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SOVEREIGNTY, SELF-DETERMINATION, AND ENVIRONMENTAL JUSTICE IN THE MESCALERO APACHE'S DECISION TO STORE NUCLEAR WASTE

Louis G. Leonard, III*

Throughout history, Americans have had an insatiable appetite for land. The desire for each individual to "own a piece of the American dream" has brought the dominant capitalist society of the United States into repeated conflict with the communal cultures of North America's indigenous peoples. Despite predating this capitalist culture in North America by over 20,000 years, the land-based heritage of most tribes suffered greatly from these conflicts. The battles were most dramatic in the previous two centuries where exploitation and crimes against Native Americans¹ and tribal land were obvious and frequent.² Today the confrontation is more subtle but continues to raise serious problems.³

One stage on which today's cultural conflict unfolds is nuclear waste siting, as tribes look to store low or high-level radioactive waste on reservation lands. Few problems are more politically charged, legally complex, or socio-economically controversial. Which governments have legal jurisdiction over such siting? Even if they have the legal power, will those governments take on this politically volatile issue? Is this an example of large corporations practicing environmental racism or

* Executive Editor, 1996—1997, BOSTON COLLEGE THIRD WORLD LAW JOURNAL.
¹ This Comment will use the terms "Native Americans," "Native people," and occasionally "Indians" interchangeably to refer to members of the over 500 federally recognized and unrecognized tribes. This generalization is done for practical purposes and is not meant to diminish the individual cultural heritage of any tribe or member.
tribes asserting long sought-after autonomy in order to provide schools and services for their people? Are these two latter possibilities mutually exclusive?

This Comment addresses these issues as they are currently playing out in the lands of the Mescalero Apache Tribe in New Mexico. It reviews the history of “Indian Country” and its exploitation, the current situation with the Mescalero Apaches, and the different “stakeholders” who legally and politically have an interest in the outcome. It examines the question of who politically and legally can best protect the interests of the land, of the people on and off the reservation, and of future generations.

Section I briefly surveys the history of land and resource exploitation on reservations. Section II chronicles the history and present state of the Mescalero Apache tribe’s involvement in the Monitored Retrievable Storage facility siting process. Section III addresses the questions surrounding legal jurisdiction and tribal sovereignty, by examining tribal, state, and federal claims. Section IV examines the ongoing debate between those scholars who believe this conflict implicates environmental justice concerns and those who believe that principles of environmental justice are incompatible with tribal self-determination. The Comment concludes that a conflict between self-determination and environmental justice is illusory and counter-productive as both approaches seek the empowerment of tribal communities and their increased input in the decision-making process.

I. LESSONS OF HISTORY

In 1829, newly elected President Andrew Jackson declared that the Indians must “go West,” and began a policy of Indian Removal.5

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4 The term “Indian Country” is the generally accepted term for land held in trust by the federal government and occupied by Native Americans, often on reservations. See 18 U.S.C. § 1151 (1994); Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW 27 (3d ed. 1982). The terms “Indian Country” and reservations are not synonymous. During the Allotment and Assimilation Periods (1871–1928) some reservation land was sold to non-Indians creating pockets of non-Indian owned land within reservations. See A. Cassidy Sehgal, Note, Indian Tribal Sovereignty and Waste Disposal Regulation, 5 FORDHAM ENVTL. L.J. 431, 444–45 (1994). These pockets of land are not considered Indian Country and tribal laws are not always applicable. See id. While this distinction creates frustrating questions of jurisdiction, this Comment will deal exclusively with jurisdictional and socio-economic issues in “Indian Country.”

5 See Cohen, supra note 4, at 81. A detailed discussion of the history of Native American removal is beyond the scope of this Comment. See Cohen, supra note 4, at Ch. 2 (History of United States Indian Policy).
Notwithstanding decisions by the United States Supreme Court, Jackson and subsequent chief executives used the United States Army to drive Native Americans from fertile lands that the new nation required for its growing population, forcing them into the uncharted West. Along with those tribes forced to migrate, the West contained many indigenous Native tribes. Beginning in 1850, these tribes faced waves of westward Anglo-migration associated with the California Gold Rush. As a result, the federal government again sought to possess those lands inhabited by tribes in order to satisfy the new white settlers. The development of the reservation system soon followed. In this way the federal government was able to place the Native tribes on small amounts of land that it deemed of little value while satisfying the land needs of the vast number of new settlers in the West.

As the extensive natural resources from the West began to dwindle during this century, Native reservations again became attractive to the land and resource hungry United States marketplace. Reservation land covered over fifty-six million acres in the continental United States, within 310 reservations, and to the surprise of the federal government, much of this land turned out to be rich with mineral deposits as well as timber, grazing, and agricultural land. As a result of market pressure, a large percentage of reservation land is presently leased out to private, non-Indian interests. These entrepreneurial interests (including the federal government) dramatically over-harvest the

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7 See Cohen, supra note 4, at 81–92. In Worcester, the Cherokee Nation brought its claims of right to land in Georgia to the Supreme Court, which affirmed the Cherokee right to its land. See id. Jackson, however, ignored the ruling and forced the Cherokee into the infamous “Trail of Tears” where over four thousand Cherokee died in the Army-led migration. See id. at 83, 91–92. President Jackson reportedly said “John Marshall has made his law; now let him enforce it.” Id. at 83.
8 See id. at 97.
9 See id.
10 See id. at 121–25. At that time, the recently developed Board of Indian Commissioners believed that Indians had been granted plots of land that were too large and recommended “[t]he policy of concentrating the Indians on small reservations of land, and of sustaining them there … until they can be induced to make the necessary exertions to support themselves … .” Id. at 124 (quoting COMM’R INDIAN AFFAIRS ANNUAL REPORT, S. EXEC. DOC. NO. 1, 35th Cong., 2d Sess. 357 (1858)).
11 Wood, supra note 3, at 1477–81. The 56.6 million acres include 6.3 million acres of commercial timber land, 43 million acres of range land, and 3 million acres of agricultural land. Id. at 1481.
land through long-term leases often paying a fraction of the market worth.12

In the late 1920's the federal government's policy toward Indian affairs began to moderate slightly.13 Assimilationist policies of the Allotment Era were condemned,14 and a new respect for Native culture developed. The cornerstone of this period was the Indian Reorganization Act of 1934 (IRA).15 The IRA was an attempt to encourage self-determination and cultural independence while also promoting economic development on reservation land, arguably for the benefit of poverty-stricken Natives.16 Economic development was encouraged by the Act.17 One of the major provisions of the IRA (Section 16), however, ran directly counter to the idea of cultural independence.18 Section 16 offered tribes the opportunity to organize and adopt a constitutional form of government generally modeled after the United States Constitution.19 Theoretically, these tribal constitutions could be tailored individually to each tribe. In practice, however, standard "boilerplate constitutions" were prepared by the Bureau of Indian Affairs (BIA) and approved by the tribes.20 In most circumstances, these documents were not based on tribal custom or practice and thus were a radical change from previous forms of tribal governing.21 This loss of traditional culture often created a rift in tribes, between tradi-

12 See id. at 1481–82. Over 15 million acres of reservation land are leased to grazing, mining, and commercial interests. See id. Indian range land is seriously overgrazed and timber clear cutting practices by the federal government on Indian land have decimated forest and fishery resources. Id. at 1482.
13 See Cohen, supra note 4, at 144.
14 See id. The General Allotment Act of 1887, 25 U.S.C. §§ 331–334, 339, 341, 342, 348, 349, 354, 381 (1994), authorized the President to assign certain quantities of reservation land to individual members of the tribe who would then be free to alienate that land as they saw fit. See Cohen, supra note 4, at 131. This plan was revoked after a short time as officials recognized the corruption and erosion of the reservation land base that was occurring as a result of the policy. See id. at 136–42 (description of the effects of the Allotment Act).
16 See Cohen, supra note 4, at 147.
17 Id. at 147–50. Along with Section 16, Section 17 of the IRA permitted tribes to form business corporations which would facilitate development with non-Indian business. See id. at 149.
18 See Wood, supra note 3, at 1552.
19 See id. Tribes were not required to adopt this government form, since under the recognition of retained sovereignty tribes are free to establish their own form of government. Id. at 247. Since tribes were recognized as separate nations, they were not constrained by most provisions of the United States Constitution except for those applied by congressional legislation. See id. Despite this freedom to structure their government as they chose, most tribes opted to accept the "constitutionally based" government. See Cohen, supra note 4, at 150.
20 See Cohen, supra note 4, at 149.
21 See id. at 149; Wood, supra note 3, at 1552–53.
tionalist members and more development-oriented members. Generally, members who were interested in encouraging non-Indian development preferred the constitutional form of government because it allowed for greater business opportunities with outside industry.\textsuperscript{22} In this way, the IRA continued to facilitate private and government efforts to exploit Native populations and their expansive land base.\textsuperscript{23}

The discovery of large uranium deposits on reservation lands in the 1950's forced Native Americans to become unwilling participants in the experiment with nuclear power. Over half of all uranium deposits in the United States are located on Indian reservations.\textsuperscript{24} Because this land legally was held in trust by the federal government, it was the easiest and most economical for the government to mine.\textsuperscript{25} Consequently, the majority of federal uranium production comes from Indian reservation land.\textsuperscript{26} Since most mining occurred on their land, and reservation jobs were scarce, tribal members became the obvious choice for a labor force to staff the uranium mines.\textsuperscript{27} These mining jobs were highly dangerous and often caused the contamination of an entire tribe or village.\textsuperscript{28} Uranium mines and the waste products and pollution that accompanied them dotted reservation land, while the federal government and private interests made little effort to clean up after themselves.\textsuperscript{29} The legacy of the Cold War and the nuclear power boom of the 1950's and 1960's for tribes can be seen in the residual effects of these mines, nuclear weapons testing on reservation lands, and radiation testing on Indian miners.\textsuperscript{30}

\textsuperscript{22} See Wood, \textit{supra} note 3, at 1552–53.
\textsuperscript{23} See id. at 1552 n.375.
\textsuperscript{24} See id. at 1481.
\textsuperscript{25} See id. at 1472–75 (discussing Indian Trust Doctrine and its connection to exploitation of natural resources on reservation land).
\textsuperscript{26} See id. at 1482. In fact, in 1975 all federally controlled uranium production came from Indian reservations. See id.
\textsuperscript{27} See Johnson, \textit{supra} note 2, at 593.
\textsuperscript{28} See Bill Lambrecht, \textit{Poisoned Land . . . Cold War Brought Mining Jobs to The Indians, But Uranium Mines Also Paid Off In Misery}, \textit{St. Louis Post-Dispatch}, Nov. 19, 1991, at 1A. The effects of uranium mines in communities included increased incidents of birth defects, lung cancer, and other less dramatic health effects. \textit{Id}. Also, in many communities, tribes built homes with chunks of uranium from mines, thus exposing them to constant radiation. \textit{Id}.
\textsuperscript{29} See id. The Navajo Nation alone has 1,000 old mines and waste piles and has received only about one percent of the cost of cleaning them up from the federal government. See id.
\textsuperscript{30} See id. The federal government used an 1863 Treaty with the Shoshone Indians in southern Nevada to allow the use of reservation land to build a test site for nuclear weapons. See id. Also, the United States Government, aware of health studies that showed adverse effects on uranium miners, refused to tell miners about the dangers and instead decided to use them to study the effects of radiation in secret tests during the 1960s. See id.
The federal government's policy towards Indians began to change once again in 1961 as the era of "Self Determination" was born. Driven by calls for more control of their own lives and problems, this philosophy included increased recognition of tribes as "viable units of local government" and a more laissez-faire policy toward Indian affairs. In accord with this policy, President Lyndon Johnson included Native Americans in much of the "Great Society" legislation, while calling for more Indian participation in planning and development of federal Indian programs. President Richard Nixon continued this theme in a message to Congress that called for a compromise between paternalism and assimilationist termination policies. Despite the noble ideas and powerful rhetoric of the federal government's Self-Determination policy, tribes have faced a new set of problems from different and more subtle attacks on Indian land, as government and private interests have found ways to profit from the idea of tribal independence.

