailer is not located on trust land. See the discussion of *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 651 (2001) in note 22. For retail sales in Indian country, the answer would be yes. This result follows from the reasoning of *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980).

[55] See note 14.

[56] *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989) (tribe may impose severance tax on non-Indian severance of oil and gas from reservation trust land; tribal and state taxing jurisdiction is concurrent); *Mustang Production Co. v. Harrison*, 94 F.3d 1382 (10th Cir. 1996), *cert. denied* 117 S. Ct. 1288 (1997) (tribal taxing authority extends to allotted, nontrust lands in Indian country).

[57] 502 U.S. 251 (1992).

[58] *Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 113 (1998). In the wake of *Cass County*, there has been litigation in both Montana and Michigan to determine whether contrary final decisions by lower courts rendered before *Cass County* continued to bind the local governments (granting property tax exemptions for tribal and individual Indian fee lands) under principles of *res judicata* or other theories. Both courts concluded these earlier decisions did not bind the state taxing authorities for future taxes. *Baraga County v. State Tax Commission*, 645 N.W.2d 13 (Mich. 2002); *Jefferson v. Big Horn County*, 4 P.3d 26 (Mont. 2000).

[59] The Minnesota Supreme Court has also held that the congressional grant of power to tax fee land includes the authority to define what constitutes real property, rather than personal property. *Cogger v. County of Becker*, 690 N.W.2d 739 (Minn. 2005). This issue arose in the context of a mobile home on fee land owned by a tribal member. The court cited no federal authority for this, reaching its conclusion that the power to tax was implicit in the state's sovereign power.

[60] See, e.g., *Thomas v. Gray*, 169 U.S. 264 (1898) (personal property tax on cattle grazing on Indian lands under lease with tribe).

[61] See note 66.

[62] The leading case is generally considered to be *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). *Braker* involved motor vehicle license and fuel use taxes imposed on a contractor doing business with the tribe on the reservation.

[63] *Compare Confederated Tribes of the Chehalis Reservation v. Thurston County Board of Equalization*, 724 F.3d 1153 (9th Cir.) (property tax on permanent improvements owned by private corporation with majority ownership by tribe preempted by federal statute) with *Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457 (2nd Cir. 2013) (personal property tax on gaming machines leased by tribe, which was responsible for paying tax under lease, not preempted).

[64] 25 C.F.R. § 162.017 (effective Jan. 4, 2013). This rule applies to personal property that consists of "permanent improvements on the leased land" or to "activities under a lease conducted on the leased premises" and exempts them from "any fee, tax, assessment, levy or other charge" imposed by a state or local government. However, these provisions are subject to a proviso that they are "Subject only to applicable federal law," which creates some ambiguity as to what effect this will have on preemption analysis either under specific federal statutes or under the general Indian law principles.

[65] This column lists the authority of either the state or its political subdivisions to impose property taxes within Indian country or on tribal property outside of Indian country. In Minnesota, the state tax applies only to commercial-industrial, public utility, and seasonal-recreational properties.

[66] *The New York Indians*, 72 U.S. 761 (1866); *The Kansas Indians*, 72 U.S. 737 (1866) (Indians are immune from state taxation, whether their land is held tribally or in allotments). The federal trust status of these lands also prevents state taxation.

[67] See note 66.

[68] This power flows from the tribe's authority to tax its own members. *See* note 14. Because ownership of trust land is in the federal government, the tax would need to be imposed on the members' beneficial interest in the allotted trust land. The tribe would be unable to enforce the tax by imposing a lien on the real property. The tax would be similar to the property tax that Minnesota imposes on private leasehold interests on federal lands. *See, e.g.*, Minn. Stat. §§ 272.01, subd. 2; 273.19 (2002).

[69] *Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103 (1998), held that fee lands, whether owned by the tribe or individual members, are generally subject to state ad valorem property taxes. Minnesota law contains a statutory exemption for Indian lands. This issue was not raised or litigated in *Cass County*. Minn. Stat. § 272.01, subd. 1, provides that "All real and personal property in this state * * * is taxable, except Indian lands * * *." The exact scope of this statutory exemption is not clear; the most plausible interpretation is that it means tribal and individual allotments of trust lands. It is possible that individual treaties or federal laws may provide property tax exemptions for fee land that is alienable, however.

[70] See note 69.

[71] A tribe can likely tax fee land within the boundaries of its reservation, if a tribal member owns the land and jurisdiction to tax can, thus, be based on tribal membership.

[72] Although there is no definitive U.S. Supreme Court case, it seems unlikely that a tribe can tax fee lands owned by a nonmember. Recent Supreme Court cases clearly imply that the authority to tax nonmembers on fee land is limited. Two nontax cases state that tribes' civil authority (e.g., to regulate or adjudicate) over nonmember conduct on non-Indian fee land "exists only in limited circumstances." *Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997) (tribal court had no jurisdiction to adjudicate tort suit arising out of incident involving two nonmembers on a public highway that the Court concluded was fee land because an easement had been granted by the tribe to the state); *Montana v. United States*, 450 U.S. 544 (1981) (tribe did not have authority to regulate hunting and fishing by nonmembers on non-Indian fee land). In 2001, the Supreme Court extended this principle to limit the authority to impose sales tax on nonmembers on fee lands within the boundaries of the reservation. *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 651 (2001). The Court described the tribe's power to tax nonmembers as "sharply circumscribed." *Id.* at 650. At least one lower federal court has applied this principle to proscribe a tribal property tax on fee lands owned by nonmembers. *Big Horn County Electric Coop., Inc. v. Adams*, 219 F.3d 944 (9th Cir. 2000) (public utility property tax, easements granted over trust land to utility held to be fee lands, following *Strate* rule). Under *Montana* and *Atkinson Trading Co.*, the Court has held that taxation may be justified if one of two conditions is met: (1) the nonmember has a consensual relationship with the tribe or its member or (2) when the conduct threatens or has some direct effect upon "the political integrity, the economic security, or the health or welfare of the tribe." *Atkinson Trading Co. v. Shirley*, 532 U.S. at 651. Neither of these exceptions seems likely to have much application to property taxation of fee lands, given the narrow way in which the Court has described them. The Court has said the consensual relationship must have some nexus to the tax itself. *Id.* at 656. The hotel's status as an Indian trader in *Atkinson Trading Co.* did not satisfy the criterion. Nor did it matter in *Big Horn Electric* that half of the public utility's customers were tribal members or that the tribe had granted the easement for the power lines. *Big Horn County Electric Coop., Inc. v. Adams*, 219 F.3d at 948, 951. With regard to the second

exemption, it is not clear how it will be applied in the context of taxation. In *Atkinson Trading Co.* it did not matter that the hotel and trading operation was a very large part of the reservation economy (employing 100 tribal members). The Court was concerned that allowing an exception for taxation because it is "necessary" to self-government would, in effect, allow the exception to swallow the general rule. *Atkinson Trading Co. v. Shirley*, 532 U.S. at 657, note 12. The *Big Horn County Electric* court was unpersuaded by the claim that eliminating the tax would "irreparably" harm the tribe's treasury and ability to provide services. It felt the tribe was free to enact a different tax that complied with *Montana*. *Big Horn County Electric Coop., Inc. v. Adams*, 219 F.3d at 951. It seems likely that circumstances in which a tribal property tax can be applied to fee lands owned by nonmembers are very limited, perhaps nonexistent.

[73] See note 72.

[74] See note 72.

[75] The county has not received final notice of the trust transfer, but the tribe has stopped paying taxes on the property. The casino had a taxable market value of $20,560,200 for the 2005 assessment. It is not clear how comparable this amount is to the 2004 tax-exempt abstract values. If it were added to the 2004 exempt value and removed from the taxable value, Mahnomen County's percentage would rise to 27.37 percent.

[76] The federal law formally authorizing these operations was adopted in 1988. Minnesota compacts were negotiated in 1989 and 1991.

[77] This estimate was prepared by Alan Meister as reported in Minnesota State Lottery, *Gambling in Minnesota*, p. 16 (January 2013). These amounts have been flat for the last several years (the 2006 report showed about the same amount of revenues net of prizes). Thus, it seems safe to conclude that the rapid growth of tribal casino revenues that occurred in the 1990s and early 2000s has ended.

[78] Some local governments have opposed or attempted to delay transfers in trust either administratively (in the BIA processes) or judicially. Two recent cases involve the White Earth Band's transfer of the Shooting Star casino into trust in Mahnomen and the Fond du Lac Band's plan to transfer property next to its casino in Duluth in trust. *White Earth Band of Chippewa Indians v. County of Mahnomen*, 605 F. Supp.2d 1034 (D. Minn. 2009) (detailing administrative efforts by county and state); *City of Duluth v. Fond du Lac Band of Lake Superior Chippewa*, 2013 WL 1500884 (Minn. App. 2013), *review granted* (June 26, 2013).

[79] The payments under this agreement were qualitatively different than the typical in lieu payments made by other tribes. The agreement and the payment under it were more in the nature of a revenue sharing arrangement that was entered into originally (before passage of the federal law authorizing Indian gaming) as a way to provide expanded revenues to the tribal government and economic development in the city of Duluth. It was this revenue sharing element (or joint business venture aspect) of the agreement that ultimately led to its termination by the NIGC as inconsistent with the federal law requirement that tribal governments have the "sole proprietary interest" in gaming operations. As discussed in note 80, these issues are still being litigated by the city. The typical in lieu payment, by contrast, stems from a decision by a tribal government to compensate a city or county for the services it provides to tribal operations.

[80] The band began withholding payments to the city in 2009 and requested the determination by NIGC. The city, in turn, sued the band for breach of contract. Both the federal district court and the court of appeals held that the NIGC action invalidated the contract and effectively ended (prospectively) the requirement of the band to make contractual payments to the city. *City of Duluth v. Fond du Lac Band of Lake Superior Chippewa*, 702 F.3d 1147 (8th Cir. 2013). Whether the city is entitled to all or part of the payments the band withheld between 2009 (when the band started withholding payments) and 2011 (when the court invalidated the agreement) remains to be resolved by the district court. According to newspaper reports, the city is now suing the NIGC in federal court, challenging its action. John Meyers, "Duluth sues National Indian Gaming Commission," *Duluth News Tribune* (Jan. 28, 2013), available at: http://www.twincities.com/ci_22689243/duluth-sues-national-indian-gaming-commission (last accessed Oct. 3, 2013).

[81] Laws 2001, 1st spec. sess., ch. 5, art. 7, § 5, codified at Minn. Stat. § 270.60, subd. 5 (2001 Suppl.).

[82] Laws 2013, ch. 143, art. 5, §§ 10, 11, and 28.

[83] The original aid program was limited to "qualified counties." A county qualified, if it had below-average personal income (80 percent or less than the state average) or if an above-average share of the property in the county (more than 30 percent) was exempt from taxation. Four counties with casinos—Goodhue, Redwood, Scott, and St. Louis—did not meet these criteria. The 1998 Legislature repealed the restriction to qualified counties, allowing payments to be made to any county. Laws 1998, ch. 389, art. 16, § 11. The qualification rules were retained to allocate payments, if the aid payments exceeded the $1.1 million limit on the aid appropriation. In 2002, the legislature completely repealed the limit on the appropriation.

[84] Laws 2003, 1st spec. sess., ch 21, art. 9, § 3, now codified as Minn. Stat. § 270C.19, subd. 4, para. (a), cl. (2).

Health and Human Services for Indians

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Chemical Dependency Treatment

The state Department of Human Services may enter into agreements with federally recognized tribal units to pay for chemical dependency treatment services and provide prevention, education, training, and community awareness programs.[1] An American Indian Advisory Council assists the agency in formulating policies and procedures relating to chemical dependency and the abuse of alcohol and other drugs by Indians.[2]

Civil Commitment

Commitment by Tribal Court. A special provision in Minnesota's Civil Commitment Act authorizes contracts between the Commissioner of Human Services and the federal Indian Health Service, so that individuals committed as mentally ill, developmentally disabled, or chemically dependent by a tribal court of the Red Lake Band of Chippewa Indians or the White Earth Band of Chippewa Indians can be admitted to regional treatment centers for treatment. The act guarantees individuals all of the patient rights under Minnesota Statutes, section 253B.03. In addition, the law requires that the commitment procedure utilized by the tribal court provide due process protections for proposed patients, similar to those under the state's civil commitment laws.[3]

Minnesota Sex Offender Program. Courts have jurisdiction to civilly commit tribal members for treatment as a sexually dangerous person or a sexual psychopath.[4] The legal decisions that surround civil commitment of American Indians in Minnesota are discussed on page 33.

Health Grants

Health Care Programs. Indians are eligible for the Medical Assistance (MA), General Assistance Medical Care (GAMC), and MinnesotaCare programs, if they meet income, asset, and other eligibility requirements. State law governing these programs contains several provisions specific to the delivery of health care services to Indians.

- **Child and teen checkups.** The Department of Human Services is allowed to contract with federally recognized Indian tribes to provide child and teen checkup administrative services under MA.[5]

- **Facility reimbursement.** Indian Health Service facilities and health care facilities operated by a tribe or tribal organization funded under the Indian Self-Determination and Education Assistance Act (Pub. L. 93-638) are reimbursed for inpatient hospital services

at rates set by the Indian Health Service, rather than at the MA rate. These facilities have the option of being reimbursed at the Indian Health Service rate, rather than the MA rate, for outpatient health care services.[6]

- **Prepaid health care.** Indians enrolled in the Prepaid Medical Assistance Program (PMAP) or county-based purchasing are allowed to receive services on a fee-for-service basis from Indian Health Service facilities and health care facilities operated by a tribe or tribal organization.[7]

- **Provider participation.** Health care professionals credentialed by a federally recognized Indian tribe to provide health care services to its members within a Minnesota reservation are classified as vendors of medical care for purposes of participating in the MA program.[8]

- **Premium and cost-sharing protection.** Indians receiving services under MA as employed persons with disabilities are exempt from paying premiums. Indians are also exempt from paying premiums under the MinnesotaCare program. In addition, Indians are exempt from paying deductibles, coinsurance, copayments, and other cost-sharing for MA services received from: an Indian health care provider; an Indian tribe, tribal organization, or urban Indian organization; or from a provider of contracted health services. MA payment to these providers cannot be reduced by the amount of any cost-sharing.[9] These provisions are required by the American Recovery and Reinvestment Act (ARRA) of 2009 (Public Law 111-5).

