MN HOUSE RESEARCH

American Indians, Indian Tribes, and State Government

About this Publication

This guidebook discusses major issues involved in the relationship between American Indian Tribes, American Indians, and state government, including criminal and civil jurisdiction, employment, control of natural resources, gaming and liquor regulation, taxation, health and human services, child welfare, education, labor, and civic engagement.

February 2023

Contributors

American Indians, Indian Tribes, and State Government is a cooperative project by legislative analysts in the Research Department of the Minnesota House of Representatives. This publication introduces Minnesota legislators to the major legal issues involved in the relationship between American Indians, Indian Tribes, and state government.

This report was coordinated by Mary Davis, a legislative analyst specializing in the areas of American Indian Tribal government and Indian law. General questions regarding the guide can be directed to Mary Davis, 651-296-9253. Topical questions should be addressed to the analyst who covers that subject.

Civil Jurisdiction	Mary Davis	651-296-9253
Criminal Jurisdiction	Jeffrey Diebel	651-296-5041
	Ben Johnson	651-296-8957
	Mary Davis	651-296-9253
Demographics & Statistics	Sean Williams	651-296-5053
Education	Tim Strom (K-12)	651-296-1886
	Cristina Parra (K-12)	651-296-8036
	Nathan Hopkins (Postsecondary)	651-296-5056
Elections & Voting Rights	Matt Gehring	651-296-5052
Environmental Regulations	Bob Eleff	651-296-8961
Gaming Regulation	Alexandra Haigler	651-296-8956
Health & Human Services	Randall Chun	651-296-8639
	Danyell Punelli	651-296-5058
	Sarah Sunderman	651-296-8079
	Elisabeth Klarqvist	651-296-5043
	Annie Mach	651-296-5204
Indian Child Welfare	Mary Davis	651-296-9253
	Sarah Sunderman	651-296-8079
Labor & Employment	Mary Davis	651-296-9253
	Marta James	651-296-5057
Liquor Regulation	Chris Kleman	651-296-8959
Natural Resources	Janelle Taylor	651-296-5039
Taxation	Chris Kleman	651-296-8959
	Jared Swanson	651-296-5044
	Alexandra Haigler	651-296-8956

MN HOUSE RESEARCH

Minnesota House Research Department provides nonpartisan legislative, legal, and information services to the Minnesota House of Representatives. This document can be made available in alternative formats.

www.house.mn/hrd | 651-296-6753 | 600 State Office Building | St. Paul, MN 55155

Contents

Overview

This publication introduces Minnesota legislators to the major legal issues involved in the relationship between American Indian Tribes, American Indians, and state government. It is not intended to be a comprehensive or in-depth treatment of the subject. (Please see "A Note on Terminology" on the following page on the use of terms, including American Indian and American Indian Tribes.)

The publication begins with some basic data on American Indians in Minnesota today. Map 1 shows the locations of Tribal reservations. Map 2, Figure 1, and Appendix I present population information from the Census Bureau's American Community Survey five-year estimates for 2017 to 2021. 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 American 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
- Labor and Employment Law 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 American Indians and Tribes
- Indian Child Welfare Laws
- Education Laws Affecting American Indian Students
- Postsecondary Education Laws Affecting Indian Students
- Elections, Voting Rights, and Civic Engagement

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

Appendix IV lists the 11 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.

A Note on Terminology

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 Indigenous people still residing in Minnesota are the Dakota and the Chippewa, also referred to as Ojibwe or Anishinaabe. This publication uses the term "American Indian" to collectively refer to Indigenous people of North America and Minnesota. This publication also 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" when describing statutory or legal identification. 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.

American Indians in Minnesota

Population of American Indians in Minnesota

Minnesota has 11 federally recognized Indian reservations and an additional Tribal government, 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.

Anishinaabe Bands (Chippewa/Ojibwe)

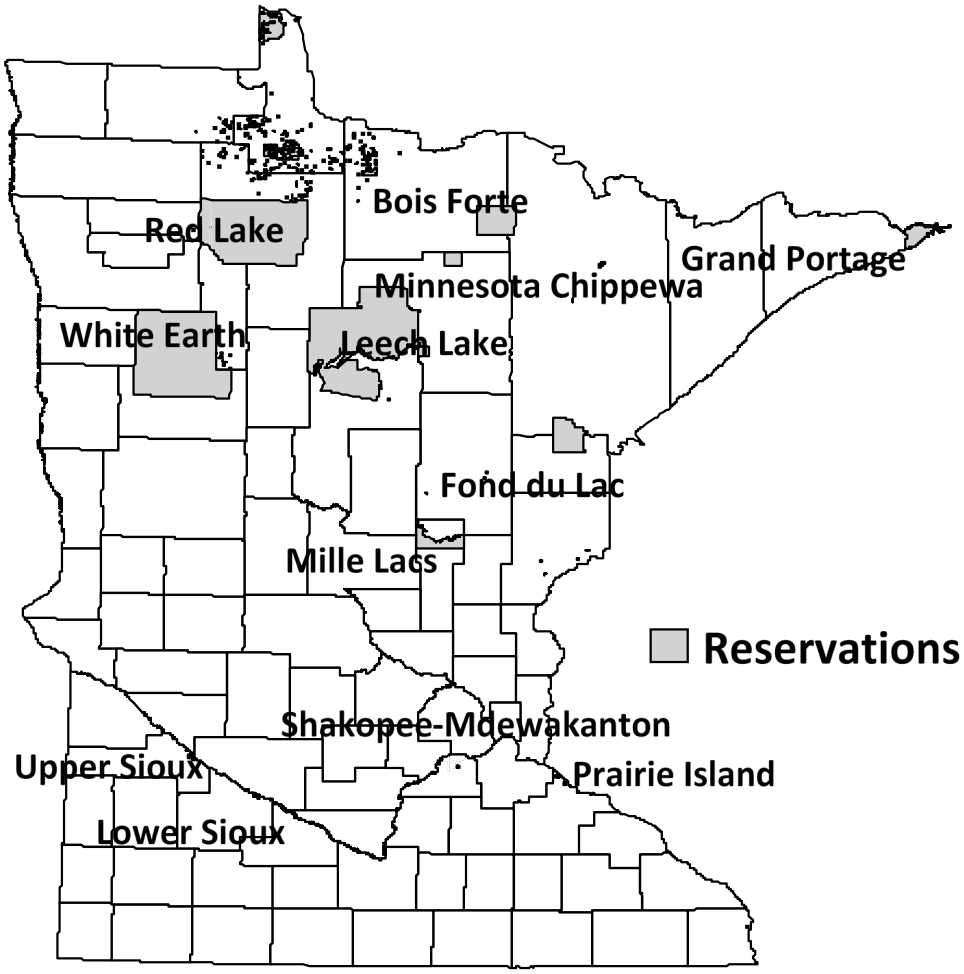
- Bois Forte (Nett Lake)
- Fond du Lac
- Grand Portage
- Leech Lake
- Mille Lacs
- Red Lake
- White Earth

Dakota Communities[1]

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

Map 1 shows the location of these reservations.

Map 1: Minnesota Indian Reservations

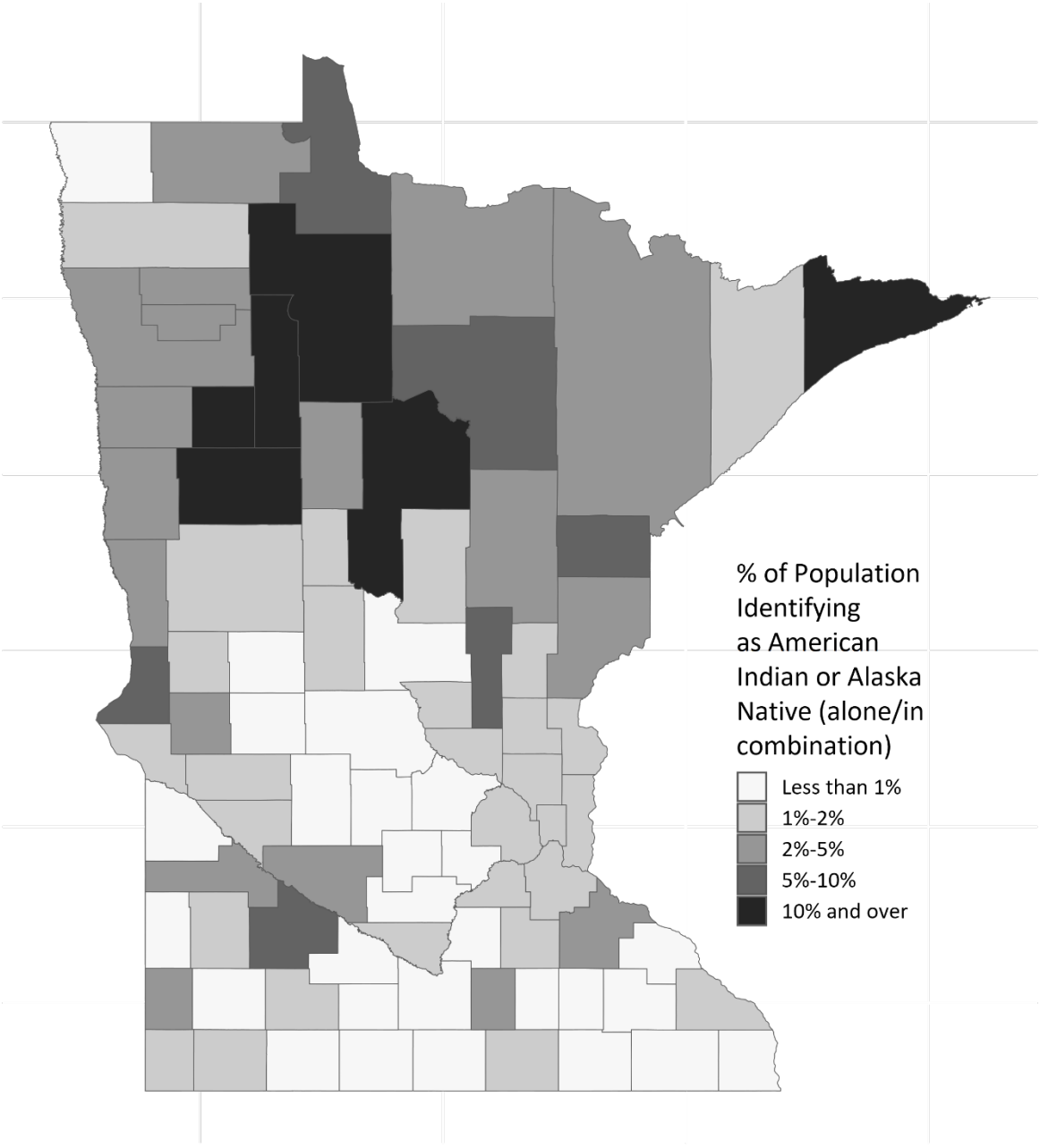


This map shows the approximate location of 12 federally recognized Tribes in Minnesota, including the location of the Minnesota Chippewa Tribe government offices.

The Census Bureau's American Community Survey estimated there were 114,778 individuals in Minnesota identifying as "American Indian and Alaska Native persons"[2] in part or in combination with another race in 2017 to 2021. These individuals represented approximately 2.0 percent of the state's population.

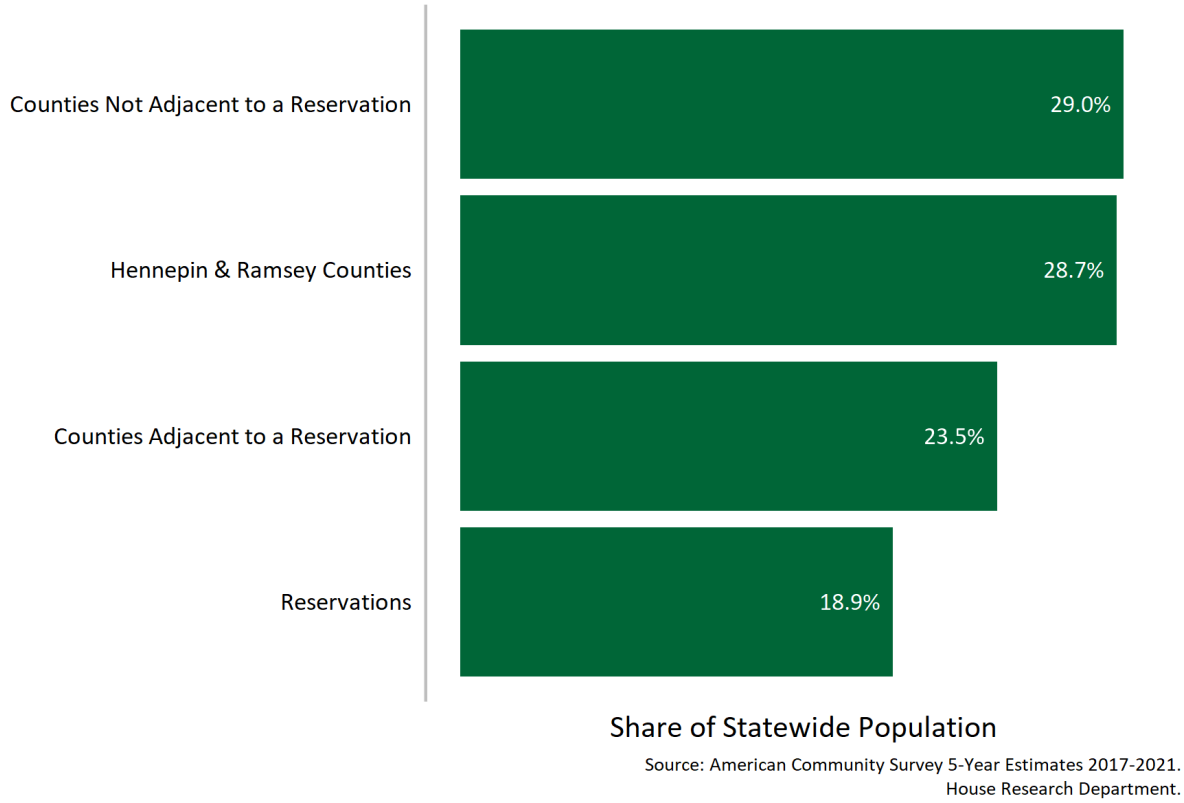
Map 2: American Indians as a Percent of County Population

Map 2 shows what percentage of each county's population identifies as American Indian or Alaska Native (alone or in combination). The table in Appendix I details American Indian population by county (see page 140).



Map by House Research.
Source: American Community Survey 5-Year Estimates 2017-2021.

Figure 1: Where the Minnesota American Indian Population Lives



Source: American Community Survey 5-Year Estimates 2017-2021.
House Research Department.

Figure 1 shows where individuals identifying as American Indian in Minnesota lived in 2017 to 2021. About 19 percent of the Minnesota Indian population lived on reservations. About 24 percent of the population lived in a county adjacent to a reservation.[3] About 29 percent of the Minnesota Indian population lived in Hennepin or Ramsey County. Finally, approximately 29 percent of the Minnesota Indian population lived elsewhere in the state.[4]

Appendix II (see page 143) provides information specific to each reservation, including information regarding Tribal enrollment, land, casinos, Tribal colleges, and demographic information from the Census Bureau's American Community Survey from 2017 to 2021.

Endnotes

[1] 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/indian-affairs/.

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

[3] 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.

[4] There are 574 federally recognized American Indian Tribes, and nearly 200 tribes that are unrecognized. Any of them may identify as American Indian for the U.S. Census.

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."

There are differences between Tribal membership, legal definitions of Indian, and Indian ancestry.

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 American Indian because that person has American Indian ancestry, but may not be a recognized member of a Tribe by state or federal law or may not be recognized as an American Indian for various federal legal purposes.

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

To have American 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 American 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. Tribes in Minnesota 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 is recognized as a Tribe but acts as a governing entity for 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) is not 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] In the summer of 2022, the members of the six Ojibwe Tribes voted in support of changing the constitutional provisions, to allow each individual Tribe to decide the blood quantum requirement.[4] The process to amend the Minnesota Chippewa Tribe Constitution has not yet begun.

Formal enrollment is a relatively recent concept in Indian law. Some American 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 American Indians under various statutes are available to Indians more broadly defined.[5] However, an American 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.[6]

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 American 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.[7]

In 1924, Congress conferred citizenship upon all American Indians born within the United States.[8]

American Indians were granted citizenship in the 1924 Citizenship Act,[9] but this did not include American Indians born before 1924 or outside the country until the Nationality Act of 1940[10] was passed. Prior to this, some American Indians were considered citizens under the Dawes Act of 1887[11] 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.[12]

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 also 25 U.S.C. § 131, requiring the Federal Register to include a list of all federally recognized tribes, band, nations, pueblos, villages, or communities. 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] Kraker, Dan; "*Chippewa Tribe Members Vote to Eliminate Blood Quantum,*" MPR News, July 22, 2022; https://www.mprnews.org/story/2022/07/22/chippewa-tribe-members-vote-to-eliminate-blood-quantum.

[5] As a result, the Bureau of Indian Affairs often relies on informal rolls to determine which American Indians are entitled to receive federal services, as opposed to those entitled to receive distributions. However, American Indians not organized as a tribe have struggled to gain benefits when they were unable to organize as a tribe or unrepresented by a tribe in the litigation. See *Wolfchild v. United States*, 731 F.3d 1280 (Fed. Cir. 2013), *Osage Tribe of Indians of Oklahoma v. U.S.,* 85 Fed.Cl. 162 (2008).

[6] *Cohen,* § 3.03[1], at 172 (Nell Jessup Newton ed., 2012).

[7] *Cohen,* § 3.03[5], at 183 (Nell Jessup Newton ed., 2012).

[8] 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 American Indians.

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

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

[11] 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.

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

Definition of "Indian Tribe"

Legal recognition under federal and state law provides Tribes and the members of those Tribes certain benefits and services. Legal 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). State-recognized Tribes and federally recognized Tribes can have district legal rights as well.[1]

As with the definition of "Indian," the legal status of Tribes is 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. It is important to note that some American Indians dispute the way the federal government has recognized their Tribes, or are still fighting to have their Tribes be recognized by the federal government.

In general, the Indian Commerce Clause of the U.S. Constitution authorizes Congress[2] to determine which groups of American Indians will have legally recognized Tribal status.

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.[3]

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.[4] 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 American Indian community.[5]

Department of the Interior regulations provide an administrative procedure for Tribes seeking recognition.[6] This rule was substantially revised in 2015. The revision increased public access to the process, making petitions for recognition public and providing notice of applications to local governments. The revision also provides an expedited rejection process, clarification on the documentation needed to meet the criteria, an administrative hearing on the proposed findings, and for judicial review of the assistant secretary's final decision. The revised rule does not allow a proposed Tribe to reapply. The Department of the Interior has also indicated it will only allow Tribes to be recognized consistent with the process in Code of Federal Regulations, title 25, section 83.[7]

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 1900 until the present
c) The petitioner has maintained political influence or authority over its members as an autonomous entity from 1900 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 American 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
g) Neither the petitioner nor its members are the subject of congressional legislation that has expressly terminated or forbidden recognition[8]

Congress can also terminate federal supervision of a Tribe.

When Congress terminates a Tribe's federal status, 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 American Indian Tribes.

The federal trust responsibility for American Indian land and many of the federal services and benefits are gained through federal recognition of an American Indian Tribe, and the termination of federal status generally removes many benefits and protection to Tribes. The BIA identifies 574 federally recognized American Indian and Alaska Native Tribes and villages.[9] Some Tribes can receive benefits as a state-recognized Tribe or nonprofit, and some federal programs provide benefits to individual American Indians, the definition of which changes depending on the program and statute.[10]

In September 2016, the Department of the Interior approved a rule that would allow Native Hawaiians to establish formal government-to-government relations with the federal government.[11]

Endnotes

[1] *Timpanogos Tribe v. Conway*, 286 F.3d 1995 (10th Cir 2002); *Schaghticoke Tribal Nation v. Harrison*, 826 A.2d 1102 (Conn. 2003).

[2] U.S. Const. art. I, § 8. Congress has occasionally delegated the power to recognize Tribal status to the executive branch.

[3] *Morton v. Mancari*, 417 U.S. 535 (1974); also *Cohen's Handbook of Federal Indian Law*, at 181.

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

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

[6] 25 C.F.R. § 83 (Revised 2015).

[7] Revisions to Regulations on Federal Acknowledgement of Indian Tribes (25 C.F.R. § 83).

[8] 25 C.F.R. § 83.11 (Revised 2015).

[9] U.S. Department of the Interior, Bureau of Indian Affairs, http://www.bia.gov/service/tribal-leaders-directory.

[10] A U.S. Government Accountability Office study found that between 2007 and 2010, out 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, https://www.gao.gov/assets/gao-12-348.pdf (GAO-12-348).

[11] 43 C.F.R., part 50 (2016), Procedures for Reestablishing a Formal Government-to-Government Relationship with the Native Hawaiian Community.

Indian Lands and Territories

The legal term "Indian country" is used to describe 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, sale, and taxation of Indian lands. For information on criminal and civil jurisdiction on land controlled by American Indians, see the "civil jurisdiction" and "criminal jurisdiction" sections in Part Two starting on page 31.

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 American 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.[6]

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.[7] Courts have consistently held that congressional action is also needed to disestablish a reservation.[8]

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*[9] 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 on page 172.

Allotted trust lands are held in trust for the use of an individual American 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. Status as trust land—both Tribal and allotted—confers exemption from state and local property taxation.

In 1887, Congress enacted the General Allotment Act,[10] which divided up some American Indian reservations and allotted the partitioned land to individual American 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.[11] Many of the allotments passed out of trust status and are now no longer owned by American Indians. Although some land passed legitimately at the expiration of the "trial period" to American Indian ownership, most passed out of trust status and out of American Indian ownership through fraud and tax sales.[12] In 1934, with the passage of the Indian Reorganization Act (IRA), the trust status of the remaining allotments was extended indefinitely.[13] 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, who may be a Tribal member 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.[14]

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 American

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 American 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).[15] 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.[16] AIPRA attempts to curb some of the fractionation by encouraging trust land owners to write a will and also devising new inheritance laws when a decedent does not have a will. The Department of the Interior updated the federal rules on probates of Indian trust property. The new rule went into effect on January 19, 2022.[17]

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,*[18] was filed against the federal government to address the mismanagement of Indian trust land. The resulting settlement in 2009 provided American Indians throughout the country a settlement award as owners and heirs to trust land or Individual Indian Money Accounts.[19] 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. See Control of Natural Resources section, pages 63 to 65 for more on off-reservation treaty rights.

[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). See also *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020), (holding government allotment of acres to Tribal members did not terminate the Creek Reservation even when the land was not referenced to as a "reservation," and Congress must act to disestablish a reservation).

[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] See *Lower Brule Sioux Tribe v. State of South Dakota*, 711 F.2d 809 (9th Cir. 1983).

[7] 25 U.S.C. § 5110.

[8] *Mille Lacs Band of Ojibwe v. County of Mille Lacs* (confirming boundaries of 1855 treaty), 589 F. Supp. 3d 1042 (Minn. 2022).

[9] 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 Eighth 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.

[10] 25 U.S.C. §§ 331 et seq. This is commonly referred to as the Dawes Act. Repealed in 1934.

[11] 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.

[12] In the early 1980s, only about 6 percent of the original acreage of the White Earth Reservation remained 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). Current estimates show the White Earth Nation holds close to 10 percent of the original reservation land. See Minnesota Indian Affairs Council website.

[13] 25 U.S.C. § 5102.

[14] See *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992) and discussion on taxation, page 74.

[15] 25 U.S.C. §§ 2201-2221. AIPRA is an amendment to the Indian Land Consolidation Act.

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

[17] 86 Fed. Reg. 72068, published December 20, 2021, effective January 19, 2022, https://www.federalregister.gov/documents/2021/12/20/2021-27257/american-indian-probate-regulations.

[18] 573 F.3d 808 (D.C. Ct. App. 2009).

[19] The U.S. Department of the Interior website provides information on the *Cobell* settlement, https://www.doi.gov/cobell.

Tribal Sovereignty: Limits on State Power

American 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 authority over American 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 American Indian relations are the exclusive concern of Congress[7] but also found that states' rights do not end at the border of a reservation.[8] In any case, 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 Tribe-owned commercial enterprises 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 partially 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 American 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 can extend 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 American 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's Handbook of Federal Indian Law*, § 4.01[1], at 206-211.

[4] Id.

[5] *Worcester v. Georgia*, 31 U.S. 515, 561 (1832).

[6] See discussion in *Cohen's*, § 4.01[1][a], at 209.

[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 on the issue of Tribal sovereign immunity.

[10] *Cohen's*, §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's*, 7.05[1][a], at 638-639. 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; *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024 (2014), Tribal officials may be responsible for illegal conduct.

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

[14] Id., 523 U.S. at 759; upheld by *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024 (2014), when the Supreme Court refused to overturn the *Kiowa* decision and ruled that it is "fundamentally Congress's job to determine whether or how to limit Tribal immunity."

[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); *Cook v. Avi Casino Enterprise, Inc.*, 548 F.3d 718 (9th Cir. 2008).

[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 American 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 American 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 American Indian lands without the consent of the affected American Indians or their Tribes. This mechanism was changed in 1968 when Congress amended the law prospectively to prohibit additional states from asserting jurisdiction over American 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 American Indians, not Tribes, and allows civil causes of action between American 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

American 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. (Page 32 of this guidebook discusses criminal jurisdiction in Indian county).

The Tribal Law and Order Act has expanded federal criminal jurisdiction for some Minnesota Tribes.

Two Minnesota Tribes have had federal jurisdiction extended to crimes on their reservations under the Tribal Law and Order Act.[9] On the White Earth Reservation and the Mille Lacs Reservation, the Tribes, state, and federal government all have jurisdiction over crime.

Endnote

[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 (Laws of Minnesota 1973, chapter 625 – House File 1635; May 23, 1973).

[3] 28 U.S.C. § 1360(a) (1953).

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

[5] 480 U.S. 202 (1987). IGRA later allowed states to sue tribes to enjoin class III gaming activities in certain situations.

[6] 25 U.S.C. § 1302(a)(3).

[7] *United States v. Wheeler*, 435 U.S. 313 (1978), and *United States v. Lara*, 124 S. Ct. 1628 (2004).

[8] Pub. L. No. 111-211, The Tribal Law and Order Act, amended sections of the Indian Civil Rights Act and Public Law 280.

[9] See the House Research publication *The Tribal Law and Order Act and Minnesota*, January 2017.

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 American 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 American 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 American 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 vary their application of the canons.

Although the canons of construction have long been a key element of Indian law,[7] in some 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. However, more recent cases such as *Washington State v. Cougar Den* and *McGirt v. Oklahoma*, show a trend toward upholding the traditional canons of construction. [10]

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's Handbook of Federal Indian Law*, §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 American 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).

[10] See *Washington State Department of Licensing v. Cougar Den*, 139 S.Ct. 1000 (2019); *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020); See also Harris, Meredith, "Analyzing the Implications of the Supreme Court's Application of the Canons of Construction in Recent Federal Indian Law Cases," *American Indian Law Journal*, vol. 10, issue 1 (January 25, 2022).

American Indians and State Government Relations

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 American Indians. It also serves as a liaison between national, state, and local units of government and the American 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 and the following nonvoting members: two members of the House of Representatives, two members of the Senate, 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 also an urban advisory board of six American Indians from urban areas in the state.

The Indian Affairs Council works in consultation with the state archeologist on burial ground authentication and identification.[3] Along with staff to assist with those cultural resources, the Indian Affairs Council also administers Legacy Arts and Cultural Heritage grants to groups providing Dakota and Ojibwe language programs.[4]

Ombudsperson for American Indians

There is an ombudsperson for American Indian families who is an independent state agency.[5] The ombudsperson works on issues related to American Indians in the child protection system and investigates complaints related to the child welfare system. They issue a report each year on the work of the office (see page 101 for more details).

Government-to-Government Relationship

A new law passed in 2021[6] requires state agencies to consult with each individual Tribe no less than annually, whenever a legislative or fiscal matter has an implication for that Tribe. The law requires agencies to train staff on collaborating with Tribal government and to have policies on communicating with Tribal governments. The training helps connect state agency workers with their Tribal counterparts.

Endnotes

[1] Minn. Stat. § 3.922.

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

[3] Minn. Stat. § 307.08.

[4] Laws 2021, 1st Spec. Sess. ch. 1, art. 4, § 2, subd. 9.

[5] See Ombudsperson for Families, Minn. Stat. § 3.9215.

[6] Minn. Stat. § 10.65, Government-to-Government Relationship with Tribal Government (2021).

Part Two: Specific Issues by Topic

Criminal Jurisdiction in Indian Country

by Jeffrey Diebel (651-296-5041)
by Ben Johnson (651-296-8957)
by Mary Davis (651-296-9253)

"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 on page 16.

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 criminal law 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 American 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. Historical changes in the relationship between the federal government and the Indian Tribes prompted some of these laws; others were enacted in response to Supreme Court rulings on jurisdictional issues.

Federal Criminal Jurisdiction

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. This act is also known as the General Crimes Act or the Indian Country Crimes Act and 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.

Assimilative Crimes Act. In 1825, Congress enacted a second jurisdictional statute known as the Assimilative Crimes Act. This act incorporates state criminal laws not otherwise included in the federal criminal code into federal law, meaning that the state laws and criminal penalties 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, two statutory exceptions and one judicially created exception sharply limit the scope of these jurisdictional statutes. First, the statutes exempt offenses committed by one American 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 generally the proper forum for prosecuting such a crime.[6]

In short, federal jurisdiction under the Enclaves Act and Assimilative Crimes Act 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 American 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. In general, Public Law 280 gives covered states criminal jurisdiction over conduct that occurs on Indian land that is within the state's boundaries. There are a number of exceptions to this rule in Minnesota. Jurisdiction over crimes committed on the Red Lake or Bois Forte (Nett Lake) Reservations generally resides with the federal government, although the Tribal government has concurrent jurisdiction. Another 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). Finally the White Earth Band and Mille Lacs Band have requested, and been granted, federal jurisdiction consistent with the Major Crimes Act pursuant to the Tribal Law and Order Act.[10]

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.[11]

Criminal Jurisdiction on MN Reservations OTHER THAN Red Lake, Bois Forte, White Earth, and Mille Lacs

Victim	Indian Offender	Non-Indian Offender
Indian	State and Tribe[12]	State*
Non-Indian	State and Tribe[13]	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.

