

NARF

Review

Native American Rights Fund

Amendments Provide Stop-Gap Protection For Native Land And Corporations

by Bob Anderson and Lare Aschenbrenner

**Editor's Note: Alaska issues have been reported on in two other "NARF Legal Review", articles. See the Winter 1984 issue and the Summer 1986 issue.*

On February 3, 1988, President Reagan signed into law the "1991 Amendments" to the Alaska Native Claims Settlement Act. While partially satisfying their primary goal of protecting the Native corporations and their land, they failed to deal with fundamental flaws in the system, and permit the continued treatment of Alaska Native governments as second class Indian tribes. Throughout the process, NARF represented the Alaska Native Coalition which is the state-wide organization representing tribal governments throughout village Alaska.

The Alaska Native Claims Settlement Act (ANCSA) of 1971 settled aboriginal-tribal land claims, but adopted an experimental approach to the land and money obtained by the Natives in the settlement. Rather than grant these assets to the tribes, upon whose claims the Act was based, the assets were vested in corporations whose stock is held by Alaska Natives alive on December 18, 1971. Twelve regional corporations were established, along with some two hundred village corporations. Although the settlement has provided economic benefits to some Natives, most corporations, especially in the villages, struggle to survive. At the same time, land obtained in the settlement slips slowly away – but slip away it does.

The corporations were organized under state law, and have few of the protections or powers possessed by Indian tribes based on their unique governmental status. Rather, the Native corporations are business entities whose major asset is

ancestral lands. As with any profit corporation, the assets must be risked in order to perpetuate corporate existence. For most of the isolated Native villages, located hundreds of miles from the road system and accessible only by boat or plane, there are simply no economic development opportunities available. As Judge Berger, author of Village Journey, an extensive review of ANCSA, put it, "even Lee Iacocca couldn't sell a Chrysler in Shishmaref".

Congress temporarily ensured continued Native ownership of the corporations by precluding sale of the stock until December 18, 1991. After that, they would be on equal footing with other public corporations and their stock would be freely alienable. A great fear in the Native community was that non-Natives would purchase the stock after 1991 and thus gain control of the corporations. If outsiders controlled the corporations they would also control the land and could manage it in ways inconsistent with Native values. Traditional hunting, fishing, trapping and

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gathering could, for example, be curtailed or even prohibited. An equally grave concern arose from the fact that many corporations were in danger of losing their land through bankruptcy or improvident business dealings. Indeed, one of the twelve regional corporations is now in bankruptcy due to poor investment advice.

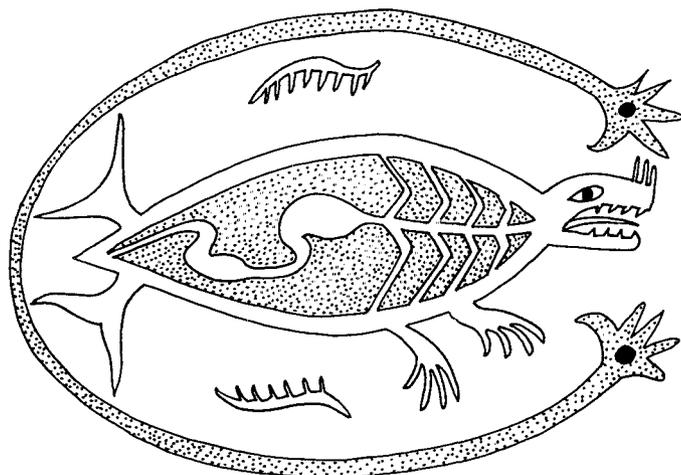
It was thus apparent to all that ANCSA was in need of major changes if the corpus of the settlement was to be preserved. The primary goals of the 1991 amendments to ANCSA were: (1) to ensure continued Native ownership of the corporations and their land; (2) to offer a way out of the corporate system through a tribal option; and (3) to authorize issuance of stock to Natives born after 1971.

The 1991 amendments as finally passed adequately dealt with the new Natives. This amendment was needed to eliminate the inequity in provisions limiting participation in settlement to those alive on December 18, 1971. Brothers and sisters born on either side of this date had a totally different status. Those born before having full corporate rights and a voice in management of traditional lands. Those born after having none. Such an arbitrary rule made little sense to Alaska's aboriginal people.

