TRIBE-SANCTIONED NUCLEAR WASTE FACILITIES AND THEIR INVOLUNTARY NEIGHBORS

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In 2010, President Barack Obama appointed the Blue Ribbon Commission on America's Nuclear Future (BRC) in order to study options for dealing with nuclear waste as alternatives to replace permanent disposal at Yucca Mountain, Nevada. The BRC recommended a new voluntary siting mechanism based on the Nuclear Waste Negotiator (NWN), an expired program decried as "radioactive racism" for its almost exclusive focus on Native Americans. The NWN inspired numerous articles supporting or opposing tribes' efforts to host nuclear waste facilities. Rather than focus on the tribal majorities that have pursued such facilities, as previous scholarship has done, this Note refocuses the analysis on the substantial tribal minorities that have actively opposed their leaderships' decisions to host such facilities. The Note has two main goals. First, it seeks to elucidate the uphill legal battle that minority tribe members face under current law if they decide to challenge the Bureau of Indian Affairs' approval of the lease for a facility that their tribal leadership has signed. Second, it offers specific recommendations for Congress to implement as part of its impending nuclear waste legislation.

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I. INTRODUCTION

The year 2012 was the hottest on record in the United States and the second most volatile as measured by the damage from natural disasters.[1] Scientists "doubt that such a striking new record would have been set without the backdrop of global warming caused by the human release of greenhouse gases," one of which is carbon dioxide.[2] Carbon dioxide represents 82.5% of U.S. greenhouse gas emissions,[3] and the electricity industry accounts for 38% of these emissions,[4] primarily due to coal and gas-fired power plants.[5] In order to achieve maximum reductions in greenhouse gases, many believe that the U.S. should invest in nuclear energy.[6] Before it can be a viable fuel option, however, policy-makers must devise a solution to the problem of how to dispose of the radioactive waste that is regularly

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[1] Justin Gillis, *Not Even Close: 2012 Was Hottest Ever in U.S.*, N.Y. TIMES, Jan. 9, 2012, at A1.

[2] *Id.*

[3] U.S. ENVTL. PROT. AGENCY, DRAFT INVENTORY OF U.S. GREENHOUSE GAS EMISSIONS AND SINKS: 1990-2012 ES-7 (2014), *available at* http://www.epa.gov/climatechange/Downloads/ghgemissions/US-GHG-Inventory-2014-Main-Text.pdf.

[4] *Id.* at 3-14.

[5] *See Sources of Greenhouse Gas Emissions: Electricity Sector Emissions*, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/climatechange/ghgemissions/sources/electricity.html (last updated Apr. 17, 2014).

[6] *See* Oliver Morton, *Special Report on Nuclear Energy: The dream that failed*, THE ECONOMIST, Mar. 10, 2012, at 13; *see also* Blue Ribbon Commission on America's Nuclear Future: Memorandum for the Secretary of Energy, 75 Fed. Reg. 5485, 5485 (Feb. 3, 2010).

generated by nuclear power plants. This issue has been called "one of the most intractable problems facing the nuclear power industry throughout the world."[7]

Even without an expansion in nuclear power, however, the question remains of what to do with the 2,000–2,400 metric tons of waste that is produced annually[8] by the U.S.'s 104 nuclear reactors,[9] in addition to the existing 65,000 metric tons that lack a permanent storage facility.[10] For two decades, the federal government pursued a plan to house a repository at Yucca Mountain, Nevada, despite fierce opposition from Nevadans.[11] Even if this facility were to ever receive wastes—an unlikely prospect given current political realities[12]—it would almost immediately reach its capacity, necessitating a new repository.[13]

Concurrent with its efforts to host a permanent repository at Yucca Mountain, the federal government was also attempting to host a temporary storage facility for wastes. Chief among these efforts was the creation of a short-lived Office of the Nuclear Waste Negotiator (NWN) in order to incentivize, through monetary compensation, states and Indian tribes to host such a temporary facility.[14] A lack of interest among other communities[15] ensured that tribes were almost exclusively the only parties that sought to host one,[16] and the NWN's implementing statute provided for the program's automatic defunding in 1995 before the successfully siting of a facility.[17] A private effort that evolved out of the NWN program involving the Skull Valley Band of Goshute Indians ("Skull Valley Band"), a tribe located outside of Salt Lake City, Utah, also failed due largely to political opposition within the state.[18] These voluntary efforts to site such hazardous and nuclear waste projects have simultaneously been decried as "radioactive racism"[19] and lauded for providing much-needed economic benefits to tribes and for fostering their self-determination.[20]

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[7] MASS. INST. TECH, THE FUTURE OF NUCLEAR POWER: AN INTERDISCIPLINARY STUDY 10 (2003), *available at* http://web.mit.edu/nuclearpower/pdf/nuclearpower-full.pdf.

[8] BLUE RIBBON COMM'N ON AMERICA'S NUCLEAR FUTURE, REPORT TO THE SECRETARY OF ENERGY 4 (2012) [hereinafter *Blue Ribbon Commission Report*], *available at* http://brc.gov/sites/default/files/documents/brc_finalreport_jan2012.pdf.

[9] *Map of Power Reactor Sites*, U.S. NUCLEAR REGULATORY COMM'N, http://www.nrc.gov/reactors/operating/map-power-reactors.html (last updated Mar. 29, 2012).

[10] *Blue Ribbon Commission Report*, *supra* note 8, at 14.

[11] *See* RICHARD B. STEWART & JANE B. STEWART, FUEL CYCLE TO NOWHERE: U.S. LAW AND POLICY ON NUCLEAR WASTE 4 (2011).

[12] *See id.* at 9, 187. The Department of Energy (DOE) withdrew its license application for the site "with prejudice" on March 3, 2010. MARK HOLT, CONG. RES. SERV., CIVILIAN NUCLEAR WASTE DISPOSAL 1 (2011), *available at* http://www.fas.org/sgp/crs/misc/RL33461.pdf.

[13] *See* OFFICE OF CIVILIAN RADIOACTIVE WASTE MGMT., THE REPORT TO THE PRESIDENT AND THE CONGRESS BY THE SECRETARY OF ENERGY ON THE NEED FOR A SECOND REPOSITORY 1 (2008) [hereinafter *Need for a Second Repository*], *available at* http://www.brc.gov/sites/default/files/documents/second_repository_rpt_120908.pdf; *see also* HOLT, *supra* note 12, at 12; 42 U.S.C. § 10134(d) (2012).

[14] *See infra* Part II.C.

[15] *See* PUB. CITIZEN, RADIOACTIVE RACISM: THE HISTORY OF TARGETING NATIVE AMERICAN COMMUNITIES WITH HIGH-LEVEL ATOMIC WASTE DUMPS (2014), *available at* http://www.citizen.org/documents/radioactiveracism.pdf.

[16] *See* U.S. NUCLEAR REGULATORY COMM'N, MRS GRANT APPLICANT LIST (1997), *available at* pbadupws.nrc.gov/docs/ML0037/ML003733648.pdf.

[17] *See* 42 U.S.C. § 10250 (2012).

[18] *See infra* Part III.B.

[19] RADIOACTIVE RACISM, *supra* note 15.

[20] *See, e.g.*, Jana L. Walker & Kevin Gover, *Commercial Solid and Hazardous Waste Disposal Projects on Indian Lands*, 10 YALE J. ON REG. 229, 231 (1993).

In 2010, President Barack Obama appointed the Blue Ribbon Commission on America's Nuclear Future (BRC) in order to study other options for dealing with nuclear waste.[21] In 2012, the BRC recommended a new voluntary mechanism for siting a repository involving states, municipalities, and tribes.[22] The BRC suggested that this mechanism should be implemented by creating a program similar to the expired NWN, which would provide compensation to parties willing to host a facility.[23] If history is an indication, tribes will almost certainly be prominently represented among the applicants in such a process.[24]

The BRC's proposals have brought voluntary siting issues back to the forefront of the nuclear waste debate. Previous scholarship on Native American tribes' voluntary efforts to host nuclear waste storage facilities dates from the era of the NWN program. On one side of the debate are those who believe that tribes are fortunate to receive such offers for economic development and should have a right to pursue them freely.[25] On the other side are scholars who use concepts such as the federal trust responsibility and environmental justice to cast doubt on the fairness of allowing tribes to make these decisions. These scholars emphasize the environmental hazards of such projects and the degree to which the poor economic conditions of the tribes have a coercive effect on their decisions.[26] Still others have tried to bridge the gap between environmentalists and self-determinationists in various ways.[27] While all

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[21] *See* HOLT, *supra* note 12, at 2.

[22] *Blue Ribbon Commission Report*, *supra* note 8, at viii.

[23] *Id.*

[24] *See infra* Part II.C.

[25] *See, e.g.*, Walker & Gover, *supra* note 20, at 231 ("This Article advocates that the evaluation of the viability of waste disposal projects to be developed on Indian lands should be governed by the overriding goals of tribal self-determination and economic self-sufficiency, not public sentiment."); Kevin Gover & Jana L. Walker, *Escaping Environmental Paternalism: One Tribe's Approach to Developing a Commercial Waste Disposal Project in Indian Country*, 63 U. COLO. L. REV. 933, 933 (1992) ("[I]n those cases where a community wishes to have [a waste disposal facility], its decision is to be respected."); Lincoln L. Davies, *Skull Valley Crossroads: Reconciling Native Sovereignty and the Federal Trust*, 68 MD. L. REV. 290, 365–76 (2009) (arguing for a new model of federal-tribal relations that tilts the balance between the trust doctrine and native sovereignty in favor of the latter); Mark Poole, *Nuclear Sovereignty: Reservation Waste Disposal for the Twenty-First Century and Beyond?*, 4 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 165, 165 (1998) ("Despite the longstanding conflicts of law among federal, state, and Native American sovereigns and the complexity of environmental regulation and health and safety issues in the area of nuclear disposal, the Mescalero Apache should be afforded the opportunity through self-determination to pursue the location of a private nuclear waste disposal facility on reservation land.").

[26] *See, e.g.*, Jon D. Erickson, Duane Chapman & Ronald E. Johnny, *Monitored Retrievable Storage of Spent Nuclear Fuel in Indian Country: Liability, Sovereignty, and Socioeconomics*, 19 AM. INDIAN L. REV. 73, 103 (1994) ("The siting of an MRS on an Indian reservation is unethical and dangerous."); Nancy B. Collins & Andrea Hall, *Nuclear Waste in Indian Country: A Paradoxical Trade*, 12 LAW & INEQ. 267, 270 (1994) ("The essence of the proposed waste agreement is land for money."); Charles K. Johnson, *A Sovereignty of Convenience: Native American Sovereignty and the United States Government's Plan for Radioactive Waste on Indian Land*, 9 ST. JOHN'S J. LEGAL COMMENT. 589, 594 (1994) ("[T]he United States government has now discovered a new useful commodity belonging to the Native American community. That commodity is Indian national sovereignty."); *but see*, Sierra M. Jefferies, *Environmental Justice and the Skull Valley Band of Goshute Indians' Proposal to Store Nuclear Waste*, 27 J. LAND RES. & ENVTL. L. 409, 409 (2007) (arguing that expanding environmental justice to include voluntary siting scenarios, such as the Skull Valley Band's, risks environmental justice "being co-opted into the larger environmental or civil rights movements"); James L. Huffman, *An Explanatory Essay on Native Americans and Environmentalism*, 63 U. COLO. L. REV. 901, 903 (1992) ("While white Americans pursue harmony with mother nature from their comfortable offices on the Potomac and their high tech kayaks on the Colorado, Native Americans will struggle to feed their children and make sense of a culture not of nature but of alcohol, poverty and desperation.").

