Indians, Indian Tribes and State Government

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Copies of this report may be obtained by calling 296-6753.

Contents

Introduction

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

The publication begins with some basic data on Indians in Minnesota today. A map shows where the reservations of which tribes are located, and the sites of the current gaming facilities. Population information from the 1990 census is presented on a second map and in tables in an appendix. Part One defines terms such as "Indian tribes" and "Indian lands" and explains concepts like "tribal sovereignty" that are necessary for understanding the basic nature of state and federal power relative to Indians and Indian tribes.

Part Two contains a series of papers on a number of specific legal issues that may be of interest to legislators. The covered topics are

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

* 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. Indians prefer to be called by the name they call themselves in their own language. The main groups of Indians in Minnesota are the Dakota and the Ojibway. This publication 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."

Population of Indians in Minnesota

Minnesota contains twelve Indian reservations:

Minnesota Chippewa Tribe (the Ojibway)

- Bois Forte
- Fond du Lac
- Grand Portage
- Leech Lake
- Mille Lacs
- Red Lake
- Lake Vermilion
- White Earth

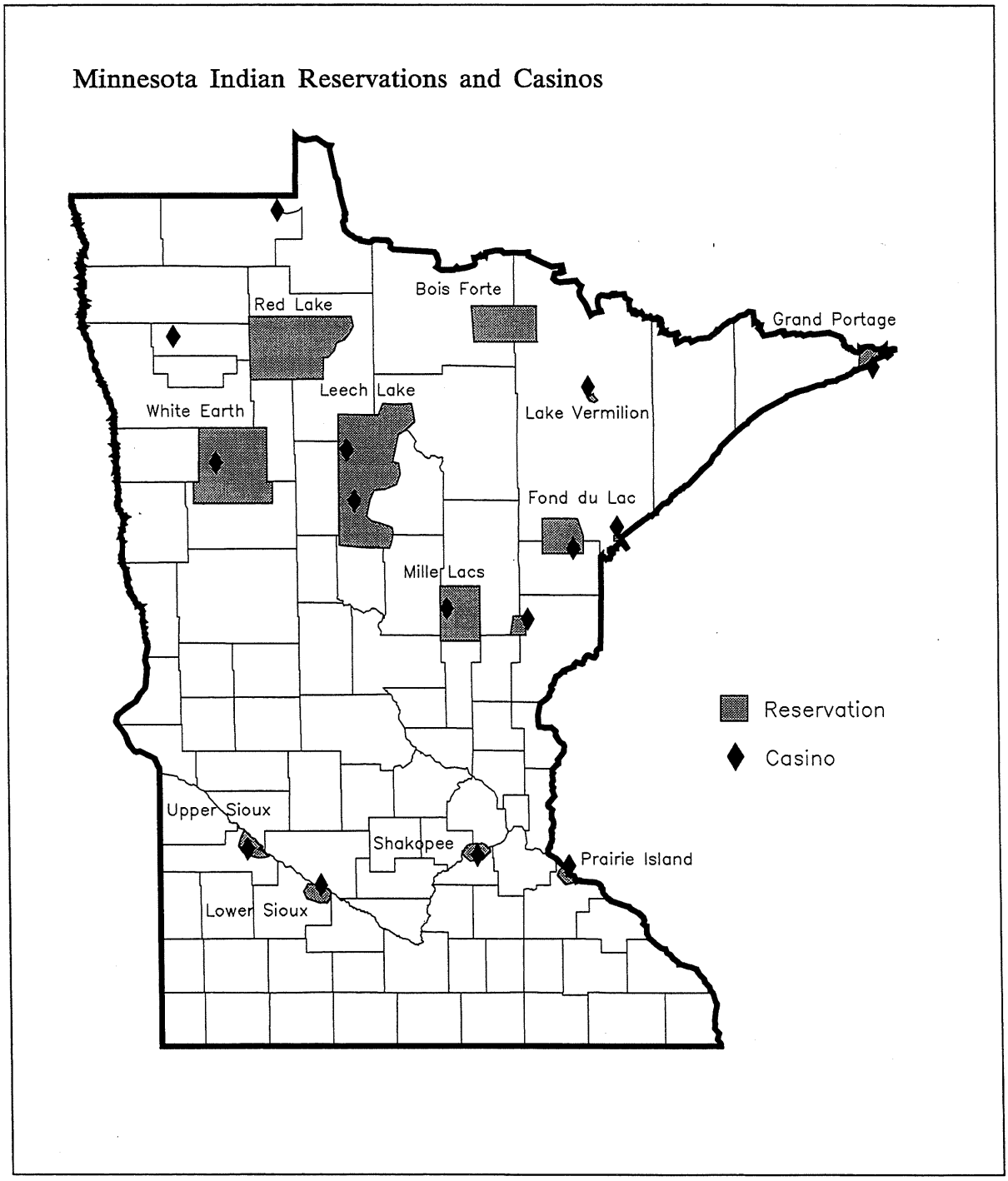
Sioux Communities (the Dakota)

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

Map 1 shows the location of these reservations, as well as the location of Indian gaming facilities.

The 1990 census recorded 49,507 "American Indian, Eskimo, and Aleut persons"[1] in Minnesota or slightly more than one percent of the population. In 1990, about one-quarter of the Indians in Minnesota (or just over 12,000) lived on reservations. This number probably has increased somewhat since, as employment opportunities on the reservations have increased with the expansion of Indian gaming.[2] Hennepin and Ramsey counties contain slightly more than 38 percent of the Minnesota Indian population.

Map 2 shows what percentage of each county's total population is Indian. See a table in the appendix for Indian population by county.


Minnesota Indian Reservations and Casinos
Red Lake
Bois Forte
Grand Portage
Leech Lake
White Earth
Lake Vermilion
Fond du Lac
Mille Lacs
Reservation
Casino
Upper Sioux
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Prairie Island
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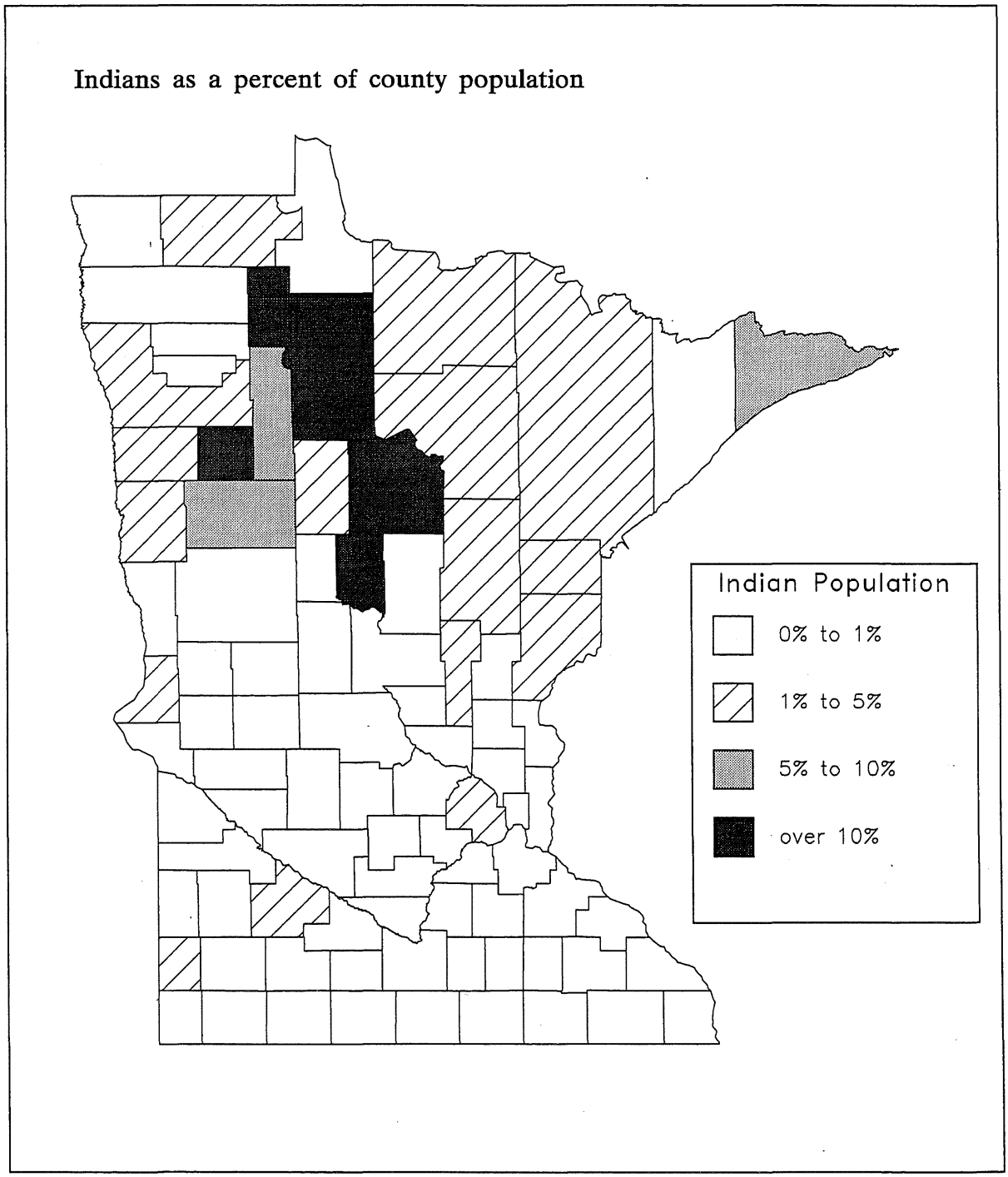
Indians as a percent of county population
Indian Population
0% to 1%
1% to 5%
5% to 10%
over 10%
House Research Graphics

Endnotes

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

2. The Indian population of Minnesota reservations increased by over 25 percent between the 1980 and 1990 census. Indian Affairs Council, Annual Report (Nov. 15, 1992) p. 7. It seems reasonable to attribute much of this population increase to the expansion of employment opportunities resulting from Indian gaming. Since there has been further expansion of these activities after the 1990 census, more migration back to the reservations seems likely to have occurred.

Part One

Terms and Concepts

Definition of "Indian"

Federal law defines "Indian" in a variety of ways for different purposes and programs. The National Tribal Chairman's Association examined the criteria of federal agencies in 1980 and found forty-seven definitions of "Indian." Census data simply counts individuals as Indians who identify themselves as such.

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

An individual may not qualify under ethnological notions as an Indian (e.g., a person who is three-quarters Caucasian and one-fourth Indian), but nevertheless may be a tribal member or may be recognized as an Indian for various federal legal purposes.

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

To have Indian blood some of the individual's ancestors must have lived in North America before its discovery by Europeans. Many statutory and common law references to "Indian" refer to an individual's status as a member of an Indian tribe.

Tribes have the power to determine their membership.

