wildlife designated as endangered in rules adopted by the DNR, if such endangered species cannot be firmly reestablished elsewhere; or (b) unique features of the land, as determined by state or federal designation and incorporated in rules adopted by the DNR, as wilderness areas, wild and scenic rivers, national or state parks, wildlife refuges and areas, archaeological areas, property registered in the National or State Register of Historic Places and other lands of a type designated as unique or unsuitable for surface mining.

4. The proposed mine will not endanger public health, safety or welfare.

5. The proposed mine will result in a net positive economic impact in the area reasonably expected to be most impacted by the activity.

6. The proposed mining operation conforms with all applicable zoning ordinances.

The DNR is required to ***deny*** a mining permit if any of the following situations may reasonably be expected to occur during or subsequent to mining [s. 293.13 (2) (d), Stats.]:

1. Landslides or substantial deposition from the proposed operation in stream or lake beds which cannot be feasibly prevented.

2. Significant surface subsidence which cannot be reclaimed because of the geologic characteristics present at the proposed site.

3. Hazards resulting in irreparable damage to various types of buildings or facilities which cannot be avoided by removal from the area of hazard or mitigated by purchase or by obtaining the consent of the owner.

4. Irreparable environmental damage to lake or stream bodies despite adherence to the requirements of ch. 293, Stats.

The DNR is also required to deny issuance of a mining permit if the person applying for the permit or certain related persons have engaged in activities specified in s. 293.49, Stats., which indicate that the person may be unsuitable to operate a mine. [s. 293.49 (2), Stats.]

C. DESCRIPTION OF THE ENGROSSED BILL

The Engrossed Bill would establish two preconditions for issuance of a mining permit by the DNR in addition to the requirements of current law. Under the Engrossed Bill, the DNR may not issue a permit for the mining of a sulfide ore body until both of the following preconditions are satisfied:

1. The DNR determines, based on information provided by an applicant for a permit under s. 293.49, Stats., that a mining operation has operated in a sulfide ore body which is not capable of neutralizing acid mine drainage in the United States or Canada, for at least 10 years without the pollution of groundwater or surface water from acid drainage at the tailings site or at the mine site or from the release of heavy metals.

2. The DNR determines, based on information provided by an applicant for a permit under s. 293.49, Stats., that a mining operation that operated in a sulfide ore body which is not capable of neutralizing acid mine drainage in the United States or Canada, has been closed for at least 10 years without the pollution of groundwater or surface water from acid drainage at the tailings site or at the mine site or from the release of heavy metals.

The Engrossed Bill defines "pollution" to mean "degradation that results in any violation of any environmental law" and defines "sulfide ore body" to mean a mineral deposit in which metals are mixed with sulfide minerals.

D. APPLICABILITY OF MINING PERMIT LAWS AND THE ENGROSSED BILL TO MINING CONDUCTED UPON INDIAN LANDS

1. Background

There are certain legal principles which affect state jurisdiction to regulate transactions which occur on Indian lands. First, a federally recognized Indian tribe is a legitimate governmental entity possessing attributes of sovereignty over its members and territory and only the federal government has authority to qualify this power. In addition, state law is not applicable within the boundaries of Indian tribal lands except with the consent of the tribe itself, in conformity with federal laws or where the courts have determined that state laws shall apply. The limitations on state jurisdiction to regulate transactions which occur on Indian lands are attributable to art. VI, cl. 2 (the "Supremacy Clause") of the U.S. Constitution and the federal government's consequent authority to preempt state laws.

The applicability of state regulatory and tax laws to activities on Indian lands is complex. Some of the complexity is because much of the law is not established in federal or state statutes but, rather, has been enunciated in a number of court decisions. An additional source of this complexity is the lack of clarity in tests used by the courts to determine whether a state law is applicable.

The U.S. Supreme Court has stated that there is no rigid rule by which to resolve the questions of whether a particular state law may be applied to Indian lands or to tribal members. [*White Mountain Apache v. Bracken*, 448 U.S. 136, 100 S. Ct. 2578 (1980).] In this case, the Court stated that the broad congressional authority to regulate Indian affairs (under the Indian Commerce Clause of art. I, s. 8, cl. 3, U.S. Constitution) and the semi-independent position of Indian tribes create two related, but independent, barriers to the assertion of state authority over Indians on Indian lands. The first barrier is that the exercise of state authority may be ***preempted*** by federal law. The second barrier is that the state authority may ***unlawfully infringe on the right of reservation Indians to make their own*** laws.

2. Applicability Where Mining on Indian Lands is Conducted by the Tribe

As was described in Parts B. and C. of this memorandum, the requirements that must be met in order to obtain a metallic mining permit from DNR under current law, and the requirements that would be imposed under the Engrossed Bill, are comprehensive in nature. Imposition

of these requirements would authorize the DNR to determine whether, when and how a tribe could engage in mining.

In 1986, the Wisconsin Attorney General opined that the state mining permit process is generally not applicable to mining operations on the Sokaogon Reservation, whether those operations are conducted by the tribe or by a non-Indian lessee. [75 Op. Att'y Gen. (*op. cit.*).] The Attorney General first noted the strong federal and tribal interests that are at stake in regulating activities upon Indian lands:

> The application of the mining permit process to a tribal mining operation involves an attempt to regulate Indian use of Indian trust lands. [*Santa Rosa Band of Indians v. Kings County*, 532 F. 2d 655, 658 (9th Cir. 1975), *cert. den.*, 429 U.S. 1038 (1977).] . . . This significant territorial component to tribal power [citation omitted] forms part of the backdrop of Indian sovereignty against which the courts determine whether the federal government has preempted state jurisdiction.

The Attorney General also noted that a tribal government would engage in mining for the purpose of economic development and for tribal self-sufficiency, which both are goals of established federal policy to promote tribal self-government. [*New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983).] Thus, the Attorney General concluded that:

> Regulation by the state, through the mining permit process, could infringe substantially on Indian resource development, interfering with the federal policy of promoting tribal governmental and economic independence. Because of the potential for significant infringement on tribal activity within reservation boundaries represented by the mining permit process, the state's interest in regulating and controlling Indian mineral development is not sufficient to overcome the tribal and federal interests involved. The balance of interests concerning the state's authority to impose the mining permit process on tribal mining operations must tip in favor of the tribe and the federal government. [75 OAG, *op. cit.*, p. 22.]

3. Applicability Where Mining on Indian Lands is Conducted by a Non-Indian Lessee

The Attorney General also opined that federal statutory enactments and regulations promulgated by the Secretary of the Interior preempt state laws that would require non-Indian lessees to obtain a permit from DNR to engage in mining activities on Indian lands.

Under 28 U.S.C. s. 1360 (b), which relates to real property belonging to an Indian tribe and held in trust by the United States, the Secretary of the Interior has promulgated regulations that prevent the application of most state laws to the use and development of leased trust property, except where the Secretary of Interior has adopted such laws or made them applicable in specific cases or in specific geographic areas. [25 C.F.R. s. 1.4.] In part, this federal

regulation provides that "none of the laws, ordinances, codes, resolutions, rules or other regulations of any state . . . limiting, zoning or otherwise governing, regulating or controlling the use or development of any real . . . property . . . shall be applicable to any such property leased from or held or used under agreement with and belonging to any . . . Indian tribe, band, or community that is held in trust by the United States . . . ."

In light of this regulation, the Attorney General concluded that: "The Wisconsin mining permit process, if applied to non-Indian mineral lessees, clearly would regulate or control the use or development of trust lands leased from the tribe. Since it does not appear that the Secretary of the Interior has ever adopted or made applicable the state mining permit laws, it is my opinion that application of the permit process to a non-Indian lessee of mining operations would conflict with this federal regulation . . . ." [75 OAG 220, *op. cit.*, p. 23.] In addition, the Attorney General opined that states are prohibited from requiring permits by non-Indian lessees to mine on Indian lands by the Indian Mineral Leasing Act of 1938 and regulations pursuant to the Act under C.F.R. Part 211.

Please contact me at the Legislative Council Staff offices if I can be of further assistance.

WF:rv:jt:ksm;wu

Attachments

LEVEL 1 - 2 OF 4 CASES

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF WISCONSIN

OAG 43-86

1986 Wisc. AG LEXIS 5; 75 Op. Atty Gen. Wis. 220

November 7, 1986

SYLLABUS:
[*1]

CAPTION:

The state net proceeds occupation tax and mining permit process are generall not applicable to mining operations on the Sokaogon Reservation, whether those operations are conducted by the tribe or by a non-Indian lessee. Any federal environmental impact statement required by the federal government would legally need to be shared with or presented to the state. The applicability of state pollution control laws to mining activity on the reservation is also discussed.

REQUESTBY:

The Honorable Anthony S. Earl
Governor
115 East, State Capitol
Madison, Wisconsin 53702

OPINIONBY:
Bronson C. La Follette, Attorney General

OPINION:
You have asked a series of questions relating to possible future mining operations on the reservation of the Mole Lake (Sokaogon) Chippewa Community. Specifically, you ask whether the Wisconsin net proceeds occupation tax, mining permit process and pollution control laws would apply to mining activities by the Sokaogon Tribe, and whether leasing the mining operation to a non-Indian would affect the applicability of these laws. In addition, you wish to know whether an environmental impact statement, if required by the federal government, legally needs to be shared with or presented [*2] to the state.

For the reasons explained below, it is my opinion that neither the net proceeds occupation tax nor the mining permit process is applicable to mining operations on the Sokaogon Reservation, whether the mining is conducted by the Tribe or by a non-Indian lessee. In order to answer comprehensively your question concerning the application of state pollution control laws, this opinion would need to analyze in the context of Indian law each state environmental statute and its federal counterpart. An analysis of that depth i beyond the scope of this opinion. Consequently, the section addressing pollution control laws will discuss certain general principles and guidelines, but will not attempt a definitive answer to your question. Finally, it is my opinion that where a federal environmental impact statement must be prepared, the state is entitled to a voice in the process under federal regulations.

The following discussion will first describe the analytical framework used to determine issues of state regulatory authority on Indian reservations. Each of the three regulatory issues -- the net proceeds occupation tax, the mining permit process and state pollution control [*3] laws -- will then be discussed in turn, as each applies both to a tribal mining operation and to mining conducted by a non-Indian lessee. Finally, your question concerning environmental impact statements will be addressed.

I.

ANALYTICAL FRAMEWORK FOR STATE JURISDICTION

The enactment of Pub. L. No. 280, 67 Stat. 588 (1953), conferred on Wisconsin criminal and civil jurisdiction over all Indian reservations within the state other than the Menominee Reservation. 18 U.S.C. @ 1162; 28 U.S.C. @ 1360. The grant of civil jurisdiction has been interpreted by the United States Supreme Court to refer to state court jurisdiction over private civil matters arising on Indian reservations to which Indians are parties. Pub. L. No. 280 did not, the Court held, confer on the state any regulatory jurisdiction, including the power to tax. Bryan v. Itasca County, 426 U.S. 373, 388-90 (1976).