[27] *See, e.g.*, Louis G. Leonard, III, *Sovereignty, Self-Determination, and Environmental Justice in the Mescalero Apache's Decision to Store Nuclear Waste*, 24 B.C. ENVTL. AFF. L. REV. 651, 687–92 (1997) (arguing that environmental justice and self-determination are compatible because environmental justice only seeks to empower underrepresented communities with the knowledge they need to make an informed decision); Martin D. Topper, *Environmental Protection in Indian Country: Equity or Self-Determination,* 9 ST. JOHN'S J. LEGAL COMMENT. 693, 701 (1994) ("[T]he special relationship between Indians and the federal government requires that the special legal status of tribal governments be considered when

of this prior scholarship is useful in setting the tone of the current debate over voluntary siting, it emphasizes the tribe members who support the construction of the facility on their reservation without adequately considering the concerns of minority tribe members who oppose the facility. Minority tribe members are a critical constituency in the siting decision because only a bare majority of members have tended to support nuclear waste projects.[28] Moreover, current voluntary siting proposals do not differentiate between the facility's prospective neighbors who may have voted against the facility and tribe members living off the reservation who may have supported it.[29]

Rather than harmonizing previous scholarship on environmental justice and self-determination, this Note seeks to refocus the analysis on the minority of tribe members who have chosen to actively oppose their tribe's decision to host a repository or storage facility. The Note has two main goals. First, it seeks to elucidate the uphill legal battle that minority tribe members face, under current law, if they decide to challenge the Bureau of Indian Affairs' (BIA)[30] approval of the lease for a facility that their tribal leadership has signed. While some members might be able to significantly delay the project or seek damages from the BIA in case of an accident,[31] they will be unable to thwart the project solely through a legal challenge. Second, it offers specific recommendations for Congress to implement as part of its impending nuclear waste legislation. Congress should ensure that minority tribe members' interests are adequately considered and their burden is lessened in the event that a facility is sited on their reservation.

The Note is organized as follows:

Part II provides more background on the nuclear waste issue. Specifically, it addresses the existing and future production of waste, past efforts to site storage facilities and repositories, and the current voluntary siting proposal in the BRC's Report.

Part III addresses the history of Native Americans and nuclear waste through a case study of the Skull Valley Band's attempt to site a storage facility on its reservation. It also discusses the Indian Long Term Leasing Act of 1955 (ILTLA),[32] the federal law that requires BIA approval of tribal leases, which served as a basis for the BIA's disapproval of the Skull Valley Band's lease, and would presumably apply to a future lease.

Part IV discusses the difficulty that minority tribe members would face in court if they attempted to enjoin the construction of the facility or seek damages from the BIA for a leak. First, members could sue the BIA under the Administrative Procedure Act (APA)[33] for violations of the ILTLA or the National Environmental Policy Act (NEPA).[34] If successful, tribe members would only achieve a delay in construction of the facility, not the death of the project. Moreover, Rule 19 may bar their ILTLA claim because the tribe is probably a required party and cannot be sued without its consent. Second, tribe

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providing protection from the risks to health and environment caused by environmental pollution on or near Indian lands.").

[28] *See infra* Part IV.C.

[29] *See infra* Part II.B–C (discussing the NWN's process of deferring to majority votes and the BRC's proposal to base its voluntary siting method on the NWN); *See infra* Part III.B (discussing Margene Bullcreek's efforts to prevent other tribe members from siting a nuclear waste facility nearby her residence).

[30] The BIA is an agency within the Department of the Interior (DOI).

[31] Many nuclear waste storage facilities are generally considered to be safe, but there have been some alarming hazards involving such facilities. *See, e.g.*, Kirk Johnson, *Underground Nuclear Tanks Leaking in Washington State*, N.Y. TIMES, Feb. 22, 2013, at A12.

[32] Pub. L. No. 84-255, 69 Stat. 539 (1955) (codified as amended at 25 U.S.C. § 415 (2012)).

[33] Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C. (2012)).

[34] Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4321–4347 (2012)).

members could sue the BIA for damages under the Indian Tucker Act[35] for breach of the BIA's trust responsibility under the ILTLA, but will be unlikely to succeed unless they own the land on which the facility is built.

In light of the lack of legal remedies for minority tribe members, Part V makes several recommendations for Congress to consider in its forthcoming nuclear waste legislation. Finally, Part VI presents a brief summary of the Note's main themes.

II. NUCLEAR WASTE AND DISPOSAL EFFORTS

A. The Generation of Radioactive Waste

Radioactive waste is almost exclusively a byproduct of the production of nuclear weapons and the generation of electricity by nuclear power plants.[36] Much of it must be isolated from human contact for thousands of years because of its exceedingly long half-life.[37] For several decades, there has been a broad consensus in the U.S. that the only way to dispose of the country's most dangerous nuclear waste in perpetuity is through deep geological disposal.[38] While such a repository has been found for various defense-related wastes,[39] the problem since the passage of the Nuclear Waste Policy Act of 1982 (NWPA of 1982)[40] has been to find a place for spent nuclear fuel (SNF) and other civilian high-level waste (HLW).[41]

Currently, about 65,000 metric tons of SNF is in temporary storage at the reactors that generated it,[42] posing public health, proliferation, and terrorism-related concerns.[43] This total is increasing steadily

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[35] 63 Stat. 102 (codified as amended at 28 U.S.C. § 1505 (2012)).

[36] *See* MICHAEL B. GERRARD, WHOSE BACKYARD, WHOSE RISK: FEAR AND FAIRNESS IN TOXIC AND NUCLEAR WASTE SITING 25 (1995).

[37] Richard B. Stewart, *Solving the U.S. Nuclear Waste Dilemma*, 40 ENVTL. L. REP. NEWS & ANALYSIS 10783 (2010).

[38] *Id.* at 10785; *see also* JAMES D. WERNER, CONG. RES. SERV. 1, U.S. SPENT NUCLEAR FUEL STORAGE, (May 24, 2012), *available at* http://www.fas.org/sgp/crs/misc/R42513.pdf.

[39] *See Waste Isolation Pilot Plant*, U.S. DEP'T OF ENERGY, http://www.wipp.energy.gov (last visited Apr. 20, 2014).

[40] Pub. L. No. 97-425, 96 Stat. 2201 (1983) (codified as amended at 42 U.S.C. §§ 10101–10270 (2012)).

[41] There are various classifications of radioactive wastes. SNF consists of fuel rods that were used to heat the water that runs nuclear power plants but have become too radioactive and need to be discarded. *See* Gerrard, *supra* note 36, at 28; *see also Blue Ribbon Commission Report*, *supra* note 8, at 96. HLW is a product of SNF reprocessing, an activity that President Ford ordered terminated in the civilian context in 1976. *See* Gerrard, *supra* note 36, at 28; *see also Blue Ribbon Commission Report*, *supra* note 8, at 96. Transuranic (TRU) waste is "waste other than SNF and HLW that contains concentrations of transuranic elements." *Blue Ribbon Commission Report*, *supra* note 8, at 96. Mill tailings are refuse from uranium ore processing. *Id.* Low-Level Waste (LLW) is "waste other than SNF, HLW, TRU waste, or mill tailings." *Id.* Additionally, the term "mixed waste" includes a mix of chemically hazardous waste and radioactive elements. Mixed waste is subject to regulation by the DOE or Nuclear Regulatory Commission (NRC) under the Atomic Energy Act (AEA), 42 U.S.C. § 2011 *et seq.* (2012), and by the Environmental Protection Agency (EPA) under the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901 *et seq.* (2012). *See* HOLT, *supra* note 12, at 11. The waste classification system has been criticized for focusing too heavily on the source of the waste as opposed to its radioactivity. Accordingly, the NRC is currently working on a new system that would base the classification on the level of risk posed by the waste. *Blue Ribbon Commission Report*, *supra* note 8, at 98.

[42] *Blue Ribbon Commission Report*, *supra* note 8, at 14. In addition to the increasing amount of SNF that requires disposal, there remain a few thousand metric tons of HLW from the era of civilian reprocessing. *See supra* note 41.

[43] *See Safety and Security of Commercial Spent Nuclear Fuel Storage: Public Report*, NAT'L RES. COUNCIL OF THE NAT'L ACADS. 5–11 (2006), *available at* www.nap.edu/catalog/11263.html; *see also* HOLT, *supra* note 12, at 12–13.

at a rate of 2,000–2,400 metric tons of SNF per year.[44] The U.S.'s reliance on storage, rather than disposal, is so singular that the BRC has concluded, "[s]torage is not only playing a more prominent and protracted role in the nuclear fuel cycle than once expected, it is the only element of the back end of the fuel cycle that is currently being deployed on an operational scale in the United States."[45]

B. The Blue Ribbon Commission's Proposal for the Voluntary Siting of Nuclear Waste Facilities

In 2010, when it became clear that progress on the Yucca Mountain repository would not proceed for the foreseeable future,[46] President Obama created the BRC in 2010 to conduct a "comprehensive review of policies for managing the back end of the nuclear fuel cycle, including all alternatives for the storage, processing, and disposal of civilian and defense used nuclear fuel and nuclear waste."[47] Released on January 26, 2012,[48] the BRC report advocated a "new, consent-based approach to siting future nuclear waste management facilities," the creation of a new agency to manage nuclear waste, and the development of storage facilities alongside repositories.[49] The BRC's proposal was inspired by the NWN[50] and recommended that the new siting process should resemble the NWN albeit under different leadership.[51] Since the BRC issued its report, Senator Ron Wyden (D-OR) introduced S. 1240, the Nuclear Waste Administration Act of 2013, in the 113th Congress in order to create an agency to implement the consent-based approach to nuclear waste repository siting.[52] The bill specifies a preference for the co-location of storage facilities and repositories.[53] The Committee on Energy and Natural Resources held a hearing on the bill on July 30, 2013.[54]

The issuance of the BRC report and introduction of S. 1240 require a reconsideration of the relationship of Native Americans to nuclear waste because of the similarity of the proposed voluntary siting method to the process that almost led to the siting of a nuclear waste storage facility on the Skull Valley Band's reservation in the 1990s and 2000s.

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[44] NAT'L RES. COUNCIL OF THE NAT'L ACADS. at 4.

[45] *Blue Ribbon Commission Report*, *supra* note 8, at 33.

