

**Malcolm Wiener Center  
for Social Policy**

*Developing a Management Plan  
for Crow Tribal Wildlife Resources*

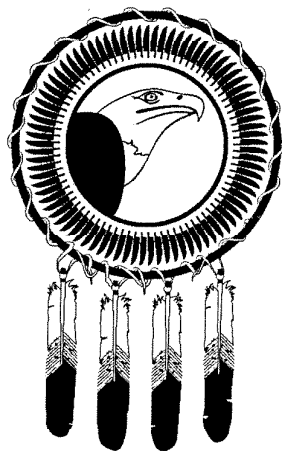
*A Report to the Crow Tribe of Montana*

by

**Kim Mead and Denise Toussaint**

*PRS 87-4*

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**Harvard Project on  
American Indian Economic Development  
John F. Kennedy School of Government  
Harvard University**

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**MEMORANDUM**

To: Richard Real Bird, Barney Old Coyote, Mike Doss, Gilbert Birdinground, and Joe Kalt  
From: Kim Nead, Denise Toussaint  
Date: May 29, 1987  
Re: Developing a Management Plan for Crow Tribal Wildlife Resources

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As requested, we have examined the issues involved in establishing an active Crow wildlife management plan. This strategy adoption is valuable as:

- (1) A potentially significant revenue source.
- (2) A means of asserting tribal sovereignty.
- (3) A method of developing and preserving tribal natural and human resources.

Within our document, we discuss a set of key activities which must be performed and obstacles which must be traversed in order to establish and implement a management plan. Some of our related recommendations include:

- (1) Making tribal education on the virtues of natural resource preservation a top priority.
- (2) Hiring a permanent wildlife biologist.
- (3) Banning big game hunting on the reservation during an initial monitoring period.
- (4) Developing a comprehensive management plan.
- (5) Writing a tribal fish and game code.
- (6) Applying for BIA funding.
- (7) Garnering support from Montana's representatives on Capital Hill.
- (8) Exploring the possibility of obtaining legal assistance from the Native American Rights Fund.
- (9) Avoiding joint State-Tribe jurisdiction over reservation wildlife.
- (10) Including Crow-owned allotted lands in a fish and game code.
- (11) Excluding fee lands from the code.
- (12) Including all waters within reservation boundaries in the plan.
- (13) Clearly establishing and marking the boundaries between tribal reservation, allotted, and fee lands.

We wish to stress that developing a Crow tribal wildlife management plan involves complex legal issues. In a number of cases, the Tribe must make difficult judgment calls which will require legal advice based on a detailed familiarity with Crow specifics. Our recommendations are based on discussions with knowledgeable attorneys who admittedly lack an awareness of all the intricacies of the Crow situation. We hope that the Tribe will find our study and recommendations useful as a basis for serious consideration of these issues, but that you will also recognize the limitations of such a short-term study.



DEVELOPING A MANAGEMENT PLAN  
FOR CROW TRIBAL WILDLIFE  
RESOURCES

Client: The Crow Indian Tribal Council

Academic Advisor: Joe Kalt

Students: Kim Nead

Denise Toussaint

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INTRODUCTION

In order to achieve a degree of economic self-sufficiency, many American Indian tribes have, in the last several decades, turned to the natural resources located on their reservation land as a source of economic development. Economic necessities and technological possibilities often render rapid and destructive development appealing; nonetheless, the need for environmentally sound resource management and the accompanying need for improvements in human resources through education and training are requirements of a development scheme which has any long-term viability.

Several tribes, most notably the White Mountain and Mescalero Apaches in Arizona, have been successful in channeling both human capital and renewable resources into tribally-run fish and game departments. These offices and their accompanying fish and game codes serve to safeguard these resources for future generations, assert tribal sovereignty over a valuable tribal asset, provide employment opportunities and generate revenue for tribal development.

#### **CURRENT STATUS OF WILDLIFE MANAGEMENT ON THE CROW RESERVATION:**

In the First Treaty of 1851 and Second Treaty of 1868 at Fort Laramie, the Crow surrendered 30,000,000 acres of land to the federal government, while the government set aside approximately 2,282,764 acres of land in southeastern Montana for the use and occupation of the Crow Tribe. The Allotment Act of 1887 allowed some of the reservation land to be granted to individual Indians instead of the Tribe. Over the years, much of this land was sold to non-Indians. As of 1980, 17.33% of the Crow reservation was tribally owned, 52.02% was allotted to individual tribal members, and 28.33% was owned in fee simple by non-Indians.

The Crow are endowed with valuable fish and wildlife resources. Reservation assets include big game species such as elk, buffalo and deer. However, wildlife populations have been drastically reduced in recent years. A wildlife survey

performed in the 1970s counted 5000 head of elk in the Big Horn mountains; a similar survey conducted in March 1987 revealed only 65 elk. A long standing policy of generally unrestricted tribal hunting combined with minimal State and Tribal enforcement of non-member regulations have led to this situation.

