

Skull Valley Crossroads: Reconciling Native Sovereignty and the Federal Trust

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Articles

SKULL VALLEY CROSSROADS: RECONCILING NATIVE SOVEREIGNTY AND THE FEDERAL TRUST

LINCOLN L. DAVIES*

ABSTRACT

It has been long recognized that a deep tension pervades federal American Indian law. The foundational principles of the field—on the one hand, the notion that tribes keep their inherent right of sovereignty and, on the other, that the federal government has a power and duty to protect them—clash on their face. Despite years of criticism of this conflict, the two principles continue to coexist, albeit uncomfortably. Using the example of the Skull Valley Band of Goshute Indians’ controversial proposal to store high-level nuclear waste on their land, this Article revisits the tension in these doctrines, weighs prior proposals attempting to reconcile them, and concludes that, ultimately, sovereignty and the federal trust are not reconcilable. Finding sovereignty superior—morally, historically, and politically—the Article thus offers a new model for promoting native sovereignty: allowing tribes to choose to be treated similarly to states.

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INTRODUCTION

Drive forty miles west of Salt Lake City on Interstate 80, the highway that connects New Jersey to San Francisco, and you reach a crossroads. At the Great Salt Lake's whitening edge, in the barren khaki desert of sagebrush, solitary junipers, and brittle air, there is a choice. Keep west and you will be in Tahoe or Reno by nightfall. Or bear south on State Road 196 for another forty minutes and find yourself simultaneously in the middle of nowhere and the center of controversy—Skull Valley.

The crossroads of Skull Valley is at once symbolic and real. For the Skull Valley Band of Goshute Indians, it represents the intersection of their future and their past. The Goshutes have fiercely clung to this "beautiful wasteland"¹ as their ancestral homeland for nearly a millennium, but now that existence is in peril. At its apex, the historical Goshute tribe numbered 20,000 members.² Today, less than 130 remain in the band, barely two dozen live on the reservation, only four fluently speak the native tongue, and tribal poverty and unemployment tops three times the national average.³

In part because of this situation, in part in response to it, the Goshutes brokered a most controversial plan in 1997. The tribe signed a lease with a consortium of investor-owned electric utility companies to store up to 40,000 metric tons of nuclear waste on their reservation for up to forty years. Under this plan, the waste would take nearly twenty years to arrive by rail in Skull Valley, another twenty years to remove, and once there would sit in steel and concrete cylindrical storage casks on a 100-acre cement pad under the desert sun.⁴

The reaction the Goshutes' plan elicited was complex—and heated. The tribe found itself amidst a swirl of lawsuits, politics, legislation, and more attention than it had ever seen. Indeed, that the Goshutes even considered this plan—voluntarily putting literally tons of the most deadly waste known mere miles from their homes—is

1. Martin Kasindorf, *Tribes Seek Uranium Enrichment*, USA TODAY, Aug. 12, 2002, at 4A (quoting then-Chair of the Skull Valley Band of Goshute Indians, Leon Bear).

2. Margot Roosevelt, *Utah's Toxic Opportunity*, TIME, Mar. 13, 2006, at A11.

3. David Rich Lewis, *Skull Valley Goshutes and the Politics of Nuclear Waste: Environment, Identity, and Sovereignty*, in NATIVE AMERICANS AND THE ENVIRONMENT: PERSPECTIVES ON THE ECOLOGICAL INDIAN 304, 320 (Michael E. Harkin & David Rich Lewis eds., 2007).

4. OFFICE OF NUCLEAR MATERIAL SAFETY AND SAFEGUARDS, U.S. NUCLEAR REGULATORY COMM'N, 1 NUREG-1714, FINAL ENVIRONMENTAL IMPACT STATEMENT FOR THE CONSTRUCTION AND OPERATION OF AN INDEPENDENT SPENT FUEL STORAGE INSTALLATION ON THE RESERVATION OF THE SKULL VALLEY BAND OF GOSHUTE INDIANS AND THE RELATED TRANSPORTATION FACILITY IN TOOELE COUNTY, UTAH xxix–xxxii (2001), <http://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr1714/v1/cover.pdf> [hereinafter FEIS].

somewhat remarkable. But the tribe did not do so flippantly. It spent years studying the possibility, and when it came down to it, the price was right. The Goshutes deeply valued their land, but no one, they noted, would “buy a tomato” or anything else “green or environmental” from them because of what slowly had surrounded their reservation:⁵ the nation’s largest stockpile of chemical and biological weapons, including anthrax and the plague; military bomb testing and training grounds; a low-level radioactive waste disposal facility; a magnesium plant responsible for eighty-five percent of the nation’s annual point-source chlorine emissions; and an area where the military released 3.5 trillion lethal doses of nerve gas.⁶ The roughly \$40 million the Goshutes would receive for accepting the nuclear waste thus seemed the least the band deserved. Accepting it might mean a culture different from some of their traditions, but the future it could provide would be consistent with the core of what they have always been: survivors.

The choice the Goshutes faced—past or future, tradition or evolution, extinction or survival—could not be placed in starker terms. But it also was not their crossroads alone. For the Goshutes’ struggle epitomizes the dilemma of survival, of maintaining differentness and Indian-ness, that Native Americans⁷ across the United States face in increments large and small every day. At the center of that crossroads is the intersection of two timeless doctrines of Indian law—tribal sovereignty and the federal trust responsibility—that exert enormous influence on the outcome of what such choices will be. Although both are foundational to the field, the dual persistence of native sovereignty and the federal trust leave tribes in a doctrinal quandary: Sovereignty demands Indian self-determination, while the trust injects the federal government into those decisions.

This Article uses the Skull Valley Goshutes’ nuclear controversy to illuminate this tension. The Article seeks to reconcile sovereignty and the federal trust, ultimately concluding that the two concepts are not reconcilable. Accordingly, it proposes a new model based in sovereignty, akin to what states bear today, to promote tribal survival.

5. Kevin Fedarko, *In the Valley of the Shadow*, OUTSIDE, May 2000, <http://outside.away.com/outside/magazine/200005/200005skullvalley4.html> (quoting Leon Bear).

6. Lewis, *supra* note 3, at 316–17; Andrew Gumbel, *Valley of the Damned*, THE INDEP. (LONDON), July 2, 2000, at 12; Brenda Norrell, *Skull Valley’s Nerve Gas Neighbors*, INDIAN COUNTRY TODAY, Oct. 26, 2005.

7. Although the term “Native American” is more accurate, this Article follows the convention of legal scholarship and many tribes, using “Indian” and “Native American” interchangeably.

The Article proceeds via three interweaving strands—the Goshutes, the trust, and sovereignty. Part I provides a brief history of the Goshutes. Part II outlines the legal framework for sovereignty and the trust. Part III describes the immense controversy surrounding the Goshutes’ nuclear proposal. Finally, Part IV seeks to braid these three strands, to trace an initial architecture for a new model of tribal sovereignty.

I. PEOPLE OF THE DESERT: A BRIEF HISTORY OF THE SKULL VALLEY GOSHUTES

Before the Mormons, before the fur trappers, before the conquistadors, aboriginal peoples claimed as their home what we now call Utah. The most prominent of these groups included the Utes, Paiutes, and Shoshone.⁸ But there was also a lesser known group that had persisted for centuries: the Goshutes.

The Goshutes arrived in the region southwest of the Great Salt Lake as early as A.D. 1200.⁹ Taking their modern name from the native Ku’tsip or Gu’tsip, meaning people of the ashes, dry earth, or desert, the Goshutes’ territory was vast, extending across the Utah West Desert from the Oquirrh Mountains on the east to Nevada’s Steptoe Mountains on the west.¹⁰ Within this domain, the Goshutes concentrated in three areas: Deep Creek Valley near Ibapah on the Utah-Nevada border, Simpson’s Springs farther southeast, and the Skull and Tooele Valleys.¹¹ It was in this harsh climate that the Goshutes made their centuries-long bid to “survive[] in an area where very little survived.”¹²

8. OUIDA BLANTHORN, A HISTORY OF TOOELE COUNTY 36–37 (1998); DEAN L. MAY, UTAH: A PEOPLE’S HISTORY 101 (1987).

9. See BLANTHORN, *supra* note 8, at 37.

10. Dennis R. Defa, *Goshute Indians*, in UTAH HISTORY ENCYCLOPEDIA 228, 228 (Allan Kent Powell ed., 1994), available at http://historytogo.utah.gov/utah_chapters/american_indians/-goshuteindians.html [hereinafter Defa, *Goshute Indians*]; Dennis Ray Defa, A History of the Gosiute Indians to 1900, 12–13 (June 1979) (unpublished M.A. thesis, University of Utah) (on file with University of Utah Library, University of Utah) [hereinafter Defa, *Gosiute History*].

11. See Defa, *Gosiute History*, *supra* note 10, at 5–6 (describing past and present concentration of the Goshute population); see also James B. Allen & Ted J. Warner, *The Gosiute Indians in Pioneer Utah*, 39 UTAH HIST. Q. 162, 163 (1971) (describing the Goshutes’ region of inhabitation).

12. Defa, *Gosiute History*, *supra* note 10, at 13; see also MAY, *supra* note 8, at 28 (noting the Goshutes’ ability to extract food and supplies from the sparse environment they inhabited); Jesse D. Jennings, *Prehistory of Utah and the Eastern Great Basin*, in 98 UNIV. OF UTAH, ANTHROPOLOGICAL PAPERS 246 (1978) (describing the Goshutes as having an archaic lifestyle); Defa, *Gosiute History*, *supra* note 10, at 13–16 (describing the Goshutes’ struggle for

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A. *Defining Survival—Traditional Goshute Culture*

Goshute culture reflected—was defined by—the tribe’s survival in this inhospitable land. In an economy of hunting and gathering, the desert’s limited plant resources assumed primary importance.¹³ The Goshutes possessed a deep understanding of their environment, harvesting nearly 100 species of wild vegetables¹⁴ and hunting both insects and other, typically small, game. The most important vegetable was the pine nut, and the most important insects were red ants, crickets, and grasshoppers.¹⁵ Goshutes also hunted lizards, snakes, small fish, birds, gophers, rabbits, rats, skunks, squirrels, and, when available, antelope, bear, coyote, deer, elk, and sheep.¹⁶

The traditional Goshute political organization was the family, and most Goshutes gathered with other families only two or three times a year, typically for pine nut harvests, communal hunts, and winter lodging.¹⁷ These gatherings often lasted no more than two to six weeks, although winter gatherings were longer, with families organizing under a dagwani, or village headman.¹⁸ The dagwani delegated responsibilities, served as a “clearinghouse for information,” and provided some leadership,¹⁹ but “possessed little real political power.”²⁰

Most Goshutes adorned themselves with vegetable fiber clothes, rabbit skin capes, and animal skin moccasins, while those with greater hunting skill sported full buckskin attire similar to many Great Plains tribes.²¹ Goshute dwellings varied by resources and locale and included semi-circular windbreaks, caves lined with grass, and, in Skull

survival amidst economic poverty and the harsh conditions of the desert region they inhabited).

13. RALPH V. CHAMBERLIN, THE ETHNO-BOTANY OF THE GOSIUTE INDIANS OF UTAH (1911), *reprinted in* 2 MEMOIRS OF THE AMERICAN ANTHROPOLOGICAL ASSOCIATION pt. 5, at 337 (Kraus Reprint Corp. 1964); Allen & Warner, *supra* note 11, at 163.

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14. Allen & Warner, *supra* note 11, at 163; Sara Sue Price, A Comparison of Gosiute Material Culture and the Archaeology of Western Utah 6 (1952) (unpublished M.A. thesis, University of Utah) (on file with University of Utah Library, University of Utah).

15. BLANTHORN, *supra* note 8, at 56; CHAMBERLIN, *supra* note 13, at 336; Price, *supra* note 14, at 5–6.

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16. CHAMBERLIN, *supra* note 13, at 335–36; Allen & Warner, *supra* note 11, at 163; Defa, Gosiute History, *supra* note 10, at 9; Price, *supra* note 14, at 3–5.

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17. *See* CHAMBERLIN, *supra* note 13, at 336 (describing Goshute families’ annual autumn cooperative rabbit hunts); Defa, Gosiute History, *supra* note 10, at 15–19 (describing the Goshutes’ hunting and gathering habits and familial interaction).

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18. JULIAN H. STEWARD, CULTURE ELEMENT DISTRIBUTIONS: XXIII NORTHERN AND GOSIUTE SHOSHONI 279 (1943); Defa, Gosiute History, *supra* note 10, at 16–18.

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19. STEWARD, *supra* note 18, at 279.

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20. Defa, Gosiute History, *supra* note 10, at 16.

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21. Price, *supra* note 14, at 7–8.

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Valley, unique gabled houses.²² Perhaps most common, however, was the conical lodge made from logs thatched with juniper or cedar bark and branches.²³ Goshutes used these lodgings for their communal winter gatherings, where they told their myths. In these myths, hawk and coyote dominated, and it was a quarrel between the two on a large mountain that formed the Goshutes' terrain: "In anger hawk flew high, then swooped down on the mountain and clawed it, breaking off the top and scattering it into smaller mountains."²⁴

B. *Facing the Saints—Mormon Settlement and Displacement*

For many years, the Goshutes had effectively no contact with European colonists. As early as 1776, Spanish missionaries and, later, fur trapper Jedediah Smith observed the Goshutes,²⁵ but these observations discouraged rather than encouraged further Euro-Goshute encounters. Their journals described the Goshute domain as impassable—"barren and desolate," lacking in water, "destitute of game"—thus urging travelers to cross westward elsewhere.²⁶ It was not until the 1830s, when Spanish slave traders (and the Utes) began abducting Goshute women and children into forced servitude in California and New Mexico, that colonial contact occurred with any regularity²⁷—and that contact was merely a horrible, emerging harbinger of the sea change about to come.²⁸

On July 24, 1847, the vanguard members of the Mormon wagon and handcart companies entered the Salt Lake Valley, and the unfettered transformation of Goshute life began. Although many

22. *Id.* at 10–12.

23. *Id.* at 10; see CHAMBERLIN, *supra* note 13, at 346.

24. Floyd A. O'Neil, The Utes, Paiutes, and Goshutes, Utah History to Go, http://historytogo.utah.gov/people/ethnic_cultures/the_people_of_utah/theutessouthernpaiutesandgoshutes.html (last visited Feb. 12, 2009).

25. MAY, *supra* note 8, at 24; CHARLES S. PETERSON, UTAH: A BICENTENNIAL HISTORY 9 (Gerald George et al. eds., 1977); Defa, Gosiute History, *supra* note 10, at 23. Father Pierre Jean De Smet is believed to be the first European to actually contact the Goshutes. JOHN UPTON TERRELL, AMERICAN INDIAN ALMANAC 385 (1971). For more information on Smith's journey, see DALE L. MORGAN, JEDEDIAH SMITH AND THE OPENING OF THE WEST 7 (1953) and Charles Kelley, *Jedediah S. Smith on the Salt Desert Trail*, 3 UTAH HIST. Q. 23, 24 (1930).

26. MAY, *supra* note 8, at 24; Defa, Gosiute History, *supra* note 10, at 24–26.

27. See *id.* at 28–33 (explaining that enslavement of Great Basin natives was somewhat customary by 1813 but increased with the opening of the Old Spanish Trail). See generally William J. Snow, *Utah Indians and the Spanish Slave Trade*, 2 UTAH HIST. Q. 67, 69–73 (1929) (examining the exploitation of various Utah Indian tribes in the nineteenth century).

28. See Defa, Gosiute History, *supra* note 10, at 33 (noting that the slave trade struck fear in the Goshutes).

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Mormons assumed that Indians were a “chosen people,”²⁹ these religious pilgrims were not immune from the contemporary cultural view of Native Americans as more “creature” than human.³⁰ The resulting mix of beliefs proved to exacerbate the harm. Unlike many Euro-Americans pursuing property or money in the West, the Mormons did not just displace native occupants. They actively sought to assimilate Indians into their culture and religion,³¹ consequently speeding their displacement.³² The Goshutes were no exception.

In the autumn following the Mormons’ arrival, a group of Goshutes traveling to the Salt Lake Valley to bathe in natural hot springs taught a number of Mormons how to survive on the land’s resources, demonstrating techniques for gathering sunflower seeds, harvesting sego lily and other roots, and making cricket meal cakes.³³

29. S. Lyman Tyler, *The Indians in Utah Territory*, in *UTAH’S HISTORY* 357, 359 (Richard D. Poll et al. eds., 1989) (noting that the Book of Mormon identified American Indians as a branch of the House of Israel).

30. See MAY, *supra* note 8, at 102 (describing the attitude of white immigrant settlers in Utah toward Indians). Any generalization of an entire group’s attitude is of course fraught with fault by definition—necessarily over- and under-inclusive. Mormon-Indian relations were unquestionably complex. See Ronald W. Walker, *Toward a Reconstruction of Mormon and Indian Relations, 1847–1877*, 29 *BYU STUD.* 23, 23–24 (1989). Many accounts characterize Mormon settlers as friendly and bearing good intentions, for example, MAY, *supra* note 8, at 102–03; Tyler, *supra* note 29, at 358–59, and there is evidence that many Mormons were more enlightened in this respect than their contemporaries. See, e.g., MAY, *supra* note 8, at 102–03; Defa, *Gosiute History*, *supra* note 10, at 34. Still, a rather disdainful perception of Native Americans as “treacherous” often emerges. Defa, *Gosiute History*, *supra* note 10, at 43 (quoting Mormon settlers); see also BRIGHAM D. MADSEN, *THE SHOSHONI FRONTIER AND THE BEAR RIVER MASSACRE* 15 (Charles S. Peterson ed., 1985) (describing Goshutes as “degraded” and “wretched”); Floyd A. O’Neil & Stanford J. Layton, *Of Pride and Politics: Brigham Young as Indian Superintendent*, 46 *UTAH HIST. Q.* 236, 236–37 (1978) (noting the Mormon leaders’ promise of accommodation and respect for Indians, who were nevertheless crowded off of choice land); Tyler, *supra* note 29, at 359 (quoting Brigham Young and describing his friendly conduct toward Indians despite his belief that they were a “degraded and ignorant” people); Coulsen Wright & Geneva Wright, *Indian-White Relations in the Uintah Basin*, 2 *UTAH HUMAN. REV.* 319, 319, 339 (1948) (describing white views of Indians as an inferior race that harbors savage traits). See generally Dale L. Morgan, *The Administration of Indian Affairs in Utah, 1851–1858*, 17 *PAC. HIST. REV.* 383 (1948) (providing a historical account of activities conducted by the Administration of Indian Affairs in Utah).

31. Tyler, *supra* note 29, at 359; see also Defa, *Gosiute History*, *supra* note 10, at 45 (noting that by 1852 Mormons had begun to acculturate the Goshutes into Mormon society). For instance, Mormons abhorred the Indian slave trade, and Young urged settlers to purchase and free potential slaves and to marry native women, in hope of assimilation. MAY, *supra* note 8, at 106.

32. See ANGIE DEBO, *A HISTORY OF THE INDIANS IN THE UNITED STATES* 19–83 (1989) (explaining the European displacement of Indians). *But cf.* Tyler, *supra* note 29, at 358 (contending that Mormon impact “did not differ substantially from the outcomes elsewhere in the United States” where whites encountered Indians).

33. THOMAS G. ALEXANDER, *UTAH: THE RIGHT PLACE* 97 (1995).

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The favor, however, went unreturned. Goshutes quickly became known among whites by the demeaning moniker “Diggers,”³⁴ with the newcomers repeatedly lamenting Goshutes as “the most miserable looking set of human beings . . . ever beheld.”³⁵ Writing about his trip through the area a number of years later, for instance, Mark Twain described the Goshutes as:

[T]he wretchedest type of mankind [They] have no villages . . . a people whose only shelter is a rag cast on a bush to keep off a portion of the snow, and yet who inhabit one of the most rocky, wintry, repulsive wastes that our country or any other can exhibit.³⁶

Unfortunately for the Goshutes, the Mormon impact was not limited to verbal slights. Just as European colonists had done elsewhere, the Mormons brought with them new diseases, and many Indians began suffering from smallpox and measles.³⁷ Even more problematic, the Mormon influx opened Goshute territory to white land grabs. In July 1849, Mormon leader Brigham Young and a group of men entered Tooele Valley in search of suitable settlement locations; within three months, the Mormons had established a permanent presence.³⁸ Approximately a dozen Mormon families spent the 1849–1850 winter in the Tooele region.³⁹ By 1853, the city of Tooele boasted 602 Mormons and its neighboring community of Grantsville had 159.⁴⁰

The effect was obvious. Unfamiliar with the “strange white culture” and its “idea of exclusive [resource] use,” the Goshutes’ complete displacement quickly became imminent.⁴¹ To provide water for their new farms, mills, and housing, Mormons began permanently occupying land near streams and canyons—the same locations that the Goshutes traditionally used.⁴² Consequently, already sparse resources became even scarcer, and the Goshutes were forced to move away from the places they had historically relied upon for sustenance.⁴³

34. See BLANTHORN, *supra* note 8, at 39; Allen & Warner, *supra* note 11, at 163.

35. Defa, Gosiute History, *supra* note 10, at 49 (quoting non-Mormon Superintendent of Indian Affairs Jacob Forney).

36. MARK TWAIN, *ROUGHING IT* 146–47 (Beverly R. David & Ray Sapirstein eds., Oxford Univ. Press 1996) (1872).

37. ALEXANDER, *supra* note 33, at 97.

38. Defa, Gosiute History, *supra* note 10, at 42.

39. *Id.*

40. *Id.* at 43.

41. Allen & Warner, *supra* note 11, at 164.

42. *Id.*

43. See Tyler, *supra* note 29, at 358 (detailing the Mormons’ use of Indian grazing land and the reliance of both Mormons and Indians on the same water source). Other Mormon-led resource extraction, including timber harvesting, ranching, and mining, also laid

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C. Conflict Continued—The Goshute War and the Treaty of 1863

By 1860, the non-Indian population in the Goshutes' traditional domain was 1,000, more than the Goshutes themselves.⁴⁴ As this white presence swelled, hostilities also heightened and the conflict continued. An 1851 incident in which a group of Goshutes abducted a small herd of cattle was emblematic of the growing tension. The Goshutes ran the stolen cattle into Skull Valley for slaughter.⁴⁵ Fourteen men pursued but, after deeming the Goshute group too large, held back and waited for additional men.⁴⁶ When they returned with reinforcements, including military officers, they attacked the Skull Valley encampment, killing nine Goshutes in the process.⁴⁷ But if the white community intended to use death as retaliation, the impetus behind the Goshutes' raids was more paradoxical. While some were spurred by revenge,⁴⁸ most were motivated by necessity. Due to white occupation of their best lands, the Goshutes' livelihood gradually became dependent on the very immigrants who were displacing them.⁴⁹ As one settler observed, "[I]t is really a matter of necessity with these Indians that they starve or steal"⁵⁰

In 1860, the growing hostility came to a head. The Pony Express began service along a route that traversed the Goshute domain, with at least twenty stations on Goshute land, further diminishing available resources.⁵¹ In response, Goshutes began raiding mail stations and stage coaches, stealing supplies, and, sometimes, killing resisters.⁵² Settlers reacted by calling in the military, which attempted to protect the route by attacking Indians and defending stations and coaches.⁵³ The federal government also sought to quell Goshute hostility by giv-

a heavy hand. See Allen & Warner, *supra* note 11, at 163–64; Defa, Gosiute History, *supra* note 10, at 67–69, 72–75 (describing how ranching and mining undertaken by the Mormons deprived the Goshutes of essential resources and threatened their way of life).

44. Allen & Warner, *supra* note 11, at 164.

45. Defa, Gosiute History, *supra* note 10, at 48.

46. *Id.*

47. *Id.* at 48–49.

48. See, e.g., Floyd A. O'Neil, *Utes, Southern Paiutes, and Gosiutes*, in THE PEOPLES OF UTAH 27, 57 (Helen Z. Papanikolas ed., 1976) (describing the killing of soldiers who raped Goshute women).

49. Allen & Warner, *supra* note 11, at 164–65.

50. *Id.* at 167 (quoting Amos Reed).

51. *Id.* at 164; see also BLANTHORN, *supra* note 8, at 93–96; Defa, Gosiute History, *supra* note 10, at 46, 52 (noting that the Pony Express route followed the Overland Stage route, on which many stations that deprived the Goshutes of valuable resources had been built).

52. See O'Neil, *supra* note 48, at 57.

53. See Defa, Gosiute History, *supra* note 10, at 54–55 (describing military attacks on the Goshutes and the assignment of soldiers to stations along the route to protect them from and prevent Goshute raids).

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ing the stage company provisions to distribute along its route, yet the Goshute raids continued.⁵⁴ By the time the series of attacks, which became known as the Goshute War, ended in 1863, over 100 Indians and approximately sixteen whites were dead.⁵⁵

On October 12 of that year, the Goshutes entered into a treaty with the United States, signed by Abraham Lincoln, in which they declared their mutual “peace and friendship.”⁵⁶ Specifically, the Goshutes agreed to end “hostilities and all depredations upon the emigrant trains, the mail and telegraph lines, and . . . citizens of the United States,”⁵⁷ and to allow construction of military posts, mines, and rail lines in their territory.⁵⁸ In exchange, the United States agreed to pay \$1,000 per year for twenty years as “full compensation and equivalent for the loss of game” and the “inconvenience” of settlement.⁵⁹ Despite these concessions, the Goshutes did not relinquish sovereignty over their land.⁶⁰ Rather, the treaty described “the country of the Goship” as the tribe’s traditional domain; it included no territorial surrender.⁶¹

D. Removal Resisted—Federal Neglect and Failed Relocation

After the treaty, the Goshutes ended their attacks, but the treatment they received in return was anything but friendly.⁶² When Brigham Young was made governor and Superintendent of Indian Affairs upon Utah’s receipt of territorial status in 1850,⁶³ he wrote Congress requesting that Utah’s indigenous peoples, including the Goshutes, be relocated to a reservation where “white men [do not] dwell.”⁶⁴ Nothing ever came of his proposal, but when Jacob Forney replaced Young as Superintendent in 1858, he too ventured to consolidate “all”

54. Allen & Warner, *supra* note 11, at 167.

55. MAY, *supra* note 8, at 105; *see also* Defa, Gosiute History, *supra* note 10, at 56 (noting that the stage company lost 17 stations, 150 horses, and 16 men in the attacks).

56. Treaty with the Shoshonee-Goship Indians, U.S.-Shoshonee-Goship Bands of Indians, Oct. 12, 1863, 13 Stat. 681 [hereinafter Shoshonee-Goship Treaty].

57. *Id.* art. I.

58. *Id.* arts. II–IV.

59. *Id.* art. VII.

60. *See* Nw. Bands of Shoshone Indians v. United States, 324 U.S. 335, 343, 346 (1945) (construing four contemporaneous treaties “similar in form” to the Goshutes’ treaty as including no “cession or relinquishment”); *see also* Defa, Gosiute History, *supra* note 10, at 58 (noting that the treaty was an agreement of peace and amity and did not result in the Goshutes giving up sovereignty over their land).

61. Shoshonee-Goship Treaty, *supra* note 56, art. IV.

62. *See* Defa, Gosiute History, *supra* note 10, at 58–59 (describing the steps taken by the federal government to extinguish Indians’ title to land in Utah).

63. *Id.* at 45.

64. MAY, *supra* note 8, at 105–06 (quoting Young).

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of the Goshutes “into Deep Creek.”⁶⁵ Forney’s attempt failed, however, as the Skull Valley band refused to leave their ancestral home.⁶⁶ The pattern would only repeat from there.

In 1864 and 1865, Congress tried again to remove the Goshutes, variously, to the Uintah-Ouray Reservation, which the federal government established in 1861 for many Ute bands, or to new Goshute reservations to be created “at points as remote as may be practicable from the present settlements.”⁶⁷ Each time, the Goshutes resisted vehemently:

[The Goshutes] have a decided objection to go to the Uintah or any other place. They are willing to do anything on their own land, the land of their fathers . . . but they are not willing to go to the land of the strangers. The land of their fathers is sacred to them. On it they wish to live. And in it they wish their bodies laid when dead.⁶⁸

Still, the government refused to abandon its efforts, no doubt in part because white settlers increasingly sought Indian farmland for themselves.⁶⁹ By 1871, the government commissioned John Wesley Powell and George W. Ingalls to travel to the Great Basin and “induce” the Goshutes to remove to reservations.⁷⁰ Powell and Ingalls’s report recommended that the Goshutes, whom they estimated numbered approximately 256 in Utah and 204 in Nevada, be ordered to relocate to Uintah-Ouray.⁷¹ Predictably, the Goshutes disagreed, and the government backed down.⁷²

65. Defa, *Gosiute History*, *supra* note 10, at 49 (quoting U.S. DEP’T OF THE INTERIOR, OFFICE OF INDIAN AFFAIRS, REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS ACCOMPANYING THE ANNUAL REPORT OF THE SECRETARY OF THE INTERIOR FOR THE YEAR 1859, at 363–64 (1860)); *see also* Steven J. Crum, *The Skull Valley Band of the Goshute Tribe—Deeply Attached to Their Native Homeland*, 55 UTAH HIST. Q. 250, 252 (1987) (discussing the Bureau of Indian Affairs’ removal and consolidation policies). R

66. Crum, *supra* note 65, at 252; *see also* Allen & Warner, *supra* note 11, at 167 (discussing similar efforts to relocate natives to “reservations” by Forney’s successor, Benjamin Davis). R

67. Act of Feb. 20, 1865, ch. 45, 13 Stat. 432; *see also* Act of May 5, 1864, ch. 77, 13 Stat. 63; Crum, *supra* note 65, at 254–56 (detailing the 1870 effort of the Commissioner of Indian Affairs to again remove the Goshutes from their homeland). At one point in the process, J.E. Tourtellotte, a sympathetic Superintendent for Indian Affairs for Utah, recommended that the Goshutes remain on reservations in their homeland. *Id.* at 254. R

68. Crum, *supra* note 65, at 256 (quoting a letter from William Lee to the Bureau of Indian Affairs). R

69. *See id.* at 172.

