

**Indian Law Outline**  
**Just the Basics for the Newly Licensed Montana Lawyer**  
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**A. What this outline is not.**

1. This outline does not summarize or attempt to describe the laws of the tribes occupying the seven Indian reservations located in Montana. Reservation Indians have the right to “make their own laws and be ruled by them.” *Williams v. Lee*, 358 U. S. 217 (1959). The federally recognized tribes in Montana have websites containing contact information:

- a. Crow ([www.crowtribe.com](http://www.crowtribe.com))
- b. Northern Cheyenne ([www.cheyennation.com](http://www.cheyennation.com))
- c. Fort Peck (Assiniboine and Sioux) ([www.fortpecktribes.com](http://www.fortpecktribes.com))
- d. Fort Belknap (Gros Ventre and Assiniboine) ([www.fortbelknap.org](http://www.fortbelknap.org))
- e. Rocky Boy (Chippewa Cree) ([www.rockyboy.org](http://www.rockyboy.org))
- f. Blackfeet ([www.blackfeetnation.com](http://www.blackfeetnation.com))
- g. Flathead (Confederated Salish and Kootenai Tribes—the Bitterroot Salish, the Pend d’Oreille and the Kootenai tribes) ([www.cskt.org](http://www.cskt.org))

The practice of law on an Indian reservation is governed by the tribe. The admission to practice before a tribal court is within the tribe’s jurisdiction. Some tribes administer their own bar examinations.

2. This outline is not a comprehensive outline on what is commonly called “Indian Law,” a complex area of the law. The outline only hits the “highlights.”

**B. Non-Tribal Member Relations With Indian Tribes and Their Members.**

1. According to the Census Bureau quick facts website, in 2012 Native Americans comprised approximately 6.4% of Montana’s estimated population of 1,005,141.

2. Indian Tribes are “domestic dependent nations,” sometimes called “dependent domestic sovereigns.”

“The condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence. In the general, nations not owing a common allegiance are foreign to each other. The term *foreign nation* is, with strict propriety, applicable by either to the other. But the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist no where else. . . .

They [Indian Tribes] acknowledge themselves in their treaties to be under the protection of the United States; they admit that the United States shall have the sole and exclusive right of regulating the trade with them, and managing all their affairs as they think proper; . . .

Though the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government; yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be **denominated domestic dependent nations**. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.” *Cherokee Nation v. Georgia*, 30 U.S. 1, 5 Pet. 18 L.Ed. 25. (Marshall, C.J.)

3. Nevertheless, Indians are citizens of the states in which they reside. Indian Citizenship Act (43 U.S. Stats. At Large, Ch. 233, p. 253 (1924)) reads as follows:

*BE IT ENACTED by the Senate and house of Representatives of the United States of America in Congress assembled, That all non citizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States: Provided That the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property.”* Approved, June 2, 1924. June 2, 1924. [H. R. 6355.] [Public, No. 175.] SIXTY-EIGHTH CONGRESS. Sess. I. CHS. 233. 1924. This statute has been codified in the United States Code at Title 8, Sec. 1401(b).

The courts of Montana are open to Indians. They have the same constitutional right to bring actions in them as non-Indians.

4. Congressional Authority is Plenary. Congress has plenary authority over relationships with Indian Tribes. Article I, Section 8 of the Constitution provides that “Congress shall have the power to regulate Commerce with foreign nations and among the several states, and with the Indian tribes.” “The power of the General Government over these remnants of a race once powerful, now weak and

diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that Government, because it never has existed anywhere else; because the theater of its exercise is within the geographical limits of the United States; because it has never been denied; and because it alone can enforce its laws on all the tribes." *U.S. v. Kagama*, 118 U.S. (1886). Since the Indian Appropriations Act of 1871, the U.S. stopped entering into new treaties with tribes. Treaties entered into before 1871 were not abrogated by the new policy.

5. **Montana Lacks Jurisdiction.** The State of Montana has no authority over the seven Indian reservations located in Montana. 25 Stat. 676 Sec. 4; Article I, Montana Constitution ("All provisions of the enabling act of Congress (approved February 22, 1889, 25 Stat. 676), as amended and of Ordinance No. 1, appended to the Constitution of the state of Montana and approved February 22, 1889, including the agreement and declaration that all lands owned or held by any Indian or Indian tribes shall remain under the absolute jurisdiction and control of the congress of the United States, continue in full force and effect until revoked by the consent of the United States and the people of Montana.")

6. **Montana cannot tax Indian tribes.** Income earned from Indian trust land is exempt from state taxes. *McClanahan v. Arizona State Tax Commission* (411 U.S. 164 (1973)). Tribal lands and land allotted to individual Indians to which U.S. holds legal title is exempt from state real estate taxes.

7. **As a sovereign, a tribe, subject to the authority of the United States, possesses inherent related sovereign powers, among which are:**

- a. The power to make rules governing itself and internal relations, i.e. tribal constitution, code, regulations. *Williams v. Lee*, 358 U.S. 217 (1959).
- b. The power to create and administer its own government.
- c. 14<sup>th</sup> Amendment to U.S. Constitution does not apply to tribes. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978)
  - i. But see, Indian Civil Rights Act. (ICRA) 25 U.S.C. §§ 1301-03. Federal courts lack jurisdiction to enforce. ICRA.
- d. Tribal Employment Rights Ordinances (TERO) often require those doing business on a reservation to grant preferential employment opportunities to tribal members.

