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Controlling Boomtown Development: Lessons From the Intermountain Power Project, Part One

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In 1974, the Intermountain Consumer Power Association began planning the construction of a fifteen hundred megawatt coal-fired electric generating plant which was ultimately located near the town of Lynndyl, Utah. Throughout the planning process, officials of the Intermountain Power Project were determined to avoid the litany of problems which commonly plague energy boomtowns. In the first part of a two part article, the author describes the efforts of project planners in cooperation with city, county and state officials to mitigate and alleviate the impact of the development on the local community. The second part of the article will evaluate the extent to which these efforts succeeded.

The boomtown is part of the legend of the American West. Hollywood directors and popular novelists have preserved some of the flavor of the community suddenly created by the discoveries of mineral wealth, the coming of the railroad, or the great cattle drives. Boomtown life was vigorous. Law and order were lacking. The craving for sudden wealth was the shared attitude. As the wealth ran out, the boomtown declined to a backwater community or ghost town.

The 1960's and 1970's witnessed a new boomtown era in the West. The typical contemporary boomtown is fueled by a quest for energy in the form of a fossil-fueled electric generating plant, a hydroelectric dam or a new mine. The energy project is located near a small community or is forced to start a community from scratch. Often, the boomtown is poorly planned and underfinanced. Long time residents find their community changed for the worse and newcomers find the town an undesirable place

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to live. The result is a cycle of lawlessness, alcoholism, inadequate public services, and depression.

The modern boom communities reflect the interdependent nature of the United States in meeting its energy needs. Large mines, dams, power plants, or pipelines are not built for the benefit of the boom community, but for larger population centers hundreds of miles away. Contemporary environmental demands and land costs compel the construction of electric generating plants away from major population centers.

This article examines one major energy development and the efforts to control boomtown impacts. The development is the Intermountain Power Project (IPP), planned as the world's largest (three thousand megawatts) coal-fired electric generating plant. The plant was designed to be located in rural Utah and to deliver a major portion of its power over high transmission lines to southern California. At the present time, a fifteen hundred megawatt version of the Project is approaching completion in the desert in Millard County, Utah. According to its sponsors, construction is proceeding on time and budget, a rare accomplishment in a decade of cancelled or postponed energy facilities. The Project is also avoiding some of the worst of boomtown consequences but has not solved every problem of boomtown impact. Mistakes were made and unnecessary costs were incurred. On balance, however, the plant construction and the impact mitigation program provide lessons for similar facilties.

Part one of this article examines briefly the general literature on boomtown development. The remainder focuses on IPP and Millard County. The article first discusses the decision to locate the IPP in Millard County and the attention given to boomtown impact mitigation in the site selection process. Part two examine the workings of the impact mitigation agreements.[1]

THE CONTEMPORARY BOOMTOWN

Considerable scholarly attention has been given to the contemporary Western boomtown.[2] Although a boomtown cannot be distinguished precisely from a non-boomtown, John Gilmore's frequently cited studies

1. Much of the information for this section is drawn from interviews conducted with state, local and Project officials. The interviews were conducted from September to November, 1984 in Millard County and Salt Lake City, Utah. In my five years of involvement with Millard County as a consultant and a researcher, I have been helped in countless ways by my University of Utah colleagues, Professors Robert Huefner, Jan Miller, and Morris Johnson. All four of us participated in the negotiations and approval of the conditional use permit for the Project and the original impact alleviation agreement. We served as part of the team of consultants to Millard County after County officials asked the University of Utah for assistance in their negotiations with the IPP.

2. *See, e.g.*, MIT ENERGY IMPACTS PROJECT, STATE RESPONSES TO THE ADVANCED IMPACTS OF ENERGY DEVELOPMENT IN WYOMING (1977) (examining the Rock Springs and Gillette, Wyoming booms); M. DIXON, WHAT HAPPENED TO FAIRBANKS? (1978) (examining the Alaska Oil Pipeline Construction); C. DUERKSEN, ENVIRONMENTAL REGULATION OF INDUSTRIAL PLANT SITING (1983); Hachman, *Energy Development and Community Growth*, 39 UTAH ECON. & BUS. REV., January 1979, at 1; J. Gilmore, *Boom Towns May Hinder Energy Resources Development*, 191 SCIENCE 535 (1976); UNITED STATES DEPARTMENT OF ENERGY, THE NEED

suggest that a population growth in excess of fifteen percent annually results in the creation of boomtown conditions.[3] Typical western boomtowns have shown growth rates in excess of twenty-five percent.[4] The boomtown is characterized by inadequate public services, undesirable labor conditions, confusion in community structure, and deterioration of the quality of life arising from rapid population growth due to a major economic stimulus.[5] Accelerated growth is the most distinguishing characteristic of a boomtown.[6]

Problems of rapid growth in some boomtowns are compounded by the fact that most of the population disappears with the completion of project construction. Five times as many workers may be needed to construct a power plant as to operate it. The numbers may be even more disproportionate for a major pipeline or dam. When the construction ends, a substantial reduction in population is virtually guaranteed. Hence, there may be no long term justification for providing an infrastructure necessary to maintain adequate levels of service during the construction period.

A critical problem of the boomtown is that the money necessary to build water systems, schools and roads and to fund salaries and maintenance costs is mismatched, both in time and place by traditional taxing programs. The energy construction project is usually not subject to local property tax until it nears completion which may be five years after the impact has occurred. Alternative sources of tax revenue cannot begin to cover the cost of providing the necessary services.[7]

Even if some governments have money, they may not be the right governments. Local government in America is a combination of general and special purpose entities each with differing responsibilities and revenue raising authority. A boomtown development may impact on a number of distinct units of government including counties, cities, unincorporated towns or villages, school districts, and special purpose districts. These governments handle matters as diverse as recreational services, water distribution and mosquito control. State tax laws and the physical

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for Power and the Choice of Technologies: State Decisions on Electric Power Facilities (1981); HIGH COUNTRY NEWS, December 11, 1981, at 14 (Rangely, Colorado-Western Fuels Assoc. Mitigation Agreement); N. Lihach, *Plant Construction and Community Stress,* 7 ELECTRIC POWER RESEARCH INST. J., November 1982, at 14 (summary of twelve case studies of impact areas); Wall St. J., October 7, 1982, at 3, col. 3 (Emery County, Utah, experience with major development); N.Y. Times, July 24, 1981, at 1, col. 2, (Challis, Idaho molybdenum mine development and other boomtown projects); S. MURDOCK AND F. LYSTRIZ, ENERGY DEVELOPMENT IN THE WESTERN UNITED STATES; IMPACT ON RURAL AREAS (1979); Zillman and Solomon, *The Impact on Communities and Legal Problems of Major Energy Developments in the United States,* 15 U.W. AUSTRALIA L. REV. 64 (1983). Similar concerns exist throughout the world. *See, e.g.,* LEA AND ZEHNER, THE PLANNING OF RESOURCE-BASED COMMUNITIES IN AUSTRALIA: IDENTIFYING THE ISSUES (1983).

3. Gilmore, *supra* note 2, at 536.

4. *Id.*

5. Hachman, *supra* note 2, at 2.

6. *See* Little, *Some Social Consequences of Boom Towns,* 53 N.D.L. REV. 401 (1977).

7. Watson, *Measuring and Mitigating Socio-Economic and Environmental Impacts of Constructing Energy Projects: An Emerging Regulatory Issue,* 10 NAT. RESOURCES LAW. 393, 396 (1977).

location of the project determine which entities are able to draw signficant tax revenue from the development. Some entities may suffer the impact of the development without being able to tax it. For, example, a development may be located in the county just outside the limits of an incorporated city. The county will be entitled to tax the property while the city may receive most of the project population and demand for services.

Studies have shown that large scale development in sparsely populated areas causes major social problems. Street and water systems construction, school developemnt and police and fire protection lag far behind the population growth.[8] The population boom also causes a critical shortage of housing and the growth of trailer parks and other temporary housing arrangements. Rent and property tax increases join with a rise in the general cost of living to harm persons on fixed incomes.[9] Education in the community may suffer. Classrooms are overcrowded, teachers are overworked, and tempted to quit for higher paying jobs on the development. Transient students move in and out of the school system.[10]

The changes in the economic and natural environment have added consequences for the social environment.[11] One result of boomtown living is a higher incidence of divorce, depression, alcoholism and attempted suicide.[12] Researchers have found value conflicts, changes in attitudes toward the community and higher crime rates in boomtowns.[13] Until recently, planners have ignored or understated such social problems.[14] While the boomtown tends to promote an "us against them" mentality—the old-timers versus persons brought to the community by the boom—the fact remains that all parties suffer. The newcomers are as plagued by the lack of public facilties and services as the long-time resident. The newcomers may blame the old-timers for a lack of hospitality and support just as the old-timers may blame them for a deterioration of the community way of life. The consequences of the boomtown also harm the project developer. The undesirable community results in poor worker productivity and frequent worker turnover, factors which delay contruction and push projects over budget.[15] The result of all of this is, in boomtown expert John Gilmore's phrase: "The energy boomtown in the Western United States is apt to be a bad place to live. It is apt to the a bad place to do business."[16]

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8. Hachman, *supra* note 2, at 4.
9. Little, *supra* note 6, at 401.
10. *See* Lihach, *Plant Construction and Community Stress,* ELECTRIC POWER RESEARCH INST. J., November 1982, at 15.
11. Little, *supra* note 6, at 407.
12. E. Kohrs, Social Consequences of Boom Growth in Wyoming (July, 24, 1974) (unpublished manuscript).
13. *See* Little, *supra* note 6, at 408-15.
14. Little, *supra* note 6, at 424-25.
15. Lihach, *supra* note 10, at 15; Wall St. J., August 12, 1981, at 1, col. 1; N.Y. Times, July 24, 1981, at 1, col. 2.
16. Gilmore, *supra* note 2, at 535.

