



# Policy Basics: Land Status of Indian Country

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This report is the third in an ongoing project that introduces readers to foundational topics in Indian Country. The first two covered tribal sovereignty and citizenship. Future policy basics in this series will cover jurisdiction and taxation. This report focuses on land.

In total, tribal governments have jurisdiction over an area of land that would make Indian Country the fourth largest state in the nation.<sup>1</sup> Just like a state has various types of lands, including federal and private, within its boundaries, the same holds true for Indian Country. This report discusses various land types, the harmful consequences of policies of the past, and solutions to right past wrongs.

## What Is Indian Country?

The term Indian Country holds two different meanings. First, it refers generally to tribal governments, communities, cultures, and peoples. The second meaning is the focus of this report. Indian Country is a legal term for the area over which the federal government and tribal nations exercise primary jurisdiction.<sup>2</sup> It includes:

- All land within a reservation under the jurisdiction of the federal government;
- All dependent Indian communities; and
- All Indian allotments still in trust, regardless of whether they are located within the exterior boundaries of reservations.<sup>3</sup>

Indian Country includes land owned by non-Indians and towns incorporated by non-Indians when located within the boundaries of a reservation. It is where tribal sovereignty is strongest and where state authority is most limited.

A **reservation** is an area of land reserved for a tribal nation as permanent homelands under a treaty or other agreement with the United States, executive order, or federal statute or administrative action. The federal government holds title to the land in trust on behalf of the tribal nation. Reservations are generally exempt from state jurisdiction, except when Congress specifically authorizes such jurisdiction.<sup>4</sup>

**Dependent Indian communities**, such as New Mexico Pueblos, are neither reservations nor allotments; however, they are similar in concept.<sup>5</sup> Dependent Indian communities satisfy two basic criteria. First, the federal government must have set aside the land for the use of American Indians as Indian land. Second, the federal government must exercise some control or oversight of these lands for Indian purposes.<sup>6</sup>

**Allotted trust lands** are held in trust by the federal government for American Indians. For example, a 1904 Congressional act resulted in allotments of formerly public lands in Montana to individual citizens of the Turtle Mountain Band of Chippewa.<sup>7</sup>

## The Policy of Allotment

Before the arrival of European settlers to what is today the United States, indigenous peoples and nations inhabited these lands. When European settlers arrived on the East Coast and expanded westward, tribal nations, as sovereigns, entered into treaties with the federal government to cede control of vast

territories in exchange for the continued inherent right of self-governance, reservations as permanent homelands, and federal assistance and provisions, such as health care and education, in perpetuity.

However, the federal government reneged on its obligations. In response to growing settler demand for reservation lands and the assimilation of American Indians into non-Indian society, Congress passed the General Allotment Act of 1887, beginning the allotment and assimilation period.<sup>8</sup> Allotment involved Congress dividing communally held reservation lands into individual parcels without tribal consent. The federal government then allocated to each tribal citizen or household an allotment and sold “surplus” parcels to non-Indian settlers, most often without compensating tribal nations.<sup>9</sup> Through allotment, the federal government sought to eliminate tribal sovereignty, abolish reservations, and assimilate American Indians into non-Indian society.<sup>10</sup>

Between 1887 and 1934, allotment took from tribal nations more than 90 million acres, or nearly two-thirds, of all reservation lands, an amount roughly the size of present-day Montana.<sup>11</sup> Reservation lands are now a patchwork pattern of ownership and land status, with reservation lands in Montana generally falling into one of two types of status: trust or fee.

**Trust land** is held in trust by the federal government and includes land collectively owned by a tribal nation and allotments to tribal citizens. Trust land is exempt from property taxes.<sup>12</sup> To help offset the loss of property taxes that support local public schools, the federal Impact Aid Program, also known as Title VII Funds, provides assistance to school districts located on or near reservations.<sup>13</sup>

**Fee land** is generally private property and can be owned by American Indians and non-Indians. Because of the forced allotment of reservation lands, state and local taxing jurisdictions may assess property taxes on tribally owned fee land.<sup>14</sup>

The amount of fee and trust lands varies by reservation. The Rocky Boy’s Reservation is the only reservation in Montana that did not undergo allotment. Of the allotted reservations, much of the allotted lands passed out of tribal control.<sup>15</sup>

Land Status of Reservations in Montana			
Reservation	Total Acreage	% Trust Land	% Fee Land
Blackfeet	1.5 million	63	36
Crow	2.2 million	68	32
Flathead	1.3 million	56	32
Fort Belknap	697,617	97	3
Fort Peck	2.1 million	46	54
Northern Cheyenne	445,000	99	1
Rocky Boy’s	122,259	100	0

Source: Legislative Services Division and Margery Hunter Brown Indian Law Clinic, “Tribal Nations in Montana: A Handbook for Legislators,” Oct. 2016.