- **Exemption of certain property from assets.** Certain Indian-specific property is excluded from assets when determining MA eligibility for Indians, as required under the ARRA. This property includes that which is connected to the political relationship between the tribes and federal government, and property with unique religious, spiritual, traditional, or cultural significance.[10]

- **Exemption from estate recovery.** Certain income, resources, and property are exempted from MA estate recovery from Indians. These include, but are not limited to, ownership interests in trust or nontrust property located on or near reservations, and ownership interests or usage rights that have unique religious, spiritual, traditional, or cultural significance.[11]

Grants to Eliminate Health Disparities. The Department of Health administers a grant program to reduce health disparities between American Indians and populations of color, as compared with whites. Some grant funding must be awarded to American Indian tribal governments for community interventions to reduce disparities in certain priority areas including immunization rates for adults and children; infant mortality rates; and morbidity and mortality rates from breast and cervical cancers, HIV/AIDS and sexually transmitted diseases, diabetes, and accidental injuries and violence. In addition, the commissioner must consult with the Indian Affairs Council and tribal governments in developing and implementing a plan to reduce health disparities in the targeted areas, and in determining the effectiveness of the program in reducing health disparities.[12]

Indian Health Grants. The Department of Health is authorized to provide grants to community health boards to establish, operate, or subsidize health clinics and services, in order to provide health care services to Indians residing off of reservations.[13]

Affordable Care Act. The Affordable Care Act (Public Law 111-148 and related amendments) contains a number of provisions that specifically affect Indians. These include, but are not limited to:

(1) an exemption from the financial penalty for failure to obtain and maintain certain minimum health coverage[14]; and

(2) for Indians purchasing individual health coverage through an exchange, an exemption from cost-sharing for persons with incomes that do not exceed 300 percent of federal poverty guidelines (FPG).[15]

Local Public Health Grants. An amount specified in statute is available to tribal governments for certain public health activities, including maternal and child health programs and emergency preparedness.[16]

Health-Related Occupations: Licensing Exceptions

State law exempts members of certain health-related occupations from specified state licensure requirements if they practice according to standards established by tribes and penalties under tribal jurisdiction. Alcohol and drug counselors who are licensed to practice alcohol and drug counseling according to standards established by federally recognized tribes and are practicing under tribal jurisdiction are exempt from state licensing requirements, but they are afforded the same rights and responsibilities as counselors licensed by the state.[17] Licensure is voluntary for social workers who are members of the ethnic population served and are employed by federally recognized tribes.[18] Licensure is also voluntary for marriage and family therapists who are employed by federally recognized tribes and are members of the ethnic population served.[19]

Indian Elders

The Minnesota Board on Aging maintains an Indian elder position for the purpose of coordinating efforts with the National Indian Council on Aging and working toward development of a comprehensive statewide service system for Indian elders.[20]

Ombudsperson for Families

Legislation passed in 1991 established an ombudsperson's office to operate independently from, but in collaboration with, the Indian Affairs Council. The ombudsperson for families is specifically charged with the duty of monitoring state and local agency compliance with all laws governing child protection and placement, as they affect children of color.[21]

Welfare Reform

Federal. Federal welfare reform legislation enacted in 1996 (Pub. L. 104-193) replaced Aid to Families with Dependent Children (AFDC) with a block grant program for states called Temporary Assistance for Needy Families (TANF). Under this legislation, federally recognized Indian tribes are eligible to apply to the United States Department of Health and Human Services to create and administer welfare programs under the TANF block grant. If a tribal plan is approved, tribes receive federal funds out of the state's federal TANF block grant allocation to implement separate tribal TANF programs. In structuring a separate TANF program, tribes have the flexibility to establish their own work participation rates and time limits for receipt of benefits, which may differ from the federal requirements with which states must comply.

State. In 1997, Minnesota enacted welfare reform legislation to implement the TANF requirements. Minnesota's program is the Minnesota Family Investment Program (MFIP). One provision of the MFIP legislation requires county governments to cooperate with tribal governments in implementing MFIP.[22] Another provision of the legislation authorizes the Commissioner of Human Services to enter into agreements with tribal governments to provide employment services.[23] One Minnesota tribe, the Mille Lacs Band of Ojibwe, applied for and received federal approval to operate a separate tribal TANF program. The program began operating January 1, 1999, in a six-county area covering Aitkin, Crow Wing, Morrison, Benton, Mille Lacs, and Pine counties. It serves TANF-eligible families where one or more of the eligible adults is a member of the band. In 2005 the Mille Lacs Band expanded the tribal TANF program to enrolled members of the Minnesota Chippewa tribes who reside in Hennepin, Ramsey, and Anoka counties. The Tribal TANF program has different income guidelines for participants than the county programs.

Indian Child Welfare Laws

The Federal Indian Child Welfare Act. In 1978, Congress passed the federal Indian Child Welfare Act (ICWA).[24] The statute creates federal requirements that state courts must follow in the placement of Indian children in nonparental custody, whether the placement is voluntary or involuntary on the part of the parents. The act covers foster care placement, termination of parental rights, preadoptive placement, the adoption of Indian children by non-Indians, and status offenses in juvenile delinquency cases. The intent of the act is to preserve the cultural identity of Indian children and to promote the stability and security of Indian tribes and families. The act does not apply to custody disputes between parents, such as in a divorce, though it has been held to apply to intra-family custody disputes between parent and grandparent when all parties are enrolled members of a tribe.[25] The act does not apply to placements for juvenile delinquency where the delinquent act would be a crime if committed by an adult.

The act requires notice to tribes and Indian custodians of an involuntary, covered out-of-home placement of an Indian child. If there is a tribal court, the court may take jurisdiction in the matter.[26] If there is a tribal court and the child lives on the reservation, the matter must be transferred to tribal court. The act also allows that the tribe may intervene in a matter being conducted in state court.

Whether the placement is voluntary or involuntary, the court must find that "active efforts" have been made to keep the child with a parent. This is higher than the "reasonable efforts" standard that applies in cases involving placement of non-Indian children. "Active efforts" have been interpreted to mean a rigorous and concerted level of case work that requires local social service agencies to request the tribal participation at the earliest time possible, to actively solicit the tribes participation throughout the case, use the tribe's prevailing social and cultural values to preserve the Indian child's family and prevent out-of-home placement, and to return the child to the Indian child's family at the earliest possible time if out-of-home placement has occurred.

If a child placement is involuntary, a witness expert in Indian child placement issues must be consulted on the question of possible serious emotional or physical damage to the child from the existing or proposed placement. The burden of proof for involuntary foster care is clear and convincing evidence. The standard of proof for involuntary parental rights termination is "beyond a reasonable doubt," the criminal law standard, which is higher than the standard applied in terminating the parental rights of non-Indians.

Finally, the act contains a preference for placing the child with extended family members, other members of the child's tribe, or other Indian families, if the child cannot remain with a parent. The recent Supreme Court decision in *Adoptive Couple v. Baby Girl* will likely affect how the federal ICWA is implemented. It is unclear how those changes will be applied in Minnesota in conjunction with the Minnesota Indian Family Preservation Act, which requires different and higher standards than the federal ICWA.[27]

Indian Child Protection and Family Violence Prevention Act.[28] This federal law requires reporting and investigating allegations of child abuse and neglect on tribal lands and the completion of background checks on foster families, adoptive families, and other individuals who have contact with Indian children. It also authorizes funding for tribal child abuse prevention and treatment programs.

Fostering Connections to Success and Increasing Adoptions Act.[29] Passed in 2008, this federal law gives tribes the ability to directly access IV-E funds for foster care, adoption assistance, and kinship care assistance programs. It requires state IV-E agencies to work with any tribe that wants to negotiate an agreement with the state agency to administer all or part of its own IV-E program. Currently the Leech Lake, Mille Lacs, Red Lake, and White Earth Bands of Ojibwe have elected to enter into Title IV-E agreements with the State of Minnesota.

The State Indian Family Preservation Act. In 1985, Minnesota adopted a state version of the federal Indian Child Welfare Act, which is known as the Minnesota Indian Family Preservation Act.[30] The state law was intended to call the controlling federal law to the attention of state courts and professionals in child placement proceedings. It also enacted some more stringent requirements than the federal law. For example, the state statute requires notice to the tribe whenever a child covered by the Indian Child Welfare Act is being placed outside the home, not just when the placement is involuntary, as federal law provides. The state law does not allow the courts to determine the applicability of this chapter based on whether an Indian child is part of an existing Indian family or based on the level of contact the child has with the child's Indian tribe,

reservation, or Indian community. The state law provides funding in the form of grants to Indian tribes, Indian organizations, and tribal social services agency programs located off-reservation for various Indian family preservation and child welfare services. The statute allows transfer of cases to tribal court absent good cause to the contrary in termination of parental rights cases and in involuntary foster care cases. A change to the statute in 2013, allows transfer of a juvenile court matter to tribal court in pre-adoptive and adoptive placement cases as well.[31]

Tribal/State Indian Child Welfare Agreement. Negotiated between the 11 tribes and the Minnesota Department of Human Services, this agreement identifies the roles and responsibilities of the tribes and the department in the provision of child welfare services to Indian children and their families. The stated purpose of the agreement is to strengthen implementation of the Indian Child Welfare Act and the Minnesota Indian Family Preservation Act, thereby protecting the interests of Indian children and their families and maintaining the integrity of the child's family and the child's tribal relationship. The agreement applies to all Indian children in Minnesota, whether or not the child's tribe executed the agreement. The agreement was developed to maximize the participation of tribes in decisions regarding Indian children, address barriers to implementing services in child protection matters, and prevent foster placement and non-Indian adoptions. This agreement was signed by the Minnesota Department of Human Services and the 11 tribal governments in 1999, and was amended in 2007.

American Indian Child Welfare Programs.[32] In 2008, the county-based delivery of child welfare services was reformed into a tribal delivery system for Indian children and their families who live on the Leech Lake and White Earth reservations. According to data from the Department of Human Services, the number of out-of-home placements of children who receive services from the tribes has decreased by 19 percent. The tribal programs exceed federal child welfare performance standards for measures related to repeat maltreatment, repeat out-of-home placement, and rate of relative care. Tribal programs provide child welfare services including: child abuse prevention, family preservation, child protection services, foster care, foster care licensing, children's mental health screening, reunification, and customary adoption services.

Tribal/State IV-E Agreements. Title IV-E is a federal entitlement program that provides financial support to states and tribes to prove the quality of foster care and adoption programs. Four Minnesota tribes have negotiated tribal IV-E agreements with the Minnesota Department of Human Services: Leech Lake, White Earth, Mille Lacs, and Red Lake Bands of Ojibwe. These agreements replace the individual county and tribal out-of-home placement supervision agreements and apply statewide. The Title IV-E agreement must be in effect before tribes and counties can access federal reimbursement for costs associated with managing a foster care program for children who are in the custody of the tribal social services agency. Eligible costs include administrative costs, training, and out-of-home placement costs.

Indian Child Welfare Grants.[33] The Commissioner of Human Services has statutory authority to provide grants to tribal social service agencies and other organizations to support tribal child welfare programs, including prevention, reunification, and legal services. Services provided through these grants include: child welfare and mental health services for families; early intervention and family engagement; foster home and adoptive placement resource development; family reunification services; and court advocacy.

ENDNOTES

[1] Minn. Stat. §§ 254A.031; 254B.09, subd. 2.

[2] Minn. Stat. § 254A.035.

[3] Minn. Stat. § 253B.212.

[4] *Beaulieu v. Minnesota Dep't of Human Services*, 825 N.W.2d 716 (Minn. 2013); *In re Civil Commitment of Johnson*, 800 N.W.2d 134 (Minn. 2011).

[5] These services are also known as early and periodic screening, diagnosis, and treatment services (EPSDT). Minn. Stat. § 256B.04, subd. 1b.

[6] Minn. Stat. §§ 256.969, subd. 16; 256B.0625, subd. 34.

[7] Minn. Stat. § 256B.69, subd. 26.

[8] Minn. Stat. § 256B.02, subd. 7.

[9] Minn. Stat. §§ 256B.057, subd. 9; 256L.15, subd. 1.

[10] See CMS, memo to state Medicaid directors, "ARRA Protections for Indians in Medicaid and CHIP," January 22, 2010.

[11] See CMS, memo to state Medicaid directors, "ARRA Protections for Indians in Medicaid and CHIP," January 22, 2010.

[12] Minn. Stat. § 145.928.

[13] Minn. Stat. § 145A.14, subd. 2.

[14] Pub. L. No. 111-148 and 111-152, Consolidated Print, § 5000A (e).

[15] Pub. L. No. 111-148 and 111-152, Consolidated Print, § 1402 (d).

[16] Minn. Stat. § 145A.14, subd. 2a.

[17] Minn. Stat. § 148F.11, subd. 3.

[18] Minn. Stat. § 148E.065, subds. 5 and 5a.

[19] Minn. Stat. § 148B.38, subd. 3.

[20] Minn. Stat. § 256.975, subd. 6.

[21] Minn. Stat. §§ 257.0755 to 257.0769.

[22] Minn. Stat. § 256J.315.

[23] Minn. Stat. § 256J.645.

[24] 25 U.S.C. §§ 1901 to 1963.

[25] *In re Custody of A.K.H.*, 502 N.W.2d 790 (Minn. App. 1993), *rev. denied* (1993).

[26] *Nebraska v. Elise M.*, no. 12-1278 was appealed to the U.S. Supreme Court and the petition for a writ of certiorari was denied. The Nebraska Supreme Court ruled that foster care placement and termination of parental rights can be considered distinct proceedings, termination of parental rights proceedings are not necessarily an advanced stage of the case, and the best interest of the child is not a factor in determining whether or not there is good cause to deny a motion to transfer a case to tribal court

[27] *Adoptive Couple v. Baby Girl*, 133 S.Ct. 2552 (2013).

[28] 25 USC § 3202.

[29] Pub. L. No. 110-351 (2008).

[30] Minn. Stat. §§ 260.751 to 260.835.

[31] Laws 2013, ch. 65; Minn. Stat. § 260.771, subd. 3.

[32] Minn. Stat. § 256.01, subd. 14b.

[33] Minn. Stat. § 260.785.

Education Laws Affecting Indian Students

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Most American Indian students in Minnesota attend public schools. There were 18,944 kindergarten, elementary, and secondary American Indian students, or 2.2 percent of the total student population, enrolled in Minnesota's K-12 public schools in the 2012-2013 school year. One-third of these American Indian students attend public school in the seven-county metropolitan area and two-thirds of the students attend public school in out-state Minnesota. American Indian students also attend: federally funded tribal schools located on the Fond du Lac, Mille Lacs, White Earth, and Leech Lake reservations; charter schools; and nonpublic schools.[1]

School Districts with the Highest Concentration of American Indian Students – 2012-2013 School Year

Rank	District	American Indian Students	Total Students	Percent American Indian	% of Total American Indian Student Population
1	Bemidji Regional Interdistrict Council	24	24	100.0%	0.1%
2	Red Lake Public School District	1,364	1,365	99.9	7.0
3	Pine Point Public School District	52	53	98.1	0.3
4	Nett Lake Public School District	77	79	97.5	0.4
5	Cass Lake-Bena Public School District	1,024	1,131	90.5	5.3
6	Waubun-Ogema-White Earth Public School District	416	554	75.1	2.1
7	Mahnomen Public School District	465	655	71.0	2.4

Source: Minnesota Department of Education

Charter Schools with the Highest Concentration of American Indian Students – 2012-2013 School Year

Rank	District	Geographic District	American Indian Students	Total Students	% of American Indian Students
1	Oshki Ogimaag Charter School	Cook County	28	34	82.4%
2	Naytahwaush Community School	Mahnomen	96	119	80.7
3	Minisinaakwaang Leadership Academy	McGregor	18	23	78.3
4	Voyageurs Expeditionary	Bemidji	37	67	55.2

Source: Minnesota Department of Education

K-12 American Indian Education Programs

American Indian Education Act of 1988.[2] The Minnesota Legislature passed this law in order to provide American Indian people with education programs that meet their unique education needs. To that end, the act encourages districts and schools to provide elementary and secondary language and cultural education programs that include: instruction in American Indian language, literature, history, and culture; staff support components; research projects examining effective communication methods; personal and vocational counseling; modified curriculum, instruction, and administrative procedures; and cooperative arrangements with alternative schools that integrate American Indian culture into their curricula.

