

## Module 3: Federal Indian Law and Policy

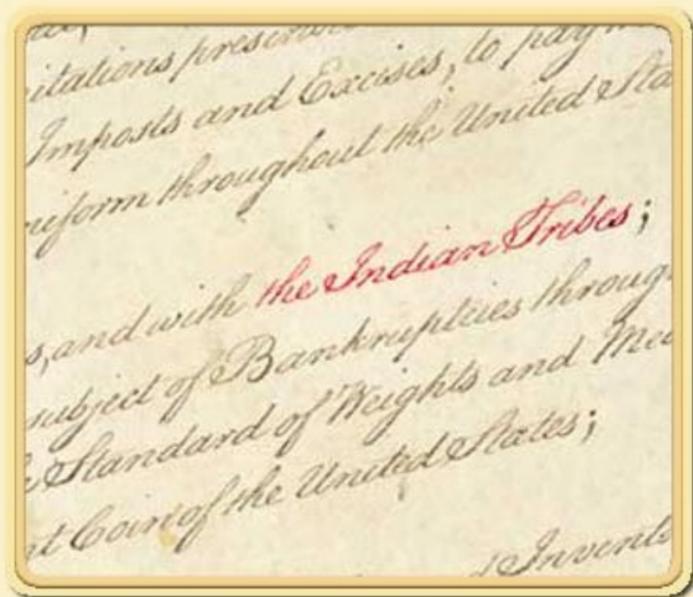
### Module Objectives

In this module, you will gain both a historical and a present-day perspective of policies and issues regarding Native Americans and the federal government, and an overview of federal Indian law. There will also be a brief introduction to jurisdiction in Indian Country.

More laws have been enacted concerning Native Americans than for any single racial or ethnic group in America. For example, an entire volume of federal statutes, Title 25 of the U.S. Code, is exclusively focused on Indians and Indian tribes.

This module presents an introduction to:

- The history of federal policy with Native Americans.
- Federal Indian law regarding jurisdictional issues.
- Tribal and state relations.



### History of Indian Law and Policy

While this section provides the historical background for Indian law and policy, numerous legal principles and policies, which were established in the 17th, 18th, and 19th centuries, are still in effect today. Treaties, the U.S. Constitution, and Supreme Court decisions form the foundation of federal Indian law and shape the federal-tribal relationship.

From the early 1800s to the present day, there have been several shifts in federal policies which have affected Native Americans, and the federal-tribal relationship. In some cases, these eras overlap.

#### The Treaty Making Era (1778-1871)

Treaties established the earliest pattern of legal and political interaction between the U.S. government and Indian tribes.

Europeans signed the first treaties with Indian tribes in the early 1600s. In 1778, the U.S. signed its first treaty with an Indian tribe: the Delaware Indians. In 1871, when the treaty making era formally ended, the U.S. had signed more than 350 treaties with Indian tribes. Even after 1871, there were many written agreements between tribes and the United States which functioned like treaties.

#### The Removal Era (1830-1850)

Indian Removal Act policies during the time period between 1830 and 1850 removed many tribes from their eastern homelands to lands west of the Mississippi River, especially into the area known as Indian Territory, which is now the State of Oklahoma. These mass removals included the "Trail of Tears," a long journey traveled primarily on foot by the Cherokee, Choctaw, Creek, Chickasaw, and Seminole, during which many died.

#### The Reservation System (1850-1891)

Removal policies later gave way to the reservation system. Between 1850 and 1891, numerous treaties and other written agreements were made that required tribes to relocate to distant territories, or confined them to smaller areas that were "reserved" portions of the tribes' aboriginal territories. These reservations were created by treaties, statutes, and executive orders.

#### The Allotment and Assimilation Era (1887-1934)

The General Allotment Act, also known as the "Dawes Act," was passed in 1887. It broke up communal reservation lands and assigned individual parcels, called "allotments," to tribal members. These parcels were to be held in trust for 25 years, although this time period was often extended or shortened by the federal government. Because of the parcels' trust status, they could not be sold, or leased, or otherwise conveyed by their Indian owners without federal approval. After the trust period expired, titles to the parcels were to be converted to fee simple status, giving the owners the ability to convey an interest in their parcels without federal approval. The remaining reservation land, which had not been allotted to tribal members, was declared "surplus," and was opened to non-Indian settlement. The Indian Reorganization Act, enacted in 1934, ended the creation of allotments, eliminated time limitations on trust status, and allowed existing allotments to remain in trust status indefinitely. Allotments which remained in trust in 1934 are still Indian country.