Court decisions have held that determining tribal membership is a fundamental or basic power of tribes.[1] Minnesota tribes have differing rules for determining their membership.

Membership itself is a difficult term to define, because membership can refer to a formal enrollment on a tribal roll of a federally recognized tribe, or to a more informal status as one recognized to be a member of the tribal community. Enrollment is commonly a prerequisite for acceptance as a member of a tribal community, and it provides the best evidence of Indian status. Where formal enrollment is required, there can be no Indian without a tribe.[2]

Limiting membership and property sharing is accomplished in three ways: by patrilineal or matrilineal descent rules; by blood quantum; and by residency requirements. Where tribal eligibility for membership is determined through patrimonial or matrimonial lines, children of full-blooded Indians, in certain cases, may not be eligible for membership in any tribe. 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. Many tribes require one-fourth tribal blood. Some require as much as five-eighths. Congress has also often imposed a particular blood quantum requirement in addition to, or in lieu of, enrollment.

As an example, the Minnesota Chippewa Tribe (MCT) requires that a member be at least one-fourth MCT blood and an American citizen. Application for enrollment is made within a year after birth. The governing body of the MCT reservation makes the determination with an appeal process.[3]

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

Coexisting with this abstract concept of tribal membership is an actual tribal community composed of persons who are not all enrolled tribal members, but who nevertheless fully participate in the social, religious, and cultural life of the tribe if not its political and economic processes. Formal rolls have a limited purpose, so many tribes have informal rolls. Although some statutes provide benefits to formally enrolled members of federally recognized tribes, many of the benefits accorded Indians under various statutes are available to Indians more broadly defined.[4]

The modern congressional trend is to define the term "Indian" broadly to include both formal and informal membership as well as requirements of a certain degree of Indian blood. For example, the 1988 law creating a department of Indian education in the Department of Education, takes into account the lack of a unitary definition of Indian by defining Indian as anyone "considered by the Secretary of the Interior to be an Indian for any purpose," a broad definition that permits many Indians who may not be formally enrolled to qualify for benefits.[5]

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.

In 1924 Congress conferred citizenship upon all Indians born within the United States.[6]

Through the Fourteenth Amendment, the grant of federal citizenship also made Indians citizens of the states in which they resided. 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.[7]

Definition of "Indian Tribe"

Tribal existence (in the legal-political sense) results from recognition under federal law. Recognition may come from congressional or executive action that, for example, created a reservation for the tribe, negotiated a treaty with the tribe, or established a political relationship with the tribe such as providing services through the Bureau of Indian Affairs (BIA).

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

Federal recognition of tribes does not necessarily follow ethnological divisions. The federal government has, for example, combined separate ethnological tribes into one "legal" tribe or divided one ethnological tribe into separate legal tribes.[8]

In general, the Indian Commerce Clause of the constitution authorizes Congress[9] to determine which groups of Indians will have recognized tribal status.

The courts generally will not question congressional or executive action in recognizing a tribe. Courts, however, will order the executive to honor tribal status for a particular purpose where it has been judged to have been the intent of Congress.[10] Courts will also not allow the federal government to confer tribal status arbitrarily on some group that has never displayed the characteristics of a distinctly Indian community.[11]

In 1978, the Department of the Interior adopted regulations creating an administrative procedure to be invoked by tribes seeking recognition.[12] Development of the criteria involved significant research into ethnohistory and anthropology. The criteria were designed to achieve eligibility for federal services and other benefits of tribal status for Indian groups that have maintained a "substantially continuous tribal existence and which have functioned as autonomous entities throughout history until the present."[13] Tribal identity may be established by various types of evidence, including dealings as a tribe with federal, state, or local governments, recognition by historical records, scholarly opinion, or dealings with other tribes. It is essential to recognition that the group exercise some sort of governmental authority over its members, and that it occupy a specified territory or inhabit a community viewed as distinctly Indian.[14]

Although required for many federal statutes, federal recognition is not essential to tribal status for all purposes. Federal statutes before 1934 rarely defined the term "Indian tribe." The recent congressional trend is to define the term "tribe" in particular statutes.

A tribe can abandon its tribal status, although this is not inferred easily. Congress can also terminate federal supervision of a tribe. This does not eliminate the tribe, but only its special relationship with the federal government. The terminated tribe retains its sovereignty to the extent not inconsistent with the act terminating its status. No recognized tribes in Minnesota have been terminated.

Indian Lands and Territories

Two concepts must be distinguished in discussing Indian lands: (1) **tribal territory or "Indian country"** -- the area in which the tribe's power of self-government applies and state powers are restricted, and (2) **land tenure** -- the ownership status of land within Indian country.

Tribal territory or Indian country is a crucial concept of Indian law.

Under federal law, tribal territory defines the jurisdiction of tribes, the federal government, and state government. It is generally within these areas that tribal sovereignty applies and state power is limited.[15] Although the public generally thinks of these areas as "reservations," the precise legal term is "Indian country."[16]

Federal law generally defines Indian country as including Indian reservations, dependent Indian communities, and Indian allotments.[17] 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.

Indian country is 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 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.[18]

As will be discussed under 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 or tenure considerations as well.

Land tenure or landownership in Indian country can be divided into several basic categories: tribal trust lands; allotted trust lands; and fee lands.

Tribal trust lands are held in trust by the federal government for the use of a tribe. The federal government holds the legal title and the tribe holds the beneficial interest.

This is the largest category of Indian land. Tribally owned trust land is held communally by the tribe in undivided interest and the 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. Land acquired by the tribe, which it wishes to have held in trust, must be approved by the Bureau of Indian Affairs; if the land is outside of defined Indian country (i.e., a reservation), the conveyance to the United States in trust for the tribe must be approved by the Secretary of the Interior.

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

In 1887, the Congress enacted the General Allotment Act[19], which divided up Indian reservations and allotted the partitioned land to individual Indians. The land was to be held in trust by the federal government for a period of years (originally 25 years), until the beneficial owner could show that he was competent to own the land in fee. In Minnesota, the Nelson Act of 1889 implemented the allotment process.[20] Many of the allotments passed out of trust status. Some land passed legitimately at the expiration of the "trial period," but most passed out of trust status and out of Indian hands through fraud and tax sales.[21] Most of the allotted land is no longer owned by Indians. In many cases, however, the trust period was extended by statute, and in 1934, with the passage of the Indian Reorganization Act (IRA), the trust status of the remaining allotments was extended indefinitely.[22] The IRA also allowed no more Indian land to be allotted. As a result, a significant amount of allotted land remains in trust today.

Fee lands are held by an owner, whether Indian or non-Indian, in fee simple absolute. Fee land within Indian country owned by non-Indians generally does not enjoy the sovereign immunity protection enjoyed by trust land such as exemption from taxation.[23]

Other lands are held in Indian country by federal, state and local (non-tribal) governments. The federal government holds land in fee simple absolute with no obligation toward Indians regarding the land. These include, for example, National Forest lands which are wholly owned by the federal government, but which 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.

Tribal Sovereignty -- Limits on State Power

Indian tribes have a special legal status that derives from their status as sovereign nations under the United States 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 by the constitution. Establishment of the United States subjected the tribes to federal power, but did not eliminate their internal sovereignty or subordinate them to the power of state governments.[24] The tribes lost their "external sovereignty," i.e., they were no longer able to deal with foreign nations. However, they still retain their sovereignty within their tribal territories.[25] The tribes retain the powers of self-government over their lands and members. In some ways, this gave the tribes equal status with states.

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.[26] One element of this fiduciary relationship has been to preserve tribes' status as self-governing entities within their territories, including protection from state interference.[27] 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.[28]

Federal Indian affairs policy has varied significantly over the years with the importance accorded by Congress to sovereignty and tribal self-government rising and waning. Assimilationist policies at times downplayed its importance. However, it is an important theme throughout and currently is a central principle of federal policy.

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

The Constitution gives Congress complete authority over Indian tribes, including the powers to repeal treaties, eliminate reservations, and grant the states jurisdiction over particular tribes. The only constraints binding upon the federal government are the guarantees contained in the Bill of Rights and provisions of the Fourteenth Amendment of the U.S. Constitution.

Tribal sovereignty and tribes' right of self-government is the important touchstone that affects tribal relations with state government.

Congress has the exclusive power to regulate Indian affairs. A state, by contrast, only has the power over Indian affairs within tribal territory (Indian country or lands) that Congress has specifically given it. State power over tribal territory is limited to those powers which Congress has delegated to it or which have not been preempted by the exercise of federal or tribal law.

Public Law 280

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

The federal law, as originally enacted, granted to the states of Wisconsin, Oregon, California, Minnesota and Nebraska criminal and civil jurisdiction in most Indian lands[29] located within the boundaries of these states.

Under a 1958 amendment, Alaska was granted similar criminal and civil jurisdiction. In addition, Public Law 280 originally contained a mechanism under which certain other states could choose to assert full or partial civil or criminal jurisdiction over Indian lands without the consent of the affected Indians or their tribes.[30] This mechanism was changed in 1968 when Congress amended the law prospectively to prohibit additional states from asserting jurisdiction over Indians without their consent. The 1968 amendments also permitted states to "retrocede" or grant back jurisdiction acquired under Public Law 280 to an Indian tribe; however, retrocession had to be initiated by the state and approved by the federal government.[31] The Indian tribes have no direct role in or control over the retrocession process.

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.

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.

There are two important cases for interpreting Public Law 280.

The scope of jurisdiction granted by Public Law 280 has been limited by several U.S. Supreme Court decisions. Two of the most important decisions are discussed here.

First, in *Bryan v. Itasca County*,[32] the Court ruled that states could not tax an Indian's personal 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.

Second, in *California v. Cabazon Band of Mission Indians*,[33] the Court ruled that California could not enforce certain of 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.

Special Rules for Interpreting Indian Law

The United States Supreme Court in a series of decisions dating from the early nineteenth century has held that the federal government has a special trust responsibility with the Indian tribes.[34] These trust principles have developed in several ways. One important result is that the Court has developed a special set of rules or "**canons of construction**" for construing treaties, statutes, and executive orders affecting Indian tribes and peoples. These rules of construction or interpretation are important in shaping the development of the law and, in particular, in establishing and protecting the rights of the tribes and their members.

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

They represent, in part, an acknowledgement 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.

The canons are expressed in various different ways.

In general, they provide that treaties, statutes, executive orders, and agreements are to be construed liberally in favor of establishing or protecting Indian rights and that ambiguities are to be resolved in favor of Indians.[35] 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.[36] 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.[37]

Endnotes

1. *Santa Clara Pueblo v. Martinez*, 435 U.S. 49, 72 fn. 32 (1978). Furthermore, a person regarded as a member by the tribe may not be so regarded by the Secretary of the Interior, who claims the authority to determine membership for purposes of distributing property rights. See BIA Manual, Release 83-4, Part 8, Enrollment, § 8.2 (1959). 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.