The act directs the Board of Teaching to grant to eligible individuals teaching licenses in American Indian language and cultural education. Districts may seek exemptions from the licensing requirement if compliance would make it difficult to hire qualified teachers. The act requires districts and schools that provide a language and cultural education program to try to hire persons who share the culture of the American Indian children enrolled in the program. American Indian schools and school districts in which there are ten or more enrolled American Indian children must consult with a parent committee regarding curriculum that affects American Indian education and the educational needs of the students.

Under the act, a school district with at least ten enrolled American Indian children may retain an American Indian teacher who is a probationary teacher or who has less seniority than other, non-American Indian teachers the district employs when placing teachers on unrequested leaves of absence.[3]

Pine Point school. The Minnesota Legislature gave the White Earth Reservation Tribal Council control of the K-8 Pine Point public school. The school is to provide American Indian children with a supportive educational environment that integrates Ojibwe culture and history into the school's curriculum and teaching practices. The tribal council has the same powers and duties as a school board. It may cooperate with other school districts to purchase or share education-related services. The school is subject to the same standards for instruction as other public schools. It is eligible to receive federal aids and grants, as well as the same aids, revenues, and grants that local school districts receive.[4]

American Indian language and culture. The state education commissioner must include the contributions of Minnesota's American Indian tribes and communities when reviewing and revising state academic standards.[5] World language and culture programs must encompass indigenous American Indian languages and cultures.[6]

Tribal Nations Education Committee; American Indian Education Director. The state education commissioner must consult with the Tribal Nations Education Committee on all issues related to American Indian education, including the administration of Minnesota's American Indian Education Act of 1988 and other American Indian education programs, American Indian scholarship and postsecondary preparation grant awards, and recommended education policy changes affecting American Indian students.[7] The state education commissioner also must appoint an Indian education director to: serve as a liaison with American Indian tribes and

organizations; evaluate the state of American Indian education in Minnesota; seek advice from the American Indian community and other persons interested in American Indian education on improving the quality of American Indian education in Minnesota; advise the commissioner on American Indian issues; develop a strategic plan and a long-term framework for American Indian education that is updated every five years; and keep the American Indian community informed about the work of the state education department.[8]

State Indian Scholarships and Grants. The legislature appropriates money for American Indian scholarships and grants. The amounts for fiscal years 2014 and 2015 are displayed in the table.

K-12 Indian Education Programs
Fiscal Years 2014 and 2015 Appropriations

Program	Amount	
	2014	**2015**
Indian Scholarships (Minn. Stat. § 136A.126)	$3,100,000	$3,100,000
Tribal College Grants (Minn. Stat. § 136A.1796)	150,000	150,000
Indian Teacher Preparation Grants: Eligible recipients include University of Minnesota at Duluth and Duluth School District No. 709; Bemidji State University and Red Lake School District No. 38; Moorhead State University and one of the school districts located within the White Earth Reservation; and Augsburg College and Minneapolis Special School District No. 1 and St. Paul School District No. 625. (Minn. Stat. § 122A.63)	190,000	190,000
Tribal Contract Schools (Minn. Stat. § 124D.83)	2,080,000	2,230,000
Early Childhood Programs at Tribal Schools (Minn. Stat. § 124D.83, subd. 4	68,000	68,000
Success for the Future Grants (Minn. Stat. § 124D.81)	2,137,000	2,137,000
Total	**7,725,000**	**7,875,000**

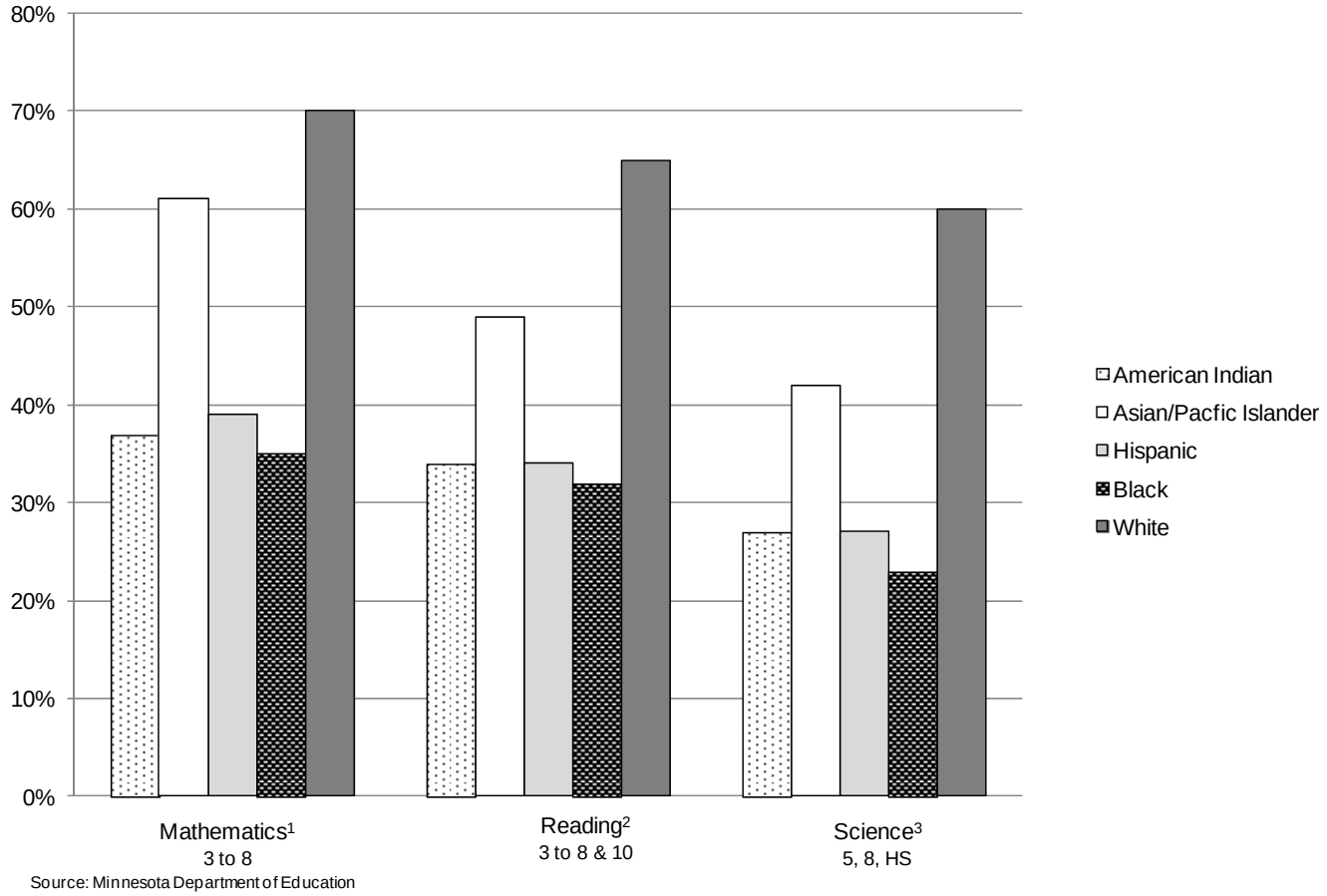
American Indian student achievement. The National Assessment of Educational Progress (NAEP) is a continuing, federally mandated test of what students know and can do in math, reading, science, writing, and other subjects. The National Center for Education Statistics administers the test using a sampling procedure that captures the diversity of U.S. schools and students. NAEP results make possible state and district comparisons of student academic progress over time. NAEP data on student achievement are reported for different demographic groups, including socioeconomic status and race/ethnicity. American Indian students consistently score lower on the NAEP 4th and 8th grade reading and math assessments than the national average for non-Indian students.

NAEP data on American Indian students show a consistent pattern among states: American Indian student achievement decreases as the concentration of American Indian students in the school increases. In addition, concentrated poverty affects student achievement.[9] When there is a high concentration of American Indians in a school, there is often more poverty in the surrounding community.[10] Patterns of concentrated poverty show disparate educational outcomes.[11]

The No Child Left Behind Act (NCLB). The federal No Child Left Behind Act of 2002[12] mandates accountability in public education, among other requirements. Title I, sections 1111-1127, of the act authorize funding[13] to states and school districts to improve basic education programs that help low-achieving students attain their state's academic standards. Title I imposes testing requirements on states and public schools, establishes student proficiency goals, and penalizes public schools and school districts that, among other things, fail to close the achievement gap between identified categories of students, including students who are economically disadvantaged, racial or ethnic minorities, or disabled, or have limited English proficiency. Under Title I, all public school students must demonstrate reading and math proficiency on a statewide assessment by the 2013-2014 school year.

Minnesota Comprehensive Assessment (MCA) testing data generated under Title I enable school districts and schools to show students' educational progress. An overall improvement in Minnesota students' test scores has not significantly reduced the achievement gap between white non-Hispanic students and students of color, nor the disparity in four-year high school graduation rates. The chart below provides the test scores for each ethnicity in math, reading, and science. American Indian students are underrepresented in the Minnesota Postsecondary Enrollment Options program[14] and among Advanced Placement test takers,[15] and a large number of American Indian students qualify for a free or reduced price lunch or special education services.[16]

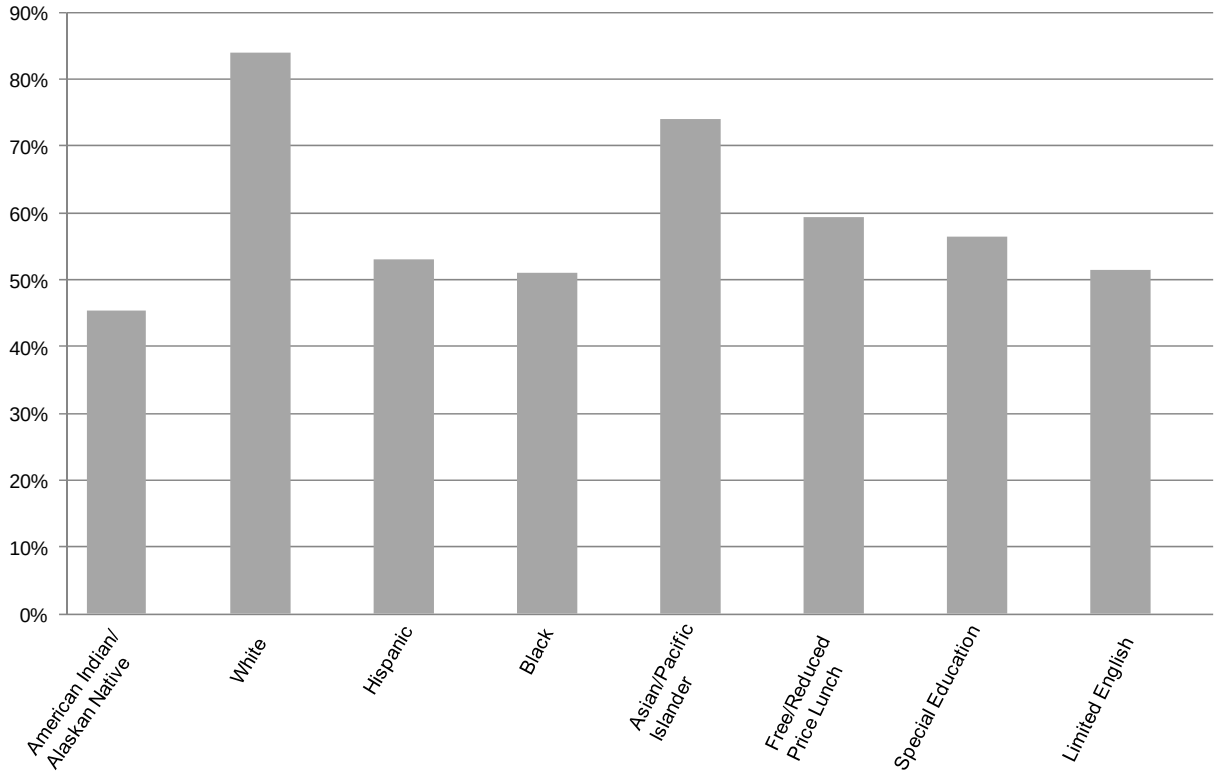
2013 MCA-III Math, Reading, and Science Scores by Ethnicity



Source: Minnesota Department of Education

[1] A new MCA-III mathematics test for grades 3 to 8 was introduced in 2011.
[2] A new MCA-III reading test was introduced in 2013.
[3] A new MCA-III science test was introduced in 2012.

2012 Minnesota Four-Year Graduation Rate by Student Category



Source: Minnesota Department of Education

Career and college readiness. Minnesota students in grade 8 in the 2012-2013 school year and later are subject to new statewide assessments premised on comparable expectations for careers and college readiness and completion rates. These expectations are based on a continuum of empirically derived, clearly defined career and college-ready benchmarks. These benchmarks let students, parents, and teachers know how well students must perform to have a reasonable chance to succeed in a career or college without need for postsecondary remediation.

Other No Child Left Behind Act Programs that serve American Indian students. The English Language Acquisition and Language Enhancement Program (Title III, sections 3001-3304) authorizes formula and discretionary competitive project grants to American Indian tribes, tribally sanctioned educational authorities, and Bureau of Indian Education (BIE)-funded schools to improve American Indian students' fluency in English as a second language and to preserve students' tribal languages in a manner that is consistent with their tribal traditions and cultures.

American Indian Education Act Grants (Title VII, sections 7101-7152) authorize formula and discretionary grants to states, school districts, American Indian tribes, and BIE-funded schools to help meet the unique educational and culturally relevant academic needs of eligible American Indian students and help American Indian students meet challenging academic content and

achievement standards through supplemental and comprehensive programs. The law requires formula grant program applicants to consult with American Indian parents and American Indian parent advisory committees or tribes. The discretionary grants are available for scientifically based and culturally appropriate programs, projects, and activities that improve American Indian students' educational opportunities and level of academic achievement. Professional development grants are available to states, school districts, and American Indian tribes, in cooperation with higher education institutions, to support American Indian teachers, administrators, teacher's aides, social workers, and other educational staff, who must work in schools serving tribal students or repay their training costs.

The Impact Aid program (Title VIII, sections 801-805) authorizes funding for general operating expenditures and school construction costs through the U.S. Department of Education to compensate local school districts for large amounts of nontaxable federal Indian land located within the district. Impact aid recipients must ensure that Indian tribes and parents participate in planning and operating district education programs. The program includes a grievance process that allows American Indian tribes and parents to try to ensure they participate as intended.

BIE-funded Programs and Schools

American Indian students attend public schools, private schools, schools operated by the federal Bureau of Indian Education (BIE), and tribal schools. The BIE, which was established in 2006, operates within the Department of the Interior and is responsible for K-12 and postsecondary schools. Students who attend BIE schools must be members of federally recognized tribes or their descendants and reside on or near federal Indian reservations. Schools funded by the BIE are operated by the BIE or by tribes under contracts or grants. Tribal schools often have low student enrollment rates because fewer students reside in rural communities where many tribal schools are located. The curriculum and educational accountability requirements in BIE-operated schools are the same as those of the state where the BIE schools are located and include requirements under the No Child Left Behind Act and the Individuals with Disabilities Education Act. BIE-operated schools are funded by a weighted funding formula designed to provide additional services to eligible students and annual formula grants from the Department of Education. A study on Indian education conducted through NAEP by the National Center for Education Statistics shows achievement levels for BIE students to be much lower than the general population of American Indian students.[17] In 2012, the Departments of Interior and Education established a memorandum of understanding[18] to facilitate communication between these two agencies in order to promote more effective school reform and support BIE efforts to monitor and enforce compliance with education requirements for which BIE schools receive funding through the Department of Education.

