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Using The Federal Communication Commission's Tower Construction Notification System As A Model For Siting Nuclear Waste On Native American Land

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By Casey Zivin*

Abstract

Since the advent of nuclear power in the United States in the mid-20th century, the federal government has struggled to find a suitable location to store the hazardous waste associated with nuclear power generation. In 1991, in an attempt to solve the problem of storing nuclear waste, the federal government created grant programs which offered funding to states and Native American tribes who volunteered to store nuclear waste on their lands. One tribe in particular, the Skull Valley Goshute of Utah, viewed storing nuclear waste as an opportunity to infuse their reservation with monies. Further, because tribes enjoy sovereign status in the United States, the Goshute believed their application could overcome state and federal opposition. However, the Goshute's application to store nuclear waste on their reservation was denied by the federal government which used its powers under the Federal Trust Doctrine to rule that storing nuclear waste on the Goshute reservation would adversely affect the health and well-bring of the Goshute tribe.

This Note explores the conflict between the Federal Trust Doctrine and tribal sovereignty and how the Federal Communication Commission (FCC) handled this conflict in the siting of cellular towers on Native American land. Further, a proposal for a nuclear waste facility siting system based on the FCC's Cellular Tower Construction Notification System is presented as a solution to the United States' nuclear waste storage problem. This new siting system would allow tribes to enter in to lucrative contracts to store nuclear waste on their land while allowing the tribes to maintain their full sovereign rights. In order for this new siting system to work, the conflict between the Federal Trust Doctrine and tribal

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sovereignty must be reconciled by acknowledging that tribes have full self-determination limited only by externality moderations approved by the tribes.

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I. Introduction

In the spring of 2009, President Barack Obama ceased almost all funding for the Yucca Mountain Nuclear Repository Project in Nye County Nevada.[1] The President's decision ended a twenty-two year debate

1. *See* Editorial, *Mountain of Trouble: Mr. Obama Defunds the Nuclear Repository at Yucca Mountain. Now What?*, WASH. POST, Mar. 8, 2009, at A18, *available at* http://www.washingtonpost.com/wp-

concerning where the United States' nuclear waste should be stored permanently and safely.[2] As of 2008, the United States had 56,000 metric tons of nuclear waste, an amount expected to more than double by the year 2035.[3] Currently, that nuclear waste is stored in thirty-nine states across the country in more than 121 facilities.[4] As the country's amount of nuclear waste continues to grow, the need for long-term storage facilities becomes more critical. While the federal government searches for solutions to our country's nuclear waste problem, there is a group of people who, in the past, have shown a willingness to site nuclear waste on their land: Native Americans.

After centuries of cultural oppression, many Native Americans have left their reservations to live in cities and towns across the country.[5] Tribal members who have chosen to stay on reservations live on remote pockets of land across the United States.[6] Most of the land—far removed from centers of human economic activity—has very little value,[7] and the majority of the Native American population lives in extreme poverty.[8] Tribal leaders are left with the unenviable task of finding commercial ventures to sustain the current and future tribal population.[9]

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dyn/content/article/2009/03/07/AR2009030701666.html [hereinafter *Mountain of Trouble*] ("President Obama has succeeded in killing the contentious project that remains unfinished 22 years after Congress selected the site.") (on file with the Washington and Lee Journal of Energy, Climate, and the Environment).

2. *See id.* (explaining the debate in Congress over where to locate nuclear waste and the President's final decision to take the Yucca Mountain option off of the table).

3. *See* Lincoln L. Davies, *Skull Valley Crossroads: Reconciling Native Sovereignty and the Federal Trust*, 68 MD. L. REV. 290, 331 (2009) ("[A]s of April 2008, the United States had stockpiled over 56,000 metric tons of spent nuclear fuel, an amount predicted to increase to 119,000 metric tons by 2035.").

4. *See Mountain of Trouble*, *supra* note 1 ("[S]torage is spread over 121 above-ground sites located within 75 miles of more than 161 million people in 39 states.").

5. *See* Eric J. Lacey, *Manifest Destiny's New Face: "Soft-Selling" Tribal Heritage Lands for Toxic Waste*, 92 GEO. L.J. 405, 405–08 (2004) (illustrating the greater problem of Native Americans being forced to sell their lands by narrating the plight of the Shoshone-Bannock, a tribe that left the Fort Hall Indian Reservation and settled in rural Pocatello, Idaho).

6. *See id.* at 425 (noting the economic isolation of tribal land, due in part to their "remoteness and seclusion").

7. *See id.* (noting the usefulness of the land has been diminished by the isolation of the land, pollution, and overuse).

8. *See* M.V. Gowda & Doug Easterling, *Nuclear Waste and Native America: The MRS Siting Exercise*, 9 RISK 229, 246 (1998) ("According to the 1990 census, 50.7% of Native Americans living on reservations have incomes below the federal poverty level.").

9. *See* Nancy B. Collins & Andrea Hall, *Nuclear Waste in Indian Country: A Paradoxical Trade*, 12 LAW & INEQ. 267, 319–21 (1994) (stating that tribes must continually search for potential sources of economic development in order to merely sustain self-sufficiency).

One venture that tribal leaders have considered is creating monitored retrievable storage (MRS) facilities to store nuclear waste on their lands.[10] Objections to such facilities have come from both neighboring non-Native American populations and members of the tribes themselves. Tribal members opposed to MRS facilities argue that the economic benefit from siting this type of facility on their land is illusory and the danger of storing nuclear waste outweighs any economic benefits.[11] Tribe members in favor of nuclear waste storage argue that the economic benefits tribes would receive would provide economic strength to reservations and produce funds for education, healthcare, and jobs for future generations.[12] Further, proponents of storing nuclear waste argue that the nuclear waste trade can potentially attract other industries, which can further boost the tribe's economy and make the tribe less dependent on the United States government for funding.[13]

Regardless of the arguments for allowing or rejecting nuclear waste facilities on their reservations, determining which government entities have jurisdiction over tribes and reconciling the conflict between Native American sovereignty and the Federal Trust Doctrine are essential for creating a system that would allow tribes to voluntarily site nuclear waste storage facilities on their tribal land. Currently the federal government has asserted primary authority and has sided with opponents: officials have yet to approve a proposal for siting nuclear waste on tribal land.[14]

Section II begins with the history of nuclear power regulation to show how nuclear waste siting regulations have evolved to their current state. Next, a case study involving the Skull Valley Goshute tribe's attempt to site nuclear waste on their land is presented to show why a new model is necessary to resolve the conflict between the Federal Trust Doctrine and tribal sovereignty.

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10. *See id.* at 270 ("Native American nations must balance the potential economic benefits of the waste trade against the potential environmental harm of nuclear waste storage."); *see also id.* at 287 (explaining the MRS facility).

11. *See id.* at 275 (stating that some Native American leaders see the MRS projects as merely another "big promise[]" from the federal government that will be "ecologically disastrous" for the reservations and that the Native American people "won't ever see a dime from it" (quoting Margaret L. Knox, *Their Mother's Keeper*, SIERRA, Mar./Apr. 1993, at 57)).

12. *See* Collins, *supra* note 9, at 274–75 ("These are tools for self-determination and are necessary for tribes to escape economic domination by the U.S. government, to regain tribal power, and to preserve the tribe for future generations.").

13. *See id.* (noting that tribes rely on the federal government to supply them with funding necessary to tribal infrastructure and development).

14. *See* Davies, *supra* note 3, at 341–48 (listing various attempts to approve proposals for siting nuclear waste on tribal reservations).

Section III presents the history of federal and state jurisdiction powers over Native Americans to explain why the Federal Trust Doctrine has overpowered tribal sovereignty when tribes have tried to site nuclear waste facilities on their reservations.

Section IV argues that cellular tower siting is similar to nuclear waste siting and therefore that cell tower siting procedures should be implemented for nuclear waste siting. Then, historic preservation laws and the legislative history are presented to explain why cellular tower siting procedures have evolved to their present state.

Section V discusses the problems that arise in trying to create a regulatory system for nuclear waste and goes on to propose that a new regulatory system, modeled on cellular tower siting procedures, should be created for nuclear waste.

The paper concludes that Native American tribes should be allowed to exercise their sovereign powers and be allowed to practice full self-determination, without challenges from the federal government or states, in deciding whether to site nuclear waste repositories on their reservations.

II. Nuclear Power in the United States

In the mid-twentieth century, with the advent of nuclear power, federal, state, and tribal jurisdiction issues began to intensify. Tensions began to rise soon after the Atomic Energy Act of 1946[15] was passed and increased as the federal government began mining uranium on tribal lands. The government tapped civilian workers to mine and produce resources necessary for generating nuclear power, encouraged states to build nuclear power plants, pressured states and tribes to store nuclear waste as part of the Nuclear Waste Policy Act,[16] and later encouraged them to store nuclear waste in MRS facilities on their land. These tensions are particularly clear in the case of the Skull Valley Goshute, who have spent years attempting to site nuclear waste on their land using MRS facilities.[17]

A. The Creation of Laws Governing Nuclear Power

Prior to 1946, states and tribes had never been concerned with nuclear waste nor with uranium mining on their land, but in 1946, the federal

15. Atomic Energy Act of 1946, Pub. L. No. 70-585, 60 Stat. 755 (1946) (codified as amended at 42 U.S.C. §§ 2011–2296 (1988 & Supp. IV 1992)).

16. Nuclear Waste Policy Act of 1982, Pub. L. No. 97-425, 96 Stat. 2201 (1982) (codified as amended at 42 U.S.C. §§ 10101–10270 (2000)).

17. *See infra* notes 56–105 and accompanying text (describing the case of the Skull Valley Goshute).

government passed the Atomic Energy Act of 1946 that gave control of nuclear technology to the civilian-run Atomic Energy Commission.[18] Shortly after the Atomic Energy Act of 1946 was passed, large deposits of uranium, the core ingredient in developing nuclear power, were discovered on many reservations.[19] The federal government determined it was easiest and most cost-effective to mine the uranium on tribal lands, which they held in trust.[20] The decision to mine uranium on tribal lands gave numerous jobs to tribe members, benefiting the tribes economically, but the impact on the environment was devastating.[21] Native Americans were left occupying land surrounded by highly radioactive waste, which the federal government and private corporations made little effort to clean up.[22]

A few years after mining began to intensify, Congress passed the Atomic Energy Act of 1954,[23] which developed the structure for how the nuclear industry operates.[24] The main purpose of the Act was to encourage civilians to invest in nuclear power and to build nuclear power plants.[25] Further, the Act intended to "promote world peace, improve the general welfare, increase the standard of living, and strengthen free competition in private enterprise."[26] In order to further encourage private companies to build nuclear power plants, the Atomic Energy Commission promised to reprocess nuclear waste and planned to transport nuclear waste after it was removed from nuclear reactors.[27] However, in 1974, Congress passed the

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18. *See* Atomic Energy Act of 1946, Pub. L. No. 70-85, 60 Stat. 755 (1946) (codified as amended at 42 U.S.C. §§ 2011–2296 (1988 & Supp. IV 1992)) (legislating federal government ownership of all nuclear material and facilities, while civilians were limited to performing contract work for the government).

19. *See* Louis G. Leonard III, *Sovereignty, Self-Determination, and Environmental Justice in the Mescalero Apache's Decision to Store Nuclear Waste*, 24 B.C. ENVTL. AFF. L. REV. 651, 655 (1997) ("The discovery of large uranium deposits on reservation lands in the 1950's [sic] forced Native Americans to become unwilling participants in the experiment with nuclear power.").

20. *See id.* ("Because this land legally was held in trust by the federal government, it was the easiest and most economical for the government to mine.").

21. *See id.* ("[T]ribal members became the obvious choice for a labor force to staff the uranium mines. These mining jobs were highly dangerous and often caused the contamination of an entire tribe or village.").

22. *See id.* ("[T]he federal government and private interests made little effort to clean up after themselves.").

23. Atomic Energy Act of 1954, Pub. L. No. 83-703, 68 Stat. 919 (1954) (codified as amended at 42 U.S.C. §§ 2011–2296 (1988 & Supp. IV 1992)).

24. *See* Collins, *supra* note 9, at 277 ("[T]he Atomic Energy Act of 1954 . . . laid out the structure through which the nuclear industry operates today.").

25. *See id.* ("The 1954 Act encouraged civilian ownership of 'both energy production and utilization facilities.'").

26. 42 U.S.C. § 2011(b) (1988)).

27. *See* Collins, *supra* note 9, at 277 ("The AEC initially planned to reprocess waste

Energy Reorganization Act of 1974,[28] which dissolved the Atomic Energy Commission and gave the Energy Research and Development Administration research and development responsibilities while bestowing regulatory and licensing functions on the Nuclear Regulatory Commission (NRC).[29] Thus, the NRC became responsible for transporting and storing the United States' nuclear waste.

B. The Federal Government's Attempt at Nuclear Waste Siting

Until the late 1970s, the federal government emphasized expanding nuclear power as quickly as possible with no regard to the environmental ramifications.[30] The government failed to develop a plan for what to do with all the waste generated by mining, milling, and using uranium in the production of nuclear power.[31] The failure to foresee the enormous amount of hazardous waste associated with nuclear power has created a serious ecological threat, which has been characterized by Congressman Edward Markey as, "the most potentially serious environmental hazard . . . fac[ing] the health and safety of people on this planet . . . for the next 10,000 years . . . ."[32]

Mounting nuclear waste led Congress to enact the Nuclear Waste Policy Act (NWPA)[33] in 1982, which had three key components. The first component of the NWPA created a program to research and find permanent geologic structures that could be used to store nuclear waste.[34] These repositories would be owned and operated by the federal government and

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and promised utilities that nuclear waste would be transferred from utilities shortly after its removal from reactors. In response to this federal initiative, many utilities built nuclear power plants.").

28. Energy Reorganization Act of 1974, Pub. L. No. 93-438, 88 Stat. 1233 (1974) (codified as amended at 42 U.S.C. § 5801, et seq.); *see also* 42 U.S.C. §§ 5801–5879, 2000(d) (specific sections of the Code changed by the 1974 Act).

29. *See* Collins, *supra* note 9, at 278 (explaining that the Energy Reorganization Act gave regulatory and licensing authority to the NRC and gave research and development responsibilities to the Energy Research and Development Administration).

30. *See id.* at 278–79 ("The buildup of uncontrolled nuclear waste resulted from a deliberate policy of the United States government . . . of emphasizing rapid expansion of nuclear power and de-emphasizing nuclear safety and health.").

31. *See id.* at 278 ("[T]he United States cavalierly mined, milled, and used uranium with no pre-planning for the safe disposal of the inevitable waste.").

32. 128 CONG. REC. 26,302 (1982) (statement of Rep. Markey).

33. Nuclear Waste Policy Act of 1982, Pub. L. No. 97-425, 96 Stat. 2201 (1982) (codified as amended at 42 U.S.C. §§ 10101–10270 (2000)).

