

## NOTE

### NUCLEAR NATIVE AMERICA: NUCLEAR WASTE AND LIABILITY ON THE SKULL VALLEY GOSHUTE RESERVATION

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#### I. INTRODUCTION

The United States' brief experience with commercial nuclear power has left

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the country with a long-term problem—disposing of the highly radioactive reactor fuel that nuclear utilities produce.<sup>1</sup> It is estimated that the hundred plus commercial nuclear reactors will, within the next 40 years, generate approximately 85,000 metric tons of spent nuclear fuel.<sup>2</sup> Because the spent nuclear fuel will remain dangerous for tens of thousands of years, the most effective means of safe disposal is to bury the fuel permanently in an underground repository.<sup>3</sup> Due to the long-term planning required for disposal and the political sensitivity that revolves around radioactive waste, the development of a permanent repository has been slow and painstaking.<sup>4</sup>

Therefore, a consortium of nuclear power utilities have joined forces to develop a temporary centralized storage facility in which to place spent fuel until a permanent repository is available.<sup>5</sup> Hoping to derive various economic benefits from its development, the Skull Valley Band of Goshutes, an American Indian tribe native to Utah, has agreed to lease a portion of their reservation to host the facility.<sup>6</sup> In exchange for these benefits, the Goshutes will be helping the nuclear utilities address the various problems created by the accumulation of spent fuel at the utilities' reactor sites.<sup>7</sup> The Goshutes' efforts at leasing the land for the facility has attracted opposition from environmental groups, the State of Utah, and members of their own tribe, all of whom are concerned by the dangers posed by radiation.<sup>8</sup>

The development of a nuclear waste storage facility on Indian land gives

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<sup>1</sup> See generally NUCLEAR WASTE TECHNICAL REVIEW BOARD, DISPOSAL AND STORAGE OF SPENT NUCLEAR FUEL—FINDING THE RIGHT BALANCE 1-8 (1996) [hereinafter BOARD] (report to Congress and the Secretary of Energy).

<sup>2</sup> See *id.* at 9-10. The Board's report to Congress assumes that operations at the individual reactors will cease at the termination of each reactor's 40-year operating license and that no new reactors will be constructed. See *id.* at 11 fig.2.

<sup>3</sup> See *id.* at 4-5 (describing the history of the various federal agencies' proposals for storage and disposal of spent nuclear fuel from 1970 to 1987).

<sup>4</sup> See *id.* at 7 (describing technical progress at Yucca Mountain, the Federal Government's permanent spent fuel repository site).

<sup>5</sup> See John J. Fialka, *Goshute Indians' Plan to Store Nuclear Waste for Eight Utilities is Opposed by Utah Governor*, WALL ST. J., Aug. 26, 1998, at A24; see also Michael Rasmussen, Note, *Gaining Access to Billions of Dollars and Having a Nuclear Waste Back Yard*, 18 J. LAND RESOURCES & ENVTL. L. 335, 343 (1998).

<sup>6</sup> See Fialka, *supra* note 5 (“Some Indian tribes gamble their economic futures on roulette wheels . . . [T]he Skull Valley Band of the Goshute Indian tribe, is betting on a private solution to a longstanding national dilemma: what to do with nuclear waste.”).

<sup>7</sup> See BOARD, *supra* note 1, at 14 –17 (discussing the concerns of the utilities regarding the on-site accumulation of spent fuel).

<sup>8</sup> See Fialka, *supra* note 5. The governor of Utah has deemed the nuclear waste plan “an over-my-dead-body issue.” *Id.* Environmental groups have drawn attention to the threat posed by the facility to a number of interests, including Skull Valley's 10 Bald Eagles and Salt Lake City's plans to host the 2002 Winter Olympics. See *id.*

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rise to numerous legal, political, and technological dilemmas. Included among these are questions of state, federal, and tribal jurisdiction;<sup>9</sup> claims of environmental racism;<sup>10</sup> and the problems involved in transporting and storing spent nuclear fuel.<sup>11</sup> This note will address the narrow but important issue of whether and how the existing federal statutes regulating nuclear activities will financially protect and insure the Goshute Tribe with respect to the storage facility. Maximizing the financial protection available to the tribe is consistent with the United States' current policies regarding nuclear power and will ensure that the project proceeds smoothly by addressing a major concern shared by all the parties involved.

Part II of the note briefly describes the development of America's nuclear laws and the Price-Anderson Act. Part III explains the problems with nuclear waste and describes the federal government's policy towards nuclear waste disposal. Part IV gives a brief history of the Goshute people and their relationship with the nuclear power industry. The question of whether the Price-Anderson Act, as an initial matter, will even apply to the storage facility being developed on the Goshute's reservation is explored in Part V of the note. Part VI analyzes whether, under the Price-Anderson Act, the Goshute tribe will be protected against any liability arising out of a nuclear accident. Part VII addresses the facility's operation and eventual decommissioning and makes recommendations to amend the Nuclear Waste Policy Act to ensure safe operation and decommissioning.<sup>12</sup> Part VIII discusses how the Price-Anderson Act will affect the Goshutes' efforts to recover damages in the event of a nuclear accident and provides recommendations to remove potential obstacles

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<sup>9</sup> Due to an 1863 treaty providing the Goshutes with sovereignty over their land, the tribe need not consult county or state officials when making decisions regarding the economic development of their territory. See Jim Woolf, *Nuclear Storage; Goshute Defends Band's Right to Riches; Goshutes Want to Profit from Nuclear Storage*, SALT LAKE TRIB., Oct. 5, 1997, at A1, available in 1997 WL 3428630. See also Rasmussen, *supra* note 5, at 347-53 (discussing the jurisdictional problems involved in siting a spent fuel storage facility on reservation land).

<sup>10</sup> See generally M.V. Rajeev Gowda & Doug Easterling, *Nuclear Waste and Native America: The MRS Siting Exercise*, 9 RISK: HEALTH SAFETY & ENV'T 229, 246-58 (1998). The concept of environmental justice concerns the disproportional number of environmentally unfriendly developments being located in regions primarily inhabited by racial or economically disadvantaged minorities. See *id.* at 246.

<sup>11</sup> See Rasmussen, *supra* note 5, at 345 (describing how spent nuclear fuel will be transported from its various current locations to the Skull Valley reservation).

<sup>12</sup> See 10 C.F.R. § 72.3 (2000) ("Decommission means to remove a facility or site safely from service and reduce residual radioactivity to a level that permits— (1) release of the property for unrestricted use and termination of license; or (2) release of the property under restricted conditions and termination of license."). For the purposes of this note, decommissioning will refer to such activities at both a nuclear waste storage facility and a nuclear power reactor.

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to recovery. Part IX will conclude that the relevant statutes and regulations governing the private use of nuclear materials must be amended to ensure that any harm to the Goshutes stemming from the leasing of reservation land for the spent fuel storage facility will be minimized.

### II. THE HISTORY AND REGULATION OF ATOMIC ENERGY

After World War II, at the dawn of atomic age, atomic power was a federal government monopoly.<sup>13</sup> The Atomic Energy Commission (“AEC”), created by the Atomic Energy Act of 1946, was charged with operating the government’s atomic monopoly.<sup>14</sup> In 1954, Congress amended the Atomic Energy Act to terminate its monopoly over atomic power and to encourage the private development of atomic power for beneficial use.<sup>15</sup> The new role envisioned for the AEC was the supervision of commercial atomic development through a system of licensing and regulation.<sup>16</sup> Under this arrangement, a license from the AEC was required of all owners of atomic energy facilities.<sup>17</sup>

Discouraged by fears of the devastating liability that could arise from an atomic accident, private industry proved slow to expand into the field of atomic power generation.<sup>18</sup> To assuage those fears, Congress passed the Price

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<sup>13</sup> See *Duke Power Co. v. Carolina Env'tl. Study Group, Inc.*, 438 U.S. 59, 63 (1978) (discussing the overall history of congressional regulation of nuclear energy); James W. Kuntz, *Nuclear Incidents on Indian Reservations: Who has Jurisdiction? Tribal Court Exhaustion versus the Price Anderson Act*, 21 AM. INDIAN L. REV. 103, 105 (1996) (discussing both the history of and the issue of jurisdiction and forum over Price-Anderson claims). The justification for the government monopoly of atomic power was the security of nuclear secrets and the belief that development of peaceful utilization of atomic power was still far off. See S. REP. NO. 83-1699, at 2-4 (1954), reprinted in 1954 U.S.C.C.A.N. 3456, 3457-59.

<sup>14</sup> See S. REP. NO. 83-1699, at 8, reprinted in 1954 U.S.C.C.A.N. at 3463 (“All right, title, and interest within or under the jurisdiction of the United States, in or to any fissionable material now, or hereafter produced, shall be property or [Atomic Energy] Commission . . .”).

<sup>15</sup> See *Duke Power Co.*, 438 U.S. at 63 (“Congress concluded that the national interest would be better served if the government encouraged the private sector to become involved in the development of atomic energy for peaceful purposes . . . . The Atomic Energy Act of 1954 implemented this policy decision . . . .”); Kuntz, *supra* note 13, at 105 (“Congress later concluded that it would be in the national interest to permit private sector involvement in the industry . . . . This policy decision was implemented in the Atomic Energy Act of 1954.”).

<sup>16</sup> See *Duke Power Co.*, 438 U.S. at 63.

<sup>17</sup> See Atomic Energy Act of 1954, 42 U.S.C. §§ 2131-34 (1994).