The nuclear power and chemical industries have produced an immense amount of waste along with their profits since the 1960's. As the production of various waste products increased, government and private producers of waste had to find disposal sites, leading them again to reservation land. Reservation land was initially chosen by the federal government because it lacked traditional economic potential and was considered "unwanted" and "unproductive" by most settlers at the time. Prior government policies resulting in the depletion of natural resources and the pollution of Indian country, made many areas of tribal land virtually useless and thus vulnerable to this type of characterization. Recognizing the few viable uses for reservation

31 See Cohen, supra note 4, at 180–83.
32 Id. at 184.
33 See id. The voices of tribal leaders were symbolized in the "Declaration of Indian Purpose" signed by sixty-seven tribes gathered in Chicago in June, 1961. Id. at 183–84.
34 Id. at 184.
35 Id. at 185–86. The "Termination Era" preceded the "Self-Determination Era" and called for total integration of Native tribes into Anglo-society by terminating the federal trust relationship and tribes' special status with the federal government. See id. at 152–80 (detailed description of Termination Era and its effects on tribes).
36 See Wood, supra note 3, at 1474, 1483. Wood asserts that instead of overt land grabbing, today's reservations face a loss of land base from "rapid development, pollution and loss of resources occurring within and around Indian reservations." Id. at 1474.
37 Id. at 1484–85.
39 See id. at 300, 310.
land, owners of nuclear and hazardous waste now use "intense market pressure" when pursuing tribal land, creating a more subtle type of exploitation. Poor tribal communities with lenient regulations, very low employment, and little political resistance have become economically and politically popular cemeteries for non-Indian waste. A significant amount of reservation land, especially in the West, is also conducive to waste siting because of arid conditions and a sparse population with little political power. As a result, reservation land has become the home of a disparate amount of toxic and nuclear waste sites despite producing none of the substances deposited. The history of exploitation on tribal land is reflected in the despair of many tribal members: "They have taken our land and left us their poisons."  

II. THE MESCALERO APACHES AND THE LURE OF THE MONITORED RETRIEVABLE STORAGE PROJECT

A. A History of the Mescaleros

The Mescalero Apaches are a division of the Apache tribe and have lived for centuries in the southeastern portion of what is now the state of New Mexico. Traditionally, the Mescaleros were a tribe of warriors who supported a raiding culture; most activities other than acts of war were left to the female members of the tribe. The Mescaleros were determined warriors who successfully defended their land during the last three centuries from the Spanish, the Mexicans, the Texans, and the Americans. After years of bitter fighting, the last

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40 Wood, supra note 3, at 1484.
41 See id. at 1483-84.
42 See Johnson, supra note 2, at 592-93. Unemployment on reservation averages from 30-80% and Native Americans are by most standards the poorest ethnic group in the country. Dirk Johnson, Economic Pulse: Indian Country, N.Y. TIMES, July 3, 1994, at A1. High rates of alcoholism, suicide, and domestic violence on reservations have compounded problems and created the need for expensive programs. See id.
43 See Collins & Hall, supra note 38, at 300, 306; Johnson, supra note 2, at 592-93.
44 See Collins & Hall, supra note 38, at 311. A 1985 Environmental Protection Agency study of 25 reservations found 1200 toxic waste sites, while another study showed 46% of all Native Americans live near abandoned toxic waste dumps. See Wood, supra note 3, at 1482-83, 1483 n.56.
45 Lambrecht, supra note 28, at 1A (quoting Fannie Yazzie, member of Navajo Nation in Oak Springs, Arizona).
47 Id. at 23-24.
48 SONNICHSEN, supra note 46, at 31-57 (describing Mescaleros fight against Spanish); Ed Vulliamy, Nothing is Sacred In The Apache Nuclear Feud, THE OBSERVER (London), May 21,
great Apache Chiefs, Cochise and Geronimo, finally yielded to the United States Cavalry and were placed on the reservation lands where their descendants reside today.49

The rich history and tradition of Chiefs Geronimo and Cochise are still apparent in the words and actions of the present group of Mescalero Apaches.50 In fact, the great-grandsons of both Geronimo and Cochise still live and are active in the present tribe.51 The 3,400 member tribe resides on a 461,000 acre reservation in southwestern New Mexico that contains areas that are both strikingly beautiful and relatively productive.52 The tribe runs a popular resort and ski lodge at the Inn of the Mountain Gods, a tax-free “Apache Casino,” a lumber company that processes some of the tribe’s timber, and a cattle herd 7,000 head strong.53

Tribal government is dominated by Wendell Chino, a formidable politician who has channeled the Apache’s historic aggressiveness into business ventures for the reservation.54 Chino has led the Mescaleros for thirty years as their president, while acting as one of the driving forces behind the Native American sovereignty movement.55 In this way Chino has become a legendary figure among his own people and wields almost complete control over the tribe.56 Chino discourages outside influence and views the Mescaleros as locked in a struggle for their independence and cultural survival.57 He believes that only when the Mescalero find economic independence will they prosper and “continue the tribe into perpetuity.”58

1995, at 19 (describing waves of attack from Spanish, Mexican, Texan, Confederate, and Yankee forces repelled by Apache).

51 Vulliamy, supra note 48, at 19 (describing great-grandsons of Geronimo and Cochise on opposite sides of Mescalero nuclear feud).
53 Id.
54 Satchell, supra note 50, at 29.
57 See Abramson, supra note 55, at A22; Wald, supra note 52, at A18.
58 Wald, supra note 52, at A18 (quoting Fred Peso, Vice-President of Mescaleros and Chino supporter).
Chino and his followers have faced a constant struggle in an attempt to reach this goal. Despite the presence of the resort and other industry on the reservation, more than one-third of tribal members are unemployed and over half live under the federal poverty line.\(^{59}\) The tribe also suffers from a housing shortage as well as a lack of any school system.\(^{60}\) Without youth services, many among the younger members of the tribe, who make up about half of the tribe's population, are leaving the reservation for jobs in nearby towns or are turning to vandalism and violence.\(^{61}\)

**B. The Monitored Retrievable Storage Facility Project**

Faced with the reality of economic depression and lack of opportunity, Wendell Chino and the Mescalero Tribal Council eagerly welcomed the two-pound package of materials from the Office of the United States Nuclear Waste Negotiator (NWN) that arrived in early October, 1991.\(^{62}\) The materials were the latest in a series of efforts by the federal government to find a suitable temporary site for the disposal of spent fuel from the nation's 111 commercial nuclear reactors and dismantled nuclear warheads while a permanent repository was developed.\(^{63}\) The NWN proposal, available to any state, locality,
or Indian tribe, called for a three-part process of studying the feasibility of a monitored retrievable storage (MRS) facility and offered substantial grant money for each stage.\(^{64}\) Wasting little time, the Mescalero Tribal Council sent its proposal to the NWN. On October 17, 1991, six days after applying, the Mescaleros were awarded the first Phase I grant of $100,000.\(^{65}\) The Apaches were not the only tribe interested in the project, as sixteen of the twenty-one Phase I applications were from Indian tribes, while only four local county governments applied.\(^{66}\)

During this process the Mescaleros developed a task force within the tribe to oversee the project and employed scientists and individuals from nuclear industries as consultants and advisors.\(^{67}\) Many of these consultants came from the private sector nuclear industry.\(^{68}\) Miller Hudson, a non-Indian, was hired as the information officer for the project and a chief spokesperson for the tribe.\(^{69}\) Hudson’s former employer was Pacific Nuclear Corporation (PN, Inc.), a nuclear storage company that is working closely with the Mescaleros on the project.\(^{70}\) While the influence of these companies is unconfirmed, Hudson himself admitted that if the Mescalero site is approved, power plants across the country may have to use the waste storage containers that are produced by PN, Inc. to ship waste to the site.\(^{71}\)

Five months after receiving a Phase I grant in March, 1992, the Mescaleros applied for Phase II-A funding that offered an additional $200,000; they were approved the following month.\(^{72}\) All nine of the groups that applied for Phase II-A funding were Indian tribes. The

\(^{64}\) See Erickson et al., supra note 56, at 79–81; Mescalero Apache Tribe Renews Efforts to Site MRS on New Mexico Reservation, 24 Env’t Rep. (BNA) No. 6, at 274 (June 11, 1993) [hereinafter Tribe Renews Efforts]. An MRS facility is an above-ground container unit for temporary storage of spent fuel that would occupy about 400–600 acres and consist of spent uranium fuel pellets kept in a one-inch thick steel cylinder covered with 27 inches of concrete. Erickson et al., supra note 56, at 97 n.115; Keith Schneider, Nuclear Plants to Become de Facto Radioactive Dumps, N.Y. TIMES, Feb. 15, 1995, at A19.

\(^{65}\) Erickson et al., supra note 56, at 79.

\(^{66}\) See id. at 81. The extra application was from the Fifield Development Corporation in Wisconsin. See Tribe Renews Efforts, supra note 64, at 274. Their application was immediately denied, however, because the program required a governmental body. See id.

\(^{67}\) Erickson et al., supra note 56, at 92.

\(^{68}\) See id.

\(^{69}\) See Reese Erlich, Indians Press Clinton To Halt Waste Storage, CHRISTIAN SCIENCE MONITOR, Nov. 25, 1992, at 8.

\(^{70}\) Id.

\(^{71}\) Id.

\(^{72}\) Erickson et al., supra note 56, at 81.
few county governments that applied for Phase I funding withdrew their applications in the face of local grassroots opposition or political resistance from the state government. On August 4, 1993, the Mescaleros applied for the third and final stage of funding. Because of the local political attention that the potential site was beginning to draw this grant was never awarded. In a subtle political move, New Mexico Senator Jeff Binghaman used an appropriations rider to cut fiscal year 1994 funding for the NWN and put the entire project on hold.

The action by Binghaman was but the first battle in the war over an MRS facility on the Mescalero Reservation. The issue mobilized many in New Mexico in opposition to the site. Along with Sen. Binghaman, the entire New Mexican congressional delegation as well as then-Governor Bruce King were on record as opposing the site. Local communities surrounding the reservation have also opposed it. Ruidoso is one such town that borders the reservation and houses many tourists who ski at the Mescaleros’ resort. Environmental groups have risen against the site as well. Groups like Save the Sacramentoos Committee in Ruidoso have voiced strong opposition and threatened active resistance to the project.