## Contemporary Issues of Allotment

As intended, allotment hurt tribal governments, economies, and cultures, and the overall well-being of American Indians. Although the allotment period ended in 1934, its legacy lives on today. The following sections discuss several issues of that legacy.

**Checkerboarding** refers to the checkerboard-like pattern of various land types and ownerships, including by non-Indians, of reservation lands. This pattern of scattered, fractionated, and intermixed land ownership often makes reservation land bases less usable for agriculture and other forms of economic development that require adjoining tracts of land.<sup>16</sup>

Checkerboarding also creates **jurisdictional challenges**, as different governing authorities; including state, county, federal, and tribal; claim authority to regulate, tax, or carry out various activities within reservation boundaries. Jurisdictional matters on checkerboard lands demand a high level of coordination and the development of cooperative agreements between different jurisdictions.

Tribal lands are critical to **tribal sovereignty**, or the inherent right of tribal nations to exercise self-governance and self-determination.<sup>17</sup> Because allotment has opened up reservation lands to non-tribal jurisdictions, those non-tribal jurisdictions often conflict with tribal interests and sovereignty, making it difficult for tribal nations to assert their regulatory and legal control. Tribal taxation authority provides one example. Over time, state and local governments have successfully challenged in court tribal governments' once-exclusive right to levy taxes within their reservation boundaries to the point that tribal taxation authority is greatly diminished today.<sup>18</sup>

Due to the forced allotment of many reservations, fee land represents a significant share of land on four of the seven reservations. As established, fee land, even when tribally owned, is subject to state and local property taxes. This is an **inconsistent treatment of government-owned property**. In Montana, property that is owned by federal, state, and local governments receives an automatic property tax exemption,<sup>19</sup> as is consistent with the Montana Constitution.<sup>20</sup> However, the Montana Constitution also declares that all lands owned or held by an American Indian or tribal nation remain under the jurisdiction and control of the U.S. Congress.<sup>21</sup>

## Righting the Wrongs of Allotment

In 1934, Congress ended the policy of allotment when it passed the Indian Reorganization Act (IRA). Under the IRA, tribal nations and the federal government can return fee land to trust status. These fee-to-trust transfers benefit tribal communities. First, trust acquisitions serve to promote tribal sovereignty and self-determination. Among other things, these acquisitions also provide tribal nations with the ability to enhance housing options for their citizens, more flexibly negotiate leases, develop tribal economies, and identify natural resource development and commerce opportunities.<sup>22,23</sup>

However, these transfers generally take years to complete and require many steps that can be costly for tribal nations.<sup>24</sup> By comparison, trust-to-fee transfers take just 30 days.<sup>25</sup> Despite the time and resources that tribal communities put into the fee-to-trust process, state and local governments and general interested parties are each given 30 days to appeal the transfer once the Bureau of Indian Affairs makes its decision available to those parties.<sup>26</sup>

In 2011, the Montana Legislature passed Senate Bill (SB) 412 to create a five-year property tax exemption for tribally owned fee lands when those lands have a trust application pending with the federal government.<sup>27</sup> Because fee-to-trust conversions are costly, SB 412 facilitates trust acquisitions by allowing tribal nations to exclusively direct resources to the process. However, as recently as the 2019 legislative session, the Legislature attempted and failed to repeal and modify this exemption.<sup>28,29</sup>

SB 412 honors and promotes tribal sovereignty, the government-to-government relationship between tribal nations and the state, and the process by which tribal nations can restore tribal lands that the

federal government took through allotment. Yet, opportunities exist for the state to do better. For example, the 2013 Idaho Legislature exempted from property taxes all tribally owned property within reservation boundaries. The law is an effort to treat all government properties in the state consistently.<sup>30</sup> The fiscal note projects no fiscal impact to state and local governments because of federal Impact Aid.<sup>31</sup>

Tribal communities play an important role in moving Montana forward by growing our shared economies for our shared communities and by providing essential government programs, services, and functions that benefit Montanans. Land issues in Indian Country today are a legacy of anti-Indian policies of the past that sought to undermine tribal sovereignty and terminate reservations. Montana legislators must keep in mind the ways in which land impacts other policy issues.