The State of Montana sets hunting seasons and bag limits for the reservation's fee lands. It also sells fishing licenses and water fowl hunting permits for fee lands, waters adjacent to fee lands and the Big Horn River, although the Tribe does not receive any portion of funds so generated. Despite these State activities, the State does not provide an adequate enforcement presence on the fee lands and makes little effort to clarify for hunters and fishers where fee lands end and allotted lands begin. Because no one is actively enforcing State regulations, hunters on fee lands can exceed bag limits. Also, these hunters often "wander" onto allotted lands under the jurisdiction of the Tribe. Tribal game wardens often avoid enforcing no trespassing regulations on these non-members because they have no jurisdiction over non-Indians on fee lands, and it is difficult to determine the boundaries of this checkerboard arrangement of fee lands and allotted lands. Some tribal members earn income by acting as outfitters for hunting groups. Problems arise when the outfitters get permission to bring non-Indians onto fee lands to hunt and then take the hunting party onto allotted lands where non-member big game hunting is prohibited.

The Tribe is not currently enforcing any official fish and game code on reservation lands. Title 12 of the Fish and Game Code within the Crow Law and Order Code was rescinded within the last year because it was a criminal code, and the Tribe lacks criminal jurisdiction over non-members. No civil code has been adopted to replace the former fish and game code, although Gilbert Birdinground of the Crow Fish, Wildlife and Recreation Department is currently developing one. This code has been approved by the Bureau of Indian Affairs, but awaits Council approval. At present, the Tribe enforces reservation trespassing regulations on non-members found on allotted and reserve lands. This regulation regarding tribal and non-tribal hunting and fishing is the only regulation which the Tribe is currently enforcing. Members are not generally subsistence hunters. They often use the prime parts of the animal, sell the meat and leave the rest of the animal behind.

Another important aspect of the current state of tribal fish and wildlife management is that non-Crow Indians hunt and fish on the reservation without restriction. Their status on the reservation is unclear, because the Fort Laramie Treaties created a relationship among the treaty tribes that allows them to hunt and fish on all treaty lands. Thus, non-Crow treaty tribes such as the Cheyenne contribute to depletion of Crow tribal wildlife resources, and the Crow government's jurisdiction to regulate their behavior is poorly defined.

## **FUTURE PROSPECTS FOR WILDLIFE MANAGEMENT:**

A new tribal administration took office last July. They have expressed a strong desire to develop economically while preserving their cultural and physical resources. Reservation unemployment currently stands at 80%, and the tribe has just declared bankruptcy. The Tribe also faces serious challenges to its sovereign right to self-government and self-determination. The Crow can take significant steps toward self-sufficiency and self-determination through aggressively pursuing tribal management of their fish and wildlife resources. Implementing such a strategy will require traversing significant social, economic, and legal barriers. The Tribe has already moved toward sound management of their resources by terminating the practice of giving out trespass permits to non-members. Such permits essentially functioned as hunting permits for non-members under the current limitations of enforcement capacity and code development. Putting an end to this practice was politically difficult.

Future activities to develop sound, comprehensive tribal management of tribal resources may also require considerable courage and wit. An active approach to tribal management of wildlife resources is essential for several reasons. As noted above, such management is an exercise of tribal sovereignty. In addition, because the Crows' primary resources lie in their human and natural resource capital, preservation of these

assets is essential to ensure successful long-term development. Such an approach will afford the Crow the opportunity to sustain both important resources through conservation-oriented management and assertion of sovereignty over tribally-owned assets. Such a strategy not only protects the physical resources, but also increases tribal employment opportunities and develop the skill levels of tribal members involved in management-related activities. Thus, the Crow can independently determine the evolution of their culture as they pursue economic development. And, of course, the sale of big game hunting permits to non-members is a proven means of generating tribal income.

#### THE MARKET FOR BIG GAME HUNTING

Demand for outdoor recreation is greatly increasing in the United States. Experts such as John Krutilla, a natural resource economist and researcher at Resources for the Future, predict that demand for activities such as hunting, fishing, hiking, and camping will continue to grow with the growth in U.S. population. In addition, they argue that, as real per capita income rises and wilderness areas become increasingly scarce, the value people place on hunting and fishing experience will continue to increase well into the next century.

Accordingly, a strong market for big game hunting experiences has developed in this country. The rising popularity of hunting native big game on private ranches is one indication of this trend. Declining hunting success rates, deteriorating quality of hunting experience, and reduced trophy size of animals taken on public lands in the West have all resulted from increased public pressure for differing and often conflicting demands for land use. Demand for quality big game hunting experience on properly managed lands will rise. The president of a national big game hunting newsletter has articulated his belief that the private big game hunting business is just beginning to see its potential. In one week alone, three venture capitalists approached him regarding investments in private game ranches.

