Charla Lenz

Yucca Mountain Project: federal, state and tribal struggles over sovereignty

In the arid barrens of southern Nevada, on Federal land, juxtaposed to the Nevada Test Site, 100 miles from Nevada's largest city[1], is Yucca Mountain. It is comprised of porous volcanic rocks: the remnants of the eruptions of an ancient super-volcano.[2] As an ode to its volcanic past, the mountain lies within twenty miles of ten active fault lines. One of these fault lines is capable of hosting a seismic event of M6.5 or greater.[3] Additionally, Yucca Mountain is situated directly above an aquifer which is part of an underground system of rivers feeding life to various endangered species which live in canyons under the desert floor.[4] Despite the mountain being located among such dangers as active fault lines, such environmental hazards as a desert aquifer and endangered species, and in close proximity to Las Vegas; Yucca Mountain is the site for a proposed high-level nuclear waste dump.

A. The Project

The plans for the nuclear waste dump, known as the Yucca Mountain Project, contain designs for a facility under the mountain which is capable of to holding up to 70,000 metric tons of federal and commercial high-level radioactive waste. Among the many who have opposed this project are the State of Nevada and the Western Shoshone Nation.[5] Both entities base their objections on their respective sovereign rights over Yucca Mountain. The rights of the state to control the land and activities within its borders, and the sovereignty of native tribal nations, are directly opposed to the sovereignty claimed by the United States Congress to build a nuclear waste repository on federal land.

Yucca Mountain remains a vestige of mystery to the native inhabitants of the area as it has since pre-historic times. The Western Shoshone claim that this mountain is a spiritually significant land mark of which prophesies have been told since generations and times long past.

This volcanic relic is a historic monument of the long-standing connection that the Western Shoshone maintain with their ancestors who first established the lands of the Great Basin as their home. The protection of this mountain means the protection and continuation of their culture, and therefore, their national identity. The Western Shoshone Nation has been an active participant in the fight against the Yucca Mountain Project to save their land from becoming a federal nuclear waste dump.[6]

1. Nuclear Waste

The United States' most effective weapons and most efficient commercial energy sources are derived from radioactive materials and nuclear reactions. The fuel for such defense experiments and commercial energy plants indubitably leaves behind the world's most formidable waste: high-level nuclear waste. This nuclear waste has been accumulating and is being stored in interim storage containers at the nation's various nuclear testing facilities and commercial nuclear power plants since the 1930s.[7] This high level waste has been continuously manufactured and subsequently stored on the site of its manufacture for nearly a century, with nothing but slow moving aspirations of building a permanent storage facility.[8]

2. Federal Solutions

Considering the possibility of a nuclear waste accident due to a lack of regulation of on-site nuclear waste storage facilities, Congress formed the Nuclear Waste Policy Act (NWPA). The purpose of the Act was to establish a means of consolidating the nation's nuclear waste for "safekeeping".[9] The NWPA developed the Department of Energy (DOE) to facilitate the development plans for a geological nuclear repository (which is considered the safest type of repository.)[10] In 1983, the DOE nominated nine sites, based on geological studies, to house the proposed nuclear waste repository. By 1984, the six sites had been eliminated due to political

pressures. In 1987 the NWPA was amended to mandate that only Yucca Mountain should be analyzed by the DOE for purposes of building a nuclear waste repository.[11]

In 2002, President Bush authorized the Senate and House resolutions that resulted in damning Yucca Mountain to become the site of the geological nuclear waste repository. After this, the DOE needed to obtain approval to build the nuclear waste facility by applying to the President and the Nuclear Regulatory Commission (NRC) for a license to construct the repository.[12] Such licensure was not difficult for the NRC to obtain, as Congress and the President had already spent over $59 billion on the project, thus illustrating their commitment to having the repository built at the Yucca Mountain site.[13] This solidarity between the President and Congress has also been demonstrated in their efforts to circumvent the courts when the courts have stalled the project's completion.[14]

3. Objections to the Project

Objections to the Yucca Mountain Project have come from the many people, governments and organizations opposed to plans to build a repository in Nevada. Objections have been based on the falsification of safety reports; flawed humidity measurements resulting in work shutdowns; and the Environmental Protection Agency's determination that the DOE's proposed 10,000 year compliance period was too short.[15] These objections have significantly stalled the completion of the Yucca Mountain site. The stalled completion of the project has resulted in numerous commercial nuclear energy manufacturers filing lawsuits against the DOE for its breach of contracts to remove spent nuclear fuel rods stored at the numerous commercial nuclear energy plant sites by January 31, 1998.[16]

Additionally, there are concerns over the possibility of terrorists stealing and using the spent fuel rods as they are stored in relatively unsecured locations.[17] Furthermore, numerous

lawsuits have been filed against the Federal government by the State of Nevada, several of that state's counties, various Native American Nations, and many interest groups; all of these suits have significantly slowed the progress of constructing and opening the nuclear repository at Yucca Mountain.

B. Federalism

The tense debate continues between the Western Shoshone and the state of Nevada (on one side), and the U.S. government (on the other side) over which entity has the sovereign right to control the destiny of Yucca Mountain. The branches of the federal government have joined forces to further the completion of the Yucca Mountain Project. This display of federal sovereignty is arguably unconstitutional according to those opposing the Project.