<sup>1</sup> National Congress of American Indians, "[Tribal Governance.](#)"

<sup>2</sup> National Congress of American Indians, "[Tribal Nations and the United States: An Introduction.](#)"

<sup>3</sup> Legislative Services Division and Margery Hunter Brown Indian Law Clinic, "[Tribal Nations in Montana: A Handbook for Legislators.](#)" Oct. 2016.

<sup>4</sup> Bureau of Indian Affairs, "[Frequently Asked Questions: What is a federal Indian reservation?](#)"

<sup>5</sup> Shagen, P. W., "[Indian Country: The Dependent Indian Community Concept and Tribal/Tribal Member Immunity from State Taxation.](#)" New Mexico Law Review, Vol. 27, No. 2, 1997.

<sup>6</sup> U.S. Environmental Protection Agency, "[Definition of Indian Country.](#)"

<sup>7</sup> Legislative Services Division and Margery Hunter Brown Indian Law Clinic, "[Tribal Nations in Montana: A Handbook for Legislators.](#)" Oct. 2016.

<sup>8</sup> National Congress of American Indians, "[Tribal Nations and the United States: An Introduction.](#)"

<sup>9</sup> National Congress of American Indians, "[Tribal Nations and the United States: An Introduction.](#)"

<sup>10</sup> Legislative Services Division and Margery Hunter Brown Indian Law Clinic, "[Tribal Nations in Montana: A Handbook for Legislators.](#)" Oct. 2016.

<sup>11</sup> National Congress of American Indians, "[Tribal Nations and the United States: An Introduction.](#)"

<sup>12</sup> Legislative Services Division and Margery Hunter Brown Indian Law Clinic, "[Tribal Nations in Montana: A Handbook for Legislators.](#)" Oct. 2016.

<sup>13</sup> U.S. Department of Education, Office of Elementary and Secondary Education, "[About Impact Aid.](#)"

<sup>14</sup> Cahoon, H., "Revenue Competitions between Sovereigns: State and Tribal Taxation in Montana," American Indian Culture and Research Journal, Vol. 42, No. 1, 2018, pp. 17-39

<sup>15</sup> Legislative Services Division and Margery Hunter Brown Indian Law Clinic, "[Tribal Nations in Montana: A Handbook for Legislators.](#)" Oct. 2016.

<sup>16</sup> National Congress of American Indians, "[Tribal Nations and the United States: An Introduction.](#)"

<sup>17</sup> National Congress of American Indians, "[Tribal Nations and the United States: An Introduction.](#)"

<sup>18</sup> Cahoon, H., "Revenue Competitions between Sovereigns: State and Tribal Taxation in Montana," American Indian Culture and Research Journal, Vol. 42, No. 1, 2018, pp. 17-39

<sup>19</sup> Department of Revenue, "[Automatic Tax Exempt Property.](#)"

<sup>20</sup> [Mont. Const., Article VIII, Section 5.](#)

<sup>21</sup> [Mont. Const., Article I.](#)

<sup>22</sup> U.S. Department of the Interior, Bureau of Indian Affairs, "[Fee to Trust.](#)"

<sup>23</sup> Cason, J., U.S. Department of the Interior, testimony on "[Comparing 21st Century Trust Land Acquisition with the Intent of the 73rd Congress in Section 5 of the Indian Reorganization Act.](#)" United States House Subcommittee on Indian, Insular and Alaska Native Affairs," July 13, 2017.

<sup>24</sup> Indian Land Tenure Foundation, "[Land Tenure Glossary.](#)"

<sup>25</sup> Indian Land Tenure Foundation, "[Land Tenure Glossary.](#)"

<sup>26</sup> U.S. Department of the Interior, Bureau of Indian Affairs, Office of Trust Services, "[Acquisition of Title to Land Held in Fee or Restricted Fee Status \(Fee-to-Trust Handbook\).](#)" June 28, 2016.

<sup>27</sup> Montana 62nd Legislature, "[Revise laws to temporarily exempt tribal fee land in trust land process.](#)" SB 412, enacted on Apr. 28, 2011.

<sup>28</sup> Rep. Hertz, G., "[Repeal temporary tribal property tax exemption.](#)" HB 401, Montana 66th Legislature, as tabled in the House Committee on Taxation on Mar. 15, 2019.

<sup>29</sup> Rep. Hertz, G., "[Revise temporary exemption for certain tribal property.](#)" HB 733, Montana 66th Legislature, as tabled in the Senate Committee on Taxation on Apr. 11, 2019.

<sup>30</sup> Hancock, H., "[Statement of Purpose/Fiscal Note H0 140.](#)"

<sup>31</sup> Hancock, H., "[Statement of Purpose/Fiscal Note H0 140.](#)"