NARF Review

Native American Rights Fund

Highlights of Indian Legislation in the 99th Congress

The 99th Congress will be remembered in the Indian world more for the bills it failed to pass than for the bills that were actually signed into law. The fact that Congress did not enact major Indian legislation, however, is not necessarily an indication of failure. In many instances this failure to act was a victory for Indian interests.

When viewing the accomplishments of any given Congress one must keep in mind that there are at least three ways in which a bill can fail to become law. The first is actually a victory for Indian rights — where the legislative process is being used by anti-Indian forces to obtain a result that they cannot achieve through hostile court action. Secondly, there is the honest failure to overcome vested political interests who are opposed to what you are doing. Third is the case where a bill is not enacted due to political events that are unconnected with the merits of the bill. This article will review some of the notable bills that Congress failed to enact and will indicate the impact of this failure on the Indian world. It will also briefly consider major Indian legislation that was enacted into law.

1991 Legislation

The proposed amendments to the Alaska Native Claims Settlement Act (ANCSA) is a prime example of a bill which was not enacted into law but which must be considered as a major Indian victory. Congress enacted the Alaska Native Claims Settlement Act in 1971 to settle tribal claims of aboriginal title. A unique approach was adopted to settle the claims. The Act did not vest the proceeds of the settlement in the tribes upon whose claims the settlement was premised. Rather, ANCSA provided for the creation of 13 regional corporations and roughly 200 village corporations to hold title to the 44 million acres of land settled for by the Natives. The regional corporations were entitled to select lands within their respective geographic areas as their major asset and village corporations were required to select lands adjacent to their villages. Every Alaska Native alive on December 17, 1971 received stock in a regional and village corporation and the Act specifically provides that stock in these corporations could not be sold until the year 1991. This protection for the corporations and the land's

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protection from taxation for a twenty-year period were intended to give Natives time to get their corporations operating as part of the mainstream of the American economy.

In many instances, however, the ANCSA experiment has been a failure. The land is in danger of being lost. Many of the regional corporations do not consistently show a profit and one has been forced to seek protection under the bankruptcy laws. Several village corporations are also in bankruptcy proceedings and others face the same fate since as business entities they function poorly or not at all. The land owned by these corporations could be liquidated to satisfy corporate debts. With the restrictions on the sale of Native stock lapsing in 1991, Native corporations could be taken over by non-Native corporations or so much stock could be voluntarily sold or involuntarily lost that Natives would lose control of their corporations and their land.

Loss of the land from corporate failure or outside takeover would spell disaster. The corporations own the land surrounding Native villages which is essential for subsistence. The indigenous people of Alaska continue to depend upon the land to supply them with fish and game resources as they have for countless generations. Their very existence as Native people depends upon this subsistence way of life, which in turn is entirely dependent upon the land. The substantial land holdings gained in the settlement could be lost in a short period of time because of the inherent hazards of the corporate system. The effect on the Native land base and tribal existence could rival the disaster of the allotment era.

To head off this disastrous result, the Native villages and corporations submitted proposed "1991 legislation" to Congress in order to protect the lands, the corporations and provide a way out of this corporate system which is ill-suited to many villages. As the bill passed through the hearing and mark-up stages, however, it became clear that Alaska's Senatorial delegation had decided to make loss of tribal sovereignty the price that would have to be paid to secure land and corporate protections and to provide a tribal option out of the corporate system. At each stage of the legislative process a bill that was sovereignty neutral on its face when submitted to Congress was gradually, but with certainty, changed into a bill that seriously eroded the legal rights held by Alaska Native tribes. The Senate re-write of the House-passed bill made clear that the cost, in terms of tribal sovereignty, was simply too great. Use of the so-called tribal option in the Senate bill would have nearly reduced Native tribal governments to the status of mere social clubs. The Senate bill appeared to give a tribal option with one hand, but it took away tribal rights with the other.

Native Village governments, represented by the newly formed Alaska Native Coalition, eventually decided that they could no longer support the legislation and reluctantly took action to kill the bill. Despite the determined efforts of Alaska's Senators Stevens and Murkowski to secure passage, this harmful bill was prevented from becoming enacted into law.