34. *See* 42 U.S.C. § 10132 (outlining the requirements for candidate sites); *see generally* 42 U.S.C. §§ 10131–10135 (2000) (laying out a structure by which new locations would be found in the United States for the purpose of storing nuclear waste).

funded by taxing nuclear power generation.[35] The second component dictated that once the waste was taken to a federal repository, the government would take full ownership and responsibility for the storage of the waste.[36] Third, the NWPA required the Department of Energy (DOE) to conduct a study regarding the use of MRS facilities, where nuclear waste could temporarily be stored, as well as potential sites for permanent nuclear waste storage.[37]

In 1987, amendments were made to the NWPA, which directed the DOE to study one potential location for permanent nuclear waste storage: Yucca Mountain, Nevada.[38] However, because Yucca Mountain was not going to be able to accept nuclear waste until after the year 2010, the government focused its attention on locations for MRS facilities to hold nuclear waste until Yucca Mountain was ready.[39]

C. Siting Monitored Retrievable Storage Facilities

The DOE believed MRS facilities were the short-term answer to the country's nuclear waste storage problems because MRS facilities could store nuclear waste safely, with minimal impact to the environment and communities living near them.[40] The DOE established three criteria for its first attempt at siting MRS facilities. First, the DOE looked for locations on

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35. *See* 42 U.S.C. §§ 10131 et seq. (establishing federal responsibility for the waste and spent fuel and funds for the selection of an appropriate storage site).

36. Id.

37. *See* 42 U.S.C. § 10132 (recommending candidate sites and directing the Secretary of Energy to begin the study of candidate sites).

38. *See* Jon D. Erickson, Duane Chapman & Ronald E. Johnny, *Monitored Retrievable Storage of Spent Nuclear Fuel in Indian Country: Liability, Sovereignty, and Socioeconomics*, 19 AM. INDIAN L. REV. 73, 76 (1994) ("After considering various locations for a repository, the 1987 Amendments to the NWPA (the 1987 Amendments) directed the [Department of Energy] to exclusively study the site at Yucca Mountain, Nevada."); *see also* William La Jeunesse, *Tracking Your Taxes: The High Price of Nuclear Waste*, FOXNEWS.COM, Nov. 4, 2009, http://www.foxnews.com/politics/2009/11/04/tracking-taxes-high-price-nuclear-waste/ (last visited Feb. 1, 2011) (noting that President Barack Obama has recently discontinued the Yucca Mountain project, meaning that siting of nuclear waste on tribal lands may gain a renewed interest) (on file with the Washington and Lee Journal of Energy, Climate, and the Environment).

39. *See* Erickson et al., *supra* note 38, at 76 (noting the NWPA also authorized the DOE to "study and site both a repository for permanent disposal and an MRS facility for the purpose of temporary storage, consolidation, and repackaging of waste").

40. *See* Office of Civilian Radioactive Waste Mgmt., Dep't of Energy, A Monitored Retrievable Storage Facility: Technical Background Information 6–8 (1991), *available at* http://www.energy.gov/media/Monitored_Retrievable_Storage_Background.pdf (outlining the simple functions MRS facilities will perform and predicting the minimal impact on the environs surrounding the MRS facilities).

federal lands.[41] Second, the locations had to be in the eastern half of the United States,[42] where most nuclear waste is generated, and third, the site had to be at least 1100 acres and not near any operating reactors.[43] Using these criteria, the DOE identified eleven possible MRS sites and focused on studying three located in Tennessee more extensively.[44] The site they found that fit the criteria most perfectly was owned by the state of Tennessee, and in 1987 the DOE submitted its final proposal to Congress for the construction of a MRS facility there.[45] However, the proposal was denied after strong opposition by the public and local government.[46]

After this failed attempt, the DOE created the Nuclear Waste Negotiator position to facilitate MRS siting and adopted a new siting approach.[47] The DOE decided to try to find a state or Native American tribe to voluntarily site a MRS facility on their land.[48] In 1991, the DOE authorized a grant program in which the Nuclear Waste Negotiator invited

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41. Office of Civilian Radioactive Waste Mgmt., Dep't of Energy, Screening and Identification of Sited for a Proposed Monitored Retrievable Storage Facility 1–4 (1985) (DOE/RW-0023) [hereinafter Screening and Identification].

42. *See* Erickson et al., *supra* note 38, at 77–79 (noting that the DOE originally wanted to site nuclear waste facilities in the eastern half of the United States to minimize the risks in transporting the waste; however, once the DOE concluded there were no suitable sites in the eastern half of the United States, this criterion was eliminated); *see also* SCREENING AND IDENTIFICATION, *supra* note 41, at 1 ("The eleven sites are located within a preferred geographic region where an MRS facility can significantly reduce spent fuel shipment miles and related impacts.").

43. *See* SCREENING AND IDENTIFICATION, *supra* note 41, at 1 ("Each site has at least 1100 available acres without known land-use conflicts such as operating or planned commercial nuclear power plants.").

44. *See* Office of Civilian Radioactive Waste Management, Dep't of Energy, Monitored Retrievable Storage Submission to Congress: The Proposal 13–14 (1987) [hereinafter MRSS] (describing the selection process).

45. *See id.* at 13 ("Of the three candidate sites, the Clinch River site in the Roane County portion of Oak Ridge is recommended to the Congress as the preferred site . . . .").

46. *See* 42 U.S.C. § 10162(a) (1988) (Subtitle C of the NWPA of 1982 amended) ("The proposal . . . to locate a monitored retrievable storage facility . . . on the Clinch River in the Roane County portion of Oak Ridge . . . with alternative sites on the Oak Ridge Reservation . . . and on the former site of a proposed nuclear powerplant in Hartsville . . . is annulled and revoked.").

47. *See* 42 U.S.C. §§ 10241–10251, 10242(b)(2) (NWPA of 1982 amended by Title IV) ("The Negotiator shall attempt to find a State or . . . tribe willing to host a repository or monitored retrievable storage facility at a technically qualified site on reasonable terms and shall negotiate with any State or Indian tribe which expresses [such] an interest . . . .").

48. *See* Office of Civilian Radioactive Waste Mgmt., U.S. Dep't of Energy, Preliminary Site Requirements and Considerations for a Monitored Retrievable Storage Facility iii (1991) [hereinafter Preliminary Site Requirements], *available at* http://www.energy.gov/media/MRS_Preliminary_Site_Requirements.pdf ("The Negotiator is to seek to negotiate a proposed agreement with a State or Indian Tribe willing to site an MRS facility at a technically qualified site.").

state governors and tribal leaders to request grants to be used to research the feasibility of constructing MRS facilities on their lands.[49] The grant system was to last until 1993 and had three phases.[50] Phase I offered $100,000 grants for governors and tribes to do independent research on MRS facilities.[51] Phase II-A offered $200,000 grants to continue research, and Phase II-B offered up to $2.8 million grants to fund educational outreach programs, to identify potential sites and begin environmental assessments, and to enter formal negotiations.[52] After all of the studies were completed, tribes or governors could enter into negotiations with the DOE regarding the compensation for siting the MRS facility and procedures for operating the facility.[53] By the time the application deadline for grants expired in 1993, nine of the twelve Phase I grants were awarded to Native American tribes, all nine of the Phase II-A grant applications were made by tribes, and both Phase II-B grant applications were made by tribes.[54] These statistics show that Native American tribes were the people willing to bear the burden of this nation's nuclear waste. One of those tribes was the Skull Valley band of Goshute Native Americans in western Utah.[55]

D. The Skull Valley Goshute Tribe's Efforts to Obtain a Nuclear Waste Facility

The Goshute tribe was an ideal candidate to host MRS facilities because of their remote location in western Utah.[56] The Goshute tribe has inhabited a desolate area in western Utah, known as Skull Valley, for more than 800 years, originally subsisting on small game and wild vegetables.[57] After Spanish missionaries and fur trappers came in contact with the Goshute, the missionaries urged travelers to take a different route West

49. Office of the U.S. Nuclear Waste Negotiator, 1992 Annual Report to Congress 1–2 (1993).

50. *See* Erickson et al., *supra* note 38, at 79–80 (explaining the chronological progress of the grant system).

51. *Id.*

52. *Id.* at 80.

53. *See id.* ("Upon completion of feasibility studies, a tribe may then enter into formal negotiations with the DOE . . . [i]nclud[ing] details regarding the siting and operation of an MRS, as well as formulating compensation in the form of cash payments and benefits.").

54. *Id.* at 82.

55. *See* Davies, *supra* note 3, at 292, 332 (noting that a Goshute tribe member filed an application). *But see infra* notes 79–84 and accompanying text (regarding environmental justice campaign led by Goshute tribe members in opposition to Leon Bear's pursuit of nuclear waste disposal).

56. *See id.* at 295 (describing expansive Goshute territory in the Utah West Desert).

57. *See generally id.* at 294–95 (regarding traditional survival methods in the Goshute culture).

because the Goshute land was devoid of resources.[58] After numerous conflicts with settlers in the area, the Goshute entered into a treaty with the United States in 1863 that allowed construction of military posts, mining facilities, and rail lines on their territory in exchange for $1,000 to be paid by the government every year for twenty years.[59] A year later, the government tried to remove the Goshute from the area to make room for expanding military outposts and mining operations and relocate them to a reservation hundreds of miles to the East.[60] However, the Goshute refused, arguing that the land belonged to their fathers and they had a right to stay there.[61] After this attempt failed, and after another failed attempt to relocate them in 1871, the government gave up and mostly forgot about them.[62] Finally in 1911, an agent of the Bureau of Indian Affairs (BIA) was sent to meet with the Goshute, and following the agent's report, the government created an eighty-acre reservation in Skull Valley for the Goshute.[63] A few years later, President Woodrow Wilson expanded the Skull Valley reservation to encompass 18,000 acres.[64] In addition, the BIA set up a school and houses on the reservation.[65] The influx of federal funding soon dried up, and by 1936 the BIA had ceased funding the Skull Valley Goshute, arguing that the tribe was too small to warrant government funding, and tried, again, to force the Goshute to move off of the land.[66] The tribe refused, and the BIA gave up for good.[67] However, by the end of

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58. *See* DEAN L. MAY, UTAH: A PEOPLE'S HISTORY 24 (1987) (describing Spaniards' expedition through Utah in search of easily passable route to California); *see also id.* at 28 (explaining the inventive survival methods of the Goshute in a harsh desert environment).

59. Davies, *supra* note 3, at 300 (summarizing the terms of the treaty).

60. *See id.* at 301 (addressing various strategies for removing the Goshute).

61. *See id.* (concerning struggles between the Goshute and the federal government of the United States); *see also* Steven J. Crum, *The Skull Valley Band of the Goshute Tribe—Deeply Attached to Their Native Homeland*, 55 UTAH HIST. Q. 250, 251–52 (1987) (evoking Goshute cultural heritage and connection to the landscape).

62. *See* Davies, *supra* note 3, at 301–02 (recounting government efforts to remove the Goshute in the late nineteenth and early twentieth centuries).

63. *Id.* at 302; Exec. Order No. 1539 (May 29, 1912), *reprinted in* Executive Orders Relating to Indian Reservations 1855–1922, at 168 (1975) (on file with the Washington and Lee Journal of Energy, Climate, and the Environment).

64. Exec. Order No. 2699 (Sept. 7, 1917), *reprinted in* 4 Indian Affairs: Laws and Treaties 1049 (Charles J. Kappler ed., 1929) (on file with the Washington and Lee Journal of Energy, Climate, and the Environment); Exec. Order No. 2809 (Feb. 15, 1918), *reprinted in* 4 Indian Affairs: Laws and Treaties 1049 (Charles J. Kappler ed., 1929) (on file with the Washington and Lee Journal of Energy, Climate, and the Environment).

65. *See* Crum, *supra* note 61, at 260 (describing BIA actions to bring development to the Goshute reservation).

66. *See id.* at 261, 263–64 (regarding the BIA showing a declining amount of interest in the Goshute).

67. *See* Davies, *supra* note 3, at 303 (noting that, notwithstanding the ongoing efforts

World War II, the Skull Valley Goshute reservation had become "surrounded by chemical weapons, military testing facilities, and toxic waste."[68]

When the Nuclear Waste Negotiator was appointed and began to meet with tribes to discuss the grant system, the Skull Valley Goshute decided to take part in the program.[69] Mary Allen, a former vice chair of the tribe, explained that the MRS facility would help insure the future of her tribe.[70] The economic gain would enable the tribe to educate future generations about the history of the Goshute and would keep their culture alive.[71] The tribe was granted the $100,000 Phase I grant, as well as the $200,000 Phase II-A grant.[72] The tribe used the money to fund a five-year intensive study regarding the MRS process, how the waste was stored, and what the dangers were.[73] Tribe members traveled to France, England, Sweden, and Japan to see MRS facilities currently in use.[74] Further, one tribe member took a month-long internship at a nuclear power plant to learn more about the process of creating nuclear power and how the waste was stored.[75]

The application deadline for the grant program had expired before the Goshute had finished their research and decided they wanted to build a MRS facility, but a consortium of eight electric utility companies approached the Goshute and began negotiations to build a private facility.[76]

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by the BIA to advocate removal as late as 1942, the Goshutes prevailed and the BIA relented).

68. Id.

69. *See id.* at 332, 337 (describing decision by limited number of tribal members to seek grants from DOE, in contravention of traditional consensus-based governance among the Goshute).

70. *See Private Fuel Storage*, INTERIM STORAGE INC., http://www.interimstorageinc.com/private-fuel-storage (last visited Feb. 2, 2011) (explaining rationale of developer seeking to store nuclear waste on Goshute lands) (on file with the Washington and Lee Journal of Energy, Climate, and the Environment).

71. *See generally id.* (expressing view that the storage of nuclear waste would yield economic value for the Goshute).

72. Erickson et al., *supra* note 38, at 80–81.

73. *Skull Valley: The Documentary: Interview with Leon Bear*, KUED, http://www.kued.org/productions/skullvalley/documentary/interviews/bear.html (last visited Feb. 2, 2011) (on file with the Washington and Lee Journal of Energy, Climate, and the Environment).

74. *See id.* (describing grants that the Goshute received from the Department of Energy and visits taken by Goshute tribe members to international nuclear facilities).

75. See Peter Ritter, Nuke 'Em! Excel Energy Spearheads a High-Stakes Plan to Store Nuclear Waste on a Tiny, Dirt-Poor Indian Reservation in the Utah Desert, CITY PAGES MINNEAPOLIS-ST. PAUL (May 12, 2004), available at http://www.citypages.com/content/printVersion/14839 (providing an overview of the effort to store nuclear waste on the land of the Skull Valley Goshute) (on file with the Washington and Lee Journal of Energy, Climate, and the Environment).