70. *Id.* at 256; Defa, *Gosiute History*, *supra* note 10, at 64. R

71. Allen & Warner, *supra* note 11, at 174–75. R

72. Crum, *supra* note 65, at 257. R

Eventually, the government turned its attention to other matters, and the United States’ policy toward the Goshutes gradually became one of neglect. For over twenty years after Powell and Ingalls’s report, the Goshutes were consistently listed as occupants of the Uintah-Ouray Reservation, even though they remained hundreds of miles to the west.⁷³ By 1900, the Goshutes thus were very much a “forgotten people.”⁷⁴ Bureau of Indian Affairs (“BIA” or the “Bureau”) correspondence failed to make any real mention of them, and “no one took the trouble even to enumerate them.”⁷⁵ Powell and Ingalls’s 256 figure was repeated in every annual report from 1873 through 1895, “after which the Gosiutes disappeared completely from these statistical summaries.”⁷⁶

E. Shadows and Specters—Reservation and Revival

As the century turned, the government’s treatment of the Goshutes began to change. In 1911, the BIA finally sent an agent, Lorenzo Creel, to assess Goshute conditions.⁷⁷ Although white settlers favored removal,⁷⁸ Creel, recognizing the Goshutes’ “ardent[]” attachment to “the particular localities which they . . . inhabit[ed],”⁷⁹ ultimately recommended that the Goshutes be allowed to remain in Deep Creek and Skull Valley and that the government facilitate this course by providing agricultural and educational assistance.⁸⁰ In response, the government set aside two reservations exclusively for the Goshutes: 80 acres in Skull Valley and 34,560 acres in Deep Creek.⁸¹ Shortly thereafter, in a series of executive orders, Woodrow Wilson enlarged the Skull Valley Reservation to roughly 18,000 acres.⁸² The

73. See Allen & Warner, *supra* note 11, at 176 (noting that reports from Uintah listed the Goshute tribe as living on the reservation when few, if any, actually lived there); Defa, Gosiute History, *supra* note 10, at 64, 66 (finding that, rather than remove to Uintah, most Goshutes continued to live at Skull Valley and Deep Creek).

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74. Allen & Warner, *supra* note 11, at 176.

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75. *Id.*

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76. *Id.*

77. Crum, *supra* note 65, at 258.

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78. *Id.*

79. *Id.* at 258–59 (quoting Creel).

80. *Id.* at 259.

81. Exec. Order No. 1539 (May 29, 1912), *reprinted in* EXECUTIVE ORDERS RELATING TO INDIAN RESERVATIONS 1855–1922, at 168 (1975); Exec. Order No. 1903 (Mar. 23, 1914), *reprinted in* 4 INDIAN AFFAIRS: LAWS AND TREATIES 1048 (1929) [hereinafter LAWS AND TREATIES]; see also Allen & Warner, *supra* note 11, at 177 (discussing the size of each respective reservation).

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82. Exec. Order No. 2699 (Sept. 7, 1917), *reprinted in* LAWS AND TREATIES, *supra* note 81, at 1049; Exec. Order No. 2809 (Feb. 15, 1918), *reprinted in* LAWS AND TREATIES, *supra* note 81, at 1049.

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Bureau also built a number of wood-framed houses and a school in Skull Valley, and assigned an agricultural agent to assist the band in its continuing yet struggling farming efforts.⁸³

The additional governmental attention did not last long. Determining that the Goshutes were too few to justify funding, the BIA quickly relinquished its efforts in the name of fiscal constraint.⁸⁴ Mere years after its first class was held, the Bureau closed the Skull Valley school and soon “completely abandoned” the reservation.⁸⁵

Then, in yet one more ironic twist, the BIA in 1936 revitalized the idea of removing the Skull Valley Goshutes to Deep Creek, this time under the new name “consolidation.”⁸⁶ Some Skull Valley Goshutes in fact had already made this move to further their children’s education,⁸⁷ but those who remained in Skull Valley possessed no desire to leave. “[W]e are not going to move,” wrote Skull Valley leaders Little Moon and Sam Moon. “We want to stay here on Skull Valley Reservation.”⁸⁸ Yet the Bureau was unrelenting. It continued pushing removal as late as 1942, and when those Goshutes living in Deep Creek decided to establish a tribal government in 1940, the BIA saw that a provision was included in the Deep Creek Constitution allowing affiliation by the Skull Valley Goshutes—despite that band’s professed desire not to join and their repeated assertions that they were being “forc[ed] . . . to sign the self government papers.”⁸⁹

Ultimately, the Goshutes’ efforts to remain in Skull Valley prevailed. As World War II came and went, as their land increasingly became surrounded by chemical weapons, military testing facilities, and toxic waste, the Goshutes survived.⁹⁰ That the band managed to keep its homeland—even if what remained was a mere shadow of its aboriginal domain—thus became not only a symbol of the tribe’s resilience, but a specter of what was to come. Indeed, more than anyone could know, remote Skull Valley would eventually come to characterize, even epitomize, the crossroads that exists at the intersection of federal, state, and tribal relations: a crossroads of native sovereignty and the federal trust.

83. Crum, *supra* note 65, at 260.

84. *See id.* at 261 (“[T]he BIA concluded that it was not cost-effective to spend money on small, scattered groups of Indians living in isolated areas.”).

85. *Id.*

86. *Id.* at 263.

87. *See id.* at 264 (noting that, after World War I, some Goshutes were forced to move to Deep Creek because the Skull Valley school closed).

88. *Id.* at 265 (quoting Moon and Moon’s letter to BIA officials).

89. *Id.* at 265–66 (quoting Moon and Moon).

90. *See infra* Part III.A.

II. A TORTURED HISTORY, A CONFLICTED FUTURE: SOVEREIGNTY AND THE TRUST DOCTRINE IN CONTEXT

The federal trust doctrine and native sovereignty, from the Euro-American legal perspective at least,⁹¹ spring from a single origin—Chief Justice Marshall’s decisions in the *Cherokee Cases*⁹² nearly two centuries ago. But the doctrines’ common genesis foreshadowed little of what was to come. Today, the federal trust doctrine stands divorced in many ways from its original conception. Where the trust once represented a federal duty to protect indigenous nations from state jurisdiction, the ways in which it is now enforced are limited, and it cohabits with the converse rule that the federal duty to protect also affords a federal power to destroy. Sovereignty, which began as a principle that native nations should self-govern within their territories, somehow became the idea that native sovereignty is not bounded by land, but, like a social club, by membership—and even then oft diminishes whenever it touches “mainstream” society. The Supreme Court of the United States once proudly declared that “Indian nations ha[ve] always been considered . . . distinct, independent political communities, retaining their original natural rights.”⁹³ Mere shadows of this perspective remain.

A. *An Uneasy Marriage—The Cherokee Cases*

The birth of native sovereignty and the trust doctrine came from a place quite removed from Skull Valley, but the implications that these ideas ultimately had for the Goshutes could not be more profound. The story begins in Georgia in 1828—the year before President Andrew Jackson would threaten in his Annual Message⁹⁴ that the Cherokees should “emigrate beyond the Mississippi” or “submit” to state law,⁹⁵ and only two years before Congress would pass the Indian Removal Act of 1830,⁹⁶ effectively ordering this expulsion.⁹⁷

91. See, e.g., Philip P. Frickey, *Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 HARV. L. REV. 1754, 1777 (1997) [hereinafter Frickey, *Adjudication and Its Discontents*] (criticizing Indian law’s exclusion of Indian perspectives).

92. See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).

93. *Worcester*, 31 U.S. at 559.

94. This was the former name for the State of the Union Address. Gerard N. Magliocca, *Preemptive Opinions: The Secret History of Worcester v. Georgia and Dred Scott*, 63 U. PITT. L. REV. 487, 522 (2002).

95. THOMAS HART BENTON, THIRTY YEARS’ VIEW 164 (1865).

96. Indian Removal Act, ch. 148, 4 Stat. 411 (1830).

97. See VINE DELORIA JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 7, 33 (1983); Stacy L. Leeds, *By Eminent Domain or Some Other Name: A Tribal Perspective on Taking Land*, 41 TULSA L. REV. 51, 62–63 (2005). The statute failed at pushing the Cher-

Georgia started the fight, and the Cherokees took up arms to the Supreme Court to settle it. In 1828 and 1829, Georgia enacted two laws purporting to “add” the Cherokees’ territory to the state and to replace “all” Cherokee laws with Georgia’s.⁹⁸ Displeased with such a hostile overture, the Cherokees petitioned the Supreme Court for an injunction in *Cherokee Nation v. Georgia*.⁹⁹ This raised a threshold constitutional question: whether the Supreme Court had original jurisdiction over the case as a dispute “between a state,” Georgia, “and [a] foreign state[],” the Cherokees.¹⁰⁰ Although the Cherokees had long exercised sovereignty and, in fact, had recently adopted a constitution structurally mirroring the federal model, the Court took up the question.

Chief Justice Marshall’s astonishingly brief opinion negotiated a compromise position. He found that tribes were neither a domestic state nor a foreign nation. Instead, they occupied a twilight position, conducting relations with the United States “marked by peculiar and cardinal distinctions which exist no where else.”¹⁰¹ Accordingly, the Cherokees did not qualify as a “foreign state” under Article III, thus precluding jurisdiction.¹⁰² Marshall recognized that the Cherokees had made “numerous treaties” with the United States, just as a distinct political state would.¹⁰³ However, he pointed to Court precedent from eight years earlier holding that the so-called “discovery” of North America by European nations gave each “discovering” sovereign title over the claimed land to the “exclusion of all other Europeans.”¹⁰⁴ In the crosshairs of these competing factors, Marshall thus cast indige-

okees into “Indian Territory” as planned. That did not occur until 1838 when the government used military force to drive the tribe out of their homeland via the infamous “Trail of Tears.” Nearly a quarter of the 15,000-plus Cherokees in this forced migration died along the way. MURIEL H. WRIGHT, *A GUIDE TO THE INDIAN TRIBES OF OKLAHOMA* 58 (1951). For more information on the Trail of Tears, see generally CAROLYN ROSS JOHNSTON, *CHEROKEE WOMEN IN CRISIS: TRAIL OF TEARS, CIVIL WAR, AND ALLOTMENT, 1838–1907* (2003).

98. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 7–8 (1831).

99. *Id.* at 2.

100. U.S. CONST. art. III, § 2. The case proceeded as a question of original jurisdiction because general federal question jurisdiction in the district courts did not arise until 1875. See Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470, 470 (describing the requirements for federal question jurisdiction at that time).

101. *Cherokee Nation*, 30 U.S. at 16.

102. *Id.* at 20.

103. *Id.* at 16.

104. *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 573 (1823). For more information on the “discovery doctrine” and its criticisms, see Blake A. Watson, *The Thrust and Parry of Federal Indian Law*, 23 U. Dayton L. Rev. 437, 443–47 (1998). Of course, the very notion of discovery by Europeans was false. See generally CHARLES C. MANN, *1491: NEW REVELATIONS OF THE AMERICAS BEFORE COLUMBUS* (2006).

nous tribes into a previously non-existent netherworld. In a single stroke, he “denominated” them “domestic dependent nations.”¹⁰⁵

It was this holding that created the idea of the federal trust. Having deemed tribes “domestic dependent nations,” Marshall likened the Cherokees’ relationship with the United States to “that of a ward to his guardian.”¹⁰⁶ This “state of pupilage,” then, meant that although tribes maintained the right to live on their land, it was the federal government, as ultimate sovereign, that actually owned it, holding tribal territory in trust to protect tribes from other European claims.¹⁰⁷

This rejection of the Cherokees’ claim, however, did not end the matter. While *Cherokee Nation* was pending, Georgia enacted another law purporting to exercise jurisdiction over the Cherokees. This time, the statute declared it unlawful, among other things, for the Cherokees to assemble “any council or other pretended legislative body,” to hold “any court or tribunal whatever,” or for any “white person []” to reside on Cherokee land “without a license” from Georgia’s governor.¹⁰⁸ Four white Christian missionaries then sued to challenge the law.

In *Worcester v. Georgia*,¹⁰⁹ the Court addressed whether Georgia had the authority to enforce its laws on a tribe.¹¹⁰ Identifying the case as “of the deepest interest,” Chief Justice Marshall again wrote for the Court.¹¹¹ Marshall began with a lengthy historical account of European colonization, British-tribal relations, and the Cherokees’ various treaties. From this, he extracted a single principle: that tribes remained “completely separate[]” political entities despite European colonization, but that to remain as such they had accepted the protection of “more powerful” nations.¹¹² But this acceptance of protection did not divest tribal self-governance. “A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state.”¹¹³ Accordingly, Marshall found the Cherokee Na-

105. *Cherokee Nation*, 30 U.S. at 17.

106. *Id.*

107. *Id.* at 17–18.

108. *See Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 521–23 (1832) (quoting the statute passed by the Georgia state legislature) (internal quotation marks omitted).

109. 31 U.S. (6 Pet.) 515.

110. *Id.* at 541.

111. *Id.* at 536.

112. *Id.* at 555–59.

113. *Id.* at 561.

tion to be “a distinct community occupying its own territory . . . in which the laws of Georgia can have no force.”¹¹⁴

By these two cases, the Court thus wed native sovereignty and the trust from the outset. This may have been an uneasy marriage, but it was a marriage nonetheless. Not only did the federal government have a duty to protect tribes from other nations and states under *Cherokee Nation*, but under *Worcester* it was clear that the purpose of that protection was to ensure tribes’ ability to self-govern.¹¹⁵ In short, the *Cherokee Cases* canonized the federal trust doctrine, but the trust they created was all about protecting tribal autonomy.¹¹⁶

B. Protection or Power?—The Federal Trust Duty

Courts, commentators, and scholars struggle to clearly define the federal trust doctrine. Writers have called the doctrine “elusive and confusing,”¹¹⁷ “vexing”¹¹⁸ and “vague,”¹¹⁹ “unsatisfactorily amorphous”¹²⁰ and “unclear,”¹²¹ “schizophrenic,”¹²² “ill-defined,”¹²³ a “double-edged sword,”¹²⁴ “lack[ing] any coherence,”¹²⁵ and more

114. *Id.*

115. *Id.* at 554–56.

116. Although the Supreme Court thus created a sovereignty-based trust doctrine, it can be fairly said that in the years after the *Cherokee Cases*, the doctrine existed more in principle than practice. Just as the Goshutes experienced, those years featured continued westward expansion, tribal disruption and removal, and reservation creation. See COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 45–75 (Nell Jessup Newton et al. eds., LexisNexis 2005) (1941) [hereinafter COHEN]; LAURENCE ARMAND FRENCH, LEGISLATING INDIAN COUNTRY: SIGNIFICANT MILESTONES IN TRANSFORMING TRIBALISM 38–65 (2007) (describing the removal and dissolution of Indian tribes during the nineteenth century). For more background about the *Cherokee Cases*, see JILL NORGREN, THE CHEROKEE CASES: THE CONFRONTATION OF LAW AND POLITICS (1996) and Magliocca, *supra* note 94, at 521–47.

117. Kristen A. Carpenter, *Interpreting Indian Country in State of Alaska v. Native Village of Venetie*, 35 TULSA L.J. 73, 96 (1999).

118. G. William Rice et al., Commentary, *Federal Trust Responsibility and Conflicts of Interest: Environmental Protection or Natural Resource Development?*, 71 N.D. L. REV. 365, 379 (1995).

119. Derek C. Haskew, *Federal Consultation with Indian Tribes: The Foundation of Enlightened Policy Decisions, or Another Badge of Shame?*, 24 AM. INDIAN L. REV. 21, 31 (2000).

120. Nell Jessup Newton, *Enforcing the Federal-Indian Trust Relationship After Mitchell*, 31 CATH. U. L. REV. 635, 644 (1982).

121. Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471, 1495 [hereinafter Wood, *Trust Doctrine Revisited*].

122. Raymond Cross, *The Federal Trust Duty in an Age of Indian Self-Determination: An Epitaph for a Dying Doctrine?*, 39 TULSA L. REV. 369, 375 (2003) (explaining that the Supreme Court has made a schizophrenic distinction between “generalized” and “specific” trust duties).

123. GILBERT L. HALL, THE FEDERAL INDIAN-TRUST RELATIONSHIP 9 (1979).

124. Janice Aitken, *The Trust Doctrine in Federal Indian Law: A Look at Its Development and at How Its Analysis Under Social Contract Theory Might Expand Its Scope*, 18 N. ILL. U. L. REV. 115, 146 (1997) (explaining that the Court’s use of the trust doctrine has both given Congress power over Indian affairs and allowed Indians to retain sovereignty).

“conflicted” than any other concept in Indian law.¹²⁶ Professor Nell Jessup Newton cuts to the point: “Asserting the existence of the trust relationship between Indian tribes and the federal government is far easier than defining its contours.”¹²⁷

Despite these definitional dilemmas, the trust’s importance to Indian law cannot be lost on even the field’s most casual observer. The doctrine has long been recognized as “basic,”¹²⁸ “ageless,”¹²⁹ “foundational,”¹³⁰ “fundamental,”¹³¹ “central,”¹³² “core,”¹³³ and “principal”¹³⁴ to United States-tribal relations—a “constant[],”¹³⁵ “one of the primary cornerstones of Indian law.”¹³⁶ Thus, although outlining the meaning of the trust doctrine is problematic, it is also critical.

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.¹³⁷ In this context, the federal government has been found to owe a fiduciary duty to tribes and Indians as a literal manager of the trust.¹³⁸ More broadly, however, the doctrine also has been characterized as imposing a moral obliga-

125. Rice et al., *supra* note 118, at 368.

126. *Id.* at 367.

127. Nell Jessup Newton, Introduction, *The Indian Trust Doctrine after the 2002–2003 Supreme Court Term*, 39 TULSA L. REV. 237, 237 (2003).

128. COHEN, *supra* note 116, at 418.

129. CROSS, *supra* note 122, at 375.

130. Christy McCann, *Dammed if You Do, Damned if You Don't: FERC's Tribal Consultation Requirement and the Hydropower Re-licensing at Post Falls Dam*, 41 GONZ. L. REV. 411, 434 (2006).

131. Robert J. Miller, *The Doctrine of Discovery in American Indian Law*, 42 IDAHO L. REV. 1, 26 (2005).

132. Lynn H. Slade, *The Federal Trust Responsibility and Tribal-Private Natural Resource Development*, 2005 ROCKY MTN. MIN. L. INST. 13B-1, 13B-5 [hereinafter Slade, *Natural Resource Development*].

133. Robert A. Williams Jr., *Columbus's Legacy: Law as an Instrument of Racial Discrimination Against Indigenous Peoples' Rights of Self-Determination*, ARIZ. J. INT'L & COMP. L., 1991, at 51, 67.

134. Robert Laurence, *Thurgood Marshall's Indian Law Opinions*, 27 HOW. L.J. 3, 3 (1984).

135. HALL, *supra* note 123, at iii.

136. FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 221 (Rennard Strickland et al. eds., 1982).

137. Mary Christina Wood, *The Tribal Property Right to Wildlife Capital (Part I): Applying Principles of Sovereignty to Protect Imperiled Wildlife Populations*, 37 IDAHO L. REV. 1, 91–94 (2000). The Department of the Interior defines the trust doctrine as the federal government’s “legal obligation . . . to protect valuable Indian lands, water[,] minerals, and other natural resources.” HALL, *supra* note 123, at 2 (citation and internal quotation marks omitted).

138. *See, e.g., Seminole Nation v. United States*, 316 U.S. 286, 296–97 (1942).

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tion on the federal government to protect tribes generally.¹³⁹ Today, the federal trust responsibility, “[r]educ[ed] to its essence,” represents all these things.¹⁴⁰ It is “a creature of the judiciary . . . used to harness actions taken by the other two branches of government, and as a basis for compensating wrongs committed by those branches against the Indian people.”¹⁴¹ This is the inherent malleability that Marshall created—a malleability that has allowed the doctrine to be repeatedly transformed over the years, leaving a conflicted legacy for tribes and their members.

1. *The Trust as Power—Kagama and Lone Wolf*

The trust doctrine’s metamorphosis from a shield for self-governance to a sword of cultural destruction transpired in two of the Supreme Court’s most infamous cases of all time: *United States v. Kagama* and *Lone Wolf v. Hitchcock*.¹⁴²

In *United States v. Kagama*,¹⁴³ two Indians were accused of murder on the Hoopa Valley reservation in California. The federal courts asserted jurisdiction under a new statute making it a federal crime for any Indian to commit eight different major crimes, including murder, on or off the reservation.¹⁴⁴ Ruling on appeal, the Supreme Court found it self-evident that Congress had prerogative to regulate Indian-committed crimes. The Court acknowledged that tribes possessed inherent sovereignty but nevertheless found tribes’ “semi-independent position” of “regulating their internal and social relations” of little mo-

139. Wood, *Trust Doctrine Revisited*, *supra* note 121, at 1509; *see also* *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565–66 (1903) (observing that in its dealing with Indian tribes, “a moral obligation rested upon Congress to act in good faith in performing the stipulations entered into on its behalf”).

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140. *See* Wood, *Trust Doctrine Revisited*, *supra* note 121, at 1495 (noting that the trust doctrine is “amorphous” and used both to harness the actions of Congress and compensate Indians for wrongs committed against them by the government).

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141. *Id.*

142. *See* Ediberto Roman, *Coalitions and Collective Memories: A Search for Common Ground*, 58 MERCER L. REV. 637, 649–50 (2007) (categorizing *Kagama* and *Lone Wolf* with *Dred Scott v. Sandford* and *Plessy v. Ferguson*). Numerous scholars have explained why *Kagama* and *Lone Wolf* were wrongly decided. *See, e.g.*, Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 171–77, 184–87 (2002) (arguing that the *Kagama* Court departed from norms of constitutional interpretation, misused precedent, and disrespected tribal sovereignty in reaching its decision, and that the *Lone Wolf* Court justified the plenary doctrine on false historical assertions and failed to differentiate between foreign nations and Indian tribes); Daniel L. Rotenberg, *American Indian Tribal Death—A Centennial Remembrance*, 41 U. MIAMI L. REV. 409, 414–21 (1986) (arguing that the *Kagama* Court incorrectly analyzed the case and misconstrued constitutional policy).

143. 118 U.S. 375 (1886).

144. *Id.* at 376–78. Today, the list of such “major crimes” is longer. *See* 18 U.S.C. § 1153 (2006).

ment.¹⁴⁵ Instead, the Court unanimously held that because tribes, as “wards of the nation,” are “*dependent* on the United States . . . for their political rights,”¹⁴⁶ the federal government’s “duty of protection” also gave it a sweeping power to regulate their actions under federal law.¹⁴⁷

If this twisting of the trust was not enough, the Court’s decision in *Lone Wolf v. Hitchcock*¹⁴⁸ two decades later transformed the principle even further. There, the Kiowas and Comanches had entered into an 1867 treaty with the United States creating a reservation and declaring invalid any later cession of that reservation without the signatures of at least three-fourths of the reservation’s adult males.¹⁴⁹ Subsequently, the federal government entered into an agreement to pay the tribes \$2 million to allot approximately two million acres of the reservation for settlement by non-Indians.¹⁵⁰ When Congress ratified the agreement, however, some of the terms were changed, and it became evident that far less than the required three-fourths of male members had assented.¹⁵¹ The Supreme Court nevertheless had no trouble dismissing the tribes’ suit. Citing Congress’s paramount authority over Indian property, the Court cast aside its prior decisions recognizing the occupation of tribal lands as sacred.¹⁵² Congress’s power was not only paramount but plenary, and so the legislature necessarily had the right to effect “mere change[s] in the form of investment of Indian tribal property”—from actual land to money.¹⁵³

In just a few pages, the Supreme Court thus entirely reshaped the federal trust from a protective relationship to a power dynamic.¹⁵⁴ This is precisely why commentators have described *Kagama* and *Lone Wolf* as the “dark side” of the trust,¹⁵⁵ “the Indians’ *Dred Scott* decision.”¹⁵⁶ These cases “present[] a very different conception of the trust responsibility from that of the *Cherokee Cases*—as a basis for congressional power outside the enumerated provisions in Article I . . . unconstrained by any requirement to protect tribal self-govern-

145. *Kagama*, 118 U.S. at 381–82.

146. *Id.* at 383–84.

147. *Id.* at 384–85.

148. 187 U.S. 553 (1903).

149. *Id.* at 554 (citing Treaty with the Kiowas and Comanches, U.S.-Kiowa-Comanche Tribes of Indians, art. XII, Oct. 21, 1867, 15 Stat. 581, 585).

150. *Id.* at 555.

151. *Id.* at 556–57.

152. *Id.* at 564–65.

153. *Id.* at 565, 568.

154. COHEN, *supra* note 116, at 420.

155. Slade, *Natural Resource Development*, *supra* note 132, at 13B-7.

156. *Sioux Nation of Indians v. United States*, 601 F.2d 1157, 1173 (Ct. Cl. 1979) (Nichols, J., concurring), *aff'd*, 448 U.S. 371 (1980).

ment.”¹⁵⁷ Indeed, the Court’s initial conception of Congress’s new trust power seemed completely unbridled: Congress’s moral obligation to protect tribes is largely hortatory because, as the Court wrote in *Lone Wolf*, courts “must *presume* that Congress acted in *perfect good faith* in the dealings with the Indians.”¹⁵⁸

2. *The Trust as Charade: Retreating from the Plenary, Sort of*

As it turned out, the plenary power that the Court endorsed in *Kagama* and *Lone Wolf* was not entirely unqualified. Although certainly not disavowing the power side of the trust,¹⁵⁹ the Court eventually placed some limitations on this naked authority.

One series of cases repeatedly held that while the federal government could take Indian land without tribal consent, it could not do so without compensation.¹⁶⁰ “That,” the Court held, “would not be an exercise of guardianship, but an act of confiscation.”¹⁶¹ The Court, though often deeming Indians “simple and uninformed people,”¹⁶² also has recognized that despite technical federal title, tribes “owned” their lands “[f]or all practical purposes.”¹⁶³ Furthermore, courts have found that the trust responsibility applies not only to federal confiscation of lands but also to federal mismanagement of funds.¹⁶⁴

By 1946, the Court explicitly acknowledged the broader rule to which these cases already had been pointing in principle. The Court observed, “The power of Congress over Indian affairs may be of a ple-

157. 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-1, 13A-10; see also Alex Tallchief Skibine, *Reconciling Federal and State Power Inside Indian Reservations with the Right of Tribal Self-Government and the Process of Self-Determination*, 1995 UTAH L. REV. 1105, 1132 [hereinafter Skibine, *Reconciling*] (noting that the *Lone Wolf* Court inferred from *Kagama* that Congress’s duty to protect tribes provides an additional source of congressional power beyond that provided by the Constitution); Alex Tallchief Skibine, *Redefining the Status of Indian Tribes Within “Our Federalism”: Beyond the Dependency Paradigm*, 38 CONN. L. REV. 667, 692–93 (2006) (arguing that once Indian tribes are incorporated into the United States’ constitutional system, Congress can only exercise power over commerce with Indian tribes).

158. *Lone Wolf*, 187 U.S. at 566, 568 (emphasis added).

159. See Chambers, *supra* note 157, at 13A-11.

160. See, e.g., *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110, 113 (1919).

161. *Id.*

162. *Id.* at 111.

163. *United States v. Shoshone Tribe of Indians*, 304 U.S. 111, 115–16 (1938); see also *United States v. Creek Nation*, 295 U.S. 103, 109–11 (1935) (holding that although the tribal lands were under a guardianship of the United States, the government was required to provide the tribe with just compensation for appropriating the land). The Court has also held that the trust obligation continued to apply even though an Indian may have gained citizenship. *Cramer v. United States*, 261 U.S. 219, 232 (1923).

164. *Seminole Nation v. United States*, 316 U.S. 286, 296–97 (1942).

nary nature; but it is not absolute.”¹⁶⁵ Thus, the Court left open the door for a possible return to a trust doctrine rooted more in Marshall’s conception of self-determination and tribal separatism than *Kagama* and *Lone Wolf*’s emphasis on power and cultural submission.¹⁶⁶ As one commentator put it, “The twentieth century [saw] the Court back away from the harshest elements of [the *Kagama-Lone Wolf*] era cases and begin to define the contours of a legally enforceable federal trust obligation with respect to Indian land.”¹⁶⁷ The precise shape of these contours, however, would prove far more complex than might have been imagined.