[46] While this Note focuses on attempts to site nuclear waste facilities on Indian reservations, the U.S. has also attempted to site a repository on federal land at Yucca Mountain. The NWPA of 1982 ordered the DOE to recommend three sites for detailed study, called "characterization," as potential repositories. 42 U.S.C § 10132(b)(1)(B) (2012). The DOE proposed the sites, which were approved by President Reagan in 1986, Gerrard, *supra* note 36, at 30, but Congress intervened with the Nuclear Waste Policy Amendments Act of 1987 (NWPAA of 1987), deciding to only allow site characterization at Yucca Mountain, Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, § 5011, 101 Stat. 1330 (1987) (codified at 42 U.S.C. § 10172(a) (2012)). Because of its treatment of Nevada, some have termed the NWPAA of 1987 the "Screw Nevada [A]ct of 1987." *Leave well alone: The best thing to do with nuclear waste is to stash it away, not reprocess it*, THE ECONOMIST (Mar. 10, 2012), http://www.economist.com/node/21549102. For the moment, Nevada has defeated the Yucca Mountain project by convincing the DOE to withdraw its license application for the site "with prejudice" on March 3, 2010, HOLT, *supra* note 12, at 1, but the tide may turn again if the political climate changes. *See* Stewart & Stewart, *supra* note 11, at 9, 187.

[47] *Blue Ribbon Commission on America's Nuclear Future: Memorandum for the Secretary of Energy*, 75 Fed. Reg. 5,485, 5,485 (Feb. 3, 2010). Even if Yucca Mountain became a politically viable option, the quantity of waste currently in existence exceeds its statutory capacity, and an additional repository would have to be constructed. *See Need for a Second Repository*, *supra* note 13, at 1; *see also* HOLT, *supra* note 12, at 12; 42 U.S.C. § 10134(d) (2012).

[48] Matthew L. Wald, *Revamped Search Urged for a Nuclear Waste Site*, N.Y. TIMES, Jan. 27, 2012, at A13.

[49] *See Blue Ribbon Commission Report*, *supra* note 8, at vii.

[50] *See id.* at 40.

[51] *See id.* at viii.

[52] S. 1240, 113th Cong. (2013).

[53] *Id.* at §§ 305(b)(2)(B), 306(c)(2).

[54] *To Consider the Nuclear Waste Administration Act of 2013, Hearing Before the Subcomm. on Energy & Nat. Res.*, 113th Cong. (2013), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-113shrg85875/pdf/CHRG-113shrg85875.pdf.

C. The Origin of Attempts to Site Nuclear Waste Storage Facilities on Native American Reservations

In 1987, Congress mandated that the DOE study the need for a monitored retrievable storage facility (MRS).[55] Storage facilities are used to prepare waste for placement in a repository, but unlike repositories, they are not intended to house waste permanently.[56] In March 1987, DOE recommended a site in Tennessee for an MRS facility, but due to political pressure from the state, Congress scrapped the plan later that year.[57]

Instead, Congress created the NWN in order to find a state or tribe that was willing to accept a repository or an MRS facility.[58] Providing for a three-tiered program by which states and tribes could apply to host facilities with each tier growing closer to actual siting of the facility, the statute authorized the NWN to negotiate agreements and provide for compensation for affected states, municipalities, and tribes.[59] Phase I meant initial consideration of the site; Phase II-A required public information hearings; Phase II-B required feasibility studies; and the final phase was siting of the facility.[60] The initiative ran out of time before a facility was sited because the statute provided for the NWN to be automatically dissolved in 1995.[61]

During the operation of the NWN program, Nuclear Waste Negotiator David Leroy conducted a concerted campaign to find Native American hosts for the facilities. Addressing the National Congress of American Indians in 1991, Leroy claimed, "With atomic facilities designed to safely hold radioactive materials with half-lives of thousands of years, it is the Native American culture and perspective that is best designed to correctly consider and balance the benefits and burdens of these proposals."[62] When applications arrived for Phase I MRS grants, sixteen out of twenty came from Native American tribes, and all Phase II applicants were tribes.[63] Nevertheless, the NWN expired in 1995 without having made any substantial progress on siting because host states had not supported the process.[64] For example, when the Mescalero Apache Nation of New Mexico appeared on the verge of hosting an MRS facility, Senator Jeff Bingaman (D-NM) succeeded in attaching an appropriations rider that effectively killed the project.[65]

The Skull Valley Band was one of the Phase II applicants under the NWN program.[66] When the NWN dissolved in 1995, the Skull Valley Band met with a private consortium of utilities and negotiated a lease for a private storage facility on their reservation.[67] After reviewing the Environmental Impact

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[55] 42 U.S.C. § 10161(b)(1) (2012).

[56] *See* JOHN E. CANTLON, U.S. NUCLEAR WASTE TECHNICAL REVIEW BD., NUCLEAR WASTE MANAGEMENT IN THE UNITED STATES: THE NUCLEAR WASTE TECHNICAL REVIEW BOARD'S PERSPECTIVE 9–10 (1996), *available at* http://www.nwtrb.gov/reports/wastemgt.pdf.

[57] Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, § 5021, 101 Stat. 1330 (1987) (codified at 42 U.S.C. § 10162(a) (2012)).

[58] *Id.* § 5041 (codified at 42 U.S.C. § 10242(b)(2) (2012)). With Yucca Mountain as the designated site for the repository, attention turned toward siting the MRS facility.

[59] 42 U.S.C. § 10243(d)(2) (2012).

[60] Collins & Hall, *supra* note 26, at 291.

[61] *See* 42 U.S.C. § 10250 (2012).

[62] RADIOACTIVE RACISM, *supra* note 15.

[63] *See* MRS GRANT APPLICANT LIST, *supra* note 16.

[64] *See Blue Ribbon Commission Report*, *supra* note 8, at 23.

[65] *See* Noah Sachs, *The Mescalero Apache Indians and Monitored Retrievable Storage of Spent Nuclear Fuel: A Study in Environmental Ethics*, 36 NAT. RESOURCES J. 881, 885 (1996).

[66] MRS GRANT APPLICANT LIST, *supra* note 16, at 3.

[67] Davies, *supra* note 25, at 334.

Statement (EIS), the BIA decided to disapprove the lease.[68] Although a United States District Court determined that the BIA's disapproval was "arbitrary and capricious,"[69] the DOI did not appeal that determination.[70] It is likely that staunch political opposition by the people of Utah contributed to the project's demise despite the court ruling that seemed to favor the project's backers.[71] Part III examines the Skull Valley Band's attempt to host a storage facility in greater detail.

III. NATIVE AMERICANS AND NUCLEAR WASTE

Native Americans have had a long and troubled history with nuclear materials,[72] but their involvement in the waste disposal issue dates to the relatively recent era of the NWN.[73] This Part discusses Native Americans' experience with nuclear waste through a case study of the Skull Valley Band's attempt to build a storage facility and the BIA's disapproval of its lease due largely to political pressure imposed by non-Indians within the state. Before turning to the Skull Valley Band, however, it is necessary to review the ILTLA, the leasing statute that allows the BIA to review and approve leases of Indian lands.

A. The Indian Long Term Leasing Act

The executive branch must always consider the interests of the tribes when conducting activities or making decisions affecting them. "It is fairly clear that any Federal government action is subject to the United States' fiduciary responsibilities toward the Indian tribes."[74] One of the ways in which Congress has required that the executive branch exercise its trust responsibility is by giving the executive the power to approve leases of Indian lands. Native Americans are generally unable to execute long-term business leases without first obtaining the BIA's approval.[75]

The ILTLA was designed to "protect[] Native American interests by insuring that their land transactions with third parties are advantageous."[76] It allows Native Americans to lease lands that they own with the approval of the Secretary of the Interior acting through the BIA.[77] Leases may be approved for a period of up to ten, twenty-five, or ninety-nine years, depending on the purpose and the tribe

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[68] U.S. BUREAU OF INDIAN AFFAIRS, RECORD OF DECISION FOR THE CONSTRUCTION AND OPERATION OF AN INDEPENDENT SPENT FUEL STORAGE INSTALLATION (ISFSI) ON THE RESERVATION OF THE SKULL VALLEY BAND OF GOSHUTE INDIANS (BAND) IN TOOELE COUNTY, UTAH, 5 (2006) [hereinafter *Skull Valley ROD*], *available at* http://www.deq.utah.gov/Issues/topics/highlevelwaste/docs/2006/Sep/ROD%20PFS%2009072006.pdf.

[69] Skull Valley Band of Goshute Indians v. Davis, 728 F. Supp. 2d 1287, 1295 (D. Utah 2010).

[70] Judy Fahys, *Interior Won't Fight Ruling on Nuclear Site*, SALT LAKE TRIB (Sept. 28, 2010), http://www.sltrib.com/sltrib/home/50365983-76/interior-department-nuclear-ruling.html.csp.

[71] *See* Davies, *supra* note 25, at 338–44; *see also* Jefferies, *supra* note 26, at 409.

[72] *See generally* PETER H. EICHSTAEDT, IF YOU POISON US: URANIUM AND NATIVE AMERICANS (1994).

[73] *See supra* Part II.C.

[74] Nance v. EPA, 645 F.2d 701, 711 (9th Cir. 1981) (citing Seminole Nation v. United States, 316 U.S. 286, 295 (1942)).

[75] The Helping Expedite and Advance Responsible Tribal Homeownership (HEARTH) Act allows tribes to circumvent BIA approval of long-term residential leases and shorter-term business leases if the leases are executed under BIA-approved tribal regulations. *See* Pub. L. No. 112-151, § 2, 126 Stat. 1150 (2012) (codified at 25 U.S.C.A. § 415(h) (2013)).

[76] Utah v. DOI, 45 F. Supp. 2d 1279, 1283 (D. Utah 1999) (citing Webster v. United States, 823 F. Supp. 1544, 1550 (D. Mont. 1992), *aff'd*, 22 F.3d 221 (9th Cir. 1994); Hawley Lake Homeowners' Ass'n v. Deputy Assistant Sec'y, 13 I.B.I.A. 276, 288–89 (1985)).