House Research Department

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[14]
Non-Indian	Federal (major crimes only) or Tribe (major and minor crimes)	State
Other: License Offenses; Status Offenses; Government Victim	Tribe	State

House Research Department

Criminal Jurisdiction on White Earth and Mille Lacs Band Reservation

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

House Research Department

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.[15] The Court reached this conclusion based on two primary factors. 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 determined that the laws addressing the jurisdiction of the federal government address the treatment of American Indians, not the treatment of non-Indians, for conduct that happened to take place on Indian lands.

Public Law 280. While the federal government has criminal jurisdiction on the Red Lake and Bois Forte Reservations, and on many Indian reservations throughout the nation, it is the exception within the state of Minnesota. During the 1950s, Congress enacted changes in Indian policy that required Minnesota and five other states to assume complete criminal jurisdiction and limited civil jurisdiction over most Indian reservations located within their boundaries.[16] 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.[17] 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.[18]

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 Mille Lacs Band and the White Earth Reservation both requested concurrent jurisdiction, and the Department of Justice agreed to reassume jurisdiction. Federal jurisdiction over these two reservations 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 these reservations.[19]

In sum, federal jurisdiction does not apply to Indian reservations in Minnesota except for crimes committed on the White Earth, Mille Lacs, Red Lake, or Bois Forte Reservations, unless the crime is one of general applicability as indicated on pages 32 and 33 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.[20]

Murdered and Missing Indigenous Women Task Force. In 2019, the state legislature created the Murdered and Missing Indigenous Women Task Force.[21] The legislature directed the task force to examine the causes of, and recommend solutions to, the epidemic of murdered and missing Indigenous women in the state as a way to help policymakers and practitioners protect Indigenous women and solve the cases of missing and murdered Indigenous women. The legislature subsequently established and funded the Office of Missing Indigenous Relatives within the Department of Public Safety's Office of Justice Programs.[22] The office's purpose is to aid missing and murdered Indigenous relatives and work to implement the recommendations of the Missing and Murdered Indigenous Women Task Force.

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*.[23] 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.[24]

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.[25]

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.[26]

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 (e.g., driving) or narrowly (e.g., 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, meaning that state law generally permits the conduct, then 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[27]

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.[28] The Minnesota Supreme

Court also indicated, in *dicta*, that the laws prohibiting drunk driving and careless or reckless driving are likewise criminal/prohibitory.[29]

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.[30]

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

Criminal/Prohibitory	Civil/Regulatory
▪ Marijuana possession[31] ▪ Obstruction of legal process[32] ▪ Driving after cancellation as inimical to public safety (cancelled due to multiple DWI offenses)[33] ▪ Driving after revocation (revoked because of DWI)[34] ▪ Fifth-degree assault[35] ▪ Disorderly conduct[36] ▪ Underage drinking[37] ▪ Predatory offender registration[38]	▪ Driving after suspension (suspended for failure to pay child support)[39] ▪ No proof of insurance/No insurance[40] ▪ Driving after revocation (revoked for failure to provide proof of insurance)[41] ▪ Expired registration[42] ▪ No driver's license/Expired driver's license[43] ▪ Speeding (petty misdemeanor)[44] ▪ Failure to wear seatbelt[45] ▪ No child restraint seat[46] ▪ Failure to yield to an emergency vehicle[47]

Civil commitment of American Indian sex offenders. The Minnesota Supreme Court has ruled that American Indians can be civilly committed as sexually dangerous persons under state statute.[48] 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.[49] 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. The Tribe retains jurisdiction over any crime not covered under the Major Crimes Act or through Public Law 280. 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.[50] Second, the Indian Civil Rights Act[51] 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 only prosecute minor crimes (misdemeanors and gross misdemeanors) committed on their lands. The Tribal Law and Order Act of 2010 allowed Tribes to request greater sentencing abilities.[52] To date, no Minnesota Tribes have these enhanced sentencing capabilities.

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.[53] 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.[54]

The Violence Against Women Act and Tribal jurisdiction over crimes of domestic violence. As part of the Violence Against Women Reauthorization Act of 2013 and the Violence Against Women Act Reauthorization Act of 2022, 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 American 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 American Indian residing on the Tribe's land.[55]

Tribes were able to begin prosecuting under this authority starting on March 7, 2015, unless they requested and were granted an earlier start date by the U.S. Attorney General.[56]

Law enforcement authority. The Federal Bureau of Indian Affairs funds and administers the Tribal law enforcement agencies on the Red Lake and Bois Forte Reservations. Tribal police officers are professional officers trained at the Indian Police Academy in New Mexico.[57]

Minnesota law grants law enforcement authority to all Tribes in Minnesota allowing Tribal police officers to operate in the community in coordination with local state law enforcement.[58] A law passed in 1991 granted certain law enforcement powers to the Mille Lacs Band of Ojibwe Indians.[59] 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.[60]

In June 2016, Mille Lacs County ended the law enforcement agreement that had been in place for 25 years. Without the county's agreement, the provisions of Minnesota Statutes, section 626.90, were not met and the Mille Lacs Band Tribal police could not be connected to centralize law enforcement databases or 911 dispatch through Mille Lacs County.[61] In September 2018, the county and Tribe announced that they had reached a new agreement.[62] The county and Tribe continue to litigate the issue of policing on the Tribe's reservation with a focal point of the dispute being the boundaries of the reservation.[63]

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.[64] The state extended law enforcement authority to all other qualifying Tribal peace officers in 1999.[65] In 2019, the legislature granted the Prairie Island Indian Community of the Mdewakanton Dakota Tribe an exception to the requirement that a cooperative agreement with the local sheriff be in place in order for the Tribe to exercise law enforcement authority so long as all other requirements are met.[66]

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, page 19.

[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] Tribal Law and Order Act of 2010 (Pub. L. No. 111-211). See the House Research publication *The Tribal Law and Order Act and Minnesota*, January 2017.

[11] *United States v. Lara,* 541 U.S. 193 (2004).

[12] 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, U.S. 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.

[13] See note 9.

[14] A recent U.S. Supreme Court decision has opened the door for the possibility that the state could prosecute offenses committed on reservations by non-Indians against Indians expressly exempted from state jurisdiction under Public Law 280. See, *Oklahoma v. Castro-Huerta*, 597 U.S. ___ (2022). The *Castro-Huerta* ruling came in the wake of the U.S. Supreme Court's *McGirt* decision, which held that reservation boundaries in Oklahoma were much broader than state and local officials believed them to be for decades. *McGirt v. Oklahoma*, 591 U. S. ___ (2020) See also "Indian Lands and Territories," page 14, endnote 4. This ruling resulted in a seismic disruption in criminal jurisdiction for crimes committed on the expanded areas of Oklahoma reservations. As a result of the *McGirt* decision, the state of Oklahoma ceased charging and dismissed charges in many criminal cases that arose on the vast expanses of Tribal territory. In *Castro-Huerta*, the state of Oklahoma sought to prosecute a non-Indian for a crime committed against an Indian on a reservation. Although Oklahoma is not a Public Law 280 state, the court held that the existence of "Public Law 280 contains no language preempting state jurisdiction" in cases like *Castro-Huerta*. Whether courts would extend this reasoning to reservations like Red Lake and Bois Forte is unclear. This is an issue that will need to be clarified by subsequent court cases or congressional action. See also, *Martin v. State*, 969 N.W.2d 361, Minn. S. Ct. 2022 (finding the decision in *McGirt* did not limit state criminal jurisdiction on the Fond Du Lac reservation).

[15] *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).

[16] 18 U.S.C. § 1162. In addition to Minnesota, Public Law 280 required Alaska, California, Nebraska, Oregon, and Wisconsin to assume criminal jurisdiction over Indian reservations within their boundaries. 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.

[17] 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).

[18] Laws 1973, ch. 625.

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

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

[21] Laws 2019, 1st Spec. Sess. ch. 5.

[22] Minn. Stat. § 299A.85; Laws 2021, 1st Spec. Sess. ch. 11

[23] 480 U.S. 202 (1987).

[24] 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.

[25] 480 U.S. at 211 (1987).

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

[27] The list is not exhaustive, meaning courts may consider other, similar factors. In addition, no single factor is dispositive.

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

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

[30] See, e.g., *State v. Johnson*, 598 N.W.2d 680 (Minn.1999).

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

[32] Id.

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

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

[35] *State v. Judkins* C8-98-1038, C2-98-1069 (Minn. App. May 4, 1999), 1999 WL 261694, *unpublished opinion.*

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

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

[38] *State v. Jones,* 729 N.W.2d 1 (Minn. 2007).

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

[40] *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).

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

[42] *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).

[43] Id.

[44] Id.

[45] Id.

[46] Id.

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

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

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

[50] 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.

[51] 25 U.S.C. § 1302(7)(B) (2012).

[52] Tribal Law and Order Act, Pub. L. No. 111-211 (2010). A number of tribes have or are beginning to use enhanced sentencing, see a list at http://wwww.ncai.org/tribal-vawa/resources/tribal-law-order-act.

[53] *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.

[54] See Indian Civil Rights Act, 25 U.S.C. 1301, Pub. L. No. 102-137, this was Congress's 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.

[55] 25 U.S.C. § 1304 (2013).

[56] Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 908, 127 Stat. 54, 125-26; Violence Against Women Act Reauthorization Act of 2022, Pub. L. No.117-103, div. W, 136 Stat. 49, 840-962.

[57] Federal law enforcement training centers (www.fletc.gov).

[58] Minn. Stat. §§ 626.90- 629.93.

[59] Laws 1991, ch. 189.

[60] Minn. Stat. § 626.90.

[61] LaMoore, Vivian, *Dissecting the Revocation of the Law Enforcement Agreement*, *Mille Lacs Messenger*, July 6, 2016.

[62] *Mille Lacs County, Band of Ojibwe Settle Dispute Over Policing*, Kristi Marohn, MPR News, September 19, 2018.

[63] *Mille Lacs Band of Ojibwe v. County of Mille Lacs,* 589 F.Supp 3d 1042 (MN.2022) (holding congressional language was needed to disestablish a portion of a reservation, and confirming the reservation boundaries from the 1855 treaty. See discussion of the case in the Control of Natural Resources section on page 62.

[64] Minn. Stat. §§ 626.92; 626.91.

[65] Minn. Stat. § 626.93.

[66] Minn. Stat. § 626.93, subd. 7.

Civil Jurisdiction in Indian Country

by Mary Davis (651-296-9253)

"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 on page 16.

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 20 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 American Indians, or to which American 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.

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 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 a 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 nontribal members on non-Indian fee lands within Indian country.[14] In *Montana v. United States*, the Supreme Court 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] The Supreme Court has upheld the *Montana* exceptions, and recently affirmed that non-Indians who enter consensual relationships with Indian Tribes can be subject to the civil jurisdiction of the reservation's courts.[17]

State court jurisdiction must be available to an American Indian to invoke against a non-Indian, even if the dispute arises in Indian country.[18] State courts may take jurisdiction of civil actions arising in Indian country and involving only Tribal members if there is no Tribal court,[19] if the Tribal court lacks jurisdiction of the subject matter under its Tribal law,[20] or if an Indian party is found to have voluntarily submitted to state court jurisdiction by filing a petition there.[21] 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[22] or may decline jurisdiction for public policy reasons.[23]

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.[24] 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 for 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.

State statutes vary in how they give effect to Tribal court decisions. Some statutes grant full faith and credit to all Tribal court judgments,[25] some to only judgments in certain kinds of cases,[26] and some statutes only grant full faith and credit to Tribal court judgments where specified conditions are met.[27]

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.[28] 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 has adopted rules on state court recognition of Tribal court orders.

The rules were updated and amended in 2018. Recognition of a Tribal court order 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.[29] There is also a rule that provides specific procedures for Tribal court civil commitment order to be enforced by a state district court.[30] Finally, in all other cases, the court can schedule a hearing, and generally shall enforce orders unless the order is invalid, the court lacks jurisdiction, the parties were not given due process, the order was obtained by fraud, or the Tribal court doesn't enforce state court orders.[31]

Endnotes

[1] 28 U.S.C. § 1360.

[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, page 30.

[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. §§ 5101-5144.

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

[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, following *Montana v. United States*, 450 U.S. 544, 565 101 S. Ct. 1245 (1981).

[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.2d 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] *Dollar General v. Mississippi Band of Choctaw Indians*, 579 U.S. 545 (2016).

[18] *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).

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

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

[21] Ibid.

[22] *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).

[23] *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).

[24] U.S. Const. art. IV, § 1, cl. 1.

[25] Wis. Stat. Ann. § 806.245.

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

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

[28] *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).

[29] General Rules of Practice for the District Courts, Rule 10.01.

[30] General Rules of Practice for the District Court, Rule 10.02.

[31] General Rules of Practice for the District Court, Rule 10.03.

Labor and Employment Law in Indian Country

by Mary Davis (651-296-9253)
by Marta James (651-296-5057)

"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 on page 16.

Federal Employment Law

The application of federal employment laws to Indian Tribes and to employers on Indian reservations has been widely litigated. While some federal statutes specifically exempt Indian Tribes as employers, a number of federal statutes do not, and in those cases there is often confusion as to when and how to apply those laws to Tribal employers. In some cases the decision to apply the laws depends on whether the Tribe is running a business and is an employer through a commercial enterprise, or whether the Tribe is engaged in purely Tribal matters as a government employer. Lawsuits have also arisen to determine the application of employment and labor laws to businesses owned by Tribal members who operate businesses on Indian lands. The application of certain employment and labor laws to Indian Tribes may seem inconsistent, as different federal district courts and circuit courts (and sometimes even courts within the same circuit), as well as various federal agencies, disagree on the application of these laws in Indian country.

Some federal statutes specifically exempt Tribes, and other federal statutes are silent on their application to Tribal governments and businesses owned by the Tribe.

Specific Exemptions for Tribes

Title VII of the Civil Rights Act of 1964[1] prohibits employment discrimination on the basis of race, color, religion, sex, or national origin. This widely used anti-discrimination law expressly exempts Indian Tribes from the term "employer."[2] However, the Seventh Circuit has held that a partially Indian-owned business was required to comply with the provisions of Title VII in an action involving non-Tribal employees.[3]

The Genetic Information Nondiscrimination Act of 2008 (GINA)[4] prohibits employment or health insurance discrimination on the basis of genetic information. GINA incorporates the definition of "employer" from Title VII, meaning that GINA expressly exempts Indian Tribes.[5]

The Americans with Disabilities Act (ADA)[6] prohibits discrimination by employers against employees based on physical or mental disabilities. Title I of the ADA, which prohibits discriminations based on disability, expressly exempts Indian Tribes from the definition of employer.[7] Other titles of the ADA do not specifically exempt Tribes from the application of the law so an Indian Tribe may be subject to the other provisions of the ADA. However, because

Tribes have not waived their sovereign immunity to such lawsuits, a lawsuit against a Tribe under those other provisions of the ADA would generally be barred by the Tribe's sovereign immunity, absent unequivocal Congressional intent to the contrary.[8]

The Employee Retirement Income Security Act of 1974 (ERISA)[9] is a federal law that establishes standards and regulations for retirement and health plans. The law applies to the private sector and has an exemption for state and federal government plans.[10] ERISA does not apply to the Tribe as a government employer.[11] When Congress updated ERISA under the Pension Protection Act of 2006, it expressly defined "governmental plan" to exempt plans established and maintained by an Indian Tribal government or subdivision that cover employees performing essential government functions.[12]

The 2006 update limited the Indian Tribal exemption to plans where all covered employees are performing an "essential government function" and did not exempt Indian Tribe's "commercial activities" from ERISA.[13] Accordingly, ERISA may apply to Tribes as commercial employers when they have an ERISA employee benefit plan that covers employees engaged in commercial activities.[14] This is an area where the distinction between the Tribe as a government employer (employing individuals to perform government functions) and the Tribe as a commercial employer (employing employees to run a business) are distinct for the purposes of applying the federal law.

The Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA)[15] makes continued health insurance benefits available to group health plan participants and beneficiaries for limited periods under certain circumstances, for example when an employee is terminated or has left their job. Similar to the distinction made for the application of ERISA, COBRA has been found to apply to insurance plans covering employees of a Tribal commercial enterprise, but not to plans covering Tribal government employees.

Silent on Application to Tribes

As a starting point, the Supreme Court in *Federal Power Commission v. Tuscarora Indian Nation* ruled that "general acts of Congress apply to Indians as well as to all others in the absence of a clear expression to the contrary."[16] The Ninth Circuit in *Donovan v. Coeur d' Alene Tribal Farm* established a widely adopted three-part framework for determining when generally applicable federal laws otherwise silent on their application do not apply to Indian Tribes.[17] Such laws do not apply to: 1) purely intramural matters of Tribal self-government; 2) when the law's application would encroach on rights guaranteed by Indian treaties; or 3) when the legislative intent indicates an intent to exclude Tribes from coverage.[18] If none of these exceptions expressly apply, courts have found such laws are applicable to Indian Tribes and Indian commercial entities.[19]

The Occupational Safety and Health Act of 1970 (OSHA) requires certain standards to protect the health and safety of workers in the private sector.[20] OSHA is silent as to whether or not Tribes are considered employers. The Department of Labor has codified the general applicability analysis from *Tuscarora* in applying OSHA to Tribes, with the assumption under the regulation being that Tribes are considered as "employers" subject to OSHA, absent an

exception to the definition or special treatment by Congress.[21] The Ninth Circuit has upheld OSHA enforcement of a Tribe-owned and operated sawmill, finding that a treaty right to exclude was insufficient.[22] The Ninth Circuit in the leading *Coeur d' Alene* case also held that OSHA applied to an otherwise normal commercial Tribal farm enterprise operating in interstate commerce that employed primarily Tribe members (and some non-Indians), where none of the recognized exceptions expressly applied.[23] The Second and Seventh Circuit Federal District Courts have ruled similarly under the *Coeur d' Alene* framework in applying OSHA to Tribal commercial enterprises.[24]

In contrast, the Tenth Circuit held that OSHA did not apply to a Tribal business manufacturing wood products owned and operated by the Tribe, where enforcing OSHA would have infringed on Tribal sovereignty and self-government and treaty language providing the right to exclude non-Indians.[25] In a more recent 2020 case, the Eighth Circuit—which includes Minnesota—similarly held that OSHA regulations did not apply to a Tribe-owned commercial fishery employing only Tribal employees given an explicit treaty right to fish.[26]

Accordingly, OSHA is an example of a federal law of general applicability where the case-by-case application to Indian Tribes varies depending on which federal circuit or federal district court is considering the case.

The Age Discrimination in Employment Act of 1967 (ADEA)[27] prohibits employers from discriminating based on age. Like OSHA, the ADEA does not specifically exempt Tribes, but the Eighth Circuit has held that the law does not apply to Tribes where its application would interfere with Tribal self-government and a specific right reserved to Indians—by treaty, statute, agreement, or executive order.[28] Applying the *Coeur d' Alene* framework, the Eighth Circuit said that "absent clear and plain Congressional intent," the ADEA does not apply to an action involving a Tribal employee, Tribal employer, and purely internal reservation employment.[29] Again, the Circuit Courts have reached different conclusions on when the ADEA and other laws of general applicability apply to Indian Tribes.[30]

Fair Labor Standards Act (FLSA)[31] establishes the federal minimum wage and overtime laws; it also prohibits sexual discrimination in compensation and provides rules for the employment of youth under 18. The FLSA applies to private employers with annual sales of $500,000 or more, state, federal, and local governments, and to certain employees engaged in interstate commerce or production.[32] Although the FLSA exempts certain categories of workers from coverage, it does not specifically exempt Indian Tribes or employers on Indian reservations.[33] Again, federal courts have ruled differently on whether or when the FLSA applies to Indian Tribes.[34] In a 2021 decision, the federal district court for Minnesota dismissed an action based on the Equal Pay Act (EPA), which is part of the FLSA.[35] The court held that sovereign immunity barred the action, and reiterated that neither the EPA nor the ADA and Title VII apply to "Indian Tribes when the matters at issue are purely internal."[36]

National Labor Relations Act (NLRA)[37] provides private employees the right to form or join unions and to engage in collective bargaining activities. The law is also silent on whether it applies to Indian Tribes. Because there is no clear direction in the NLRA, like other laws of general applicability, the issue has been litigated around the country, and varied rulings from

the federal circuit courts have meant that certain Tribes are subject to the provisions of the act, while others are not.[38]

The **Family Medical Leave Act (FMLA)**[39] is similarly silent as to whether it applies to Indian Tribes. Tribes may choose to adopt the FMLA or provide FMLA-type leave policies to employees. While Indian-owned businesses could be required to provide FMLA leave in areas outside of Indian country, it is likely that Tribal sovereign immunity would bar a lawsuit against the Tribe for failing to comply with FMLA, on or off the reservation.[40]

The EEOC largely lacks jurisdiction over discrimination matters involving Indian employers engaged in purely Tribal activities.

The U.S. **Equal Employment Opportunity Commission** (EEOC) is responsible for enforcing federal employment discrimination laws against employers covered by these laws. Whether the EEOC has jurisdiction over an Indian employer depends on which federal law is at issue and whether the employer is a private employer.[41] The EEOC does *not* have jurisdiction over charges of employment discrimination based on race, national origin, sex, color, or religion under Title VII, disability under the ADA, or genetic information under GINA for Tribal employers. However, the EEOC may have jurisdiction over private employers operating on Tribal land or contracting with a Tribe, or over a Tribally owned business performing primarily nongovernmental activities that is not controlled by or integrated with the Tribe. In addition, the EEOC has indicated its jurisdiction over age discrimination charges under the ADEA and gender-based discrimination under the Equal Pay Act—as long as the EEOC's jurisdiction would not interfere with treaty rights or Tribal sovereignty. A Tribe member employed by an employer subject to EEOC enforcement would also be covered by these laws.

Employers on or near a reservation and the Bureau of Indian Affairs may exercise an Indian hiring preference.

The federal government has recognized a hiring preference for Indian Tribes as well as for the Bureau of Indian Affairs (BIA).[42] There is also an Indian preferential treatment exception under Title VII of the Civil Rights Act, which allows employers on and near a reservation to have a preference for hiring Indian applicants.[43] Indian hiring preferences have been upheld in a number of cases because the hiring preference is considered a political preference, and not a race-based preference.[44] Tribes have also recognized Indian employment preferences through Tribal employment rights ordinances (TEROs), laws, or policies, or through their Tribal Employment Rights Office, which governs labor and employment rights and provisions on a reservation. The EEOC may work with or contract with a Tribal Employment Rights Office regarding Tribal preferences and other Tribal employment issues.[45]

State labor and employment laws do not generally apply to Tribes; however most Tribes have their own employment laws and policies.

Generally, state employment and labor laws do not apply to Indian Tribes.[46] For instance, state antidiscrimination laws and required leave acts do not apply to Tribal employers on the reservation, but unemployment compensation is available to employees of Tribes who elect to

become reimbursing employers, as provided by federal and state law.[47] The Minnesota Supreme Court has ruled that the Minnesota Workers' Compensation Act is a civil regulatory law that would not apply to an Indian Tribe, and also found that Tribes in those cases have not waived their sovereign immunity from suit.[48] Other state courts have applied workers' compensation laws to non-Tribally owned businesses operating in Indian country.[49]

Most Tribes have their own employment laws and employment policies and may have a Tribal Employment Rights Office or applicable TEROs governing Tribal employment matters. Many Tribes have policies that mirror state or federal discrimination and leave policies. The Tribe may or may not choose to waive their sovereign immunity with regard to those laws and policies, which may affect the ability of an employee or applicant to sue under those provisions, or in the case of federal discrimination laws, for the EEOC to get involved in any investigation or enforcement action.

Endnotes

[1] 42 U.S.C. § 2000e *et seq*.

[2] 42 U.S.C. § 2000e(b); *Wardle v. Ute Tribe,* 623 F.2d 670, 673 (10th Cir. 1980); see also *Morton v. Macari*, 417 U.S. 535, 553-54 (1974) (recognizing historical intent of exclusion from the law was to allow Tribes to preference Indians in Tribal self-government employment decisions).

[3] *Myrick v. Devils Lake Sioux Manufacturing Corp*., 718 F.Supp. 753, 754-55 (D.N.D. 1989) (holding Title VII applied where the facts involved nontribal reservation employees, no arm of the tribe was a party, and the Tribal court's jurisdiction was not being challenged).

[4] 42 U.S.C. §§ 2000ff to 2000ff-11.

[5] 42 U.S.C. § 2000ff(2)(B)(i).

[6] 42 U.S.C. §§ 12101-12213.

[7] 42 U.S.C. § 12111(5).

[8] *Florida Paraplegic Assoc., Inc. v. Miccosukee Tribe of Indians of Florida*, 166 F.3d 1126, 1129-1134 (11th Cir. 1999) (explaining that although the application of Title III of the ADA to a Tribal casino would not interfere with Tribal self-government, a private suit was nonetheless barred by Tribal sovereign immunity absent any intent to waive such immunity).

[9] 29 U.S.C. §§ 1001-1461.

[10] Pension Protection Act of 2006, 29 U.S.C. § 1002(32).

[11] Pension Protection Act of 2006, 29 U.S.C. § 1002(32).

[12] Pension Protection Act of 2006, 29 U.S.C. § 1002(32).

[13] Pension Protection Act Pub. L. No. 109-280; *Cohen's Handbook of Federal Indian Law*, § 21.02[5](c), 1341 (2012).

[14] Pension Protection Act of 2006, 29 U.S.C. § 1002(32).

[15] 29 U.S.C. §§ 1161-1169.

[16] *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 120 (1960). But see *Donovan v. Navajo Forest Products Indus.*, 692 F.2d 709, 710-12 (10th Cir. 1982) (distinguishing *Tuscarora's* general applicability rule in holding that OSHA was inapplicable to a Tribal business entity where applying OSHA would have interfered with rights provided by Indian treaty).

[17] *Donovan v. Coeur d' Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985).

[18] *Coeur d' Alene Tribal Farm*, 751 F.2d at 1116.

[19] *Tuscarora*, 362 U.S. at 120; *Menominee Tribal Enterprises v. Solis*, 601 F.3d 669, 670-71 (7th Cir. 2010); *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 179-82 (2d Cir. 1996); *Coeur d' Alene Tribal Farm*, 751 F.2d at 1116;

[20] 29 U.S.C. §§ 651- 678.

[21] 29 U.S.C. § 1975.4(b)(3).

[22] *U.S. Dep't of Lab. v. Occupational Safety & Health Rev. Comm'n*, 935 F.2d 182, 186-87 (9th Cir. 1991).

[23] *Coeur d' Alene*, 751 F.2d at 1116-18.

[24] See *Menominee Tribal Enterprises*, 601 F.3d at 670-71 (adopting three-exception framework similar to *Coeur d' Alene* in finding OSHA applicable to tribe-owned commercial sawmill)*; Mashantucket Sand & Gravel*, 95 F.3d at 179-82 (2d Cir. 1996) (adopting the *Coeur d' Alene* analysis in applying OSHA to commercial construction activities of construction firm owned and operated by the tribe exclusively on the reservation).

[25] *Navajo Forest Products Indus.*, 692 F.2d at 712.

[26] *Scalia v. Red Lake Nation Fisheries, Inc.*, 982 F.3d 533, 535-36 (8th Cir. 2020).

[27] 29 U.S.C. §§ 621- 634.

[28] *EEOC v. Fond du Lac Heavy Equipment and Constr. Co.*, 986 F.2d 246, 248-49 (8th Cir. 1993) (declining to apply ADEA to purely intramural considerations of Tribal employee's age by Tribal employer).

[29] *Fond du Lac*, 986 F.2D at 249.

[30] In addition to the Eighth Circuit, courts in the Ninth and Tenth Circuits have ruled that OSHA and the ADEA are not applicable to tribes based on principles of Tribal self-government and sovereignty. See *EEOC v. Karuk Tribe Housing Authority*, 260 F.3d 1071, 1080 (9th Cir. 2001) (finding that ADEA did not apply to purely intramural government matter of Tribal housing based on right of Tribal self-governance); *EEOC v. Cherokee Nation*, 871 F.2d 937 (10th Cir. 1989) (holding ADEA was inapplicable to tribe's health and human services department in light of treaty guaranteeing Tribal self-governance and absent showing of congressional intent to the contrary). However, the Ninth, Seventh, and Second Circuit Courts have also held that such laws, as well as the Fair Labor Standards Act (FLSA), are applicable to tribes in certain circumstances absent a recognized exception. For OSHA, see endnote 22. For FLSA, see *Solis v. Matheson*, 563 F.3d 425, 428 (9th Cir. 2009).

[31] 29 U.S.C. §§ 201 to 219 (2000).

[32] 29 U.S.C. § 203.

[33] 29 U.S.C. § 203(e).

[34] See *Solis v. Matheson*, 563 F.3d 425, 434-37 (9th Cir. 2009) (ruling that FLSA wage and hour requirements applied to purely commercial business owned by tribe member operating in interstate commerce and employing and selling to Indians and non-Indians); but see *Snyder v. Navajo Nation*, 382 F.3d 892, 895 (9th Cir. 2004) (holding FLSA inapplicable to Tribal law enforcement officers engaged in a traditional government function citing FLSA exemption for state and local law enforcement officers); *Reich v. Great Lakes Indian Fish and Wildlife Commission*, 4 F.3d 490, 495-96 (7th Cir. 1993) (finding Tribal fish and wildlife law enforcement officers exempt from FLSA coverage based on exercising traditional government function).