<sup>18</sup> See *Duke Power Co.*, 438 U.S. at 64 (“[T]here remained in the path of the private nuclear power industry various problems—the risk of potentially vast liability in the event of a nuclear accident of a sizable magnitude being the major obstacle.”); Kuntz, *supra* note 13, at 105 (“[P]rivate actors entering the nuclear power industry were still required to

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Anderson Act of 1957 “[I]n order to protect the public and encourage the development of the atomic energy industry . . .”<sup>19</sup>

The Price-Anderson Act embodies three central features that both encourage private development of nuclear energy and safeguard the public welfare.<sup>20</sup> First, the Act placed a limit upon the aggregate liability arising from a nuclear accident that could be imposed upon private entities licensed by the federal government to conduct nuclear activities.<sup>21</sup> Liability here includes all legal responsibility for any damage, injury, or other legal costs arising or resulting from a nuclear incident, including those associated with a precautionary evacuation.<sup>22</sup> The limit was initially set at \$500,000,000, plus any private insurance the private entity could obtain.<sup>23</sup>

Second, under the Act’s “channeling of liability” provisions, private actors other than the facility operator who are exposed to liability arising from a nuclear incident are indemnified under Price-Anderson.<sup>24</sup> In other words, “the Price Anderson Act provides a type of ‘no fault’ insurance, by which all liability after an accident is assumed to rest with the facility operator, even though other parties (such as subcontractors or suppliers) might be liable under conventional tort principles.”<sup>25</sup>

Third, the Act provides that the federal government will indemnify all public liability claims, in excess of the amount of insurance available to licensed facilities from private sources, in a total amount not to exceed the aggregate liability allowed under the Act.<sup>26</sup> Private industries making use of nuclear materials under the supervision of the AEC were required to obtain privately funded insurance to the maximum amount available, which, in 1957, was \$60,000,000.<sup>27</sup> “Thus, the actual ceiling on liability was the amount of

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confront the risks associated with potentially devastating liability which might be imposed in the event of a major nuclear accident.”)

<sup>19</sup> Price-Anderson Act of 1957, Pub. L. No. 85-256, 71 Stat. 576 (codified as amended in scattered sections of 42 U.S.C.).

<sup>20</sup> See S. REP. NO. 100-218, at 2 (1988), reprinted in 1988 U.S.C.C.A.N. 1476, 1477; see also Kuntz, *supra* note 13, at 105.

<sup>21</sup> See S. REP. NO. 100-218, at 2, reprinted in 1988 U.S.C.C.A.N. at 1477 (“[T]he Act established a limit on the aggregate liability of those who wished to undertake activities involving the handling or use of radioactive materials . . .”).

<sup>22</sup> See 42 U.S.C. § 2014(w) (defining the term “public liability” for purposes of the Price-Anderson Act).

<sup>23</sup> See S. REP. NO. 100-218, at 2, reprinted in 1988 U.S.C.C.A.N. at 1477.

<sup>24</sup> See *id.*

<sup>25</sup> S. REP. NO. 100-70, at 14 (1988), reprinted in 1988 U.S.C.C.A.N. 1424, 1426-27.

<sup>26</sup> See S. REP. NO. 100-218, at 2, reprinted in 1988 U.S.C.C.A.N. at 1477 (“[T]he 1957 Act provided that all public liability claims that exceeded the required level of protection would be indemnified by the Federal Government . . .”).

<sup>27</sup> See *id.* at 2, reprinted in 1988 U.S.C.C.A.N. at 1477.

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private insurance coverage plus the Government's indemnification obligation which totaled \$560 million."<sup>28</sup> The Act authorized the AEC to enter into indemnification agreements concerning public liabilities with each of its licensees.<sup>29</sup>

The Price-Anderson Act has since been amended in 1966, 1975, and 1988 to postpone its expiration date and improve upon its scheme.<sup>30</sup> The 1966 amendments included a provision that authorized the AEC to require an indemnified party to waive certain defenses in the event of an extraordinary nuclear occurrence, essentially creating a strict liability scheme.<sup>31</sup> The 1966 amendments also provided for original federal jurisdiction in cases stemming from extraordinary nuclear occurrences.<sup>32</sup>

The 1975 amendments supplemented the federal indemnification plan with an industry-wide retrospective premium plan that required each operator of a licensed commercial nuclear reactor to contribute upwards of \$5,000,000 to cover public liability in the event of a nuclear incident.<sup>33</sup> Any amount collected from the licensed operators in excess of the liability ceiling would correspondingly increase the aggregate amount of public liability allowed under the Act.<sup>34</sup> The 1988 amendments extended the federal courts' original jurisdiction to include all nuclear incidents as opposed to only extraordinary nuclear occurrences.<sup>35</sup>

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<sup>28</sup> *Duke Power Co. v. Carolina Env'tl. Study Group, Inc.*, 438 U.S. 59, 65 (1978).

<sup>29</sup> *See* S. REP. NO. 100-218, at 2, *reprinted in* 1988 U.S.C.C.A.N. at 1477

<sup>30</sup> *See id.* at 2-3, *reprinted in* 1988 U.S.C.C.A.N. at 1477-78 (discussing the Price-Anderson amendments of 1966 and 1975); *see also* Kuntz, *supra* note 13, at 105-07 (discussing the Price-Anderson amendments of 1966, 1975, and 1988).

<sup>31</sup> *See* S. REP. NO. 100-218, at 2-3, *reprinted in* 1988 U.S.C.C.A.N. at 1477-78 ("Congress modified the Act to add a fourth key provision, referred to as the 'waiver of defenses provision' . . ."); *Duke Power Co.*, 438 U.S. at 65-66 ("A waiver of defenses was thought to be the preferable approach since it entailed less interference with state tort law than would the enactment of a federal statute prescribing strict liability.").

<sup>32</sup> *See* Kuntz, *supra* note 13, at 106.

<sup>33</sup> *See Duke Power Co.*, 438 U.S. at 66 (discussing the 1975 "deferred premium" provision).

<sup>34</sup> *See* S. REP. NO. 100-218, at 3, *reprinted in* 1988 U.S.C.C.A.N. at 1478. In 1982, the amount that could be collected from the licensees equaled the liability ceiling and thus federal indemnification was phased out. *See id.* Therefore, liability ceiling increases with an increase in the number of licensees available to contribute to the retrospective coverage plan. *See id.* Also, the amount of privately available insurance has since increased to \$160 million dollars. *See id.*

<sup>35</sup> *See* 42 U.S.C. § 2210(n)(2) (1994); Kuntz, *supra* note 13, at 106-07.

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III. THE PROBLEM OF NUCLEAR WASTE

A. *Nuclear Power and Nuclear Waste*

Nuclear power has not become the cheap and clean energy source that was envisioned. Nuclear energy is produced by ‘burning’ uranium fuel.<sup>36</sup> More precisely, a heavy uranium atom is split into two lighter atoms through a process called fission.<sup>37</sup> The total mass of the two resulting lighter atoms is less than the mass of the original uranium atom.<sup>38</sup> The fission process converts this missing mass into energy.<sup>39</sup> A nuclear power plant captures this energy in the form heat, which is then converted into electricity for public use.<sup>40</sup> In a nuclear reactor, the fission process does not take place one atom at a time;<sup>41</sup> rather, the uranium atoms are compressed into fuel pellets.<sup>42</sup> These pellets are stacked into fuel rods that are bundled into assemblies and loaded into reactors where the fission process occurs.<sup>43</sup>

The fission process continues converting uranium until a certain minimal percentage of uranium remains,<sup>44</sup> at which time the fuel no longer can sustain the fission process and must be removed from the reactor.<sup>45</sup> The fission products contained in the spent nuclear fuel continue to emit heat and lethal amounts of radiation.<sup>46</sup> The spent fuel will remain radioactive for tens of thousands of years.<sup>47</sup>

These properties make storage and disposal of spent fuel a complicated

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<sup>36</sup> See RAYMOND L. MURRAY, UNDERSTANDING RADIOACTIVE WASTE 33-35 (Judith A. Powell, ed., 2d ed. 1989). For a more detailed discussion of nuclear energy, see generally SAMUEL GLASSTONE, SOURCEBOOK ON ATOMIC ENERGY (2d ed. 1958).

<sup>37</sup> See MURRAY, *supra* note 36, at 33-35. Fission is often confused with a similar nuclear process, fusion, which generates energy by the combination of two lighter atoms into one larger atom. See *id.* at 36-37.

<sup>38</sup> See GLASSTONE, *supra* note 36, at 390-91.

<sup>39</sup> See *id.*

<sup>40</sup> See MURRAY, *supra* note 36, at 46-50.

<sup>41</sup> See *id.* at 33-35, 40-41 (describing a “chain reaction”).

<sup>42</sup> See *id.* at 62-64.

<sup>43</sup> See *id.* at 62-65. Fuel Rods typically have an operating life of one year. See *id.* at 65.

<sup>44</sup> See *id.* at 65-66.

<sup>45</sup> See *id.*; see also NRC, *High-Level Radioactive Waste*, Aug. 22, 1997 (“After uranium fuel has been used in a reactor for a while, it is no longer as efficient in splitting its atoms and producing heat to make electricity.”), available at <<http://www.nrc.gov/NRC/NUREGS/BR0216/part04.html>>.

<sup>46</sup> See MURRAY, *supra* note 36, at 65-67. The new atoms produced by the fission process are undergoing radioactive decay in order to reach a point of atomic stability. See *id.* at 35. Byproducts of this decay include beta and gamma radiation. See *id.*

<sup>47</sup> See *id.* at 36; see also NRC, *supra* note 45 (describing half-lives for various fission products).

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matter.<sup>48</sup> Currently, most spent fuel is stored underwater in large cooling pools located at the reactor sites.<sup>49</sup> However, this practice provides only a temporary solution. As the pools reach their maximum capacity, the operator must either close the plant,<sup>50</sup> or find an alternative method of storage.<sup>51</sup> One alternative method is to place the fuel in what are known as dry storage casts.<sup>52</sup> Dry storage creates an additional expense the utilities must incur.<sup>53</sup> Also, as reactors reach the extent of their operating lives, complete decommissioning cannot occur until the dangers posed by the spent fuel stored at the reactor site have been addressed.<sup>54</sup>

### B. *The Nuclear Waste Policy Act of 1982*

In recognition of the nation's growing nuclear waste problem,<sup>55</sup> Congress passed the comprehensive Nuclear Waste Policy Act of 1982 ("NWPA").<sup>56</sup> The NWPA charged the federal government with responsibility for developing a permanent method of disposal.<sup>57</sup> However, the Act also requires the nuclear industry to finance the government's permanent solution.<sup>58</sup>

According to the NWPA, the Department of Energy ("DOE")<sup>59</sup> is charged with locating, constructing, and operating a permanent deep-seated geological repository for disposal of the waste or, in short, burying it forever.<sup>60</sup> The DOE

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<sup>48</sup> See MURRAY, *supra* note 36, at 67-71 (discussing the storage of spent fuel).

