4.0 ENVIRONMENTAL LAW ASPECTS

4.1 JURISDICTION

4.1.1. Introduction

This section of the environmental permit analysis seeks to clarify which jurisdictions have the right to regulate development projects constructed and operated by an Indian tribe or a business entity composed in part by an Indian tribe. This analysis heavily draws upon the Draft Manual describing the Tribal Environmental Review Process, prepared by Arnold and Porter for CERT.

The focus of this analysis is on the applicability of state law to such a development project. This focus is based on two considerations: (1) In the case of the construction and operation of a synfuels facility on the Crow reservation, the Tribe can probably impose tribal regulations on the development because of the consensual nature of the relationship between the Tribe and other entities involved (Merrion vs. Jicarillo Apache Tribe, 71 L.Ed.2d 21 (1982)); and (2) There is little question that the federal government has the power to apply its laws to Indian reservations. This power is rooted in the Constitution's grant of exclusive authority to the federal government to regulate commerce with the Indian tribes. As was noted by Arnold and Porter, many of the federal environmental statutes, by their own terms, are made applicable to Indians or Indian lands. (See, for example, the Federal Water Pollution Control Act (33 U.S.C. §§ 1251 and 1362(4)); the Solid Waste Disposal Act (42 U.S.C. §§ 6901, 6903(13)); the Surface Mining Control and Reclamation Acts (30 U.S.C. §§ 1201, 1281(9) and 1300).)

It is concluded that a determination whether a particular state statute is applicable to a development project, such as the proposed synfuels facility, will be predicated upon an analysis of several key elements identified in

4.1.1 (Continued)

decisions of the United States Supreme Court. Those elements include (1) Is the subject area which the state seeks to regulate already comprehensively regulated by the federal government or by the tribal government; (2) Does the state statute interfere with the purposes of federal statutes pertaining to Indian tribes; (3) Does the state statute interfere with the Indian Tribe's right to self-government; (4) What is the history of treaties between the United States and the Indian tribe (Crow) and the statutory history pertaining to the Crow Indians; (5) To what State-Indian tribe relationship have the Crows previously accommodated themselves; (6) Is the project on an Indian reservation; and finally, (7) What legitimate state interests are involved. Unfortunately, this long list of considerations does not lend itself to easy applicability.

Additionally, it should be noted that to the best of our knowledge no cases decided by the Unites States Supreme Court have presented a factual situation in which a business entity was composed partially of an Indian tribe and partially of non-Indian interests. Therefore, it is difficult to anticipate how the Supreme Court would resolve a controversy involving such a fact pattern. Additionally, of course, it is unclear whether the State of Montana will assert that its various regulatory statutes do apply to the construction and operation of a synfuels plant built in part by the Crow tribe. All these factors will have to be explored and evaluated if the synfuels project is pursued.

4.1.2 Applicability of State Laws to Indian Tribes

Although historically federal law rather fully protected the autonomy of Indian tribes, making state law inapplicable in Indian country over either Indians or non-Indians (see Worchester v. Georgia, 31 U.S. (6 Pet.) 515 (1832)), that concept has been eroded with time. Since about 1970, the United States Supreme Court has issued numerous decisions in the area of

4.1.2 (Continued)

Indian law. Although these cases still generally, although not universally, protect Indians on Indian reservations from the application of state law (see McClanahan v. State Tax Commission of Arizona, 411 U.S. 164 (1973)), the law of jurisdiction is far less clear when the issue is whether state law applies to the activities of non-Indians on an Indian reservation. Suffice it to say that the outcome will be even more difficult to determine if non-Indians are involved with Indians on land which is not reservation land, but in which the Indians have a mineral or other interest. As indicated in the Introduction, the Supreme Court and lower federal courts seeking to implement the rules articulated by the Supreme Court, look at numerous factors in deciding whether or not a particular state law is applicable, although generally the same factors, albeit not necessarily all of them, are considered by the Supreme Court in deciding any given case, the emphasis of the Courts seems to vary from case to case. The underlying analytic construct on which the Court is predicating its decisions is not readily discernible.

Therefore, the most helpful thing that this analysis can do is to describe the factors, with factual examples highlighted by individual cases, relied upon by the Supreme Court.

4.1.2.1 Preemption and Right of Self Government

Generally the first factor considered by the Supreme Court is whether the law in question has been preempted. This is perhaps one of the most difficult areas in which to fathom the direction which the Supreme court is taking. For example, during 1980 the United States Supreme Court decided at least three Indian cases in which preemption played a big role in the Court's analysis. Yet the outcome of the various cases do not appear to be totally consistent.

4.1.2.1 (Continued)

In White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980), the Court considered whether the State of Arizona could apply its motor license and fuel use tax to Pinetop Logging Company. That entity is an enterprise consisting of non-Indian corporations authorized to do business in Arizona and operating solely on the Fort Apache Reservation. The Apache Tribe is involved in timber harvesting. Said harvesting plays a very important role in contributing to revenues used to fund the tribe's governmental process. The tribe contracted with Pinetop Logging Company to perform certain services for the tribal corporation which the tribal organization cannot itself carry out economically. Pinetop employs tribal members, and its activities are performed solely on the Fort Apache Reservation. The roads which Pinetop uses are not built by the state. Basically, the state provides no services to Pinetop. There is a pervasive federal scheme of regulation pertaining to timber harvesting on Indian reservations. Those regulations are promulgated by the Department of Interior.

The Court held the federal timber harvesting regulatory scheme is so pervasive as to preclude the additional burden sought to be imposed by the state. In a variety of ways the assessment of state taxes would obstruct federal policies (Congressional statutes encouraging tribal self-sufficiency and economic development). Equally important in the Court's consideration was the fact that the state was unable to identify any regulatory function or service it performed that would justify the assessment of taxes for Pinetop's activities on Bureau and Tribal roads within the reservation. Additionally, the Court noted that the economic burden of the taxes would ultimately fall on the tribe. For these reasons the Court judged that the state taxes are inapplicable.

4.1.2.1 (Continued)

It should be noted that the value of the timber harvesting business, in which Pinetop and the Apache tribe are involved, is generated by the reservation. Other Court decisions suggest that the sources of a business' value an important role in considering the relative interests of the tribe and the state.

In contrast to the White Mountain decision, in Washington v. Confederated Tribe, 447 U.S. 134 (1980), the Court held that the State of Washington could impose cigarette taxes on non-tribal members purchasing cigarettes on the tribal reservation in tribal smoke shops. Here, the Court noted that the Indian tribes did have their own cigarette sales and taxing schemes. Also, the tribes were involved to a greater or lesser extent in the operation of the smoke shops in question. The Court also noted that the Indian Tobacco dealers made a large majority of their sales to non-Indians who journeyed to the reservations to take advantage of the claimed tribal exemption from state cigarette and sales taxes. All parties concurred that if the state were able to tax sales by Indian smoke shops and eliminate the savings to non-Indians, the stream of non-Indian bargain hunters to those stores would dry up. Hence, the Indian retailers' business to a large degree depended upon their tax-exempt status.

The tribes argued that both their involvement in the operation of the smoke shops and their taxation of cigarette marketing on the reservation ousted the state from any power to exact its taxes. The Court held that the principles of Indian Law, whether stated in terms of preemption, tribal self-government, or otherwise, do not authorize Indian tribes to market an exemption from state taxation to persons who would normally do their business elsewhere. The value marketed by the smoke shops to persons coming from outside the reservation is not generated on the reservation by activities in which the tribes have a significant interest. Moreover, the Court held various federal statutes cited do not preempt Washington's sales

4.1.2.1 (Continued)

and cigarette taxes. Although those statutes, including the Indian Traders' Statutes, 25 U.S.C. 261, et seq., incorporate the congressional desire comprehensively to regulate businesses selling goods to reservation Indians for cash or exchange, no similar intent is evident with respect to sales by Indians to non-members of the tribe. Additionally, the Court stated that neither the fact that the Department of Interior approved the Indians' taxing schemes nor the fact that the tribes exercise congressionally sanctioned powers of self-government, means that Congress has delegated to the tribes the power to preempt state taxes.

The Court also held that the State of Washington's taxes do not infringe the right of reservation Indians to make their own laws. Although the tribes do have an interest in raising revenues for central government programs, that interest is strongest when the revenues are derived from value generated on the reservation by activities involving the tribe, and when the taxpayer is the recipient of tribal services. The State also has a legitimate governmental interest in raising revenues, and that interest is likewise strongest when the tax is directed at off reservation value and when the taxpayer is the recipient of state services. Here the Court pointed out that the state taxes do not burden commerce that would exist on the reservation without respect to the tax exemption.

In Central Machinery Company vs. Arizona State Tax Commission, 448 U.S. 160 (1980), the question before the Court was whether the State of Arizona could impose taxes on the sale of farm machinery to an Indian tribe when the sale took place on the Indian reservation but was made by a corporation that did not reside on the reservation and was not licensed to trade with the Indians. The Court predicated its decision on preemption. The Statutes it relied upon are the pervasive Indian Trading statutes promulgated by the federal government. The Court found that

4.1.2.1 (Continued)

the Arizona tax is invalid as applied here, because of the pervasive federal regulatory scheme. It reached this decision despite the fact that the businesses in question were not licensed under the Indian Trading statutes.

Apparently a key element in recent Court considerations regarding preemption is whether the state laws in question, will negatively impact a business in which the value is actually generated on the Indian reservation. Hence, if there are federal laws or Department of Interior regulations which regulate a synfuels facility, assuming that the facility is on the reservation, then an argument could be mounted for the proposition that state laws relating to the same subject matter are preempted, and further that such state statutes interfere with those policies of the Indian Reorganization Act, etc., encouraging tribal self sufficiency.

How a lower court deals with these questions is best demonstrated by Crow Tribe of Indians vs. State of Montana, 650 Fed.2d 1104 (9th Cir., 1981). It is the Ninth Circuit that has jurisdiction over the Crow Reservation. In this case the issue before the Court was whether the State of Montana's imposition of severance taxes on coal mined by non-Indians (Westmoreland) in the ceded area, is valid. Since the Court reversed a lower court decision that the tribe had failed to state a claim, the decision is not a final adjudication of the issues. In it, however, the Court articulated the rules to be utilized by the District Court on remand when it tries the factual issues.

First it is important to note that this case states that the ceded strip, where the Crows do not own surface rights but do own the rights to underlying minerals, is not part of the Crow Tribal Reservation. (See Littlelight vs. Crist, 649 Fed.2d 683 (9th Cir., 1981))

4.1.2.1 (Continued)

The Court, decided that the severance tax in question is not on the tribe, but rather on the producer of the tax. However, using a preemption analysis, the Court determined that to the extent the tribe's allegations are correct, the Montana severance tax would directly and substantially thwart policies underlying the Mineral Leasing Act of 1938. Those policies included the goals of achieving uniformity in the law governing mineral leases on Indian land; of achieving broad policies of the Indian Reorganization Act--namely tribal governments being revitalized; and of encouraging tribal economic development. The Montana severance tax would prevent the Crow tribe from receiving a large portion of the economic benefits of its coal. The Court stated that some economic impact on the tribe can be justified if the state's interest in imposing the tax is legitimate. Revenue raising purposes are legitimate. However, the Montana severance tax has an additional purpose of having the state share in the wealth of a non-renewable resource. While such purpose is legitimate in areas of the state over which the state has unfettered jurisdiction, the state has no legitimate interest in appropriating Indian mineral wealth. An additional purpose of the Montana severance tax is discouraging resource waste. Such regulation conflicts with the Mineral Leasing Act's purpose of allowing tribes to control the development of their own mineral resources.

