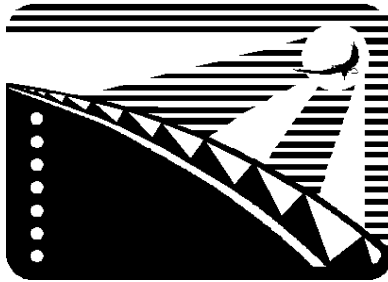


# **Tribal Giving: What are the Advantages and Disadvantages of Formalized Philanthropy?**

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# INTRODUCTION

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The purpose of this handout is to provide general information regarding some of the issues involved with tribal philanthropic giving. It is presented with two components. The first component addresses tribes as the donor or grantmaker. The second component presents tribes as fundraisers or grantseekers. Both components are formatted to address the most frequently asked questions such as:

- 1) Why formalize your tribe's giving?
- 2) What are the options and vehicles available for giving?
- 3) What are the legal regulatory considerations?
- 4) Where are there resources or further information on tribal giving?

The following material is not intended, nor should it be construed, as legal advice. The services and advice of a lawyer, especially within the areas of tax and tribal law, are essential and highly recommended if/when implementing any of the philanthropic initiatives mentioned in this booklet.

# COMPONENT ONE: FORMALIZED TRIBAL GRANTMAKING

When contemplating the creation of a formalized process of giving, there are several options available to tribes. This component highlights the most commonly asked questions, and outlines the issues that a tribe may need to consider.

## I. Selecting the Right Vehicle for Your Tribe to Promote Native American Causes:

### 1. *Why create a formal tribal giving program?*

There are several advantages for a tribe to create a formal giving program:

- Provides a means for the values and aspirations of the tribe to be realized.
- Brings visibility, awareness, and builds public relations regarding tribal giving.
- Allows for tribal members who give to use the amount donated to be deducted against their income tax.
- Allows the tribe to collaborate with other donors to affect change and improvement.
- Allows the tribe to direct its giving and to focus its resources.
- May provide the tribe the opportunity to play a more active role in the causes to which it contributes.

### 2. *What are the major options available to tribal governments in creating a vehicle to promote Native American causes?*

There are a number of vehicles through which a tribe may promote philanthropic causes. Briefly, a few examples of common vehicles for giving are provided below. Each of the vehicles described below has different tax consequences for both the organization and the donor. The information below contains general characteristics of these tax consequences only; the advice of an experienced tax attorney is essential when determining the best vehicle.

- ***A tribe can create a tribal philanthropic program that functions as a Section 7871 organization.*** A tribe can develop a program dedicated to philanthropic work in such areas as education, health, or social services. Donations to this program will be tax deductible if the tribal government meets the requirements of Section 7871 of the Internal Revenue Code (discussed in greater detail below). The Spirit of the Salmon Fund (part of the Columbia River Inter-tribal Fish Commission) is one such organization that operates as a 7871 philanthropic program.

- ***A tribe can create a charitable nonprofit organization (often called a 501 (c)(3) organization).*** The nonprofit must first be incorporated under tribal or state law, and then must apply for 501(c)(3) status from the IRS. The nonprofit can receive unrestricted gifts or restricted gifts. An unrestricted gift allows the organization to have complete discretion to use the gift whereas with a restricted gift, the donor specifies how the gift is to be used.
- ***A tribe can start a community foundation.*** A community foundation is a tax-exempt, nonprofit, autonomous, public-supported charitable organization operated primarily as a permanent collection of endowed funds for the long-term benefit of a defined geographic area. Donations made to such an organization are deductible for the donor.
- ***A tribe can start a private foundation.*** A private foundation is a charitable organization that receives funding primarily from one source, as opposed to a public foundation that receives funding from many sources; private foundations are treated differently than public organizations for tax purposes, but can still receive tax deductible donations.

Each of these vehicles are created either through Section 501(c)(3) or Section 7871 of the Internal Revenue Code.

### ***3. What is the history of Section 7871?***

In 1982, Congress passed the ***Indian Tribal Governmental Tax Status Act***. This piece of legislation, codified as Section 7871 of the Internal Revenue Code, treats tribal governments as state governments for certain tax purposes. This allows tribal governments, and their political subdivisions, to receive tax-deductible donations.

