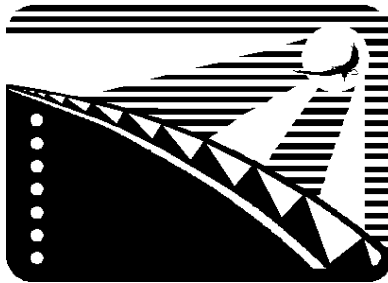


NATIVE AMERICAN GIVING: Legal Questions and Answers

Prepared by
Kathleen Nilles and Wanda Lord

July 2000



**Native Assets Research Center
First Nations Development Institute
11917 Main St.
Fredericksburg, VA 22408
540-371-5615
www.firstnations.org
research@firstnations.org**

Table of Contents

NATIVE AMERICAN GIVING: Legal Questions and Answers

I.	INTRODUCTION	1
II.	GIVING BASICS	1
	A. <i>What are benefits of charitable giving?</i>	1
	B. <i>Is there a minimum level of giving?</i>	1
	C. <i>What about for certain deferred or planned gifts?</i>	1
	D. <i>What vehicles are available to promote Native American causes?</i>	1
III.	ADDITIONAL CONSIDERATIONS FOR TRIBAL MEMBERS	2
	A. <i>To what extent do tribal members (living on or off the reservation) need to be concerned about tax deductions?</i>	2
	B. <i>How can tribal philanthropy be used to reinforce tribal sovereignty?</i>	3
	1. Making direct gifts to tribal governments that are treated as qualified governmental units under Section 7871 of the tax code.....	3
	2. Encouraging private foundations to fund tribal governmental programs.	3
	3. Establishing Native-run nonprofit organizations incorporated under tribal law.	3
	4. Establishing a tribal foundation and/or donor-advised fund program as an integral part of the tribal government.....	3
IV.	WAYS OF GIVING	3
	A. <i>Giving Directly to a tribal government</i>	3
	1. <i>When are such gifts tax-deductible?</i>	3
	2. <i>What if I bequeath a gift to the tribal government through my will?</i>	4
	3. <i>Do the same tax rules apply to programs and/or unincorporated divisions of a tribal government?</i>	4
	4. <i>Can I give to a tribal government through a private foundation?</i>	4
	B. <i>Giving options that enable individuals to pool their donations with others</i>	5
	1. <i>Public charities (also called nonprofit organizations)</i>	5

2.	<i>Community foundations</i>	5
3.	<i>Community Development Financial Institutions (CDFI)</i>	6
C.	<i>Private Foundations</i>	6
1.	<i>How much money do I need to start my own foundation?</i>	6
D.	<i>What if I want more control over the use of my gift, but my assets are not sufficient to create a separate foundation or charitable organization?</i>	7
1.	<i>Restricted gifts</i>	7
2.	<i>Donor-advised funds</i>	7
E.	<i>What if I want to actually operate charitable programs as well as donate money?</i>	8
1.	<i>Publicly-supported charity</i>	8
2.	<i>Private operating foundation</i>	8
F.	<i>What are the most common giving options associated with making a will or formulating a trust?</i>	9
1.	<i>Simple bequest</i>	9
2.	<i>Charitable remainder unitrusts</i>	9
3.	<i>Charitable remainder annuity trusts</i>	9
V.	DISCUSSION OF TYPES OF GIFTS	10
A.	<i>What if I give cash?</i>	10
1.	<i>Need to obtain and keep documentation/acknowledgement of gift</i>	10
B.	<i>What if I give stock/securities?</i>	10
1.	<i>Donation of appreciated, capital gain stock may yield a double tax benefit to the donor.</i>	10
2.	<i>A gift of stock may trigger limits on how much you can give in one year.</i>	11
3.	<i>There may be valuation issues if the stock is not publicly-traded.</i>	11
C.	<i>What if I give real property?</i>	11
1.	<i>If the gifted real estate involves allotted trust lands, you may have to obtain approval from the Bureau of Indian Affairs (BIA).</i>	11
2.	<i>Treatment of appreciated real estate.</i>	12
3.	<i>Need to document value of gifted real estate.</i>	12
D.	<i>What if I give artwork or other collectibles?</i>	12
1.	<i>How do I determine my deduction for a gift involving artwork or historical artifacts?</i>	12
2.	<i>What kind of appraisal procedures does IRS require?</i>	12