[35] *Butler v. Leech Lake Band of Ojibwe*, No. CV 20-2332(DSD/KMM), 2021 WL 2651981 (D. Minn. June 28, 2021); 29 U.S.C. § 206(d).

[36] *Butler*, 2021 WL 2651981 at *2-*3.

[37] 29 U.S.C. §§ 141-187.

[38] The Tenth Circuit has found in favor of the tribes in *N.L.R.B. v. Pueblo of San Juan,* 276 F.3d 1187, 1200 (10th Cir. 2002) (en banc) (holding that "Congress did not intend by its NLRA provisions to preempt Tribal sovereign authority to enact its right-to-work ordinance"). The Sixth Circuit and the D.C. Circuit Courts have found that the NLRA does apply to tribes. See *N.L.R.B. v. Litter River Band of Ottawa Indians Tribal Government,* 788 F.3d 537 (6th Cir. 2015) (cert. denied, 136 S. Ct. 2508 (2016)) (upholding the NLRB's determination that the NLRA applies

to the tribe); *Soaring Eagle Casino and Resort,* 791 F.3d 648, 662 (6th Cir. 2015), *reh'g en banc denied* (6th Circuit Sept. 29, 2015) (holding that the NLRA was applicable to the casino, and the NLRB could regulate the casino's employment practices); *San Manuel Indian Bingo and Casino v. N.L.R.B.*, 475 F.3d 1306, 1315 (D.C. Cir. Feb. 2007), *reh'g en banc denied* (D.C. Cir. June 8, 2007) (holding that NLRB could apply the NLRA to Tribal casino without significantly impinging on Tribal self-governance and sovereignty). More recently, the Ninth Circuit Court also held in *Pauma v. N.L.R.B.,* 888 F.3d 1066, 1077 (9th Cir. 2018), that the NLRA is a generally applicable law and the NLRB could apply the NLRA to the Casino Pauma.

[39] 29 U.S.C. §§ 2601 to 2654 (2000).

[40] See *Muller v. Morongo Casino, Resort, & Spa*, No. EDCV 14-02308-VAP, 2015 WL 3824160, at *5 (C.D. Cal. June 17, 2015) (holding FMLA does not abrogate Tribal sovereign immunity of a Tribal casino as an "arm of the tribe"); *Chayoon v. Chao*, 355 F.3d 141, 143 (2d Cir. 2004) (ruling Indian tribe had sovereign immunity from casino employee's FMLA action); see also *Miccosukee Tribe of Indians of Fla.*, 166 F.3d at 1130 ("[W]hether an Indian tribe is *subject* to a statute and whether the tribe may be *sued* for violating the statute are two entirely different questions.").

[41] https://www.eeoc.gov/frequently-asked-questions-about-indian-tribes-and-Tribal-employment-rights-offices.

[42] 25 U.S.C. §§ 5116, 5307; *Mancari*, 417 U.S. at 553-54.

[43] 42 U.S.C. § 2000e-2(i); EEOC has indicated up to 60 miles for a reservation is considered "near" the reservation for the purposes of this section.

[44] *Mancari*, 417 U.S. at 553-54; *Preston v. Heckler*, 734 F.2d 1359, 1367-68 (9th Cir. 1984) (recognizing exemption for Indian applicants from federal civil service requirements); *Am. Fed'n. of Gov't. Employees v. United States*, 330 F.3d 513, 523 (D.C. Cir. 2003) (upholding preference for Indian tribes in federal government appropriations bill as constitutional and rationally related to legitimate government purpose).

[45] https://www.eeoc.gov/frequently-asked-questions-about-indian-tribes-and-Tribal-employment-rights-offices.

[46] *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 791-795 (2014) (upholding Tribal sovereign immunity from state authority over gaming on (or outside of) Indian lands—absent a waiver—as codified in the Indian Gaming Regulatory Act, while also recognizing a state's authority to otherwise enforce state gaming laws on state land against Indians and non-Indians alike); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987) (recognizing that state laws do not apply to tribes on their reservations unless Congress expressly provides so).

[47] See, e.g., Minn. Stat. § 268.0525.

[48] *Tibbetts v. Leech Lake Reservation Business Committee*, 397 N.W.2d 883, 887-90 (Minn. 1986).

[49] *State of North Dakota ex rel. Workforce Safety & Ins. v. JFK Raingutters,* 733 N.W.2d 248, 255 (2007).

Gaming Regulation in Indian Country

by Alexandra Haigler (alexandra.haigler@house.mn)

"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 on page 16.

Indian Gaming Regulatory Act allows Indian Tribes to own and operate casinos.

In 1987, Indian Tribes successfully argued that they had the right to own and operate casinos outside of state regulation.[1] Congress passed the Indian Gaming Regulatory Act (IGRA) one year later. The 1988 law sought to balance the interests of the states, Tribes, and federal government. Courts sought to balance those concerns and the federal law replaced tests from a series of federal court decisions in the 1970s and 1980s with standards that permit different levels of state involvement in different classes of games.

The Indian Gaming Regulatory Act:

- allows states to prohibit types of gambling by all people in a state, including Tribes;
- allows Tribes to offer some types of gambling outside of state regulation when a state permits or regulates that type of gambling in any way;
- directs states and Tribes to negotiate an agreement permitting some other types of gambling; and
- requires federal approval for any ordinance or resolution a Tribe adopts to authorize gambling.

As a result, the Tribal right to conduct gambling applies only on Indian land, and Tribes must be aware of state law before knowing what types of gambling they can offer.

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.[2]

Class I gambling, which includes traditional Indian ceremonial games, is under the exclusive control of the Tribes.

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) as long as those games are authorized or not prohibited by state law. 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 all games that are not class I or class II, including 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 and can apply any 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. By dividing gambling into three classes, the federal law permits increasing levels of state involvement and control over the actions of Tribes. While Tribes have complete control over class I gambling, they may only conduct and regulate class II gambling if the state "permits such gaming for any purpose by any person, organization or entity."[3] The right to conduct class III gambling depends on both the state permitting that type of gambling by any person, organization, or entity and on the state and Tribe entering into a compact memorializing the terms of their agreement.[4] There have been significant disputes regarding the role of states in prohibiting and regulating Indian gambling, and the responsibility of states to engage in negotiations to establish Tribal-state compacts.

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 or regulates in any way. The states' right to *control* Indian gambling is also sharply limited under federal law.

States have the ability to prohibit some class II gambling, but only if the state does not permit that type of gambling by any person or entity in the state. A state can permit a type of gambling without it being commercial or profit-making; gambling by nonprofit organizations for charitable purposes, or even private social betting, can provide a basis for Tribes to claim the right to conduct comparable forms of gambling. As a result, a state can only prohibit class II gaming if the state completely prohibits those activities.[5] If a state permits, regulates, or tolerates bingo and other class II games, then the state has no role in regulating those games on

Indian land and Tribes can conduct that type of gambling without complying with state regulation.

States have more control over class III gambling because Tribes can only conduct that type of gambling if the Tribe and state enter into a compact. As drafted, federal law required a state to negotiate a compact with an Indian Tribe requesting negotiations if a state permitted class III games by any person in the state.[6] Under the federal law, a state's refusal to negotiate gave the Tribe the right to go to federal court to seek a court order requiring further negotiations. If further negotiations failed to result in a compact, each side would submit a proposal to a court-appointed mediator who selected the proposal that was the more consistent with the federal law. A state that objected to the mediator's decision could appeal to the Secretary of the Interior. At that point the secretary prescribed the compact, taking into consideration the mediator's decision, state law, and federal law. Thus, a state's refusal to negotiate in good faith did not prevent a compact from being written, but could result in the state's being eliminated from the process of writing the compact. Those enforcement provisions remain part of the federal law but Tribes cannot rely on them.

In 1996, the Supreme Court invalidated the provisions of the IGRA that allow Tribes to sue states that are not negotiating in good faith towards a Tribal-state compact, reasoning that the provisions violate states' sovereign immunity under the 11th Amendment.[7] As a result, a Tribe cannot conduct class III gambling without a compact "and cannot sue to enforce a State's duty to negotiate a compact in good faith."[8] For more information on sovereign immunity see "Sovereign Immunity" page 21.

In response to *Seminole Tribe*, the Secretary of the Interior promulgated procedures that gave administrative effect to the law,[9] but in a challenge to those procedures by the state of Texas, the Fifth Circuit Court of Appeals invalidated them.[10] In a similar case arising out of New Mexico, the Tenth Circuit reached the same conclusion.[11] While the Supreme Court has not addressed the question, it is unlikely that a Tribe can successfully enforce the good-faith negotiation provision in IGRA absent a state's waiver of sovereign immunity.

States cannot tax Indian gambling.

Federal law specifically prohibits states from imposing taxes or fees on Indian gambling, except for fees agreed to by the Tribe. 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. 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.[12]

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.

Compacts between the state and Indian Tribes located within Minnesota permit class III games in the form of 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 such as prohibiting employment of individuals with felony convictions; machine payout percentages; and regulation of the play of blackjack. In addition, the legislature authorized simulcast transmissions of horse racing to locations on Tribal land where the Tribe has entered into a Tribal-state compact.[13]

The compacts governing blackjack obligate Minnesota Indian Tribes to pay the state a total of approximately $150,000 each year to assist in administering the compacts. However, they 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.

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.

The Minnesota Legislature 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.[14]

States may legalize sports betting.

In 2018, the U.S. Supreme Court struck down a 1992 federal law that placed a ban on commercial sports betting in most states, effectively opening the door for states to legalize sports betting within their borders.[15] Since 2018, many states have legalized a form of sports betting (online or in-person on Tribal land casinos), some doing so through compacts with Indian Tribes. Minnesota has not yet legalized sports betting.

Casino Revenues

It is difficult to know how much money Minnesota's Indian casinos take in.

Indian casinos report revenue to the National Indian Gaming Commission (NIGC) and the NIGC reports the total revenue by region. Minnesota is part of the St. Paul region, which also includes Indiana, Iowa, Michigan, Nebraska, and Wisconsin. In 2021, the region reported gaming revenue of approximately $4.7 billion.[16] Net gaming revenue at Minnesota Indian gaming facilities amounted to nearly $1.5 billion in 2014.[17]

Casino revenues have been the source of litigation in Minnesota. A decade-long dispute over an agreement between the city of Duluth and the Fond du Lac Tribe was resolved in 2016. The casino, which opened in 1986 and prior to the passage of IGRA in 1988, included an agreement for the Tribe to pay the city a large sum of revenue for rent. After years of litigation that began in 2009, the Tribe and city of Duluth reached an agreement to make the terms of the rent more consistent with IGRA and allow the casino to continue operating (see page 84 for more on the agreement between the Fond du Lac Band and Duluth).[18]

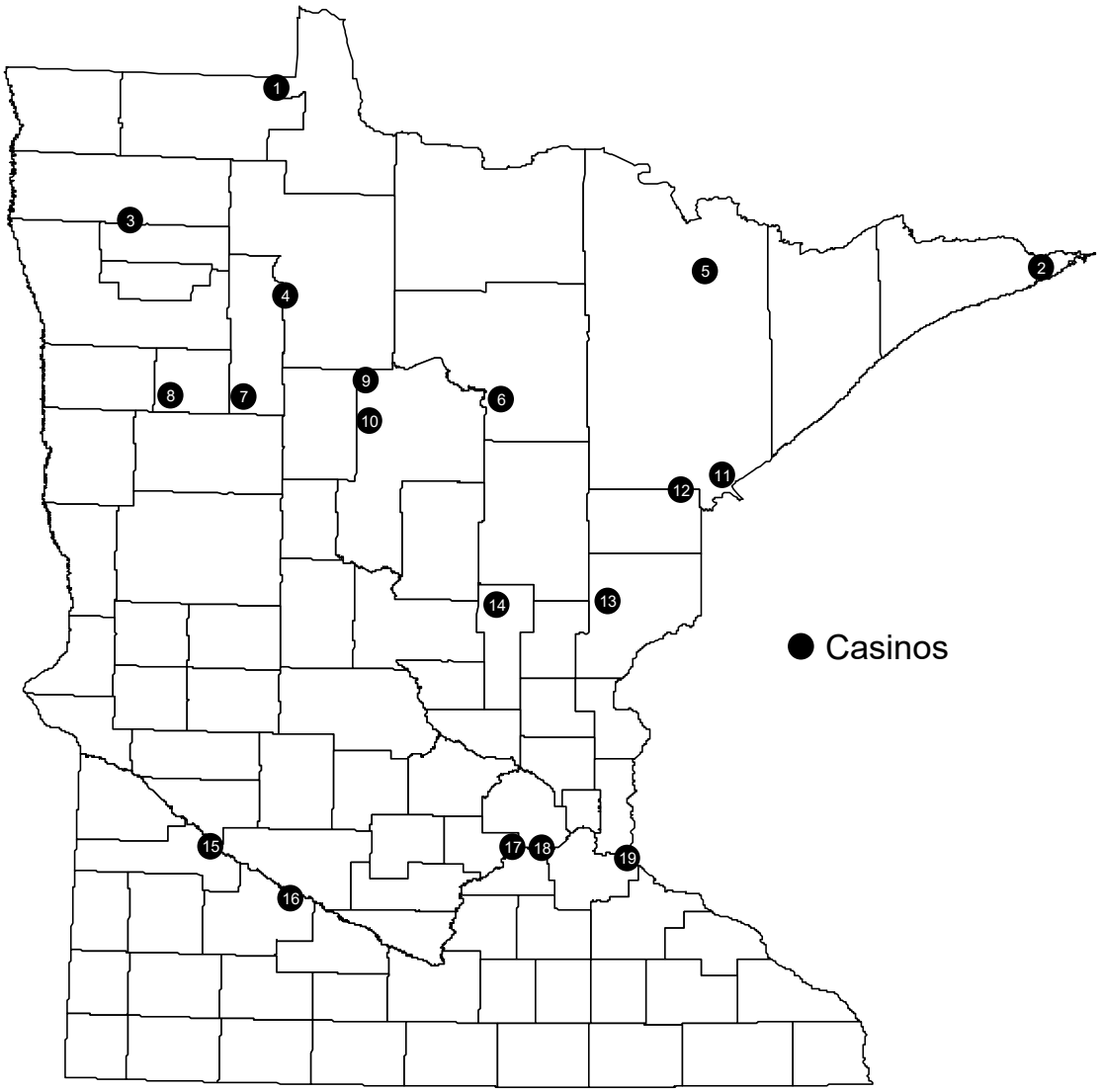
Casinos in Minnesota

Minnesota currently has 11 Tribes operating 19 casinos.

Initially, this was more Tribal casinos than in any other state. There are several reasons for this:

- Minnesota Tribes were involved in legal gambling under federal court decisions upholding Indian sovereignty for several years before the passage of IGRA. 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, each year an estimated 2.4 million casino patrons live outside of Minnesota.
- 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, Bagley
8. Shooting Star Casino Hotel, Mahnomen
9. Cedar Lakes Casino & Hotel
10. Northern Lights Casino
11. Fond-du-Luth Casino
12. Black Bear Casino
13. Grand Casino Hinckley
14. Grand Casino Mille Lacs
15. Prairie's Edge Casino Resort
16. Jackpot Junction Casino Hotel
17 & 18. Little Six Casino & Mystic Lake Casino Hotel
19. Treasure Island Resort and Casino

Endnotes

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

[2] 25 U.S.C. §§ 2703(6) - (8), 2710.

[3] 25 U.S.C. § 2710(b)(1)(A).

[4] 25 U.S.C. § 2710(d)(1).

[5] *Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536, 546 (8th Cir. 1996).

[6] Federal appellate courts have reached different conclusions regarding the appropriate test to determine whether a state permits a particular game. Under the "Wisconsin" or "categorical test," if the state permits any form of class III gaming, compact negotiations can encompass all types of class III gaming. In contrast, the "Florida" or "game-specific test" permits a state to prohibit a specific game even if it permits other games in the same class. See, *Northern Arapaho Tribe v. State of Wyoming*, 389 F.3d 1308 (10th Cir. 2004).

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

[8] *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 797 (2014).

[9] 25 C.F.R. §§ 291.1 to 291.15.

[10] *Texas v. United States*, 497 F.3d 491 (5th Cir. 2007).

[11] *New Mexico v. Department of Interior*, 854 F.3d 1207 (10th Cir. 2017).

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

[13] Laws 2012, ch. 279; Minn. Stat. § 240.13, subd. 9.

[14] Laws 1990, ch. 590, art. 1, § 48.

[15] *Murphy v. National Collegiate Athletic Association*, 138 S. Ct. 1461 (2018).

[16] National Indian Gaming Commission, Tribal Gaming Revenues (in Thousands) by Region, Fiscal Year 2021 and 2020.

[17] Meister, Alan, *Casino City's Indian Gaming Industry Report* (2016).

[18] *Duluth, Minnesota v. Fond du Lac Band of Lake Superior Chippewa*, 785 F.3d 1207 (8th Cir. 2015).

Liquor Regulation in Indian Country

by Christopher Kleman (Christopher.Kleman@house.mn)

"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 on page 16.

Federal law prohibits the possession of alcoholic beverages in and introduction of alcoholic beverages into Indian country.[1] 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.[2] 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

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.

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[3] 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;[4] Indian Tribal members who own liquor establishments on reservations could apply for a city or county license if they wish, but they do not have to if they already have a Tribal license.

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, American 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.[5]

Endnotes

[1] 18 U.S.C. §§ 1154 and 1156.

[2] 18 U.S.C. § 1161.

[3] Minn. Stat. § 340A.4055.

[4] The effective date for the 1985 law states that liquor licenses issued by a city or county to a non-Indian in Indian country must be approved by the governing body of the tribe. Laws 1985, ch. 308, sec. 7.

[5] See discussion in Part One, pages 19 to 20.

Control of Natural Resources in Indian Country

by Janelle Taylor (651-296-5039)

"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 on page 16.

The U.S. Supreme Court and the Minnesota Supreme Court have consistently upheld American 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. Hunting, fishing, and gathering includes access to natural resources viewed by the Tribes as important to their cultural heritage.

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.

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 in U.S. district court, and Chief Judge Diana 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 Michael 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 to 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. For example, the annual walleye harvest was limited to 320,000 pounds in 1997 (40,000 pounds for band members and 280,000 pounds for state-licensed anglers).

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 Tribal 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 level in 2002, and a cap on future walleye limits. Harvest levels continue to be established by the 1837 Ceded Territory Fisheries committee, which includes Tribal and state biologists. The harvest levels have fluctuated over the years, with a high of 600,000 pounds (in 2006) and a low of 40,000 pounds (in 2015 and 2016). The harvest level for 2022 was 135,000 pounds (54,700 for band members and 80,300 for state-licensed anglers).

Endnotes

[1] Minn. Stat. §§ 97A.151, 97A.155.

[2] Minn. Stat. § 97A.161.

[3] See Minnesota Statutes, 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).

[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)

"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 on page 16.

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 both where corresponding federal laws are absent or where Tribal laws 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 American 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, 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 on environmental matters 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 view Tribal Governments as the appropriate non-federal parties for making decisions and carrying out program responsibilities affecting Indian reservations, their environments, and the health and welfare of the reservation populace… [T]he agency will assist interested Tribal Governments in developing programs and preparing to assume regulatory and program management responsibilities for reservation lands.[5]

EPA officially reaffirmed this policy in 2021.[6]

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:[7]

- **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[8]
- **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
- **Toxic Substances Control Act:** Emergency response activities regarding asbestos; reducing exposure to lead[9]

If Tribes do not seek or do not receive approval from EPA to administer federal environmental laws, EPA retains responsibility for their implementation. However, EPA is required to consult with Tribes regarding policies that affect them, under both a presidential Executive Order and an adopted EPA policy.[10]

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; (2) the functions to be exercised are within the Tribe's jurisdiction;[11] 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.[12]

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…"[13]

While this process is referred to as a delegation of federal authority, it may more properly be termed a recognition of a Tribe's inherent sovereignty. In *City of Albuquerque v. Browner*, the Tenth Circuit decision stated: "Congress's authorization for the EPA to treat Indian Tribes as states *preserves* the right of Tribes to govern their water resources. . . ."[14] Referring to section 1370 of the Clean Water Act, which allows states to impose water quality standards more stringent than those of the federal government, the court held that "Indian Tribes have residual sovereign powers that already guarantee the powers enumerated in section 1370, absent an express statutory elimination of those powers."[15] One commentator has made the more general statement that "[i]n almost every instance where a statute has more or less explicitly

treated 'Tribes as States,' either the statute or an attendant Supreme Court opinion clarified that the Tribe itself, and not the statute, provided the source of the Tribe's sovereignty."[16]

Some Minnesota Tribes have been granted "treatment as state" status by the EPA, authorizing the Tribes to administer the federal programs listed in the table below.

Minnesota Tribes With EPA Treatment as State (TAS) Status

Tribes	Clean Water Act			Clean Air Act		Toxic Substances Control Act
	Sec. 106[a]	Sec. 319[b]	Secs. 303/401[c]	Sec. 105[d]	Sec. 505a(2)[e]	Sec. 402[f]
Bois Forte Band	√					√
Fond du Lac Band	√	√	√	√	√	
Grand Portage Band	√	√	√	√	√	
Leech Lake Tribe	√	√	√	√	√	
Lower Sioux Indian Community	√					√
Mille Lacs Band	√			√	√	
Minnesota Chippewa Tribe	√					
Prairie Island Community	√	√				
Red Lake Band	√	√	√	√	√	
Shakopee Mdewankanton Sioux Community	√	√				
Upper Sioux Indian Community	√					√
White Earth Band	√					

[a] Section 106 provides funding to help Tribes understand, assess, and preserve water resources. Funds are used to develop water quality monitoring programs, conduct water quality assessments, purchase equipment, train personnel, and develop Tribal water quality ordinances.
[b] Section 319 authority pertains to the control of pollution from nonpoint sources by such means as monitoring and assessing water quality, developing water quality standards, and ensuring compliance with those standards.
[c] Section 303 grants authority to Tribes to develop and implement water quality standards for specific waterbodies. Section 401 authorizes the issuance of waivers for federal permits discharging into reservation waters.
[d] Section 105 provides grants to plan, develop, and implement air pollution control programs.
[e] Section 505(a)(2) requires that Tribes located within 50 miles of a facility that is seeking an air quality permit from the federal or state government be notified of such permits, so they may participate in the permitting process.
[f] Section 402 grants authority to train workers to properly remove paint containing lead and to certify such training programs.

Sources: Columns 2 to 6: U.S. Environmental Protection Agency, Region 5, Tribal and International Affairs Office.
Column 7: U.S. Environmental Protection Agency, "TAS Approvals to Operate Regulatory Programs and Perform Administrative Functions – by Tribe," https://www.epa.gov/tribal/Tribes-approved-treatment-state-tas.

House Research Department

EPA and Tribes may employ cooperative mechanisms other than TAS status, including memoranda of understanding and an agreement known as a Direct Implementation Tribal Cooperative Agreement (DITCA), under which Tribes may be compensated for undertaking certain activities, such as education or inspections.

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,[17] although these powers may be limited, modified, or eliminated by Congress.[18]

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.[19]

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.[20] 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.[21] 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."[22] For more on Public Law 280, see pages 24 and 25.

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 the sales, distribution, or use of certain types of products or products containing certain chemicals or materials;
- of activities that may pollute water;

- on placing certain items in solid waste, in a solid waste processing or disposal facility;
- of miscellaneous activities

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
Sanitizing or hand and body cleaning products containing triclosan	§ 145.945
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.0951
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
Perchloroethylene used as a dry cleaning solvent	§ 325E.381
Sweeping compounds containing petroleum oil	§ 325E.40
Tents and sleeping bags that are not durably flame resistant	§ 325F.04
Children's products or upholstered residential furniture containing more than 1,000 parts per million of any of four specific flame-retardant chemicals	§ 325F.071
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

House Research Department

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

House Research Department

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

House Research Department

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
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

House Research Department

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 over non-Indians 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."[23]

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, https://www.epa.gov/sites/default/files/2015-04/documents/indian-policy-84.pdf.

[6] U.S. Environmental Protection Agency, *Reaffirmation of the U.S. Environmental Protection Agency's Indian Policy*, September 30, 2021, https://www.epa.gov/system/files/documents/2021-09/oita-21-000-6427.pdf.

[7] 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.

[8] Title 40, Code of Federal Regulations, Part 49, identifies Clean Air Act programs that tribes can implement with EPA approval, https://www.ecfr.gov/current/title-40/chapter-I/subchapter-B/part-49.

[9] A fuller description of Tribal authorities to administer federal laws can be found in U.S. Environmental Protection Agency, *EPA's Direct Implementation of Federal Environmental Programs in Indian Country*, February 25, 2016, https://www.epa.gov/sites/default/files/2016-09/documents/epa-direct-implementation-indian-country.pdf.

[10] Executive Order 13175, *Consultation and Coordination with Indian Tribal Governments*, issued November 9, 2000, https://www.federalregister.gov/documents/2000/11/09/00-29003/consultation-and-coordination-with-indian-tribal-governments; U.S. Environmental Protection Agency, *EPA's Policy on Consulting and Coordinating*

with Indian Tribes, issued May 4, 2011, https://www.epa.gov/sites/default/files/2013-08/documents/cons-and-coord-with-indian-tribes-policy.pdf.

[11] 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. As a result of this decision, a tribe may require, through a permit it issues or in a memorandum of understanding, that the non-Indian party affirmatively recognize the consensual relationship established. *Environmental Law Reporter*, "Environmental Protection in Indian Country: The Fundamentals," vol. 47, November 2017, p. 10913.

[12] 42 U.S.C. § 300j-11(b).

[13] 42 U.S.C. § 4368b(b).

[14] *City of Albuquerque v. Browner*, 97 F.3d, 415, at 418 (10th Cir. 1996).

[15] Id., at 423.

[16] Richard A. Monette, "Treating Tribes as States Under Federal Statutes in the Environmental Arena: Where Laws of Nature and Natural Law Collide," *Vermont Law Review*, vol. 21 (1996), p. 130.

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

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

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

[20] 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.

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

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

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

Taxation in Indian Country

by Chris Kleman (651-296-8959)
by Jared Swanson (651-296-5044)
by Alexandra Haigler (651-296-8956)

"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 on page 16.

This section 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 can promote Tribal sovereignty and provide economic support for Indian communities. They also 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 economic burden of the tax may fall on Tribes or American 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 construed liberally and ambiguities are to be resolved in the favor of American 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 frequently litigated. 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 American Indians who are not Tribal members, to non-American 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 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. States also may tax the reservation income of American 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

Subject of Tax	Governmental Unit Imposing 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[12]	No[13]	Yes
Non-Indian country income	Yes	Unclear[14]	Probably yes[15]
Passive income	Yes	Unclear[16]	Probably yes[17]
Tribal member outside Indian country			
Indian country source income	Yes	Yes[18]	Probably yes[19]
Non-Indian country income	Yes	Yes	Probably yes[20]
Passive income	Yes	Yes	Probably yes[21]
Nonmember Indian in Indian country			
Indian country source income	Yes	Probably yes[22]	Unclear[23]
Non-Indian country income	Yes	Yes	No[24]
Passive income	Yes	Yes	No[25]
Nonmember Indian outside Indian country			
Indian country source income	Yes	Yes[26]	No[27]
Non-Indian country income	Yes	Yes	No
Passive income	Yes	Yes	No
Non-Indian in Indian country			
Indian country source income	Yes	Yes	Unclear[28]
Non-Indian country income	Yes	Yes	No[29]
Passive income	Yes	Yes	No[30]
Non-Indian outside Indian country			
Indian country source income	Yes	Yes	No[31]
Non-Indian country income	Yes	Yes	No
Passive income	Yes	Yes	No

House Research Department

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 summarized in Table 2. Most Tribes have entered into taxing agreements with the state for collection of sales and excise taxes. These agreements are discussed beginning on page 85.

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

Tax/Transaction	Entity Legally Subject to Tax		
	Tribe	Indian[32]	Non-Indian[33]
State Taxation			
Cigarette excise tax	No[34]	No[35]	Yes[36]
Severance tax on minerals			
Leases under pre-1938 law[37]	Yes	Yes	Yes
Leases under post-1938 law[38]	No	No	Yes[39]
General sales tax	No[40]	No[41]	Yes[42]
Motor vehicle license	No	No	No[43]
Gross receipts of contractor with Tribe	N.A.	No	Maybe[44]
Alcohol excise[45]	No	No	Yes
Motor fuel sales to Indian retailer in Indian country	N.A.	N.A.	No[46]
Motor fuel sales to non-Indian distributor for ultimate sale in Indian country	Yes[47]	Yes[48]	Yes[49]
Tribal Taxation			
Cigarette excise	N.A.	Yes[50]	Yes[51]
Alcohol excise	N.A.	Yes[52]	Yes[53]
General sales	N.A.	Yes[54]	No[55]
Oil and gas severance	N.A.	Yes[56]	Yes[57]

House Research Department

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 American 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 American 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*[58] 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."[59] 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.[60]

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 of non-Indians located in Indian country, even when the property was used under leases granted by the Indians.[61] (Personal property owned by Tribes or individual members and held on the reservation is exempt.[62]) 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.[63] 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.[64] A 2013 administrative rule adopted by the BIA may increase the likelihood of preemption.[65]

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[66]	Tribal
Trust land		
Tribal	No[67]	N.A.
Allotted to individual Indian	No[68]	Yes[69]
Fee land – on reservation		
Tribally owned	Yes[70]	N.A.
Owned by enrolled Indian	Yes[71]	Yes[72]
Owned by nonenrolled Indian	Yes	No[73]
Owned by non-Indian	Yes	No[74]
Tribal fee land – off reservation	Yes[75]	N.A.

House Research Department

Table 4 displays the amount of tax-exempt Indian trust lands by county for the three most recent tax-exempt abstracts (2004, 2010, and 2016). The table shows the dollar amounts of exempt market value and the percentage that this value makes up of taxable market value for each county. The total value of exempt Indian land has increased over this period, growing from $1.12 billion in 2004 to $1.98 billion in 2016. However, the amount of this value relative to the taxable values has declined from 1.9 percent in 2004 to 1.2 percent in 2016.