The Court noted that the State of Montana does assert some legitimate interests which may affect the ultimate outcome of the litigation. Among those are the following: Large scale mining operations in rural areas place great strains on state and local governments to provide roads, schools, utilities, fire and police protection, recreation or health facilities, and other more subtle benefits such as a trained work force and an organized government and system of law. The coal miner, although he works on the reservation or the ceded strip, will undoubtedly be using state services and burdening state government. In addition, mining on reservation or ceded strip could cause significant environmental effects elsewhere, such

4.1.2.1 (Continued)

as ground and surface water pollution, air pollution, and solid waste disposal problems. The state may encounter substantial costs in dealing with these effects. The Court, however, stated that it suspects these legitimate interests will not be shown to be enough to save the severance tax from fatal conflict with the purpose behind the 1938 Mineral Leasing Act. However, a tax carefully tailored to effectuate the state's legitimate interest might survive. The Court also noted that the fact that Westmoreland mine is on the ceded strip may alter the balance of responsibilities between state and tribal government. The Court distinguished the factual situation in this case from that in Washington vs. Confederated Tribes, supra, on the basis that here the state is attempting to tax the tribe's mineral resources, and hence potentially cutting to the heart of the tribe's ability to sustain itself.

This case, although not finally decided, sheds more light on the type of factual situation the synfuels facility will engender than any other cases reviewed. It suggests that each law of the state will have to be weighed against the interests of the tribe and the laws of the federal government in the area. Together with the Supreme Court opinion in Washington vs. Confederated Tribes this case also suggests that the motion of interference with tribal self-government becomes a more powerful argument when the state attempts to interfere with a business of value to the tribe and deriving its value from the reservation or Indian mineral wealth.

4.1.2.2 History of Treaties and Statutes

The treaty and statutory history of an Indian tribe, as well as the relationship that has in fact developed between the Indian tribe and state, can also play a prominent role in the Court's decision. Examples of this type of analysis are found first in Puyallup Tribe vs. Washington Game Department, 433 U.S. 165 (1977). This is perhaps the single most

4.1.2.2 (Continued)

surprising case rendered by the Supreme Court during the 1970's. Here, the Supreme Court determined that the State of Washington was entitled to regulate, to some degree, fishing activity of Indian tribal members on the reservation. It based its decision on the peculiar factual circumstances of the case. The majority of the court interpreted the applicable treaties as having given the Tribe fishing rights in common with citizens of the territory (now the State). Those rights, granted in the Treaty of Medicine Creek, were not exclusive, but rather the subject of reasonable regulation by the state pursuant to the power to conserve an important natural resource. If this were not so, the Court stated, the Indians could frustrate the right of non-Indians, which was recognized in the Treaty of Medicine Creek.

In Montana vs. United States, 67 L.Ed.2d 493 (1981), a case involving the Crow tribe, the history of the treaties between the Crows and the United States was emphasized. The Court decided that the Crow tribe's claim to authority to prohibit all hunting and fishing by nonmembers of the tribe on non-Indian property within the reservation boundaries was not supported. In reaching this conclusion, the Court studied the treaty history of the Crows to determine that the Crows did not own the bed of the Big Horn River. Additionally, the Court reviewed the Allotment Acts. It was not Congressional intent that non-Indian settlers on alienated allotted lands in Indian reservations, were to be subject to tribal rule. The Court conceded that an Indian tribe has the power to regulate, through taxation, licensing or other means, the activities of nonmembers who enter consentual relationships with the tribe or its members through commercial dealings, contracts, leases, or other arrangements. (See also Merrion v. Jicarillo Apache Tribe).

4.1.2.2 (Continued)

Turning to self-government arguments of the Crows, the Court stated such assertion is refuted by the fact that the District Court found that the State of Montana has traditionally exercised near exclusive jurisdiction over hunting and fishing on fee lands within the reservation. The parties to the case had accommodated themselves to such state regulation. Hence, the tribe did not require the power to prohibit the hunting and fishing in question in order effectively to govern itself.

These cases appear important to the synfuels facility in two respects. First, they demonstrate that all treaties between the United States and the Crows must be reviewed to ascertain whether by means of those treaties Montana was given the power to regulate the subject matter in question. Absent a finding that such powers were given to the state or territory, nevertheless if the State of Montana has in fact exercised certain regulatory powers over the land on which the synfuels facility would be situated, the Court might consider such prior Indian-state relationships in determining whether the state's regulatory scheme would indeed interfere with the tribe's right of self government.

4.1.2.3 Off Reservation Tribal Enterprise

Turning to the question of an Indian business outside reservation boundaries, the United States Supreme Court has determined that the State of New Mexico could impose a gross receipts tax on a ski resort business constructed and operated by the Apache tribe, since that business is not located on the Mescalero Apache Reservation. (Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973)) The Court also determined that a use tax of the state could not be applied. This was based on statutory interpretation. The Indian Reorganization Act (25 U.S.C. § 461 et seq.) provides that land taken in the name of the United States in trust for the tribe is to be exempt from state and local taxation. Since the personal property

4.1.2.3 (Continued)

on which the state was attempting to impose the use tax was affixed to the realty and thereby became part of the realty, the Court determined that under the terms of the Indian Reorganization Act, New Mexico could not impose the use tax. This case, however, clearly suggests that if a tribal business is located outside the bounds of the reservation, protection otherwise provided by Indian law to Indian activities on the reservation will probably no longer be applicable, absent a specific statutory provision, such as that found in the Indian Reorganization Act.

Although we have not had an opportunity to read it, it was noted in a law review article on this topic Dolan "State Jurisdiction Over Non-Indian Mineral Activities on Indian Reservations" 52 N. Dakota L.R. 265 (1975), that in 1973 the Montana Attorney General in Opinion No. 54 (December 28, 1973), rendered an opinion that the state could not apply its Strip Mining Law to coal activities in the Northern Cheyenne Reservation. That opinion and any other opinions of the Montana Attorney General's office should be reviewed. They may indicate that the State of Montana would not apply some or any of its regulatory laws to a synfuels plant located on the Crow tribal lands.

If the synfuels project is pursued and when it is determined exactly where the project will be located and what type of business entity would construct and operate the project, then an update of United State Supreme Court cases and relevant lower federal court cases in this area should be prepared. Since during recent years this area of the law has been developing quickly, such an update may shed additional light on the question whether the State of Montana's regulatory laws would apply to the construction and operation of a synfuels facility. To the extent that the federal courts at such time are employing the same factors described above to analyzing state-Indian tribe relationships, and to the extent that the

4.1.2.3 (Continued)

State of Montana is asserting jurisdiction over the synfuels plant, each law of the state should be analyzed in light of the factors heretofore described. Only by undertaking such an analysis can it be ascertained whether the state law would be preempted by federal statutes or regulations. If the state law is not obviously preempted, then the relative interests of the state and the Crows on the subject matter area in question must be examined. It would appear that the area of environmental law may be one in which both the tribe and the state have interests, as was pointed out by the Court of Appeals in Crow Tribe of Indians v. State of Montana.

4.2 FEDERAL PERMITS

4.2.1 Permit Requirements

Prior to the siting, construction and operation of the synfuels project, it will be necessary to obtain several federal environmental and land use permits. These permits run the gamut from rather specific right-of-way grants to more comprehensive air quality and hazardous waste authorizations. Typically the more comprehensive permits are issued subject to several conditions which will to some degree impact a proposed project's planning, design, or mode of operation. A brief summary of the major permit approvals which will be required is provided below.

4.2.1.1 Rights-of-Way Permits Over Indian Land - Department of Interior, Bureau of Indian Affairs

Approval by the Secretary of the Interior is needed for construction of a synfuels facility on the Crow Reservation. The Crow tribe would negotiate a lease or business agreement with the project proponent for a specific plant site on the reservation. Also, the project developer would need to

4.2.1.1 (Continued)

obtain consent for temporary and permanent rights-of-way to cross tribal and individually owned lands with pipelines, roads, railroad spurs, or other means of access to the synfuels facility, and to store equipment and material during construction. The lease or permit and the rights-of-way would be subject to Secretarial approval through the Bureau of Indian Affairs.

Authority: Leasing and Permitting 25 C.F.R. § 131
Rights-of-Way Over Indian Land 25 C.F.R. § 161

4.2.1.2 Dredge and Fill Permit - Corps of Engineers; Environmental Protection Agency (EPA)

The 404 permit governs discharges of dredged or fill material into "waters of the United States." This has further been defined to include wetland areas and/or streams having a flow greater than 5 cubic feet/second. The design and location of facilities, structures, and activities for the synfuels project will determine whether or not this permit is required. Structures such as the water intake pipe for the synfuels facility or pipeline or utility stream crossings may necessitate a 404 permit.

This permit is included in the proposed coordinated review process as a necessary precaution. If a permit is required then the application must be reviewed by several governmental bodies, including the EPA, U.S. Fish and Wildlife Service, and the State of Montana. Conditions such as the restriction of use of machinery, revegetation of disturbed areas, restoration of lost habitat, etc., are likely to be imposed upon the permit.

Authority: Federal Water Pollution Control Act Amendments of 1972, § 404, 33 U.S.C. § 1344.
General Regulatory Policies, 33 C.F.R. § 320.

4.2.1.2 (Continued)

Processing of Department of the Army Permits, 33 C.F.R. § 325.
Public Hearings, 33 C.F.R. § 327.
Permits for Discharges of Dredged or Fill Material into Waters of the United States, 33 C.F.R. § 323.

4.2.1.3 Air Quality Permit - Environmental Protection Agency

The Prevention of Significant Deterioration (PSD) provisions of the Clean Air Act establish a permitting system which limits emissions of air pollutants to prevent significant deterioration of air quality in geographical areas where the air quality is better than that required by national ambient air quality standards. The PSD provisions, as presently worded, will affect the proposed synfuels project in two ways.

First, the Northern Cheyenne Reservation, which borders the Crow Reservation in the east, is designated as Class I -- the strictest air quality designation. See, 40 C.F.R. § 52.1382(c)(2). Since the synfuels plant has the potential to pollute the air beyond the allowable increment for a Class I area, the plant must be sited so as to avoid exceeding the standards for the Northern Cheyenne Reservation. This can be accomplished through geographic relocation or by imposing sufficient emission controls to lessen the impact on the pristine Class I area.

Second, regardless of the location of the plant on the Crow Reservation, the proponent will probably need to obtain a PSD permit prior to construction. According to preliminary information, even with pollution control devices that would allow emissions to meet tribal, federal and state new source standards, controlled emissions will be sufficient to classify the synfuels plant as a "major stationary source" subject to PSD permit requirements. See, 40 C.F.R. §§ 52.21(b)(1)(i)(b); 52.21(i)(3). In addition, although emissions from the coal mining operation alone may not

4.2.1.3 (Continued)

be sufficient to trigger PSD review, those emissions may have to be included in determining emissions from the plant under EPA's definition of a "stationary source," if the mines are located on property contiguous to the facility.

EPA implements the PSD program for sources on Indian reservations, even if the program has been delegated to the state in which the reservation is situated. See, 40 C.F.R. 52.21(u). Although PSD permitting is exempt from the Environmental Impact Statement (EIS) preparation requirements of National Environmental Policy Act (NEPA), EPA is directed to coordinate its PSD reviews with reviews under NEPA "to the maximum extent feasible and reasonable." See, 40 C.F.R. 52.21(s).

During the PSD review, the permit applicant is often required to monitor ambient air quality for a period of as much as one year prior to the submission of an application. See, 40 C.F.R. 52.21(m). If sufficient air quality data already exists for the region, EPA may shorten this time to several months or waive the monitoring requirement altogether. Waivers have been rare in the past, but could be used more frequently in the future if there have been relatively few changes in the region's air quality since the last monitoring.

Finally it should be emphasized that the Clean Air Act is currently before Congress for reauthorization. Significant changes in the PSD permit program may be made. It is still too early to predict the nature of such changes. It is doubtful, however, that any revisions will result in more restrictive requirements and further administrative delays than presently exist.