C. The Push For Privatization

The possibility of resistance has not daunted Chino who cites the power of Native sovereignty and stridently defends the project. He and his followers abandoned the idea of a federal agreement and

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73 Id.
76 See Mescaleros Do About Face, Vote to Renew MRS Talks, 23 Energy Report (IAC) No. 10, at 0888–8188 (Mar. 13, 1995); Mescalero Apaches, Nuclear Utilities Said Near Agreement on Storage Facility, 25 Envt Rep. (BNA) No. 28, at 1332–33 (Nov. 4, 1994) [hereinafter Agreement on Storage Facility]. King was defeated in the 1994 election and was replaced by Republican Gary Thompson who has said he “will keep the door open to the Mescalero facility.” Agreement on Storage Facility, supra.
78 See id. Dave Dale, founder of Save the Sacramentoos, has warned of “years of litigation and people lying in front of trucks . . . .” Id.
instead looked to private industry.79 “If we build it, they will come,” declared Mescalero Vice President Fred Peso.80 The tribe then accepted an earlier invitation to negotiate with Northern States Power (NSP), a Minnesota nuclear power company that was facing an alarming lack of storage space for its spent fuel.81 On Thursday, February 3, 1994 the Mescaleros and NSP officials signed an agreement to study and design a private MRS facility on the reservation.82 During the next few months NSP and the Mescaleros began courting other utilities nationwide whose storage capabilities were insufficient.83 On March 10, 1994, officials representing thirty utilities from across the country convened at the reservation to discuss the project.84 From this meeting came an agreement by thirty-five private utilities to contribute funds for initial studies of cost and feasibility.85

Throughout the remainder of the year, the Mescaleros and their new partners worked on the specifics of the arrangement. In December, 1994, thirty utilities and NSP announced the signing of a non-binding letter of intent to store waste on Mescalero tribal lands.86 Chino believed the agreement did not need to be approved by the tribal population, but he was so confident about the level of support in the tribe that he was willing to leave the decision up to the members.87 Instead of another sweeping victory for Chino, the powerful

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80 See David Einstein, NM Tribe Wants to Build Nuclear Dump on Reservation, S.F. CHRONICLE, Apr. 23, 1994, at A5.
81 There is uncertainty whether the Mescaleros first approached NSP or whether they were actually following up on conversations begun by NSP in previous years. See Coalition Lambastes NSP Record, supra note 63, at 1B; Tom Meersman, NM Tribe to Vote on Nuclear Storage, STAR TRIBUNE (Minneapolis), Jan. 31, 1995, at 1B [hereinafter NM Tribe to Vote on Nuclear Storage]. NSP Chairman Jim Howard claims the Mescaleros approached him, but other reports indicate there was an outstanding invitation to negotiate by NSP. See Coalition Lambastes NSP Record, supra note 63, at 1B (indicating that NSP initiated talks); NM Tribe to Vote on Nuclear Storage, supra (quoting Mr. Howard).
82 See John Yoder, Mescaleros and NSP Officially Sign Agreement to Build A Private MRS, 22 Energy Rep. (IAC) No. 5, at 0888–8183 (Feb. 7, 1994). Under the agreement NSP also committed to soliciting other utilities for participation. See id.
83 See id. Peso said that the joint venture would require the support of 10–12 nuclear utilities in order to make construction possible. See Wamsted, supra note 79, at 17.
85 See Newman, supra note 75 (contains list of 33 utilities and two nuclear industry contractors that signed agreement). Each utility contributed $5,000 to the project. See id.
86 See Tom Meersman, Indians Say No To NSP, Others, STAR TRIBUNE (Minneapolis), Feb. 2, 1995, at 1A.
leader suffered his most significant defeat as the tribe rejected the project by a vote of 490 to 362.  

Tribal leaders declared that they were shocked by the vote, but claimed they would abide by the referendum because it was the “will of the people.” Fred Kaydahzine, a “self-described, grass roots tribal activist” (described by others as the Housing Director appointed by Chino) quickly circulated a petition asking the council for another referendum. Before the first vote the traditional female leaders of the tribe called the members together and made a powerful plea to reject the proposal. During the campaign for a revote, those same leaders and others opposing the site claimed that they suffered from threats and coercion in order to quell their opposition. Rufina Marie Laws and Joseph Geronimo, also vocal in opposition to the site, faced pressure to vote in favor of it. Laws claims that tribal members were “scared that they would lose their jobs or homes if they voted against the waste site.” In the end, 700 signatures were collected (twice the number that voted in favor of the project just three weeks earlier) and a new vote was scheduled for March 9, 1995. In that referendum the project was overwhelmingly endorsed by a vote of 593 to 372.

Since the revote tribal project leaders have faced several obstacles and have continued to refine the agreement. In the process, however, the pact has lost the participation of some of the original utilities that had supported the plan. Instead of the original thirty-five, some

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88 See id.
90 See Mescaleros to Reconsider, supra note 60, at 2126.
91 Meersman, supra note 86, at 1 A. Some within the tribe object to the MRS project because of the location of the facility. Emily Costello, Nuclear Showdown: Would You Store Nuclear Waste in Your Backyard? New Mexico Apache Tribe Says Yes! Good Idea or Raw Deal?, SCIENCE WORLD, Nov. 17, 1995, at 16. A freshwater stream and an accompanying watershed area are located on the potential site and a fault line lies just a few miles away. Id. Thus, critics of the location of the site argue that an earthquake could damage any facility and the resulting spill would cause widespread contamination. See id.
92 Mescaleros Do About Face, Vote to Renew MRS Talks, supra note 76, at 10; Erickson et al., supra note 56, at 91.
93 Rufina Marie Laws is the founder of Humans Against Nuclear Waste Dumps (HANDs) and a leader of the opposition to the MRS facility within the tribe. Costello, supra note 91, at 16. Ms. Laws has run against Chino for the Presidency, but was unsuccessful. Joseph Geronimo, the great-grandson of the legendary Apache warrior, has faced armed attacks and scare tactics such as “rattlesnakes thrown into his backyard.” Edward Helmore, Indians Fall Out Over Reservation N-Waste, THE OBSERVER (London), June 2, 1996, at 15.
94 Costello, supra note 91, at 16.
95 Mescaleros to Reconsider, supra note 60, at 2126.
96 Mescalero Reversal Backs Storage Plan, 234 Engineering News-Record (IAC) No. 11, at 8 (Mar. 20, 1995). The account refers to the vote as “masterminded by Wendell Chino.” Id.
97 See Utilities Say they aren't Involved in Waste-Site Plan, SANTA FE NEW MEXICAN, July
reports indicated that support for the project had dropped to only seventeen utilities.\textsuperscript{98} Moreover, along with opposition from traditional tribal members, President Chino faced a surprise challenge in the last election by his former Vice-President, Fred Peso.\textsuperscript{99} Peso, once a manager of the project, was backed by a traditional group called the "Apache Stronghold" that opposes the MRS project.\textsuperscript{100} While Chino's presidency has survived the defection, the challenge shows a lack of consensus and growing opposition to the project. Project leaders continue to maintain that the MRS project is successfully moving ahead, and an application for a license from the Nuclear Regulatory Commission (NRC) was scheduled for early 1996.\textsuperscript{101}

In the spring of 1996, the agreement between the Mescaleros and the NSP-led coalition of utilities began to deteriorate.\textsuperscript{102} With legal liability, compensation, and location unresolved, the talks between the two groups were "indefinitely suspended" on April 16, 1996.\textsuperscript{103} Apparently Chino demanded that the actual MRS site be constructed on a plot of land that the tribe planned to annex at the edge of the reservation, in order to connect it with a nearby rail line.\textsuperscript{104} This setback has not put an end to the possibility of an MRS site on Mescalero Apache land.\textsuperscript{105} President Chino released a statement on April 18, 1996

\textsuperscript{98} See id.

\textsuperscript{99} Briefs, SANTA FE NEW MEXICAN, Nov. 8, 1995, at B3.

\textsuperscript{100} Id.


\textsuperscript{102} NM Tribe, Utilities Halt Talks Over Storage of Nuclear Fuel Rods, DALLAS MORNING NEWS, Apr. 19, 1996, at 38A.

\textsuperscript{103} Elaine Hiruo & Kathleen Hart, Mescalero-Utility Talks Crumble, Effort on Joint Storage Dies, NUCLEAR FUEL, Apr. 22, 1996, at 1. According to one unnamed source, the utilities wanted the tribe to waive its sovereign immunity, while desiring immunity for themselves. See id.

\textsuperscript{104} See id. While Chino claimed the annexed land would be more practicable for transportation reasons, the coalition was concerned that placing the MRS site on land not officially on the reservation would incite public outcry and protest. See id.

\textsuperscript{105} See id. This setback for the NSP-led coalition did not end the possibility that these nuclear utilities will contract with a Native American tribe. See Jim Woolf, Utah's Not Aglow Over Goshute Deal to Store N-Waste; Goshutes Hope to Store Nuclear Waste, THE SALT LAKE TRIBUNE, December 25, 1996, at A1. Most of the nuclear utility companies that attempted to cement a deal with the Mescaleros (including NSP) have now found another potential site for their waste. See id. This site is also located on a Native American reservation. Id. The coalition has negotiated a preliminary agreement with the Skull Valley Band of the Goshute tribe in Utah. Id. The Goshute tribe has a mere 200 members and faces an economic depression similar to the Mescaleros'. See id. With much of the State of Utah in opposition to the agreement, many of these same issues may play out in Utah as well as New Mexico. See id.
stating that the tribe will “continue with plans for the development and construction of a temporary facility.”106

Instead of working with utility companies directly, Chino’s new plan seems to involve the tribe teaming up with a large nuclear storage and cleanup company like British Nuclear Fuels (BNFL).107 The tribe and BNFL admitted that they were involved in preliminary discussions about a possible partnership; however, neither side has provided details of what the partnership might entail.108 BNFL reportedly is interested in becoming involved in the lucrative United States nuclear waste storage and reprocessing industry, and could become a partner in the construction and operation of an MRS facility on the Mescalero reservation.109 The partnership would then have to negotiate with individual utilities on the storage of spent fuel.110

III. JURISDICTIONAL ISSUES

One of the pivotal legal questions in the fight over an MRS facility on the Mescalero reservation is which government has control, including the power to guide, influence, veto, or otherwise impede the siting decision. This question necessarily implicates issues of tribal sovereignty. Under federal Indian law, tribes generally have control over activities that occur within reservation borders.111 Unfortunately, the sovereignty issue surrounding the MRS facility is not quite this clear. This section provides a general road map of the legal jurisdiction of different governments over activities on Indian reservations. It will shed some light on how much power the Mescalero tribe, the State of New Mexico, and the federal government have in this case, and the

106 Id. Chino noted in a press conference later that month that the tribe was already negotiating with a potential new partner. Elaine Hiruo, DOE Slated to Proceed Soon On Privatizing Transportation, NUCLEONICS WEEK, May 2, 1996, at 4.
107 See Helmore, supra note 93, at 15. The tribe is actually negotiating with the American arm of BNFL. Id. BNFL already has contracts to help clean up the Rocky Flats nuclear site in Colorado and the Savannah River nuclear plant in South Carolina. Id.
108 See id.
109 See id.
110 This strategy could be a wise business move, since many experts believe collective projects by utility companies like the NSP-led coalition of utilities are not likely in the future. See Elaine Hiruo, NAC’s Davis Says Prospects Dim for New Collective Utility Projects, NUCLEAR FUEL, May 6, 1996, at 8. Shortly after the first Mescalero agreement dissolved, the Federal Energy Regulatory Commission (FERC) released its final rule on market access for utility companies that should “pave the way for competitive markets” and make future cooperation between utilities unlikely. Id.
111 Cohen, supra note 4, at 232.
likely implications for a private MRS facility on the Mescalero Reservation.