**In 1924, U.S. citizenship was granted to all Native Americans.**

#### The Reorganization Policy (1934-1953)

The next phase of the federal government's policy supported the reorganization of Indian tribes. The Indian Reorganization Act of 1934 ended the allotment of reservations, ensured that any allotted parcels still held in trust for individual Indians would not convert to fee simple status, and reaffirmed that tribal governments had inherent powers. The Act also provided a mechanism for the formalization of tribal government through written constitutions and charters for tribes that would agree to federal oversight.



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### History of Indian Law and Policy (continued)

#### The Termination Era (1953-1968)

During this period, many of the reorganization era reforms were reversed, primarily by the U.S. government's decision to terminate the federal recognition of many Indian tribes. Note that the federal trust relationship was terminated, not the tribes themselves. The Termination Policy was intended to further promote the assimilation of Native Americans into mainstream American society. In some cases, termination led to a loss of federal services and resources for those tribes. Some tribes terminated during this period have successfully petitioned to have their federal recognition restored. In 1953, a statute known as Public Law 280 transferred federal criminal jurisdiction, and some civil jurisdiction, to certain states over tribal lands that lay within their boundaries.



#### The Self-Determination Era (1968 to the present)

In the late 1960s and early 1970s, federal Indian policy began to support the concept of Indian self-determination. Various laws and presidential policies strengthened support for tribal governments and reaffirmed federal acknowledgment of tribal sovereignty.

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### Introduction to Jurisdictional Issues

This section will discuss jurisdictional issues related to:

- Civil jurisdiction.
- Criminal jurisdiction.
- Tribal and state relations.

Jurisdiction is the power of a government to exercise authority over persons and things in a specified territory. When a government has jurisdictional authority, its laws or regulations will apply, and its courts may be the forum in which disputes are heard and where cases involving violations of the law are adjudicated.

There are three types of domestic sovereign governments recognized by the laws of the United States:

- Federal
- Tribal and
- State

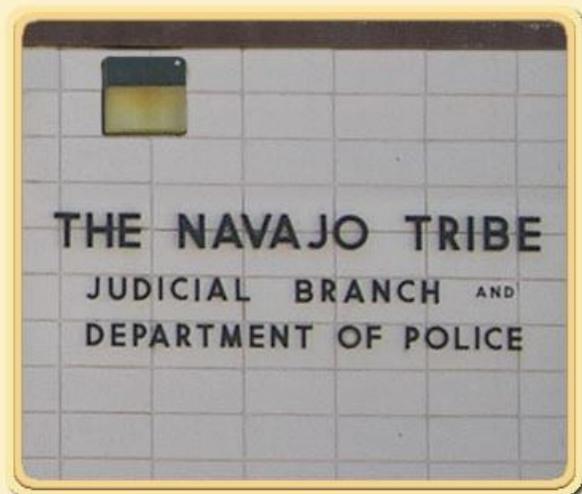
In Indian Country, sometimes the jurisdictions overlap.

Indian Country is a legal term of art that is found in Title 18 U.S.C. § 1151 and includes all areas within a reservation, including non-Indian fee land, dependent Indian communities, and Indian allotments to which title has not been extinguished.

Courts have interpreted § 1151 to include lands held in trust by the United States for a tribe or an individual Indian. Although the "Indian Country" definition is found in the federal criminal statutes, it is also used in civil cases.

To view the statutory definition of Indian Country found at 18 U.S.C. § 1151 select "here" [./:LawAndPolicy/P4a/](http://LawAndPolicy/P4a/)

- [Indian Reservations](#)
- [Trust Land](#)
- [Fee Land](#)
- [Allotted Land](#)
- [Dependent Indian Communities](#)
- [Other Terms: Checkerboard Land, Restricted Land, Ceded Territory](#)



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### Indian Reservations

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A reservation is land established by treaty, statute, executive order, or administrative procedure for the use of a designated tribe. Many tribes reserved portions of land for themselves when they relinquished other land areas to the U.S. government through treaties.