Joe Jajola, the White Mountain Apache's fish and wildlife expert, believes that there will continue to be a large demand for big game hunting on tribally owned lands. He cites the success of the seven Southwest Indian reservations which have undertaken big game marketing as evidence of this trend. Most hunters on the Apache land are from Texas and New Mexico, with a large contingency from the East. He believes the local and nonlocal market in Montana would be equally strong. A renowned safari outfitter estimates that elk permits could be sold in Montana for between \$3000 and \$6000, depending on the quality of the herd. He believes the market for buffalo, while not as strong as that for elk, could bring a permit price of 3000.

At present, the state of Montana conducts one buffalo hunt each year outside of Yellowstone Park. The Department of Fish, Wildlife, and Parks maintains a roster of hunters who wish to participate in this hunt which occurs when the buffalo wander out of the park. Last year 3000 hunters paid \$5 each to enter their names on this roster. 200 hunters are randomly selected for the roster. From this list, approximately 30 hunters are chosen each year to go on the hunt. On the day of the hunt, resident permits are sold for \$200 and non-resident permits for \$1000. Hunters' money is refunded if the buffalo do not show up. A hunting preserve for German tourists is located in an extremely isolated spot in the northern portion of the state. A permit to hunt buffalo on this preserve has been known to sell for as much as \$5000. Another small ranch caters to primarily Midwest hunters who take 75 to 80 bison a year. Clearly, a demand for buffalo hunting in Montana exists; however, the current suppliers are not fully meeting this demand.

Fred King, publisher of a Texas-based hunting newsletter, offered several explanations for this imbalance between buffalo hunters and buffalo hunt suppliers. Bison carry a disease called brucellosis which is extremely contagious and detrimental to the health of any cattle which become infected. Therefore, very few ranchers who are currently engaging in traditional ranching activities and are considering providing big game hunting experience on their lands are willing to

provide habitat for buffalo grazing. He also believes that the American bison is still widely perceived as an endangered species in this country. Aside from this perception, buffalo are not particularly challenging to hunt and do not provide a high quality hunting experience. Nonetheless, the high ratio of hunters to permits available indicates that the buffalo hunt may provide a unique niche in the big game hunting market.

Very little official work has been done on the market value of big game in Montana; however, the Montana Cooperative Extension Service conducted a survey of 600 private ranchers, 555 of whom responded. Although only 8% of the respondents had ever charged access fees for hunting on their land, 90% believed ranchers should be compensated for providing wildlife habitat. With demand for big game hunting increasing and the price of meat falling, many ranchers are looking at private provision of big game hunting experience as a viable business pursuit. Fred King has articulated that the market will be strong on a very long-term basis; he believes big game will hold a permanent spot in the marketplace.

In offering his optimistic outlook, Mr. King emphasized the continued demand for quality outdoor experience. Quality is derived from any number of attributes of a big game hunting experience, and it is highly reliant upon the needs of the hunters involved. These attributes can include size of animals, availability of scenic landscape, and quality of

guides, housing, and vehicles provided. Those private ranchers who have emphasized overall experience have typically fared better than those ranchers who have targetted the "big trophy" aspect. Survey results yield figures of \$1500-2500 for seven-day elk hunts with a cabin and four-wheel drive vehicle. Seven-day mule deer hunts go for \$1500-2000. These hunts are not guided. The Apaches have added to their hunting revenues by providing tribally-guided hunting expeditions; seven-day elk hunts sell for \$8000, while ten-day hunts go for \$10,000. Tribal enforcement capabilities are enhanced by selling only big game expedition packages. However, the private outfitting business in Montana is much bigger than it is in Arizona. In fact, there are more private outfitters in Montana than in any other western state; they comprise a very large and active lobbying group. Yearly revenues approach \$60-65 million. Many outfitters lease private ranch land for around \$10,000. Thus, any Crow-guided packages should provide a high quality experience in order to compete in this more competitive market. Providing these packages can generate both extra revenues and new jobs for tribal members.

KEY ACTIVITIES NECESSARY TO  
ESTABLISH ACTIVE TRIBAL FISH  
AND GAME MANAGEMENT

Once the Crow tribal council has decided how to handle fee lands, allotted lands, and the Big Horn River streambed, the council can begin the process which will lead to active tribal management of its fish and wildlife resources.

(1) The tribe needs to hire a permanent wildlife biologist who will:

- a. Compile a comprehensive and accurate assessment of both populations and habitats of tribal wildlife.

Data should include information on:

- \*Populations, by age class and sex, of all big game and fish species currently residing on reservation lands.
- \*Condition of the species' habitats. Is the land being degraded by other economic endeavors such as grazing or exploratory mining operations? This information will aid in determining if some areas should be permanently closed to big game hunting.
- \*Current tribal harvest rates of animals by age and sex.

\*Habitat feasibility determination. What is the carrying capacity of the land for particular land uses?