Probably the most celebrated examples of modern boomtowns are several Wyoming cities which burgeoned during the 1960's and early 70's. Mineral development and power plant construction imposed the boom syndrome on small communities like Rock Springs and Gillette with near disastrous consequences. The image presented by the national news media portrayed the "sin city" aspect of uncontrolled boom development and alerted communities and project developers to the worst aspects of major development in sparsely populated areas. As a consequence, by the mid 1970's there was a recognition that planning and impact mitigation programs were necessary to control boomtown development. The Wyoming lessons would be taken to heart in the development of the Intermountain Power Project.

THE PARTICIPANTS

The Intermountain Power Project

While it is appealing to view boomtown conflicts in terms of the giant corporate developer versus the small local government, the Intermountain Power Project is the product of a curious parentage that evades easy designation. The Intermountain Consumer Power Association was organized in 1959 by thirty municipally owned utilities and cooperatives in Utah, Nevada, Wyoming and Arizona. These individual members of ICPA ranged in size from small to minute. The power companies became members because they desired independence from the large investor-owned utility serving their area, hoped for lower rates, or were unable to secure electric power service from other sources. Like many other small municipals and cooperatives throughout the country, the ICPA members generated no power on their own. Rather, they relied on bulk power purchases from other generators and served only as distributors of the power to their customers. ICPA's major source of low-cost power was from federally owned generating plants, typically ones operated in connection with major federal water projects. In 1970, the United States Bureau of Reclamation forced the ICPA to rethink its access to bulk power when it announced it could not make power from the Colorado River storage programs available for additional ICPA growth after 1975.[17] When other sources of purchased power appeared unavailable or too expensive, the ICPA began to consider building its own electric generating plant.

The need for capital and the economies of power plant construction encouraged the ICPA to seek partners in its venture. ICPA found a receptive audience in several large southern California municipal utilities. These municipals were eager to secure additional sources of bulk power and certain that a large coal-fired electric generating plant could not be licensed in the smog-ridden southern California basins. The result was the formation of the Intermountain Power Project (the Project) as a non-profit corporation on January 18, 1974. The Project consisted of such different entities as the Holden and Kanosh, Utah municipal utilities, each

17. 3 IPP, DRAFT ENVIRONMENTAL IMPACT STATEMENT 57 (1979) [hereafter DEIS].

promising to take 1.2 megawatts of generated power and the Los Angeles Department of Water and Power, promising to take 1,022 megawatts.[18]

All parties perceived benefits in the arrangement. The small ICPA municipals secured financial and technical backing to undertake the construction of a major generating plant that would supply them with generated power for decades to come. The California municipals had opened the way for securing an attractive power plant construction site.

Preliminary feasibility studies by the IPP proved encouraging. By 1977, the Project was ready to proceed towards construction. As a necessary first step the Project asked the Utah legislature to give statutory recognition to the Project. The vehicle for approval of the Project was the Interlocal Cooperation Act, a statute first passed by the Utah legislature in 1965 to "permit local governmental units . . . to cooperate with other localities on a basis of mutual advantage . . . to provide service and facilties."[19] The original Act allowed units of government to jointly exercise any powers held by the individual entities.[20] The original sponsors of the legislation envisioned relatively modest cooperative efforts through which two or more units of government could economize on services. Most probably, they did not envision encouraging a collection of towns and cities throughout the state to involve themselves in an eight billion dollar project.

The 1977 amendment to the Act reflected this more ambitious view of interlocal cooperation. The purpose section of the statute was amended to add the words: "and to provide the benefit of economy of scale, economic development and utilization of natural resources for the overall promotion of the general welfare of the state."[21] The amendment left unstated the fact that a major electric generating plant could not only benefit the municipal electric companies, but would also be a major source of employment for both the construction industry and the depressed coal industry in Utah. A new section of the Utah Code was enacted to authorize public entities to "create a separate legal or administrative entity to accomplish the purpose of their joint or cooperative action."[22] The separate entity is "deemed a political subdivision of the state."[23] The entity was given powers to "construct facilities, borrow money and incur indebtedness and sell the product of its service to public agencies within or without the state."[24] An amendment to Section 11-13-14 made clear that the entity had authority to create capacity "in excess of those required to meet the needs and requirements of the parties to the contract."[25] Another section authorized the entity to "issue bonds or notes . . . for the purpose

18. *Id.* at 58.
19. Interlocal Cooperation Act, ch. 14, § 2, 1965 Utah Laws 62 (codified at UTAH CODE ANN. § 11-13-2 (1973 & Supp. 1983)).
20. UTAH CODE ANN. § 11-13-4 to -5 (1973 & Supp. 1983).
21. *Id.* § 11-13-2.
22. *Id.* § 11-13-5.5.
23. *Id.*
24. *Id.* § 11-13-5.6.
25. *Id.* § 11-13-14.

of financing its facilities or improvements. . . . [Such] bonds shall not be a debt of any public agency party to the agreement."[26]

Two additional sections of the amendment addressed the concerns of the local community in which the power plant would be located. The Utah Constitution exempts the property of municipalities from property taxation.[27] The legislature attempted to finesse the constitutional prohibition by amending section 11-13-25. If a legal or administrative entity created under this act sells part of its capacity, service or other benefit to consumers outside the state, it must pay an annual fee in lieu of ad valorem property tax on the assessed valuation of the percentage of the facility or improvement which is used to produce the capacity, service or benefit that is sold outside the state. Each service contract with an out-of-state consumer must contain a provision for payment of the in lieu fee by the outside consumer.[28]

The following section provided that the entities would be subject to state sales and use taxes equal to the "state and local sales and use tax" payable by a non-exempt entity.[29]

While the Interlocal Cooperation Act amendments passed both houses of the Utah legislature by comfortable margins, they caused "lengthy and sometimes impassioned debate" in the state Senate.[30] Legislative opponents objected that the bill was socialistic and provided a tax avoidance scheme for out-of-state power users.[31] The legislation also created a new type of public entity. This explained a separate section of the Act which limited its application to the construction of electric generating facilities.[32]

Shortly after passage of the amendment, the Intermountain Power Agency was formed, consisting of the twenty-three Utah municipal participants in the IPP.[33] The Agency would own the Intermountain Power Project and other participants such as the ICPA Cooperatives and the California municipals would receive energy from the plant in accordance with individual power sale contracts.[34] A vigorous lobbying effort by the Utah Power & Light Company (UP&L), Utah's major investor owned utility, secured a statutory guarantee from the 1977 legislature that any utility serving customers in Utah could take a portion of the IPP output.[35] UP&L's subsequent agreement to take twenty-five percent of the Project output made it the second largest purchaser of IPP power.[36]

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26. *Id.* § 11-13-19.

27. UTAH CONST art. XIII, § 2 provides: "The property of the state, counties, towns, school districts, municipal corporations and public libraries . . . shall be exempt from taxation."

28. UTAH CODE ANN. § 11-13-25 (1977).

29. *Id.* § 11-13-26. The statute made an exception to U.C.A. 59-15-6 which exempted from taxation all sales to political subdivisions of the State of Utah.

30. Salt Lake Tribune, March 5, 1977, at 6, col. 6; *Id.* March 10, 1977, at 1, col. 4.

31. *Id.*

32. Interlocal Cooperation Act, ch. 47, § 3, 1977 Utah Laws 215 (codified at UTAH CODE ANN. § 11-13-5.5 (1973 & Supp. 1983)).

33. DEIS, *supra* note 17, at 58.

34. *Id.*

35. UTAH CODE ANN. § 11-13-5 (Supp. 1983).

36. The Los Angeles Department of Water and Power originally contracted to take thirty-four percent of the generated power.

With the legal structure of the Project assured, attention moved to finding a location for the three thousand megawatt plant. A substantial portion of 1977-79 was spent on site selection. Planners examined several rural Utah sites. Essential factors in site selection were the availability of water, access to coal, the ability to secure land for the plant and transmission lines, and compliance with environmental laws, primarily those governing air pollution from a coal-burning facility. A site near Hanksville, Utah, in the south central part of the state, was the first choice of the Project.[37] The site, known as Salt Wash, in Wayne County, appeared to have adequate water and was located near the eastern Utah coal fields. The Project proposed creation of a new town to house the work force. The Salt Wash site was blocked by the fact that it was located less than ten miles from Capital Reef National Park. Environmental studies showed that IPP would occasionally violate Sulfur Dioxide discharge standards in the National Park.[38] Air pollution from the plant also threatened to violate the park's visibility standards.

The prospect of an environmental veto of the Salt Wash site prodded government agencies to consider alternate sites. A federal-state task force was created to examine alternative siting in Utah. The interagency group informally rejected Salt Wash in November 1977,[39] and moved to the evaluation of thirteen alternate sites. The consensus selection was a site in Millard County, Utah, in the west central part of the state, approximately eleven miles north of Delta and twelve miles west of Lynndyl. The small town gave its name to the site, which was located on land owned by the Federal Bureau of Land Management. The construction of a short railroad spur would allow shipment of coal from existing rail lines. Adequate water could be provided by purchases from existing agricultural users in the county. The City of Delta, population two thousand, provided a base for project operations. Most critically, the site was a long distance from the national park areas of Utah and could comply with federal air pollution laws. On April 4, 1978, the Project notified Secretary of the Interior Cecil Andrus that it would undertake a study of the Lynndyl site alternative.[40] Despite occasional revivals of support for Salt Wash,[41] Lynndyl emerged as the site choice. In December 1979, Secretary Andrus gave formal approval to the Lynndyl site. By then, Project planners had long since been at work in Millard County.[42]

Millard County

Millard County is Utah's third largest county, covering 6,793 square miles (larger than the state of Connecticut and six times the size of Rhode

37. DEIS, *supra* note 17, at 36; Millard County Chronicle, January 24, 1980, at 5, col. 6.
38. DEIS, *supra* note 17, at 305.
39. *Id.* at 36.
40. *Id.*
41. U.S. Senator Jake Garn (R-Utah) suggested in 1980 that a new national administration could reverse the Salt Wash veto. Senator Garn felt the distance from the coal fields and the scarcity of water in Millard County made Lynndyl a poor site for the Project. Millard County Chronicle, Feb. 21, 1980, at 1, col. 1.
42. *Id.* Dec. 27, 1979, at 1, col. 4.