Federal Indian Grants and Contracts

Under the Indian Self-Determination and Education Assistance Act,[19] Indian tribes in Minnesota contracted with the federal government to establish schools on the Leech Lake, White Earth, Fond du Lac, and Mille Lacs Indian Reservations. These schools are designed to provide Indian

students with educational services that are more responsive to the needs and desires of the Indian communities. Under Title VII of the Elementary and Secondary Education Act,[20] the federal government provides grants to local educational agencies and tribal schools for elementary and secondary programs designed to meet the unique needs of Indian students so that the students can achieve the same challenging state performance standards expected of all students. Funding also is available for programs that encourage Indian students to acquire a higher education or reduce the number of Indian elementary and secondary student dropouts and for fellowships to Indian students who demonstrate outstanding academic performance, leadership, and commitment to the Indian community. Under the Public Health and Welfare Act,[21] the federal government assists tribal contract schools with public health services.

Constitutional Issues

Constitutional issues affecting elementary and secondary Indian students and teachers often involve questions of: (1) whether the Equal Protection Clause of the 14th Amendment permits states or school districts to provide preferential treatment to Indians in the form of education or employment-related benefits; and (2) whether a school district's distinction between Indian and non-Indian students is a political or racial classification.

The Equal Protection Clause and preferential treatment of Indians. The U.S. Supreme Court held that federal programs designed to meet Indians' needs may withstand an equal protection challenge[22] so long as the programs are "tied rationally to the fulfillment of Congress's unique obligation toward Indians." The Court rejected claims of racial discrimination arising out of an employment preference for Indians at the BIA.[23] The Court premised its decision on "the unique legal status of Indian tribes under federal law and upon the plenary power of Congress, based on a history of treaties and the assumption of a 'guardian-ward' status, to legislate on behalf of federally recognized Indian tribes." The Court considered the government's preference political in nature because it was "granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities…"

The state allocates benefits to American Indian students in a manner different than that of the federal government. A state, local school district, or school may be providing education or employment-related benefits to Indians in an urban setting where the benefits do not necessarily turn on Indians' tribal relationship.

The Equal Protection Clause and separate Indian education. It is unclear whether an Indian classification that a school or school district uses to provide educational benefits to Indian students is a racial or a political classification under the Equal Protection Clause. In *Booker v. Special School District No. 1,* 351 F.Supp. 799 (D.Minn. 1972), a federal district court found that the Minneapolis School Board, through discretionary decisions, "had acted intentionally to maintain or increase racial segregation in the schools." The court ordered the district to implement a desegregation/integration plan. The school district asked the court to modify its desegregation order, in part by permitting a high concentration of Indian students in one or a limited number of schools. The court denied the board's request, concluding that the district's classification "has nothing to do with tribal membership or any quasi-sovereign interests of

particular tribal groups or reservations." The next section discusses the desegregation rule and the integration revenue statute, which were passed after the *Booker* decision.[24]

Minnesota's School Desegregation/Integration Rule

Certain American Indian students are exempt from the requirements under Minnesota Rules, chapter 3535, governing equal opportunity in schools. The exemption appears to be based on students' political status defined by the federal government's relationship with American Indian tribes or through an agreement with an American Indian tribal government. For purposes of developing a school or school district desegregation plan under the state rules, the definition of segregation does not include a concentration of enrolled American Indian students that (1) exists to meet the students' unique educational needs through federal education programs and (2) is voluntary on the part of the parents or students or both.[25] However, a district containing a racially identifiable school or a racially isolated district must develop a plan to improve integration in the school or district, and must include in the plan programs that provide instruction about different cultures, including options such as American Indian language and culture programs that are uniquely relevant to American Indian students.[26]

Minnesota's integration revenue program,[27] which provided money to certain school districts for integration-related activities beginning in 1997, was repealed in 2011, and is effective for revenue in fiscal year 2014.[28] A 12-member advisory panel was charged with recommending to the legislature how to repurpose the revenue to improve educational outcomes and narrow and close the academic achievement gap. The 2013 Legislature adopted a new achievement and integration program[29] for pursuing racial and economic integration, increasing student achievement, and reducing academic disparities in K-12 public schools. To ensure that the new program and the underlying school desegregation rules conformed, the legislature directed the education commissioner to review the rules for consistency with the new statutory program and, if needed, to recommend rule and statutory amendments.[30] Prospective changes in the substance of the school desegregation rules might affect American Indian students.

Higher Education

Enrollment in postsecondary education. American Indian students are enrolled in all types of postsecondary institutions. The largest number of students are enrolled in the two-year colleges of the Minnesota State Colleges and Universities. According to data collected by the Office of Higher Education, in 2012 students identifying as exclusively American Indian represented 0.98 percent of the total postsecondary enrollment population in Minnesota, below the same statistic collected in 2002 (approximately 1.2 percent).

The U.S. Census Bureau estimates that, of Minnesota residents age 25 or older who identify exclusively as American Indian, approximately 35.5 percent have attended some college or attained an associate degree, 8.7 percent have attained a bachelor's degree, and 3.2 percent have attained a graduate or professional degree.[31]

American Indian Enrollment in Minnesota Postsecondary Institutions*						
	2012	**2011**	**2010**	**2009**	**2008**	**2007**
Minnesota State Colleges and Universities						
Two-Year Colleges	1,355	1,481	1,474	2,180	1,936	1,949
State Universities	351	364	366	637	612	611
University of Minnesota	479	531	600	664	783	767
Private Colleges & Universities	332	348	360	389	375	363
Private Career Schools	709	625	681	670	627	359
Private Career Online Schools**	735	763	734	586	491	371
Private Graduate & Professional	13	11	18	21	24	18
Total Enrollment of American Indians	3,974	4,123	4,233	5,147	4,848	4,438

Source: Minnesota Office of Higher Education

* Federally mandated changes to racial/ethnic data reporting categories, fully implemented across all institutions in 2010, may account for some of the apparent enrollment shifts that appear in these data.

** Private online career schools report only nationwide enrollment statistics. The data in the table reflect reported American Indian enrollment at Capella and Walden universities, both headquartered in Minnesota, but whose enrollment likely includes significant numbers of students from out of state.

Free Tuition at University of Minnesota, Morris

State law[32] requires admission of qualified American Indian students to the Morris campus of the University of Minnesota free of tuition charges and on an equal basis with white students. This requirement dates back to 1909 when Minnesota accepted the Morris Indian school lands from the United States.[33] Under the terms of the transfer, the property must remain a school that admits American Indian students without charge and on the same basis as white students. The Morris school became a campus of the University of Minnesota in 1960. In 1961, the legislature enacted this statutory provision to continue the guarantee of free tuition and equal access for American Indian students.

In the fall of 2012, 281 American Indian students were enrolled at the University of Minnesota, Morris. To be eligible for a tuition waiver, the university requires students to prove they are directly descended from a member of a federally recognized tribe or that the student is personally enrolled in a federally recognized tribe.

Unique Needs and Abilities of American Indian People

State law[34] requires public postsecondary governing boards and institutions to have American Indian advisory committees, recognize student competency in American Indian languages, and recognize competency in American Indian culture when hiring faculty for instructional and noninstructional American Indian courses. Under this law, if ten or more American Indian students make a request, the governing board of the University of Minnesota or the Minnesota State Colleges and Universities must establish an American Indian advisory committee in consultation with tribal representatives. This law also requires public postsecondary institutions to provide opportunities for assessment, placement, or postsecondary credit for students proficient in American Indian languages. Finally, the law allows American Indian individuals who demonstrate knowledge and skills in American Indian language, culture, and history to provide instruction in these subjects.

The regents of the University of Minnesota adopted a board policy requiring each campus of the university that enrolls American Indians to establish an American Indian advisory board. The university offers a bachelor of arts in American Indian studies including a general focus track and a language-focus track. Certificate programs are available for language teaching in the Ojibwe language and the Dakota language. Students who are proficient in a native language can take a foreign language test that, if passed, satisfies two years of college language requirements.

On the Twin Cities campus, first year students with American Indian heritage or interests can apply to live in the American Indian Cultural House, a student-led "living learning community" located on a single floor with a designated residence hall. Activities of the Cultural House are programmed by residents and hall staff, and are designed to facilitate shared American Indian interests and experiences among participating students.

The University of Minnesota Duluth campus offers several academic programs related to American Indian issues, including a master's degree in tribal administration and governance, as well as several related student organizations and centers.

In the Minnesota State Colleges and Universities system (MnSCU), four state universities and six two-year colleges have established an American Indian advisory committee.[35] Fifteen institutions grant world language credit for demonstrated proficiency in an American Indian language. Several colleges and universities within the MnSCU system offer academic programs and student organizations related to the American Indian experience, including a bachelor's degree program in American Indian Studies, at Minnesota State University, Mankato, and certificate programs at multiple community colleges.

Tribal Colleges and Universities

Tribal colleges and universities have been established in various locations nationwide to respond to the higher education needs of American Indians. Three tribally chartered colleges are located in Minnesota.

Name	Location	Established	Chartering Tribe	Accreditation Status
Fond du Lac Tribal and Community College	Cloquet	1987	Fond du Lac Band of Superior Chippewa	Accredited
Leech Lake Tribal College	Cass Lake	1990	Leech Lake Band of Ojibwe Tribal Council	Accredited
White Earth Tribal and Community College	Mahnomen	1997	White Earth Reservation Tribal Council	Accredited; on probationary status as of June 27, 2013

Since 1994, Fond du Lac has been both a tribal college and a community college. The college is jointly governed, through a memorandum of understanding, by a tribal board of directors and the board of trustees of the MnSCU system. Fond du Lac's unique status, dual mission, and joint governance is established in Minnesota law.[36]

Tribal colleges are accredited by regional accreditation agencies and are recognized in federal law. Since 1978, federal law has provided grants and endowment funding for operating and improving tribally controlled colleges and universities.[37] In the Equity in Educational Land-Grant Status Act of 1994, the federal government gave land-grant status to 29 tribal colleges including Fond du Lac and Leech Lake. The federal action provided funding for the tribal colleges in place of the land grants conveyed to the original land-grant colleges under the first Morrill Act.[38]

State Aid Programs for Postsecondary Students and Institutions

American Indian Scholarship. The Office of Higher Education administers the American Indian Scholarship program for Minnesota residents with at least one-quarter Indian ancestry, and who demonstrate sufficient academic progress and financial need. The maximum scholarship amount for an undergraduate student is $4,000 per academic year; the maximum for a graduate student is $6,000 per year.[39]

In 2012-2013, 758 students received Indian scholarship awards, totaling in aggregate $2.38 million.[40] Funding for the scholarship program was increased in the 2014-2015 state budget; a total of $3.1 million will be available in each year to administer the program and make scholarship awards.

The Commissioner of Higher Education is required by law to employ at least one person with demonstrated competence in American Indian culture, residing in or near the city of Bemidji, to assist students with the Indian Scholarship program and other opportunities to obtain financial aid.[41]

Tribal College Supplemental Assistance Grants. In general, the state does not provide direct financial support to tribal colleges. However, in 2013 a Tribal College Supplemental Grant Assistance program was enacted into law. This program provides grants to tribally controlled colleges to defray the costs of education associated with a college's enrollment of students who

are not members of a federally recognized Indian tribe (under current federal law, tribal colleges are not eligible for federal aid to support enrollment of these students).[42]

The maximum award available to a tribal college in 2014-2015 is $5,300 per qualifying full-time equivalent student per year. A total of $150,000 in each year was appropriated to the Office of Higher Education for purposes of awarding the grants.[43]

ENDNOTES

[1] An Update on Indian Education in Minnesota, Dennis W. Olson, Office of Indian Education, Minnesota Department of Education, Minnesota American Indian Education Summit, September 23, 2013, p. 5.

[2] Minn. Stat. §§ 124D.71-124D.82.

[3] Minn. Stat. § 124D.77. This measure may violate either the Equal Protection Clause of the 14th Amendment or Title VII of the Civil Rights Act. Courts may find more acceptable those employment measures that impose a diffuse burden on many individuals, such as hiring goals or affirmative recruitment plans, than measures that impose a heavy burden on a few individuals, such as race-conscious layoffs.

[4] Minn. Stat. § 128B.011.

[5] Minn. Stat. § 120B.021, subd. 4.

[6] Minn. Stat. § 120B.22, subd. 1, para. (b).

[7] Minn. Stat. 2013 Supp. § 124D.79, subd. 4.

[8] Minn. Stat. 2013 Supp. § 124D.791.

[9] Parents' educational backgrounds also may help explain the difference in students' achievement. A smaller percentage of 8th grade American Indian students taking the NAEP reported that at least one parent had some education beyond high school as compared to the percentages of Black, White, and Asian students.

[10] Striving to Achieve: Helping Native American Students to Achieve - The National Caucus of Native American State Legislators 2008, pp. 18-19.

[11] Students eligible for free and reduced-price lunch have consistently lower NAEP scores than do students who are not eligible for free and reduced-price lunch.

[12] No Child Left Behind Act of 2001, Pub. L. No. 107-110.

[13] Title I is the single largest source of federal education funding. Funding is distributed based upon the number of low-income families residing in a school district.

[14] High school students who participate in the Minnesota Postsecondary Enrollment Options program and earn college credit without having to pay college tuition and fees have a financial advantage.

[15] According to the College Board, American Indian students in Minnesota took 0.4 percent of Advanced Placement exams in the 2011-2012 school year.

[16] Minnesota Minority Education Partnership 2012 State of Students of Color report, page 3, citing Minnesota Department of Education data showing 22.6 percent of American Indian students qualify for special education and 71.6 percent qualify for free and reduced price lunch.

[17] National Center for Education Statistics, National Indian Education Study 2011 (NCES 2012-466) (Washington, D.C.: Institute of Education Sciences, U.S. Department of Education, 2012).

[18] The MOU was required by Executive Order 13592, Improving American Indian and Alaska Native Educational Opportunities and Strengthening Tribal Colleges and Universities, signed by President Obama on December 2, 2011.

[19] 25 U.S.C. § 450 *et seq.*

[20] 20 U.S.C. § 7401 *et seq*.

[21] 42 U.S.C. § 2004b.

[22] An equal protection challenge arises when a government's action distinguishes between groups of people based upon a group's characteristics. Courts use one of two legal standards to decide whether the distinction, or "classification," is constitutionally permissible: a "compelling state interest" standard that triggers strict judicial scrutiny and places a heavy burden on a government to justify a classification; and a "rational basis" standard that places a lesser burden on government.

[23] *Morton v. Mancari*, 417 U.S. 535 (1974).

[24] Minn. Rules, parts 3535.0100 to 3535.0180, and Minn. Stat. § 124D.86.

[25] Minn. Rules, part 3535.0110, subp. 9, para. B.

[26] Minn. Rules, parts 3535.0160, subp. 3, para. B; and 3535.0170, subp. 6.

[27] Minn. Stat. § 124D.86.

[28] Laws 2011, 1st Spec. Sess., ch. 11, art. 2 § 51, para. (d).

[29] Laws 2013, ch. 116, art. 3, §§ 29, 30, and 35.

[30] Laws 2013, ch. 116, art. 3, § 32.

[31] U.S. Census Bureau, 2009-2011, American Community Survey.

[32] Minn. Stat. § 137.16.

[33] Laws 1909, ch. 184.