2. See *Epps v. Androus*, 611 F.2d 915 (1st Cir. 1979); *United States v. Heath*, 509 F.2d 16 (9th Cir. 1974)(where Congress has terminated a tribe's special relationship with the federal government, the individual members of that tribe are no longer Indians for the purposes of federal criminal jurisdiction).

3. E. Ebbott, Indians in Minnesota, 39-40 (4th ed. 1985).

4. As a result, the BIA often relies on informal rolls to determine who is an Indian entitled to receive federal services, as opposed to those entitled to receive distributions. See BIA Manual, Release 83-4, Part 8, Enrollment, § 8.5 (1959).

5. 25 U.S.C. § 5351(c).

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

7. *Winton v. Amos*, 225 U.S. 373 (1921); *United States v. Nice*, 241 U.S. 591 (1916).

8. For example, the Shoshones and Arapahos, two ethnologically separate tribes, were combined into the Wind River Tribes for purposes of federal law. See Felix S. Cohen's Handbook of Federal Indian Law 6 (1982) for several other examples.

9. Congress has occasionally delegated this power to the executive branch.

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

11. *United States v. Sandoval*, 231 U.S. 28, 46 (1913).

12. 25 C.F.R. Part 83.

13. 25 U.S.C. § 83.3.

14. The core requirements for recognition are set forth in 25 C.F.R. § 83.7.

15. 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.

16. Indian country is the term that has been used consistently since 1948. 18 U.S.C. § 1151.

17. *Id.*

18. Cohen, supra note 8, at 45 fn 158. However, other authority may suggest the land becomes a reservation without further action. *Id.*

19. 25 U.S.C. §§ 331 *et. seq.* This is commonly referred to as the Dawes Act.

20. 25 Stat. § 642.

21. Only about six percent of the original acreage of the White Earth Reservation remains in Indian control. E. Peterson, That So-Called Warranty Deed: Clouded Land Titles on the White Earth Indian Reservation in Minnesota, 59 N.D.L. Rev. 159, 163 (1983).

22. 25 U.S.C. § 462.

23. See *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nations*, 112 S.Ct. 683 (1992) and discussion below under taxation, page 61.

24. The special status of Indian tribes is recognized in the language of the United States 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."

25. These basic principles of Indian law were established initially in *Worchester v. Georgia*, 31 U.S. 515 (1832).

26. *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); see generally the discussion in Cohen, supra note 8, at 232-37 (1982).

27. *Id.* at 234.

28. *Worchester v. Georgia*, 31 U.S. 515, 561 (1832), cited in Cohen, supra note 8, at 235.

29. The Red Lake Reservation was excluded from this grant of jurisdiction in Minnesota.

30. These states are Arizona, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, and Washington.

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

32. 426 U.S. 373 (1976).

33. 408 U.S. 202 (1987).

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

35. See generally Cohen, supra note 8, at 221-25 for a discussion of the canons.

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

37. See, e.g., *Bryan v. Itasca County* 426 U.S. 373, 392-39 (1976).

Part Two

Background Papers

Criminal Jurisdiction in Indian Country

by Emily Shapiro (296-5041)

This paper discusses which level of government (federal, state, or tribal) has jurisdiction to prosecute and punish crimes committed in Indian country in Minnesota. The answer to this complex jurisdictional question depends on a number of factors including where the incident took place, what type of law was violated and whether either the perpetrator or the victim was a member of an Indian tribe.

Jurisdiction over federal crimes of nationwide application (such as assault of a federal officer) resides with the federal government no matter where the incident occurred. Otherwise, the general rule in Minnesota is that the state of Minnesota has jurisdiction to prosecute and punish criminal law violations committed in Indian country except for crimes committed by or against Indians on the Red Lake or Bois Forte Reservations. Jurisdiction over crimes committed on these two reservations resides with the federal, state, or tribal governments depending on the nature of the crime and/or the Indian status of either or both of the parties.

The following chart illustrates which level of government has criminal jurisdiction over various types of offenses committed in Indian country in Minnesota.

Federal	State	Tribal*
Federal crimes of nationwide application Certain major crimes committed by an Indian against an Indian or non-Indian on the Red Lake or Bois Forte Reservations Other felony crimes committed by an Indian against a non-Indian or by an non-Indian against an Indian on the Red Lake or Bois Forte Reservations	Any state crime committed by a non-Indian against a non-Indian anywhere within the state, including on Indian lands Any major or minor crime committed by or against an Indian on Indian land, except on the Red Lake or Bois Forte Reservations	Minor crimes committed by an Indian against an Indian on Indian land owned or controlled by the tribe *** Red Lake and Bois Forte Reservations only**

"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 of the complete document.

Constitutional basis for determining jurisdiction. The fundamental legal basis for determining which 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 several states, and with the Indian tribes. Based on this language, the U.S. Supreme Court has 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]

Federal Criminal Jurisdiction

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

Federal crimes of nationwide application. Federal criminal laws of nationwide application, such as assault of a federal officer, apply throughout the nation without regard to the location of the criminal incident. Therefore, the federal government has exclusive criminal jurisdiction over these crimes whether they occur on Indian land or elsewhere.

Enclave and Assimilative Crimes Act provisions. In addition to federal crimes of nationwide application, the federal criminal code contains crimes that apply in those areas of the country under the sole and exclusive jurisdiction of the United States government. These areas are known as "federal enclaves" and include places like military installations and national parks. In 1816, the Congress enacted a jurisdictional law[2] providing that, with certain exceptions, federal criminal laws apply in Indian country to the same extent that they apply in other federal enclaves.

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

However, the scope of these jurisdictional statutes is sharply limited by two statutory exceptions and one judicially-created exception. First, the statutes exempt offenses committed by one Indian against the person or property of another Indian.[5] Second, the statutes exempt offenses over which criminal jurisdiction has been conferred on a particular tribe by treaty. Third, according to U.S. Supreme Court cases, the statutes

do not apply to crimes committed in Indian country by a non-Indian against another non-Indian. Instead, state court is the proper forum for prosecuting such a crime.[6]

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

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

State Criminal Jurisdiction

Non-Indian offenses. As was mentioned earlier, the U.S. Supreme Court ruled in a series of cases beginning in the late nineteenth century that all states have criminal jurisdiction over crimes committed on Indian lands where both the perpetrator and the victim are non-Indians.[10] The Court's reasoning was two-fold. First, it reasoned that states have inherent power over Indian lands within their borders as a consequence of their admission into the Union without an express disclaimer of jurisdiction. Second, it reasoned that the non-ward status of both the perpetrator and the victim divests the federal government of any jurisdiction over the matter.

Public Law 280. The federal jurisdictional scheme outlined thus far applies to many Indian reservations throughout the nation, but has limited application within the state of Minnesota. Due to changes in Indian policy enacted by the Congress during the 1950s, the state of Minnesota, along with five other states, was required to assume complete criminal jurisdiction and limited civil jurisdiction over most Indian reservations located within its boundaries.[11] 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. In 1973, at the request of the Nett Lake (Bois Forte) band of Chippewa, the Minnesota Legislature retroceded its criminal jurisdiction over the Bois Forte Reservation, thereby returning the reservation to federal criminal jurisdiction.[12]

As a result, federal jurisdiction over crimes described in the Enclave and Assimilative Crime Acts and the Major Crimes Act does not apply to Indian reservations in Minnesota except for crimes committed on the Red Lake Reservation or the Bois Forte Reservation.

The criminal/prohibitory and civil/regulatory distinction. The breadth of criminal jurisdiction conferred on states by Public Law 280 has been limited recently by the U.S. Supreme Court's ruling in *California v. Cabazon Band of Mission Indians.*[13] This case concerned the authority of California to enforce certain of its gambling laws on Indian land. 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.[14]

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.[15]

Tribal Jurisdiction

Oliphant decision. Until recently, it was believed that an Indian tribe retained sovereign powers unless specifically removed by federal statute or relinquished by treaty. However, in 1978 the U.S. Supreme Court further limited tribal powers by ruling that powers not "inherent" or historically held by tribes do not exist unless delegated to the tribes by Congress. Specifically, the Court ruled that, absent congressional authority, tribes may not exercise criminal jurisdiction over crimes committed against Indians on Indian land by non-Indians.[16] 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.

Jurisdiction over minor crimes. Tribal jurisdiction over crimes committed on the Red Lake and Bois Forte reservations in Minnesota is further limited in two ways. First, under federal law, these tribes may only prosecute minor crimes committed by one Indian against another Indian. The perpetrator need not be a member of the tribe asserting jurisdiction; as long as both the parties are Indians, the tribe may assert jurisdiction over crimes committed on the tribe's lands.[17] Second, the Indian Civil Rights Act[18] 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 means that the tribes may only prosecute minor crimes (misdemeanors and gross misdemeanors) committed on their lands.

Law enforcement authority. The tribal law enforcement agencies on the Red Lake and Bois Forte Reservations are funded and administered by the federal Bureau of Indian Affairs. Tribal police officers are professional officers trained at the Indian Police Academy in Utah.[19]

Additionally, the Minnesota Legislature recently granted certain law enforcement powers to the Mille Lacs band of Chippewa Indians. Although the state did not retrocede its criminal jurisdiction over land located within the Mille Lacs reservation or trust lands, it did grant to the band concurrent law enforcement jurisdiction, with the Mille Lacs county sheriff's department, over the following:

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

The sheriff of the county in which the violation occurred is responsible for receiving persons arrested by the band's peace officers, and the Mille Lacs county attorney is responsible for prosecuting such violators.[20]

Endnotes

1. See *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *Johnson v. McIntosh*, 21 U.S. 543 (1823).

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 has since been 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 U.S. 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. These crimes include murder, manslaughter, attempted murder, conspiracy to commit murder, kidnapping, rape, statutory rape, robbery, arson, assault, maiming, larceny, receiving stolen property, and false pretenses/fraud on the high seas.

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

10. *United States v. 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).

11. 18 U.S.C. § 1162. The other states that were required to assume criminal jurisdiction over Indian reservations within their boundaries are Alaska, California, Nebraska, Oregon, and Wisconsin. P.L. 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.

12. 1973 Minn. Laws, chap. 625.

13. 480 U.S. 202 (1987).

14. 480 U.S. at 209 (1987). This case ultimately led to the 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.

15. 480 U.S. at 211 (1987).

16. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

17. Tribal authority over crimes committed against Indians by non-member Indians has only recently been affirmed by Congress. Congress did so in response to the U.S. 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, the 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.

18. 25 U.S.C. § 1302.

19. Ebbott, Indians in Minnesota (4th ed. 1985).

20. 1991 Minn. Laws, chap. 189.