Authority: Clean Air Act, §§ 160-169, 42 U.S.C. §§ 7470-7479. Procedures for Decisionmaking, 40 C.F.R. § 124. General Provisions, 40 C.F.R. § 52.21

4.2.1.4 Hazardous Waste Permit - Environmental Protection Agency

Any person who owns or operates a facility which treats, stores, or disposes of "hazardous waste" must obtain a permit from EPA. (Persons generating hazardous wastes are also regulated, but are not required to obtain permits.) Since it is anticipated that the proposed synfuels plant may generate wastes defined as hazardous under the Resource Conservation and Recovery Act ("RCRA"), a hazardous waste permit may be necessary to treat, store, or dispose of these wastes.

Preliminary investigation indicates that the synfuels plant will produce the following wastes: flue gas desulfurization sludge, fly ash, boiler bottom ash, wastewater treatment sludges, gasifier ash, marketable by-products (including creosote, naphtha, phenol, anhydrous ammonia, sulfur, and methanol), and minor amounts of spent catalysts and spent solvents.

Many of the wastes which are likely to be generated by the plant are not currently regarded as "hazardous wastes" for purposes of the RCRA permitting requirements. RCRA regulations presently exclude "(s)olid waste from the extraction, beneficiation and processing of ores and minerals (including coal)..." from the definition of hazardous waste. See, 42 U.S.C. § 6982(f); 42 C.F.R. § 261.4(b)(7). Fly ash, bottom ash, slag waste, and flue gas desulfurization sludge from the combustion of coal, all of which would be waste products from the synfuels facility, are presently defined as solid, rather than hazardous, waste. Solid wastes, which are not deemed hazardous, are not subject to RCRA permitting requirements. Gasifier ash, which is similar to coal boiler bottom ash, has not yet been classified as a hazardous waste or solid waste and is not subject to RCRA regulation.

4.2.1.4 (Continued)

Other materials generated by the facility could be regarded as hazardous wastes. For example, phenols and creosote, which are produced as by-products in the gasification process, are listed as hazardous wastes in 40 C.F.R. § 261.33. Although these materials will be recycled in the gasification process to produce additional crude gas, storage or disposal of these materials in any other manner would probably be subject to the permitting requirements governing hazardous waste management.

In addition to the likelihood that certain marketable by-products will be stored or disposed of as wastes generated by the facility which are regarded as "hazardous wastes" by EPA, the RCRA permitting requirements may govern short-term storage of other common industrial wastes which are generated at the facility. Moreover, the RCRA permitting requirements also attach to a wide variety of "treatment" activities with regard to spent materials, by-products and sludges generated by wastewater and air pollution control technologies. In view of all these potential activities which would require a RCRA permit, and in view of the fact that many of the wastes which are presently excluded from the regulations may become regulated wastes in the near future, it is very likely that EPA will require a RCRA permit as a prerequisite to the commence of facility operations.

Authority: Resource Conservation and Recovery Act, 42 U.S.C. § 6925.

EPA Administered Permit Program, 40 C.F.R. § 122.
Procedures for Decisionmaking, 40 C.F.R. § 124.
Technical Requirements, 40 C.F.R. §§ 260-267.

4.2.1.5 National Pollutant Discharge Elimination System (NPDES) Permit - Environmental Protection Agency

An NPDES permit is needed for the discharge of pollutants into waterways. EPA administers the NPDES permit program on the Crow Reservation, although this program has been delegated to the State of Montana. The state generally permits only discharges in incorporated municipalities on Indian reservations.

NPDES permits could be sought for both the mining and gasification portions of the synfuels project. The synfuels plant will be designed to use a "zero discharge" technology in which there will be no discharges of effluents into waterways. Even when no discharges are planned, companies routinely obtain NPDES permits as a precaution.

An NPDES permit would be needed for any new coal mine on the reservation. Coal mining is an industrial category for which new source performance standards have been established. See, 40 C.F.R. § 434. Therefore, the mine would be classified as a "new source." See, 40 C.F.R. § 122.3.

Authority: Federal Water Pollution Control Act Amendments, § 402, 33 U.S.C. § 1342.

EPA Administered Permit Programs, 40 C.F.R. § 122.
Procedures for Decisionmaking, 40 C.F.R. § 124.
Technical Requirements, 40 C.F.R. §§ 125, 129, 133, 423, 434.

4.2.1.6 Mining Approval - Office of Surface Mining

Under Section 710 of the Surface Mining Control and Reclamation Act (SMCRA), Indian lands -- defined to include both lands within the reservation and land with mineral interests held in trust for the tribe or supervised by the tribe -- are distinguished from other types of lands

4.2.1.6 (Continued)

subject to the Act. See, 30 U.S.C. §§ 1281(a), 1300. To operate a coal mine on Indian lands, the proponent must obtain approval from the Secretary of Interior, even if, as in Montana, the program has been delegated to the state. Mine plan approval by the U.S. Geological Survey is a component of the SMCRA decision package.

Section 710, which explicitly recognizes the special jurisdictional status of Indian lands, provides for a study of legislation to allow tribes to assume full regulatory authority under SMCRA. See, 30 U.S.C. § 1300(a). The Crow Tribe has adopted a Reclamation Code, which could ultimately lead to delegation of the federal program if enabling legislation is eventually passed by Congress.

The Crow Synfuels Feasibility Study Grant Proposal identified two economically feasible sources of coal for the synfuels plant: the Westmoreland mine and the proposed Shell mine.

Westmoreland Resources now has the permits and equipment in place to meet the volume of coal production needed for the synfuels facility. Additionally, the mining company may apply for a permit to expand its operations beyond the currently permitted capacity in the spring of 1982. Therefore, it is likely that the permitting requirements for this potential source of coal will be satisfied well before permits are sought for the proposed synfuels facility.

The Shell mine is a new mine and therefore all applicable permits will be needed. Thus, a complete mine plan approval is required. Shell is currently preparing its application for possible submission in the spring of 1982.

4.2.1.6 (Continued)

The timing of permitting for the two identified sources of coal is such that it may be unnecessary to include a mining permit in the coordinated review process. However, if the Shell permit is delayed, or if the Crow Tribe chooses to develop its own coal mine to feed the synfuels plant, it may be desirable to include a mining permit in the process.

Authority: Surface Mining Control and Reclamation Act, 30 U.S.C. §§ 1251-1279.

25 C.F.R. § 177 establishes performance standards for coal operations on Indian lands and requirements for mine plan approval. However, there are no procedural regulations for implementation of the SMCRA on Indian lands. In the interim, the Office of Surface Mining ("OSM") uses the statute itself for guidance.

OSM is in the process of developing new regulations for Indian lands. These regulations, which may be proposed as soon as August, 1982, will probably resemble the regulations for permitting on federal lands, which are presently undergoing revision.

4.2.2 Non-Permit Requirements

In addition to the aforementioned permits which must be obtained prior to construction and/or operation of a synfuels plant, there are several other environmental review procedures which will be necessary. These procedures can be as time-consuming as the permitting process.

4.2.2.1 National Environmental Policy Act (NEPA) - Environmental Protection Agency

The National Environmental Policy Act (NEPA) is the most significant environmental statute impacting a new project. This law requires all

4.2.2.1 (Continued)

agencies of the federal government to prepare a detailed "Environmental Impact Statement" (EIS) on major federal actions, programs, leases, projects, permits, etc., that significantly affect the quality of the human environment. The EIS must discuss the environmental impact of the proposed action, unavoidable adverse impacts, alternatives and mitigation measures, and any irreversible commitments of resources which would be involved if the proposed action were implemented.

The NEPA process also involves a public review and comment period as well as technical review by other interested agencies. Through this process much of the same information required for other permits should be obtained.

The lead agency for development of the EIS will be the agency with the most direct involvement with approving the project. In the case of some uncertainty the various federal agencies will agree as to the "lead agency". The synfuels facility lead agency will probably be the responsibility of the Bureau of Indian Affairs or the Office of Surface Mining.

Authority: National Environmental Policy Act, 42 U.S.C. § 4331

4.2.2.2 National Historic Preservation Act and Related Historic Preservation Laws

Congress has enacted numerous historic and cultural resource protection laws. These statutes, and accompanying Executive Orders, establish a procedure for determining if historic or cultural resources will be impacted by a federal undertaking or a federally licensed project. They also prescribe mitigation measures or alternatives for minimizing adverse impacts of such federally approved undertakings. This process, which is intended

4.2.2.2 (Continued)

to coincide with NEPA, is particularly important on Indian lands where historic and cultural resources can be expected to abound.

The federal oversight role is the responsibility of the Department of Interior and various subdivisions thereof. The Advisory Council on Historic Preservation, an independent agency of the executive branch, is also charged with commenting on projects impacting historic and cultural resources and recommending mitigation measures.

Authority: National Historic Preservation Act 16 U.S.C. § 470a et seq.
Archaeological Resource Protection Act 16 U.S.C. § 470aa et seq.
Antiquities Act of 1906

4.2.2.3 Endangered Species Act - Fish and Wildlife Service

The Endangered Species Act is designed to provide special protection for the critical habitat of several plant, fish, and wildlife species. Included in this protection are certain prohibitions on siting facilities or conducting activities in areas inhabited by threatened or endangered species. Mitigation measures and alternatives which are developed in the NEPA process should be utilized to satisfy the requirements of this law. The U.S. Fish and Wildlife Service administers this law and must approve the mitigation proposals.

It should also be emphasized that the Endangered Species Act is currently before Congress for reauthorization and may be significantly changed.

Authority: Endangered Species Conservation Act of 1969 16 U.S.C. § 668aa et seq. Endangered Species Act of 1973 16 U.S.C. § 1531 et seq.

4.2.2.4 Floodplain Management Executive Orders 11988 and 11990

The Floodplain Management Executive Orders require each federal agency to determine the potential effects of actions it may take in a floodplain, and to avoid adversely impacting such floodplains whenever possible. These Executive Orders apply to all federal agencies which acquire, manage and dispose of federal lands, as well as, finance, assist in construction and improvements, conduct planning activities, permitting or licensing with regard to federal lands. The location of the proposed synfuels facility will determine the applicability of these provisions.

Authority: Executive Orders 11988, 11990

4.2.3 Excluded Permits

Numerous potentially applicable permits were excluded from the review process. The scope of the permit analysis was limited to major federal environmental approvals for components of the synfuels facility and coal mine on the Crow Reservation. Non-environmental or minor permits were excluded. Additionally, permits and approvals related to water rights, transportation, and off-reservation facilities were not discussed.

Several federal environmental permits and approvals were excluded from the process for a variety of reasons:

4.2.3.1 Underground Injection Control Permit

Based on currently available information, there are no plans for underground injection of wastes from either the synfuels plant or the mine. See, 42 U.S.C. § 300f et seq.

4.2.3.2 River and Harbour Act of 1889 Section 9 and 10 Permits See, 33 U.S.C. §§ 401, 403.

The description of proposed facilities in the Crow Synfuels Feasibility Study Grant Proposal includes no mention of construction of dams or dikes or other obstructions in navigable waters.

4.2.3.3 Mining Lease Approval by the Secretary of Interior

The leases of tribal land for coal mining for both the Westmoreland and Shell mines have already been negotiated. Only if the Crow Tribe proposes to utilize another source of coal for the gasification plant that requires a new lease, will a new mining lease approval and environmental impact statement be necessary.

4.2.3.4 Toxic Substances Control Act Premanufacture Notification

Notification requirements are not required prior to construction of the synfuels facility. See, 15 U.S.C. § 2604.

4.2.3.5 Clean Air Act New Source Performance Standards ("NSPS")

The standard and reporting requirements for compliance with NSPS regulations can be met without extensive environmental review or close coordination with other agencies. See, 42 U.S.C. § 7411; 40 C.F.R. § 60.

4.2.3.6 Natural Gas Act Certificate of Public Convenience and Necessity 15 U.S.C. § 717(f)

Proponents of the Great Plains Gasification Plant, a facility similar to that proposed by the Crow Tribe, sought certification by the Federal Energy Regulatory Commission ("FERC"). However, the U.S. District Court of Appeals for the District of Columbia ruled that FERC has no jurisdiction over synthetic gas until the gas commingles with natural gas in an

4.2.3.6 (Continued)

interstate pipeline or for sale in interstate commerce. Ohio Consumers Council v. FERC, No. 80-1303, F.2d (D.C. Cir. 1980).