3.	<i>Need to document value of gifted artwork and other collectibles.</i>	13
E.	<i>Where can I obtain copies of the IRS forms and publications mentioned in this pamphlet?</i>	13

I. INTRODUCTION

The purpose of this booklet is to provide an overview of legal questions and answers related to charitable giving.

Many Indian people are interested in giving back to their communities or to nonprofit charitable organizations that promote important causes.

This book provides an overview of giving options, and provides information on tax advantages to giving, as well as many other advantages.

II. GIVING BASICS

A. *What are benefits of charitable giving?*

The benefits of charitable giving are numerous and wide-ranging including:

- Providing a means through which economic conditions on Indian reservations may be improved.
- Providing incentives for other individuals and younger generations to become involved in charitable endeavors to further Native American causes.
- Promoting the development of a sense of social responsibility among tribal communities.
- Reducing the donor's federal and state income taxes, and estate and gift taxes.

B. *Is there a minimum level of giving?*

There is no minimum level of charitable giving. In fact, many of the vehicles described below are designed to combine money and other assets contributed by numerous donors to further Native American causes.

C. *What about for certain deferred or planned gifts?*

Certain types of planned giving vehicles are relatively costly to set up. Thus, a donor needs to be aware that legal and accounting fees may consume a disproportionately large part of certain complex giving structures.

D. *What vehicles are available to promote Native American causes?*

There a number of vehicles through which Native American causes may be promoted. Donors are encouraged to select the most appropriate vehicle for contributions based on various factors – including the donor's intended level of

involvement with the charitable organization after a donation is made. Briefly, as further discussed below, a few examples of common vehicles for giving include:

- Direct contributions to tribal governments or government programs.
- Unrestricted or restricted gifts to charitable organizations.
- Community foundations.
- Donor-advised funds.
- Supporting organizations.
- Private foundations.
- Community Development Financial Institutions (CDFI).
- Charitable trusts.
- Wills.

III. ADDITIONAL CONSIDERATIONS FOR TRIBAL MEMBERS

A. *To what extent do tribal members (living on or off the reservation) need to be concerned about tax deductions?*

1. *Federal income tax basics*

Tribal members are subject to U.S. federal income tax unless specifically exempted by a treaty or statute. Virtually all wages earned by tribal members are subject to federal income tax -- whether earned on or off the reservation. Per capita payments received by tribal members may also be subject to federal tax depending on the source and purpose of the payment. For example, per capita payments made under the Indian Gaming Regulatory Act are fully taxable and subject to withholding. Like all U.S. citizens, tribal members can reduce their tax liability by filing a federal income tax return and claiming deductions for items like charitable contributions and home mortgage interest.

2. *State income tax issues*

The degree to which a tribal member is subject to state income tax depends on:

- a) The tax policy/laws of the particular state with jurisdiction over the income taxpayer.
- b) Whether the tribal member is residing on or off the reservation.
- c) Whether the tribal member is working on or off the reservation.
- d) The type and source of the income.

As a general rule, income earned by a tribal member who is both living and working on the reservation will be tax free. However, tribal members do incur substantial state income tax liability under a variety of circumstances.

3. *Estate Tax Issues.*

Like all U.S. citizens, tribal members are subject to the federal estate tax on the transfer of their assets at death to family members or other loved ones. While the dollar threshold for the imposition of estate tax is relatively high, federal estate tax rates are also extremely high (up to 55 percent).

B. *How can tribal philanthropy be used to reinforce tribal sovereignty?*

Tribal philanthropy reinforces tribal sovereignty when donors utilize giving options that are consistent with the concept of the tribe as a governmental unit.