The failure of this legislation has had significant positive effects. The village governments and corporations have awakened to the necessity for unified action. They have discussed and pondered the need and value of tribal sovereignty. The Alaska Federation of Natives, the long-time voice of the corporations, at its convention in October pledged to work with the Alaska Native Coalition to secure passage of a bill which would protect the land, the corporations and provide a neutral tribal option for those villages which find the corporate system undesirable and unworkable. They have sent a strong message to their Congressional delegation that they will not agree to a reduction of their sovereign tribal rights in return for protection of their lands. In the 100th Congress, a new effort led by a grass roots village movement will again attempt to secure protection for Native land, Native corporations and provide a tribal option in order to forever protect the Native way of life.

California-Nevada Compact

Another major piece of legislation that failed to pass the Congress and which can be viewed as a legislative victory, is the failure of Congress to ratify the California-Nevada Compact. This compact was first negotiated between California and Nevada in the 1960's. Basically it divided the rights to the use of the water flow between the two states. The negotiations were conducted without active participation by the affected Indian tribes or the federal government. Needless to say, the resulting compact did not consider the legitimate interests to those same waters of two Indian tribes — the Pyramid Lake Paiute Tribe and the Walker River Paiute Tribe — who have a vital stake in these streams.

The California-Nevada compact was approved by the legislatures of the two states in the early 1970's and were signed into law by then Governors Reagan and Laxalt. In order for the compact to become effective, by its own terms, approval by the United States Congress was required. Despite massive efforts over the years, approval was never granted. Because the tribal and federal rights were not adequately protected, every administration that had been asked to consider approval (from Presidents Nixon through Carter) opposed enactment.

Retiring Senator Paul Laxalt made adoption of the compact a high priority during his last Congress. The tribes were successful in getting the bill killed in the Judiciary Committee. Despite this victory, Senator Laxalt introduced the legislation as an amendment to an Appropriations bill, which was a likely candidate for passage. The Pyramid Lake Paiute and Walker River Paiute Tribes, with assistance from many tribes across the nation, vigorously opposed the amendment and, after much last-minute bargaining, managed to kill the amendment.

This was the last chance to see the compact enacted into law. By now, the terms of the compact itself are badly out of date and it is doubtful that another Senator will have the power or inclination to push the bill through. If there is to be a compact it will have to be renegotiated and, because the Indian interests were able to stop the legislation, any new negotiations will have to include them.

Gambling Legislation

Perhaps the biggest bill not to become enacted into law this session was a bill that would have permitted and regulated Indian gaming on reservations. The failure of this bill to become enacted into law must be considered a major disappointment in Indian country.

There is a long and somewhat complicated history to this legislation which has been covered in an earlier issue of *The NARF Legal Review*, (see Vol. 10, No. 4). The failure of this bill to become law, however, must be seen as a defeat for tribal interests.

In 1981, a Fifth Circuit Court of Appeals decision (*Butterworth v. Seminole Indian Tribe*) held that the Seminole Tribe was able to conduct high stakes

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bingo operations on their reservation even though the state of Florida prohibited such games outside of the reservation. Other tribes in other states used the reasoning of the *Butterworth* decision to start their own high-stakes bingo operations. Some tribes have also used the reasoning of Butterworth to engage in other forms of high-stakes gambling such as card games and various forms of pari-mutuel betting. Today an estimated one-third of the 308 federally recognized Indian tribes conduct high-stakes bingo games or other gaming activities on their reservation. The tribal revenue and employment opportunities provided by these games is becoming an increasingly important source of tribal revenue — especially in light of the federal budget cuts that have been imposed on tribes.

Congressman Udall, at the request of the tribes, introduced legislation that would have permitted bingo and high-stakes gaming. These activities would have been subject to strict regulation by a regulatory body made up of tribal representatives. The tribes with the assistance of various federal agencies would have been responsible for the oversight of the gaming activities. As the legislation went through the hearing and mark-up process it became clear that while bingo was largely acceptable, other forms of high-stakes gaming was objected to by the states. The opposition was based upon the facts that states would not be able to control such activity and that Indian gaming would provide competition to their own gaming activities.