<sup>49</sup> See NRC, *supra* note 45. Water serves as a shield against radiation emitted from the spent fuel. See *id.*; see also MURRAY, *supra* note 36, at 67-69 (describing fuel rod storage in a spent fuel pool). Alternatively, some utilities place the spent fuel in dry storage casts. See NRC, *supra* note 45.

<sup>50</sup> See Private Fuel Storage, *Alternatives to Skull Valley*, Oct. 28, 1998, available at <<http://www.privatefuelstorage.com/AlternativestoSkullValley.html>>.

<sup>51</sup> See NRC, *supra* note 45.

<sup>52</sup> See *id.* Spent fuel must still be cooled in storage pools prior to placement in dry storage though. See *id.*; see also BOARD, *supra* note 1, at 10 ("The practice at all commercial reactors is to store the newly discharged spent fuel in pools on site for at least five years to allow for cooling.").

<sup>53</sup> See BOARD, *supra* note 1, at 14. Though dry storage itself is a less expensive method than pool storage, utilities did not anticipate the necessity of providing dry storage for the reasons explained below in the section on the NWPA. See *id.*; see *supra* Section III-B.

<sup>54</sup> See BOARD, *supra* note 1, 15.

<sup>55</sup> See 42 U.S.C. § 10131(a) (1994) (Findings and purposes).

<sup>56</sup> See Nuclear Waste Policy Act of 1982, 42 U.S.C. §§ 10101-10226 (1994).

<sup>57</sup> See *id.* § 10131(a)(4).

<sup>58</sup> See *id.*

<sup>59</sup> The DOE is a successor agency to the AEC. See 42 U.S.C. §§ 7101-7382f (1994); see generally Rasmussen, *supra* note 5, at 353-354 (describing the history of the federal agencies charged with the regulation of the nuclear industry).

<sup>60</sup> See 42 U.S.C. § 10131-10145; see also Jon D. Erickson et al., *Monitored Retrievable*

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chose Yucca Mountain in Nevada as the site for the spent fuel repository and Congress amended the NWPA in 1987 to reflect this choice.<sup>61</sup> Due to political opposition and the sheer complexity of the project,<sup>62</sup> Yucca Mountain is not expected to begin receiving spent fuel until 2010.<sup>63</sup> Some believe even this is an optimistic estimate.<sup>64</sup>

In addition to the permanent repository, the NWPA also sought to provide a temporary solution to the nuclear waste problem—Monitored Retrievable Storage (“MRS”).<sup>65</sup> In the original 1982 enactment of the NWPA, Congress instructed the DOE to compile a study on the need for and feasibility of a continuously monitored facility that could temporarily accommodate and provide for the retrieval of high-level nuclear waste.<sup>66</sup> Though the DOE’s study failed to bear fruit,<sup>67</sup> Congress included in the 1987 NWPA amendments a number of provisions directed toward the actualization of a MRS facility.<sup>68</sup> The amendments established the Monitored Retrievable Storage Commission to report on MRS feasibility,<sup>69</sup> directed the DOE to submit a proposal for a MRS facility,<sup>70</sup> and created the Nuclear Waste Negotiator (“Negotiator”).<sup>71</sup>

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*Storage of Spent Nuclear Fuel in Indian Country: Liability, Sovereignty, and Socioeconomics*, 19 AM. INDIAN L. REV. 73, 75-76 (1997) (discussing the legislation regarding the Yucca Mountain repository and progress in developing it).

<sup>61</sup> See Nuclear Waste Policy Amendments Act of 1987, 42 U.S.C. § 10172 (1994).

<sup>62</sup> See BOARD, *supra* note 1, at 24-30 (discussing the development of the permanent repository at Yucca Mountain).

<sup>63</sup> See *id.* at 26; NRC, *High-Level Radioactive Waste Project Background*, July 13, 1999, available at <<http://www.nrc.gov/NMSS/DWM/background.htm>>.

<sup>64</sup> See BOARD, *supra* note 1, at 1 (“[T]he Secretary of Energy projected that a repository may not begin operating until around 2015.”); see generally *Private Fuel Storage, Skull Valley Facility Will Be Temporary*, Oct. 23, 1998 (“The NRC believes there is reasonable assurance that at least one permanent geologic repository will be available by the year 2025.”), available at <<http://www.privatefuelstorage.com/SkullValleytemp.html>>.

<sup>65</sup> See Nuclear Waste Policy Amendments Act of 1987, 42 U.S.C. §§ 10162-10169 (1994).

<sup>66</sup> See 42 U.S.C. § 10161(b). Under this Act, retrieval of the nuclear waste was thought necessary for further processing and preparation before final disposal. See *id.* § 10161(b)(1)(C).

<sup>67</sup> See Erickson et al., *supra* note 60, at 77-78. The DOE’s proposals to site the MRS facility in Tennessee met with considerable opposition and was finally revoked by Congress. See *id.*; see also 42 U.S.C. § 10162(a) (statutory nullification of DOE’s proposal).

<sup>68</sup> See 42 U.S.C. §§ 10162-10169.

<sup>69</sup> See *id.* § 10163(a)(1) (establishing the Monitored Retrievable Storage Commission).

<sup>70</sup> See *id.* § 10161(b) (detailing the required proposal by the Secretary of Energy).

<sup>71</sup> See *id.* §§ 10241-10251 (establishing the Nuclear Waste negotiator); see also S. REP. NO. 100-517, at 2 (1988), reprinted in 1988 U.S.C.C.A.N. 3212, 3213 (discussing the intended role of the Nuclear Waste Negotiator).

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The Negotiator, a new independent entity within the executive branch,<sup>72</sup> was charged with finding a volunteer state or Native American tribe willing to host a MRS site.<sup>73</sup> The Negotiator was authorized to negotiate the terms of an agreement, including financial arrangements, with the volunteers and submit any agreements to Congress for approval.<sup>74</sup> Congress hoped the Negotiator would be able to solicit volunteers to avoid having to impose such a burden on a state.<sup>75</sup>

The original NWPA created the Nuclear Waste Fund (“NWF”) as a mechanism for having private utilities finance the disposal of spent fuel.<sup>76</sup> Financing for the fund is provided by charging producers of commercial nuclear energy one mil (one tenth of .01 cents) for every kilowatt-hour of energy billed.<sup>77</sup> The charge is collected by the DOE and held in account by the Secretary of the Treasury.<sup>78</sup> Expenditures from the NWF are restricted to activities conducted in conjunction with the disposal of radioactive waste.<sup>79</sup> Current estimates place the NWF at approximately \$14 billion.<sup>80</sup>

In exchange for the utilities’ payments into the NWF, the Secretary of Energy was authorized to execute contracts with the utilities regarding the government’s responsibility to dispose of the Nuclear Waste.<sup>81</sup> As mandated by the NWPA and the contracts, disposal was scheduled to begin on January 31, 1998.<sup>82</sup> As the statutory deadline approached, the DOE announced that it would not be able to begin disposal until a later, undetermined date.<sup>83</sup> The

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<sup>72</sup> See 42 U.S.C. § 10242(a).

<sup>73</sup> See *id.* § 10242(b)(2) (“The Negotiator shall attempt to find a State or Indian tribe willing to host a repository or monitored retrievable storage facility . . .”).

<sup>74</sup> See *id.* § 10243 (enumerating the duties of the Nuclear Waste Negotiator).

<sup>75</sup> See Erickson et al., *supra* note 60, at 79-82 (describing the Negotiator and the MRS siting experience).

<sup>76</sup> See Nuclear Waste Policy Act of 1982, 42 U.S.C. § 10222(a)-(d) (1994) (establishing the Nuclear Waste Fund).

<sup>77</sup> See *id.* § 10222(a)(2) (describing the financing of the Nuclear Waste Fund). The Act also contains a provision that assesses a fee for radioactive waste generated before the passage of the NWPA. See *id.* § 10222(a)(3).

<sup>78</sup> See *id.* § 10222(c) (establishing the Nuclear Waste Fund).

<sup>79</sup> See *id.* § 10222(d) (describing the use of the Nuclear Waste Fund).

<sup>80</sup> See Rasmussen, *supra* note 5, at 357 (“At present, over \$14 billion has been paid into NWF, and it is estimated that an additional \$700 million is paid yearly.”).

<sup>81</sup> See 42 U.S.C. § 10222(a)(1) (describing contracts for DOE’s acceptance of spent nuclear fuel).

<sup>82</sup> See *id.* § 10222(a)(5)(B) (“[T]he Secretary, beginning not later than January 31, 1998, will dispose of the high-level radioactive waste or spent nuclear fuel . . .”). A copy of the standard contract between the DOE and the utilities is available in the Code of Federal Regulations. See 10 C.F.R. § 961.11 (2000).