Civil Jurisdiction in Indian Country

by Deborah K. McKnight (296-5056)

In addition to its effect on criminal jurisdiction on Indian lands, federal Public Law 280 granted specified states, including Minnesota, civil jurisdiction over Indian lands. Minnesota state civil jurisdiction does not apply to the Red Lake Reservation.[1] The federal law provided that state civil laws of general application apply to Indian reservations, except as those laws affect trust or restricted real or personal property, including water rights. In 1968 the act was amended to allow states with civil jurisdiction over Indian reservations to retrocede (give back) that jurisdiction to the federal government.

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 a reservation. Statewide laws affecting private transactions and relationships, such as contracts, marriage, divorce, and torts apply in Indian Country.[2] However, 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.[3] Similarly, a state law regulating bingo that was civil rather than criminal was held not authorized by Public Law 280.[4]

Because Public Law 280 requires a state law to be of statewide application in order to apply in Indian country, no local ordinance is applicable in Indian country.[5]

"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 of the complete document.

Endnotes

1. 28 U.S.C. § 1360.

2. *Bryan v. Itasca County*, 96 S.Ct. 2102 (1976).

3. *Confederated Tribes of Colville Reservation v. State of Washington*, 938 F. 2d 146 (CA9 1991), cert. den. 112 S.Ct. 1704 (1992).

4. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S.Ct. 1083 (1987).

5. *Segundo v. City of Rancho Mirage*, 813 F.2d 1387 (CA9 1987), (after remand on another issue) 873 F.2d 1277 (CA 1989).

Gaming Regulation in Indian Country

by John Williams (296-5045)

Nationally, Indian gambling is authorized by the federal Indian Gaming Regulatory Act of 1988. This law generally allows Indian tribes in any state to conduct on Indian land those types of gambling that the state allows for non-Indians. Instead of being bound by state law in these operations, Indian gambling is subject to either federally-approved tribal ordinances or negotiated tribal-state compacts, depending on the types of gambling involved.

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

Under the federal law gambling can be conducted on "Indian land."

It 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 having it declared Indian trust land by the U. S. Secretary of the Interior. However, such a designation of Indian trust land for gambling purposes also requires the concurrence of the governor of the state. It is this latter requirement that has served to limit the growth of off-reservation Indian gambling.

"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 of the complete document.

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

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

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

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

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

States have limited rights to regulate or prohibit Indian gambling.

A state cannot ***prohibit*** Indian gambling if it is a type of gambling that the state allows for non-Indians. The states' right to ***control*** Indian gambling is sharply limited under federal law.

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

States cannot tax Indian gambling.

The federal law specifically prohibits states from imposing taxes or fees on Indian gambling, except for fees that the tribe agrees to. These fees are intended to compensate the state for its costs in performing inspections and other regulation under the tribal-state compact. In other words, states cannot raise general revenue by taxing Indian gambling.

Income earned by employees at Indian casinos, as well as casino winnings, are taxable if the employee or winner is a non-Indian, but the casino does not withhold state taxes on either winnings or wages. Income earned at an Indian casino by tribal members is non-taxable by the state.

Minnesota's tribal-state compacts allow blackjack and slot machines.

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

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

Indian casinos are not required to report their revenues or earnings to any state agency, so exact figures are unavailable. The best estimate, by Minnesota Planning in its recent report on gambling in the state, is that approximately $900 million was wagered at Minnesota casinos in calendar year 1991. Of this amount the casinos' gross revenues (gross gambling receipts after payout of winnings) were estimated at $180 million. Harry Baltzer, director of the state's Lawful Gambling Control Board, estimates the total volume of wagering at Indian casinos in 1992 at $2 billion.

There is no agreement on the outcome of Indian gambling if Minnesota were to prohibit gambling by non-Indians.

The federal law says that if a state allows a form of gambling by any person for any purpose, Indians in that state have the right to conduct that form of gambling. It makes no mention of what happens if a state repeals that authorization after a compact is negotiated.

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

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

Minnesota presently has 16 Indian casinos.

This is probably more than any other state, although the Indian gaming situation is changing so rapidly that up-to-date comparisons are difficult. Oklahoma, for instance, has 36 Indian tribes and as of late 1992 at least 20 of them were seeking compacts to open casinos.

There are several reasons why Minnesota has so many casinos:

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

- Several Indian tribes have benefitted from the fact that their reservations are located close to the metropolitan area, close to the Canadian border, or in prime tourism areas. An estimated 15 percent of casino visitor-days are by non-Minnesotans.

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

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

Liquor Regulation in Indian Country

by John Williams (296-5045)

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

State Law on Alcoholic Beverages

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

Tribal licenses. The state law recognizes the validity of licenses to establishments located in Indian country and issued by an Indian tribe to a tribal member or tribal entity. 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.

"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 of the complete document.

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

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

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

Summary

The present Minnesota law on alcoholic beverages in Indian country represents a "live and let live" approach to the situation. 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.

Endnote

1. Minn. Stat. § 340A.4055 (1992).

Control of Natural Resources in Indian Country

by John Helland (296-5039)

The U.S. Supreme Court and the Minnesota Supreme Court have consistently upheld Indians' rights to hunt and fish free of state regulation on Indian reservations. These rights are 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 expressing an intent to do so.

Three significant agreements have been ratified by statute, and a fourth agreement was reached as a separate land settlement law, between the state and certain Chippewa bands. The first ratification occurred in 1973 with the agreement between the Leech Lake band of Chippewas and the state Department of Natural Resources.[1] The original ratification exempted band members from state law on hunting, fishing, trapping, bait taking, and wild rice gathering on the 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 so that the Leech Lake band receives five percent of all licenses sold in the state for fishing, hunting, trapping and bait taking.

A similar agreement between the state and the White Earth band of Chippewas was consummated in 1980. Because the land area involved is smaller than Leech Lake, the White Earth band receives two and one-half percent of all licenses sold in the state for fishing, hunting, trapping, and bait taking.

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 U.S. Department of Interior had proclaimed that land owners' titles to 100,000 acres on the reservation were not valid and belonged to Indian allottees of the land or their heirs.

Generally, the state agreed to provide an increased land base through transfer to the White Earth band government in recognition of the past removal of reservation land from Indian ownership. The state also agreed to provide technical assistance needed by the Department of the Interior to administer the settlement.

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

In 1988, the so-called "1854 Treaty Area Agreement" was ratified in statute over similar natural resource rights with the Grand Portage, Bois Forte and Fond du Lac bands of Chippewa. The Fond du Lac band voted out of the state agreement in 1989. Each year since then, the remaining two bands have received $3,770,000 to split between them for their natural resources rights.

Proposed Mille Lacs Band Agreement

The Mille Lacs band of Chippewa and the state of Minnesota have reached a tentative agreement in a lawsuit concerning hunting, fishing and gathering rights in the 1837 treaty-ceded territory. The tentative agreement outlines the major provisions of a proposed lawsuit settlement. Details of the agreement have not yet been finalized. The Minnesota Legislature and the Mille Lacs band government must approve the final agreement in order for it to be put into effect. Major provisions of the agreement:

- recognize band hunting, fishing and gathering rights, limited by a band conservation code, and other provisions of the agreement

- prohibit commercial harvest of big game, game fish, and timber

- establish a tribal fishing zone of about 6,000 acres on Lake Mille Lacs, which is 4.5 percent of the lake

  - provide opportunities for band-regulated sport angling by non-band members in the tribal zone

  - allow fishing in the tribal zone managed by the band so that the harvest is similar to that on the rest of the lake (approximately 4 pounds per acre in a typical year)

  - prohibit spearing or netting of game fish except for subsistence in the tribal zone on Lake Mille Lacs and other limited waters in east-central Minnesota only

- transfer 7,500 acres of state land to the band, with lands selected through a process that includes input from affected local governments and the public

- agree not to construct casinos on the transferred lands

- pay (by the state) the band $10 million over five years

- place 50 percent of the payment in a fund which, for ten years, may only be used for environmental and natural resource management and law enforcement.

Court decisions in other states have often recognized the existence of Indian rights in similar cases. In Wisconsin, the federal court ruled that the bands 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.

Endnote

1. M.S. §§ 97A.151, 97A.155 (1992).

Environmental Regulation in Indian Country

by Linda Taylor (296-8961)

This section discusses the application of federal and state environmental law to Indian lands. As used here, environmental law includes, for the most part, only pollution control laws. The term "Indian country" is synonymous with the term "Indian lands" for the purposes of environmental regulatory law.

Basic Rule

Federal and tribal, not state, regulatory environmental laws apply on Indian lands.

Federal **regulatory** environmental laws apply to Indian lands. State **regulatory** environmental laws, to the extent that they differ from federal law, and state administration and enforcement of federal laws do not apply on Indian lands, including Indian lands owned by non-Indians. This basic rule is generally consistently applied by Congress, the United States Environmental Protection Agency (EPA), and the courts.

Recognized tribes generally have the authority to regulate pollution activities on Indian lands in the absence of or beyond federal law (regardless of Indian or non-Indian ownership of property within the Indian lands boundaries). This authority stems from the residual sovereignty held by recognized tribes as well as "tribes as states" provisions in the federal laws.

Regulatory Versus Prohibitory Laws

The difference between a "prohibitory" and a "regulatory" statute is not clear in the environmental area.

Beyond the general federal statutory scheme of environmental regulation, it is not entirely clear how to make the distinction between a state law that is "regulatory" as opposed to civil or criminal. Under Public Law 280, Minnesota is required to enforce civil and criminal law in Indian country, except on the Red Lake Reservation.[1] This state enforcement is concurrent with the authority of a tribe to enforce civil and criminal law.

"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 of the complete document.

Some states, including Minnesota, have begun to prohibit some pollution behaviors and to impose civil or criminal sanctions for violations. Whether a court would characterize these state laws as "regulatory" and therefore not applicable in Indian country is uncertain. The best guidance in this area comes from *California v. Cabazon Band of Mission Indians*, in which the Supreme Court said:

> If 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, ... Pub. L. 280 does not authorize its enforcement on an Indian reservation.[2]

Under this language it appears that Minnesota's laws prohibiting placement of waste tires, major appliances, automobile batteries, and specified items containing mercury in or on the land or in the garbage probably apply on Indian lands. Similarly, the criminal statute that makes it a gross misdemeanor for a commercial waste hauler to dump garbage in an unpermitted location also probably applies on Indian lands (even though the permitting authority may not be the state). These kinds of environmental laws depart in different degrees from the traditional regulatory approach in environmental law, which is to permit the polluting activity but regulate how it is done or how the resulting pollution is controlled. Whether courts will make the distinction between the regulatory approach and the prohibitory statutes in the environmental area remains unclear.

Minnesota's "prohibitory" environmental laws may apply on Indian lands.

Nearly all of Minnesota's environmental statutes are clearly regulatory and therefore do not apply on Indian lands. Most of the statutes are parallel to federal statutes or are in addition to them. Many of the state statutes are the basis for state implementation of the federal statutes in Minnesota. In addition the broad authority given the Minnesota Pollution Control Agency to protect human health and the environment is almost entirely regulatory.