76. *See* Charles Seabrook, *Utilities Offer Millions: Poor Utah Tribe Gambles on*

In May 1997, the Goshute signed a lease agreement with a corporate entity representing the consortium, and three days later the BIA conditionally signed off on the lease.[77] The project would have provided an influx of money and created numerous jobs for members of the tribe; the lease would have provided the means to keep the Goshute tribe, and culture, alive.[78]

The plan was not without opposition.[79] Some tribe members believed a MRS facility would be too dangerous and were worried their land would be destroyed.[80] Others felt tribal leadership was corrupt.[81] The opposition continued to swell as tribe members accused Leon Bear, the tribal chairman, of silencing tribal members who opposed the waste plan and depriving them of project monies.[82] Bear even cancelled several tribal chairman elections to ensure he remained in power.[83] Soon Goshutes on other reservations, environmental justice advocates, churches, and other environmental groups joined in opposition against the proposal.[84] Even the

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Nuclear Waste, ATLANTA J. CONST., Sept. 22, 2002, at 1A (noting that in 1993 the U.S. Office of the Nuclear Waste Negotiator lost its budget but that the Goshutes conducted further negotiations with Private Fuel Storage, the utility group).

77. *See* Bureau of Indian Affairs, Record of Decision for the Construction and Operation of an Independent Spent Fuel Storage Installation (ISFSI) on the Reservation of the Skull Valley Band of Goshute Indians (Band) in Tooele County, Utah 4–5 (Sept. 7, 2006) http://www.deq.utah.gov/issues/no_high_level_waste/index.htm (follow the link below "Documents") (last visited Feb. 16, 2011) [hereinafter ISFSI] ("In May 1997, the Band and PFS signed the First Amended and Restated Lease ('first lease') for the proposed ISFSI. . . . On May 23, 1997, the Superintendent of the BIA Uintah and Ouray Agency . . . signed a 'conditional approval' of the first lease that would allow PFS to begin ISFSI construction . . . .") (on file with the Washington and Lee Journal of Energy, Climate, and the Environment).

78. *See* Davies, *supra* note 3, at 334 (discussing the numerous potential benefits of the PFS project).

79. *See id.* at 335 (introducing a tribe member in opposition of the plan, Margene Bullcreek, who "was so strongly opposed that she formed a grass roots group . . . in an effort to put brakes on the plans").

80. *See id.* at 335–36 (discussing the opinions of two tribe members, Bullcreek and Sammy Blackbear).

81. *See id.* at 336–37 (giving Blackbear's opinion that the PFS plan would "corrupt[] tribal custom").

82. *See id.* ("Some tribal members also alleged that Bear had shut out those members who disagreed with the waste plan, depriving them of project monies and a forum to be heard."); *see also* Judy Fahys, *The High Price of Dissent*, SALT LAKE TRIB., Jan. 6, 2003, at B1 (giving examples of some problems experienced by some members of the opposition, with specific reference to how the Tribal Chairman, Leon Bear, was handling the situation).

83. *See* Davies, *supra* note 3, at 337 ("Bear's term as chairman, in fact, was set to expire in 2004, but he canceled seven straight elections on the grounds of an insufficient quorum, thus keeping himself in power as acting chairman."); *see also* Deborah Bulkeley, *Goshute Elections Are Contested*, DESERET MORNING NEWS, Nov. 3, 2006, at B4 (discussing the contested elections that have taken place in an effort to keep current Chairman Leon Bear and his supporters in office).

84. *See* Davies, *supra* note 3, at 337–38 (introducing a number of people and groups

governor of Utah, Michael Leavitt, joined in opposition.[85] However, due to how tribal sovereignty is currently interpreted, the decision rested with the federal government.[86]

The NRC completed an environmental impact statement[87] that was reviewed by the BIA and the Bureau of Land Management (BLM).[88] The environmental impact statement found that the project posed little threat to the safety of the Goshute and surrounding populations, and in the end the NRC approved the proposal.[89] In March 2001, after hearing of the approval, the legislature of Utah passed, and Governor Leavitt signed, a number of bills that attempted to block nuclear waste from being brought into the state.[90] The Goshute filed a federal lawsuit against the state, and the courts found that the bills were preempted by federal regulation.[91]

After Leavitt's defeat in federal court, Utah's five-member congressional delegation began exerting political pressure to have the proposal denied.[92] By December 2005, Senator Orrin Hatch had persuaded

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who were also opposed to the PFS plan, including Bullcreek's Ohngo Guadadeh Devia, the Confederated Goshute Tribe in Deep Creek, and Winona LaDuke, "a nationally known Native American and environmental justice advocate").

85. *See id.* at 338 ("Utah's governor at the time, Michael Leavitt, wanted to stop the Goshutes' plan before it was even set.").

86. *See id.* at 338–39 (recognizing that the federal government, specifically the Nuclear Regulatory Commission, makes the ultimate decision regarding licensing this particular storage proposal).

87. The purpose of environmental impact statements is to evaluate the positive and negative effects a project will have on the landscape. *See* National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370f, 4332 (2000) (discussing a number of justifications for environmental impact statements).

88. *See* Office of Nuclear Material Safety & Safeguards, NRC, 1 NUREG-1714, Final Environmental Impact Statement for an Independent Spent Fuel Storage Installation on the Reservation of the Skull Valley Band of Goshute Indians, iii (2001), *available at* http://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr1714/v1/cover.pdf [hereinafter FEIS] (outlining the purpose of the environmental impact statement and which agencies must give approval to the PFS proposal for it to continue).

89. *See id.* at xxix–xxxii, *available at* http://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr1714/v1/exec-summ.pdf (summarizing the PFS proposal to the four involved federal agencies: the U.S. Nuclear Regulatory Commission, U.S. Bureau of Indian Affairs, U.S. Bureau of Land Management, and the U.S. Surface Transportation Board).

90. *See* Davies, *supra* note 3, at 340 ("By March 2001, Leavitt had delivered on his promise [to stop the Goshutes' plan]. He signed into law a series of bills attempting to prevent the delivery of high-level nuclear waste into the state.").

91. *See* Skull Valley Band of Goshute Indians v. Leavitt, 215 F. Supp. 2d 1232, 1250 (D. Utah 2002) (holding that Utah's statutes at issue were preempted by the Atomic Energy Act), *aff'd*, Skull Valley Band of Goshute Indians v. Nielson, 376 F.3d 1223 (10th Cir. 2004).

92. *See* Davies, *supra* note 3, at 341–43 (outlining some of the ways that Utah's congressional delegation were able to use their political pressure to aid in stopping the PFS

the two biggest private investors in the consortium to back out of the deal.[93] Utah's five-member congressional delegation believed that the proposed site's proximity to an Air Force training base, coupled with the potential for terrorist attacks, made the nuclear waste facility too dangerous.[94]

Undeterred, the NRC granted the consortium's proposal for the nuclear waste site in September 2005.[95] This victory, however, was short-lived. In January 2006, "Utah Congressman Rob Bishop . . . succeeded in attaching to a defense spending bill a measure designating a vast expanse of federal land north of the Goshute reservation—over 100,000 acres—as a formal 'wilderness area.'"[96] In essence, the defense spending bill created a land barrier around the Goshute, preventing the Goshute from using roadways and railways to transport waste to the waste facility.[97] Thus, it did not matter whether the proposal for the storage facility had been granted, because the Goshute had no way to transport the waste to the facility.[98] Leavitt had failed in his attempt to block transportation corridors because of federal preemption, but the wilderness designation was federally mandated and could not be preempted.[99] In September 2006, the BIA reversed its approval of the MRS facility on the Goshute reservation, citing their concern for the health and well-being of the Goshute.[100] However, it was

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plan).

93. *See id.* at 342 ("[T]wo of PFS's biggest backers, the Southern Company and Xcel Energy, PFS's majority stockholder, announced that they would no longer support the project.").

94. *See* Joe Bauman, *Nuclear Storage Battle Fires Up*, DESERET NEWS, Mar. 18, 2005, http://www.deseretnews.com/article/600119494/Nuclear-storage-battle-fires-up.html?pg=1 (last visited Feb. 15, 2011) (commenting that "[m]any of the planes [from Hill Air Force Base] carry live ordnance, increasing the danger should an aircraft crash into the PFS facility") (on file with the Washington and Lee Journal of Energy, Climate, and the Environment).

95. *See* Private Fuel Storage, 62 N.R.C. 403, 405 (2005) (denying the petition for review and authorizing "the NRC to issue a license to construct and operate the PFS facility").

96. Davies, *supra* note 3, at 343; *see also* Utah National Guard Readiness Act, H.R. 3651, 110th Cong. § 2 (2008) (conveying approximately 431 acres of land adjacent to Camp Williams to Utah for the use of the Utah National Guard, with a specific provision included to financially penalize the state for storing hazardous materials on site).

97. *See* Davies, *supra* note 3, at 343 ("The wilderness designation built on an earlier effort by Governor Leavitt to erect a 'land moat' around the Goshutes.").

98. *See id.* ("The idea was simple: [i]f the Goshutes could not use surrounding transportation corridors to move waste to the site, whether they had a storage license would be irrelevant.").

99. *See id.* (suggesting that the "wilderness effort" avoided the preemption problem encountered in the earlier proposed solution because it was enacted through a congressional mandate).

100. *See ISFSI*, *supra* note 77, at 19 ("Upon weighing the benefits to the Band against the significant uncertainties and other factors . . . we conclude that it is not consistent with

clear to all of those involved that the main reason for the BIA reversing their approval of the MRS facility was the considerable political pressure Congress had applied.[101]

The Goshute have not given up. In July 2007 they sued the U.S. Department of the Interior, challenging the decision to deny the MRS facility.[102] On July 26, 2010, the judge vacated the U.S. Department of the Interior's decision to deny the Goshute permission to build the MRS facility and remanded the proposal back to the U.S. Department of the Interior for reconsideration.[103] Even if the U.S. Department of the Interior allows the Goshute to build the facility, they will likely face strong opposition to their proposal, as evidenced in the tribe's previous battles. While the case continues to work its way through the courts, the bigger question is: what happens to the Skull Valley Goshute now? They still live on barren land surrounded by facilities such as chemical weapons plants, military testing grounds, and toxic waste.[104] An MRS facility was a chance for the Goshute to infuse their tribe with the means to survive, but now constructing a nuclear waste facility is unlikely to happen.[105] It is ironic that the trust doctrine, a mechanism used to insure the protection and survival of tribes, is what ultimately led to the denial of the proposal, a decision that could signal the end of the Skull Valley Goshute as a people, culture, and tribe.

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the conduct expected of a prudent trustee to approve a proposed lease that promotes storing [spent nuclear fuel] on the reservation."). The BIA said the EIS did not evaluate the impact on the tribe when the waste was actually removed from the MRS facility, there was no timetable for how long the waste would stay on the reservation, and there was no assurance of law enforcement on the reservation. *Id.* at 20–25.

101. *See* Davies, *supra* note 3, at 344–45 ("[I]t . . . was plain that the decisions were based more heavily in politics than reasoned decisionmaking . . . .").

102. *See* Amended Complaint at 2–3 Skull Valley Band of Goshute Indians v. Cason, (D. Utah July 20, 2007) (No. 2:07cv00526) 2007 WL 5354505 (outlining the plaintiff's case and praying for relief in the form of one of the five potential outcomes set forth by the plaintiff's complaint).

103. *See* Skull Valley Band of Goshute Indians v. Davis, No. 07-cv-0526-DME-DON, 2010 WL 2990781, at *12 (D. Utah July 26, 2010) (vacating the Department of the Interior's Calvert and Cason Records on Decisions and remanding PFS's right-of-way application back to that agency).

104. *See* Davies, *supra* note 3, at 303 (giving the history of the Goshute tribe, particularly with respect to their geographical location and its features).

105. *See* Press Release, Bob Bennett, U.S. Senator, Bennett Hails News that PFS Loses Final Push to Bring Nuclear Waste to Utah (Sept. 7, 2006), http://web.archive.org/web/20060923023130/bennett.senate.gov/press/record.cfm?id=262652 (last visited Feb. 1, 2011) (announcing the denial of both PFS's Bureau of Land Management application for a right-of-way for transporting high-level nuclear waste and their Bureau of Indian Affairs application a nuclear waste storage facility to be located on tribal lands) (on file with the Washington and Lee Journal of Energy, Climate, and the Environment).

This case study serves as an example of the legal barriers that Native American tribes face when they try to exercise their sovereign status. Moreover, the Goshute tribe's story exemplifies the broader problem of state and federal governments stifling the economic opportunities of Native American tribes. Although the Goshutes were able to overcome legal challenges from the state of Utah, their proposal for a nuclear waste facility was ultimately denied because the federal government used the Federal Trust Doctrine to overrule the power of the tribe's sovereign status. The first step in resolving the conflict between Native American sovereign status and the trust doctrine is to understand how the two powers were created and how courts interpret the two powers.

III. The Creation of Tribal Sovereignty and the Federal Trust Doctrine

The interplay between Tribal sovereignty, State jurisdiction, and Federal jurisdiction are all important forces when nuclear waste siting is at issue. Tribes contend that due to their sovereign status, they should be free to site nuclear waste on their land if they choose to do so.[106] Federal government officials believe that, pursuant to the Trust Doctrine, they should be able to veto tribes who have decided to site nuclear waste on their land.[107] Further, state officials believe that because nuclear waste must travel on their roadways and railways in order to reach MRS facilities on tribal land, they should also have the power to deny tribes the right to store nuclear waste on their land.[108] Analyzing the history of each entity's power is essential in sorting out whether tribes have an ultimate right to site nuclear waste on their land or if their sovereignty is controlled by federal or state jurisdictional powers.

A. Tribal Sovereignty

Tribal sovereignty is not a power that was delegated by Congress; rather it is seen as a pre-existing power retained by the tribes.[109] Tribal sovereignty is accepted as a form of international law, where the

106. *See* Davies, *supra* note 3, at 334–35 ("[T]he [Goshute] tribe very much sees that sovereignty as bound up in their choice to accept nuclear waste.").

107. *See id.* at 308 ("At its most basic level, the trust doctrine is precisely what it implies, a duty of the federal government, acting as trustee, to protect a res, a tribal property interest that has been placed in trust for beneficiaries, namely, tribes and tribal members.").

108. *See id.* at 340–41 (outlining the ways that the Utah state government attempted to legislate to prevent the storage of nuclear waste within state boundaries, including preventing passage along the state's roads and highways).