If it is determined that these or other permits should be included in the environmental review process, they can be easily incorporated.

4.3 STATE AND LOCAL PERMITS

4.3.1 Introduction

This section provides a list of laws under which the State of Montana conceivably could issue permits for the siting and construction of the proposed synfuels facility.

The most likely local government to assert jurisdiction over any aspect of the project is Big Horn County. Most of the Crow Reservation is within its boundaries as are the most likely off-reservation lay-down areas. With respect to the jurisdiction of Big Horn County over the proposed project, the power of any county government to regulate activities on Indian reservations is wholly derived from the power of the state to regulate such activities. (Arnold & Porter Draft Manual describing the Tribal Environmental Review Process for the proposed synfuels project.) Furthermore, Big Horn County is one of many county governments who, as a matter of policy, do not enforce ordinances on Indian reservations, and in fact specifically exclude reservation lands from the reach of county ordinances. (Arnold & Porter Draft Manual at footnote 54, section II C.)

Such a view that county involvement in the project could be very limited or even nonexistent, is supported by a statement made in a phone conversation with the County Counsel for Big Horn County. According to him, the county might issue a permit for that portion of a facility built

4.3.1 (Continued)

off-reservation, but would not issue a permit for any facility built on the Crow Reservation. The County Counsel also serves as a half-time state attorney.

While no municipal or county ordinances, including those of Big Horn County, have been reviewed, they would apparently be applicable only to off-reservation activities. A check to determine whether the state has delegated any of its powers to Big Horn County revealed that the state has not done so. Until and unless the county ordinances are reviewed, it is impossible to do more than list the potential areas of county involvement.

A sample listing of the more common regulations that may be administered by local governments follow:

*Land use planning and zoning

*Siting approvals and permits

*Utility, highway, and other right-of-way approvals and permits

*Building codes

*Safety and fire inspection codes

*Sewage treatment and disposal

*Floodway regulation

*Waste disposal and burning permits

4.3.1 (Continued)

*Mining and oil and gas leases

*Green area and open space preservation

*Stream preservation

*Air and water pollution permits

*Water appropriations

*Health and sanitation approvals

4.3.2 Potential State Permits

The preceding discussion should be qualified in that if federal law expressly confers jurisdiction on a state, state law may be applicable even if the activity is purely Indian and is wholly contained within reservation boundaries. This issue is raised where the federal government has delegated certain permitting functions to the state, discussed in Section 4.3.2.2.2.

4.3.2.1 Non-Environmental Permits

While state tax, corporate, building construction, and worker safety laws, are examples of state laws that could ultimately impact the construction and operation of a synfuels plant, few if any of these laws require that a permit be obtained prior to facility siting. In fact, the only non-environmental state law that could require a permit prior to facility siting or construction appears to be the Occupational Health Act of Montana.

4.3.2.1 (Continued)

Occupational Health Act of Montana, sections 50-70-1012 to 118 Montana Code Annotated (hereinafter cited as MCA); Title 16, Chapter 42, Admin. Rules of Mont.

Pursuant to the Occupational Health Act, the Montana Board of Health and Environmental Sciences can require a permit for the installation of equipment found to contribute to occupational disease. The board is authorized to establish standards necessary to prevent, abate, or control occupational diseases. It is empowered to establish allowable concentrations or quantities of emissions from any source, and issue permits for the installation, alteration, or operation of machines and equipment which may contribute to occupational disease.

4.3.2.2 Environmental Laws

The production of synthetic fuels may have several adverse environmental impacts. Specifically, various methods of synthetic fuels production may have the potential to produce: increased emission of particulate matter, nitrogen and sulfur oxides, CO and CO2, hydrocarbon vapors and fugitive dust; increased volumes of solid and hazardous wastes; increased consumption of water; increased discharge of hazardous pollutants into waters of the region; potentially toxic or carcinogenic substances; and disruption of large areas of land. As a result of these impacts, the proposed synthetic fuels plant may be the target of regulation by various state and local agencies. The following is a list of state environmental permits that could be required for the proposed project. The permits are broken into two categories: those which are issued by the state based solely upon Montana law, and those issued by the state pursuant to a delegation of authority from an agency of the federal government.

4.3.2.2.1 Undelegated State Permits

4.3.2.2.1.1 Montana Department of Natural Resources and Conservation

Montana Environmental Policy Act, sections 75-1-101 to 324 MCA

The Montana Environmental Policy Act requires that a detailed statement of the environmental impact of certain proposed projects be prepared prior to state agency review or approval of the project. With certain very limited exceptions, Montana's Environmental Policy Act adopts the language of the National Environmental Policy Act.

Montana Major Facility Siting Act, sections 72-20-101 to 1205 MCA; Title 36, Chapter 7, Admin. Rules of Mont.

In 1973, the Montana legislature enacted the Montana Major Facility Siting Act to ensure environmental compatibility and public need prior to the siting and construction of certain major energy generation or production facilities. Pursuant to the mandate of this act, neither construction nor further state permitting can proceed prior to receipt of a certificate of environmental compatibility and public need from the Montana Board of Natural Resources and Conservation.

The synfuels project would fall within this act if it were found to be a "facility" as defined in section 75-20-104(10) MCA. "Facility" is defined to mean:

> (a) except for crude oil and natural gas refineries, and facilities and associated facilities designed for or capability of producing, gathering, processing, transmitting, transporting, or distributing crude oil or natural gas, and those facilities subject to the Montana Strip and Underground Mine Reclamation Act, each plant, unit, or other facility and associated facilities designed for or capable of: . . . .

4.3.2.2.1.1 (Continued)

(ii) producing 25 million cubic feet or more of gas derived from coal per day or any addition thereto having an estimated cost in excess of $10 million; or . . . .

(v) utilizing or converting 500,000 tons of coal per year or more or any addition thereto having an estimated cost in excess of $10 million; . . .

(c) each pipeline and associated facilities designed for or capable of transporting gas (except for natural gas), water, or liquid hydrocarbon products from or to a facility located within or without this state of the size indicated in subsection (10)(a) of this section . . . .

Pursuant to this definition, with the possible exception of any coal mining operation (which could be subject to the Montana Strip and Underground Reclamation Act (see section 82-4-201, 221 MCA)), there is the potential for application of the Siting Act to portions of the proposed project.

The Act specifically does not apply to any aspect of a facility over which an agency of the federal government has exclusive jurisdiction, though it applies to any unpreempted aspect of a facility over which an agency of the federal government has partial jurisdiction. (Section 75-20-202 MCA.)

Once the certificate of environmental compatibility and public need has been issued by the Board of Natural Resources and Conservation, the facility must be constructed, operated, and maintained in conformance with the certification. No state or local government may require any approval, consent, permit, certificate, or other condition for the construction, operation, or maintenance of a facility authorized by a certificate issued pursuant to this chapter, except that the Montana Department of Health and Environmental Sciences retains its authority to enforce state and

4.3.2.2.1.1 (Continued)

federal standards and implementation plans for air and water quality. Additionally, the Siting Act does not prevent the application of state laws for the protection of employees engaged in the construction, operation, or maintenance of a facility.

While it appears that the language of the Act allows for the certificate to substitute for an environmental impact statement pursuant to the Montana Environmental Policy Act (section 75-20-216(3)), in practice it appears that the Department of Natural Resources will issue an EIS in addition to preparing the materials and performing the evaluation required for the certificate of environmental compatibility and public need. (See Northern Plains Resource Council v. Board of Natural Resources and Conservation, 594 P.2d 297 (1979).)

State and local legal requirements must be met even though other permit requirements are not applicable. (Section 75-20-201(2)(f) MCA)

Water Use Act, sections 85-2-101 to 807 MCA; Title 36, Chapter 12, Admin. Rules of Mont.

The Water Use Act is administered by the Department of Natural Resources and Conservation, and provides a system by which existing and future rights to both surface and groundwater are to be determined. Existing rights are determined by judicial proceedings and new appropriations are granted by permits secured from the department. (Section 85-2-102 MCA)

A certificate of water rights will be issued when the applicant actually begins using the water. It will not be issued until existing rights are adjudicated for the area or water source. Similarly, a permit issued prior to final adjudication of existing rights is provisional and subject to change if it interferes with existing rights.

4.3.2.2.1.1 (Continued)

Diversions from the Yellowstone Basin, sections 85-2-801 to 807 MCA

Any appropriator proposing to divert from the Yellowstone Basin water allocated to Montana under the terms of the Yellowstone River Compact or divert from the basin unallocated compact water within Montana, shall file an application with and obtain approval from the Department of Natural Resources and Conservation.

Appropriation and Regulation of Groundwater, sections 85-2-501 to 520 MCA; Title 36, Chapter 16, Admin. Rules of Mont.

While appropriations of groundwater are generally governed by Part 3 of the Water Use Act, disputes over priorities and quantities of groundwater rights will be determined under this part by the Board of Natural Resources and Conservation. The Department and the Board of Natural Resources and Conservation have the responsibility for ensuring that water from aquifers is not depleted through excessive withdrawals. Following a hearing, the board may limit withdrawals from a controlled groundwater area. Permits to withdraw water from such an area will be granted by the Department only if it decides the withdrawal will not exceed the aquifer's capacity.

Floodway Management, sections 76-5-101 to 1117 MCA; Title 36, Chapter 15, Admin. Rules of Mont.

If a project includes artificial obstructions or nonconforming uses in a delineated floodway or floodplain, it may require a permit. While the Department of Natural Resources is directed to conduct a program delineating the floodways and floodplains in all drainages of the state, it is the responsibility of local governing bodies to use this information to adopt land use regulations for the delineated floodways and floodplains. If within six months of receipt of the floodplain information the local

4.3.2.2.1.1 (Continued)

governing body has not adopted land use requirements that meet or exceed the minimum standards set by the state, the department shall enforce the state standards.

4.3.2.2.1.2 Montana Department of Health and Environmental Sciences

Clean Air Act of Montana, sections 75-2-101 to 429 MCA; Title 16, Chapter 8, Admin. Rules of Mont.

Prior to the commencement of construction of any facility which may directly or indirectly cause or contribute to air pollution, the owner or operator of such facility shall file with the Department of Health and Environmental Sciences an application for a permit to conduct such activity.

Local Air Pollution Control, Section 75-2-301 MCA

A municipality or county may establish its own air pollution program on petition of 15 percent of the voters in the locality. Local air pollution control programs, if compatible with, or more stringent or more extensive than the Clean Air Act of Montana, must be complied with if approved by the Board of Health and Environmental Sciences.

Water Pollution Control Act of Montana, sections 75-5-101 to 641 MCA; Water Quality Permit, sections 75-5-401 to 404 MCA; Title 16, Chapter 20, Admin. Rules of Mont.

The Board of Health and Environmental Sciences requires that a permit be obtained prior to the discharge of sewage, industrial wastes, or other wastes into state waters. The board also requires the filing of plans and specifications relating to the construction, modification, or operation of disposal systems. Permits are for up to five years.

4.3.2.2.1.2 (Continued)

Water Quality Permit - Public Water Supply, section 75-6-112(3)(b) MCA; Title 16, Chapter 20, Admin. Rules of Mont.

A permit must be received from the Board of Health and Environmental Sciences prior to building or operating an electric plant or manufacturing plant of any kind on any watershed of a public water supply system. Detailed plans and specifications for sanitary precautions must be submitted to the board.

The Montana Solid Waste Management Act, sections 75-10-201 to 233 MCA; Title 16, Chapter 14, Admin. Rules of Mont.

Big Horn County has received a delegation of authority to run the refuse management program within the county. A permit must be received from the county prior to the disposal of solid wastes.

Montana Hazardous Waste Act, sections 75-10-401 to 421 MCA; Title 16, Chapter 44, Admin. Rules of Mont.