The tribally proposed legislation emerged from the House in relatively acceptable form. Total tribal dominance of the regulatory agency was, however, discarded in the House version in favor of a mixed tribal/federal representative scheme. Bingo and more traditional forms of Indian gaming was segregated from pari-mutuel betting and other forms of high-stakes gambling. There was also a moratorium placed on class three gaming (as non-bingo high-stakes gaming was defined) with the whole question to be reexamined in four years. Also, and most importantly, class three gaming had to have standards applied to it which were at least as stringent as those that existed in the state where the tribally run gaming occurred. The tribes were definitely not

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happy with these developments but, in recognition of the fact that some compromise was inevitable, basically supported this version of the legislation.

The erosion of tribal control and the extent to which non-bingo gaming was restricted, however, accelerated on the Senate side with the gaming interests in states like Nevada obtaining more and more restrictions on Indian gaming. Eventually, the Senate version became so restrictive that support for it died among the tribes. Tribal support evaporated to an extent that state gaming interests were able to kill the legislation entirely.

The failure to get the bill through is particularly painful in light of the fact that the United States Supreme Court is now reviewing the legality of high-stakes on-reservation gaming (*California v. Cabazon Band of Mission Indians*). If the Supreme Court were to strike such gaming down then the ability of numerous tribal governments to continue to function on a realistic fiscal basis will be imperiled. Because the Supreme Court is reviewing the issue there is no chance that legislation can be introduced and passed before the decision is published by the Supreme Court. If the Court upholds Indian gaming then tribes will resist national legislation (though stepped up regulation by the BIA is likely). Should the U.S. Supreme Court rule against gaming, however, a much narrower bill authorizing bingo will probably be tried.

Other bills of importance which failed to pass Congress.

One of the largest, the Indian Health Care Act, was of major importance but failed to be enacted because the bill was entangled in a political dispute between Senator Melcher and the Administration which delayed passage of the bill until the last days of Congress. The bill was eventually passed and sent to the House for reconcilation where it was expected to pass easily. Unfortunately, it got caught up in political wrangling that had nothing to do with the merits of the bill. Because the Democrats wouldn't agree to a bill which was objectionable to them (relating to oil leasing on Indian lands), the Republicans refused to permit the enactment of *any* Interior Committee bills. The Indian Health Care bill along with four other Indian bills died as a result. All are expected to be reintroduced in the next Congress.

The Lummi Tribe had proposed an amendment to the tax bill that would have defeated an attempt by the IRS to tax the income that individuals derived from exercising commercial treaty fishing rights. Senator Bradley was the sponsor of this amendment. Again, the legislation was killed not because of the merits or problems with the bill but because of the politics of the situation. During the Senate debate all amendments to the tax bill were being resisted.

Bills That Were Signed Into Law

Even though the 99th Congress will be remembered primarily for what it did not do, there were some solid legislative accomplishments. The Omnibus Drug Supplemental Appropriations Act of 1987 was one of these. This was a huge bill that was a bipartisan effort to address the numerous problems that drug abuse has fostered in this country. Of the $1.7 billion total appropriation, $22.5 million was included for the BIA. This money was earmarked for items such as education ($3 million for curriculum development and $2.4 million for additional school counselors in the 180 BIA schools nationwide); for judicial training ($1 million), law enforcement ($3.6 million) and construction or renovation of emergency shelters and halfway houses for juveniles ($7.5 million).

In addition, $21.7 million was appropriated to the Indian Health Service to help fight the problems of alcohol and substance abuse. Drug and alcohol abuse on reservations has been a major problem for many years. Given the education and enforcement emphasis of the bill it is hoped that this bill represents more than just throwing money at a problem.

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Most of the remaining bills that were passed by Congress and signed into law were bills of significance primarily to the tribe directly involved. For example, the Zia Pueblo and the Papago Tribe received settlements for claims that they had against the federal government. The Klamath Tribe received tribal recognition from the federal government. This recognition restores their tribal status which had been terminated by Congress in the 1950's. The Houlton Band of Maliseets were able to get technical changes to the Maine Settlement Act through. Although these bills were of great importance to the tribes directly involved, their impact was limited. They were not a part of a trend nor did they indicate any shift in the basic policies of the federal government.