\*Seasonal ranges of the animals. Are all seasons spent on reservation land, or do some animals migrate off the reservation during particular times of the year? This information is integral to establishing reasonable hunting seasons.

b. Develop a comprehensive resource management plan.

\*The plan must be very strongly conservation-oriented. Close scrutiny must convince others that tribal management of wildlife is superior to state management. This factor was very important in achieving a Supreme Court victory for the Mescalero Apaches when they asserted sovereign control over their tribal resources.

\*A comprehensive plan should include provisions to protect all aspects of the reservation environment integral to the survival of wildlife included in the plan. It must provide a reasonable balance between competing land and water uses.

\*The plan should include special provisions to protect any threatened or endangered species. This consideration will make the plan especially appealing as a comprehensive conservation scheme.

e. Assist in writing the tribal fish and game code.

\*We recommend that the Crow use the Apache Code as a model in drawing up their own fish and game code (with appropriate modifications.)

\*The code should explicitly state that revenues from permit and license sales will be used to provide essential governmental functions to the Crow. This inclusion will strengthen legal arguments that tribal jurisdiction over fish and wildlife resources is critical to the political and economic security of the Crow tribe.

\*The code should include a severability clause. This clause provides limited protection for the fish and game code; if the courts declare aspects of the code invalid, the rest of the code will not be jeopardized. This protection holds only if the invalid portions of the code are not central to its purpose.

d. Direct yearly monitoring and enforcement activities.

\*Without effective enforcement, the fish and game code will hold no weight no matter how well designed.

(2) The tribe must develop a comprehensive program designed to educate tribal members on the virtues of engaging in active tribal wildlife management.

- a. Significant use should be made of any concrete data provided by the wildlife biologist.
- b. Inviting outside speakers, especially those from tribes who have successfully implemented programs, may prove very helpful in this endeavor.

(3) The tribe must strengthen its fish and wildlife office capabilities so that it can:

- a. Issue licenses and permits.

\*The tribe must hire or assign a staff member to act as an administrative secretary.

\*Issuing licenses and permits generates tribal income and employment opportunities, and establishes the Tribe's right to regulate nonmembers.

- b. Enforce tribal fish and game code regulations.

\*The tribe currently has six full time game wardens and two wardens-in-training at the BIA Police Academy. It should hire and train an additional two to seven enforcement officers.

\*The ability to prove tribal enforcement capacity and commitment will be critical to legal

victories over the State of Montana if the tribe decides to challenge the State's jurisdiction over fee lands, contiguous waters and/or the Big Horn River.

c. Conduct yearly wildlife monitoring.

\*This monitoring is needed to manage tribal wildlife resources in a sound manner and to prove that tribal management is superior to State management.

(4) In order for any plan to be effective, the Tribe must ban big game hunting on the reservation for three to five years while the wildlife biologist assesses resources.

- a. The duration of the hunting prohibition will depend upon the animal population trends, so the Council resolution should provide some flexibility and allow the elected tribal council officers (with the biologist's recommendation) to determine the precise period of the ban. This ban and members' adherence to it will demonstrate a commitment to preserving and enhancing tribal wildlife and its habitats.
- b. If banning tribal big game hunting immediately proves politically infeasible, two options exist for banning big game hunting incrementally. The Tribe can slowly restrict the bag limit to zero. Alternatively, the Council can gradually shorten the hunting season until the season is nonexistent.

(5) Adopt the Crow fish and game code and any other resolutions or tribal constitutional amendments required to assert tribal control over resource management and enforcement.

- a. The Crow tribal constitution, which was not established under the Indian Reorganization Act, should be studied to determine if it should/can be changed to strengthen the tribe's ability to establish itself as the sole regulatory and enforcement authority for member and non-member hunting and fishing on the reservation.
- b. The particular aspects of the legal status of the Crow tribe may affect how the code is written, as well as how State and Tribal jurisdictions are defined and delineated.

OBSTACLES TO ASSUMING ACTIVE  
TRIBAL WILDLIFE MANAGEMENT

**INTERNAL CONSTRAINTS:**

**1. LACK OF TRIBAL GOVERNMENT LEGITIMACY DUE TO PERCEPTIONS OF  
CORRUPTION WITHIN PAST TRIBAL ADMINISTRATIONS.**

The current tribal administration has verbalized a strong commitment to honest government. Unfortunately, perceptions that some previous tribal administrations were corrupt hinders current governmental efforts. Many tribal members believe that

they will experience little benefit from increased funds for tribal programs because they expect funds to be diverted by corrupt officials. This expectation may decrease the value which Crow place on generating tribal income through permit and license sales. In additions, off-reservation perceptions of a history of tribal government corruption decreases the Crow's chances of obtaining outside funding and support for wildlife management efforts.

## 2. HIGH LEVELS OF UNEMPLOYMENT ON THE RESERVATION.

A tribal unemployment rate of 80% limits support for stronger enforcement of restricted hunting by tribal members and non-members. Because some members benefit economically from the current state of limited restrictions and enforcement, private incentives exist within the reservation to maintain the status quo.