The state is not absolutely prohibited, however, from exercising jurisdiction over Indian tribes and tribe members. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 141 (1980); County of Vilas v. Chapman, 122 Wis. 2d 211, 214, 361 N.W.2d 699 (1985); State v. Webster, 114 Wis. 2d 418, [*4] 432, 338 N.W.2d 474 (1983). State regulatory jurisdiction within reservation boundaries is determined according to established principles most recently articulated by the United States Supreme Court in Rice v. Rehner, 463 U.S. 713 (1983). There exist "two independent but related barriers" to state jurisdiction: federal preemption of state authority and infringement of the tribal right to self-government. Rice, 463 U.S. at 718-19 (citing Bracker, 448 U.S. at 142); Chapman, 122 Wis. 2d at 214; Webster, 114 Wis. 2d at 432. The trend in recent cases has shifted the emphasis away from the second barrier of tribal sovereignty and toward reliance on federal preemption. Rice, 463 U.S. at 718; Chapman, 122 Wis. 2d at 214; Webster, 114 Wis. 2d at 433.

The test for federal preemption is two-pronged. Initially, the courts must assess the "backdrop" of tribal sovereignty by determining whether the tribe has a tradition of self-government in the area sought to be regulated and by balancing the state, federal and tribal interests involved. Against this backdrop, the courts then determine whether the federal government has preempted the state's exercise of [*5] jurisdiction. Rice, 463 U.S. at 719-20; Webster, 114 Wis. 2d at 434-36. A finding of preemption in Indian law, however, does not necessarily require that Congress explicitly preempt the assertion of state authority. Rice, 463 U.S. at 719; New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334 (1983).

Judicial analysis of regulatory issues has recently favored the doctrine of federal preemption. Where preemption is not found, however, the courts will address the second and independent barrier of state infringement on the tribal right of self-government. "Although self-government is related to federal preemption in the sense that both depend on congressional action and in the sense that preemption is considered in the context of the deeply ingrained traditional notions of self-government, the self-government doctrine is an independent barrier to state regulation." Crow Tribe of Indians v. Montana,

650 F.2d 1104, 1110 (9th Cir. 1981), cert. denied, 459 U.S. 916 (1982). See also Bracker, 448 U.S. at 143.

Each of your first three questions, regarding the applicability of the state net proceeds occupation tax, mining permit process and pollution [*6] control laws to reservation mining activities, whether operated by the tribe or leased to non-Indians, raises an issue of state regulatory authority within reservation boundaries. Consequently, each is analyzed below using this general preemption/infringement framework.

II.

NET PROCEEDS OCCUPATION TAX

The Wisconsin net proceeds occupation tax, section 70.37 et seq., Stats., is designed to compensate the state and its municipalities for the loss of irreplaceable metalliferous minerals and for the costs associated with that loss. Sec. 70.37(2), Stats. The tax is imposed on all "persons engaged in the activity of mining metalliferous minerals in this state." Id. A "person" is defined as "a sole proprietorship, partnership, association or corporation and includes a lessee engaged in mining metalliferous minerals." Sec. 70.375(1) (d), Stats. Under this taxing scheme, if the Sokaogon Tribe or a tribal enterprise were to conduct mining operations on the reservation, the legal incidence of the net proceeds occupation tax would clearly fall on the tribe.

A. Sokaogon Tribe

A basic tenet of preemption in federal Indian law is that "Indian tribes and individuals [*7] generally are exempt from state taxation within their own territory." Montana v. Blackfeet Tribe of Indians, 105 S. Ct. 2399, 2402 (1985). Application of the doctrine has been uniform: states may not, for example, tax Indian income derived solely from reservation sources (McClanahan v. Arizona State Tax Com. 411 U.S. 164 (1973)); personal property of an Indian which is located on trust lands within the reservation (Bryan v. Itasca County, 426 U.S. 373 (1976)); or on-reservation sale of cigarettes to Indians by Indian retailers (Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980)).

This line of tax cases establishes a tradition of tribal immunity from state taxation, which may be overcome only "where Congress has expressly provided that state laws shall apply." McClanahan, 411 U.S. at 171 (quoted in Rice, 463 U.S. at 719-20). The United States Supreme Court has recently reiterated this application of Indian law preemption:

In keeping with its plenary authority over Indian affairs, Congress can authorize the imposition of state taxes on Indian tribes [*8] and individual Indians. It has not done so often, and the Court consistently has held that it will find the Indians' exemption from state taxes lifted only when Congress has made its intention to do so unmistakably clear.

Blackfeet Tribe, 105 S. Ct. at 2403. The question here, then, is whether Congress has clearly authorized the State of Wisconsin to impose its net proceeds occupation tax on Indian mining activities within reservation boundaries.

As noted earlier in this opinion, Wisconsin was granted criminal and civil jurisdiction within the Sokaogon Reservation pursuant to Pub. L. No. 280. The United States Supreme Court has expressly held, however, that Pub. L. No. 280 did not confer on the states the power to tax reservation Indians. Bryan, 426 U.S. at 378-79, 390. Nor am I aware of any other congressional enactment which would confer on the state taxing authority over Indian mining activities on the reservation. Consequently, in the absence of congressional intent to permit state taxation, it is my opinion that the Wisconsin net proceeds occupation tax does not apply to on-reservation mining operated by the Sokaogon Tribe or a tribal enterprise.

B. [*9] Non-Indian Lessee

You also ask whether the net proceeds occupation tax would apply if the mining operation were leased to a non-Indian. If the non-Indian lessee were permitted to pass the net proceeds occupation tax along to the tribe, then the legal incidence of the tax would fall on the tribe and the tax would not be applicable for the reasons stated above. See Montana v. Blackfeet Tribe of Indians, 105 S. Ct. 2399 (1985), and the district court's explanation of the tax there involved, Blackfeet Tribe of Indians v. Montana, 507 F. Supp. 446, 448 (D. Mont. 1981). Unlike the Montana net proceeds tax held inapplicable to Indian mining in Blackfeet Tribe, however, the Wisconsin scheme may tax directly "a lessee engaged in mining metalliferous minerals," with no provision permitting the lessee to pass the tax along to the owner of the minerals. Sec. 70.375(1)(d), Stats.

The fact that the legal incidence of the Wisconsin tax falls on the non-Indian lessee, however, does not necessarily mean that the tax may be imposed. The United States Supreme Court has consistently found that where a comprehensive federal regulatory scheme is present and the actual economic [*10] burden of the tax would ultimately fall on the tribe, the legal incidence test is not controlling. Ramah Navajo School Bd. v. Bureau of Revenue of N.M., 458 U.S. 832, 844 n.8 (1982); see also White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980); Central Machinery Co. v. Arizona State Tax Com., 448 U.S. 160 (1980); Warren Trading Post Co. v. Arizona Tax Com., 380 U.S. 685 (1965). On the other hand, where the preemptive effect of pervasive federal regulation is not present, the Court has upheld state taxes which burden non-Indians. Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980).

Under this preemption analysis, the Court has invalidated a number of state taxes imposed on non-Indians engaged in business on Indian reservations. The Court has struck down both a state sales tax and a state "transaction privilege tax" on the privilege of doing business in the state, imposed on non-Indian sellers for sales to Indians on the reservation. Warren Trading Post, 380 U.S. 685; Central Machinery, 448 U.S. 160. In each case, the Court [*11] held that the federal Indian trader statutes preempted the state tax. "[B]y enacting these statutes Congress 'has undertaken to regulate reservation trading in such a comprehensive way that there is no room for the states to legislate on the subject.'" Central Machinery, 448 U.S. at 166 (quoting Warren Trading Post, 380 U.S. at 691 n.18). Similarly, the Court invalidated state motor carrier license and use fuel taxes applied to a non-Indian company engaged in logging over tribal and Bureau of Indian Affairs roads within the reservation. Bracker, 448 U.S. 136. The Court held that the federal government had so comprehensively

regulated the harvesting of Indian timber as to preclude the state taxes, noting that the state performed no governmental services in return for the taxes it sought to assess. n1 Id. at 148, 150. More recently, the Court struck down a state gross receipts tax on a non-Indian company constructing a school for Indian children on the reservation. Ramah Navajo School Bd., 458 U.S. 832. The Court determined that federal regulation of the financing and construction of Indian schools was pervasive and comprehensive, "leaving no room for the additional [*12] burden sought to be imposed by the State through its taxation of the gross receipts." Id. at 841-42. As in Bracker, the Court noted that the state did not seek to assess the tax in return for governmental services provided to the non-Indian contractor, nor did the state assert "any specific, legitimate regulatory interest to justify the imposition of its gross receipts tax." Id. at 843.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - -

n1 See also Hoopa Valley Tribe v. Nevins, 590 F. Supp. 198 (N.D. Cal. 1984). Relying on the preemption analysis in Bracker, the California district court invalidated a tax on the value of timber at the time of harvest as levied against non-Indian purchasers of tribal timber. The court held that neither regulatory nor revenue-raising interests of the state permitted the burden which the tax imposed on the federal regulatory scheme.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

The applicability of the Wisconsin net proceeds occupation tax to non-Indian lessees must be judged against the standards articulated in this line of cases -- specifically, the [*13] existence of a comprehensive federal regulatory scheme, and the balance of federal, state and tribal interests involved. The first question, then, is whether there is a comprehensive federal scheme regulating non-Indian mining within reservation boundaries.

The Indian Mineral Leasing Act of 1938, n2 52 Stat. 377, 25 U.S.C. @ 396a et seq., governs the leasing of unallotted reservation lands for mining purposes. n3 The Act provides that an Indian tribe may, with the approval of the Secretary of the Interior, lease its lands for mining operations. n4 25 U.S.C. @ 396a; see also 25 C.F.R. @ 211.2. Various sections of the Act address the duration of leases (section 396a), the type of bond to be furnished by the lessee (section 396c), and the officials authorized to approve leases (section 396e). Pursuant to authority granted by section 396d, the secretary promulgated the rules found at 25 C.F.R. pt. 211, described by the Ninth Circuit as follows:

The regulations promulgated by the Secretary under authority of the 1938 Act cover many aspects of mineral leasing between tribes and non-Indian lessees, including the procedures for acquiring mineral leases, minimum rates [*14] for rentals and royalties and the manner in which payments are to be made, penalties for failure to comply with the terms of leases, information to be supplied by lessees, acreage limitations, inspections of lessees' records by Indian lessors or by Department of Interior officials, and cancellation of leases.

Crow Tribe of Indians v. Montana, 650 F.2d 1104, 1112 n.9 (9th Cir. 1981), as amended, 665 F.2d 1390 (9th Cir. 1982), cert. denied, 459 U.S. 916 (1982).