Such options include

1. Making direct gifts to tribal governments that are treated as qualified governmental units under Section 7871 of the tax code.
2. Encouraging private foundations to fund tribal governmental programs.
3. Establishing Native-run nonprofit organizations incorporated under tribal law.
4. Establishing a tribal foundation and/or donor-advised fund program as an integral part of the tribal government.

IV. WAYS OF GIVING

A. *Giving directly to a tribal government*

1. *When are such gifts tax-deductible?*

Under Section 7871 of the Internal Revenue Code, contributions made to a tribal government are tax deductible:

- a) When made to an Indian tribal government that has been recognized as such by the IRS and the Interior Department.
- b) When made for exclusively public purposes. (*Note:* To assure the donor that the money is being used for exclusively public purposes, the tribal government should set up a restricted fund).

SECTION 7871. INDIAN TRIBAL GOVERNMENTS TREATED AS STATES FOR CERTAIN PURPOSES

(a) General rule. An Indian tribal government shall be treated as a State –

(1) for purposes of determining whether and in what amount any contribution or transfer to or for the use of such government (or a political subdivision thereof) is deductible under –

(A) **section 170** (relating to income tax deduction for charitable, etc., contributions and gifts),

(B) **sections 2055 and 2106(a)(2)** (relating to estate tax deduction for transfers of public, charitable, and religious uses), or

(C) **section 2522** (relating to gift tax deduction for charitable and similar gifts);

. . .

(7) for purposes of-

(A) **Chapter 41** (relating to tax on excess expenditures to influence legislation), and

(B) **Subchapter A of Chapter 42** (relating to private foundations).

Source: Internal Revenue Code

2. *What if I bequeath a gift to the tribal government through my will?*

Bequests made to a federally recognized Indian tribal government through a will are deductible for estate tax purposes if they are made for exclusively public purposes.

3. *Do the same tax rules apply to programs and/or unincorporated divisions of a tribal government?*

Yes, any gift made to an “integral part” of an Indian tribal government is treated the same as a gift to the government itself.

4. *Can I give to a tribal government through a private foundation?*

Yes. In a General Information Letter issued by the IRS to First Nations Development Institute (Sept. 8, 1998), the IRS confirmed that a private

foundation grant to a tribal government would be treated as a qualifying distribution, and not as a taxable expenditure.

5. *Can tribal members establish their own 7871 foundation?*

No, by definition, a Section 7871 entity must be a tribal government, or a political subdivision or integral part thereof; therefore, a federally-recognized Indian tribal government must be in control. Tribal members may, however, establish a private foundation or public charity.

B. *Giving options that enable individuals to pool their donations with others*

1. *Public charities (also called nonprofit organizations)*

A public charity is an organization exempt from U.S. federal income tax because it is either:

a) A public institution.

Public institutions generally include governmental units, schools, colleges, universities, some hospitals, and churches. Also, some Native organizations like First Nations Development Institute, American Indian College Fund, and the Native American Rights Fund.

b) A publicly-supported charity.

Publicly-supported charities are charities that receive a substantial part of their support from a governmental unit or a broad spectrum of the general public. Supporting organizations must meet requisite relationship tests to the public institutions or publicly-supported charities to be considered public charities. An example of this entity is a hospital or a church.

c) An organization that supports one or more public institutions or publicly-supported charities (a “supporting organization”).

An example of a supporting organization would be the United Way.

A public charity is usually a 501(c)(3) organization.

2. *Community foundations*

A community foundation is an organization established to support charitable causes in a geographical area. Based on the breadth of its donor base, it generally qualifies as a publicly-supported organization.

3. *Community Development Financial Institutions (CDFI)*

Generally, a CDFI is a community-based lending institution (*e.g.*, a nonprofit community loan fund) whose mission is to invest in and serve economically disadvantaged communities, including targeted Native American communities.