## 3. HISTORY OF HIGH TRIBAL ADMINISTRATION TURNOVER.

High turnover may affect the way Crow view tribal programs. Initiatives are more likely to be considered temporary, decreasing tribal member commitment and compliance. The Crow Tribe's history of political instability also affects outsiders' perceptions. Funding sources may question the cost effectiveness of tribal proposals and the potential for program continuity; future administrations may not exhibit a commitment to the program funded under the current administration. Frequent governmental turnover also precludes the building of

stable working relationships with BIA personnel and other off-reservation organizations.

4. CROW MEMBERS' TENDENCY TO BE INDIVIDUALISTIC AND NOT IDENTIFY WITH THE TRIBE AS A POLITICAL UNIT.

Tribal members may not relate to the strengthening of tribal government and establishing tribal sovereignty as goals worthy of personal sacrifice. Along the same lines, Crow often view passover rights as belonging to them as individuals rather than the Tribe as a whole and do not necessarily favor joint tribal determination of who may come on the reservation.

5. LACK OF FUNDS.

Assuming active tribal wildlife management requires tribal expenditure. A wildlife biologist's salary runs between \$20,000 and \$25,000. Each game warden costs around \$11,000 to \$14,000 plus benefits. Also, asserting greater tribal control over tribal resources will likely require costly litigation. Since the Tribe recently declared bankruptcy, funds are not available for existing programs, let alone for new initiatives.

**RECOMMENDATIONS:**

**RECOMMENDATION #1:**

Make natural resource education of tribal members a top priority. Data provided by the wildlife biologist on population trends may spark tribal awareness and concern about long-term herd viability. Outside visits from successful

tribes such as the White Mountain and Mescalero Apache could generate an appreciation of the potential benefits of active tribal management of fish and wildlife resources.

**RECOMMENDATION #2:**

Apply to the BIA for funds to cover the costs of a wildlife biologist, some travel and office supplies and a secretary. Gary Rankle, with BIA Fish, Wildlife and Recreation in Washington, recommended this approach. Specifically, he suggested that the Crow submit a proposal that the \$25,000 currently earmarked by the Fish and Wildlife Service for services to the Crow Reservation be transferred for direct use by the Tribe. The proposal could request an additional \$30-40,000 to meet the above described needs. Such a conservative proposal is much more likely to receive funding than more comprehensive proposals requiring extensive funding. There is no harm in also submitting a more comprehensive plan; however, the Crow should submit the smaller proposal separately. Rankle also informally indicated that sending a copy of the management proposal to the tribe's representatives on Capital Hill increases the likelihood of getting the plan funded. The tribe's relationship with Senator Melcher may alter the advisability of taking such an approach, however.

**RECOMMENDATION #3:**

Write to the tribe's representatives on the Hill indicating the Crow tribe's support of the current BIA policy of transferring funds from the Fish and Wildlife Service to the

tribe to assume functions currently performed by FWS. According to Rankle, most tribes support this policy, but some tribes with federal fish hatcheries on their reservations are strongly lobbying against such transferral of funds to tribes. Once again, we caution that the tribal administration consider the Crow tribe's particular relationship with representatives when they determine whether to follow this suggestion.

#### **RECOMMENDATION #4:**

Explore the possibility of getting legal assistance from the Native American Rights Fund in writing the fish and game code or developing other aspects of the management plan. According to Kim Gottschalk, a NARF attorney, obtaining assistance requires writing a letter to the Deputy Director. Jeannette Wolfley is the current deputy director. The letter should provide as much detail as possible about specific activities the Tribe wishes NARF to perform. Part of NARF's decision to assume a particular case is based on how much legal time the assistance will require. Less complicated and time consuming assistance needs are given top priority. NARF has a general policy of avoiding Indian-Indian conflicts, such as tribal vs. individual Indian rights on allotted lands.

**LEGAL CONSTRAINTS:****1. ALLOTTED LANDS AND FEE LANDS:**

The Crow Tribe possesses tribal powers of self-government derived from its quasi-sovereign status. The Crow reservation thus constitutes an independent political community. However, the Tribe does not possess sole jurisdiction over all land on its reservation, as the state currently regulates non-tribal activity on the fee lands. Fee lands are considered the private property of individual non-Indians. Allotted lands make the future composition of the reservation unpredictable; the tribal members who own these lands can of course sell them to non-Indians, thus increasing the percentage of fee lands on the reservation.

The Supreme Court ruled in **United States v. Montana** (1980) that the Crow Tribe does not have the authority to regulate fishing and hunting by non-Indians on fee lands within reservation boundaries. The Court ruled that state regulation does not "threaten the Tribe's political or economic security." The ruling alluded to the traditional exercise of "near exclusive" state regulation of non-Indian hunting and fishing in its upholding state authority over these activities. That is, the Court ruled against the Crow Tribe, which argued that Montana had no right to regulate non-tribal activity on the reservation. The State has done so in the past through enforcement of state laws and sales of state hunting

and fishing licenses on the reservation. Money obtained from the sale of these licenses does not go to the Tribe. The state does not allow big game hunting on reservation land.