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - -

-

n2 The 1938 Act repealed all acts or parts of acts "inconsistent herewith." Act of May 11, 1938, sec. 7. The Act of May 29, 1924, 43 Stat. 244, 25 U.S.C. @ 398 et seq., amending an 1891 Act, authorized state and local governments to levy and collect taxes on mineral lessees of Indian lands "in the same manner as such taxes are otherwise levied and collected." 25 U.S.C. @ 398c. The United States Supreme Court recently concluded, however, that neither the text nor the legislative history of the 1938 Act suggests a congressional intention to permit state taxation. Consequently, the Court held, "if the tax proviso survives at all, it reaches only those leases executed under the 1891 Act and its 1924 amendment." Blackfeet Tribe, 105 S. Ct. at 2404. Any mineral lease issued today would, of course, be under the 1938 Act, and thus not subject to the tax provision of the 1924 Act. [*15]

n3 Allotted lands may also be leased for mining purposes pursuant to 25 U.S.C. @ 396 and its attendant regulations, 25 C.F.R. pt. 212 (1985). This opinion will not address mining on allotted lands, however, since it is my understanding that there are no allotted lands on the Sokaogon Reservation.

n4 In addition, Congress in 1982 enacted the Indian Mineral Development Act, 96 Stat. 1938, 25 U.S.C. @ 2101 et seq. The major purpose of the Act was to expand mineral development options available to tribes beyond the usual lease agreements and into the possibility of joint ventures and other non-lease arrangements. H.R. Rep. No. 746, 97th Cong., 2d Sess. 4, reprinted in 1982 U.S. Code Cong. & Ad. News 3465, 3466. Since you have asked only about leasing of the mining operation to non-Indians, a discussion of the 1982 Act is beyond the scope of this opinion.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

It appears from these descriptions of the statutes and regulations that the federal scheme governing non-Indian leasing of tribal lands for mining purposes is as pervasive and comprehensive as the federal regulation of Indian traders [*16] (Central Machinery), harvesting of Indian timber (Bracker) and school construction (Ramah Navajo School Bd.). n5 Once such a comprehensive federal regulatory scheme has been identified, the federal, state and tribal interests involved must be identified and balanced.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n5 In a previous opinion of this office, in the specific context of prospecting and mining activity conducted on non-Indian lands within the reservation, I stated that "the federal government has not undertaken comprehensive regulation of mining activities, in general, or groundwater, in particular, within reservation boundaries." 72 Op. Att'y Gen. 54, 60 (1983). Given the sources cited above, that conclusion clearly does not apply to federal regulation of mineral leasing of Indian lands within reservation boundaries.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

The federal interests involved derive both from general federal Indian policy and from the specific policy goals of the 1938 Indian Mineral Leasing Act. On the more general level, "[i]n a variety of ways, the assessment of state [*17] taxes would obstruct federal policies." Bracker, 448 U.S. at 148.

Foremost among these is "a firm federal policy of promoting tribal self-sufficiency and economic development. Ambiguities in federal law have been construed generously in order to comport with . . . the federal policy of encouraging tribal independence." Id. at 143-44. More specifically, the 1938 Act was designed to achieve three goals: uniformity of laws governing Indian mineral leases, revitalization of tribal governments and encouragement of tribal economic development. Crow Tribe, 650 F.2d at 1112-13, citing generally H.R. Rep. No. 1872, 75th Cong., 3d Sess. (1938), and S. Rep. No. 985, 75th Cong., 1st Sess. (1937). A tax which would keep from the tribe the economic benefits of its minerals would conflict with these purposes of the Act. Crow Tribe, 650 F.2d at 1113.

The Wisconsin net proceeds occupation tax may, in particular, reduce the royalties or other compensation a lessee is willing or able to offer the tribe. Id. at n.13. Moreover, the tax may "undermine the Secretary's ability to make the wide range of determinations committed to his authority concerning the setting of fees and [*18] rates" with respect to mineral leasing. Bracker, 448 U.S. at 149; see 25 C.F.R. @ 211.15. "The assessment of state taxes would throw additional factors into the federal calculus, reducing tribal revenues and diminishing the profitability of the enterprise for potential contractors." Bracker, 448 U.S. at 149. Finally, the burden of the net proceeds occupation tax, though imposed indirectly through the non-Indian lessee, may "necessarily impede" the strong federal interest in promoting tribal economic development by depleting available funds. Ramah Navajo School Bd., 458 U.S. at 842, 844 n.8.

The next factor in the preemption analysis is the state's interest in the tax: whether the state seeks to assess the tax in return for governmental functions it provides, or whether it asserts any specific, legitimate regulatory interest to justify the imposition of the tax. Bracker, 448 U.S. at 150; Ramah Navajo School Bd., 458 U.S. at 843-44. Neither services provided by the state to the non-Indian lessee off the reservation nor a generalized interest in raising revenue is sufficient to justify a state tax where the federal government has comprehensively regulated [*19] the area. Ramah Navajo School Bd., 458 U.S. at 843-44; Bracker, 448 U.S. at 150.

The governmental functions to be supplied by the state to those upon whom the net proceeds occupation tax is levied are identified in the statutes as "highways, sewers, schools and other improvements which are necessary to accommodate the development of a metalliferous mining industry." Sec. 70.37(1)(d), Stats. The state's asserted regulatory interests are also identified; they include controlling environmental damage, counteracting potential adverse impacts on the quality of life in communities directly affected by mining, and taxing the privileges enjoyed by those mining in the state. Secs. 70.37(1)(e)-(h), Stats. The Wisconsin Legislature expressly declared its intent that the tax was "established in order that the state may derive a benefit from the extraction of irreplaceable metalliferous minerals and in order to compensate the state and municipalities for costs, past, present and future, incurred or to be incurred as a result of the loss of valuable irreplaceable metallic mineral resources." Sec. 70.37(2), Stats. To this end, forty percent of the tax collected is transferred to [*20] the general fund, while sixty percent of the net proceeds occupation tax is deposited in a local "impact fund" for the use of municipalities in meeting both "long- and short-term costs associated with social, educational, environmental and economic impacts of metalliferous mineral mining." Secs. 70.395 and 70.37(1)(i), Stats. Payments from the local impact fund are made yearly in an amount equal to $100,000 to each city, town

or village and to each county in which metalliferous minerals are extracted; each such county also receives twenty percent of the net proceeds occupation tax collected in that county, or $250,000, whichever is less. Sec. 70.395(2) (d), Stats. These annual disbursements from the fund include an amount equal to $100,000 to "any Native American community that has tribal lands within a municipality qualified to receive a payment" from the impact fund. Sec. 70.395(2) (d) (2m), Stats. In its entirety, the Wisconsin taxing scheme "demonstrates a purpose to keep the value represented by the state's nonrenewable assets intact, for use by [the state's residents] in the future." Crow Tribe, 650 F.2d at 1114.

These asserted state interests must be balanced against [*21] the interests of the federal and tribal governments. The basic problem inherent in the state's interest in a mining tax has been identified by the Ninth Circuit: "While the state may have an interest in perpetuating the value of mineral wealth subject to its general civil jurisdiction, it has no such legitimate interest in appropriating Indian mineral wealth." Crow Tribe, 650 F.2d at 1114. Put simply, subsurface minerals on the reservation are "not the state's to regulate." Id. Unlike metalliferous minerals located elsewhere in the state, reservation minerals do not belong in any sense to the state. The subsurface minerals, rather, like the land under which they lie, are held by the federal government in trust for the tribe. See, e.g., Quantum Exploration, Inc. v. Clark, 780 F.2d 1457, 1461 (9th Cir. 1986).

Like the State of Montana in Crow Tribe, 650 F.2d at 1114, Wisconsin does assert other legitimate interests in imposing its net proceeds occupation tax, including governmental services provided and costs incurred by the state and municipalities, and the adverse effect of mining on the area's environment and quality of life. However, while some of the [*22] governmental functions identified in the Wisconsin statutes will be performed by the state even for an on-reservation mining operation, many more will not. A number of the governmental services necessary to a mining operation within reservation boundaries likely will be provided by the Sokaogon Tribe. Off-reservation services performed by the state for the non-Indian lessee would not justify the tax in question since presumably state tax revenues from the lessee's business activities outside the reservation are adequate to reimburse the state for those services. Ramah Navajo School Bd., 458 U.S. at 843-44 and n.9. Moreover, the net proceeds occupation tax is intended to compensate the state and its municipalities for costs incurred as a result of mining operations, but many of the costs from on-reservation mining will be borne by the tribe. Similarly, the tribe rather than the state will absorb the bulk of the detrimental effects of mining on the local environment and quality of life.

In Crow Tribe, the Ninth Circuit balanced the similar interests of the State of Montana against those of the federal and tribal governments, and concluded: "On balance, we suspect that [*23] these legitimate interests will not be shown [at trial] to be enough to save the severance tax from fatal conflict with the purposes behind the 1938 [Indian Mineral Leasing] Act." 650 F.2d at 1114. The court went on to note, however, that "[a] tax carefully tailored to effectuate the state's legitimate interests might survive." Id. As with the Montana tax, a "major purpose" of the Wisconsin net proceeds occupation tax is "to establish a fund that would keep the value of the [minerals] for future generations of [Wisconsin residents]. To the extent that this tax is not related to the actual governmental costs associated with the mining of the Indian [minerals], . . . the state's interest in acquiring revenues is weak in

comparison with the Tribe's right to the bounty from its own land." Id. at 1117 (citation omitted).

An Indian tribe's interest in taxing "is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services." Colville, 447 U.S. at 156-57. The state's interest in taxation "is likewise strongest when the tax is directed at off-reservation value and [*24] when the taxpayer is the recipient of state services." Id. at 157. In the case of applying the net proceeds occupation tax to mining activities conducted on the reservation by a non-Indian lessee, the value to be taxed will be generated on the reservation, the activity will involve the tribe and the taxpayer, although receiving some state services, will also be the recipient of tribal services.

Considering all these factors, along with the comprehensive federal regulation of Indian mining leases and the burdens on federal policy, it appears that the balance must tip in favor of federal preemption of the Wisconsin tax. Consequently, it is my opinion that in this case "the federal regulatory scheme is so pervasive as to preclude the additional burdens sought to be imposed" by the Wisconsin tax. Bracker, 448 U.S. at 148. The Wisconsin net proceeds occupation tax may not, therefore, be applied to non-Indian lessees of mining operations on the Sokaogon Reservation.

III.

MINING PERMIT PROCESS

Wisconsin law provides that "[n]o operator may engage in mining or reclamation at any mining site that is not covered by a mining permit and by written authorization to mine under s. [*25] 144.86(3)." n6 Sec. 144.85(1)(a), Stats. An operator is defined as "any person who is engaged in, or who has applied for or holds a permit to engage in, prospecting or mining, whether individually, jointly or through subsidiaries, agents, employes or contractors." Sec. 144.81(9), Stats. An application for a mining permit must include, among other items, a mining plan, including a description and detailed map of the proposed site; a detailed reclamation plan showing the manner, location and time of reclamation; satisfactory evidence of application for all necessary approvals under local zoning ordinances and for all necessary licenses and permits issued by the Department of Natural Resources (DNR); and an itemized estimation of the cost to the state of reclamation. Secs. 144.85(3)-(4), Stats. In addition, the applicant must pay DNR's actual cost of evaluating the mining permit application. Sec. 144.85(2), Stats. Following a public hearing, DNR shall issue a mining permit if it finds that the application meets certain conditions set out in the statutes. Sec. 144.85(5), Stats.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n6 Written authorization is issued upon approval of the bond required of the operator pursuant to section 144.86.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

[*26]

A. Sokaogon Tribe

Your first question concerning the mining permit process is whether the Sokaogon Tribe would be required to obtain a permit in the event that it conducted mining activities on the reservation. The application of the mining permit process to a tribal mining operation "involves an attempt to regulate Indian use of Indian trust lands." Santa Rosa Band of Indians v. Kings County, 532 F.2d 655, 658 (9th Cir. 1975), cert. denied, 429 U.S. 1038 (1977). Indian tribes are "distinct, independent political communities," possessing inherent sovereign powers to regulate "their internal and social relations," and to make "their own substantive law in internal matters." Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55-56 (1978). As such, Indian tribes exercise "attributes of sovereignty over both their members and their territory." United States v. Mazurie, 419 U.S. 544, 557 (1975). This "significant territorial component to tribal power," Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 142 (1982), forms part of the "backdrop" of Indian sovereignty against which the courts determine whether the federal government has preempted state jurisdiction. [*27]

The second component of the "backdrop" is the balance of federal, state and tribal interests. In a situation such as tribal mining of minerals located under trust lands, the balance will usually tip in favor of the tribal and federal interests. "When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the state's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest." Bracker, 448 U.S. at 144; see also 72 Op. Att'y Gen. 54, 56 (1983).