[34] Minn. Stat. § 135A.12.

[35] The MnSCU campuses with American Indian advisory committees are Hibbing Community College, Itasca Community College, Minnesota State Community and Technical Colleges, Minnesota State University, Mankato, Minnesota State University, Moorhead, Northland Community and Technical College, Southwest Minnesota State University, and St. Cloud State University.

[36] Minn. Stat. § 136F.12.

[37] 25 U.S.C. §§ 1801-1852.

[38] 7 U.S.C. § 301 note.

[39] Minn. Stat. § 136A.126.

[40] Data reported as of April 22, 2013.

[41] Laws 2013, ch. 99, art. 1, § 3, subd. 7.

[42] Minn. Stat. § 136A.1796.

[43] Laws 2013, ch. 99, art. 1, § 3, subd. 8.

Appendices

Appendix I

Population of American Indian and Alaska Native Persons

American Indian and Alaska Native Persons 2010 Minnesota and County Populations				
County	Total Population	American Indian or Alaskan Native Population, Alone or in Combination	% of Population that is American Indian or Alaskan Native	Share of Total MN Indian Population
Aitkin	16,202	516	3.2%	0.5%
Anoka	32,504	3,259	10.0%	3.2%
Becker	44,442	10,074	22.7%	9.9%
Beltrami	38,451	344	0.9%	0.3%
Benton	32,504	3,259	10.0%	3.2%
Big Stone	5,269	38	0.7%	0.0%
Blue Earth	64,013	415	0.6%	0.4%
Brown	25,893	61	0.2%	0.1%
Carlton	35,386	2,711	7.7%	2.7%
Carver	91,042	536	0.6%	0.5%
Cass	28,567	3,676	12.9%	3.6%
Chippewa	12,441	198	1.6%	0.2%
Chisago	53,887	601	1.1%	0.6%
Clay	58,999	1,310	2.2%	1.3%
Clearwater	8,695	995	11.4%	1.0%
Cook	5,176	533	10.3%	0.5%
Cottonwood	11,687	72	0.6%	0.1%
Crow Wing	62,500	977	1.6%	1.0%
Dakota	398,552	4,196	1.1%	4.1%
Dodge	20,087	138	0.7%	0.1%
Douglas	36,009	230	0.6%	0.2%
Faribault	14,553	106	0.7%	0.1%
Fillmore	20,866	80	0.4%	0.1%
Freeborn	31,255	190	0.6%	0.2%
Goodhue	46,183	796	1.7%	0.8%
Grant	6,018	42	0.7%	0.0%
Hennepin	1,152,425	21,106	1.8%	20.7%
Houston	19,027	94	0.5%	0.1%

County	Total Population	American Indian or Alaskan Native Population, Alone or in Combination	% of Population that is American Indian or Alaskan Native	Share of Total MN Indian Population
Hubbard	20,428	798	3.9%	0.8%
Isanti	37,816	472	1.2%	0.5%
Itasca	45,058	2,223	4.9%	2.2%
Jackson	10,266	46	0.4%	0.0%
Kanabec	16,239	239	1.5%	0.2%
Kandiyohi	42,239	297	0.7%	0.3%
Kittson	4,552	12	0.3%	0.0%
Koochiching	13,311	487	3.7%	0.5%
Lac qui Parle	7,259	37	0.5%	0.0%
Lake	10,866	136	1.3%	0.1%
Lake of the Woods	4,045	86	2.1%	0.1%
Le Sueur	27,703	200	0.7%	0.2%
Lincoln	5,896	24	0.4%	0.0%
Lyon	25,857	224	0.9%	0.2%
Mahnomen	36,651	187	0.5%	0.2%
Marshall	9,439	88	0.9%	0.1%
Martin	20,840	98	0.5%	0.1%
McLeod	23,300	98	0.4%	0.1%
Meeker	26,097	1,870	7.2%	1.8%
Mille Lacs	9,439	88	0.9%	0.1%
Morrison	33,198	264	0.8%	0.3%
Mower	39,163	241	0.6%	0.2%
Murray	8,725	42	0.5%	0.0%
Nicollet	32,727	242	0.7%	0.2%
Nobles	21,378	190	0.9%	0.2%
Norman	6,852	229	3.3%	0.2%
Olmsted	144,248	926	0.6%	0.9%
Otter Tail	57,303	624	1.1%	0.6%
Pennington	13,930	352	2.5%	0.3%
Pine	29,750	1,231	4.1%	1.2%
Pipestone	9,596	207	2.2%	0.2%
Polk	31,600	836	2.6%	0.8%
Pope	10,995	71	0.6%	0.1%
Ramsey	508,640	9,267	1.8%	9.1%
Red Lake	4,089	87	2.1%	0.1%

County	Total Population	American Indian or Alaskan Native Population, Alone or in Combination	% of Population that is American Indian or Alaskan Native	Share of Total MN Indian Population
Redwood	16,059	1,019	6.3%	1.0%
Renville	15,730	171	1.1%	0.2%
Rice	64,142	527	0.8%	0.5%
Rock	9,687	70	0.7%	0.1%
Roseau	15,629	322	2.1%	0.3%
St. Louis	200,226	6,938	3.5%	6.8%
Scott	129,928	1,908	1.5%	1.9%
Sherburne	88,499	944	1.1%	0.9%
Sibley	15,226	80	0.5%	0.1%
Stearns	150,642	1,041	0.7%	1.0%
Steele	36,576	212	0.6%	0.2%
Stevens	9,726	192	2.0%	0.2%
Swift	9,783	74	0.8%	0.1%
Todd	24,895	222	0.9%	0.2%
Traverse	3,558	171	4.8%	0.2%
Wabasha	21,676	111	0.5%	0.1%
Wadena	13,843	195	1.4%	0.2%
Waseca	19,136	210	1.1%	0.2%
Washington	238,136	2,353	1.0%	2.3%
Watonwan	11,211	71	0.6%	0.1%
Wilkin	6,576	102	1.6%	0.1%
Winona	51,461	309	0.6%	0.3%
Wright	124,700	920	0.7%	0.9%
Yellow Medicine	10,438	394	3.8%	0.4%
State Total	5,303,925	101,900	1.9%	100.0%

Source: US Census Bureau; Decennial Census 2010; American Factfinder, Generated July 2013.

Appendix II

Demographic and Other Information about Minnesota's Indian Reservations

This appendix includes information and certain demographic data about Minnesota's 12 federally recognized Indian reservations. Following is a brief description of certain terms and concepts used in this appendix.

Note: Maps of reservations on the following pages are from the U.S. Census Bureau, using federal definitions of American Indian areas. These census maps do not align with legal definitions of reservation boundaries and are used in this report as geographic illustrations.

Minnesota Chippewa Tribe Member: Indicates whether the reservation is a member of the Minnesota Chippewa Tribe. The Minnesota Chippewa Tribe is a federally recognized tribal government that provides certain services and technical assistance to its six member reservations— Bois Forte, Fond du Lac, Grand Portage, Leech Lake, Mille Lacs, and White Earth. The Red Lake reservation is not included as a member reservation.

Adjacent County: Lists the counties in which the reservation is located.

Tribal Enrollment: Enrollment numbers are subject to frequent change due to deaths, births, new enrollments, and relinquishments of tribal memberships. The numbers presented represent the most accurate count available at the time of publication. House Research collected enrollment numbers via direct phone contact with the enrollment offices of each tribe during August and September of 2013. In some cases, tribes were unable to provide an exact number of enrolled members, but instead gave approximate estimates of their current enrollment. Because the House Research Department was unable to directly gather an enrollment numbers for the White Earth and Grand Portage bands of Chippewa, it used numbers provided by the Minnesota Chippewa Tribe.

Tribal Land/Individual Land/Government Land: Lists acreage information received from the Bureau of Indian Affairs (BIA) Midwest Regional Office in September 2013. The BIA collected acreage data from the Trust Asset and Accounting Management System.

Top Three Industries Employing Residents: Lists the three industries employing the largest

numbers of reservation residents. Percentages reflect the percent of the civilian workforce ages 16 and older employed in a given industry. These percentages include all residents of the reservation, not just enrolled members of the tribe.

Tribal Governance: Lists basic information on the tribal governance structure, as well as contact information for important tribal leaders. Information was collected directly from tribe websites and the 2012 BIA tribal leader directory.

Demographic Information: Provides information from the 2010 Decennial Census and the U.S. Census Bureau's 2007 to 2011 American Community Survey (ACS) about a reservation, the counties adjacent to the reservation, and the state, including:

- *Population and Percent American Indian:* The total population for the geographical area; the American Indian and Alaska Native population for the geographical area, alone or in combination with another race; the percentage of the geographical area's population represented by the American Indian population, and the percentage of the statewide total population of American Indians. Age and race/ethnicity data are from the 2010 Decennial Census.

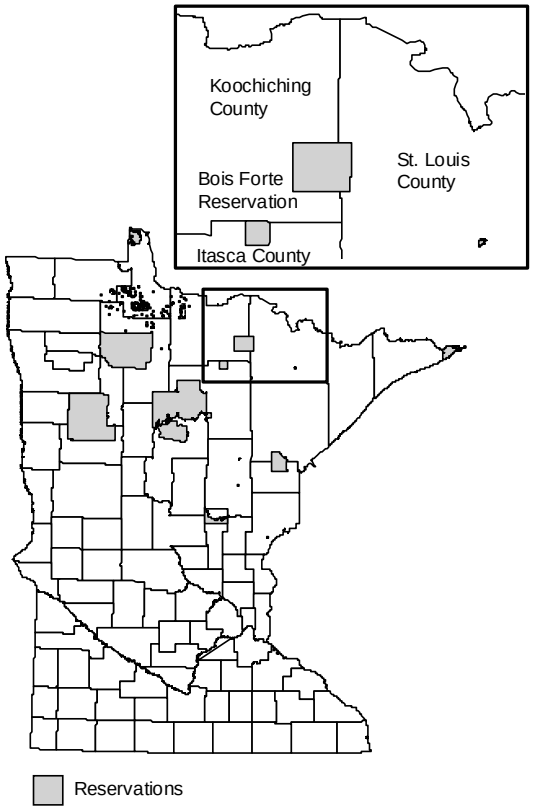
- *Age:* Data on the age of the geographical area's population. Age data from the 2010 Decennial Census.

- *Economic and Income Data:* The median household income, the per capita income, the percentage of the population experiencing poverty status within the last 12 months, and the percentage of the population receiving public assistance in the last 12 months. Economic and income data are from the U.S. Census Bureau's ACS, specifically five-year pooled data from 2007 to 2011. Percentages reported are taken out of the ACS estimate of the population, rather than the reported Decennial Census population.

- *Labor:* Includes the percentage of the population aged 16 and older in the civilian labor force, the percentage of the civilian labor force that is employed, and the percentage of the labor force that is unemployed. Labor data are from the ACS five-year pooled sample, 2007 to 2011. Employed and unemployed percentages display the percent of the workforce that is employed and unemployed, and do not account for the population that is not part of the civilian workforce.

- *Education:* Information about the educational attainment of the population age 25 and over in each geographical area, including the percentage of the population with no high school diploma, a high school diploma only, some college with no degree or an associate degree, and a bachelor's or graduate degree. Data are from the ACS five-year pooled sample, 2007 to 2011.

Bois Forte



(Nett Lake)

Minnesota Chippewa Tribe Member

Bois Forte Tribal Government – Nett Lake
5344 Lakeshore Drive
Nett Lake, MN 55772
218-757-3261 or 800-221-8129
218-757-3312 (Fax)
www.boisforte.com

Adjacent Counties: Itasca, Koochiching, and St. Louis counties

Nearby Cities*:* Big Falls, Cook, Little Fork

Tribal Enrollment (2013): 3,385

Tribal Land: 29,116.25 acres

Individual Land*:* 11,924.57 acres

***Government Land*:** 0 acres

Casino: Fortune Bay Resort Casino
1430 Bois Forte Road
Tower, Minnesota 55790
800-992-7529
www.fortunebay.com/index.php

Top Three Industries on Reservation: Education, health care, and social services (29.6 percent); arts, entertainment, recreation, accommodation, and food services (27.0 percent); public administration (10.3 percent).

Tribal Governance: Governed by five-member tribal council.

Tribal Chair (Term expires June 30, 2016):
Kevin Leecy
kevin.leecy@boisforte-nsn.gov
Phone: 218-757-3261

Demographics of Bois Forte Reservation and Surrounding Areas

Population

	Population	Individuals Identifying as American Indian Alone or in Combination	% of Population Identifying as American Indian	% of Statewide American Indian Population
Bois Forte	874	635	72.7%	0.6%
Adjacent Counties	258,595	9,648	6.8%	6.8%
State	5,303,925	101,900	1.9%	100.0%

Age

	% Population Under Age 18	% Population Age 18 to 64	% Population Age 65 and Over
Bois Forte	32.6%	87.4%	12.6%
Adjacent Counties	20.2%	63.2%	16.6%
State	24.2%	62.9%	12.9%

Income

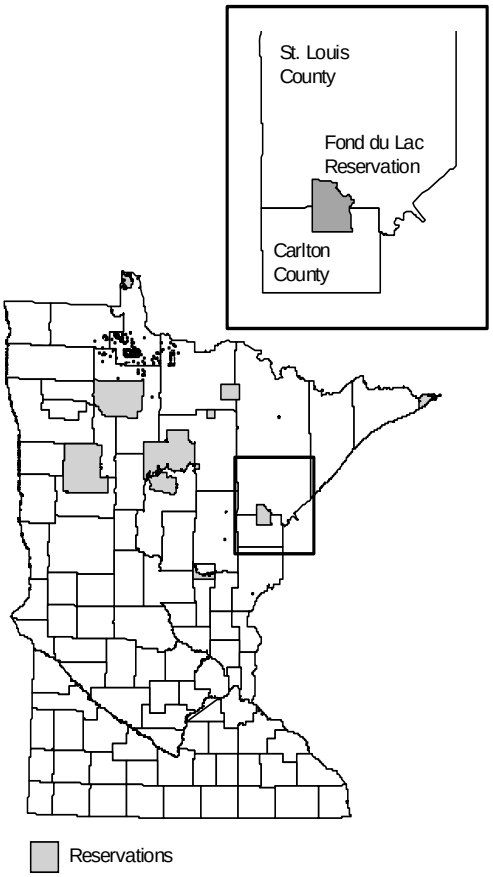
	Median Household Income	Per Capita Income	% Individuals in Poverty Status (last 12 months)	% Receiving Public Assistance (last 12 months)
Bois Forte	$40,417	$20,938	17.6%	6.1%
Adjacent Counties	$44,546	$24,827	15.0%	10.4%
State	$58,476	$30,310	11.0%	3.3%

Labor

	% Population Age 16 and Over in Civilian Labor Force	% Labor Force Employed	% Labor Force Unemployed
Bois Forte	62.7%	82.8%	17.2%
Adjacent Counties	61.9%	91.5%	8.5%
State	70.8%	93.1%	6.9%

Education

	% Population Age 25 and Over – No High School Diploma	% Population Age 25 and Over – High School Graduate Only	% Population Age 25 and Over – Some College or Associate Degree	% Population Age 25 and Over – Bachelor's or Graduate Degree
Bois Forte	20.5%	40.5%	25.9%	13.2%
Adjacent Counties	7.7%	31.3%	36.8%	24.2%
State	8.4%	27.5%	32.3%	31.8%



Fond du Lac

Minnesota Chippewa Tribe Member

1720 Big Lake Road
Cloquet, MN 55720
218-879-4593
218-879-4146 (Fax)
www.fdlrez.com

Adjacent Counties: Carlton and St. Louis counties

Nearby Cities: Cloquet and Duluth

Tribal Enrollment (2013): 4,212

Tribal Land: 11,072.38 acres

Individual Land: 15,982.33 acres

***Government Land*:** 44.6 acres

Casinos:

Black Bear Casino
1785 Highway 210, P.O. Box 777
Carlton, MN 55718
888-771-0777
218-878-2327
www.blackbearcasinohotel.com

Fond du-Luth Casino
129 East Superior Street
Duluth, MN 55802
800-873-0280
218-722-0280
www.fondduluthcasino.com

Top Three Industries on Reservation: Education, health care, and social services (20.0 percent); arts, entertainment, recreation, accommodation and food services (16.9 percent); manufacturing (12.6 percent).