A. Tribal Power

Native tribes were functioning communities with their own powers and forms of government long before European settlers arrived in the new world. These two concepts—power and form of government—are important when analyzing Native American tribal jurisdiction. The federal government’s recognition of tribal power is based on the concept of a pre-existing Native sovereignty. Tribal sovereignty thus is not based on any grant or delegation of power by Congress; rather, sovereignty is something that is retained by the tribe from its original power. Under federal Indian law, tribal power was recognized through concepts of international law. Early caselaw treated the relationship of Native tribes and the federal government as that of the dominance of a weaker nation by a stronger nation. Under this theory, while the subject nation must yield to the overriding legislative authority of the dominant nation, it may depend on the stronger nation for protection, and it is otherwise independent.

This general principle of international law is reflected in the way tribes are recognized by the United States Constitution and in early constitutional law. The two references to “Indians” in the Constitution indicate their status as independent sovereigns. In the Indian Commerce Clause, tribes are grouped with other sovereign entities when determining the federal government’s regulation of commerce. The only other reference to Native Americans in the Constitution is to “[I]ndians not taxed” when determining how to apportion representatives and determine taxes. This reference also implicitly recognizes the independent status of tribes and their members.

113 See id.
114 See id.
115 See Cohen, supra note 4, at 232.
116 See id.
117 Id.
118 See id. at 232–33.
119 U.S. Const. art. I, § 8, cl. 3. The Commerce Clause states that Congress shall have the power “to regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes.” Id.
120 Id.
121 See Cohen, supra note 4, at 233. This reference shows the separate but limited independent status of tribes by recognizing their tax exempt status and by removing them from the electoral
In early United States Supreme Court cases, the Court also acknowledged the independent power of the tribes.\footnote{See, e.g., Talton v. Mayes, 163 U.S. 376, 381–82 (1896) (ruling that tribal governments were not subject to Fifth Amendment’s requirement of indictment by jury); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 560 (1832) (reconciling idea of guardian-ward relationship between federal government and tribes with idea of retained independence).} In \textit{Worcester v. Georgia}, Chief Justice Marshall attempted to reconcile the independent nature of tribal power with the federal government’s trust responsibility to tribes.\footnote{See \textit{Worcester}, 31 U.S. at 560–61.} Marshall concluded that “a weaker power does not surrender its independence, its right to self-government, by associating with a stronger, and taking its protection.”\footnote{Id. at 561.} Based on this idea, tribal authority is generally presumed to be exclusive over internal self-governing matters within tribal territory, unless these powers have been limited by the federal plenary power or by treaty.\footnote{Id. at 236.}

Despite this general recognition of tribal power, the federal government has acted often in an attempt to influence the form of tribal government. Long before federal constitutional law addressed the subject of tribal power, Native communities across North America had their own ways of dealing with tribal policy and governance. Generally, tribal governments were based on informal and unwritten laws.\footnote{Id. at 230.} Traditional customs guided the norms of conduct of each tribe.\footnote{Id.} Tribal policy on major issues concerning war or relations with other tribes was often shaped by consensus at general council meetings open to all adults.\footnote{See id. at 147–49 (describing federal government’s policy of encouraging constitutional forms of government under the IRA).} This process was not necessarily quick or “efficient” by Western standards, and so it came under attack by the federal government.\footnote{See supra notes 13–17 and accompanying text. The Allotment Era was the height of the assimilationist movement to make Native Americans citizens of the United States and erase tribal customs. See Cohen, supra note 4, at 143–44. While the Indian Reorganization era officially was less interested in assimilation, its policies actually promoted assimilation much more efficiently than earlier, more direct attempts. See Wood, supra note 3, at 1552.} During the early decades of this century, the federal government increased efforts to facilitate relations between tribes and non-Indians, and ultimately sought to assimilate the native people into American culture and life.\footnote{Id. at 147–49 (describing federal government’s policy of encouraging constitutional forms of government under the IRA).}
The Mescalero Apaches were one of the many tribes that opted for a new form of government under the IRA. Their constitution reflects influence from the federal government and endorses assimilationist ideas. The general form of government is familiarly divided into three branches: the executive, the legislature, and the judiciary. Under this constitution the tribe has considerable power that is broadly delegated to the branches. The division of power among branches is somewhat misleading however, as the constitution encourages accumulation of power in the tribal council, which is controlled by the President. First, the President presides as head of the tribal council, which is the legislative branch, thus effectively consolidating the executive and legislative power. The President's power also includes the power to "appoint all non-elected officials," "establish such boards, committees or sub-committees as the business of the council may require, . . . serve as an ex-officio member of all such committees," "serve as contracting officer for the Mescalero Apache Tribe," "direct the tribal police," appoint trial court judges, and sit on the tribal Court of Appeals. In this way the Mescalero Constitution offers the opportunity for extreme consolidation of power in the President, an opportunity of which Wendell Chino has taken full advantage.

This constitutional form of tribal government is in extreme contrast to the traditional form of government prevalent in tribes before the IRA. Consolidation of power in the few members of the tribal council and especially in the President have replaced earlier ideas of con-

132 See id. preamble. The Preamble to the Constitution includes the assimilatist goal of "bring[ing] our representative tribal government into closer alignment with State and National governments . . . ." See id.
133 See id. art. VII.
134 See id. art. XI (describing powers of tribal council); art. XXII (describing powers of the president); art. XXV (describing powers of tribal court).
135 See Wood, supra note 3, at 1553.
136 See Mescalero Const. art. XXII, § 1, cl. (a); Wood, supra note 3, at 1553. Article XXII officially does not allow the President to vote on the tribal council, but he sits as Chairman and may vote to break a tie. Mescalero Const. art. XXII. The President may also veto tribal council decisions. Id. art. XXII, § 1, cl. (e).
137 Mescalero Const. art. XXII, § 1, cl. (b).
138 Id. art. XXII, § 1, cl. (c).
139 Id. art. XXII, § 1, cl. (d).
140 Id. art. XXII, § 1, cl. (g).
141 Id. art. XXVI, § 1, § 2. The entire tribal council sits as a court of appeals "whenever necessary." Id.
142 See supra notes 126–30 and accompanying text.
sensus and inclusion of all tribal members in the process. Traditional religious or spiritual leaders who represent the culture and history of the tribe often clash with those development-minded members of the tribe who frequently seek government offices. The legitimacy of decisions of these governments are often questioned based on claims of fraud, unfairness, or abuses of process. Problems of this nature allegedly have been present in the Mescalero government throughout the MRS process. Decisions of official tribal governments are often criticized for not being truly representative of marginalized traditional groups or other tribal members who are not a part of the President's inner circle.

Nevertheless, the broad constitutional power granted to the IRA-created tribal governments provides the necessary legal authority for the tribe to develop the MRS project within its borders. The constitution vests in the president the authority to serve as the contracting officer for the tribe, a power Chino used to approve the agreement with the utilities. It also provides the tribal council with the power to lease land, which will be necessary once a site is chosen. The only question concerning tribal power is whether the tribe is superseded by federal or state law. The federal government's reconstruction of tribal governance through the IRA does invite a continuing debate: are tribal decisions actually made by the tribe itself or does the consolidation of power in the president remove all others from the decision-making process.

B. Federal Power

Any discussion of the power of the federal government over reservation land must include both an analysis of the breadth of the federal

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143 See Wood, supra note 3, at 1552–53.
144 See id. at 1551–53.
145 See id. at 1553.
146 See supra notes 90–96 and accompanying text (describing possible fraud and corruption during second vote on MRS site by tribe).
147 See id. at 1553–55 (discussing tendency of IRA form of government to encourage corruption, centralization of power without benefit of separation of powers or "sunshine laws" to provide government accountability).
148 See supra notes 135–41 and accompanying text. This authority is of course subject to potential federal and state power. See infra Section III (B) (Federal Power), Section III (C) (State Power).
149 Const. art. XI, § 1, cl. (d).
150 Id. art. XI, § 1, cl (b).
plenary power, and the limitations and responsibilities of the federal government embodied in the “Trust Doctrine.” The issue of federal power over tribal lands presents few questions concerning where the legal power lies. In three early United States Supreme Court cases, known as the “Marshall trilogy,” the framework of Native sovereignty was developed based on principles of international law. The Court, however, simultaneously granted significant regulatory power to Congress over tribal lands. The sources of the plenary power rest in various parts of the Constitution that together created “a single power over Indian affairs, an amalgam of several constitutional provisions.”

The Court likened tribes to “domestic dependent nations,” but limited this grant of power to the federal government, not the states, to regulate Indian affairs.

Along with this general plenary power over Indian affairs granted to Congress, the United States Supreme Court has also recognized a general responsibility to protect Indian rights. The Court in Cherokee Nation v. Georgia first described this responsibility as that of “a ward to his guardian,” giving birth to the Trust Doctrine and the recognition of a fiduciary relationship between the federal government and the tribes. The Court developed the basic parameters of federal power recognizing a generally autonomous tribal government, subject to congressional authority, but largely free from state control.

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152 See Cohen, supra note 4, at 212-21 (discussion of plenary power and trust doctrine).
154 Sehgal, supra note 4, at 435-36 (1994). These cases were Johnson v. McIntosh, 21 U.S. (8 Wheat) 543 (1823), Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831), and Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832). A complete development of the legal contours of Native American sovereignty is beyond the scope this Comment. See Cohen, supra note 4, at Ch. 3 (comprehensive examination of Indian sovereignty law).
155 Cohen, supra note 4, at 211. These provisions include the Indian Commerce Clause, which grants Congress power to regulate commerce with the various Indian tribes; the Property Clause, which grants power to Congress to dispose of and regulate territory and property belonging to the United States; the Treaty Clause, which grants power to the President to make treaties; the Supremacy Clause, which makes federal law supersede any state law that comes into conflict with it; and the Necessary and Proper Clause. See id. at 207-11.
156 Cherokee Nation, 30 U.S. at 17.
157 Id. at 16-17.
158 Id. at 17.
159 Id.
160 Wood, supra note 3, at 1472 (discussing trust doctrine generally).
The federal plenary power grants broad latitude to Congress to legislate specifically with respect to tribal lands. Pursuant to this power, most environmental and other regulatory legislation specifically addresses Indian Country, making most regulatory law applicable there. Complementing this authority, the United States Supreme Court has held that most general federal statutes that simply refer to "all persons" include Indians as well. Known as the "Tuscarora Rule," this assumption of applicability requires either evidence of a statutory scheme requiring national or uniform application, or legislative history showing a congressional intent to invade tribal rights. Under this general plenary power, Congress has virtually unlimited authority to legislate with respect to Native Americans.