Since then, reservations have been established through executive orders and federal statutes. There are approximately 275 Indian land areas in the U.S. administered as Indian reservations (this includes pueblos, rancherias, and dependent Indian communities).





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### Trust Land

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As commonly used, the term "trust land" refers to land whose title is held by the U.S. government "in trust" for an Indian tribe or an individual tribal member.

In these circumstances, a tribe or individual Indian is often referred to as the "beneficial" owner of the land. Trust land cannot be conveyed, sold, assigned or transferred without federal approval.

In some cases, a tribe may have trust lands that are located outside of the exterior boundaries of its reservation. Those lands generally have the same status as if they were located within the reservation's boundaries.



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### Fee Land

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The term "fee land" refers to a parcel located within a reservation's exterior boundaries whose title is owned in fee simple. One attribute of "fee simple" land status means the parcel can be sold without U.S. government approval. Many fee lands are owned by non-tribal members, often a result of the allotment policies discussed later in this module. However, fee lands are defined as such because of the status of their title, not the ethnicity of their owners. While reservation fee lands are not held in trust by the U.S. government, they are still considered to be Indian country.

The New Mexico Pueblos hold their lands in fee simple as a result of historic Spanish grants, but the Supreme Court has held that these lands are nevertheless Indian country and cannot be sold without the approval of the U.S. government. The Pueblo lands are administered by the federal government as reservations.

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### Allotted Land

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The term "allotted land" refers to land owned by individual Indians that is either held in trust by the United States or is subject to a statutory restriction on sale or other forms of alienation (conveyance or transference of property to another). Most allotted lands are the result of allotment laws that the U.S. government passed in the late 1800s and early 1900s that mandated the subdivision of Indian reservations. These statutes decreed that reservations be broken up and the land divided into parcels, or "allotments," to be assigned to the heads of Indian households or single individuals, the "allottees."

The best known of the allotment statutes is the 1887 General Allotment Act (commonly called the Dawes Act). The Dawes Act and other Indian allotment statutes were designed to dissolve tribal collective control of reservations and to assimilate tribal members into mainstream American society by teaching them the importance of private property and farming. After assigning parcels from reservation lands to individual tribal members, the remaining "surplus" lands were opened to non-Indian settlement.

The parcels assigned to tribal members were to be held in trust by the U.S. for a period of time, usually 25 years, although this time period could be extended or shortened, after which title was to pass to the Indian owners in fee simple. Owning their lands in fee simple meant that the Indian owners could sell their lands without federal approval. It also meant these lands could be taxed. Financial pressures and unscrupulous land speculators caused many allottees to sell their fee parcels. Many other allotments were lost due to sale for unpaid taxes.

The opening up of reservation lands to non-Indian settlement and the sale of Indian allotments caused a dramatic decline in the total amount of Indian lands in the U.S. The practice of allotment ended in the 1930s with the passage of the Indian Reorganization Act, which halted further allotments, stopped any remaining allotments from converting into fee simple status, and continued the trust status of existing allotments indefinitely. The Indian Reorganization Act remains in effect.

Today, many reservations contain both Indian allotments and fee lands, owned by both Indian and non-Indian owners, within their borders. This combination of land holdings has resulted in a checkerboard pattern of ownership within many reservation boundaries.



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### Dependent Indian Communities

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"Dependent Indian communities" are included within the 18 U.S.C. § 1151 definition of "Indian country" as a result of a 1913 U.S. Supreme Court decision, *United States v. Sandoval*, 231 U.S. 28, which held that the New Mexico Pueblos that hold their lands in fee simple are dependent Indian communities. That case, and another Supreme Court decision, *United States v. Candelaria*, 271 U.S. 432 (1926), which held that the Pueblo tribes could not sell their land without the consent of the United States, established that dependent Indian communities were to be considered Indian country, even if they were not situated within a reservation. However, not all other Native American communities have been found to meet the statutory definition of "dependent Indian communities."

The 1998 U.S. Supreme Court decision in *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, held that "dependent Indian communities" refers to a limited category of Indian lands which are neither reservations nor allotments and which must satisfy two requirements: first, they must have been set aside by the federal government for the use of the Indians as Indian land; and, second, they must be under federal superintendence.