The Department of Health and Environmental Sciences is authorized pursuant to this Act to permit hazardous waste facilities, to regulate their siting, construction, and operation, and to govern the treatment, storage, transportation, and disposal of hazardous wastes. No person may construct a hazardous waste management facility (a synfuels plant would probably fall within this definition) without first obtaining a permit from the department.

Additionally, the department has received Phase I interim authorization to run portions of the federal RCRA program. It is anticipated that the department will soon receive Phase II authorization from EPA giving it full authority to run the federal program.

4.3.2.2.1.3 Montana Department of Fish, Wildlife, and Parks

The Natural Streambed and Land Preservation Act of 1975, sections 75-7-101 to 124 MCA; Title 12, Chapters 1-9, Admin. Rules of Mont.

Any project that might alter a stream or river, or streambed or bank, is subject to regulation by the Montana Department of Fish, Wildlife, and Parks. Written notification of the intended project must be sent to the board of supervisors of the appropriate soil and water conservation district, if any, and if not, to the directors of the appropriate grass conservation district, if any, and if not, to the board of county commissioners.

4.3.2.2.1.4 Montana Department of State Lands

The Strip and Underground Mine Siting Act, sections 82-4-101 to 142 MCA; Title 26, Chapter 4, Admin. Rules of Mont.

No person may commence preparatory work on a new strip or underground mine without having first obtained a mine-site location permit from the Department of State Lands. A party desiring a mine-site location permit shall file with the department an application which shall contain a reclamation plan for any preparatory work that will be undertaken. With the exception of prospecting, preparatory work includes all on-site disturbances.

The Montana Strip and Underground Mine Reclamation Act, sections 82-4-201 to 254 MCA; Title 26, Chapter 4, Admin. Rules of Mont.

This law applies to coal and uranium mining operations and is administered by the Board of Land Commissioners and the Department of State Lands. No operator may engage in strip or underground mining without having first obtained from the department a permit designating the lands

4.3.2.2.1.4 (Continued)

reasonably anticipated to be mined during the five-year life of a permit. Permits are renewable every five years.

Prospecting Permit, section 82-4-226 MCA

Prospecting by any person on land not included in a valid strip-mining or underground-mining permit shall be unlawful without possessing a valid prospecting permit issued by the Department of State Lands.

Geophysical Exploration Permit, sections 82-1-101 to 110 MCA

Any party wishing to engage in geophysical exploration within Montana shall file a notice of intention to engage in the exploration with the county clerk and recorder in each county in which exploration is to be carried on or engaged in. The notice shall be filed prior to the actual commencement of the exploration. Upon compliance with the notice requirement, the county clerk and recorder shall issue a geophysical exploration permit.

Montana Historical Society, Preservation of Antiquities, sections 23-2-101 to 442 MCA; Title 10, Chapters 120-21, Admin. Rules of Mont.

On the recommendation of the Montana Historical Society, the Board of Land Commissioners may designate sites on state lands for registration as historic sites, and may reserve such state lands as are necessary for the protection of such sites. A permit must be obtained from the Montana Historical Society in order to excavate, remove, or restore a registered site or object. The Montana Historical Society may seek injunctions to prevent the destruction of a registered site. Persons conducting excavations or construction on lands owned or controlled by the state must report all discoveries of historic objects, and must take steps to protect them.

4.3.2.2.2 Permitting Pursuant to a Delegation from the EPA

As previously mentioned, certain federal programs have been delegated by agencies of the federal government for state administration. Delegable environmental programs are NPDES permitting, section 404 dredge and fill permits, underground injection control permits, PSD, hazardous waste management permits, coal mining and reclamation permits, and radiation source permits. The following programs have been delegated, in whole or in part, to the State of Montana.

National Pollutant Discharge Elimination System Permit

An NPDES permit is required of all industrial and municipal facilities that discharge from a point source into navigable waters. Industrial facilities that discharge into municipal systems do not require permits, but may be subject to pretreatment requirements and also to user charges. A permit is not required of a facility that recycles its potential effluents and thus has no discharge.

The NPDES program is authorized by the Federal Water Pollution Control Act and is administered by the U.S. Environmental Protection Agency (EPA) or a delegated state. The NPDES program has been run by the State of Montana for the past five years under such a delegation from the EPA. Nevertheless, according to the EPA's office in Helena, the EPA continues to issue such permits on reservation land.

Prevention of Significant Deterioration Permit

Pursuant to the Clean Air Act, a PSD permit is required for any new facility or modified facility if sulfur dioxide or particulate emissions exceed 100 tons per year and a facility falls within one of 28 specified industrial categories. All other facilities that do not fall within one of these industrial categories require a permit only if the potential emissions exceed 250 tons per year.

4.3.2.2.2 (Continued)

The program is authorized by the Clean Air Act and is administered by the EPA or a delegated state. According to the document prepared by the Council of Energy Resource Tribes on the environmental review process for major energy facilities, while the EPA has retained responsibility for issuing PSD permits on Indian lands, delegated states should be consulted as part of the Tribal Environmental Review Process. While the State of Montana presently issues its own PSD permit in addition to those required and administered by the EPA, according to EPA's office in Helena, Montana, the state will run EPA's program by August, 1982. While this information has not yet been published in the Federal Register, notice is in the mail to the Montana Department of Health and Environmental Sciences.

Hazardous Waste Management Permits

Pursuant to the Resource Conservation and Recovery Act, a federal/state regulatory program has been created requiring a permit for the treatment, storage, or disposal of hazardous wastes. In addition, certain record keeping requirements are imposed on generators and transporters of hazardous wastes.

The program is administered by the EPA or an authorized state. The State of Montana has received Phase I interim authorization from EPA allowing the State of Montana to operate a portion of the federal program in lieu of EPA involvement. According to EPA'S Helena office, the State of Montana will receive Phase II authorization by the end of 1982, which will be a complete delegation of authority over the hazardous waste management to the State of Montana.

5.0 REGULATORY LAW ASPECTS

5.1 Federal Regulation

The manufacture, transportation and sale of coal gas is not regulated by the Federal Energy Regulatory Commission (FERC). The FERC's jurisdiction under Section 1(b) of the Natural Gas Act, 15 USC § 717(b), is defined as follows:

"The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the production or gathering of natural gas."

Natural gas has been defined under Section 2(5) of the Natural Gas Act, 15 USC § 717a(5), as "either natural gas unmixed, or any mixture of natural gas and artificial gas." Coal gas alone, unmixed with natural gas, does not come within the definition of natural gas and therefore is not regulated by the FERC.

The courts have also clearly established that the manufacture, transportation and sale of coal gas, not commingled with natural gas, is beyond the jurisdiction of the FERC. Office of Consumer Council v. FERC, 655 F.2d 1132 (D.C. Cir. 1980); Henry v. FPC, 513 F.2d 395 (D.C. Cir. 1975). Thus the manufacture, transportation and sale of coal gas, even though it may involve interstate commerce, is not within FERC jurisdiction until the coal gas is mixed with natural gas.

Therefore the synfuels plant and the sale of SNG to the pipeline carrier at the tailgate of the plant would not be within FERC jurisdiction. In addition, the pipeline transporting the SNG would not be within FERC

5.1 (Continued)

jurisdiction, under either the base case, in which the SNG is transported only within Montana, or the alternative case, in which the SNG may be transported beyond Montana.

FERC jurisdiction under the Natural Gas Act would apply to the coal gas once it commingled with natural gas since it would then come within the Section 2(5) definition of natural gas. This commingling of SNG with natural gas would occur at the point of interconnection with a FERC regulated interstate pipeline. Under the base case, this interconnection would be with Northern Border Pipeline in Montana. The interconnection, under the alternative case, would occur with the proposed Rocky Mountain Pipeline in Wyoming.

Once commingled, FERC authority would have to be obtained for any subsequent transportation or sale. This authorization would require obtaining a certificate of public convenience and necessity under Section 7(c) of the Natural Gas Act, 15 USC § 717f(c). Thus, the interstate pipeline, either Northern Border and Pacific Gas Transmission under the base case or Rocky Mountain Pipeline under the alternative case, would require a certificate for the transportation of the commingled gas. In addition, a certificate would be required under Section 7(c), 15 USC § 717f(c), for any construction or extension needed for the transportation of the mixed gas.

Finally, FERC authorization in the form of a Section 7(c) certificate, 15 USC § 717f(c), would be needed for a sale for resale to the local distribution company. A sale to Southern California Gas Company or Pacific Lighting Gas Supply Company by Pacific Interstate would be a sale for resale under Section 1(b) of the Natural Gas Act, 15 USC § 717(b). Thus, FERC approval would be needed for the ultimate sale of the commingled SNG and natural gas to SoCal Gas or PLGS.

5.2 Montana Regulation

The State of Montana does not have any specific statute to regulate natural gas pipelines. Heretofore, the regulation of such pipelines has been extremely limited. Safety concerns have been addressed by adopting the federal Department of Transportation (DOT) safety regulations for natural gas pipelines. 49 CFR §§ 191-92.

There does, however, appear to be a state statute which is written broadly and could be utilized as a basis to regulate an intrastate SNG pipeline. Sections 69-13-101 et seq. of the Montana Code regulate every person, firm, corporation, limited partnership, joint-stock association or association of any kind which owns, operates, or manages any pipeline or any part thereof for the transportation of "crude petroleum, coal or the products thereof by pipelines." This language would seem to apply to an SNG pipeline since the gas being transported will be the product of coal. This conclusion has been confirmed in conversations with representatives of the Montana Public Service Commission (PSC).

The Montana PSC is the regulatory agency given the jurisdiction over the aforementioned pipeline carriers. The PSC has the power to established and enforce rates and regulations for gathering, transporting, loading, and delivering crude petroleum, coal, or the products thereof by pipeline carriers within the state. Montana Code §§ 69-13-1201 et seg. It also establishes rates and regulations for the use of storage facilities necessarily incident to such transportation and prescribes rules for the government and control of such carriers in respect to their pipelines and receiving, transferring, and loading facilities. Montana Code § 69-13-201(1).

The PSC cannot issue an order concerning rates and/or regulations until after notice has been given and a hearing has been held. Montana Code § 69-13-201(2). All orders of the PSC are presumed valid until set aside or vacated by judicial decree. Montana Code § 69-13-202. Finally, the PSC

5.2 (Continued)

has the authority to hear and determine complaints, compel the attendance of witnesses, and institute any suits necessary to enforce its orders. Montana Code § 69-13-203.

6.0 WATER LAW ASPECTS

At its ultimate capacity (250 MMSCF/CD), the proposed synthetic fuels plant will require approximately 20,000 acre feet of water per year. All of this water will be consumed; none of it will be returned to its source or to any other source. Half of that amount will be needed for the initial plant. The rights to the use of this water are based on the reserved water rights of the Crow Tribe under federal law. Accordingly, it will not be necessary to apply for or to receive a water permit from the State of Montana.

The water rights of the Crow Tribe are founded on the Winters doctrine, named after the landmark decision of the United States Supreme Court in Winters v. United States, 207 U.S. 564 (1908). The Court held that the establishment of an Indian reservation carries with it the right to sufficient water to fulfill the reservation's purposes. The application of the Winters doctrine to the Crow Indian Reservation was confirmed in the subsequent Supreme Court decision of United States v. Powers, 305 U. S. 527 (1939).

There are two crucial aspects of any water right in the West, the amount of water to which the right attaches and the priority of the right. Most western water rights are governed by the law of prior appropriation under which the amount of the water right is limited by the quantity that is actually put to beneficial use. The priority of a water right is important in times of scarcity, when there is not enough water to meet all established rights. At such times, the holders of the oldest, most senior rights are accorded priority while the most recent, junior appropriators are required to forego their diversions.

Under the Winters doctrine, the water rights of Indian tribes are measured by the amount required to fulfill the reservation's purpose. They encompass past and present, as well as future uses, so they are not limited

by the amount of water that is actually used at any given time. The purpose of Indian reservations is to provide a permanent, economically self-sustaining homeland for the Indian people. The amount of water that is reserved for this purpose cannot be ascertained definitely in the absence of a final water rights decree issued by a court of competent jurisdiction. Water rights suits involving the Crow Indian Reservation have been initiated, but are not yet completed.