Island).[43] Millard County has the typical western characteristics of limited rainfall and small population. The federal government (primarily Bureau of Land Management of the Department of the Interior) owns a substantial portion of land in the county. Nearly half the people in the county live in two small cities, Delta, near the IPP site, and Fillmore, the county seat, forty miles to the southeast. Agriculture, principally livestock and the irrigated production of alfalfa and alfalfa seed, is the primary source of employment. Since 1960, there has been growing employment in manufacturing, trade, service industries and all branches of government. Brush Beryllium Company began a moderate sized mining operation at a location between Delta and Lynndyl in the 1970's.

Millard County is quite isolated. The closest significant population center, Provo, Utah, is eighty-five miles away. Salt Lake City is 132 miles distant. Las Vegas is between five and six hours by car. The Union Pacific Railroad's mainline runs from Salt Lake City to Los Angeles and a small airport serves Delta.

Most residents have deep roots in the county, many dating back to the county's founding in the early 1850's in the wake of the Mormon settlement throughout Utah. A 1979 study estimated ninety-three percent of the residents were of the LDS faith.[44] While most of the residents expressed satisfaction with the county as an excellent place to raise a family and to participate in outdoor recreation, the county was suffering economic decline. County population declined eleven percent between 1960 and 1970. Although population increased between 1970 and 1980, the median age was higher than the state average and the per capita income was twenty-eight percent below the Utah average. The residents' major concerns involved the lack of job opportunities and the lack of services. A familiar complaint of the residents was that young people were forced to leave the county because jobs were unavailable.

Millard County government reflects the American pattern of multiple local entities. The most significant bodies are the county itself, the cities of Delta and Fillmore and the countywide school district. In addition, the county contains a handful of small towns and special purpose districts. The county is governed by three elected commissioners. Until 1980, a single part-time county attorney provided the entire scope of legal services from prosecuting criminals to advising on ordinance drafting. A County Planning Commission existed but, until 1979, no full-time professional planner was on the payroll. Intergovernmental relations were typically handled informally and with varying degrees of success. The two cities, Delta and Fillmore, are each run by an elected mayor and city council. The school district is run by an elected part-time board and a full-time superintendent based in Delta.

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43. The Millard County information is drawn from the DEIS and IPP, FINAL EIS, Nov. 1979 [hereinafter FINAL EIS]; LOS ANGELES DEPT OF WATER & POWER, IPP PRELIMINARY ENGINEERING AND FEASIBILITY STUDY April 1979.

44. ARCHITECTS/PLANNERS ALLIANCE, SOCIOECONOMIC ANALYSIS: LYNNDYL ALTERNATIVE 79 (1979).

County officials and citizens quickly identified the major advantages and significant detriments of the IPP to the county. The jobs and tax benefits promised to revitalize government services in the area, raise average income, and prevent the drain of young people from the county. The Project-inspired growth also offered the prospect of increased development of private business. The Project meant new convenience stores, more doctors, and new recreational facilities. For local entrepreneurs, Project development offered the prospect of wealth from other development activities. Lastly, the Project appealed to residents who wanted to bring greater vitality and modernity to the county.

On the other hand, the adverse consequences of boomtown development shortly became known to most residents. The typical view of the construction worker lifestyle contrasted sharply with the cultural preference of most Millard County natives for a lifestyle that stressed close family relationships, abstinence from alcohol and tobacco, and a strong religious faith.

Other factors were relevant to Millard County's decisions regarding the Project. In the late 1970's, county officials and many citizens were aware of the potential for major growth in Utah and the Rocky Mountain West. Most immediately, the Delta area was faced with the enormous impact of the location of the MX Missile Complex in western Utah and eastern Nevada. The forty billion dollar MX project made even IPP seem small scale. In addition, significant oil and gas exploration in the Overthrust Belt running from Canada to Mexico had begun. Residents of eastern Utah, Wyoming and western Colorado faced a possible increase in coal and uranium mining and a massive effort to develop synthetic fuels from the tar sands and oil shale indigenous to the area. Denver, Salt Lake City and other cities were becoming major business centers as national corporations and individuals relocated in the Rocky Mountains.

By mid-1979, all of these ventures were promising but still uncertain. The energy boom was contingent on foreign supplies, national demand, and federal government support. Veterans of previous energy boomlets could reflect that oil shale, tar sands, and coal conversion had often seemed promising but had never developed. The MX system was subject to the considerable uncertainties of its cost, political acceptability, and foreign and military policies. In short, regional, national, and international decisions would to a large extent determine Millard County's future. Information existed to suggest that either Millard County was about to be overwhelmed by development opportunities or that it would be left behind the rest of the state and region as development proposals evaporated or located elsewhere.

The State of Utah

The size of the Intermountain Power Project and the statewide membership in the IPA made the Project a matter of concern to Utah state officials as well as those in Millard County. The legislative approval

of the Interlocal Cooperation Act Amendments[45] signified state endorsement of the IPP at some Utah site, a fact not lost on Millard County officials. State officials recognized the same potential benefits from the Project as did local officials and residents. In addition, three other factors influenced state legislators and executive branch officials.

First, state government was still feeling the pain of the 1976 abandonment of a major coal mining and electric generation project on the Kaiparowits Plateau in the southern part of the state. The Kaiparowits Project, like the IPP, was designed to use Utah coal and to provide development in an economically depressed section of the state. A substantial portion of the power generated would have been used by southern California utilities. For a combination of environmental and economic reasons, the Kaiparowits Project had been abandoned by its sponsors after many years of planning. The decision had caused bitter divisions within the state. In particular, many officials and citizens in the Kaiparowits area felt that their economic future had been sacrificed to serve environmental goals. Whatever the merits of the decision to abandon Kaiparowits, the entire process had reflected decision making at its worst. State officials were concerned that another episode of lengthy study, substantial controversy, and eventual project abandonment could undermine Utah's ability to attract major development of any sort.

Second, critical IPP licensing decisions took place at the same time that Congress was considering President Carter's proposal to speed the siting of major energy projects.[46] The immediate stimulant to this proposed Energy Mobilization Board had been the failure of the Sohio Pipeline Project, designed to move oil from California to Texas. As with Kaiparowits, the failure of the Sohio Project was blamed on too many government units, too many permits and too many opportunities for delay. President Carter proposed a federal board to coordinate and speed the granting of permits for major energy projects. Western representatives feared the board would undermine state sovereignty. Though the Energy Mobilization Board legislation died in Congress in June 1980,[47] the message had been sent: if the states would not assure that energy projects could be built, the federal government could take over the responsibility.

Third, as noted, in 1979 and 1980, the federal government proposed siting the MX Missile Project in Utah and Nevada. Objections to MX in Utah ranged from those based on the fear of making the western desert a target for Russian attack, to those based on the cost of the project, its demand on water resources, and a general dislike of an increased federal presence. Both the Nevada[48] and Utah[49] legislatures had endorsed the Sage

45. *See supra* text accompanying notes 19-28.

46. PAPERS OF THE PRESIDENT, JIMMY CARTER 1240 (1980).

47. *House Kills White House Plan for Energy Mobilization Board*, ENERGY USERS REP. (BNA) No. 360, at 3 (July 3, 1980).

48. *See* NEV. REV. STAT. § 328.500 (1981).

49. 1980 Utah Laws ch. 79.

Brush Rebellion effort to "return" federal public lands to state or private control. From the state governments' perspective, the MX program was a less desirable form of development than construction of major power plants and the development of mineral resources. At both the state and local level, the IPP was seen as a good development and the MX as a bad one. Given this situation, development of the IPP served as an arguing point for the State of Utah in its battle against the MX. Utah could contend that the impact on the locality of both IPP and MX would be overwhelming. Further, Utah could claim that in view of the IPP's benefits to population centers of southern California, Utah had already made its share of sacrifices for the national good.

THE IPP COMES TO MILLARD COUNTY

Land Acquisition

About sixty percent of the land in Utah is under federal ownership with the majority of it controlled by the Bureau of Land Management.[50] It came as no surprise, therefore, that the forty-five hundred acre site proposed for the IPP was located on BLM land. To obtain the federally owned land, the IPP would either have to obtain a transfer or enter into a long-term lease with the BLM. Rights-of-way for the transmission corridors across federal land were also required. These factors, among others, required compliance with the National Environmental Policy Act and helped give the Secretary of the Interior an effective veto over project site location in Utah.

Neither the federal government nor the IPP contended that the federal government had exclusive jurisdiction over the plant location decision to the exclusion of state or local laws. The United States Supreme Court in *Kleppe v. New Mexico*[51] and *Ventura County v. Gulf Oil*[52] recognized that the federal government could assert full regulatory power on the federal public lands. In those cases, however, the courts found that Congress had chosen to preempt state and local legislation. In the IPP situation, no such choice had been made. Further, if the IPP proceeded to acquire fee ownership of the plant site from the federal government, the Project would face county regulation at a later date. Therefore, both Millard County and the IPP proceeded on the assumption that the county would have the power to approve IPP's use of the plant site.

The Department of the Interior's role in moving the project site to Millard County made the department receptive to approving the necessary land transfers. On February 19, 1980, the BLM issued necessary rights-of-way for the project.[53] In August of 1981, after the project had been approved by Millard County, the IPA and BLM signed the land purchase

50. The BLM administers forty-two percent of Utah's total land area. PUBLIC LAND L.REV COMM'N, REPORT TO THE PRESIDENT AND CONGRESS, ONE-THIRD OF THE NATION'S LAND 327, app. F.

51. 426 U.S. 529 (1976).