3. *The Trust as Modern Ideal: Weeks, Mitchell, and Marshall’s Return?*

The modern federal trust is riddled with the ironies and intricacies its turbulent history portends. Some scholars have argued that the trust now signifies, at least to a degree, a return to Marshall’s original conception,¹⁶⁸ and thus, is “a major weapon in the arsenal of Indian rights.”¹⁶⁹ The trust today “provides Indian litigants with legal theories to overturn agency action, to obtain money damages against private parties and the United States . . . and, at least theoretically, to provide limits on the exercise of ‘plenary’ authority by Congress.”¹⁷⁰ Still, courts have not left the power portion of the trust entirely aside, and the doctrine’s conflicted legacy persists. How that legacy plays, the Supreme Court has held, turns largely on two factors: the branch of the federal government at issue and, as to the Executive Branch, the statutes in question.

a. *The Trust and Congress*

The trust remains perhaps the most inherently conflicted when applied to Congress. The Court’s original reconceptualization of the trust was all about congressional authority, and courts today continue

165. *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 54 (1946) (citing *Stephens v. Cherokee Nation*, 174 U.S. 445, 478 (1899)); see also *Creek Nation*, 295 U.S. at 109–10 (noting that the government’s power to control and manage the tribe’s lands was limited by the requirement that the government provide the tribe with just compensation before giving the land to others or appropriating it for its own purposes).

166. See Chambers, *supra* note 157, at 13A-12.

167. Lynn H. Slade, *The Federal Trust Responsibility in a Self-Determination Era*, 1999 ROCKY MTN. MIN. L. INST. 2A-1, 2A-8 [hereinafter Slade, *Self-Determination Era*].

168. Chambers, *supra* note 157, at 13A-19–20.

169. Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 233 (1984).

170. Paul E. Frye, “A Travesty of a Mockery of a Sham”: *The Federal Trust Duty and Indian Self-Determination*, 1999 ROCKY MTN. MIN. L. INST. 2B-1, 2B-5.

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to recognize that the trust yields this extra-constitutional muscle.¹⁷¹ In its most recent precedent, however, the Court has established a test limiting how far Congress may flex this trust power.

In *Delaware Tribal Business Committee v. Weeks*,¹⁷² Congress had adopted legislation providing for funds to redress the United States' breach of an 1854 treaty with the Delaware Indians. A subset of the Delawares that, a century before, had chosen to remain in Kansas when the main group was removed to Oklahoma challenged the statute for excluding them. Assessing this claim, the Court noted that even though *Lone Wolf* purported to make every congressional enactment addressing Indians "always . . . a political one," the plenary power was plenary no more.¹⁷³ Instead, congressional acts were subject to judicial review, and the standard was that Congress's "judgment should not be disturbed '[a]s long as the special treatment can be tied rationally to the fulfillment of Congress'[s] unique obligation toward the Indians'"¹⁷⁴

Based on *Weeks*, then, the trust appears to impose at least some limits on Congress. Granted, the kind of "rationality" standard that *Weeks* articulated is in the family of the most deferential available, but the Court's recognition that there is at least *some* review is significant. Furthermore, given that such review must take place under the lens of Congress's "unique obligation toward the Indians"¹⁷⁵ rather than being justified by "any" legitimate public purpose,¹⁷⁶ it is possible that this standard is more akin to "rational basis plus" than the plain rationality review courts typically envision.¹⁷⁷ Of course, even in the face of *Weeks*, the Court has never used the trust to strike down a con-

171. See, e.g., *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998) ("Congress possesses plenary power over Indian affairs, including the power to modify or eliminate tribal rights.").

172. 430 U.S. 73 (1977).

173. *Id.* at 84 (quoting *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903)).

174. *Id.* at 85 (alteration in original) (quoting *Morton v. Mancari*, 417 U.S. 535, 555 (1974)); see also *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 249 (1985) (noting that Congress's plenary power "does not mean that litigation involving such matters necessarily entails nonjusticiable political questions").

175. *Weeks*, 430 U.S. at 85 (quoting *Morton*, 417 U.S. at 555).

176. See *Christy v. Hodel*, 857 F.2d 1324, 1329 (9th Cir. 1988) ("The law will be upheld if the court can hypothesize any possible basis on which the legislature might have acted.").

177. Alex Tallchief Skibine, *Integrating the Indian Trust Doctrine into the Constitution*, 39 TULSA L. REV. 247, 253–54 (2003). For more on the notion of "rationality plus" review, see generally Jane S. Schacter, *Lawrence v. Texas and the Fourteenth Amendment's Democratic Aspirations*, 13 TEMP. POL. & CIV. RTS. L. REV. 733, 740–43, 747–48 (2004), which discusses Justice O'Connor's use of a "more searching" or "rational basis plus" standard of review in her *Lawrence v. Texas* concurrence.

gressional act.¹⁷⁸ That fact alone urges questions of just how meaningful the trust really can be in limiting Congress, although it also bears noting that Congress today takes the trust very seriously.¹⁷⁹ Yet, as the Supreme Court would soon point out following *Weeks*, Congress’s repeated acknowledgment of the trust is not enough to restrain.

b. The Trust and the Executive

In 1980 and 1983, the Supreme Court issued two companion decisions—*United States v. Mitchell*¹⁸⁰ (“*Mitchell I*”) and *United States v. Mitchell*¹⁸¹ (“*Mitchell II*”)—that together form the most important trust doctrine case since *Lone Wolf*. These decisions established the framework for measuring trust claims against the Executive Branch.

At issue in *Mitchell I* and *Mitchell II* were the monetary claims of the Quinault Tribe and individual allottee land owners. The claimants alleged that the United States Department of the Interior (“DOI”) breached its trust obligation by failing, among other things, to obtain fair market value for timber sold off the claimants’ land, to collect payment on those sales, and to sustainably manage the land.¹⁸²

The basis of the claim in *Mitchell I* was the General Allotment Act of 1887, which declared that the United States would “hold the land . . . in trust for the sole use and benefit of” Indian allottees to whom tribal land had been assigned until, effectively, a fee patent issued.¹⁸³ The Court determined that a congressional act could create two kinds of trust relationships: one that impresses a “bare” or “lim-

178. COHEN, *supra* note 116, at 423; Chambers, *supra* note 157, at 13A-12; Wood, *Trust Doctrine Revisited*, *supra* note 121, at 1508 (recognizing that despite many decisions from the Court describing Congress’s fiduciary duties to Indian tribes, the Court has never used the doctrine to invalidate a federal statute). Indeed, the Court has gone so far as to uphold Congress’s authority to terminate the trust relationship *in toto*. See, e.g., Bd. of County Comm’rs v. Seber, 318 U.S. 705, 718 (1943) (noting that Congress retains the power to end the guardian relationship); *United States v. Sandoval*, 231 U.S. 28, 46 (1913) (noting that Congress’s power to end the guardianship is settled doctrine (citing *Tiger v. W. Inv. Co.*, 221 U.S. 286, 315 (1911))).

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179. COHEN, *supra* note 116, at 420–23 (finding that most modern statutes reaffirm the trust responsibility); Kevin Gover, *An Indian Trust for the Twenty-First Century*, 46 NAT. RESOURCES J. 317, 340 (2006).

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180. *United States v. Mitchell (Mitchell I)*, 445 U.S. 535 (1980). For a more in-depth discussion of *Mitchell I*, see generally Newton, *supra* note 120.

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181. *United States v. Mitchell (Mitchell II)*, 463 U.S. 206 (1983).

182. *Mitchell I*, 445 U.S. at 537.

183. General Allotment Act of 1887, ch. 119, § 5, 24 Stat. 388, 389 (codified as amended at 25 U.S.C. § 348 (2006)). See generally Kenneth H. Bobroff, *Retelling Allotment: Indian Property Rights and the Myth of Common Ownership*, 54 VAND. L. REV. 1559 (2001) (arguing that the General Allotment Act failed because it forced a property system on all Indian tribes without allowing any tribe to change it); Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ.

ited” duty of care for a narrow purpose, such as against land divestiture, and another that imposes a more searching “full fiduciary responsibility” to actively manage a trust *res*.¹⁸⁴ Consequently, because the General Allotment Act envisioned that “the Indian allottee, and not a representative of the United States,” would bear responsibility for managing the allotted lands, the Court held that the right to recover from the government “must be found in some source other than [the General Allotment] Act,” and remanded the case.¹⁸⁵

Mitchell II involved the claimants’ attempt to find that other source referenced by the Court in *Mitchell I*. The Court agreed that the claimants found it in various timber management statutes giving the DOI “pervasive” control over the Quinaltuls’ land.¹⁸⁶ This type of *de facto* management—from “literal[] daily supervision” to administration of “[v]irtually every stage” of harvesting and sales¹⁸⁷—meant that each of the “necessary elements of a common-law trust [we]re present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands, and funds).”¹⁸⁸ Accordingly, the Court ordered that the DOI would be held to an exacting fiduciary standard and that the claimants could rightfully seek monetary damages.¹⁸⁹

The *Mitchell* decisions, therefore, created a decisional dichotomy for trust claims against the Executive.¹⁹⁰ Where the government involves itself extensively in the management of Indian lands, as in *Mitchell II*’s timber statutes, a higher trust standard applies and monetary damages are available so long as sovereign immunity is waived.¹⁹¹ In contrast, where the government is less involved in the management of Indian lands, as under the General Allotment Act in *Mitchell I*, a lesser trust obligation controls and remuneration typically cannot be

ST. L.J. 1 (1995) (discussing the legacy of the General Allotment Act from its origins through recent Supreme Court opinions that directly and indirectly interpret the Act).

184. *Mitchell I*, 445 U.S. at 542; *Mitchell II*, 463 U.S. at 224.

185. *Mitchell I*, 445 U.S. at 542–43, 546.

186. *Mitchell II*, 463 U.S. at 219, 224.

187. *Id.* at 222 (citation and internal quotation marks omitted).

188. *Id.* at 225.

189. *Id.* at 224–26, 28.

190. See COHEN, *supra* note 116, at 428–29; Rebecca Tsosie, *The Conflict Between the “Public Trust” and the “Indian Trust” Doctrines: Federal Public Land Policy and Native Nations*, 39 TULSA L. REV. 271, 276–77 (2003) (arguing that the federal government’s trust relationship with Indian tribes consists of a “general” trust relationship, a relationship of specific duties created by statutes, or a full fiduciary relationship that results from the government’s management of tribal assets).

191. See *Mitchell II*, 463 U.S. at 218–19 (finding that the government waived its sovereign immunity under the Tucker Act, 28 U.S.C. § 1505 (2006), and could be found liable for monetary damages if the substantive laws at issue allowed for monetary recovery).

obtained. In short, “the applicable statutes, regulations, treaties, and executive orders ‘define the contours of the United States’ fiduciary responsibilities.’”¹⁹² The upside of this dichotomy is that it is now clear that both tribes and individual Indians may rely on the trust to seek compensation. The downside is that federal law dictates when that duty arises in the first place. Moreover, drawing the line between what is “narrow” and “comprehensive” is not always particularly easy.¹⁹³

The picture is yet muddier still when a party seeks prescriptive relief rather than monetary damages. Some commentators have argued that the *Mitchell* cases’ logic should not bleed from the Indian Tucker Act¹⁹⁴ context in which those decisions were rendered,¹⁹⁵ but the fact is that the *Mitchell* cases’ schema has influenced courts’ consideration of other trust-based claims.¹⁹⁶ By default, “courts tend to read *Mitchell* [II] broadly as requiring that the trust doctrine be limited to obligations specifically stated in statutes.”¹⁹⁷ Consequently, although there are some cases in which courts have found that an extra-statutory trust obligation must guide or influence agency decisionmaking,¹⁹⁸ the bulk of precedent weighs against the trend. When an

192. COHEN, *supra* note 116, at 433 (quoting *Mitchell II*, 463 U.S. at 224).

193. See Aitken, *supra* note 124, at 137–38 (arguing that the Supreme Court has failed to define the parameters of the *Mitchell II* idea of “comprehensiveness” of federal control, leaving future courts room to construe it in a manner favorable to the outcome they desire). A relatively easy case in this respect was *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003), which ruled that where the United States held land under a statutory trust that did not impose duties of management and conservation, the government’s daily occupation of the land nevertheless subjected it to an obligation to preserve the property improvements. *Id.* at 474–76. Filling the interstices between cases like *White Mountain Apache Tribe* and *Mitchell I* is the more difficult task.

194. Pub. L. No. 79-726, 60 Stat. 1055 (1946) (codified as amended at 28 U.S.C. § 1505 (2000)).

195. See Wood, *Trust Doctrine Revisited*, *supra* note 121, at 1522 (arguing that the holdings of the *Mitchell* cases are limited to the Tucker Act context and should not apply to common law claims). *But see* *Gros Ventre Tribe v. United States*, 344 F. Supp. 2d 1221, 1226–27 (D. Mont. 2004) (criticizing this view).

196. See, e.g., *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 574 (9th Cir. 1998); *N. Slope Borough v. Andrus*, 642 F.2d 589, 611–12 (D.C. Cir. 1980); *Gros Ventre Tribe*, 344 F. Supp. 2d at 1226–27; see also Wood, *Trust Doctrine Revisited*, *supra* note 121, at 1522 n.234 (providing examples of courts that have relied on *Mitchell II*).

197. COHEN, *supra* note 116, at 438.

198. See, e.g., *N. Cheyenne Tribe v. Hodel*, 851 F.2d 1152, 1158 (9th Cir. 1988) (finding that social, cultural, and economic costs to the tribe must be considered); *United States v. Washington*, 759 F.2d 1353, 1357 (9th Cir. 1985) (upholding tribe’s right to take fish, regardless of whether natural or stocked); *Jicarilla Apache Tribe v. Supron Energy Corp.*, 728 F.2d 1555, 1567 (10th Cir. 1984) (“[S]tricter standards apply to federal agencies when administering Indian programs.”); *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252, 256 (D.D.C. 1972) (commenting that DOI’s “duty was not to determine” water allocation that “hopefully everyone could live with”).

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agency has satisfied its specific statutory mandates, courts repeatedly have found the trust obligation thereby fulfilled as well.¹⁹⁹ In fact, when a generally applicable statute, such as federal environmental law, is in question, some courts have found sufficient the agency's mere consideration of the Indian interest along with the statute's other public considerations.²⁰⁰

Where this leaves the trust is in a place far removed from Marshall's original conception. Despite the great hope of many advocates and commentators, the trust doctrine—though certainly a useful tool in some respects—simply is not the robust vehicle of self-determination it could be. Perhaps even more troubling, the Supreme Court's current vision of tribal sovereignty also has become increasingly lacking.

199. See, e.g., *Okanogan Highlands Alliance v. Williams*, 236 F.3d 468, 479 (9th Cir. 2000) (finding that when an agency does not have a specific duty to a tribe, it fulfills its fiduciary responsibility to the tribe by complying with its general regulations); *Skokomish Indian Tribe v. FERC*, 121 F.3d 1303, 1308–09 (9th Cir. 1997) (finding that the federal trust did not compel FERC to grant a tribe's application to build a hydropower facility when such permit was barred by FERC's generally applicable regulations); *Nance v. EPA*, 645 F.2d 701, 710–11 (9th Cir. 1981) (noting that absent specific provisions, the Clean Air Act and EPA regulations provided adequate procedures to fulfill the federal trust obligation); *N. Slope Borough*, 642 F.2d at 611–13 (noting that trust responsibilities are only created by statute, treaty, or executive order, and that, barring such specific responsibilities, no fiduciary responsibilities exist beyond those required by agency regulations); *Gros Ventre Tribe*, 344 F. Supp. 2d at 1226 (noting that where there is no specified duty or control over tribal property, the agency satisfies the federal trust by complying with the applicable laws or regulations); *Havasupai Tribe v. United States*, 752 F. Supp. 1471, 1489 (D. Ariz. 1990) (finding that the government fulfilled its general fiduciary duty in the absence of specific duties by complying with the underlying statute and regulations); cf. *Dep't of Interior v. Klamath Water Users Prot. Ass'n*, 532 U.S. 1, 15–16 (2001) (declining to create a Freedom of Information Act exemption based on the trust).

200. See, e.g., *Morongo Band of Mission Indians*, 161 F.3d at 574 (noting that in the absence of a specific duty, the federal trust responsibility is satisfied by compliance with general regulations); *N. Slope Borough*, 642 F.2d at 593 (stating that an Indian tribe's reliance on whale hunting was to be considered along with the country's need for increased oil capacity); see also *Okanogan Highlands Alliance*, 236 F.3d at 472–73, 478–80 (ruling in the context of the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370d (2000)). Such holdings are largely due to the inherent conflict of interest under the trust—the government's obligation to Indian beneficiaries, but also to the public. See Ann C. Juliano, *Conflicted Justice: The Department of Justice's Conflict of Interest in Representing Native American Tribes*, 37 GA. L. REV. 1307, 1329–36 (2003) (outlining the various conflicts of interest that may arise over government management of Indian land); Judith V. Royster, *Equivocal Obligations: The Federal-Tribal Trust Relationship and Conflicts of Interest in the Development of Mineral Resources*, 71 N.D. L. REV. 327, 348–58 (1995) (discussing the conflict of interests present when the federal government manages water resources for the benefit of both the tribe and federal interests).

C. *Power or Paucity?—Native Sovereignty*

When tribes speak of sovereignty, they typically mean *inherent* sovereignty. Indeed, this is the sovereignty that tribes long have possessed. Before European contact, “[m]ost Indian tribes were independent, self-governing societies” with their own laws, social norms, and enforcement mechanisms.²⁰¹ Although these forms of government varied, the colonizing European nations, first, and the United States, subsequently, entered into over 800 treaties with Native American nations.²⁰² Because treaty-making is exclusively a power of the state,²⁰³ “[t]he fact that Europeans and the United States made treaties with Indian nations demonstrates that they recognized the sovereignty of Indian nations.”²⁰⁴

Sovereignty has a thousand shades, but at its core, sovereignty means power: the power to govern, the power to determine the shape of a society.²⁰⁵ Sovereignty thus might be thought of as a bundle of rights, or powers.²⁰⁶ Historically, “In the technical language of the

201. COHEN, *supra* note 116, at 204.

202. KIRKE KICKINGBIRD ET AL., *INDIAN TREATIES* 2, 10 (1980); *see also* Hope M. Babcock, *A Civic-Republican Vision of “Domestic Dependent Nations” in the Twenty-First Century: Tribal Sovereignty Re-envisioned, Reinvigorated, and Re-empowered*, 2005 UTAH L. REV. 443, 458–59 (noting that the rights Indians have acquired through treaties create a distinct legal relationship between the tribes and the federal government); Alex Tallchief Skibine, *United States v. Lara, Indian Tribes, and the Dialectic of Incorporation*, 40 TULSA L. REV. 47, 48 (2004) (noting that the United States began signing treaties with Indian tribes in 1778 and continued doing so throughout much of the nineteenth century). For more information about the European legal treatment of tribes, *see* COHEN, *supra* note 116, at 10–20, and for a discussion of the early treaties between Indians and the United States, *see* 1 FRANCIS PAUL PRUCHA, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS* 44–50 (1984).

203. Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CAL. L. REV. 799, 822 (2007).

204. Kirke Kickingbird, *What’s Past Is Prologue: The Status and Contemporary Relevance of American Indian Treaties*, 7 ST. THOMAS L. REV. 603, 604 (1995).

205. *See* Babcock, *supra* note 202, at 453–54 (arguing that essential aspects of tribal sovereignty are the right to protect its collective identity and the right to structure its government); Ray Halbritter & Steven Paul McSloy, *Empowerment or Dependence? The Practical Value and Meaning of Native American Sovereignty*, 26 N.Y.U. J. INT’L L. & POL. 531, 570 (1994) (arguing that sovereignty for Indian tribes stems from not being dependent upon any entity, including *inter alia* federal, state, and local governments); Patrick Macklem, *Distributing Sovereignty: Indian Nations and Equality of Peoples*, 45 STAN. L. REV. 1311, 1348 (1993) (noting that sovereignty’s value results from “the fact that it creates a legal space in which a community can negotiate, construct, and protect a collective identity”).

206. Sarah Krakoff, *The Virtues and Vices of Sovereignty*, 38 CONN. L. REV. 797, 801 (2006) [hereinafter Krakoff, *Virtues and Vices*]; *see* Kirke Kickingbird et al., *Indian Sovereignty, in NATIVE AMERICANS AND THE LAW: NATIVE AMERICAN SOVEREIGNTY* 1, 8–12 (John R. Wunder ed., 1996) [hereinafter *NATIVE AMERICANS AND THE LAW*] (defining the bundle of sovereign powers to include government formation, membership definition, legislation, law enforcement, taxation, and property and social regulation); *cf.* Babcock, *supra* note 202, at 450–51 (describing sovereignty as a fluid, flexible concept).

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seventeenth and eighteenth centuries, sovereignty was the absolute power of a nation to determine its own course of action with respect to other nations.”²⁰⁷ In the modern context, however, tribal sovereignty is no longer absolute.

European contact began transforming tribal sovereignty almost instantly; Chief Justice Marshall’s decision in *Cherokee Nation* was only an early call in this unyielding erosion. In 1871, the United States announced that it would no longer enter into treaties with tribes,²⁰⁸ and the trajectory was only downhill from there. As the Goshutes had seen, earlier treaties already had instituted the era of forcibly “removing” tribes to make way for the continuing colonial encroachment of tribal lands,²⁰⁹ and the coming shifts in federal policy would prove even more problematic.

The General Allotment, or Dawes, Act of 1887²¹⁰ affirmatively sought to serve, as Theodore Roosevelt later put it, as “a mighty pulverizing engine to break up the tribal mass” and assimilate Indians into the purportedly superior mainstream society.²¹¹ Indeed, the result of this policy, in which the government chopped up reservations into individual parcels to be “allotted” to tribal members and then sold off so-called “surplus” lands to non-Indians, was nothing short of crushing.²¹² When Congress passed the law, “the indigenous peoples of what is now the United States had already lost more than 90 percent of their land By 1934, when the [f]ederal government ended allotment, the policy had cost Indians almost 90 million acres—two-thirds of the land they owned fifty years earlier.”²¹³

It was not until 1934 that the federal government finally recognized the utter failure of its social experiment to push foreign cultural

207. Vine Deloria Jr., *Self-Determination and the Concept of Sovereignty*, in *NATIVE AMERICANS AND THE LAW*, *supra* note 206, at 118, 118.

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208. Act of Mar. 3, 1871, ch. 120, 16 Stat. 544, 566.

209. COHEN, *supra* note 116, at 45. For a unique look at the Indian Removal Era, see TIM ALAN GARRISON, *THE LEGAL IDEOLOGY OF REMOVAL: THE SOUTHERN JUDICIARY AND THE SOVEREIGNTY OF NATIVE AMERICAN NATIONS* 13–33 (2002), which charts the history of removal from 1767 and suggests that a desire for more land for settlement and agriculture led the English colonialists to relocate Indian tribes.

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210. Ch. 119, 24 Stat. 388.

211. Gavin Clarkson, *Not Because They Are Brown, But Because of Ea: Why the Good Guys Lost in Rice v. Cayetano, and Why They Didn't Have to Lose*, 7 *MICH. J. RACE & L.* 317, 325–26 (2002) (emphasis removed) (quoting 15 *MESSAGES & PAPERS OF THE PRESIDENT* 6674 (1901)).

212. See Royster, *supra* note 183, at 70–78; Rebecca Tsosie, *Sacred Obligations: Intercultural Justice and the Discourse of Treaty Rights*, 47 *UCLA L. REV.* 1615, 1656 (2000).

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213. Bobroff, *supra* note 183, at 1560–61.

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norms onto tribes and “turn Indians into farmers.”²¹⁴ Accordingly, the ensuing Indian Reorganization Act (“IRA”),²¹⁵ among other things, prohibited additional allotment, restricted the alienation of Indian land, and permitted tribes to “organize and adopt constitutions with a congressional sanction of self-government.”²¹⁶ Given the necessity of land to any exercise of sovereignty,²¹⁷ and the impunity with which allotment had stripped tribes of their territorial base, the importance of the IRA’s halting of this practice could not be exaggerated.

The IRA, though, was no panacea.²¹⁸ The IRA’s very premise was that the federal government would decide when to “recognize” acceptable tribal governments.²¹⁹ And, because the Act envisioned constitutions that mimicked the federal system, it necessarily imprinted Anglo-American governance norms, which often did not conform to traditional tribal governance, upon tribes.²²⁰

Whether or not the IRA promoted native sovereignty as well as possible, far more vexing for tribes was the sharp turn Congress took

214. Charles Wilkinson, *Filling in the Blank Spots on Powell’s and Stegner’s Maps: The Role of Modern Indian Tribes in Western Watersheds*, 23 J. LAND RESOURCES & ENVTL. L. 41, 43–44 (2003). That anyone believed tribes needed such turning was highly ironic. See Robert J. Miller, *Economic Development in Indian Country: Will Capitalism or Socialism Succeed*, 80 OR. L. REV. 757, 767 (2001) (noting that at the time of European contact “the majority of Indians lived . . . in small towns and villages” supported primarily by farming).

215. Wheeler-Howard (Indian Reorganization) Act, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461–479 (2006)). See generally INDIAN AFFAIRS AND THE INDIAN REORGANIZATION ACT: THE TWENTY YEAR RECORD (William H. Kelley ed., 1954) (discussing the effects, strengths, and weaknesses of the IRA on tribal life).

216. COHEN, *supra* note 116, at 86.

217. Eduardo Moisés Peñalver, *Is Land Special? The Unjustified Preference for Landownership in Regulatory Takings Law*, 31 ECOLOGY L.Q. 227, 265 (2004); 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, 113 [hereinafter Wood, *Protecting Native Sovereignty*]. But cf. *John v. Baker*, 982 P.2d 738, 748–53 (Alaska 1999) (holding that a native Alaskan village possesses non-territorial sovereignty unless divested by Congress).

218. See COHEN, *supra* note 116, at 89–97; David C. Williams, *The Borders of the Equal Protection Clause: Indians as Peoples*, 38 UCLA L. REV. 759, 862 (1991) (noting that although the IRA introduced a “scheme for expressing tribal sovereignty,” a number of tribes rejected the IRA scheme and maintain traditional tribal governments).

219. Indian Reorganization Act §§ 16–17.

220. See, e.g., George S. Esber Jr., *Shortcomings of the Indian Self-Determination Policy*, in STATE AND RESERVATION: NEW PERSPECTIVES ON FEDERAL INDIAN POLICY 212, 218–19 (George Pierre Castile & Robert L. Bee eds., 1992) (discussing the fact that many tribal governments do not conform to the democratic one-person, one-vote system envisioned by the federal government and the IRA); Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law*, 46 ARK. L. REV. 77, 104–05 (1993) (discussing the tension between autonomous tribal governments and the tribal constitutions drafted under the requirements of the IRA, many of which required tribal laws to be approved by the Secretary of the Interior).

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next. Less than two decades after the IRA was adopted, Congress abruptly announced an end to tribal self-governance. Although this declaration wrapped itself in an equitable banner of “grant[ing Indians] all of the rights and prerogatives” of other American citizens,²²¹ the real message was clear: “[A]s rapidly as possible”—“at the earliest possible time”²²²—Congress wanted tribes, and all the notions of sovereignty bound up in them, to vanish. Like allotment before it, the effect of this “termination” policy was by all accounts “devastating”²²³ and “tragic,”²²⁴ “[s]weepingly destructive,”²²⁵ “harrowing,”²²⁶ and “nefarious.”²²⁷ Congress’s half-page termination resolution initially targeted only five tribes,²²⁸ but the broader policy affected all Indian nations.²²⁹ In the next decade, Congress passed numerous additional termination acts affecting approximately 12,450 Native Americans, 110 tribes and bands, and 1.5 million acres of native lands.²³⁰ Still, the true impact came from the symbolism of these acts. Even tribes who did not have their legal and political status eliminated felt they “lost their ability to exist as distinct sovereign people,”²³¹ because what

221. Freedom from Federal Supervision Act, 67 Stat. B132 (1953).

222. *Id.* Perhaps tellingly, Dillon S. Myer, the government official who oversaw Japanese American internment camps in World War II, also was charged with executing tribal termination. Robert A. Williams Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man’s Indian Jurisprudence*, 1986 WIS. L. REV. 219, 221. See generally RICHARD DRINNON, *KEEPER OF CONCENTRATION CAMPS: DILLON S. MYER AND AMERICAN RACISM* (1987) (detailing Myer’s involvement in “termination” of tribal rights and identities).

223. Michael C. Walch, Note, *Terminating the Indian Termination Policy*, 35 STAN. L. REV. 1181, 1181 (1983).

224. COHEN, *supra* note 116, at 95.

225. David H. Getches, *Beyond Indian Law: The Rehnquist Court’s Pursuit of States’ Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 355 (2001).

226. Krakoff, *Virtues and Vices*, *supra* note 206, at 806.

227. John P. LaVelle, *Sanctioning a Tyranny: The Diminishment of Ex Parte Young, Expansion of Hans Immunity, and Denial of Indian Rights in Coeur D’Alene Tribe*, 31 ARIZ. ST. L.J. 787, 790 (1999). For more information on termination, see generally KENNETH R. PHILP, *TERMINATION REVISITED: AMERICAN INDIANS ON THE TRAIL TO SELF-DETERMINATION, 1933–1953* (1999), and Charles F. Wilkinson & Eric R. Biggs, *The Evolution of the Termination Policy*, 5 AM. INDIAN L. REV. 139 (1977).

228. Freedom from Federal Supervision Act, 67 Stat. B132 (1953).

229. John Fredericks III, *America’s First Nations: The Origins, History and Future of American Indian Sovereignty*, 7 J.L. & POL’Y 347, 377–78 (1999).