Significantly, in Younger v. Harris, the Supreme Court defines federalism as a system in which the Federal and State interests are both considered, and in which the Federal government seeks to further Federal rights and interests without unwarranted interference with the State's justified interests.[18] This statement illustrates the contentions of the Western Shoshone and Nevada that the federal government has failed to protect the sovereign rights and interests of the tribe and the state. In the same decision, the Court further stated that federalism is neither a prescription giving the federal government legal authority, nor is it a basis for state's rights.[19] This statement serves to highlight the frustration of Nevada, that its state rights can easily be illegitimated with the sweep of the Court's pen, and that the federal government can easily claim sovereign authority, right, or power to control federal lands within the state's borders, regardless of the effects on the state's citizens, environment and economy.[20]

1. State rights regarding Hazardous Waste

Additionally, the Court has issued several decisions that shed light on its evolving interpretation of federalism and its limits and powers with regard to states' rights concerning hazardous waste products.

One of those decisions was issued in New York v. United States.[21] In that case, New York attempted to back out of its agreement to the federal Low-Level Radioactive Waste Policy Amendments Act. That Act provided three "incentives" for a state's compliance therewith. Two of the three incentives were determined to be constitutional. Those constitutional incentives were that states could charge a fee for waste brought in from out-of-state; and that states could gradually increase their fee for out-of-state access to in-state waste repositories and eventually the state could prohibit out-of-state use of those repositories. The third incentive for state compliance with this Act, found to be unconstitutional, was that if states refused to comply, they would be required to assume title and therefore liability of all waste generated in-state.

The Court held that this last incentive was too coercive to be consitutional.[22] The Court therefore held that Congress may encourage the states to implement regulations by providing monetary incentives, but only if there is a relationship between the regulation and the purpose of the funds.[23] The Court also held that Congress may allow the states to choose between being regulated according to federal standards in a particular field, or to have state law, concerning that field, preempted by federal regulation.[24] However, Congress may not effectually make the state government a regulatory service of the federal government.[25]

The Court seemed to take the position that the federal government merely had to entice the states to comply with federal funding, or otherwise preempt state law in the particular field at issue. This case reflects the idea that states' rights extend only to the state's right not to be blamed for federal actions, though the state's right to regulate matters within its borders is not

upheld. Instead, the Court allows federal preemption as an alternative to federal coercion of a state. Therefore, in the event that state law opposes federal legislation, the state must either succumb to federal legislation through coercion or succumb to legislation through federal preemption.

In the case of Yucca Mountain, the project site sits on federal land which is designated to the Western Shoshone tribe under the Treaty of Ruby Valley, and which is located within the boundaries of Nevada. According to the decision in New York, Nevada most likely does not have the right to regulate the issue of hosting a nuclear waste facility within its borders since the federal government has clearly preempted any such state right by implementing the NWPA Act of 1987. However, the federal government has yet to provide incentives to the state of Nevada for hosting the federal repository. Moreover, because Yucca Mountain sits on federal land, and does not concern a state owned repository, the facts of New York can be distinguished from the problem of the Yucca Mountain repository. Additionally, the decision of New York does not broach the topic of the sovereign rights of the Western Shoshone over this land.

Another decision, concerning the right of states to formulate a statute that prohibits out-of-state waste from entering the state, is that formulated in City of Philadelphia v. New Jersey.[26] New Jersey's purpose for enacting the statute at issue was to protect the health and safety of its citizens.[27] The statute was decidedly invalid because it inhibited the Dormant Commerce Clause in that the New Jersey statute discriminated against interstate trade.[28] The Court held that unless there is a reason, apart from the place of the product's origin, which is the basis for discrimination, a state may not interfere with interstate commerce by restricting products from passing through state borders.

The Court provided that the applicable test is whether the state law was enacted as a protectionist measure, or whether the law is directed at "legitimate local concerns, with effects upon interstate commerce that are only incidental."[29] The states therefore have general police powers that allow interference with interstate commerce, if the state's interests are legitimate. However, state statutes grounded in protectionist measures were held to be per se invalid. The court reasoned that the purpose of the state statute should not be a consideration for determining whether discrimination between states is satisfactory. The Court held that commercial products of another state shall not be differentiated based on the fact that it originated from a specific state.[30]

This case is analogous to the Yucca Mountain issues of Nevada. Like New Jersey, Nevada seeks to protect its citizens from harmful waste coming from other states in order to be stored within its borders. It is significant that New Jersey attempted to preclude the same types of liquid and solid waste from coming into its borders as were being generated within its borders. Conversely, there are neither state nor commercial producers of either high-level nuclear waste or commercial nuclear energy situated in Nevada.[31] However, the federal government generates significant quantities of nuclear waste within Nevada for purposes of national defense projects.[32] That the federal government generates high-level nuclear waste in Nevada may preclude the Nevada legislature from denying out-of-state access to the completed Yucca Mountain repository on the basis that the same type of hazardous waste is being generated in-state, as in New Jersey.

Perhaps more closely analogous to the Yucca Mountain problem is Washington State Building Construction Trades Council, AFL-CIO v. Spellman, in which the issue was the legitimacy of a Washington statute that prohibited out-of-state radioactive waste from being transported and stored in-state.[33] The court stated that the state law would be valid under the

conditions that it "(1) regulates evenhandedly; (2) accomplishes a legitimate local public purpose; and (3) has only an incidental effect on interstate commerce."[34] The court held that the Washington statute violated the Commerce Clause because it had a significant effect on interstate commerce. This holding was based on the facts that Washington, at the time, housed the nation's only liquid low-level radioactive waste repository and was receiving forty percent of the nation's low-level radioactive waste.[35] Therefore, the statute impeded the ability of the states and federal government to properly dispose of the nation's low-level radioactive waste.