Scott County has the highest amount of tax-exempt value ($397 million) with Carlton County second ($309 million). Scott County is home to the Mystic Lake Casino, the largest Tribal casino in Minnesota. However, the $397 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 (14.8 percent), reflecting the county's low tax base and the fact that Indian lands make up a large portion of the county. Carlton County (at 10.2 percent) is the only other county where Indian lands exceed 10 percent of taxable market value.

Table 4
Tax-Exempt Indian Trust Land Relative to Taxable Market Value (TMV) by County
2004, 2010, and 2016

County	2004 Value	% of TMV	2010 Value	% of TMV	2016 Value	% of TMV
Aitkin	$3,221,100	0.2	$7,742,800	0.2	$8,977,400	0.3
Becker	37,388,600	1.5	68,924,700	1.5	76,812,400	1.2
Beltrami	17,991,700	1.0	30,468,300	1.0	27,796,600	0.8
Carlton	96,025,100	5.6	307,209,200	12.0	309,302,100	10.2
Cass	241,144,100	6.3	232,393,700	3.5	234,474,700	2.9
Clearwater	8,502,300	1.8	18,789,200	2.4	23,750,000	2.2
Cook	66,654,000	6.8	97,068,600	5.4	101,982,000	4.8
Crow Wing	82,700	0.0	261,500	0.0	206,900	0.0
Dakota	-	0.0	1,100	0.0	1,100	0.0
Goodhue	33,197,800	0.8	44,471,300	0.8	69,529,400	1.0
Houston	566,700	0.0	1,001,100	0.1	851,700	0.0
Itasca	8,370,500	0.2	35,785,100	0.6	32,476,800	0.5
Koochiching	32,200	0.0	32,200	0.0	32,200	0.0
Lake of the Woods	31,550,200	11.3	39,190,200	7.9	41,515,500	6.3
Mahnomen	46,355,400	17.5	103,326,200	20.4	108,436,000	14.8
Mille Lacs	75,526,600	5.0	175,430,100	8.3	175,083,700	7.7
Pennington	10,191,200	2.0	17,409,800	2.1	20,020,700	1.3
Pine	64,441,600	3.3	128,817,900	4.3	108,101,500	3.8
Pipestone	16,700	0.0	-	0.0	-	0.0
Redwood	62,472,200	4.4	74,949,600	2.8	99,957,800	2.0
Roseau	2,435,000	0.4	4,993,800	0.5	28,457,300	2.0
St. Louis	47,048,200	0.4	97,127,000	0.6	92,685,900	0.5
Scott	249,354,900	2.4	368,283,400	2.7	396,680,900	2.3
Yellow Medicine	21,825,400	2.4	22,582,100	1.2	23,392,000	0.7
TOTAL	**$1,124,444,000**	**1.9%**	**$1,877,060,700**	**1.4%**	**$1,980,524,600**	**1.2%**

Source: Department of Revenue, 2004, 2010, and 2016 exempt abstracts

House Research Department

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 more than three 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. So far, significant numbers of transfers have not shown up in property tax data. However, the number of acres of exempt Indian lands has been increasing. There was an increase of less than 1 percent between 2004 and 2010 in exempt abstracts. But the number of exempt acres (as opposed to the value of the land and improvements) increased by nearly 10 percent between 2010 and 2016. Even though the number of exempt acres has increased for most counties, these exempt lands made up a smaller share of the total taxable market value in 2016 than in 2010. (See Table 4) This is likely due to increases in the value of nonexempt property, which means exempt lands now make up a smaller portion of those counties' overall tax bases.

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] In effect, these payments were more in the nature of revenue sharing or compensation of an investment partner. In 2009, the band ceased making payments to the city on the grounds that the underlying agreement violated federal law (even though it had been approved by the federal court). 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. The federal courts ultimately determined that the band was not required to pay any revenues after it stopped paying in 2009 (nor was it entitled to refunds of payments made before then).[80] The city and band reached an agreement

in June 2016 providing for annual payment by the band of $150,000 to the city as reimbursement for services, ending seven years of litigation in state and federal court.[81] During the period the agreement was in effect (1994-2009), the band paid the city approximately $75 million.[82]

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.[83] 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.[84] The nonsettlement fee remains in place and was increased by the 2013 Legislature to 50 cents per pack; the fee remains subject to the agreements and results in small payments. Cigarette and tobacco amounts in Table 5 reflect the combined excise tax and the nonsettlement fee amounts.

The 2013 Legislature increased the cigarette excise tax by $1.60 per pack of 20 and added an inflation adjustment, which was later repealed in 2017. The cigarette excise tax presently stands at $3.04 per pack. This has significantly increased 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 can set their retail cigarette prices to absorb some of the state tax and to increase their market share. That strategy 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.

Table 5
Per Capita Distributions to
Tribal Governments Under State Tax Agreements
Effective for payment in Calendar Year 2021

Tribal Government	Sales & Use	Cigarette & Tobacco[85]	Alcoholic Beverage	Motor Fuels[86]
Bois Forte Band	$83.00	$116.72	$17.73	$89.00
Fond du Lac Band	78.84	116.72	17.73	89.00
Grand Portage Band	80.09	116.72	17.73	64.03
Leech Lake Reservation Tribal Council	144.43	116.72	17.73	89.00
Lower Sioux Indian Community	38.09	116.72	17.73	64.08
Mille Lacs Band	73.84	116.72	17.73	63.18
Prairie Island Community*	N.A.	N.A.	N.A.	N.A.
Red Lake Band	0	116.72	8.70	0
Shakopee Mdewakanton Indian Community	25.24	116.72	17.73	64.03
Upper Sioux Indian Community	48.41	116.72	17.73	64.08
White Earth	138.37	116.72	17.73	89.00

*There is no tax agreement with the Prairie Island Community.
Source: Minnesota Department of Revenue

House Research Department

Table 6
Revenue Sharing Under State-Tribal Tax Agreement
Formulas to Calculate Tribal Governments' Share
Calendar Year 2021

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	

House Research Department

Table 7 lists the amount of payments made to the ten Tribal governments for calendar year 2021 collections by tax type.

Table 7
Payments to Tribal Governments Under State Tax Agreements
Calendar Year 2021

Tribal Government	Sales & Use	Cigarette & Tobacco Tax	Alcoholic Beverage	Motor Fuels	Total
Bois Forte Band	$948,759	$436,240	$64,181	$353,070	$1,802,250
Fond du Lac Band	1,268,846	616,539	74,371	425,365	2,385,121
Grand Portage Band	205,856	108,254	9,249	82,072	405,431
Leech Lake Reservation Tribal Council	4,075,933	2,833,794	168,013	1,164,980	8,242,719
Lower Sioux Indian Community	509,197	405,617	17,304	201,985	1,134,103
Mille Lacs Band	1,309,040	494,595	48,244	211,438	2,063,318
Red Lake Band	2,068,027	1,508,850	110,855	505,749	4,193,481
Shakopee Mdewakanton Indian Community	2,537,741	740,955	62,809	817,538	4,159,043
Upper Sioux Indian Community	295,297	175,854	9,024	79,820	559,995
White Earth	3,632,736	1,221,121	178,915	1,211,002	6,243,774
Total	$16,851,434	$8,541,818	$742,964	$5,053,019	$31,189,236
Source: Minnesota Department of Revenue					

House Research Department

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.[87] 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.[88]

Table 8 below shows the amount of aid paid in fiscal years 2017 to 2019 by county. Total aid in 2019 equaled $1,597,206, with the largest payment, $422,258, being made to Scott County.

Table 8
State Aid to Counties with Casinos
Fiscal Years 2017-19

County	Tribe	County Payment		
		FY 2017	FY 2018	FY 2019
Beltrami	Red Lake	$5,845	$3,668	$2,532
Carlton	Fond du Lac	55,053	53,132	53,012
Cass	Leech Lake	215,419	223,504	224,834
Clearwater	White Earth	NA	75,689	78,563
Cook	Grand Portage	44,398	40,738	42,568
Goodhue	Prairie Island	117,512	112,523	106,846
Itasca	Leech Lake	215,419	223,504	224,834
Mahnomen	White Earth	132,007	75,689	78,563
Mille Lacs	Mille Lacs	88,666	78,016	85,762
Pennington	Red Lake	5,845	3,668	2,532
Pine	Mille Lacs	88,666	78,016	85,762
Redwood	Lower Sioux	95,797	89,637	91,929
Roseau	Red Lake	5,845	3,668	2,532
St. Louis	Fond du Lac	55,053	53,132	53,012
Scott	Shakopee	407,540	386,585	422,258
Yellow Medicine	Upper Sioux	42,918	41,417	41,667
Total		$1,575,983	$1,542,586	$1,597,206

Source: Minnesota Department of Revenue

House Research Department

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 U.S.C. §§ 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 37.

[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 14, 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 note 23.

[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] Under a 2014 federal law, the Tribal General Welfare Exclusion Act of 2014, Congress clarified that certain payments made by Tribal governments to their members (including spouses and dependents) are exempt under the general welfare exclusion. Pub. L. No. 113-168, codified as I.R.C. § 139E. This law effectively codified an I.R.S. revenue procedure. See 113 Cong. Rec. S5686-87 (colloquy confirming that the intent of the act is to provide an exemption "no less favorable" than Revenue Procedure 2014-35). The act provides that payments made by a Tribal government under specified guidelines are exempt from federal taxation, if they are (1) available to any Tribal member who meets the guidelines, (2) for the promotion of general welfare, (3) not lavish or extravagant, and (4) not compensation for services. This exemption does not apply, for example, to per capita or similar distributions of income from gaming. See, e.g., *U.S. v. Sally Jim*, case no. 14-22441-civ (S.D.Fla. 2016) (court concluded gaming proceeds distributions did not qualify and there was no reasonable cause for the failure to pay, justifying the imposition of sanctions).

[13] *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. No. 280 is not a grant of regulatory or taxing jurisdiction over Indian reservations).

[14] 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 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 Eighth 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.

[15] 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, 152-53 (1980) (cigarette excise tax).

[16] 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 14, 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*.

[17] 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 23, 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.

[18] *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 (Minn. 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). Note that Minnesota would not tax Tribal payments that are exempt as Indian general welfare benefits under the federal income tax for Tribal members living outside of Indian country, because Minnesota uses federal adjusted gross income as its tax base. I.R.C. § 139E. See the discussion in note 12 of this exclusion. It is likely, however, that most of these benefits are provided to members living on the reservation.

[19] See note 17.

[20] See note 17.

[21] See note 17.

[22] 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).

[23] 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* (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.

[24] See note 23.

[25] See note 23.

[26] See note 18.

[27] See note 23.

[28] See note 23.

[29] See note 23.

[30] See note 23.

[31] See note 23.

[32] 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.

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

[34] "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).

[35] See note 34.

[36] 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.

[37] 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) for a discussion of these issues.

[38] *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).

[39] *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). The Court concluded that the federal statute authorizing the leases did not preempt state taxation, nor did application of general preemption doctrine because the effects of the tax were "too indirect and too insubstantial[.]" *Ibid.* 185.

[40] See note 34. Typical state sales taxes, including Minnesota's, impose the legal incidence of the tax on the consumer (purchaser). The retailer or seller is the collector of the tax. See, e.g., Minn. Stat. § 297A.77.

[41] See note 34.

[42] *Washington v. Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134 (1980). *See* discussion in note 36.

[43] 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.

[44] 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). Compare *Flandreau Santee Sioux Tribe v. Haeder*, 938 F.3d. 941 (2019) In *Haeder*, the 8th circuit held that South Dakota's 2 percent gross receipts tax on contractor services performed by a nonmember construction company on Tribal casino property was not preempted by the Indian Gaming Regulatory Act (IGRA). (The legal incidence of the tax fell on contractor.) Under *Bracker* balancing, the court found that the tax did not implicate any relevant Tribal and federal interests under the IGRA, and the state had a significant interest in raising revenue to provide services for residents such as the contractor and imposing its tax on a statewide basis.

[45] 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 34 and 36.

[46] *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 47.

[47] *Wagnon 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 versus 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 46.

[48] See note 47.

[49] See note 47.

[50] See note 15.

[51] 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).

[52] See note 15.

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

[54] See note 15.

[55] 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 23. 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).

[56] See note 15.

[57] *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).

[58] 502 U.S. 251 (1992).

[59] *Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 113 (1998). *Cf*. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin v. Evers*, 46 F.4th 552 (2022) (alienable reservation land reacquired by Tribal members is not subject to state property tax because the land was made alienable under the Treaty of

1854 rather than the General Allotment Act of 1877, the former of which also was held to guarantee that the land, if owned by Tribal members, would not be subject to taxation.)

[60] 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.

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

[62] See note 67.

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

[64] Compare *Confederated Tribes of the Chehalis Reservation v. Thurston County Board of Equalization*, 724 F.3d 1153 (9th Cir. 2013) (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).

[65] 25 C.F.R. § 162.017. 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. *Seminole Tribe of Florida v. Stranburg,* 7999 F.3d 1324, *cert. denied* 2016 W.L. 3221581 (2016) held that the BIA's administrative rule was not entitled to *Chevron* deference on preemption because *Bracker* required a "particularized, case-specific balancing of federal, Tribal, and state interests" that the court concluded could not be done as a general matter under an administrative rule. *Ibid.* 1338-42.

[66] 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.

[67] *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.

[68] See note 67.

[69] This power flows from the tribe's authority to tax its own members. See note 15. 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 (2018).

[70] *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.

[71] See note 70.

[72] 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.

[73] Although there is no definitive U.S. Supreme Court case, it seems unlikely that a tribe can tax fee lands owned by a nonmember. Some 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.

[74] See note 73.

[75] See note 73.

[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). This was the last year this publication was released.

[78] Some local governments have opposed or attempted to delay transfers in trust either administratively (in the BIA processes) or judicially. Two 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*, 843 N.W.2d 577 (Minn. 2014) (court concluded that the federal court had exclusive jurisdiction to construe agreement between city and tribe and whether city approval of trust transfers was required).

[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. See note 80. 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). The NIGC's action was ultimately upheld by the district court of the District of Columbia. *City of Duluth v. Nat'l Indian Gaming Comm'n,* 89 F. Supp. 3d 56 (D. DC 2015). Whether the city was entitled to all or part of the payments the band withheld between 2009 (when the band started withholding payments) and 2011 (when NIGC invalidated the agreement) required three court decisions (two by the federal district court for Minnesota and one by the Court of Appeals for the Eighth Circuit) to ultimately determine that the band was not required to pay the city. See *City of Duluth v. Fond du Lac Band of Lake Superior Chippewa*, 2015 WL 4545302, fn 1(2015) for the citations to all of the cases.

[81] Louwagie, Pam, "Duluth, Fond du Lac Band reach agreement over casino revenue" *StarTribune* (June 11, 2016), available at http://www.startribune.com/duluth-fond-du-lac-band-reach-agreement-over-casino-revenue/382583401/ (last accessed November 20, 2019).

[82] *City of Duluth v. Fond du Lac Band of Lake Superior Chippewa*, 785 F.3d 1207, 1208 (8th Cir, 2015) (citing $75 million amount).

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

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

[85] Amounts include payments for fee paid by nonparticipating manufacturers ($0.66 for each participating tribe).

[86] In addition, tax paid by Tribal government on its purchases is refunded.

[87] 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.

[88] 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

by Randall Chun (651-296-8639)
by Sarah Sunderman (651-296-8079)
by Elisabeth Klarqvist (651-296-5043)
by Danyell Punelli (651-296-5058)
by Annie Mach (651-296-5204)

Child Care Assistance

Federal. The Child Care and Development Block Grant Act (CCDBG) is a federal law that authorizes the Child Care Development Fund (CCDF) and outlines how states, territories, and federally recognized Tribes (including Tribal organizations) may use federal money to subsidize the child care expenses of low-income families.[1] Tribes may apply to the U.S. Department of Health and Human Services to administer child care assistance on or near a reservation.[2] If a Tribal plan is approved, then the Tribe receives federal money from the amount appropriated to the CCDF that the Secretary of Health and Human Services must set aside for Tribes. Federal law gives Tribes some flexibility in structuring their separate programs, and Tribes are not required to comply with all the federal requirements with which states must comply.

State. Minnesota receives federal money from the CCDF to administer the state's child care assistance program (CCAP) and appropriates state money to the program. The Department of Human Services (DHS) oversees the program and county agencies administer the program under DHS supervision. State statute provides that DHS may enter into contracts with federally recognized Tribes with reservations in Minnesota to administer the program, in place of a county agency, on the Tribe's reservation.[3] As of the date of this report, two Tribes with reservations in Minnesota contract with DHS to administer CCAP, the White Earth Band of Chippewa Indians and the Red Lake Band of Chippewa Indians. The White Earth Band administers CCAP for Tribal members and their families who live on and off the reservation in Mahnomen, Clearwater, and Becker Counties. The Red Lake Band administers CCAP for Tribal members and their families who live on and off the reservation in Beltrami County.

Civil Commitment

Commitment by Tribal Court. A special provision in Minnesota's Civil Commitment Act authorizes the Commissioner of Human Services to contract with and receive payment from the federal Indian Health Service, so that members of a federally recognized Indian Tribe within the state who have been committed by a Tribal court to the Indian Health Service for care and treatment of mental illness, developmental disability, or chemical dependency can be admitted to state-operated treatment programs. This provision also allows a Tribe to contract directly with the commissioner for treatment of Tribal members who have been committed by a Tribal court. The act guarantees individuals admitted to treatment programs under these provisions all of the patient rights under Minnesota Statutes, section 253B.03, and requires that the commitment procedure utilized by the Tribal court provides due process protections similar to those under the state's civil commitment laws.[4]

Minnesota Sex Offender Program. Courts have jurisdiction to civilly commit Tribal members for treatment as a sexually dangerous person or as having a sexual psychopathic personality.[5] The legal decisions that surround civil commitment of American Indians in Minnesota are discussed on page 37.

Clean Indoor Air Act: Exceptions

The state Clean Indoor Air Act generally prohibits smoking at indoor public places, public meetings, places of employment, and public transportation. However, the act does not prohibit smoking in these settings by a Native American, or lighting tobacco in these settings by an adult, as part of a traditional Native American spiritual or cultural ceremony.[6]

Health Care

Affordable Care Act. The Affordable Care Act (Pub. L. No. 111-148 and related amendments) contains a number of provisions that specifically affect American Indians. These include, but are not limited to, the following:

1) American Indians with incomes that do not exceed 300 percent of the federal poverty guidelines (FPG) and who purchase individual health coverage through an exchange, are generally exempt from cost-sharing;[7]
2) American Indians who purchase individual health coverage through an exchange, regardless of income, are generally exempt from cost-sharing for services provided by the Indian Health Service, Tribal programs, or urban Indian programs, or from another health care provider through referral under contract health services;[8]
3) American Indians may enroll in, or change their enrollment in, a qualified health plan purchased through MNsure, the state's insurance exchange, on a monthly basis, and are not restricted to enrolling during the annual open enrollment period, or a special enrollment period related to a qualifying life event such as divorce or the birth of a child.

Community Solutions for Healthy Child Development Grants. The Department of Health administers a grant program to improve child development outcomes for children of color and American Indian children, reduce racial disparities in children's health and development, and promote racial and geographic equity. A Community Solutions Advisory Council, which includes representatives of the American Indian community, advises the commissioner on selecting grant recipients. The commissioner must give priority for proposals from specified organizations, including organizations led by and serving American Indians. This grant program is funded for a four-year period, through fiscal year 2023.[9]

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; rates of prenatal care access and utilization; infant mortality rates; and morbidity and mortality rates from breast and cervical cancers, HIV/AIDS and sexually

transmitted infections, 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 in the listed priority areas.[10]

Health Care Programs. American Indians are eligible for the Medical Assistance (MA) 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 American 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.[11]
- **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. No. 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.[12]
- **Prepaid health care.** American 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.[13]
- **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.[14]
- **Premium and cost-sharing protection.** American Indians receiving services under MA as employed persons with disabilities are exempt from paying premiums. American Indians are also exempt from paying premiums and cost-sharing under the MinnesotaCare program. In addition, American Indians are exempt from paying cost-sharing for MA services if they have received or are eligible to receive services from the Indian Health Service, Tribal programs or urban Indian programs, or from another health care provider through referral under contract health services. MA payment to these providers cannot be reduced by the amount of any cost-sharing.[15] These provisions are required by the American Recovery and Reinvestment Act (ARRA) of 2009 (Pub. L. No. 111-5).
- **Exemption of certain property from assets.** Certain Indian-specific property is excluded from assets when determining MA eligibility for American 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.[16]
- **Exemption from estate recovery.** Certain income, resources, and property are exempted from MA estate recovery from American 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.[17]

Indian Health Grants. The Department of Health is authorized to provide grants to applicants to establish, operate, or subsidize health clinics and services, in order to provide health care services to American Indians residing off of reservations.[18]

Local Public Health Grants. The Department of Health may distribute a portion of the funding available for local public health grants to Tribal governments for certain public health activities, including maternal and child health programs, activities to reduce health disparities, and emergency preparedness.[19]

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.[20] Licensure is voluntary for social workers who are employed by federally recognized Tribes.[21] Licensure is also voluntary for marriage and family therapists who are employed by federally recognized Tribes.[22]

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.[23]

Ombudsperson for American Indian Families

Legislation passed in 2021 to establish the Office of the Ombudsperson for American Indian Families, which operates independently from, but in collaboration with, the Indian Affairs Council and the American Indian Child Welfare Advisory Council.[24] The ombudsperson is selected by the American Indian community-specific board and is charged with monitoring agency compliance with all laws governing child protection and placement, public education, and housing issues related to child protection that impact American Indian children and their families. The ombudsperson also has duties relating to local state court training and procedures, and may investigate decisions and acts related to the protection or placement of American Indian children.[25] Prior to the change in 2021, the ombudsperson for families performed these duties as they pertained to American Indian children.

Substance Use Disorder Treatment

The state Department of Human Services may enter into agreements with federally recognized Tribal units to pay for substance use disorder (SUD) treatment services and provide prevention, education, training, and community awareness programs.[26] Treatment programs for American Indians must be designed to meet community needs, and must recognize American Indian cultural and social needs. The American Indian Advisory Council assists the agency in formulating policies and procedures relating to SUD and substance misuse by American Indians.[27]

Tribal Maternal, Infant, and Early Childhood Home Visiting

Tribal Maternal, Infant, and Early Childhood Home Visiting (TMIECHV) is a federal program that provides grants to Tribes and Tribal organizations to develop and implement home visiting programs. Home visiting programs provide in-home education and culturally sensitive resources on health, development, and education to expecting parents and caregivers of children under five. The program is funded by a 3 percent set-aside from the federal appropriation for the MIECHV program, which provides funding to states to award home visiting grants. The White Earth Band of Chippewa Indians is the only recipient of a TMIECHV grant in Minnesota. The White Earth Band uses the grant money to provide home visiting to American Indian and non-Indian expectant families and families with children living on the White Earth Reservation. Tribes and Tribal organizations may also apply to the state for MIECHV grants.

Welfare Reform

Federal. Federal welfare reform legislation enacted in 1996 (Pub. L. No. 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 U.S. 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.[28] Another provision of the legislation authorizes the Commissioner of Human Services to enter into agreements with Tribal governments to provide employment services.[29] Two Minnesota Tribes, the Mille Lacs Band of Ojibwe and the Red Lake Band of Chippewa Indians, applied for and received federal approval to operate separate Tribal TANF programs. The Mille Lacs Band of Ojibwe 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.

The Red Lake Band of Chippewa Indians program began operating on January 1, 2015, in a two-county area covering Beltrami and Clearwater Counties. In order to be eligible for the Red Lake Band's Tribal TANF program, there must be at least one assistance unit member who is a citizen of the Red Lake Band of Chippewa Indians or is enrolled or eligible to be enrolled with another federally recognized Tribal Nation and resides within the boundaries of Red Lake Nation. Some of the features of the Red Lake Band's program are different from MFIP, including the sanctions imposed for noncompliance.

Endnote

[1] 42 U.S.C. § 9858 et seq.

[2] 42 U.S.C. § 9858m(c).

[3] Minn. Stat. § 119B.02, subd. 2.

[4] Minn. Stat. § 253B.212.

[5] *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).

[6] Minn. Stat. §§ 144.4165; 144.4167, subd. 2.

[7] 42 U.S.C. § 18071(d).

[8] 42 U.S.C. § 18071(d).

[9] Laws 2019, 1st Spec. Sess. ch. 9, art. 11, § 107.

[10] Minn. Stat. § 145.928.

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

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

[13] Minn. Stat. § 256B.69, subd. 26.

[14] Minn. Stat. § 256B.02, subd. 7.

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

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

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

[18] Minn. Stat. § 145A.14, subd. 2.

[19] Minn. Stat. § 145A.14, subd. 2a.

[20] Minn. Stat. § 148F.11, subd. 3.

[21] Minn. Stat. § 148E.065, subd 5a.

[22] Minn. Stat. § 148B.38, subd. 3.

[23] Minn. Stat. § 256.975, subd. 6.

[24] Minn. Stat. § 3.9215, subd. 2.

[25] Minn. Stat. § 3.9215, subds. 3, 5, 7.

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

[27] Minn. Stat. § 254A.035.

[28] Minn. Stat. § 256J.315.

[29] Minn. Stat. § 256J.645.

Indian Child Welfare Laws

by Sarah Sunderman (651-296-8079)
by Mary Davis (651-296-9253)

There are numerous federal, state, and Tribal laws that affect American Indian children's welfare. Many of these laws are aimed at addressing the disproportionate rate of American Indian children and families in the child protection system. These laws create a complex relationship in the application of federal, state, and Tribal laws that impact the participants in these cases and create specific requirements for social service agencies. These laws also intersect with funding streams, such as grant programs and foster care payments.

Federal Laws on Indian Child Welfare

The Federal Indian Child Welfare Act creates federal requirements for the placement of American Indian children in custody cases.

In 1978, Congress passed the federal Indian Child Welfare Act (ICWA).[1] The statute creates federal requirements that state courts must follow in the placement of American Indian children in nonparental custody cases, whether the placement is voluntary or involuntary on the part of the parents. The act covers foster care placement, termination of parental rights, pre-adoptive placement, the adoption of American Indian children by non-Indians, and status offenses in juvenile delinquency cases. The intent of the act is to preserve the cultural identity of American 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.[2] 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 American Indian custodians of an involuntary, covered out-of-home placement of an American Indian child. If the child's Tribe has a Tribal court, the court may take jurisdiction in the matter.[3] 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 the Tribe to intervene in a matter being conducted in state court.

The BIA periodically updates the federal guidelines on the implementation of the ICWA.[4] These guidelines give states and Tribes specific information about meeting the requirements of ICWA. In 2016, the BIA issued the first agency rules on the implementation of the ICWA since it was passed in 1979.[5] These federal regulations provide the specific requirements courts must follow to comply with the provisions of ICWA.[6] The rules clarify a number of provisions of the law that were previously considered ambiguous and applied in an inconsistent manner around the country, including definitions for terms and applicable standards of evidence to prove a case.[7]

Types of ICWA cases. ICWA applies to children who are enrolled members of an Indian Tribe, or eligible for enrollment and have a parent who is enrolled in a federally recognized Tribe.[8]

The state courts must ask the participants on the record whether or not the children in the case are American Indians.[9] The federal regulations provide that ICWA applies in a number of different types of court cases.[10] The regulations also identify specific situations where ICWA does not apply: an initial emergency proceeding or placement[11] and a placement based on an act, which if committed as an adult would be deemed a crime. Divorce and custody proceedings between parents are also generally exempt from ICWA by definition. ICWA applies in:

- foster care placements;
- placements with a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;
- termination of parental rights cases;
- pre-adoptive placement; and
- adoptive placement.