<sup>83</sup> See *Indiana Mich. Power Co. v. DOE*, 88 F.3d 1272, 1274 (D.C. Cir. 1996) (citing Final Interpretation of Nuclear Waste Acceptance Issues, 60 Fed. Reg. 21793, 21793-94

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DOE maintained that because no disposal facility was available, the Department was not bound by the contractual terms.<sup>84</sup> A number of utilities and state regulatory commissions have since brought various lawsuits seeking to either enforce the contracts or to obtain damages from the DOE.<sup>85</sup> The courts consistently have held that although the DOE has a clear obligation to begin disposing of the waste,<sup>86</sup> the utilities are bound by the remedies provided by their contracts.<sup>87</sup> It is still unclear what the nature of these contractual remedies will be.<sup>88</sup>

IV. THE SKULL VALLEY GOSHUTES AND PRIVATE FUEL STORAGE

The Skull Valley Band of Goshutes is a federally recognized Indian tribe native to the southwest.<sup>89</sup> Related to the large Shoshonean Indian group, the Goshutes etched out an existence in these desolate conditions by hunting game and harvesting the available wild vegetation.<sup>90</sup> Though often self-subsistent, Goshute families nevertheless organized and cooperated to form a village.<sup>91</sup> Tribal membership today stands at approximately 125 members.<sup>92</sup> The Tribal government consists of an Executive Committee elected by Tribal members every four years.<sup>93</sup> Since its creation in 1917, the Goshutes have been confined to their 18,000-acre reservation in western Utah,<sup>94</sup> approximately seventy miles from Salt Lake City.<sup>95</sup>

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(1995)).

<sup>84</sup> *See id.*

<sup>85</sup> *See Northern States Power Co. v. DOE*, 128 F.3d 754, 758 (D.C. Cir. 1997) (seeking writ of mandamus forcing DOE to begin disposing of nuclear waste); *Indiana Mich. Power Co.*, 88 F.3d at 1273 (seeking declaration regarding DOE's obligations under contract); *Northern States Power Co. v. United States*, 43 Fed. Cl. 374, 376 (1999) (seeking monetary damages for DOE's breach of contract); *see also* BOARD, *supra* note 1, at 16 (describing court actions against the DOE to begin accepting spent fuel).

<sup>86</sup> *See Indiana Mich. Power Co.*, 88 F.3d at 1274-77.

<sup>87</sup> *See Northern States Power Co.*, 128 F.3d at 759; *Northern States Power Co.*, 43 Fed. Cl. at 388.

<sup>88</sup> *See generally Spent Fuel Utilities Reject DOE Proposal to End Spent Fuel Impasse*, NUCLEAR WASTE NEWS, June 4, 1998, available in 1998 WL 10098097 (discussing the utilities' rejection of a settlement with the DOE).

<sup>89</sup> *See Utah Div. of Indian Affairs, Goshute Tribe*, Sept. 1, 2000, available at <<http://www.dced.state.ut.us/indian/Today/Goshute.html>> [hereinafter *Goshute Tribe*].

<sup>90</sup> *See id.*

<sup>91</sup> *See id.*

<sup>92</sup> *See id.*

<sup>93</sup> *See id.*

<sup>94</sup> *See id.*

<sup>95</sup> *See Fialka, supra* note 5.

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The reservation contains few natural resources<sup>96</sup> and is in close proximity to a nerve gas incinerator, a low-level radioactive waste dump, a coal burning power plant, and a magnesium production plant.<sup>97</sup> Thus, the reservation's potential for economic development is limited.<sup>98</sup>

The Goshutes' initial interest in hosting a spent fuel storage facility arose from the tribe's dealings with the federal government.<sup>99</sup> In 1991, the Negotiator began contacting state and tribal governments seeking a volunteer to host a federal MRS facility.<sup>100</sup> Initial grants of \$100,000 were made available to those interested in studying the feasibility of maintaining a MRS site on their land.<sup>101</sup> Twenty applications, including one from the Skull Valley Goshutes, were received for the feasibility grants.<sup>102</sup> The Goshutes used this money to study nuclear waste projects in Europe and Japan.<sup>103</sup> After continuing negotiations and additional grants, the Goshutes and three other Tribes remained in contact with the Negotiator.<sup>104</sup> However, in 1994, Congress allowed authorization for the Negotiator to expire.<sup>105</sup> Negotiations between the tribes and the federal government terminated soon after.<sup>106</sup>

Concerned that the federal government would be unable to dispose of their spent fuel before they exceeded their on-site storage capacity, a number of nuclear utilities formed a consortium to seek out alternative means of storage.<sup>107</sup> The consortium, Private Fuel Storage ("PFS"),<sup>108</sup> approached the

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<sup>96</sup> See *Goshute Tribe*, *supra* note 89.

<sup>97</sup> See William Claiborne, *Utah Resisting Tribe's Nuclear Dump*, WASH. POST, Mar. 2, 1999, at A3 ("[T]he Goshutes' reservation is surrounded by the detritus of weapons of mass destruction and other hazardous materials."); see also Fialka, *supra* note 5 ("Some of the nation's most dangerous materials are stored or dumped on the borders of [the Goshutes'] reservation."); Rasmussen, *supra* note 5, at 339-41.

<sup>98</sup> See *Goshute Tribe*, *supra* note 89.

<sup>99</sup> See Fialka, *supra* note 5.

<sup>100</sup> See Erickson et al., *supra* note 60, at 79.

<sup>101</sup> See *id.*

<sup>102</sup> See *id.* at 79-81 & tbl.1.

<sup>103</sup> See Fialka, *supra* note 5; see also Woolf, *supra* note 9 ("Using federal grants, [tribal leaders] traveled to Japan, France, England, Sweden and Canada to learn how other nations handled radioactive waste.").

<sup>104</sup> See Erickson et al., *supra* note 60, at 80.

<sup>105</sup> See Gowda & Easterling, *supra* note 10, at 236.

<sup>106</sup> See *id.*

<sup>107</sup> See Rasmussen, *supra* note 5, at 343 (describing the history of Private Fuel Storage).

<sup>108</sup> The consortium is a limited liability company comprised of the following utilities: Northern States Power (Minnesota), Illinois Power (Illinois), American Electric Power (Ohio), Southern Nuclear Operation Company (Alabama), Consolidated Edison (New York), GPU Nuclear Corp. (New Jersey), Southern California Edison (California), and Genoa Fuel Tech, Inc. (Wisconsin). See Private Fuel Storage, *People Are Asking . . .*, Feb. 15, 2000, available at <<http://www.privatefuelstorage.com/qa.html>>.

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Goshutes shortly after the tribe's negotiations with the federal government ended.<sup>109</sup> PFS was interested in constructing a privately-owned and -operated facility, similar to the unrealized MRS facilities, to store the spent fuel produced by the consortium's members.<sup>110</sup> The proposed facility would be located on reservation land leased to the consortium by the tribe.<sup>111</sup>

The facility PFS plans to construct is commonly referred to as an Independent Spent Fuel Storage Installation ("ISFSI").<sup>112</sup> The ISFSI would store the spent fuel rod in sixteen foot-tall, air-cooled, dry storage casks constructed from steel and concrete.<sup>113</sup> Each cask would contain about ten tons of spent fuel rods and would sit upon a concrete bed above ground in the desert.<sup>114</sup> The proposed facility could accommodate up to 4,000 casks, or 40,000 tons of spent fuel.<sup>115</sup> In return, the Goshutes would profit from both the large lease revenue and the estimated forty permanent and 500 temporary construction jobs generated by the ISFSI.<sup>116</sup>

The State of Utah, in which the entire Goshute reservation is located, is vehemently opposed to the ISFSI proposal.<sup>117</sup> Governor Michael Leavitt characterized the issue as one of a politically weak western state becoming the dumping ground for wealthy eastern utilities.<sup>118</sup> However, the State's ability to oppose the facility is constrained. Native American tribes located on reservation land within the United States possess limited sovereign status.<sup>119</sup> Though a complete discussion of the jurisdictional issues arising from the placing of a nuclear waste facility on reservation land is beyond the scope of this note, it is important to observe that "[s]tate law generally is not applicable

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<sup>109</sup> See Fialka, *supra* note 5.

<sup>110</sup> See *id.*; see also Rasmussen, *supra* note 5, at 343-44 (describing the Goshutes' relations with PFS).

<sup>111</sup> See Claiborne, *supra* note 97.

<sup>112</sup> See 10 C.F.R. § 72.3 (2000) ("[An] independent spent fuel storage installation or ISFSI means a complex designed and constructed for the interim storage of spent nuclear fuel and other radioactive materials associated with spent fuel storage.").

<sup>113</sup> See Claiborne, *supra* note 97.

<sup>114</sup> See Sue Vorenberg, *Leavitt, Goshute Leaders Escalate SF Storage Struggle*, NUCLEAR WASTE NEWS, Apr. 1 1999, available in 1999 WL 10308984 (describing the physical characteristics of the facility).

<sup>115</sup> See *id.*

<sup>116</sup> See Claiborne, *supra* note 97.

<sup>117</sup> See *id.*; Fialka, *supra* note 5.

<sup>118</sup> See Claiborne, *supra* note 97; see also Utah Dep't of Env'tl. Quality, *Opposition to High Level Nuclear Waste Storage*, July 22, 1997, available at <[http://www.deq.state.ut.us/Hlw\\_fact.htm](http://www.deq.state.ut.us/Hlw_fact.htm)>.

<sup>119</sup> See generally RENNARD STRICKLAND, ET AL., EDS., FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 207-75 (1982) (discussing Indian sovereignty and limits thereon).

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to Indian affairs within the territory of an Indian tribe . . . .”<sup>120</sup> Thus, it is unlikely that Utah can directly prevent the construction of the ISFSI facility.

However, the state has taken steps to deter construction of the facility, including the passage of legislation stripping PFS of its limited liability status,<sup>121</sup> the annexation of lands surrounding the reservation to create a “jurisdictional moat,”<sup>122</sup> and the filing of a complaint against the Department of the Interior (“DOI”) to allow the State to participate in proceedings concerning the facility.<sup>123</sup> None of this has met with much success and Utah’s chances at preventing the storage of nuclear waste within its borders appear bleak.<sup>124</sup>

Yet, the project is far from complete. Due to the fiduciary relationship which exists between the federal government and the Native American tribes, the Department of the Interior (“DOI”) must approve any lease of reservation land.<sup>125</sup> In 1997, the Goshutes submitted a copy of the lease negotiated with PFS to the DOI.<sup>126</sup> Additionally, PFS is in the process of obtaining the appropriate NRC license necessary for construction of the ISFSI facility.<sup>127</sup> The estimated completion date for the facility is 2002.<sup>128</sup>

The Goshutes are not the first Native American tribe to entertain the possibility of hosting a storage facility for spent nuclear fuel.<sup>129</sup> Like the Goshutes, the Mescalero Apaches of New Mexico were participants in the Nuclear Waste Negotiator’s attempt to site a federal MRS facility before the government’s program fell apart.<sup>130</sup> Afterwards, the Mescaleros entered into

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<sup>120</sup> *Id.* at 259.