State laws that are clearly regulatory include those governing surface and groundwater pollution, air pollution, solid and hazardous waste management laws (for the most part), environmental cleanup laws, wetlands regulation, mining reclamation, land use planning and environmental analysis of development projects, noise pollution, power plant siting, and radioactive waste management.

Over time, however, Minnesota has enacted absolute prohibitions on various polluting activities that may be applicable to Indian lands under Public Law 280 and the language of the *Cabazon Band* case. These statutes include prohibitions on:

- sale or use of certain pesticides[3]
- sale or distribution of misbranded pesticides[4]
- certain fertilizer activities[5]

- locating a hazardous or radioactive waste disposal facility near potable waters or below ground[6]
- placement in or on the land certain waste items[7]
- packaging materials that contain intentionally introduced lead, cadmium, mercury, or hexavalent chromium[8]
- littering (with a civil penalty of not less than twice or more than five times the cost of proper disposal)[9]
- sale or use of cleaning agents containing more than the maximum permissible level of nutrients and of household laundry or dishwashing compound not labeled with the percentage of phosphorus contained in the compound[10]
- sale of items containing PCBs[11]
- sale of CFC-processed packaging[12]
- construction or operation of a radioactive waste management facility without express authorization of the legislature[13]

The above list is not exhaustive, but is indicative of the kinds of prohibitions that may apply to the whole state, including Indian lands. Other enforcement of the environmental laws arises out of the regulatory efforts of the state and would likely be seen as part of the regulatory law (such as, criminal penalties for deliberate misinformation on a hazardous waste manifest or label or penalties for failure to comply with air, water, or waste permit conditions).

Federal Environmental Regulatory Scheme and Indian Lands

Federal laws apply on Indian lands.

Courts have held, even in the absence of specific statutory or treaty language, that the major federal environmental statutes apply on Indian lands to the same extent that they apply across the country.[14] The rationale for this holding is the necessity for baseline, consistent environmental standards with which everyone in the country must comply.

Tribes may administer federal environmental statutes "in lieu of" federal administration.

The federal statutes generally

- set minimum federal standards for allowable pollution and polluting behavior

- envision state administration and enforcement with federal financial and technical assistance

- allow states to set more strict pollution standards or controls on polluting behavior (but not less strict standards)

The operative programs of the federal statutes are generally structured as "in lieu of" programs. Under varying program-specific criteria, a state can submit a plan to the federal Environmental Protection Agency and, depending on the adequacy of the plan and the state's ability to enforce, the EPA will authorize the state to act in lieu of the EPA. The EPA always retains residual authority and may step in if a state fails to implement a program or adequately enforce standards.

In relation to Indian lands, most of the federal statutes now contain a "tribes as states" provision. Most of these provisions have been added in later versions of the statutes. The only major federal environmental statute that does not yet have a "tribes as states" provision is the Resource Conservation and Recovery Act (RCRA), which governs solid and hazardous waste management.[15] Even so, the Ninth Circuit Court of Appeals has held that states have no authority to administer RCRA on Indian lands and that the EPA is responsible for that administration.[16] Given the recent trend, it is very likely that Congress will include a "tribes as states" provision in the reauthorization of RCRA that is due to be considered again during 1993.

A "tribes as states" provision is very helpful because it clarifies who administers the law on Indian lands and allows a qualified tribe to receive the same financial and technical assistance the states receive for "in lieu of" implementation.

Tribes are treated "government-to-government" by the EPA.

Even in the absence of specific "tribes as states" provisions, the EPA relates to recognized Indian tribes on a "government-to-government" basis. In 1983 President Reagan announced his administration's Indian policy:

> Our policy is to reaffirm dealing with Indian tribes on a government-to-government basis and to pursue the policy of self-government for Indian tribes without threatening termination.[17]

In response, the EPA adopted its Indian Policy in 1984.[18] The overall policy has been to treat tribes as states and to delegate environmental programs to the tribes wherever possible. Further, when a tribe cannot or does not seek to implement an environmental program, the EPA has consistently taken the position, affirmed by various courts, that only it has authority for environmental programs on that tribe's lands and that a state cannot fill the void left by lack of local (tribal) implementation.[19]

Not all tribes are eligible to implement federal environmental statutes.

Generally the "tribes as states" provisions in the federal laws require a tribe to meet three criteria to qualify for implementing a program in lieu of the EPA. The most recently enacted "tribes as states" provision is in the Clean Air Act Amendments of 1990.[20] The statute authorizes a tribe to act as a state for the purposes of the act only if:

- the Indian tribe has a governing body carrying out substantial governmental duties and powers;
- the functions to be exercised by the Indian tribe pertain to the management and protection of air resources within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction; and
- the Indian tribe is reasonably expected to be capable, in the judgement of the (EPA) Administrator, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this act.

There are a number of environmental regulatory programs that may be implemented by qualified tribes.

All of the major federal pollution control statutes, except the Resource Conservation and Recovery Act (RCRA) have either "tribes as states" provisions or express authorization for tribes to implement specific programs. It is very likely that RCRA will have a "tribes as states" provision in the near future.

The following is an incomplete list of the types of programs that may be implemented by qualified tribes.

Water pollution control programs under the Clean Water Act (CWA)[21]

- planning for and funding of wastewater treatment facilities; granting permits for discharge of pollutants into surface and ground water; controlling pollution from "nonpoint" sources such as agricultural land runoff

Air pollution control programs under the Clean Air Act (CAA)[22]

- granting permits for emissions of pollutants to the air; enforcing air pollution standards; designating air quality areas; administering of the mobile sources (vehicles) and clean fuels programs; establishing a small business compliance assistance program

Pesticide programs under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)[23]

- registering pesticides and pesticide producers; regulating application and certifying applicators; regulating import, export, transportation, and disposal

Protection of drinking water supplies under the Safe Drinking Water Act (SDWA)[24]

- setting and enforcing drinking water standards; regulating the injection of fluids into the ground (underground injection control); protecting water wellhead areas

Regulation of surface mining and reclamation of abandoned mines under the Surface Mining Control and Reclamation Act (SMCRA)[25]

- administering the abandoned mine reclamation program; regulating present and future mineral exploration and surface mining through permits and enforcing standards

Cleaning up hazardous waste sites under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund)[26]

- administering the cleanup provisions of Superfund, collecting compensation from those responsible for the contamination; also, paying to clean up sites where the tribe is a responsible party

Summary

Federal regulatory environmental statutes apply on Indian lands. In the absence of federal statutes, or in addition to them, tribal law applies. State regulatory environmental statutes do not apply on Indian lands.

Qualified tribes may implement most of the programs in the federal statutes in lieu of the federal government on their own lands, including Indian land owned by non-Indians. Not all tribes qualify and not all tribes will seek this authority. The federal government retains the authority to implement and enforce the laws on Indian lands where a tribe does not do so.

State laws that prohibit specific polluting behavior and impose civil or criminal penalties for violation probably apply on Indian lands to the same extent they apply in the rest of the state. This is not, however, a settled area of the law.

Endnotes

1. Act of August 15, 1953, Pub. L. No. 83-280, 67 Stat. 588, as amended by the Indian Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 78.

2. 480 U.S. 202, at 209 (1987).

3. Minn. Stat. §§ 18B.11 and 18B.115 (TCDD and chlordane).

4. Minn. Stat. § 18B.135.

5. Minn. Stat. § 18C.201.

6. Minn. Stat. §§ 115.063 and 115.067.

7. Minn. Stat. §§ 115A.904 (waste tires), 115A.915 (motor vehicle batteries), and 115A.916 (used motor oil).

8. Minn. Stat. § 115A.965.

9. Minn. Stat. § 115A.99.

10. Minn. Stat. §§ 116.23 and 116.27.

11. Minn. Stat. § 116.37.

12. Minn. Stat. § 116.72.

13. Minn. Stat. § 116C.72.

14. *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99 (1960).

15. 42 U.S.C. §§ 6901-6991.

16. *Washington Department of Ecology v. U.S Environmental Protection Agency*, 725 F.2d 1465 (9th Cir. 1985).

17. 19 Weekly Comp. Pres. Docs. 98, 99 (1983).

18. U.S. Environmental Protection Agency, EPA Policy for the Administration of Environmental Programs on Indian Reservations 2 (1984).

19. *Washington DOE*, see note 5.

20. Act of November 15, 1990, Pub. L. No. 101-549, Title I, § 107, 104 Stat. 2462, codified at 42 U.S.C.A. § 7601 (d) (1992 Supp.).

21. 33 U.S.C. §§ 1251-1376.

22. 42 U.S.C. §§ 7401-7642.

23. 7 U.S.C. §§ 136-136y.

24. 42 U.S.C. 300f-300j-11.

25. 30 U.S.C. §§ 1201-1328.

26. 42 U.S.C. §§ 9601-9675.

Taxation in Indian Country

by Joel Michael (297-5057)

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, since it can result in a double tax burden if both state and tribal taxes apply to the same property, income, or transaction. In addition, imposition of tribal taxes may preempt state taxes.

Two general principles apply:

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

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

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

Tribal immunity may make it practically impossible for the state to collect taxes on transactions in Indian country.

The converse situation arises where the tax burden falls on non-Indians, who are not immune from the state tax, but the collection obligation falls on a tribal business. In this situation, the

"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 of the complete document.

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 on a reservation 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 Indians. Indian tax immunities are generally only lifted when Congress has indicated "a clear purpose" to do so.[4]

Numerous U.S. Supreme Court cases have established a complex set of rules governing state and tribal authority to tax Indians and activities in Indian country.

The authority to impose state taxes in Indian country has been, and continues to be, frequently litigated. The United States Supreme Court regularly -- nearly every term of the Court -- has before it an issue of the application of state taxes to transactions or property in Indian country. This pattern seems likely to continue.

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 following tables display the legal authority to apply state or tribal taxes to tribal members, to Indians who are not tribal members, to non-Indians, and to property in Indian country. The "yes-no" answers given in the tables, in some instances, oversimplify complex constitutional or statutory issues. Therefore, these entries should be viewed with some caution. The notes to the tables provide case authority for the rules outlined in the tables and give some flavor of the complexity involved.

States, in general, may not tax the income of tribes or income of an enrolled member that is derived from reservation sources. States, however, may tax the off-reservation income of enrolled members or other Indians. States also may tax the reservation income of non-enrolled members. Although tribal governments generally do not do so, they have the authority to impose income taxes on reservation income of both tribal members and non-members. These income tax rules are listed in Table 1 and its notes.