[77] *See* 25 U.S.C. § 415(a) (2012).

involved; and the parties can extend them once for up to twenty-five years.[78] If Native Americans desire to lease their land for a longer period of time, as a nuclear waste repository would require, Congress would have to amend the statute[79] or use its plenary power to expressly authorize the action.[80] Further, the Secretary must consider various factors, commonly referred to as § 415(a) factors, before approving any lease. Specifically,

> [T]he Secretary of the Interior shall first satisfy himself that adequate consideration has been given to the relationship between the use of the leased lands and the use of neighboring lands; the height, quality, and safety of any structures or other facilities to be constructed on such lands; the availability of police and fire protection and other services; the availability of judicial forums for all criminal and civil causes arising on the leased lands; and the effect on the environment of the uses to which the leased lands will be subject.[81]

The implementing regulations for 25 U.S.C. § 415(a) at 25 C.F.R. Part 162 were revised in 2013.[82] The change has been called "the most comprehensive reform of federal regulations governing Native American land surface leasing in more than 50 years."[83] Replacing the former dichotomy between agricultural and non-agricultural leases, the BIA now applies different regulations for residential, business, and wind and solar resource leases.[84] "Commercial or industrial leases for retail, office, manufacturing, storage, biomass, waste-to-energy, or other business purposes" fall under the business leasing provisions in Subpart D.[85]

The BIA "will approve"[86] a business lease unless it meets one of following three conditions: "[t]he required consents have not been obtained from the parties to the lease," "[t]he requirements of this subpart have not been met," or "[the BIA] find[s] a compelling reason to withhold [its] approval in order to protect the best interests of the Indian landowners."[87] Before the BIA approves a lease, Subpart D requires that it "determine that the lease is in the best interest of the Indian landowners."[88] This determination requires the BIA to "[i]dentify potential environmental impacts and ensure compliance with all applicable environmental laws, land use laws, and ordinances;" "assure [itself] that adequate consideration has been given to the factors in 25 U.S.C. § 415(a);" and "[r]equire any lease modifications or mitigation measures necessary to satisfy any requirements including any other Federal or tribal land use requirements."[89] The BIA must "defer, to the maximum extent possible, to the Indian landowners' determination that the lease is in their best interest" and cannot "unreasonably withhold approval of a lease."[90]

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[78] *See id.*

[79] *Skull Valley ROD*, *supra* note 68, at 29.

[80] *See* note 223 *infra.*

[81] 25 U.S.C. § 415(a) (2012).

[82] Residential, Business, and Wind and Solar Resource Leases on Indian Land, 77 Fed. Reg. 72,440, 72,440 (Dec. 5, 2012).

[83] Nancy J. Appleby, *Doing Business on Tribal Lands*, RISK MGMT. ASS'N J., July–Aug. 2012, at 53.

[84] Residential, Business, and Wind and Solar Resource Leases on Indian Land, 77 Fed. Reg. at 72,440.

[85] 25 C.F.R. § 162.401(a)(4) (2014).

[86] The BIA has sixty days in which to make this approval once all documents have been submitted, unless it requires more time to conduct reviews. *Id.* § 162.440(b)(2) (2014).

[87] *Id.* § 162.441(a)(1–3) (2014).

[88] *Id.* § 162.440(a) (2014).

[89] *Id.* § 162.440(a)(2–4) (2014).

[90] *Id.* § 162.441(b–c) (2014).

Although these regulations were not applicable when the Skull Valley Band attempted to host a storage facility, an understanding of them will be necessary for future minority tribe members, and they provide a general idea of how the BIA has applied the approval procedure in practice in recent years.

B. The Skull Valley Band Attempts to Site a Facility on its Reservation

The Skull Valley Goshute Reservation is located within the geographical boundaries of Tooele County, Utah, about fifty miles west of Salt Lake City.[91] It consists of 18,000 acres that were set aside by executive order in 1917 and 1918.[92] While 134 members belong to the tribe, only about fifteen to twenty of them live on the reservation.[93]

Toxic industries surround the reservation, including a weapons testing center, a storage facility for nerve agents, a magnesium production facility, two power plants, and others.[94] Levels of poverty and unemployment on the reservation are very high,[95] as the land has little economic potential.[96] Indeed, most reservation lands are unproductive because the federal government intentionally set aside the least productive land as reservations.[97] Thus, in order to bring much needed income to the reservation, the tribe applied for and received Phase I and II-A grants from the NWN to study the possibility of hosting a nuclear waste storage facility.[98] As discussed earlier, the NWN program was short-lived.[99]

When the NWN program expired in 1995, a private utility consortium formed to continue progress towards the siting of a facility, but the Skull Valley Band did not begin negotiations with this consortium immediately.[100] The Mescalero Apache Tribe, another one of the Phase II-A grant recipients, approached the consortium and proposed its own deal.[101] In March 1995, the Mescalero Apaches voted 593-372 to complete negotiations with the consortium, a miraculous occurrence since in January 1995 the tribe had voted 490-362 to reject the facility.[102] There were accusations among minority tribe members that the vote had been rigged by false claims and the promise of cash rewards.[103] Despite the tribe's newfound support for the project, the two parties failed to strike a final agreement, and the project collapsed in 1996.[104] After the Mescalero Apaches withdrew, the Skull Valley Band met with some of the same utilities, which had created a consortium called Private Fuel Storage, LLC (PFS),[105] and proposed their own deal.[106]

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[91] Jefferies, *supra* note 26, at 410.

[92] *Id.* at 409.

[93] *Id.*

[94] *See id.* at 410–11.

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

[96] *See* Jefferies, *supra* note 26, at 410.

[97] Leonard, *supra* note 27, at 656.

[98] *See* Davies, *supra* note 25, at 332.

[99] *See supra* Part II.C.

[100] *See* Poole, *supra* note 25, at 167.

[101] *Id.*

[102] *Id.* at 168.

[103] *Id.*

[104] *Id.*

[105] *See generally, NRC Considers Application for Spent Fuel Storage Facility on Skull Valley Goshute Indian Reservation In Utah,* U.S. NUCLEAR REG. COMM'N (Jul. 22, 1997), *available at* http://pbadupws.nrc.gov/docs/ML0037/ML003711168.pdf.

[106] *See* Davies, *supra* note 25, at 334.

On May 20, 1997, the Skull Valley Band signed a lease with PFS,[107] and the BIA issued a "conditional approval" on May 23.[108] Nevertheless, the project was not without significant dissent among the members of the Skull Valley Band itself. Chairman Leon Bear, a supporter of the project, asserts that two thirds of the tribe's members voted for the facility,[109] but Margene Bullcreek, a chief opponent of the project and one of the few residents of the reservation,[110] claims that a majority of members living on the reservation actually opposed the project.[111] Bullcreek founded a group called Ohngo Guadadeh Devia that ran protests against the waste facility[112] and even intervened in the NRC's licensing proceeding.[113] Bullcreek opposed the project because of the potential harm it posed to the reservation and asserted that the money from PFS would not be shared equally among tribe members.[114] She said that she had never been permitted to see the lease terms[115] and viewed the tribe's leadership as "unyielding and corrupt."[116] In 2005, when NPR's Morning Edition interviewed her and Chairman Bear, she was not on speaking terms with him.[117] In the interview, she asserted, "I don't think it's worth selling our Mother Earth. I don't think it's worth giving up the battles that was [sic] fought by our forefathers to hold onto at least one bit of land."[118]

Minority tribe members participated in the campaign to prevent the facility from being built, but their efforts were secondary to the firestorm of political activity outside the reservation that sought to make final approval of the lease impossible before completion of the EIS.[119] State leaders openly pressured the BIA to disapprove the lease[120] and succeeded in convincing Congress to designate as a protected area the Cedar Mountain Wilderness Area, preventing construction of a required right-of-way.[121] When the BIA finally reviewed the EIS, it issued a Record of Decision (ROD) disapproving the lease.[122] The ROD based its decision on the BIA's trust duty to the tribe,[123] the lack of a requirement that the BIA approve the lease,[124] the inadequacy of the EIS,[125] the 25 U.S.C. § 415(a) factors,[126] the

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[107] *Id.*

[108] *Skull Valley ROD*, *supra* note 68, at 5. The BIA later determined, in its ROD, that the superintendent's conditional approval was ultra vires and did not constitute final approval. *See id.* at 11–15.

[109] Davies, *supra* note 25, at 334 (citing Telephone Interview by Lincoln L. Davies with Leon Bear, Chairman, Skull Valley Band of Goshute Indians (Aug. 11, 2008)). Since actual vote counts appears unavailable, it is necessary to rely on conflicting accounts of the vote.

[110] *See* David Kestenbaum, *Morning Edition: A Tribe Split by Nuclear Waste*, NAT'L PUB. RADIO (Oct. 21, 2005), http://www.npr.org/templates/story/story.php?storyId=4967885.

[111] *See* Lewis, *supra* note 95, at 326.

[112] Patty Henetz, *Goshute Group to Hold Weekend Nuke Protest*, SALT LAKE TRIB., Oct. 9, 2004, http://www.sltrib.com/utah/ci_2425338.

[113] *State Seeks Standing in NRC Review of Nuclear Waste Storage Proposal*, LAS VEGAS SUN, Sept. 13, 1997, http://www.lasvegassun.com/news/1997/sep/13/state-seeks-standing-in-nrc-review-of-nuclear-wast.

[114] *See* Kestenbaum, *supra* note 110.

[115] *Id.*

[116] Davies, *supra* note 25, at 335 (citing Margene Bullcreek, Guest Lecture at S.J. Quinney College of Law, University of Utah (Nov. 12, 2008)).

[117] Kestenbaum, *supra* note 110.

[118] *Id.*

[119] *See* Davies, *supra* note 25, at 338–43.

[120] *See id.*

[121] National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 384, 119 Stat. 3136 (2006).

[122] *Skull Valley ROD*, *supra* note 68, at 1.

[123] *Id.* at 17.

[124] *Id.* at 18.

[125] *Id.* at 20–22.

[126] *Id.* at 22–25 (Specifically, the ROD considers the relationship of the leased lands to neighboring lands and the availability of police protection.).

BIA's poor understanding of nuclear issues and resulting inability to monitor the lease,[127] and the possibility that nuclear waste might remain on the reservation permanently in light of the uncertainty over construction of the Yucca Mountain repository.[128]

The Skull Valley Band responded to the ROD by suing the BIA in U.S. District Court for the District of Utah. In *Skull Valley Band of Goshute Indians v. Davis,* the court held that the BIA's disapproval was arbitrary and capricious.[129] Nevertheless, there does not appear to have been any further progress on the project, and the BIA has not issued another ROD. A brief glance at PFS's website in April 2013 revealed that it had not been updated since 2004, and the website appears to no longer function as of 2014,[130] two signs that the consortium has abandoned its efforts.[131]

Although the minority tribe members appear to have received their desired result, their secondary role in the debate is troubling because their lack of an ability to define their own destiny leaves them dependent on the activities of others. As the next Part demonstrates, the legal system would similarly leave them without any alternative recourse. For this reason, it is imperative that Congress act to afford them greater consideration in the siting process.

IV. THE LACK OF LEGAL REMEDIES FOR MINORITY TRIBE MEMBERS

This Part discusses the uphill legal battle that minority tribe members will face if they challenge the BIA's approval of the lease for a nuclear waste facility or seek damages from the BIA for an accident at the site. These claims will be highly fact dependent, but some generalizations can be made. In order to challenge the lease approval, members can bring suit under the APA for violations of the ILTLA and NEPA. If successful, this suit would only force the BIA to revise its justification for approval of the lease or to consider more of the project's adverse impacts. Although the delay that results from such suits has contributed to the downfall of projects in the past,[132] minority tribe members have only a slim possibility of success. Moreover, Federal Rule of Civil Procedure 19 may bar most minority tribe members from raising their claims under the ILTLA. Second, if an accident occurs after the facility is built, members could sue the BIA for damages under the Indian Tucker Act for breach of its fiduciary duty, but are unlikely to succeed unless they own the land on which the facility is built. Nevertheless, before the minority tribe members sue the BIA in federal court, they will have to exhaust their administrative remedies.