230. Walch, *supra* note 223, at 1187.

231. Nancy Thorington, *Civil and Criminal Jurisdiction over Matters Arising in Indian Country: A Roadmap for Improving Interaction Among Tribal, State and Federal Governments*, 31 MC-GEORGE L. REV. 973, 983 (2000). *But see* Menominee Tribe of Indians v. United States, 391 U.S. 404, 412–13 (1968) (holding that termination ended only the trust relationship, not treaty rights).

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Congress was saying was that it could inflict such a fate on any tribe it wished.²³²

Termination's inherent flaws, and native resistance to it, became increasingly apparent, and by the late 1950s, the federal government abdicated the stance and returned to an IRA-like vision of tribal self-governance.²³³ The official federal policy thenceforth was one of tribal "self-determination"—in a word, native "sovereignty." Indeed, "every president since 1960" has reaffirmed the concepts of tribal self-determination.²³⁴ As President Nixon announced in 1970, "The time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions."²³⁵

Congress also repeatedly reaffirmed tribal self-governance. The Indian Self-Determination and Education Assistance Act of 1975,²³⁶ for instance, created a process for tribes to contract with the federal government to administer various health, education, and other social programs previously provided by the BIA.²³⁷ Likewise, the Tribal Self-Governance Act of 1994 ("TSGA")²³⁸ relied on a policy of "permanently establish[ing] and implement[ing] tribal self-governance" by

232. See Daniel H. Israel, *The Reemergence of Tribal Nationalism and Its Impact on Reservation Resource Development*, 47 U. COLO. L. REV. 617, 622 (1976) (noting that during the Termination Era, tribes lived in fear that any exercise of self-government would result in Congress issuing a new act of termination). Other Termination Era initiatives included officially promoting "relocation" of nearly half the entire Indian population from reservations to urban centers by 1980, and Public Law 280, which began transferring criminal and civil jurisdiction over Indian lands to states. Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588. See also Act of Aug. 3, 1956, Pub. L. No. 84-959, 70 Stat. 986, amended by Act of Dec. 23, 1963, Pub. L. No. 88-230, 77 Stat. 471 (instituting vocational programs to provide Indians who lived on a reservation with job training and skills). See generally Joan Ablon, *American Indian Relocation: Problems of Dependency and Management in the City*, 26 PHYLON 362 (1965) (analyzing the dependency and survival issues for Indians that relocate to urban areas); Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 UCLA L. REV. 535 (1975) (examining the jurisdictional disputes between states and Indian tribes before and after Public Law 280).

233. See Fred A. Seaton, *U.S. Sec'y of the Interior, Remarks* (KCLS, Flagstaff, Arizona, radio broadcast Sept. 18, 1958), in 105 CONG. REC. 3105 (1959) (discussing the success of certain Indian tribes as evidence they have the desire and capacity to self-govern their affairs).

234. See COHEN, *supra* note 116, at 98; David Williams, *Legitimation and Statutory Interpretation: Conquest, Consent, and Community in Federal Indian Law*, 80 VA. L. REV. 403, 419-20 (1994).

235. Message from the President of the United States Transmitting Recommendations for Federal Indian Policy, H.R. DOC. NO. 91-363, at 1 (1970), reprinted in DAVID H. GETCHES ET AL., *FEDERAL INDIAN LAW* 218 (5th ed. 2005).

236. Pub. L. No. 93-638, 88 Stat. 2203 (codified as amended at 25 U.S.C. §§ 450-458bbb-2 (2006)).

237. *Id.* § 2(a)(2).

238. Pub. L. No. 103-413, 108 Stat. 4270 (codified as amended at 25 U.S.C. §§ 458aa-458hh (2006)).

giving tribes block grants and entering into tribal-federal agreements for what would otherwise be DOI-delivered programs and services.²³⁹

These executive and congressional strides meant much for tribes. But they were not the whole story. Looming in the background was the Judicial Branch, and to say that the Supreme Court did not proceed in lockstep with its counterparts would be an understatement.²⁴⁰ Beginning in the 1970s, the Court slowly but clearly began converting tribal sovereignty from a relatively firm principle of governance based on territorial control to a far more malleable concept of authority based on consent. Even in the context of congressional acts promoting tribal sovereignty, this transformation—what some have termed “judicial termination”²⁴¹—had serious ramifications. They are ramifications that not only show modern Indian law as a “morass of doctrinal and normative incoherence,”²⁴² but that also illuminate the struggles tribes face in seeking to meaningfully exercise sovereignty at all.

1. *Sovereignty as Territory*—Williams and McClanahan

Two cases from the middle of last century illustrate the shift tribal sovereignty has undergone in the Supreme Court’s view. Both involved comparable facts, both reached the same result, but neither moored itself to the same conception of sovereignty.

239. *Id.* §§ 202–203. For an assessment of such agreements in a non-BIA administered arena, see generally Mary Ann King, *Co-Management or Contracting?: Agreements Between Native American Tribes and the U.S. National Park Service Pursuant to the 1994 Tribal Self-Governance Act*, 31 HARV. ENVTL. L. REV. 475 (2007), which analyzes the relationships between tribes and federal land management agencies under the TSGA through a case study of the National Park Service.

240. See Sarah Krakoff, *Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty*, 50 AM. U. L. REV. 1177, 1178 (2001) [hereinafter Krakoff, *Undoing Indian Law*] (noting that the Supreme Court has consistently ruled against tribal litigants in disputes involving federal Indian law).

241. Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431, 481 (2005) [hereinafter Frickey, *(Native) American Exceptionalism*]; see also L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 COLUM. L. REV. 809, 814 (1996) [hereinafter Gould, *The Consent Paradigm*] (describing the consequences of the Supreme Court’s embrace of consent-based sovereignty in place of inherent sovereignty); Joseph William Singer, *Canons of Conquest: The Supreme Court’s Attack on Tribal Sovereignty*, 37 NEW ENG. L. REV. 641, 643 (2003) (explaining how the Supreme Court has stripped tribes of government authority while giving more power to the states, contradicting recent congressional and executive policies toward tribal governments). *But cf.* Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L.J. 1, 8 (1999) [hereinafter Frickey, *Judicial Divestiture*] (explaining that recent Court decisions are more indicative of uneasiness with tribal authority than a “paradigmatic . . . doctrinal shift”).

242. Frickey, *Adjudication and Its Discontents*, *supra* note 91, at 1754.

In *Williams v. Lee*,²⁴³ a non-Indian operating a general store on the Navajo reservation filed a state court action to collect for goods he had sold to tribal members.²⁴⁴ The Indians challenged jurisdiction, and a sovereignty battle ensued. On appeal, the Supreme Court admitted frankly that its sovereignty jurisprudence had not been static over time.²⁴⁵ Still, the starting point was *Worcester's* rule that states lacked jurisdiction except in limited circumstances.²⁴⁶ “[A]bsent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.”²⁴⁷ Under this standard, the jurisdictional answer was plain. The Navajo Nation—not Arizona—had authority over its reservation, and that was the end of the matter. As the Court stated, “It is immaterial that respondent is not an Indian. *He was on the Reservation and the transaction with an Indian took place there.*”²⁴⁸ Territory, in short, controlled.

Decided just fourteen years later, *McClanahan v. Arizona State Tax Commission*²⁴⁹ involved a Navajo tribal member’s attempt to reclaim \$16.20 in state taxes that had been withheld from her income, all of which she earned on the reservation.²⁵⁰ Although *Williams's* territorial-based rule would have seemed to offer an easy resolution, the Court took great pains to distinguish its prior holding. The Court pointed on the one hand to the “policy of leaving Indians free from state jurisdiction” as “deeply rooted in the Nation’s history,”²⁵¹ but then noted on the other hand that “it would vastly oversimplify the problem” to consequently find that “state tax legislation[] may not extend.”²⁵² Rather, the Court now saw tribal sovereignty ultimately as a guide, not a rule:

The modern cases . . . tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes

. . . [S]overeignty . . . is relevant, then, not because it provides a definitive resolution . . . but because it provides a

243. 358 U.S. 217 (1959).

244. *Id.* at 217–18.

245. *Id.* at 219.

246. *Id.*

247. *Id.* at 220.

248. *Id.* at 223 (emphasis added).

249. 411 U.S. 164 (1973).

250. *Id.* at 165–66.

251. *Id.* at 168 (quoting *Rice v. Olson*, 324 U.S. 786, 789 (1945)).

252. *Id.* at 170.

backdrop against which the applicable treaties and federal statutes must be read.²⁵³

In this new construct, the fact that the taxed activities had occurred on the reservation was no longer controlling. What governed instead was *whom* the state had taxed, because it was, purportedly, tribal *members*, and not the tribe itself, that the treaties and statutes protected.²⁵⁴ The Court thus held that the *Williams* test did not apply because it was for “situations involving non-Indians,” where “both the tribe and the State could fairly claim” a jurisdictional interest.²⁵⁵ Nevertheless, because the appellant was Navajo and had earned her income on Navajo land, the Court deemed the dispute “totally within the sphere” of Navajo jurisdiction.²⁵⁶

2. *Sovereignty as Consent*—Oliphant, Montana, and Brendale

Initially, *McClanahan*'s shift in sovereignty may have seemed subtle. In both *Williams* and *McClanahan*, state jurisdiction was precluded, and the rationale was sovereignty. But what first appeared to be a mere tremor ultimately proved tectonic.²⁵⁷ The change from *Williams*'s territory-focused sovereignty to *McClanahan*'s membership-centered vision soon infected virtually every area in which the Court addresses native rights.²⁵⁸ The change was most stark for criminal ju-

253. *Id.* at 172 (emphasis added). *But cf.* *Bryan v. Itasca County*, 426 U.S. 373, 377, 387–90 (1976) (finding no room for state tax jurisdiction over tribal member's tangible property on a reservation where federal statute did not clearly delegate authority to the state).

254. *McClanahan*, 411 U.S. at 179–81. One aspect that made this holding so strange was that, in the very next year, the Court emphasized that Congress's trust authority emanates from its constitutional treaty and commerce powers to deal with *tribes*. *Compare* *Morton v. Mancari*, 417 U.S. 535, 551–52 (1974) (noting that Congress' power to deal with tribes comes from the Constitution itself), *with* *Malabed v. N. Slope Borough*, 70 P.3d 416, 422–23 (Alaska 2003) (explaining that the Alaska Constitution grants the state no powers for dealing with Indian disputes).

255. *McClanahan*, 411 U.S. at 179.

256. *Id.* at 179–80.

257. Professor Pommersheim has noted the geologic nature of American Indian jurisprudence in this way, or what he referred to as “the shifting tectonic plates of tribal sovereignty”—as such decisions unquestionably send shockwaves through native life and tribal culture. FRANK POMMERSHEIM, *BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE* 100 (1995); *cf.* Sarah Krakoff, *A Narrative of Sovereignty: Illuminating the Paradox of the Domestic Dependent Nation*, 83 OR. L. REV. 1109, 1113 (2004) [hereinafter Krakoff, *Illuminating the Paradox*] (describing tribal governance adaptation in light of changing federal Indian law).

258. *See, e.g.*, Allison M. Dussias, *Geographically-Based and Membership-Based Views of Indian Tribal Sovereignty: The Supreme Court's Changing Vision*, 55 U. PITT. L. REV. 1, 4, 17–18, 86 (1993) (noting that the Court has applied either geographically based sovereignty or membership-based sovereignty according to the nature of the case before the Court); L. Scott Gould, *Tough Love for Tribes: Rethinking Sovereignty After Atkinson and Hicks*, 37 NEW ENG. L.

isdiction,²⁵⁹ but the other critical areas—civil jurisdiction and land regulation—also were profoundly touched.

*Oliphant v. Suquamish Indian Tribe*²⁶⁰ is perhaps most indicative of the criminal arena.²⁶¹ There, two non-Indians sought a writ of habeas corpus after their tribal court arraignment for allegedly assaulting a tribal officer and engaging in a high-speed chase with tribal police.²⁶² Addressing this jurisdictional challenge, the Supreme Court ruled that the tribe's inherent sovereignty must be weighed with a "great solicitude" for both defendants' right to full constitutional protection and the fact that tribal attempts to prosecute nonmembers were not a historical regularity, but a "relatively new phenomenon."²⁶³ In that calculus, individual federal constitutional rights could *only* weigh more heavily than tribes' "'quasi-sovereign' authority"²⁶⁴ because Congress had hinted strongly enough to find tribes divested of prosecutorial power over non-Indians.²⁶⁵ This constitutional subordination applied, moreover, even if it interfered with a tribe's ability to keep order on its reservation.²⁶⁶ *McClanahan's* shift to consent-based sovereignty thus became increasingly apparent. Where a territory-based version of sovereignty would have ensured the tribe's right to prosecute because of *where* these crimes took place, its new membership-based brand *precluded* enforcement because of *who* was in question.²⁶⁷

REV. 669, 669 (2003) [hereinafter Gould, *Tough Love*] (explaining that tribes do not have power over nonmembers unless Congress has delegated such power to the tribe).

259. See, e.g., *Duro v. Reina*, 495 U.S. 676, 693 (1990) ("[I]n the criminal sphere membership marks the bounds of tribal authority.").

260. 435 U.S. 191 (1978).

261. Frickey, *Adjudication and Its Discontents*, *supra* note 91, at 1769.

262. *Oliphant*, 435 U.S. at 194.

263. *Id.* at 196–97, 210.

264. *Id.* at 208 (citing *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 15 (1831)).

265. *Id.* at 208–12.

266. *Id.* at 210. The lack of full tribal criminal jurisdiction has reached near-crisis levels. Violent crimes against Indians occur at more than twice the national rate. LAWRENCE A. GREENFELD & STEVEN K. SMITH, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE NCJ 173386, AMERICAN INDIANS AND CRIME 2–3 (1999), <http://www.ojp.usdoj.gov/bjs/pub/pdf/aic.pdf>. One in three Indian women—2.5 times the national rate—will be raped or sexually assaulted during their lifetimes; eighty-six percent of the time these crimes are committed by non-Indians. AMNESTY INT'L, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA 2, 4 (2007), <http://www.amnestyusa.org/women/maze/report.pdf>. The *Oliphant* Court, however, found these trends irrelevant. *Oliphant*, 435 U.S. at 212 ("[W]e are not unaware of the prevalence of non-Indian crime on today's reservations But these are considerations for Congress . . .").

267. See Daan Braveman, *Tribal Sovereignty: Them and Us*, 82 OR. L. REV. 75, 94–95 (2003) (explaining that without congressional authorization, a tribe has no inherent authority over nonmember activities on the reservation).

By the time the Court issued its self-proclaimed “pathmarking”²⁶⁸ decision in *Montana v. United States*²⁶⁹ three years later, membership’s importance over territory was cemented. The Court couched *Montana*’s question as tribal authority “to regulate hunting and fishing by non-Indians” on reservation lands “owned in fee simple by non-Indians.”²⁷⁰ That authority, the Court held, hinged on power over persons—not land. The Court declared that absent a congressional act, inherent tribal sovereignty does “not extend to the activities of nonmembers” except in two limited circumstances: (1) where the nonmembers “enter consensual relationships . . . through commercial dealing, contracts, leases, or other arrangements;” or (2) where the nonmembers’ conduct “threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”²⁷¹ Sovereignty under *Montana* thus became as much paucity of power as an affirmation of it. Although the Court seemed to blend territory and consent by acknowledging tribal jurisdiction over nonmembers on tribal and trust lands,²⁷² its actual holding was far broader, reconceptualizing sovereignty altogether. The Court ruled that all that tribes had left was the authority “necessary to protect tribal self-government or to control internal relations.”²⁷³ Unless granted by Congress, they no longer possessed any other power.²⁷⁴

Indeed, although the *Montana* Court carved exceptions to its new rule, later cases demonstrated just how narrow the exceptions were. In *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*,²⁷⁵ for instance, the Court ruled that the Yakima could rightfully impose their zoning laws on the “closed” area of their reservation where the public was not allowed, but could not do so on the “open” portion where there was a large non-native presence.²⁷⁶ This rationale effectively used the land’s “Indian-ness” as a proxy for consent.²⁷⁷

268. *Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997).

269. 450 U.S. 544 (1981).

270. *Id.* at 547 (emphasis added).

271. *Id.* at 565–66.

272. *Id.* at 557.

273. *Id.* at 564.

274. *Id.* at 564–65 (citing *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978)). *But cf.* *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 19 (1987) (affirming the exhaustion principle for tribal courts); *Nat’l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856–57 (1985) (noting that the question of tribal judicial jurisdiction must be exhausted in tribal court before challenging in federal forum).

275. 492 U.S. 408 (1989).

276. *Id.* at 415–16, 425, 428.

277. Dussias, *supra* note 258, at 72–78; Frickey, *Judicial Divestiture*, *supra* note 241, at 78; Gould, *The Consent Paradigm*, *supra* note 241, at 876–77; *see also* *City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 215–17 (2005) (comparing the permissible

For the closed land, Justice Stevens, in his concurring opinion, likened the tribe's zoning to an "equitable servitude," whereas he saw no such restriction on lands in the open portion.²⁷⁸ Moreover, the need to uniformly regulate reservation land use could not satisfy *Montana's* exceptions because holding title did not constitute a consensual commercial relationship, nor had the Yakimas made a showing that controlling "every use of fee land" threatened their political integrity, economic security, or welfare.²⁷⁹

In the era, then, when Congress and the Executive arguably have become more solicitous of tribal rights than at any other time in our history, the trust doctrine and native sovereignty appear at odds. As interpreted by the Supreme Court, the trust is today as much a source of federal power as a limitation upon it, and tribal sovereignty, the more it butts up against non-tribal players and the rights they assert, only continues to diminish.²⁸⁰ Whether this means that the courts truly are the "final agent[s] of colonization,"²⁸¹ the apparent conflict between official federal policy and how the courts actually interpret it makes one thing very clear: 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.

exercise of state jurisdiction over tribal land that is over ninety percent non-Indian with New York's continued jurisdiction over tribal land reacquired from the state by the Oneida tribe after 200 years).

278. *Brendale*, 492 U.S. at 442, 446 (Stevens, J., concurring).

279. *Id.* at 428, 430–31 (majority opinion). See also *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 659 (2001) (holding that a hotel occupancy tax imposed against nonmembers located on non-Indian fee land within a reservation was invalid because the tax was not related to a consensual relationship with the tribe); *Strate v. A-1 Contractors*, 520 U.S. 438, 457–58 (1997) (finding that *Montana's* exceptions were not met by tribal jurisdiction over a nonmember car accident on a public highway running through reservation).

280. See Frickey, *Adjudication and Its Discontents*, *supra* note 91, at 1775 (noting the Court's tendency to favor nonmember rights of liberty in criminal cases over considerations stemming from tribal sovereignty); Gould, *Tough Love*, *supra* note 258, at 669, 674 (noting that where tribes attempt to exert authority over nonmembers, the nonmembers' rights to due process and equal protection usually trump claims of tribal sovereignty); Krakoff, *Illuminating the Paradox*, *supra* note 257, at 1195 (arguing that federal doctrines that limit tribal jurisdiction over nonmembers erode tribal sovereignty).

281. Krakoff, *Undoing Indian Law*, *supra* note 240, at 1214–15; see also Frickey, *Judicial Divestiture*, *supra* note 241, at 7 (accusing the Court of usurping a legislative function by "implementing the ongoing colonial process").

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III. BATTLE IN THE DESERT: PRIVATE FUEL STORAGE, THE GOSHUTES, AND NUCLEAR WASTE

Perhaps more than any other example in recent memory, the Skull Valley Goshutes, this tiny tribe dwelling in the desert, have come to epitomize the conflict between native sovereignty and the federal trust. After decades of colonial encroachment and hostility, of government disregard and neglect, the Goshutes were a fragment of their former selves. Dwindled in numbers, ignored by society, and stalled in abject poverty, only a handful of band members persisted on the reservation.²⁸² It was hardly surprising, then, that when the federal government announced that it was looking for a place to temporarily store nuclear waste, the Goshutes, already surrounded by a host of other toxic sources and scars, were willing to listen. Ultimately, the Goshutes decided that nuclear storage could benefit the tribe. This decision tested the tribe's resiliency, resulting in a collision between sovereignty and the trust.

A. *The "Vexing Problem"*

The roots of the Goshutes' plan²⁸³ to store nuclear waste trace to 1954—long before the tribe was involved at all. In that year, Congress adopted the Atomic Energy Act of 1954,²⁸⁴ which encouraged private development of nuclear power "under a program of federal regulation and licensing."²⁸⁵ This proverbial "turning of swords into plow-

282. See H. Josef Hebert, *N-waste Bitterly Divides Utah Tribe*, DESERET MORNING NEWS, JUNE 25, 2006, at A10.

283. In referring throughout this Article to a "Goshute" plan, position, or decision on nuclear waste, I recognize that no tribe, no group, ever speaks with a single voice—particularly here, where there was much internal dissent among tribal members. See *infra* Part III.B–C. Nevertheless, recognizing that any exercise of sovereignty will reflect the views of one part of a group while simultaneously quelling those of another, I employ this rhetorical convenience to refer to the position ultimately adopted by the majority of the band: According to tribal leaders, two-thirds of adult members voted in favor of the project. Telephone Interview with Lawrence Bear, Chairman, Skull Valley Band of Goshute Indians (Aug. 11, 2008) [hereinafter Lawrence Bear Telephone Interview]; see also Lewis, *supra* note 3, at 321 (noting that Skull Valley leaders see the storage project as a necessary survival tool for the tribe). Indeed, the notion that a tribe might decide to push against the grain of not only some of its own members, but modern society at large, is hardly unique to the Goshutes. See generally Riley, *supra* note 203 (advocating against federal involvement with tribal decisionmaking even though those decisions may often not conform to Western ideals).

284. Atomic Energy Act of 1954, Pub. L. No. 703, 68 Stat. 919 (codified as amended at 42 U.S.C. §§ 2011–2297h-13 (2000)). Congress first authorized civilian development of nuclear power in 1946. See generally Atomic Energy Act of 1946, Pub. L. No. 585, 60 Stat. 755.

285. *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 206–07 (1983).

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shares . . . symbolized the transformation of atomic power into a source of energy in American society.”²⁸⁶ Today, 103 commercial nuclear reactors operate in the United States,²⁸⁷ together providing nearly twenty percent of the nation’s electricity,²⁸⁸ or power for over fifty million Americans.

Nuclear power carries significant benefits. Once online, its marginal operating costs are low, making it “baseload” generation, or facilities that utilities run even when system demand is light.²⁸⁹ Its “capacity factor,” or the percentage of time it actually runs, is high.²⁹⁰ And its associated contribution to global warming is comparatively meager.²⁹¹ Every energy source has disadvantages, however, and nuclear power’s are undeniably large. The toxic legacy of atomic testing and uranium mining has long plagued the American West.²⁹² The 1979 accident at Three Mile Island and the disaster at Chernobyl raised serious questions about the technology’s safety.²⁹³ President Carter’s concern over the risk of spent nuclear fuel falling into the wrong hands caused him to ban reprocessing for commercial use.²⁹⁴ And, because a typical commercial nuclear reactor produces twenty-three tons of intensely radioactive waste every year,²⁹⁵ ultimate disposition of this waste is a glaring constraint on the technology’s future.

286. *Id.* at 193–94.

287. Energy Info. Admin., U.S. Nuclear Generation of Electricity, http://www.eia.doe.gov/cneaf/nuclear/page/nuc_generation/gensum.html (last visited Feb. 12, 2009).

288. Energy Info. Admin., How Is My Electricity Generated, Delivered, and Priced?, http://tonto.eia.doe.gov/energy_in_brief/electricity.cfm (last visited Feb. 12, 2009).

289. RONALD E. HAGEN ET AL., ENERGY INFO. ADMIN., U.S. DEP’T OF ENERGY, IMPACT OF U.S. NUCLEAR GENERATION ON GREENHOUSE GAS EMISSIONS 22 (2001), <http://tonto.eia.doe.gov/ftproot/nuclear/ghg.pdf>.

290. *Id.* at 21–22.

291. *Id.* at 5 (comparing zero carbon emissions during a nuclear plant’s operation versus 0.266 metric tons of carbon emissions per megawatt-hour from coal).

292. See generally MICHAEL A. AMUNDSON, YELLOWCAKE TOWNS: URANIUM MINING COMMUNITIES IN THE AMERICAN WEST (2002) (analyzing the effects of nuclear testing and uranium mining on four communities in the West); THE ATOMIC WEST (Bruce Hevly & John M. Findlay eds., 1998) (exploring the impact of atomic power on the West through a series of interdisciplinary essays); CHIP WARD, CANARIES ON THE RIM: LIVING DOWNWIND IN THE WEST (1999) (describing the harsh environmental conditions in the West caused by toxic conditions and the effect it has had on those who inhabit the area).

293. The Three Mile Island incident led to sweeping nuclear regulatory reform. Eric R. Pogue, *The Catastrophe Model of Risk Regulation and the Regulatory Legacy of Three Mile Island and Love Canal*, 15 PENN ST. ENVTL. L. REV. 463, 470–72 (2007).

294. DONALD L. BARLETT & JAMES B. STEELE, FOREVERMORE: NUCLEAR WASTE IN AMERICA 92–94 (1985).

295. Energy Info. Admin., Nuclear Power and the Environment, <http://www.eia.doe.gov/cneaf/nuclear/page/nuclearenvissues.html> (last visited Feb. 12, 2009).

This final question is nuclear power's Achilles' heel, its most "vexing problem"²⁹⁶—what to do with all the waste? Indeed, as 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 2035.²⁹⁷ All of this waste keeps accumulating, but no one has a place to permanently store it. A recent multi-expert report summarized: "[D]isposal of high-level radioactive spent fuel . . . is one of the most intractable problems facing the nuclear power industry throughout the world. No country has yet successfully implemented a system for disposing of this waste."²⁹⁸

Recognizing this mounting dilemma, in 1982 Congress passed the Nuclear Waste Policy Act ("NWPA"),²⁹⁹ which with respect to "high-level," or nuclear reactor, waste,³⁰⁰ had three key components. First, the NWPA created a program to establish permanent geologic nuclear waste "repositories," owned and operated by the federal government and funded by a special fee on nuclear generation.³⁰¹ Second, the NWPA specified that once waste was delivered to a federal repository, the government would assume title to and responsibility for managing the waste.³⁰² Third, it required the Department of Energy ("DOE") to complete "a detailed study" no later than June 1, 1985, on the need and feasibility of "one or more monitored retrievable storage ["MRS"] facilities"—storage sites where high-level nuclear waste could be continuously observed and readily retrieved.³⁰³

Although the NWPA tilled much new regulatory ground, Congress overhauled the statute only five years later. Those amendments reduced the locations being studied for a permanent repository to one: Yucca Mountain, Nevada.³⁰⁴ They also revamped the former

296. *Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223, 1227 (10th Cir. 2004).

297. U.S. Dep't of Energy, *How Much Nuclear Waste Is In The United States?*, http://www.ocrwm.doe.gov/ym_repository/about_project/waste_explained/howmuch.shtml (last visited Feb. 12, 2009).

298. MASS. INST. OF TECH., *THE FUTURE OF NUCLEAR POWER* 10 (2003).

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

300. 42 U.S.C. § 10101(12).

301. *Id.* §§ 10131–10135.

302. *Id.* §§ 10143, 10222.

303. *Id.* § 10161.

304. *Id.* § 10172(a)(1). Development of the Yucca Mountain facility, approximately 100 miles north of Las Vegas, has incurred staggering delays. The DOE missed its initial 1998 deadline, only to announce in 2004 that it would not meet its goal of 2010. Recently, the DOE announced a "best achievable" construction date of 2017, though many doubt anything sooner than 2025 is possible, and even that is unlikely. See Elaine Hiruo, *Repository Operations in 2017 is DOE's Latest Schedule Estimate*, INSIDE NRC, July 24, 2006, at 1 (describ-

MRS provisions, nixing the DOE's plans for a site in Oak Ridge, Tennessee, and establishing a new entity, the Office of Nuclear Waste Negotiator, to find other locations.³⁰⁵ In 1991, the Nuclear Waste Negotiator sent a letter inviting states, localities, and Indian tribes to apply for \$100,000 grants to study the possibility of siting an MRS in their communities.³⁰⁶ Sixteen tribes and four counties applied.³⁰⁷ One was the Skull Valley Goshutes.³⁰⁸

B. "Sovereignty Equals Survival"

Listen to why the Goshutes want to bring nuclear waste to their land and one of the first things they mention is the future. Mary Allen, a former vice chair of the band, explains: "A long time ago . . . everybody would do things together; it was like a big family. Everybody would speak their native language and right now that's disappearing. So, that's what we need to bring back for our future and the children."³⁰⁹ To many this might seem a strange thing, to argue that placing one of the deadliest wastes in the world in the center of your homeland will be a boon to posterity. But for the Skull Valley Goshutes, it was not a decision made lightly.

Surrounded by the government's toxic waste, still fighting, even, to remove from their land the 1,500-plus sheep that had been buried there since Army nerve gas killed more than 6,000 sheep three decades earlier,³¹⁰ the Goshutes were skeptical when they heard of the search for MRS locations. "Well at first we [were] kind of [leery] of the federal government," said Leon Bear, the former tribal chairman who spearheaded the storage effort.³¹¹ "[W]e were [leery] of the federal government and their offer, thinking it was . . . some way to tie us into this and get us to take this waste"³¹²

ing DOE's failed deadlines and the latest proposals for the beginning of a functioning repository at Yucca Mountain).