<sup>121</sup> See Dan Harrie, *Leavitt Erects New Obstacle to Goshute Nuclear Storage*, SALT LAKE TRIB., Mar. 19, 1999, at B2, available in 1999 WL 3352473.

<sup>122</sup> See Claiborne, *supra* note 97; Vorenberg, *supra* note 114.

<sup>123</sup> See *Utah v. United States Dep’t of Interior*, 45 F. Supp. 2d 1279, 1282 (D. Utah 1999) (involving, specifically, Utah suit seeking a declaration that it was entitled to participate in the DOI’s approval of the Goshutes’ lease to PFS).

<sup>124</sup> *Cf.* Rasmussen, *supra* note 5, at 347. Additionally, Utah lost its suit against the Department of the Interior to gain standing in the lease approval proceedings. See *Utah*, 45 F. Supp. 2d at 1282-84.

<sup>125</sup> See *Utah*, 45 F. Supp. 2d at 1281-82 (“Pursuant to [25 U.S.C.] § 415(a), any lease of trust lands must be approved by the Secretary of the Interior . . .”).

<sup>126</sup> See *id.* Approval of the lease is contingent upon NRC approval of the construction of the facility. See *id.*

<sup>127</sup> See Private Fuel Storage, *The Project*, Mar. 2, 2000, available at <<http://privatefuelstorage.com/theproject.htm>>.

<sup>128</sup> See *id.*

<sup>129</sup> See Michael Satchell, *Dances with Nuclear Waste*, U.S. NEWS & WORLD REP., Jan. 8, 1996, at 29, 29.

<sup>130</sup> See *id.* at 30; see also Erickson et al., note 60, at 79-81 (describing the Negotiator and the MRS siting experience).

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serious negotiations with a number of nuclear utilities concerning the storage of spent fuel on their reservation.<sup>131</sup> However, the deal fell through after two years of talks.<sup>132</sup> Liability for the facility was one factor that prevented an agreement from being reached.<sup>133</sup>

V. APPLICABILITY OF THE PRICE-ANDERSON ACT TO PRIVATE FUEL STORAGE'S ISFSI

One concern regarding the ISFSI project is whether Price-Anderson indemnity will apply to a private facility. The relevant laws that provided for the creation of a government-run MRS also resolved the issue of indemnification for such a facility.<sup>134</sup> Under the original NWPA scheme, the DOE was to construct and operate the MRS facility.<sup>135</sup> The Secretary of Energy was, by June 1, 1985, to submit to Congress a study regarding and a proposal for a MRS facility that included recommendations for potential sites and facility designs.<sup>136</sup> An independent Monitored Retrievable Storage Commission was to review the Secretary's proposal and submit a report to Congress by November 1, 1989.<sup>137</sup> The report was to include a technical evaluation of the Secretary's proposal and information regarding parties that would be affected by the Secretary's proposed sites.<sup>138</sup> The Secretary was then to select a site and submit a license application to the NRC for the construction of the MRS facility.<sup>139</sup>

Any liability arising from a nuclear incident at a DOE operated MRS facility would be covered by the Price Anderson Act.<sup>140</sup> Specifically, Section 2210(d)(1)(B)(ii) provides that any "[p]ublic liability arising out of nuclear waste activities . . . shall be compensated from the Nuclear Waste Fund . . ."<sup>141</sup> Additionally, the statutes governing the MRS are subject to many of the provisions set out in the statutes that govern the development of the permanent repository.<sup>142</sup> These sections instruct the Secretary to enter into

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<sup>131</sup> See Satchell, *supra* note 129, at 30.

<sup>132</sup> See Elaine Hiruo, *Tired of Waiting, 11 Utilities Sign Lease With Goshutes for Storage Facility*, NUCLEAR FUEL, Jan. 27, 1997, available in 1997 WL 9379906.

<sup>133</sup> See *id.* ("Key stumbling blocks there . . . involved the issues of liability, money, and location.").

<sup>134</sup> See Nuclear Waste Policy Amendments Act of 1988, 42 U.S.C. §§ 10161-10169 (1994) (discussing the framework for the MRS project).

<sup>135</sup> See *id.* § 10161(a)(2).

<sup>136</sup> See *id.* § 10161(b).

<sup>137</sup> See *id.* § 10163(a).

<sup>138</sup> See *id.* § 10163(a)(1)(C)-(2).

<sup>139</sup> See *id.* §§ 10165(a), 10168.

<sup>140</sup> See Price-Anderson Act of 1957, 42 U.S.C. § 2210(d) (1994).

<sup>141</sup> *Id.* § 2210(d)(1)(B)(ii).

<sup>142</sup> See *id.* § 10161(h) ("Any facility authorized pursuant to this section shall be subject

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written agreements, specifying that the Secretary will assist states (or any affected Native American tribes) in resolving liability concerns arising from nuclear accidents.<sup>143</sup> Finally, while forming the Price-Anderson Amendments Act of 1988, Congress itself articulated its intention that Price-Anderson protection apply to the MRS facility.<sup>144</sup>

Though not explicitly stated, an examination of the relevant laws and regulations indicates that Price-Anderson indemnification will also cover the private ISFSI facility operated by PFS. Any private entity planning to construct and operate an ISFSI facility must first obtain a license from the NRC.<sup>145</sup> Under Price Anderson, the NRC may require licensees to maintain financial protection, likely in the form of private insurance.<sup>146</sup> Section 2210(c) directs that:

[T]he Commission shall, with respect to licenses . . . for which it requires financial protection of less than \$560,000,000, agree to indemnify and hold harmless the licensee and other persons indemnified . . . from public liability arising from nuclear incidents which is in excess of the level of financial protection required of the licensee.<sup>147</sup>

How much insurance the NRC will require PFS to maintain is not known. Section 2210(b) allows the NRC to adjust the amount of required insurance for licensees whose nuclear activities are not for the purpose of generating power, such as university research reactors.<sup>148</sup> Because an ISFSI is strictly a storage facility, and thus not subject to a melt-down or capable of generating a profit, the NRC is unlikely to require PFS to maintain a substantial amount of private insurance. However, because the NRC would require PFS to obtain a license to build and operate the ISFSI facility, it would appear that Price-Anderson indemnity applies.

Other aspects of the Price-Anderson Act indicate that ISFSI facilities may not be indemnified. Section 2014(q) of the Act defines “nuclear incidents” as “any occurrence . . . causing . . . sickness, disease or death, or loss of or damage to property, or loss of use of property arising out of or from the radioactive, toxic, explosive, or other hazardous properties of source, special

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to the provisions of sections 10135, 10136(a), 10136(b), 10136(d), 10137, and 10138 of this title.”).

<sup>143</sup> See Nuclear Waste Policy Act of 1982, 42 U.S.C. § 10137(c)(5) (1994).

<sup>144</sup> See S. REP. NO. 100-218, at 10 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1476, 1485 (“[T]he bill clarifies that DOE’s authority to indemnify its contractors extends to those contractual activities involving the storage, transportation, and disposal of spent nuclear fuel, high-level radioactive waste, and transuranic waste.”).

<sup>145</sup> See *generally* 10 C.F.R. pt. 72 (2000).

<sup>146</sup> See 42 U.S.C. § 2210(a).

<sup>147</sup> *Id.* § 2210(c).

<sup>148</sup> See *id.* § 2210(b)(1)(B)-(C).

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nuclear, or byproduct material . . . .”<sup>149</sup> Arguably, spent nuclear fuel is not properly classified as “source, special nuclear or by-product material.”<sup>150</sup> In fact, high-level radioactive waste and spent nuclear fuel are defined elsewhere.<sup>151</sup> Technically then, any accident or mishap involving such waste might not constitute a “nuclear incident” indemnified under Price-Anderson.

However, as a practical matter, and in accordance with the spirit of the definition, the NRC should consider spent nuclear fuel “source material” for all intended purposes.<sup>152</sup> Price- Anderson would then indemnify the ISFSI from nuclear incidents via section 2210(c).<sup>153</sup> Furthermore, the expansive interpretation the Supreme Court has given Price-Anderson also supports the contention that the Act will indemnify a private storage facility.<sup>154</sup> The Act’s provisions indemnifying DOE-operated MRS sites, when analyzed under this expansive interpretation, indicate that Price Anderson was meant to indemnify all high-level nuclear waste facilities. Lastly, indemnification of a private ISFSI facility is in accordance with Congress’s expressed desire to include nuclear waste activities within the ambit of the Price Anderson Act.<sup>155</sup> This note will therefore assume that Price-Anderson indemnifies the proposed PFS facility on the Goshute Reservation.

VI. EXEMPTION OF THE SKULL VALLEY GOSHUTES FROM LIABILITY UNDER  
THE PRICE-ANDERSON ACT

Assuming that the Price-Anderson Act will indemnify Private Fuel Storage’s ISFSI facility, it must be determined how this will protect the Goshutes and their reservation. The NRC license authorizing the facility will be in PFS’s name, which indicates that only PFS will be indemnified in the event of a nuclear incident.<sup>156</sup> Ideally, Price-Anderson’s liability channeling provisions would indemnify the Goshutes as well.<sup>157</sup> However, a close

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<sup>149</sup> *Id.* § 2014(q).