The broad federal plenary power over tribal lands rests solely with Congress and not federal agencies. However, federal programs dealing with tribes historically have been enforced by certain executive departments. The most prominent example is the Bureau of Indian Affairs (BIA). Under congressionally delegated authority, the BIA manages most reservation land as an outgrowth of the federal government's legal designation as trustee of the land. The BIA's management authority includes direct supervision over land and resource development through resource allocation, contract negotiation, and the collection of royalties. The BIA also has "approval power" to validate or void tribal council decisions on certain uses of reservation land. All leases of Indian land and resource development agreements must have BIA approval. Some commentators feel that these

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163 See id. at 116 (describing environmental laws that specifically address Indians, including Clean Air Act, Clean Water Act, Surface Mining Control and Reclamation Act, and others).
165 See Haner, supra note 153, at 114.
166 See id. at 109.
168 See Wood, supra note 3, at 1478.
169 See id.
171 See Wood, supra note 3, at 1478–79.
172 Id. at 1479.
direct and paternalistic powers of oversight have great potential to suffocate all Native power over their lands.\textsuperscript{174}

In the Self-Determination Era, however, Congress and federal administrative agencies have taken steps to voluntarily restrain their vast power and promote autonomy within tribes.\textsuperscript{175} Under Presidential leadership, federal agencies have worked to initiate a more laissez-faire policy toward tribal relations.\textsuperscript{176} Under current policies, the BIA for instance, will no longer force a tribe to accept a lease or transaction that has been opposed by the tribal council, and as a practical matter BIA approves all transactions that tribal governments endorse.\textsuperscript{177} Along the same lines, the Environmental Protection Agency (EPA) has developed an “Indian Policy” that calls for working with tribal governments on a “government to government” basis and taking into account tribal “interests and concerns” whenever EPA takes action on Indian lands.\textsuperscript{178} As an outgrowth of this policy, the EPA and Congress developed an extensive program of educating and providing technical assistance to tribes in order to make a government-to-government relationship more feasible.\textsuperscript{179} This plan includes the Indian Environmental General Assistance Program Act of 1992, which provides funding for tribes to investigate and determine their environmental protection needs.\textsuperscript{180} The EPA has also joined with other administrative agencies that deal with tribal issues to develop a \textit{National Memorandum of Understanding} to allow for a more comprehensive and coordinated approach to Native American issues.\textsuperscript{181} Finally, the EPA has developed a Native American Network under the Office of Solid Waste.\textsuperscript{182} This program holds training sessions on solid waste management for tribal officials and provides “solid waste circuit riders” who travel to reservations in order to offer hands-on technical

\textsuperscript{174} See id. at 1479–80 (describing difference between past and present uses of approval power by BIA).

\textsuperscript{175} See supra notes 31–36 and accompanying text; Cohen, supra note 4, at 180–204.

\textsuperscript{176} See Cohen, supra note 4, at 180–204.

\textsuperscript{177} See Wood, supra note 3, at 1480.

\textsuperscript{178} Martin D. Topper, \textit{Environmental Protection in Indian Country: Equity or Self-Determination}, 9 ST. JOHNS J. LEGAL COMMENT 693, 695 (1994).

\textsuperscript{179} Id. at 697.

\textsuperscript{180} Id. (citing 42 U.S.C. §§ 4368(b) (1994)).

\textsuperscript{181} Id. The BIA, the Indian Health Service, and the Department of Housing and Urban Development were the other agencies. Id. at 697–98 (exploring specifics of plan and its successes).

\textsuperscript{182} Id. at 698.
assistance for tribes to develop their own solid waste disposal programs.\textsuperscript{183} Through programs like these, some agencies have moved toward self-restraint in tribal affairs while others have worked affirmatively to make self-determination a reality.\textsuperscript{184}

In contrast to the broad and seemingly limitless plenary power of Congress, the Trust Doctrine defines the responsibilities of the federal government to follow a fiduciary duty in its actions toward tribes.\textsuperscript{185} The Trust Doctrine, along with certain constitutional provisions, are the only legal checks on federal power over tribes.\textsuperscript{186} The Trust Doctrine was first recognized in \textit{Cherokee Nation v. Georgia}, when Chief Justice Marshall described the relationship between Natives and the federal government as that of "a ward and its guardian."\textsuperscript{187} The doctrine has not been viewed as an independent source of federal authority, but instead it has been used as a constitutional standard of review and a standard of conduct that government agents must meet in their dealing with Indians.\textsuperscript{188} Because most dealings with tribes are expressed in agreements, statutes, executive orders, and regulations, the doctrine offers a method of reviewing these actions in light of a fiduciary duty.\textsuperscript{189}

The constitutionality of congressional action affecting Indians can be reviewed under the Trust Doctrine.\textsuperscript{190} The United States Supreme Court offered a test for legislative action in \textit{Morton v. Mancari},\textsuperscript{191} requiring congressional statutes that deal with Indians to be "tied rationally to the fulfillment of Congress' unique obligation toward the Indians...."\textsuperscript{192} Some commentators believe that this standard of re-

\textsuperscript{183} See Topper, \textit{supra} note 178, at 699.
\textsuperscript{184} See id.
\textsuperscript{185} See Wood, \textit{supra} note 3, at 1472.
\textsuperscript{186} See West, \textit{supra} note 161, at 72-73. Congress is bound by the Fifth Amendment "Takings Clause." See id. Also judicial review of congressional action is possible under a "tied rationally" standard that requires legislation to be "tied rationally to the fulfillment of Congress' unique obligation towards the Indians." Cohen, \textit{supra} note 4, at 218 (quoting Delaware Tribal Bus. Comm. v. Weeks, 430 U.S. 73, 85 (1977)).
\textsuperscript{187} \textit{Cherokee Nation}, 30 U.S. at 17.
\textsuperscript{188} Cohen, \textit{supra} note 4, at 220-21.
\textsuperscript{189} See \textit{id}. The doctrine is most successfully used as a method of review where the federal government is already obligated in some way to act under a statute or treaty; the trust argument is weaker when argued as an affirmative duty for the government to act. \textit{See} United States v. Mitchell, 463 U.S. 206, 225 (1983).
\textsuperscript{190} See Cohen, \textit{supra} note 4, at 221.
\textsuperscript{191} 417 U.S. 535 (1974).
\textsuperscript{192} \textit{Id}. at 555.
view, while deferential, may impose substantive limits on congressional actions. At least when promulgated under the plenary power, the Trust Doctrine seems to require that "statutes be based on a determination that the Indians will be protected."

The Trust Doctrine also serves as a check on federal administrative power by mandating a standard of conduct for all administrative agencies that work with tribes. This standard of conduct holds agencies to "moral obligations of the highest responsibility and trust" as well as a duty of loyalty found in ordinary trust law. These strict duties and obligations are especially important since many administrative agencies that deal with tribes have their own agenda that may be in conflict with the best interests of tribes or reservation land. The Trust Doctrine may be used in this way by tribal members to challenge practices such as the BIA's approval power over land uses when this approval is in violation of its duty of loyalty to Indian interests.

In the case of the Mescaleros, the Office of the Nuclear Waste Negotiator (NWN) acted under the federal plenary power. The NWN was an administrative office working pursuant to a congressional mandate, thus invoking the plenary power. Because the Mescalero project is now a private agreement, a plenary power analysis based on the NWN is no longer relevant. At present, the siting of a private MRS facility remains outside the direct scope of a federal statute. The MRS facility still requires a license from the NRC, and may be subject to other environmental and safety regulations surrounding the transport of nuclear waste. Moreover, in reaction to the Mescalero situation several bills are now pending before Congress that

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193 See Cohen, supra note 4, at 221.
194 Id.
195 Id. at 225.
196 Id. at 226 (citing Seminole Nation v. United States, 316 U.S. 286, 297 (1942)).
197 See id. at 227.
198 See Cohen, supra note 4, at 227–28. This is especially true with respect to agencies that are not directly dealing with Indian policies, such as the Nuclear Regulatory Commission, or the Office of the Nuclear Waste Negotiator, whose primary goals are to find a site for nuclear waste, not manage Indian affairs. See id.
199 See Wood, supra note 3, at 1551.
201 See id. The NWPA Amendments of 1987 entrusted the formulation of the MRS process to the NWN, however, that office has been discontinued, leaving the regulation of the MRS process in doubt. See Ware, supra note 74, at 2449.
202 See Mescalero Apaches Private SF Storage Plan Moves Ahead; Federal Program Stalled,
would directly regulate private MRS storage facilities. These bills could be passed into law under the plenary power and would apply on reservation land.

C. State Power

While the analysis of federal power within reservation borders is a fairly predictable exercise, the question of when state laws are enforceable on reservation land is a much more complex and uncertain inquiry. When the jurisdictional question involves hazardous and nuclear waste the debate becomes especially heated. States argue that these sites will affect their quality of life and therefore they should have some control over the land. Tribes, on the other hand, assert that if they surrender power to the states, these states will continue to use Native land as a dumping ground. The problem is further complicated by the quagmire of jurisdictional issues that surround questions of state power within reservations. Important distinctions exist based on whether the laws in question would impact Natives or non-Natives, Native owned property or non-Native owned property; and whether the jurisdiction asserted is civil, criminal, or regulatory. Each of these differences can have a dramatic impact upon whether state or tribal power is recognized.

1. State Power Over Natives in “Indian Country”

The general proposition that states do not have authority over Indian affairs in Indian Country traces its roots back to the Marshall
trilogy, specifically *Worcester v. Georgia.* In that case, the United States Supreme Court held that a Georgia law was "extra-territorial," meaning it was not recognizable on Indian land absent the consent of Congress. This general prohibition on state jurisdiction over Indian Country has been modified substantially in the 160 years since the *Worcester* decision, yet the general principle still underlies most decisions involving state power over tribes. The expansion of state power has arisen as a result of the presence of non-Indians in Indian Country as well as the Supreme Court's differentiation between civil, criminal and regulatory authority.

State civil and criminal jurisdiction over a tribe or its members while in Indian Country remains barred absent an express grant of congressional authority, following the *Worcester* holding. The clearest example of a grant of such power to states is under "Public Law 280." Generally speaking, Public Law 280 required some states and permitted others to take civil and criminal jurisdiction over all or most of the reservations within their borders. New Mexico was not one of the states that was either required to or opted to exercise this jurisdiction.

In the area of regulatory authority over tribal land and its members, Indian law has turned away from the absolute restrictions voiced in earlier opinions in favor of a more flexible approach. State jurisdiction is now based on a detailed factual analysis, structured around entirely of "Indian Country." See *id.* Those lands within reservations that are owned by non-Natives or areas where there is a substantial amount of non-Native ownership fall outside the "Indian Country" definition and usually allow for more state control. See *Sehgal,* supra note 4, at 444. This section deals only with state power over activities within "Indian Country."