Notice of an ICWA proceeding. Federal regulations clarify that the party seeking an involuntary out-of-home placement or termination of a parent's rights is required to provide notice when an American Indian child or an ICWA-eligible child (a child eligible for enrollment in an Indian Tribe and who has an Indian parent) is the subject of the proceeding. The rules identify what information has to be provided in the notice, including a copy of the petition for the action. The notice of the proceedings must be provided to the Indian parents, Indian custodians, and the child's Tribe, and copies must be provided to the Secretary of the Interior and the appropriate regional director of the BIA.[12] The notice to the parents must include information about the right to court-appointed counsel. The proceedings cannot occur less than ten days after the notice has been received, and the parents can request an additional 20 days to prepare.[13]

Court-appointed attorneys in ICWA cases. ICWA requires that parents be appointed an attorney.[14] In Minnesota, if a parent, guardian, or child is indigent in a child protection case, he or she is appointed an attorney.[15]

Transfer of cases to Tribal court. If the child is already a ward of the Tribal court or if the child is domiciled on a reservation that has exclusive jurisdiction over child custody proceedings, then the state court must dismiss the state court action, notify the Tribal court, and send it the court records of the case.[16] In any other case, the parent, the Indian custodian, or a child's Tribe can request the case be transferred to the child's Tribe. The request can be made orally on the record in court or in writing at any stage of the case.[17] Once a state court has received a transfer petition, the court must transfer the case unless one of the parents of the child has objected to the transfer, the Tribal court has declined the case, or a good cause exists to deny the transfer.[18] Good cause cannot include a failure to transfer past child protection cases related to the child, a child's lack of connection to the Tribe, or how the transfer will affect the current placement of the child.[19]

"Active efforts." 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 under Minnesota law to cases involving placement of non-Indian children. "Active efforts" have been interpreted to mean a rigorous and concerted level of casework that requires local social service agencies to request the Tribal participation at the earliest time possible, to actively solicit the Tribe's participation throughout the case, use the Tribe's prevailing social and cultural values to preserve the American Indian child's family and prevent out-of-home placement, and to return the child to the American Indian child's family at the earliest possible time if out-of-home placement has occurred. The term "active efforts" is defined in the federal regulations, and examples of how to comply with this requirement are also provided in the 2015 update to the BIA ICWA guidelines.[20]

"Qualified expert witness." If a child placement is involuntary, a witness expert in American 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.[21] The burden of proof for involuntary foster care placement 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.[22]

A qualified expert witness can be a person identified by the Indian child's Tribe or, if the court or a party cannot find someone through the Tribe, the BIA office serving that child's Indian Tribe can assist in locating a person to testify, but the social worker who is working on the case cannot be the qualified expert witness.[23]

Out-of-home placement of an American Indian child. For a foster care placement or a pre-adoptive placement, the court must follow the placement preferences in ICWA or follow the placement preferences of the child's Tribe. For foster care placements, the preferences provide a tier structure as follows:

1) members of the child's extended family;
2) a foster home licensed by the Tribe;
3) an American Indian foster home;
4) an institution approved by the Tribe or operated by an Indian organization.[24]

For adoptive placements, ICWA preferences are as follows:

1) members of the child's extended family;
2) other members of the child's Tribe;
3) other American Indian families.[25]

Voluntary proceedings for placement of an American Indian child, even with the parent's consent, must also follow the ICWA placement preferences.[26]

The Minnesota Indian Family Preservation Act requires that the ICWA placement preferences be followed and outlines specific requirements when deviation from the preferences are contemplated that are generally consistent with the 2015 BIA ICWA guidelines.[27] The federal regulations also elaborate on what constitutes "good cause" to deviate from the placement

preferences, which can include the wishes of either parent, the wishes of the child, or the extraordinary physical, mental, or emotional needs of the child.[28]

Recent court challenge to ICWA. In November 2022, the U.S. Supreme Court heard arguments on *Haaland v. Brackeen* and three consolidated cases challenging the constitutionality of ICWA.[29] Plaintiffs include the state of Texas, three non-Indian couples who tried to foster or adopt American Indian children (including one Minnesota couple), and one biological mother of an Indian child. Defendants include several Tribal nations and the federal government. The plaintiffs asserted that (1) ICWA violates the Constitution's equal protection clause by discriminating based on race; (2) ICWA exceeds Congress's power by regulating adoption and child protection proceedings—traditionally state matters; (3) ICWA violates the 10th amendment of the constitution by requiring states to adopt or enforce federal law; and (4) ICWA unconstitutionally delegates legislative power to Tribes by allowing them to adopt their own order of placement preferences for use in state courts. The Court has not issued a decision at the time of this publication; a decision is expected by October 2023.

The Indian Child Protection and Family Violence Prevention Act addresses child abuse and neglect.[30]

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 American Indian children. It also authorizes funding for Tribal child abuse prevention and treatment programs.

The Fostering Connections to Success and Increasing Adoptions Act deals with foster care, adoption, and kinship assistance.[31]

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. (See page 110 for a description of IV-E agreements.) 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.

Minnesota Laws on Indian Child Welfare

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 (MIFPA).[32] The state law was intended to call the controlling federal law to the attention of state courts and professionals in child placement proceedings.

The MIFPA was amended in 2015 and incorporated numerous changes to the existing state law.[33] The changes addressed ambiguities in case law, but also tied definitions to federal definitions and made aspects of the state law more consistent with the BIA ICWA guidelines. Some of the notable changes include the following:

- Changing the definition of "relative" to be consistent with the federal ICWA
- Providing that a "parent" includes a father as it is defined by Tribal custom or Tribal law and that paternity is acknowledged when an unmarried father takes any action to hold himself out as the biological father[34]
- Adding a new definition for the term "Qualified Expert Witness" (QEW) and providing specific criteria for finding and using a QEW
- Requiring all social service agencies or private child-placing agencies to inquire of known parties about the child's lineage to determine if a child is potentially an American Indian child
- Requiring notice to the Tribe from the social service agency, including available information about the child and parents, within seven days of the beginning of family assessment or investigation
- Requiring the court to notify a Tribe if the Tribe of the child is known when there is an emergency hearing for out-of-home placement
- Requiring the social service agency to involve the child's Tribe at the earliest possible time in the case, but provides that the Tribe may choose to participate at any point in the case
- Providing criteria for deviation from the placement preferences under ICWA and specifically requiring that good cause to deviate from the placement preferences must be determined at each stage of the proceeding
- Creating a statutory definition of the term "active efforts" and providing specific criteria that the social service agency must meet in order for the court to order an American Indian child into an out-of-home-placement[35]
- Creating a statutory definition of the term "best interest of an Indian child"
- Requiring a social services agency to avoid out-of-home placement by working with the Tribe at the earliest possible time and looking for alternatives to out-of-home placements
- Providing that good cause to deny a transfer to Tribal court cannot include an assessment of the Tribal court or social service agency who would accept the case, but the court may find good cause not to transfer a case if there is no Tribal court to send the case to or if there is an undue hardship to the parties to transfer the case that goes beyond geographic distance alone[36]

The state law provides many specific requirements for local social service agencies who may be doing an assessment or investigation. The law is specifically triggered in any instance where an American Indian child may be put into out-of-home-placement. MIFPA 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.[37]

The federal ICWA law and the regulations enacted by the Department of the Interior are controlling in these cases; however, where MIFPA and other state laws provide greater protections to American Indian families, courts in Minnesota will need to comply with the state laws.[38]

Tribal/State Indian Child Welfare Agreement

Negotiated between all of the Tribes in Minnesota 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 American Indian children and their families. The stated purpose of the agreement is to strengthen implementation of the ICWA and the MIFPA, thereby protecting the interests of American 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 American 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 American 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 Tribal governments in 1999, and was amended in 2007.

American Indian Child Welfare Programs[39]

In 2008, a program called the American Indian Child Welfare Initiative reformed the county-based delivery of child welfare services into a Tribal delivery system for American Indian children and their families who live on the Leech Lake, Red Lake, and White Earth reservations.[40] The Tribal programs exceed federal child welfare performance standards for measures related to placement stability, timeliness to adoption, 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[41]

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 have included: 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.

Native American Equity Pilot Project and TTCP

The Department of Human Services (DHS) began a pilot project in 2017 to address the disproportionate number of American Indian children in out-of-home placements. The department partnered with the University of Minnesota-Duluth, St. Louis County, and Tribes to study the underlying causes of the child welfare disparities, prepare a report, and develop a training curriculum for county and Tribal social service agencies. The pilot project concluded in 2020.

In January 2020, the University of Minnesota Duluth began the Tribal Training and Certification Partnership (TTCP), which partners with Tribes, the Child Welfare Training Academy, and the Child Safety and Permanency Division at the DHS to provide education and training to professionals in the child welfare system.[42]

Endnotes

[1] 25 U.S.C. §§ 1901- 1963.

[2] *In re Custody of A.K.H.,* 502 N.W.2d 790 (Minn. App. 1993), *rev. denied* (1993). See also 25 CFR 23.2, definition of "Foster Care Placement."

[3] *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.

[4] "Guidelines for State Courts and Agencies in Indian Child Custody Proceedings," Bureau of Indian Affairs, Department of the Interior, published in the Federal Register, vol. 80, no. 37, Feb. 25, 2015.

[5] 25 C.F.R. Part 23, Indian Child Welfare Act proceedings, published on June 14, 2016, effective December 12, 2016.

[6] The new federal regulations affect cases that are initiated after December 12, 2016.

[7] 25 C.F.R. §§ 23.02 (definitions) and 23.121 (applicable standards of evidence).

[8] 25 U.S.C. § 1903; 25 C.F.R. § 23.108 provides that state courts must rely on a tribe's determination of eligibility for enrollment.

[9] 25 C.F.R. § 23.107.

[10] 25 C.F.R. § 23.2.

[11] 25 C.F.R. § 23.113; emergency proceedings have specific requirements provided for in the federal regulations and should last no longer than 30 days.

[12] 25 C.F.R. § 23.11.

[13] 25 C.F.R. § 23.112.

[14] 25 C.F.R. § 23.13, 25 U.S.C. 1912(b). ICWA requires a parent get a court-appointed attorney.

[15] Minn. Stat. § 260C.163, subd. 3.

[16] 23 C.F.R. § 23.110.

[17] 25 C.F.R. § 23.115.

[18] 25 C.F.R. § 23.117.

[19] 25 C.F.R. § 23.118.

[20] 25 C.F.R. § 23.2, "Active Efforts" definition; see also "Guidelines for State Courts and Agencies in Indian Child Custody Proceedings," Bureau of Indian Affairs, Department of the Interior, published in the Federal Register, vol. 80, no. 37, Feb. 25, 2015.

[21] The qualified expert witness testimony must support the court's determination that continued custody with a parent will result in serious harm. See *In the Matter of the Welfare of the Children of S.R.K. and O.A.K.*, 911 N.W.2d 821 (Minn. 2018).

[22] 25 C.F.R. § 23.121

[23] 25 C.F.R. § 23.122.

[24] 25 U.S.C. § 1915, 25 C.F.R. §§ 23.130 and 23.131.

[25] Id.

[26] 25 C.F.R. § 23.124.

[27] Minn. Stat. § 260.771, subd. 7.

[28] 25 C.F.R. § 23.132.

[29] *Haaland v. Brackeen,* 142 S. Ct. 1205 (2022), cert. accepted; appealing decision from the Fifth Circuit, *Haaland v. Brackeen*, 994 F.3d 249, 5th Cir. (Tex.), Apr. 06, 2021, en blanc decision found portions of the ICWA unconstitutional.

[30] 25 U.S.C. § 3202.

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

[32] Minn. Stat. §§ 260.751- 260.835.

[33] Laws 2015, ch. 78, art. 1, §§ 1 to 36.

[34] Minn. Stat. § 260.755, subd. 14.

[35] Minn. Stat. § 260.762.

[36] Minn. Stat. § 260.771, subd. 3a.

[37] Minn. Stat. § 260.771, subd. 2.

[38] 25 U.S.C. § 1921.

[39] Minn. Stat. § 256.01, subd. 14b.

[40] The Mille Lacs Band is working with DHS to begin providing delivery of child welfare services through the American Indian Child Welfare Initiative.

[41] Minn. Stat. § 260.785.

[42] See University of Minnesota Duluth, College of Education and Human Service Professions, Tribal Training and Certification Partnership, at https://cehsp.d.umn.edu/ttcp.

Education Laws Affecting Indian Students in Early Education Through Grade 12

by Tim Strom (651-296-1886)
by Cristina Parra (651-296-8036)

Counting American Indian Students

There are two primary counts of American Indian students in Minnesota. The "legacy count" or "state count" includes persons who identify as American Indian, as well as persons who identify as multi-racial. The state count is used for the state's American Indian Program aid and to determine whether a district has ten or more American Indian students, triggering a state law requirement that the district have an American Indian parent committee. This count identifies 26,794 public school students, or 3.1 percent of the total student population, as American Indians in the 2022-2023 school year.

The federal count does not include students who self-identify as American Indian and another race, or as American Indian and Hispanic. The federal count is used for federal reporting under federal law and state reporting in the Minnesota Report Card, and determining integration revenue. The federal count identifies 14,901 prekindergarten, kindergarten, elementary, and secondary students identifying as American Indian students, or 1.7 percent of the total student population, enrolled in Minnesota's K-12 public schools in the 2022-2023 school year.

Generally, classification as "American Indian" is considered a political, not racial, classification based on American Indian Tribes' status as governmental and political entities.

K-12 American Indian Education School Options

American Indian students attend public schools, private schools, schools operated by the federal Bureau of Indian Education (BIE), and Tribal contract schools.

Most American Indian students in Minnesota attend public schools operated by Minnesota's school districts and charter schools. Approximately 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 Greater Minnesota. American Indian students also attend federally funded Tribal schools located on the Fond du Lac, Mille Lacs, White Earth, and Leech Lake reservations and nonpublic schools.

Total American Indian Enrollment 2021-2022 School Year

School	Total All Students	Federal Count American Indian Students	% of Students who are American Indian (Federal)	% of Total American Indian Student (Federal)	State Count American Indian Students	% of Students who are American Indian (State)	% of Total American Indian Students (State)
School Districts	796,518	13,786	1.7%	88.7%	24,944	3.1%	90.9%
Charter Schools	66,480	945	1.4%	6.1%	1,601	2.4%	5.8%
BIE Schools	635	635	100.0%	4.1%	635	100.0%	2.3%
Cooperative Units	7,508	170	2.3%	1.1%	249	3.3%	0.9%
State Totals	**871,141**	**15,536**	**1.8%**	**100.0%**	**27,429**	**3.1%**	**100.0%**

House Research Department

American Indian students can also, like other students, meet compulsory instruction requirements by attending nonpublic schools, including homeschools.

School Districts

In the 2021-2022 school year, there were 329 independent, common, and special school districts in Minnesota. School districts are governed by elected school boards, and operate traditional elementary and secondary schools, as well as area learning centers and other alternative programs, within their geographic boundaries. All of Minnesota's reservation land is within public district borders.

School Districts with the Most American Indian Students 2021-2022 School Year Based on the State Count

Rank	District	Total Students	State Count American Indian Students	% of District Students who are American Indian	District Students as a % of State Total American Indian Students
1	Minneapolis	30,115	1,667	5.5%	6.1%
2	Red Lake	1,467	1,466	99.9%	5.3%
3	Bemidji	4,874	1,253	25.7%	4.6%
4	St. Paul	33,475	1,233	3.7%	4.5%
5	Anoka-Hennepin	38,230	1,139	3.0%	4.2%
6	Cass Lake-Bena	1,165	1,069	91.8%	3.9%

Rank	District	Total Students	State Count American Indian Students	% of District Students who are American Indian	District Students as a % of State Total American Indian Students
7	Mahnomen	701	599	85.4%	2.2%
8	Duluth	8,487	592	7.0%	2.2%
9	Waubun-Ogema-White Earth	699	575	82.3%	2.1%
10	Detroit Lakes	2,805	549	19.6%	2.0%

Source: Minnesota Department of Education

House Research Department

School Districts with the Highest Concentration of American Indian Students 2021-2022 School Year Based on the State Count

Rank	District	Total Students	American Indian Students	% American Indian	% of Total State Am Ind Pop
1	Pine Point	72	72	100.0%	0.3%
2	Nett Lake	40	40	100.0%	0.1%
3	Red Lake	1,467	1,466	99.9%	5.3%
4	Cass Lake-Bena	1,165	1,069	91.8%	3.9%
5	Mahnomen	701	599	85.4%	2.2%
6	Waubun-Ogema-White Earth	699	575	82.3%	2.1%
7	Browns Valley	173	98	56.6%	0.4%
8	Onamia	561	294	52.4%	1.1%
9	Kelliher	297	143	48.1%	0.5%
10	Deer River	901	421	46.7%	1.5%
	State Totals	**871,189**	**15,533**		

Source: Minnesota Department of Education

House Research Department

Some school districts with large American Indian populations have developed programs with a particular focus on American Indian culture and language. Three such programs are noted below.

St. Paul School District. St. Paul serves 4.5 percent of Minnesota's American Indian students. The American Indian Magnet School serves students in a prekindergarten program, and in grades kindergarten through 8. The school was founded with a goal of providing an American Indian perspective and to welcome students of all backgrounds to a diverse school community. Students in grades six to eight are required to study either the Lakota or Ojibwe language.

Minneapolis School District. The Minneapolis School District serves 6.1 percent of Minnesota's American Indian students. In 2006, the district signed a memorandum of agreement with the Metropolitan Urban Indian Directors to improve the education of American Indian students in the district. The agreement has been renewed periodically; the most recent agreement went into effect on January 1, 2022. Under the agreement, the district must designate four American Indian Best Practice school sites, and four American Indian Pathways school sites. The Best Practice sites are "intended to demonstrate the integration of culture and academic rigor, and to provide examples for replication in other schools," while the Pathway sites provide language and culture offerings that are less immersive than the Best Practice sites.[1]

The Best Practice sites are: Anishinabe Academy, South High School All Nations, Takoda Prep of AIOIC (American Indian Opportunities Industrialization Center), and Nawayee Center School. The latter two are contract alternative programs run by community agencies; students in the programs must qualify for the graduation incentives program,[2] and continue to be Minneapolis public school students while enrolled at the contract alternative schools. The pathway sites are: Northeast Middle School, Sanford Middle School, Edison High School, and South High School.

Duluth School District. The Duluth School District serves 2.2 percent of Minnesota's American Indian students. Students in grades kindergarten to 5 at Lowell Elementary may participate in the Misaabekong Ojibwe Language Immersion program. The program supports academic and linguistic development in English and Ojibwe.

Pine Point School. The Minnesota Legislature statutorily granted the White Earth Reservation Tribal Council control of the Pine Point public school, kindergarten through grade 8, and funds the school on a per pupil basis through state aid payments. The school is also eligible to receive federal aids and grants, as well as the same aids, revenues, and grants that local school districts receive.[3] The school provides 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 (other than the power to levy a property tax). 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.

Charter Schools

A charter school is a public school established under a contract between a charter school board of directors and an authorizer. A charter school must comply with some state requirements as though it were a district, but is exempt from school district requirements that are not explicitly applicable to charter schools. Charter schools cannot limit admissions based on race, ethnicity, or membership in an American Indian Tribal nation, but they can adopt a mission that affirms or integrates particular cultural beliefs.

In the 2021-2022 school year, there were approximately 180 charter schools in Minnesota, including several with an explicit focus on American Indian culture. The tables below list the charter schools with the highest number, and highest concentration, of American Indian students.

Charter Schools with the Most American Indian Students 2021-2022 School Year Using the State Count

Charter School	Total Students	American Indian Students	% American Indian	Geographic County
Minnesota Transitions Charter School	4,893	222	4.5%	Hennepin
Naytahwaush Community School	145	144	99.3%	Mahnomen
TrekNorth High School	251	127	50.6%	Beltrami
Bdote Learning Center	100	98	98.0%	Hennepin
Aurora Charter School	435	96	22.1%	Hennepin
Duluth Academy	987	79	8.0%	St Louis
Voyageurs Expeditionary	100	64	64.0%	Beltrami
Aurora Waasakone Community of Learners Charter School	113	44	38.9%	Beltrami
Venture Academy	307	39	12.7%	Hennepin
High School for Recording Arts	311	35	11.3%	Ramsey

House Research Department

Charter Schools with the Highest Concentration of American Indian Students 2021-2022 School Year Using the State Count

Rank	District	Total Students	American Indian Students	% American Indian	Geographic County
1	Oshki Ogimaag Charter School	29	29	100.0%	Cook
2	Naytahwaush Community School	145	144	99.3%	Mahnomen
3	Bdote Learning Center	100	98	98.0%	Hennepin
4	Voyageurs Expeditionary	100	64	64.0%	Beltrami
5	TrekNorth High School	251	127	50.6%	Beltrami
6	Aurora Waasakone Community of Learners Charter School	113	44	38.9%	Beltrami
7	Vermilion Country School	27	10	37.0%	St. Louis
8	Augsburg Fairview Academy	99	32	32.3%	Hennepin
9	Aurora Charter School	435	96	22.1%	Hennepin
10	Jennings Community School	62	11	17.7%	Ramsey

Source: Minnesota Department of Education

House Research Department

Federal Laws and Programs Affecting Indian Education

The Bureau of Indian Education

The Bureau of Indian Education (BIE) was established in 2006 and operates within the Department of the Interior. The BIE was previously known as the Office of Indian Education Programs, and was part of the Bureau of Indian Affairs (BIA). The BIE's mission is to "provide quality education opportunities from early childhood through life in accordance with the Tribes' needs for cultural and economic well-being in keeping with the wide diversity of Indian Tribes and Alaska Native villages as distinct cultural and governmental entities."[4] The BIE must also "manifest consideration of the whole person, taking into account the spiritual, mental, physical, and cultural aspects of the person within family and Tribal or Alaska Native village contexts."[5]

The BIE school system includes 183 elementary and secondary schools, and dormitories in 23 states. 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. BIE-operated schools are federally funded by a weighted funding formula designed to provide additional services to eligible students and annual formula grants from the U.S. Department of Education.

BIE Tribal Contract Schools

The federal government began establishing Indian schools in the 1870s,[6] implementing a federal policy of acculturating and assimilating American Indian people through a system of BIA-run boarding schools.[7] In 2021, the Department of the Interior began an investigation into the federal Indian boarding school system. The first report of the Federal Indian Boarding School Initiative Investigative Report was issued in 2022.[8] The report identified 408 boarding schools across 37 states or then-territories, operated or supported between 1819 and 1969, including 21 in Minnesota.[9]

In the 1960s, Tribes started contracting with the federal government to manage the BIA-funded schools, and in 1975, Congress passed the Indian Self-Determination and Education Assistance Act,[10] which encouraged more Indian Tribes to contract with the government to control BIA schools. In 1988, Congress passed the Tribally Controlled Schools Act.[11] Under the act, the federal government provides schools grants to "assure maximum Indian participation in the direction of educational services" and make the services "more responsive to the needs and desires of Indian communities."[12]

Today, 130 of the 183 BIE-funded schools are Tribally controlled and known as "Tribal contract" or "contract" schools. The remaining 53 are directly operated by the BIE.[13] In Minnesota, Indian Tribes have contracted with the BIE to manage schools on the Leech Lake, White Earth, Fond du Lac, and Mille Lacs Indian Reservations. These schools are designed to provide American Indian students with educational services that are more responsive to the needs and desires of the Indian communities. Under the Public Health and Welfare Act,[14] the federal government assists Tribal contract schools with public health services.

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 federal Every Student Succeeds Act and the Individuals with Disabilities Education Act.

Minnesota's Tribal Contract Schools; 2021-2022 School Year

School	Total Students	American Indian Students	% American Indian	% of Total American Indian Students (State)
Fond Du Lac Ojibwe (Fond du Lac)	181	181	100.0%	0.7%
Bug-O-Nay-Ge-Shig (Leech Lake)	208	208	100.0%	0.8%
Circle of Life (White Earth)	103	103	100.0%	0.4%
Nay Ah Shing (Mille Lacs)	143	143	100.0%	0.5%
Total BIE Students	**635**	**635**	**100.0%**	**2.3%**

House Research Department

Head Start and Early Head Start

Head Start, including Early Head Start, is a federal program designed to provide comprehensive family-oriented programming that improves school readiness and social competence of children from birth to five years old from low-income families.[15] Congress appropriates money to Head Start, which is awarded to community organizations. A portion of the federal appropriation is set aside for American Indians and Alaska Natives and is awarded to Tribal governments. The state also appropriates money for Head Start. The money is appropriated to MDE, which distributes the state appropriation among the community organizations that receive federal Head Start funding.

In Minnesota, there are 34 community organizations designated as Head Start grantees that receive federal and state Head Start funding. The 34 Head Start grantees include eight Tribal governments: Bois Forte, Fond du Lac, Grand Portage, Leech Lake, Lower Sioux, Mille Lacs, Red Lake, and White Earth. Roughly 10 percent of Minnesota's total state and federal Head Start funding is provided to the Head Start programs operated by the eight Tribal government recipients. In state fiscal year 2022, the eight Tribal governments collectively received about $14.9 million from the federal government and $2.4 million from the state, which funded Head Start programming for approximately 1,170 children.[16]

The Elementary and Secondary Education Act

The Elementary and Secondary Education Act (ESEA)[17] was signed by President Lyndon Johnson in 1965, and was part of President Johnson's War on Poverty. The ESEA has been periodically reauthorized since then. The two most recent reauthorizations were known as No Child Left Behind, signed in 2002, and the Every Student Succeeds Act (ESSA), signed in 2015. ESSA requires states to submit plans to the U.S. Department of Education, explaining how they will

meet the minimum criteria of the law. Within ESSA, Title I is the single largest source of federal education funding, providing financial assistance to districts with high numbers or concentrations of students from low-income families. Title I also has a number of substantive requirements relating to assessments, accountability, and school support and improvement. Other parts of the law relate to instruction, English learners, American Indian students, and homeless children and youths, among others. A summary of the provisions most relevant to American Indian students follows.

Meaningful Consultation. ESSA requires states and school districts to consult with Indian Tribes when implementing ESSA. States must consult with representatives of Indian Tribes when they develop their state plans. In addition, a district that receives more than $40,000 under Title VI or has at least 50 percent American Indian enrollment, must consult with Tribes when developing a plan or application for a program under ESSA. The consultation requirement also applies to individual schools with at least 50 percent American Indian enrollment. Consultation must provide enough opportunity for officials from Indian Tribes or Tribal organizations to meaningfully and substantively contribute to the plan.[18]

Title VI. ESSA authorizes formula grants to local education agencies that enroll at least ten American Indian students or whose enrollment is at least 25 percent American Indian, to Indian Tribes or organizations, and to schools operated or funded by the BIE. The Indian education formula grants are intended to fund programs that meet the culturally related academic needs of Indian children. In addition, Title VI authorizes competitive grants to improve educational opportunities and achievement of American Indian children and youth, and to support professional development for Indian teachers and education professionals. Title VI funds may be used to fund native language immersion programs.

Title VII. The Impact Aid program[19] under Title VII 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.

State Revenue Streams and Programs

Beginning in the 1970s, Minnesota funded several grant programs, including the Postsecondary Preparation Program and the American Indian Language and Culture Program, to support American Indian students enrolled in public schools and in federal BIE-funded schools. In 2000, a newly combined state-funded Success for the Future program provided annual competitive grants to a limited number of school districts and schools eligible to receive the same grant amount, regardless of district size or number of enrolled American Indian students.

American Indian Education Aid

In 2015, the legislature replaced the Success for the Future grants with the American Indian Education Formula Aid program. The aid program is directed to all school districts, charter schools, and Tribal contract schools operating an American Indian education program and serving more than 20 American Indian students.[20]

To qualify for the aid, the qualifying school must develop and submit a plan to the Indian education director at the Minnesota Department of Education. The program helps educators meet the needs of American Indian students and provides new and continuing programs, services, and activities to American Indian students, consistent with the requirements of the World's Best Workforce[21] and the Indian Education Act of 1988.[22] Permissible aid program expenditures include student and staff support services, innovative teaching and student evaluation, career counseling, and culturally competent instruction, among other expenditures, all of which must help increase the completion and graduation rates for American Indian students. American Indian education aid is funded on a per-pupil basis based on the legacy count of American Indian students. For fiscal year 2022, 156 school districts, four Tribal schools, and 17 charter schools qualified for American Indian Education Aid totaling $11.5 million.

Indian Teacher Preparation Grants. The American Indian teacher preparation program assists American Indian people who intend to become teachers through grants to cooperative programs between school districts and colleges and universities. Grants are statutorily prescribed to: the University of Minnesota at Duluth and the Duluth school district; Bemidji State University and Red Lake school district; Moorhead State University and one of the school districts located within the White Earth Reservation; and Augsburg College and Minneapolis school district and St. Paul school district. Grant money may be used for programs, student scholarships, and student loans.[23]

Tribal Contract School Aid. Minnesota pays Tribal contract school aid to the four Tribal contract schools in the state. The Tribal contract schools must comply with Minnesota's education statutes, and state aid must supplement, not replace, funds provided by the federal government. State aid for Tribal contract schools is allocated on a per-pupil basis, and intended to make up the difference between what the federal government provides and the per-pupil funding the state provides to school districts and charter schools.[24]

Tribal contract schools that receive state aid are also eligible for early childhood family education (ECFE) revenue. For school districts, ECFE funding is based on a statutory allowance times the population that resides in the school district from birth to age 5. The total ECFE funding for Tribal contract schools in contrast is set at a fixed amount, with the same proportionate share of the total allocated to each of the four Tribal contract schools.

Language Revitalization. Legacy funding has been provided to the Minnesota Indian Affairs Council for Dakota and Ojibwe language revitalization grants.[25] Recognized educational institutions and certain nonprofit organizations are eligible to apply for the grants.

Facility Support for Some School Districts with Low Property Tax Base. School districts located on Tribal reservations tend to have small property tax bases. As a result, these districts find it difficult or impossible to finance construction projects through conventional bond sales. The maximum effort school aid law allows a district with a small property tax base to receive a forgivable capital loan. This program has been used for several school construction projects in the Red Lake and Nett Lake school districts. The state finances the loans through bond sales. Maximum effort capital loans are forgiven if they are not paid within 50 years.[26] The loans to Red Lake and Nett Lake will be forgiven when the 50-year term is reached.