The federal-tribal interests at stake here are particularly compelling. The established federal policy of promoting tribal self-government encompasses the "overriding goal of encouraging tribal self-sufficiency and economic development." New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 335 (1983) (quoting Bracker, 448 U.S. at 143). The Court has held that Indian tribes, "[i]n part as a necessary implication" of this federal policy, have the authority to manage and control the use of their territory and their resources. Id. More specifically, Congress has recognized mineral development of Indian lands [*28] as an appropriate tool for economic development and governmental revitalization. See Crow Tribe, 650 F.2d at 1112 (discussing the goals of the Indian Mineral Leasing Act).

A tribal mining operation doubtlessly would be undertaken to develop and manage the reservation's resources for the benefit of the tribe's members, generating revenues for essential tribal governmental services and providing employment for tribe members resident on the reservation. See Mescalero Apache Tribe, 462 U.S. at 341. Under these circumstances, state imposition of a regulatory scheme would serve as an obstacle to the full accomplishment of the federal goals for tribal self-determination and economic revitalization. Id.

The state's interests in regulating tribal mining operations must be "justified by functions or services performed by the state in connection with the on-reservation activity." Id. at 336. The state's interests in imposition of its mining permit process, as reflected in the statutory criteria for permit approval, appear to be reclamation, compliance with applicable state environmental laws, suitability of the site for mining, public health and safety, economic [*29] impact, and compliance with zoning ordinances. Sec. 144.85(5) (a) (1), Stats. While these are clearly legitimate state regulatory interests in mining activity elsewhere in the state, with respect to Indian

mineral wealth, "[t]his coal is not the state's to regulate, and assertion of such authority diminishes the Tribe's own power to regulate." Crow Tribe, 650 F.2d at 1114. Imposition of the state mining permit process could allow the state to dictate whether, when and how the tribe could choose to develop and manage the reservation's resources for the benefit of the tribe members. Regulation by the state, through the mining permit process, could infringe substantially on Indian resource development, interfering with the federal policy of promoting tribal governmental and economic independence.

Because of the potential for significant infringement on tribal activity within reservation boundaries represented by the mining permit process, the state's interest in regulating and controlling Indian mineral development is not sufficient to overcome the tribal and federal interests involved. The balance of interests concerning the state's authority to impose the mining permit process [*30] on tribal mining operations must tip in favor of the tribe and the federal government.

Under these conditions -- retained tribal sovereignty over reservation lands, subordinate state regulatory interests, and strong federal and tribal interests -- state laws are generally not applicable to Indian activities on the reservation except where Congress has expressly provided that they shall apply. McClanahan, 411 U.S. at 170-71; 72 Op. Att'y Gen. at 56. As noted previously in this opinion, Pub. L. No. 280, which outlined above. The state thus can ensure, in either case, that it has input into the EIS process. conferred upon the state jurisdiction over private civil actions, was not a grant of regulatory authority. Bryan, 426 U.S. at 378-79, 390. Nor am I aware of any federal enactment that does grant to the state such authority, either generally to regulate Indian activities within reservation boundaries or specifically to require mining permits of tribal mining operations. Without any clear congressional authorization, and in the absence of exceptional circumstances, it is my opinion that the mining permit process is not applicable to tribal mining operations on trust lands [*31] within reservation boundaries.

B. Non-Indian Lessee

Your next question is whether the mining permit process would be applicable to non-Indian lessees of mining operations on the reservation. In such cases, where the state asserts authority over the conduct of non-Indians engaged in on-reservation activity, federal enactments are examined "in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence." Bracker, 448 U.S. at 144-45.

One such federal enactment is the grant of civil jurisdiction to Wisconsin contained in Pub, L. No. 280, codified at 28 U.S.C. @ 1360. Subsection (b), which concerns in part real property belonging to an Indian tribe and held in trust by the United States, provides in pertinent part that: "Nothing in this section . . . shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto." 28 U.S.C. @ 1360(b). The Secretary of the Interior has promulgated regulations which prevent the application of most state laws to the use and development of [*32] leased trust property, except where the Secretary has adopted such laws or made them applicable in specific cases or specific geographic areas. 25 C.F.R. @ 1.4 (1985). See Santa Rosa Band, 532 F.2d at 664-65. In relevant part, the federal regulation provides that:

[N]one of the laws, ordinances, codes, resolutions, rules or other regulations of any State . . . limiting, zoning or otherwise governing, regulating, or controlling the use or development of any real . . . property . . . shall be applicable to any such property leased from or held or used under agreement with and belonging to any . . . Indian tribe, band, or community that is held in trust by the United States. . . .

25 C.F.R. @ 1.4(a) (1985). The Wisconsin mining permit process, if applied to non-Indian mineral lessees, clearly would regulate or control the use or development of trust lands leased from the tribe. Since it does not appear that the Secretary of the Interior has ever adopted or made applicable the state mining permit laws, it is my opinion that application of the permit process to a non-Indian lessee of mining operations would conflict with this federal regulation and, consequently, with [*33] Pub. L. No. 280.

A second, more specific federal enactment applicable in the mining permit context is the Indian Mineral Leasing Act of 1938, discussed previously in connection with the net proceeds occupation tax. As I concluded in that section, the 1938 Act and its attendant regulations, 25 C.F.R. pt. 211, comprise a comprehensive federal scheme regulating non-Indian leasing of tribal lands for mining purposes. The pervasiveness of the federal scheme is particularly clear in relation to the mining permit process, where the federal requirements correspond closely to state law provisions. Specifically, the 1938 Act requires approval by the Secretary of the Interior of all mining leases entered into with Indian tribes, and addresses the duration of leases and the type of bond to be furnished by the lessee. 25 U.S.C. @@ 396a and 396c. The regulations promulgated pursuant to the 1938 Act control such aspects of mineral leasing as procedures for acquiring leases, bonding requirements, penalties for failure to comply with lease terms, acreage limitations and cancellation of leases. See generally 25 C.F.R. pt. 211. Mine operators are required to submit a mining plan for [*34] the approval of the United States Geological Survey's Regional Mining Supervisor. 25 C.F.R. @ 216.7(a) (1985). These plans may include descriptions and maps of the site, proposed methods of operating, and proposed manner and time of reclamation. 25 C.F.R. @ 216.7(b) (1985). In addition, actual operations may not be started without written permission, and all operations must be conducted in accordance with the operating regulations promulgated by the Secretary of the Interior. 25 C.F.R. @ 211.20(b) (1985).

Federal policies underlying the 1938 Act were also noted previously in this opinion. Specifically, the three goals of the Act were uniformity in the laws governing Indian mineral leases, revitalization of tribal governments and encouragement of tribal economic development. Crow Tribe, 650 F.2d at 1112-13, citing generally H.R. Rep. No. 1872, 75th Cong., 3d Sess. (1938), and S. Rep. No. 985, 75th Cong., 1st Sess. (1937). More generally, federal Indian policy in recent decades had been firmly committed to promoting tribal self-government and self-sufficiency. Mescalero Apache Tribe, 462 U.S. at 334-35 n.17; Bracker, 448 U.S. at 143-44.

Viewed in light of these [*35] federal policies, the potential for conflict between the state and federal regulatory schemes is manifest. For example, the Secretary of the Interior could approve a lease, but the state could deny a mining permit, thereby blocking the federal intent to permit that mining operation. Similarly, the state could cancel or revoke its mining permit, with the result that the non-Indian lessee would be prevented from mining under a valid, federally-approved lease. Either situation would

directly conflict with all three goals of the 1938 Act: either would decrease uniformity in the laws governing Indian mineral leases, subordinate the tribe's lease to state control, thereby weakening the role of the tribal government, and discourage the economic development represented by mining operations on tribal lands. For the same reasons, application of the mining permit process to non-Indian lessees would interfere with federal Indian policy, and directly conflict with federal regulations preventing the application of state law to the development of leased trust property.

Consequently, it is my opinion that these federal enactments, along with their attendant regulations and underlying policies, [*36] preempt the application of the state's mining permit process to a non-Indian lessee of tribal mineral lands.

IV.

POLLUTION CONTROL LAWS

Wisconsin has legislated an extensive regulatory scheme to control environmental pollution within the state. The regulations address water and sewage, air pollution, solid waste, hazardous waste and refuse (ch. 144, Stats.) and water pollution (ch. 147, Stats.). In general, these state regulations are companion laws to federal regulatory statutes, such as the Clean Air Act, 42 U.S.C. @ 7401 et seq., the Resource Conservation and Recovery Act, 42 U.S.C. @ 6901 et seq., and the Federal Water Pollution Control Act, 33 U.S.C. @ 1251 et seq., which provide mechanisms by which the states may administer their own pollution control programs in lieu of the federal programs.

As evidenced by the regulations in chapters 144 and 147, Wisconsin has implemented its own pollution control programs in a number of areas. The question you raise is whether these state regulations are applicable to mining operations on the Sokaogon Reservation, whether conducted by the tribe or by a non-Indian lessee. For the reasons explained below, I do [*37] not believe that a blanket determination of the applicability of state pollution control laws to on-reservation mining can be made.

As already noted, pollution control legislation, on both the state and federal levels, is diverse and complex. In particular, the degree to which these environmental laws address or are expressly applicable to Indian tribes varies from one statute to the next. n7 An adequate and comprehensive response to your question, therefore, would require an analysis of (1) each federal statute, its legislative history and its application within reservation boundaries, (2) the equivalent state law and the extent to which it addresses Indian tribes, and (3) the principles of the preemption and infringement doctrines as applied to each set of paired statutes. A calculus of that depth and length -- particular to each environmental statute -- is simply beyond the scope of this opinion. Alternatively, a discussion of the applicability of pollution control laws in general would be inadvisable given the diversity and complexity of state and federal statutes.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - -

n7 For somewhat dated discussions of the federal environmental statutes and the extent to which each addresses Indian tribes, see Will, Indian Lands Environment -- Who Should Protect It?, 18 Natural Res. J. 465, 474-87 (1978);

Schaller, The Applicability of Environmental Statutes to Indian Lands, 2(8) Am. Indian J. 15 (1976).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

[*38]

Consequently, the following sections will provide no definite answer, either as to pollution control laws in general or, with a few exceptions, as to specific environmental statutes. The sections instead will discuss the available published law on the topic, and address general principles and guidelines to be employed in deciding on the applicability of any particular environmental law.