52. 445 U.S. 947 (1980).

53. Millard County Chronicle, March 6, 1980, at 1, col. 3.

agreement for the site. The 4,615 acres were appraised at $692,200.[54] The arrangement called for the Bureau to issue a patent for full title to the land upon receipt of complete payment. The Project had secured its land.

Acquisition of Water Rights

A significant decision, destined to influence the bargaining process between IPP and Millard County, involved the purchase of water rights. A coal-buring electric generating plant requires a large amount of water for its operation.[55] Utah, like most western states, is water poor. State water laws are governed by the law of prior appropriation which awards water to the first user to make beneficial use of it.[56] Later appropriators may take only what water is left after the earlier appropriators have received their full share. By the late 1970s, most water in Millard County had been appropriated for agricultural purposes. Therefore, it was clear that if the Project wished a secure supply of water, it would have to purchase water rights from their existing agricultural owners. While Utah law requires that a change of ownership be approved by the state engineer,[57] Utah has generally been willing to allow the free market to govern the transfer of property rights in water. Thus, while there was no prior approval of a transfer of water rights, the Project could anticipate state approval. The economics of the situation clearly indicated the Project valued water far more than any agricultural users. The Project eventually offered $1750 per acre foot. The agricultural value of the water was a fraction of that amount.

The Project estimated that it would need about forty-five thousand acre feet per year. It sought to acquire the water shares from two companies with rights to surface water from the Sevier River and from owners of groundwater wells. Negotiations over water began shortly after the Millard County site for the Project was suggested. They went on for almost two years. Local water owners agreed to pool their negotiating efforts with the Project. They retained several attorneys including a prominent natural resources and water lawyer who was also the state senator from the area.

After lengthy bargaining, an agreement was signed in January 1979, for the sale of eighty-three million dollars worth of water rights.[58] Approximately three hundred water share owners including a number of public officials and prominent citizens sold their water rights to the Project. At the meeting of the joint shareholders of the major water companies, only three persons opposed the sale out of 175 in attendance.[59] At other

54. *Id.* Aug. 6, 1981, p. 1, col. 5.
55. *See generally* Lewis, *Water and Supply and Demand Inventory: The Utah Great Basin Region,* ENERGY L. 731-32 (1979). Lewis estimates that an evaporative cooling system on a steam-electric coal plant can require 15,000 acre feet per year for a 1000 megawatt plant.
56. UTAH CODE ANN. § 73-3-1 (1980).
57. *Id.* § 73-3-3.
58. Millard County Chronicle, Feb. 1, 1979, at 1, col. 5.
59. *Id.* Feb. 8, 1979, at 1, col. 3.

shareholders' meetings ten to twenty-five percent of the owners opposed the sales.[60]

The sale of the water was made contingent upon the issuance of bonds to fund construction of the Project at the Lynndyl site. The Project was not unreasonable in insisting on this contingency. The Project itself had no funds adequate to purchase the water. Its financial strength was its ability to encourage investment in bonds to finance the three-thousand megawatt generating plant. When the contracts for the water sales were signed in early 1979, the sellers anticipated that the delay between signature and payment would be no more than six months. Individual water sellers became sorely distressed as the months of 1979 and 1980 went by without the approval of plant construction and the consequent raising of water funds from bond sales.

From the Project's standpoint, the water sales agreements provided a substantial impetus to Millard County to reach an agreement on plant approval. County officials throughout the negotiating process were faced with constituent demands to speed up Project permitting so that the water money could be paid. From the point of view of many Millard County residents, the promised eighty-three million dollars in water sales was the major Project investment in the county. To the individual water sellers, they offered the chance to pay off mortgages, buy new equipment, or in some cases, retire from farming altogether. From the Project's perspective, the eighty-three million dollar water investment was a small part of an eight billion dollar venture. It turned out to be a wise investment that helped secure continued support in the county for the licensing of the Project.

Despite praise for the "spirit of cooperation" that marked the water negotiations,[61] a minority of Millard County citizens were unhappy with the transaction. Opponents filed suit against the transfer and otherwise expressed their discontent that Utah's water had been lost to serve the power needs of southern California.[62] The water litigation continued as a minor irritant to the Project and eventually reached the Utah Supreme Court[63] before being settled. It did not, however, measurably slow the development of the Project.

Zoning Approval

As noted, the Project had assumed that it would need to comply with county zoning ordinances. Utah statutes delegate zoning authority in unincorporated areas to counties. The basic statute, enacted in 1941, is drawn from the Standard Zoning Enabling Act.[64] The statutes have not been amended to recognize many of the developments of zoning practice of the

60. *Id.* Feb. 1, 1979, at 1, col. 5.
61. *Id.* March 8, 1979, at 1, col. 1.
62. *See* IV FINAL EIS, *supra* note 43, at 9-70 (1979).
63. Crafts v. Hansen, 667 P.2d 1068 (Utah 1983).
64. Standard Zoning Enabling Act, ch. 23, 1941 Utah Laws 29 (codified at UTAH CODE ANN. § 17-27-1 to -27 (1973 & Supp. 1985)).

last three decades, especially the development of such flexible controls as conditional use permits. Millard County's master plan and zoning ordinances had adopted conditional use zoning depite its lack of specific statutory authorization.[65] Nevertheless, the laws existing in early 1980 did not provide for the construction of an IPP.

While Project and county officials agreed that legal change in the zoning ordinances was essential, they differed on the form it should take. The Project sought a prompt and irrevocable grant of permission to begin construction. It contended such permission was a necessary condition to the issuance of any revenue bonds. The officials were hesitant to grant irrevocable construction authority. The size and duration of construction suggested that even the best planning could not identify all impacts the Project might bring to Millard County. Therefore, county officials studied a number of land use devices that would allow them to write more particular terms for the Project's approval and reserve some power over the Project in case of noncompliance with the terms or unexpected changes of circumstances.

County officials finally chose the conditional use permit as the mechanism for Project approval. The proposed IPP site was located in the open range and forest zone. The zone's permitted uses included agriculture, ranching, overnight camps and recreation grounds.[66] Conditional uses included dump grounds, mineral extraction industries, and mobile home parks. In the summer of 1980, an amendment to the open range and forest zone proceeded through the Planning Commission and County Commission. The amendment authorized as conditional uses electric generating stations, accessory uses, and transportation and communications corridors.[67] A further portion of the amendment authorized transportation and communication corridors as conditional uses in the agricultural zone.[68] The zoning amendment also changed the procedure for conditional use permits. The conditional use application was now to be made to the Planning Commission rather than the building inspector.[69]

A further amendment authorized a conditional use permit fee.[70] This fee took on considerable significance, both actual and symbolic. The fee offered the county the opportunity to secure significant revenue at an early stage of the Project. Well before the ground breaking, the county incurred Project-related costs for planning consultants, engineers, and legal advisors. These costs were expected to be only the first of the substantial community impacts from the Project. The permit fee could help to cover these costs. The payment of the fee was also of symbolic value as an in-

65. *Id.* § 17-27-11 provides in part: "All such regulations shall be uniform for each class or kind of building or structure throughout any zone, but the regulations in any one zone may differ from those in other zones."

66. MILLARD COUNTY, UTAH, ZONING ORDINANCES, No. 78, ch. 8 (1980).

67. Millard County Chronicle, September 4, 1980, at 10, col. 1. The amendment was approved at the August 13, 1980 meeting of the County Commission. *Id.* ch. 8-2, §§ 6-7.

68. *Id.* ch. 10-2, § 10.

69. *Id.* ch. 15-3.

70. *Id.* ch. 15-9.

dication of Project willingness to proceed. The money would be the first paid by the Project to the county. As delay occurred in summer and autumn of 1980, some county officials felt frustration in having to spend considerable time and money on Project work when the Project had not yet put up earnest money. Project representatives responded that the uncertainties of licensing and feasibility work made such delays a fact of life in major construction projects.

The August 1980, amendment of the zoning ordinance finessed the fee issue. One section of the amendment provided for a waiver of the building permit if the Planning Commission and County Commission determined a project was subject to "sufficient review and inspection so as to adequately protect the public health, safety and welfare. . . ."[71] A separate section of the amended ordinance provided for a conditional use permit fee. The fee was set by the acreage involved and limited to a maximum of one hundred and fifty thousand dollars.[72] The County Commission could establish a detailed payment scale for fees. The first fifty thousand dollars of any fee was due with the filing of the application. The fee was nonrefundable, but would be credited to the fee for any building permit.

With the August 1980 amendment to the zoning ordinance, the county assumed it would shortly receive an application for the conditional use permit to build a plant. This did not happen. At this point, new legal counsel for the Project entered the negotiations. Their review of the Millard County Master Plan and Zoning Ordinance found several inadequacies in the procedure proposed for approval of the IPP. Given their fears of possible litigation, the Project's bond counsel determined further that legal revision was necessary before the conditional use permit could be granted.

The delay raised understandable suspicions on the part of the county officials. The county had revised its ordinance in accord with IPP suggestions in August, and was now being told that more needed to be done. The county official's options, however, were limited. Payments for community impacts and the water sale contracts required funds raised from the bond market. The bond attorneys required additional steps to be taken before approving the first bond issue. The lawyers returned to the drawing board in the fall of 1980.

The result of their labor was a revised Master Plan specifically addressing the impact of the IPP. The plan concluded that the IPP "represent[ed] a substantial economic potential for Millard County"[73] and that careful planning could control the undesireable aspects of the Project.