One measure of an Indian tribe's water rights adopted by the courts is the amount required to irrigate a reservation's practicably irrigable acres. Additional water rights have also been adjudicated for other purposes, including sufficient water to fulfill a tribe's hunting and fishing rights. The courts have not yet ruled whether water rights are also reserved for industrial uses such as the extraction and development of coal and other minerals. Even if additional water is not reserved for such industrial uses, water rights that are reserved for agricultural uses can be transferred by a tribe to any other beneficial use, including industrial uses. Changes can also be made in the place of use and the time of use, subject only to the requirement that other water users are no worse off than they would be if the water rights were exercised for the original purpose for which it was reserved. There is no need or obligation to obtain state approval for such transfers.

The priority of the Crow Tribe's water rights is no later than September 17, 1851, the date of the First Treaty of Fort Laramie, which identified approximately 38,500,000 acres as Crow territory including the present Crow Indian Reservation of approximately 2,300,000 acres. This means that the Crow Tribe enjoys the first and earliest priority to all of the waters that arise on, border, traverse, underlie, or are encompassed within the Crow Reservation. This priority can be exercised to insure that the plant's water supply is not interrupted. In other words, if

sufficient water for the plant is available from any source within the reservation, the priority of the Tribe's reserved right will insure that the water requirements of the plant will be satisfied before anyone else is permitted to make any diversions from that source.

The Crow Tribe's reserved water rights are based on federal law. They are therefore not subject to state regulatory jurisdiction. Those rights can be exercised by the Crow Tribe and its members and all persons or entities claiming by, through, or under the Crow Tribe without any permit or other form of authorization issued by a state or state agency. The federal statute providing for the lease of tribal and allotted Indian lands for business and other purposes specifically authorizes lessees to develop or utilize natural resources in connection with operations under their leases. 25 U.S.C. § 415(a).

Based on the application of these well-established principles to the Crow Reservation, there is no doubt that the Crow Tribe owns and controls more than sufficient reserved water rights to supply approximately 20,000 acre feet annually to the proposed synthetic fuels plant. The agreement with the Crow Tribe for the plant should provide that the Crow Tribe agrees to transfer all reserved water rights that are necessary for the operation of the plant if it should be determined that the measure of the Tribe's water rights does not include industrial uses such as the development of its coal resources. In that case, the Tribe would agree to transfer its water rights for some other purpose, such as its agricultural water right, to the synfuels plant.

In the early 1960's, the Bureau of Reclamation constructed Yellowtail Dam on the Big Horn River. The reservoir created by that dam, Big Horn Lake (also known as Yellowtail Reservoir), has a storage capacity of 1,375,000 acre feet. Both Wyoming and Montana have issued permits

authorizing the storage of water in Big Horn Lake. At the present time, virtually all of this water is uncommitted and is not being used for any consumptive use. The courts have upheld the power of the Secretary of the Interior to enter into contracts for the sale of water stored in Big Horn Lake for industrial uses once Environmental Impact Statements have been issued. Environmental Defense Fund v. Andrus, 596 F.2d 848 (9th Cir. 1979). The Bureau of Reclamation is now preparing a draft environmental impact statement.

There are many unanswered questions concerning the relationship between the Crow Tribe's reserved water rights and the waters of the Big Horn River captured and stored in Big Horn Lake. The Bureau of Reclamation has acknowledged that approximately 98,000 acre feet per year of Big Horn Lake water was reserved for the irrigation of Hardin Bench agricultural lands on the Crow Reservation. (The Hardin Bench unit has not been constructed.) In 1971, the Bureau of Indian Affairs, the Bureau of Reclamation, and the Crow Tribe entered into a Memorandum of Understanding pursuant to which 30,000 acre feet of that 98,000 acre feet was "tentatively transferred" for industrial purposes for the development of Crow coal resources. (That Memorandum expressly provides that it is without prejudice to the Crow Tribe's water rights claims.)

In 1967, the Bureau of Reclamation initiated a program for marketing water from Big Horn Lake for industrial purposes. Between 1967 and 1971, the Bureau entered into at least 16 contracts with energy companies in which the companies obtained options to purchase water from Big Horn Lake for industrial uses. A total of 623,000 acre feet of water per year was committed under these contracts, 365,000 acre feet for use in Wyoming and 258,000 acre feet for use in Montana. This amount included 140,000 acre feet for industrial uses of water for the development of the Crow Tribe's energy resources, 110,000 acre feet that was administratively set aside for

this purpose (again without prejudice to the Tribe's water rights claims), plus the 30,000 acre feet transferred from agricultural use. All of those option contracts have either expired or have been terminated. At the present time, there are no outstanding commitments to deliver any water from Big Horn Lake to any industrial water users in Montana or Wyoming.

In July, 1980, the Chairman of the Crow Tribe wrote to the Bureau of Reclamation asking for clarification regarding the use of Big Horn River water for the development of the Tribe's coal resources. The letter specifically mentioned the Tribe's interest in two projects, the synthetic fuels plant and the coal-fired power plant, which together would require approximately 30,000 acre feet per year. The August 5, 1980 response from the Bureau of Reclamation states:

> As you know, we are under Federal court order to prepare an environmental impact statement on the industrial water marketing program for Yellowtail water. As part of this effort we will reassess the available water supply taking into account additional years of record.
>
> At this time we have no reason to believe that the total quantity of water available will vary much from previous estimates. Water should still be available for development of Crow coal resources in an amount near 110,000 acre-feet annually and most certainly the 30,000 acre-feet annually required for the two projects you now have under consideration would be physically available.

6.0 (Continued)

It appears to us at this time that factors other than water availability such as air quality parameters and social and economic impacts will be the limiting constraints to future synfuel and powerplant development in this area. If your proposed projects can pass these and other environmental tests, then we would conclude that water availability would be no problem.

The waters of the Big Horn River are apportioned between the states of Wyoming and Montana under the Yellowstone River Compact of 1950, 65 Stat. 663. Article V(B)(2) of the Compact allocates 80% of the Big Horn River to Wyoming and 20% to Montana. But Art. VI of the Compact states: "Nothing contained in this Compact shall be so construed or interpreted as to affect adversely any rights to the use of the waters of Yellowstone River and its tributaries owned by or for Indians, Indian tribes, and their reservations." The Compact does not present an obstacle to the proposed synthetic fuels plant. Montana is not using its 20% share of the Big Horn, and even if it were, the Compact limitation would not prevent the Crow Tribe from exercising the full extent of its reserved water rights.

Based on the Tribe's recognized rights and the ample water supplies that are available in Big Horn Lake and the Big Horn River, the Crow Tribe will definitely be able to provide the plant with sufficient water to meet 100% of its requirements. In the preliminary financial feasibility projections of the proposed synfuels plant that have been made in this study, the source of water for all four proposed sites was assumed to be either the Big Horn River or Big Horn Lake because of the assured supply available from those sources. The cost of conveying water from those sources to the proposed sites will be the upper limit of the cost of obtaining water for the plant. Other possible sources, such as the Little Big Horn River and its tributaries, should be examined in more detail during the second phase, once a site has been selected. The subsequent

6,0 (Continued)

investigation will determine whether sufficient water for the plant is available from any alternate source of water by virtue of the reserved water rights of the Crow Tribe, and whether water for the plant can be obtained at reduced or comparable cost from sources other than the Big Horn River and Big Horn Lake. If sufficient water from an alternate source or sources can be obtained at comparable or reduced cost, the determination of the source to be used by the plant will be made by the Crow Tribe.

7.0 INDIAN LAW ASPECTS

7.1 Jurisdiction and Regulatory Authority Within the Crow Indian Reservation

7.1.1 Introduction

Of the 2,282,764 acres of land encompassed within the exterior boundaries of the Crow Reservation, roughly 52% is allotted, 17% is tribal trust lands, and 28% is fee-patented, private lands. The General Council of the Crow Tribe will soon be asked to consider undertaking a major effort to pursue development of a major synfuels project to produce 125 million cubic feet (125MMSCF/CD) of substitute natural gas daily with potential expansion to 250MMSCF/CD. The project would be located on trust lands within the reservation and require a significant work-force comprising both Crow tribal members and non-members. The question has naturally arisen as to which government (state, federal, or tribal) would have leading civil regulatory jurisdiction over the facility and the various associated activities.

7.1.2 Background

The Crow Reservation once included approximately 38.5 million acres. This large tract of lands was recognized as Crow lands by the United States in the Treaty of Fort Laramie of 1851, 11 Stat. 749. In 1868, the original reservation was reduced to approximately 8 million acres by the Second Treaty of Fort Laramie, 15 Stat. 649. Subsequent acts of Congress reduced the reservation to its present acreage. Article 2 of the Treaty of 1868 specifically describes the reservation as "set apart for the absolute and undisturbed use and occupation of the Indians." The Allotment Acts of 1887, 24 Stat. 388; of 1891, 26 Stat. 813; and of 1920, 41 Stat. 751, provided that patents in fee could be issued by the United States to individual allottees. Once issued patents, Crow allottees could

7.1.2 (Continued)

convey their lands to non-Indians. Significant additional acreage within the reservation was opened for homesteading by non-Indians.

7.1.3 Overview

The notion that an Indian reservation is a distinct, wholly independent nation within a state has yielded, over time, to the exigencies of concrete situations. See, e.g., Organized Village of Kake v. Egan, 369 U.S. 60 (1962). Although the policy of leaving Indians free from state jurisdiction and control is rooted deeply in the nation's history, Rice v. Olson, 324 U.S. 786 (1945), situations have occurred involving non-Indians where both tribes and states can fairly claim a legitimate interest in asserting their respective jurisdictions, McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973). Absent an applicable federal statute, the test is to determine whether state action would infringe upon the right of reservation Indians to make their own laws and be ruled by them. Williams v. Lee, 358 U.S. 217 (1959).

Since 1973, the point of departure in analyzing Indian jurisdiction and tax cases has been to examine the applicable federal statutes. McClanahan v. State Tax Commission, supra. The Indian sovereignty doctrine, though still relevant (particularly in relations between tribes and their members), merely provides an analytical "backdrop" against which applicable statutes and treaties must be read. States retain the regulatory jurisdiction over the on-reservation activities of non-members that they enjoyed prior to passage of P.L. 280, Draper v. United States, 164 U.S. 240 (1896); United States v. McBratney, 104 U.S. 621 (1881); see also, Fort Mojave Tribe v. County of San Bernardino, 543 F.2d 1253 (9th Cir. 1976), cert. denied, 430 U.S. 983 (1977), UNLESS: (A) state actions would interfere with the administration of Indian trust lands by the Department of the

7.1.3 (Continued)

Interior, Metlakatla Indian Community v. Egan, 369 U.S. 45 (1962); or (B) state actions affect essential matters of tribal government, Arizona ex rel. Merrill v. Turtle, 413 F.2d 683 (9th Cir. 1969), cert. denied, 396 U.S. 1003 (1970).

7.1.4 Environmental Regulation

It seems fairly clear that neither the Clean Water Act, 33 USC §§ 1261 to 1376, nor the Clean Air Act, 42 USC §§ 7401 to 7642, are applicable federal statutes in the sense of conferring on states an express grant of jurisdiction for water and air pollution control. In 1977, EPA General Counsel William Frick advised the Minnesota Pollution Control Agency that the state would have to rely on a treaty provision or some statute other than either the Federal Water Pollution Control Act (Clean Water Act) or P.L. 280 to provide the legal support for state issuance and enforcement of water pollution discharge (so-called NPDES) permits within Minnesota Indian reservations. As a matter of administration, the regional Environmental Protection Agency office in Region VIII (which includes Montana), retains authority under the environmental statutes to issue permits for tribal or Indian pollution sources and relies on the state to issue permits for incorporated municipalities within the reservation areas.