To protect Native ownership of the corporations, the amendments extend the restrictions on sale of stock for an indefinite period of time, but authorize individual corporations to lift the restrictions at their option. Any proposal to terminate restrictions must be approved by the shareholders and becomes effective if approved by a majority of the eligible shares. The simple majority requirement for removal of restrictions may well be too low, however. Corporations and shareholders could be subject to unfair practices to induce removal of the restrictions. The enormous pressure which major mineral development corporations have imposed on poverty stricken tribes in the lower forty-eight states is well documented. While the restrictions hold out promise of protecting Native ownership, another section creates new threats.

A particularly dangerous provision authorizes corporations to issue new voting stock to non-Natives. The stock may even be given greater voting power than existing shares of Native-owned stock and could be bought and sold on the open market. The present shareholders must authorize the issue of new stock and certain disclosure requirements are imposed should the issuance result in Native shareholders losing voting control of the corporation. This may, however, turn out to be hollow protection. In most cases,

effective control of a corporation can be maintained by far fewer than fifty-percent of the voting shares. This provision could be manipulated to concentrate power in the hands of a few wealthy shareholders, or slowly erode effective Native control despite the existence of majority Native ownership. All in all, this section provides ample opportunity for the eventual loss of Native control of the affected corporation.



Amendments provide limited land protection

On the positive side, the legislation provides automatic "land bank" protections to land owned by a Native corporation so long as the land is not developed, leased, or sold to third parties. While these protections from taxation, squatters rights, bankruptcy and involuntary dissolution are essential — there are significant gaps in the coverage. Native corporations could lose their land if it were pledged as collateral for a loan. Likewise, it could simply be sold and lost by the corporation through unwise business decisions. In short, undeveloped Native corporation lands receive nowhere near the protection afforded lands owned by an Indian tribe. The Indian Nonintercourse Act, for example, forecloses any voluntary or involuntary conveyance of tribally-owned land absent the express consent of Congress. Further, tribes have sovereign immunity, which means that law suits may not be used to get at the land, or to bankrupt the Native owners through protracted litigation. Moreover, tribally owned lands in Alaska are protected from loss through tax foreclosures proceedings by the Alaska Statehood Act. And lands held by tribes organized under the Indian Reorganization Act are statutorily protected from loss without the tribe's consent.

One of the most glaring defects in the new law lies in the fact that the land bank protections do not cover developed lands. Thus, the core areas of villages, where people live, will be exposed to loss through taxation, bankruptcy and other forms of judicial foreclosure. This large gap in protection allows non-Native interests a window through which critical inroads into the Native land base may be achieved. In short, the "land bank" is a decent stop-gap measure, but still offers manifold opportunities for erosion of the Native land base. For permanent Native land ownership, there is no substitute for the iron-clad protections accorded tribally-owned land.

Ways out of the corporate system

Land safeguards aside, it is undisputed that the corporate system is unworkable and undesirable for many, if not most, Alaska Native villages. For this reason, as well as for greater land protection, the Alaska Native Coalition, along with the Tanana Chiefs Conference¹ and the Association of Village Council Presidents² embarked on a four year quest to secure a "tribal option." The tribal option took shape in the "Qualified Transferee Entity" (QTE) sections of the House and Senate 1991 bills. The QTE section would have authorized Native corporations to transfer land to tribal governments without having to pay dissenting shareholders. Such transfers would have been permitted if approved by a simple majority of the outstanding shares. This option was deemed critical due to the difficulty, and in many cases the practical impossibility, of undertaking such transfers under existing state law. Alaska Senators Stevens and Murkowski, however, insisted upon a disclaimer and other provisions which had the effect of taking away critical elements of tribal sovereignty as the price for their approval of the land transfers. The Native community rebelled, voting overwhelmingly to reject the Stevens-Murkowski Bill in October 1986, and the Bill died.

Early in 1987 the Coalition and the Alaska Federation of Natives (the state-wide entity which primarily represents the interests of the large Regional corporations) renewed their efforts to secure passage of an acceptable bill - including a neutral tribal option - from the 100th Congress. The Coalition garnered the support of national Indian organizations, many religious denominations and other Senators on the Energy Committee. The Alaska Senators, however, remained adamant. Succumbing to the pressure of the National Rifle Association and other anti-tribal



government organizations, they demanded that the Native community accept their Bill, or no Bill at all. Unfortunately, their opposition split the Native community with the Coalition continuing to insist on a tribal option, and the Alaska Federation of Natives, as the lesser of two evils, acceding to the Senators' ultimatum. Thus, although the Native community unanimously agreed that the tribal option was essential, its lobbying effort was divided and the tribal option was dropped.