CONCLUSION

The 99th Congress is typical of most. Major problems such as 1991, Indian gaming and Indian health were left unresolved. Most, if not all, of these bills will be reintroduced in the 100th Congress. With a new majority party in the Senate and with some minor changes on the House side, time and circumstances may have altered sufficiently to permit the development of legislation in these areas that was not possible in the last Congress.

Article written by NARF staff attorney, Henry Sockbeson, Washington, D.C. office.

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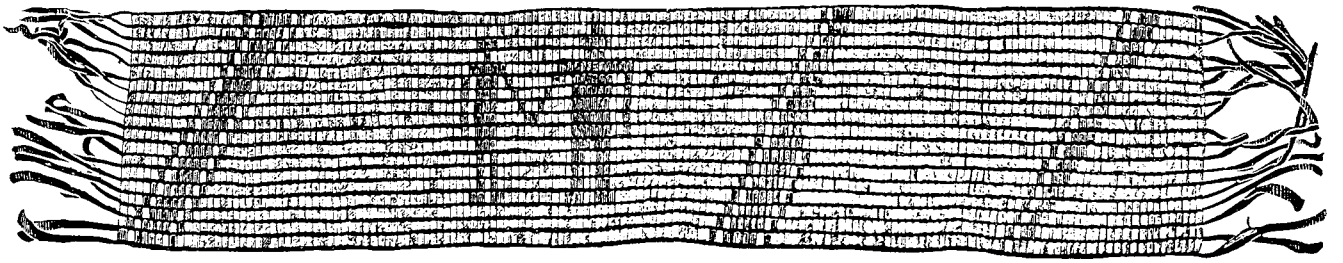

Case Updates

Appeals Court Upholds Tunica-Biloxi Tribe's Ownership of Treasure

The Supreme Court of the State of Louisiana denied *certiorari* (review) in an Indian excavation case, *Charrier v. Bell*. In the case, an appeals court held that the Tunica-Biloxi Tribe is the lawful owner of numerous artifacts discovered by an amateur archeologist. In *Charrier v. Bell,* Mr. Charrier located and excavated approximately 150 burial sites containing artifacts estimated to weigh two to two and one-half tons. Charrier attempted to loan the artifacts to the Peabody Museum of Harvard University, but could not prove ownership. He filed a law suit against several landowners requesting the court to declare he was the owner of the artifacts. The Tunica-Biloxi Tribe intervened into the suit seeking title to the artifacts and the site of the burial ground.

Ninth Circuit Dismisses Action Granting Mining Lease On Tribal Lands

On September 12, 1986, the Court of Appeals for the Ninth Circuit vacated and dismissed a Nevada district court decision which declared that a mining company was entitled to mineral leases on the Walker River Indian Reservation. In *Wilson, et al. v. Department of Interior*, the Walker River Paiute Tribe had granted a permit to a mining company to prospect for minerals on land within the Reservation. Subsequently, the company applied to the Tribe for several mining leases. The Tribe referred the application to the BIA to deny the leases. However, the BIA denied the lease based on other grounds. The mining company filed an action in district court after pursuing its administrative remedies, naming only the Department of Interior as defendant, and seeking it had a right to leases on the Reservation.

The district court ruled that the company was entitled to mineral leases. The Ninth Circuit, however, ruled the action was moot because the court could not grant any effective relief. The Court ruled that only the Tribe has the authority to lease its land, therefore the Secretary had no authority to enter into a lease or consider the lease application on behalf of the Tribe. NARF handled the appeal for the Walker River Paiute Tribe.

Federal Court Denies Preliminary Injunction In Action Challenging Department of Interior's Trust Land Policy

The district court in the District of Columbia denied the St. Croix Chippewa Tribe's motion for preliminary injunction challenging a decision of the Secretary of Interior which denied the Tribe's request to place certain land in trust on which the Tribe planned to establish a bingo operation. In *St. Croix Chippewa Indians of Wisconsin v. United States, et al.*, the Tribe claims the denial of its request was unlawful because the policy decision constitutes a rule promulgated in violation of the public notice and comment requirements of the Administrative Procedure Act, and the Secretary failed to exercise his statutory discretion in accordance with departmental regulations. The Tribe seeks to have the court declare the Interior's policy decision invalid, set aside the denial of the Tribe's trust acquisition request and direct that the Secretary review the requirement in accordance with the regulations.