The field of reservation environmental protection remains unsettled. Only a handful of the twenty-four tribal governments within Region VIII appear both interested and capable of assuming the major technical and legal responsibilities for reservation environmental regulation. The Crow Tribe appears to be one of these tribes.

A general misconception exists that Indian tribes must be expressly granted congressional authority to exercise police powers. The whole federal environmental statutory framework rests on the foundation of existing local powers in the states or tribes for enforcement. The intent

7.1.4 (Continued)

of Congress was to create temporary federal programs until such programs could be delegated to the states. Delegation was achieved to the extent that states could justify that they each had the prerequisite legal authority to carry out the environmental programs they proposed. Existing state authority is obviously limited regarding Indian reservation lands. A significant shortcoming of the existing federal statutes is the omission of guidance for the states in dealing with federal Indian reservation lands.

7.1.5 Interior's Application of State Laws

It is legally conceivable, though politically highly unlikely at this point, that under the authority of 25 USC § 231, the Department of the Interior could promulgate regulations to allow Montana's enforcement of its environmental laws and regulations within the Crow Indian Reservation. Under this 1929 statute, the Act of February 15, 1929, 45 Stat. 1185, the Secretary is authorized to "permit the agents and employees of any State to enter upon Indian tribal lands, reservations, or allotments" to inspect and enforce health and sanitation regulations.

It should be noted that 25 USC § 231 is not self-executing and that the Solicitor has held (Sol. Mem. No. M-36768, February 7, 1969), that in the absence of implementing regulations the statute "cannot serve as a source of authority to enforce state health and sanitation laws in Indian Country." Section 231 was originally implemented through regulations found at 25 CFR Part 84.78 (1949 ed.) which appeared to authorize state regulations of trust lands conditional upon Secretarial approval. The regulation was revoked on July 1, 1955, when responsibility for health and hospitals was transferred from BIA to the Department of Health, Education, and Welfare. No regulations exist to implement Section 231 at present.

7.1.5 (Continued)

A decision by the Department whether to allow state law to be applied to Indian reservation lands would, no doubt, be decided on a case-by-case basis. In the present climate supportive of government-to-government relations with Indian tribes, it is difficult to envision the Department taking unilateral action without extensive consultation and agreement with the affected Tribe. In the 1969 Solicitor's Memorandum, the Department's position on the scope of state authority allowable under P.L. 280 was discussed. In the view of the Solicitor, state jurisdiction under P.L. 280 extended over Indian individuals and private (non-trust) property, but not over trust property. This approach contrasts sharply with the plain words of the statute, as amended, see, 28 USC § 1360(b) and 25 USC 1322(b), and would bring state enforcement efforts into conflict with the Department's claims of exclusive authority. See, 25 CFR 1.4(a).

Santa Rosa Band of Indians v. Kings County, 532 F.2d 655 (9th Cir. 1975) appears to preclude state jurisdiction over reservation trust lands. Santa Rosa concerned the attempted county regulation of Indian use of trust lands. Under P.L. 280, California had been given jurisdiction over Indian reservations. In interpreting this statute, the court spelled out the limitations of state jurisdiction within reservations even under a comprehensive congressional scheme. The court determined that the county ordinance was a prohibited "encumbrance" under 28 USC § 1360(b).

The court also noted that 25 CFR 1.4 was a regulation in derogation of any jurisdiction states might obtain under P.L. 280, and that the county ordinance would conflict with federal programs to provide housing and sanitation services to members of tribes.

Santa Rosa was cited with approval in Bryan v. Itasca County, 426 U.S. 373 (1976), wherein the U.S. Supreme Court determined that Congress, in enacting P.L. 280, had not intended that states choosing to extend (by legislation) jurisdiction within Indian reservation areas be allowed to

7.1.5 (Continued)

exercise general civil regulatory authority. Except for the Flathead Reservation, Montana does not exercise jurisdiction within Indian reservation areas.

It should be noted, however, that federal environmental safeguards built into federal decision-making would be applicable to any major facility on the reservation. Thus, the consideration of environmental factors and alternatives would probably necessitate preparation of an Environmental Impact Statement by the Bureau of Indian Affairs under the National Environmental Policy Act of 1969. An NPDES (discharge) permit is required under the Clean Water Act, as is a "dredge and fill" permit. Under the Clean Air Act, a Prevention of Significant Deterioration (PSD) permit is required for air pollution control. A hazardous waste permit is required under the Resources Conservation and Recovery Act of 1976. The permits (with the exception of "dredge and fill") are administered by the U.S. Environmental Protection Agency.

No doubt, federal agency decision-making will allow for public comment and review at various stages.

The applicability of state law to activities involving non-Indians within Indian reservation depends upon (1) the specific factual circumstance, (2) the applicable federal statutes and treaties, (3) the Tribe's interest, and (4) the interest of the state. An answer to the question of primary jurisdiction will then, of necessity, have to await specific facility siting and project management decisions. From the standpoint of the State of Montana, issues relative to jurisdiction which merit analysis will probably include: (1) Is the subject area which the state seeks to regulate already comprehensively regulated by the federal government or by the tribal government; (2) Does the state statute interfere with the purposes of federal statutes pertaining to Indian tribes; (3) Does the state statute interfere with the Indian Tribe's right to self-government; (4) What is the history

7.1.5 (Continued)

of treaties between the United States and the Indian tribe (Crow) and the statutory history pertaining to the Crow Indians; (5) To what State-Indian tribe relationship have the Crow previously accommodated themselves; (6) Is the project on an Indian reservation; and finally, (7) What legitimate state interests are involved.

Obviously these factors require an analysis of the specific state law in question. Such an analysis can be prepared only after a more detailed project proposal is in hand and the state's perspective is understood. Careful planning may well avoid protracted disputes regarding legal jurisdiction.

7.1.6 Tribal Authority

The interest of the Crow Tribe in the protection and enhancement of Crow Reservation land is evidenced through various ordinances passed by the Crow Tribe. In 1976, the Crow Tribe adopted a land use ordinance as well as one governing environmental health and sanitation.

In recent years, Indian tribes throughout the West have enacted measures to control land use and regulate activities within reservations. As a result, cases have arisen from challenges by non-members against tribal regulation of their activities.

Although Indian tribes lack inherent authority to try and punish non-Indians for criminal offenses, Oliphant v. Suquamish Indian Tribe et al., 435 U.S. 191, 212 (1978), tribes still retain authority to regulate non-Indian conduct under certain circumstances. Absent a pertinent treaty provision and when congress has not acted to delegate or deny tribes the right to control use of non-Indian owned land, tribes may regulate.

7.1.6 (Continued)

In Montana v. United States, U.S. 101 S.Ct. 1245 (1981), the U.S. Supreme Court recognized the right of Indian tribes to exercise some forms of civil jurisdiction over non-Indians, even on non-Indian lands. The tribes retain the right to exercise inherent sovereign powers where non-Indians enter into "consensual" relationships with tribes or their members. It is proper for tribes to regulate the conduct of non-Indians on fee-patented, private lands if such "conduct threatens or has some direct effect on the political integrity, the economic security, or health or welfare of the tribe." Id., at 1258.

As pointed out in Merrion v. Jicarilla Apache Tribe, U.S., 42 CCH S. Ct. p. 1121 (1982), the authority of tribes to impose taxes upon oil and gas producers arises from their inherent sovereignty as opposed to their proprietary interests in tribal lands. The U.S. Supreme Court said tribes have "attributes of sovereignty over both their members and their territory." Ibid. Cases awaiting decision in the courts of appeals for the 9th and 10th circuits quickly followed suit.

In Cardin v. De La Cruz, F.2d (9th Cir. 1982), the court of appeals upheld tribal regulation of a non-Indian owned and operated store located on private land. Cardin, the court held, had entered into "consensual relationships" with the Tribe through commercial dealings, and the continued maintenance of a decrepit store "threatens or has some direct effect" on the health and welfare of the Tribe. In Knight v. Shoshone and Arapahoe Indian Tribes, F.2d (10th Cir. 1982), the court upheld a tribal zoning ordinance governing subdivision development on fee lands within the Wind River Reservation in Wyoming. The court noted that included among tribal powers is "a broad measure of civil jurisdiction over the activities of non-Indians on Indian reservation lands in which the tribes have a significant interest." Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 152-53 (1980). The zoning ordinance, when considered against the absence of any other land use

7.1.6 (Continued)

controls, was justified as the exercise of a legitimate tribal interest in preserving and protecting homelands.

The Crow Tribe has legitimate interests in promoting economic development within the reservation as well as in protecting the health and safety of its members. The exercise of Crow Tribe police powers over major facilities is reasonably related to tribal government objectives. Protection of health and safety provide a compelling basis for regulation.

The opportunity for non-member input into the legislative process of Indian tribes is limited. The U.S. Supreme Court has held, on several occasions, that the lack of non-member participation into the tribal legislative process or regulation is "immaterial" when reviewing the basic authority of tribes. Tribes, like other governments, are aware of the fine line separating a climate fostering economic development from an atmosphere of excessive and unnecessary government regulation.

7.2 PLEDGING TRUST ASSETS AS COLLATERAL

7.2.1 Introduction

The purpose of this section is to present a discussion of the trust relationship existing between the government of the United States and the Crow Tribe and how that trust relationship affects the ability of the Crow Tribe to pledge assets of the Tribe as collateral for loans or mortgages.

Any time an Indian Tribe seeks to allow a third party to acquire an interest in its tribally held lands, before that interest becomes effective and legally binding the United States must approve it. The term "lands" is a term of art and has been construed to include not only the surface but also that which is below together with all interests both corporeal and incorporeal. 73 C.J.S. Property Section 7. Therefore, were the Tribe to

7.2.1 (Continued)

pledge or transfer any of its surface lands or resources to help finance this project as an equity contribution, the approval of the United States would have to be obtained.

The Crow Tribe is possessed of abundant natural resources in the form of a large land base, vast coal deposits, water, oil, gas, and bentonite. It is these assets which could be used to help finance long-term development of the sort envisioned by this project. The Tribe owns approximately 350,000 acres of surface land, has the mineral rights to 17 billion tons of coal, of which current estimates place 6 to 7 billion tons as strippable under today's economics. The land base supports agricultural, pastural, and commercial timber uses. The water rights of the Crow Tribe have been dealt with in another section of this study.

7.2.2 Legal Basis for Federal Approval Requirements

The ability of the Crow Tribe both to develop and to pledge these resources as collateral for loans or mortgages is circumscribed by the Trust relationship and the plenary authority of the United States over the Tribe. The Trust relationship doctrine was judicially developed from a recognition that Tribes are domestic dependent nations in a state of tutelage. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831). This Trust doctrine imposes a duty on the United States to exercise guardianship responsibilities over Indians and to protect them in their property and personal rights. Heckman v. United States, 224 U.S. 820, 828 (1912), United States v. Kagama, 118 U.S. 375, 384 (1886).

Co-existing with the Trust relationship doctrine but in many circumstances at odds with it is the plenary authority of the United States to control the lands and resources of the Tribe. This plenary authority arises from the United States' succession to the territory over which the various European nations asserted dominion. Three nations under the doctrine of discovery

claimed the right to "appropriate the lands occupied by the Indians." Johnson and Graham's Lessee v. M'Intosh, 8 Wheat 681, 691 (1823). This assertion of a right to appropriate these lands "extends to the complete ultimate title, charged with this right of possession by the Indians, and to the exclusive power of acquiring that right." Id., at 696. That is to say that the territory acquired by the United States gave it clear title, "subject only to the Indian right of occupancy." Ibid., at 691.

Thus, the plenary authority to exercise dominion over Indian lands is not absolute. For example, should the United States engage in a course of action which is in derogation of a treaty or constitutional right enjoyed by the Tribe, or where the United States "takes" land of the Tribe for a governmental purpose, just compensation must be paid to the Tribe for these actions. Shoshone Tribe v. United States, 229 U.S. 476, 498 (1937), In accord, Bennett County, S.D. v. United States, 394 F.2d 8 (8th Cir. 1968).