The issues in Spellman are similar to those surrounding the Yucca Mountain Project. In both situations, a state seeks to restrict the inflow and storage of hazardous waste that was generated outside of its borders. Under Spellman, a Nevada state law would be invalid if a court found that the state law's prohibition on nuclear waste entering the state restricted interstate commerce. This is likely given the holdings in New Jersey, specifically that out-of-state waste should not be differentiated from in-state waste and restricted from entering a state based on its location of origin.

Looking at the above cases together, it is clear that there is not a bright line rule that designates when decisions concerning federalism will favor state's rights. The Court's decision may turn on how the issues of the case are defined.[36] Under New Jersey, if the issue is defined as one of protectionist measures, the Court may invalidate a Nevada statute prohibiting the in-state storage of nuclear waste from other states. A different result may come to surface if, under New York, the issue concerns whether Nevada is being coerced by the federal government to regulate the storage of or assume the liability of nuclear waste. Under such a finding, federal coercion would most likely be held unconstitutional, and a Nevada statute prohibiting the storage of such waste might avoid preemption until Congress enacted new legislation that was less

coercive. Likewise, under Spellman, a Nevada statute would likely fail if the Court viewed it as being not even-handed; not presenting a local interest that outweighed a federal interest; or interfering with interstate commerce.

Therefore, if Nevada creates protectionist statutes seeking to keep nuclear waste outside of its borders for the good of its citizens, economy, etc.; those statutes may fail on the basis of their protectionism or interference with a federal or national interest. Whereas, if the Court decides that Nevada is being coerced by the federal government into accepting responsibility for the high-level nuclear waste, such coercion may temporarily preclude federal preemption of the state statute until the Congress formulated a method of encouraging Nevada to accept such waste. Additionally, any Nevada legislation attempting to restrict waste from entering the state to be stored within the state would likely be viewed as restricting interstate commerce or discriminating against other states. These cases indicate that Nevada is powerless to exercise sovereignty within its borders with regard to keeping the nation's supply of high-level radioactive waste from being brought into the state and stored indefinitely.

C. State regulation of nuclear waste within its borders.

If it is questionable as to whether Nevada has the sovereign right to keep out-of-state nuclear waste from being transported into and being stored in the Yucca Mountain repository, another consideration is whether Nevada may be allowed to regulate the nuclear waste which comes into the state. There are many issues surrounding whether federal law prevents states from exercising their sovereignty in regulating spent nuclear fuel. Two identifiable issues are whether the state can regulate the intrastate transportation of the waste and whether the state can regulate the storage of the waste.[37]

1. Intrastate Transportation of Waste

Each of these issues presents a question of federal preemption. Federal preemption is a possibility because Congress has evidenced an "intent to occupy" these areas through its creation of the Yucca Mountain Project to house most of the nation's commercial and military high-level nuclear waste.[38] Furthermore, where state law would conflict with federal law concerning these issues, the state law is preempted if it would be impossible for transporters and/or repository administrators to comply with both federal and state law.[39]

Concerning the issue of Nevada's regulation of the transportation of nuclear waste, the state's regulations must be minimal in order to survive a federal preemption challenge as in New Hampshire Motor Transport Association v. Flynn.[40] In Flynn, the state imposed a minimal annual fee on transporters of hazardous waste. The court held that because the state statute requiring the fee did not frustrate the transportation of waste under the federal Hazardous Materials Transportation Act (HMTA), it was not preempted.[41] However, such minimal state regulations would doubtless produce satisfactory results with regard to the Yucca Mountain Project since such minimal regulations would most likely be unprofitable to the state and inconsequential with regard to negating the ill effects of hosting a high-level nuclear waste repository. The state may well determine that minimal state regulations would be a waste of state resources in implementing as compared to the fact that the state regulation would do nothing to resolve the issues of harboring the nuclear waste repository.

According to this cases, as long as Nevada imposes minimal regulations on the transportation of waste, which do not interfere with any federal regulations, it is not likely that the Nevada regulations will be preempted. This does not leave much room for allowing Nevada to implement regulations that would restrict waste from being shipped into the state.

2. State Regulation of Storage of Waste

Turning to the issue of the whether the state can prohibit or regulate the storage of nuclear waste within its boundaries; the state will have to overcome two hurdles. The first hurdle is that under the NWPA, states and tribes are treated as equals, such that states are unable to veto the storage of nuclear waste on native land.[42] This is not likely to be a problem for Nevada or the Western Shoshone, as both entities oppose the Yucca Mountain Project emphatically. The next hurdle is federal preemption of regulation concerning transportation of nuclear waste. The court discussed this hurdle in Nevada v. Watkins.[43] The court's discussion in Watkins illustrates the difficulty, if not near impossibility, of a state's ability to overcome preemption of federal regulations concerning nuclear waste.[44]

Before Watkins, Nevada had long been fighting the Yucca Mountain Project through both legislation and litigation.