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[127] *Id.* at 25–26.

[128] *Skull Valley ROD*, *supra* note 68, at 26–29.

[129] 728 F. Supp. 2d 1287, 1295 (D. Utah 2010). *See also infra* Part IV.B.2.

[130] Private Fuel Storage, PRIVATE FUEL STORAGE LLC, http://www.privatefuelstorage.com (last visited Apr. 20, 2014).

[131] Although PFS may no longer be seeking to build a nuclear waste facility, one anti-nuclear advocacy organization believes that the Skull Valley Band will be the "most likely target" of a voluntary siting program under the BRC's proposal. *See* Kevin Kamps, *Beyond Nuclear response to publication of report by DOE's Blue Ribbon Commission on America's Nuclear Future*, BEYOND NUCLEAR (Jan. 26, 2012), *available at* http://www.beyondnuclear.org/radioactive-waste-whatsnew/2012/1/26/beyond-nuclear-response-to-publication-of-report-by-does-blu.html.

[132] For example, the delay produced by similar litigation may have given minority members of the Passamaquoddy Tribe enough time to convince their leadership to back out of a lease for a liquefied natural gas terminal on tribal lands. *See* Nkihtaqmikon v. E. Reg'l Dir., 56 I.B.I.A. 127, 128 (2013) (noting that the "the Tribe's request for BIA to cancel the Lease was, effectively, a revocation of the Tribe's consent, thus rendering moot any decision by BIA to approve the Lease"); Nkihtaqmikon v. Impson, 585 F.3d 495, 496–98 (1st Cir. 2009) (providing factual background on the case).

A. Minority Tribe Members Would First Have to Exhaust Their Administrative Remedies

The highest adjudicatory body for Native American affairs within the DOI is the Interior Board of Indian Appeals (IBIA).[133] The IBIA accords significant deference to the decisions of BIA staff.[134] In reviewing the approval of leases, the IBIA does no more than "ensure that proper consideration was given to all legal prerequisites to the exercise of discretion."[135] In light of the ILTLA's merely procedural requirements and the significant deference given to staff decisions, it will be difficult for minority tribe members to succeed in defeating the facility in an administrative proceeding. The main purpose of appealing to the IBIA will be to attain a right to judicial review and to further delay construction of the facility.[136] No facility may be built without BIA approval of a lease, and that approval is "not final during the appeal period and during the pendency of an appeal, unless otherwise provided by law."[137]

Regarding the effect of an appeal to the IBIA, the experience of the Skull Valley Band provides an instructive precedent. After the tribe received conditional approval of the storage facility's lease,[138] members of the tribe's council appealed to the IBIA in order to challenge that approval.[139] The board held that individual tribe members do not have standing to claim that the tribe did not properly approve a lease[140] or that the BIA's delay in complying with NEPA violated its trust duties to the tribe.[141] The IBIA explicitly rejected the argument that members of the tribe's council had special standing to assert these interests.[142]

Rather than challenge the conditional approval of the lease on behalf of the tribe, the board suggested that tribe members would have to wait for a final approval in order to challenge the lease "to protect their interests, as individuals, from alleged adverse health, economic, or environmental effects that would result from the proposed storage facility."[143]

B. A Successful Action for Injunctive Relief Would Only Delay Construction of the Facility

Once the minority tribe members exhaust their administrative remedies, they will be able to challenge the BIA's lease approval in federal court under the APA.[144] Under the APA, a court may "hold

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[133] IBIA decisions may be found on the home page of the U.S. Department of Interior website. *See* http://www.doi.gov (last visited Apr. 20, 2014).

[134] Rathkamp v. Billings Area Dir., 21 I.B.I.A. 144, 148 (1992) ("[T]he awarding of a lease of trust or restricted property is generally a discretionary decision.")

[135] *Id.*

[136] Although "BIA regulations require an appeal to the Interior Board of Indian Appeals before lease approval is 'final,' and therefore subject to judicial review under the APA," exhaustion is not a prerequisite to review of a lease approval under the ILTLA. Nulankeyutmonen Nkihtaqmikon v. Impson, 503 F.3d 18, 33 (1st Cir. 2007). Nevertheless, exhaustion is a generally applicable requirement subject to certain exceptions. *See id.*

[137] Nkihtaqmikon v. E. Reg'l Dir., No. IBIA 09-07-A, at 4 (Oct. 4, 2012) (order requesting supplemental briefing), *available at* http://www.savepassamaquoddybay.org/documents/bia/IBIA_09-07-A_10-138_2012Oct4.pdf.

[138] *See supra* Part III.B.

[139] *See* Abby Bullcreek v. W. Reg'l Dir., 40 I.B.I.A. 196 (2005).

[140] The DOI has a "responsibility to refrain from interfering in intra-tribal disputes." Swab v. Sacramento Area Dir., 25 I.B.I.A. 205, 208 (1994).

[141] *Abby Bullcreek*, 40 I.B.I.A. at 200.

[142] *Id.* at 201.

[143] *Id.*

[144] Since the IBIA defers to the decisions of BIA staff, the primary purpose of seeking an administrative remedy appears to be to attain a right to judicial review in federal court. The APA provides a right of review to

unlawful and set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . ."[145] Accordingly, they must identify provisions of law that the BIA could have violated by approving the lease. Their two claims will likely originate from NEPA, which requires environmental reviews, and the ILTLA, which requires BIA approval of leases.[146] Minority tribe members could use both of these claims to delay the commencement of construction.

1. NEPA Claims

NEPA requires federal agencies to consider the effects on the human environment resulting from their major actions,[147] but places no substantive obligations on agencies beyond complying with its procedural mandate.[148] NEPA applies to many ordinary uses of Native American land because of the federal hook created by the lease approval.[149] Plaintiffs frequently use NEPA suits to delay projects for a significant period of time while they mobilize opposition outside the courts.[150] Plaintiffs argue that the relevant federal agency did not prepare the requisite environmental review or that the review was inadequate. Courts will sometimes require an agency to prepare an EIS in a case where the agency has decided one is not necessary or to compile a more complete EIS when it is deficient. Although there have been several notable victories for plaintiffs pursuing this strategy,[151] ultimately it is the political opposition, not the litigation, which is outcome determinative. Moreover, NEPA is ultimately inadequate because of the limit that courts place on the consideration of socio-economic factors.[152]

2. ILTLA Claims

The ILTLA requires the BIA to ensure that "adequate consideration" has been given to several factors before it approves any lease of Native American lands.[153] Courts apply the statute in a similar

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"person[s] . . . adversely affected or aggrieved by agency action within the meaning of a relevant statute . . . ." 5 U.S.C. § 702 (2012). Minority tribe members fall within the zone of interests protected by the ILTLA. *See* Nulankeyutmonen Nkihtaqmikon v. Impson, 503 F.3d 18, 30 (1st Cir. 2007).

[145] 5 U.S.C. § 706(2)(A) (2012).

[146] Congress could create a lease approval procedure that would provide no role for these statutes, but existing law would require agency review under NEPA and the ILTLA. Although a complete analysis of these claims must wait until the BIA is presented with an actual lease, some issues can be confronted in the abstract.

[147] 42 U.S.C. § 4332(2)(C) (2012).

[148] Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227 (1980). Although NEPA cannot be used to compel agencies to decide a certain way, it has encouraged public participation in agency decisions and has prevented agencies from pursuing some projects that would have had drastic consequences for the human and natural environment if those consequences had not been appropriately studied. *See* Robert Dreher, *NEPA Under Siege: The Political Assault on the National Environmental Policy Act*, GEO. ENVTL. L. & POL'Y INST. 10 (2005), *available at* http://www.arcticgas.gov/sites/default/files/documents/2005-nepaundersiege.pdf.

[149] *See* Davis v. Morton, 469 F.2d 593, 597 (10th Cir. 1972) ("We conclude approving leases on federal lands constitutes major federal action and thus must be approved according to NEPA mandates.").

[150] *See* COUNCIL ON ENVTL. QUALITY, THE NEPA TASK FORCE REPORT TO THE COUNCIL ON ENVIRONMENTAL QUALITY: MODERNIZING NEPA IMPLEMENTATION 71 (2003), *available at* http://ceq.hss.doe.gov/
ntf/report/finalreport.pdf; *see also* Michael Gerrard, Environmental Impact Assessment: Adequacy of Analysis, Environmental Law, Address at Columbia Law School (Nov. 15, 2012).

[151] *See, e.g.*, N.B. Dennis, *Can NEPA Prevent "Ecological Trainwrecks"?*, *in* ENVIRONMENTAL POLICY AND NEPA: PAST PRESENT, AND FUTURE 151 (Ray Clark & Larry Canter eds., 1997) (discussing the successful defeat of the Westway project in Manhattan).

[152] *See, e.g.*, Metro. Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 775–79 (1983) (finding that the NRC had no obligation to consider the risk of psychological health damage); Image of Greater San Antonio v. Brown, 570 F.2d 517, 522 (5th Cir. 1978) (holding that socio-economic impacts are not sufficient to trigger an EIS).

[153] *See* 25 U.S.C. § 415(a) (2012); *See supra* Part III.A.

fashion as they do NEPA. If the agency's ROD inadequately considers the factors in the statute and regulations, then a court will require the agency to submit a superiorly reasoned decision. For minority tribe members, courts' current interpretation of the ILTLA as a statute designed to allow tribes unfettered discretion is especially burdensome. The District of Utah's decision to invalidate the BIA's disapproval of the Skull Valley Band's lease with PFS in *Skull Valley Band of Goshute Indians v. Davis*[154] serves as an example.

In reaching its decision, the court in *Skull Valley Band* emphasized that the regulations implementing the ILTLA made the BIA's disapproval untenable, but its qualms were primarily related to the careless manner in which the agency wrote its ROD, not to the outcome.[155] At the time of the litigation, 25 C.F.R. § 162.107(a) stated that the BIA will "defer, to the maximum extent possible, to the Indian landowners' determination that the lease is in their best interest."[156] The court concluded that the BIA did not adequately consider the regulation because it failed to explain why "*it* was rejecting the Band's determination that its lease with PFS was in its best interest."[157] Because the ROD failed to even mention the regulation,[158] the court declined to enumerate the specific measures that the BIA should have taken in order to comply with it.[159] Further, the court noted that the BIA failed to even respond to the tribe's offers to address the BIA's concerns and to provide the BIA with more information.[160] Rather, the BIA concluded that it lacked "sufficient information about the 25 U.S.C. § 415(a) factors" needed to decide whether approval was warranted.[161] Given the court's focus on the ROD's procedural inadequacies, it might uphold a new ROD that thoroughly explained its reasoning and carefully considered the tribe's submissions.