Table 1
Authority to Impose Income Taxes

Subject of tax	Governmental Unit Imposing Tax: Federal	State	Tribal[5]
Tribe			
Reservation source income	Waived[6]	No	N.A.
Off-reservation income	Waived[7]	Yes[8]	N.A.
Passive income	Waived[9]	No	N.A.
Enrolled tribal member on reservation			
Reservation source income	Yes	No[10]	Yes
Off-reservation income	Yes	Yes[11]	Probably yes[12]
Passive income	Yes	No[13]	Probably yes[14]
Enrolled tribal member off reservation			
Reservation source income	No	Unclear[15]	Probably yes[16]
Off-reservation income	Yes	Yes	Probably yes[17]
Passive income	Yes	Yes	Probably yes[18]
Non-enrolled Indian on reservation			
Reservation source income	Yes	Yes[19]	Probably yes[20]
Off-reservation income	Yes	Yes	Probably yes[21]
Passive income	Yes	Yes	Probably yes[22]
Non-enrolled Indian off reservation			
Reservation source income	Yes	Yes[23]	Probably yes[24]
Off-reservation income	Yes	Yes	No
Passive income	Yes	Yes	No
Non-Indian on reservation			
Reservation source income	Yes	Yes	Probably yes[25]
Off-reservation income	Yes	Yes	Probably yes[26]
Passive income	Yes	Yes	Probably yes[27]
Non-Indian off reservation			
Reservation source income	Yes	Yes	Probably yes[28]
Off-reservation income	Yes	Yes	No
Passive income	Yes	Yes	No

States may not impose sales and excise taxes on on-reservation sales or use of goods between tribes and tribal members; on-reservation sales between tribes or tribal members and non-members are subject to state tax. Tribal governments may, and occasionally do, impose sales and excise taxes on general sales or specific goods, such as cigarettes or alcoholic beverages. The sales and excise tax rules are presented in Table 2.

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

Tax/Transaction	Entity legally subject to tax		
	Tribe	Indian[29]	Non-Indian[30]
State Taxation			
Cigarette excise tax	No[31]	No[32]	Yes[33]
Severance tax on minerals			
Leases under pre-1938 law[34]	Yes	Yes	Yes
Leases under post-1938 law[35]	No	No	Yes[36]
General sales tax	No[37]	No[38]	Yes[39]
Motor vehicle license	No	No	No[40]
Gross receipts of contractor with tribe	N.A.	No	No[41]
Alcohol excise[42]	No	No	Yes
Motor fuel sales to Indian retailer on reservation	N.A.	N.A.	No[43]
Motor fuel use	No	No	No[44]
Tribal Taxation			
Cigarette excise	N.A.	Yes[45]	Yes[46]
Alcohol excise	N.A.	Yes[47]	Yes[48]
General sales	N.A.	Yes[49]	Yes[50]
Oil and gas severance	N.A.	Yes[51]	Yes[52]

Indian trust lands, whether held in trust for the tribe or allotted for individual tribal members, are exempt from state ad valorem taxation. In a 1992 case, *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*,[53] the Supreme Court held that Congress had authorized state and local ad valorem taxation of allotted fee lands, whether held by the tribe or individual Indians. There may be some question as to the application of this case to some Minnesota fee lands that were allotted under different federal legislation, but the general practice in Minnesota has been to impose property tax on fee lands. Although they generally have not chosen to do so, tribal governments may impose ad valorem property taxes on properties within their jurisdiction. Table 3 outlines the rules governing real property taxation.

Table 3
Real Property Taxation

	Entity Imposing Tax	
Type of Property	**State**[54]	**Tribal**
Trust land		
Tribal	No[55]	N.A.
Allotted to individual Indian	No[56]	Yes
Fee land -- on reservation		
Tribally owned	Yes[57]	N.A.
Owned by enrolled Indian	Yes[58]	Yes[59]
Owned by non-enrolled Indian	Yes	Yes[60]
Owned by non-Indian	Yes	Yes[61]
Tribal fee land -- off reservation	Yes[62]	N.A.

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 section -- (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 lead to agreements between individual tribes and the state. These agreements attempt to preserve the tribes' and tribal members' immunities, while collecting the state tax legally owed by non-tribal members.

A typical arrangement under one of these agreements provides for the state tax to be imposed and a portion of the revenue to be refunded to the tribe. These refund payments reflect an estimate of the revenue attributable to the tax imposed on tribal members. Minnesota has a large number of agreements with tribes. These agreements are summarized in Table 4.

Table 4
Tax Agreements between Revenue Department and Minnesota Tribal Governments
August 1, 1992

Tribal Government	Sales and Motor Vehicle Excise Taxes		Cigarette		Alcoholic Beverage		Petroleum	
	Agreement	Formula*	Agreement	Formula*	Agreement	Formula*	Agreement	Formula*
Bois Forte Band	Yes	pop. X $257 (adjusted annually)	Yes	MN per capita consumption X pop. X tax rate	Yes	MN per capita consumption X pop. X tax rate	Yes	reservation business comm. purchases X tax rate
Fond du Lac Band	Yes	pop. X $145	Yes	same	Yes	same	Yes	same
Grand Portage Band	Yes	pop. X $110 (Radisson Lodge sales not taxable)	Yes	same	Yes	same	Yes	same
Leech Lake Reservation Tribal Council	Yes	per capita sales and use tax collections in counties X pop.	Yes	same	Yes	same	Yes	estimated business comm. fleet use
Lower Sioux Indian Community	Yes	pop. X $135 (telephone and heating fuels exempt)	Yes	70% of tax on purchases by tribe or agent + MN per capita consumption X pop. X 30% of tax rate	Yes	same	No	
Mille Lacs Band	No		Yes	same	Yes	same	No	
Prairie Island Community	No		Yes	same	Yes	same	No	
Red Lake Band	Yes	pop. X $110 - $15	Yes	MN per capita consumption X pop. X tax rate	Yes	same	No	
Shakopee Mdewakanton Indian Community	No		Yes	70% of tax on purchases by tribe or agent + MN per capita consumption X pop. X 30% of tax rate	No		No	
Upper Sioux Indian Community	Yes	pop. X $65 (utility services exempt)	Yes	same	No		No	

Source: Minnesota Department of Revenue
* The formulas are used to determine the amount refunded to the tribal government.

Endnotes

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

2. See *Oklahoma Tax Com'n v. Potawatomi Indian Tribe*, 111 S.Ct. 905 (1991).

3. A recent case is *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 112 S.Ct. 683 (1992).

4. See, e.g., *Bryan v. Itasca County*, 426 U.S. 373 (1976), and the discussion in Part One, p. 26.

5. Tribes generally have exercised the power to tax in very few circumstances, usually in the context of non-Indian businesses operating on the reservation.

6. See Indian Tribal Governmental Tax Status Act of 1982, Pub.L. No. 97-473, 96 Stat. 2607, 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.

7. See note 6.

8. 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).

9. See note 6.

10. See *McClanahan v. Arizona Tax Com'n*, 411 U.S. 164 (1973)(states lack power to tax income of tribal members earned on the tribe's reservation); *Bryan v. Itasca County*, 426 U.S. 373 (1976)(Pub.L. 280 is not a grant of regulatory or taxing jurisdiction over Indian reservations).

11. 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).

12. Tribes have always been assumed to have power to tax their own members. This power has generally not been exercised due to traditional Indian hostility to taxation and the poverty of a large part of the tribal populations.

13. Passive income could be deemed to be earned on-reservation in the same manner as wages. This issue has apparently never been litigated. See H. Duncan, Federation of Tax Administrators: Issues in State-Tribal Taxation (mimeo prepared for NCSL, State-Tribal Tax Issues Conference, Washington D.C., Oct. 23, 1991).

14. See note 12.

15. Compare *Sac and Fox Nation v. Oklahoma Tax Com'n*, 967 F.2d 1425, (10th Cir. 1992), cert. denied 113 S.Ct. 459 (1992)(state income tax is unlawful as applied to Indian tribe members whose income is derived solely from a tribal source on tribal lands regardless of member's residence, because taxing income earned on the reservation infringes on the tribe's right to self-government) with *Anderson v. Wisconsin Department of Revenue*, 169 Wis.2d 255, 484 N.W.2d 914 (Wis. 1992), petition for certiorari filed (No. 92-5988)(state is not precluded from taxing income earned on the reservation because taxpayer's choice of residence (off reservation), not the nature of employment, gives rise to tax liability).

16. See note 12.

17. See note 12.

18. See note 12.

19. In *Washington v. Confederate Colville Tribes*, 447 U.S. 134 (1980), the Court held that non-member Indians on the reservation are subject to state taxes to the same extent as non-Indians.

20. This specific question has not been addressed as it applies to income taxation, but courts have generally upheld the tribe's power to tax. See *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134 (1980)(upheld the imposition of a tribal cigarette tax on non-tribal purchasers, indicating that federal courts had long acknowledged the power of tribes to tax non-Indians entering the reservation to engage in economic activity). In *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1981) 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. The Court added: "The power [to tax] does not derive solely from the Indian tribe's power to exclude non-Indians from tribal lands. Instead, it 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." Note, however, that under this reasoning, courts could limit a tribe's income taxing jurisdiction to "tribal lands," and define "tribal lands" as trust land and allotted trust land rather than as the broader term "Indian country" which would also include all fee land within a reservation's boundaries. Moreover, tribal authority over non-Indian lands within reservations is generally more limited. See *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).

21. See note 20.

22. See note 20.

23. See note 19.

24. See note 20.

25. See note 20.

26. See note 20.

27. See note 20.

28. See note 20.

29. 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 Reservation*, 447 U.S. 134 (1980).

30. This includes Indians who are not enrolled members of the tribe governing the reservation in which the transaction occurs. See note 29.

31. *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976)(where legal incidence of the tax falls upon Indians living on the reservation, the state tax must fail). 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 non-enrolled Indians residing on the reservation); *Oklahoma Tax Com'n v. Potawatomi Indian Tribe*, 111 S.Ct. 905 (1991)(immunity precluded the state from taxing sales of goods to tribal members, but the state was free to collect taxes on sales to non-members); *Oklahoma Tax Com'n v. City Vending of Muskogee*,

Inc., 835 P.2d 97 (Okla. 1991)(state may validly collect cigarette tax from wholesaler who sold cigarettes to Indian retail outlets located on reservation land that resold the cigarettes to non-tribal members as well as). In *Judybill Osceola v. Florida Dept. of Revenue*, 893 F.2d 1231 (11th Cir. 1990), cert. denied, 111 S.Ct. 674 (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.

32. See note 31.

33. See note 31.

34. 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, chap. 210, 43 Stat. 244, codified at 25 U.S.C. § 398; Act of Mar. 3, 1927, chap. 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, chap. 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, Felix S. Cohen's Handbook of Federal Indian Law 408-10 (1982 ed.) for a discussion of these issues.

35. *Montana v. Blackfeet Tribe*, 471 U.S. 759 (1985)(in the absence of an explicit provision, a state may not tax royalties from mineral leases on trust land, and since the 1939 Indian Mineral Leasing Act contained no such authorization, the royalties after 1938 are not taxable by a state). See also discussion in note 34.

36. *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).

37. See note 31.

38. See note 31.

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

40. 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 benefitting the tribal roads and the roads at issue were built, maintained and policed exclusively by the federal government, the tribe and its contractors).