ANC's Positive Impact

Notwithstanding the unsuccessful effort to obtain a tribal option, the Alaska Native Coalition favorably influenced other provisions of the legislation. Throughout the 1991 process the Department of Interior took positions even more hostile to Alaska tribes than Senators Stevens and Murkowski. The Coalition's presence unquestionably had a positive balancing effect on the radical views of the Department and insured that Congress was aware of and sensitive to tribal issues. Perhaps most importantly, the Coalition ultimately won its relentless fight to modify the language of the "disclaimer clause" insisted upon by the Alaska Senators. The Senators' language would have cast doubt and may indeed have been construed to permanently terminate the self-governing powers of Alaska Native tribes. As modified it remained neutral on the question of tribal sovereignty.

Another section of the legislation, included at the Coalition's request, provides that ANCSA benefits including stock, cash, or land may not be taken into account to bar eligibility for any federal or federally assisted welfare program. The Coalition also succeeded in deleting provisions allow-

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ing stock restrictions to be lifted prior to 1991. In addition, the Coalition insisted on the inclusion of provisions providing disclosure requirements in the event a Native corporation decides to issue stock to non-Natives. The Coalition was also successful in having the land bank protections extended to the property of Native corporations which have been, or may be, involuntarily dissolved under State law.

Conclusion

There is no doubt that the Native corporations and their shareholders are better off now that some amendments to ANCSA have passed. Equally clear, however, is the fact that the amendments fall far short of what Alaska Natives want and deserve. Natives are still the subject of invidious discrimination by the State and Federal Governments vis-a-vis other Indian tribes. The battle to end this discrimination must continue in the Courts and the Congress. NARF will continue to represent Alaska Native tribes in this battle.

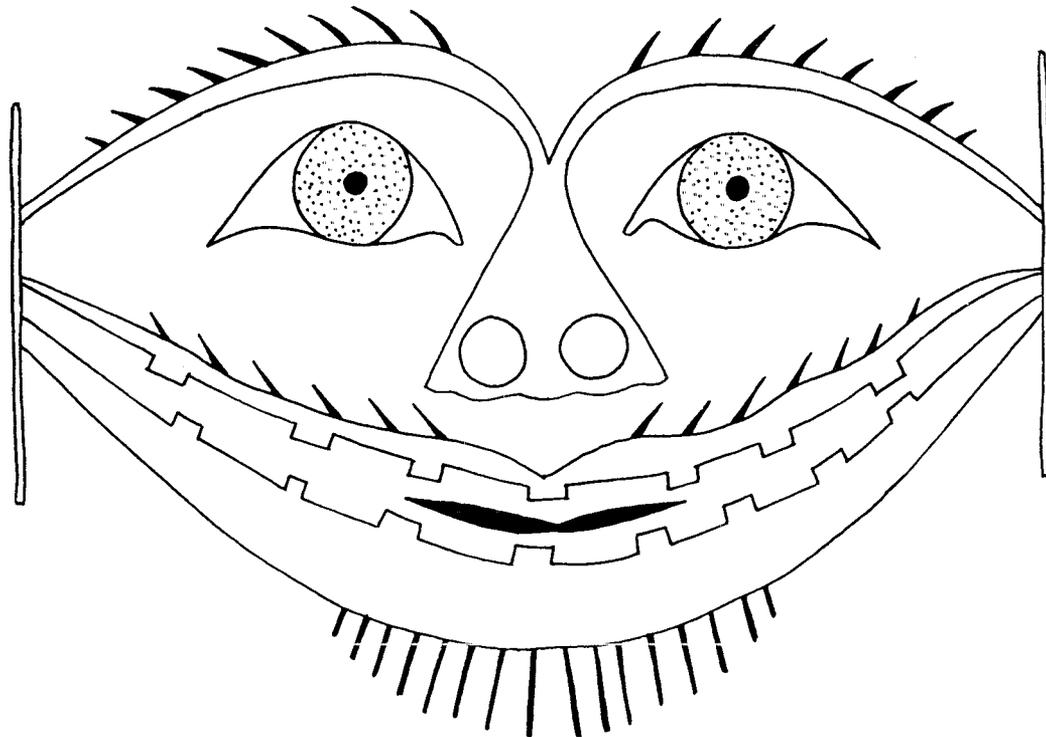
Alaska Tribal Sovereignty cases

NARF has several key cases pending which attack the discriminatory treatment tribes have been subjected to and seek to clarify rights and powers of Alaska Native tribes. These cases, along with two others summarized below, should go a long way toward resolving the basic question

whether Alaska Native tribes are only social clubs or are federally recognized tribes with essentially the same powers and rights as tribes in the lower 48 States. The answer to this question should become fairly apparent within the next year. Once it does, the issues which only Congress can resolve will likewise be identified and the campaign to legislatively eradicate any vestiges of discrimination must be renewed.