<sup>150</sup> *Id.*

<sup>151</sup> *See id.* § 2014(dd). This subsection instructs the reader to refer to section 10101 of the NWPA for definitions of high-level radioactive waste and spent nuclear fuel. *See id.*

<sup>152</sup> *See id.* § 2014(z) (defining “source material” as “uranium, thorium, or any other material which is determined by the Commission . . . to be source material . . .”).

<sup>153</sup> *See id.* § 2210(c).

<sup>154</sup> *See Kuntz, supra* note 13, at 107. “A claim growing out of any nuclear incident is compensable under the terms of the Amendments or it is not compensable at all.” *Id.* (quoting *In re TMI Litig.* Case Consol. II, 940 F.2d 832, 854-55 (3d Cir. 1991)).

<sup>155</sup> *See* S. REP. NO. 100-70, at 12 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1424, 1425.

<sup>156</sup> *See* 42 U.S.C. § 2210(c) (mandating that the NRC shall agree to indemnify licensees).

<sup>157</sup> *See* S. REP. NO. 100-218, at 2 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1476, 1477 (“[A]ny person who might be held liable . . . including not only the party directly engaged in the activity that results in the nuclear incident but any other person as well, was to be indemnified under the [“channeling of liability” provisions of the] Price Anderson

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examination of the Act's language indicates that the Goshutes may not be covered.

Indemnification of the Goshutes depends in part on their status under the lease agreement. Section 2210(r) of the Price Anderson Act explicitly exempts the bona fide lessor of a "production or utilization facility" from any legal liability arising from a nuclear incident at such a facility unless the lessor is in "actual possession and control" of the facility.<sup>158</sup> Although this seems to indicate that Congress intended all liability to be channeled toward the NRC licensed operator, it is not clear whether this provision will exempt the Goshutes and their reservation. The plain language of section 2210(r) explicitly exempts only the lessor of a "production or utilization facility."<sup>159</sup> The specific terms of the lease are not available, but the Goshutes likely will be leasing only the land for the facility.<sup>160</sup> PFS will own the ISFSI.<sup>161</sup> This strict textualist analysis suggests that section 2210(r) and its exemption provision may not apply to the Goshutes.

Most likely, however, this differentiation will be of little substance. Many mines, mills, and other facilities involved in the nuclear industry are located on American Indian lands.<sup>162</sup> In the few nuclear tort cases that have occurred within these facilities, courts have consistently channeled liability toward to the indemnified private entity operating the facility.<sup>163</sup>

The language of section 2210(r) presents an additional obstacle to indemnifying the Goshutes from potential liability. An ISFSI facility storing spent nuclear fuel technically does not fall under the Price-Anderson definition of a "production or utilization facility."<sup>164</sup> For the purposes of the Act, a "production facility" is any equipment capable of producing special nuclear material,<sup>165</sup> while a "utilization facility" is any equipment capable of making

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System . . .").

<sup>158</sup> 42 U.S.C. § 2210(r).

<sup>159</sup> *Id.*

<sup>160</sup> *See* Private Fuel Storage, *supra* note 108.

<sup>161</sup> *See id.*

<sup>162</sup> *See* Kuntz, *supra* note 13, at 103.

<sup>163</sup> *See, e.g.,* El Paso Natural Gas Co. v. Neztosie, 526 U.S. 473, 476-79 (1999) (involving a uranium mine located on a Navajo Reservation); Kerr-McGee Corp. v. Farley, 115 F.3d 1498, 1500-01, 1508-09 (10th Cir. 1997) (involving a uranium processing mill located on a Navajo Reservation).

<sup>164</sup> *See* 42 U.S.C. § 2014(v), (cc) (defining respectively the terms production facility and utilization facility).

<sup>165</sup> *See id.* § 2014(v). The statute defines "production facility" as:

(1) [A]ny equipment or device determined by rule of the Commission to be capable of the production of special nuclear material in such quantity as to be of significance to the common defense and security, or in such manner as to affect the health and safety of the public; or (2) any important component part especially designed for such equipment or device as determined by the Commission.

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use of special nuclear material.<sup>166</sup> Under a strict interpretation of section 2210(r), the provisions exempting lessors would not apply to ISFSI facilities, thus leaving the Goshutes exposed to liability.

Such a result would be highly undesirable. Failing to extend protection to the tribe is inconsistent with Price-Anderson's liability channeling provision, the purpose of which is to ensure adequate and efficient public compensation.<sup>167</sup> Furthermore, the absence of Price-Anderson protection will surely act as deterrent towards the Goshutes' critical participation in the nuclear storage project. Ambiguity as to the respective liabilities of those involved in the Mescalero Apaches' spent fuel storage project was one of the key factors that led to its collapse.<sup>168</sup>

The uncertainty as to whether section 2210(r) will cover the Goshutes can be resolved by amending the Price-Anderson Act to include the term "Nuclear Waste Storage Facility," defined at a minimum as an ISFSI.<sup>169</sup> Section 2210(r) of the Act then should be amended to read: "No person under a bona fide lease of any utilization, . . . production, [or nuclear waste storage facility] shall be liable by reason of an interest as lessor . . ." <sup>170</sup> Because the Price-Anderson Act pre-empts state tort laws which conflict with the Act's provisions,<sup>171</sup> such an amendment would completely immunize the Goshutes and any similarly situated lessors against liability arising from a nuclear incident occurring on their land.

VII. EXTENDED OPERATION AND DECOMMISSIONING OF THE ISFSI FACILITY

A. *Concerns Over the Extended Operation and Decommissioning of a Spent Fuel Storage Facility*

Assuming the Price-Anderson Act does apply to the ISFSI facility, there remains the question of what will occur when the facility's lease expires.

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*Id.*

<sup>166</sup> See *id.* § 2014(cc). The statute defines "utilization facility" as:

[A]ny equipment or device . . . determined by rule of the Commission to be capable of making use of special nuclear material . . . or peculiarly adapted for making use of atomic energy in such quantity as to be of significance to the common defense and security, or in such manner as to affect the health and safety of the public . . .

*Id.*

<sup>167</sup> See S. REP. NO. 100-70, at 14 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1424, 1426-27.

<sup>168</sup> See HIRUO, *supra* note 132.

<sup>169</sup> The definitions used in the Price-Anderson Act currently do not define "Nuclear Waste Storage Facility" as an ISFSI. See 42 U.S.C. § 2014.

<sup>170</sup> *Id.* § 2210(r).

<sup>171</sup> See *id.* § 2014(hh); Kuntz, *supra* note 13, at 107-08 ("[A]ll claims against a party concerning a nuclear incident fall under the auspices of the Price-Anderson Act and must be tried according to the federal statute.").

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Though intended only to be temporary, there exists an obvious concern that the spent fuel will remain on the reservation well beyond the lease term due to the possibility that a permanent repository for the spent fuel will not be in place.<sup>172</sup> Furthermore, the establishment of a temporary facility may have the unintended effect of reducing the perceived importance of and need for a permanent repository.<sup>173</sup> This could result in further delays in the development of the repository at Yucca Mountain, requiring spent fuel to remain in temporary storage.

A related concern is that if the temporary storage facility is required to operate long past its planned existence, the qualified workers and necessary financing required to maintain it might dissipate.<sup>174</sup> Additionally, even once the nuclear waste is moved to a permanent repository at the end of the lease, it may still leave the land around the facility contaminated, with no available financing for clean-up and continued monitoring.

The various laws and regulations governing the construction and operation of the federal MRS and private ISFSI facilities attempt to address the problematic concerns of extended operation and final decommissioning of the facility.<sup>175</sup> Given the inherent distinctions between the two schemes, the federal MRS scheme may be better suited to protect the Goshutes and their reservation.

#### B. *Operation and Decommissioning of a Government-Operated MRS Facility*

Regarding the above, DOE-operated MRS facilities as envisioned by the NWPA had significant advantages over a private ISFSI. Anticipating the possibility that a permanent repository might not exist when the temporary facility ceases to function, the NWPA conditioned construction of a MRS on the issuance of a license for construction of a permanent repository.<sup>176</sup> This limitation provides at least some assurance that a permanent repository will be in place and that any operating MRS facility would be temporary.

Additionally, the NWPA already has amassed substantial sums to pay for

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<sup>172</sup> See Claiborn, *supra* note 97 (“[The] director of Utah’s Department of Environmental Quality . . . said that because of uncertainties involved in Nevada’s Yucca Mountain repository and its certification as environmentally sound, the proposed Skull Valley dump cannot be viewed as a temporary facility.”). Congress voiced such a concern in formulating the MRS provisions of the NWPA. See H.R. REP. NO. 97-491, pt.1, at 42 (1982), *reprinted in* 1982 U.S.C.C.A.N. 3792, 3808.

<sup>173</sup> See H.R. REP. NO. 97-491, pt.1, at 42, *reprinted in* 1982 U.S.C.C.A.N. at 3808.

<sup>174</sup> See *id.*

<sup>175</sup> See, e.g., 10 C.F.R. § 72.30(a) (2000) (requiring a decommissioning proposal plan to be submitted with each application for a license to construct and operate an ISFSI or MRS).

<sup>176</sup> See Nuclear Waste Policy Amendments Act of 1988, 42 U.S.C. § 10168(d)(1) (1994).

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the decommissioning and clean up.<sup>177</sup> The portion of the NWPA creating the NWF provides that expenditures may be made for “decommissioning, and post-decommissioning maintenance and monitoring of any . . . monitored retrievable storage facility . . .”<sup>178</sup> In essence, the federal government has already collected funds for decommissioning a MRS facility.