A. Sokaogon Tribe

In previous opinions, I have addressed the applicability of certain state environmental laws to Indian tribes and reservations. OAG 51-78 (unpublished, dated July 31, 1978); 72 Op. Att'y Gen. 54 (1983). In the earlier of these opinions, which addressed the on-reservation applicability of the Wisconsin Pollution Discharge Elimination System (WPDES), chapter 147, I concluded that the state was "without authority to issue WPDES permits" to Indian tribes or tribal organizations operating on reservations and Indian lands in Wisconsin. OAG 51-78 at 1, 3. I based my opinion on the fact that the Wisconsin Legislature did not include Indian tribes or organizations within the definition of persons covered by chapter 147, whereas the equivalent Federal Water Pollution Control [*39] Act (FWPCA) expressly extended its scope to both tribes and tribal organizations. Id. at 2-3. This failure plainly to include tribes, in my opinion, represented a deliberate legislative decision. Id. at 2-4. I noted also that the federal Environmental Protection Agency currently was issuing permits to tribal dischargers pursuant to federal law, id. at 4, as a means of ensuring that on-reservation dischargers adhered to federal environmental standards.

I am not aware of any factor that would cause me to alter my existing opinion. Neither the federal nor state definition of persons covered has been changed; the federal statute still includes tribes and tribal organizations, while the state law still excludes them. Had the state Legislature wished to amend the state law to expressly cover Indian tribes, it certainly could have done so. Consequently, it remains my opinion that chapter 147 is not applicable to a tribal mining operation on the reservation.

An identical analysis would be applicable to hazardous waste regulations, since the federal Resource Conservation and Recovery Act (RCRA) expressly includes Indian tribes and organizations, 42 U.S.C. @@ 6903(13) and [*40] 6093(15), while the equivalent state Hazardous Waste Management Act does not. Secs. 144.61(9) and 144.01(6), Stats. It is not necessary to reach this analysis, however, because an express federal pronouncement preempts Wisconsin's hazardous waste jurisdiction on Indian reservations. In granting Wisconsin final authority to operate its hazardous waste management program in lieu of the federal program, the Environmental Protection Agency (EPA) specifically stated: "Wisconsin is not authorized to operate the RCRA program on Indian lands, and this authority will remain with the U.S. EPA." 51 Fed. Reg. 3783, 3784 (1986). n8 The state Hazardous Waste Management Act, sections 144.60 to 144.74, therefore, is not applicable to tribal mining operations on the reservation.

- - - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - -

n8 The EPA's authority to make such a determination has been upheld by the Ninth Circuit. State of Wash., Dept. of Ecology v. U.S. E.P.A., 752 F.2d 1465 (9th Cir. 1985).

- - - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - - -

The analysis employed for the water pollution control regulations does not appear [*41] to be applicable to other sets of paired state and federal environmental laws, because unlike FWPCA, other federal environmental statutes do not apply expressly to tribes and tribal organizations. Nor do there appear to be specific federal pronouncements concerning state environmental jurisdiction in any area other than hazardous waste management. Where neither the FWPCA analysis nor a specific federal statement of preemption is applicable, state jurisdiction to impose environmental regulations on tribal activities is determined according to the same principles as jurisdiction to impose the mining permit process. While it is beyond the scope of this opinion specifically to apply those principles to the range of state environmental laws, the following general discussion may prove helpful.

An analysis of the applicability of a particular state environmental regulation to tribal mining operations would begin with the "backdrop" of tribal sovereignty. As noted in the mining permit process discussion, regulations such as pollution control laws and the mining permit process involve the regulation of Indian use of Indian trust lands, a situation in which the territorial component of [*42] tribal sovereignty forms a significant element of the "backdrop." Of significance also is the tradition of self-government which the Tribe exercises in the area of pollution control. While I am not aware of any tribal environmental protection laws at this time, the existence or development of such regulations, coupled with effective enforcement mechanisms, would weigh heavily against the applicability of state environmental laws. n9 See, e.g., Webster, 114 Wis. 2d at 434-35.

- - - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - -

n9 A number of authors have suggested that the optimal approach to on-reservation environmental protection is the assumption of full responsibility by the tribes. See Will, Indian Lands Environment -- Who Should Protect It?, 18 Natural Res. J. 465, 499 (1978); Comment, The Applicability of the Federal Pollution Acts to Indian Reservations: A Case for Tribal Self-Government, 48 U. Colo. L. Rev. 63, 93 (1976).

- - - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - - -

The other component of the "backdrop" of tribal sovereignty is the balance of state, federal and tribal interests. [*43] In the area of environmental protection, those interests are particularly strong on all sides.

On one side of the balance of interests are those of the state. As the Ninth Circuit stated in the context of asserted state jurisdiction over hazardous waste: "We recognize the vital interest of the State of Washington in effective hazardous waste management throughout the state, including on Indian lands." State of Wash., Dept. of Ecology v. U.S. E.P.A., 752 F.2d 1465, 1472 (9th Cir. 1985). The substantial character of the state's interest stems from the

trans-boundary nature of pollution, and its migratory impact outside the reservation. See, e.g., Comment, The Developing Test for State Regulatory Jurisdiction in Indian Country: Application in the Context of Environment Law, 61 Ore. L. Rev. 561, 564, 582 (1982). The United States Supreme Court has recognized the importance to the state of adverse "spillover" effects of on-reservation conduct or activities. Rice, 463 U.S. at 724. "A state's regulatory interest will be particularly substantial if the state can point to off-reservation effects that necessitate state intervention." Mescalero Apache Tribe, 462 [*44] U.S. at 336.

On the other hand, the federal and tribal interests are also compelling. Despite the potential for spillover, a tribal mining operation constitutes "on-reservation conduct involving only Indians," a situation in which "the federal interest in encouraging tribal self-government is at its strongest." Bracker, 448 U.S. at 144. In the context of hazardous waste management, the Ninth Circuit posited the interests involved as "the tribal interest in managing the reservation environment and the federal policy of encouraging tribes to assume or at least share in management responsibility." State of Wash., Dept. of Ecology, 752 F.2d at 1472. The court noted that "[t]he federal government has a policy of encouraging tribal self-government in environmental matters," a policy reflected both in federal environmental statutes giving tribes "a measure of control over policymaking or program administration or both" and in the policies and practices of the EPA. Id. at 1471 (footnote omitted). See also, Will, Indian Lands Environment -- Who Should Protect It?, 18 Natural Res. J. 465, 474-87 (1978). More specifically, the court cites to EPA policy documents [*45] which advocate "an enhanced role for tribal government in relevant decision-making and implementation of Federal environmental programs on Indian reservations," n10 and which charge EPA to "endeavor where appropriate to give tribal governments the primary role in environmental program management and decisionmaking relative to Indian lands." n11

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n10 EPA Policy for Program Implementation on Indian Lands, Dec. 19, 1980, at 5, quoted in State of Wash., Dept. of Ecology, 752 F.2d at 1471.

n11 EPA Office of Federal Activities, Administration of Environmental Programs on Indian Lands 35 (1983), quoted in State of Wash., Dept. of Ecology, 752 F.2d at 1471 n.7.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

The "backdrop" of tribal sovereignty, consisting of the elements discussed above, informs the question whether the federal government has preempted state jurisdiction to impose a given environmental law. Factors which may be significant to the preemption analysis include the EPA policy statements quoted above and the authority of EPA, under certain [*46] federal statutes, to permit tribes the primary responsibility for environmental protection within reservation borders. See Nance v. EPA, 645 F.2d 701, 714 (9th Cir. 1981) (Indian tribes can set on-reservation air quality goals, independent of the states, under the Clean Air Act). Two additional factors, however, may be of more importance to the preemption analysis.

The first of these is that Congress has not expressly authorized the imposition of state pollution control laws within reservation boundaries. The

general grant of state civil jurisdiction, Pub. L. No. 280, did not authorize the applicability of state regulations, such as environmental laws, to Indian uses of reservation lands. Bryan, 426 U.S. at 378-79, 390; Will, Indian Lands Environment -- Who Should Protect It?, 18 Natural Res. J. 465, 489 (1978). Neither do the federal environmental statutes confer jurisdiction over reservation lands upon the states. State of Wash., Dept. of Ecology, 752 F.2d at 1467-68; see also Will, Indian Lands Environment -- Who Should Protect It?,i 18 Natural Res. J. 465, 474-87 (1978).

The second factor of importance is the retained authority of EPA to [*47] enforce adherence to federal environmental standards. As a rule, federal environmental statutes are generally applicable within reservation borders. Some of the federal environmental laws, such as RCRA and FWPCA, expressly include Indian tribes. See State of Wash., Dept. of Ecology, 752 F.2d at 1466-67; OAG 57-78 (1npublished, dated July 31, 1978). Other federal laws are applicable under the general rubric that federal statutes of a general nature apply to Indians and Indian tribes as to any other persons. Will, Indian Lands Environment -- Who Should Protect It?, 18 Natural Res. J. 465, 468 (1978), citing Federal Power Commission v. Tuscarora Indian Nation, 362 U.S. 99 (1960). Consequently, as the Ninth Circuit has noted, an absence of state environmental jurisdiction "does not leave a vacuum in which [pollutants] go unregulated. EPA remains responsible for ensuring that the federal standards are met on the reservations." State of Wash., Dept. of Ecology, 752 F.2d at 1472.

The few authorities which have considered the applicability of particular state environmental laws within reservation borders have concluded that the state, at most, has environmental [*48] jurisdiction only in limited circumstances. The Ninth Circuit upheld EPA's conclusion that under RCRA, the federal hazardous waste management statute, states have no jurisdiction over Indian lands. Id. at 1469, 1472. See also 51 Fed. Reg. at 3784. Despite the "vital interest" of the state in hazardous waste management, the court reasoned that "the tribal interest in managing the reservation environment and the federal policy of encouraging tribes to assume or at least share in management responsibility are controlling." Id. at 1472. See also Nance, 645 F.2d at 714 (under the Clean Air Act, tribes possess "the same degree of autonomy to determine the quality of their air as was granted to the states."); Smith and Guenther, Environmental Law: Protecting Clean Air: The Authority of Indian Governments to Regulate Reservation Airsheds, 9 Am. Indian L. Rev. 83 (1981).

The Attorney General of Alaska, addressing the question of state jurisdiction to enforce air quality regulations on reservations, concluded that there is no "legally certain" basis for state jurisdiction over pollution sources within the reservation "absent evidence of trans-boundary pollution." [*49] 1983 Op. Att'y Gen. Alaska No. 101. In a recent opinion of this office addressing state authority to monitor groundwater on Indian reservations, I reached a similar conclusion. 72 Op. Att'y Gen. 54 (1983). That opinion, in balancing the interests involved, determined that "the state's interest in conducting this activity does not appear to be sufficient to overcome the general rule that prohibits the exercise of state jurisdiction on Indian lands without specific congressional authorization." Id. at 59. Analogous to the Alaska opinion, I concluded as follows: "Although not settled, it is my opinion that where it can be conclusively shown that without state regulation prospecting or mining activity would contaminate groundwater moving beyond Indian lands thereby posing an immediate danger to public health, safety or the general welfare, such regulation is permissible." Id. at 61.