41. 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).

42. 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.

43. See *Herzog Brothers Trucking, Inc. v. State Tax Com'n*, 69 N.Y.2d 536, 516 N.Y.S.2d 179, 508 N.E.2d 914 (1987), vacated and remanded for further consideration in light of new regulations, *State Tax Commission of New York v. Herzog Bros. Trucking Inc.*, 487 U.S. 1212 (1988)(where a non-Indian motor fuels wholesaler sold motor fuel to an Indian retailer located on reservation lands, the state could not require the wholesaler to prepay the motor fuel and sales tax on fuel sold to the Indian retailer for resale to tribal members, when as a practical matter, the state could estimate the amount of fuel consumed by tribal members).

44. See note 40.

45. Tribal governments have always been assumed to have the power to tax their own members.

46. See *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134 (1980)(upholding imposition of a tribal cigarette tax on non-tribal purchasers).

47. See note 45.

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

49. See note 45.

50. See note 48.

51. See note 45.

52. *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).

53. 112 S.Ct. 683 (1992).

54. In Minnesota, the state does not directly levy real estate taxes. The tax is levied by its political subdivisions, such as counties, cities and school districts. 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.

55. *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. In addition, Minn. Stat. § 272.02, 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, but it certainly includes tribal and individual allotments of trust lands. It may also extend to tribally owned land which is not held by the federal government in trust.

56. See note 55.

57. A 1992 Supreme Court case held that fee land held either by the Yakima Nation or an individual tribal member was subject to state and local ad valorem property taxation. *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 112 S.Ct. 683 (1992)[hereafter referred to as "*Yakima Indian Nation*"]. The Court concluded that Congress had authorized state taxation of fee land in the General Allotment Act (or Dawes Act). The Court was particularly influenced by the language of the Burke Act of 1906. 34 Stat. 182. The Burke Act modified the allotment procedures in two significant ways. First, it made it clear that allottees were not subject to state plenary jurisdiction during the 25 year trust period. This reversed a prior Supreme Court decision that had held allottees were immediately subject to state jurisdiction. *In re Heff*, 197 U.S. 488 (1905). Second, the Burke Act of 1906 allowed the Secretary of the Interior to waive the 25 year trust period if the secretary was convinced that the allottee was competent. The language of this provision stated that when a fee patent was issued (notwithstanding the 25 year trust period) "all restrictions as to sale, incumbrance, or taxation of said land shall be removed * * *." Burke Act of 1906, 34 Stat. 183. This language convinced the Court that Congress had intended to authorize state ad valorem property tax of the fee property involved. *Yakima Indian Nation*, 112 S.Ct. 683, 688-89.

It is not clear whether the decision in *Yakima Indian Nation* applies to make all fee land in Minnesota taxable, however. For example, allotments in the White Earth Reservation were made under separate legislation, the "Clapp Rider" Act of June 21, 1906, 34 Stat. 353. The Clapp Rider was passed the same year as and paralleled the Burke Act. It also gave the Secretary of the Interior authority to transfer a fee patent immediately

to a full blooded allottee, when the secretary was convinced that the allottee was competent. It provided, unlike the Burke Act, that a mixed blood allottee was entitled to receive an immediate fee patent without a showing of competence. The Clapp Rider did not contain language similar to the Burke Act stating that these fee properties were subject to taxation. These or other differences in the allotment acts could provide a basis for construing some or all of the fee lands in Minnesota to be exempt. It seems likely that this will be a subject for future litigation.

In Minnesota, local ad valorem property taxes generally have been imposed on fee lands. Thus, the holding in *Yakima Indian Nation* is consistent with this practice.

58. See note 23, 57.

59. The few reported cases suggest that tribal taxing jurisdiction is not preempted by federal laws making allotted land and other trust or restricted property nontaxable. See, e.g., *Conroy v. Conroy*, 575 F.2d 175 (8th Cir. 1978)(tribal court had jurisdiction to order division of allotted land in a divorce proceeding); *Barta v. Oglala Sioux Tribe*, 259 F.2d 553 (8th Cir. 1958), cert. denied, 358 U.S. 932 (1959)(sustained tribal taxes on allotment lessees, but did not directly consider whether the allotment laws preempt the tribal taxing power).

60. See note 59.

61. See note 59.

62. Unless preempted by federal law, tribal ownership of land outside of Indian country is probably not as a sovereign, and, thus, this property would be subject to state ad valorem taxation, although there are no cases. The statutory exemption of "Indian lands" may include tribally owned fee land, although it is more likely that this term was intended to apply only to properties within the jurisdictional boundaries of Indian country.

Health and Human Services for Indians

by Maureen Bellis (296-5044)
by Randall Chun (296-8639)
by Deborah K. McKnight (296-5056) (Indian Child Welfare Laws)

Civil Commitment

Red Lake band. A special provision in Minnesota's Civil Commitment Act authorizes contracts between the Commissioner of Human services and the federal Indian Health Service, so that individuals committed as mentally ill, mentally retarded, or chemically dependent by a tribal court of the Red Lake band of Chippewa Indians can be admitted to state hospitals for treatment. The act guarantees individuals all of the patient rights under Minnesota Statutes section 253B.03; in addition, the law requires that the tribal courts provide due process protections for proposed patients, similar to those under the state's civil commitment laws.[1]

Chemical Dependency Treatment

The Department of Human Services may enter into agreements to provide special chemical dependency treatment programs for American Indians.[2] A special American Indian Advisory Council within the agency advises the commissioner on chemical dependency treatment programs for American Indians. There is also a special allocation of funds for treatment of American Indians within the Chemical Dependency Consolidated Treatment Fund.[3]

Health Grants

The Department of Health is authorized to provide grants to community health boards to establish, operate, or subsidize health clinics and services, in order to provide health care services to American Indians residing off reservations.[4]

Indian Affairs Council

The Indian Affairs Council operates to advise the legislature and the executive branch on matters relating to Indians, not just issues of health or human services. It also serves as a liaison between national, state, and local units of government and the Indian population in the state. The council consists of 13 voting members representing Indian reservations, tribal councils, and boards (including two at large members) and 16 ex officio members representing units of state government.[5]

Indian Child Welfare Laws

The Federal Indian Child Welfare Act

In 1978, Congress passed the federal Indian Child Welfare Act.[6] The statute restricts state courts' powers to place Indian children in nonparental custody, whether the placement is voluntary or involuntary on the part of the parents. The act covers foster care, preadoption placement, and the adoption of Indian children by non-Indians. The intent of the act is to preserve the cultural identity of Indian children. The act does not apply to custody disputes between parents, such as in a divorce, or to placements for juvenile delinquency where the delinquent act would be a crime if committed by an adult.

The act requires notice to tribes and Indian custodians of an involuntary, covered out-of-home placement of an Indian child. If there is a tribal court, the court may take jurisdiction in the matter. If there is a tribal court and the child lives on the reservation, the matter must be transferred to tribal court. In Minnesota the only tribal court at this time is on the Red Lake Reservation. In other cases the tribe may intervene in a matter being conducted in state court.

Whether the placement is voluntary or involuntary, the court must find that "active efforts" have been made to keep the child with a parent. This is higher than the "reasonable efforts" standard that applies in cases involving placement of non-Indian children. If a child placement is involuntary, a witness expert in Indian child placement issues must be consulted on the question of possible serious emotional or physical damage to the child from the existing or proposed placement. The burden of proof for involuntary foster care is clear and convincing, a higher standard than applies in involuntary placements of non-Indian children. 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 parental rights terminations involving non-Indians.

Finally, the act contains a preference for placing the child with extended family members or Indian families, if the child cannot remain with a parent.

The State Indian Family Preservation Act

In 1985, Minnesota adopted a state version of the federal statute, which is known as the Minnesota Indian Family Preservation Act.[7] The state law was intended to call the controlling federal law to the attention of state courts and professionals in the child placement area. It also enacted some more stringent requirements than the federal law. For example, the state statute requires notice to the tribe whenever a child covered by the Indian Child Welfare Act is being placed outside the home, not just when the placement is involuntary, as federal law provides.

Child Welfare Funding

Counties receive funds for child welfare services through the Minnesota Family Preservation Act.[8] A special provision of that act authorizes special grants for placement prevention and family reunification programs for American Indian and minority children.[9]

Ombudsperson for Families

Legislation which passed in 1991 authorized the establishment of an ombudsperson's office as part of the Indian Affairs Council. The ombudsperson for families is specifically charged with the duty of monitoring state agency compliance with child welfare and child protection laws.[10]

Endnotes

1. Minn. Stat. § 253B.212.

2. Minn. Stat. § 254A.031.

3. Minn. Stat. § 254B.09.

4. Minn. Stat. § 145A.14, subd. 2.

5. Minn. Stat. § 3.922.

6. 25 U.S.C. § 1901.

7. Minn. Stat. §§ 257.35 to 257.3579.

8. Minn. Stat. chapter 256F.

9. Minn. Stat. § 256F.08.

10. Minn. Stat. §§ 257.0755 to 257.0769.

Education Laws Affecting Indian Students

by Lisa Larson (296-8036)

State Laws

American Indian Education Act of 1988

The purpose of the act is to provide American Indian people with education programs that meet their unique education needs.[1] To that end, the act encourages districts and schools to provide elementary and secondary language and cultural education programs that include: instruction in American Indian language, literature, history and culture; staff support components; research projects examining effective communication methods; personal and vocational counseling; modified curriculum, instruction and administrative procedures; and cooperative arrangements with alternative schools that integrate American Indian culture into their curricula.

The act directs the Board of Teaching to grant to eligible individuals teaching licenses in American Indian language and cultural education. Districts may seek exemptions from the licensing requirement if compliance would make it difficult to hire qualified teachers. The act requires districts and schools that provide a language and cultural education program to try to hire persons who share the culture of the American Indian children enrolled in the program. American Indian schools and school districts in which there are ten or more American Indian children enrolled 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 American Indian children enrolled may retain an Indian teacher who is a probationary teacher or who has less seniority than other, non-Indian teachers the district employs when placing teachers on unrequested leaves of absence.[2]

Pine Point School

The Minnesota Legislature gave the White Earth Reservation Tribal Council control of the K-8 Pine Point public school. The school is to provide Indian children with a supportive educational environment that integrates Ojibway culture and history into the school's curriculum and teaching practices. The tribal council has the same powers and duties as a school board. It may cooperate with other school districts to purchase or share education-related services. The school is subject to the same standards for instruction as other public schools. It is eligible to receive federal aids and grants, as well as the same aids, revenues and grants that local school districts receive.[3]

State Indian Scholarships and Grants

The legislature has appropriated money for Indian scholarships and grants. The amounts for fiscal year 1993 are displayed in the table.