Significantly, however, the court's decision in *Skull Valley Band* also contains language that appears to render BIA disapproval of a lease prohibitively difficult. "[N]ot[ing] that [BIA regulations] clearly do[] *not* mandate that the agency simply acquiesce to the Indian landowner's wishes,"[162] the court quoted language from *Brown v. United States*, an opinion of the U.S. Court of Federal Claims, in emphasizing that the ILTLA was created:

> [T]o encourage and enable Indian landowners to handle their own affairs without assistance from the federal government. It is consistent with this basic objective that the duties of the government be interpreted minimally, ensuring that Indians receive the full responsibility of managing their own affairs.[163]

The court in *Skull Valley Band* did not have an opportunity to expand upon the federal government's "minimal[]" duties, but it would be hard to identify a lease that might warrant the BIA's rejection given the court's tacit approval of a nuclear waste facility. As is explored further in Part V, such a reading of the ILTLA would be a mischaracterization of *Brown v. United States* and would effectively nullify the executive's trust responsibility.

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[154] 728 F. Supp. 2d 1287 (D. Utah 2010).

[155] *See id.* at 1299; *see also* Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) ("The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency.").

[156] The same language is now codified at 25 C.F.R. § 162.441(b) (2014).

[157] 728 F. Supp. 2d at 1300 (emphasis in original).

[158] *See Skull Valley ROD*, *supra* note 68.

[159] 728 F. Supp. 2d at 1301.

[160] *Id.* at 1300–01.

[161] *Id.* at 1301.

[162] *Id.* (emphasis in original).

[163] *Id.* (quoting Brown v. United States, 42 Fed. Cl. 538, 553 (1998), *aff'd*, 195 F.3d 1334 (Fed. Cir. (1999)).

Even if minority tribe members' ILTLA and NEPA claims against the BIA's lease approval were to succeed on the merits, however, the BIA would still be able to revisit its decision and issue a new approval. Moreover, as the next section discusses, Federal Rule of Civil Procedure 19 may bar most minority tribe members from bringing suit under the APA for violation of the ILTLA.

C. FRCP 19 may bar Most Minority Tribe Members From Asserting ILTLA Claims Because the Tribe has Sovereign Immunity and is Likely a Required Party

Rule 19 specifies certain parties that are "required" to be joined in a suit and gives courts discretion to determine whether an action may proceed when joinder is not feasible.[164] When litigation implicates an interest of the tribe, the tribe may be such a required party.[165] This poses a problem for minority tribe members because of the tribe's sovereign immunity.[166] Minority tribe members may be able to overcome this hurdle on an adequate representation theory or by arguing that joinder of the tribe would be inequitable, but few courts have been receptive to such arguments.

A party must be joined if he is "subject to service of process," his joinder "will not deprive the court of subject-matter jurisdiction," he "claims an interest relating to the subject of the action," and he "is so situated that disposing of the action in the person's absence may . . . as a practical matter impair or impede the person's ability to protect the interest" or "leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest."[167] The prejudicial effect is minimized if the "absent party is adequately represented in the suit."[168] Adequate representation turns on "whether 'the interests of a present party to the suit are such that it will undoubtedly make all' of the absent party's arguments; whether the party is 'capable of and willing to make such arguments'; and whether the absent party would 'offer any necessary element to the proceedings' that the present parties would neglect."[169]

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[164] *See* FED R. CIV. P. 19(a–b).

[165] Importantly, however, the tribe is not a required party in a NEPA suit. *See* Manygoats v. Kleppe, 558 F.2d 556, 559 (10th Cir. 1977); Diné Citizens Against Ruining our Env't v. U.S. Office of Surface Mining Reclamation and Enforcement, No. 12–CV–1275–AP, 2013 WL 68701, at *6 (D. Colo. Jan. 4, 2013). Nor is the tribe likely to be a required party in a suit for damages under the Indian Tucker Act for breach of the federal government's fiduciary duties under the ILTLA, unless the litigation implicates a substantial tribal interest. *Compare* Brown v. United States, 42 Fed. Cl. 538, 563–66 (1998) (holding that the tribe was not a required party in a suit against the BIA for breach of its fiduciary duty to manage an ordinary lease under the ILTLA), *with* Klamath Tribe Claims Comm. v. United States, 97 Fed. Cl. 203, 210–14 (2011) (holding that the tribe was a required party in a suit to safeguard treaty-based water rights that belonged to the tribe). For a discussion of claims under the Indian Tucker Act, *see infra* Part IV.D.

[166] Tribal sovereign immunity is a judge-made rule that is not constitutionally-compelled, and authorities differ over which judicial precedent provides its underpinning. *Compare* Clay Smith, *Tribal Sovereign Immunity: A Primer*, THE ADVOCATE, May 2007, at 19 (arguing that tribal sovereign immunity was created in Turner v. United States, 248 U.S. 354 (1919)), *with* Andrea M. Seiestad, *The Recognition and Evolution of Tribal Sovereign Immunity Under Federal Law: Legal, Historical, and Normative Reflections on a Fundamental Aspect of American Indian Sovereignty*, 37 TULSA L. REV. 661, 689–94 (2002) (arguing that various pre-*Turner* cases demonstrate that the Supreme Court was implicitly applying a doctrine of tribal sovereign immunity). Congress accordingly has the authority to authorize suits against the tribes. *Turner*, 248 U.S. at 358. Although the doctrine will probably remain in force for the moment, future plaintiffs may not need to wrestle with it in the future. In a recent opinion, the Supreme Court voiced significant concern over a strong tribal sovereign immunity doctrine. *See* Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc., 523 U.S. 751, 758 (1998) (discussing "considerations [that] might suggest a need to abrogate tribal immunity, at least as an overarching rule").

[167] FED R. CIV. P. 19(a).

[168] Makah Indian Tribe v. Verity, 910 F.2d 555, 558 (9th Cir. 1990).

[169] Shermoen v. United States, 982 F.2d 1312, 1318 (9th Cir. 1992) (citing Fresno County v. Andrus, 622 F.2d 436, 439 (9th Cir. 1980)).

When a party is required but joinder is "not feasible," Rule 19(b) outlines four non-exhaustive discretionary factors that a court may use to determine whether "in equity and good conscience" the action should proceed:[170] "the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;" "the extent to which any prejudice could be lessened or avoided by . . . protective provisions in the judgment . . . shaping the relief[] or . . . other measures;" "whether a judgment rendered in the person's absence would be adequate;" and "whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder."[171]

Tewa Tesuque v. Morton presents a paradigmatic case of how minority tribe members might fail procedurally under Rule 19.[172] In *Tewa Tesuque*, members of an "unincorporated member association" of the Pueblo of Tesuque sued the BIA seeking cancellation of a BIA-approved, ninety-nine year lease signed by the tribe and a development company. The development company wanted to construct a community of 17,000 non-Indians on the reservation lands.[173] The court held that the district court did not err in deeming the Pueblo of Tesuque an "indispensable" party,[174] which prior to the 2007 amendment to Rule 19 was the equivalent of "required party" under the current version.[175] In rejecting reliance on the discretionary factors in 19(b), the court emphasized the tribe's economic loss from the cancellation of the lease, the court's inability to lessen the burden on the tribe, the likelihood that a cancellation of the lease would cause additional lawsuits, and the plaintiffs' alternate remedy in a tribal forum.[176] Accordingly, the court affirmed the district court's dismissal of the suit because neither the tribe, nor Congress on its behalf, had consented to joinder.[177]

Nevertheless, there are two ways in which minority tribe members could overcome the Rule 19 hurdle: either by demonstrating that the tribe is not a required party because it is adequately represented in the suit or by arguing that despite being a required party, the tribe's joinder would be inequitable under the factors in 19(b).

The Ninth Circuit appears receptive to the argument that the federal government can adequately represent the tribe's interests. In *Washington v. Daley*, a group of non-Indian fisherman challenged a National Marine Fisheries Service (NMFS) regulation recognizing certain tribal fishing rights that had been established by treaty.[178] The Ninth Circuit agreed with the district court's ruling that the tribes were required parties under 19(a)(1)(B)[179] because of their interest in fishing, but held that the government adequately represented the tribes' interests. There was "no conflict of interest between the federal defendants and the Tribes"[180] because the NMFS had the same interests as the tribe and had a "trust responsibility" to them.[181] In reaching its decision, the Ninth Circuit distinguished the case from a prior holding in *Makah Indian Tribe v. Verity* that dealt with a conflict over ocean harvest quotas assigned to

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[170] FED R. CIV. P. 19(b).
[171] FED R. CIV. P. 19(b)(1–4).
[172] Tewa Tesuque v. Morton, 498 F.2d 240, 240 (10th Cir. 1974).
[173] *Id.* at 242.
[174] FED. R. CIV. P. 19 (1987) (amended 2007).
[175] 498 F.2d 240, 242 (10th Cir. 1974).
[176] *Id.* at 242–43.
[177] *Id.* at 242.
[178] Washington v. Daley, 173 F.3d 1158, 1161 (9th Cir. 1999).
[179] The court actually refers to 19(a)(2), which is currently codified at 19(a)(1)(B).
[180] 173 F.3d at 1167.
[181] *Id.* at 1168.

various tribes.[182] Since the NMFS regulation's scope was confined to acknowledging the tribes' fishing rights and did not seek to allocate fish among the tribes, there could be no conflict.[183]

District courts in the Tenth Circuit, on the other hand, have rejected such adequate representation arguments. In *Center for Biological Diversity v. Pizarchik*, a judge in the District of Colorado disagreed with various environmental non-profits that challenged the DOI's grant of a permit to operate a coalmine on a Navajo reservation, holding that the government did not adequately represent the tribe's interests because of the tribe's "unique role in relation to its members and to the management of its own lands."[184] The court emphasized that the DOI would not be economically harmed by the loss of the coalmine, as would the tribe.[185]

Whether minority tribe members will succeed under an adequate representation theory might ultimately depend on the circuit in which the litigation occurs. Of the sixteen Phase I applicants under the NWN's program that were tribes, ten were in the Tenth Circuit, four were in the Ninth Circuit, and two were in the Eighth Circuit.[186] If similar tribes seek to host a nuclear waste facility under the BRC proposal, most will be unable to sue on an adequate representation theory.

Success on the theory that the tribe's joinder would be inequitable, on the other hand, appears exceedingly difficult. There do not appear to be any cases where minority tribe members have convinced a court not to join the tribe even though the tribe is a required party. For example, in *Tewa Tesuque*, the court held that the tribe would be prejudiced due to its economic interest in the litigation; that lessening the prejudice would be impossible; that the tribe's non-participation in the suit would invite further litigation; and that the minority tribe members had an adequate remedy in a tribal forum.[187]

Although a court could always accept new arguments about adequate representation or the discretionary factors in 19(b), especially if plaintiffs can demonstrate that their case would create an unusually inequitable result, minority tribe members will be unlikely to surmount the hurdle posed by Rule 19 and tribal sovereign immunity in any court. The Ninth Circuit presents the only glimmer of hope for such plaintiffs, but they will still be hard-pressed to succeed on the merits of their ILTLA claim, and no action under the APA would permanently defeat the project. Given minority tribe members' inability to prevent construction of the facility, the following section explores the uphill battle they would face if they were to sue the BIA for damages.