A further complication lies in the fact that Montana is an optional 280 state under the Enabling Act of 1953. Public Law 280 granted the State of Montana criminal jurisdiction over offenses committed by Indians on Indian reservations upon ammendment of its constitution or statutes, where necessary, to remove any legal impediment. Section 7 provides that "the consent of the United States is hereby given to any...State not having jurisdiction with respect to criminal offenses..., as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the state to assumption thereof." Montana has exercised this prerogative in the past on the Flathead Indian Reservation without a constitutional amendment of the disclaimer clause, the legality of which was upheld in *State ex rel. McDonald v. District Ct. of Fourth J.D.* (1972). Arizona is not a 280 state; this fact simplified assertion of exclusive Tribal authority by the White Mountain Apaches. In addition, the Fort Apache reservation has no allotted lands within its boudaries.

## 2. BIG HORN RIVER STREAMBED/WATER RIGHTS ISSUES:

In *United States v. Montana*, the Supreme Court ruled that the streambed of the Big Horn River, located within the Crow

reservation boundaries, passed to the State of Montana upon its establishing statehood. The Court ruled that the treaties of Fort Laramie did not convey ownership of the streambed to the Crow. Consequently, the Tribe cannot prohibit non-member fishing on the river. Also, the State of Montana has recently begun selling licenses for fishing along those parts of the Little Big Horn River adjacent to fee lands in an attempt to extend State control over on-reservation fishing.

### 3. RELATIONSHIP OF FORT LARAMIE TREATIES TRIBES:

Tribes covered under the Fort Laramie treaties possess reciprocal rights to hunt and fish on all reservations included in the treaties. However, the exact nature and extent of these rights are not clearly defined. The Crow Tribe's ability to regulate non-Crow Indians, such as the Cheyenne, remains subject to exploration. Some court cases on the relationship between Indians of different tribes have ruled that tribal authority over non-member Indians is similar to the authority it has over non-Indians. But, according to Kim Gottschalk, there is little reason to believe that non-Crow Indians have the legal right to preferential treatment over Crow on the Crow reservation. In other words, if the Tribe passes hunting regulations governing tribal member hunting, Cheyenne hunting on the Crow reservation should probably be held to the same restrictions.

**OPTIONS:**

The Tribe must determine if it will attempt to regulate fish and wildlife by Crow Indians, non-Crow Indians and non-Indians on all reservation lands. Asserting control over disputed lands, including the Big Horn streambed and fee lands, would present a challenge to the 1980 Supreme Court ruling. Another issue to be addressed is determining how to incorporate allotted lands into the tribal resource management plan in a way which will limit the possibility of losing tribal control over these lands if they are sold to non-Indians in the future.

Several conflicting approaches have been recommended. Bob Brauchli, tribal attorney for the White Mountain Apaches, strongly recommends including the disputed land in the code. He recommends including a severability clause, similar to that of the Apaches', which states that the overall code's validity is not diminished if any one portion of the code is ruled invalid. Joe Jajola, the Apaches' wildlife biologist, believes that a checkerboard reservation requires cooperation with the State of Montana, adoption of a fish and game code, and entering into a cooperative management arrangement with the State.

Yet another suggestion from Zig Plater, visiting professor at the Harvard Law School, is to adopt Montana regulations into

a tribal fish and game code for the fee lands and other regulations for the allotted and undisputed reservation lands. Kim Gottschalk, who represented the Mescalero Apache in their successful assertion of the Tribe's exclusive right to regulate reservation fish and wildlife, does not recommend following this approach. He believes the Mescalero Apache's case was strengthened by the Tribe's contention that it had scientific data on its wildlife population which rendered its regulations more appropriate than State regulations based on more limited data.

The Flathead Reservation Indians are currently litigating their right to control tribal member and non-tribal member activities on the reservation on fee lands, allotted lands and reserve lands. They are attempting to require the purchase of recreation permits. Clearly, the outcome of this Court battle will be of great interest to the Crow who have a checkerboard reservation structure similar to the Flathead Reservation's. However, the Crow have already gone to court and lost their right to regulate non-member hunting and fishing on fee lands. Even if the Flathead Reservation Indians gain the right to regulate fee lands, the Crow will probably have difficulty bringing this issue back into court. Generally speaking, issues can not be re-litigated simply on the basis of a legal argument which could have been brought up in the previous case.