109. *See* Leonard, *supra* note 19, at 666 (recognizing that tribal power is "based on the concept of a pre-existing Native sovereignty").

relationship of the federal government and tribes is analogous to a more powerful nation having dominance over a weaker one.[110] While tribes are subject to the legislative authority of the federal government and can rely on the federal government for protection against states trying to exercise authority over them, tribes are otherwise independent.[111] The wording of the United States Constitution in regard to Native Americans reflects the concept of treating tribes under international law.[112] The Constitution states that Native Americans are not taxed, and the Indian Commerce Clause groups tribes with other sovereign entities when considering the extent of federal power to regulate tribal commerce.[113] Both of these mandates recognize the sovereign status of tribes and their members.[114]

The independent power of tribes was reinforced in early Supreme Court Cases.[115] In *Cherokee Nation v. Georgia*,[116] the Supreme Court held that the federal government had a general duty to protect Native American rights and compared the relationship of Native Americans and the federal government to that of a "ward to his guardian."[117] Moreover, in *Worcester v. Georgia*,[118] Chief Justice Marshall concluded that "a weaker power does not surrender its independence, its right to self-government, by associating with a stronger [power], and taking its protection."[119] Therefore, tribal authority controls all internal self-governing matters, unless that power has been limited by federal plenary power or treaty.[120]

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110. *See id.* (discussing the source of tribal powers through international law concepts).

111. *See id.* (suggesting the relationship between Native tribes and the federal government is analogous to the dominance of a weaker nation by a stronger nation—tribes are independent aside from the necessity to yield to the laws of the dominant nation and a possible dependence on that nation for protection).

112. *See* U.S. CONST. art. I, § 8, cl. 3 ("Congress shall have the power . . . [t]o regulate commerce with foreign nations, and among the several States, and with the Indian tribes.").

113. *See id.* at art. I, § 2, cl. 3 ("[E]xcluding Indians not taxed . . . .").

114. *See* Leonard, *supra* note 19, at 666 (recognizing that "[t]he two references to 'Indians' in the Constitution indicate their status as independent sovereigns").

115. *See id.* at 667 (introducing early instances where the Supreme Court acknowledged Indian tribes' sovereign power).

116. *See* Cherokee Nation v. Georgia, 30 U.S. 1, 59 (1831) (holding that the Supreme Court did not have original jurisdiction over the Cherokee nation because they are a dependent nation rather than a state or an independent nation).

117. *See id.* at 17 (suggesting that Indian nations are more akin to "domestic dependent nations" rather than "foreign nations").

118. *See* Worcester v. Georgia, 31 U.S. 515, 520 (1832) (holding as unconstitutional a Georgia statute prohibiting non-Indians from visiting tribal lands without a permit from the state because the state had no authority over tribal affairs—that is the role of the federal government).

119. *Id.* at 560–61.

120. *See id.* at 561 (concluding that tribes can maintain their right to government and independent status while remaining under the protective powers of a "stronger" state).

B. Federal Jurisdiction

The decisions in early Supreme Court cases led to the adoption of the Federal Trust Doctrine.[121] While scholars have struggled to define what the trust doctrine actually is, the Department of the Interior treats the doctrine as a symbol of the federal government's duty to protect tribes, their land, and natural resources.[122] In a narrow sense, the doctrine bestows a fiduciary responsibility on the federal government to protect tribes, but in a broader sense, the federal government has a moral obligation to protect tribes generally.[123] This broad plenary power grants Congress almost completely unfettered power to pass legislation with respect to tribes.[124]

Although federal agencies are not granted the same broad powers as Congress, some departments, like the BIA, have acted as if they had the same powers as Congress.[125] The BIA operates under congressionally mandated authority and is charged with managing reservation land under the federal government's designation as trustee.[126] More specifically, the BIA monitors land development by controlling resource allocation, contract negotiation, and collecting royalties.[127] Further, resource agreements and leases are subject to BIA approval, and the BIA can overrule tribal council decisions regarding use of tribal land.[128]

In 1961, the beginning of the Self-Determination Era, the federal government began to lessen the amount of power departments like the BIA could exercise.[129] The Self-Determination Era is characterized by the

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121. *See* Leonard, *supra* note 19, at 670 (introducing three U.S. Supreme Court cases, referred to as the "Marshall trilogy," which addressed the issue of Native sovereignty).

122. *See* GILBERT L. HALL, THE FEDERAL INDIAN-TRUST RELATIONSHIP 2 (1979) (defining the government's responsibility "to protect valuable Indian lands, water minerals, and other natural resources") (internal quotations omitted).

123. *See* Davies, *supra* note 3, at 308–09 (defining, in both specific and broad terms, the obligation placed on the federal government by the trust doctrine).

124. See Jennifer Smith Haner, Tribal Solutions to On-Reservation Environmental Offenses: Jurisdictional Parameters, Cultural Considerations, and Recommendations, 19 AM. INDIAN L. REV. 105, 109 (1995) (identifying the predictable, preeminent power that the federal government holds over "both tribal and state claims of authority").

125. *See* Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471, 1478–80 (1994) (outlining the BIA's role in managing the government's duty to maintain federal Indian land).

126. *See id.* at 1478 (assigning the responsibility of managing the trust title vested in the government to the BIA).

127. *See id.* at 1478–89 (setting out the day-to-day supervisory for which the BIA is responsible).

128. *See id.* at 1479 (giving the BIA primary authority to review tribal decisions with regard to certain uses of their land).

129. *See* Leonard, *supra* note 19, at 672 (discussing steps taken by Congress and

federal government taking a more laissez-faire approach towards regulating Native American affairs,[130] as well as recognizing tribes as capable local governments.[131] Although President Lyndon Johnson, and later President Richard Nixon, advocated for increased tribal participation in developing federal programs for Native Americans,[132] the advent of nuclear power created complex problems for the ideology of the Self-Determination Era.[133]

C. State Jurisdiction

The preceding discussion regarding federal power over tribes shows the complexities involved in untangling tribes and the Federal Trust Doctrine. Unfortunately, sorting out what powers States have over tribes is just as complicated.[134] Different rules apply depending on whether Native or non-Natives are affected, whether Native-owned or non-Native-owned property is involved, and whether the case is civil, criminal, or regulatory.[135] Basically, states are preempted from asserting authority over Natives on tribal lands when state action would interfere with federal or tribal interests.[136] Conversely, states generally have authority to regulate the actions of non-Natives on tribal land.[137]

States can gain civil and criminal jurisdiction over natives on tribal land through a grant by Congress.[138] In regard to regulatory authority, state jurisdiction is based on a two-part test developed in two Supreme Court

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federal agencies to loosen their grip over and promote autonomy within the tribes).

130. *See id.* (indicating the change in government oversight of the tribes to a "more laissez-faire policy toward tribal relations").

131. *See id.* at 672–73 (detailing steps that the Environmental Protection Agency and BIA have taken to allow tribes the opportunity "to develop their own solid waste disposal programs . . . to make self-determination a reality").

132. *See id.* at 656 (analyzing executive policy during the "era of 'Self Determination'").

133. *See supra* notes 30–105 and accompanying text (describing the problems).

134. *See* Leonard, *supra* note 19, at 675 ("[T]he question of when state laws are enforceable on reservation land is a much more complex and uncertain inquiry.").

135. *See* Judith V. Royster & Rory SnowArrow Fausett, *Control of the Reservation Environment: Tribal Primacy, Federal Delegation, and the Limits of State Intrusion*, 64 WASH. L. REV. 581, 597 & 606–07 (1989) (comparing various legal and regulatory standards governing Natives and their land with those governing non-Natives and non-Native land).

136. *See* Leonard, *supra* note 19, at 676–79 (upholding the general principle set out in the *Worcester* decision that states may not exercise jurisdiction over Indian Country).

137. *See id.* at 679–80 (discussing states' jurisdiction over non-Native Americans on reservations).

138. *See* Worcester v. Georgia, 31 U.S. 515, 561 (1832) (noting that acts of Congress may give states power over the Cherokee nation).

cases.[139] The Court in *Williams v. Lee*[140] established the first part of the test, holding "absent governing Acts of Congress, the question has always been whether the state action *infringed* on the right of reservation [Native Americans] to make their own laws and be ruled by them."[141] However, the focus on infringement was deemphasized by the Court in *McClanahan v. Arizona State Tax Commission.*[142] The Court held the proper test was not only whether tribal custom or law preempted state involvement but whether a Congressional power or statute did as well.[143] Following the shift to a preemption focus, a special preemption test was developed.[144] The special preemption test is basically a balancing test, which weighs federal and tribal interests against a state's interest in regulating an activity.[145] The Supreme Court further defined the test in *New Mexico v. Mescalero Apache Tribe*[146] by holding that state law is always preempted when it conflicts with federal and tribal interests, unless the state interest is sufficient to override federal or tribal authority.[147] Thus, the special preemption test balances four factors: tribal sovereignty, federal interests, tribal interests, and state interests.[148] Tribal self-determination, economic development, and health and welfare are recognized as legitimate tribal and federal interests.[149]

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139. *See* Leonard, *supra* note 19, at 676–77 ("State jurisdiction is now based on a detailed factual analysis, structured around a two-part 'preemption/infringement' test, set out in two United States Supreme Court opinions."); *see also* Haner, *supra* note 124, at 115 ("State authority is determined by the application of a two-part test, the 'infringement/preemption' test.").

140. *See* Williams v. Lee, 358 U.S. 217, 223 (1959) (holding that allowing the state to exercise jurisdiction would undermine the authority of the tribal courts).

141. *Id.* at 220 (emphasis added).

142. *See* McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 179–80 (1973) (noting the power to tax reservation income is limited by treaty to the federal government and the tribal government).

143. *See id.* at 178–80 (rejecting the position that state action need only avoid infringing upon tribal self-government).

144. *See* Haner, *supra* note 124, at 115–16 (noting the Supreme Court's preference for preemption over infringement).

145. *See id.* at 116 ("The Court balances tribal, federal, and state interests in regulating the activity, assessing the burdens and interests of each party.").

146. *See* New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 343–44 (1983) (holding that when the "exercise of concurrent jurisdiction by the State would effectively nullify the Tribe's unquestioned authority to regulate the use of its resources" and in "the absence of State interests which justify the assertion of concurrent authority," the Tribe's interest is superior).

147. *See id.* at 334 ("State jurisdiction is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the State interests at stake are sufficient to justify the assertion of State authority.").

148. *See* Royster, *supra* note 135, at 644–49 (describing the component interests balanced in the preemption analysis).

149. *See* Haner, *supra* note 124, at 117–18 (describing specific tribal and federal

These interests must be balanced against a state's interest in protecting its economy and environmental resources and ensuring tribes do not receive special economic advantages from adhering to less strict tribal regulations.[150]

The Supreme Court held in *Montana v. United States*[151] that states, not tribes, have jurisdiction over non-Native Americans on tribal land.[152] However, the Court held that one exception to this holding was that states have no jurisdiction where a non-Native American party has entered into a consensual agreement with a tribe or tribal members or in cases where tribal sovereignty interests are at issue.[153] Thus, if a tribe entered an agreement with non-Native Americans to site nuclear waste on their tribal land, states would not have jurisdiction over the corporation, or any individuals of the corporation, constructing the waste facility or working at the waste facility.

Although tribes have sovereignty and control all self-governing matters, it is clear that the federal government does have the ability to control Tribes' actions using the Federal Trust Doctrine.[154] Further, the courts have made it clear that, except in very limited circumstances, states cannot control what Tribes do on their land.[155] However, as the Goshute tribe case study showed, the federal and state governments have still found ways to block Tribal activities through federal legislation and lobbying efforts.[156]

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interests).

150. *See id.* at 118 (specifying relevant state interests to be balanced against tribal and federal interests).

151. *See* Montana v. United States, 450 U.S. 544, 564 (1981) (holding that "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation").

152. *See id.* at 565 (declaring that "Indian tribes cannot exercise power inconsistent with their diminished status as sovereigns").

153. *See id.* at 565–66 (reciting two retained inherent sovereign powers, one to regulate "activities of nonmembers who enter consensual relationships with the tribe" and the other to "exercise civil authority over the conduct of non-Indians . . . when that conduct threatens . . . the political integrity . . . of the tribe").

154. *See* Davies, *supra* note 3, at 348 (noting that requiring federal approval for the leasing of tribal lands negates the possibility of actual sovereignty).

155. *See* Royster, *supra* note 135, at 604 (describing the circumstances permitting state jurisdiction over tribal lands).

156. *See* Davies, *supra* note 3, at 340–47 (chronicling the successful efforts by opponents to prevent construction of a MRS facility on Goshute lands).

IV. The Federal Communications Commission and the Siting of Cell Towers

While the conflict between Native American sovereignty and the trust doctrine is a complex issue, government agencies like the Federal Communications Commission (FCC) have been able to create a siting system for cellular towers that enables tribes the freedom to allow cellular towers to be sited on their land while still maintaining their full sovereign status.[157] Therefore, because cell towers and nuclear waste facilities are so similar,[158] delving into the history of the Federal Communications Commission and the history of their cell tower siting practices can illuminate solutions to the NRC's nuclear waste siting problems.

A. How Cell Towers and Nuclear Waste Sites are Similar

Cell towers and nuclear waste facilities are more similar than they might first appear. Siting both types of facilities creates issues concerning the sacred nature of tribal land, technologies' violation of nature, and safety concerns.[159] Further, both the cellular and nuclear industries are continuing to expand, and the siting of facilities for both enterprises is only going to grow in importance.[160]

Many tribes believe it is their duty to protect their land and the environment.[161] For them, the land is sacred and must be protected at all

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157. *See* FCC, NATIONWIDE PROGRAMMATIC AGREEMENT FOR REVIEW OF EFFECTS ON HISTORIC PROPERTIES FOR CERTAIN UNDERTAKINGS, 12 (2004), *available at* http://wireless.fcc.gov/siting/npa/tribal.html (follow "Full Text PA (PDF)" hyperlink) (outlining procedures for siting cell phone towers and related communications respecting tribal sovereignty).

158. *See infra* notes 159–191 and accompanying text (explaining the similarities between cell towers and nuclear waste facilities from a siting perspective).

159. *See* Gowda, *supra* note 8, at 238 (discussing the sacred nature of tribal land and technologies' violation of nature); *see also Cellular Phone Towers*, AM. CANCER SOCIETY (Jan. 31, 2006)

http://www.cancer.org/docroot/PED/content/PED_1_3X_Cellular_Phone_Towers.asp (last visited Jan. 19, 2011) [hereinafter ACS] (discussing safety concerns) (on file with the Washington and Lee Journal of Energy, Climate, and the Environment).

160. *See* Davies, *supra* note 3, at 331 (discussing the mounting nuclear waste problem); *see also Wireless Quick Facts*, CTIA-THE WIRELESS ASS'N, http://www.ctia.org/media/industry_info/index.cfm/AID/10323 (last visited Jan. 19, 2011) [hereinafter CTIA] (showing the increased usage of cellular phones) (on file with the Washington and Lee Journal of Energy, Climate, and the Environment).