213 See *Cohen,* supra note 4, at 261–64 (citing *Worcester,* 31 U.S. at 542, 561).
214 See *id.* at 261. Some commentators argue that there is a presumption against the application of state laws within reservation borders based on the Court's reluctance to permit state jurisdiction. See *Royster & Faussett,* supra note 167, at 601.
215 See *Cohen,* supra note 4, at 261; *Royster & Faussett,* supra note 167, at 604.
216 See *Royster & Faussett,* supra note 167, at 604.
218 *Royster & Faussett,* supra note 167, at 607–08.
219 See *Cohen,* supra note 4, at 362 nn.122–25. (describing states that did exercise some portion of jurisdiction allowed under Act).
220 See *Royster & Faussett,* supra note 167, at 601.
a two-part "preemption/infringement" test, set out in two United States Supreme Court opinions. In Williams v. Lee, the Court declared that "absent 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 governed by them." This emphasis on infringement was tempered by the Court in McClanahan v. Arizona State Tax Commission where the opinion focused not only on whether there was a tribal law or custom dealing with the matter, but also whether the issue more properly fell in a sphere of congressional statute or power. In fact, the Court in McClanahan diminished the importance of the infringement prong, stating that the "trend has been away from the idea of inherent Indian sovereignty [or the infringement prong and toward] reliance on federal preemption."

Since this shift to preemption as the focus for analyzing state power over tribes, a "special type of federal preemption unique to Indian law" has developed. Of course the classic example of federal preemption—a specific federal statute superseding a state law on the same issue—continues to apply in the Indian context. In cases where a federal law or treaty does not explicitly cover the same issue, federal law can still be said to preempt state law. Essentially, this special preemption analysis is a general balancing test, weighing federal and tribal interests in regulating the activity against similar state interests. The inquiry was summarized by the United States Supreme Court in New Mexico v. Mescalero Apache Tribe. The Court held that a state law is preempted if "it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state

221 See Haner, supra note 153, at 115; Royster & Fausett, supra note 167, at 601.
223 Id. at 220.
225 See id.
226 Id.
227 Royster & Fausett, supra note 167, at 602.
228 See Haner, supra note 153, at 116. This is a standard analysis under the Supremacy Clause and is especially relevant now that Congress has delegated much authority to tribes by treating them as states under many environmental statutes. See id. In cases such as this, tribal law made pursuant to a federal statute would preempt state law under a standard Supremacy Clause analysis. See id.
229 Haner, supra note 153, at 116.
230 See id.
interests at stake are sufficient to justify the assertion of state author­
ity.\textsuperscript{232} In order to take into account the federal government’s “over­
riding goal of encouraging tribal self-sufficiency and economic develop­
ment,”\textsuperscript{233} the Court has recently said that this balancing should be
done “in light of traditional notions of Indian sovereignty and the
congressional goal of self-government.”\textsuperscript{234}

The special preemption test therefore seems to encompass a four­
part inquiry, examining the backdrop of tribal sovereignty; the rele­
vant federal interests; the relevant tribal interests; and finally, the
relevant state interests.\textsuperscript{235} Many of the factors in the first three steps
overlap greatly.\textsuperscript{236} The interests in tribal self-determination and eco­
nomic development are stressed as federal and tribal interests, as is
the interest in a pollution-free reservation.\textsuperscript{237} The interests in provid­
ing for the health and welfare, as well as the economic development
of the tribe, are also recognized by courts as legitimate tribal and
federal interests.\textsuperscript{238} Balanced against these interests are the legiti­
mate interests of the state in controlling its economic and environ­
mental quality of life, preventing spillovers or other accidents, and
restraining tribes from receiving undue economic advantage from less
stringent tribal standards or regulations.\textsuperscript{239} Thus, leniency or lack of
regulation by the tribe, or lack of enforcement by the federal govern­
ment in the environmental or nuclear waste context could substan­
tially strengthen a state’s claim of jurisdiction.\textsuperscript{240}

\textsuperscript{232} Id.

\textsuperscript{233} California v. Cabazon Band of Mission Indians, 480 U.S. 202, 216 (1987) (despite being a
Public Law 280 state, California gambling law is preempted on reservation by federal and tribal
rights).

\textsuperscript{234} Id.

\textsuperscript{235} See Royster & Fausett, supra note 167, at 644–49.

\textsuperscript{236} See id. at 602 n.74. These factors also greatly resemble interests that would naturally seem
to fall under the ‘infringement’ prong of the test. See id. Many commentators feel that the
current preemption test has incorporated the infringement prong into itself creating an essen­
tially one step “special” preemption test. See id.; see also Stephen M. Feldman, Preemption and
the Dormant Commerce Clause: Implications for Federal Indian Law, 64 OR. L. REV. 667, 678
(1986); Russell Lawrence Barsh, Is There Any Indian Law Left? A Review of the Supreme

\textsuperscript{237} See Haner, supra note 153, at 117.

\textsuperscript{238} See Royster & Fausett, supra note 167, at 650–52.

\textsuperscript{239} See Haner, supra note 153, at 118; Royster & Fausett, supra note 167, at 652–53.

\textsuperscript{240} See Haner, supra note 153, at 118.
2. State Power Over Non-Natives on Reservation Land

State jurisdiction over activities on reservation land does not only include jurisdiction over the Native Americans themselves or Native owned property.241 Unlike the foregoing assertions of state power, when states regulate non-Natives or non-Native owned property, Indian law generally allows more extensive actions by states.242 The United States Supreme Court most recently spoke on this issue in Montana v. United States.243 The Court put forth a general presumption that states, not tribes, have authority to regulate non-Natives on reservation land.244 This presumption is qualified by a few important exceptions, which together have created three spheres of influence over non-Natives on reservation land.245

First, tribal authority is exclusive where non-Natives have entered into consensual dealings with the tribe or its members or where Native sovereign interests are implicated.246 Second, state authority to regulate is exclusive where it does not impact those tribal sovereign interests.247 When a state involvement in a regulated activity is especially strong and no tribal interests are recognized, courts have allowed state power to prevail.248 Third, courts have occasionally recognized concurrent jurisdiction between states and tribes over non-Natives on reservations.249 This overlapping jurisdiction implicates enforcement and administrative problems and thus has not been used frequently.250 Occasionally, states and tribes have been granted concurrent jurisdiction to tax certain products especially where the product taxed was produced off the reservation and brought into Indian country for resale.251

Therefore, states generally have been denied power over Native activities in Indian Country so long as the tribe shows a willingness to regulate that activity.252 States are given more power when non-
Native persons or property are at stake. While consensual agreements between tribes and non-Natives are usually respected, courts have reserved the right to authorize concurrent jurisdiction in limited cases.

In the Mescalero situation it is uncertain how much power New Mexico or other states may have over the process. Since a private MRS does not directly implicate the NWPA, New Mexico could argue that there is no direct federal preemption. A license by the NRC could be considered direct federal preemption. However, the special preemption analysis discussed above does not require a directly conflicting federal statute. A court's decision could depend on whether the Mescaleros develop a set of tribal regulations dealing with the MRS facility. If a tribe has no history of regulating a given activity, courts have been more apt to allow state regulation. Also, New Mexico has a legitimate interest in protecting their environment from spillover effects of activities on reservations. The issue of spillover effects could be heightened if an MRS facility is located on annexed land between the reservation and the rail line as Chino desires. This land is not a part of the reservation at present and would be physically closer to non-Indian land, creating greater spillover concerns.

A precise balancing may not be necessary in the area of nuclear waste, since the United States Supreme Court has implied that the federal government has “occupied the entire field of nuclear safety concerns . . . .” This comment has been relied on by at least one federal Circuit Court and could end the state law debate entirely in the favor of the federal government.

Finally, New Mexico or any other state through which nuclear waste would be transported, could attempt to regulate that transportation. This attempt would probably fail as well on Dormant Com-

253 Royster & Fausett, supra note 167, at 606.
254 See id. at 599.
255 See id.
256 See Collins & Hall, supra note 38, at 339.
257 Haner, supra note 153, at 116.
258 See id. at 118–19.
260 Haner, supra note 153, at 118; Royster & Fausett, supra note 167, at 652.
261 See Hiruo & Hart, supra note 103, at 1.
262 See id.
264 See Nevada v. Watkins, 914 F.2d 1545, 1560 (9th Cir. 1990).
265 See Collins & Hall, supra note 38, at 335.
merce Clause grounds. On previous occasions the United States Supreme Court has specifically prohibited states from regulating the importation of waste into its borders. A state attempting to regulate the transportation of nuclear waste could face even stronger legal barriers since the nuclear industry and its waste is highly regulated by the federal government.

Therefore, the Mescaleros could strengthen their position by establishing a set of tribal regulations dealing with the MRS facility. However, given the federal nature of the nuclear industry and the direct presence of the federal government through an NRC license, state intervention most likely is preempted.

IV. SELF-DETERMINATION AND ENVIRONMENTAL JUSTICE

A. The Self-Determination Movement

The possibility of housing nuclear waste on Indian reservations and the more common issue of toxic and solid waste siting in Indian Country have sparked a heated exchange in recent legal literature. Many scholars have framed the debate as a conflict between those who endorse tribal self-determination and economic survival on the one hand, and those in the media and the environmental movement who pursue environmental protection at all costs, on the other. "Environmental justice" and "environmental racism" are concepts that have come into vogue recently. These ideas have been applied (some say misapplied) to waste siting on reservation land. This Section will look closely at both "sides" of this debate, in order to find

266 See id.
268 See Collins & Hall, supra note 38, at 335.
269 See Haner, supra note 153, at 118.
270 See Collins & Hall, supra note 38, at 343.
271 See, e.g., Johnson, supra note 2; Sehgal, supra note 4; Topper, supra note 178; Collins & Hall, supra note 38.
273 Sehgal, supra note 4, at 454; Topper, supra note 178, at 693.
the common ground that these social movements share and can use to improve the condition of tribes and their environment.

The legal literature is currently brimming with articles that appear to draw a line between those who promote self-determination for tribes, and those who call for an environmental justice perspective in waste siting on reservations.274 One of the principal arguments for not interfering with tribes that choose to operate waste sites on reservation lands is the great economic boom that these sites provide communities in financial distress.275 Producers of waste are often willing to pay much of the startup costs for these sites, enabling even the most impoverished tribes to take advantage of the opportunity.276 Proponents often herald a waste site as a great source of jobs for tribes with high unemployment.277 Moreover, pragmatic supporters of waste sites quickly point out that these projects are one of the few development opportunities that are compatible with the limited resources that tribes have left to offer: isolated land and a relatively unskilled or semi-skilled workforce.278

The potential economic benefits of such a waste site for tribes are not usually the critical point of division in this debate. Instead, self-determination advocates argue that environmentalists ignore issues of sovereignty when calling for an end to the storage of government and corporate waste on reservations.279 These advocates condemn the media and environmentalists for creating a stereotype of Native Americans as simple people attempting to act as caretakers of nature, but being swindled by the government or big industry into taking waste.280 In using this romantic view of tribal life and culture, these commentators argue that some in the media and in the environmental move-

274 See Huffman, supra note 272, at 919; Sehgal, supra note 4, at 454; Topper, supra note 178, at 693; Walker & Grover, supra note 272, at 934. These articles address many different types of waste siting, including solid, toxic, and nuclear waste. While all of the arguments put forth in these articles do not apply to nuclear waste, most are general enough to apply to all three. This Comment has attempted to be true to these nuances and point out cases where the arguments have dealt specifically with one type of waste site or another.