305. 42 U.S.C. §§ 10162(a), 10241–10251. For more information on the Oak Ridge site, see Jon D. Erickson et al., *Monitored Retrievable Storage of Spent Nuclear Fuel in Indian Country: Liability, Sovereignty, and Socioeconomics*, 19 AM. INDIAN L. REV. 73, 77–78 (1994).

306. Erickson et al., *supra* note 305, at 79–80.

307. *Id.* at 81.

308. *Id.*

309. Private Fuel Storage, Voices For PFS: Mary Allen, <http://www.privatefuelstorage.com/voices/allen.html> (last visited Feb. 12, 2009) [hereinafter PFS, Mary Allen].

310. Gumbel, *supra* note 6; Norrell, *supra* note 6; Roy Reed, *Army Admits Its Nerve Gas Killed 6,000 Sheep*, N.Y. TIMES, May 22, 1969, at 14.

311. KUED, Skull Valley: The Documentary: Interview with Leon Bear, <http://www.kued.org/productions/skullvalley/documentary/interviews/bear.html> (last visited Feb. 12, 2009) [hereinafter KUED, Leon Bear].

312. *Id.*

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The Nuclear Waste Negotiator, however, awarded the Goshutes the \$100,000 study grant they requested, as well as a \$200,000 “Phase II-A” study grant that eight other tribes also sought.³¹³ The Goshutes used the money to evaluate the nuclear possibility, studying the “dry cask” storage system that would be used to encase the spent fuel rods on their land. Before they were done, band members traveled to France, England, Sweden, and Japan to see the system in use.³¹⁴ They met with scientists from Harvard and the DOE’s lead laboratory on nuclear energy.³¹⁵ They toured Yucca Mountain, and Bear even took a month-long internship at Xcel Energy’s Prairie Island nuclear facility in Minnesota.³¹⁶ “At the beginning we didn’t know anything about spent fuel,” said Bear.³¹⁷ But after the tribe educated itself on the subject for more than half a decade, it held itself out as understanding spent nuclear fuel better than virtually any other governmental entity in the United States outside the DOE. “The Skull Valley Tribal Council has done everything,” Danny Quintana, the tribe’s former lawyer, told one journalist, “with the exception of getting their physics degrees at MIT”³¹⁸

Knowledge gave the tribe confidence. In the years between the initial study grants and the Goshutes’ decision to accept the waste, Congress canceled funding for the federal MRS program.³¹⁹ A consortium of thirty-three electric utilities then floated a proposal to build a private facility instead, and a tribe in Arizona, the Mescalero Apaches, appeared poised to take it.³²⁰ When opposition within that tribe resulted in capitulation, however, eight of the utilities still inter-

313. Erickson et al., *supra* note 305, at 80–81.

314. KUED, Leon Bear, *supra* note 311.

315. Gumbel, *supra* note 6; KUED, Leon Bear, *supra* note 311; *see also* Charles Seabrook, *Utilities Offer Millions: Poor Utah Tribe Gambles on Nuclear Waste*, ATLANTA J. CONST., Sept. 22, 2002, at 1A.

316. KUED, Leon Bear, *supra* note 311; Peter Ritter, *Nuke ‘Em! Xcel 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, <http://www.citypages.com/content/printVersion/14839>.

317. KUED, Leon Bear, *supra* note 311.

318. KUED, Skull Valley: The Documentary: Interview with Danny Quintana, <http://www.kued.org/productions/skullvalley/documentary/interviews/quintana.html> (last visited Feb. 12, 2009).

319. M.V. Rajeev Gowda & Doug Easterling, *Nuclear Waste and Native America: The MRS Siting Exercise*, 9 RISK 229, 235–36 (1998).

320. Noah Sachs, *The Mescalero Apache Indians and Monitored Retrievable Storage of Spent Nuclear Fuel: A Study in Environmental Ethics*, 36 NAT. RESOURCES J. 881, 885–86 (1996). *See generally* Wendell Chino, *Comment*, 36 NAT. RESOURCES J. 913 (1996) (responding to Sachs, *supra*); Louis G. Leonard III, *Comment, Sovereignty, Self-Determination, and Environmental Justice in the Mescalero Apache’s Decision to Store Nuclear Waste*, 24 B.C. ENVTL. AFF. L. REV. 651 (1997) (analyzing the attempt of the Mescalero Apache Tribe to site an MRS facility).

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ested in proceeding began negotiations anew when the Skull Valley Goshutes approached them.³²¹ On May 20, 1997, the tribe entered into a lease agreement with the corporate entity, Private Fuel Storage, L.L.C. (“PFS”), representing the utility consortium. Three days later, the BIA conditionally approved the lease.³²²

The reasons the Goshutes wanted the waste were as plain as their intent to seek it out. Repeatedly, tribal members pointed to what an infusion of money could provide for the dwindling band. The PFS facility “will benefit us with education, schools, housing and health for our people,” noted Mary Allen.³²³ Indeed, the Goshutes planned to use the PFS money not simply for services, but to revitalize their nation as “a bottom-line tool for cultural survival.”³²⁴ “A lot of people have been away from the reservation because there’s not many jobs. So, this would be a good opportunity for many to come and live on the reservation”³²⁵ The PFS project would create jobs, and the money it would give the tribe also would pay for houses, roads, scholarships, a school, health insurance, and a health clinic.³²⁶ In other words, the Goshutes saw in the PFS project not just the possibility of helping members return, but also of “keep[ing] them there.”³²⁷

That storing nuclear waste on their land could deliver such a tribal regathering is perhaps why Goshutes are so quick to mention the future when asked about the project. It is also likely the reason why the adult members of the tribe voted by a two-to-one margin to bring PFS’s waste to Skull Valley.³²⁸ “[A]ctually what we’re doing [is] for the next generation, next couple of generations . . . [s]o they can have the sovereignty, the knowledge to make decisions for the tribe,” says Bear.³²⁹ “The reservation is a hard life But we survived.”³³⁰ Continuing this survival, of course, ultimately depends on the Goshutes’ right to define who they are—their right to sovereignty. And the tribe very much sees that sovereignty as bound up in their choice to accept

321. Sachs, *supra* note 320, at 888–90; Seabrook, *supra* note 315.

322. U.S. Dep’t of Interior, Bureau of Indian Affairs, Approval of Lease (May 23, 1997) (on file with author).

323. PFS, Mary Allen, *supra* note 309.

324. Lewis, *supra* note 3, at 321.

325. PFS, Mary Allen, *supra* note 309.

326. Lewis, *supra* note 3, at 321; Private Fuel Storage, Voices For PFS: Leon Bear, <http://www.privatefuelstorage.com/voices/bear.html> (last visited Feb. 12, 2009).

327. Lewis, *supra* note 3, at 321.

328. *Id.* at 319; Lawrence Bear Telephone Interview, *supra* note 283; KUED, Leon Bear, *supra* note 311.

329. *Id.*

330. Dennis Romboy & Lucinda Dillon Kinkead, *A Time of Change—Industry Plans Cause Discord in, out of Tribes*, DESERET MORNING NEWS, Sept. 26, 2006, at A1.

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nuclear waste. “[S]overeignty,” one writer visiting Skull Valley succinctly observed, “equals survival.”³³¹ Bear concurs. “Sovereignty—that’s what we’ve held onto.”³³²

C. “*Ohngo Gaudadeh Devia*”

Despite general tribal support, the decision to go forward with the PFS project was not without dissent. Margene Bullcreek, one of the few Goshutes actually living on the reservation, was so strongly opposed that she formed a grassroots group, Ohngo Guadadeh Devia, meaning “timber setting community,” in an effort to put brakes on the plans.³³³ That group saw the possibility of a PFS facility as too risky, the presence of nuclear waste in Skull Valley as inconsistent with Goshute tradition, the tribal leadership as unyielding and corrupt, and the very idea of the project as smacking of environmental racism.³³⁴ “Why are they sacrificing our lives and our future lives for

331. Timothy Egan, *New Prosperity Brings New Conflict to Indian Country*, N.Y. TIMES, Mar. 8, 1998, at 1.

332. *Id.*

333. Margene Bullcreek, *Skull Valley Goshutes*, 8 VOICES FROM THE EARTH No. 2 (2007), available at http://www.sric.org/voices/2007/v8n2/skull_valley_goshutes.html.

334. Charges of environmental racism, or environmental injustice, surrounding the Goshute-PFS dispute are manifold. The first attack is that the very scheme of monitored retrievable storage was structurally racist from the outset, as it was designed to prey upon tribes’ often dire economic situations. Another level of criticism is that utilities, including the PFS coalition, expressly targeted tribes, seeing their sovereignty as a loophole around what was sure to be “not in my backyard” activism in non-native localities and states. *See, e.g.*, Margene Bullcreek, Guest Lecture at S.J. Quinney College of Law, University of Utah, Environmental Justice Seminar (Nov. 12, 2008) [hereinafter Bullcreek Lecture] (“It was environmental racism, genocide The economic development was a carrot to say [to] any tribe, ‘We’re going to bring prosperity to your land with nuclear waste They knew that we had sovereignty, and they knew that would be an easy way to get the project on our land.”).

Another layer of environmental justice critique is that regardless of whether the PFS dispute is indicative of typical distributional environmental justice problems, it represents a kind of “procedural environmental injustice” presaged by “a prolonged process of historical colonialism over [the Goshute] people and land [that] has produced a landscape of injustice in which the tribe’s choices have been severely structurally limited.” Noriko Ishiyama, *Environmental Justice and American Indian Tribal Sovereignty: Case Study of a Land-Use Conflict in Skull Valley, Utah*, 35 ANTIPODE 119, 135 (2003) [hereinafter Ishiyama, *Case Study*]; accord Noriko Ishiyama, *Environmental Justice and American-Indian Sovereignty: Political, Economic, and Ethnic Struggles Regarding the Storage of Radioactive Waste 12–18*, 226–35 (2002) (unpublished Ph.D. dissertation, Rutgers University) (on file with Rutgers Library, Rutgers University). In this view, “Even if the tribe makes an informed decision to host the PFS facility . . . they never participated in the decision-making process leading to production of nuclear waste or to the absence of alternate means of economic survival in the desert landscape.” Ishiyama, *Case Study, supra*, at 135.

Further still, some charge that the very possibility of nuclear waste on native lands is environmental injustice because such waste is inconsistent with traditional Indian ways. *See, e.g.*, Annie Gracie Ross, *One Mother Earth, One Doctor Water: A Story About Environ-*

their own greed[?],” Bullcreek lamented.³³⁵ “Yet again, like the Mes-calero Apache in New Mexico . . . our sovereign reservation is being targeted by aggressive, giant energy corporations and complicit government agencies . . . We do not want this radioactive waste dump on our sacred land.”³³⁶

Sammy Blackbear, another tribal member, agreed with this traditionalist critique. He viewed the PFS plan not only as corrupting tribal custom but as corroding the band’s future:

[W]hether or not people like it . . . the land is not ours. It never was ours and never will be. We’re caretakers of the land. We’re [supposed] to take care of it for the next generation and I don’t see us doing that [by] putting a nuclear facility there.³³⁷

The prospect of nuclear waste so troubled Blackbear that he alleged the project would “diminish[] who we are,”³³⁸ even accusing Bear—his cousin—of “trying to use our own sovereignty against us.”³³⁹ “[Our] tribal sovereignty has been waived,” Blackbear declared.³⁴⁰ “Leon sold it to them . . . He can’t do that but he did it anyway.”³⁴¹

Blackbear’s accusations, it turned out, ran deep indeed. He argued that entering into the PFS lease was not just improvident, but “illegal.”³⁴² Some tribal members also alleged that Bear had shut out those members who disagreed with the waste plan, depriving them of

mental Justice in the Age of Nuclearism, a Native American View 451 (2002) (unpublished Ph.D. dissertation, University of California at Davis) (on file with University of California at Davis Library, University of California at Davis) (“Nuclearism is the opposite of eco-philosophic community principles of maintenance of Mother Earth ecological integrity . . .”); Bullcreek Lecture, *supra* (arguing that accepting the waste was inconsistent with Goshute tradition and not worth “losing what little we have left”). *But see* Lewis, *supra* note 3, at 333–35 (contending that such views oversimplify the complexities of the dispute in the context of modern realities and native self-determination).

335. Brent Israelsen, *Nuclear Panel Begins Hearings on Skull Valley Plan*, SALT LAKE TRIB., June 3, 1998, at B3.

336. Press Release, Public Citizen, Opposition to Private Fuel Storage Mounts from Public Interest Groups and Tribes (Apr. 4, 2005), *available at* http://www.citizen.org/press-room/print_release.cfm?ID=1911.

337. KUED, Skull Valley: The Documentary: Interview with Sammy Blackbear, <http://www.kued.org/productions/skullvalley/documentary/interviews/blackbear.html> (last visited Feb. 12, 2009) [hereinafter KUED, Sammy Blackbear].

338. *Id.*

339. *Id.*

340. Tracylee Clarke, *An Ideographic Analysis of Native American Sovereignty in the State of Utah: Enabling Denotative Dissonance and Constructing Irreconcilable Conflict*, 17 WICAZO SA REV. 43, 57 (2002).

341. KUED, Sammy Blackbear, *supra* note 337.

342. *Id.*

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project monies and a forum to be heard.³⁴³ The way Goshute governance traditionally had been carried out was through consensus-building and agreement, not majoritarian division, and Bear had broken with that tradition here.³⁴⁴ 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.³⁴⁵ In response, Blackbear claimed the chairmanship via a September 2001 election that was not recognized by the BIA. Ultimately, Blackbear and those who claimed tribal leadership with him pled guilty to criminal charges of theft for withdrawing and spending over \$40,000 from tribal accounts.³⁴⁶ Bear, for his part, also was investigated and, facing federal embezzlement charges, pled guilty to tax evasion.³⁴⁷ He received three years of probation, an order to pay \$13,101 in back taxes, and agreed to return over \$30,000 to the tribe.³⁴⁸

As intratribal political strife swirled, Bullcreek's Ohngo Guadadeh Devia only garnered further strength. Support for their cause poured in. The Confederated Goshute Tribe in Deep Creek loudly voiced opposition to the PFS plan. They intervened in the project's ongoing Nuclear Regulatory Commission ("NRC") licensing proceeding,³⁴⁹ worrying that the project would "irreparabl[y] damage" the character of the area.³⁵⁰ Other tribal forces also joined the fight. Winona LaDuke, a nationally known Native American and envi-

343. Judy Fahys, *The High Price of Dissent*, SALT LAKE TRIB., Jan. 6, 2003, at B1. That Bear rewarded those who sided with him on the PFS debate, such as through the purchase of new prefabricated homes or cars, and punished those who opposed him, by consistently withholding such benefits or otherwise selectively targeting them with tribal governmental action, was a recurring theme throughout the dispute. See Lewis, *supra* note 3, at 326-29; Bullcreek Lecture, *supra* note 334.

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344. Interview with Margene Bullcreek, Chairperson, Ohngo Gaudadeh Devia, in Salt Lake City, Utah (Mar. 26, 2008) [hereinafter Bullcreek Interview]. Indeed, apparently because Bear previously had been authorized to enter into business agreements on the tribe's behalf as a general matter, some members reported learning about the PFS deal from the morning newspaper. Bullcreek Lecture, *supra* note 334.

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345. Deborah Bulkeley, *Goshute Elections Are Contested*, DESERET MORNING NEWS, Nov. 3, 2006, at B4.

346. Geoffrey Fattah, *Goshute Is Ordered to Repay Stolen Funds*, DESERET MORNING NEWS, Nov. 29, 2005, at B3; *Goshute Sentenced, Ordered to Repay Funds*, DESERET MORNING NEWS, Jan. 5, 2006, at B2.

347. Roosevelt, *supra* note 2, at A11.

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348. *Id.*

349. Brief of the Confederated Tribes of the Goshute Reservation on Standing, Private Fuel Storage, No. 72-22 (NRC May 8, 1998) (on file with author).

350. Letter from John Paul Kennedy, Counsel for Confederated Tribes of the Goshute Reservation, to Mark S. Delligatti, Nuclear Regulatory Commission (Dec. 8, 2000) (on file with author).

ronmental justice advocate, brought her group's heft to the table. "The problem of nuclear waste is not solved when the 'solution' is to dump it on Indian lands," LaDuke urged.³⁵¹ But concern was not limited to those espousing traditional tribal culture and interests. Churches,³⁵² including the Mormons, environmental groups,³⁵³ and many others weighed in vociferously against the project.³⁵⁴

Soon, the groundswell of opposition was overwhelming. Only a few years earlier, most Utahns had never heard of Skull Valley. Now the Goshutes were an international news item. From a political standpoint, that did not bode well for the tribe's nuclear proposal.

D. "Over My Dead Body"

Utah's governor at the time, Michael Leavitt, wanted to stop the Goshutes' plan before it was even set. When the idea of a federal MRS was still alive, the Goshutes had sought a third federal study grant, this time for \$2.8 million.³⁵⁵ Leavitt's reaction when he caught wind of this was unequivocal. "This is an over-my-dead-body issue," he announced to reporters. "They may be able to get a grant, but I guarantee they'll never get a permit to move waste over our borders."³⁵⁶

Of course, by the time the Goshutes inked their deal with PFS, they were already seeking just such a permit. Shortly after the lease was signed, PFS filed an application with the NRC for a license to store waste for up to forty years on Goshute land.³⁵⁷ Under longstanding law, it was this federal agency—not Utah—that would decide whether

351. Brenda Norrell, *Federal Energy Bill, Economic Opportunity or Bush's Fire Sale?*, INDIAN COUNTRY TODAY, Aug. 17, 2005.

352. Joe Bauman, *No to N-storage, LDS Say*, DESERET MORNING NEWS, May 5, 2006, at A1; Judy Fahys, *Unitarian Congregation Throws Weight Behind Anti-N-Waste Campaign*, SALT LAKE TRIB., Dec. 15, 2001, at A8.

353. See, e.g., Joe Bauman, *NRC Chief's Comments Anger Foes of N-Waste*, DESERET MORNING NEWS, Mar. 16, 2005, at B1 (Sierra Club); Patty Henetz, *N-Waste Protesters Rally at Skull Valley*, SALT LAKE TRIB., Oct. 10, 2004, at B3 (Health Environment Alliance of Utah, or HEAL Utah).

354. See, e.g., Brent Israelsen, *Leavitt Leads Angry Opposition to N-Waste on Goshute Reservation*, SALT LAKE TRIB., July 28, 2000, at A1 (Utah Downwinders, an anti-nuclear group); Donna M. Kemp, *Utahns Unite to Fight N-Site*, DESERET NEWS, July 26, 2000, at B1 (Citizens Against Nuclear Waste, an activist group whose members include a group of mayors and former politicians). Even cultural icons like the musical group the Indigo Girls, rock star Ani DiFranco, and actor James Cromwell, star of the movie *Babe*, joined the opposition. Robert Gehrke, *Nuclear Dump's Foes Enlisting Star Power*, SALT LAKE TRIB., July 26, 2005, at B4.

355. Jim Woolf, *E. Utah Goshutes Seek Funds for N-Dump Study*, SALT LAKE TRIB., Aug. 12, 1993, at A1.

356. *Id.*

357. Wilson Dizard III, *License Sought for Private Storage Site, as Opponents Seek Law to Block Project*, NUCLEAR FUEL, June 30, 1997, at 1.

the storage proposal was safe.³⁵⁸ Still, Governor Leavitt was unmoved: “We don’t produce it. We don’t benefit from it and we don’t want to store it for those who do. We think it’s unsafe in the context of our community . . . [and] inconsistent with our vision of what we want this state to be.”³⁵⁹

The Goshutes, however, had arrived at their own vision of what they wanted their nation to be and, dissenters aside, were certain the project was safe. “[We] would never compromise . . . to harm any of our children, the tribe, the land or the territory around it,” Bear promised.³⁶⁰ Slowly, the federal government appeared to be concluding this was true. As part of its review of the proposed license, the NRC prepared an environmental impact statement (“EIS”) as required under the National Environmental Policy Act (“NEPA”).³⁶¹ The BIA, because it bore responsibility for the lease approval, and the Bureau of Land Management (“BLM”), because the project called for rights-of-way on federal land for rail facilities, also participated in the evaluation.³⁶² When the EIS was complete, the NRC recommended that the storage plan proceed.³⁶³

The EIS evaluated a number of possibilities in which nuclear waste might be stored on Goshute land, including two different sites on the reservation and a separate non-Goshute site in Wyoming.³⁶⁴ Another possibility the EIS explored was a “no action” alternative in which the PFS facility would not be built at all, just as Governor Leavitt asked.³⁶⁵ Despite these options, the EIS found that construction, operation, and shipping to the waste facility was likely to have minimal

358. See, e.g., Atomic Energy Act of 1954, Pub. L. No. 703, 68 Stat. 919 (codified as amended at 42 U.S.C. §§ 2011–2297h-13 (2000)) (giving the NRC authority to regulate the safety aspects of the construction and operation of nuclear plants); *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 205 (1983) (construing the Atomic Energy Act as giving the NRC exclusive authority over safety aspects of nuclear plant construction and operation, but reserving to states “their traditional responsibility . . . for determining questions of need, reliability, [and] cost” for such facilities); see also *English v. Gen. Elec. Co.*, 496 U.S. 72, 80–82 (1990) (applying *Pacific Gas & Electric Co.’s* reading of the Atomic Energy Act in the tort liability context); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 249–50 (1984) (same).

359. KUED, *Skull Valley: The Documentary: Interview with Governor Michael Leavitt*, <http://www.kued.org/productions/skullvalley/documentary/interviews/leavitt.html> (last visited Feb. 12, 2009) [hereinafter KUED, Michael Leavitt].

360. Christopher Smith, *Tribes Still Considering Storing Radioactive Fuel*, SALT LAKE TRIB., Dec. 28, 1993, at D3.

361. 42 U.S.C. §§ 4321–4370f (2000).

362. FEIS, *supra* note 4, at i. The Surface Transportation Board also participated. *Id.*

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363. *Id.* at liv.

364. *Id.* at xxxiii.

365. *Id.*; KUED, Michael Leavitt, *supra* note 359.

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environmental impacts. Indeed, the EIS specifically deemed the risk of radiological harm both to the public and workers as “small.”³⁶⁶ “The potential impacts of accidents” from the waste’s shipment, the EIS reported, for example, “are . . . no greater than the equivalent of . . . 0.042 [fatalities] among members of the public along the [shipment’s] rail routes . . . over a 20-year period.”³⁶⁷ Thus, the NRC green-lighted the project from an environmental perspective. “The preferred alternative of the NRC staff is the proposed action”³⁶⁸ The other agencies concurred. As the EIS stated for the BIA, “the BIA preferred alternative is the proposed action. The proposed action . . . would have no significant adverse impacts but would have significant economic benefits for the Skull Valley Band.”³⁶⁹

Fearing where federal decisionmakers were headed, the Utah state government sprung into action. The NRC issued its draft EIS in June 2000.³⁷⁰ By March 2001, Leavitt had delivered on his promise. He signed into law a series of bills attempting to prevent the delivery of high-level nuclear waste into the state.³⁷¹ The bills specifically targeted PFS. Among other things, they presumptively “prohibited” the siting of high-level nuclear waste transfer, storage, treatment, or disposal facilities within the state’s “exterior boundaries”;³⁷² erected a complex state permitting scheme should the NRC license such a facility; and barred localities from providing municipal services to any such site.³⁷³ PFS and the Goshutes immediately responded in kind. They filed a federal lawsuit urging invalidation of these new laws. The courts sided with the Goshutes, striking down much of the statutes as

366. FEIS, *supra* note 4, at xxxvii. The EIS defined “small” as effects that “are not detectable or are so minor that they will neither destabilize nor noticeably alter any important attribute of the resource.” *Id.* at xxxviii.

367. *Id.* at lxxx.

368. *Id.* at liv.

369. *Id.* at lv.

370. News Release, U.S. Nuclear Regulatory Comm’n, NRC Requests Comments on Draft Environmental Impact Statement for Proposed Spent Fuel Facility in Utah; Schedules Meetings (June 20, 2000), <http://www.nrc.gov/reading-rm/doc-collections/news/2000/00-099.html>. The FEIS was issued in December 2001. FEIS, *supra* note 4, at i.

371. See Judy Fahys, *Lawmakers Sit on Anti-Nuke Bills*, SALT LAKE TRIB., Feb. 28, 2001, at D1 (explaining Governor Leavitt’s efforts to obtain approval of anti-nuclear bills).

372. UTAH CODE ANN. § 19-3-301(1) (2007).

373. See Act of Feb. 16, 2001, 2001 Utah Laws 107 (prohibiting a county from providing municipal-type services to a site under consideration for a high-level nuclear storage facility and mandating planning by the county if the federal government authorizes such placement); Act of Feb. 16, 2001, 2001 Utah Laws 269 (requiring a study on and “long-term strategic plan” for “economic development on the Native American reservations within the state” as part of the state’s efforts “to prevent siting of any nuclear waste facility . . . within the state”).

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preempted by federal regulation.³⁷⁴ Leavitt, however, was not done. “I’m shooting every bullet I can muster, at every target I can find when it comes to this matter,” he stated.³⁷⁵ “We’re going to use every legislative tool, every political tool, every environmental tool, and every litigation tool we can find to keep this high level nuclear waste out of our state,” he vowed. “We don’t want it here. We don’t want it here now. We don’t want it in the future. We don’t ever want it here.”³⁷⁶

E. “Another Nail in the Coffin”

It perhaps was not a coincidence, but the political discourse over the Goshutes’ proposal dealt heavily in a rhetoric of death. Leavitt first said that nuclear waste would come over his “dead body,” and Utah’s other prominent politicians, now sounding in a chorus of opposition, followed his lead.

Facing the prospect of imminent NRC licensure, Utah’s five-member congressional delegation wrote the NRC urging disapproval. The delegation was particularly troubled by the reservation’s proximity to Hill Air Force Base and the 7,000 F-16 fighter jets making training flights over the area each year, as well as the broader post-September 11 terrorism concerns from having so much spent fuel stored above ground in one place. “[W]e find it inconceivable,” the delegation wrote, “that a government entity would consider giving its endorsement of the PFS plan without thoroughly taking into account this added terrorist threat.”³⁷⁷ Orrin Hatch, Utah’s senior senator, elaborated: “In my view, the plan is already dead on arrival . . . This is a reckless, dangerous proposal, and I am pulling out all the stops to make sure this waste never makes a home in Utah.”³⁷⁸

374. *Skull Valley Band of Goshute Indians v. Leavitt*, 215 F. Supp. 2d 1232, 1250 (D. Utah 2002), *aff’d*, *Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223, 1254 (10th Cir. 2004). The Goshutes’ challenge was only one in a bevy of litigation surrounding the dispute. *See, e.g., Ohngo Gaudadeh Devia v. NRC*, 492 F.3d 421, 422 (D.C. Cir. 2007) (appealing the NRC license); *Bullcreek v. NRC*, 359 F.3d 536, 537 (D.C. Cir. 2004) (questioning the NRC’s authority to issue a license); *Utah v. U.S. Dep’t of the Interior*, 256 F.3d 967, 969 (10th Cir. 2001) (challenging the DOI’s redaction of the lease agreement); *Utah v. U.S. Dep’t of the Interior*, 210 F.3d 1193, 1194–95 (10th Cir. 2000) (appealing the denial of intervention in a lease approval proceeding).

375. KUED, Michael Leavitt, *supra* note 359.

376. *Id.*

377. Letter from Robert F. Bennett, U.S. Senator, to Nils J. Diaz, Chairman, NRC (Mar. 17, 2005) (on file with author).

378. Press Release, Orrin G. Hatch, U.S. Senator, *Skull Valley Fight Just Beginning* (Sept. 9, 2005), <http://hatch.senate.gov/public/index.cfm?FuseAction=PressReleases.Home>.

The delegation, and Hatch in particular, began exerting all kinds of political pressure indicative of just how controversial the Goshute proposal had become. The first step was to push investors out of PFS. It did not take long. By December 2005, two of PFS's biggest backers, the Southern Company and Xcel Energy, PFS's majority stockholder, announced that they would no longer support the project.³⁷⁹ Given that five of the other six investors previously had halted funding, Hatch saw this as the beginning of the end. "This marks the first nail in the coffin for PFS," Hatch said. "The PFS plan has been on life support for some time, and we're removing the feeding tubes."³⁸⁰

As 2005 ground to a close, it appeared that the Utah political strategy might be slowing any momentum the project had achieved. On September 9, 2005—more than eight years after PFS had submitted its application—the NRC cleared the way for issuance of a license.³⁸¹ That decision affirmed a two-to-one ruling by the NRC's adjudicative arm, the Atomic Safety and Licensing Board Panel, that there was a less than one-in-a-million chance per year that an F-16 would crash into the site and breach a storage cask.³⁸²

Spurred on by this result, Utah's political leaders redoubled their efforts. Hatch convinced the DOI to take the admittedly "rare move" of reopening the public comment period on the proposed rail facility rights-of-way proposal.³⁸³ Utah's new governor, Jon M. Huntsman Jr., also repeatedly pronounced his opposition, promising to "lie prostrate on the train tracks to keep this out of our state."³⁸⁴ And, in one of the most worrying maneuvers to that point for PFS proponents, Utah

379. Letter from J. Bernie Beasley Jr., President & CEO, Southern Co., to Orrin G. Hatch, U.S. Senator (Dec. 7, 2005) (on file with author); Letter from Richard C. Kelly, President & CEO, Xcel Energy, to Orrin G. Hatch, U.S. Senator (Dec. 8, 2005) (on file with author).