4. *Tribal foundations*

The term “tribal foundation” could refer to either of the following:

- (a) A tribal governmental unit, organized to receive charitable contributions for exclusively public purposes.
- (b) A nonprofit corporation formed under tribal law for charitable purposes.

In the case of the latter, to qualify for the benefits of federal tax exemption (including tax deductibility of contributions), the organization needs to obtain a ruling or determination letter from the IRS; in the case of the former, an IRS letter may not be required if the organization has been listed in one of two IRS Revenue Procedures issued in the 1980s.

C. *Private foundations*

A private foundation is any charitable organization described in section 501(c)(3) that does not qualify as a public charity (discussed above). The purposes of private foundations usually reflect the charitable objectives and purposes of the founder. By establishing a private foundation, the donor has a greater ability to ensure that his or her contribution is used in furtherance of his or her particular charitable goals. Private foundations principally make grants to other charitable organizations in furtherance of their exempt purposes. They are called “private” foundations because they generally derive financial support from only one source (*e.g.*, a family, a corporation, an individual, etc.).

1. *How much money do I need to start my own foundation?*

In light of the organizational and compliance costs associated with establishing and maintaining a private foundation, an initial contribution of \$200,000 or more is generally needed.

- D. *What if I want more control over the use of my gift, but my assets are not sufficient to create a separate foundation or charitable organization?*

You have a number of options, including:

1. *Restricted gifts*

A restricted gift is one in which the donor attaches condition to a specific gift made to a charitable organization.

a. *What kind of conditions can be attached to a specific gift?*

A donor may attach conditions restricting the use of the gift to certain exempt purposes or projects (such as funding for Native American health care) provided that the gift is not restricted to providing benefits for a named individual or members of a particular family. In addition, a donor may not attach conditions to the gift that would likely prevent the charitable organization from obtaining the gift or force it to divest its interest in the gift in the future.

b. *If I make a “restricted gift,” will the charity be required to honor my wishes in perpetuity?*

A charitable organization will generally be required to honor a restricted gift in perpetuity unless the purposes or projects for which the restricted gift was made change so much that the donor would likely have redirected the gift.

c. *How do I determine whether the restrictions I have proposed are appropriate?*

Restrictions that limit the use of the gift to or for certain exempt purposes or projects generally will be appropriate. To determine whether further restrictions are appropriate, a donor should seek advice from a professional financial or tax advisor. The donor may also want to ask the charitable organization whether it feels that it can comply with the restrictions.

2. *Donor-advised funds*

A donor-advised fund allows a donor to get an immediate tax deduction for a gift of cash or property, and retain the right to advise the fund program how and when to disburse the proceeds.

- a. *Is there any cost involved or fees charged when a fund is created?*

There is very little cost involved in establishing a fund. The program sponsor generally picks up most of the cost, but may charge a nominal fee.

- b. *Can I transfer assets out of my fund at a later date?*

No. The gift is irrevocable; the fund legally belongs to the sponsoring organization.

- c. *Can I add to an existing donor fund?*

Yes. Most programs encourage donor-advisors to make additional contributions.

- d. *Can a tribal government sponsor a donor-advised fund program?*

Although the IRS has not formally ruled on the issue, it appears that any entity eligible to receive charitable contributions can establish a donor-advised fund program.

3. *Supporting organizations*

A donor may want to contribute to a charitable organization which supports one or more public charities. These organizations may have been established or have programs to support certain purposes of the public charities.

E. *What if I want to actually operate charitable programs as well as donate money?*

1. *Publicly-supported charity*

An individual may wish to establish his or her own publicly supported charity to conduct programs that further exempt purposes selected by the individual. The publicly supported charity would then need to solicit and receive financial support from a broad spectrum of the general public.

2. *Private operating foundation*

A private operating foundation is a private foundation that actively conducts its own charitable programs and that devotes substantially all of its earnings and substantially more than half of its assets directly to the conduct of such charitable programs.

F. *What are the most common giving options associated with making a will or formulating a trust?*

1. *Simple bequest*

A donor may make a contribution to a charitable organization in his or her will.