275 Walker & Grover, supra note 272, at 232.

276 See id.

277 Id.

278 See id. at 231.

279 See Sehgal, supra note 4, at 454; Topper, supra note 178, at 693.

280 See Grover & Walker, supra note 272, at 942; Sehgal, supra note 4, at 456. A typical stereotype of Native Americans in this context portrays Indians as not producing trash, never harming the environment, being simple in their approach to complex issues, and therefore not being intelligent or sophisticated enough to deal with the issue of waste disposal. Id.
ment have ignored the idea of self-determination and Native sovereignty under the assumption that tribes do not want these sites. Instead they contend, as this Comment has described, that tribal leaders are in fact actively courting waste producers. The “self-determinationists” consider those who proscribe to this romantic notion of Indians and Indian life to be racist themselves and paternalistic for not recognizing Native tribes as intelligent people, capable of addressing this complex issue.

An example of successful siting lauded by many scholars who are interested in promoting tribal economic development is the Campo Band of Mission Indians of California. The Campo Band is a small tribe that experienced high levels of poverty and unemployment, and chose to pursue solid waste disposal in order to raise money for the tribe. The tribal government developed a regulatory infrastructure for the reservation in order to avoid state regulation; it incorporated Indian hiring preferences into the final private contract; and it included environmental liability insurance for the project. The tribe faced significant local opposition to their proposal, but succeeded nonetheless. Proponents of tribal self-determination argue that the Campo Band’s success dispels the “utopian visions” of some environmentalists that tribes do not want and cannot handle waste sites. Not only can Native Americans handle the complexities of waste siting, these proponents argue, but the tribes are the only ones who should make these choices. The decision of whether to pursue such a project

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281 Grover & Walker, supra note 272, at 933.
282 See supra Section II.
283 Sehgal, supra note 4, at 456.
284 See Grover & Walker, supra note 272, at 933; Walker & Grover, supra note 272, at 250. The authors of these two articles are Native American attorneys who advised the Campo Band in their pursuit of a solid waste landfill. Walker & Grover, supra note 272, at 265. The Campo model is useful when analyzing a way tribes can develop the necessary support and infrastructure to realize such a solid waste venture. See Walker & Grover, supra note 272, at 232. It is less helpful when analyzing the nuclear waste site at issue here, because nuclear waste is subject to different and often more complex regulations, different questions of expertise, and a greater risk of serious health and environmental consequences than solid waste. See Erickson et al., supra note 56, at 75–81 (describing federal law regarding nuclear waste and MRS facilities).
286 Walker & Grover, supra note 272, at 253–54.
287 See Grover & Walker, supra note 272, at 939.
288 Huffman, supra note 272, at 919–20.
requires a complex analysis of costs and benefits, one that only the tribe should make.\textsuperscript{290}

The issue of whether the federal government should play a role in supporting tribal development varies considerably from scholar to scholar in the self-determination movement. Some call for an end to federal powers like BIA approval\textsuperscript{291} or the Trust Doctrine,\textsuperscript{292} while others lay out detailed criteria for a new form of federal review.\textsuperscript{293} Most scholars agree that some government safeguards are necessary in the area of hazardous waste siting.\textsuperscript{294} They caution, however, that these safeguards must allow tribes to make decisions without significant interference.\textsuperscript{295}

Many of these same commentators have been critical of the role of an environmental justice perspective in the analysis of waste siting decisions by tribes.\textsuperscript{296} They argue that the concepts of industry singling out reservations for waste storage and of tribes suffering a disproportionate impact from hazardous waste sites are fictions created by the media and environmental justice advocates.\textsuperscript{297} This fiction will not become a reality, they explain, because there is no guarantee that tribes will even choose to place nuclear waste sites on their land.\textsuperscript{298} These self-determinationists caution against applying a traditional environmental justice approach in the Native American context because, unlike other low income communities, tribes have the power

\textsuperscript{290} Id.
\textsuperscript{291} See supra notes 169–74 and accompanying text.
\textsuperscript{292} See Collins & Hall, supra note 38, at 326 (condemning Trust Doctrine as paternalistic).
\textsuperscript{293} See Walker & Grover, supra note 272, at 260–61. The authors suggest several criteria that the BIA should incorporate when evaluating waste disposal sites, including the market value of the compensation, the background of the developer, and Indian preferences in hiring. Id. This type of BIA oversight has been criticized by others who advocate for tribal self-determination. See Haner, supra note 153, at 105 (criticizing proposed bill that would provide substantially similar oversight).
\textsuperscript{294} See Topper, supra note 178, at 701; Sehgal, supra note 4, at 456; Sitkowski, supra note 289, at 242; Walker & Grover, supra note 272, at 232.
\textsuperscript{295} See Sitkowski, supra note 289, at 242; Topper, supra note 178, at 701; Walker & Grover, supra note 272, at 232.
\textsuperscript{296} See Sehgal, supra note 4, at 456; Topper, supra note 178, at 693.
\textsuperscript{297} Sehgal, supra note 4, at 456; Haner, supra note 153, at 106. However, at least one of these authors went on to admit that “many reservation communities experience desperate economic conditions, making members susceptible to the lure of money from exploiting weak federal and tribal environmental enforcement.” Haner, supra note 153, at 121.
\textsuperscript{298} Collins & Hall, supra note 38, at 323. Of course, this hope has been proven wrong, not only by the Mescaleros’ actions, but also by the imminent deal between the Skull Valley Band of Goshute tribe and many of the same nuclear industries that negotiated with the Mescaleros. See Woolf, supra note 105, at A1.
to make an "affirmative decision" to accept waste.\textsuperscript{299} In general, those supporting tribal self-determination have characterized the environmentalist approach as calling for an absolute prohibition against development on reservations; as viewing Natives in a stereotypically naive way; and as trying to "impos[e] its values and visions, already clouded by racism, upon Native Americans."\textsuperscript{300}

**B. Environmental Justice\textsuperscript{301}**

When we label an environmental practice as an example of environmental racism, we are saying that the predictable distributional impact of that decision contributes to the structure of racial subordination and domination that has similarly marked many of our public policies in this country.\textsuperscript{302}

The issue of nuclear waste siting on reservation land implicates many of the same problems and concerns that surround other more common examples of environmental racism.\textsuperscript{303} As a result, an environmental justice perspective may be helpful when analyzing the nuclear waste siting on native lands generally and the Mescalero decision specifically. Like the inner-cities in the United States, reservation communities experience desperate economic conditions that often force these communities to live with a dirtier or more dangerous environment in return for the promise of jobs and economic aid.\textsuperscript{304} Like the inner-cities, reservation communities find themselves the home of Locally Undesirable Land Uses (LULUs) because they do not have

\textsuperscript{299} See Collins & Hall, \textit{supra} note 38, at 317; Topper, \textit{supra} note 178, at 693.

\textsuperscript{300} Collins & Hall, \textit{supra} note 38, at 327.

\textsuperscript{301} This Comment will use the terms "environmental justice," "environmental inequity," and "environmental racism" to refer to the general concern regarding the disproportional impact of environmental harms and waste sites in low-income communities and communities of color. These terms and concepts were introduced by Dr. Benjamin Chavis of the United Church of Christ's Commission for Racial Justice in the early 1980's. See Richard Lazarus, \textit{Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection}, 87 \textit{Nw. U. L. Rev.} 787, 790 n.13 (1993).


\textsuperscript{303} See Lazarus, \textit{supra} note 301, at 790. The most typically encountered example of environmental racism seems to be the urban centers of the United States, especially "ghetto" neighborhoods or other communities within urban areas that are predominantly poor and minority. See \textit{id.} at 788 n.6. These communities are often victims of racist zoning practices, a lack of government cleanup efforts, a poor housing stock, and other local living conditions that lead to a disproportionately dirtier environment. See Robert Bullard, \textit{Environmental Blackmail in Minority Communities, in Race and the Incidence of Environmental Hazards} 82, 82–85 (Bunyan Bryant & Paul Mohai eds., 1992).

\textsuperscript{304} See Haner, \textit{supra} note 153, at 121.
the economic alternatives or the political power to refuse.\textsuperscript{305} Like inner-city minority populations, Native Americans have suffered discrimination from all aspects of American society, including the legal system, since the first settlers arrived in North America.\textsuperscript{306} Like inner-city populations, tribal members are impacted by the "synergistic" health effects of a long history of exposure to many forms of pollution. This history of living with pollution makes both communities more susceptible to health problems associated with present forms of pollution.\textsuperscript{307} The pertinent difference for this debate between these two minority populations who both suffer from poverty and disproportionate environmental harm, is that the ghettos Native Americans have been forced to inhabit are governed by the Indians themselves.\textsuperscript{308}

Many advocates of tribal self-determination have seized upon this difference, arguing that respect for Native sovereignty requires blind deference to decisions of tribal councils.\textsuperscript{309} This approach, however, ignores the realities of tribal power and the history of oppression and control by the majority in this country.\textsuperscript{310} Simply having some measure of control over the governing of reservation land cannot remove tribal members from the list of underrepresented voices in this country.\textsuperscript{311}

Two power structures are involved in tribal decision-making that affect the empowerment of tribal members: the tribal system itself and the federal system.\textsuperscript{312} An environmental justice perspective ex-
amines these power structures by listening "to the voices of the oppressed [and] the marginalized"\(^{313}\) in each system in order to address their needs through empowerment. The goal of empowerment calls for opening up discussion and decision-making to underrepresented groups through education and access to information.\(^{314}\) This inclusive approach to decision-making aims to create decisions that reflect a real consensus of those who are affected by a hazardous project.\(^{315}\) This approach is perfectly compatible with many of the principles of tribal self-determination. However, instead of blind deference to tribal decisions, the environmental justice perspective calls for a more searching inquiry into federal and tribal council decisions in order to determine which voices or perspectives may have been marginalized or silenced.\(^{316}\) These voices must then be empowered with increased information and knowledge so that they can be exercised in an informed manner.\(^{317}\) Only when this empowerment has occurred are environmental justice advocates willing to defer to tribal decisions.

C. Self-Determination and Environmental Justice in the Mescaleros' MRS Facility

As discussed above, the council structure employed by most tribes that reorganized under the IRA raises questions about its representative nature and tendency to support presidential dominance.\(^{318}\) This is especially true in the case of the Mescaleros. Like many other tribes, the Mescaleros have strongly traditional members who have refused to participate in the IRA-designed government, along with more modern members who hold positions in that government.\(^{319}\) In this way, the tribal council (and hence the rest of the Mescalero


\(^{314}\) See id. at 1120; Torres, *supra* note 302, at 843–44.


\(^{318}\) See *supra* notes 135–47 and accompanying text.