380. Press Release, Orrin G. Hatch, U.S. Senator, Major PFS Partners Backing Out of Skull Valley Plan (Dec. 8, 2005), <http://hatch.senate.gov/public/index.cfm?FuseAction=PressReleases.Home> (quoting Hatch). The next week, a third company, Florida Power & Light, also agreed to back away. Suzanne Struglinski, *3rd Investor Abandons PFS Project for N-Waste*, DESERET MORNING NEWS, Dec. 14, 2005, at A1.

381. Private Fuel Storage, 62 N.R.C. 403, 405 (2005).

382. *Id.* The Panel's decision overruled its earlier determination that there was too great a chance—four-in-a-million per year—that an F-16 would crash into the site, as opposed to the lower probability later assessed of also breaching a canister. Private Fuel Storage, No. 72-22-IFSI, at 4 (NRC Feb. 24, 2005) (on file with author).

383. Press Release, Orrin G. Hatch, U.S. Senator, Interior to Re-Evaluate PFS Lease (Dec. 9, 2005), <http://hatch.senate.gov/public/index.cfm?FuseAction=PressReleases.Home>; see also Notice of Request for Comments, 71 Fed. Reg. 6286 (Feb. 7, 2006) (requesting public comments on the application made by PFS to store spent fuel on the Goshute's land).

384. Roosevelt, *supra* note 2.

Congressman Rob Bishop, with the aid of fellow House members Chris Cannon and Jim Matheson, 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.”³⁸⁵

The wilderness designation built on an earlier effort by Governor Leavitt to erect a “land moat” around the Goshutes.³⁸⁶ The idea was simple: If the Goshutes could not use surrounding transportation corridors to move waste to the site, whether they had a storage license would be irrelevant. Governor Leavitt effectively had seized control of nearby railroad crossings and county roads,³⁸⁷ but those laws had been struck down in the courts with the other state measures.³⁸⁸ The wilderness effort, as a congressional mandate, avoided the earlier measure’s federalism problem. That it was anything other than a roadblock to the PFS site, however, was not lost on anyone. Ecstatic at the authorization, Lawson LeGate, a Sierra Club representative, explained:

Utah is not the nation’s dumping ground for high-level nuclear waste. With the passage of this legislation, not only will Utah get its first new wilderness area in two decades, but Congress will have taken the first significant step in protecting Utahns and other Americans from transportation and storage of this dangerous material.³⁸⁹

Indeed, with the bill’s passage, the Utah political campaign saw its target in sight. “We have created wilderness the right way,” Representative Bishop attested. “We have moved forward in the effort to prevent nuclear spent fuel rods from reaching the Goshute Reservation. We have put another nail in the coffin of PFS”³⁹⁰

385. *Id.*; *see also* Utah National Guard Readiness Act, H.R. 3651, 110th Cong. § 2 (2006). The land was designated the Cedar Mountain Wilderness Area. National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 384, 119 Stat. 3136, 3217.

386. Clarke, *supra* note 340, at 53.

387. UTAH CODE ANN. §§ 54-4-15, 72-3-301, 72-4-125(4) (2000).

388. Skull Valley Band of Goshute Indians v. Nielson, 376 F.3d 1223, 1252–53 (10th Cir. 2004).

389. Press Release, Wilderness Soc’y, Utah Wilderness Coalition Calls Success on Cedar Mountain Wilderness a Victory for All (Dec. 16, 2005) (on file with author).

390. Press Release, Bob Bennett, U.S. Senator, UTTR-PFS Provision Included in Final Defense Bill (Dec. 16, 2005), <http://www.senate.gov/~bennett/press/record.cfm?id=249988>.

F. "Skull Valley Is Dead"

The politicians did not let up. By the summer of 2006, Mike Lee, Huntsman's general counsel, characterized the ongoing legal, litigation, and policy efforts this way: "We will leave no stone unturned. It may take years, but . . . we will end this plan and dance gleefully on its grave when it's dead."³⁹¹ Within three months, Lee had his wish. On September 7, the BLM and the BIA issued companion "Records of Decision" on the EIS, denying the PFS rights-of-way applications and reversing the earlier lease approval, respectively.³⁹²

The decisions were curious documents. It was not particularly surprising that the BLM denied PFS's rights-of-way requests, given that the proposed rail spur would need to cross the newly named wilderness area, which had been designed to prevent this very thing.³⁹³ Nor could one claim that PFS's proposed right-of-way for a rail-to-truck transfer facility necessarily comported with the public interest, when movement by truck would entail making 4,000 trips down a 20-foot-wide road using 150-foot-long, 12-foot-wide tractor trailers.³⁹⁴ But it also was plain that the decisions were based more heavily in politics than reasoned decisionmaking, and the denial of the Goshute-PFS lease was another matter altogether.

Both the BLM and the BIA, recall, had explicitly declared in the EIS their preference for construction of the PFS facility.³⁹⁵ Now, in the face of staunch political opposition and the flood of public comments from the "exceedingly rare" reopened comment period the politicians had requested,³⁹⁶ the agencies had flip-flopped. The reasons given for this change of heart were transparent. The BLM, for

391. Michael Riley, *Trainload of Debate over Nuke Storage*, DENV. POST, June 11, 2006, at A1 (quoting Mike Lee, Chief Counsel for Utah Governor Jon Huntsman).

392. Record of Decision Addressing Right-of-Way Applications U 76985 and U 76986 (Bureau of Land Mgmt. Sept. 7, 2006) (on file with author) [hereinafter BLM ROD]; Record of Decision for the Construction and Operation of an Independent Spent Fuel Storage Installation (Bureau of Indian Affairs Sept. 7, 2006) (on file with author) [hereinafter BIA ROD].

393. See BLM ROD, *supra* note 392, at 8–10 (explaining that one of the bases for BLM's decision was that the rail line would impact the wilderness in a way that was incompatible with the wilderness values contemplated by Congress). R

394. See *id.* at 11 (detailing the dimensions and physical parameters that would restrict heavy-haul trailers); see also 43 U.S.C. § 1761(a)(7) (2000) (giving the Secretary of the Interior and the Secretary of Agriculture the power to extend or renew rights-of-way on public lands to facilitate "necessary transportation or other systems or facilities which are in the public interest").

395. FEIS, *supra* note 4, at liv–lv. R

396. Audio: Senator Orrin G. Hatch, Comments at Senate Republican Conference (Sept. 7, 2006), available at http://src.senate.gov/public/_files/radio/hatchenviron09_07_06.mp3 [hereinafter Hatch, Radio Interview].

instance, repeatedly cited letters from citizens of Utah and Senators Bennett and Hatch, translating those comments into reasons for its decision.³⁹⁷

The BIA's treatment was even more striking. Though the Bureau gave lip service to its duty to "conform to the fiduciary standard normally placed upon the United States,"³⁹⁸ and though placing high-level nuclear waste on Goshute land certainly falls within the agency's statutory mandate of giving "adequate consideration" to a lease's "effect on the environment,"³⁹⁹ the BIA's decision seemed determined to emphasize the agency's "broad discretion" in how it carries out its trust responsibility for lease approvals.⁴⁰⁰ The BIA was fully "cognizant" and "aware" of the "income" and "economic benefit" the project would provide the Goshutes, and it was deliberate in reassuring the tribe that these factors "weighed heavily in [its] consideration of the proposed lease."⁴⁰¹ Nevertheless, the BIA reminded that under statute, it was the Secretary's role to balance "the long-term viability of the Skull Valley Goshute reservation as a homeland for the Band (and the implications for preservation of Tribal culture and life) against the benefits and risks from economic development activities."⁴⁰² Making that calculation, the Bureau decided that the lease was not in the tribe's best interest for a litany of reasons. Among others, the EIS did not evaluate the impacts of moving waste "*away from*" the reservation, even though it had expressly found the impacts of moving the waste *to* it negligible.⁴⁰³ The Bureau could not "ascertain when [the waste] might leave,"⁴⁰⁴ even though the EIS specifically considered this and the NRC license was limited to a total of forty possible years plus

397. See BLM ROD, *supra* note 392, at 13–16 (referencing comments from Utah's citizens and politicians). R

398. BIA ROD, *supra* note 392, at 17. R

399. 25 U.S.C. § 415(a) (2006).

400. BIA ROD, *supra* note 392, at 16. Courts have recognized such discretion, subject to statutory and fiduciary limitations. See, e.g., *Brown v. United States*, 42 Fed. Cl. 538, 562–63 (1998); *Webster v. United States*, 823 F. Supp. 1544, 1549 (D. Mont. 1992). See generally Reid Peyton Chambers & Monroe E. Price, *Regulating Sovereignty: Secretarial Discretion and the Leasing of Indian Lands*, 26 STAN. L. REV. 1061, 1074–75 (1974) (discussing the Act of Aug. 9, 1955, Pub. L. No. 255, 69 Stat. 539 (codified as amended at 25 U.S.C. § 415(a) (2006))). R

401. BIA ROD, *supra* note 392, at 19. R

402. *Id.* at 18.

403. *Id.* at 21.

404. *Id.* at 26 (emphasis removed). This certainly was a concern that Utah and public interest groups fighting the proposal expressed it repeatedly. Given the immense delay in completing Yucca Mountain, one indeed must question how much political weight the NRC might actually muster once *any* nuclear repository, whether "temporary" or not, commences operation. Cf. *infra* note 554. R

decommissioning.⁴⁰⁵ And there was no assurance of law enforcement on the reservation, even though the NRC gave “exhaustive consideration” to the proposed site’s “security,”⁴⁰⁶ and PFS had forged a contract with Tooele County to provide all necessary emergency, fire, police, and other municipal services for the site.⁴⁰⁷

Utah’s politicians were just as enthusiastic to receive these decisions as they were ready to take credit for pushing the agencies to them. Representative Matheson, noting that he had sent comments to the BLM, praised the result: “Utahns stand united against the East Coast dumping its nuclear garbage on the West. Today’s decisions prove that perseverance pays and I couldn’t be more relieved.”⁴⁰⁸ Senator Hatch likewise declared the two decisions a “killing blow” to the PFS project.⁴⁰⁹ “With today’s DOI decision, the PFS plan has been burned to the ground.”⁴¹⁰ “As far as I can see it, Skull Valley is now stone cold dead.”⁴¹¹

Today, it is perhaps unclear whether there truly is no hope at all left for the PFS project. In July 2007, PFS and the tribe together sued the DOI challenging the September 2006 decisions;⁴¹² that case remains pending.⁴¹³ What is clear, however, is that given the daunting setbacks the project has already incurred, even if the parties win in

405. FEIS, *supra* note 4, at xxxii, 2-32, 2-33; Private Fuel Storage, 60 N.R.C. 125, 143 (2004).

406. BIA ROD, *supra* note 392, at 24.

407. Agreement Between Private Fuel Storage L.L.C. and Tooele County, Utah, § 3, at 4–5 (May 23, 2000) (on file with author); *see also Utah Lawmakers Take Aim at PFS Facility*, NUCLEAR FUEL, Mar. 5, 2001, at 8 (noting that Tooele County had agreed to dispatch officers to the storage site); Judy Fahys, *Tooele Signs Deal for N-Waste*, SALT LAKE TRIB., May 25, 2000, at B1 (noting that the agreement between Tooele County and PFS stipulated that an annual payment would be made to the county for the provision of police and fire services).

408. Press Release, Jim Matheson, U.S. Congressman, Nix on Goshute Lease Could be Final Blow to Radioactive Waste Dump (Sept. 7, 2006), <http://matheson.house.gov/press2006/060907b.shtml>.

409. Press Release, Orrin Hatch, U.S. Senator, Utahns Deliver Killing Blow to Skull Valley Nuke Waste Plan (Sept. 7, 2006), <http://hatch.senate.gov/public/index.cfm?FuseAction=PressReleases.Home> [hereinafter Hatch, Utahns Deliver Killing Blow].

410. *Id.*

411. Hatch, Radio Interview, *supra* note 396; *see also* 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://bennett.senate.gov/press/record.cfm?id=262652> (quoting Senator Bennett that “[t]his ends any possibility that the Goshute facility will ever be used for the storage of high-level nuclear waste”).

412. *See* Amended Complaint at 2–3, Skull Valley Band of Goshute Indians v. Cason, No. 2:07cv00526 (D. Utah July 20, 2007). In turn, Utah and others have challenged the NRC license issuance, though that case has been held in abeyance because the court deemed it unripe based on the ambiguity of whether the project would proceed. *Ohngo Gaudadeh Devia v. NRC*, 492 F.3d 421, 422–23 (D.C. Cir. 2007).

413. This was true as of February 12, 2009.

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court, overcoming the tremendous opposition they face in Utah will require something on the order of a miracle. Hatch was right. In all likelihood, “PFS is dead. It’s that simple.”⁴¹⁴

The broader question that the Goshutes’ saga raises, though, is not whether PFS is dead but whether, as Hatch put it clearly referring to PFS, “Skull Valley is . . . dead.”⁴¹⁵ For the story of the Goshutes’ plan to store nuclear waste did not begin with spent fuel rods. It began with sovereignty. It was the tribe’s own competing visions of what sovereignty means—Bear’s claim that the tribe was exercising sovereignty to “keep our traditions and our cultural resources intact,”⁴¹⁶ and Bullcreek’s conflicting view that accepting the waste would “‘destroy who we are’”⁴¹⁷—that drove much of the conflict, that showed just how discordant modern notions of native sovereignty can be. And after nearly two decades of pursuing the project, it was sovereignty’s own internally conflicted twin—the trust doctrine—that helped end the Goshutes’ nuclear bid. Ultimately, it is how these two principles interact, how they are reconciled, that will answer whether tribes prosper or founder in the future. Ultimately, it is sovereignty and the trust that will answer whether Skull Valley is still alive, or if it is dead.

IV. A CONFLICTED PROBLEM, A DIFFICULT SOLUTION: RECONCILING SOVEREIGNTY AND THE TRUST?

The most powerful product of reconciling sovereignty and the trust may be expressly identifying what in these doctrines pushes tribes down and what allows them to rise—what promotes their ability to maintain a separate Indian-ness, and what suppresses that capacity. Using the Goshutes’ nuclear plan as a lens, the remainder of this Article attempts that daunting task. This Part begins by arguing that sovereignty and the trust are not reconcilable. Next, the Part reviews previously proposed solutions for combining the doctrines. It then contends that none of these solutions achieves a real sovereignty-trust reconciliation. Accordingly, I contend that enhanced tribal sovereignty is the best solution, despite its potential pitfalls. Finally, with no pretense that the innumerable nuances and variations of Indian relations can be captured in any single proposal, I offer a beginning

414. Hatch, *Utahns Deliver Killing Blow*, *supra* note 410.

415. Hatch, *Radio Interview*, *supra* note 396.

416. Lewis, *supra* note 3, at 321.

417. Jerry Spangler, *Foes of Goshute N-Waste Plan Take Case to D.C.*, *DESERET MORNING NEWS*, Apr. 5, 2005, at B2 (quoting Bullcreek); *see also* Bullcreek Lecture, *supra* note 334 (arguing that there is “more to” sovereignty than simple self-determination because one generation has a responsibility to keep traditions alive for the next).

framework for a new doctrinal model to pursue greater tribal sovereignty.

A. *The Dilemma*

Even a brief step back reveals that tribal sovereignty and the federal trust are, on their face, irreconcilable. On the one hand, sovereignty is about self-governance and self-determination; it is about tribal power. The trust, on the other hand, is about a federal duty to protect Indians; it is about the submission of tribal power to a higher authority.

The sovereignty-trust conflict is perhaps best illustrated by its permeation of the Goshutes' proposal. Most prominent was the requirement that the tribe receive federal approval before leasing its land.⁴¹⁸ This requirement is well-settled statutory law, and has come to be seen as rooted in a nominally benevolent purpose—protecting tribal territory against actual or *de facto* attrition, a problem so devastating to tribes in the past.⁴¹⁹ In this way, the trust could be seen as promoting tribal sovereignty. Since land is necessary for self-governance,⁴²⁰ a check against its loss should limit sovereignty's diminution as well.⁴²¹ Still, the very presence of this federal oversight begs the question: If we really believe in tribal self-determination, why should any entity other than the tribe exercise control over how its land is used? Nations and states do not require outside approval of their land regulation or disposition, precisely because that authority is seen as definitionally sovereign. Restricting the same power for tribes communicates that, because of the trust, tribal sovereignty is not really sovereignty at all.

The Goshutes ran headlong into this doctrinal dilemma. They negotiated a lease with PFS that they believed would benefit their tribe.⁴²² This was their sovereign determination. Nevertheless, the

418. 25 U.S.C. § 415(a) (2006).

419. See Robert N. Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government*, 33 STAN. L. REV. 979, 1002–03 (1981) (noting that the approval requirement for leasing Indian land initially served to “protect[] the tribal land base”); see also *supra* note 183 and accompanying text. The actual origin of federal lease approval authority for Indian lands was not so benevolent; it arose in 1891 as a way to facilitate allotment. See Chambers & Price, *supra* note 400, at 1071–72 (explaining that leasing Indian land would assist in allotment by bringing in white farmers and producing capital).

420. See Wood, *Trust Doctrine Revisited*, *supra* note 121, at 1474.

421. See Clinton, *supra* note 419, at 1066–67 (explaining that protecting the Indian land base would allow Indians to determine the destiny of their communities and prevent federal leasing programs from resulting in termination).

422. See *supra* Part III.B.

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BIA had to “satisfy” itself that “adequate consideration ha[d] been given” to a variety of factors, including the leased land’s relationship with that around it and the accompanying environmental effects.⁴²³ It was in carrying out this obligation that the BIA attempted to balance the Skull Valley reservation’s “long-term viability . . . as a homeland” against the PFS project’s “benefits and risks”⁴²⁴—a task one would expect the tribe to perform itself if tribal sovereignty is at all meaningful. The BIA, in fact, disagreed with the tribe’s own determination on this front, despite the tribe’s worry that without the project, it might dwindle past its current status of barely surviving. Thus, although it is uncommon for the BIA to disapprove tribally proposed leases,⁴²⁵ the Skull Valley dispute stands foremost as an example of the trust’s ability to quash exercises of tribal sovereignty. If that risk exists, then the trust-sovereignty conflict does too. The Goshute example makes clear that the risk is real.⁴²⁶ When the trust and sovereignty seek to coexist, neither thrives. For either to have real meaning, the other must succumb.

B. Proposed Solutions

Numerous commentators have recognized the conflict between a robust trust doctrine and full-fledged tribal sovereignty,⁴²⁷ their proposed solutions cover just as broad a spectrum. At one end, some commentators have argued for greater faith in the trust doctrine itself, or at least a re-tooled version modified for modernity. At the other end, a few authors have advocated for a complete return to sover-

423. 25 U.S.C. § 415(a).

424. BIA ROD, *supra* note 392, at 18.

425. *See* Chambers & Price, *supra* note 400, at 1066–67 (noting that the Secretary applies a limited procedure to reviewing leases and discussing the possible endangerment of tribal self-government if the Secretary begins disapproving leases sought by tribal members); Wood, *Trust Doctrine Revisited*, *supra* note 121, at 1480 (noting that, practically, “BIA simply approves transactions that tribal governments support”).

426. Indeed, it is not just in cases as controversial as the Goshutes’ where the sovereignty-trust conflict crops up. *See, e.g.*, *United States v. Navajo Nation*, 537 U.S. 488, 508, 518 (2003) (noting that the Secretary’s responsibility to review leases and tribal autonomy are at odds, and that the two interests require balancing). *But cf.* Cross, *supra* note 122, at 394 (seeing trust-sovereignty tension as needlessly “zero sum”).

427. *See, e.g.*, Gould, *Tough Love*, *supra* note 258, at 675 (characterizing the doctrines as “opposing”); Tadd M. Johnson & James Hamilton, *Self-Governance for Indian Tribes: From Paternalism to Empowerment*, 27 CONN. L. REV. 1251, 1254 (1995) (calling the doctrines “utterly inconsistent”); Stacy L. Leeds, *Moving Toward Exclusive Tribal Autonomy over Lands and Natural Resources*, 46 NAT. RESOURCES J. 439, 441 (2006) (recognizing the doctrines as “inconsistent”); Skibine, *Reconciling*, *supra* note 157, at 1156 (recognizing “inherent conflicts”); Wood, *Protecting Native Sovereignty*, *supra* note 217, at 113 (noting “many inevitable direct conflicts”).

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eignty, with a significantly diminished trust role. Finally, in the middle are suggestions attempting to balance the two.

1. *Trust-Based Solutions*

Professor Mary Christina Wood offers the leading example of the trust-based proposals.⁴²⁸ In a series of exhaustive articles,⁴²⁹ Wood envisioned a trust divorced from *Kagama's* “plenary power”—a trust she terms the “sovereign trusteeship.”⁴³⁰ This solution draws on *Worcester's* conception of a federal trust obligation that protects tribal self-governance,⁴³¹ though updated with a twist.

The core of this solution is “a duty to protect a viable native separatism.”⁴³² Specifically, Wood defines four interlinking elements of tribal sovereignty that she argues the federal government has a duty to protect: “(1) a stable, separate land base; (2) a viable tribal economy; (3) self-government; and (4) cultural vitality.”⁴³³ Without each of these attributes intact, native peoples who “embrace tribal separatism” and traditionalism will be deprived of “the freedom to choose their own lifestyles within the larger society.”⁴³⁴ Wood acknowledges that the attributes may at times conflict; thus, she concludes that this “new trust paradigm” must ensure “protection to all four attributes.”⁴³⁵

Wood's model would provide this kind of “sovereign trust” protection at two levels. First, it would impose upon agencies a procedural obligation to weigh proposed actions' likely impact on the four attributes and “affirmatively protect the tribe's interests when it undertakes action.”⁴³⁶ Second, this trusteeship would compel courts to “devise a substantive test” in which they would take an “independent” look at whether the federal action “interferes with one or more” of the

428. For examples of other trust-based proposals, see Aitken, *supra* note 124, at 150, arguing that the trust obligation is binding on all branches of government and requires the Supreme Court to evaluate violations of the trust using strict scrutiny, and Slade, *Self-Determination Era*, *supra* note 167, at 2A-23, urging a trust responsibility that assesses tribes' “short-term and long-term interests.”

429. Wood, *Protecting Native Sovereignty*, *supra* note 217; see also Mary Christina Wood, *Fulfilling the Executive's Trust Responsibility Toward the Native Nations on Environmental Issues: A Partial Critique of the Clinton Administration's Promises and Performance*, 25 ENVTL. L. 733 (1995); Wood, *Trust Doctrine Revisited*, *supra* note 121.

430. See Wood, *Protecting Native Sovereignty*, *supra* note 217, at 112 (explaining that the trust obligation requires the federal government to protect “native separatism”).

431. *Id.* at 128–29.

432. *Id.* at 113.

433. *Id.*

434. *Id.* at 132.

435. *Id.* at 132, 223, 234.

436. *Id.* at 225.

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attributes.⁴³⁷ In this way, Wood's model seeks to resolve the inherent trust-sovereignty conflict by using the trust as a vehicle for sovereignty. The model would require the federal government to exercise its trust obligation in a way that promotes sovereignty's attributes.

2. *Compromise-Based Solutions*

Between Wood's "sovereign trusteeship" and solutions emphasizing sovereignty is a broad range of suggestions attempting to strike a balance between the two.

Reid Peyton Chambers's approach is illustrative of what might be referred to as such "compromise-based" solutions. Chambers adopts a two-pronged approach. First, to maximize sovereignty but protect against the risk of short-term profit maximization that might erode long-term cultural survival, he would remove the trust-based requirement of federal approval for "short term" tribal leases, but maintain it for longer transactions that could "permanently or irreparably alter reservation lands."⁴³⁸ Next, he would deploy the trust to serve "as a judicially enforced limitation upon congressional power,"⁴³⁹ thereby ensuring that gains in sovereignty achieved in one branch would not simply be taken away by the other.

Numerous other authors have offered solutions based on existing statutory frameworks for tribal-federal contracts. In short, these authors suggest that the best way for tribes to exercise sovereignty is by sub-contracting out trust obligation work for themselves.⁴⁴⁰ Professor Alex Tallchief Skibine pushes that concept a step further. He would solve the sovereignty-trust conflict by placing tribes in a status akin to federal trust territories such as Puerto Rico or Guam, thus allowing each tribe to negotiate the terms of its "political relationship" with the United States.⁴⁴¹ Likewise, Professor Hope Babcock has propounded a proposal to allow tribes to "nullify (or opt out of) laws that diminish" tribal sovereignty—though she warns that tribes will have to adjust

437. *Id.* at 223, 231.

438. Chambers, *supra* note 157, at 13A-37; *see also* Chambers & Price, *supra* note 400, at 1084, 1086 (arguing that although retraction of the approval power for short-term leases is appropriate to limit the Secretary's discretion, the Secretary should retain the power to review long-term tribal leases that would alter Indian culture and tribal self-government).

439. Chambers, *supra* note 157, at 13A-41.

440. *See, e.g.*, Johnson & Hamilton, *supra* note 427, at 1278-79; *cf.* Cross, *supra* note 122, at 396 (urging a sovereignty-centric judicial canon of construction); Robert Laurence, *A Paradigmatic, Comparative, Private-Law Perspective on the Federal Trusteeship*, 46 NAT. RESOURCES J. 463, 486-87 (2006) (envisioning a "contractually based" trust including an implied covenant of good faith).

441. Skibine, *supra* note 157, at 1116, 1156.

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their activities when their rejection of outside laws have “undesired spillover impacts on adjacent communities.”⁴⁴²

3. *Sovereignty-Based Solutions*

Other commentators have taken the opposite course of Wood, arguing for greater deference to sovereignty with a concomitant diminishment in trust obligations. An approach espoused by Professor Kevin Gover straddles the line between compromise-based approaches and such sovereignty-based proposals. Like Professor Skibine, Gover would have tribes negotiate with the federal government to determine which trust obligations each would carry out, and which would remain at all.⁴⁴³ Gover anticipates, however, that tribes would typically have full “authority over trust lands,” including, potentially, “the option of alienating land without thereby losing their authority over it.”⁴⁴⁴ Professor Gover’s vision is thus of tribes as socio-cultural governmental entities irrespective of land ownership.

An even more sovereignty-centric model builds on Gover’s notion of allowing Indian land alienation. Professor Stacy Leeds would execute this proposal in three parts. First, title to Indian lands would be conveyed to tribes and allottees.⁴⁴⁵ Second, federal law would be amended to “protect against state interference and preserve tribal autonomy” over the land.⁴⁴⁶ And third, tribes would then “decide for themselves” whether they wished to manage, alienate, or encumber their lands, or if they instead preferred to continue federal supervision.⁴⁴⁷

442. Babcock, *supra* note 202, at 448, 566.

443. Gover, *supra* note 179, at 359–60.

444. *Id.* at 363.

445. Leeds, *supra* note 427, at 456.

446. *Id.* at 457.

447. *Id.* at 457–58. Still others urge a return to pre-colonial Indian nation-states, or what might be termed modern Indian “secession” from the Union. Russel Lawrence Barsh, *Indigenous North America and Contemporary International Law*, 62 OR. L. REV. 73, 123–25 (1983); *see also* Erik M. Jensen, *American Indian Tribes and Secession*, 29 TULSA L.J. 385, 396 (1993) (calling for the exploration of possible Indian secession); *cf.* Babcock, *supra* note 202, at 551–53 (illustrating the problems with possible Indian secession); Wallace Coffey & Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 STAN. L. & POL’Y REV. 191, 191 (2001) (advocating emphasis on “cultural,” rather than political, sovereignty); Macklem, *supra* note 205, at 1345 (urging acknowledgement that sovereignty is distributed at many levels of American government).

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C. *Toward Sovereignty*

Although important, these solutions do not actually reconcile sovereignty and the trust as much as demonstrate how they are at odds. Taking each class in turn shows why.

Wood's "sovereign trusteeship," for instance, does not truly meld its component parts, but elevates the trust above sovereignty. Three broad categories typify when the trust doctrine may apply to administrative agencies: (1) when they are managing Indian resources on a day-to-day basis, as in *Mitchell II* or *Cobell v. Norton*,⁴⁴⁸ (2) when they are making decisions directly about Indian resources but are not exerting day-to-day control, as in leasehold approvals; and (3) when they are making decisions about non-Indian resources that nonetheless affect Indians, such as the permitting of a power plant upwind of a reservation.⁴⁴⁹ In the latter of these circumstances, a sovereign trusteeship makes eminent sense, particularly if the tribe is meaningfully consulted,⁴⁵⁰ because it is in this context that the agency must balance its special responsibility to Indians with its statutory duties owed to the general public.⁴⁵¹ Conversely, if either day-to-day management or a threshold Indian resource decision is at issue, the notion of a "sovereign trusteeship" would seem paradoxical.⁴⁵² What such a trusteeship means in those situations is that an entity other than the tribe will decide what is best for it—the antithesis of self-determination.