Indian Education Programs
Fiscal Years 2022 and 2023 Appropriations

Program	Amount	
	2022	2023
American Indian Education Aid (Minn. Stat. § 124D.81)	$11,351,000	$11,775,000
Tribal Contract Schools (Minn. Stat. § 124D.83)	2,743,000	3,160,000
Indian Scholarships (Minn. Stat. § 136A.126)	3,500,000	3,500,000
Indian Teacher Preparation Grants (Minn. Stat. § 122A.63)	600,000	600,000
Tribal College Grants (Minn. Stat. § 136A.1796)	150,000	150,000
Early Childhood Programs at Tribal Schools (Minn. Stat. § 124D.83, subd. 4)	68,000	68,000
Total	**$18,412,000**	**$19,253,000**

House Research Department

State Educational Policies and Student Outcomes

American Indian Education Act of 1988

The Minnesota Legislature passed the American Indian Education Act to provide American Indian people with education programs that meet their unique education needs. 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 Professional Educator Licensing and Standards Board 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. Districts and schools that provide a language and cultural education program must 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 laying teachers off.[27]

Tribal Nations Education Committee. The state education commissioner must consult with the Tribal Nations Education Committee (TNEC) 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.[28]

In 2019, Governor Walz issued Executive Order 19-4, requiring state agencies to implement Tribal consultation policies to guide their work and interaction with Minnesota Tribal Nations, among other things. The Department of Education issued its policy, and in 2020, issued the 2019 Minnesota State of Indian Education Report. The report provides data on educational outcomes of American Indian students and discusses factors that affect educational outcomes. The policy requires annual consultation with TNEC, as well as ongoing consultation.[29]

American Indian Education Director. Minnesota Statutes requires the state education commissioner to 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.[30]

Educational Outcomes of American Indian Students

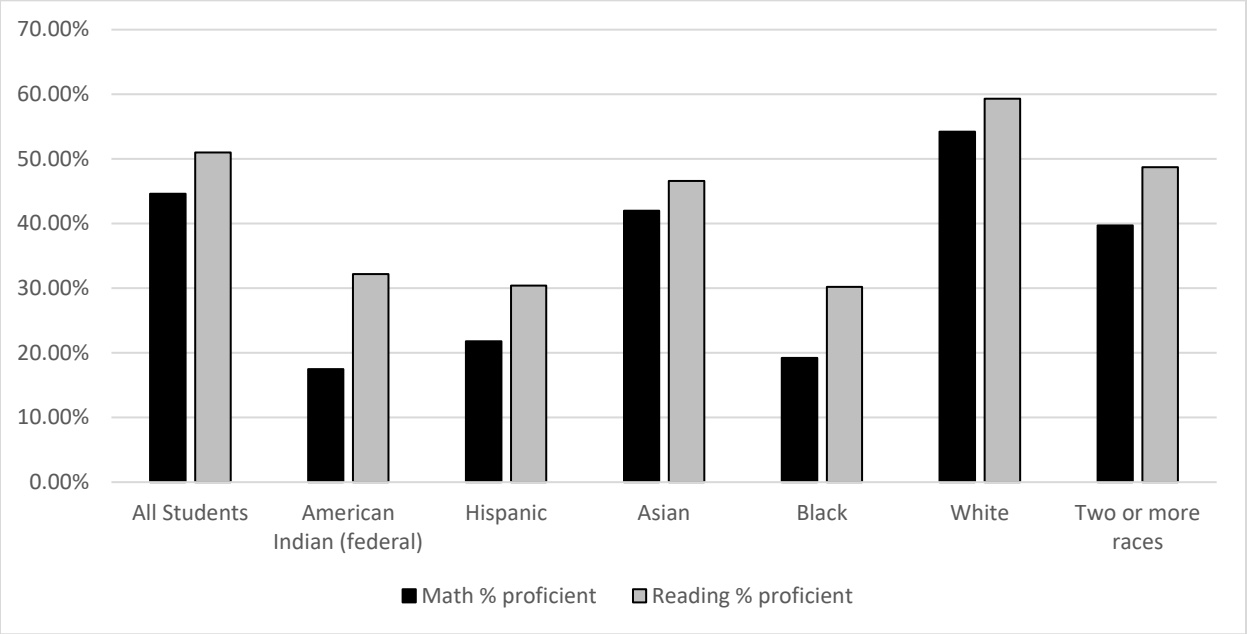
ESSA requires states to set goals for academic achievement and graduation rates, and to create accountability systems to measure progress toward state goals. Minnesota's accountability system, known as the North Star,[31] uses the statewide reading and math Minnesota Comprehensive Assessments (MCAs), four- and seven-year graduation rates, and other indicators of school quality or student success.[32] The next several sections provide an overview of how American Indian students perform on these indicators, along with other information about American Indian academic performance and student discipline.

Academic Assessments

American Indian students generally score lower on the MCAs than other student groups. The chart below shows the percentage of students in each group that meet or exceed state standards, as measured by the 2022 reading and math MCAs. Minnesota's reading achievement rate for all student groups in grades 3 to 8 and 10 was 51 percent; the math achievement rate was 44.6 percent. Based on the federal count, the reading achievement rate

for American Indian students was 32.2 percent, and the math achievement rate was 17.5 percent.[33]

MCA Proficiency Rates
2021-2022 School Year



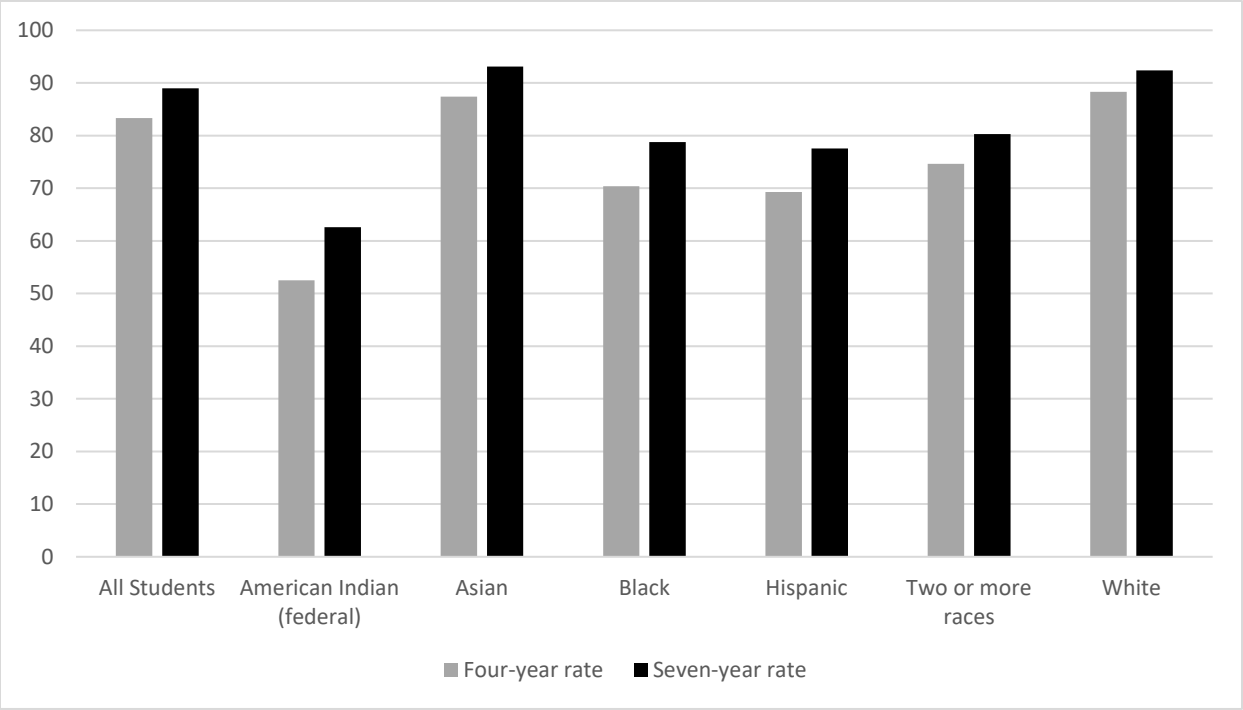
Source: Minnesota Department of Education House Research Department

In addition to the MCAs, American Indian student performance is measured by the National Assessment of Educational Progress (NAEP), 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.[34]

Graduation Rates

American Indian students graduate at lower rates than other students in Minnesota. In 2021, 83.3 percent of all Minnesota students graduated in four years, and 89 percent graduated in seven years. For American Indian students, the four-year rate was 52.5 percent, and the seven-year rate was 62.6 percent.

Graduation Rates, 2021



Source: Minnesota Department of Education

House Research Department

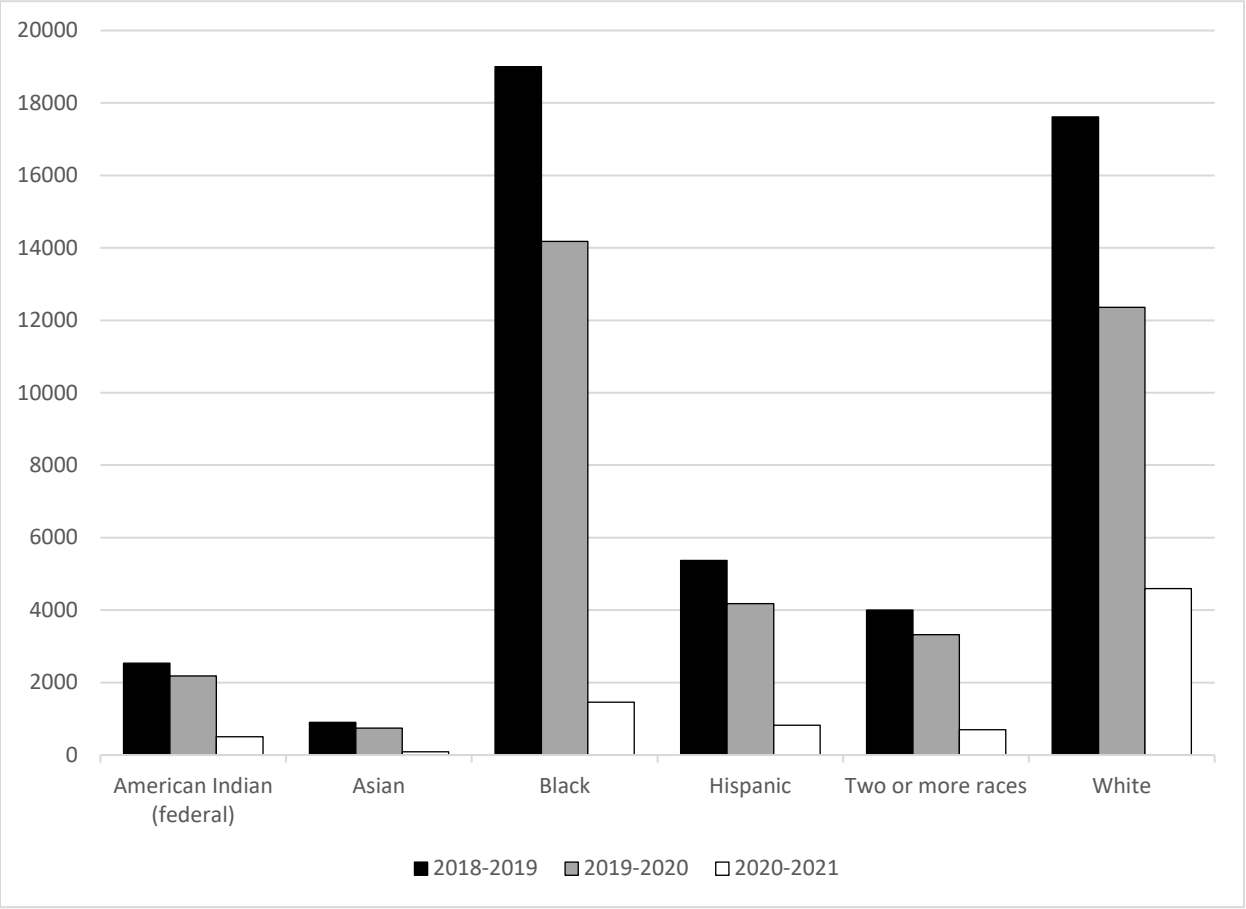
Other Academic Indicators

American Indian students are underrepresented in the Minnesota Postsecondary Enrollment Options (PSEO) program and among Advanced Placement (AP) and International Baccalaureate (IB) exam takers.[35] High school students who participate in PSEO earn college credit without having to pay college tuition and fees.[36] Students who take AP courses may take AP exams to qualify for college credit. Some high schools offer an International Baccalaureate program, which allows students with qualifying IB scores to receive college credit. Minnesota subsidizes the cost of AP and IB exam fees for low-income students, and provides scholarships for teachers attending AP or IB training.[37]

Student Discipline

American Indian students accounted for 6.1 percent of all kindergarten through grade 12 disciplinary actions across the state in the 2021-2022 school year. Discipline rates varied widely in the past few school years; for context, the chart below shows disciplinary actions across the state, by reported racial or ethnic group for three school years.[38] A disciplinary action is defined as an out-of-school suspension for one day or more, expulsion, or exclusion.

Disciplinary Actions by Race/Ethnicity
2020-2021 School Year



Note: The bar graph makes it look like there were 0 disciplinary actions for Asian students in 2020-2021, but there were 86.
Source: Minnesota Department of Education

House Research Department

Special Education

Minnesota's American Indian students are identified as special education students at a much higher rate than students of other races/ethnicities. The tables below show that 27.7 percent of Minnesota's American Indian students are identified in one of Minnesota's 13 disability categories,[39] and compares identification rates by the most common disability categories.

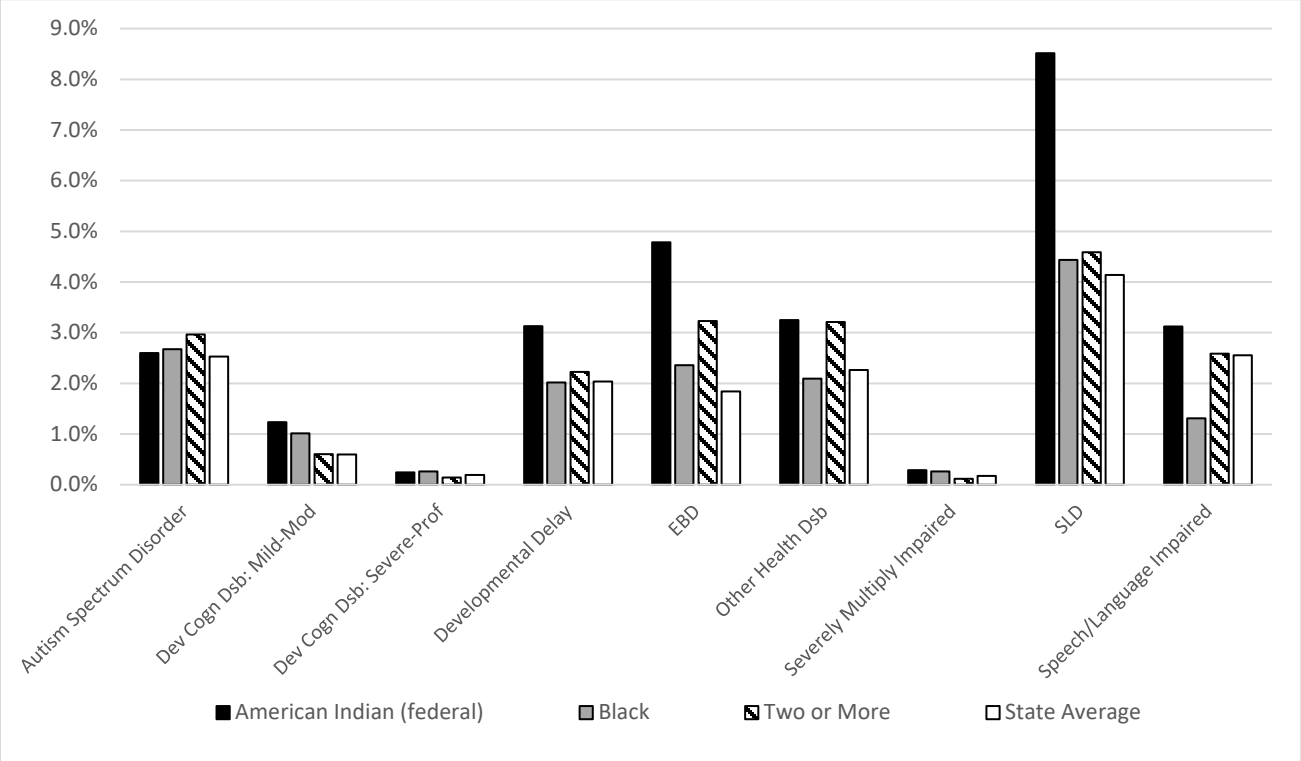
Percent of Special Education Students by Race/Ethnicity; 2021-22 School Year

	Special Education Students	Total Students	% of Students in Special Education
Asian	6,357	60,461	10.5%
Black	17,188	101,388	17.0%
Hispanic	17,733	91,601	19.4%

	Special Education Students	Total Students	% of Students in Special Education
American Indian	4,135	14,901	27.7%
Two or More Races	10,504	52,028	20.2%
Hawaiian/Pacific Islander	126	890	14.2%
White	91,020	549,237	16.6%
Total	**147,063**	**870,506**	**16.9%**
Source: Minnesota Department of Education			

House Research Department

Special Education Percentages by Category



Source: Minnesota Department of Education

House Research Department

Curriculum

The state education commissioner must include the contributions of Minnesota's American Indian Tribes and communities when reviewing and revising state academic standards.[40] All school districts and charter schools must provide students instruction in accordance with the state academic standards. World language and culture programs must encompass indigenous American Indian languages and cultures.[41]

Minnesota's School Desegregation/Integration Rule

In 1973, the Minnesota Board of Education (which before 2000 was the rulemaking and policy-making body for the Department of Education) adopted desegregation rules based on comparisons of minority student enrollment among schools within the same district. In 1978, the rules were amended to specify that segregation occurred when the minority student population in any school building exceed the minority racial composition of the student population for the entire district by 15 percent. Schools that were found segregated based on the 15 percent standard had to submit for approval a comprehensive plan to eliminate segregation. The substance of the rules remained the same through the 1970s and 1980s. New rules were adopted in 1999, which remain in place.

Under the 1999 rules, the commissioner uses data on the racial composition of each school to determine whether "segregation" exists, whether there is a "racially identifiable school" within a district, and whether the district as a whole is "racially isolated." Each of these terms is defined in the rule. If the commissioner determines that a racially identifiable school exists, the commissioner must determine whether the racial composition at the school is the result of acts motivated at least in part by a discriminatory purpose. If the commissioner finds that segregation exists, the district must submit a plan to remedy the segregation. The plan must include 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.[42]

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.[43]

The 2013 Legislature adopted a new achievement and integration program[44] 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.[45] In 2015, the department began the rulemaking process to amend the achievement and integration rules. After a hearing on the rules, an administrative law judge issued a report disapproving certain proposed rules. The department withdrew the proposed rules and concluded the rulemaking process. Prospective changes in the substance of the school desegregation rules may affect American Indian students.

Endnotes

[1] Memorandum of Agreement Between Minneapolis Public Schools and Metropolitan Urban Indian Directors, available at https://indianed.mpls.k12.mn.us/uploads/moa_between_mps_muid_2022.pdf.

[2] Minn. Stat. § 124D.68. The graduation incentives program uses statutory criteria to identify at-risk students.

[3] Minn. Stat. § 128B.011.

[4] 25 C.F.R. § 32.3.

[5] Id.

[6] *Cohen's Handbook of Federal Indian Law*, 2012 edition, 22.03[2][a].

[7] U.S. Department of the Interior, Indian Affairs, Frequently Asked Questions, available at https://www.bia.gov/frequently-asked-questions.

[8] U.S. Department of the Interior, Federal Indian Boarding School Initiative Investigative Report, issued May 2022, available at https://www.bia.gov/service/federal-indian-boarding-school-initiative.

[9] U.S. Department of the Interior, Federal Indian Boarding School Initiative Investigative Report Appendix A and Appendix B, issued May 2022, available at https://www.bia.gov/service/federal-indian-boarding-school-initiative.

[10] Pub. L. No. 93-638.

[11] Pub. L. No. 100-297, title V, part B, 102 Stat. 385 (1988) (repealed Pub. L. No. 107-110, § 1043, 115 Stat. 2063 (2002)).

[12] 25 U.S.C. § 2501 (a).

[13] U.S. Department of the Interior, Bureau of Indian Education Strategic Direction, 2018-2023, issued Aug. 16, 2018, available at https://www.bie.edu/cs/groups/xbie/documents/site_assets/idc2-086443.pdf.

[14] 42 U.S.C. § 2004b.

[15] 42 U.S.C. § 9801 et seq.

[16] Data received from MDE in August 2022.

[17] 20 U.S.C. § 7401 *et seq*.

[18] 20 U.S.C. § 7918. *See also* Minnesota Tribal Consultation Guide, Minnesota Department of Education, August 2018.

[19] The Impact Aid program was established in 1950. In 1994, it was incorporated into Title VIII of the Elementary and Secondary Education Act. When the ESEA was reauthorized as ESSA, the program was revised and moved into Title VII.

[20] Minn. Stat. § 124D.81.

[21] Minn. Stat. § 120B.11. The World's Best Workforce is Minnesota's academic accountability system. It requires districts and charter schools to develop plans for meeting statutory goals to develop the World's Best Workforce.

[22] Minn. Stat. §§ 124D.71- 124D.84.

[23] Minn. Stat. § 122A.63.

[24] Minn. Stat. § 124D.83.

[25] Laws 2021, 1st Spec. Sess. ch. 1, art. 4, § 2, subd. 9. Legacy funding comes from the Arts and Cultural Heritage Fund, which is one of four funds created by a constitutional amendment that increased the state's sales tax by 3/8ths of 1 percent. Arts and cultural funding is provided to the Indian Affairs Council for language revitalization. For more on this fund, see the House Research publication *The Arts and Cultural Heritage Fund*, July 2022.

[26] Minn. Stat. §§ 126C.62- 126C.72.

[27] Minn. Stat. § 124D.77. In 2017, the legislature modified the teacher layoff requirements, requiring districts to adopt layoff plans and removing the statutory default of seniority-based layoffs when no plan exists.

[28] Minn. Stat. § 124D.79, subd. 4.

[29] The report is available at https://education.mn.gov/MDE/about/rule/leg/rpt/2020Reports/.

[30] Minn. Stat. § 124D.791.

[31] The Minnesota Report Card displays information used in the North Star system and is available at http://rc.education.mn.gov/#mySchool/p--3.

[32] ESSA also requires states to set goals for English-language proficiency; Minnesota uses the ACCESS test to measure English learner progress, and includes ACCESS performance data in the North Star system. Minnesota's original state plan used consistent attendance (the percentage of students in a student group who are not chronically absent) as its indicator of school quality or student success. For the 2021-2022 school year only, Minnesota used an indicator based on enrollment maintenance from 2020-2021 to 2021-2022 instead of consistent attendance. Minnesota's amended state plan, submitted for federal approval in 2022, adds measurements of career- and college-readiness coursework, and a well-rounded education, beginning in 2023-2024, or as data are available and reliable.

[33] Based on the state count, 27.2 percent of American Indian students were proficient in reading, and 22.4 percent were proficient in math.

[34] The Nation's Report Card, NAEP Data Explorer at https://www.nationsreportcard.gov/ndecore/landing. The National Center for Education Statistics also completed the 2019 National Indian Education Study, which focuses on the academic performance and educational experiences of American Indian and Alaska Native students in grades 4 and 8, using NAEP cognitive questions and survey questionnaires. For more information, see https://nces.ed.gov/nationsreportcard/nies/.

[35] Rigorous Course Taking: Advanced Placement, International Baccalaureate, Concurrent Enrollment and Postsecondary Enrollment Options Programs, Minnesota Department of Education (2022) available at https://education.mn.gov/MDE/about/rule/leg/rpt/2022Reports/.

[36] Minn. Stat. § 124D.09.

[37] Minn. Stat. § 120B.13.

[38] A student is counted multiple times if multiple disciplinary actions occurred.

[39] EBD stands for Emotional Behavioral Disorder, and SLD stands for Specific Learning Disability.

[40] Minn. Stat. § 120B.021, subd. 4.

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

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

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

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

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

Postsecondary Education Laws Affecting Indian Students

by Nathan Hopkins (651-296-5056)

Enrollment Data and Notable Postsecondary Institutions

American Indian students attend every type of postsecondary institution in Minnesota. Cumulatively, American Indian students represent 0.8 percent of enrolled undergraduate students statewide, and 0.7 percent of the state's total postsecondary enrollment. For context, American Indians represent between 1.1 to 1.9 percent of the state's total population. Below is a table showing the institutions with the largest populations of enrolled American Indian undergraduates using fall 2019 enrollment data from the Minnesota Office of Higher Education.[1]

Largest Enrollment of American Indian Students in Postsecondary Institutions, Fall 2019

Institution	Number of American Indian Students	American Indian Students as % of Total Undergraduate Enrollment
Leech Lake Tribal College	144	92%
Bemidji State University	122	3
Red Lake Nation College	121	100
University of Minnesota - Morris	116	8
Fond du Lac Tribal & Community College	109	18
White Earth Tribal & Community College	98	83

Source: Minnesota Office of Higher Education

House Research Department

Represented in the table above are Minnesota's **three Tribal colleges**: White Earth Tribal and Community College (est. 1997), Leech Lake Tribal College (est. 1990), and Red Lake Nation College (est. 1987). A Tribal college is a postsecondary institution established and governed by an American Indian Tribe.

In addition to the three traditional Tribal colleges is **Fond du Lac Tribal and Community College** (est. 1987). Fond du Lac Tribal and Community College is unique in that it operates under a joint governance model between the Fond du Lac Band of Lake Superior Chippewa and the Board of Trustees of the Minnesota State Colleges and Universities (Minnesota State) system. Unlike the other three Tribal colleges, Fond du Lac is therefore a part of the Minnesota State system and considered a state institution.[2] Accordingly, the state provides operational funding to Fond du Lac as part of the broader operations appropriation to the Minnesota State system.

All four Tribally affiliated colleges in Minnesota have been given federal land-grant status by the U.S. Congress under the Equity in Education Land-Grant Status Act of 1994, making them eligible for limited federal funds to advance agriculture and the mechanic arts.[3] The three traditional Tribal colleges also receive more significant operational funding from the federal government under the Tribally Controlled Colleges and Universities Assistance Act of 1978 (TCCUAA).[4] Because federal funding under the TCCUAA is based only on the number of Indian students enrolled at an institution, Minnesota provides additional operational support to the three traditional Tribal colleges under the Tribal College Supplemental Grant program,[5] which provides state funds based on the number of non-Indian students enrolled at the institution.

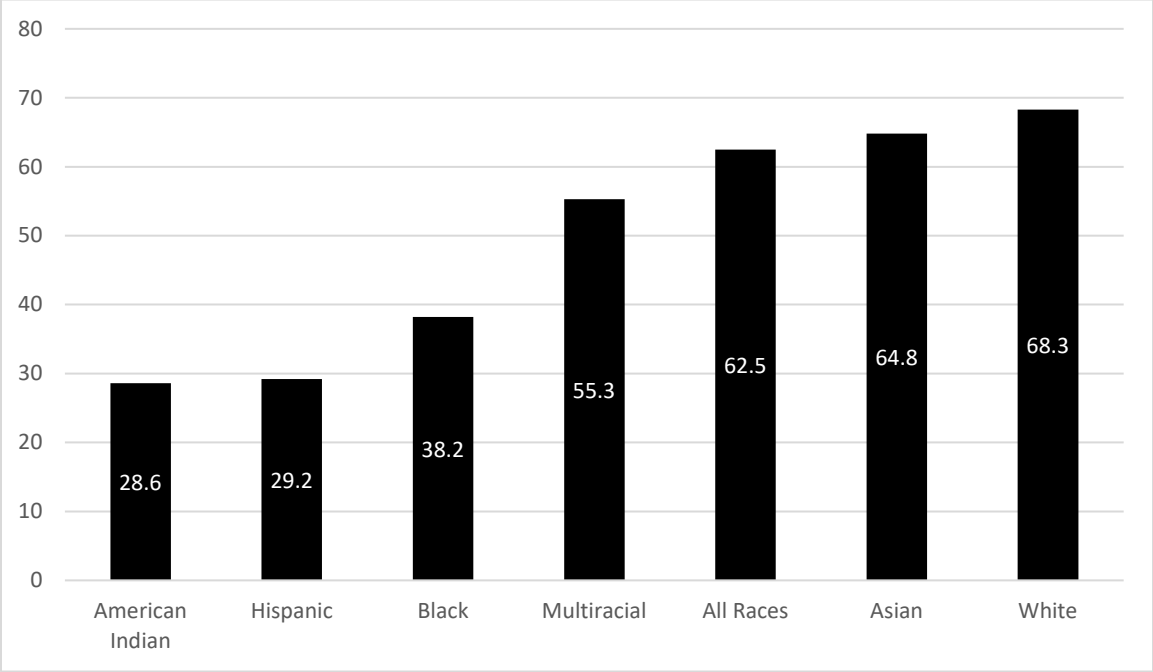
The **University of Minnesota's Morris campus** is not affiliated with any particular Tribe, but it has a unique mission and history regarding American Indian students. In the late 19th century, the campus housed an American Indian boarding school. That boarding school closed in 1909, and the federal government (which was operating the school at that point) transferred the campus to the state with the requirement that a school be maintained and that "Indian pupils be admitted free of charge for tuition and on terms of equality with white pupils."[6] In 1960, Morris became a four-year liberal arts college within the University of Minnesota system, and, in 1961, the legislature renewed and codified its commitment that tuition would remain free for American Indian students.[7]

Degree/Credential Attainment Data

Minnesota's Office of Higher Education tracks postsecondary credential attainment as required by a law setting a higher education attainment goal for the state.[8] That attainment goal provides that, by 2025, at least 70 percent of Minnesota residents ages 25 to 44 should hold a postsecondary degree or certificate. The law also sets benchmark goals of 30 percent and 50 percent for each race or ethnicity group.

Current estimates by the Minnesota Office of Higher Education show that, of all Minnesotans aged 25 to 44, 62.5 percent have completed a postsecondary certificate or degree.[9] But, as shown in the chart below, significant attainment gaps exist when this general population is broken down by racial and ethnic groups. American Indians have the lowest attainment percentage at 28.6, which closely trails Hispanics at 29.2 percent—below the first benchmark of 30 percent.[10]

Percentage of Minnesotans, Age 25-44, with a Postsecondary Credential, 2021 Estimates by Race Group



The Office of Higher Education estimates that, in order to meet the 70 percent attainment goal by 2025, 108,500 more Minnesotans age 25 to 44 must earn a credential. Of these persons, around 6,100 should be American Indians.[11]

State-level Policies and Programs

Unique Needs and Abilities of American Indian People[12]

This law applies to Minnesota's public postsecondary institutions. It has three components:

1) It requires the formation (upon request of ten or more full-time American Indian students) of an advisory committee with Tribal representatives that will recommend programs and services to meet the needs of American Indian students.
2) It provides that knowledge of American Indian languages be given the same treatment as other non-English languages for purposes of academic credit, assessment, and course placement.
3) It requires an individual's knowledge of American Indian language, history, and culture to be considered in assessing the individual's competence to provide instructional or noninstructional services specific to American Indian peoples.

Community and Commissioner Participation in Postsecondary Education of American Indians[13]

Requires the Office of Higher Education to consult with the Tribal Nations Education Committee and other American Indian stakeholders on matters regarding postsecondary education of American Indian students.