Perhaps most importantly, under the NWPA scheme, the responsibility for the MRS facility and the spent nuclear fuel remains with the federal government.<sup>179</sup> Despite past mistreatment of Native Americans by the United States government,<sup>180</sup> federal responsibility for a spent fuel storage facility located on an Indian reservation is the best method to insure the safety and well-being of the tribal hosts. The DOE is the most competent and accountable organization to operate the MRS if, after the terms of the lease have expired, no permanent repository exists to receive the spent fuel. Additionally, the DOE will be in the best position to obtain the level of expertise required to care for the facility. The Treasury Department, by administering the NWF, may adequately finance DOE operation of the MRS.<sup>181</sup> Furthermore, the DOE’s responsibility for the MRS would provide an additional incentive for the agency to fulfill its duty in developing a permanent repository.<sup>182</sup>

*C. Operation and Decommissioning of a Privately Operated ISFSI Facility*

PFS’s high-level nuclear waste facility, though a private development, is subject to strict federal regulation.<sup>183</sup> To build and operate an ISFS facility, one must obtain a license from the NRC for a renewable term not to exceed twenty years.<sup>184</sup> Many of the conditions and obligations with which the licensee must comply address both the long-term concerns mentioned above and the always prevalent concern over safety.<sup>185</sup> For instance, license applications must contain information regarding the facility’s technical

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<sup>177</sup> See Nuclear Waste Policy Act of 1982, 42 U.S.C. § 10222(a)-(c) (1994) (creating the Nuclear Waste Fund).

<sup>178</sup> *Id.* § 10222(d)(1).

<sup>179</sup> See *id.* § 10161(b)(2)(A).

<sup>180</sup> See generally STRICKLAND ET AL., *supra* note 119, 207-16 (describing the various government policies toward the Indian tribes including forced removal and termination of tribes).

<sup>181</sup> See 42 U.S.C. § 10222(c), (d)(1) (stating that expenditures from the Nuclear Waste Fund may be made for operation of and Monitored Retrievable Storage facility).

<sup>182</sup> See 42 U.S.C. § 10131(a)(4) (“[T]he Federal Government has the responsibility to provide for the permanent disposal of high-level radioactive waste and such spent nuclear fuel . . .”).

<sup>183</sup> See 10 C.F.R. pt. 72 (2000).

<sup>184</sup> See *id.* § 72.42(a).

<sup>185</sup> See generally *id.* pt. 72.

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specifications,<sup>186</sup> the applicant's technical qualifications,<sup>187</sup> an estimate of the cost to construct and operate the facility,<sup>188</sup> an emergency plan in the event of an accident,<sup>189</sup> an environmental study,<sup>190</sup> and a proposed decommissioning plan.<sup>191</sup> Minimum requirements to satisfy these conditions are set out elsewhere in the regulations.<sup>192</sup>

As a private entity, one would expect PFS to be subject to the financial fluctuations and economic hazards of business. Many of the regulations seek to minimize the harm these financial hazards pose to the long-term operation and ultimate decommissioning of the facility. Specifically, the required decommissioning plan "must include . . . information on proposed practices and procedures for the decontamination of the site and facilities and for disposal of residual radioactive materials after all spent fuels or high-level waste has been removed . . ." <sup>193</sup> The decommissioning plan must also provide a financing method to fund the decommissioning and clean-up of the facility site.<sup>194</sup> Such financing must be in relation to a required decommissioning cost estimate that may be periodically updated over the existence of the ISFSI.<sup>195</sup> The regulations direct that the facility's decommissioning fund, either in the form of a surety method, external sinking fund, or prepaid trust, must be segregated from its other assets and may not be liquidated for other reasons.<sup>196</sup>

This information, along with the rest of the application, is subject to review and approval by the NRC before a license will issue.<sup>197</sup> Furthermore, the license application is then made available for public inspection<sup>198</sup> and subjected to public hearings.<sup>199</sup> Furthermore, the NRC may revoke the license for any violation of the conditions or terms of the license.<sup>200</sup>

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<sup>186</sup> See *id.* § 72.26.

<sup>187</sup> See *id.* § 72.28(a).

<sup>188</sup> See *id.* §§ 72.22(e)(1)-(2).

<sup>189</sup> See *id.* § 72.32.

<sup>190</sup> See *id.* § 72.34.

<sup>191</sup> See *id.* § 72.30.

<sup>192</sup> See generally *id.* pt. 72.

<sup>193</sup> *Id.* § 72.30(a). The regulations also contain detailed requirements regarding the decommissioning of such facilities. See *id.* § 72.54.

<sup>194</sup> See *id.* § 72.30(b)-(c).

<sup>195</sup> See *id.* § 72.30(b).

<sup>196</sup> See *id.* § 72.30(c).

<sup>197</sup> See *id.* § 72.40.

<sup>198</sup> See *id.* § 72.20.

<sup>199</sup> See *id.* § 72.46(a). Any subsequent amendments are also subject to public hearings. See *id.* § 72.46(b)(1).

<sup>200</sup> See *id.* § 72.60(b)(3); see also § 72.44(b)(2) ("The license shall be subject to revocation, suspension, modification, or amendment in accordance with the procedures

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Despite these regulations, the disadvantage of the limited finances of a private ISFSI owner still exists. The facility is not a profit making enterprise itself, but rather an external cost of the nuclear power industry paid for by the members of PFS. In the future, as utilities continue to decommission nuclear reactors, one would expect less financing to be available for maintaining and operating the nuclear waste facility. If the facility is forced to extend operations past its planned service life because no permanent repository exists, resources will be drained from PFS. Essentially there is no guarantee that PFS will remain solvent and no contingency plan currently exists for PFS's insolvency.<sup>201</sup>

*D. Recommendation for Insuring Extended Operation and Decommissioning of the ISFSI Facility*

One solution to the risk posed by the facility's potential for financial instability is to amend the federal statutes addressing the nuclear industry so that the benefits of the NWPA program would apply to the private facility whose owners have the largest incentive to actually develop. Specifically, either the Price-Anderson Act or the provisions creating the Nuclear Waste Fund should be amended to guarantee the decommissioning costs and provide the necessary financial support in the event PFS is no longer financially capable of operating and maintaining the facility. Under this scheme, if PFS financially collapses, the NRC would assume the role of supervising the continued operation and final decommissioning of the facility.

Supervision here envisions stricter control and more active participation by the NRC in the operation of the facility than the aforementioned regulatory role currently provides. NRC supervision, as opposed to outright replacement of existing PFS personnel, is desirable under the assumption that these employees are already familiar with the technical operation of the facility and their retention would therefore be advantageous. Financing for the NRC's activities would be provided by either of the two utility-funded sources mentioned above.

Amending the NWF, rather than the Price-Anderson Act, would better safeguard against financial instability. First, Price-Anderson was designed to address the potential liability involved in the private development of nuclear energy, not for the continuous funding of an industrial operation.<sup>202</sup> Second, as the number of nuclear power utilities decline, sources for the retrospective insurance plan disappear.<sup>203</sup> Essentially, the Price-Anderson Act faces

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provided by the Atomic Energy Act of 1954, as amended, and Commission regulations.”).

<sup>201</sup> Part 72 of the Code of Federal Regulations, on storage of spent nuclear fuel, provides as a condition of the license both a bankruptcy notice requirement and regulations governing license transfers to creditors. *See* 10 C.F.R. § 72.44(b)(6)(i); *id.* § 72.52(b)-(c).

<sup>202</sup> *See* Price Anderson Act of 1957, 42 U.S.C. § 2210 (1994).

<sup>203</sup> A general assumption has been made throughout this note that no new reactors will be

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financial problems similar to PFS's long-term funding of ISFSI.

The NWF, on the other hand, has already amassed a substantial sum now administered by the Secretary of the Treasury.<sup>204</sup> Initially, the fund was created in part to finance a DOE-operated MRS.<sup>205</sup> Structurally, then, it should be adequate to finance the ISFSI if necessary. In the event of a PFS bankruptcy, the NRC could easily make periodic withdrawals from the NWF to cover the cost of operating the ISFSI. This would insure that if the facility is forced to extend its operating life, technically qualified personnel can be retained, maintenance and upgrades can be funded, and funds will exist to extend the lease agreement until a permanent repository is developed. Preventing the facility from ever becoming an un-piloted hazard would thus further the public interest.

### VIII. RECOVERY UNDER THE PRICE-ANDERSON ACT

#### A. *Jurisdiction under the Price-Anderson Act*

Assuming that the Price-Anderson Act indemnifies the facility, it is important to understand what effect the Act may have on the tribe's attempt to recover for damages caused by a nuclear incident. The Price-Anderson Act affects what would otherwise be a usual tort suit in a significant number of ways.<sup>206</sup> For instance, Price-Anderson substantially alters the issue of jurisdiction,<sup>207</sup> providing federal district courts with original (but not exclusive) jurisdiction over liability claims arising from nuclear incidents.<sup>208</sup>

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constructed in the future. *See generally* BOARD, *supra* note 1, at 24-26 (discussing only the disposal of spent fuel from existing reactors). Funding for Price-Anderson coverage is provided by the operators of nuclear power plants. *See* 42 U.S.C. § 2210(b). In the future, as nuclear power plants reach the extent of their pre-determined operating life, one would expect the funding resource for Price-Anderson to dissipate.

<sup>204</sup> *See* Nuclear Waste Policy Act of 1982, 42 U.S.C. § 10222(e) (1994).

<sup>205</sup> *See id.* §10222(d)(1), (3)-(6).

<sup>206</sup> *See* S. REP. NO. 100-218, at 4 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1476, 1479 ("The Price-Anderson system . . . provides persons seeking compensation for injuries as a result of a nuclear incident with significant advantages over the procedures and standards for recovery that might otherwise be applicable under State tort law.").

<sup>207</sup> *See* 42 U.S.C. § 2210(n)(2) (conferring original jurisdiction upon federal district courts over nuclear tort suits involving the Price-Anderson Act); *see also* *El Paso Natural Gas Co. v. Neztosie*, 526 U.S. 473, 484-84 (1999) ("Congress thus expressed an unmistakable preference for a federal forum . . . for litigating a Price Anderson claim . . ."). For a detailed discussion of federal, state and tribal jurisdiction over Price-Anderson suits, *see generally* Kuntz, *supra* note 13, at 108-26.