The trend in reported case law and opinions appears to deny general state environmental jurisdiction within reservation boundaries, although exceptions may be recognized for on-reservation pollution sources with adverse off-reservation effects. The determination of the applicability of a given [*50] state regulation, however, will be determined on a case-by-case basis, employing the framework and general principles outlined above.

B. Non-Indian Lessee

You also ask whether state environmental protection laws are applicable to a non-Indian lessee conducting mining operations on the reservation. As noted in previous sections, questions of state authority over the on-reservation activities of non-Indians require an examination of the tradition of tribal sovereignty and of the broad policies underlying relevant federal enactments. Bracker, 448 U.S. at 144-45. The determination calls "for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." Id. at 145.

Because the question of state environmental jurisdiction over non-Indians requires an examination of the "specific context," the following discussion, like the preceding section, will not attempt a definitive answer to your inquiry. n12 As with the applicability of state pollution control laws to tribal mining operations, an answer to your question [*51] concerning non-Indian lessees particular to each state environmental law is beyond the scope of this opinion, whereas a general answer would be a disservice given the diversity and complexity of state and federal regulation in the area. The following discussion, therefore, will briefly discuss the pertinent federal laws and regulations, and outline the state, federal and tribal interests that may be implicated by the assertion of state environmental authority over Indian mineral leases.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n12 The exception is state jurisdiction over hazardous waste management. As noted previously, the EPA, in granting Wisconsin final authority to operate its hazardous waste management program in lieu of the federal program, specifically exempted Indian lands. 51 Fed. Reg. at 3784. Authority under RCRA "on Indian lands" was reserved to the federal agency. This retained federal jurisdiction apparently would extend to all mining activity, whether conducted by the tribe or by a non-Indian lessee, on tribal lands within the reservation boundaries.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -
[*52]

The relevant federal enactments and their underlying policies have to a large extent been described in previous sections of this opinion. One such enactment is the federal regulation which prohibits the state from "limiting, zoning or otherwise governing, regulating, or controlling the use or development" of trust lands leased from an Indian tribe. 25 C.F.R. @ 1.4(a) (1985). It would appear that state pollution control laws, through their permitting requirements, may substantially affect the use or development of property subject to the permits. Consequently, it seems that to the extent state environmental laws conflict with the provisions of section 1.4, the state regulations would be preempted by federal law.

The other relevant federal enactment is the Indian Mineral Leasing Act of 1938. Previous sections of this opinion have established that the 1938 Act and its attendant regulations generally comprise a comprehensive federal scheme to regulate non-Indian mineral leasing of tribal lands. In the particular context of environmental protection, regulations promulgated by the Secretary of the Interior include 25 C.F.R. pt. 216, which is designed to provide procedures "to avoid, [*53] minimize, or correct damage to the environment -- land, water, and air -- and to avoid, minimize, or correct hazards to the public health and safety" which may arise from mineral development of Indian lands. 25 C.F.R. @ 216.1 (1985). n13

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n13 For an argument that federal regulations preempt state environmental regulation of mineral lessees, see Comment, The Applicability of the Federal Pollution Acts to Indian Reservations: A Case for Tribal Self-Government, 48 U. Colo. L. Rev. 63, 81, 86 (1976); Comment, The Developing Test for State Regulatory Jurisdiction in Indian Country: Application in the Context of Environmental Law, 61 Ore. L. Rev. 561, 583-84 (1982).

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

To those ends, the regulations provide that, in connection with every lease application, the appropriate Bureau of Indian Affairs (BIA) officer shall make a "technical examination of the prospective effects of the proposed exploration or surface mining operations upon the environment." 25 C.F.R. @ 216.4(a)(1) (1985).

The technical examination shall [*54] take into consideration the need for the preservation and protection of other resources, including cultural, recreational, scenic, historic, and ecological values; and control of erosion, flooding, and pollution of water; the isolation of toxic materials; the prevention of air pollution; the reclamation by revegetation, replacement of soil or by other means, of lands affected by the exploration or mining operations; the prevention of slides; the protection of fish and wildlife and their habitat; and the prevention of hazards to public health and safety.

Id. Based on this technical examination, the BIA sets "general requirements which the applicant must meet for the protection of nonmineral resources"; these standards are then incorporated in the operator's mining lease. 25 C.F.R. @ 216.4(b) (1985). At any time the BIA may restrict or even prohibit operations if the mining cannot feasibly be conducted without lowering water quality below certain standards or causing the destruction of other resources. 25 C.F.R. @ 216.4(d) (1985). If the operation appears likely to lower water quality, no lease will be issued until compliance with the Federal Water Pollution Control Act [*55] is assured. 25 C.F.R. @ 216.4(e) (1985). In addition, operators must submit a mining plan to the United States Geological Survey's Regional Mining Supervisor, who may require the plan to include proposed measures to prevent environmental pollution. 25 C.F.R. @ 216.7 (1985). Specific regulations for coal mining, moreover, address such issues as disposal of spoil and waste materials, topsoil handling and protection of the hydrologic system. 25 C.F.R. @@ 216.100 to 216.111 (1985).

This federal regulatory scheme must be viewed in light of the goals of the 1938 Act: uniformity in the laws governing Indian mineral leases, revitalization of tribal governments and encouragement of tribal economic development. To

the extent that the imposition of state pollution control laws on non-Indian lessees, by requiring lessees to comply with two sets of environmental laws, would decrease uniformity in the laws applicable to mineral leases, weaken the tribal governmental role in development of reservation resources and discourage economic development by placing increased burdens on mineral lessees, the state laws may well be preempted.

In the balance of the state, federal and tribal interests [*56] involved, the state's interests are strong where, as here, the on-reservation activities may have off-reservation effects and the activities are conducted by non-Indians. The federal and tribal interests are also strong, however: they include "the tribal interest in managing the reservation environment and the federal policy of encouraging tribes to assume or at least share in management responsibility," State of Wash., Dept. of Ecology, 752 F.2d at 1472; the 1938 Indian Mineral Leasing Act goals of uniform laws, stronger tribal governments and increased tribal economic development; and the general federal Indian policy of encouraging tribal self-government and economic self-sufficiency. The authority of the state to impose a particular environmental law or regulation will require balancing these interests against the backdrop of the federal regulatory scheme for controlling environmental damage by non-Indian lessees. See e.g., Comment, The Developing Test for State Regulatory Jurisdiction in Indian Country: Application in the Context of Environmental Law, 61 Ore. L. Rev. 561, 583-84 (1982).

V.

ENVIRONMENTAL IMPACT STATEMENTS

Your final question concerns any [*57] Environmental Impact Statement (EIS) for mining activities on the Sokaogon Reservation, whether conducted by the tribe or by a non-Indian lessee, which may be required under the National Environmental Policy Act (NEPA), 42 U.S.C. @ 4321 et seq. If a federal EIS is prepared pursuant to NEPA, you ask whether it would legally need to be shared with or presented to the state.

Under a number of federal regulations, the federal agency responsible for preparing an EIS must make the document publicly available. For instance, agencies are charged with ensuring public involvement in the EIS process through various notice procedures, including specific notice to those who have requested it on an individual action. 40 C.F.R. @ 1506.6 (1985). Agencies are also required to solicit comments at the draft stage of the EIS process from "appropriate State and local agencies which are authorized to develop and enforce environmental standards," as well as any other agency "which has requested that it receive statements on actions of the kind proposed." 40 C.F.R. @ 1503.1(a)(2) (1985). Moreover, the preparing agency is required to circulate both draft and final versions of the EIS, including [*58] the entire statement to any agency which has requested it and, for the final EIS, any agency which submitted substantive comments on the draft. 40 C.F.R. @ 1502.19 (1985).

Given these strictures, it is virtually certain that a federal agency preparing an EIS in connection with proposed mining operations on the Sokaogon Reservation would present the document, in both draft and final forms, to the state for comment and review. In the unlikely event that the preparing agency did not, the state need merely request the EIS under the regulations outlined

above. The state thus can ensure, in either case, that it has input into the EIS process.

ATTACHMENT 2

THE PROCEDURE BY WHICH NON-INDIAN LAND IS CONVERTED INTO INDIAN LAND

The process for converting non-Indian land into Indian land begins with a written request by a tribe or an individual Indian to the U.S. Secretary of the Interior which contains at least the identity of the applicants and a description of the land. [25 C.F.R. s. 151.9.] Any land ***otherwise eligible*** for conversion to trust status may be purchased by a tribe or an individual Indian for the purpose of converting the land into Indian land. In other words, an Indian need not be "landless" in order to live on trust property; he or she may purchase property and then have the property converted to trust status. [See *Chase v. McMasters*, 473 F. 2d 1011 (8th Cir. 1978), *cert. den.*, 439 U.S. 965, 99 S. Ct. 453, and *City of Sault Ste. Marie, Michigan v. Andrus*, 532 F. Supp. 157 (D.C.D.C. 1980).]

The law that determines which property is eligible for conversion to trust status begins with 25 U.S.C. s. 465, which provides in part:

> The Secretary of the Interior is hereby authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.
>
> . . .
>
> Title to any lands or rights acquired . . . shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from state and local taxation.

Under the regulations of the Bureau of Indian Affairs (BIA), land may be acquired for a ***tribe*** in trust status when:

1. The property is located within the exterior boundaries of the tribe's reservation or adjacent to the reservation or within a tribal consolidation area;

2. The tribe already owns an interest in the land; or

3. When the Secretary of the Department of the Interior determines that the acquisition or the land is necessary to facilitate tribal self-determination, economic development or Indian housing. [See 25 C.F.R. s. 151.3 (a).]

Further, land may be acquired for an ***individual*** Indian in trust status when the land is located within the exterior boundaries of an Indian reservation or adjacent to the reservation or when the land is already in trust or restricted status. [25 C.F.R. s. 151.3 (b).]

In evaluating requests for the acquisition of land in trust status, the Secretary of the Department of the Interior is required to consider the following factors under 25 C.F.R. s. 151.10:

1. The existence of statutory authority for the acquisition and any limitations contained in the authority.

2. The need for the individual Indian or the tribe for additional land.

3. The purposes for which the land will be used.

4. If the land is to be acquired for an individual Indian, the amount of trust or restricted land already owned by or for that individual and the degree to which the Indian needs assistance in handling his or her affairs.

5. If the land to be acquired is in unrestricted fee status, the impact on the state and its political subdivisions resulting from the removal of land from the tax rolls. The term "restricted land" or "land in restricted status" is defined in the regulations to mean land the title to which is held by an individual Indian or a tribe and which can only be alienated (transferred or sold) or encumbered by the owner with the approval of the Secretary of the Department of the Interior. [See 25 C.F.R. s. 151.2 (e).]

6. Jurisdictional problems and potential conflicts of land use which may arise.

7. If the land to be acquired is in fee status, whether the BIA is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status.

The state or a local unit of government has no ultimate authority or control over the purchase of land by or for a tribe. However, given the factors the Secretary of the Department of the Interior is required to consider when evaluating requests for land acquisition, state and local officials may attempt to affect the decision by presenting evidence to the Secretary regarding the impact of the acquisition on the state and its political subdivisions in the following areas:

1. The removal of the land from the tax rolls.

2. Jurisdictional problems.

3. Potential conflicts of land use which may arise. [See 25 C.F.R. s. 151.10.]

In addition, casino gambling may not be conducted on lands acquired by the Secretary of the Department of the Interior in trust for the benefit of any tribe after October 17, 1988, unless:

1. The lands are located within or contiguous to the boundaries of the reservation on October 17, 1988; ***or***

2. The tribe has no reservation on October 17, 1988 and the lands are within the Indian tribe's last recognized reservation within the state. [See 25 U.S.C. s. 2719 (a).]