The court determined a preliminary injunction was not appropriate because the Tribe failed to demonstrate it would suffer irreparable injury absent such relief. Instead, the court found the Tribe's claim was economic loss which does not require injunctive relief. The court has not made a final determination on the merits of the case. NARF represents the St. Croix Chippewa Tribe.

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Case Updates continued . . .

Montana Supreme Court Upholds Intervention Into Adoption Proceedings

On September 16, 1986, the Supreme Court in Montana ruled in *In Re The Matter of M.E.M., Jr.*, that a paternal aunt of an Indian child could intervene into adoption proceedings. A member of the Gros Ventre and Assiniboine Tribes of the Fort Belknap Indian Reservation was placed into foster care with a non-Indian family immediately following his birth. Prior to M.E.M.'s birth, a paternal aunt had notified the state social services that she was interested in caring for the child. Subsequently, adoption proceedings were initiated with the non-Indian family. By chance, the aunt learned of the proceedings, and filed a petition for adoption and motion to intervene.

The district court denied her petition and motion. In reversing, the Supreme Court found that under the Indian Child Welfare Act in adoptive placements a preference shall be given to an Indian child's extended family member. Since the aunt was an extended family member, she had an interest and right to participate in the adoption proceedings. The Court remanded the case to the lawer court to determine the adoptive placement of the child. NARF filed an *amicus curiae* brief in the case.

Federal Court Affirms Dismissal of Damages Action

In *Jones v. United States*, the Court of Appeals for the Federal Circuit affirmed the Court of Claims dismissal of a damages action against the federal government. The Court found the action was time-barred because Jones failed to initiate her breach of fiduciary duty claim within six years after the taking of her property.

Tribe Files Suit To Recover Tribal Land

Last fall, NARF filed a land claim suit against the State of New York on behalf of the Stockbridge-Munsee Tribe. The Stockbridge-Munsee Tribe currently has a reservation in the State of Wisconsin. The Tribe seeks the recovery of reservation lands illegally taken by the State. In *Stockbridge-Munsee Community v. State of New York*, the Tribe alleges the lands were taken in violation of the 1790 Indian Trade and Intercourse Act.

NARF Resources & Publications

At this writing, we have just received word of a grant from Chevron, U.S.A. to help purchase a computer printer for the National Indian Law Library.

The grant is a first-time one from Chevron to NARF. Our special thanks to Chevron for its participation with us on behalf of Native American people throughout the country.

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.

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)

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NARF Resources & Publications continued . . .

Bibliography on Indian Economic Development

Designed to provide aid for the development of essential legal tools for the protection and regulation of commercial activities on Indian reservations. Assembled by Anita Remerowski, formerly of NARF, and Ed Fagan of Karl Funke and Associates, this bibliography provides a listing of articles, books, memoranda, tribal codes, and other materials on Indian economic development. An update is in progress. (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 listings. (43 volumes. Price: $820). (Index price: $25.00).

Indian Rights Manual

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 practise 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.)

A Self-Help Manual for Indian Economic Development. This manual is designed to help Indian tribes and organizations on approaches to economic development which can ensure participation, control, ownership, and benefits to Indians. Emphasizing the difference between tribal economic development and private business development, the manual discusses the task of developing reservation economies from the Indian perspective. It focuses on some of the major issues that need to be resolved in economic development and identifies options available to tribes. The manual begins with a general economic development perspective for Indian reservations: how to identify opportunities, and how to organize the internal tribal structure to best plan and pursue economic development of the reservation. Other chapters deal with more specific issues that relate to the development of businesses undertaken by tribal government, tribal members, and by these groups with outsiders. (Approx. 300 pgs. Price: $35.)

Handbook Of Federal Indian Education Laws. This handbook discusses provisions of major federal Indian education programs in terms of the legislative history, historic problems in implementation, and current issues in this radically changing field. (130 pgs. Price: $20.)