Tribal Governance: Governed by five-member tribal council consisting of three regional representatives, a chairperson, and a secretary treasurer. Tribal council members are elected to staggered four-year terms.

Tribal Chairwoman (Term expires June 30, 2016):
Karen R. Diver
218-879-4593
karendiver@fdlrez.com

Demographics of Fond Du Lac Reservation and Surrounding Areas

Population

	Population	Individuals Identifying as American Indian Alone or in Combination	% of Population Identifying as American Indian	% of Statewide American Indian Population
Fond du Lac	4,250	1,872	44.0%	1.8%
Adjacent Counties	235,612	9,649	9.5%	9.5%
State	5,303,925	101,900	1.9%	100.0%

Age

	% Population Under Age 18	% Population Age 18 to 64	% Population Age 65 and Over
Fond du Lac	28.4%	60.1%	11.6%
Adjacent Counties	20.3%	63.9%	15.8%
State	24.2%	62.9%	12.9%

Income

	Median Household Income	Per Capita Income	% Individuals in Poverty Status (last 12 months)	% Receiving Public Assistance (last 12 months)
Fond du Lac	$42,210	$20,282	22.4%	4.8%
Adjacent Counties	$49,476	$25,197	15.3%	4.0%
State	$58,476	$30,310	11.0%	3.3%

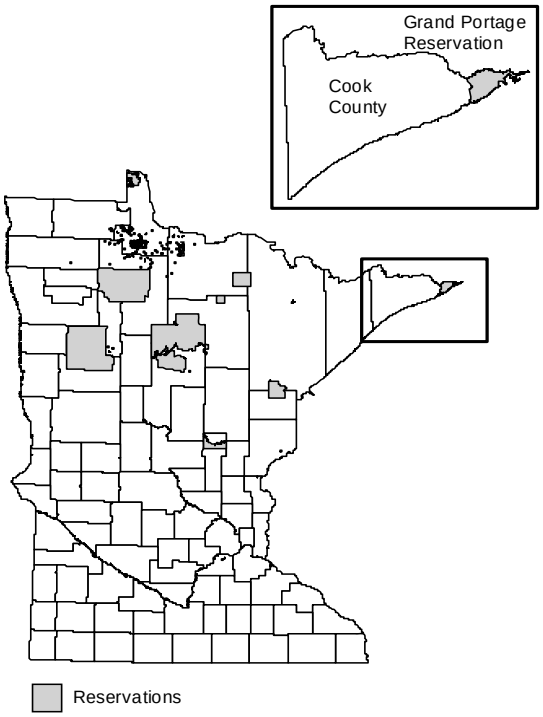
Labor

	% Population Age 16 and Over in Civilian Labor Force	% Labor Force Employed	% Labor Force Unemployed
Fond du Lac	64.0%	54.9%	14.1%
Adjacent Counties	62.6%	57.5%	5.1%
State	70.8%	93.1%	6.9%

Education

	% Population Age 25 and Over – No High School Diploma	% Population Age 25 and Over – High School Graduate Only	% Population Age 25 and Over – Some College or Associate Degree	% Population Age 25 and Over – Bachelor's or Graduate Degree
Fond du Lac	12.0%	34.8%	40.0%	13.2%
Adjacent Counties	7.7%	30.6%	36.7%	25.0%
State	8.4%	27.5%	32.3%	31.8%

Grand Portage



Minnesota Chippewa Tribe Member

Post Office Box 428
Grand Portage, MN 55605
218-475-2277
218-475-2284 (Fax)
www.grandportage.com/community.php

Adjacent County: Cook County

Nearby City: Grand Marais

Tribal Enrollment (2013): 1,112

Tribal Land: 39,274.34 acres

Individual Land: 6,575.52 acres

***Government Land*:** 81.5 acres

Casino: Grand Portage Lodge and Casino
P.O. Box 233
Grand Portage, MN 55605
800-543-1384
218-475-2401
www.grandportage.com

Top Three Industries on Reservation: Arts, entertainment, recreation, accommodation, and food services (24.3 percent); education, health, and social services (16.5 percent); retail trade (16.5 percent)

Tribal Governance: Governed by five-member tribal council consisting of a chairman, a vice chairman, a secretary treasurer, and two at-large members. Enrolled members of the Grand Portage Band of Lake Superior Chippewa elect half of the members of the tribal council every two years, with council members serving four-year terms.

Tribal Chairwoman (Term expires June 30, 2016):
Norman DesChampe
218-475-2277
norman@grandportage.com

Demographics of Grand Portage Reservation and Surrounding Areas

Population

	Population	Individuals Identifying as American Indian Alone or in Combination	% of Population Identifying as American Indian	% of Statewide American Indian Population
Grand Portage	565	394	69.7%	0.4%
Adjacent Counties	5,176	533	0.5%	0.5%
State	5,303,925	101,900	1.9%	100.0%

Age

	% Population Under Age 18	% Population Age 18 to 64	% Population Age 65 and Over
Grand Portage	23.2%	66.7%	10.1%
Adjacent Counties	16.8%	62.9%	20.3%
State	24.2%	62.9%	12.9%

Income

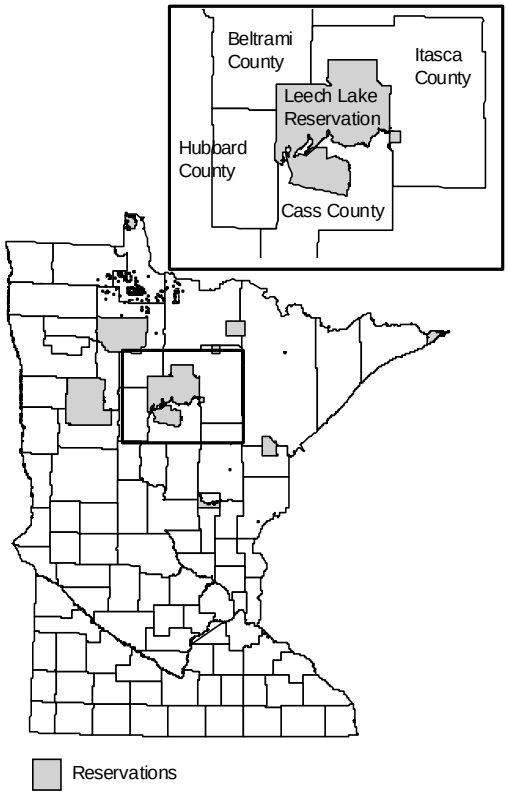
	Median Household Income	Per Capita Income	% Individuals in Poverty Status (last 12 months)	% Receiving Public Assistance (last 12 months)
Grand Portage	$37,292	$21,386	14.4%	3.2%
Adjacent Counties	$49,496	$30,501	9.1%	1.9%
State	$58,476	$30,310	11.0%	3.3%

Labor

	% Population Age 16 and Over in Civilian Labor Force	% Labor Force Employed	% Labor Force Unemployed
Grand Portage	75.1%	71.4%	4.9%
Adjacent Counties	65.5%	61.3%	6.4%
State	70.8%	93.1%	6.9%

Education

	% Population Age 25 and Over – No High School Diploma	% Population Age 25 and Over – High School Graduate Only	% Population Age 25 and Over – Some College or Associate Degree	% Population Age 25 and Over – Bachelor's or Graduate Degree
Grand Portage	19.1%	39.4%	30.6%	10.9%
Adjacent Counties	6.7%	26.9%	29.7%	34.4%
State	8.4%	27.5%	32.3%	31.8%



Leech Lake

Minnesota Chippewa Tribe Member

115 Sixth Street NW
Cass Lake, MN 56633
218-335-8200
218-335-8309 (Fax)
www.llojibwe.com

Adjacent Counties: Beltrami, Cass, Hubbard, and Itasca counties

Nearby Cities: Bemidji, Deer River, Grand Rapids, Walker

***Tribal Enrollment (2013*)**: 9,378

Tribal Land: 14,855.02 acres

Individual Land: 12,252.11 acres

***Government Land*:** 140 acres

Casinos: Northern Lights Casino
6800 Y Frontage Road NW
Walker, MN 56484
800-252-7529

Palace Casino Hotel
6280 Upper Cass Frontage Road NW
Cass Lake, MN 56633
877-972-5223

White Oak Casino
45830 U.S. Highway 2
Deer River, MN 56636
800-653-2412
www.whiteoakcasino.com

Top Three Industries on Reservation: Education, health, and social services (24.4 percent); arts, entertainment, recreation, accommodation, and food services (23.1 percent); retail trade (9.7 percent)

Tribal College:
Leech Lake Tribal College
Cass Lake (Cass County)

Tribal Governance: Governed by five-member Reservation Business Committee (commonly referred to as Reservation Tribal Council), composed of a tribal chair, secretary/treasurer, and three regional representatives.

Tribal Chairwoman (Term expires June 30, 2016):
Carri Jones
218-335-8200
carri.jones@llbo.org

Demographics of Leech Lake Reservation and Surrounding Areas

Population

	Population	Individuals Identifying as American Indian Alone or in Combination	% of Population Identifying as American Indian	% of Statewide American Indian Population
Leech Lake	10,666	5,124	48.0%	5.0%
Adjacent Counties	138,495	16,771	16.5%	16.5%
State	5,303,925	101,900	1.9%	100.0%

Age

	% Population Under Age 18	% Population Age 18 to 64	% Population Age 65 and Over
Leech Lake	27.8%	56.7%	15.5%
Adjacent Counties	22.8%	59.4%	17.8%
State	24.2%	62.9%	12.9%

Income

	Median Household Income	Per Capita Income	% Individuals in Poverty Status (last 12 months)	% Receiving Public Assistance (last 12 months)
Leech Lake	$37,196	$19,225	22.7%	9.3%
Adjacent Counties	$44,968	$23,865	14.9%	4.8%
State	$58,476	$30,310	11.0%	3.3%

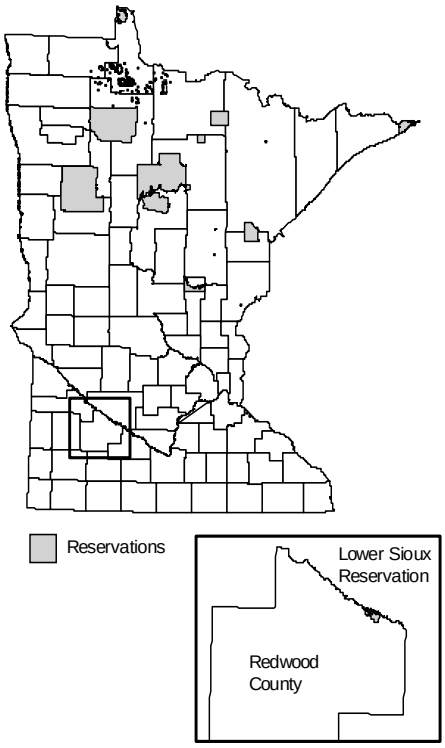
Labor

	% Population Age 16 and Over in Civilian Labor Force	% Labor Force Employed	% Labor Force Unemployed
Leech Lake	58.4%	50.7%	7.7%
Adjacent Counties	61.2%	55.5%	5.7%
State	70.8%	93.1%	6.9%

Education

	% Population Age 25 and Over – No High School Diploma	% Population Age 25 and Over – High School Graduate Only	% Population Age 25 and Over – Some College or Associate Degree	% Population Age 25 and Over – Bachelor's or Graduate Degree
Leech Lake	11.2%	34.9%	35.8%	18.1%
Adjacent Counties	9.1%	32.2%	35.3%	23.4%
State	8.4%	27.5%	32.3%	31.8%

Lower Sioux



39527 RES Highway 1
P.O. Box 308
Morton, MN 56270
507-697-6185
507-697-6110 (Fax)
www.lowersioux.com

Adjacent County: Redwood and Renville counties

Nearby City: Redwood Falls

Tribal Enrollment (2013): Approx. 850

Tribal Land: 1,729.62 acres

Individual Land: 0 acres

***Government Land*:** 0 acres

Casino: Jackpot Junction Casino Hotel
39375 County Highway 24
Post Office Box 420
Morton, MN 56270
800-946-2274 or (507) 697-8000
www.jackpotjunction.com

Top Three Industries on Reservation: Arts, entertainment, recreation, accommodation, and food services (46.5 percent); education, health, and social services (15.1 percent); public administration (10.5 percent)

Tribal Governance: Governed by the five-member community council of the Lower Sioux Reservation, composed of a president, vice president, secretary, treasurer, and assistant secretary/treasurer. Voters elect either two or three members of the council every two years. The community council is responsible for electing from its membership the positions of president, vice-president, etc.