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### **Other Terms: Checkerboard Land, Restricted Land, Ceded Territory**

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#### **Checkerboard Land**

"Checkerboard land" is a term that generally refers to a mixture of Indian trust parcels and non-tribal fee simple parcels, which together result in a checkerboard pattern of ownership within reservation boundaries. Checkerboard land patterns are largely a result of the federal allotment statutes of the late 1800s and early 1900s that broke up reservation lands into individual parcels.

#### **Restricted Lands**

"Restricted lands" refers to lands that are held in fee simple by tribal members, but still have certain restrictions on their title. As a result, they have some characteristics of both fee and trust lands. When dealing with this class of Indian land, federal employees should consult with their agency's legal counsel.

#### **Ceded Territory**

"Ceded territory" refers to land located within a reservation's former boundaries (meaning that the original size of the reservation was subsequently reduced), or within a tribe's aboriginal territory (prior to the establishment of any reservation), that has been ceded, or relinquished, by the tribe, usually by treaty.

Tribes may have retained treaty rights to hunt, fish, and/or gather other resources (and the right to regulate members exercising those reserved rights) in ceded territories, as is the case for some Great Lakes and Northwest tribes.

## Module 3: Federal Indian Law and Policy

### Jurisdiction: Civil and Criminal

Only entities having sovereign powers can exercise jurisdiction. Most introductions to Indian sovereignty, and the relationship between Indians and non-Indians, begin with a discussion of three Supreme Court cases from the early 1800s:

- *Johnson v. McIntosh*, 21 U.S. 543 (1823)
- *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831)
- *Worcester v. Georgia*, 31 U.S. 515 (1832)

Rulings from these cases recognized Indian sovereignty and set the stage for the federal Indian trust responsibility and the interplay of federal-tribal jurisdiction.

These cases held that tribes had placed themselves under the protection of the United States, and established that tribes could not sign treaties with states, nor transfer lands to states or other non-federal entities without federal permission.



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### Civil Jurisdiction

Civil jurisdiction is the authority of a government to prescribe civil laws and regulations, and to have its courts hear disputes between parties.

Tribes have inherent jurisdiction over their own tribal members living within Indian Country, which includes land within the boundaries of a reservation and tribal trust land. In some circumstances, for example, when tribal hunting and fishing rights exist, jurisdiction may extend outside a tribe's territory.

Tribal authority over non-tribal members on fee lands within reservations is controlled by the 1981 case of *Montana v. U.S.*, 450 U.S. 544, in which the Supreme Court stated that tribes retained their inherent power to "exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands," but only when:

1. Non-members enter into consensual relationships with the tribe or its members; or
2. A non-member's conduct threatens or has a direct effect on the political integrity, economic security, or health or welfare of the tribe.

This analysis, called the "Montana Test," is applied by courts when determining whether Indian tribes have inherent authority to regulate non-member activities on fee lands within reservation boundaries.

In some cases, civil jurisdiction will also be affected by acts of Congress. For example, the Clean Water Act allows qualifying tribes to assume certain responsibilities, such as enforcement of provisions of the Act.

Knowing which jurisdiction exists in a given situation is important to understanding the federal role.





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### Tribal and State Relations

Relations between tribes and states are often complex – and made even more so by Public Law 280. One reason is that Congress and the federal courts have not fully addressed many key questions about tribal and state jurisdictional authority.

As a result of differing legal views about their respective jurisdictional authority, tribes and states at times compete aggressively for such authority; however, there are often many points of agreement, and cooperative partnerships between tribes and states are commonplace.

Usually, these agreements between tribes and states have focused on information exchanges and trans-boundary coordination, much like agreements commonly reached between states. An example is cross-deputization agreements between tribal, local, and state law enforcement agencies.



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### General Laws Concerning Indian Tribes

The preceding material represents a sampling of the subjects addressed in the vast body of federal Indian law. Other important areas include economic development; housing; natural resources and the environment; cultural heritage and preservation; gaming; child welfare; and Indian health. Any one of these areas – including many not mentioned here – could be an important factor in the way your agency implements its programs and mission.