161. *See* Gowda, *supra* note 8, at 238 (noting that Native Americans feel a protective duty for the land because it is sacred).

costs.[162] The construction of nuclear waste facilities significantly alters the landscape,[163] as do cell towers.[164] The construction of both types of facilities disturbs the ground they are built on and has the potential to destroy archaeological sites.[165]

Some tribes believe that the creation of nuclear power violates nature.[166] Their rationale is that the atomic forces involved are sacred and the act of splitting an atom harnesses a power fit for God, not humans.[167] It follows that if the creation of nuclear power violates nature, constructing MRS facilities to store the nuclear waste would carry the same stigma.[168] While cellular technology does not involve the splitting of atoms, the process by which cell phones work is highly scientific,[169] and conservative members of tribes may feel that this type of technology also intrudes on the realm of God.[170]

Storing and transporting nuclear waste does carry a stigma of causing environmental contamination,[171] but the environmental impact statement filed by the NRC, BIA, and BLM in the case of the Skull Valley Goshute

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162. *See id.* (acknowledging the integral role of land in tribal culture).

163. *See Cell Phone Tower Types and Information*, STEEL IN THE AIR, INC., http://www.steelintheair.com/Cell-Phone-Tower.html (last visited Feb. 14, 2011) (showing images of constructed cell phone towers) (on file with the Washington and Lee Journal of Energy, Climate, and the Environment); *see also New Nuclear Waste Site for Sydney*, ABC NEWS (Sept. 22, 2008) http://www.abc.net.au/news/stories/2008/09/22/2370289.htm (last visited Feb. 14, 2011) (illustrating the massive space necessary to store nuclear waste) (on file with the Washington and Lee Journal of Energy, Climate, and the Environment).

164. *See* Brian R. Manuel, *Protecting Historic Landscapes Against the Proliferation of Cellular Towers*, SJ053 ALI-ABA 307, 309 (2004) ("The effect of these modern day monoliths on the landscape is substantial . . . .").

165. *See* ADVISORY COUNCIL ON HISTORIC PRESERVATION, SECTION 106 ARCHAEOLOGY GUIDANCE 20 (2009), *available at* http://www.achp.gov/archguide/ (follow the "PDF" hyperlink) (acknowledging the potential of construction projects to disturb archaeological sites, including those on tribal lands).

166. *See* WALLACE H. BLACK ELK & WILLIAM S. LYON, BLACK ELK: THE SACRED WAYS OF A LAKOTA 37 (1990) (describing man's creation of nuclear power as cosmic misbehavior).

167. *See* Gowda, *supra* note 8, at 238 ("[T]he atomic force that binds the nucleus together is a sacred force; splitting the atom and transmuting matter is viewed as an intrusion into the realm of God . . . .").

168. *See id.* ("If nuclear power is viewed as a violation of nature, an MRS facility would likely carry this same sense of impropriety.").

169. *See* Manuel, *supra* note 164, at 309–11 (explaining the technical, scientific aspect of cell phone operation).

170. *See* Gowda, *supra* note 8, at 238 ("[T]ransmuting matter is viewed as an intrusion into the realm of God . . . .").

171. *See* Collins, *supra* note 9, at 272–73 ("Fear of a nuclear accident dominates the thinking of nuclear opponents, who argue strongly that both use and disposal of nuclear materials are fraught with danger.").

determined that the construction and operation of the proposed nuclear waste facility would have little impact on the surrounding environment.[172] Further, the environmental impact statement found that potential for radiological harm to humans was very low.[173] The same is true for cell towers.[174] One of the largest environmental impacts caused by cell towers is on migratory birds, and the FCC is continuing to investigate how large the impact is.[175] However, many people believe living in close proximity to cell towers causes cancer due to the radiofrequency energy waves traveling through the towers,[176] although there has yet to be a conclusive study linking cell towers to cancer.[177]

While nuclear waste is continuing to be stockpiled at nuclear power plants and nuclear weapon facilities,[178] the cellular industry is booming.[179] The growth of these two industries means that solutions to our nuclear waste storage program and regulations for cell tower siting are two issues that continue to grow in importance. Mounting stockpiles of nuclear waste will pose significant problems in the near future for the federal government.[180] Stockpiles of nuclear waste and the cell phone industry are both entities that continue to grow.[181] As more consumers switch from landlines to cellular phones,[182] new cell towers are needed to improve technology and bear the burden of increased airwave traffic, but where can these cell towers be constructed? Cell towers are aesthetically unpleasing and consumers worry the radiation from radiofrequencies increases cancer

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172. *See* Davies, *supra* note 3, at 339–40 (detailing the environmental impact statement's conclusions regarding the risk of harm).

173. *See id.* at 340 (characterizing the danger of radiological harm as minimal).

174. *See* ACS, *supra* note 159 (stating that there is "very little" evidence of harm).

175. Catherine Wang, A Review of Wireless Developments: Oct. 2003–Sept. 2004, 813 PLI/PAT 103, 165–66 (2004).

176. *See* ACS, *supra* note 159 (stating that some people believe in a link between cell phone towers and cancer).

177. *See id.* (stating that most studies show no link between cell phone use and cancerous tumors).

178. *See* Davies, *supra* note 3, at 331 (discussing nuclear power plants and nuclear weapon facilities).

179. *See* CTIA, *supra* note 160 (discussing the cellular industry).

180. *See* Davies, *supra* note 3, at 331 (stating that the American government has found no permanent solution to the stockpiling of nuclear waste).

181. *See* Davies, *supra* note 3, at 331 (discussing nuclear power plants and nuclear weapon facilities); CTIA, *supra* note 160 (discussing the cellular industry).

182. *See* Tim Barker, *More People Drop Their Phone Landlines and Go Cell-only*, ST. LOUIS POST-DISPATCH, Dec. 10, 2008, http://www.allbusiness.com/media-telecommunications/12004194-1.html (last visited Feb. 2, 2011) (documenting increasing numbers of consumers switching from land lines to cell phones) (on file with the Journal of Energy, Climate, and the Environment).

risks.[183] Further, as new cell towers spring up around the country, they are encroaching on land owned by Native American tribes.[184] In order for cellular companies to offer the type of service the public demands, they have to expand their network coverage, and that includes building cell towers on tribal land.[185]

The FCC was created by the Communications Act of 1934 (Act of 1934).[186] The main purpose of the Act of 1934 was to condense authority over the licensing of wire and radio communications to one federal agency.[187] Therefore, because the FCC is responsible for the licensing of telecommunications activities, cellular tower siting is under their jurisdiction.[188] The FCC has struggled at times to balance the public's desire for better cell phone technology with the requirements set forth in the National Historic Preservation Act (NHPA) and some tribes' desire to have their land, religion, and society respected.[189] The NHPA makes the federal government responsible for protecting American history, archaeology, and

183. *See* Manuel, *supra* note 164 (registering the complaints against cell phone towers as springing from their aesthetically displeasing nature); *see also* ACS, *supra* note 159 (noting that some people worry about radiological harm from cell phone towers).

184. *See* Marcia Yablon, *Property Rights and Sacred Sites: Federal Regulatory Responses to American Indian Religious Claims on Public Land*, 113 YALE L.J. 1623, 1645 (2004) (noting several instances of cell phone towers being built around sites sacred to American Indians).

185. *See* Gregory A. Smith, *The Role of Indian Tribes in Section 106 National Historic Preservation Act Review Process*, SJ053 ALI-ABA 649, 652 (2004) (stating that tribes have received thousands of requests by service providers to build cell phone towers on tribal lands).

186. Communications Act of 1934, ch. 652, 48 Stat. 1064 (1934) (codified as amended at 47 U.S.C. § 151 (1988)).

187. *See* Gary A. Lehman, *New Wave Policy: Protection of Direct Broadcast Satellite Transmissions Under Section 605*, 14 SW. U. L. REV. 590, 594 (1984) (stating that the law's purpose was to centralize various federal agencies).

188. *See* Nat'l Trust for Historic Pres., *Selected Materials on Cellular Communication Towers and Historic Preservation*, SG040 ALI-ABA 275, 295-296 (2001) [hereinafter Nat'l Trust for Historic Pres.] (stating that the FCC has regulatory powers over licensing telecommunications activities).

189. *See* FCC, *Learning Interactive Unit: Nationwide Programmatic Agreement*, http://wireless.fcc.gov/siting/npa/intro.html (last visited Feb. 2, 2011) [hereinafter *Learning Interactive Unit]* (stating that tribes that do want cell towers on their land feel that cell tower construction companies have disrespected them by failing to treat them as sovereign nations) (on file with the Washington and Lee Journal of Energy, Climate, and the Environment); *see also* National Historic Preservation Act, Pub. L. No.89-665, 80 Stat. 915 (1966) (codified as amended at 16 U.S.C. § 470 et seq. (2000)) ("The Congress finds and declares that . . . historic properties significant to the Nation's heritage are being lost or substantially altered . . . ."); *see also* Press Release, FCC, Wireless Telecomm. Bureau Announces Execution of Programmatic Agreement with Respect to Collocating Wireless Antennas on Existing Structures, 16 FCC REC. 5574 (2001) [hereinafter Collocation Agreement] (setting forth a series of operating principles agreed to by the FCC and historic preservation organizations).

culture from destruction and is triggered any time a project is determined to be a federal undertaking.[190] A federal undertaking is defined as "a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a federal agency," and because the FCC regulates the installation of all transmission frequencies, cell tower construction is considered a federal undertaking.[191] Thus, when cellular towers are constructed, even on Native American land, a full NHPA review must be undertaken.

B. History of How Federal Laws Have Shaped Cell Tower Regulation

Tribes are sometimes concerned that government projects, like cell towers, not only destroy their land, but also destroy their culture.[192] These types of projects require facilities to be constructed on land that might contain artifacts and burials important to tribal culture.[193] The federal government was aware of these concerns and thus included an important requirement in any review of a project under the NHPA.[194]

This requirement is Section 106 of the NHPA, which makes the federal government responsible for "tak[ing] into account the effect . . . federal undertaking[s]" may have on historic properties.[195] Once the NHPA is triggered, cell tower construction companies must complete a lengthy Section 106 review process before the project can commence.[196] The NHPA also created the Advisory Council on Historic Preservation (ACHP), an independent federal agency,[197] charged with promoting the "preservation, enhancement, and productive use of our country's historic

190. 16 U.S.C. § 470f (2000).

191. *Id.* at § 470w(7).

192. *See* Gowda, *supra* note 8, at 238 (writing that American Indians hold land to be integral to their cultural identity).

193. *See id.* (writing that American Indian cultural identity is intertwined with the land).

194. *See* Collocation Agreement, *supra* note 189 (noting the concerns of the tribes).

195. 16 U.S.C. § 470(f) (2000).

196. *Id.* The NHPA requires that:

> [The] federal agency must make a reasonable and good faith effort to identify historic properties, 36 C.F.R. § 800.4(b); determine whether identified properties are eligible for listing on the National Register based on criteria in 36 C.F.R. § 60.4; assess the effects of the undertaking on any eligible historic properties found, 36 C.F .R. §§ 800.4(c), 800.5, 800.9(a); determine whether the effect will be adverse, 36 C.F.R. §§ 800.5(c), 800.9(b); and avoid or mitigate any adverse effects, 36 C.F.R. §§ 800.8(e), 800.9(c).

Muckleshoot Indian Tribe v. U.S. Forest Serv., 177 F.3d 800, 805 (9th Cir.1999).
19716 U.S.C. § 470i(a) (2000).

resources."[198] The ACHP reviews and comments on all federal projects that qualify under the NHPA prior to their implementation.[199] The ACHP review process requires consultation with local State Historic Preservation Officers (SHPOs),[200] as well as local Native American tribes that might be impacted.[201] The ACHP ensures that cell tower construction companies have consulted with SHPOs and have followed the protocol laid out in the NHPA. However, the FCC's desire to improve cellular technology across the country has led to conflict with tribes and ultimately led to the FCC implementing a revolutionary siting system for cell towers on tribal land.[202]

1. The Conflict Between the FCC, Cellular Companies, and Tribes

Although the Section 106 power is broad and far-reaching, the statute specifically protects tribes by ordering any federal agency to "consult with any [Native American] tribe . . . that attaches religious and cultural significance to [a piece of] propert[y]."[203] This requirement was deemphasized in 1996, when Congress passed the Telecommunications Act of 1996 (Act of 1996)[204] to "accelerate rapid[] private sector deployment of advanced telecommunications and information technologies and services . . . by opening all telecommunications markets to competition."[205] In order to rapidly advance telecommunication and information technologies, the Act of 1996 put limitations on the zoning authority of local governments to deny applications for the construction of cell towers.[206]

198. *See* THE NAT'L HISTORIC PRES. ACT, CONN. TRUST FOR HISTORIC PRES., http://www.cttrust.org/index.cgi/1047 (last visited Feb. 2, 2011) (detailing the history of the National Historic Preservation Act) (on file with the Washington and Lee Journal of Energy, Climate, and the Environment).

199. *See id.* (detailing the review process set up by the National Historic Preservation Act).

200. *See* 16 U.S.C. § 470a(b)(3)(I) (requiring SHPOs to consult with federal agencies in any federal undertaking that may affect historic properties).

201. *See id.* at § 470a(d)(6)(B) (2000) (requiring the ACHP to consult with Native American tribes when performing Section 106 reviews).

202. *See supra* notes 191–193 and accompanying text (providing examples of the conflict).

203. *See* 16 U.S.C. § 470a(d)(6)(B) (2000) (noting that Native Hawaiian groups must also be consulted with, when applicable).

204. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

205. H.R. Conf. Rep. No. 104-458, at 113 (1996), reprinted in 1996 U.S.C.C.A.N. 10, 124.

206. *See* 47 U.S.C. § 332(c)(7)(A)–(B) (2003) (limiting in certain situations the power of local authorities to reject applications for cell phone tower construction).

In line with the Act of 1996's de-regulatory mandate, the FCC issued its own regulations to fulfill its responsibilities under Section 106 of the NHPA.[207] The FCC's regulations required the preparation of environmental assessments and environment impact statements, as well as coordination of Section 106 reviews.[208] Under the new regulations, companies engaged in the construction of cellular towers were required to conduct environmental assessments for projects, which could affect the entities listed in the NHPA.[209] After an environmental assessment is filed with the FCC, there is a thirty-day waiting period, and then the FCC either approves the construction or requests the preparation of an environmental impact statement to further review the effect the proposal will have on the environment or historic resources.[210] However, because the FCC uses an honor system, in which the FCC relies on the cell tower construction company to identify historic properties that might be affected, without the input of the FCC or SHPOs, there is sometimes no oversight by the FCC.[211] Until 1999, this lack of oversight had allowed tens of thousands of cell towers to be built across the country without tribal consultation.[212]

In 1999, the FCC adopted new rules to conform with Section 106 regulations.[213] The FCC's new rules required cell tower construction companies to consult with SHPOs and tribes, a rule that restricted the de-regulatory mandate of the Act of 1996.[214] However, the FCC's new rules opened the floodgates for Section 106 reviews for tribes and at SHPOs across the country.[215] Tower construction companies flooded tribes with

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207. 47 C.F.R. §§ 1.1301–1.1319 (2009).