Tribal President (Term expires June 30, 2015):
Denny Prescott
507-697-6185
Denny.Prescott@lowersioux.com

Demographics of Lower Sioux Reservation and Surrounding Areas

Population

	Population	Individuals Identifying as American Indian Alone or in Combination	% of Population Identifying as American Indian	% of Statewide American Indian Population
Lower Sioux	419	384	91.6%	0.4%
Adjacent Counties	31,789	1,190	1.2%	1.2%
State	5,303,925	101,900	1.9%	100.0%

Age

	% Population Under Age 18	% Population Age 18 to 64	% Population Age 65 and Over
Lower Sioux	27.8%	56.7%	15.5%
Adjacent Counties	22.8%	59.4%	17.8%
State	24.2%	62.9%	12.9%

Income

	Median Household Income	Per Capita Income	% Individuals in Poverty Status (last 12 months)	% Receiving Public Assistance (last 12 months)
Lower Sioux	$50,625	$17,187	42.0%	0.0%
Adjacent Counties	$46,797	$24,406	10.7%	2.3%
State	$58,476	$30,310	11.0%	3.3%

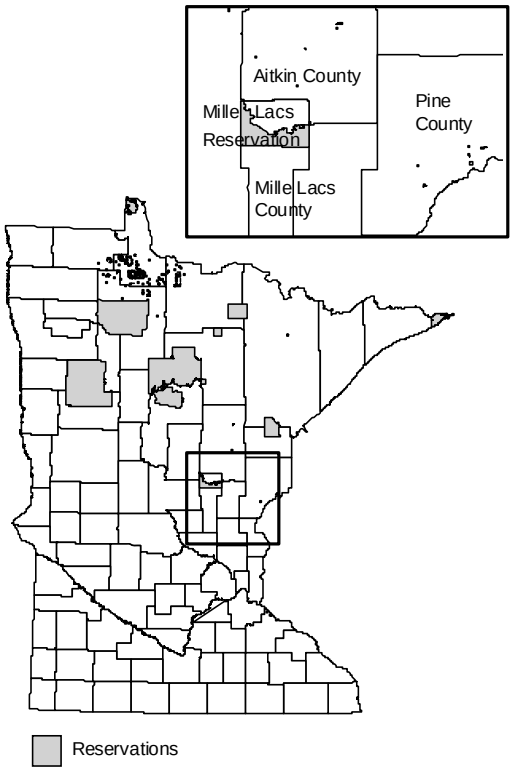
Labor

	% Population Age 16 and Over in Civilian Labor Force	% Labor Force Employed	% Labor Force Unemployed
Lower Sioux	35.9%	59.7%	40.3%
Adjacent Counties	65.7%	62.1%	5.4%
State	70.8%	93.1%	6.9%

Education

	% Population Age 25 and Over – No High School Diploma	% Population Age 25 and Over – High School Graduate Only	% Population Age 25 and Over – Some College or Associate Degree	% Population Age 25 and Over – Bachelor's or Graduate Degree
Lower Sioux	46.7%	33.0%	13.4%	6.9%
Adjacent Counties	12.5%	39.1%	32.2%	16.1%
State	8.4%	27.5%	32.3%	31.8%

Mille Lacs



Minnesota Chippewa Tribe Member

43408 Oodena Drive
Onamia, MN 56359
320-532-4181
320-532-7505 (Fax)
www.millelacsojibwe.org

Adjacent Counties: Aitkin, Crow Wing, Kanabec, Mille Lacs, Morrison and Pine counties

Nearby Cities: Brainerd, Onamia

Tribal Enrollment (2013): 4,418

Tribal Land: 4,369.27 acres

Individual Land: 136.47 acres

***Government Land*:** 0 acres

Casinos: Grand Casino Hinckley
777 Lady Luck Drive
Hinckley, MN 55037
800-472-6321
www.grandcasinomn.com

Grand Casino Mille Lacs
777 Grand Avenue
Onamia, MN 56359
800-626-5825
www.grandcasinomn.com

Top Three Industries on Reservation: Arts, entertainment, recreation, accommodation, and food services (16.7 percent); education, health, and social services (25.3 percent); manufacturing (11.3 percent)

Tribal Governance: Separation of powers system featuring an executive branch led by a chief executive and a legislative branch called the Band Assembly. The Band Assembly is composed of a secretary/treasurer, who serves as the assembly speaker, and three district representatives. The chief executive, secretary/treasurer, and district representatives are elected to four-year terms.

Chief Executive (Term expires June 30, 2016):
Melanie Benjamin
Melanie.benjamin@millelacsband.com
320-532-4181

Demographics of Mille Lacs Reservation and Surrounding Areas

Population

	Population	Individuals Identifying as American Indian Alone or in Combination	% of Population Identifying as American Indian	% of Statewide American Indian Population
Mille Lacs	4,907	1,726	35.2%	1.7%
Adjacent Counties	183,986	5,097	5.0%	5.0%
State	5,303,925	101,900	1.9%	100.0%

Age

	% Population Under Age 18	% Population Age 18 to 64	% Population Age 65 and Over
Mille Lacs	27.1%	53.1%	19.8%
Adjacent Counties	23.1%	58.9%	17.9%
State	24.2%	62.9%	12.9%

Income

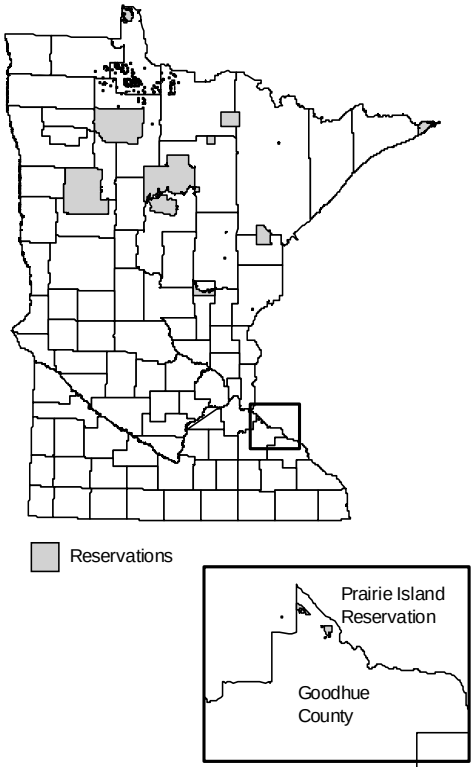
	Median Household Income	Per Capita Income	% Individuals in Poverty Status (last 12 months)	% Receiving Public Assistance (last 12 months)
Mille Lacs	$34,375	$18,784	22.7%	4.9%
Adjacent Counties	$45,329	$26,367	13.0%	3.5%
State	$58,476	$30,310	11.0%	3.3%

Labor

	% Population Age 16 and Over in Civilian Labor Force	% Labor Force Employed	% Labor Force Unemployed
Mille Lacs	58.2%	85.8%	14.2%
Adjacent Counties	63.6%	57.6%	9.1%
State	70.8%	93.1%	6.9%

Education

	% Population Age 25 and Over – No High School Diploma	% Population Age 25 and Over – High School Graduate Only	% Population Age 25 and Over – Some College or Associate Degree	% Population Age 25 and Over – Bachelor's or Graduate Degree
Mille Lacs	15.7%	39.0%	33.5%	11.9%
Adjacent Counties	11.1%	37.6%	34.4%	16.9%
State	8.4%	27.5%	32.3%	31.8%



Prairie Island

5636 Sturgeon Lake Road
Welch, MN 55089
800-554-5473
651-385-2554
651-267-4180 (Fax)
www.prairieisland.org

Adjacent County: Goodhue County

Nearby City: Red Wing

Tribal Enrollment (2013): Approx. 850

Tribal Land: 2,601.36 acres

Individual Land: 0 acres

***Government Land*:** 0 acres

Casino: Treasure Island Resort and Casino
5734 Sturgeon Lake Road
Welch, MN 55089
800-222-7077
www.treasureislandcasino.com

Top Three Industries on Reservation: Construction (48.6 percent); public administration (25.7 percent); retail trade (8.6 percent)

***Tribal Governance*:** Five-member tribal council composed of president, vice president, secretary, treasurer, and assistant secretary-treasurer. Council members are elected every two years to serve two-year terms. Elections were held in November 2013, with new council members sworn in December 2013.

Tribal President (Term expires December 2015):
Ron Johnson

Inquiries for council members should be directed through the tribal council's administrative assistant, Deborah McCoy, 651-267-4062.

Demographics of Prairie Island Reservation and Surrounding Areas

Population

	Population	Individuals Identifying as American Indian Alone or in Combination	% of Population Identifying as American Indian	% of Statewide American Indian Population
Prairie Island	217	178	82.0%	0.2%
Adjacent Counties	46,183	796	0.8%	0.8%
State	5,303,925	101,900	1.9%	100.0%

Age

	% Population Under Age 18	% Population Age 18 to 64	% Population Age 65 and Over
Prairie Island	30.0%	60.4%	9.7%
Adjacent Counties	23.7%	59.8%	16.4%
State	24.2%	62.9%	12.9%

Income

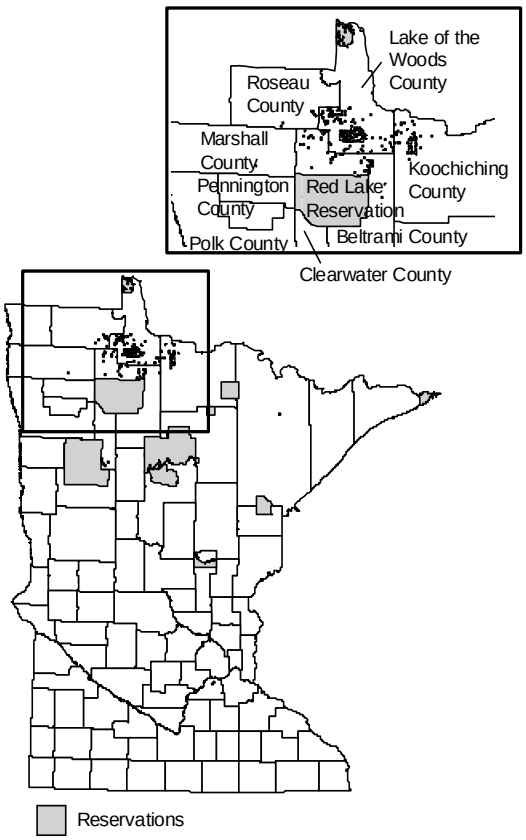
	Median Household Income	Per Capita Income	% Individuals in Poverty Status (last 12 months)	% Receiving Public Assistance (last 12 months)
Prairie Island	$103,542	$37,785	37.8%	0.0%
Adjacent Counties	$56,099	$27,996	8.2%	1.6%
State	$58,476	$30,310	11.0%	3.3%

Labor

	% Population Age 16 and Over in Civilian Labor Force	% Labor Force Employed	% Labor Force Unemployed
Prairie Island	17.7%	89.7%	10.3%
Adjacent Counties	70.1%	93.9%	6.1%
State	70.8%	93.1%	6.9%

Education

	% Population Age 25 and Over – No High School Diploma	% Population Age 25 and Over – High School Graduate Only	% Population Age 25 and Over – Some College or Associate Degree	% Population Age 25 and Over – Bachelor's or Graduate Degree
Prairie Island	17.7%	45.8%	31.3%	5.2%
Adjacent Counties	9.0%	33.0%	35.8%	22.2%
State	8.4%	27.5%	32.3%	31.8%



Red Lake

Post Office Box 550
Red Lake, MN 56671
218-679-3341
218-679-3378 (Fax)

Adjacent Counties: Beltrami, Clearwater, Koochiching, Lake of the Woods, Marshall, Pennington, Polk, and Roseau counties

Nearby Cities: Bemidji, Thief River Falls

Tribal Enrollment (2013): 11,441

Tribal Land: 806,698.49 acres

Individual Land: 0 acres

***Government Land*:** 0 acres

Casinos:

Seven Clans Red Lake Casino and Bingo
10200 Hwy. 89
Red Lake, MN 56671
888-679-2501
www.sevenclanscasino.com/red_lake

Seven Clans Thief River Falls Casino
20595 Center Street East
Thief River Falls, MN 56701
800-881-0712
www.sevenclanscasino.com/thief_river_falls

Seven Clans Warroad Casino
1012 East Lake Street
Warroad, MN 56763
800-815-8293
www.sevenclanscasino.com/warroad

Top Three Industries on Reservation: Education, health, and social services (29.6 percent); arts, entertainment, recreation, accommodation, and food services (27.0 percent); public administration (10.3 percent)

Tribal Governance: Governed by an 11-member tribal council, consisting of two representatives from each of the four main communities on the reservation and three members elected at large. Seven hereditary chiefs, descendents of past leaders of the tribe, serve lifetime appointments as advisors to the tribal council.

Current Tribal President:
Floyd "Buck" Jourdain
Floydjourdain2@hotmail.com
218-679-3341

Demographics of Red Lake Reservation and Surrounding Areas

Population

	Population	Individuals Identifying as American Indian Alone or in Combination	% of Population Identifying as American Indian	% of Statewide American Indian Population
Red Lake	5,896	5,805	98.5%	5.7%
Adjacent Counties	141,091	13,240	13.0%	13.0%
State	5,303,925	101,900	1.9%	100.0%

Age

	% Population Under Age 18	% Population Age 18 to 64	% Population Age 65 and Over
Red Lake	38.2%	55.2%	6.6%
Adjacent Counties	24.1%	60.5%	14.0%
State	24.2%	62.9%	12.9%

Income

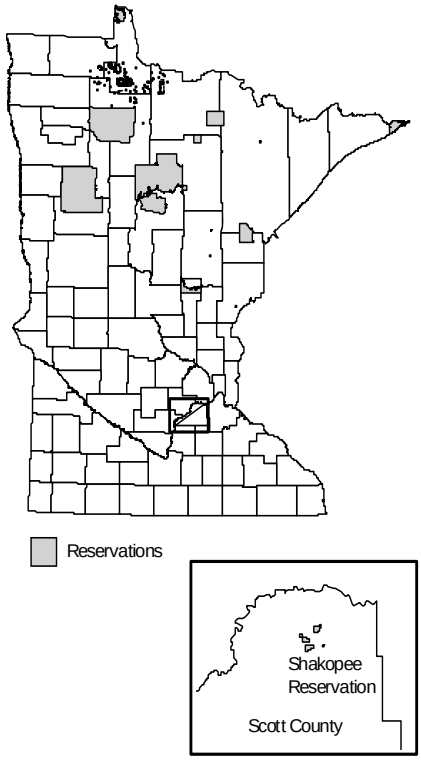
	Median Household Income	Per Capita Income	% Individuals in Poverty Status (last 12 months)	% Receiving Public Assistance (last 12 months)
Red Lake	$30,990	$10,544	43.8%	29.0%
Adjacent Counties	$45,038	$23,878	14.6%	4.7%
State	$58,476	$30,310	11.0%	3.3%

Labor

	% Population Age 16 and Over in Civilian Labor Force	% Labor Force Employed	% Labor Force Unemployed
Red Lake	61.3%	74.9%	25.1%
Adjacent Counties	66.4%	95.3%	7.1%
State	70.8%	93.1%	6.9%

Education

	% Population Age 25 and Over – No High School Diploma	% Population Age 25 and Over – High School Graduate Only	% Population Age 25 and Over – Some College or Associate Degree	% Population Age 25 and Over – Bachelor's or Graduate Degree
Red Lake	23.9%	33.1%	35.3%	7.6%
Adjacent Counties	11.8%	33.1%	33.9%	21.3%
State	8.4%	27.5%	32.3%	31.8%



Shakopee-Mdewakanton

2330 Sioux Trail NW
Prior Lake, MN 55372
952-445-8900
952-445-8906 (Fax)
www.shakopeedakota.org

Adjacent County: Scott County

Nearby City: Shakopee

Tribal Enrollment (2013): Approx. 500

Tribal Land: 1,797.39 acres

Individual Land: 0 acres

***Government Land*:** 0 acres

Casinos: Little Six Casino
2450 Sioux Trail NW
Prior Lake, MN 55372
952-445-6000
www.littlesixcasino.com

Mystic Lake Casino Hotel
2400 Mystic Lake Boulevard
Prior Lake, MN 55372
952-445-9000
800-262-7799

Top Three Industries on Reservation: Manufacturing (31 percent); professional, scientific, management, administrative and waste management (16.7 percent); other services (14.3 percent)

Tribal Governance: Governed by a General Council and Business Council. All enrolled members of the tribe 18 years and older are members of the General Council, which elects the Business Council every four years. The Business Council is responsible for day-to-day governance of the tribe and for implementing the wishes of the General Council. The Business Council consists of a chairman, vice chairman, and secretary/treasurer.

Tribe Chairman (Term expires January 16, 2016):
Charlie Vig

To contact Business Council members, contact Laurie Tolzmann: laurie.tolzmann@shakopeedakota.org, or 952-496-6109.