In court, Nevada has been unsuccessful at challenging the Yucca Mountain Project, but successful at stalling it. The state petitioned for review of the DOE for its inconsistency with the NWPA in 1986. The court dismissed this petition based on the court's lack of jurisdiction over the DOE's plans for the Yucca Mountain repository since the plans were considered "preliminary decision making activity."[45] That year, the state also petitioned to invalidate the recommendation of Yucca Mountain as a repository site. However, this petition was dismissed due to an amendment to the NWPA, which characterized Yucca Mountain as the sole repository site.[46]

In December of 1988, the DOE issued the final site characterization plan and filed for the necessary environmental permit as required under Nevada law to begin characterization of Yucca Mountain as the site for the repository.[47] Nevada legislature issued a Joint Resolution while the permit applications were pending.[48]

In January of 1989, the state presented Assembly Joint Resolution 6, which was based on the environmental and economic harm that a repository threatened.[49] This resolution stated that consent of the Nevada state Assembly or revocation of the Assembly's jurisdiction was necessary before the federal government established the Yucca Mountain repository.[50] After both Congress and the President failed to respond to the Joint Resolution, the Nevada legislature enacted Assembly Bill 222, which prohibited the storage of high-level waste in the state by any governmental or non-governmental entity.[51]

The Nevada Attorney General, in November 1989, informed Nevada's Governor that the Joint Resolutions were valid notices of Nevada's opposition to the repository; and that Congress had approved of the state's Joint Resolution by failing to answer within ninety days, as stipulated by the NWPA.[52] Therefore, the application for the environmental permit was no longer relevant and characterization of Yucca Mountain should end.[53]

In Nevada v. Watkins, the court stated that Nevada could not submit an official disapproval of the Yucca Mountain Project before the President issued his recommendations for the project; since Nevada would not know what it disapproved of before a recommendation was issued.[54] Therefore, the Joint Resolution 6 and subsequent Assembly Bill 222 were mute.

Nevada sought to prevent storage of nuclear waste within state lines by enacting a law making it illegal for any person or government to store high-level radioactive waste.[55] The court reiterated that state law is preempted when: Congress has expressed intent to occupy a given field; or when the state law conflicts with federal law such that simultaneous compliance with the state law and fulfillment of the purposes and objectives of Congress are impossible.[56] The court held that the Nevada statute was unconstitutional because it was preempted by the NWPA,[57] despite the fact that Nevada was concerned of the effects of having a nuclear waste

repository on the economy and environment of Nevada.[58] Therefore, Nevada's statute was held preempted by the NWPA.

The result of this case was that Nevada was left with little legislative and political power to keep the Yucca Mountain repository from being completed and used.

Likewise, in Pacific Gas and Electric Company v. State Energy Resources Conservation and Development Commission, California had passed a statute that temporarily halted the construction of in-state nuclear power plants for safety concerns.[59] The court stated that the federal government was responsible for the regulation of the construction, operation, and supervision of safety of nuclear facilities; while the state was responsible for the economic concerns, licensing, rates and land-use planning.[60] Because these responsibilities of the federal and state government compliment rather than compete with one another, the state regulations were not preempted.[61]

Although the discussion, in Pacific Gas, of the division of responsibilities between the state and federal governments seems helpful, this case is distinguishable from Nevada's situation in that this case pertains to the opposition between a private company and a state, rather than between a state and the federal government which have opposing goals in the formation of their regulations. Furthermore, this case pertains to a nuclear facility to be constructed on private, rather than federal land within the state. Additionally, the court in Pacific Gas lays out the division of responsibilities between the federal and state governments in the construction of nuclear power plants not the construction of nuclear waste facilities.

Even if the situation in Pacific Gas was more comparable to Nevada's difficulties with the Yucca Mountain Project, the fact that the court lays out the specific responsibilities of the state and federal governments does not preclude federal preemption of state regulations

concerning its responsibilities. This is because, under Watkins, if Nevada were to enact statutes dealing with the state's specific responsibilities, which interfered with the federal government's objectives or purposes, the state statutes would be preempted.

When a state statute is not substantially the same as federal laws regulating nuclear materials, the court held, in Colorado Public Utilities Commission v. Harmon, that the state is federally preempted. The court further held that, the state's statute could be preempted if it interfered with the federal government's purposes and objectives even though there was not a federal regulation concerning the issue regulated by the state statute.[62]

These decisions present further complications for Nevada by providing a basis upon which state statutes that may seek to inhibit nuclear storage at the Yucca Mountain facility may be federally preempted. According to these decisions, Nevada statutes interfering with the federal objectives of opening the Yucca Mountain repository would be federally preempted. Furthermore, Nevada statutes frustrating the federal purpose of any laws regulating the management of the Yucca Mountain facility including transportation and storage of the waste would also be preempted by federal law.

D. Native American Preemption

Having discussed the reasons why any Nevada legislation pertaining to dismantling the Yucca Mountain Project will most likely be preempted; we should consider whether it is possible for the Western Shoshone to protect Yucca Mountain from becoming a nuclear waste facility. While Nevada's state rights resting in the Tenth Amendment seem weak under the above cases; native tribes traditionally retain tribal sovereignty over reservation lands.[63] However, the Western Shoshone have never been designated to reservation lands. Additionally, the Indian Trust Doctrine serves to maintain a doctrine by which the federal government may maintain

control over native lands under a supposed fiduciary responsibility. The degree to which native tribes retain tribal sovereignty, and therefore jurisdiction, over such lands varies according to the terms and provisions of treaties between the U.S. and native tribes, subsequent federal statutes and/or settlements.[64]