D. Minority Tribe Members are Unlikely to Prevail in an Action for Damages Under the ILTA Because the ILTLA Probably Fails to Establish an Enforceable Fiduciary Duty on the BIA That Runs to Them

The APA may provide an avenue for minority tribe members to temporarily enjoin the BIA's approval of the facility's lease, but it cannot provide for monetary damages to their reservation.[188] The

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[182] Makah Indian Tribe v. Verity, 910 F.2d 555, 556 (9th Cir. 1990).

[183] 173 F.3d at 1168.

[184] 858 F. Supp. 2d 1221, 1227 (2012).

[185] *Id.*

[186] *See* MRS GRANT APPLICANT LIST, *supra* note 16, at 1–3; *see also Geographic Boundaries of United States Courts of Appeals and United States District Courts*, U.S. COURTS, http://www.uscourts.gov/uscourts/images/CircuitMap.pdf (last visited Mar. 5, 2014).

[187] Tewa Tesuque v. Morton, 498 F.2d 240, 242–43 (10th Cir. 1974).

[188] *See* 5 U.S.C. § 702 (2012) ("An action in a court of the United States seeking relief *other than money damages* . . . shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party." (emphasis added)).

Indian Tucker Act, on the other hand, waives federal sovereign immunity[189] and gives the U.S. Court of Federal Claims "jurisdiction of any claim against the United States . . . in favor of any tribe, band, or other identifiable group of American Indians . . . whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President . . . ."[190] Nevertheless, the Indian Tucker Act "does not create any substantive right enforceable against the United States . . . ."[191] Therefore, minority tribe members must identify a source of "substantive law" that the U.S. has violated and "demonstrate that . . . [the] law . . . can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained."[192] Since the ILTLA provides for the federal government's authority over Native American lands, minority tribes would have to prove that they are entitled to damages for the BIA's breach of the duty imposed by the ILTLA.[193] They would only succeed in demonstrating their entitlement if the ILTLA established a fiduciary duty on the BIA that ran to them. Accordingly, although landowners could successfully recover damages from the BIA for property damage caused by the facility, opponents of the project would be unlikely to prevail because the "BIA does not manage their interests in a fiduciary capacity."[194] Therefore, minority tribe members are unlikely to be directly compensated for damages to their reservation.[195]

The Supreme Court explored the Indian Tucker Act's application to the federal government's managerial responsibilities over Native American lands in two opinions arising from the same factual circumstances. In *United States v. Mitchell* (*Mitchell I*), Native American plaintiffs sought to recover damages from the federal government for "mismanagement of timber resources found on the Reservation."[196] The Court of Claims had found that the BIA's statutory mandate to "'hold the land . . . in trust for the sole use and benefit of the' allottee" created a fiduciary duty on the United States to properly manage Native timber resources.[197] The plaintiffs could recover "money damages . . . for breaches of this trust, apparently because that remedy is available in the ordinary situation in which a trustee has violated a fiduciary duty and because without money damages allottees would have no effective redress for breaches of trust."[198] Declining to consider whether damages resulting from the government's breach of its trust responsibility were cognizable under the Indian Tucker Act, the Supreme Court held that the statute at issue "created only a limited trust relationship between the United States and the allottee that does not impose any duty upon the Government to manage timber resources."[199] Significantly, however, the Court of Claims had not ruled on the arguments that "other statutes . . . render the United States liable in money damages" or that "the alleged mismanagement is

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[189] United States v. Mitchell (*Mitchell II*), 463 U.S. 206, 216 (1983) ("If a claim falls within the terms of the Tucker Act, the United States has presumptively consented to suit.").

[190] 28 U.S.C. § 1505 (2012).

[191] United States v. Testan, 424 U.S. 392, 398 (1976) (referring to the Tucker Act, 28 U.S.C. § 1491 (2012), a statute that is interpreted similarly); *see also* United States v. Mitchell (*Mitchell I*), 445 U.S. 535, 540 (1980) ("28 U.S.C. § 1505 no more confers a substantive right against the United States to recover money damages than does 28 U.S.C. § 1491.").

[192] *Mitchell II*, 463 U.S. at 216 (quotation marks and citations omitted).

[193] *See id.* The ILTLA provides the current leasing framework, but Congress could create a special leasing program for nuclear waste facilities to replace it.

[194] Nulankeyutmonen Nkihtaqmikon v. Impson, 503 F.3d 18, 31 (2007).

[195] On the other hand, the Indian Tucker Act might provide a means through which the landowner or the tribe could recover for damages caused by the BIA's negligent management of the lease.

[196] *Mitchell I*, 445 U.S. at 537.

[197] *Id.* at 541 (quoting 25 U.S.C. § 348 (2012)).

[198] *Id.* at 541–42.

[199] *Id.* at 542.

cognizable under the Tucker Act because it involves money improperly exacted or retained."[200] Accordingly, the Supreme Court declined to consider these claims.[201]

On remand, the Court of Claims found cognizable claims under "timber management statutes, various federal statutes governing road building and rights of way, statutes governing Indian funds and government fees, and regulations promulgated under these statutes imposed fiduciary duties" the breach of which "implicitly required compensation for damages sustained."[202] The Supreme Court affirmed, holding that:

> [W]here the Federal Government takes on or has *control or supervision* over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection.[203]

It was sufficient for the Court that "[t]he Department of the Interior . . . exercise[d] literally daily supervision over the harvesting and management of tribal timber" and that "[v]irtually every stage of the process [was] under federal control."[204]

While the Supreme Court has never decided whether the ILTLA and its implementing regulations impose an enforceable fiduciary duty on the federal government, the Federal Circuit found such a duty in *Brown v. United States*.[205] In *Brown*, members of an Indian community, who had improvidently leased land to a corporation, claimed that the BIA had breached its fiduciary duty by "failing . . . to compel the lessees to fulfill their reporting and payment responsibilities" and "to cancel the lease in a timely manner once . . . lease violations were uncovered."[206] Even though the BIA might not exercise sufficient "supervision" over Indian leases,[207] the court found that the ILTLA "impose[s] an enforceable fiduciary duty on the government under the 'control' portion of *Mitchell II* 's [disjunctive] 'control *or* supervision' test" because Native Americans "do not control the leasing of their lands."[208] The court emphasized that the BIA must approve a lease for it to be valid, must dictate lease terms, has final authority to terminate a lease, and can terminate a lease without the lessor's consent.[209] Moreover, Native Americans have no ability to transfer possession or ownership of their lands without engaging in the proper procedures with the BIA.[210] Finally, the court stressed that several implementing regulations give the BIA the responsibility to protect Native Americans' financial interests in their lands, a common characteristic of a private fiduciary relationship.[211]

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[200] *Id.* at 546 n.7 (internal citation omitted). The Supreme Court also declined to consider plaintiffs' arguments that the "special relationship between the United States and Indian tribes establishes a right to money damages for timber mismanagement" and that the statute at issue "create[s] trust responsibilities on the part of the United States that constitute implied contracts within the scope of the Tucker Act" because these were only raised on appeal. *See id.*

[201] *Id.*

[202] United States v. Mitchell (*Mitchell II*), 463 U.S. 206, 211 (1983) (internal citations omitted).

[203] *Id.* at 225 (alterations in original) (emphasis added) (citations and quotation marks omitted). This language is known as the "'control or supervision' test." Brown v. United States, 86 F.3d 1554, 1561 (Fed. Cir. 1996).

[204] *Mitchell II*, 463 U.S. at 222 (internal citations, quotation marks, and footnotes omitted).

[205] *Brown*, 86 F.3d at 1561.

[206] *Id.*

[207] *Id.* (finding that "the Secretary lacks ongoing management responsibility over the day-to-day administration of commercial leases concerning allotted lands").

[208] *Id.* (emphasis added).

[209] *Id.* at 1561–62.

[210] *Id.* at 1562.

[211] *Brown*, 86 F.3d at 1562–63.

Nevertheless, the Supreme Court's decision in *United States v. Navajo Nation*[212] casts doubt on the holding in *Brown*. In *Navajo Nation*, the Court declined to find a duty imposed by a statute permitting the lease of Indian lands for mining purposes "with the approval of the Secretary of the Interior"[213] because the statute "simply requires Secretarial approval before coal mining leases negotiated between Tribes and third parties become effective . . . and authorizes the Secretary generally to promulgate regulations governing mining operations."[214] Importantly, however, the statute at issue in *Navajo Nation* was significantly shorter than the ILTLA, and the Court held inapplicable various additional provisions imposing more substantial duties on the Secretary.[215] The ILTLA's additional requirements might differentiate it from the statute in *Navajo Nation*.[216]

Even if the Supreme Court were to find an enforceable fiduciary duty on the BIA, however, the duty probably would not run to non-landowning minority tribe members. Although the court in *Brown* did not focus on this issue, the plaintiffs in that case challenged the BIA's management of their own lands.[217] In *Nulankeyutmonen Nkihtaqmikon v. Impson*, the First Circuit found this fact decisive in a challenge by a group of minority tribe members to their tribe's approval of a liquified natural gas terminal on land with "historical, cultural, religious, and recreational significance."[218] Noting that they were "not land owners and the BIA [did] not manage their interests in a fiduciary capacity,"[219] the court dismissed their claim based on the executive's trust responsibility. Minority tribe members opposing the siting of a nuclear waste facility could argue that they are more like the claimants in *Brown*, but courts will most likely dismiss their claims because they are not beneficiaries of the trust.[220]

Landowning Native Americans and the tribe itself may succeed in receiving compensation under the Indian Tucker Act. However, minority tribe members appear unable to prevent construction of the facility under the APA and also appear to lack a remedy for damages. Given minority tribe members' inadequate legal remedies, this Note proposes several recommendations for pending nuclear waste legislation in Part V.

V. RECOMMENDATIONS FOR NUCLEAR WASTE LEGISLATION

While the BRC's proposed voluntary siting mechanism alleviates some of the concerns about the federal government's heavy-handedness with regard to the Yucca Mountain site,[221] it poses fairness concerns of its own. When a nuclear waste facility is located in the center of a small municipality, a local government may afford an opportunity for prospective neighbors to be the primary decision-makers in

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[212] 537 U.S. 488 (2003).

[213] *Id.* at 493 (quoting 25 U.S.C. § 396a (2012)).

[214] *Id.* at 507 (internal citation omitted).

[215] *Id.* at 509–13.

[216] Decided on the same day as *Navajo Nation*, White Mountain Apache Nation v. United States, 537 U.S. 465 (2003), might also help differentiate minority tribe members' claims. In *White Mountain*, a tribe sued the United States for breach of its fiduciary duty to maintain a tribe-owned property that the U.S. had occupied since 1870. *Id.* at 468–69. The Court found a fiduciary duty, emphasizing that "the United States has not merely exercised daily supervision but has enjoyed daily occupation, and so has obtained control at least as plenary as its authority over the timber in *Mitchell II*." *Id.* at 474. Similarly, the United States would presumably manage and occupy the nuclear waste facility under a lease agreement with the tribe.

[217] Brown v. United States, 86 F.3d 1554, 1556 (Fed. Cir. 1996).

[218] 503 F.3d 18, 23–25 (2007).