- [General Laws Concerning Indian Tribes](#)
- [Tribal Self-Determination Laws](#)
- [Economic Development Laws](#)
- [Housing Laws](#)
- [Natural Resources and Environmental Protection](#)
- [Cultural Heritage and Preservation Laws](#)
- [Indian Gaming Laws](#)
- [Child Welfare Laws](#)
- [Indian Health](#)
- [Indian Arts And Crafts Amendments](#)
- [Violence Against Women and Department of Justice Reauthorization Act of 2005](#)



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### **Natural Resources and Environmental Protection Laws**

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#### **The National Environmental Policy Act of 1969 (NEPA):**

NEPA requires the preparation of an environmental assessment (EA) or environmental impact statement (EIS) for any proposed major federal action that may significantly affect the quality of the human environment. While the statutory language of NEPA does not mention Indian tribes, the Council on Environmental Quality (CEQ) regulations and guidance do require agencies to contact Indian tribes and provide them with opportunities to participate at various stages in the preparation of an EA or EIS. CEQ has issued a Memorandum for Tribal Leaders encouraging tribes to participate as cooperating agencies with federal agencies in NEPA reviews. (42 U.S.C. § 4321 et seq.)

#### **Snapshot of the Environmental Protection Agency's Laws and Indian Program Implementation:**

Some environmental laws explicitly authorize the Environmental Protection Agency (EPA) to treat Indian tribes as states for purposes of becoming eligible to receive grants, and to manage programs for which states may also be eligible. The Clean Water Act § 518 (CWA), 33 U.S.C. § 1377, the Safe Drinking Water Act § 1451 (SDWA), 42 U.S.C. § 300j-11, and the Clean Air Act § 301(d) (CAA), 42 U.S.C. § 7601(d) all fall in this category. EPA issued a series of rules for implementing tribal provisions of the Clean Water and Safe Drinking Water Acts between 1988 and 1994, and issued the Final Tribal Air Rule in February of 1998, specifying those provisions of the Clean Air Act for which tribes may be treated in the same manner as states. Other statutes specify some role for tribes under particular provisions. The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136(u) and the Comprehensive Environmental Recovery, Compensation, and Liability Act Section 126 (CERCLA), 42 U.S.C. § 9626, fall into this category.



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### Natural Resources and Environmental Protection Laws (continued)

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#### Snapshot of the Environmental Protection Agency's Laws and Indian Program Implementation: (continued)

**Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)** 7 U.S.C. § 136(u), among other things, allows for tribes to enter cooperative agreements with the EPA for enforcement, and for tribes to obtain the ability to certify applicators of pesticides.

**Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)** 42 U.S.C. § 9626, provides that tribes may be treated substantially the same as states under several provisions.

**Toxic Substance Control Act (TSCA)** Section 404, 15 U.S.C. § 84, and the **Emergency Planning & Community Right to Know Act (EPCRA)**, 42 U.S.C. § 11001 et seq., are silent on tribal roles, but those roles have been addressed in EPA rule makings under these acts. EPCRA has been interpreted to allow a tribe to develop a local rule for coordinating emergency response, and to report either to the state or directly to the EPA, as states do.

**Resource Conservation and Recovery Act (RCRA)** 42 U.S.C. § 6901 et seq., has not been amended to make tribes eligible to manage programs for which states are eligible. However, tribes may apply to the EPA to waive certain federal requirements for reservation landfills.

To be federally approved, environmental programs established by a tribe must meet applicable federal standards and regulations. A key aspect of protecting the environment in Indian country is the enforcement of either tribal or federal environmental laws or regulations. Enforcement includes activities such as inspections, compliance monitoring, and other efforts to encourage compliance with environmental standards. Issuing and enforcing tribal rules and permits enables tribes to exercise authority to protect their environments.

For more information about the Environmental Protection Agency's Indian program and authorities visit the following link: <http://www.epa.gov/tribalportal>.

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### Cultural Heritage and Preservation Laws

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**National Historic Preservation Act of 1966 (NHPA)**, as amended, includes several provisions that relate to federal-tribal consultation and enhance tribal participation in the national historic preservation program. Most importantly, the 1992 amendments clarified that federal agencies, in carrying out their § 106 responsibilities, must consult with any Indian tribe that attaches religious and cultural significance to historic properties that may be affected by an undertaking.