1. Indian Trust Doctrine

Under the Indian Trust Doctrine, the federal government maintains a fiduciary relationship with tribal nations. Based on the acknowledgment that the U.S. government holds more power than the various tribal nations; the federal government holds tribal lands in trust for natives and regulates laws concerning tribal lands and resources.[65] Under this doctrine, tribes are viewed as sovereigns distinguishable from states and territories.[66] Native tribes as sovereign entities retain their independence by maintaining and independent economy, government, culture and their own land.[67] The land is the basis for the sovereign's ability to maintain the other three sovereign characteristics. Therefore, tribal lands are necessary for the viability of the sovereign.[68] As such, tribal sovereignty is completely dependant upon the fiduciary duty held by the federal government to each tribal sovereign.[69]

The Western Shoshone view the Yucca Mountain Project as a breach of this federal fiduciary duty to hold native lands in trust. This allegation is based on the real danger of environmental damage due to the waste storage, including future drinking and ground-water contamination from nuclear waste seepage from the Yucca Mountain repository.[70] The threat of contamination is in part due to the seismic instability of the Yucca Mountain area.[71] Most other escape of radioactive fuel into the environment from the facility is foreseeable and is therefore allowed, in small amounts, by the Public Health and Environmental Radiation Protection

Standards for the Yucca Mountain facility.[72] The small amounts that will foreseeably escape still provide the potential for environmental contamination.

2. Treaty of Ruby Valley

Aside from the Indian Trust Doctrine, treaties form a basis for the creation of fiduciary relationships between the U.S. and native tribes. The Supreme Court has held that a breach of this fiduciary relationship by either party allows the offended beneficiary to sue for damages resulting from breach of the trust.[73] However, a suit for damages contains no solace for an injured tribe that desires the use and benefits of its land over "damages".[74] Additionally, the Court has held that Native American treaties are to remain in effect and the rights provided therein are to be enforced.[75] Furthermore, the terms of the treaty are to be construed against the federal government as the stronger party.[76]

Moreover, the Western Shoshone believe that the Treaty of Ruby Valley vests sovereignty in the tribe over the Yucca Mountain area.[77] The Treaty of Ruby Valley is not a land granting treaty and does not issue a reservation of land to the Western Shoshone; it is a peace treaty which grants land use to the federal government for several named purposes.[78] The treaty specifically provides that it does not cede any land or create a reservation for the tribe.[79] However, the treaty allows the tribe to retain authority over the land described therein, which encompasses Yucca Mountain.[80] The treaty allows the federal government and its citizens various rights of passage over the tribal lands.[81] More specifically to the Yucca Mountain facility, the treaty provisions allow the United States to set up military posts.[82] Although Yucca Mountain is on land owned by the federal government, and governed by the Treaty, the nuclear waste repository cannot reasonably be construed as a military post since it is not being built specifically to accomplish national defense objectives. Rather, the repository is being built to

satisfy commercial and military needs. Furthermore, the Western Shoshone have never been given a permanent reservation,[83] nor has the Treaty ever been specifically reneged by an Act of Congress.[84] Therefore tribal title and sovereign rights to the land should conceivably remain with the tribe.

One such Act of Congress has been construed to limit the Treaty of Ruby Valley. The sovereign land rights held by the Western Shoshone under the Treaty of Ruby Valley were held to be subject to the Taylor Grazing Act of 1934[85] in U.S. v. Dann.[86] The court held that tribal title to the land no longer exists since the U.S. "paid" $26 million in an Indian Claims Commission award to the tribe.[87] The court confirmed that the tribal land was now under the federal control granted by the Taylor Grazing Act despite adamant assertions of the Western Shoshone Nation that it never agreed to such a settlement, nor received any compensation there from.[88] The court, however, would not restore the tribe's land to the unlimited land-use provisions of the Treaty.[89]

Despite this holding, the Western Shoshone claim that the Treaty of Ruby Valley remains in effect and that the Taylor Grazing Act is an illegal infringement upon tribal rights to use the land free of federal control.[90]

This controversy stems from a claim filed by the Temoak Bands Council in 1951 wherein compensation was sought under the Indian Commerce Clause[91] for federal takings of Western Shoshone land.[92] The Temoak Bands Council represents only part of the Western Shoshone Nation, but filed their unauthorized claim on behalf of the whole of the Western Shoshone Nation.

The holding in Dann should not defeat the Western Shoshone's sovereign right to live on and use land that is free from nuclear waste contamination. While the Taylor Grazing Act has

been construed to narrow tribal use of the Treaty lands, it does not specifically or categorically revoke it. According to the Treaty, unless and until the federal government creates a reservation for the Western Shoshone, on Ruby Valley land, the Western Shoshone remain able to live on and use the land.[93] No such reservations have been formed to date. Since the storage of high-level nuclear waste in Yucca Mountain would undeniably, substantially impair tribal use of the Yucca Mountain area; it logically follows that the contamination of the land by nuclear waste is an unauthorized federal use of the Ruby Valley land under the Treaty. Therefore, the storage of nuclear waste in Yucca Mountain requires the federal government to breach its fiduciary duty to the Western Shoshone.

3. Tribal Sovereignty over Tribal Territory

One should consider the breadth of tribal sovereignty to control the land and people within tribal territory. The holding in, Rice v. Rehner, clearly indicates that tribes retain their sovereignty to the extent that their sovereignty does not affect those outside its borders.[94] In Rice, California constructed a statute which required that state liquor licenses had be obtained by commercial retailers of liquor on reservations regardless of whether the reservation had issued a local liquor license.[95] The Court held that tribal interests in sovereignty can be given little or no weight, as the court so chooses. Furthermore, where an activity on a reservation is likely to have a considerable influence on the activities or events outside the reservation, the court is at liberty to weigh the tribal interest in sovereignty as it chooses.[96]

This case deals specifically with tribal reservations, therefore, its applicability to the Western Shoshone is uncertain since the Western Shoshone have not been granted a reservation. This case indicates that if the Western Shoshone were to interfere with the building or operation of the Yucca Mountain facility, the interference would affect the ability of the federal

government and many commercial nuclear energy plants to dispose of their nuclear waste. This would clearly be a substantial impact of activities occurring outside of the reservation. Therefore, the court could decide not to weigh the Western Shoshone's interest in sovereignty over the activities taking place on their land. Such a court decision would undermine or negate tribal sovereignty and the Treaty of Ruby Valley.