It remained to reamend the zoning ordinance. A new chapter was added to the ordinance entitled "Large Scale Projects."[74] A large scale proj-

71. *Id.* ch. 3-5.
72. *Id.* ch. 15-9.
73. MILLARD COUNTY, UTAH, AMENDMENT TO MASTER PLAN OF LAND USE 26 (1980).
74. MILLARD COUNTY, UTAH, ZONING ORDINANCES, No. 78, ch. 16 (1980).

ect was defined as a "manufacturing, processing, fabrication, electric power generation or similar industry or activity or a mine, gravel pit, or mineral extractive or processing activity" requiring a conditional use permit and requiring a site area of more than forty acres.[75] The approval of a large scale project, by contrast, required more formal proceedings.[76] The amended ordinance sought to provide the benefits of both an administrative decision by the Planning Commission and the legislative judgment of the County Commission. The applicant for a large scale project was to file for the conditional use permit with the Planning Commission. The Planning Commission would review the plans, request additional data, and hold a public hearing on the conditional use permit. The Planning Commission would then recommend approval or disapproval to the County Commission. Before a decision on the conditional use permit by the County Commission, a further public hearing was required.

Activities continued on several fronts during the months while the master plan and zoning ordinance were being retooled. On September 17, 1980, the Project applied for the conditional use permit with the payment of a fifty thousand dollar check.[77] The payment encouraged both sides by signaling that progress was taking place.

The November 1980, general election offered an opportunity for an unofficial county referendum on the IPP. No active opposition to the project presented itself, however. No candidate ran on a platform of avowed opposition to IPP.

Of more immediate consequence to county planning was the narrow defeat of a state constitutional amendment. One part of the amendment would have authorized county property taxation of projects like the IPP. If approved, the amendment would have removed the constitutional uncertainty of in lieu of taxation schemes to secure revenue from the Project. Unfortunately, this amendment was combined with a variety of other tax amendments, and the entire package went down to narrow defeat.

On November 6, 1980, the public hearing on the amendment to the master plan was held in Delta.[78] About twenty-five citizens attended the meeting of the Planning Commission. Millard County's retained legal counsel summarized the master plan amendment. A number of concerns were expressed by the audience including the scarcity of water, the lack of tax revenue from the Project, and the community impact of the Project. The attorney responded that each of the concerns had been considered and could be satisfactorily resolved. Minor amendments to the master plan were made and the amendment was unanimously approved. The mood of the public seemed more one of resigned concern than active opposition. The November election and master plan hearing were obviously places

75. *Id.* ch. 1-5, definition 50.
76. *Id.* ch. 16-2.
77. Letter to Mr. Leon Smith, Chairman, Millard County Planning Commission from Mr. Joseph Fackrell, President, Intermountain Power Project (September 17, 1980).
78. Millard County Chronicle, Nov. 14, 1980, at 6, col. 6.

to express opposition to the IPP. The response indicated the county's desire to proceed with the Project if satisfactory terms could be reached.

The discussions of August and September had determined that a conditional use permit would govern construction of the IPP. The harder task that now faced the parties was that of agreeing upon the exact conditions to be imposed on the Project.

In general, the Project favored precise guarantees that assured its right to build the IPP and spelled out its obligations to the county. The county, by contrast, sought to retain flexibility to adjust to unanticipated occurrences in the lengthy construction period.

The result was a three section conditional use permit. Section I approved the construction of the Project. Section II identified a wide variety of requirements for plant approval but for the most part only obligated the Project to "develop and submit" planning documents to the county and then "implement and comply with" the provisions that were adopted. Section III provided remedies for the parties.[79]

Two factors in addition to the constraint of time and the eagerness of county officials to expedite bond sales were involved in the willingness to agree to the provisions. The first was the degree of trust that had developed between county and Project officials. While specific issues would divide the parties, the Project had made efforts to establish a local presence in the community which had born fruit.[80] County officials were willing to believe Project promises that it would mitigate problems arising from construction.

The second factor was the availability of impact alleviation funding.[81] County officials recognized that they could alleviate project burdens in two ways. The first was by placing the burden directly on the Project through a condition in the use permit. The second was by expanding local facilities to correct the problem and then charging the costs to the Project through an impact alleviation contract authorized by Utah statute. The plant site security question is illustrative. At least two approaches were possible. On the one hand, the conditional use permit could require the Project to provide armed, private security officers twenty-four hours a day. This would measurably reduce the demand on county law enforcement personnel. Alternatively, the county sheriff's office could be expanded to provide for the increased security requirements. Payment would be made by the Project through an alleviation contract. With no alleviation process, the county would have found it to their advantage to be far more precise about the numbers, training, duty hours, and capabilities of the plant security force in the use permit. With the impact alleviation con-

79. MILLARD COUNTY PLANNING COMM'N, INTERMOUNTAIN POWER PROJECT, CONDITIONAL USE PERMIT § III (1981). [hereinafter CONDITIONAL USE PERMIT].

80. As one example of its community relations program, IPP had begun a regular series of public reports on the Project in the Millard County Chronicle, March 19, 1979, at 5. The same issue reported an IPP-sponsored tour of the St. John's and Page power plants for Millard County citizens. *Id.* at 1, col. 3.

81. UTAH CODE ANN. §§ 11-13-28 to -36 (1980).

tract, county officials felt they could afford to leave matters somewhat flexible, knowing that added police costs would be paid initially by the Project.

Section III of the conditional use permit, General Terms, provided protection for the Project in case of dispute over default. The condition recognized that the permit would be "subject to revocation proceedings by the county."[82] The provision then provided notice and fair hearing requirements and specified a number of circumstances that would not be considered a default by the Project. The Project was allowed up to ninety days to correct any alleged defaults. The Project could not be defaulted where the failure was the result of force majeure, including "the 'inability of the Grantee to sell or to issue or sell its bonds' or where compliance with the condition 'would be unreasonably expensive or cause economic waste or would adversely affect the use of the Project'."[83] The final section provided for revocation of the conditional use permit if the Project failed to commence site preparation by July 5, 1982. After satisfying that deadline, the Project had only to proceed "with reasonable diligence" toward the completion of the construction.[84] No actual deadline was given.

The most controversial provision of the conditional use permit required the Project to "follow the procedure for alleviating the impacts" from the Project, as provided by Utah statute.[85] This provision was not in the original drafts of the conditional use permit.

The Alleviation of Community Impacts

From the start of site planning in Millard County, all parties were concerned with controlling the boomtown impacts of Project construction. They recognized that IPP posed two difficulties for Millard County. First, the Project would present the standard litany of boomtown problems identified in other western developments.[86] Among these was the problem that the community impacts would occur before tax revenues were received. IPP anticipated that it would be five years before the first unit of the plant began producing power. During this time, the construction force and the population impacts that came with it would grow. While this would eventually supply added revenue to the county, a serious revenue lag would initially exist. New roads, sewers, police and fire personnel, schools, and health facilities would be needed in 1982 and 1983. A government entity wishing to build to anticipate the population growth would face both constitutional limits on the bonding capacity of the entity[87] and the normal resistance of local taxpayers to a substantial increase in taxes. What was needed was "front end money"—revenue available to the local government to meet the needs of development as they occurred.

82. CONDITIONAL USE PERMIT *supra* note 79, at § III A.
83. *Id.*
84. *Id.* § III E.
85. *Id.* § II P.
86. *See Id.* § II.
87. In common with many states, the Utah Constitution limits the indebtedness of units of local government. UTAH CONST. at XIV, § 4 sets out the maximum indebtedness as a percentage of the taxable property in the government entity.

The distinctive nature of the IPP posed a second problem—the constitutionality of a tax on the Project. Both the Utah and the United States Constitutions were involved. Article 13, Section 2 of the Utah Constitution exempts the "property of counties, cities, towns, municipal corporations . . . from taxation." IPP's governmental status under the Interlocal Cooperation Act appeared to provide this immunity.[88] As noted, the Utah legislature had attempted to give Millard County the ability to tax all or a portion of the largest facility within its borders. The 1977 legislation allowed the imposition of "an annual fee in lieu of ad valorem property tax" where power from the IPP was sold to "consumers outside the state."[89]

In the 1978 legislative session, the statute was amended to delete references to "consumers outside the state."[90] The revised statute authorized taxation of sales to an "energy supplier or suppliers whose tangible property is not exempted" from the ad valorem property tax by the Utah Constitution. The amendment was clearly in response to the United States Supreme Court decision in *Arizona Public Service v. Snead*.[91] There the Court held that a New Mexico tax on electricity sales violated federal law by discriminating against out-of-state purchasers. The decision turned on provisions of federal statute rather than on a constitutional violation of the commerce clause. Nonetheless, the Utah legislature felt that the blatant discrimination against non-resident (California) purchasers created constitutional deficiencies in the Utah "in-lieu" statute. The 1978 amendment did have the effect of allowing property taxation on the share of power taken by Utah Power & Light, the one private, but Utah-based, power consumer involved with IPP.

In 1979, the legislature sought to resolve the state constitutional problem by proposing an amendment to article 13, section 2. Under the amendment, the property tax exemption was rewritten to cover:

> The properties of counties, cities, towns, special districts, and all other political subdivisions of the state, except that to the extent and in the manner provided by the Legislature, the property of a county, city, town, special district, or other political subdivision of the state located outside of its geographic boundaries may be subject to the ad valorem property tax.[92]

The proposition appeared on the ballot for voter approval in the November 1980 election. As noted, this "IPP amendment" was joined with several other revisions of the taxing article and the composite amendment failed by a close vote.[93]

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88. UTAH CODE ANN. § 11-13-5.5 (Supp. 1983).

89. *Id.* § 11-13-25(1); Interlocal Cooperation Act, ch. 47, 1977 Utah Laws § 9.

90. Interlocal Cooperation Act Clarification, ch. 3, 1978 Utah Laws § 1 (codified at UTAH CODE ANN. § 11-13-25 (Supp. 1983)).

91. 441 U.S. 141 (1979).

92. S. Joint Res. 6, 1980 Utah Laws 550.

93. A second part of the defeated constitutional amendment was of significance to IPP. It would have allowed revenue-sharing among units of local government. The revenue-sharing

While the parties appreciated the need to clarify the tax statute, Millard County was, in the summer and fall of 1980, faced with approving Project construction before it was positive that it could secure revenue from the Project. Millard County's worst case scenario involved a rejection of the Utah constitutional amendment by the voters, coupled with a declaration of the unconstitutionality of the in lieu tax provision by either a state or federal court. Even if a favorable solution to the tax issue was found, the county still faced the concern over front-end costs—how to secure revenue for needed public services before property tax payments began in the mid-1980's.