Although the plenary authority and the Trust relationship concepts can meld together in certain instances, it can generally be said that when the United States is exercising dominion over tribal lands and resources, it is acting in its plenary capacity. Whereas, when it is acting in its Trustee role, the United States is exercising a guardianship role over tribal land and resources and is under a duty to see to it that the transaction touching these resources and lands is in the best interests of the Tribe.

Pursuant to either of the above two legal precepts, the United States can forbid alienation of tribal land or resources unless conducted pursuant to guidelines set out by the United States. Thus, the United States, like its predecessors in interest--Britain, Spain, and France--has not sought to forbid Indian alienation of their lands, but has regulated such dispositions. Felix Cohen, Handbook of Federal Indian Law, 321 (1942 ed., Univ. of New Mexico reprint).

7.2.3 Federal Prohibitions

Prior to enactment of certain federal statutes vesting authority in the Executive Branch to approve various transfers of interests in Indian lands, the United States regarded a treaty ratified by Congress as the only way by which an Indian Tribe could transfer its lands or an interest therein. United States v. Kagama, supra, at 381. Congress clearly expressed its position on this matter when it enacted the Nonintercourse Act (codified at 25 USC § 177) of June 30, 1834. That statute invalidates any "purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians" unless made by treaty or convention in accordance with the Constitution. The statute was enacted for the purpose of preventing unfair, improvident, or improper disposition by Indians of lands owned or possessed by them to other parties. Mashpee Tribe v. Seabury Corp., 427 F. Supp. 899 (D.C. Mass. 1977). The United States is, thus, under the statute acting in its trustee capacity toward the Crow Tribe and not because the United States holds the fee title to the lands as sovereign.

25 USC § 177 not only acts as a limitation on the Tribe, but also on the Executive Branch of the government. That is, unless there is express congressional authority to do so, alienation of tribal lands by the Executive is ineffective. United States ex rel. Hualapai Indians v. Santa Fe Pac. R.R., 314 U.S. 339, 347 (1941). This general restraint on alienation generally applies equally to both voluntary and involuntary alienations. Felix Cohen, Handbook of Federal Indian Law (1982 ed.). As a consequence of the alienation restraint, states are unable through their courts or otherwise to transfer title by foreclosure sale when enforcing a mortgage. Narragansett Tribe v. Southern R. I. Dev. Corp., 418 F. Supp. 798, 805-06 (D.C. R.I. 1976). Unless approved by the United States, even a good faith acquisition of property held by an Indian Tribe will not render good a title which was not acquired in accordance with federal conditions for acquisition. Oneida Nation of New York v. Oneida County, 434 F. Supp. 527 (D.C., N.Y. 1977).

7.2.4 Authorizing Federal Statutes

There are certain federal acts which can be used by various methods whereby the Crow Tribe could make an equity contribution as a collateral pledge toward the project.

The first is the 1938 Mineral Leasing Act (codified at 25 USC § 396a-396g). Under this Act, the Tribe could lease coal deposits with special lease conditions whereby the lessee would be obligated to pay substantial advance royalties which the Tribe could then contribute as its share toward the project. Alternately, the lease terms could specify that the leasehold would be dedicated to the project.

A second statute which has application to this project is 25 USC § 415. That Act permits the leasing of Tribal land for business purposes, "including the development or utilization of natural resources in connection with operations under such leases." A lease granted under § 415 is one for an initial term of 25 years which can include provisions for renewal with one additional term of not more than 25 years.

The Tribe could lease lands for the project and include within that lease dedications of coal and water resources in sufficient quantities to fulfill the needs of the project.

Therefore, under either of these two general federal statutes, there exists the means whereby the Tribe can, with federal approval, commit particular tribal resources to the project. These commitments can be in the form of equity contributions or as collateral to support various financing schemes.

A specific statute which is of importance to the Crow Tribe, and which may be available for use in the financing context, is the Act of May 19, 1958, 72 Stat. 121. That Act restored to the Crow Tribe vacant and undisposed of lands in an area commonly referred to as the "ceded area" of the reservation. Section 3 of that Act authorizes the sale or exchange

7.2.4 (Continued)

of these restored lands with the approval of the Secretary. Although the Act actually restored only 10,260.95 acres in the ceded area, the language of the Act also provides for later restorations, inasmuch as it states "all lands now or hereafter classified as vacant and undisposed." Therefore, it is arguable that tribal coal resources in the ceded area could be sold or mortgaged as a means for providing capital for the project.

Under the above referenced statutes, there exist the means whereby the Tribe can contribute toward the financing of the proposed project.

7.3 BUSINESS AND TAX STATUS

It is estimated that the proposed synthetic fuels plant will cost in excess of two billion dollars in capital costs. In a business venture of this magnitude, business and tax considerations become an integral part of project planning as well as determining the over-all project feasibility. The scope of this section will be limited to the effect that unique Indian law considerations may have on the business and tax structuring of the project.

Any discussion of the business and tax status of Indian tribes in relationship with the development of their resources must begin with their unique status as sovereign governments. Indian tribes still possess all aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status. Congress has the authority to limit the sovereign power of tribes through specific acts.

Except in limited circumstances, the inherent sovereign powers of an Indian tribe do not extend to the activities of non-members of the tribe. There are times however, where Indian tribes may exercise their sovereign power in the forms of civil jurisdiction over non-Indians on non-Indian fee

land within their reservations. A tribe may regulate, through taxation, licensing, or other means, the activities of non-members who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. Indian tribes also retain the inherent power to exercise civil authority over the conduct of non-Indians on fee lands within their reservations when that conduct threatens or has some direct effect on the health and welfare of their respective tribes.

As sovereign governments, Indian tribes also enjoy immunities. In Rev. Rules 67-284, the IRS has said "Income tax statutes do not tax Indian tribes. The tribe is not a taxable entity." This tax immunity extends to tribal business enterprises provided they are essential to the functioning of tribal governments. Indian tribes are immunized from suit unless such immunity is waived by an act of Congress or is expressly waived by the tribal governing body.

Also, Indian tribes enjoy tax exemptions. They are not taxed by the Federal government on income derived from their land and mineral interests which are held in trust by the United States government. Oil produced by an Indian tribe is exempt from the windfall profits tax on domestic crude oil.

Other governmental functions performed by, or which are provided for, the benefit of tribal government may be subject to federal taxes. Unless there exists an express exemption for Indian tribes, each tax must be carefully examined in light of tribal treaties, other federal statutes and general principles of Indian law in determining whether a tribe is subject to such taxes.

Indian tribe's business and tax status vis-a-vis state laws and taxes present an important consideration in determining the overall feasibility of

the synfuels project. State government has been zealous in its efforts to tax Indian resources either directly or indirectly. As a result of these efforts by state governments, much litigation has taken place and the courts have developed some basic concepts of law where states may or may not tax Indian tribal activities.

The infringement test was developed by the courts and is tied closely to Indian tribes as sovereigns. The test is, if state law interferes with the right of a tribe to make its own laws and be governed by them, the law is invalid. In applying the infringement test, the relevant federal treaties and statutes must be examined to determine whether state government has been granted any authority to tax the activity.

When the Federal Government regulates an area of activity so completely that there is no room left for state regulation, the Federal Government has preempted the area and displaced state law from it. Federal preemption flows from the Supremacy and Commerce Clauses of the United States Constitution. Federal preemption in Indian law is different from the doctrine of federal preemption in other areas of the law. Because of the inherent sovereign power of Indian tribes discussed supra, federal preemption in Indian law does not require an express congressional statement of intent that state law be preempted.

The concept of tribal preemption flows from federal preemption and Indian tribes as sovereign governments. When an Indian tribe, exercising its inherent governmental authority, enacts a regulatory or tax law and the state enacts a similar law involving the same activity, the tribal law should preempt the state law; thereby, barring the application of the state law on the reservation.

Article I, Section 8 of the United States Constitution gives Congress the power, "to regulate commerce with foreign nations and among the several states, and with the Indian tribes." The Supreme Court has suggested that the Indian Commerce Clause might have a role to play in preventing undue discrimination against, or burdens on, Indian commerce. The Court indicated that undue discrimination or burdens might occur where state taxes are imposed upon commerce that would exist on the reservation without respect to tax exemptions.

The federal preemption doctrine has played a major role in protecting Indian tribes from state taxes whenever the taxes are imposed on the tribes directly. It has played an even greater role in warding off state taxes where the tax itself is imposed on non-Indians but the economic impact of the tax is felt by the tribe. The economic impact on an Indian tribe of a state tax on a non-Indian alone, however, may be enough to invalidate the state tax, except when tribes are marketing a tax exemption. In cases where tribes are marketing a tax exemption, the tribes must show economic impact coupled with extensive federal concern for the activity which suffers from the economic impact of the tax before federal preemption exists.

Federal preemption has been based upon Indian treaties and general federal legislation such as the Indian Reorganization Act of 1934 and disclaimers of jurisdiction over Indian lands found in state constitutions. These have generally been enough to support tribal exemptions from state taxes imposed on Indian tribes within their reservations. Whenever the tax is imposed on non-Indians within the reservations or on tribes outside their reservations, the courts look for a much more specific intention on the part of the federal government to preempt the subject of the tax the state seeks to impose.

7.3 (Continued)

Whenever the legal incidence of the tax is on non-Indians, tribes must show that the federal government extensively regulates the area, or that the tribe itself has a significant interest in the transaction in which the tax is imposed. If the tribe is marketing only a tax exemption, specific federal intent to preempt is required. If, however, the tribe is marketing some value that is generated on-reservation, the general federal statutes which encourage tribal self-government and economic development may be sufficient to defeat a state tax with the federal preemption doctrine.

Some states have been successful in having their taxes upheld by imposing a tax on non-Indian lessees of Indian trust land. The tax in these cases is a Possessory Interest Tax on possession of land by non-Indian lessees. Although there is an economic impact on the Indian tribe, the courts have held that federal law did not preempt the Possessory Interest Tax. The Possessory Interest Tax was upheld prior to the Supreme Court substantially clarifying the law of federal preemption in relationship to Indian tribes.

Under the most recent pronouncements of the Supreme Court on federal preemption, shifting the legal incidence of a state tax to non-Indians does not guarantee that the tax will be upheld as a valid tax. If the Possessory Interest Tax violates the federal preemption doctrine, Indian self-government or the Indian Commerce Clause, it will be found to be invalid.

States also have attempted to tax the severancy of Indian minerals by non-Indian lessees and the gross proceeds derived from the sale of the severed minerals. The courts have reviewed these taxes and held that if tribes can show that such taxation conflicts with federal statutes or treaties or interferes to an impermissible extent with the ability of the tribe to govern itself, then the taxes would be found to be preempted and would infringe upon the tribe's right to govern itself.

7.3 (Continued)

Congress enacted the Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396g (1976) which governs the leasing of Indian minerals. The courts have found the goals of this Act to be threefold: (1) The Act sought to achieve uniformity in the law governing mineral lease on Indian lands. (2) The Act was designed to help achieve the broad policy of the Indian Reorganization Act of 1934, 25 U.S.C. §§. 461-479 (1976), that tribal governments be revitalized. (3) The Act was intended to encourage tribal economic development. Unless the Severance and Gross Proceeds Tax can be carefully tailored to effectuate a state's legitimate interests, the taxes will fatally conflict with the purposes behind the 1938 Act.

Indian tribes occupy a unique business and tax status with regard to state and federal taxation. Careful consideration must be given to the tribe's unique status in determining how the Crow Tribe should participate in the ownership of the Synthetic Fuels Plant.

It is clear that tribal ownership of the project will allow the project to take advantage of the Tribe's business and tax status. The Tribe's unique status will have to be balanced against the business and tax interest of the corporation who will participate with the Crow Tribe in making the Crow Synthetic Fuels Plant a reality.

8.0 Conclusion

To sum up the results of this preliminary legal assessment, there appears no insurmountable legal obstacles to the Crow Synfuels Project.