4. Treaty Preempted by Federal Sovereignty

One must consider when, if ever, tribal sovereignty can be preempted or disregarded by federal sovereignty. The doctrine of federal plenary power dictates how the U.S., as a sovereign, will address issues of foreign policy.[97] Because the Constitution does not apply to sovereign nations (Native American nations), the federal plenary power is extra-constitutional and is derived from U.S. sovereignty.[98] Under this plenary power, U.S. courts defer decisions of foreign policy to the legislative and executive branches.[99] In the context of the Western Shoshone's struggle to protect Yucca Mountain, the court in Western Shoshone National Council v. U.S. indicated that the federal plenary power trumps tribal sovereignty with respect to the power of tribal nations to self-govern.

In questioning the extent to which tribal sovereignty within their territory was affected by the U.S.'s decision to build the Yucca Mountain repository on tribal land, the Western Shoshone brought their case against the United States, in Federal District Court, alleging that the proposed nuclear repository violated the Treaty of Ruby Valley.[100] The Western Shoshone argued that the Treaty directs that the tribal land will not be used by the US, except as provided in the Treaty. However, because the Treaty was created in 1863, such contingencies as nuclear waste repositories were left unconsidered.[101]

The court dismissed the complaint on the grounds that the U.S. government had sovereign immunity from suit.[102] The Western Shoshone cited the Administrative Procedure Act (APA) as a waiver of federal sovereign immunity. However, the court maintained that this waiver of immunity was only valid where another statute provided for agency review.[103] Furthermore, since agency action by the DOE had not been completed, the agency's actions were not ripe for review.[104]

The Western Shoshone reasoned that because it was a sovereign entity, the United States did not need to waive its sovereign immunity in order to sue.[105] The court disagreed.[106]

The Western Shoshone filed a Request for Reconsideration of Court's Grant of Motion to Dismiss.[107] In denying the request, the court reasoned that while the tribe may sue to enforce the Treaty in federal court, it must first establish subject matter jurisdiction and U.S. waiver of immunity from suit.[108] The court acknowledged that the APA contained a provision that enabled judicial review of agency action.[109] However, it held that judicial review was only authorized by an applicable substantive statute or when agency action was "final."[110]

The language of the NWPA contradicts the court's assessment that agency action must be "final" before it can be subject to judicial review. The NWPA expressly authorizes judicial review of "any final decision or agency action" by specifically distinguishing final decision from agency action.[111] However, the court stated that "final" agency action is necessary before the tribe may file an action for judicial review under the APA.[112]

Furthermore, the court determined that concerns over violation of the Treaty of Ruby Valley should be decided without the help of the courts since the Treaty did not waive U.S. sovereign immunity.[113] Therefore, court further failed to respond to the Western Shoshone's

assertion that the Treaty contains restrictive covenants that run with the land regardless of who holds title to the land.[114]

The reasons the court gave for dismissing this complaint illustrate that tribal sovereignty as determined by treaty is quite illusory. The court is unwilling to interpret either the Treaty of Ruby Valley or statutes waiving federal sovereign immunity and allowing judicial review of agency action, so as to allow tribal sovereigns to challenge federal agencies. Without the ability to challenge actions by the U.S. government which undermine tribal sovereignty, the Western Shoshone are required to simply watch as the federal government takes offensive actions. This inability to challenge the federal government has stripped the Western Shoshone of any recognizable sovereign authority and has rendered them powerless as illusory sovereigns.

5. Statutory Basis for Disregarding Tribal Sovereignty

Under the NWPA, after being put on official notice of obvious tribal disapproval of the Yucca Mountain facility, Congress may be able to disregard tribal sovereign rights to their lands and any impact the facility may have on tribal lands.[115] This is because the NWPA allows the state, in which a nuclear waste repository is to sit, and the native tribe, on whose reservation land a nuclear waste repository is to sit, to submit their respective notices of disapproval of the repository.[116] However, the NWPA allows Congress to disregard any notices of disapproval and approve the site for a nuclear waste repository.[117] Additionally, the ability of a tribal nation to submit a notice of disapproval may ride on the fact that the repository site is proposed to sit on a tribal *reservation*. Whereas, the Western Shoshone were never granted a reservation by the federal government and oppose the repository site which is proposed to sit on their land *designated* under the Ruby Valley Treaty.

The NWPA requires that native tribes and states have equal decision-making power regarding the issue of whether to host a federal nuclear waste facility.[118] To this end, the state and the tribal governments must come to a concession on the matter before action is taken. Native tribes lobbied to obtain the right to voice their opinions under the NWPA.[119] Tribal nations believed that being included in the decision making process would enable them to protect tribal interests either for or against hosting a federal nuclear repository.[120] While the NWPA enables tribes to share equally with states in the decision-making process, the statute has been nearly useless in protecting tribal interests.[121]

E. Conclusion

Though both the state of Nevada and the tribal nations are unified in their objection to the Yucca Mountain Project, this has not stopped the federal government from continuing with the construction of the repository. The state of Nevada finds that it is preempted from enacting any laws that would interfere with the Project. Moreover, the state is restricted from enacting any laws which may impose state regulation of issues tangential to the federal interests and purposes of building, maintaining or using the repository. The crux of the federal preemption exists because the repository is situated on federal land, for federal purposes. Additionally, the federal legislative and executive branches of government have heretofore been unified in their determination to see the Yucca Mountain Project through to completion. This unified effort of the federal government to see the repository through has empowered the federal government at the expense of Nevada and the Western Shoshone.