208. Nat'l Trust for Historic Pres., *supra* note 188, at 296. The major differences between environmental assessments and environmental impact statements are that environmental assessments are the precursor to environmental impact statements. JACOB I. BREGMAN, ENVIRONMENTAL IMPACT STATEMENTS 24 (2d ed. 1999). Environmental assessments do not require that public meetings are held about the proposed project; almost all the material used in the assessment is readily available, meaning no new material has been collected for the assessment. *Id.* Further, environmental assessments are not required to be published in the *Federal Register*. *Id.* Lastly, environmental assessments are completed much more quickly than the lengthy environment impact statement process. *Id.*

209. *See* Nat'l Trust for Historic Pres., *supra* note 188, at 296 (noting the requirement of environmental assessments).

210. *See id.* (describing the notification and approval procedure).

211. *See id.* (noting the lack of direct supervision).

212. *See* Smith, *supra* note 185, at 652 (noting that some of the tens of thousands of towers built across America were built on American Indian cultural land).

213. 36 C.F.R. § 800.2 (2000).

214. *See id.* (requiring the FCC to consult with certain groups before becoming involved in an undertaking).

215. *See* Nat'l Trust for Historic Pres., *supra* note 188, at 296 (recalling the thousands of requests SHPOs have received to approve cell phone tower construction).

requests for information about their land and often told the tribes if they did not hear back within thirty days, they would assume their project would not adversely affect tribal land.[216] Problems were also created for SHPOs who were overwhelmed by requests for Section 106 reviews, some for towers that had already been built.[217]

None of the parties involved with the process were satisfied, and all had specific complaints.[218] Tower construction companies complained the review process took too long and worried that the regulations protected areas too strictly.[219] SHPOs complained that because submissions from tower construction companies were not standardized, submissions varied to such a degree that review of them was sometimes impossible.[220] Tribes complained that cell tower construction companies felt they should not have to compensate tribes for reviewing their applications.[221] Tribes felt they should be compensated for providing their expertise in reviewing applications.[222] Further, cell tower construction companies often failed to contact tribes before they began construction.[223] Even when tower construction companies did contact tribes directly, they were violating the tribe's right as a sovereign entity to consult with the FCC privately concerning a federal undertaking.[224]

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216. *See* Smith, *supra* note 185, at 653 (stating that certain letters from cell phone companies deeming a lack of objections on the tribe's part to be consent to build a cell phone tower).

217. *See* Nat'l Trust for Historic Pres., *supra* note 188, at 296 (noting the flood of Section 106 requests).

218. *See Learning Interactive Unit*, *supra* note 189 (noting the dissatisfaction amongst interested parties).

219. *See id.* (referring to complaints from cell phone companies).

220. *See id.* (recalling that submissions SHPOs received from tower construction companies, "varied in detail, format, and often were insufficient to perform a review").

221. *See* Smith, *supra* note 185, at 653 ("[C]ell tower companies, which stand to make great profits from these towers, have with few exceptions, been unwilling to pay fees to cover tribal costs.").

222. *See id.* (noting the costs and "onerous workload" that tribes have in responding to cell phone tower location requests by cell phone companies).

223. *See Learning Interactive Unit*, *supra* note 189 ("[M]any Indian tribes reported tower constructors frequently failed to contact them prior to construction, which, unfortunately, on at least one occasion led to the destruction of a tribal sacred site.").

224. *See* Smith, *supra* note 185, at 653 (noting the tribes contention the cell phone companies, by directly contacting the tribes, have violated the tribes' "sovereign right to consult" with the FCC).

2. The FCC's Solution to Cell Tower Siting

In order to address these issues, a "Working Group" was created composed of members from the FCC, ACHP, SHPOs, Native American tribes, the communications industry, and other historic preservation consultants.[225] The Working Group wanted to ease the burdens of all parties involved in the cell tower siting process, and in March 2001, the Working Group released the Nationwide Programmatic Agreement For The Collocation of Wireless Antennas (Collocation Agreement).[226] Collocation arises in a situation where a cell tower company is hired to place a new, or additional, antenna on a *pre-existing* tower, structure, or building.[227] The benefit of the Collocation Agreement is that it enables cell tower companies to bypass the lengthy Section 106 review.[228] However, the Collocation Agreement only applied to existing towers, so the Working Group developed another programmatic agreement in 2004: The Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings Approved by the Federal Communications Commission (NPA).[229]

The NPA makes the Section 106 process much easier for all parties involved in five specific ways.[230] First, the NPA refines the process for identifying land or buildings that may be harmed in the construction process by requiring records kept at SHPO offices be reviewed.[231] Second, the NPA "[e]xclud[es] certain categories of undertakings from review that

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225. *See* Nat'l Trust for Historic Pres., *supra* note 188, at 296 (detailing the creation of a "working group" of interested parties).

226. Collocation Agreement, *supra* note 189.

227. *See* Nat'l Trust for Historic Pres., *supra* note 188, at 297 (defining the term "collocation").

228. *See id.* (detailing the four preconditions for bypassing Section 106 review).

229. Nationwide Programmatic Agreement Regarding the Section 106 Nat'l Historic Pres. Act Review Process, 20 FCC REC. 1073 app. B (2004) [hereinafter Nationwide Programmatic Agreement]. Two years before the NPA was released, the ACHP released a letter to the FCC stating that when, in the course of Section 106 review, a tribe fulfills the role of a consultant or contractor in regard to providing information, compensation for its expertise is appropriate; however, applicants are not *required* to pay a fee, but they are still responsible for obtaining the necessary information from the tribe. John M. Fowler, Letter Relating to Payment of Fees in the Section 106 Review Process (Apr. 26, 2002), *in* THE COMPLETE NPA USER'S MANUAL: A COMPREHENSIVE GUIDE AND REFERENCE FOR THE NATIONWIDE PROGRAMMATIC AGREEMENT FOR SECTION 106 HISTORICAL PRESERVATION REVIEW OF THE UNDERTAKINGS OF THE FEDERAL COMMUNICATIONS COMMISSION 327–28 (John F. Clark ed., 2005) [hereinafter Fowler].

230. *Learning Interactive Unit*, *supra* note 189 ("The Nationwide Agreement improves the Section 106 process in five principal ways . . . .").

231. *Id.* (noting that the first improvement is a "[r]efining [of] the process for identifying 'eligible properties,' by requiring the use of records in the SHPO offices").

. . . are not likely to adversely effect historic properties."[232] Third, procedures for contacting SHPOs were revamped to facilitate timely communication.[233] Further, the NPA grants construction companies the ability to move forward with their project if the SHPO does not respond within thirty days.[234] Fourth, the NPA requires the use of uniform forms when filing reports to SHPOs.[235] Lastly, new guidelines were established for consulting with Native American tribes.[236]

As part of the new guidelines, the FCC created an online database called the Tower Construction Notification System (TCNS).[237] Native American tribes interested in siting cell towers on their land can upload information about their land, including what areas would be disturbed by tower construction, to help guide companies in selecting locations to build towers.[238] Further, the system can alert tribes when construction companies have submitted proposals for towers that might affect them.[239] By using the system, tribes can begin discussions with tower construction companies and

232. *Id.* (detailing that the excluded categories of "undertakings include: (a) Enhancements to towers; (b) Temporary Towers; (c) Replacement Towers; (d) Certain Towers Constructed in Industrial and Commercial Areas; (e) Certain towers constructed in Utility Corridor rights-of-way and (f) Towers constructed in SHPO/THPO designated areas").

233. *Id.* (acknowledging the newly-established process by which to contact SHPOs).

234. *Id.* (stating that the process for contacting SHPOs now includes a "provision authorizing tower constructors to proceed with construction if a SHPO does not respond within thirty days").

235. *Id.* (noting the standard forms, called the submission packet).

236. *See id.* (mentioning that the final change is the advent of guidelines for "consulting with federally recognized Indian tribes and NHOs"). The new guidelines reinforced the regulations in place, requiring tower construction companies to contact and consult tribes when the project would affect areas tribes had an interest in. Nationwide Programmatic Agreement, *supra* note 229, at 1149–54.

237. *See* Harry Martin, *New Tower Notification System*, RADIO MAG. (Apr. 1, 2004, 12:00 PM), http://radiomagonline.com/fcc/radio_new_tower_notification/index.html (last visited Jan. 29, 2011) (announcing the new tower notification system) (on file with the Washington and Lee Journal of Energy, Climate, and the Environment).

238. *See* FCC, TOWER CONSTRUCTION NOTIFICATION SYSTEM, http://wireless.fcc.gov/outreach/notification/TCNS_tribe.pdf (last visited Jan. 15, 2011) [hereinafter *TCNS*] ("[TCNS] provides a means for Tribes, NHOs, and SHPOs to respond directly to the companies if they have concerns about the proposed tower construction.") (on file with the Washington and Lee Journal of Energy, Climate, and the Environment). Nearly 600 Native American tribes have registered with the TCNS, including the Skull Valley Goshute. FCC, TOWER CONSTRUCTION NOTIFICATION SYSTEM: TRIBES, http://wireless.fcc.gov/outreach/index.htm?job=tower_notification (follow "Tribe/NHOs" hyperlink beneath "Log In" button) (last visited Jan. 15, 2011) (on file with the Washington and Lee Journal of Energy, Climate, and the Environment).

239. *See TCNS*, *supra* note 238 ("[The Tribe] may reply to a single notification [it has] received regarding proposed tower construction.").

their consultants more quickly.[240] However, the TCNS is not a substitute for Section 106 review,[241] nor does the system alleviate the FCC of its duty to consult with tribes on a government-to-government basis, because under the TCNS the FCC acts as a "middle man."[242] Proposals for new towers get uploaded to the TCNS, and the FCC then forwards them to tribes who might be interested.[243] The tribes then respond to the FCC and those messages are forwarded to the company who submitted the original proposal.[244]

In 2006, the FCC unveiled the second generation TCNS.[245] The new version of the TCNS included some improvements to further streamline the application process.[246] The improvements for tribes included creating a "batch reply" function for tribes to respond to multiple proposals at once; an added language feature that enables tribes to create more detailed preferences for what projects they would allow; an automated response feature that enables tribes to send "canned" responses instead of individually replying to every proposal; and a map function for tribes to outline their geographic areas of interest in more detail.[247] Once tribes have accepted the proposal and the Section 106 review has taken place, cell tower companies can negotiate terms of a lease and begin construction.[248]

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240. *See id.* ("By making themselves available to receive notification of proposed tower construction sites as early as possible, Tribes, NHOs, and SHPOs can increase their ability to engage tower constructors and their consultants at an early date.").

241. *See id.* ("We emphasize to system users that the TCNS is a tool to facilitate Section 106 Consultation. . . . The system is NOT to be used as a substitute for Section 106 Consultation.").

242. *See id.* ("The TCNS also enables the Commission to consult on a government-to-government basis with federally-recognized Tribes at an early date.").

243. *See* Martin, *supra* note 237 ("The system streamlines the process, providing one-stop shopping for tower proponents: They provide the FCC with the notification, and the Commission then handles the dissemination of that information to organizations that might be affected by the proposed construction.").

244. *See id.* ("Those entities may then submit responses back to the Commission, and the Commission will forward those responses back to the notifier.").

245. *See* Marvin Webster, *FCC Announces "Second Generation" Enhancements to Its Tower Construction Notification System*, ENVTL. CORP. OF AM., http://www.eca-usa.com/files/ECA_TCNS_Enhance.pdf (last visited Jan. 15, 2011) ("The FCC's public demonstration of recent enhancements to the TCNS was webcast March 30, 2006.") (on file with the Washington and Lee Journal of Energy, Climate, and the Environment).

246. *See id.* ("These changes, which incorporated a new *Nationwide Programmatic Agreement* (NPA) into the FCC environmental regulations, were designed to streamline environmental processing of new wireless telecommunications facilities.").

247. Id.

248. *See* Nationwide Programmatic Agreement, *supra* note 229, at 1161 (stating that companies can proceed with the project after a determination of "no [h]istoric [p]roperties affected" or "no adverse effect").

Since the Act of 1996, cell tower construction regulation has evolved almost perfectly to protect tribal lands and sovereignty. Under the current Collocation Agreement and NPA, tribes are assured of being involved in the siting of cell towers on sites they have an interest in.[249] Also, they can receive consultation fees from construction companies to ease the burden of reviewing applications, and lastly, the regulations in place protect the sovereign status of tribes and enable them to consult solely with the FCC if they choose.[250] Due to the success of the cell tower siting practices by the FCC and the similarities between cell towers and nuclear waste storage facilities, the NRC should create a regulation system akin to the cellular tower siting system currently in use by the FCC, so tribes can have the option to site nuclear waste facilities on their land.

V. Creating a Siting System for Nuclear Waste Facilities

Open discussions between federal agencies, tribal groups, SHPOs, and private contractors have helped the FCC create an ideal system for siting cellular towers. This system enables tribes to retain their sovereign status, allows cellular companies to receive prompt feedback concerning tower proposals, and allows the FCC to satisfy all of the requirements set forth in the NHPA.[251] The FCC's handling of cellular tower regulation provides a template for how the NRC should create a siting system for nuclear waste facilities on Native American land.

A. Problems with how the Nuclear Waste Regulatory System Currently Functions

Before a nuclear waste regulatory system like the TCNS can be created, jurisdictional issues must be resolved. First, Courts must continue to rule that federal law preempts any state challenge to the construction of

249. *See* Collocation Agreement, *supra* note 189, app. A, at 5576 (stating the Collocation Agreement does not preclude tribes from consulting with relevant parties when tower construction might affect significant properties); *see also* Nationwide Programmatic Agreement, *supra* note 229, app. B, at 1185–86 (recognizing the requirement for companies to consult with tribes in the tower construction process).

250. *See* Fowler, *supra* note 229, at 327 (discussing consultation fees); *see also TCNS*, *supra* note 238 (discussing regulations to protect a tribe's sovereign status).

251. *See supra* notes 225–250 and accompanying text (describing these benefits).

nuclear waste facilities on tribal lands.[252] Second, Congress must address how tribal sovereignty and the trust doctrine can coexist.[253]

1. Courts Must Continue to Rule that Federal Law Preempts State Challenges to Nuclear Waste Siting

Under the Nuclear Waste Policy Act,[254] states cannot reject the siting of nuclear waste on tribal land, although they can voice their opinion on the construction of a waste facility.[255] Further, the Atomic Energy Act of 1954 gave full responsibility to the federal government to dispose of, and regulate, nuclear waste.[256] Therefore, states should be preempted from challenging proposed MRS sites on tribal land based on the power bestowed on the federal government in the Atomic Energy Act of 1954.