State of Alaska v. Native Village of Venetie involves critical issues of tribal taxing authority; the existence of Indian country; ANCSA's effect on tribal existence; and tribal court jurisdiction. The Native Village of Venetie is organized under the Indian Reorganization Act. In 1978, it passed a five percent gross receipts tax to raise revenue. In 1986, after private contractors refused to pay the tax, the Tribe initiated enforcement proceedings in tribal court. The State of Alaska, once again displaying its unyielding antipathy for Native tribal governments, volunteered to defend the private companies. It filed a broad-based attack on the Tribe's very existence as well as its taxing authority. A Federal District Judge agreed with the State as a preliminary matter and enjoined the tribal court proceedings. The Tribe appealed and oral argument is scheduled before the Ninth Circuit Court of Appeals.

Noatak, et al. v. Hoffman, in which NARF is co-counsel with Alaska Legal Services and the Tanana Chiefs Conference, also raises fundamental questions with respect to the legal status of



Alaska Native tribes under state and federal law. Specifically, whether Native tribes are federally recognized with self-governing powers similar to all other Indian tribes in the United States. At issue is the validity of the State Revenue Sharing Act, which directed the Department of Community and Regional Affairs to pay \$25,000 annually to "Native village governments." The State Attorney General concluded, among other things, that Native tribes were racial institutions rather than governments and therefore it would violate equal protection guarantees of both the State and Federal Constitution for the State to provide financial aid to the tribes. As a result, the tribes received less than their statutory shares of funding. The Tribes sued the State and the case was dismissed on jurisdictional grounds. It is likewise before the Ninth Circuit on appeal.

City of Nome v. Nome Eskimo Community, is currently on appeal to the Alaska Supreme Court and concerns the validity of the city's tax on the tribal headquarters and other property of the Nome Eskimo Community. The Community was organized under the Indian Reorganization Act in 1939. Specifically the case raises the questions of whether: (1) The Nome Eskimo Community is a federally recognized tribe; (2) The Community is protected from the city's tax by Section 16 of the Indian Reorganization Act; (3) the city's tax is barred by the Alaska Statehood Act; (4) the Indian Nonintercourse Act applies to Alaska and to the Community's lands; (5) the lands subject to the tax are Indian Country; (6) the city's tax is void for infringement on tribal self-government; and (7) the Community holds sovereign immunity from suit without its consent.

NARF is also participating as amicus curiae in the important case of Native Village of Tyonek v. Puckett in support of the federal district court's ruling that Tyonek possesses sovereign immunity and self-governing powers, unaffected by passage of ANCSA. The case is awaiting decision by the Ninth Circuit. Another significant pending Ninth Circuit case is Chilkat Indian Village v. Johnson in which the tribe seeks enforcement of an ordinance preventing religious objects and artifacts from being removed from Chilkat Village without its consent. The Village is represented by Alaska Legal Services.

¹Tanana Chiefs Conference is a non-profit corporation representing 43 villages in the Interior primarily comprised of Athabaskan Indians.

²Association of Village Council Presidents is a non-profit corporation representing 56 Yupik Eskimo villages in western Alaska.



NILL Receives Grant To Update Codes

The National Indian Law Library (NILL) recently received a \$7,500 grant from the AT&T Foundation to fund its tribal code project. The purpose of the project will be to update and revise NILL's tribal code collection, thereby enhancing NILL's ability to serve as a central clearinghouse and information center for the tribes. Ed Bristow, NILL Research Associate, will be managing the project.

Tribal codes are tribally-enacted laws exercising the tribe's governmental powers within its

jurisdiction. The tribe enacts codes to deal with everything from education issues to environmental matters to business affairs. The current NILL code collection includes laws, statutes, and rules and regulations.

During the next year, NILL will be evaluating its collection and requesting codes from tribes. Currently, tribes are requesting model codes from NILL to adapt for their own tribal use. The grant allows NILL to provide a more updated comprehensive collection to better serve tribal needs.