[219] *Id.* at 31.

[220] *See* United States v. Mitchell (*Mitchell II*), 463 U.S. 206, 224 (1983) (noting that plaintiffs must demonstrate the existence of each element of a common law trust, including "a trustee," "a beneficiary," and "a trust corpus . . ." (footnote omitted)).

[221] *See supra* note 46.

the siting process. A tribe, on the other hand, often has a substantial constituency with equal voting rights that lives outside of the reservation. This may lead to non-reservation inhabitants voting to approve a facility over the opposition of those who inhabit the area surrounding the proposed site.[222] Additionally, even tribe members who do not reside on the reservation may have a spiritual connection to the land that gives them a special interest in preserving it.

Therefore, Congress should use its impending nuclear waste legislation to ensure adequate consideration of the interests of minority tribe members and lessen their burden in the event that a facility is constructed on their reservation.[223] In order to achieve these aims, Congress should clarify the necessity of preparing an EIS before finalizing site selection, oppose the co-location of a repository and temporary storage facility, require progress toward the development of a repository before searching for a temporary facility, and establish a mechanism for tribe members to submit their comments on the project.

First, Congress should ensure that the environmental impacts of the site are adequately studied through the preparation of an EIS before a tribe accepts the facility. S. 1240, Senator Wyden's bill, does not expressly require an EIS at any point in the process, instead demanding an environmental assessment (EA) when determining whether repository sites are suitable for "characterization," a detailed study of the site.[224] By failing to specify the timing of an EIS in the statute, Congress would afford too much discretion to the Nuclear Waste Administration to decide whether or not to prepare one. Since the Supreme Court has been very deferential to agencies in NEPA cases, a challenge to the agency's NEPA regulations would be unlikely to succeed.[225]

Second, although both the BRC Report and Senator Wyden's bill in the 113th Congress express a preference for the co-location of repositories and storage facilities on the same site,[226] Congress should refrain from allowing co-location. While it might be both politically astute to have to identify only one site and environmentally sound to confine the impacts of nuclear waste to as small a geographic area as possible, this provision places a double burden on communities that are willing to host the storage facility. Particularly if Congress expresses a preference with regard to co-location, agencies might be tempted to pressure tribes into accepting both facilities. The legislative intent behind the Nuclear Waste

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[222] According to Margene Bullcreek, monetary compensation from the site was not shared equitably among the tribe's members, and support for the project was not equal among residents and non-residents of the reservation. *See supra* Part III.B.

[223] Although there are no examples of a court ever enforcing it against the legislative branch, Congress also has a trust responsibility to the Native Americans. WILLIAM C. CANBY, AMERICAN INDIAN LAW IN A NUTSHELL 36 (2009). Congress's power over the tribes is plenary and rooted in the Indian Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, and the Treaty Clause, *id.* art. II, § 2, cl. 2. *See* United States v. Lara, 541 U.S. 193, 200–01 (2004). There are only three minor limitations on Congress's power to abrogate tribal rights: 1) the trust responsibility requires Congress's actions to be "consistent with good faith towards the Indians," Lone Wolf v. Hitchcock, 187 U.S. 553, 566 (1903); 2) Congress's actions must be in accordance with constitutional provisions, Babbitt v. Youpee, 519 U.S. 234 (1997) (takings clause); and 3) ambiguous statutory language will be interpreted according to the Indian law canons of construction, which are deferential toward tribal interests, but if the statute is explicit, then the canons are inapplicable. *See* FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 2.02 (Neil Jessup Newton ed., 2012).

[224] S. 1240, 113th Cong. § 306(b)(4) (2013). The bill's sole use of the term EIS appears in the section where it provides for judicial review. *Id.* § 404(a)(1)(D).

[225] *See generally* Richard J. Lazarus, *The Power of Persuasion Before and Within the Supreme Court: Reflections on NEPA's Zero for Seventeen Record at the High Court*, 2012 U. ILL. L. REV. 231 (2012).

[226] *Blue Ribbon Commission Report*, *supra* note 8, at vii; *see also* S. 1240, 113th Cong. §§ 305(b)(2)(B), 306(c)(2) (2013).

Policy Act of 1987 was to develop two repositories on either coast in order to equitably balance the burden.[227] Congress should not depart from that policy.

Third, Congress should require that substantial progress be taken toward the construction of a permanent repository before work is commenced on a temporary storage facility in order to prevent tribes or other jurisdictions from unwittingly entering a permanent contract with the Nuclear Waste Administration. The BIA has expressed concerns that a storage facility could become a de facto repository given the current political climate,[228] and the existing statute contains provisions to ensure some progress on a repository.[229] Although Senator Wyden's bill likewise aims to ensure construction of a repository,[230] it offers much weaker protections on repository construction than a previous version of the bill that was introduced in the 112th Congress.[231] Thus, Congress should amend the current bill to reflect its 2012 predecessor.

Fourth, Congress should clarify that the ILTLA applies to the lease of the facility and provide the BIA with a mechanism for complying with its trust responsibility under the statute. Although the BIA acknowledges its trust duties, it appears uncertain how to exercise these duties under the ILTLA. In its announcement of the recent revision to the ILTLA regulations governing non-agricultural leases, the BIA argued that it does retain some discretion to disapprove leases in certain cases. In response to one comment, the BIA asserted that it could not "provide that leases are *always* in the best interest of the Indian landowners because BIA is required to determine whether this is true."[232] On the other hand, the BIA failed to identify any constraints on its exercise of discretion. Another commenter asked the BIA to "[a]dd examples of what a 'compelling reason' to disapprove may be."[233] The BIA responded that it "could not identify an example," but that the standard was necessary in case a "unique situation" arose that "would clearly warrant disapproval."[234] At another point in the notice, the BIA suggested that "the best interest determination includes factors beyond monetary compensation and that it will vary according to circumstances,"[235] but could not reach a greater level of specificity. As the BIA's Skull Valley ROD demonstrates,[236] the lease for a nuclear waste facility could be a "unique situation" that "would clearly warrant disapproval."

In order to ensure that the BIA correctly identifies such a unique situation warranting disapproval, Congress should instruct the BIA to incorporate minority tribe members into the decision-making process by providing a mechanism through which they can submit written comments for the BIA's consideration.[237] These comments might cause the BIA to more deeply contemplate various

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[227] Stewart, *supra* note 37, at 10785.

[228] *See Skull Valley ROD*, *supra* note 68, at 19.

[229] *See* 42 U.S.C. § 10165(b) (2012).

[230] *See* S. 1240, 113th Cong. § 305(c) (2013).

[231] *To Consider the Nuclear Waste Administration Act of 2013: Hearing on S. 1240 Before the S. Comm. on Energy & Nat. Res.*, 113th Cong. 5–9 (2013) (statement of Geoffrey H. Fettus, Senior Attorney, Natural Resources Defense Council, Inc.).

[232] Residential, Business, and Wind and Solar Resource Leases on Indian Land, 77 Fed. Reg. 72,440, 72,460 (Dec. 5, 2012) (emphasis added).

[233] *Id.*

[234] *Id.*

[235] *Id.*

[236] *See Skull Valley ROD*, *supra* note 68, at 18–19 (discussing the basis for disapproval).

[237] One such process is contained in the Outer Continental Shelf Lands Act's provision for the consideration of governors' recommendations. *See* 43 U.S.C. § 1345 (2012). The provision imposes no duty on the Secretary to accept the recommendations. *Id* at § 1345(c) (2012). Rather, "[t]he Secretary shall communicate to the Governor, in writing, the reasons for his determination to accept or reject such Governor's recommendations, or to implement any alternative

issues, such as the facility's impact on the "long-term viability of the . . . reservation as a homeland for the [tribe]."[238] Margene Bullcreek was particularly worried about the consequences of damage to hard-fought reservation land, which provided a link to previous generations;[239] and scholars have noted that the reservation is the only tool that allows tribes to maintain their independence from the rest of American society.[240] Moreover, the addition of minority tribe members' concerns about their reservation may increase the likelihood of the BIA's lease denial being upheld on review.[241] The BIA would benefit from an organized process for receiving and responding to such input.

Although the siting process will inevitably leave some community members displeased with the results, Congress's adequate consideration of minority interests will help ensure that many of the minority's concerns are addressed. Further, Congress's modifications to the procedures for siting storage facilities and repositories will minimize the burden on members of the minority once the facility is built.

VI. CONCLUSION

In many of the countries that have chosen to pursue nuclear power, the issue of where to dispose of spent fuel waste has generated an enormous amount of controversy.[242] Particularly spirited opposition has come from individuals who would have to live near the waste.[243] In the 1980s, the United States sought to confront such resistance by mandating the construction of a repository at Yucca Mountain without allowing local communities to have a voice in the siting decision.[244] The recent BRC Report proposes a voluntary siting method whereby communities would be able to vote and decide whether to host a facility.[245]

Native Americans are likely to be the primary participants in a voluntary siting process because of the apparent willingness of many to accept nuclear waste facilities on their reservations and the political difficulties that many municipalities would face if they pursued such facilities.[246] Minority tribe members are especially affected by nuclear waste facilities because they may live closer to the facilities than the majority or have a unique spiritual connection to the land,[247] have traditionally been underrepresented in siting discussions after losing intra-tribal votes,[248] and possess inadequate legal remedies.[249] Since the decision process for any nuclear waste facility is likely to last several years, these minority tribe members deserve to play a greater role in site analysis; and no site should be pursued without their substantial input.

Therefore, Congress should address some of these impacts in its impending nuclear waste legislation by clarifying the necessity to prepare an EIS before finalizing site selection, opposing the co-

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means identified in consultation with the Governor to provide for a reasonable balance between the national interest and the well-being of the citizens of the affected State." *Id.*

[238] *See Skull Valley ROD*, *supra* note 68, at 18.

[239] *See supra* Part III.B.

[240] *See, e.g.*, Collins & Hall, *supra* note 26, at 315.

[241] *See* Skull Valley Band of Goshute Indians v. Davis, 728 F. Supp. 2d 1287, 1300–01 (D. Utah 2010) (rebuking the BIA for its lack of deference to Native Americans' determination of their interests).

[242] *See generally* Charles de Saillan, *Disposal of Spent Nuclear Fuel in the United States and Europe: A Persistent Environmental Problem*, 34 HARV. ENVTL. L. REV. 461, 485–507 (2010).

[243] *Id.*

[244] *See supra* Part II.B.

[245] *See id.*

[246] *See supra* Part II.B–C, III.B.

[247] *See supra* Part III.B.

[248] *See supra* Part III.B.

[249] *See supra* Part IV.

location of a repository and temporary storage facility, requiring progress toward the development of a repository before triggering the search for a temporary facility, and establishing a mechanism for tribe members to submit their comments on the project. Although Congress walks a thin line between ensuring fairness and unjustly infringing on local control and tribal sovereignty, it must take certain measures so that tribal minorities are not marginalized in the siting process. By minimizing adverse impacts and incorporating diverse views, Congress may even succeed in easing the prolonged controversy surrounding nuclear waste facilities.