Furthermore, due to the diminution of tribal sovereignty throughout the past centuries, the Western Shoshone have been restricted in their exercise of their sovereign right to the control of their territorial land concerning the Yucca Mountain Project. Tribal sovereignty over tribal land

is simply disregarded while the courts blatantly ignore their pleas for injunctions in favor of federal sovereign immunity. Additionally, any attempt at challenging the federal right to build the repository based on violation of the Treaty of Ruby Valley are foiled by the court's determination that the federal government is immune from suit. Even if federal sovereign immunity was not at issue, the court has determined that it is not the forum for determining federal treaty violations under the federal plenary powers.

The court has turned away tribal challenges to the Yucca Mountain Project by encouraging the tribe to file suit again after the repository is built.[122] Waiting until the repository is built would leave little persuasive power to a tribe arguing that although completed, the multi-billion dollar repository should be abandoned before it is ever put to use.

The Yucca Mountain Project continues to be fought by the state of Nevada and the Western Shoshone, however, federal sovereignty has already significantly weakened both state's rights and tribal sovereignty and their collective pursuit of public safety and environmental health.

In 1999 the Western Shoshone brought charges to the United Nations Committee for the Elimination of Racial Discrimination (CERD) against the U.S. government alleging human rights violations based on the U.S. government's land use violations under the Treaty of Ruby Valley including the construction of the nuclear waste repository at Yucca Mountain.[123] In 2006, CERD issued a decision based on these allegations. The decision stated that the U.S. government was to cease actions with took or threatened to take action against the Western Shoshone, including actions to use Western Shoshone lands, presumably for the purpose of storing nuclear waste at Yucca Mountain.[124] The U.S. has yet to comply.

[1] Las Vegas is Nevada's largest city.
[2] Yucca Mountain Youth Zone, Dept. of Energy, 2008, http://www.ocrwm. doe.gov/youth/yucca.shtml.
[3] FAQ's on Seismicity Near Yucca Mountain, Seismic Laboratory University of Nevada Reno, 2008, http://www.seismo.unr.edu/htdocs/ym-faq.html.
[4] Douglas L. Threloff, Wetland and Riparian Resources of Death Valley National Park and Their Susceptibility to Water Diversion Activities, National Park Services, Report, 1998, Resources Management Division, Death Valley National Park.
[5] Andrew J. Butcher, In Search of a Remedy to the Nuclear Storage Conundrum: Western Shoshone National Council v. United States, 28 Energy L.J. 207, 209-10 (2007).
[6] See e.g., Western Shoshone Defense Project, http://www.wsdp.org/.
[7] Butcher, at 208.
[8] Id. at 208-09.
[9] Id. 209.
[10] Id.
[11] Id.
[12] Id. at 210.
[13] Id. at 212.
[14] Id. at 213.
[15] Id. at 210.
[16] Contract for Disposal of Spent Nuclear Fuel and/or High-Level Radioactive Waste, 10 C.F.R. § 961.11 (2008).
[17] Butcher, at 210.
[18] Robert Ressetar, The Yucca Mountan Nuclear Waste Repository from a Federalism Perspective, 23 J. Land Resources & Envtl. L. 219, 220 (2003) (quoting, Younger v. Harris, 401 U.S. 37, 44 (1971)).
[19] Younger v. Harris, 401 U.S. 37, 44 (1971).
[20] Younger involved an appeal by a California District Attorney from an injunction preventing him from prosecuting a man, in good faith, for violating a state statute which the federal district court determined was "void for vagueness and overbreadth in violation of the First and Fourteenth Amendments". Id. at 40.
[21] New York v. United States, 505 U.S. 144 (1992).
[22] Id. at 161.
[23] Id. at 166-167.
[24] Id. at 167.
[25] Id. at 175-178.
[26] City of Philadelphia v. New Jersey, 437 U.S. 617 (1978).
[27] Id. at 617.
[28] Alex Tallchief Skibine, High Level Nuclear Waste on Indian Reservations: Pushing the Tribal Sovereignty Envelope to the Edge?, 21 J. Land Resources & Envtl. L. 287, 305 (2001).
[29] New Jersey, 437 U.S. at 624.
[30] New York, 504 U.S. at 360; see also Id. at 617.
[31] Dennis Myers, Nuclear Summer on It's Way?, NewsReview.com, November 11, 2007, http://www.newsreview.com/reno/Content?oid=594959.
[32] The U.S. military uses the Nevada Test Site for munitions testing.
[33] Washington State Building Construction Trades Council, AFL-CIO v. Spellman, 684 F.2d 627, 633 (9th Cir. 1982).
[34] Id. at 631.
[35] Id.
[36] Ressetar, at 230.
[37] Skibine, at 299.
[38] Id.
[39] Id. at 299-300.
[40] New Hampshire Motor Transport Association v. Flynn, 751 F.2d 43 (1st Cir. 1984).
[41] Id. at 51-52.
[42] Skibine, at 301.
[43] Nevada v. Watkins, 914 F.2d 1545 (9th Cir. 1990).