The amendments also included provisions for:

- Historic properties of religious and cultural significance to Indian tribes to be eligible for listing in the National Register of Historic Places; and
- An Indian tribe to assume the responsibilities of the state historic preservation officer on its lands. (16 U.S.C. § 470 et seq.)

For more information, please visit the following link: <http://www.achp.gov/nhpa>

## Module 3: Federal Indian Law and Policy

### Knowledge Check Introduction

Take a few minutes to check your understanding of some key concepts presented in this module.

### Knowledge Check - Question 1

Is the following statement true or false?

The Indian Reorganization Act of 1934 reorganized the Bureau of Indian Affairs to make it more responsive to tribal needs.

- A. [True](#)
- B. [False](#)



## Module 3: Federal Indian Law and Policy

**Knowledge Check Introduction**

Take a few minutes to check your understanding of some key concepts presented in this module.

**Knowledge Check - Question 1**

Is the following statement true or false?

The Indian Reorganization Act of 1934 reorganized the Bureau of Indian Affairs to make it more responsive to tribal needs.

- A. [True](#)
- B. [False](#)

Select the correct answer to continue.

Select the correct answer

Resources Exit/Stop

1 of 3

Correct! The statement is false. The Indian Reorganization Act of 1934 provided a mechanism for the formalization of tribal government through written constitutions and charters for tribes that would agree to federal oversight. The Act also stopped further allotment and extended the federal trust status of allotments indefinitely.

Close



## Module 3: Federal Indian Law and Policy

### Knowledge Check - Question 2

What legal test do courts use when determining whether Indian tribes have inherent authority to regulate non-member activities on fee lands within an Indian reservation?

- A. [Nevada Test](#)
- B. [Las Vegas Test](#)
- C. [Montana Test](#)
- D. [New Mexico Test](#)



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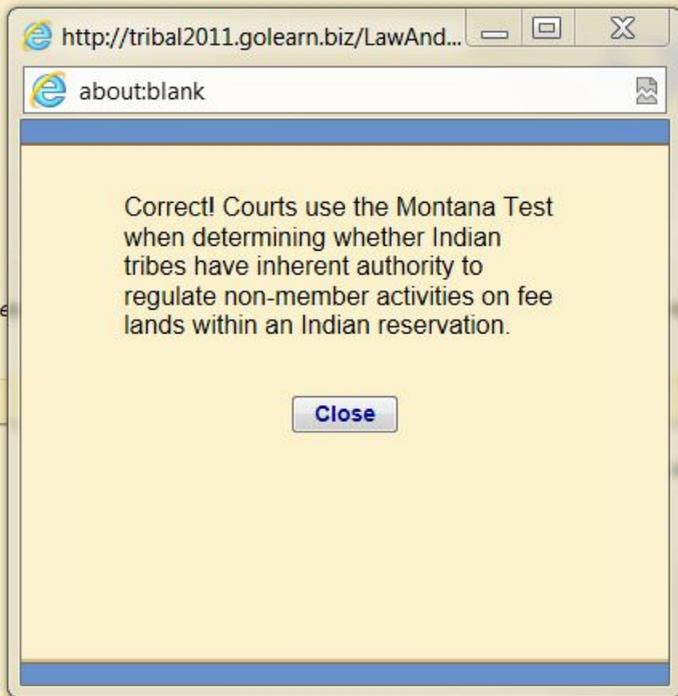
## Knowledge Check - Question 2

What legal test do courts use when determining whether Indian tribes have inherent authority to regulate non-member activities on fee lands within an Indian reservation?

- A. Nevada Test
- B. Las Vegas Test
- C. Montana Test
- D. New Mexico Test

Select the correct answer. Then click on the "Next" button to continue.

Resources Exit/Save



The screenshot shows a web browser window with the address bar containing "http://tribal2011.golearn.biz/LawAnd...". The main content area displays the text: "Correct! Courts use the Montana Test when determining whether Indian tribes have inherent authority to regulate non-member activities on fee lands within an Indian reservation." Below the text is a "Close" button.

Select answer

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## Module 3: Federal Indian Law and Policy

### Summary

You have now completed the *Federal Indian Law and Policy* module.

In this module, you learned about both historical and present-day policies and issues regarding Native Americans and the federal government, and received a general overview of federal Indian law.