Indian Scholarships[14]

This law establishes a scholarship program for Minnesota residents who attend a Minnesota postsecondary institution and who are either enrolled in a federally recognized Tribe or are of one-quarter or more Indian ancestry. The maximum award amounts are $4,000 per academic year for undergraduate students, and $6,000 per academic year for graduate students. Awards take into account an applicant's demonstrated financial needs and other financial aid received.

The biennial appropriation for this program has been $7 million for the past four biennia.

Tribal College Supplemental Grant Assistance[15]

This law provides operational funding to Minnesota's Tribal colleges based on the number of non-American Indian students attending. This is intended to supplement the federal funding received under the TCCUAA,[16] which is based only on the number of American Indian students attending the institution. This program began in 2013.

The biennial appropriation for this program has been $300,000 since its inception.

Fond du Lac Campus[17]

The Fond du Lac Tribal and Community College within the Minnesota State College and University System has a unique mission to serve the needs of American Indians. The law also allows the college to offer a four-year baccalaureate program in elementary education, which is unique among Minnesota's community colleges, which only offer certificates and two-year degrees.

Morris Branch[18]

Under state law, the Morris branch of the University of Minnesota is required to offer free tuition to American Indian students.

University of Minnesota Native American Promise Tuition Program

While not a legally required program, the University of Minnesota began its Native American Promise Tuition Program in the fall 2022 semester. The program provides need-based financial support—up to free tuition—to first-year undergraduate students and transfer students from Minnesota's Tribal colleges (including Fond du Lac) who are enrolled citizens in one of Minnesota's 11 federally recognized Tribal Nations.

Endnotes

[1] Demographic Characteristics of Students Enrolled in Minnesota, http://www.ohe.state.mn.us/sPages/student_enroll_data2.cfm.

[2] Minn. Stat. § 136F.12 (addressing the unique missions and programs of the Fond du Lac campus related to the education of American Indian students).

[3] *See* §§ 531–535 of Pub. L. No. 103-382.

[4] Pub. L. No. 95-471.

[5] Minn. Stat. § 136A.1796.

[6] Minn. Laws 1909, ch. 184, § 2.

[7] Minn. Stat. § 137.16.

[8] Minn. Stat. § 135A.012.

[9] Educating for the Future, 2021 Update (October 2021): https://www.ohe.state.mn.us/pdf/EducatingfortheFuture2021_final.pdf.

[10] Id.

[11] Id.

[12] Minn. Stat. § 135A.12.

[13] Minn. Stat. § 136A.032.

[14] Minn. Stat. § 136A.126.

[15] Minn. Stat. § 136A.1796.

[16] Pub. L. No. 95-471.

[17] Minn. Stat. § 136F.12.

[18] Minn. Stat. § 137.16.

Elections, Voting Rights, and Civic Engagement

by Matt Gehring (651-296-5052)

In general, members of Tribes who meet all other eligibility requirements may participate in federal, state, and local elections—as candidates, as voters, and as advocates on ballot issues.

Tribal members (and Tribes themselves) may also participate in other aspects of the civic process, such as engaging in public debate, advocacy, and lobbying public officials on policy issues. Some of these activities may require registration and reporting under federal and state laws.

The rights of a Tribal member to engage and participate in Tribal elections are governed exclusively by Tribal law; those rights are not provided for or regulated by federal or state law.

Eligibility to Vote

Tribal members may vote in federal, state, and local elections in Minnesota, provided all other eligibility requirements are met. To be eligible to vote, a person must be:

- a United States citizen;
- at least 18 years of age on election day; and
- a resident of Minnesota for at least 20 days.

A person who has previously been subject to a felony sentence is eligible to vote if he or she has completed all parts of the sentence. A person who has been declared legally "incompetent" by a court is not eligible to vote.[1]

Use of Tribal identification in election day voter registration

Members of federally recognized Tribes may register to vote on election day using their Tribal identification card, if the card includes the member's name, current address, signature, and photograph. If the Tribal member's identification includes all of those items except a current address, the Tribal member may register to vote using the identification card along with other proof of residence.[2]

A current listing of the documents that may be used to prove residence is available through the Office of the Minnesota Secretary of State, or online at: www.sos.state.mn.us/elections-voting/.

In 2004, Minnesota's laws governing the use of Tribal identification cards for the purpose of election day voter registration were subject to a legal challenge. The legislature later amended the law to incorporate the content of two court orders resulting from that challenge. The current law remains consistent with those orders.

Polling places on Tribal lands

Many reservation lands in Minnesota include at least one designated polling place for purposes of voting in federal, state, and local elections.

Eligibility to Hold Public Office

A Tribal member may hold any elected or appointed public office in Minnesota, as long as any other eligibility requirements for the office are met. These requirements include eligibility to vote, and certain age and residency standards, all of which are provided in the Minnesota Constitution.[3]

The eligibility requirements for holding federal offices, such as president of the United States, and United States senator or representative, are provided by the United States Constitution and are not regulated by state law.

Campaign Finance and Political Contributions

Tribes and individual Tribal members may make contributions and expenditures to support candidates for state and local public office, or to advocate on behalf of, or against, ballot questions. These contributions and expenditures must comply with the general laws governing campaign finance and campaign finance reporting.[4]

Members of the House are prohibited from soliciting or accepting a contribution from a Tribal organization during a regular or special session of the legislature.[5]

When advocating for or against candidates for federal office, Tribes and Tribal members are subject to campaign finance and reporting requirements as provided in federal law. For more information on federal campaign finance laws, see the website of the Federal Election Commission at: http://www.fec.gov/.

Lobbying and Advocacy

Tribes and Tribal members may engage in advocacy on public policy issues being considered by state and local governments.

Depending on the nature of the activity, the Tribe or Tribal member may need to register with the Minnesota Campaign Finance and Public Disclosure Board as either a "lobbyist" or as a "principal." In addition to registration, lobbyist and principals must submit periodic disclosure reports to the board. Many Tribes located in Minnesota are currently registered as principals.[6]

In general, lobbyists and principals may not give gifts to public officials, employees of the legislature, or local officials of a metropolitan government unit.[7]

More information on the types of activities that trigger registration and reporting requirements under state law is available from the Minnesota Campaign Finance and Public Disclosure Board online at: https://www.cfb.mn.gov/

Lobbying and advocacy activity before Congress and federal agencies are subject to registration and reporting as provided in federal law.

Election District Boundaries

The Minnesota Constitution requires that new districts for the state legislature and the state's representatives in Congress be drawn after each federal decennial census. The most recent federal census was conducted in 2020. Following that census, a Special Redistricting Panel appointed by the Minnesota Supreme Court ordered new district boundaries.

Among the issues considered by the panel in drawing the districts was the impact of the new district boundaries on the reservation lands of each federally recognized Indian Tribe. The principle used by the panel required contiguous reservation lands to be preserved, allowing divisions of a reservation into multiple districts only when necessary to meet other constitutional requirements.[8]

Endnote

[1] Minn. Const. art. VII, § 1.

[2] Minn. Stat. § 201.061, subd. 3, para. (d).

[3] Minn. Const. art. IV, § 6; art. VII, § 6.

[4] Minn. Stat. chs. 10A and 211A; § 211B.15.

[5] House Rule 9.10.

[6] Minn. Stat. §§ 10A.03; 10A.04.

[7] Minn. Stat. § 10A.071.

[8] See *Order Stating Preliminary Conclusions, Redistricting Principles, and Requirements for Plan Submissions*, A21-0243, A21-0546, Minnesota Special Redistricting Panel, filed Nov. 18, 2021. The panel describes the practical impact of its district boundary orders on reservation lands in its *Final Order Adopting a Legislative Redistricting Plan*, and *Final Order Adopting a Congressional Redistricting Plan*. Both orders were issued February 15, 2022.

Appendices

Appendix I: Population of American Indian and Alaska Native Persons

American Indian and Alaska Native Persons (alone or in combination)
Minnesota and County Populations, 2017-2021

County	Population	American Indian Population	% American Indian	% of MN American Indian Population
Aitkin	15,747	521	3.3%	0.5%
Anoka	360,773	5,715	1.6%	5.0%
Becker	34,995	3,555	10.2%	3.1%
Beltrami	46,033	11,002	23.9%	9.6%
Benton	41,087	769	1.9%	0.7%
Big Stone	5,155	64	1.2%	0.1%
Blue Earth	68,575	453	0.7%	0.4%
Brown	25,894	125	0.5%	0.1%
Carlton	36,145	2,598	7.2%	2.3%
Carver	105,694	737	0.7%	0.6%
Cass	29,917	4,040	13.5%	3.5%
Chippewa	12,509	234	1.9%	0.2%
Chisago	56,328	770	1.4%	0.7%
Clay	64,975	1,435	2.2%	1.3%
Clearwater	8,525	1,111	13.0%	1.0%
Cook	5,574	611	11.0%	0.5%
Cottonwood	11,484	131	1.1%	0.1%
Crow Wing	65,879	952	1.4%	0.8%
Dakota	435,863	5,286	1.2%	4.6%
Dodge	20,798	148	0.7%	0.1%
Douglas	38,742	295	0.8%	0.3%
Faribault	13,933	136	1.0%	0.1%
Fillmore	21,179	103	0.5%	0.1%
Freeborn	30,882	461	1.5%	0.4%
Goodhue	47,503	1,008	2.1%	0.9%

County	Population	American Indian Population	% American Indian	% of MN American Indian Population
Grant	6,045	67	1.1%	0.1%
Hennepin	1,270,283	22,494	1.8%	19.6%
Houston	18,806	118	0.6%	0.1%
Hubbard	21,219	783	3.7%	0.7%
Isanti	40,604	624	1.5%	0.5%
Itasca	44,969	2,331	5.2%	2.0%
Jackson	10,016	65	0.6%	0.1%
Kanabec	16,004	296	1.8%	0.3%
Kandiyohi	43,504	368	0.8%	0.3%
Kittson	4,213	25	0.6%	0.0%
Koochiching	12,203	551	4.5%	0.5%
Lac qui Parle	6,753	41	0.6%	0.0%
Lake	10,835	189	1.7%	0.2%
Lake of the Woods	3,757	243	6.5%	0.2%
Le Sueur	28,567	204	0.7%	0.2%
Lincoln	5,655	48	0.8%	0.0%
Lyon	25,477	270	1.1%	0.2%
Mahnomen	5,429	2,761	50.9%	2.4%
Marshall	9,082	103	1.1%	0.1%
Martin	20,070	151	0.8%	0.1%
McLeod	36,662	221	0.6%	0.2%
Meeker	23,268	146	0.6%	0.1%
Mille Lacs	26,397	1,853	7.0%	1.6%
Morrison	33,876	294	0.9%	0.3%
Mower	39,985	303	0.8%	0.3%
Murray	8,224	52	0.6%	0.0%
Nicollet	34,295	376	1.1%	0.3%
Nobles	22,223	391	1.8%	0.3%
Norman	6,500	218	3.4%	0.2%
Olmsted	160,928	1,031	0.6%	0.9%
Otter Tail	59,728	793	1.3%	0.7%
Pennington	14,063	319	2.3%	0.3%

County	Population	American Indian Population	% American Indian	% of MN American Indian Population
Pine	28,997	1,221	4.2%	1.1%
Pipestone	9,370	226	2.4%	0.2%
Polk	31,303	978	3.1%	0.9%
Pope	11,216	108	1.0%	0.1%
Ramsey	549,377	10,407	1.9%	9.1%
Red Lake	3,921	93	2.4%	0.1%
Redwood	15,435	971	6.3%	0.8%
Renville	14,768	302	2.0%	0.3%
Rice	66,795	933	1.4%	0.8%
Rock	9,718	109	1.1%	0.1%
Roseau	15,321	418	2.7%	0.4%
St. Louis	200,311	6,850	3.4%	6.0%
Scott	149,568	2,314	1.5%	2.0%
Sherburne	96,295	1,138	1.2%	1.0%
Sibley	14,948	97	0.6%	0.1%
Stearns	157,638	1,375	0.9%	1.2%
Steele	37,363	87	0.2%	0.1%
Stevens	9,669	224	2.3%	0.2%
Swift	9,810	99	1.0%	0.1%
Todd	25,121	272	1.1%	0.2%
Traverse	3,362	299	8.9%	0.3%
Wabasha	21,425	147	0.7%	0.1%
Wadena	14,009	226	1.6%	0.2%
Waseca	18,972	433	2.3%	0.4%
Washington	264,818	3,121	1.2%	2.7%
Watonwan	11,223	10	0.1%	0.0%
Wilkin	6,495	239	3.7%	0.2%
Winona	49,889	628	1.3%	0.5%
Wright	139,890	1,060	0.8%	0.9%
Yellow Medicine	9,616	404	4.2%	0.4%
State Total	**5,670,472**	**114,778**	**2.0%**	**100.0%**

House Research Department

Appendix II: Demographic and Other Information about Minnesota's Indian Reservations

This appendix includes information and certain demographic data about Minnesota's 11 federally recognized Indian reservations and contact information for the Minnesota Chippewa Tribe, an umbrella organization for some of the northern Ojibwe Tribes in Minnesota. 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 and the Minnesota Chippewa Tribe in January and February of 2023. Because the House Research Department was unable to directly gather current enrollment numbers for some Tribes, enrollment numbers are listed for previous years.

Tribal Land/Individual Land/Government Land: Lists acreage information received from the Bureau of Indian Affairs (BIA) Midwest Regional Office in February of 2023. The BIA collected acreage data from the Trust Asset and Accounting Management System. "Tribal land" is land held in trust for the Tribe by the federal government.

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. Data was obtained from the U.S. Census Bureau's American Community Survey, five-year estimates for 2017 to 2021.

Totals for smaller reservations are not precise and have significant margins of error due to sampling error.

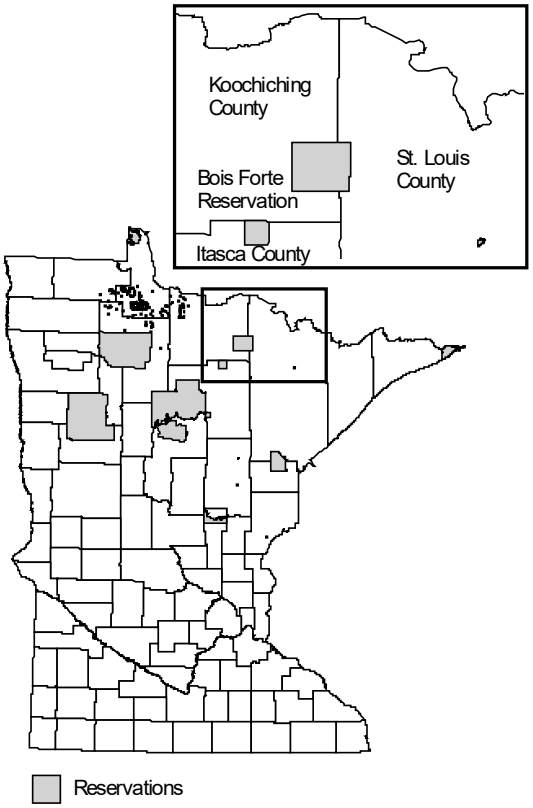
Tribal Governance: Lists basic information on the Tribal governance structure, as well as contact information for important Tribal leaders. Information was collected directly from Tribes.

Demographic Information: Provides information about a reservation, its adjacent counties, 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 share of the statewide total American Indian population.
- *Age:* Data on the age of the geographical area's population.
- *Economic and Income Data:* The median household income, the per capita income, the percentage of the population with incomes below the poverty level in the last 12 months, and the percentage of the population receiving cash public assistance in the last 12 months.
- *Labor:* Includes the percentage of the population aged 16 and older in the labor force, the percentage of the civilian labor force that is employed, and the percentage of the labor force that is unemployed.
- *Education:* Information about the educational attainment of the population age 25 and over in each geographical area, including the percentage 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.

House Research compiled all demographic information from the 2017-2021 American Community Survey five-year estimates. Data for adjacent counties was weighted by county population.

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 (2022): 3,632

Tribal Land: 29,271.40 acres

Individual Land: 13,247.06 acres

Government Land: 0 acres

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

Top Three Industries on Reservation: Public administration (24.0 percent); educational services, and health care and social assistance (18.6 percent); and arts, entertainment, and recreation, and accommodation and food services (16.9 percent)

Tribal Governance: Governed by five-member Tribal council.

Tribal Chair (Term expires June 30, 2024):
Cathy Chavers
cchavers@boisforte-nsn.gov
Phone: 218-757-3261

Demographics of Bois Forte Reservation and Surrounding Areas

Population

	Population	American Indian Population (alone or in combination)	% American Indian	% of MN American Indian Population
Bois Forte	1,005	729	72.5%	0.6%
Adjacent Counties	257,483	9,732	3.8%	8.5%
State	5,670,472	114,778	2.0%	100.0%

Age

	% Under Age 18	% Age 18 to 64	% Age 65 and Over
Bois Forte	30.7%	50.0%	19.3%
Adjacent Counties	19.4%	60.1%	20.6%
State	23.3%	60.8%	15.9%

Income

	Median Household Income	Per Capita Income	% with Income Below Poverty Level	% with Cash Public Assistance Income
Bois Forte	$36,136	$19,418	28.0%	5.3%
Adjacent Counties	$60,412	$34,184	13.1%	3.8%
State	$77,706	$41,204	9.2%	3.4%

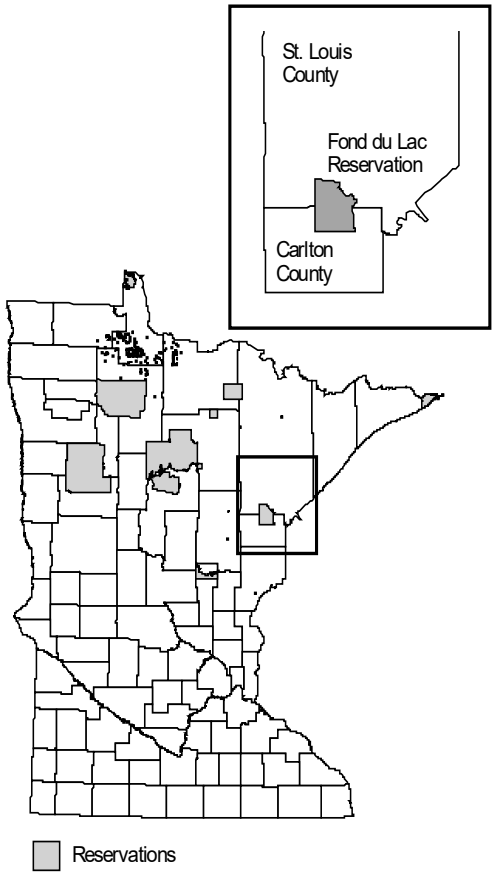
Labor

	% Population Age 16+ in Labor force	% Labor Force Employed	% Labor Force Unemployed
Bois Forte	45.9%	40.3%	5.6%
Adjacent Counties	60.4%	57.1%	3.1%
State	69.2%	66.3%	2.8%

Education

	% of Pop. Age 25+ Less than HS Grad	% of Pop. Age 25+ HS Graduate Only	% of Pop. Age 25+ Some College or Associate Degree	% of Pop. Age 25+ Bachelor's or Graduate Degree
Bois Forte	16.2%	27.7%	44.2%	11.9%
Adjacent Counties	5.5%	26.7%	38.4%	29.4%
State	6.4%	23.9%	32.1%	37.6%

Fond du Lac



Minnesota Chippewa Tribe Member

Fond du Lac Band of Lake Superior Chippewa
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 (2022): 4,128

Tribal Land: 17,592.56 acres

Individual Land: 16,134.05 acres

Government Land: 38.25 acres

Casinos:

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

Fond du-Luth Casino
129 East Superior Street
Duluth, MN 55802
800-873-0280
218-720-5100
www.fondduluthcasino.com

Top Three Industries on Reservation: Education, health care, and social services (30.0 percent); arts, entertainment, recreation, accommodation and food services (12.9 percent); public administration (11.0 percent)

Tribal College:
Fond du Lac Tirbal and Community College offers two-year degrees and is located in Cloquet, Minnesota (fdltcc.edu)

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. Chairperson and secretary also serve as members of the Executive Committee of the Minnesota Chippewa Tribe.

Tribal Chairman (Term expires June 30, 2024):
Kevin R. Dupuis Sr.
kevindupuis@fdlrez.com
218-879-4593

Demographics of Fond du Lac Reservation and Surrounding Areas

Population

	Population	American Indian Population (alone or in combination)	% American Indian	% of MN American Indian Population
Fond du Lac	4,168	1,996	47.9%	1.7%
Adjacent Counties	236,456	9,448	4.0%	8.2%
State	5,670,472	114,778	2.0%	100.0%

Age

	% Under Age 18	% Age 18 to 64	% Age 65 and Over
Fond du Lac	27.7%	57.2%	15.1%
Adjacent Counties	19.6%	61.3%	19.1%
State	23.3%	60.8%	15.9%

Income

	Median Household Income	Per Capita Income	% with Income Below Poverty Level	% with Cash Public Assistance Income
Fond du Lac	$55,542	$26,305	21.6%	2.2%
Adjacent Counties	$62,339	$34,430	13.3%	3.7%
State	$77,706	$41,204	9.2%	3.4%

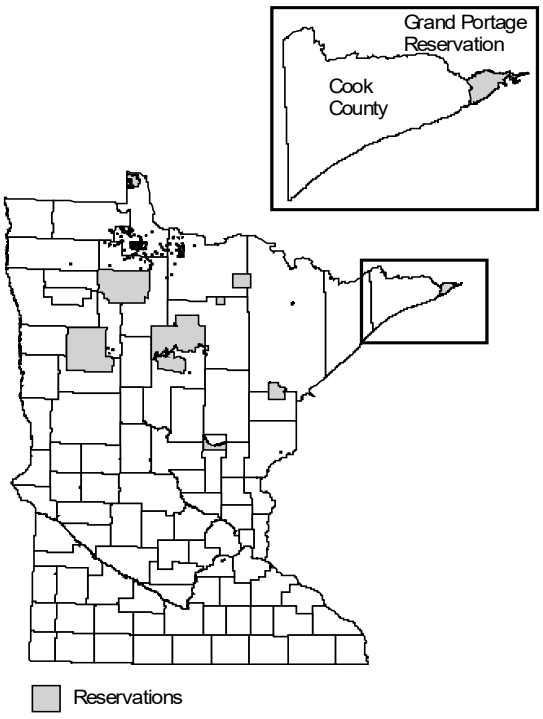
Labor

	% Population Age 16+ in Labor force	% Labor Force Employed	% Labor Force Unemployed
Fond du Lac	59.3%	52.4%	6.7%
Adjacent Counties	61.2%	58.0%	3.0%
State	69.2%	66.3%	2.8%

Education

	% of Pop. Age 25+ Less than HS Grad	% of Pop. Age 25+ HS Graduate Only	% of Pop. Age 25+ Some College or Associate Degree	% of Pop. Age 25+ Bachelor's or Graduate Degree
Fond du Lac	9.8%	35.6%	38.3%	16.4%
Adjacent Counties	5.5%	26.4%	38.0%	30.1%
State	6.4%	23.9%	32.1%	37.6%

Grand Portage



Minnesota Chippewa Tribe Member

Grand Portage Band of Lake Superior Chippewa
Post Office Box 428
Grand Portage, MN 55605
218-475-2277
218-475-2284 (Fax)
RTCReception@grandportage.com
www.grandportage.com

Adjacent County: Cook County

Nearby City: Grand Marais

Tribal Enrollment (2022): 1,024

Tribal Land: 40,098.59 acres

Individual Land: 6,947.62 acres

Government Land: 0.0 acres

Casino: Grand Portage Lodge and Casino
P.O. Box 233
70 Casino Drive
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 (29.6 percent); public administration (25 percent); education, health, and social services (17.5 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 Chairman (Term expires June 30, 2024):
Robert Deschampe
218-475-2277
robertdeschampe@grandportage.com

Demographics of Grand Portage Reservation and Surrounding Areas

Population

	Population	American Indian Population (alone or in combination)	% American Indian	% of MN American Indian Population
Grand Portage	630	417	66.2%	0.4%
Adjacent Counties	5,574	611	11.0%	0.5%
State	5,670,472	114,778	2.0%	100.0%

Age

	% Under Age 18	% Age 18 to 64	% Age 65 and Over
Grand Portage	22.5%	60.5%	17.0%
Adjacent Counties	15.8%	55.7%	28.5%
State	23.3%	60.8%	15.9%

Income

	Median Household Income	Per Capita Income	% with Income Below Poverty Level	% with Cash Public Assistance Income
Grand Portage	$55,852	$28,757	15.4%	5.8%
Adjacent Counties	65,045	$39,205	9.1%	3.0%
State	$77,706	$41,204	9.2%	3.4%

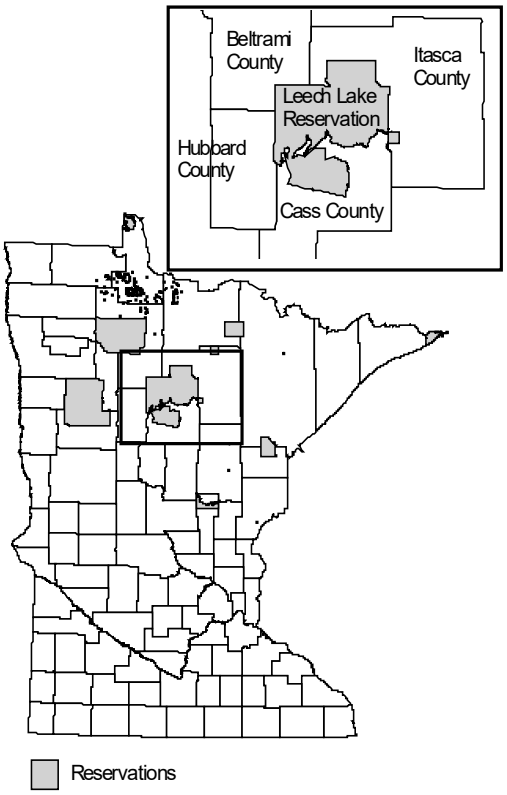
Labor

	% Population Age 16+ in Labor force	% Labor Force Employed	% Labor Force Unemployed
Grand Portage	70.2%	66.9%	3.3%
Adjacent Counties	62.7%	61.6%	1.1%
State	69.2%	66.3%	2.8%

Education

	% of Pop. Age 25+ Less than HS Grad	% of Pop. Age 25+ HS Graduate Only	% of Pop. Age 25+ Some College or Associate Degree	% of Pop. Age 25+ Bachelor's or Graduate Degree
Grand Portage	9.0%	36.0%	36.2%	18.8%
Adjacent Counties	3.5%	24.1%	30.1%	42.4%
State	6.4%	23.9%	32.1%	37.6%

Leech Lake



Minnesota Chippewa Tribe Member

190 Sailstar Drive NW
Cass Lake, MN 56633
800-442-3909 – Toll Free
218-335-8200
218-335-8309 (Fax)
www.llojibwe.org

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

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

Tribal Enrollment (2022): 9,895

Tribal Land: 14,922.30 acres

Individual Land: 13,001.00 acres

Government Land: 140 acres

Casinos:

Northern Lights Casino
6800 Y Frontage Road NW
Walker, MN 56484
800-252-7529
northernlightscasino.com

Cedar Lakes Casino & Hotel
6268 Upper Cass
Frontage Rd, NW
Cass Lake, MN 56633
844-554-2646
cedarlakescasino.com

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

Shingobee on the Bay
7114 Shingobee Rd, NW
Walker, MN 56484
218-547-6233
shingobeeonthebay.com

Top Three Industries on Reservation: Education, health, and social services (24.6 percent); arts, entertainment, recreation, accommodation, and food services (19.8 percent); retail trade (13.1 percent)

Tribal College:
Leech Lake Tribal College
Cass Lake (Cass County)
lltc.edu

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 Chairman (Term expires June 30, 2024):
Faron Jackson, Sr.
faron.jackson@llojibwe.net
218-335-8200

Demographics of Leech Lake Reservation and Surrounding Areas

Population

	Population	American Indian Population (alone or in combination)	% American Indian	% of MN American Indian Population
Leech Lake	11,440	5,040	44.1%	4.4%
Adjacent Counties	142,138	18,156	12.8%	15.8%
State	5,670,472	114,778	2.0%	100.0%

Age

	% Under Age 18	% Age 18 to 64	% Age 65 and Over
Leech Lake	28.3%	51.8%	19.9%
Adjacent Counties	22.5%	55.6%	21.9%
State	23.3%	60.8%	15.9%

Income

	Median Household Income	Per Capita Income	% with Income Below Poverty Level	% with Cash Public Assistance Income
Leech Lake	$55,941	$25,629	18.8%	6.3%
Adjacent Counties	$57,894	$30,803	13.2%	4.8%
State	$77,706	$41,204	9.2%	3.4%

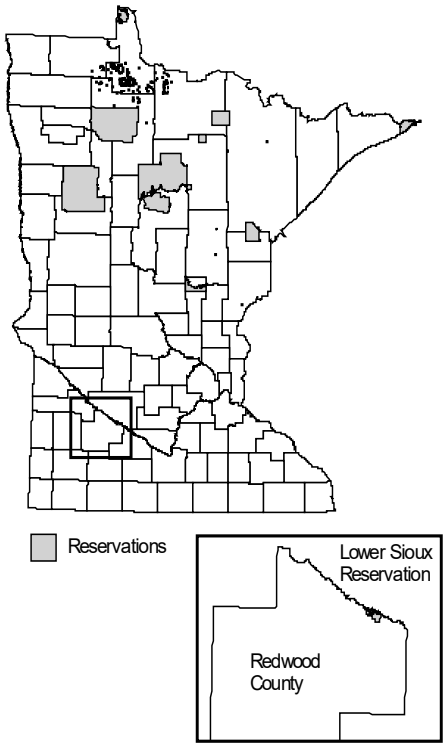
Labor

	% Population Age 16+ in Labor force	% Labor Force Employed	% Labor Force Unemployed
Leech Lake	57.5%	51.4%	6.1%
Adjacent Counties	58.7%	55.2%	3.5%
State	69.2%	66.3%	2.8%