The Goshutes' saga with nuclear waste is a paradigmatic example of how the "sovereign trusteeship" elevates the trust over sovereignty. Had Wood's model applied in the Goshutes' case, the BIA would have been charged with assessing the project's likely effects on each of the four attributes of Goshute sovereignty.⁴⁵³ Granted, this may have been a more enlightened determination than what agencies tradition-

448. 334 F.3d 1128 (D.C. Cir. 2003). The *Cobell* litigation involves the federal government's extensive mismanagement of Indian trust funds. *Id.* at 1133–34, 1136.

449. See Wood, *Trust Doctrine Revisited*, *supra* note 121, at 1478–80, 1489–90 (providing multiple examples of all three categories). R

450. See Derek C. Haskew, *Federal Consultation with Indian Tribes: The Foundation of Enlightened Policy Decisions, or Another Badge of Shame?*, 24 AM. INDIAN L. REV. 21, 21, 23–24 (1999) (arguing that tribal consultation will result in better federal policies and regulations).

451. *But see* Wood, *Trust Doctrine Revisited*, *supra* note 121, at 1527–35 (citing examples of agencies that owe fiduciary duties to Indian Tribes when making decisions that affect reservations). R

452. If an agency is merely managing Indian trust funds, there would seem no need at all for a sovereign trusteeship because money is the ultimate in fungibility; private trust rules should suffice. See Wood, *Protecting Native Sovereignty*, *supra* note 217, at 116 n.13 (stating that when the only relevant asset is money, the Indian tribe's interest is similar to those in the private context). R

453. *Id.* at 226–27.

ally have used, but it would still put sovereignty in second place. Even staunch opponents of the PFS project, such as Margene Bullcreek, describe the trust as a duty to “make sure [tribes] are not being bothered by non-Indians.”⁴⁵⁴ But a sovereign trusteeship gives the federal government the power to decide the tribal/non-Indian interactions that will be allowed and those that will not.

Indeed, the Skull Valley example appears to be precisely the kind of case Professor Wood had in mind when she acknowledged that tribal land uses “often involve inherently countervailing” aspects of sovereignty.⁴⁵⁵ For instance, the PFS proposal could have been seen as a “de facto conversion[] of land” weighing against lease approval under this model.⁴⁵⁶ Conversely, the project represented a substantial economic opportunity for the tribe, another factor recognized by the sovereign trusteeship model.⁴⁵⁷ Moreover, the project raised deep questions about how to assess the model’s “cultural vitality” factor,⁴⁵⁸ when many Goshutes strongly disagreed over whether the project was consistent with their culture.⁴⁵⁹ What is thus most telling about trust-based approaches such as the “sovereign trusteeship” is that they wrest from the tribe the most fundamental decisions about what a tribe *is*. It is one thing to say that a *tribe* may invoke private trust principles to obtain compensation when the federal government mismanages assets the tribe never asked the government to manage in the first place. But it is another altogether to say that *bureaucrats 2,000 miles away*, not the tribe, should make the core choices about a tribe’s very definition. Ultimately, the federal trusteeship, even a “sovereign” one, collapses into the latter category.

Compromise-based approaches likewise do not forge a true doctrinal reconciliation. Although they may moderate the circumstances in which sovereignty and the trust conflict, they do so by tinkering with details, not finding actual common ground. Apply the Goshutes’ case again. Under Chambers’ two-tiered approach, for instance, the Goshutes could have proceeded without BIA authorization because their twenty-five-year lease would have qualified under his definition of “short-term.”⁴⁶⁰ But this would be a mere expansion of sovereignty,

454. Bullcreek Interview, *supra* note 344.

455. Wood, *Protecting Native Sovereignty*, *supra* note 217, at 223.

456. *Id.* at 149. Numerous parties made this argument in the Goshutes’ case.

457. *Id.* at 150.

458. *Id.* at 192–95.

459. *See supra* Part III.B–C. More problematic, if the model also applied to the BLM and NRC, different agencies could have reached different results on how best to promote Goshute sovereignty.

460. Chambers & Price, *supra* note 400, at 1084.

not a resolution of the trust-sovereignty conflict.⁴⁶¹ The two doctrines would still conflict, but would simply do so at a different point—at thirty years instead of zero.

Proposals for government-to-government contracts, such as under the Tribal Self-Governance Act of 1994 or Professor Skibine's federal territory analogy, also leave the conflict intact. Models such as Skibine's, if they are meaningful, are most likely simply to edge toward full sovereignty, with negotiations between two governing entities modifying or cementing jurisdictional boundaries and responsibilities. Whether a trust duty remains in that scenario would thus be voluntary, not mandatory as it is today. The very idea of self-governance agreements, by contrast, is that the federal government must first give its approval before tribes are deemed "capable" of performing the pertinent functions.⁴⁶² This is not to diminish the clear value that such contracts currently provide tribes,⁴⁶³ but their limits mean that the trust necessarily prevails: These agreements currently do not include many functions of self-government that tribes might desire to perform—including leasing authority—and the tribe is not free to unilaterally expand the list of eligible categories.⁴⁶⁴

Nor is it fair to say that the various sovereignty-based approaches solve the doctrinal conflict. Indeed, advocates of these approaches effectively admit their preference for the triumph of self-determination. As Professor Leeds writes, "The only model that will return control and autonomy to tribes is one that envisions a final end to the federal trust of Indian lands."⁴⁶⁵

The question thus transforms from whether the trust and sovereignty can be reconciled to this: Which of the two should prevail? Perhaps what tribes need is not further attempts at combining concepts that have been at war for nearly two centuries, but the certainty of which will ultimately dictate. In that appraisal, the obvious answer, it seems, is to move toward sovereignty.

The moral reasons for promoting sovereignty over the trust are many. Foremost is that the trust is unduly paternalistic and self-determination is not. The number of scholars pointing to the trust as in-

461. *See id.* at 1086–87 (arguing that even if tribes are given more discretion over short-term leases, federal approval should still be required for long-term leases).

462. King, *supra* note 239, at 499.

463. *Id.* at 476; Dean B. Suagee, *Tribal Self-Determination and Environmental Federalism: Cultural Values as a Force for Sustainability*, 3 WIDENER L. SYMP. J. 229, 236 (1998).

464. Gover, *supra* note 179, at 346–50.

465. Leeds, *supra* note 427, at 461; *cf.* Gover, *supra* note 179, at 373 (contending that the problem is not with the actions of the trustees, but with "the trust itself").

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herently racist is legion, but their message is uniform.⁴⁶⁶ What the trust means at its core is that “mainstream” society views tribes as incapable of performing basic governmental services that we readily afford numerous other types and levels of government across the nation.⁴⁶⁷ This vision of the trust traces back to Marshall’s deeming the Cherokees “wards,” reached its height in the plenary power cases, and continues today. Of the Goshutes’ nuclear choice, Senator Hatch said this: “Even more unfortunate, Mr. President, the only tribe they could *con* into taking this waste was the Skull Valley Band of the Goshutes”⁴⁶⁸ Whether such statements are simply political hyperbole or something else, their message is clear. Arguments opposing the Goshutes’ plan dripped with assumptions and assertions of Indian inferiority and inability.⁴⁶⁹ Indeed, perhaps the most telling moment in Utah’s campaign against the Goshute proposal came when a number of legislators floated “Plan B”—a proposal to have Utah store the waste instead of the Goshutes.⁴⁷⁰ It was thus virtually a foregone conclusion that the entire Utah congressional delegation would assert that the DOI had “both the authority and a fiduciary responsibility” to deny the Goshutes’ lease.⁴⁷¹ The delegation understood what the trust, so often, is really about: sacrificing tribal self-determination to non-tribal authority.

466. See Joel A. Holt, Note, *Treat All Men Alike: An Analysis of United States v. White Mountain Apache Tribe and Suggestions for True Reparation*, 38 AKRON L. REV. 413, 454 & n.195 (2005) (citing numerous scholarly articles).

467. See, e.g., *id.* at 454 (“The trust doctrine, the cornerstone of federal Indian law, is rooted in colonialist notions of Indian inferiority, dependence and barbarism.”); Johnson & Hamilton, *supra* note 427, at 1253 (“By their first principles, [government] programs borne of paternalism assumed that American Indians were incapable of managing and governing their own affairs.”).

468. Press Release, Orrin G. Hatch, U.S. Senator, No Private Nuclear Waste Storage (June 23, 2005), <http://hatch.senate.gov/public/index.cfm?FuseAction=PressReleases.Home> (emphasis added).

469. See, e.g., Rex A. Allen, Op-Ed., *Goshutes Can’t Manage N-Waste*, DESERET NEWS, Apr. 8, 2002, at A10; Judy Fahys & Robert Gehrke, *Church Opposes Nuclear Dump*, SALT LAKE TRIB., Sept. 11, 2005, at B1; Kit Miniclier, *Tribe Seeks Nuclear Dump Site; Officials Fear Group Can’t Handle Duties*, DENV. POST, June 17, 2001, at B8; KUED, Skull Valley: The Documentary: Interview with Rep. James Hansen, <http://www.kued.org/productions/skullvalley/documentary/interviews/hansen.html> (last visited Feb. 12, 2009); KUED, Skull Valley: The Documentary: Interview with Rep. James McConkie, <http://www.kued.org/productions/skullvalley/documentary/interviews/mcconkie.html> (last visited Feb. 12, 2009).

470. Donna Kemp Spangler, *New Trust Land Plan: N-Waste Storage*, DESERET NEWS, Feb. 5, 2003, at B1.

471. Press Release, Orrin G. Hatch, U.S. Senator, Utah Delegation Urges Interior to Block Skull Valley Site (Sept. 9, 2005), <http://hatch.senate.gov/public/index.cfm?FuseAction=PressReleases.Home>.

A further argument for elevating sovereignty over the trust is that the United States has promised tribes self-determination. This is not just a matter of forty years of consistent policy⁴⁷²—though certainly that must count heavily—but also of treaty obligations. It is cliché to quote Justice Black’s now famous statement that “[g]reat nations, like great men, should keep their word,” but the rationale rings true nonetheless.⁴⁷³ The United States entered into treaties with tribes, including the Goshutes, as sovereign entities, and to say now that such sovereignty is not real would be unjustified, if not discriminatory. As a matter of history, whether as compensatory justice or as simply fulfilling a promise, this nation owes it to tribes to let them determine for themselves what it means to be Cherokee or Oneida, Cahuilla or Navajo—or Goshute. The BIA publishes an annual list of tribes with which the United States has “government-to-government relationship[s]” for a reason.⁴⁷⁴ Ensuring native sovereignty simply lives up to what our nation claims already exists.

Numerous other reasons, both practical and as furthering sound policy, also weigh in favor of promoting sovereignty over the trust. With respect to lease approvals, for instance, the evidence is ample that the trust acts as an obstacle to tribal economic development.⁴⁷⁵ The result is that rather than encouraging economic sustainability, the trust perpetuates poverty.⁴⁷⁶ Part of the problem is that the trust creates a netherworld where DOI authority blurs ultimate responsibility, in turn impeding tribal economic leadership.⁴⁷⁷ “The Department has neither the incentive, nor the responsibility, nor the capability to act as a broker of Indian lands.”⁴⁷⁸ But when tribes seek to capitalize on their resources themselves, the trust stands as an obstacle. As the Goshutes’ and Navajos’ experience shows, not only is the trust vulnerable to the whims of political manipulation, the DOI may use it to affirmatively meddle in tribal decisions.⁴⁷⁹

472. *See supra* Part II.C.

473. *Fed. Power Comm’n v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) (Black, J., dissenting).

474. *See, e.g.*, Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 72 Fed. Reg. 13,648 (Mar. 22, 2007).

475. Gover, *supra* note 179, at 346–50.

476. *Id.* at 346.

477. *Id.* at 357; *see also* THE HARVARD PROJECT ON AM. INDIAN ECON. DEV., THE STATE OF NATIVE NATIONS: CONDITIONS UNDER U.S. POLICIES OF SELF-DETERMINATION 126–28 (2008) [hereinafter THE HARVARD PROJECT] (explaining that economic successes among Indian tribes are occasioned by “(1) aggressive assertions of sovereignty, resulting in (2) self-governed institutions, which are (3) characterized by cultural match”).

478. Gover, *supra* note 179, at 348.

479. *See supra* Part III.E–F.

Indeed, tribes have the most to gain or lose when it comes to sovereignty, and they should be allowed to reap its fruits and bear its burdens. "Sovereignty's value lies in the fact that it creates a legal space in which a community can negotiate, construct, and protect a collective identity."⁴⁸⁰ Even opponents of PFS agree. Sammy Blackbear observed, "[Our] sovereignty is what protects [our] tribe and [our] reservation."⁴⁸¹ Or as Margene Bullcreek put it, "Sovereignty is the only thing we have left . . . [It allows us] to be able to be who we are as indigenous people, to be able to build our way of government unique to us."⁴⁸² Sovereignty, in other words, allows for tribal vitality. The trust, ultimately, does not.

D. *Sovereignty Pitfalls*

Despite sovereignty's importance, taking this path over the trust is not without pitfalls, each of which the Goshutes' experience illuminates. Although these obstacles are not insurmountable, they should not be overlooked, and they must be considered in any new model of sovereignty.

1. *Externalities*

The most prominent, and most formidable, of the potential pitfalls is that the exercise of tribal sovereignty may visit externalities on other parts of society that lack representation within the relevant Indian nation. The corollary to the Goshutes' situation is the long line of modern Supreme Court cases curbing tribal sovereignty where it is seen as infringing upon individual constitutional or property rights.⁴⁸³ Either way, the effect is the same. Where such externalities exist, tribal sovereignty risks inciting backlash from mainstream society, which in turn risks diminishing sovereignty. Governor Leavitt set the dilemma in stark terms: "I recognize the sovereignty of this group but let's put it in perspective. [There are] 30 or 40 people who actually live there. We're talking about that by comparison to the public safety of two million people."⁴⁸⁴

The implication behind such statements is twofold. The first is, again, an assumption that tribes are not capable of making important decisions. The second is that even if tribes are capable, they will reach

480. Macklem, *supra* note 205, at 1348.

481. KUED, Sammy Blackbear, *supra* note 337.

482. Bullcreek Interview, *supra* note 344; *see also* Lawrence Bear Telephone Interview, *supra* note 283 ("Sovereignty means that we're our own government.").

483. *See supra* Part II.C.

484. KUED, Michael Leavitt, *supra* note 359.

decisions without giving voice to their neighbors' legitimate concerns.⁴⁸⁵

The seemingly obvious substantive solution is to moderate interjurisdictional conflicts between tribes and states in the same way that interstate conflicts are resolved. States make decisions everyday with potential impacts on neighboring states, and we do not hesitate to say that such decisions remain within the deciding state's sole province. It is typically only when the effects of those decisions spill over in a way sufficiently deleterious to the non-deciding state that federal law steps in to mitigate the harm.⁴⁸⁶ This kind of externality prevention is one of the purposes of many of our modern environmental laws,⁴⁸⁷ the dormant Commerce Clause's prohibition against interstate discrimination,⁴⁸⁸ the Supremacy Clause's preemptive effect,⁴⁸⁹ and so forth.

Making tribal decisions subject to federal law when they impose externalities on neighboring jurisdictions thus could be an equitable way by which to maximize tribal sovereignty without unfairly casting aside other jurisdictions' legitimate concerns. In fact, a number of federal statutes already include provisions for treating tribes as states,⁴⁹⁰ even giving tribes authority to implement the laws under federal oversight, just as states would.⁴⁹¹ Such an approach might pro-

485. *Id.* (comparing Utah's resistance to the Goshutes' plan to land zoning regulations).

486. Sometimes, of course, states themselves form compacts to address the question directly, but those too are subject to federal approval. *See* U.S. CONST. art. II, § 10, cl. 3.

487. *But see* Noah D. Hall, *Political Externalities, Federalism, and a Proposal for an Interstate Environmental Impact Assessment Policy*, 32 HARV. ENVTL. L. REV. 49, 71-75 (2008) (arguing that interstate harms are not captured well enough by environmental laws). *See also* Rebecca Tsosie, *Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics, and Traditional Ecological Knowledge*, 21 VT. L. REV. 225, 232-33 & n.35 (1996) (noting that most federal environmental laws apply to Indian Country unless that application would breach a treaty right, and that sometimes, states themselves form compacts to address the question directly).

488. *See, e.g., City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

489. U.S. CONST. art. VI, cl. 2. Although courts traditionally point to the Supremacy Clause as the source of Congress's preemptive power, some scholars have argued that preemption is constitutionally more complex. *Compare* Stephen Gardbaum, *Congress's Power to Preempt the States*, 33 PEPP. L. REV. 39, 40 (2005) (arguing that preemption and supremacy are distinct concepts), *with* Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 231-32 (2000) (arguing that Congress's preemptive power is derived from the Supremacy Clause).

490. *See, e.g.,* 18 U.S.C. § 2265(a) (2006) (assuring full faith and credit to tribal court orders under the Violence Against Women Act); 25 U.S.C. § 1911(d) (2006) (providing for full faith and credit in state court for tribal law on child custody); 26 U.S.C. § 7871(a) (2000) (treating tribes as states for various tax purposes).

491. *See* Surface Mining Control and Reclamation Act, 30 U.S.C. § 1235(k) (2000); Clean Water Act, 33 U.S.C. § 1377 (2000); Oil Pollution Act, 33 U.S.C. § 2706(b)(1), (4) (2000); Safe Drinking Water Act, 42 U.S.C. § 300j-11 (2000); Clean Air Act, 42 U.S.C. § 7410(o) (2000); Comprehensive Environmental Response, Compensation, and Liability

vide a compromise between the reality of state pressures to curtail tribal sovereignty and the ideal degree of sovereignty for tribes. In circumstances where tribal decisions have only internal effects, they would be free from outside oversight. Where, however, those effects influence other jurisdictions sufficiently to trigger applicable federal laws, the tribe could determine its willingness to be subjected to federal law before proceeding.

2. *Extinction*

Another foreboding pitfall of sovereignty is the risk that by emphasizing it over the trust, tribes will vanish. For all its problems and paternalism, perhaps 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.⁴⁹² Indeed, courts have relied on the trust as a way to protect tribal lands from state jurisdiction and taxation,⁴⁹³ and that certainly is one reason many tribes have been unwilling to abandon the trust altogether. If those barriers to assimilation are removed, however, tribes will vanish one by one.⁴⁹⁴ The first steps down that path were seen clearly in allotment, and they could well be revived if tribes were handed sole authority to determine the fate of their lands now.

This battle was fought in Skull Valley. Band members aligned on both sides, staking positions in an "acrimonious identity war" fought

Act, 42 U.S.C. § 9626 (2000); see also David F. Coursen, *Tribes as States: Indian Tribal Authority to Regulate and Enforce Federal Environmental Laws and Regulations*, 23 ENVTL. L. REP. 10579, 10579–82 (1993) (enumerating federal statutes authorizing the EPA to treat tribes as states); H. Scott Althouse, Note, *Idaho Nibbles at Montana: Carving Out a Third Exception for Tribal Jurisdiction Over Environmental and Natural Resource Management*, 31 ENVTL. L. 721, 763 n.287 (2001) (listing additional environmental provisions giving tribes state status). See Ann E. Tweedy, *Using Plenary Power as a Sword: Tribal Civil Regulatory Jurisdiction under the Clean Water Act after United States v. Lara*, 35 ENVTL. L. 471, 473 (2005), for the argument that such provisions can "reinvest" tribes with sovereignty.

492. 25 U.S.C. § 462 (2006).

493. See, e.g., *Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 114–15 (1998) (concluding that lands once under trust and later reacquired by a tribe in fee are subject to state and local taxation); *Shivwits Band of Paiute Indians v. Utah*, 428 F.3d 966, 982–83 (10th Cir. 2005) (finding trust land exempt from state billboard regulation); *Oneida Tribe of Indians of Wis. v. Vill. of Hobart*, 542 F. Supp. 2d 908, 921–23 (E.D. Wis. 2008) (finding that fee land held by tribe within reservation boundaries was subject to locality's jurisdiction because the land was no longer under trust); see also 25 C.F.R. § 1.4(a) (2007) (providing that state land regulations are not applicable to Indian land held in trust by the United States).

494. See Wood, *Trust Doctrine Revisited*, *supra* note 121, at 1480–89 (arguing that as the public desire to exploit Indian land increases, the federal government's trust responsibilities will play a vital role in maintaining tribal control of Indian lands).

over the nuclear proposal.⁴⁹⁵ Goshute critics charged that the tribal leadership was “sacrificing [their] lives and [their] future.”⁴⁹⁶ “We need to preserve our land for future generations,”⁴⁹⁷ Margene Bullcreek asserted. “Sovereign doesn’t mean to protect the destruction of the earth. It’s not worth it.”⁴⁹⁸

Project proponents saw things differently. Adapting to changing times was a necessity, not something Goshute culture foreclosed. “I consider myself to be a traditionalist, too,” Leon Bear rejoined. “I have reverence for the animals, plant life and the Earth. But I also have reverence for the people; we’re trying to balance things with this venture.”⁴⁹⁹ This juxtaposition of the post-modern versus the traditionalist Goshute is but one example. In the contemporary context of tribal poverty and powerlessness, a context created by centuries of vacillating federal policies and court decisions that have pushed, pulled, and stretched sovereignty and the trust to accommodate those policies, suddenly shifting full tilt to sovereignty now may well result in only more battles going forward.

The outcomes of battles such as these are undeniably important, but what stake do nonmembers have in the fight? Traditionalists might claim that the further erosion of conventional tribal cultures would be another, unnecessary manifestation of this nation’s nefarious colonialist-assimilationist legacy.⁵⁰⁰ The problem with this argument is that cultures change by definition. Tribal cultures are no different. They evolved before European contact, and they continue to evolve today.⁵⁰¹ As Professor Bethany Berger has explained, “[T]he genius of Indian tribes lies not in being living museums, but rather, in adapting in the face of change to survive”⁵⁰² Granted, debates about what tribal culture means, about how much Euro-American influence it can absorb and still be Indian, will be contentious. But the

495. Lewis, *supra* note 3, at 326.

496. Brent Israelsen, *Nuclear Panel Begins Hearings on Skull Valley Plan*, SALT LAKE TRIB., June 3, 1998, at B3.

497. Bullcreek Interview, *supra* note 344.

498. Hilary Groutage, *A Sign of the Times: No N-Waste Here*, SALT LAKE TRIB., Mar. 22, 1998, at C1.

499. Bob Mims, *Different Views: For the Goshutes, a Test of Tradition*, SALT LAKE TRIB., July 17, 2000, at D1.

500. See, e.g., Wood, *Protecting Native Sovereignty*, *supra* note 217, at 197–203 (arguing that continued federal action on and around tribal lands could disrupt tribal traditions and have a serious impact on Indian culture).

501. See D’ARCY McNICKLE, *THEY CAME HERE FIRST* 283 (rev. ed. Octagon Books 1975) (1949).

502. Bethany R. Berger, *Justice and the Outsider: Jurisdiction over Nonmembers in Tribal Legal Systems*, 37 ARIZ. ST. L.J. 1047, 1124 (2005).

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answer is one the tribe itself should find, not something the trust should negotiate.

3. *Hobson's Options*

A third potential pitfall of the sovereignty path is related to its extinction risk: that tribes will make detrimental decisions not because they normally would, but because the “choice” they are afforded is not really a choice at all. Put some hard data on the general poverty of Indian Country, already alluded to a number of times.⁵⁰³ Native Americans earn a real median household income not even equivalent to 60% of the national median.⁵⁰⁴ As a group, Indians also face the country's highest poverty rates. More than one-third live in poverty, compared to 25% of African Americans, 13% of Asian Americans, and 9% of whites.⁵⁰⁵ The picture is even bleaker for Indians on reservations. Nearly 40% of this group lives in poverty, and they make barely a third of what average United States residents earn.⁵⁰⁶

Thus, any tribal economic development opportunity may quickly assume the shape of a modern Hobson's choice. Tribes will take whatever they can get because there is nothing else. Indeed, the charge that tribes are “targeted” for pollution repositories and other unsavory economic “opportunities” is a common theme of environmental justice,⁵⁰⁷ and this theme repeatedly appeared in the discourse swirling around Skull Valley.⁵⁰⁸

There is no denying the truth that tribes historically have been exploited.⁵⁰⁹ But when tribes take actions as extensive as the Goshutes'—spending years educating themselves, changing positions from wary of the storage idea to amenable to it, and, ultimately, approaching PFS themselves about the possibility—the appearance of coercion begins to fade. Indeed, other tribes, including the Mescalero Apache, took the opposite approach, eventually backing away

503. See, e.g., Gavin Clarkson, *Tribal Bonds: Statutory Shackles and Regulatory Restraints on Tribal Economic Development*, 85 N.C. L. REV. 1009, 1013–16 (2007) (providing statistics).

504. THE HARVARD PROJECT, *supra* note 477, at 7.

505. *Id.* at 115.

506. *Id.* at 114–15.

507. See, e.g., Sandra D. Benischek, *Clean Air in Indian Country: Regulation and Environmental Justice*, 12 VILL. ENVTL. L.J. 211, 228 & n.120 (2001).

508. See, e.g., Judy Fahys, *Drafts Show Seamy Side of N-Waste Deal*, SALT LAKE TRIB., Sept. 29, 2002, at A1; Donna M. Kemp, *Utahns Unite to Fight N-Site*, DESERET NEWS, July 26, 2000, at B1; Laurie Sullivan Maddox, *Leavitt, Cook Battle Goshute Waste Storage*, SALT LAKE TRIB., June 27, 1997, at A10.

509. See, e.g., Ralph W. Johnson, *Fragile Gains: Two Centuries of Canadian and United States Policy Toward Indians*, 66 WASH. L. REV. 643, 654–64 (1991) (examining the history of federal government policies toward Native Americans).

from the project after first pursuing it. When these facts are added in, the Goshutes' decision begins to sound much more like free will, and charges that the band is merely a target begin to smack of either racist assumptions of incapability or stereotyped notions of what Indians "should" be. Many Goshutes themselves saw the PFS project as a way to revitalize both their reservation and their tribe,⁵¹⁰ and this may be the most important point. Empirical work repeatedly has shown that sovereignty is key to meaningful economic development in Indian Country,⁵¹¹ and economic development is a condition precedent to the survival of tribal culture.⁵¹² As one study found, tribal sovereignty is "the only strategy" with the potential to "break[] the patterns of poverty and dependence . . . in Indian Country It takes self-rule to be able to change institutions in ways that have a maximal chance of matching Native nations' respective cultures."⁵¹³ Sovereignty provides this self-rule; the trust only stunts it.

4. *Internal Dissent*

A final pitfall is the risk that turning tribal decisions entirely over to tribes will silence internal dissent. This concern is couched numerous ways. Most typical are that removing federal oversight will lend itself to increased leadership corruption, or that the *de facto* result will be to perpetuate Euro-American governance frames embodied in most IRA-based tribal constitutions.⁵¹⁴

Once again, both variations can be seen at play in the Goshutes' experience. Claims of corruption were levied both from within and outside the tribe. Charges, for instance, that Leon Bear had entered into the PFS agreement without proper tribal council authorization

510. See *supra* Part III.B; cf. Jana L. Walker et al., *A Closer Look at Environmental Injustice in Indian Country*, 1 SEATTLE J. FOR SOC. JUST. 379, 390 (2002) (suggesting that Indian tribes have considered and supported less desirable forms of economic development that "include potentially polluting industries and locally unwanted land uses" to free themselves from federal dependence and poverty).

511. See, e.g., THE HARVARD PROJECT, *supra* note 477, at 135–36; Clarkson, *supra* note 503, at 1021; Stephen Cornell & Joseph P. Kalt, *Reloading the Dice: Improving the Chances for Economic Development on American Indian Reservations*, in WHAT CAN TRIBES DO? STRATEGIES AND INSTITUTIONS IN AMERICAN INDIAN ECONOMIC DEVELOPMENT 1, 14–15 (Stephen Cornell & Joseph P. Kalt eds., 1992); Miriam Jorgensen & Jonathan B. Taylor, *What Determines Indian Economic Success? Evidence from Tribal and Individual Indian Enterprises*, 8 RED INK (2000), available at <http://www.hks.harvard.edu/hpaied/docs/PRS00-3.pdf>.

512. See generally Lorie M. Graham, *An Interdisciplinary Approach to American Indian Economic Development*, 80 N.D. L. REV. 597 (2004) (discussing the effect of politics, law, and socio-economic and cultural norms on tribal economic development).

513. THE HARVARD PROJECT, *supra* note 477, at 126.

514. See *supra* Part II.C.

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quickly surfaced,⁵¹⁵ and perhaps the most divisive claim was that Bear was funneling PFS monies to tribal members who supported his regime, but withholding these funds from dissenters.⁵¹⁶ It was these circumstances, indeed, that led to the disputed election of Sammy Blackbear as Bear's replacement, the ultimate aftermath of which was criminal charges for both Bear and Blackbear. All of this, critics might contend, was enabled by the centralized form of governance the Goshutes now use, which differs sharply from the family- and clan-based scheme of the Goshutes of old.

No doubt, such concerns strike at the heart of good native governance,⁵¹⁷ but they are not reasons to strip tribes of their right of self-determination. Any observer can attest that governmental corruption is not limited to tribes; scarcely a week goes by when some federal, state, or local governmental scandal is not splashed across the morning headlines. Certainly corruption takes on greater weight when seen as related to tribes' very survival, as it must for tribes like the Goshutes who have dwindled to such meager numbers. But there is no reason to think that isolated instances of corruption will necessarily lead to demise, or cannot be contained by those who care most—tribal members. Ultimately, that is the inquiry: not whether federal law should *permit* tribes to choose, but why it must *recognize* tribal jurisdiction as the forum for resolving conflict that is necessarily and primarily internal.