A significant exception applies to the gambling prohibition described immediately above. The prohibition does not apply when the Secretary of the Department of the Interior determines that a gaming establishment on lands acquired after October 17, 1988:

1. Would be in the best interest of the Indian tribe and its members;

2. Would not be detrimental to the surrounding community; ***and***

3. Is concurred in by the Governor of the state in which the gaming activity is to be conducted.

WF:ksm;wu

Experts endorse current technology and laws to provide high quality environmental protection.

"The waters of the Flambeau River and the ecology of northern Wisconsin are valuable treasures to the people of this State. No one wants to be a party to the despoiling of these resources. While no one can issue guarantees that [the Flambeau Mine] will operate with absolutely no problems. I am convinced that the permits contain adequate controls to ensure a safe and clean operation."

- State of Wisconsin Hearing Examiner David Schwarz

The proposed blanket ban on mining is based on misguided assumptions.

The proposed ban on sulfide mining in Wisconsin is based on assumptions that are wrong and on criteria that are irrelevant, that is, they offer no meaningful way of measuring environmental benefits. Advocates of a ban on mining base their conclusions on two key assumptions; 1) that we don't have proven technology to protect the environment at sulfide mining operations, and 2) that Wisconsin's laws are not sufficiently strong to protect our environment.

✔ ***Experts and the evidence say technology has been proven effective.***

✓ ***Experts and the evidence say our laws work.***

Yet experts - geologists, engineers, hydrologists and regulators - have weighed in on both of these issues. They report that modern technology is able to reliably protect the environment around sulfide mining projects. And, they have said, regulations like the ones already in place in Wisconsin are the real keys to ensuring the safe operation of sulfide mines and other industries. Indeed, among engineers and scientists who have worked with and observed this technology in operation, there is a strong consensus on both of these points.

Department of Natural Resources Secretary, George Meyer:

> **"I am confident that any mine proposed in this state cannot obtain approval until a demonstration has been made that it will be environmentally safe, which demonstration needs to be as rigorous as would be required of any other type of project. Furthermore, if an environmental problem is identified after a mine has been approved and is operating, more than adequate authority has been provided to the Department by the Legislature to cause the mine to cease operations and correct the problem."**[1] (emphasis added)

1. Letter from Secretary George Meyer to Senator Robert Cowles, July 13, 1996.

The Department of Natural resources staff concluded in a 1995 report:

> **"The Department of Natural Resources staff believe appropriate application of currently available and developing technology for pollution prevention combined with the comprehensive regulatory controls provided in state laws and rules are capable of providing the necessary level of environmental protection for future mining projects in this state.** Staff share the view that a project should not be advanced if it cannot be designed, operated and closed in a manner which would effectively control the development of long-term acidic drainage and seepage conditions." (Emphasis added)[2]

Commenting on that report, Larry Lynch, Department of Natural Resources (DNR), said:

> "[Proponents of a mining ban argue] that no mining in Wisconsin should occur until successful analogous operations are documented elsewhere. In a report to the Natural Resources Board last year, Department staff stated that the main reason such successful sites have not been documented is due to the short regulatory history of requiring sound environmental protection provisions in the design of mining waste facilities. The report further indicated that if such sites did exist, there is no guarantee that the technology employed at a given site would be effective for a specific application in Wisconsin. **Staff emphasized that while this type of information may be interesting, it has little use in determining the acceptability of a specific proposal. Only through comprehensive case by case review of the specific waste materials, facility design and environmental characteristics of a proposed site can a meaningful evaluation be conducted."** (Emphasis added)[3]

Again, DNR experts:

> "The chemistry of the problem, specifically the dissolution of minerals is the same regardless of whether the site is a coal mine or another kind of

2. Wisconsin Department of Natural Resources, Bureau of Solid and Hazardous Waste Management, "An Overview of Mining Waste Management Issues in Wisconsin, July 1995, p. II.
3. Larry Lynch, Memo to George E. Meyer, July 18, 1996.

mining operation. . . .the basis for much of the technology currently applied to metal mining sites comes from the coal industry which does have a significantly longer period of regulation and research. . .

" In addition, experience gained in the solid and hazardous waste management industry in landfilling wastes is also applicable to mining sites, since management of each kind of waste shares the primary goal of isolating the waste from the surrounding environment. **This is especially important since the design and construction of solid waste facilities has reached a high level of sophistication and effectiveness"** (emphasis added)

And, the DNR concludes:

> **"All of these features [necessary for effective environmental protection] exist in Wisconsin's mining and mining waste laws and rules and provide additional assurances that proposed mining sites in the state, should they be permitted and become operational, will not result in the uncontrolled release of contaminants seen historically at mining sites throughout western United States."** (Emphasis added)[4]

Secretary Meyer was also specific in his comments about Wisconsin's mining and environmental laws:

> He begins by reminding his readers that under Wisconsin law, "If there is a standard under other state or federal statutes or rules which specifically regulates in whole an activity also regulated under [the mining law] the other state or federal statutes or rules shall be the controlling standard. . ." Mr. Meyer continues, **"No one has argued to the best of my knowledge that this state is powerless to prohibit unacceptable impacts to our resources. If air or wastewater discharges do not meet the applicable standards, they must be better treated or be discontinued. The same is true for other state regulated environmental consequences.** And the legislative directive quoted above [144.937 - Effect of other statutes] makes clear that a mine is subject to the majority of environmental requirements that apply to other activities in the state.

4. "An Overview of Mining Waste Management Issues in Wisconsin," pp. 30 - 32.

"There are two exceptions to this principle worth noting. One, mines are subject to different wetland standards than are other projects in the state. This is due to two factors. First, the Legislature made mines subject to wetland restrictions prior to similar regulations being made applicable to other activities. Second, it was recognized that mines are located where ore exist -- there is not the ability to relocate the project to another location. **The restrictions which were adopted by the Legislature require minimum disturbance of wetlands."** (Emphasis added)

> [It is worth noting that modern mines throughout the country, including the Flambeau Mine in Ladysmith are not only meeting this requirement and restoring disturbed wetlands, they have had many remarkable successes in creating additional and improved wetland habitats.]

"The second difference is that the groundwater pollution statute applicable to mines is different from that applicable to all other state activities. Again, the groundwater statute applicable to mines was passed by the Legislature before a similar but slightly different statute was passed applicable to other activities. **And, as the Department has testified at several legislative hearings, the application of the two laws is functionally the same."** (Emphasis added)[5]

Schafer and Associates addressed the question of technology and regulation in a 1995 report:

> **". . .conditions responsible for acidic drainage need not result from well designed and constructed, adequately monitored, and appropriately bonded modern sulfide mine, milling and storage facilities."** (Emphasis added)[6]

In summary, statements made to support a mining ban are short, easy to understand and designed to frighten. The facts could fill a library and they do not support a mining ban. We must base important environmental policy decisions on scientific fact and measurable evidence. The conclusion of people who have studied the science of the matter is that SB 3 is not an appropriate or relevant way to measure the ability of a project to protect our environment. We should weigh more carefully the judgments of these experts.

5. Meyer
6. Schafer and Associates, "Wisconsin Mining Association Whitepaper on Sulfide Mining," prepared for Flambeau Mining Company," March 1, 1995, p. V.

Updated 5/8/97

MINING ASSISTED PROJECT SUMMARY

TAX RECEIPTS

Following is a summary of mining net proceeds taxes received or expected to be received by local governments in Rusk County as a result of operation of the Flambeau Mine.

Rusk County

Construction year payment	$100,000
First dollar payments to date	298,200
Supplementary payments to date	376,600
First dollar payments anticipated 1997-1999	301,800
Supplemental payments anticipated 1997-1999	$1,183,400
	$2,200,000

City of Ladysmith

Construction year payment	$100,000
First dollar payments to date	300,000
First dollar payments anticipated 1997-1999	300,000
	$700,000

Town of Grant

Construction year payment	$100,000
First dollar payments to date	300,000
First dollar payments 1997-1999	300,000
	$700,000

GUARANTEED PAYMENTS

In addition to tax payments noted above "guaranteed payments" are made to local governments in Rusk County as a result of operation of the Flambeau Mine and pursuant to the Local Agreement. These payments are paid directly from Flambeau Mining and their uses are not restricted. The estimated amount to be paid to the City, Town and County combined is about $1,000,000 over the mine's life.

PROJECT SUMMARY

Following is a listing of major projects being undertaken or committed to be undertaken in Rusk County which are being funded partly or wholly from mining related sources, as indicated, or as a direct or indirect result of such projects.

Glen Flora satellite building - This $300,000 project was funded 100% from (mining) first dollar and supplemental payments to Rusk County. The building has been lease to a computer recycling and salvage operation, which employs about 30 people.

Weyerhaeuser satellite building - This $300,000 project was funded 100% from (mining) first dollar and supplemental payments to Rusk County. The building has been leased to Piccard Medical, a wheelchair manufacturer.

Fritz Avenue Manufacturing Plant Reuse - This $900,000 project was funded $450,000 from an Economic Development Administration (EDA) grant to Rusk

County and the City of Ladysmith and $450,000 from (mining) first dollar and supplemental taxes paid to the City and County. The plant is leased to three tenants; Flambeau Litho Corp. a textbook printer; The Sign Shop, a sign printer; and to ADF, Inc. which makes store displays and other custom acrylic products. The three firms have employed an average of about 50 people between them.

Rusk County Visitor's Center - This $225,000 project will be funded $80,000 from (mining) first dollar and supplemental payments to Rusk County; $80,000 from borrowing by the City of Ladysmith; with the balance from future sale of the present undersized and not handicap accessible facility. The facility will be built as a replica railroad depot alongside a popular existing display of vintage rail equipment and so will attract visitors into learn more about what Rusk Co. has to offer visitors. It will help replace loss of the mine's visitor center which has logged over 100,000 visitors in the past 5 years making it the locality's most popular tourist destination.

Rusk County Community Library - This $1,300,000 project is being funded from a $500,000 key donation from Flambeau Mining Co.; $250,000 in (mining) first dollar and supplemental payments to Rusk County; $350,000 in borrowing by the City of Ladysmith; and, $200,000 in donations from other sources. This very attractive facility is located along Corbett Lake in Ladysmith's O.J. Falge Park.

Rusk County Enterprise Center - This $1,250,000 project is funded $840,000 from an EDA grant to Rusk County and the City of Ladysmith, and $560,000 from (mining) first dollar and supplemental mining tax payments to the City and County. Seven manufacturing spaces will soon be available which range in size from about 1,400 sq. ft. to 10,000 sq. ft. Office space is also available for lease with or apart from the manufacturing space. It is expected to create at least 40 jobs.

Rusk County Airport Runway Extension Project - This $3,000,000 1998 project will be funded $2,400,000 from a Wisconsin Department of Transportation, Bureau of Aeronautics grant to Rusk County and $600,000 from (mining) first dollar and supplemental tax payments to Rusk County. It will provide for complete reconstruction of the existing runway at the Rusk County Airport, lengthening it to 4,000 ft. In addition, it will involve land acquisition to facilitate future extension of the main runway, addition of a crosswind runway, and relocation of the terminal and access facilities.