Case Updates

Supreme Court Overturns Religious Freedom Ruling

For over 200 years the Yurok, Karuk and Tolowa Indians have used the Chimney Rock section of the Six Rivers National Forest in California for religious ceremonies and rituals. On April 19, 1988, the U.S. Supreme Court ruled that the Forest Service could complete a road project in that section regarded as sacred by the Tribes. The ruling ends years of struggle for the Indians to preserve their sacred religious site.

In a 5-3 decision, the Court overturned an appeals court ruling that held the project violated the Indians' religious freedom guarantee under the First Amendment. Writing for the majority, Justice Sandra Day O'Connor stated "that the Constitution simply does not provide a principle that could justify upholding respondents' legal claims." She continued, "Whatever rights the Indians may have to the use of the area, however, those rights do not divest the government of its right to use what is, after all, *its* land."

In a strongly worded dissent, Justice William J. Brennan wrote, "today's ruling sacrifices a religion at least as old as the Nation itself, along with the spiritual well-being of its approximately 5,000 adherents, so that the Forest Service can build a six-mile segment of road that two lower courts found had only the most marginal and speculative utility, both to the Government itself and to the private lumber interests that might conceivably use it." He added "given today's ruling, that freedom amounts to nothing more than the right to believe that their religion will be destroyed....it fails utterly to accord with the dictates of the First Amendment."

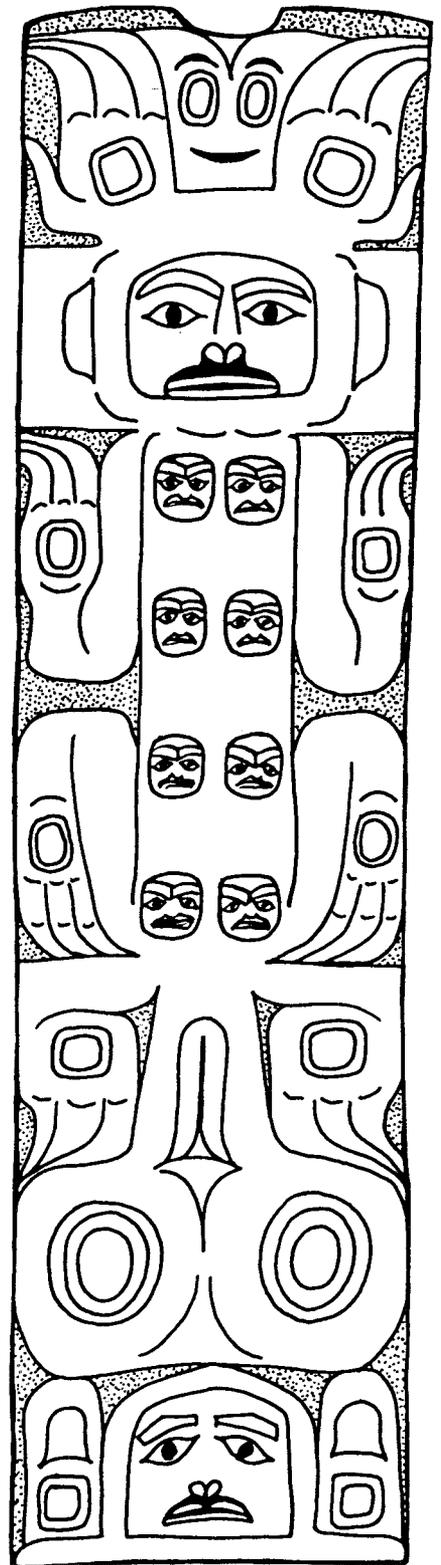
In *Lynn v. Northwest Indian Cemetery Protection Association*, NARF wrote an *amicus curiae* brief on behalf of the several tribes and Indian organizations.

Supreme Court Undecided on Peyote Use in Oregon

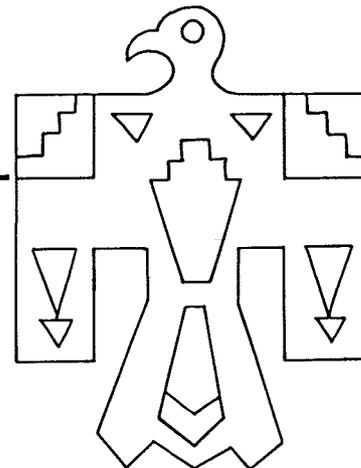
The U.S. Supreme Court sent a peyote case back to the Oregon Supreme Court to determine if the use of peyote is legal in Oregon. In *Employment Division v. Smith*, the Court examined the refusal of the State of Oregon to pay unemployment benefits to members of the Native American Church who were fired from their jobs for peyote use during religious ceremonies.