2. *Charitable remainder unitrusts*

A charitable remainder unitrust is a trust which pays a variable annuity (based on a fixed percentage between 5 percent and 50 percent of the annual net fair market value of its assets) to one or more noncharitable persons (if an individual, the individual must be alive at the time of the creation of the trust) for a specified number of years (up to a maximum of 20 years) or for the life or lives of any individuals and the remainder of which is irrevocably transferred to, or paid to, a charitable organization upon the expiration of the term of years or death of the individual or individuals.

3. *Charitable remainder annuity trusts*

A charitable remainder annuity trust has the same requirements as a charitable remainder unitrust except that the annuity paid to any noncharitable persons is a sum certain which is not less than 5 percent and not more than 50 percent of the initial fair market value of the assets placed in the trust.

4. *Charitable lead trusts*

A charitable lead trust is essentially the reverse of a charitable remainder unitrust or charitable remainder annuity trust. In such a trust, the donor transfers property to a trust that provides for an annuity (either variable or sum certain) to be paid to a charity and the remainder to either be returned to the donor or transferred to an individual (usually a family member).

G. *What should I investigate before selecting a custodian/administrator for my fund?*

[Generally, a donor should investigate the custodian/administrator's familiarity with the U.S. federal income taxation of charitable organizations. The custodian/administrator should also be fairly knowledgeable with respect to federal, gift and estate tax issues related to contributions to charitable organizations. A donor likely would also want to ensure that the custodian/administrator is responsive and will use the funds for the exempt purposes delineated by the donor.]

H. *What types of reports should I expect to receive with respect to my contribution?*

You should receive a letter or statement acknowledging your contribution and setting forth the exempt purposes for which it will be used. You may also receive literature (newsletters, pamphlets, etc.) regarding the charitable organization's mission and upcoming fundraising activities. A donor may also obtain a copy of the charitable organization's annual tax return, which contains information about its activities and financial operations, upon request.

I. *Can I expect to be asked to serve on the board if I make a large contribution?*

A donor should not expect to be asked to serve on the board of a charitable organization as a result of making a large contribution. However, some organizations acknowledge major donors by offering membership in a donor council or club.

V. DISCUSSION OF TYPES OF GIFTS

A. *What if I give cash?*

1. *Need to obtain and keep documentation/acknowledgement of gift.*

Cash contributions include those paid by cash, check and credit card. For contributions of less than \$250, a donor must keep one of the following for each separate contribution:

- a) A cancelled check or readable statement.
- b) A receipt or acknowledgement from the charitable organization.
- c) Other reliable written records made or small gifts received (such as buttons) near or at the time of the contribution.

For contributions of \$250 or more, the donor must have an acknowledgement of the contribution from the charitable organization.

B. *What if I give stock/securities?*

1. *Donation of appreciated, capital gain stock may yield a double tax benefit to the donor.*

The donation of appreciated stock that would have generated long-term capital gain if sold may yield a double tax benefit to the donor because the donor may be entitled to deduct the fair market value of the securities (subject to certain limitations) as a charitable contribution (unless the stock is non-publicly traded stock contributed to a private foundation). The donor is not taxed on the appreciation of the stock and may claim a

charitable deduction with respect to such appreciation. For more information, see IRS Publication 526 (Charitable Contributions).

2. *A gift of stock may trigger limits on how much you can give in one year.*

The charitable deduction for gifts of appreciated, capital gain stock may be limited to 30 percent of the donor's contribution base (generally, the donor's adjusted gross income) for gifts to public charities and 20 percent of the donor's contribution base for gifts to private foundations. Donations in excess of the limits may be carried forward for five years.