A September 1979, memorandum prepared by the Department of Community and Economic Development, identified existing funding approaches to deal with impact mitigation.[94] The memo suggested the creation of a federal-state revolving loan fund to be repaid out of local bonds, the prepayment of sales and use taxes by the Project,[95] and other sources of grant or loan funds. Those other sources included Farmers Home Administration grants and loans for water and waste facilities, Environmental Protection Agency sewer grants, Four Corners Regional Commission Planning and Study Grants, and the Utah Division of Water Resources interest free loans for culinary water projects. While useful, all of these funding sources were subject matter specific. Planning, water and waste facilities would be needed in the booming communities, but they would hardly be the only needs.

The most comprehensive source for up-front funds was the state Community Impact Account. The legislature had created the account in 1977 "to assist those political subdivisions . . . impacted by natural resource development, where there is or may be substantial population growth and the need for public facilities and services beyond the financial ability of the political subdivision."[96] Money for the fund would be drawn from federal mineral lease revenues paid to the state.[97] A Community Impact Board consisting of representatives of various state agencies would award

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amendment would have helped to correct another difficulty in community impact finance. That difficulty arose from the fact that the local entities receiving tax revenues from a major energy project were not always the ones bearing the burden of the project impacts. Property tax revenues accrue in substantial part to counties and school districts. A city that might receive most of the population increase from an energy project might be the governmental entity most needing additional funds. The proposed constitutional amendment allowing, though not requiring, sharing of revenues could alleviate the problem. *Id.*

94. Community Development Division of Department of Community and Economic Development, Mitigation of Impacts (Memorandum Sept. 10, 1979).

95. The session laws authorized, but did not require, certain natural resource developers to prepay sales or use taxes. A special fund was created for such money to "be used to finance state-related public improvements, including but not limited to, highways and related facilities and schools and related facilities." Resource Development Act, ch 133, 1975 Utah Laws § 4. (codified at UTAH CODE ANN. § 63-51-4 (1978)). Section 8 provided for prepayment of sales and use taxes to finance specific road developments. The statute was broadened in 1978 to allow prepayments for "industrial development." Resource Development Act Amendments, ch. 16, 1978 Utah Laws § 16.

96. Community Impact Account Act, ch. 195, 1977 Utah Laws § 1.

97. *Id.* UTAH CODE ANN. § 65-1-64(9) (1978) (provides for state receipt of federal mineral lease revenues).

grants and loans from the account to eligible government entities.[98] The awards could pay for "planning," "construction and maintenance of public facilities," and the "provision of public services."[99] The Community Impact Board was placed under the jurisdiction of the Department of Community and Economic Development when that state agency was created in 1979.[100] The Community Impact Account provided the first impact funding for Millard County when it paid for the hiring of a professional planner in 1979.[101]

While the various impact mitigation programs offered help to Millard County, both county and state officials felt more would be needed. Meetings and exchanges of letters in the late summer and fall of 1979 (a year before the zoning negotiations took place) emphasized to IPP that impact alleviation was an essential part of licensing the Project.[102] The Project moved to support an IPP specific impact mitigation program. A September 7, 1979, letter from the Project manager stated the willingness of the Project to provide in lieu tax payments, sales and use tax prepayments, and "financial aid, in advance, for the construction of the infrastructural needs due to the Project in exchange for a credit to its sales and use tax obligation or its payment of in lieu ad valorem taxes."[103] A month later, the Chief Executive Officer of IPP reported that both the IPA and IPP boards had approved front-end impact alleviation financing. Contracts would provide "for payment of reasonable amounts necessary to help alleviate the direct impacts caused by IPP on facilities or services furnished by the county, municipalities, school districts, and other public entities."[104]

In fact, Project concerns over impact mitigation had started well before the summer of 1979. In May of 1978, the Project had opened an office in Delta and hired a Project representative. The representative was a Millard County native who had moved to Salt Lake City six years earlier. He was given a one week orientation about the Project before opening the office. His function was to keep the Project informed of local concerns and attitudes and to be the local source of information about Project development. The Project representative soon become "Mr. IPP" to Millard County officials and citizens. As such, he could report back to his superiors on the serious local concerns about impact mitigation. Project sponsored tours of energy development areas in the west[105] and meetings with county residents began the process of asserting the Project's concern about impact mitigation.

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98. Community Impact Account Act, ch. 195, 1977 Utah Laws §§ 2-3.

99. *Id.* § 3.

100. Department of Community and Economic Development, ch. 234, 1979 Utah Laws §1 (codified at UTAH CODE ANN. §§ 63-33-1 to -8 (Supp. 1983)).

101. ARCHITECTS/PLANNERS ALLIANCE, *supra* note 44, at 7.

102. *See* IV FINAL EIS, *supra* note 43, at 9-56 (reference to Aug. 14, 1979 meeting with Governor and members of the legislature), 9-104 (letter from Governor Matheson noting that socio-economic planning is essential), 9-127 (letter from Millard County Attorney Eldon Eliason, Aug. 27, 1979 expressing concerns over mitigation).

103. *Id.* at 9-55.

104. *Id.* at 9-57.

105. Salt Lake Tribune, Jan. 30, 1980, at 1, col. 6.

By the fall of 1979, the parties had decided to obtain legislative endorsement of a mitigation program. This formality appealed to the Project as well as to county and state officials. The Project wanted clear recognition of its power to make impact payments and the local government's power to receive them. An ordinance or contractual agreement might be challenged for lack of authority. It might also subject the IPP participants to challenges from their owners and customers that the impact payments were not necessary. State legislation would resolve these concerns. County officials wanted state backing of the impact mitigation promises. County officials still felt overwhelmed in dealing with the combined expertise and wealth of the Project participants. Getting the state involved would provide Millard County with added leverage. Lastly, state officials in both the legislature and the governor's office recognized that the impacts of the IPP would extend far beyond Millard County. The state personnel thus saw a joint need to protect the interests of the county and also to be certain that Millard County's inexperience or parochialism did not harm the rest of the state.

The result was a statute drafted for the 1980 legislative session after consultation with all of the interested parties. The vehicle was Senate Bill 67, prepared as an amendment to the Interlocal Cooperation Act.[106] The enactment authorized and required the payment of impact alleviation monies. The exact amount of payment was not refined, but parties spoke in terms of twenty million dollars in impact expenditures during project construction.[107] This was legislation providing for more than just consultant studies. Project money would be available to build schools, roads, and hospitals, and to pay for additional police officers, educators, and social service workers.

The legislation was carefully designed to apply to only the IPP.[108] The bill was endorsed by the legislative leadership and moved to a quick and virtually unanimous passage in the legislative session.[109]

The heart of Senate Bill 67 was the provision codified at UCA 11-13-28(1) to authorize the Project to assume financial responsibility for the "alleviation of direct impacts." Subsection (2) gave a "candidate" the power to "require the project entity to enter into a contract . . . requiring the project entity to assume financial responsibility for or provide for the alleviation of any direct impacts experienced by the candidate." A candidate included the state and any governmental entity of the state.[110] The remainder of section 28 specified provisions of the impact alleviation contract.

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106. Amendments to the Interlocal Cooperation Act, ch. 10, 1980 Utah Laws §§ 1-12 (codified in scattered sections of UTAH CODE ANN. §§ 11-13-1 to -35 (Supp. 1983)).

107. Salt Lake Tribune, Jan. 30, 1980, at 1, col. 6.

108. UTAH CODE ANN. § 11-13-3(7), (8) (Supp. 1983) defines "project" and "project entity" by reference to legal entities created under the Interlocal Cooperation Act for the generation and transmission of electricity. IPP was the only body meeting the definition.

109. Salt Lake Tribune, Jan. 30, 1980, at 1, col. 6 (Senate passage by 27-1); *Id.* Feb. 2, 1980, at B-1, col. 5 (House passage 65-3).

110. UTAH CODE ANN. § 11-13-3(4) (Supp. 1983).

Section 28 authorized and provided for consensual impact alleviation. Section 29 provided for dispute resolution if the Project and the candidate could not agree upon all or a portion of the impact alleviation contract. In such a situation, the dispute would be submitted to the state's Community Impact Board. After a hearing, the Board would determine impact charges. This order could be appealed to the district court in which the candidate was located. There, it would be reviewed on the record compiled by the Board and not set aside unless the board had "clearly abused its discretion."[111]

Other provisions of the statute limited the Project's responsibility. First, impact payments were limited to revenues raised from bonds issued for the Project or other available funds.[112] Second, the failure to reach an impact alleviation agreement would not be grounds for enjoining construction or operation of the Project.[113] Third, payments made under an impact alleviation contract would be credited to the eventual tax liability of the Project to that jurisdiction.[114] Fourth, the impact alleviation contract would terminate at the time a candidate became eligible to receive payments in lieu of property taxes.[115] Finally, any alleviation payments received from federal or state sources would be credited to the Project's alleviation obligation.[116]

The novelty of the impact alleviation concept and the speed with which Senate Bill 67 was drafted and approved left many matters imprecise. A fundamental question was what matters were covered by the term "direct impacts." The term was defined to mean "an increase in the need for any public facilities or services which is attributable to the project" other than facilities to furnish fuel, construction, or operation materials.[117] The following section enumerated sixteen categories of "public facilities" and "services" covering almost every possible government service.[118] Some county advisors argued that the Project should pay for all impacts. The limitation to "direct impacts" suggested a reduction of the Project's responsibilities. On the other hand, the prospect of paying for every increase in public services disturbed the Project. Further, the potential arrival of the far larger MX development suggested it might be difficult to distinguish Project from non-Project impacts. In essence, the direct impact concept was left to be interpreted in individual negotiations between the parties.[119]

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111. *Id.* § 11-13-32(2).
112. *Id.* § 11-13-28(4).
113. *Id.* § 11-13-31.
114. *Id.* § 11-13-34(1).
115. *Id.* § 11-13-33.
116. *Id.* § 11-13-34(2).
117. *Id.* § 11-13-3(5).
118. *Id.* § 11-13-3(6).
119. The legislative history of Senate Bill 67 is examined in Osborne, The Meaning of "Direct Impacts" Under Utah's Interlocal Cooperation Act (1981) (unpublished manuscript on file at Energy Law Center, University of Utah).