With regard to tribal management of fishing on the Big Horn River, Little Big Horn River and other reservation waters,

several approaches are possible. Bob Brauchli strongly recommends including the streambeds in the fish and game code. Kim Gottschalk believes that recovery of control of the Big Horn River is unlikely and that including such questionable aspects in a code is likely to be detrimental to the rest of the Crow case. Gary Rankle mentioned the arrangement between the State of Minnesota and the Leech Lake Tribe (which has a checkerboard reservation similar to the Crow Tribe's) as an option which is useful to both parties. The Tribe receives 5% of annual State fishing license receipts in exchange for allowing non-member fishing on all reservation waters.

**RECOMMENDATIONS ON LEGAL ISSUES:**

In light of our research, we suggest that the Tribe consider the following recommendations. However, we caution that these issues are clearly judgment calls and that further legal consultation on such matters is not only wise, but essential.

**RECOMMENDATION #1:**

We do not recommend that joint State-Tribe jurisdiction over reservation wildlife be established as a precedent. The State of Montana is likely to contest the tribe's sole authority over hunting and fishing on the reservation lands; in the past, all similar tribal management takeovers have led to legal battles. By establishing a cooperative management agreement with the State, the Tribe could weaken its case. Asserting the Crow Tribe as the sole wildlife-regulating body

on the reservation (sans fee lands) could be more difficult if the Tribe has already explicitly initiated an authority-sharing relationship with the State. However, Kim Gottschalk believes that, in theory, such a contract should not indicate any surrender of tribal sovereignty as long as the Tribe writes a statement to that effect into the agreement.

**RECOMMENDATION #2:**

We recommend including Crow-owned allotted land in the fish and game code, since this land is currently owned by tribal members, and the Tribe's authority over tribal members is upheld by the Tribe's right to self-government. However, according to Gottshalk, even this seemingly clearcut issue could wind up in litigation since the rights of individual tribal members vs. tribal government are being pitted against each other. One way to try to ensure that this land remains subject to tribal authority would be to pass a council resolution governing sale of these lands. Specifically, the resolution could require that deeds stipulate that hunting and fishing rights on the land remain under the sole regulation of the Crow tribal council regardless of the membership status of the owner.

**RECOMMENDATION #3:**

We recommend not including the current fee lands in the fish and game code. We believe it is extremely unlikely that the Crow Tribe can win the legal right to regulate the hunting

and fishing of non-Indians on fee lands. It is unlikely that such a case would be heard, since the Supreme Court has already ruled specifically on this issue. Perhaps the best way to handle hunting and wildlife management on the fee lands is to leave this duty to the State of Montana without explicitly entering into a cooperative management arrangement.

**RECOMMENDATION #4:**

The Big Horn streambed should be included in the fish and game management plan. Even if the Tribe is unable to legally prohibit non-tribal member fishing on the river, it retains the right to regulate fishing by tribal members. To the extent that the Tribe can reasonably restrict tribal member fishing on the Big Horn and other reservation rivers, it will protect the fishing rights of future generations of tribal members by managing tribal fishing based on sound principles of conservation. Including the streambed and referring to Crow jurisdiction over non-tribal member fishing on the river in the fish and game code seems less wise. A decision on how to handle the streambed issue will definitely require a judgement call, however.

**OTHER CONSTRAINTS:****1. DIFFICULTY DISTINGUISHING BOUNDARIES BETWEEN FEE LANDS AND ALLOTTED LANDS.**

Enforcement efforts by tribal game wardens are severely hindered by the lack of clear boundary lines on the reservation that indicate the status of lands (fee vs. allotted vs. reserve). It is easy to either mistakingly wander onto allotted lands or claim ignorance if caught trespassing.

**2. INABILITY TO CROSS-DEPUTIZE TRIBAL GAME WARDENS.**

The State of Montana currently has no motivation to certify tribal enforcement officers as officers of the peace. Because the State sees no benefit in such an arrangement, no cross-deputization of tribal game wardens currently occurs. Such arrangements usually occur only when both parties have a stake in the agreement. For example, cross-deputization is beneficial and common in cases where the Tribe wishes to enforce off-reservation tribal hunting and fishing rights and exchanges this capacity for increased State enforcement prerogatives on the reservation. Since this is not the case on the Crow Reservation, cross-deputization of Crow game wardens is highly unlikely. This factor hinders active tribal wildlife management because it increases the likelihood that tribal enforcement officers' powers will be disputed later.

**RECOMMENDATIONS:****RECOMMENDATION #1:**

Clearly mark off the boundaries within the reservation. Make generous use of signs indicating specific government jurisdiction over the land (State vs. Tribe), as well as hunting restrictions for non-members/members. It is important to clarify legal status for the benefit of both enforcement officers and potential regulation violators.

**C O N C L U S I O N :**

We have presented a strategy for economic development through use of the reservation's wildlife resources. This recommendation is by no means designed to assert that wildlife should be the sole source of development for the Tribe. Rather, it is a business strategy based on the market for big game hunting and fishing, the Tribe's desire to assume self-management over its wildlife resources and the need to preserve these important resources while fully utilizing the human resources of the Tribe through employment training programs. Questions remain unanswered, and specific aspects of this strategy should change as the answers are discovered. The basic premise of this report is that the Crow Tribe, through some cost and effort, can indeed assert control over its wildlife resources while preserving them for economic use today and in the future.