While federal preemption can bar states from enacting legislation to prevent nuclear waste from entering their borders, tribes also rely on their sovereign status to protect their activities from attacks by states.[257] The Supreme Court, however, has recently started to erode the power vested by sovereign status.[258] The idea of Native American sovereignty has fallen into disfavor with the Supreme Court, and the concept of sovereignty has been replaced by an analysis of a tribe's history and tradition of regulating the issue in question.[259] The Supreme Court's decision to focus on a tribe's history and tradition of regulating an issue is problematic for deciding whether states can preempt a MRS facility because while tribes have no tradition of regulating nuclear waste, neither do states; the power to regulate waste resides solely with the federal government.[260] Therefore, regardless

252. *See* Skull Valley Band of Goshute Indians v. Leavitt, 215 F. Supp. 2d 1232, 1250 (D. Utah 2002) (holding that the Atomic Energy Act preempts state law), *aff'd*, Skull Valley Band of Goshute Indians v. Nielson, 376 F.3d 1223, 1254 (10th Cir. 2004).

253. *Contra* Davies, *supra* note 3, at 349 ("When the trust and sovereignty seek to coexist, neither thrives.").

254. Nuclear Waste Policy Act of 1982, 42 U.S.C. §§ 10101–10270 (2006).

255. *See id.* § 10121 (allowing state participation and consultation in the nuclear waste siting process).

256. 42 U.S.C. § 2021(c)(4) (2006).

257. *See* Frank R. Pommersheim, *Tribal-State Relations: Hope for the Future?*, 36 S.D. L. REV. 239, 250 (1991) (recognizing the "apparent strength of independent tribal sovereignty as its own barrier to state authority").

258. *See id.* at 252 (stating that Supreme Court legislation has abandoned the infringement and preemption tests created in past cases).

259. *See* Collins, *supra* note 9, at 341 ("A relatively recent line of cases seems to indicate that in certain areas, the Supreme Court is willing to let states interfere when the tribes have no 'tradition' of regulation in the field at issue.").

260. *See id.* at 342–43 ("The federal government has long held the exclusive right to regulate nuclear waste safety; neither tribe nor state, therefore, has a history of regulation in

of tribal sovereignty, if the government grants tribes the right to store nuclear waste, states have no standing to block nuclear waste from entering their borders on its way to Native American reservations.[261]

2. The Conflict Between the Trust Doctrine and Tribal Sovereignty Must Be Resolved

The second major issue involves trying to reconcile tribal sovereignty and the Federal Trust Doctrine.[262] In order for tribes to be able to site nuclear waste facilities on their land, they must be able to exercise the freedom afforded them by their sovereign status, without the federal government using the trust doctrine to block the siting of nuclear waste facilities. Tribes gain their power from sovereignty, which allows for self-governance and self-determination, while the trust is required to use its power to make tribes submit to the federal government in order to protect them. The problems created when tribal sovereignty and the trust doctrine intersect were on display in the case of the Skull Valley Goshute.[263] The Goshute negotiated a lease with a private group to construct a MRS facility on their land.[264] This act was consistent with the sovereign powers tribes historically enjoyed. However, the BIA stepped in and vetoed the proposal because they felt the tribe's future was at risk.[265] The BIA's actions are a prime example of the trust overpowering sovereignty. The Goshute case shows that as the trust doctrine and tribal sovereignty currently function, they cannot coexist. One must dominate the other.

A new model for how tribal sovereignty and the Federal Trust Doctrine interact is essential to resolve this conflict in order to prevent the situation the Goshute faced from occurring again. Commentators have proposed models across a wide spectrum, from nullifying the trust doctrine in favor of tribal sovereignty to rejecting the idea of tribal sovereignty

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this area.").

261. *See* Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978) (holding that states may not restrict movement of waste within its boundaries when the law is not directed toward "legitimate local concerns, with effects upon interstate commerce that are only incidental").

262. *See* Davies, *supra* note 3, at 328 ("The shape of tribal survival very much depends on how the law reconciles a rule that at its core gives the federal government authority over tribes as their purported protector—the trust—and another that seeks to allow tribes to mark their own path—sovereignty.").

263. *See supra* notes 56–105 and accompanying text (discussing the Skull Valley Goshute's interactions with the federal government in deciding whether to site a nuclear waste facility on the tribe's land).

264. Id.

265. *See ISFSI*, *supra* note 77, at 29 ("[U]ncertainty concerning when the SNF might *leave* trust land, combined with the Secretary's practical inability to remove or compel its removal once deposited on the reservation, counsel disapproval of the proposed lease.").

entirely. Professor Mary Christina Wood has proposed a model that resolves the trust-sovereignty conflict by using the trust to ensure sovereign power.[266] Wood argues that the trust doctrine must protect four areas essential to a tribe's survival: the tribe's land base, the tribe's economy, the tribe's right to self-government, and the tribe's culture.[267] Wood's model protects these four areas by requiring agencies to review how proposed projects would affect these four areas,[268] and requiring courts to create a test to determine whether a federal action interferes with these four areas.[269] However, this model appears flawed because it does not resolve the trust-sovereignty conflict, it simply has the trust prevail over sovereignty. Further, if the trust doctrine is protecting a tribe's land, economy, and culture, the federal government may decide that those areas are at risk from nuclear waste facilities and thus deny any proposals. If Wood's model was adopted during the Goshute's struggle to site a MRS facility on their land, it seems likely the outcome would have been the same.

Professor Stacy Leeds has taken the opposite approach from Wood and argues that sovereignty should always prevail over the trust.[270] For sovereignty to overpower the trust, Leeds argues that title to Native American lands must be conveyed to tribes,[271] federal law must be changed to completely preempt state challenges to tribal actions on tribal land,[272]

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266. See Mary Christina Wood, *Protecting the Attributes of Native Sovereignty: A New Trust Paradigm for Federal Actions Affecting Tribal Lands and Resources*, 1995 UTAH L. REV. 109, 231 (1995) ("[C]ourts should devise a substantive test to prioritize native property and treaty resources in conflict situations involving threats from offreservation conduct . . . . The substantive fiduciary test must be strict in order to adequately protect native interests.").

267. *See id.* at 113 ("[F]our 'attributes of sovereignty' . . . are necessary to native separatism and warrant protection as beneficiary interests under the trust doctrine: (1) a stable, separate land base; (2) a viable tribal economy; (3) self-government; and (4) cultural vitality.").

268. *See id.* at 225 ("The procedural mandate [of the trust doctrine] requires an agency to consider these effects of its actions on tribal property or other interests and assess its trust obligation towards the tribe. The substantive mandate requires the agency to affirmatively protect the tribe's interests when it undertakes action.").

269. *See id.* at 223 ("[C]ourts should exercise independent scrutiny in determining whether the proposed federal action interferes with . . . the . . . attributes of native sovereignty."); *see also id.* at 231 ("[C]ourts should devise a substantive test . . . .").

270. *See* Stacy L. Leeds, *Moving Toward Exclusive Tribal Autonomy over Lands and Natural Resources*, 46 NAT. RESOURCES J. 439, 455 (2006) ("I set forth a proposal for a gradual end to federal supervision of Indian lands and a termination of the federal trusteeship in favor of exclusive tribal autonomy.").

271. *See id.* at 456 ("In order to restore tribal autonomy, . . . [t]he first step is conveyance of fee title from the federal government to the tribal government or the Indian allottee.").

272. *See id.* at 457 ("To protect against state interference and preserve tribal autonomy, the conveyances of fee title would need to be accompanied by changes in federal law.").

and tribes must be allowed to decide if they desire federal supervision or if the tribe wants to be completely autonomous.[273]

While Leeds's proposal would ensure that tribes could site nuclear waste facilities on their land without intervention from states or the federal government, the proposal is still fraught with problems. First, if tribes are given full sovereignty power, they could make decisions that lead to a backlash from the rest of society.[274] For example, if the Goshute had built a nuclear waste facility without input from states or the federal government, the entire state of Utah, and surrounding states, would have had to cope with the nuclear waste being transported on public roadways. The safety of millions of people would have been put at risk to benefit a small population of Native Americans. Second, if tribes are given full sovereignty and choose not to have any federal supervision, they run the risk of losing their land entirely.[275] For example, tribes could sell off almost all of their land or tribes could enter ventures that permanently contaminate the land, making it uninhabitable. Tribes suffer from extreme poverty,[276] so it is possible that tribes will make a detrimental decision regarding a venture because they have no other means to produce income. For any perceived negatives associated with the trust doctrine, one of the benefits of the doctrine is that it has always preserved land for tribes to live on.[277] Lastly, full tribal sovereignty could silence internal dissent within tribes.[278] With no federal influence, leaders may become corrupt and silence any internal critics.[279]

Commentators like Reid Peyton Chambers have proposed a middle ground, where neither the trust nor sovereignty rule over the other.[280]

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273. *See id.* at 458 ("[F]or those tribes that choose to act as their own trustee over tribal resources, the tribe will make the determination of whether its lands may be otherwise encumbered as a matter of tribal law.").

274. *See* Davies, *supra* note 3, at 358 ("[T]he exercise of tribal sovereignty may visit externalities on other parts of society . . . . Where such externalities exist, tribal sovereignty risks inciting backlash from mainstream society . . . .").

275. *See id.* at 360 ("[C]ourts have relied on the trust as a way to protect tribal lands from state jurisdiction and taxation . . . . [I]f those barriers to assimilation are removed . . . tribes will vanish one by one.").

276. *See id.* at 298 (asserting that poverty among the Skull Valley Band of Goshute Indians is greater than three times the national average).

277. *See id.* at 360 ("[P]erhaps the trust's biggest benefit is that, through its prohibition on the alienation of tribal lands, the trust has helped preserve a space in which tribes can be sovereign.").

278. *See id.* at 363 ("A final pitfall [of full sovereignty] is the risk that turning tribal decisions entirely over to tribes will silence internal dissent.").

279. *See id.* (noting the concern that "removing federal oversight will lend itself to increased leadership corruption").

280. See Reid Peyton Chambers, Compatibility of the Federal Trust Responsibility with Self-Determination of Indian Tribes: Reflections on Development of the Federal Trust Responsibility in the Twenty-First Century, 2005 ROCKY MTN. MIN. L. INST. 13A (Sept. 27,

Chambers's proposal allows tribes to bypass federal authority when entering into short-term land leases lasting up to thirty years, but requires federal approval for leases lasting longer than thirty years.[281] Also, Chambers suggests the trust be used to judicially enforce a limitation on congressional power, so the power of sovereignty cannot be lessened or changed by Congress.[282] However, this model does not resolve the trust-sovereignty power struggle. Chambers's proposal gives sovereignty more power for any endeavor lasting up to thirty years, but switches power back to the trust for an endeavor lasting longer than thirty years.[283] Therefore, the trust and sovereignty still conflict at the thirty-year mark.[284]

The Wood, Leeds, and Chambers models do not resolve the trust-sovereignty issue; instead the models shift power from one side to the other.[285] However, Lincoln Davies has proposed a model that ignores balancing the trust and sovereignty and instead bases the model on three pillars essential for guaranteeing tribes sovereign status: full tribal self-determination, externality moderations, and sovereignty protection.[286] Davies argues that the purpose of this model is not to give tribes supreme power to overrule other jurisdictions; rather the model makes tribes powerful enough to stand on equal footing with states, putting tribes in a more powerful position for negotiations with other jurisdictions than they currently are.[287]

Full tribal self-determination would give tribes the option to attain the same levels of governmental power and responsibility that states enjoy. Under Davies's model, treating tribes as states gives the tribes more power,

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2005) (discussing the consistency between the federal trust doctrine and tribal self-sovereignty) [hereinafter Chambers].

281. *See id.* at 13A-37 (discussing the approval requirements for longer term leases); *see also* Reid Peyton Chambers & Monroe E. Price, *Regulating Sovereignty: Secretarial Discretion and the Leasing of Indian Lands*, 26 STAN. L. REV. 1061, 1084 (1974) (discussing abolishing federal approval for short-term leases) [hereinafter Chambers & Price].

282. *See* Chambers, *supra* note 280, at 13A-41 ("[T]he question arises as to how the trust responsibility can be better enforced. . . . [A] possible improvement could come from increased use of the trust responsibility to enforce limitation upon congressional power.").

283. *See* Chambers & Price, *supra* note 281, at 1084 (discussing situations in which Congress authorized tribes to lease lands for up to 30 years without approval).

284. *See* Davies, *supra* note 3, at 355 ("The two doctrines would still conflict . . . at thirty years instead of zero.").

285. *See id.* at 353–55 (assert that Wood's model promotes the trust doctrine over sovereignty, that Chambers' model simply changes the time at which sovereignty and the trust doctrine conflict, and that Leeds's model elevates sovereignty over the trust doctrine).

286. *See id.* at 365 (discussing Davies's proposed "three pillars . . . around which a new model of greater sovereignty may be formed").

287. *See id.* at 374 (asserting that the proposed model would enable the Goshutes to "ensure that they have the right to deal with [other] jurisdictions on a true government-to-government basis").

but also the responsibility for using that power in an appropriate manner.[288] The most obvious example of Native Americans not having full self-determination was in the case of the Skull Valley Goshute.[289] Because the Goshute lacked full tribal self-determination, the federal government essentially took away the Goshute's most valuable resource, their land.[290] Without the ability to lease their land to be used for the storage of nuclear waste, the government took away an opportunity for the Goshute's to revive their tribe's economy.[291] Further, when tribes try to expand their sovereign authority by acquiring additional land, the tribes submit to a slow, costly, and complex BIA-administered process.[292] Moreover, the federal government has final approval of many tribal constitutions and elections, thus infringing on tribal sovereignty further.[293] All of this governmental oversight has led tribes to believe they cannot really do *anything* without the federal government approving their actions.[294] States, in contrast, are not subject to any of these rules and regulations.[295] Under Davies's model, if tribes attain the same self-determination as states, they would control taxing, policing, and zoning power over their land.[296] Further, tribes could exit the "boiler-plate" constitutions they entered in to under the IRA and would be free to adopt constitutions tailored to their local circumstances and traditions.[297] The ability to create an independent form of government is at the heart of full tribal self-determination.[298]

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288. *See id.* at 367–68 ("Under my model, treating tribes as states not only importantly expands what powers tribes may have, but gives them ultimate responsibility for carrying them out.").

289. *See supra* notes 56–105 and accompanying text; *see* Davies, *supra* note 3, at 368 (stating that the Skull Valley Goshute provide the "most obvious" example of the issues that arise with tribes not having true self-determination).

290. *See* Davies, *supra* note 3, at 368 ("Continuing federal oversight of tribal land leasing drags down the value of tribes' most valuable resource, [their land].").

291. *See id.* ("Continuing federal oversight of tribal land . . . run[s] the risk of thwarting a tribe's ability to revitalize, as the Goshutes' believed nuclear storage would help them do.").