In the 5-3 majority opinion Justice Stevens wrote, "Because we are uncertain about the legality of the religious use of peyote in Oregon, it is not now appropriate for us to decide whether the practice is protected by the Federal Constitution."

The Oregon Supreme Court held that the denial of unemployment benefits violated the Free Exercise Clause of the First Amendment. NARF wrote an *amicus curiae* brief on behalf of two Native American Churches.



NARF Resources & Publications



The National Indian Law Library

The National Indian Law Library (NILL) has developed a rich and unique collection of legal materials relating to Federal Indian law and the Native American. Since its founding in 1972, NILL continues to meet the needs of NARF attorneys and other practitioners of Indian law. The NILL collection consists of standard law library materials, such as law review materials, court opinions, legal treatises, that are available in well-stocked law libraries. The uniqueness and irreplaceable core of the NILL collection is comprised of trial holdings and appellate materials of important cases relating to the development of Indian law. Those materials in the public domain, that is non-copyrighted, are available from NILL on a per-page-copy cost plus postage. Through NILL's dissemination of information to its patrons, NARF continues to meet its commitment to the development of Indian law.

AVAILABLE FROM NILL

The NILL Catalogue

One of NILL's major contributions to the field of Indian law is the creation of the National Indian Law Library Catalogue: An Index to Indian Legal Materials and Resources. The NILL Catalog lists all of NILL's holdings and includes a subject index, an author-title table, a plaintiff-defendant table, and a numerical listing. This reference tool is probably the best current reference tool in this subject area. It is supplemented periodically and is designed for those who want to know what is available in any particular area of Indian law. (1,000 + pgs. Price \$75).

Bibliography on Indian Economic Development

Designed to provide aid on the development of essential legal tools for the protection and regulation of commercial activities on Indian reservations. This bibliography provides a listing of articles, books, memoranda, tribal codes, and other materials on Indian economic development. 2nd Edition (60 pgs. Price: \$30.00). (NILL No. 005166)

Indian Claims Commission Decisions

This 43-volume set reports all of the Indian

Claims Commission decisions. An index through volume 38 is also available, with an update through volume 43 in progress. The index contains subject, tribal, and docket number listing. (43 volumes. Price \$820). (Index price: \$25.00). (Available from the Indian Law Support Center).

Prices subject to change

Indian Rights Manual

(Available from the Indian Law Support center)

A Manual For Protecting Indian Natural Resources. Designed for lawyers who represent Indian tribes or tribal members in natural resource protection matters, the focus of this manual is on the protection of fish, game, water, timber, minerals, grazing lands, and archaeological and religious sites. Part I discusses the application of federal and common law to protect Indian natural resources. Part II consists of practice pointers: questions to ask when analyzing resource protection issues; strategy considerations; and the effective use of law advocates in resource protection. (151 pgs. Price \$25).

A Manual On Tribal Regulatory Systems. Focusing on the unique problems faced by Indian tribes in designing civil regulatory ordinances which comport with federal and tribal law, this manual provides an introduction to the law of civil regulation and a checklist of general considerations in developing and implementing tribal regulatory schemes. It highlights those laws, legal principles, and unsettled issues which should be considered by tribes and their attorneys in developing civil ordinances, irrespective of the particular subject matter to be regulated. (110 pgs. Price \$25).

Native American Rights Fund

The Native American Rights Fund is a nonprofit organization specializing in the protection of Indian Rights. The priorities of NARF are: (1) the preservation of tribal existence; (2) the protection of tribal natural resources; (3) the promotion of human rights; (4) the accountability of governments to Native Americans; and (5) the development of Indian law.

Our work on behalf of thousands of America's Indians throughout the country is supported in large part by your generous contributions. Your participation makes a big difference in our ability to continue to meet ever-increasing needs of impoverished Indian tribes, groups and individuals. The support needed to sustain our nationwide program requires your continued assistance.

Requests for legal assistance, contributions, or other inquiries regarding NARF's services may be addressed to NARF's main office: 1506 Broadway, Boulder, Colorado 80302. Telephone (303) 447-8760.

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