[44] Skibine, at 302.
[45] Nevada v. Watkins, 939 F.2d 710, 712 (9th Cir. 1991) (based on 42 U.S.C. section 10132(d)).
[46] Nevada v. Watkins, 943 F.2d 1080, 1081 (9th Cir. 1991).
[47] Watkins, 914 F.2d at 1550-51.
[48] Resseret, at 234.
[49] Watkins, 914 F.2d at 1550-51.
[50] Id.
[51] Nev. Rev. Stat. § 459.910 (2007).
[52] Resseret, at 234.
[53] Watkins, 914 F.2d at 1551.
[54] Id. at 1558-59.
[55] Skibine, at 302.
[56] Watkins, 914 F.2d at 1560 (quoting California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 581).
[57] Watkins, 914 F.2d at 1561.
[58] Id.
[59] Pacific Gas & Elec. Co. v. State Energy Resources & Dev. Comm'n, 461 U.S. 190, 202 (1983).
[60] Id. at 211-212.
[61] Id. at 222-223.
[62] Colorado Public Utilities Commission v. Harmon, 951 F.2d 1571, 1583 (10th Cir. 1991).
[63] Skibine, at 308-09.
[64] Skibine, at 309.
[65] Mary Wood, Indian Law and the Promise of Native Sovereignty: The Trust Doctrine Revisited, 1994 Utah L. Rev. 1471, 1471 & 1475 (1994).
[66] Id. at 1473.
[67] Id. at 1474.
[68] Id.
[69] Id. at 1475.
[70] Butcher, at 214.
[71] Public Health and Environmental Radiation Protection Standards for Yucca Mountain, Nev., 40 C.F.R. § 197 (2001).
[72] Id.
[73] U.S. v. Mitchell, 463 U.S. 206, 226 (1983).
[74] Butcher, at 217.
[75] U.S. v. Sioux Nation, 448 U.S. 371, 415 (1980); see also, McClanahan v. State Tax Comm. of Ariz., 411 U.S. 164 (1973).
[76] Choctaw Nation v. U.S., 318 U.S. 423, 431-32 (1943).
[77] Treaty of Ruby Valley art. V, Oct. 1, 1863, 18 Stat. 689.
[78] Id. at art. III.
[79] Id. at art. VI.
[80] Id. at art. VI.
[81] Id. at art. III & IV.
[82] Id. at art. II.
[83] United States v. Dann, 572 F.2d 222, 224-225 (9th Cir. 1978).
[84] Id.
[85] This Act requires Western Shoshone ranchers to apply for a grazing permit and pay grazing fees to the federal government under penalty of having "unauthorized" tribal livestock impounded. See, supra, note 83.
[86] United States v. Dann, 873 F.2d 1189, 1199 (9th Cir. 1989).
[87] Id. at 1198.
[88] Id. at 1194-95.
[89] Id. at 1189.
[90] John D. O'Connell, Constructive Conquest in the Courts: a Legal History of the Western Shoshone Lands Struggle-1861 to 1991, 42 Nat. Resources J. 765, 766 (2002).
[91] U.S. Const. art. I, § 8.
[92] Dann, 873 F.2d at 1192.
[93] Treaty, supra, note 77 at art. VI.

[94] Rice v. Rehner, 463 U.S. 713 (1983).
[95] Id. at 743.
[96] See, Id. at 725.
[97] Natsu Taylor Saito, The Plenary Power Doctrine: Subverting Human Rghts in the Name of Sovereignty, 51 Cath. U. L. Rev. 1115, 1119 (2002).
[98] Id. at 1120.
[99] Id. at 1119.
[100] Western Shoshone Nat'l Council v. U.S., 408 F. Supp. 2d 1040, 1046 (D. Nev. 2005).
[101] Butcher, at 208.
[102] Id. at 210.
[103] Western Shoshone, 408 F. Supp. 2d at 1048.
[104] Id. at 1051.
[105] Id.
[106] Id. at 1052.
[107] Id.
[108] Id.
[109] Id. at 1049.
[110] Id. at 1050-51.
[111] 42 U.S.C. § 10139(a).
[112] Western Shoshone, 408 F. Supp. 2d at 1050-51.
[113] Id. at 1051.
[114] Id. at 1046.
[115] Nancy B. Collins & Andrea Hall, Nuclear Waste in Indian Country: a Paridoxical Trade, 12 Law & Ineq. 267, 334 (1994) (interpreting Nuclear Waste Policy Act, 42 U.S.C. s 10135(c) (2008)).
[116] Nuclear Waste Policy Act, 42 U.S.C.A. § 10135(b) (2008).
[117] Id. at § 10135(c).
[118] Id. at § 10121.
[119] Collins & Hall, at 297.
[120] Nancy Hovis, Tribal Involvement Under The Nuclear Waste Policy Act of 1982: Education by Participation, 3 J. Envtl. L. & Lit. 45, 49 (1988).
[121] Collins & Hall, at 297.
[122] Western Shoshone, 408 F. Supp. 2d at 1052.
[123] Emma Jane Kirby, Native Americans Seek UN Help, BBC News, Aug 8, 2001, http://news.bbc.co.uk/2/hi/americas/1479559.stm.
[124] Early Warning and Urgent Action Procedure, U.N. CERD, 68th Sess., CERD/C/USA/DEC/1 (April 11, 2006).