3. *There may be valuation issues if the stock is not publicly-traded.*

If the donor contributes non-publicly traded stock for which he or she claims a deduction of more than \$5,000 but \$10,000 or less, the donor must attach a partially completed appraisal summary (Parts I and IV of Schedule B, IRS Form 8283) to his or her return. For deductions in excess of \$10,000, the donor must (i) obtain a qualified appraisal of the stock by a qualified appraiser and (ii) attach to his or her return a completed appraisal summary (Schedule B of IRS Form 8283). For more information, see IRS Publication 561 (Determining the Value of Donated Property).

C. *What if I give real property?*

1. *If the gifted real estate involves allotted trust lands, you may have to obtain approval from the Bureau of Indian Affairs (BIA).*

Probate of Indian estates. BIA determines the heirs and beneficiaries of an Indian decedent's trust or restricted real estate and transfers the decedent's trust or restricted real estate to such persons. However, BIA does not determine the heirs and beneficiaries of property other than trust or restricted real property in an Indian decedent's estate.

Accordingly, BIA does not review or approve the distribution of:

- **Real or personal property** in an estate of an Indian decedent that is not trust or restricted property.
- **Restricted property** derived from allotments in the estates of members of the Cherokee, Choctaw, Creek and Seminole Tribes in Oklahoma unless the trust or restricted property is derived from other tribal allotments.
- **Trust or restricted interests** derived from allotments made to Osage Indians in Oklahoma and Osage headright interests unless the trust or restricted property is derived from other tribal allotments.

Proposed regulations issued by BIA outline the procedure for obtaining BIA approval. See 65 Fed. Reg. 43874-43952 (July 14, 2000). **[We did not find anything in the proposed regulations that addressed whether advance BIA approval is required for all wills of enrolled tribal members. Under the definition of will, the only requirement was that the will was attested to by two disinterested adult witnesses.]**

2. *Treatment of appreciated real estate.*

A donor may claim a charitable deduction for the fair market value of appreciated real estate unless the property is contributed to a private foundation (other than a private operating foundation). If the property is contributed to a private non-operating foundation, the donor's charitable deduction is generally limited to his or her basis in the property.

3. *Need to document value of gifted real estate.*

A donor who claims a charitable deduction of more than \$5,000 for a gift of real estate will need to have an appraisal report on the property from a qualified appraiser and attach a completed appraisal summary (Schedule B of IRS Form 8283) to the donor's tax return.

D. *What if I give artwork or other collectibles?*

1. *How do I determine my deduction for a gift involving artwork or historical artifacts?*

For deductions for gifts of artwork or historical artifacts in excess of \$5,000, the donor should have a qualified appraisal performed by a qualified appraiser.

2. *What kind of appraisal procedures does IRS require?*

Appraisals of artwork or other historical artifacts should be performed by a qualified appraiser (preferably by an individual specializing in the kind and price range of the art being appraised) and include:

- a) A complete description of the object.
- b) The cost, date and manner of acquisition.
- c) The history of the item, including proof of authenticity.
- d) A photograph of a size and quality fully showing the object.
- e) The facts on which the appraisal was based, including sales or analyses of similar works, quoted prices in dealer catalogs,

exhibitions at which the art was displayed, standing of the artist, etc.

For more information, see IRS Publication 561 (*Determining the Value of Donated Property*).

3. *Need to document value of gifted artwork and other collectibles.*

For gifts of artwork and other collectibles for which the donor claims a deduction of more than \$5,000, the donor must have a qualified appraisal by a qualified appraiser and attach a completed appraisal summary (Schedule B of IRS Form 8283) to his or her tax form. If the donor claims a deduction of \$20,000 or more for gifts of artwork or other collectibles, the donor must attach to his or her return:

- a) A completed appraisal summary.
- b) A complete copy of the signed appraisal.

If the art or other collectibles contributed has been appraised at \$50,000 or more, the donor should request a Statement of Value for that item from the IRS. For more information, see IRS Publication 561 (*Determining the Value of Donated Property*).

E. *Where can I obtain copies of the IRS forms and publications mentioned in this pamphlet?*

All IRS forms and publications mentioned in this pamphlet are available at www.irs.ustreas.gov under “Search Forms and Publications.”