### ***4. What is the major difference between Section 501(c)(3) and Section 7871?***

Section 501(c)(3) allows for the creation of a charitable nonprofit organization, usually done under state law. These types of organizations are more commonly known, and the process for creating them is easier. Section 7871 treats Indian tribes like states for most federal tax purposes, including determining whether a contribution to a tribal government is deductible as a charitable contribution under the Internal Revenue Code Section 170. Consequently, since a Section 501(c)(3) organization is typically created under state law, it will be subject to state laws, whereas a Section 7871 entity will not. A Section 7871 entity must either be a tribal government, or an “integral part” of a tribal government, the determination of which is made by the Internal Revenue Service. (*Note: such a*

determination is made by requesting a Private Letter Ruling confirming an Indian tribe's status under Section 7871. As a general rule, an experienced tax counsel working closely with the Indian tribe's general counsel should handle submission of a request for a private letter ruling).

**5. Are there any requirements to qualify as a Section 7871 entity?**

**Yes.** To qualify for the tax benefits of Section 7871, a tribal government must be recognized by the Department of the Treasury, in consultation with the Department of the Interior, as an entity that exercises sovereign powers. In other words, only federally recognized Indian tribes are eligible for Section 7871 treatment. In addition, to qualify for Section 7871 status, a political sub-division of a tribal government must exercise one of three sovereign powers; the power to tax, the power to police or the power of eminent domain. Consequently, due to the nature of Section 7871, creating an organization under this section requires the advice of an experienced counsel.

**6. Can tribal members establish their own Section 7871 entity?**

**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.

**7. Can several different tribal governments form a consortium for the purposes of Section 7871?**

Some Indian tribes have organized intertribal consortia as Section 501(c)(3) corporations, and in at least two rulings – one by the 10<sup>th</sup> Circuit Court of Appeals and the other by the National Labor Relations Board – those consortiums have been given quasigovernmental status for the purposes of the federal laws at issue. Although no general statement of law can be drawn from these two cases, they suggest that the formation of intertribal consortiums for governmental purposes is an option that Indian tribes may want to consider. Obtaining legal advice before organizing such a consortium is essential because the law has just begun to develop in this area.

## COMPONENT TWO: FORMALIZED TRIBAL FUNDRAISING

When fundraising from foundations or other formalized philanthropic vehicles, there are several areas of information or questions that may arise for donors. This component highlights the most commonly asked questions. Many funders may ask for similar information when considering your grant.

### I. Parameters of Fundraising

#### ***1. When giving directly to tribal governments, 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).

#### ***2. 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.

#### ***3. Can a tribal government receive a gift through a private foundation?***

**Yes.** In a General Information Letter issued by the IRS to First Nations Development Institute (dated 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. Briefly, a qualifying distribution is a donation made to a charitable organization meeting the requirements set out in the Internal Revenue Code, therefore making the donation qualify as deductible for the donor’s tax purposes.

#### ***4. What are the advantages of Section 7871 in relation to fundraising?***

Section 7871 entities are not subject to annual reporting requirements, charitable substantiation and disclosure rules or the Unrelated Business Income Tax (UBIT) rules that apply to Section 501(c)(3) organizations. However, there are some disadvantages with Section 7871 entities. First, contributions made to Section 7871 entities must be used for public purposes – a term that is not clearly defined in case law and rulings. Second, all foundations will require

reporting and accountability for funding expenditures and many will require outside audits whether or not such an audit is required by Section 7871. Third, some private foundations are still hesitant to make donations to entities with unclear public charity status.

## II. Governance Considerations

### ***1. What are the governing requirements for a Section 501(c)(3) organization?***

When creating an organization under Section 501(c)(3), the Indian tribe must be aware of the governing instruments required by all applicable federal and state law. These governing instruments will determine the structure and scope of the organization. Briefly, the following are some of the common features of the governing instruments required by Section 501(c)(3):

- Purpose clause setting out the purposes for which a charitable organization can be created.
- Private inurement prohibition whereby it is stated that none of the organizations' earnings shall be used for the benefit of a private individual.
- A plan to distribute the assets of the organization if and when it is dissolved – the assets cannot go to a private individual.
- The organization cannot engage in any political campaigning, and lobbying should be kept to a minimum so that it does not become a substantial part of the organization's activity.
- There are additional requirements under the Internal Revenue Code Section 508(e) for private foundations.

In addition, there are state law requirements that must be followed. Two points must be noted. First, in general, state law is inapplicable to tribal and Indian activities in Native American communities. Consequently, the issue of whether state law is applicable to a tribally created entity (a tribally created nonprofit corporation) is a matter requiring consultation with experienced legal counsel. Second, assuming state law does apply, each state will have different requirements that must be followed. However, some essential elements common to all states include:

- Board of Directors – each state has a minimum and maximum requirements, and may require the board to reflect community representation.
- Articles of Incorporation – a document that must be filed with the state office setting out the organization's names, purpose, names and addresses of registered agents and incorporators, and the procedure for dissolution of the organization and amending the articles of incorporation.