1986 Update To Federal Indian Education Laws Manual ($30.00) Price for manual and update ($45.00)

A Manual On The Indian Child Welfare Act And Law Affecting Indian Juveniles. This fifth Indian Law Support Center Manual is now available. This manual focuses on a section-by-section legal analysis of the Act, its applicability, policies, findings, interpretations and definitions. With additional sections on post-trial matters and the legislative history, this manual comprises the most comprehensive examination of the Indian Child Welfare Act to date. (373 pgs. Price: $35.)

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Films and Reports

"Indian Rights, Indian Law." This is a film documentary, produced by the Ford Foundation, focusing on NARF, its staff, and certain NARF casework. The hour-long film is rented from: Karol Media, 22 Riverview Drive, Wayne, NJ 07470 (201-628-9111).

ANNUAL REPORT. This is NARF's major report on its program and activities. The Annual Report is distributed to foundations, major contributors, certain federal and state agencies, tribal clients, Native American organizations, and to others upon request.

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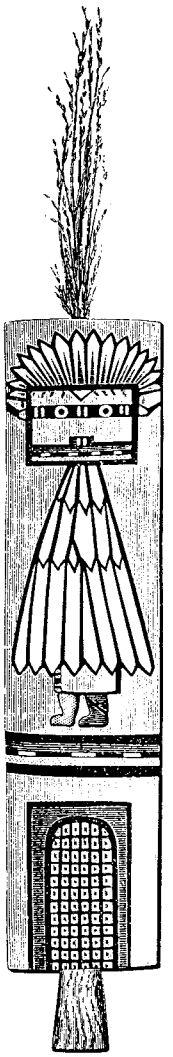

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The Native American Rights Fund is a nonprofit organization specializing in the protection of Indian rights. The priorities of NARF are: (1) the preservation of tribal existence; (2) the protection of tribal natural resources; (3) the promotion of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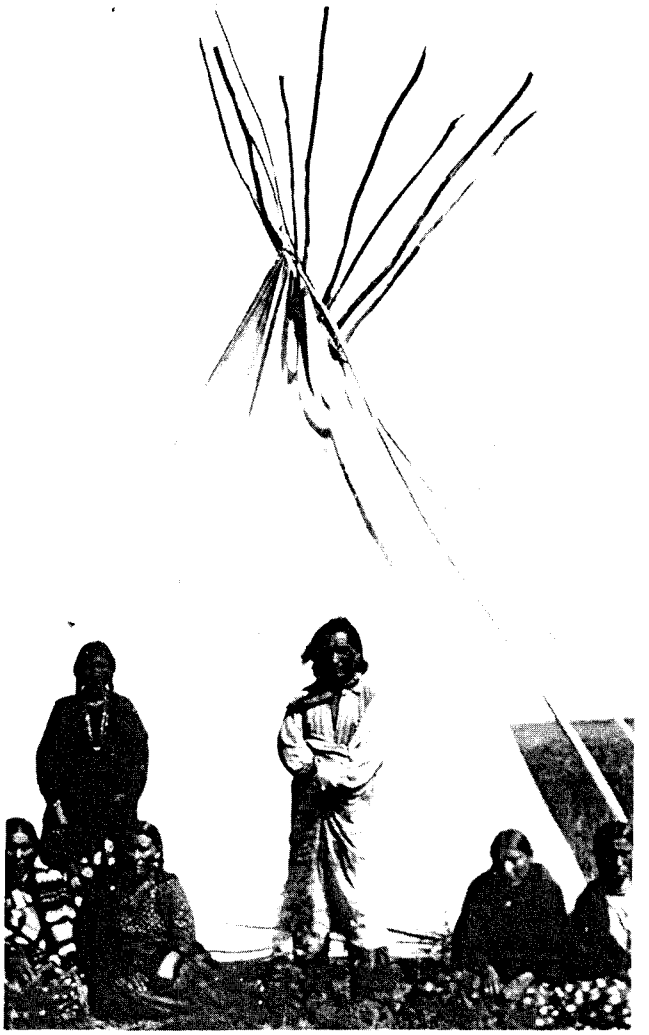

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