292. *See id.* ("[T]ribes wishing to make additional lands subject to their sovereign authority must submit to a complex BIA-administered process—one that has been criticized as too slow, too costly, and too loathe to expand tribal jurisdiction.").

293. *See id.* ("[M]any tribal constitutions and elections currently operate under federal approval and oversight.").

294. *See id.* ("Such pervasive federal involvement . . . has created the perception 'on the reservation . . . that the Indians may not do anything unless it is specifically permitted by the government.'" (quoting Warren H. Cohen & Philip J. Mause, Note, *The Indian: The Forgotten American*, 81 HARV. L. REV. 1818, 1820 (1968))).

295. *See id.* ("By contrast, states have each of these [sovereign] powers by definition.").

296. *See id.* at 369 ("[T]ribes could use the model to exercise full zoning, police, and tax powers over the breadth of their reservations, just as states do within their territories.").

297. *See* Indian Reorganization Act, ch. 576, 48 Stat. 984 (1934) (codified at 25

Externality moderation is the force that would restrain a tribe's full self-determination.[299] However, externality moderation is not analogous to the trust doctrine; instead externality moderation is included to acknowledge that every action by a sovereign entity can cause a reaction from another entity. Therefore, externality moderation mitigates the harm.[300] Currently, tribes have no say when the federal government exercises its plenary power, but externality moderation would put a halt to Congress's and the Courts' ability to weaken tribal sovereignty and create a system of rules and regulations that tribes would follow to gain such protection.[301] One challenge to this model is in determining what constitutes an externality, and in turn, which federal laws tribes must submit to in order to assure full sovereignty.[302] The outcome may be that if a tribe desired the full sovereign status enjoyed by states, they would have to submit to all of the federal-state relations outlined in the Constitution.[303] Tribes may see the adoption of externality moderation as the erosion of their nation-like sovereignty, but seeing how their sovereignty has constantly been attacked by Congress and the Courts, tribes may view accepting externality moderation as favorable.[304] Two safeguards would

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U.S.C. §§ 461–79 (2000)) (providing restrictions on Native Americans' ability to develop their own constitutions and bylaws); *see also* Davies, *supra* note 3, at 369 ("With this authority, tribes might also seek to break free from the prescriptive model of the Indian Reorganization Act-based constitutions and tune, just as states do, their governance systems to better reflect their own local circumstances and tribal traditions.").

298. *See* Davies, *supra* note 3, at 369 ("[U]ltimately this is the core of what true tribal self-determination must be about in the new model: tribes' right to implement any mode of government—whether modeled on the federal form or on native tradition, whether consistent with their existing constitutions or different from them—without . . . federal meddling.").

299. *See id.* at 370 ("Mitigating externalities is the expectation that in order to exercise greater sovereignty, tribes may need to submit to restraints on their power addressing these harms.").

300. *See id.* ("[A]cceptance [to restraints on power] must not be seen . . . as perpetuating a federal trust obligation . . . . Rather, its inclusion . . . acknowledges that because the actions of every sovereign entity in this country can affect the others, there is a need to moderate such harms in an evenhanded and fair way.").

301. *See id.* ("[W]hile today the plenary power limits tribal authority without tribal consent, the new model would use externality moderation . . . to abolish Congress's and courts' right to unilaterally diminish tribal sovereignty, and . . . to explicitly set forth the conditions tribes must choose to accede in order to obtain such a strong protection.").

302. *See id.* ("Undoubtedly, a challenging facet here will be determining what constitutes a tribal externality, and thus, what aspects of federal law tribes must submit to in order to receive the model's greater guarantee of sovereignty.").

303. *See id.* at 371 (discussing Constitutional regulations with which tribes may be required to comply in order to receive full sovereignty under the model). For example, if a tribe wanted full authority to buy, sell, or zone their reservation land, externality moderation might require the tribe to submit to Fifth Amendment power. *Id.* at 370.

304. *See supra* notes 109–156 and accompanying text (discussing how sovereignty has

prevent externality moderation from becoming analogous to the Federal Trust Doctrine.[305] First, there must be a clear division between the power bestowed on the tribe and the restrictions placed on them, and second, the restrictions placed on tribes must be the same type that states submit to in exchange for sovereign power.[306]

Ensuring the protection of sovereignty is an obvious goal for any model, but two questions remain: how to define the area of protection, and how the protection should be implemented.[307] The answer to the first question is rather straightforward.[308] The area to be protected should be a tribe's sovereignty over the land of their reservation.[309] The reasoning is three-fold: protecting a tribe's reservation land would not require any changes be made to the existing land, states already enjoy this type of sovereign protection, and protecting tribes' land allows tribes to exercise the same, or more, sovereignty on the land they are likely to use their sovereign power.[310]

There are three suggestions regarding the implementation of sovereignty protection.[311] First, the government could allow flexible treaties that allow tribes to negotiate the level of sovereignty they desire.[312]

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been attacked by Congress and the Courts); *see also* Davies, *supra* note 3, at 371–72 ("[S]ome tribes might see . . . moderation as a dilution of their historical sovereignty . . . . Others, . . . [s]eeing the United States' inconsistent diminishment of tribal sovereignty in the past, . . . may view the trade of moderation for protection as favorable.").

305. *See* Davies, *supra* note 3, at 372 (suggesting that if the new model does not provide certain assurances, "the condition of externality moderation would not be moderation at all, but simply the trust by another name").

306. *See id.* ("[I]mplementation of the new model must be careful in ensuring . . . that there is a clear nexus between the power the tribe is assured and the restriction it accepts and . . . that the restriction . . . is only a uniform requirement . . . to which all states must submit.").

307. *See id.* ("[T]he need for the final pillar of sovereignty protection should go without saying. . . . The two critical questions are: How should the area of protection be defined, and how should the protection be implemented?").

308. *See id.* ("The analogy of tribes to states should provide a straightforward answer to the first question.").

309. *See id.* ("Traditionally, tribes were seen as having sovereignty within their territories; that territory remains essential to their sovereignty today; and thus, tribal sovereignty should be protected within the boundaries of tribal reservations.").

310. *See id.* at 372–73 ("It requires no manipulation of the existing landscape. It is the same kind of sovereignty protection that states have. And it would allow for tribes either to continue the same level of sovereignty they now exercise, or to exercise more jurisdiction . . . .").

311. *See id.* at 373 ("As to the second question—how to implement this sovereign protection—there are a number of options.").

312. *See id.* ("[T]he government could void its ban on tribal treaties and create a pro forma treaty that would guarantee a minimum level of sovereignty for all tribes, but could be modified in particular circumstances via negotiation.").

Negotiation may not be the best option because the resources expended during the process could be enormous if every tribe enters in to separate negotiations with the government.[313] Second, the option for sovereignty protection could be installed as federal law.[314] This option is risky because it could allow a subsequent legislature to completely annul the sovereign protection; however, this option would create a better system of sovereignty than is currently enjoyed by tribes.[315] Lastly, provisions could be added to the Federal Constitution to guarantee tribes sovereignty and conditions for opting in to the protection.[316] Amending the Constitution is the most difficult option to implement based on how difficult it is to make amendments to the Constitution and the possibility that states may feel tribes are being provided a special status.[317] However, it is the most powerful and optimal solution based on its permanency, and for those reasons should at least be attempted.[318]

It is impossible to say if the Skull Valley Goshute would have been successful in siting their MRS facility even if they had been able to fully adopt this proposed model. The BIA would have been unable to deny the proposal between the Goshute and the MRS consortium, but the Goshute would not have been protected from Congress creating a wilderness area and thus blocking the avenues for nuclear waste to be delivered to the reservation.[319] Therefore, while the first step in allowing tribes to build nuclear waste facilities on their reservation is giving tribes full self-determination and sovereignty protection, the second step is creating a new regulation system so tribes do not face attacks from surrounding states and federal legislatures.

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313. *See id.* ("The negotiation path would consume enormous resources if conducted tribe-by-tribe . . . .").

314. *See id.* ("Another option would be to install the protection as a matter of law.").

315. *See id.* ("The codification avenue risks complete annulment by a subsequent legislature—especially in the absence of a meaningful judicial restraint that the trust has for centuries failed to provide—though this approach would be a substantial improvement on the existing status quo.").

316. *See id.* ("The most protective [option] would be to add to the Federal Constitution provisions guaranteeing tribes their sovereignty and defining the terms and conditions by which they may opt into that protection.").

317. *See id.* (asserting that the constitutional option's "obstacle is that any constitutional amendment is difficult to achieve today. When the amendment is one that some might . . . attempt to characterize as providing 'special' status to tribes, its success likely would be even more difficult to broker . . . .").

318. *See id.* ("The constitutional possibility is the most promising and most admirable.").

319. *See supra* notes 56–105 and accompanying text (discussing the BIA's rejection of the Goshute's proposal to build a nuclear waste facility on Goshute land).

B. Proposal for a New Nuclear Waste Siting System

The main issue with setting up a regulation system to allow Native Americans to enter into negotiations to site a nuclear waste facility on their land is creating a system that enables tribes to preserve their sovereign status through negotiations with private construction companies. The solution to this issue lies in the procedures for cell tower siting. There are many similarities between nuclear waste facilities and cellular towers,[320] and both are types of facilities that Native Americans are faced with constructing on their land. Whereas siting nuclear waste facilities has been a complete failure so far, siting cellular towers has steadily progressed due to regulations implemented by the FCC.[321] Just as the FCC is charged with regulating the licensing of wireless facilities,[322] the NRC is responsible for the regulation of nuclear waste and should therefore be charged with creating a siting system.[323] The system should start with an online database much like the one created for the TCNS.[324]

For tribes, the system can work in two different ways. First, tribes could upload geographic and topographic information into the database making this information viewable by private construction companies looking to build nuclear waste facilities. If a private construction company identifies a tribe they are interested in negotiating with, the company can either contact the tribe directly through the system, or, if tribes want to maintain their sovereign rights to communicate government-to-government, the company could contact the NRC, which would in turn contact the tribe directly. The other option would have construction companies identify geographic regions they are interested in, and the system could then send notices to tribes in those geographic areas. Once the notice is received, tribes could respond directly to the construction company, or through the NRC, stating whether they were interested in the proposal.

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320. *See supra* notes 159–191 and accompanying text (noting the similarities between cell towers and nuclear waste sites).

321. *See supra* notes 225–250 and accompanying text (discussing the FCC's solution for cell tower siting).

322. *See* Communications Act of 1934, ch. 652, 48 Stat. 1064, I §1 (1934) (codified as amended at 47 U.S.C. § 151 (1988)) (granting the FCC authority to regulate the licensing of wireless facilities); *see also* Nat'l Trust for Historic Pres., *supra* note 188, at 295 ("The Federal Communications Commission is the agency responsible for licensing telecommunication activities in the United States.").

323. *See* 42 U.S.C. § 5801 (1974) (discussing the government's objectives with respect to nuclear energy sources).

324. *See supra* notes 225–250 and accompanying text (discussing the TCNS online database).

If tribes are interested in the proposal, they could move on to the next phase. The next phase would include filing appropriate environmental impact statements with the NRC, as well as going through a Section 106 review. Further, all proposals would include protocol for procedures in the event of an accident. The NRC, as the regulating and licensing body, should be in charge of creating these procedures.[325] If the NRC accepts the proposal, final lease terms could be negotiated between the tribe and construction company. The NRC should still serve their regulatory function and inspect the facilities on a yearly basis to determine if both parties are adhering to the lease terms.

Assuming tribes are given full self-determination and sovereignty protection, states and the BIA would not be in a position to block the construction. Further, because of the yearly inspections by the NRC, and assuming the environmental impact statements found low potential risk of harm, Congress would be less likely to oppose the project. Moreover, with the discontinuation of the Yucca Mountain program, Congress should be more willing to construct MRS facilities, which seem to be one option currently available.[326] It is clear the waste needs to go somewhere, and if tribes are willing to shoulder the burden, they should be allowed the opportunity to pursue these projects.

VI. Conclusion

Even though the amount of nuclear waste continues to increase in the United States, the federal government has not been able to find suitable means for safely, and permanently, storing the waste.[327] One possibility for siting our country's nuclear waste involves having Native American tribes, like the Skull Valley Goshute, build nuclear waste facilities on their tribal land. However, these proposals have met fierce opposition, both politically and legally.[328] The Skull Valley Goshute case reveals that at the heart of the debate regarding nuclear waste siting on tribal land is the issue of how

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325. Procedures should include what to do if the MRS facilities fail and land is contaminated, if trucks carrying nuclear waste to the site are involved in accidents and nuclear waste is spilled in surrounding areas, and what penalties should be levied if terms of the agreement are not followed.

326. *See Mountain of Trouble*, *supra* note 1 ("Now that the Yucca Mountain project is dead the obvious question is: Now what? As a senator in 2007, Mr. Obama suggested . . . 'finding another state willing to serve as a permanent national repository . . . .'").

327. *See supra* notes 30–55 and accompanying text (discussing the federal government's attempts at siting nuclear waste facilities).

328. *See supra* notes 56–105 and accompanying text (discussing the Skull Valley Goshute tribe's efforts to obtain a nuclear waste facility).

to resolve the conflict between the Federal Trust Doctrine and Native American sovereign status, a conflict with deep historical roots.[329] To resolve this conflict, tribes must be guaranteed sovereign status through full tribal self-determination, externality moderation, and sovereignty protection.[330]

Once Native American sovereign status is guaranteed, the federal government can consider how facilities like cellular towers have been sited, and implement a nuclear waste siting system akin to the FCC's TCNS. Part of the reason the TCNS has been so successful is because government organizations, tribes, and cellular tower construction companies all voiced their opinions on how a cellular tower siting system should work.[331] The FCC was able to take the opinions of the parties involved and create a siting system that fully respects tribal sovereignty while shortening the review process for cellular tower construction companies.[332] The goals of any nuclear waste storage siting system should be to allow tribes to enter into financially beneficial nuclear waste siting contracts as sovereign entities.

Nuclear waste carries an intense stigma that is extremely difficult to overcome.[333] However, the safe disposal of nuclear waste is an issue that cannot and will not disappear. No one wants a nuclear waste facility sited in their backyard, but the reality is the waste has to go somewhere, and therefore when a city, state, or tribal group makes the determination to bear the load, the states and government should help tribes do it in the safest way possible, instead of trying to block the project through protests and legislation.

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329. Id.

330. *See supra* notes 251–326 and accompanying text (outlining a model aimed at resolving issues faced in the construction of nuclear waste facilities on Native American land).

331. *See supra* notes 225–250 and accompanying text (discussing the communication between tribes, cellular tower construction companies, and government entities).

332. Id.

333. *See* Collins, *supra* note 9, at 272–73 (discussing the public perception of nuclear power and nuclear waste).