Indeed, what such anti-self-governance concerns often boil down to is the worry that modern "tribal councils cater to corporate development interests to the detriment of traditionalist values."⁵¹⁸ Invariably, that will be true in some cases, but in others it will not. And in the end, that is the point. Each tribe should be given room to negotiate for itself what elements of traditional "Indian-ness" it wants to maintain and what aspects of "modern," non-Indian society it will incorporate. "Sovereignty must be understood in this light: not as the right to stand still in a mythicized past, but as the power to change so as to

515. See, e.g., KUED, Sammy Blackbear, *supra* note 337; see also *supra* note 343 and accompanying text. R

516. See, e.g., Bullcreek Interview, *supra* note 344. As Margene Bullcreek put it, "Those who were for the waste got lots of favors, and those who weren't, didn't." Bullcreek Lecture, *supra* note 334. Some members also alleged that the Bear regime began selectively applying tribal laws—for example, through inordinate fines for the use of reservation timber or animal grazing—to PFS dissenters. *Id.* R

517. For an excellent assessment of what effective governance should mean in the tribal context, see generally Angela R. Riley, *Good (Native) Governance*, 107 COLUM. L. REV. 1049 (2007). R

518. Wood, *Trust Doctrine Revisited*, *supra* note 121, at 1556. R

maintain and strengthen one's community when many of the historic bonds between that community have disappeared."⁵¹⁹ There will be dissent no matter which way a tribe veers, but there need not be the specter of federal oversight when it does so. Tribes should decide for themselves, on their own terms, whether they want any such assistance or oversight. They should decide for themselves who they are.

E. A New Model

Consider where sovereignty and the trust have been since the *Cherokee Cases*, and three pillars emerge around which a new model of greater sovereignty may be formed. First, federal cases and policies repeatedly have abrogated tribal rights of self-governance, thus making clear a need for a new form of *full tribal self-determination*. Second, many, if not all, of the reasons for these diminutions of tribal sovereignty tie back to concerns of what harms—whether to individual constitutional rights, as in *Oliphant* or *Brendale*, or to the non-tribal environment, as in Skull Valley—mainstream society worries tribes will visit upon them. Thus, there is a need in any new model of tribal sovereignty for formal *externality moderation*. Third, the very fact that native sovereignty repeatedly has been involuntarily reduced strongly calls for a mechanism providing for strict tribal *sovereignty protection*.

Consider, also, the rights and benefits tribes seek from exercising sovereignty. Tribes, to have true self-determination, must be able to define their membership, form and run a government of their chosen design, make and enforce laws, tax, remain immune from suit, and exercise police powers to regulate, among other things, public health, safety, and the environment. Take all these attributes together, and what the full bundle of tribal powers very much looks like is a modern American state. States have virtually all these powers, and they have them as a matter of sovereignty. There are three key differences, however, between tribes and states. First, tribal sovereignty keeps eroding, whereas state sovereignty largely does not. Second, the federal constitution formally protects state sovereignty, whereas tribal sovereignty is subject to unilateral plenary power defeasance. Third, tribal sovereignty also is bound up in a notion of separate tribal cultures, whereas state sovereignty generally is not.

Accordingly, the new model I propose is to create a uniform—but flexible—mechanism by which tribes can have guaranteed sovereignty equivalent to what we afford states today. The greatest benefits of this approach will be that native sovereignty should return much

519. Berger, *supra* note 502, at 1124.

closer to what tribes historically exercised, and that such sovereignty will be protected in a way that it now is not. Of course, there are also risks involved. Making tribes look more like states than nations may create a perception that tribal sovereignty again has been reduced or, conversely, that tribes are receiving special treatment because even states do not now have some of the rights that tribes do, such as the ability to define membership.

Of course, the very purpose of this model is to *increase* tribal sovereignty, not to reduce it.⁵²⁰ That tribes may need to accept application of some federal law certainly could be seen as undesirable, but weigh the facts as they stand today: Tribes already are subject to Congress's largely unfettered authority to apply federal law to them.⁵²¹ Tribal members also are U.S. citizens.⁵²² In this "actual state of things,"⁵²³ tribes may well want to submit to federal laws in exchange for a greater guarantee of sovereignty than they now enjoy.

One might also complain that any proposal that seeks to eliminate the trust is simply termination by another name. But termina-

520. Likewise, states certainly set their own citizenship and residency requirements, something that might be qualitatively equated with determining tribal membership. For one examination of this state power and the constitutional limits upon it, including how Native Americans might utilize those limits, see generally James B. Wadley, *Indian Citizenship and the Privileges and Immunities Clauses of the United States Constitution: An Alternative to the Problems of the Full Faith and Credit and Comity?*, 31 S. ILL. U. L.J. 31 (2006). In any event, states have no legitimate complaint when tribes exercise historical powers that have no real external effects.

521. See *FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 123 (1960) (holding that Congress gave the Federal Power Commission the authority to take Indian land for purposes of licensed projects if they provide just compensation); see also Alex Tallchief Skibine, *Applicability of Federal Laws of General Application to Indian Tribes and Reservation Indians*, 25 U.C. DAVIS L. REV. 85, 88 (1991) (discussing how courts have decided whether federal laws apply to Indian tribes when the law and its legislative history are silent on the issue). The clash of this notion and the competing idea of tribal sovereignty (and the longstanding canons favoring sovereignty) recently erupted in a labor case. See *San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306, 1308, 1318 (D.C. Cir. 2007) (holding that federal labor law could be applied in a labor dispute at a casino operated by an Indian tribe where the casino was on the reservation but employed and catered to non-Indians). See generally D. Michael McBride III & H. Leonard Court, *Labor Regulation, Union Avoidance and Organized Labor Relations Strategies on Tribal Lands: New Indian Gaming Strategies in the Wake of San Manuel Band of Indians v. National Labor Relations Board*, 40 J. MARSHALL L. REV. 1259 (2007) (analyzing *San Manuel's* effect on federal Indian law and gaming and offering suggestions for tribes dealing with labor relations); Bryan H. Wildenthal, *Federal Labor Law, Indian Sovereignty, and the Canons of Construction*, 86 OR. L. REV. 413 (2007) (criticizing the court's decision in *San Manuel* and its effect on how courts and agencies may recast longstanding principles of law even while lacking the approval of Congress or the Supreme Court).

522. 8 U.S.C. § 1401 (2006). This was not always the case. See *Elk v. Wilkins*, 112 U.S. 94, 109 (1884).

523. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 589 (1823).

tion was a policy of *ending* tribal sovereignty, inflicted on tribes by the federal government, not elected by a choice they themselves made. Full tribal self-determination as I envision it here *promotes* native sovereignty with or without a continuing trust and places the entire onus on the tribe itself.

Indeed, the model anticipates malleability to accommodate tribes' specific circumstances. Each tribe may opt-in if it wishes, or not. It may abandon the trust as it exists today, or keep it.⁵²⁴ The model also expects substantial variation. Different tribes are in different places in terms of governmental and economic sophistication. Some would be ready immediately to take on all or greater responsibility with a concomitant diminishment of federal intrusion and oversight. Others would pursue a slower course, moving only incrementally, perhaps keeping some trust responsibilities in place and shedding only a few, as a way to begin their own process of revitalization. In the end, this is the most key aspect of the model: tribes decide for themselves. It is a model whose details will need to be worked out, but that by its three pillars should ensure greater tribal sovereignty.

1. *Full Tribal Self-Determination*

True tribal self-determination is the simplest aspect of the new model. It is the option for tribes to accept additional levels of governmental power and responsibility up to the same level that states hold today. Recent statutes allowing tribes to contract to perform trust functions historically provided by the federal government make great strides in this direction,⁵²⁵ but they are insufficient. They do not include every aspect of tribal governance, they have been criticized for subjecting tribes to unduly onerous eligibility requirements,⁵²⁶ and, most importantly, they frame the services being carried out first and foremost as federal obligations—not the tribe's. Under my model, treating tribes as states not only importantly expands what powers

524. The risks of extinction and silenced internal dissent also could be ameliorated if a high threshold, a supermajority, were set for any opting-in to this model by tribes—what, perhaps accurately, might be considered a final exercise of the federal trust responsibility. In the same vein, some might advocate for the new model to employ a threshold determination by the federal government that the opting-in tribe is capable of providing sufficient government services, akin to the Energy Policy Act of 2005's provision for tribal energy leases. *See infra* note 527. Certainly incorporating such a feature could help guard against the predation on tribes by corporate and other development interests, but it would do so at the cost of continued paternalism and all the baggage that comes with it.

525. *See supra* notes 237–239 and accompanying text.

526. *See, e.g.,* King, *supra* note 239, at 499.

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tribes may have, but gives them ultimate responsibility for carrying them out.

Even a few examples make clear the importance of these missing powers. The most obvious was seen in Skull Valley. Continuing federal oversight of tribal land leasing drags down the value of tribes' most valuable resource, even running the risk of thwarting a tribe's ability to revitalize, as the Goshutes' believed nuclear storage would help them do.⁵²⁷ Likewise, tribes wishing to make additional lands subject to their sovereign authority must submit to a complex BIA-administered process⁵²⁸—one that has been criticized as too slow, too costly, and too loathe to expand tribal jurisdiction.⁵²⁹ Finally, many tribal constitutions and elections currently operate under federal approval and oversight.⁵³⁰ Such pervasive federal involvement in everyday Indian life is what has created the perception “on the reservation . . . that the Indians may not do anything unless it is specifically permitted by the government.”⁵³¹

By contrast, states have each of these powers by definition. Their police power allows them to regulate not only the land they hold, but any non-federal land within their borders. There is no need to acquire additional lands inside those borders to exercise jurisdiction, but when they do make such acquisitions, there is no notion that they must first obtain permission from the federal government. And, states operate their own elections by the terms of their own constitutions, which they set without federal oversight.⁵³²

527. Indeed, even under the Energy Policy Act of 2005, which seeks to increase tribal self-determination by allowing tribes to approve their own energy-related leases, a tribe may not exercise this power until the DOI first finds the tribe to have “sufficient capacity” to do so. 25 U.S.C. § 3504(e)(2)(B)(i) (2006); *see also* Tribal Energy Resource Agreements Under the Indian Tribal Energy Development and Self-Determination Act, 73 Fed. Reg. 12,808 (Mar. 10, 2008) (describing a regulation by which tribes may enter into energy-related leases and agreements without Secretary approval if, prior to executing the lease or agreement, the tribe first enters a tribal energy resources agreement with the Secretary).

528. 25 U.S.C. § 465 (2006); 25 C.F.R. pt. 151 (2007).

529. Gover, *supra* note 179, at 371; Padraic I. McCoy, *The Land Must Hold the People: Native Modes of Territoriality and Contemporary Tribal Justifications for Placing Land into Trust Through 25 C.F.R. Part 151*, 27 AM. INDIAN L. REV. 421, 451 n.128 (2003). Certainly any criticism of this process should not be read as oversimplifying the obviously complex problem of any sovereign annexing the land of another, but at least with respect to once-tribal lands within reservation boundaries, the reasons for restoring tribal jurisdiction—particularly where tribe or tribal members have reacquired the land—are many.

530. 25 U.S.C. § 476 (2006); 25 C.F.R. pt. 81 (2007).

531. Warren H. Cohen & Philip J. Mause, Note, *The Indian: The Forgotten American*, 81 HARV. L. REV. 1818, 1820 (1968).

532. That is unless, of course, there is an alleged federal constitutional problem. *See, e.g.,* Bush v. Gore, 531 U.S. 98, 110 (2000) (finding that the state of Florida's vote recount procedures violated the Equal Protection Clause of the United States Constitution).

Putting tribes in the same position would thus return true native self-determination to tribes. For instance, tribes could elect to quash the false distinctions that cases such as *Brendale* and *Montana* have used to bridle tribal authority—drawing lines on the basis of “open” and “closed” portions of Indian reservations, or parsing whether tribal jurisdiction exists depending on if an individual’s relationship with a tribe is “commercial” or not.⁵³³ Instead, tribes 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. Similarly, tribes might choose to abandon the legacy of plenary power cases like *Lone Wolf* and *Kagama* and take charge of all law enforcement and prosecution on their lands based—just as state jurisdiction is—not on the lineal descent of the defendant but on whether the alleged act violates the jurisdiction’s criminal code.⁵³⁴ 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.⁵³⁵

Indeed, ultimately 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 the specter of federal meddling.

533. See *supra* Part II.C.2.

534. See *supra* Part II.B.1.

535. See *supra* notes 215–220 and accompanying text; see also Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 387 (1997) (noting that governments can adapt their policies to meet and satisfy individual preferences); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 8 (1988) (noting that an advantage of state governments is the ability of the regional citizens to shape their local political atmosphere). One question that would have to be grappled with is whether tribes also would be required to abide by the Constitution’s Republican guarantee. See U.S. CONST. art. IV, § 4; see also Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 749 (1994) (arguing that popular sovereignty is the “central pillar” of a Republican form of government). Given the purpose of promoting tribal sovereignty so that tribes may define their own governance structures in the context of each tribe’s own uniqueness, a strong argument could be made that the Guarantee Clause would need not apply under the new model, or at least not unless the tribe voluntarily acceded to it. And although the new model proposed here is certainly not fully pluralist, the further legitimization of political diversification that it would offer is yet another reason for allowing tribal divergence from this constitutional norm. Cf. Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155, 1181–82 (2007) (noting that the typical nation-state form of government, while important, is not the only possible successful community organization principle).

2. *Externality Moderation*

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.⁵³⁶ To be clear, such an acceptance must not be seen in any way as perpetuating a federal trust obligation or power. Rather, its inclusion in the model merely 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. This is, then, the same acknowledgment that cases such as *Oliphant*, *Montana*, and *Brendale* effectively make, but the new model affords tribes a meaningful benefit for making the exchange that those cases do not. In other words, while today the plenary power limits tribal authority without tribal consent, the new model would use externality moderation, first, to abolish Congress's and courts' right to unilaterally diminish tribal sovereignty,⁵³⁷ and, second, to explicitly set forth the conditions tribes must choose to accede to in order to obtain such a strong protection. In this way, externality moderation might be seen as the new model's "bridge" between full tribal self-determination and the accompanying protection of that empowerment.

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. One way to handle this may be to tie the assurance of specific sovereignty powers to the acceptance of specific federal laws or constitutional provisions.⁵³⁸ Take again, for instance, some of the broader exercises of tribal sovereignty just discussed. If a tribe wanted full authority to acquire, lease, and zone lands within its borders, externality moderation under the new model might require it to accept application of the Fifth Amendment. Likewise, a tribe seeking full taxation power on its reservation, exclusive of state authority,⁵³⁹ might be required to accept the limitations that the dormant Commerce Clause imposes against discriminatory taxation.⁵⁴⁰ Or, in order

536. See *supra* Part IV.D.1.

537. That is, at least in the opted-into area of sovereignty protection.

538. Unless Congress specifically declares so, federal constitutional provisions do not apply to tribes. See *Talton v. Mayes*, 163 U.S. 376, 379–80 (1896). This may also require modification of the current presumption for when generally applicable federal laws apply to tribes. See *FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960) (noting that settled case law has found that general statutes applicable to all persons apply to Indians and their property interests).

539. See, e.g., *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 647 (2001).

540. See, e.g., *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 329 (1977).

to take on full criminal jurisdiction over both tribal members and non-Native Americans, the tribe might need to afford defendants all rights available to them under the Federal Constitution.⁵⁴¹

Certainly, as cases from *Williams* to *Oliphant* have shown, any federal constitutional right may be a battleground for what constitutes an externality.⁵⁴² And, if a tribe truly seeks the full sovereign status of a modern state, it may well need to submit to the full panoply of federal-state relations dictated by the Constitution, just as states do.⁵⁴³

Given this, tribes opting into the new model must recognize the extent and kind of moderation they are accepting before making the choice. Consider, for example, doctrines that limit states' governing authority, such as the dormant Commerce Clause and federal preemption. Commentators already are critical of these rules for, among other things, unnecessarily restricting the way states may protect their environmental resources, stunting state-based governance experimentation, preventing legislative adaptation to local conditions and circumstances, and being too subject to results-oriented manipulation.⁵⁴⁴ To the extent a tribe becomes more like a state under the new model, it too likely would be subject to the same kinds of limitations, and the same critiques would apply. Critically, some tribes might see that kind of moderation as a dilution of their historical sovereignty—particularly when that sovereignty is couched in terms of the full nation-like sovereignty tribes theoretically enjoy, or even in terms of sovereignty

541. The Indian Civil Rights Act of 1968 applies many but not all of these restrictions to tribal governments. See 25 U.S.C. §§ 1301–1303 (2006).

542. See *supra* Part IV.D.1; cf. James A. Poore III, *The Constitution of the United States Applies to Indian Tribes*, 59 MONT. L. REV. 51, 53–54 (1998) (noting that Indian citizens and non-Indian citizens are entitled to the protection of their constitutional rights).

543. One disjoint in this circumstance is that, unlike states, tribes would not have direct representation in Congress. It is unthinkable, too, that the nation would suddenly increase to nearly 600 states to accommodate tribes. But other creative solutions theoretically could be available, such as allowing the formation of cross-tribal associations that, once large enough, would have direct congressional representation.

544. See, e.g., Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1172–73 (1995) (arguing that excessive use of federal preemption interferes with the ability of a state to respond to local issues and concerns); Jamison E. Colburn, *Localism's Ecology: Protecting and Restoring Habitat in the Suburban Nation*, 33 ECOLOGY L.Q. 945, 988 n.173 (2006) (noting that the most common subject of Commerce Clause scrutiny is state action relating to interstate markets); Kirsten Engel, *Reconsidering the National Market in Solid Waste: Trade-Offs in Equity, Efficiency, Environmental Protection, and State Autonomy*, 73 N.C. L. REV. 1481, 1496–97 (1995) (arguing that the Supreme Court's dormant Commerce Clause decisions have limited state authority to adopt environmental regulation); David B. Spence & Paula Murray, *The Law, Economics, and Politics of Federal Preemption Jurisprudence: A Quantitative Analysis*, 87 CAL. L. REV. 1125, 1187–88 (1999) (noting that the majority of federal judges seem predisposed to preempt state regulation on important environment, health, and safety regulation issues).

exercised in a way that seeks to minimize federal contact—and therefore might choose not to partake in the tradeoff. Others, of course, may adopt a more practical view: Seeing the United States' consistent diminishment of tribal sovereignty in the past, some tribes may view the trade of moderation for protection as favorable.⁵⁴⁵

Thus, implementation of the new model must be careful in ensuring (1) that there is a clear nexus between the power the tribe is assured and the restriction it accepts and (2) that the restriction in no way singles out tribes, but is only a uniform requirement, such as those mentioned above, to which *all* states must submit. Otherwise, the condition of externality moderation would not be moderation at all, but simply the trust by another name.

3. *Sovereignty Protection*

Given the diminishment of tribal sovereignty by every branch of the federal government since this country's inception,⁵⁴⁶ the need for the final pillar of sovereignty protection should go without saying. A real barrier against continued withdrawal of tribal authority is desperately needed. The two critical questions are: How should the area of protection be defined, and how should the protection be implemented?

The analogy of tribes to states should provide a straightforward answer to the first question. 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. The elegance of this solution is obvious. 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 (sub-

545. Another thorny issue will be the mechanism for enforcing such externality moderation. Would parties have a cause of action in federal court, or would they instead be required to appeal to a tribal tribunal? Ultimately, this answer may be intertwined heavily in the act of defining the externality in the first place. But assuming that the externality has been defined accurately and fairly (as opposed to merely reflecting a predominating philosophical resistance to an illiberal or unpopular method of governance with effects that are truly only internal), recourse under federal law in a federal court may be inevitable.

546. See *supra* Part II; see also Frickey, *(Native) American Exceptionalism*, *supra* note 241, at 473–75 (noting that even if Congress's authority over tribes were limited to its enumerated powers, the authority would remain exceedingly broad).

ject to externality moderations) in the place they would be most expected to do so.⁵⁴⁷

As to the second question—how to implement this sovereign protection—there are a number of options. The most protective 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. Another option would be to install the protection as a matter of federal law. Finally, somewhat similar to the suggestions of Professors Gover and Skibine,⁵⁴⁸ the 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.

Each of these options presents challenges. The negotiation path would consume enormous resources if conducted tribe-by-tribe, could place at a disadvantage tribes that the federal government views as not particularly capable, and could needlessly ossify a tribe's status. 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.

The constitutional possibility is the most promising and most admirable.⁵⁴⁹ As a matter of principle, I view it as the optimal solution. At the same time, however, its obvious obstacle is that *any* constitutional amendment is difficult to achieve today.⁵⁵⁰ When the amendment is one that some might (inaccurately) attempt to characterize as providing “special” status to tribes, its success likely would be even more difficult to broker than the other options, which already admittedly press the boundaries of political palatability. But that is not to say it should not be pursued. We owe tribes more than they have to-

547. While the question of sovereign area protection should be relatively straightforward, a more difficult issue may be determining how to recognize the tribal government. This can be problematic in the international context where different factions claim ruling power, and it was echoed in Skull Valley through the Bear-Blackbear dispute. Nevertheless, there is a clear difference between the BIA's running tribal elections, and federal comity for a tribal court's determination of what tribal regime holds legitimate authority.

548. See *supra* Part IV.B.

549. For the argument that tribal sovereignty needs the protection and stability that constitutional status can provide, see Frank Pommersheim, *Is There a (Little or Not so Little) Constitutional Crisis Developing in Indian Law?: A Brief Essay*, 5 U. PA. J. CONST. L. 271, 285 (2003).

550. See generally Erwin Chemerinsky, *Amending the Constitution*, 96 MICH. L. REV. 1561 (1998) (book review) (discussing the process and the difficulty of amending the United States Constitution).

day. And, ultimately at some point in law and policy, what is right must push what is.

V. CONCLUSION

Where would a model such as the one proposed here have left the Goshutes in the controversy swirling around them? What would reconciling the sovereignty-trust conflict by choosing sovereignty provide?

The answer depends on the degree to which the Goshutes would have opted into the model, but assuming they had done so fully, the tribe would have had much greater control over its destiny. From a sovereignty perspective, the key hanging point for the Goshutes' plan was the lease approval authority the BIA held over them. With full, state-like sovereignty, this would not have been an issue. The Goshutes would have controlled what happened within their borders because those borders are theirs. They would have been able to decide for themselves, without federal intervention, the project's "implications for preservation of Tribal culture and life."⁵⁵¹ They would have been able to set their future—as a sovereign.

To be sure, this boundary-based, state-like sovereignty would not have removed the limits of other federal laws. The BLM still would have had to make its own decision about the proposed rights-of-way, and if it denied the permits, the Goshutes would have had to find a different transportation alternative. An NRC site license—the real externality moderation requirement in play here—still would have been necessary. And Utah still would have been able to push for wilderness legislation that still could have severely cramped the Goshutes' plan.

In the end, however, this is exactly what the model seeks. The purpose of a new model of full tribal self-determination is not to give tribes unfettered authority to limit other jurisdictions' rights, but to ensure that they have the right to deal with those jurisdictions on a true government-to-government basis. Assuring the Goshutes full sovereignty in this way, in fact, may well have resulted in nuclear waste *not* arriving on their reservation. But it would have given them a far stronger position from which to negotiate with Utah over other economic development opportunities the tribe might have desired.⁵⁵²

551. BIA ROD, *supra* note 392, at 18.

552. Goshutes on both sides have said that they might have accepted, for instance, casino gaming in lieu of waste as an "equitable" solution. Bullcreek Interview, *supra* note 344; KUED, Leon Bear, *supra* note 312. The height of irony was that although Utah adopted legislation purporting to provide the Goshutes with \$2 million for economic development, funds were never allocated to this mandate, while the state spent multiples of

My advocacy for this new model of sovereignty in no way should be taken as an endorsement for bringing nuclear waste to Utah, for it is not. Rather, what the Goshutes' story exposes quite clearly is the very real danger in proceeding without a cohesive policy or coherent doctrine. This was true for the Goshutes, and it was true in the nuclear context as well. As a nation, for centuries, we have allowed to persist the myth that sovereignty and the trust can fully coexist. Likewise, having never articulated a cohesive nuclear waste policy, we took the path of nuclear power without a permanent solution in place,⁵⁵³ and now the chosen answer—Yucca Mountain—remains suspended, perhaps indefinitely, in Nevada's own fierce opposition.⁵⁵⁴ Skull Val-

that amount in legal and lobbying fees fighting the proposal. *See* Lewis, *supra* note 3, at 325–26 (discussing the unfunded mandate to assist with Goshute economic development); Judy Fahys, *Legislators Fought Goshutes' Nuke Waste Dump—But Now Consider Reactors*, SALT LAKE TRIB., Oct. 26, 2007 (characterizing the PFS fight as costing Utah “millions”); Robert Gehrke, *Governor Ends Utah's Washington, D.C. Lobbyist's Contract*, SALT LAKE TRIB., June 22, 2007 (noting \$90,000 per year in PFS-related lobbying fees); Glen Warchol, *State Forks over \$844K for Goshute, PFS Lawyers*, SALT LAKE TRIB., Nov. 15, 2006 (discussing the state's obligation for legal fees); *see also* GOVERNOR'S OFFICE OF PLANNING AND BUDGET, OFFICE OF THE GOVERNOR OF UTAH, BUDGET SUMMARY FISCAL YEAR 2007, at 87–88 (2006), *available at* <http://www.governor.utah.gov/budget/Budget/Budget%20Summaries/2007BudgetSummary.pdf> (discussing PFS-related appropriation of \$250,000); GOVERNOR'S OFFICE OF PLANNING AND BUDGET, OFFICE OF THE GOVERNOR OF UTAH, BUDGET SUMMARY FISCAL YEAR 2006, at 23, 86–89 (2005), *available at* <http://www.governor.utah.gov/budget/Budget/Budget%20Summaries/2006BudgetSummary.pdf> (discussing PFS-related appropriation of \$2,000,000); GOVERNOR'S OFFICE OF PLANNING AND BUDGET, OFFICE OF THE GOVERNOR OF UTAH, BUDGET SUMMARY FISCAL YEAR 2005, at 83–83 (2004), *available at* <http://www.governor.utah.gov/budget/Budget/Budget%20Summaries/2005BudgetSummary.pdf> (discussing PFS-related appropriation of \$500,000); GOVERNOR'S OFFICE OF PLANNING AND BUDGET, OFFICE OF THE GOVERNOR OF UTAH, BUDGET SUMMARY FISCAL YEAR 2003, at 5, 96, 100, 244 (2002), *available at* <http://www.governor.utah.gov/budget/Budget/Budget%20Summaries/2003BudgetSummary.pdf> (discussing PFS-related appropriation of \$432,000 and \$250,000); GOVERNOR'S OFFICE OF PLANNING AND BUDGET, OFFICE OF THE GOVERNOR OF UTAH, BUDGET SUMMARY FISCAL YEAR 2002, at 93, 98–99, 248 (2001), *available at* <http://www.governor.utah.gov/budget/Budget/Budget%20Summaries/2002BudgetSummary.pdf> (discussing PFS-related appropriation of \$439,000, \$300,000, and \$800,000).

553. *See, e.g.*, Michael A. Mullett, *Financing for Eternity the Storage of Spent Nuclear Fuel: A Crisis of Law and Policy Precipitated by Electric Deregulation Will Face New President*, 18 PACE ENVTL. L. REV. 383, 435–38 (2001) (describing the failure in establishing the viability of the Yucca Mountain nuclear repository and its negative effect on the government's ability to deal with nuclear waste); William Mabry III, Note, *Can You Say “N”? NIMBY, NWSA, and Nuclear Preemption*, 33 NAT. RESOURCES J. 493, 493 (1993) (noting that although the government began dealing with nuclear energy in 1946, it was not until 1982 that it enacted a law to even begin planning for nuclear waste storage sites).

554. *See generally* Cinnamon Gilbreath, *Federalism in the Context of Yucca Mountain: Nevada v. Department of Energy*, 27 ECOLOGY L.Q. 577 (2000) (discussing the fierce opposition to Yucca Mountain and the ramifications of recent case law on it and other federal nuclear waste disposal policies); Robert Resselar, *The Yucca Mountain Nuclear Waste Repository from a Federalism Perspective*, 23 J. LAND RESOURCES & ENVTL. L. 219 (2003) (addressing Yucca Mountain's construction delays and the numerous challenges to its legality). For one con-

ley thus is, at one level, a symbol of the consequences that result when we leave a crossroads with no consensus, no plan for what to do next, but merely a hope of technology or solutions that “may be” in the future.

Indeed, Utah’s opposition to the Goshutes’ plan strikingly resembles Nevada’s to Yucca Mountain. It is by Nevada’s exertion of political force—it is by exercising its sovereignty—that it has pushed back against this federal proposal. And it was in the context of Utah’s sovereign-to-sovereign relations with the federal government—it was by exercising its sovereignty—that Utah did as well.

It is in this way that, at another level, Skull Valley is a symbol of the crossroads all tribes today face. Drive forty miles west out of Salt Lake City and you will find it. Under the white desert sun, at the intersection of the roads to Skull Valley, California, and New Jersey, there is a choice. It is a choice between tradition and change, between the future and the past, between survival and disappearance. Head one way and tribes will always be second class to the other sovereigns of this nation. Go another, and they can decide for themselves.