Education

	% of Pop. Age 25+ Less than HS Grad	% of Pop. Age 25+ HS Graduate Only	% of Pop. Age 25+ Some College or Associate Degree	% of Pop. Age 25+ Bachelor's or Graduate Degree
Leech Lake	8.3%	32.0%	38.9%	20.8%
Adjacent Counties	6.2%	29.7%	36.7%	27.3%
State	6.4%	23.9%	32.1%	37.6%

Lower Sioux



Part of Mdewakanton Band of Dakota

Lower Sioux Indian Community
39527 RES Highway 1
P.O. Box 308
Morton, MN 56270
507-697-6185
507-697-8617 (Fax)
www.lowersioux.com

Adjacent County: Redwood and Renville Counties

Nearby City: Redwood Falls

Tribal Enrollment (2019): Approx. 1,261

Tribal Land: 1,948.60 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 (44.9 percent); education, health, and social services (24.4 percent); public administration (10.2 percent)

Tribal Governance: Governed by the five-member Community Council of the Lower Sioux Reservation, composed of a chairman, vice chairman, 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 September 1, 2023):
Robert Larsen
507-697-6185 Ext. 8632
robert.larsen@lowersioux.com

Demographics of Lower Sioux Reservation and Surrounding Areas

Population

	Population	American Indian Population (alone or in combination)	% American Indian	% of MN American Indian Population
Lower Sioux	624	546	87.5%	0.5%
Adjacent Counties	30,203	1,273	4.2%	1.1%
State	5,670,472	114,778	2.0%	100.0%

Age

	% Under Age 18	% Age 18 to 64	% Age 65 and Over
Lower Sioux	41.85%	45.7%	12.5%
Adjacent Counties	24.3%	54.9%	20.9%
State	23.3%	60.8%	15.9%

Income

	Median Household Income	Per Capita Income	% with Income Below Poverty Level	% with Cash Public Assistance Income
Lower Sioux	$47,813	$18,313	11.7%	2.6%
Adjacent Counties	$60,418	$30,891	9.8%	2.6%
State	$77,706	$41,204	9.2%	3.4%

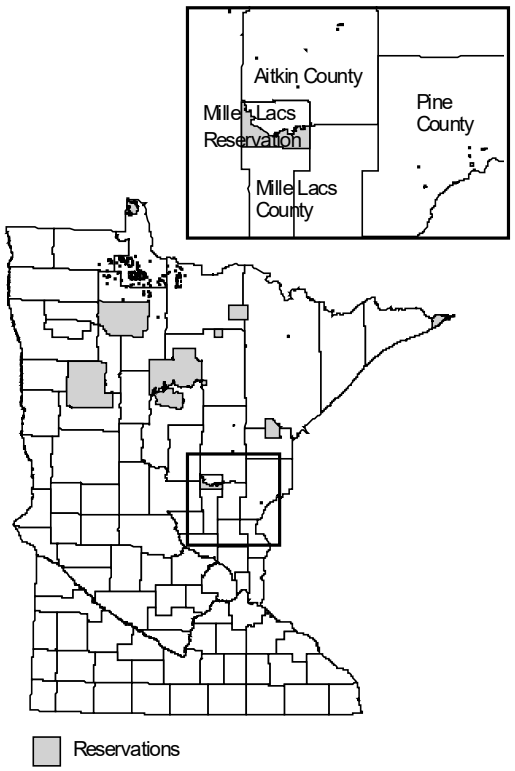
Labor

	% Population Age 16+ in Labor force	% Labor Force Employed	% Labor Force Unemployed
Lower Sioux	53.8%	52.3%	1.5%
Adjacent Counties	62.5%	60.7%	1.7%
State	69.2%	66.3%	2.8%

Education

	% of Pop. Age 25+ Less than HS Grad	% of Pop. Age 25+ HS Graduate Only	% of Pop. Age 25+ Some College or Associate Degree	% of Pop. Age 25+ Bachelor's or Graduate Degree
Lower Sioux	19.8%	38.4%	33.2%	8.5%
Adjacent Counties	8.2%	37.0%	37.2%	17.6%
State	6.4%	23.9%	32.1%	37.6%

Mille Lacs



Minnesota Chippewa Tribe Member

43408 Oodena Drive
Onamia, MN 56359
800-709-6445
320-532-4181
320-532-7505 (Fax)
www.mlbo.dev

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

Nearby Cities: Brainerd, Onamia

Tribal Enrollment (2022): 4,946

Tribal Land: 5,499.805 acres

Individual Land: 3,633.25 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: Education, health, and social services (24 percent); arts, entertainment, recreation, accommodation, and food services (16.4 percent); retail trade (13.7 percent)

Tribal College:
Anishinaabe College
In collaboration with Fond du Lac (fdltcc.edu)
1-800-709-6445

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, 2024):
Melanie Benjamin
Melanie.benjamin@millelacsband.com
320-532-4181

Demographics of Mille Lacs Reservation and Surrounding Areas

Population

	Population	American Indian Population (alone or in combination)	% American Indian	% of MN American Indian Population
Mille Lacs	4,574	1,577	34.5%	1.4%
Adjacent Counties	186,900	5,137	2.7%	4.5%
State	5,670,472	114,778	2.0%	100.0%

Age

	% Under Age 18	% Age 18 to 64	% Age 65 and Over
Mille Lacs	25.4%	51.2%	23.4%
Adjacent Counties	21.6%	56.7%	21.8%
State	23.3%	60.8%	15.9%

Income

	Median Household Income	Per Capita Income	% with Income Below Poverty Level	% with Cash Public Assistance Income
Mille Lacs	$47,031	$27,346	19.4%	6.5%
Adjacent Counties	$60,199	$31,677	10.4%	3.2%
State	$77,706	$41,204	9.2%	3.4%

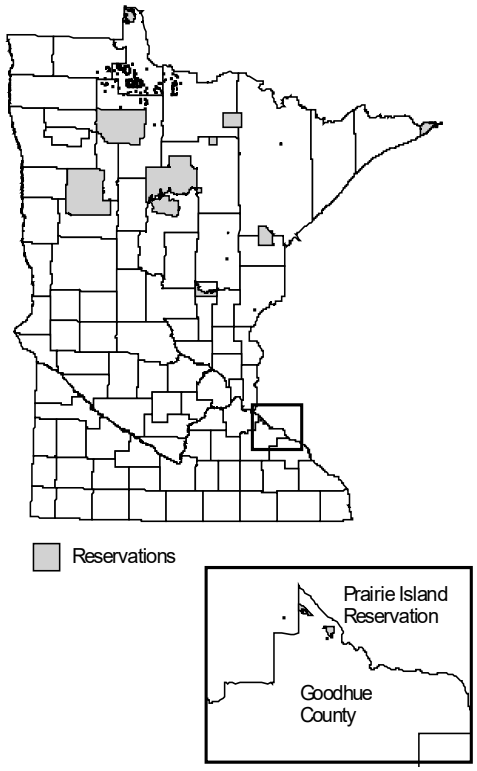
Labor

	% Population Age 16+ in Labor force	% Labor Force Employed	% Labor Force Unemployed
Mille Lacs	50.5%	44.1%	6.4%
Adjacent Counties	60.5%	57.4%	3.1%
State	69.2%	66.3%	2.8%

Education

	% of Pop. Age 25+ Less than HS Grad	% of Pop. Age 25+ HS Graduate Only	% of Pop. Age 25+ Some College or Associate Degree	% of Pop. Age 25+ Bachelor's or Graduate Degree
Mille Lacs	12.4%	33.7%	36.5%	17.4%
Adjacent Counties	7.8%	35.1%	37.3%	19.7%
State	6.4%	23.9%	32.1%	37.6%

Prairie Island



Prairie Island Indian Community
5636 Sturgeon Lake Road
Welch, MN 55089
800-554-5473
651-385-4124
651-385-4180 (Fax)
www.prairieisland.org

Adjacent County: Goodhue County

Nearby City: Red Wing

Tribal Enrollment (2019): Approx. 1,050

Tribal Land: 3,373.96 acres

Individual Land: 146.45 acres

Government Land: 0 acres

Casino: Treasure Island Resort and Casino
5734 Sturgeon Lake Road
Welch, MN 55089
888-304-0243
www.ticasino.com

Top Three Industries on Reservation: Tie between public administration and educational services, health care, and social assistance (16.7 percent); construction (14.3 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.

Tribal President (Term expires November 2023):
Johnny Johnson

Inquiries for council members should be directed through the Tribal council's administrative assistant, Jody Johnson, jody.johnson@piic.org.

Demographics of Prairie Island Reservation and Surrounding Areas

Population

	Population	American Indian Population (alone or in combination)	% American Indian	% of MN American Indian Population
Prairie Island	181	151	83.4%	0.1%
Adjacent Counties	47,503	1,008	2.1%	0.9%
State	5,670,472	114,778	2.0%	100.0%

Age

	% Under Age 18	% Age 18 to 64	% Age 65 and Over
Prairie Island	19.9%	71.3%	8.8%
Adjacent Counties	22.4%	58.0%	19.6%
State	23.3%	60.8%	15.9%

Income

	Median Household Income	Per Capita Income	% with Income Below Poverty Level	% with Cash Public Assistance Income
Prairie Island	$53,750	$46,057	37.0%	10.3%
Adjacent Counties	$71,414	$36,573	8.7%	1.6%
State	$77,706	$41,204	9.2%	3.4%

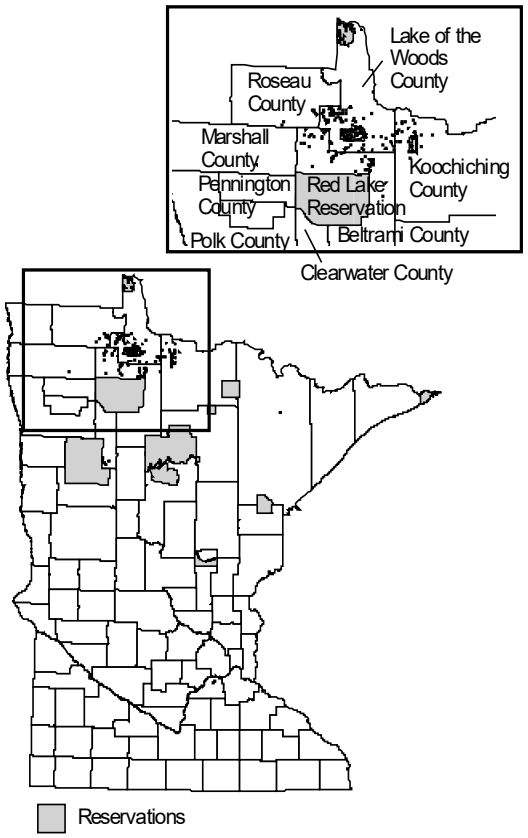
Labor

	% Population Age 16+ in Labor force	% Labor Force Employed	% Labor Force Unemployed
Prairie Island	32.0%	28.0%	4.0%
Adjacent Counties	66.2%	63.7%	2.5%
State	69.2%	66.3%	2.8%

Education

	% of Pop. Age 25+ Less than HS Grad	% of Pop. Age 25+ HS Graduate Only	% of Pop. Age 25+ Some College or Associate Degree	% of Pop. Age 25+ Bachelor's or Graduate Degree
Prairie Island	14.7%	38.8%	34.9%	11.6%
Adjacent Counties	5.6%	33.6%	34.2%	26.6%
State	6.4%	23.9%	32.1%	37.6%

Red Lake



Red Lake Nation
15484 Migizi Drive
Red Lake, MN 56671
218-679-3341 (Tribal Council)
218-679-3378 (Fax)
www.redlakenation.org

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

Nearby Cities: Bemidji, Thief River Falls

Tribal Enrollment (2022): 16,671

Tribal Land: 598,374.97 acres

Individual Land: 102.20 acres

Government Land: 0 acres

Casinos:

Seven Clans Red Lake Casino and Bingo
10200 Hwy. 89
Bemidji, 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
34966 - 605th Ave
Warroad, MN 56763
800-815-8293
www.sevenclanscasino.com/warroad

Top Three Industries on Reservation: Education, health, and social services (33.9 percent); public administration (22.8 percent); arts, entertainment, recreation, accommodation, and food services (18.4 percent)

Tribal College:
Red Lake Nation College (rlnc.edu) - A two-year accredited college
218-679-2860

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, descendants of past leaders of the Tribe, serve lifetime appointments as advisors to the Tribal council.

Current Tribal Chairman (Term expires July 2026):
Darrel G. Seki, Sr.
218-679-3341

Demographics of Red Lake Reservation and Surrounding Areas

Population

	Population	American Indian Population (alone or in combination)	% American Indian	% of MN American Indian Population
Red Lake	5,518	5,345	96.9%	4.7%
Adjacent Counties	140,287	14,725	10.5%	12.8%
State	5,670,472	114,778	2.0%	100.0%

Age

	% Under Age 18	% Age 18 to 64	% Age 65 and Over
Red Lake	44.8%	49.5%	5.7%
Adjacent Counties	24.0%	57.4%	18.6%
State	23.3%	60.8%	15.9%

Income

	Median Household Income	Per Capita Income	% with Income Below Poverty Level	% with Cash Public Assistance Income
Red Lake	$44,803	$13,613	29.7%	19.7%
Adjacent Counties	$59,568	$30,817	12.7%	4.1%
State	$77,706	$41,204	9.2%	3.4%

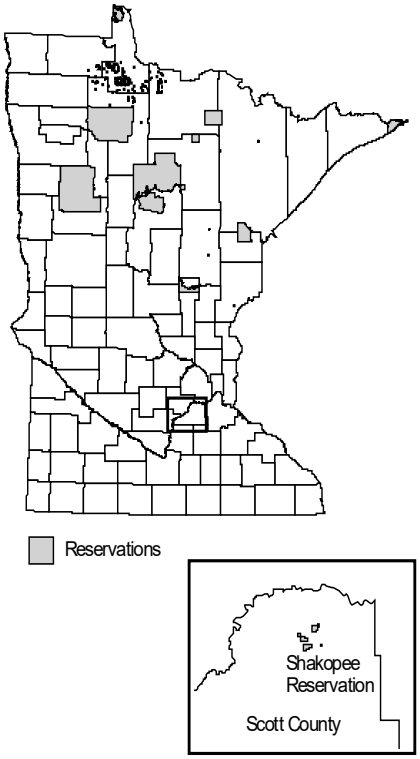
Labor

	% Population Age 16+ in Labor force	% Labor Force Employed	% Labor Force Unemployed
Red Lake	61.0%	46.0%	15.0%
Adjacent Counties	63.8%	60.7%	3.1%
State	69.2%	66.3%	2.8%

Education

	% of Pop. Age 25+ Less than HS Grad	% of Pop. Age 25+ HS Graduate Only	% of Pop. Age 25+ Some College or Associate Degree	% of Pop. Age 25+ Bachelor's or Graduate Degree
Red Lake	17.6%	35.8%	42.6%	4.0%
Adjacent Counties	7.2%	31.4%	36.9%	24.5%
State	6.4%	23.9%	32.1%	37.6%

Shakopee-Mdewakanton



Shakopee Mdewakanton Sioux Community
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 (unknown to public)

Tribal Land: 3,403.80 acres

Individual Land: 39.75 acres

Government Land: 0 acres

Casinos:

Little Six Casino
2450 Sioux Trail NW
Prior Lake, MN 55372
952-403-5525
www.littlesixcasino.com

Mystic Lake Casino Hotel
2400 Mystic Lake Boulevard
Prior Lake, MN 55372
952-403-5555
800-262-7799
www.mysticlake.com

Top Three Industries on Reservation: Educational services, health care, and social assistance (18.7 percent); arts, entertainment, recreation, accommodation, and food services (16.3 percent); tie between retail trade and public administration (15.4 percent)

Tribal Governance: Governed by a General Council and Business Council. All enrolled members of the Tribe 18 years old 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 2024):
Keith Anderson

To contact Business Council members, contact Tribal Administrator Bill Rudnicki: bill.rudnicki@shakopeedakota.org, or 952-445-8900.

Demographics of Shakopee-Mdewakanton Reservation and Surrounding Areas

Population

	Population	American Indian Population (alone or in combination)	% American Indian	% of MN American Indian Population
Shak.-Mdwktn.	617	421	68.2%	0.4%
Adjacent Counties	149,568	2,314	1.5%	2.0%
State	5,670,472	114,778	2.0%	100.0%

Age

	% Under Age 18	% Age 18 to 64	% Age 65 and Over
Shak.-Mdwktn.	28.5%	63.6%	7.9%
Adjacent Counties	27.2%	61.5%	11.3%
State	23.3%	60.8%	15.9%

Income

	Median Household Income	Per Capita Income	% with Income Below Poverty Level	% with Cash Public Assistance Income
Shak.-Mdwktn.	$250,000	$172,526	16.6%	14.4%
Adjacent Counties	$109,031	$47,334	4.6%	1.5%
State	$77,706	$41,204	9.2%	3.4%

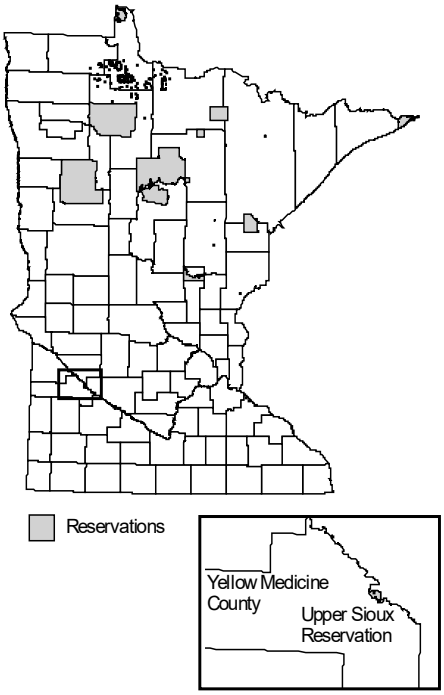
Labor

	% Population Age 16+ in Labor force	% Labor Force Employed	% Labor Force Unemployed
Shak.-Mdwktn.	29.3%	27.1%	2.2%
Adjacent Counties	76.2%	73.6%	2.4%
State	69.2%	66.3%	2.8%

Education

	% of Pop. Age 25+ Less than HS Grad	% of Pop. Age 25+ HS Graduate Only	% of Pop. Age 25+ Some College or Associate Degree	% of Pop. Age 25+ Bachelor's or Graduate Degree
Shak.-Mdwktn.	5.9%	29.6%	43.8%	20.7%
Adjacent Counties	5.1%	20.5%	32.2%	42.3%
State	6.4%	23.9%	32.1%	37.6%

Upper Sioux



Upper Sioux Community Pezihutazizi Oyate
P.O. Box 147
5722 Travers Lane
Granite Falls, MN 56241
320-564-3853
320-564-1854 (Fax)
www.uppersiouxcommunity-nsn.gov

Adjacent County: Chippewa and Yellow Medicine Counties

Nearby Cities: Granite Falls, Montevideo

Tribal Enrollment (2019): 523

Tribal Land: 1,933.05 acres

Individual Land: 2.27 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 (Fax)
www.prairiesedgecasino.com

Top Three Industries on Reservation: Arts, entertainment, recreation, accommodation, and food services (35.1 percent); public administration (21.6 percent); educational services, health care, and social assistance (12.2 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.

Tribal Chairman (Term 2021-2023):
Kevin Jensvold
320-564-6372
kevinj@uppersiouxcommunity-nsn.gov

Demographics of Upper Sioux Reservation and Surrounding Areas

Population

	Population	American Indian Population (alone or in combination)	% American Indian	% of MN American Indian Population
Upper Sioux	168	149	88.7%	0.1%
Adjacent Counties	22.125	638	2.9%	0.6%
State	5,670,472	114,778	2.0%	100.0%

Age

	% Under Age 18	% Age 18 to 64	% Age 65 and Over
Upper Sioux	30.4%	67.8%	1.8%
Adjacent Counties	23.3%	55.9%	20.8%
State	23.3%	60.8%	15.9%

Income

	Median Household Income	Per Capita Income	% with Income Below Poverty Level	% with Cash Public Assistance Income
Upper Sioux	$57,813	$27,626	14.3%	0.0%
Adjacent Counties	$61,643	$31,723	10.7%	2.1%
State	$77,706	$41,204	9.2%	3.4%

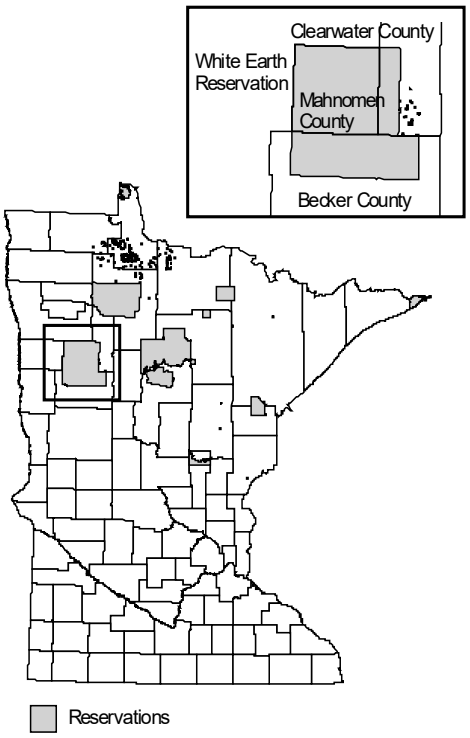
Labor

	% Population Age 16+ in Labor force	% Labor Force Employed	% Labor Force Unemployed
Upper Sioux	59.7%	57.4%	2.3%
Adjacent Counties	64.1%	61.2%	2.9%
State	69.2%	66.3%	2.8%

Education

	% of Pop. Age 25+ Less than HS Grad	% of Pop. Age 25+ HS Graduate Only	% of Pop. Age 25+ Some College or Associate Degree	% of Pop. Age 25+ Bachelor's or Graduate Degree
Upper Sioux	20.0%	36.7%	34.4%	8.9%
Adjacent Counties	8.5%	33.5%	39.2%	18.8%
State	6.4%	23.9%	32.1%	37.6%

White Earth



Minnesota Chippewa Tribe Member

White Earth Nation
Post Office Box 418
White Earth, MN 56591
218-983-3285
800-950-3248
www.whiteearth.com

White Earth Headquarters
35500 Eagle View Rd
Ogema, MN 56569

Adjacent Counties: Becker, Clearwater, and Mahnomen Counties

Nearby Cities: Bemidji, Detroit Lakes, and Park Rapids

Tribal Enrollment (2022): 17,193

Tribal Land: 65,266.90 acres

***Individual Land*:** 3,356.52 acres

Government Land: 790.42 acres

Casinos:

Shooting Star Casino Hotel
777 Casino Road, P.O Box 418
Mahnomen, MN 56557
800-453-7827
218-935-2711

Shooting Star Casino, Bagley
13325 – 340th Street
Bagley, MN 56621
1-800-453-787

Top Three Industries on Reservation: Education, health care, and social services (24.8 percent); arts, entertainment, recreation, accommodation, and food services (16.4 percent); construction (10.4 percent)

Tribal College:
White Earth Tribal and Community College
wetcc.edu
218-935-0417

Tribal Governance: Governed by five-member Tribal council consisting of chair, secretary/treasurer, and three district representatives.

Chairman (Term Expires June 30, 2024):
Michael Fairbanks
218-983-3285
michael.fairbanks@whiteearth-nsn.gov

Demographics of White Earth Reservation and Surrounding Areas

Population

	Population	American Indian Population (alone or in combination)	% American Indian	% of MN American Indian Population
White Earth	9,991	5,321	53.3%	4.6%
Adjacent Counties	48,949	7,427	15.2%	6.5%
State	5,670,472	114,778	2.0%	100.0%

Age

	% Under Age 18	% Age 18 to 64	% Age 65 and Over
White Earth	30.3%	51.6%	18.1%
Adjacent Counties	25.3%	54.3%	20.3%
State	23.3%	60.8%	15.9%

Income

	Median Household Income	Per Capita Income	% with Income Below Poverty Level	% with Cash Public Assistance Income
White Earth	$47,561	$22,706	24.1%	10.4%
Adjacent Counties	$61,151	$33,112	12.4%	4.6%
State	$77,706	$41,204	9.2%	3.4%

Labor

	% Population Age 16+ in Labor force	% Labor Force Employed	% Labor Force Unemployed
White Earth	55.0%	49.9%	5.1%
Adjacent Counties	61.3%	58.2%	3.0%
State	69.2%	66.3%	2.8%

Education

	% of Pop. Age 25+ Less than HS Grad	% of Pop. Age 25+ HS Graduate Only	% of Pop. Age 25+ Some College or Associate Degree	% of Pop. Age 25+ Bachelor's or Graduate Degree
White Earth	12.9%	38.6%	34.0%	14.5%
Adjacent Counties	8.9%	31.1%	36.9%	23.0%
State	6.4%	23.9%	32.1%	37.6%

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]

Agency regulations also provide the specific criteria that apply when the land is within or adjacent to a reservation, and the acquisition is not mandatory. For land on or adjacent to a reservation, the department looks at the following:

- Whether there is statutory authority for the acquisition
- 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]

For trust requests on land that is not adjacent to or on a reservation, the agency also considers:

- The location of the land and the distance from the existing reservation; and
- Anticipated economic benefits if acquired for business purposes.

The recently revised BIA rules require the state and local government to be notified when a Tribe requests land be taken into trust and allows the state and local government 30 days to

provide written comment to the BIA on how the acquisition will affect regulatory jurisdiction, real property taxes, and special assessments.[5]

Prior to the new rules, the process of taking land into trust was ambiguous.

The new federal regulations also clarify the agency decision-making process, clarify the appeal rights of applicants, clarify the procedure for judicial review, and provide that the trust transfer occurs immediately.[6] The Supreme Court has ruled that the courts can overturn a trust transfer so the need to stay the transfer is no longer necessary. Recent changes have also updated the specific rules for title examination prior to the land to be taken into trust.[7]

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."[8] However, one week later, the BIA director withdrew this decision on the grounds "it was issued prematurely."[9] Ultimately, the land was taken into trust for the Tribe.

In a U.S. Supreme Court decision, *Carcieri v. Salazar*,[10] the Court found that a plain reading of the Indian Reorganization Act 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. Since then, federal courts have found that the Tribe could have been "under federal jurisdiction" without being federally recognized.[11,12] There has been proposed congressional legislation to "fix" the *Carcieri* decision and clarify how the law will be applied. While Congress has not yet amended the IRA to provide clarity on this issue, the Department of Interior indicated in a

memo issued in 2014, a two-part legal analysis would be used by the department to determine whether or not a Tribe was under federal jurisdiction in 1934.[13]

Endnotes

[1] 25 U.S.C. § 5108.

[2] 25 U.S.C. § 5108.

[3] 25 C.F.R. § 151.3.

[4] 25 C.F.R § 151.10.

[5] 25 C.F.R. §§ 151.10 and 151.11.

[6] 25 C.F.R. § 151.12.

[7] 25 C.F.R. § 151.13.

[8] 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.

[9] 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.

[10] 555 U.S. 379 (2009).

[11] *Confederated Tribes of the Grand Ronde Community v. Jewell*, 830 F.3d 552 (D.C. Cir. 2016).

[12] *Armador v. U.S. Department of the Interior*, 872 F.3d 1012 (9th Circ. 2017).

[13] The meaning of "under federal jurisdiction for the purposes of the Indian Reorganization Act" memorandum from the solicitor to the Secretary of the U.S. Department of the Interior, March 12, 2014.

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 E-mail: janelle.smith@boisforte-nsn.gov	**Fond du Lac Band of Lake Superior Chippewa** 1720 Big Lake Road Cloquet, MN 55720 Phone: 218-878-7151 Fax: 218-878-7169 E-mail: courtadministrator@fdlrez.com
Grand Portage Band of Lake Superior Chippewa 54 Upper Road P.O. Box 428 Grand Portage, MN 55605 Phone: 218-475-2800 Ext. Agatha Armstrong Fax: 218-475-2284	**Leech Lake Band of Ojibwe** 190 Sailstar Drive 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 Ext. 8615 Fax: 507-697-8621 E-mail: court.clerk@lowersioux.com	**Mille Lacs Band of Ojibwe** 43408 Oodena Drive Onamia, MN 56359 Phone: 320-532-7400 Fax: 320-532-3153 E-mail: gilda.burr@millelacsband.com
Prairie Island Indian Community 5636 Sturgeon Lake Road Welch, MN 55089 Phone: 651-385-4161 Fax: 651-267-4009 E-mail: deb.english@piic.org	**Red Lake Band of Chippewa** P.O. Box 572, Hwy 1 East Red Lake, MN 56671 Phone: 218-679-3303 Fax: 218-679-2683
Shakopee Mdewakanton Sioux (Dakota) Community SMSC Community Center 2330 Sioux Trail NW Prior Lake, MN 55372 Lynn McDonald (952-233-4246; fax: 952-233-4259) Phone: 952-445-8900 Fax: 952-445-8906 E-mail: lynn@smsccourt.org	**Upper Sioux Community** P.O. Box 155 Granite Falls, MN 56241 Phone: 320-564-6317 Fax: 320-564-4915 E-mail: tribalcourt@uppersiouxcommunity-nsn.gov
White Earth Band of Ojibwe P.O. Box 289 White Earth, MN 56591 Phone: 218-983-4648 Fax: 218-983-3294 E-mail: lori.thompson@whiteearth-nsn.gov	
Minnesota Chippewa Tribe P.O. Box 217 Cass Lake, MN 56633 Phone: 218-335-8581 Fax: 218-335-8496	**Minnesota Chippewa Tribe – Court of Appeals from Six Chippewa Boards** P.O. Box 217 Cass Lake, MN 56633

House Research Department