- Bylaws – provisions concerning the specific framework as to how the organization will be governed.

**2. *What are the governing requirements for a Section 7871 entity?***

While there are no specific requirements relating to governance in Section 7871, the nature of Section 7871 does require certain characteristics. The Internal Revenue Service’s Revenue Procedure 84-36 states:

“ . . . that a subdivision of an Indian tribal government shall be treated as a political subdivision of a state if (and only if) the Secretary of the Treasury determines (after consultation with the Secretary of the Interior) that such subdivision has been delegated the right to exercise one or more of the substantial governmental functions of the Indian tribal government.”

In practical terms this means the entity created under Section 7871 must satisfy the Secretary of the Treasury that it has been delegated sovereign powers from the tribal government, specifically, the power to tax, to police, or eminent domain. In this sense, the Section 7871 entity must have a governing structure similar to a government body as opposed to a business corporation.

**3. *In a Section 7871 entity, does the tribal government have control over the organization?***

**Yes.** Since the Section 7871 entity is a political subdivision of the Indian tribal government, the government will have control over the entity.

**4. *In a Section 501(c)(3) organization, does the tribal government have control over the organization?***

**No.** If a separate charitable organization is established, the governing body and the staff of the organization will be legally separate from those of the Indian tribe, even if officers and the directors of the organization are also members of the tribal government. Although an organization can later be dissolved, the directors and officers of the organization, not the tribal government, can only make such a decision.

**5. *What accountability standards are required for a Section 7871 entity?***

Section 7871 organizations **must** establish their own accountability to their donors. It should be noted that the Internal Revenue Code specifically states that the deductibility of a donation to a Section. 7871 organization is dependent on the gift being “exclusively for public purposes.” It is assumed that tribes, and their political subdivisions will provide fiscal accountability for charitable contributions.



## APPENDIX: FURTHER RESOURCES

### Publications

The following publications provide a more in-depth understanding of formalized tribal giving:

Adamson, Rebecca & Berry, Mindy, The Wisdom of the Giveaway: A Guide to Native American Philanthropy (New York: Centre for the Study of Philanthropy, 2000).

Nilles, Kathleen, Endreson, Douglas B.L., Locklear, Amy, & Trexler, Jeffrey A., Giving with Honor: A Legal Reference on Charitable Activities of American Indian Tribes, (Washington D.C: Council on Foundations, 1998).

### Tribal Foundations

The following organizations are either tribal foundations created through Section 501(c)(3) or Section 7871 or organizations that have experience in working with such entities.

Hopi Foundation  
P.O. Box 169  
Hotevilla, AZ 86030  
Phone: (928) 734-2380  
Web address: <http://www.hopifoundation.org>

Inter Tribal Council of Arizona, Inc.  
2214 North Central Avenue, Suite 100  
Phoenix, AZ 85004  
Phone: (602) 258-4822  
Fax: (602) 258-4825  
Web address: <http://www.itcaonline.com>

Spirit of the Salmon Fund  
of the Columbia River Inter-Tribal Fish Commission  
729 NE Oregon, Suite 200  
Portland, OR  
Phone: (503) 238-0667  
Fax: (503) 235-4228  
Web address: <http://www.critfc.org>

The Chickasaw Foundation  
P.O. Box 1726  
Ada, OK 74821-1726  
Phone: (580) 421-9030  
Web address: <http://www.Chickasaw.net>

## **Organizations Working in Native American Philanthropy**

The following organizations have aided the development of Native American philanthropy for a number of years, and are able to provide further information.

First Nations Development Institute  
The Stores Building  
11917 Main Street  
Fredericksburg, VA 22408  
Phone: (540) 371-5615  
Fax: (540) 371-3505  
Web address: <http://www.firstnations.org>

Native Americans in Philanthropy  
151 East County Road B2  
Little Canada, MN 55117  
Phone: (651) 766-8777  
Fax: (651) 766-0012  
Web address: <http://www.nativephilanthropy.org>

## **Individuals Working in Native American Philanthropy**

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The following individuals have experience working with Indian tribal governments in either the area of philanthropy or taxation:

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Web address: [www.gcd.com](http://www.gcd.com)

## **Listserv Discussion on the Internet**

This listserv allows for individuals and groups interested in promoting Indian tribal sovereignty through philanthropic vehicles to post, discuss, and share ideas over the Internet.

Sovereign Philanthropy  
<http://www.groups.yahoo.com/group/SovereignPhilanthropy>