A second unanswered question was whether Senate Bill 67 specified the exclusive means by which entities of government could negotiate an impact alleviation contract with the Project. The statute did not state that it preempted other alleviation arrangements and legislative debate did not touch on preemption. Millard County claimed it was afforded the opportunity, by other provisions of state statutes governing local powers and expansive Utah Supreme Court decisions,[120] to add matters to an impact alleviation contract not addressed by statute or to change matters altogether. Yet the details of Senate Bill 67 and the history of its approval allowed the Project to argue that this negotiated arrangement was meant to preempt Millard County from other impact alleviation approaches.

A third question concerned the connection between receipt of money from an impact alleviation contract and receipt of revenues from the in-lieu-of-property-tax program. Senate Bill 67 had also amended the "in-lieu" statute. The new statute specified:

> The requirement to pay these [in-lieu-of-property-tax] fees shall commence: (a) With respect to each taxing jurisdiction that is a candidate receiving the benefit of impact alleviation payments . . . with the fiscal year of the candidate following the fiscal year of the candidate in which the date of commercial operation of the last generating unit of the project occurs; and (b) With respect to any other taxing jurisdictions, with the fiscal year of the taxing jurisdiction in which the construction of the project commences.[121]

Construction of the Project was to commence in 1981. Under subsection (b) this would be the in-lieu eligibility date for the non-candidate. Commercial operation of the last generating unit of the Project was scheduled to occur in 1990. Senate Bill 67, therefore, would present a dilemma to those entities of government which would be able to receive in-lieu-of-property tax revenue. The entity did not know whether receipt of impact alleviation payments in any year would disqualify it from eligibility for in-lieu taxes until at least 1990. If candidacy were determined on a year-by-year basis, there would be no disqualification. If "once a candidate, always a candidate," the entity would be disqualified. The matter was complicated by the obligation to provide a tax credit for impact alleviation funds.[122] Impact alleviation payments were an advance to the taxing entity to be deducted from subsequent tax obligations. Quite possibly, a unit of government which drew heavily on impact alleviation funds might find that it had used up in-lieu tax revenues in later years. The "tax credit" provision raised hard policy questions. From the Project's point of view, it was unfair to pay property tax on property not yet put to productive use. The Project rejected the view that impact alleviation was a "prepay-

120. Utah v. Hutchinson, 624 P.2d 1116 (Utah 1980); Call v. West Jordan, 606 P.2d 217 (Utah 1979).

121. UTAH CODE ANN. § 11-13-25 (Supp. 1983).

122. *Id.* § 11-13-34(1).

ment of taxes."[123] From the county's point of view, the Project would impose some of its most onerous burdens on government services during the construction period.

The uncertainties over the constitutionality of the in-lieu tax and the newness of the impact alleviation procedure also posed problems. The parties realized that the impact alleviations statute had established only a framework. It was left to the parties, the Community Impact Board, and possibly the courts to create a common law of Project responsibility for impact alleviation. If the process would prove burdensome, threatening to county autonomy, or limited in its financial rewards, units of government would find it preferable to move to the more familiar property tax (or in lieu of property tax equivalent) mechanism as soon as possible.

A further concern was the limitation on the Project's obligation to make alleviation payments. The Project insisted on tying its obligation to the receipt of revenue bond funds. The statute provided this protection for both the impact alleviation payments and the in-lieu taxes.[124]

123. The Project position on impact alleviation is explained in a letter to George Young from Carl Haase and Al Pitzer, City of Los Angeles Department of Water and Power, May 17, 1985. Haase and Pitzer stated:

> Early versions of the Interlocal Cooperation Act required the Project to pay only an in-lieu sales and use taxes. [sic] The Project's concept, that it advanced and was ultimately adopted, required it to pay both an in-lieu ad valorem tax as well as enter into impact alleviation contracts with affected entities. [sic] These impact alleviation contracts provided a mechanism for the Project to either provide directly or reimburse an affected entity for the cost to provide either a facility or a service that both the Project and the entity agreed was necessary to mitigate specific-growth induced impacts. This, in the Projects [sic] opinion definitely differs from a normal tax payer who elects officials to determine the level of service to be provided and who pays his proportional share through local taxes. The concept of agreeing on the direct impact and the Project contracting through an impact alleviation agreement to finance or provide for the impact was the basis of SB67. During the process of drafting SB67, the Project was naturally concerned about how the process would work since such a process had never been implemental [sic] before. In addition, the local governmental agencies were equally concerned. As a check and balance, Section 11-13-25 stated that ". . . a credit be given in any given year equal to the debt whose services due and payable in that given year on the bonds proceeds were used to finance an Impact Alleviation Agreement." The Section also provided that a taxing entity shall add the debt service as part of its budget for any given year in order to determine its tax rate. Several items are important . . . to note: 1) during the construction period while debt service is being paid by the Project on bonds used to finance impact alleviation, there is no credit to the Project; 2) for those districts for which the Project will not be a future tax payer (the various local communities, Social Service, Juab County, City of Nephi, etc.) there is no credit; and 3) for the county and school districts where most of the credits will occur, the Project will also be the major "tax" payer in future years and in reality, will generate the majority of funds to repay itself. This total concept is important to note for, combined with the early lack of organization of local entitites and their lack of experience in handling budgets and construction projects, the negotiation of the contracts lead [sic] to the need (and desire on many of the local officials in the early years) for the Project to work closely with the local governmental entitites. Also, it should be clear that these contracts were not considered by the Project to be prepayment of taxes, but instead a contractual agreement between two entities to provide specific services or facilities.

124. UTAH CODE ANN. § 11-13-25(3), -28(4) (Supp. 1983).

Senate Bill 67 did not address the question of who would determine whether money from revenue bonds was to be allocated to paying impact alleviation or taxes. If bond sales were less successful than expected, this could pose a problem.

Another limitation on local authority was the "non-injunction" provision of the statute.[125] The Project and the legislature were conscious of court ordered delays of construction projects under the National Environmental Policy Act. Senate Bill 67, however, prohibited stopping the Project for even a total disregard of impact alleviation obligations. Other remedies might exist, but the non-injunction section of the statute removed a major control over the Project.

Finally, Senate Bill 67 itself was subject to court challenge. A power purchaser outside Millard County might resist paying increased power costs to fund new Millard County facilities and services. The potential for discrimination against interstate commerce remained. The impact of Article Thirteen, Section Two of the Utah Constitution was also uncertain. Nor was Senate Bill 67 beyond revision in a later legislative session. The impact allevation concept was a new one and might not work in practice. The passage of a gross receipts tax[126] aimed exclusively at IPP by the 1980 legislative session had been vigorously opposed by the Project.[127] The Project contended that through the combination of in-lieu property taxes, impact alleviation payments, gross receipts taxes, and sales and use taxes, it was being asked to bear more than its fair share of public contributions. Further, state legislative politics could turn against Millard County. The IPP's combination of out-of-state interests, the major Utah investor-owned utility, and a diverse variety of local governments throughout Utah gave the Project considerable legislative power.

Impact Alleviation in the Conditional Use Permit

By November 1980, Project officials felt that the zoning process was nearing completion and that it would soon be granted the conditional use permit that would authorize plant construction. Senate Bill 67 had provided a framework for dealing with Project impacts. During the zoning negotiations of early fall, the conditional use permit, and the impact contracts had been treated as separate items. The Project assumed that after the conditional use permit was approved, separate contracts between the county governmental bodies and the Project would be drafted to set the overall framework for impact alleviation and to provide specific impact alleviation payments for 1980 and 1981. In addition, the parties discussed the need for a separate agreement providing for payments to the county in case the in-lieu taxation statute was declared unconstitutional.

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125. *Id.* § 11-13-31.

126. *Id.* §§ 59-17-2 to -6.

127. Salt Lake Tribune, Jan. 30, 1980, at 1, col. 6; *Id.* Feb. 2, 1980, at B-1, col. 5; *See also* Asplund, MacDonald and Mecham, A Legal and Economic Appraisal of the Gross Receipts Tax (unpublished manuscript Aug. 19, 1980).

In late November 1980, the county determined that the impact alleviation concept should become part of the conditional use permit. The demand reflected strained relations between the parties. The county was distressed over two incidents in October in which the Project appeared to be less than the good neighbor it portrayed itself as being. The first incident involved a Project announcement of housing plans for Project workers. The Project's offer to take options on land caught most county officials by surprise. Some local officials first learned of this significant Project initiative in the newspaper.[128] County officials were distressed by the Project's preemption of housing development and by the lack of prior consultation.

The second incident fueling county suspicion was a radio interview with the President and Executive Officer of the Project shortly before the November election. The President's comments were interpreted as opposing the proposed constitutional amendment that would have clarified the county's right to impose a property tax on the Project. Once again, the Project was seen as failing to act in the best interests of Millard County. Whatever the facts, the Project lost credibility.

The January 1981, date for the hearing on the conditional use permit forced county officials to recognize that Project construction could be approved with some aspects of the impact alleviation still unsettled. Key county officials felt it was necessary to reach agreement on major aspects of the impact alleviation agreement before granting the use permit. Three issues remained unresolved. The first was whether the impact alleviation agreement would be a condition in the conditional use permit. The second was which provisions of the impact alleviation agreement would assure the county that funds would be available to meet impact needs as they arose. The final issue was whether the agreement included all Millard County entities of government, some of them, or only the county itself. These concerns occupied the negotiators from Thanksgiving until January 5, 1981, when the County Commission granted the conditional use permit.