Demographics of Shakopee-Mdewakanton Reservation and Surrounding Areas

Population

	Population	Individuals Identifying as American Indian Alone or in Combination	% of Population Identifying as American Indian	% of Statewide American Indian Population
Shak.-Mdwktn.	658	406	61.7%	0.4%
Adjacent Counties	129,928	1,908	1.9%	1.9%
State	5,303,925	101,900	1.9%	100.0%

Age

	% Population Under Age 18	% Population Age 18 to 64	% Population Age 65 and Over
Shak.-Mdwktn.	27.5%	53.3%	19.1%
Adjacent Counties	30.2%	62.1%	7.7%
State	24.2%	62.9%	12.9%

Income

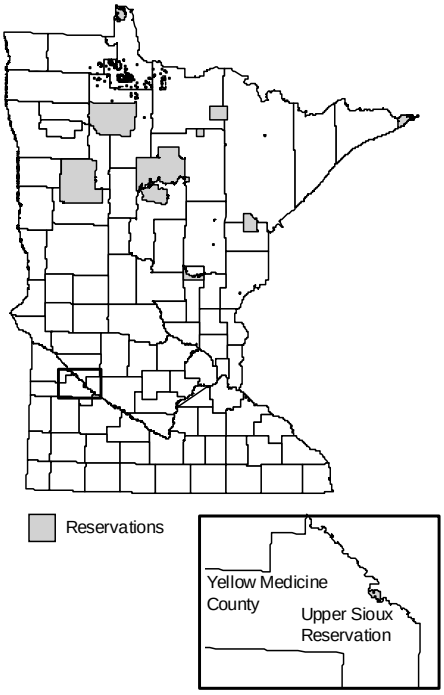
	Median Household Income	Per Capita Income	% Individuals in Poverty Status (last 12 months)	% Receiving Public Assistance (last 12 months)
Shak.-Mdwktn.	$121,250	$120,902	13.1%	1.6%
Adjacent Counties	$83,415	$34,532	5.0%	2.0%
State	$58,476	$30,310	11.0%	3.3%

Labor

	% Population Age 16 and Over in Civilian Labor Force	% Labor Force Employed	% Labor Force Unemployed
Shak.-Mdwktn.	15.5%	93.3%	6.7%
Adjacent Counties	78.7%	94.1%	5.9%
State	70.8%	93.1%	6.9%

Education

	% Population Age 25 and Over – No High School Diploma	% Population Age 25 and Over – High School Graduate Only	% Population Age 25 and Over – Some College or Associate Degree	% Population Age 25 and Over – Bachelor's or Graduate Degree
Shak.-Mdwktn.	7.8%	31.6%	42.8%	17.8%
Adjacent Counties	5.8%	24.6%	33.3%	36.3%
State	8.4%	27.5%	32.3%	31.8%



Upper Sioux

Box 147
5722 Travers Lane
Granite Falls, MN 56241
320-564-2360
320-564-3264 (Fax)
www.uppersiouxcommunity-nsn.gov

Adjacent County: Chippewa and Yellow Medicine counties

Nearby Cities: Granite Falls, Montevideo

Tribal Enrollment (2013): 492

Tribal Land: 857.14 acres

Individual Land: 54.34 acres

***Government Land*:** 0 acres

Casino: Prairie's Edge Casino Resort
5616 Prairie's Edge Lane
Granite Falls, MN 56241
320-564-2121
320-564-2547
www.prairiesedgecasino.com

Top Three Industries on Reservation: Arts, entertainment, recreation, accommodation, and food services (30.4 percent); finance and insurance, real estate rental and leasing (23.2 percent); professional, scientific, management, and administrative (21.4 percent)

Tribal Governance: Governed by five-member Board of Trustees, elected to serve staggered four-year terms. Board is composed of a chairman, vice chairman, secretary, treasurer, and senior member at large.

Chairman:
Kevin Jensvold

Demographics of Upper Sioux Reservation and Surrounding Areas

Population

	Population	Individuals Identifying as American Indian Alone or in Combination	% of Population Identifying as American Indian	% of Statewide American Indian Population
Upper Sioux	148	133	89.9%	0.1%
Adjacent Counties	22,879	592	0.6%	0.6%
State	5,303,925	101,900	1.9%	100.0%

Age

	% Population Under Age 18	% Population Age 18 to 64	% Population Age 65 and Over
Upper Sioux	43.2%	50.0%	6.8%
Adjacent Counties	23.6%	57.1%	19.4%
State	24.2%	62.9%	12.9%

Income

	Median Household Income	Per Capita Income	% Individuals in Poverty Status (last 12 months)	% Receiving Public Assistance (last 12 months)
Upper Sioux	$42,054	$21,351	9.7%	0.0%
Adjacent Counties	$47,383	$23,993	12.2%	2.7%
State	$58,476	$30,310	11.0%	3.3%

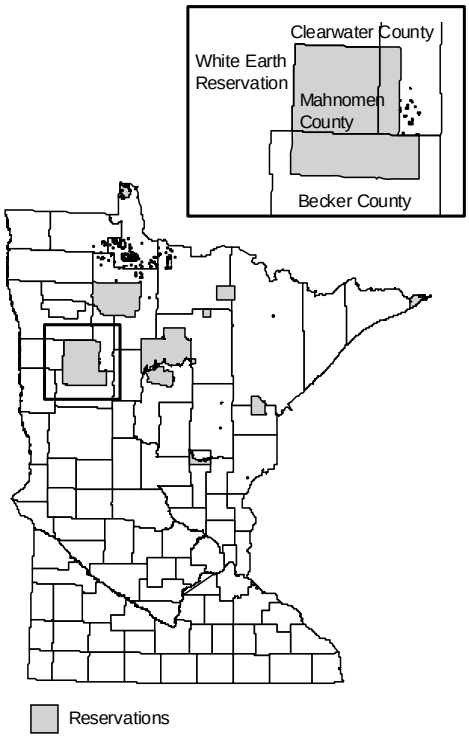
Labor

	% Population Age 16 and Over in Civilian Labor Force	% Labor Force Employed	% Labor Force Unemployed
Upper Sioux	64.4%	96.6%	3.4%
Adjacent Counties	66.9%	63.4%	5.1%
State	70.8%	93.1%	6.9%

Education

	% Population Age 25 and Over – No High School Diploma	% Population Age 25 and Over – High School Graduate Only	% Population Age 25 and Over – Some College or Associate Degree	% Population Age 25 and Over – Bachelor's or Graduate Degree
Upper Sioux	27.9%	23.3%	44.2%	4.7%
Adjacent Counties	12.0%	37.3%	33.5%	17.3%
State	8.4%	27.5%	32.3%	31.8%

White Earth



Minnesota Chippewa Tribe Member

Post Office Box 418
White Earth, MN 56591
218-983-3285
800-950-3248
www.whiteearth.com

Adjacent Counties: Becker, Clearwater, and Mahnomen counties

Nearby Cities: Bemidji, Detroit Lakes, and Park Rapids

Tribal Enrollment (2013): 18,735

Tribal Land: 63,625.16 acres

***Individual Land*:** 2,843.73 acres

***Government Land*:** 600 acres

Casinos: Shooting Star Casino Hotel
777 Casino Road, P.O Box 418
Mahnomen, MN 56557
800-453-7827
218-935-2711

Top Three Industries on Reservation: Education, health care, and social services (25.3 percent); arts, entertainment, recreation, accommodation, and food services (18.9 percent); retail trade (8.8 percent)

Tribal Governance: Governed by five-member tribal council consisting of chair, secretary/treasurer, and three district representatives.

Chairwoman (Term Expires June 30, 2016):
Erma Vizenor
ermav@whiteearth.com
218-983-3285

Demographics of White Earth Reservation and Surrounding Areas

Population

	Population	Individuals Identifying as American Indian Alone or in Combination	% of Population Identifying as American Indian	% of Statewide American Indian Population
White Earth	9,562	5,030	52.6%	4.9%
Adjacent Counties	46,612	6,931	6.8%	6.8%
State	5,303,925	101,900	1.9%	100.0%

Age

	% Population Under Age 18	% Population Age 18 to 64	% Population Age 65 and Over
White Earth	29.7%	56.0%	14.3%
Adjacent Counties	25.2%	51.5%	17.4%
State	24.2%	62.9%	12.9%

Income

	Median Household Income	Per Capita Income	% Individuals in Poverty Status (last 12 months)	% Receiving Public Assistance (last 12 months)
White Earth	$37,413	$18,721	24.6%	10.9%
Adjacent Counties	$42,162	$21,744	14.1%	4.4%
State	$58,476	$30,310	11.0%	3.3%

Labor

	% Population Age 16 and Over in Civilian Labor Force	% Labor Force Employed	% Labor Force Unemployed
White Earth	63.8%	86.6%	13.4%
Adjacent Counties	65.1%	93.0%	7.0%
State	70.8%	93.1%	6.9%

Education

	% Population Age 25 and Over – No High School Diploma	% Population Age 25 and Over – High School Graduate Only	% Population Age 25 and Over – Some College or Associate Degree	% Population Age 25 and Over – Bachelor's or Graduate Degree
White Earth	16.3%	37.8%	32.4%	13.6%
Adjacent Counties	11.7%	34.3%	34.4%	19.5%
State	8.4%	27.5%	32.3%	31.8%

Appendix III

Secretary of the Interior's Authority to Acquire Land in Trust for Indian Tribes

The Indian Reorganization Act generally authorizes the Secretary of the Interior to accept transfers of land in trust for Indian tribes and individual Indians.[1] Trust status transfers title to the federal government, in trust for the tribe or individual Indian. Under federal law, the land is exempt from state and local property taxes. Fee lands owned by the tribe, by contrast, are subject to property taxes.

The federal statute authorizes the secretary "in his discretion" to acquire land "for the purpose of providing land for Indians."[2] The statute itself provides no standard or restrictions on when transfers into trust may be accepted. Agency regulations provide three circumstances in which the secretary may acquire land for a tribe in trust status. Each of these is an *independent or separate* basis for acquiring the land:

- The property is located in or adjacent to the reservation boundaries
- The tribe already owns an interest in the land
- The secretary determines that acquisition of the land is "necessary to facilitate tribal self-determination, economic development, or Indian housing"[3]

Specific criteria apply when the land is within or adjacent to a reservation, and the acquisition is not mandatory. The most important of these appear to be:

- The tribe's need for the land
- The purpose for which the land will be used
- Impact on state and local governments of removing the land from the tax rolls
- Potential jurisdictional problems and conflicts of land use
- Whether the BIA can handle any administrative responsibilities that result from the acquisition
- The extent to which the tribe provided information needed to comply with environmental law relating to hazardous substances[4]

In 1998 the Shakopee Mdewakanton Sioux Community requested the secretary to transfer a parcel of land into trust for the tribe. The BIA regional officer declined the request, and there was no appeal. The decision provides some insight into the way in which the BIA may apply the regulations on trust transfers. Some of these insights include:

- The need for the trust status must be shown. It is not clear how this is to be done, but it seems likely that a tribe could meet it by showing that the property tax exemption is an economic necessity for the stated purpose. The need for exemption from local regulations might also be relevant. The need for these exemptions must tie back to (1) fostering economic development or (2) supporting tribal self-government.

- The BIA decision makes it clear that in measuring the effect on local tax bases, it will look only at the loss of current tax base, not any potential loss of future tax revenues.

- The decision also suggests that loss of tax base will be evaluated relative to the size of the local tax base. If it is a small share, it is unlikely to affect the application for trust status.

Events following the 1998 BIA decision underline the ambiguity involved with the rules for accepting trust transfers for Indian tribes, such as Shakopee Mdewakanton Sioux. In 2000, the tribe renewed its request to transfer the property into trust; this request involved 752 acres. State and local officials continued to object to the transfer. The BIA did not act upon this request for six years until July 2006 when the Midwest Regional office granted the request. The letter granting approval stated that federal law "does not include any type of evaluative factor to consider the wealth of the tribe prior to bringing land into trust status."[5] However, one week later, the BIA director withdrew this decision on the grounds "it was issued prematurely."[6] Ultimately, the land was taken into trust for the tribe.

In a recent U.S. Supreme Court decision, *Carcieri v. Salazar*,[7] the Court found that a plain reading of the IRA prevents land from being taken into trust for a tribe that was not "under federal jurisdiction" in 1934, when the law was enacted. This created a broad restriction for many tribes and uncertainty about which tribes could take land into trust. There has been proposed congressional legislation to "fix" the *Carcieri* decision and clarify how the law will be applied.[8]

ENDNOTES

[1] 25 U.S.C. § 465.

[2] 25 U.S.C. § 465.

[3] 25 C.F.R. § 151.3.

[4] 25 C.F.R § 151.10.

[5] Quoted in Anthony Lonetree, "Shakopee Tribe gets Land Trust Go-ahead" *Star Tribune* p. 1A, (July 11, 2006). This seems contrary to the approach taken by the BIA in reviewing the 1998 request.

[6] Memorandum from Director of Bureau of Indian Affairs to Terrance Virden, Midwest Regional Director, dated July 14, 2006. This memorandum indicates that the final decision would be issued by the national office of the BIA.

[7] 555 U.S. 379 (2009).

[8] The U.S. House and Senate have both held hearings on the issue of a *Carcieri* fix and legislation was introduced in 2009, 2011, and 2013. U.S. Senate, Committee on Indian Affairs, June 23, 2011, The Indian Reorganization Act – 75 Years Later: Renewing Our Commitment to Restore Tribal Homelands and Promote Self-Determination, http://www.gpo.gov/fdsys/pkg/CHRG-112shrg68389/pdf/CHRG-112shrg68389.pdf.

Appendix IV

Tribal Courts in Minnesota

Tribal court judges are appointed by the governing body of each tribe.

Bois Forte Band of Chippewa P.O. Box 25 Nett Lake, MN 55772 Phone: 218-757-3462 Fax: 218-757-0064	**Fond du Lac Band of Lake Superior Chippewa** 1720 Big Lake Road Cloquet, MN 55720 Phone: 218-878-7151 Fax: 218-878-7169
Grand Portage Band of Lake Superior Chippewa 54 Upper Road P.O. Box 426 Grand Portage, MN 55605 Phone: 218-475-2279 Fax: 218-879-4146	**Leech Lake Band of Ojibwe** 115 6th Street NW Cass Lake, MN 56633 Phone: 218-335-3682 Fax: 218-335-3685
Lower Sioux Community in Minnesota P.O. Box 308 39527 Res. Hwy. 1 Morton, MN 56270 Phone: 507-697-6185 Fax: 507-697-8621	**Mille Lacs Band of Ojibwe** 43408 Oodena Drive Onamia, MN 56359 Phone: 320-532-7400 Fax: 320-532-3153
Prairie Island Indian Community 5636 Sturgeon Lake Road Welch, MN 55089 Phone: 651-385-4161 Fax: 651-267-4008	**Red Lake Band of Chippewa** P.O. Box 572 Red Lake, MN 56671 Phone: 218-679-3303 Fax: 218-679-2683
Shakopee Mdewakanton Sioux (Dakota) Community Energy Park Financial Center, Suite 210 2330 Sioux Trail NW Prior Lake, MN 55372 Phone: 952-445-8900 Fax: 952-445-8906	**Upper Sioux Community** P.O. Box 155 Granite Falls, MN 56241 Phone: 320-564-6317 Fax: 320-564-4915
White Earth Band of Ojibwe P.O. Box 418 White Earth, MN 56591 Phone: 218-983-3285 Fax: 218-983-3294	
Minnesota Chippewa Tribe P.O. Box 217 Cass Lake, MN 56633 218-335-8581	**Minnesota Chippewa Tribe – Court of Appeals from Six Chippewa Boards** P.O. Box 217 Cass Lake, MN 56633 Phone: 218-335-8515 Fax: 218-335-6562