\(^{319}\) See Mescaleros Kill Nuclear Storage Plan, *supra* note 89, at A1 (describing Silas Cochise, great-grandson of legendary chief, as project manager for the MRS facility, and Joseph Geronimo, great-grandson of Chief Geronimo as traditional spiritual leader opposed to project);
government) is unrepresentative of traditional voices and perspectives.\textsuperscript{320} Furthermore, the lack of opposing views in the governing dialogue contributes to the consolidation of presidential power.\textsuperscript{321}

A convincing example of the Mescalero tribal council structure inhibiting traditional voices occurred when the elder Mescalero women protested the MRS facility before the first referendum, contributing to the initial defeat of the project.\textsuperscript{322} In traditional Apache society, elder women played a central role in advising and leading the tribe.\textsuperscript{323} These elders made a powerful argument to the tribe against the project on the eve of the first vote. According to Silas Cochise, the project manager for the Council, this argument signaled the defeat of the facility.\textsuperscript{324} However, these women hold no office in the modern government, and after the initial vote their arguments fell silent against pressure allegedly exerted by Chino and the council.\textsuperscript{325} Through means such as scare tactics and influence exerted by Housing Secretary Fred Kaydahzinne, these elders were unable to voice opposition to the project.\textsuperscript{326} Examples such as this are not considered rare in the contemporary power balance between traditional and modern tribal leadership.\textsuperscript{327} This picture of tribal governing only serves to further disempower those tribal members who do not agree with the views of the Council or President.\textsuperscript{328} This IRA-sanctioned structure also casts doubt on the legitimacy of complete deference to tribal "consensus" when it takes the form of Council decisions.\textsuperscript{329}
The internal power structure of the Mescaleros is not the only source of repression in the waste siting issue. Much of the division and power disparity in tribes like the Mescalero Apaches can be traced to the history of control and racism by the federal government. While the IRA was ostensibly passed with an eye toward empowering the tribes, its main effect was to institute Western-style democracies in tribes that were not used to or receptive to this form of government. The effect of standardizing these tribal governments was that the federal government and private industries could interact more easily with tribes. This enhanced interaction with tribes had the effect of making tribal governments more susceptible to the lure of the wealth and economic pressure associated with Western capitalism. When combined with the historic degradation of their land-based economy, and their lack of additional avenues to economic prosperity, these economic pressures have created a situation where tribes have no real choice for economic survival other than degrading their land base by accepting pollution and other waste from distant states.

Knowing that tribes are in this desperate economic situation, the federal government is now using the concept of tribal sovereignty as an excuse for allowing nuclear waste to gravitate toward tribal reservations. First, through the Nuclear Waste Policy Act Amendments of 1987 (NWPA) Congress facilitated the siting of waste on reservation lands. Today Congress is content to let the market direct waste siting; this naturally has led it to the inexpensive and politically weak lands owned by tribes. The federal government has a strong interest in allowing tribes like the Mescalero to house nuclear waste, because the NWPA obligates the federal government to take possession of the waste by 1998 if a suitable temporary storage facility

suspect if claims by Rufina Laws and other opponents of the site are true. Costello, supra note 91, at 16. Laws states that "The bottom line is greed, power, and money; . . . because the tribal leaders will be the only ones to make a profit by the waste." Id.

330 See Wood, supra note 3, at 1552-55.
331 See id. at 1552.
332 See id. at 1552-55.
333 See id. at 1555.
334 See Collins & Hall, supra note 38, at 274 (describing land-based sovereignty and economy of tribes).
335 Johnson, supra note 2, at 596-97.
337 See Erickson et al., supra note 56, at 78-80 (describing Office of the NWN and use of grant money to entice governments to site nuclear waste).
is not built.\textsuperscript{338} It faces lawsuits from the storage-deprived nuclear power industry to enforce this obligation.\textsuperscript{339} These same industries are simultaneously courting the Mescaleros.\textsuperscript{340}

In this way, both the federal power structure and the federalized tribal structure have worked to oppress tribal consensus and decision-making power. Therefore, as they operate now, neither the tribal council nor the federal government emerge as a reliable source for a solution to this siting question. Despite many assertions to the contrary in the legal literature,\textsuperscript{341} principles used to further environmental justice in other contexts may offer guidance here as well. One of the core issues inherent in the concept of environmental justice is a holistic or inclusive decision-making process.\textsuperscript{342} Essentially this means that those "oppressed or marginalized" voices must be heard and included.\textsuperscript{343} In the tribe's relationship with the federal government, this approach means there should be more tribal input. Within the tribe, this concept requires a more legitimate consensus among traditional and modern approaches in decision-making, particularly when such decisions could have far-reaching and potentially harmful effects.\textsuperscript{344} While this first step does not solve the problem, it provides a place to start and a standard from which to judge the results.

Any possible solution to a problem as complex and potentially dangerous as nuclear waste siting must involve the federal government as well as the tribes.\textsuperscript{345} As discussed previously with respect to sovereignty, the federal government has completely occupied the area of nuclear safety and could exercise its plenary power to become in-


\textsuperscript{339} See Johnson, \textit{supra} note 2, at 596. In July, the United States Court of Appeals for the District of Columbia ruled that the federal government must take possession of nuclear waste by January 31, 1998, as required by the NWPA. Ind. Mich. Power Co. v. Dep't of Energy, 88 F.3d 1272, 1277 (1996). However, because it is virtually impossible for the federal government to build a site for this waste by that date, the court's ruling does not solve the immediate storage problem. Pamela Newman, Nuclear Utilities Win Major Waste Battle, \textit{Energy Daily}, Oct. 24, 1996.

\textsuperscript{340} See Johnson, \textit{supra} note 2, at 596.

\textsuperscript{341} See Sehgal, \textit{supra} note 4, at 456; Topper, \textit{supra} note 178, at 693.

\textsuperscript{342} See Shutkin & Lord, \textit{supra} note 313, at 1120, 1126.

\textsuperscript{343} \textit{Id.} at 1129.

\textsuperscript{344} See \textit{id.} at 1126–30 (applying these ideas in context of Superfund clean up in New Bedford, Massachusetts).

\textsuperscript{345} See Collins & Hall, \textit{supra} note 38, at 294–95; Erickson et al., \textit{supra} note 56, at 77–80 (describing federal government's active role in regulating nuclear waste).
volved in the development of a private MRS facility.\textsuperscript{346} Given the technical expertise and regulatory framework that would be required for a private MRS, it is critical that the federal government strictly oversee the project.\textsuperscript{347} This view is not an affront to tribal sovereignty nor is it based on a stereotypical vision of the capabilities of Native American tribes.\textsuperscript{348} Instead, it is a recognition that a project with the potential to cause dramatic, widespread danger in a short amount of time without careful safeguards requires the benefit of federal expertise.

There is reason to question present federal regulation of the nuclear field, however, and reforms must be made in the Nuclear Regulatory Commission (NRC) generally and in the regulations that it promulgates.\textsuperscript{349} The NRC, long considered an agency captured by industry, has been criticized for being more concerned with "propping up an embattled, economically straitened, [nuclear power] industry than with ensuring public safety."\textsuperscript{350} While no specific regulations for the licensing of a private MRS facility have been promulgated, on June 22, 1995, the NRC announced the promulgation of a final rule for the licensing of an MRS under the federal program.\textsuperscript{351} This rule, which provided for emergency safety procedures and notice requirements, was criticized during the public comment proceedings as not requiring sufficient safety procedures and thus placing "an unfair burden on local emergency responders with little or no training for these type [sic] of emergencies."\textsuperscript{352} The license requires the licensee to provide all training and notification procedures; this would be costly and would

\textsuperscript{346} See Collins & Hall, supra note 38, at 336–37. On its face, the NWPA does not appear to apply to a private waste site, because the Act provides for only the government-run voluntary MRS program. Erickson et al., supra note 56, at 78–82 (describing voluntary MRS program). However, there are at present two main bills pending before Congress dealing with private MRS facilities. S. 1478, 104th Cong., 1st Sess. (1995) (sponsored by Sen. Rod Grams (R-Minn)); H.R. 1020, 104th Cong., 1st Sess. (1995) (sponsored by Rep. Fred Upton); see also SF Interim Storage, supra note 203, at 0276–2897; Federal Program Stalled, supra note 202.

\textsuperscript{347} See Johnson, supra note 2, at 595.

\textsuperscript{348} See Grover & Walker, supra note 272, at 942; Huffman, supra note 272, at 919.

\textsuperscript{349} See Eric Pooley, Nuclear Warriors, \textit{Time}, Mar. 4, 1996, at 47 (describing collusion between plant and regulators as cause of failure of NRC to address safety issues raised by engineers at Millstone nuclear power plant in Connecticut).

\textsuperscript{350} See \textit{id.} at 48. The relationship between the nuclear industry and the NRC was described as the "fox guarding the hen house" by Senator Joseph Biden (D-DE), because the industry seemed to veto Commission nominees that it deemed too hostile and NRC officials often worked for the industry before and after their time with the Commission. \textit{id.} at 49.


\textsuperscript{352} \textit{id.} at 32,434.
not provide enough federal control. Finally, as of yet there are no provisions in the NWPA or other applicable laws that would provide training and technical support similar to that provided by EPA for Native projects in the area of solid waste disposal. This type of training is essential if a private MRS is to be a safe alternative for tribes.

If there are adequate improvements in the federal regulatory framework surrounding nuclear waste, and improvements in internal tribal decision-making, tribes should have the general authority to decide whether to allow a waste-site on their land. Increased technical assistance and greater involvement by tribes at the federal level will help to educate tribal members from the outset and thus allow for an informed decision and a real opportunity for tribes to better resolve these issues for themselves. This type of empowerment through education and knowledge is the only way to begin to right the generations of marginalization and discrimination that have characterized mainstream society's relationships with tribes throughout history. These are the recommendations of an environmental justice approach: tribal self-determination empowered by knowledge.

V. CONCLUSION

This analysis of the Mescalero Apache's decision to construct an MRS facility does not offer any easy solutions. The issue is set in a long history of tribal exploitation by federal and state governments. The relationships among federal, state, and tribal governments have been shaped by centuries of federal statutes and policies, limiting a tribe's right to govern itself as it chooses. Suffering from these limited rights, Native Americans have seen their reservation land used and abused for the purposes of mainstream society. We must be careful, however, not to label all economic development opportunities involving waste storage on tribal lands as exploitation. After enduring centuries of poor treatment Native people must be given opportunities to pull themselves out of poverty and despair. When these decisions involve self-condescension and self-degradation in the form of

353 Id. at 32,442.
354 See supra notes 178-84 and accompanying text (describing EPA's policy of supporting tribes with technical and educational assistance).
355 See Shutkin & Lord, supra note 313, at 1126.
356 See id. at 1130; Torres, supra note 302, at 844.
357 See id.
accepting extremely dangerous nuclear waste, however, they must be scrutinized carefully. Legitimate tribal self-determination must be safeguarded by employing an environmental justice approach and working for a true, informed consensus within tribes through empowerment and education of tribal members. Only when making a decision with all of the appropriate information and with all stakeholders participating can tribes legitimately be said to determine their own destiny.

Given the federal interest in staying out of the private MRS siting process, and the likely preemption of state power, the Mescalero Apaches will probably be given the freedom to place an MRS facility on their reservation. Before the site is built and spent nuclear fuel is transported across the country, Wendell Chino and the Mescalero Tribal Council should take all steps necessary to ensure the consensus of their people and to provide for their safety. As the final word on this project, they have a responsibility to their people and to the land.