8. A tribe is immune to suit for damages in any court unless the tribe has expressly waived immunity or Congress expressly abrogated the immunity. *C & L Enters., Inc. v. Citizen Band, Potawatomi Indian Tribe of Okla.*, 532 U.S. 411 (2001); *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751 (1998); *Okla. Tax Comm'n v. Citizen Band, Potawatomi Indian Tribe of Okla.*, 498 U.S. 505 (1991); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Puyallup Tribe, Inc. v. Dep't of Game of State of Wash.*, 433 U.S. 165 (1977); *United States v. U.S. Fidelity & Guar. Co.*, 309 U.S. 506 (1940); *Turner v. United States*, 248 U.S. 354 (1919).

### **C. Federal Law of Tribal Jurisdiction Over Non-Members**

1. Whether a tribe may exercise civil jurisdiction over a non-member is a federal question. *Nat. Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845 (1985)
2. Tribes generally lack civil jurisdiction over non-members unless the authority is expressly granted by Congress. *A-1 Contractors v. Strate*, 520 U.S. 438 (1997)). But there, are two exceptions to the general rule, the “*Montana* exceptions:
  - a. Consensual relationship exception. A tribe may exercise civil jurisdiction over nonmembers “who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.”
  - b. Conduct that threatens the tribe exception. A tribe may exercise civil jurisdiction over a nonmember when the nonmember’s conduct “threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”
3. When a nonmember is sued in tribal court the nonmember challenging the jurisdiction of the tribal court must ordinarily exhaust his remedies in tribal court before seeking relief elsewhere (*Nat. Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845 (1985)) But, if it is “clear” the tribal court lacks jurisdiction, the usual exhaustion requirement must give way because it would serve no purpose other than delay. *A-1 Contractors v. Strate*, 520 U.S. 438 (1997), fn. 14).

### **E. The Indian Child Welfare Act.**

1. The Indian Child Welfare Act of 1978 (25 U.S.C. §§ 1901–1963) governs jurisdiction over the removal of Native American (Indian) children from their families. The Act allocates to tribes exclusive jurisdiction over adoption proceedings case when the child resides on, or is domiciled on, the reservation, or when the child is a ward of the tribe. The Act provides concurrent, but presumptive, tribal jurisdiction over non-reservation Native Americans’ foster care placement proceedings.

## **F. Criminal Jurisdiction**

1. Tribal courts do not have inherent criminal jurisdiction to try and to punish non-Indians, and hence may not assume such jurisdiction unless specifically authorized to do so by Congress. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

- a. But see, Violence Against Women Reauthorization Act of 2013, Public Law 162 109<sup>th</sup> in which Congress granted to tribes the authority to prosecute nonmembers for domestic abuse offenses. (Generally, tribes can begin prosecuting nonmembers under this authority until at least March 7, 2015).

2. The Indian Civil Rights Act ((25 U.S.C. §1301 (Definitions); §1302 (Constitutional rights); §1303 (Habeas corpus)) provides that tribal courts cannot “impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year or a fine of \$5,000 or both.”
3. General Crimes Act (18 U.S.C. § 1152): This statute (enacted in 1817 and set forth below) provides that the federal courts have jurisdiction over interracial crimes committed in Indian country as set forth below:

Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except in the District of Columbia, shall extend to the Indian Country. This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian Country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

4. Major Crimes Act (18 U.S.C. § 1153): The Major Crimes Act (enacted following the U.S. Supreme Court’s 1883 Ex Parte Crow Dog decision) provides for federal criminal jurisdiction over seven major crimes when committed by Indians in Indian country. Over time, the original seven offenses have been increased to sixteen offenses currently.
5. State Criminal Jurisdiction: The states generally do not have jurisdiction over crimes occurring in Indian Country. However, under Public Law 280 (18 U.S.C. § 1162): In 1953, Congress authorized states to exercise jurisdiction over offenses by or against Indians. Public Law 280 provided for broad state concurrent criminal jurisdiction on those states and reservations impacted by Public law 280 (both mandatory states and those states which opted to assume PL280 jurisdiction). Montana only assumed Public Law 280 jurisdiction relating to the Salish and Kootenai Tribes. In 1993, at the

request of the Confederated Salish and Kootenai Tribes, the Legislature enacted Senate Bill No. 368 that allowed for partial retrocession from P.L. 280.

In September of 1994, the Salish and Kootenai tribes entered into a memorandum of agreement, pursuant to the State-Tribal Cooperative Agreements Act, with the State of Montana; Flathead, Lake, Missoula, and Sanders Counties, and the cities of Hot Springs, Ronan, and St. Ignatius to implement Montana Senate Bill No. 368, allowing the tribes to reassume exclusive jurisdiction over misdemeanor crimes committed by Indians and providing for continued concurrent state-tribal jurisdiction over felony crimes committed by Indians. The tribes' resolution to withdraw from P.L. 280 provides for cooperation between state, tribal, and local law enforcement agencies and includes language allowing continued state misdemeanor criminal jurisdiction in limited areas, such as a guilty plea entered in state court, pursuant to a plea bargain agreement that reduces a felony crime to a misdemeanor, or in the case of a conviction in state court on a lesser included offense in a felony trial. For felonies committed by Indians, both the state and tribes retain concurrent jurisdiction, but either may transfer prosecution to the other if consideration of the factors specifically outlined in the agreement warrants transfer.

Montana's other six tribal governments have never been, and are not presently, subject to P.L. 280.

6. Non-Indian v. Non-Indian Crimes: The U.S. Supreme Court ruled in United States v. McBratney, 104 U.S. 621 (1881), and Draper v. United States, 164 U.S. 240 (1896), that state courts have jurisdiction to punish wholly non-Indian crimes committed in Indian country.