As noted, the Project had preferred to treat impact alleviation separately from the conditional use permit. The Project preferred to avoid placing unnecessary material in the permit. Senate Bill 67 provided the Project with statutory protection against project interruption for failure to satisfy impact alleviation requirements. If the impact alleviation concerns were placed in the conditional use permit, the disturbing prospect of termination of the permit upon non-compliance with impact alleviation responsibilities would again be presented. Further, impact alleviation in the conditional use permit raised legal uncertainties. The concept clearly went beyond a narrow view of land site related impacts. This type of broad-scale community planning was not necessarily authorized by Utah statute or case law.

The county, however, insisted that the conditional use permit include a condition dealing with impact alleviation. The county recognized that

128. Millard County Chronicle, Oct. 2, 1980, at 1, col. 7.

it had greater power through the zoning process than through Senate Bill 67. After negotiations, the Project acceded to a condition in the use permit that required the county to identify direct impacts of the development in conjunction with Project officials. The Project then "shall undertake to follow the procedure for alleviating the impacts" and "shall comply with the terms and conditions of any such impact alleviation contract(s) and/or final determination order(s) made pursuant to the procedures set forth under State Law."[129]

The language reflected compromise. The condition was tied to the provisions of Senate Bill 67 rather than an assertion of independent county power. This left the condition subject to a later repeal of the statute. Further, there was no attempt to define some of the imprecise provisions of the statute, particularly "direct impacts." Finally, tying the condition to the statute did not clarify the length of the Project's obligation.

Language in the condition about impacts "identified over the course of construction of the Project" suggested that the Project had obligated itself to pay for impact costs throughout the construction period. The reference to the statute and the lack of an explicit promise to pay alleviation costs, however, made the condition less than a firm vesting of rights. Nonetheless, the provision encouraged the project to reach an understanding about impact alleviation, either before or shortly after the grant of a conditional use permit. The county could then threaten revocation of the permit for failure to comply with the impact alleviation conditions.[130]

Even before the decision to include the impact alleviation provision in the conditional use permit, the parties drafted several impact alleviation contracts. The negotiations emphasized the difference between the parties. The county was concerned with the availability of impact alleviation funds at the time they were needed. Their object was to see that the alleviation money was available "up front" and not six months or a year after expenditures had to be made. The Project, by contrast, worried about advancing large amounts to a government entity before a final determination could be made as to whether a requested expense was a "direct impact." In addition to the timing of the payments, the parties also differed over the documentation which the government would have to provide to support their requests for payment. Project requests for supporting information on "the cost of office supplies" aroused fears of Project domination of county spending and decison-making.

An alleviation guidelines contract that became Impact Alleviation Agreement Number 6, resolved most of these issues in the county's favor. The agreement classified possible direct impact expenses as either operation and maintenance or capital expenditures. As to operation and maintenance expenses, the county would submit its estimates of direct impact expenses to the Project at least six months before the start of the fiscal year. The Project could request "reasonably necessary" supporting

129. CONDITIONAL USE PERMIT *supra* note 79 at § II P.
130. *Id.* § III A.

information to verify the claim. Upon receipt of the budget requests, the parties had sixty days to negotiate an impact alleviation contract. At the end of sixty days, if an agreement had not been reached, the parties would submit their disagreements to the Community Impact Board. The Board would then follow its statutory procedures which compel a decision within sixty days.[131] Any party wishing judicial review of the Board order had fourteen days to notify the other party and thirty days to file civil action. During the pendency of judicial review, however, the Project was bound to comply with the determination order and make impact payments to the county. In brief, the six month lead time allowed a determination of the impact charges that the Project would pay prior to the start of the fiscal year.[132]

Once a contract was written or a determination order made, the Project had thirty days to create an escrow account in favor of the county in a sum equal to one hundred-fifty percent of the determined operation and maintenance budget. The county could then draw on these funds in specified increments. The fifty percent surplus was designed as a contingency fund to allow the county to cover unexpected expenses.

With capital equipment and facilities expenses, the county was given the option of presenting a capital equipment and facilities acquisition budget or of presenting a request for individual items to the Project. A negotiating process similar to the one to be used for operation and maintenance costs was created. The process required a mandatory thirty day period for negotiation. If an agreement could not be reached, the dispute would be submitted to the Community Impact Board. If the Board found that the Project was responsible for a direct impact, and the impact cost less than one million dollars, the Project could either make direct payment to the county or create an escrow account similar to the operation and maintenance escrow. If the cost was in excess of one million dollars, the Project could wait to tender its share until nine months after the entry of the determination order or when judicial review became final.

This provision was a compromise between the county's desire to avoid interminable legal proceedings over Project responsibility and the Project's fear that it might be unable to recoup funds paid under a determina-

131. UTAH CODE ANN. § 11-13-29 (Supp. 1983).

132. As an example, on July 1, 1982, the county would present its impact alleviation request for 1983 to the Project. In all likelihood, by that date the Project would already have been told informally of many of the 1983 direct impact costs. The parties would have until September 1 to reach an agreement on impact costs. If an agreement was reached, the dollars would be available on January 1, 1983, the start of the fiscal year. If the Community Impact Board had to resolve the dispute, the Board's decision was required by November 1. Quite possibly, the Impact Board decision could be rendered before November 1. The county would be uncertain of its entitlement to impact funds by the start of the fiscal year only if a court appeal was taken. If the Community Impact Board ruled in the county's favor, the Project would have to make the money available. If the court reversed the Board, however, the county would have to reimburse the Project. If the Board ruled against the county's request for direct impact funds, then the county would have to spend its own funds and hope that a court would later reverse the Board's decision. This would cause considerable fiscal caution among government officials.

tion order, but later reversed by court proceedings. As with the operation and maintenance costs, the approach provided a strong incentive to the county to begin its budgeting process and impact alleviation determinations well in advance of the time funds would be needed.

Clearly, there would be limits on advance planning. Actual impacts would best be judged as close to the fiscal year as possible. A provision in the impact alleviation contract allowed the county to submit modifications to any budget proposal. This allowed the budget to be evaluated in accordance with new information submitted during the budgeting process or, in case of dispute, during the Community Impact Board review. It was less certain whether new information could be utilized during subsequent court review. By statute, the court was told to review "the record compiled before the board."[133] This appeared to preclude the submission of later and more accurate evidence of actual impact costs.

The escrow concept provided assurance to the county that the Project could not fight every alleviation request for years before making payments to the county. The escrow also provided a limited approach to the separate problem of Project financial instability. Yet the county was still concerned about the possible failure of the Project during construction. Substantial impacts on the community would be present from previous Project work. The county could also face significant burdens from major unemployment due to a possible phasing out or scaling down of the Project. If the Project had no more funds, it was unclear who would pay for these impacts. One proposal required the Project to post a performance bond of between five and ten million dollars. The bond funds would be used in case of a default by the Project on its impact alleviation responsibilities and would serve as insurance against the failure of the project. In the end, county officials did not insist on this additional protection, and the concept was dropped.

Finally, it had to be decided whether other entities of goverment besides the county would join as parties to the initial impact alleviation contract. While some of the government entities, notably the school board, had already discussed alleviation matters with the Project, they lacked the zoning power over the Project that the county had. The Project had proceeded on the assumption that it would prepare a contract with the county for impact alleviation and, at the appropriate time, reach contractual agreements with the other governmental entities. Until very late in the negotiating process, this appeared satisfactory to the county. In December, however, several other Millard County units of government decided to take advantage of the county's bargaining position to secure their own impact allevation contracts. The Project first agreed in principal to offer other entities of government the same contract as they offered the county. The county then insisted that a single contract be drafted for the county and any other entities that wished to join. The alleviation contract would have to be signed as a pre-condition to approval of the conditional use permit.

133. UTAH CODE ANN. § 11-13-32(2) (Supp. 1983).

The January 5, 1981, public hearing on the conditional use permit forced a resolution of some of these outstanding issues. Both sides recognized the dangers of further delay in going to the bond market. At a meeting prior to the afternoon public hearing, Project and county officials agreed in principle to open the impact alleviation contract to other units of government wishing to sign. Several representatives of other government units indicated their desire to sign. County officials spoke of the multi-party contract as essential to the approval of the conditional use permit. While Project officials expressed displeasure at the late mention of the issue, they were more concerned about advancing large sums of money to some of the smaller entities of government before a final impact determination had been made. A compromise was reached, and the capital improvements provision was modified to limit advance payments to a percentage of the unit of government's operating and maintenance budget.[134]

The public hearing itself was remarkable for its lack of contention. Several hundred persons appeared at the high school gym in Fillmore. County representatives discussed the history of the negotiations and explained the terms of the conditional use permit. They noted that the impact alleviation contract was in the final drafting stage and that it would be completed later in the day as a formal part of the conditional use permit. The public hearing was then open for questions and comments. Several speakers praised the Project while others asked questions about the details of Project development. No one spoke against approval of the permit. The permit was then approved by the County Commission after one commissioner disqualified himself for having a conflict of interest because he was a water seller.

The negotiators then returned to complete the impact alleviation contract. The parties agreed for the moment not to attempt further definition of "direct impacts." They also agreed not to add the performance bond. Other language was added clarifying the county's ability to shift to in-lieu tax payments and away from the impact alleviation contract during any year of the construction period. The negotiations were complete. The Project had received its permit to begin construction.

The work of many professionals had secured permission to build a large power plant. It had also created a system of incentives to accomodate growth in the community that would support the plant work force. The second part of this article[135] will examine the implementation of the impact alleviation program.

134. For an expenditure of over thirty percent of a candidate's operation and maintenance budget, the Project could delay payment.

135. Part two of this article will appear in 21 LAND & WATER L. REV. No. 2 (1986).