Conwed Relocation Project - This $2,872,000 project is being funded 100% from a (mining) Discretionary Payments Program grant to the City of Ladysmith and Rusk County and from $250,000 recycled back into the project from sale of Conwed's present plant, which was purchased from the grant. This summer, Conwed will move into a new 80,000 sq. ft. plant. Conwed will finance an additional $750,000 in new equipment, working capital and R & D from other private and public sources including a Community Development Block Grant

program loan of $150,000 and loans from the City, County and regional revolving loan fund programs. One hundred jobs are being retained locally and 25 additional jobs have already been created in anticipation of the firm's move.

Weather Shield Expansion Project - This "second generation" project revolves around sale of the former Conwed building (noted above) to Weather Shield by the City and County. The City will expend up to $1,500,000 in TIF revenues to relocate utilities and construct a road to facilitate construction of a new building linking the former Conwed building to the Weather Shield North Plant creating one large plant. In addition to purchasing the former Conwed plant Weather Shield will privately finance several million dollars in related equipment purchases and installations, and building upgrades including the linking addition. A minimum of 200 jobs are projected to be created. This project will add about 250,000 sq. ft. of main floor or mezzanine space to Weather Shield's Ladysmith operations, approximately doubling it total floor space. This is believed to be the single largest manufacturing expansion in Ladysmith in the past 50 years.

Rusk County Forest Industry Business Park - This $1,250,000 project will be funded $750,000 from an EDA grant to the City of Ladysmith and Rusk County; $479,430 from a (mining) Discretionary Payments Program grant to the City and County; and $53,270 from (mining) first dollar and supplemental tax payments to the City and County. Project design is being finalized at this time and construction is expected to start this summer. A 20,000 sq. ft. warehouse will be built just west

of Jez Rd.; public utilities will be extended from Gustafson Rd. to Meadowbrook Rd.; portions of Doughty Rd. will be rebuilt; and a log/lumber storage facility will be built. At least 40 new jobs are projected.

ADF Building - This $1,050,000 project is being funded $585,900 from a (mining) Discretionary Payments Program grant to the City of Ladysmith and Rusk County; and $400,000 from (mining) first dollar and supplemental tax payments and other City and County funds. When it is completed near year's end, ADF, Inc. and The Sign Shop will relocate to this new facility where future expansion space is available.

Rusk County Airport Terminal Project - This $525,680 project is being funded $473,100 from a (mining) Discretionary Payments Program grant to Rusk County and the City of Ladysmith and $52,580 from (mining) first dollar and supplemental tax payments to Rusk County. The project will provide for a new terminal, a maintenance and hanger building, and a paved access road to them, completing a comprehensive upgrade of the Rusk Co. Airport.

Westlake Enterprises Relocation Project - This $275,000 project will be funded $125,000 from (mining) first dollar and supplemental tax payments to Rusk County; and $150,000 from lease revenue the City of Ladysmith has earned from the Meadowbrook Multi Tenant Industrial Center where space is being added and

renovated for Westlake. The project will enable future expansion of this operation staffed primarily by developmentally disabled workers from Rusk County.

Norse Building Systems Project - This $2,200,000 project is being funded from a $750,000 (mining) Discretionary Payments Program grant to Rusk County, the City of Ladysmith and the Town of Grant; $300,000 advanced against future lease payments to Rusk Co. from Conwed; from $300,000 of (mining) first dollar payments to the Town of Grant; from $300,000 from sale of a City building to the local development corporation; from $300,000 borrowed from local banks by the development corporation; and $250,000 from sale of the old Conwed plant to Weather Shield Mfg. Norse will build manufactured housing and closed wall panels and expects to employ 60 when fully operational. Construction of a 54,000 sq. ft. addition to an existing 20,000 sq. ft. building started last week.

New Truck Route - This $776,000 project is another "second generation" project not paid for directly from mining related funds, but from Transportation Economic Assistance (TEA) grants or tax increment revenues. These were, however, made possible by the aforementioned Norse and Weather Shield projects. Construction of a new street, E. 14th St. S., between Weather Shield and the CityForest papermill, will allow much of the truck traffic to and from these firms to follow C.T.H. G south out of the City rather than Worden Ave. west into the City. From C.T.H. G truck traffic will follow Doughty Rd. to S.T.H. 27. Much of Doughty Rd. will be rebuilt to City street standards rather than town road standards.

Rerouting as much traffic as possible along C.T.H. G and Doughty Rd. will help reduce congestion and hazards in the center of Ladysmith, especially near the Middle School.

The total public cost of the above listed projects is $18,610,380, including about $8,400,000 from mining sources.

FUNDS "LEVERAGED"

The breakdown of net proceeds taxes, Discretionary Payments Program and other grants and other public revenue sources these mining funds "leveraged", which are being used to finance the above listed projects, is as follows.

Net proceeds tax or guaranteed payments	$3,248,350
Discretionary Payments Program grants	5,160,430
Bureau of Aeronautics grant	2,400,000
Transportation Economic Assistance grants	388,000
Economic Development Administration grants	2,040,000
Tax Increment Finance revenues	1,570,000
Flambeau Mining Co. contribution	500,000
Municipal borrowing or advances	1,346,100
Project income	250,000
Other donations	200,000

Building or land sales, and other	582,500
Revolving loan funds	375,000

PRIVATE INVESTMENTS

In addition to the above listed public investments, over eight million dollars worth of privately funded investments are already anticipated in conjunction with the above projects; a number expected to increase as time passes.

Total public and private investments anticipated thus far as a result of mining stimulated projects are then in excess of $25,000,000. To put the significance of this number into perspective, the City of Ladysmith's full equalized value is less than $80,000,000.

JOB CREATION

Following is a projection of total jobs which have been or are expected to be created or retained by the above listed projects.

	Retained	Created	Totals
Glen Flora satellite building	-	30	30
Weyerhaeuser satellite building	-	8	8
Fritz Avenue Manufacturing Plant reuse	22*	38*	60
Ladysmith/Rusk County Enterprise Center	-	40	40
Conwed relocation	100*	25*	125*
ADF building	included with Fritz Avenue Plant		
Weather Shield expansion	-	200	200

Forest industry business park	-	40	40
Norse Building Systems	-	60	60
Total	122	441	563

*These are actual numbers. Estimates for other facilities are based upon company projections, when available, or on comparisons to similar local facilities.

PROJECT INCOME

When fully occupied some of the above listed facilities are expected to generate considerable one time or annual income for reuse in other economic development efforts, as follows.

Facility	Amount	One Time	Annual	Comments
Glen Flora building	$300,000	x		if sold outright
Weyerhaeuser building	325,000	x		" " "
Fritz Avenue Plant	88,000		x	lease
Enterprise Center	84,000		x	lease (1)
New Conwed building	178,000		x	20 year pmt.
Old Conwed building	500,000	x		(2)
Forest Industry Park	30,000		x	warehouse lease (3)
Fritz Avenue Plant Addition	54,500		x	20 year pmt.

Westlake Ent. addition	15,000		x	annual pmt.
Totals		$1,125,000	$449,500	

(1) Intended to be recycled into staffing and related costs.

(2) To be recycled back into Conwed and Norse projects.

(3) Includes warehouse lease revenue, but does not include income from sale of sites.

NEW TAX BASE

Facility	Amount
Norse building	$2,000,000
Weather Shield expansion	2,000,000
Total	**$4,000,000**

NEW INDUSTRIAL SITES

75 acres of new serviced industrial sites and 65 acres of new unserviced sites will be developed in conjunction with the forest industry business park project.

NEW BUILDING SPACE

Glen Flora satellite building	12,000 sq. ft.
Weyerhaeuser satellite building	12,000 sq. ft.
Fritz Avenue Plant	40,400 sq. ft. reclaimed
Visitor's Center	2,300 sq. ft.
Library	18,000 sq. ft.

Enterprise Center	28,000 sq. ft.
New Conwed plant	80,000 sq. ft.
Weather Shield addition	130,000 sq. ft.
Forest industry park warehouse	20,000 sq. ft.
ADF building	25,000 sq. ft.
Westlake Enterprises addition	6,000 sq. ft.
Norse Building Systems addition	54,000 sq. ft.
Total	427,700 sq. ft.

PROJECT	MINING	MINING TAXES			BORROWING OR		TEA	EDA	TIF	REVOLV.	OTHER	BANK	TOTALS
	GRANT				ADVANCES		GRANT	GRANT		LOAN		LOANS	
		CITY	COUNTY	TOWN	CITY	COUNTY							
GLEN FLORA BUILDING			300,000										300,000
WEYERHAUSER BUILD			325,000										325,000
FRITZ AVE. PLANT		225,000	225,000					450,000					900,000
VISITOR'S CENTER		80,000	80,000								BUILD SALE 60,000		220,000
LIBRARY			250,000		350,000						DONATIONS 200,000 FLAM. MINE 500,000		1,300,000
ENTERPRISE CENTER		280,000	280,000					840,000					1,400,000
AIRPORT RUNWAY			600,000								DOT GRANT 2,400,000		3,000,000
AIRPORT TERMINAL	473,100		52,580										525,680
CONWED RELOCATION	2,872,000		52,500							375,000	RECYC. INC 250,000 CITY LAND 52,500	375,000	3,977,000
FOREST IND. PARK	479,430	26,635	26,635					750,000					1,282,700
ADF BUILDING	585,900				232,050	232,050							1,050,000
WEATHERSHIELD EXP.									1,394,000				1,394,000
WESTLAKE RELOCATION			125,000								RENT REV. 150,000		275,000
NORSE BUILDING	750,000			320,000		320,000					CITY LAND 20,000 BUILD SALE 300,000 BUILD SALE 250,000	300,000	2,260,000
TRUCK ROUTE					212,000		388,000		176,000				776,000
TOTALS	**5,160,430**	**611,635**	**2,316,715**	**320,000**	**794,050**	**552,050**	**388,000**	**2,040,000**	**1,570,000**	**375,000**	**11,182,500**	**675,000**	**18,985,380**

JUST ONE DNR VARIANCE OF OUR MINING LAWS THREATENS THE FLAMBEAU RIVER

Note the Flambeau River lapping dangerously close to the mine because of a DNR variance

State law prohibits mining within 300 feet of a river. County zoning laws further restrict the distance to 500 feet from a river. Yet, through one of the largest loopholes in our mining laws, the DNR gave Kennecott a variance to our "strong" mining laws and allowed them to mine within 140 feet of the Flambeau River.

The photo was taken in 1994, when the precariously high water level threatened to flood the mine and carry acid-laden toxics downstream. This threat will continue long after Kennecott has taken their profits and left the state because the pit is unlined and unable to prevent acid mine drainage from migrating into the groundwater and Flambeau River.

How was this possible? Many of Wisconsin's mining provisions contain exemptions and variances to the very environmental, public welfare and safety standards that the laws allegedly protect. As long as the mining companies can request exemptions from our mining laws, our clean rivers and healthy forests are at risk. Wisconsin needs to protect itself and repeal special loopholes granted to the mining industry.