APPENDIX ONE: APPLYING FOR BIA FUNDS FOR FISH, WILDLIFE AND  
RECREATION PROGRAMS

Suggestions from Gary Rankle, Bureau of Indian Affairs,  
Washington, D.C. (202) 343-4089

The demand for Bureau of Indian Affairs funding for tribal fish, wildlife and recreation programs far outstrips the money available for such projects. Approximately 90% of the Department's budget is earmarked for existing contracts. Around 100 proposals compete each year for the 10% which is available for new grants. In the 1988 budget, \$900,000 is set aside for new contracts. Rankle indicated that although no decisions have been finalized and all proposals will be considered, the BIA has a number of very worthwhile program proposals sitting in a drawer waiting to be funded. Given the BIA's inability to fund more than a fraction of submitted proposals, the Bureau gives preference to proposals addressing the agency's top priorities. A proposal earns "points" for containing each of the following:

- \*The project enhances the Tribe's capacity for self-determination.
- \*The funds will develop tribal jobs, professional capabilities and generate tribal income.
- \*The funds will help the Tribe become self-sufficient and minimize the need for future federal

assistance, service provision and involvement on the reservation.

\*The funds will be used to protect or enhance a high priority resource. (For example, an endangered species or a valuable big game population with a strong market demand.)

A Tribe's proposal can range from a one or two page letter to the Assistant Secretary to a comprehensive proposal including the history of the reservation, details of the plan, etc. According to Rankle, the form of the proposal is not the deciding factor. Rather, the Tribe must clearly convey how the requested funds will benefit the Tribe by addressing the BIA priorities outlined above. A tribal ordinance recommending the proposed activities should accompany the funding proposal.

Rankle stressed the wisdom of proposing conservative, bare bones programs during this period of fiscal austerity. The agency typically has limited discretion over funds; he described an ability to shift \$20,000 here and there. He suggests sending copies of funding proposals to the Tribe's representatives in Washington. Rankle also noted the value of appearing before the House Appropriations Subcommittee in February when Congressman Yeates invites outside Indian testimony. Effective Indian rights lobbyists often take the opportunity to cultivate relationships with staff members who can wield a lot of power in these matters.

## APPENDIX TWO: LIST OF RESOURCES AND CONTACTS

## LEGAL ADVICE/ASSISTANCE:

ROBERT BRAUCHLI

Tribal Attorney

White Mountain Apache Tribe

P.O. Box 700

Whiteriver, Arizona 85941

(602) 338-4346 Extension 211

KIM GOTTSCHALK

Attorney - involved in the 1983 Mescalero Apache case

Native American Rights Fund

Denver, Colorado

(303) 447-8760

KEVIN GOVER

Attorney with private practice - working with the Nez Pierce on water rights issues, recommended by Kathryn Vandarbar

(Associate Director of Water Resources Program, American Indian Resource Institute) as someone who might have advice on the Big Horn River streambed and other water rights issues on the Crow Reservation

New Mexico

(505) 842-6961

**ADVICE ON ADMINISTRATIVE AND TECHNICAL ASPECTS OF RESOURCE  
MANAGEMENT:**

JOE JOJOLA

Certified Wildlife Biologist working for the White Mountain  
Apache Tribe

Specializes in Big Game, Upland Game Birds, Waterfowl and  
Nongame Birds

White Mountain Recreation Enterprise

Game and Fish Department

P.O. Box 220

Whiteriver, Arizona 85941

(602) 338-4385

BARRY BETTS

Formerly with U.S. Fish and Wildlife Service out of Billings,  
former technical advisor to the Crow Tribe, now at Lower Brule  
Agency

(605) 473-5281

KATHRYN VANDARBAR

Associate Director, Water Resources Program, American  
Indian Resource Institute, Inc.

If the Tribe decides to become involved in water management  
issues, she could be a valuable contact.

American Indian Lawyer Training Program, Inc.

319 MacArthur Boulevard

Oakland, California 94610

APPENDIX THREE: AMERICAN INDIAN RESOURCE INSTITUTE

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AIRI is a program under the American Indian Lawyer Training Program, Inc. funded by the Ford Foundation. They currently focus on water resources, but may expand into other natural resource areas in the future.

AIRI offers the following:

- \* Short courses on development of water codes, tribal water regulation and administration.
- \* Technical assistance in hydrological/watershed management. They underwrite administrative costs and some travel. Tribes usually contribute - some have used BIA funds for this purpose.
- \* A four-module summer course covering all aspects of water resource management.
- \* Regional seminars as requested by the tribes.

The Tribe should contact AIRI if interested in these activities. Tribal members wishing to participate can then be put on a list. AIRI provides full and partial scholarships.