Indian Scholarship and Grant Programs
Fiscal Year 1993 Appropriations

Program	Amount
Post-secondary scholarships for Indian students*[4]	$1,600,000
Indian language and culture programs*[5]	590,000
Grants to school districts to help prepare Indian students for post secondary education*[6]	857,000
Indian education programs[7]	175,000
State Board of Teaching grants to help Indian people become teachers[8]	190,000
Tribal contract school aid[9]	600,000
Early childhood education at tribal contract schools[10]	68,000
TOTAL	$4,080,000

* Grants made through state Board of Education

Federal Laws

Federal Indian Grants and Contracts

Under the Indian Self-Determination and Assistance Act,[11] Indian tribes in Minnesota contracted with the federal government to establish schools on the Leech Lake, White Earth, Fond du Lac and Mille Lacs Indian Reservations. These schools are designed to provide Indian students with educational services that are more responsive to the needs and desires of the Indian communities. Under Title V of the Indian Education Act of 1988,[12] the federal government provides grants to local educational agencies and tribal schools for elementary and secondary programs designed to meet the unique needs of Indian students. Funding also is available for programs that encourage Indian students to acquire a higher education or reduce the number of Indian elementary and secondary student dropouts and for fellowships to Indian students who demonstrate outstanding academic performance, leadership and commitment to the Indian community. Under the Public Health and Welfare Act,[13] the federal government assists tribal contract schools with public health services.

Constitutional Issues

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

The Equal Protection Clause and preferential treatment of Indians. The U.S. Supreme Court held that federal programs designed to meet Indians' needs may withstand an equal protection challenge[14] so long as the programs are "tied rationally to the fulfillment of Congress' unique obligation toward Indians." The Court rejected claims of racial discrimination arising out of an employment preference for Indians at the Bureau of Indian Affairs.[15] The Court premised its decision on "the unique legal status of Indian tribes under federal law and upon the plenary power of Congress, based on a history or treaties and the assumption of a 'guardian-ward' status, to legislate on behalf of federally recognized Indian tribes." The Court considered the government's preference political in nature because it was "granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities. . . ." The Court regards federal regulation of Indian tribes as a permissible form of governance of once-sovereign political communities.

Arguably, there are two distinctions that can be made between federal and state regulation of Indian tribes. First, state and local governments may or may not enjoy the same trust relationship with Indians as that used to justify federal laws and regulations favoring Indians. Second, the federal laws examined by the U.S. Supreme Court affected Indians who were members of federally recognized tribes and Indians who lived on or near reservations. In contrast, a state, local school district or school may be providing education or employment-related benefits to Indians in an urban setting where the benefits do not necessarily turn on Indians' tribal relationship.

The Equal Protection Clause and separate Indian education.[16] It is unclear whether an Indian classification that a school or school district uses to provide educational benefits to Indian students is a racial or a political classification under the equal protection clause. If it is a racial classification, a court will consider it suspect, subject it to strict scrutiny and most likely invalidate it. For example, some might argue that separating Indian students for educational purposes is unrelated to tribal matters and is therefore directed toward a racial group. Under a strict scrutiny analysis, if Indian children's needs can be met by means other than promoting separation in schools, the state can not justify an Indian classification.[17] Others might argue that a state may enact protective measures to meet the educational needs of Indian children without violating the equal protection clause. When the classification of Indian is based on quasi-sovereign tribal interests[18] and is intended to benefit Indian students, it is a "benign" classification subject to less judicial scrutiny.

Endnotes

1. Minn. Stat. §§ 126.45 to 126.55.

2. Minn. Stat. § 126.501. This measure might violate either the equal protection clause of the Fourteenth Amendment or Title VII of the Civil Rights Act. Courts may find more acceptable those employment measures that impose a diffuse burden on many individuals, such as hiring goals or affirmative recruitment plans, than measures that impose a heavy burden on a few individuals, such as race conscious layoffs.

3. Minn. Stat. chapter 128B.

4. Minn. Stat. § 124.48; 1991 Minn. Laws, chap. 265, art. 3, § 39, subd. 14.

5. Minn. Stat. § 126.54; 1991 Minn. Laws, chap. 265, art. 3, § 39, subd. 9.

6. Minn. Stat. § 124.48; 1991 Minn. Laws, chap. 265, art. 3, § 39, subd. 8.

7. 1991 Minn. Laws, chap. 265, art. 3, § 39, subd. 15.

8. 1991 Minn. Laws, chap. 265, art. 3, § 39, subd. 16.

9. 1991 Minn. Laws, chap. 265, art. 3, § 39, subd. 17.

10. 1991 Minn. Laws, chap. 265, art. 3, § 39, subd. 18.

11. 25 U.S.C. 450 et seq.

12. 25 U.S.C. 5301 et seq.

13. 42 U.S.C. 2004b.

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

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

16. For further discussion, see Native American Education Separate or Integrated?, House Research policy brief, June 1990.

17. In *Booker v. Special School District No. 1*, 351 F.Supp. 799 (D. Minn. 1972), a federal district court found that the Minneapolis school board, through discretionary decisions, "had acted intentionally to maintain or increase racial segregation in the schools." The court ordered the district to implement a desegregation/ integration plan. The school district asked the court to modify its desegregation order, in part by permitting a high concentration of American Indian students in one or a limited number of schools. The court denied the board's request, concluding that the district's classification "has nothing to do with tribal membership or any quasi-sovereign interests of particular tribal groups or reservations."

18. A classification based simply on an individual's "Indian" status likely would be invalidated under the equal protection clause. Such a broad classification may include Indians that do not come within the unique jurisdiction of federal law: Indians belonging to a tribe that has no trust relationship with the federal government; or a tribe that has been terminated by Congress and Indians who have severed tribal ties.

Appendix

Table 1
American Indian, Eskimo, and Aleut Persons
1990 Minnesota and County Populations

County	Total population	Indian population	Indians as a percent of county population	Percent of total MN Indian population
Aitkin	12,425	181	1.5%	0.4%
Anoka	243,641	1,899	0.8%	3.8%
Becker	27,881	1,891	6.8%	3.8%
Beltrami	34,384	5,580	16.2%	11.3%
Benton	30,185	179	0.6%	0.4%
Big Stone	6,285	34	0.5%	0.1%
Blue Earth	54,044	93	0.2%	0.2%
Brown	26,984	33	0.1%	0.1%
Carlton	29,259	1,195	4.1%	2.4%
Carver	47,915	110	0.2%	0.2%
Cass	21,791	2,388	11.0%	4.8%
Chippewa	13,228	34	0.3%	0.1%
Chisago	30,521	136	0.4%	0.3%
Clay	50,422	583	1.2%	1.2%
Clearwater	8,309	657	7.9%	1.3%
Cook	3,868	276	7.1%	0.6%
Cottonwood	12,694	10	0.1%	0.0%
Crow Wing	44,249	371	0.8%	0.7%
Dakota	275,227	713	0.3%	1.4%
Dodge	15,731	45	0.3%	0.1%
Douglas	28,674	66	0.2%	0.1%
Faribault	16,937	30	0.2%	0.1%
Fillmore	20,777	34	0.2%	0.1%
Freeborn	33,060	66	0.2%	0.1%
Goodhue	40,690	292	0.7%	0.6%
Grant	6,246	17	0.3%	0.0%
Hennepin	1,032,431	14,687	1.4%	29.7%
Houston	18,497	68	0.4%	0.1%
Hubbard	14,939	275	1.8%	0.6%

Table 1
American Indian, Eskimo, and Aleut Persons
1990 Minnesota and County Populations

County	Total population	Indian population	Indians as a percent of county population	Percent of total MN Indian population
Isanti	25,921	118	0.5%	0.2%
Itasca	40,863	1,250	3.1%	2.5%
Jackson	11,677	6	0.1%	0.0%
Kanabec	12,802	66	0.5%	0.1%
Kandiyohi	38,761	203	0.5%	0.4%
Kittson	5,767	7	0.1%	0.0%
Koochiching	16,299	459	2.8%	0.9%
Lac qui Parle	8,924	9	0.1%	0.0%
Lake	10,415	66	0.6%	0.1%
Lake of the Woods	4,076	21	0.5%	0.0%
Le Sueur	23,239	30	0.1%	0.1%
Lincoln	6,890	13	0.2%	0.0%
Lyon	24,789	38	0.2%	0.1%
McLeod	32,030	77	0.2%	0.2%
Mahnomen	5,044	1,206	23.9%	2.4%
Marshall	10,993	42	0.4%	0.1%
Martin	22,914	84	0.4%	0.2%
Meeker	20,846	34	0.2%	0.1%
Mille Lacs	18,670	591	3.2%	1.2%
Morrison	29,604	47	0.2%	0.1%
Mower	37,385	41	0.1%	0.1%
Murray	9,660	0	0.0%	0.0%
Nicollet	28,076	75	0.3%	0.2%
Nobles	20,098	93	0.5%	0.2%
Norman	7,975	100	1.3%	0.2%
Olmsted	106,470	216	0.2%	0.4%
Otter Tail	50,714	222	0.4%	0.4%
Pennington	13,306	88	0.7%	0.2%
Pine	21,264	356	1.7%	0.7%
Pipestone	10,491	206	2.0%	0.4%
Polk	32,498	374	1.2%	0.8%
Pope	10,745	24	0.2%	0.0%
Ramsey	485,765	4,283	0.9%	8.7%
Red Lake	4,525	5	0.1%	0.0%
Redwood	17,254	275	1.6%	0.6%

Table 1
American Indian, Eskimo, and Aleut Persons
1990 Minnesota and County Populations

County	Total population	Indian population	Indians as a percent of county population	Percent of total MN Indian population
Renville	17,673	60	0.3%	0.1%
Rice	49,183	181	0.4%	0.4%
Rock	9,806	54	0.6%	0.1%
Roseau	15,026	170	1.1%	0.3%
St. Louis	198,213	3,723	1.9%	7.5%
Scott	57,846	356	0.6%	0.7%
Sherburne	41,945	274	0.7%	0.6%
Sibley	14,366	20	0.1%	0.0%
Stearns	118,791	421	0.4%	0.9%
Steele	30,729	80	0.3%	0.2%
Stevens	10,634	39	0.4%	0.1%
Swift	10,724	20	0.2%	0.0%
Todd	23,363	58	0.2%	0.1%
Traverse	4,463	112	2.5%	0.2%
Wabasha	19,744	30	0.2%	0.1%
Wadena	13,154	66	0.5%	0.1%
Waseca	18,079	32	0.2%	0.1%
Washington	145,896	659	0.5%	1.3%
Watonwan	11,682	11	0.1%	0.0%
Wilkin	7,516	63	0.8%	0.1%
Winona	47,828	78	0.2%	0.2%
Wright	68,710	229	0.3%	0.5%
Yellow Medicine	11,684	103	0.9%	0.2%
Tribal territory**	26,294	12,282	46.7%	24.8%
State Total	**4,375,099**	**49,507**	**1.1%**	**100.0%**

** The population of these areas is also counted in the county totals.