<sup>208</sup> *See* 42 U.S.C. § 2210(n)(2) ("With respect to any public liability action arising out of or resulting from a nuclear incident, the United States district court in the district where the nuclear incident takes place . . . shall have original jurisdiction without regard to the

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Thus, upon the proper motion of a defendant, a Price-Anderson claim will be removed from any state court to the appropriate federal district court.<sup>209</sup> Until recently, it was not clear how this provision would apply to claims originally brought in an Indian tribal court.<sup>210</sup> Though, as mentioned before, a complete discussion of all the jurisdictional issues implicated by the Goshutes' project is beyond the scope of this note, the Supreme Court has recently addressed this particular issue.<sup>211</sup>

Unless explicitly stated to the contrary by legislation or treaty, Indian tribes retain exclusive judicial jurisdiction over reservation affairs.<sup>212</sup> As a result, most tribes have developed their own court systems.<sup>213</sup> Generally, in civil cases involving non-Indian parties, the tribal court exhaustion doctrine holds that tribal courts should have the opportunity to determine the extent of their own jurisdiction.<sup>214</sup> Though these determinations are subject to review by the appropriate federal court, there exists a presumption of tribal jurisdiction over claims arising from injuries occurring on reservations.<sup>215</sup> Despite this, in *El Paso Natural Gas Co. v. Neztosie*, the Supreme Court held that the doctrine of tribal court exhaustion does not apply to claims covered by the Price-Anderson Act.<sup>216</sup> Thus, any litigation under Price-Anderson arising from the ISFSI likely will be litigated in the United States District Court for the District of Utah.<sup>217</sup>

*B. Recovery under the Price-Anderson Act*

The Price-Anderson Act also alters the type and form of recovery available under a public liability judgement arising out of a nuclear incident.<sup>218</sup> The Price-Anderson Act defines "public liability" as "any legal liability arising out of or resulting from a nuclear incident . . . ."<sup>219</sup> "Consequently, there can be no action for injuries caused by a nuclear incident separate and apart from the federal public liability action created by the . . . Price-Anderson Act."<sup>220</sup> Thus,

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citizenship of any party or the amount in controversy.").

<sup>209</sup> *See id.*

<sup>210</sup> *See Kuntz, supra* note 13, at 103-04.

<sup>211</sup> *See Neztosie*, 526 U.S. at 482-88.

<sup>212</sup> *See STRICKLAND ET AL., supra* note 119, at 250.

<sup>213</sup> *See id.* at 251.

<sup>214</sup> *See Kuntz, supra*, note 13, at 109-11; *see also Neztosie*, 526 U.S. at 483-84. "[A] federal court should stay its hand 'until after the Tribal Court has had a full opportunity to determine its own jurisdiction.'" *Id.* at 483 (quoting *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 857 (1985)).

<sup>215</sup> *See Kuntz, supra* note 13, at 109.

<sup>216</sup> 526 U.S. at 484-85.

<sup>217</sup> *See id.* at 483 n.5.

<sup>218</sup> *See* 42 U.S.C. § 2210(c) (1994).

<sup>219</sup> *Id.* § 2014(w).

<sup>220</sup> *Kuntz, supra* note 13, at 108 (discussing *In re TMI Litig. Cases Consol. II*, 940 F.2d

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recovery for any injury arising from a nuclear incident on the Goshute reservation must be litigated according to the Act's provisions.

The Act establishes three exceptions to the term "public liability" which are not compensated by the Act.<sup>221</sup> First, all liability claims filed by employees of the ISFSI facility, including those arising from a nuclear occurrence, are to be addressed by the appropriate workmen's compensation statute.<sup>222</sup> Because of the substantial chance that a number of Goshute tribe members will be employed at the facility, this distinction in the type of coverage that will apply is important to note. For instance, the suitability of the relevant workmen's compensation statutes must be judged in light of the long-term effects and latent harm associated by radiation. The second exception, which relates to claims arising out of an act of war, is of little relevance here.<sup>223</sup>

The final exception relates to "claims for loss of, or damage to, or loss of use of property which is located at the site or used in connection with the licensed activity where the nuclear incident occurs."<sup>224</sup> Unless otherwise indemnified, this final provision could leave the Goshutes uncompensated in the event a nuclear accident contaminates their land. Land is one of the few assets the Goshutes possess and contamination would conceivably prevent the tribe from deriving any future revenue from it.<sup>225</sup> Moreover, because of its special nature as part of their reservation, undoubtedly many Goshutes have an immeasurable attachment to this land as their home.

The 1966 amendment, providing for the waiver of enumerated defenses, presents another potential barrier to full recovery by the tribe in the event of an accident. This provision, which significantly alters common principles of tort law in favor of a strict liability approach,<sup>226</sup> authorizes the NRC to require its licensees to waive traditional tort defenses such as proof of fault, assumption of risk, special immunity, and any applicable statute of limitations laws.<sup>227</sup>

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832, 854-55 (3d Cir. 1991)).

<sup>221</sup> See 42 U.S.C. § 2014(w)(i)-(iii).

<sup>222</sup> See *id.* § 2014(w)(i).

<sup>223</sup> See *id.* § 2014(w)(ii).

<sup>224</sup> *Id.* § 2014(w)(iii).

<sup>225</sup> See Rasmussen, *supra* note 5, at 341 ("[The Goshutes] are financially impoverished, while being land rich.").

<sup>226</sup> See S. REP. NO. 89-1605 (1966), reprinted in 1966 U.S.C.C.A.N. 3201, 3209 ("The question whether courts should apply legal principles akin to those of strict liability in the event of a serious nuclear incident seems to the committee to be free from dispute.").

<sup>227</sup> See 42 U.S.C. § 2210(n)(1). Under the Act, a licensee may be required to waive:

- (i) [A]ny issue or defense as to conduct of the claimant or fault of persons indemnified,
- (ii) any issue or defense as to charitable or governmental immunity, and
- (iii) any issue or defense based upon any statute of limitations if suit is instituted within three years from the date on which the claimant first knew, or reasonably could have known, of his injury or damage and the cause thereof.

*Id.*

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The impetus behind this provision was congressional concern that state tort law regarding nuclear accidents was generally unsettled and would inadequately promote Price-Anderson's goal of ensuring quick relief for public harm.<sup>228</sup>

The applicability of the defense waivers is limited to events that are considered "extraordinary nuclear occurrences."<sup>229</sup> An "extraordinary nuclear occurrence" is "any event causing a discharge or dispersal of source, special nuclear or byproduct material from its intended place of confinement in amounts offsite, or causing radiation levels offsite, which the Nuclear Regulatory Commission or the Secretary of Energy . . . determines to be substantial . . ."<sup>230</sup> This definition allows for flexibility in determining whether an extraordinary nuclear occurrence has occurred and, thus, whether the waiver of defenses provision should apply.<sup>231</sup> Regardless, the limitation of the applicability of the waivers provision to extraordinary nuclear occurrences subjects recovery for a large number of common nuclear incidents to the traditional obstacles of tort law.<sup>232</sup>

One could reasonably assume that, because of its nature as a storage facility (as opposed to a production or utilization facility), accidents that may occur at the ISFSI will likely be regarded as a common nuclear incident. Any potential accident is likely to impact the Goshute tribe and recovery for such accident likely will be subject to traditional tort defenses, rather than the plaintiff-friendly strict liability scheme applicable to extraordinary nuclear occurrences.

*C. Recommendations to Enhance Recovery by the Goshutes*

Any action initiated by the tribe in the event of a nuclear incident at the ISFSI facility must proceed according to the terms of the Price-Anderson Act.<sup>233</sup> The Act reflects Congress's attempt to strike the appropriate balance

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<sup>228</sup> See S. REP. NO. 89-1605, *reprinted in* 1966 U.S.C.C.A.N. at 3203-04; *see also* Duke Power Co. v. Carolina Env'tl. Study Group, Inc., 438 U.S. 59, 65 (1977) ("This provision was based on a congressional concern that state tort law dealing with liability for nuclear incidents was generally unsettled and that some way of insuring a common standard of responsibility for all jurisdictions—strict liability—was needed.").

<sup>229</sup> See 42 U.S.C. § 2210(n)(1); *see also* S. REP. NO. 89-1605, *reprinted in* 1966 U.S.C.C.A.N. at 3210-12 (discussing the concept of "extraordinary nuclear occurrences").

<sup>230</sup> 42 U.S.C. § 2014(j).

<sup>231</sup> See S. REP. NO. 89-1605, *reprinted in* 1966 U.S.C.C.A.N. at 3213 ("The Commission is accorded wide latitude under the bill to determine whether or not such an 'extraordinary nuclear occurrence' has taken place.").

<sup>232</sup> See S. REP. NO. 89-1605, *reprinted in* 1966 U.S.C.C.A.N. at 3211 ("[T]he bill has been drafted so that minor claims involving nuclear facilities or materials may remain subject to the traditional rules of tort law.").

<sup>233</sup> See 42 U.S.C. § 2014(w) (defining public liability, for the purposes of the Act, as "any legal liability arising out of or resulting from a nuclear incident"); *see also* Kuntz, *supra* note 13, at 108 (citing *In re TMI Litig. Cases Consol.* II, 940 F.2d 832 (3rd Cir. 1991)).

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between protecting the public and encouraging the beneficial use of nuclear energy by private industry.<sup>234</sup> However, the foregoing discussion highlights some of the deficiencies in applying Price-Anderson to the special instance of storing spent nuclear fuel on reservation land. The provisions of the Act should be reassessed in light of these deficiencies. Changes should be made to the existing laws to further ensure that the Goshutes may be compensated adequately in the event of a nuclear incident. Reducing the risk that members of the tribe may go uncompensated in certain instances will likely moderate resistance to the project within the tribe,<sup>235</sup> while furthering Price-Anderson's stated goal of protecting the public through a system of compensation.<sup>236</sup>

For instance, section 2014(w) of the Act should be amended to ensure that the exemptions to "public liability" do not bar recovery for losses on leased property.<sup>237</sup> Adding a short clause qualifying the property exemption can achieve this. The relevant part of section 2014(w) would then read: "[C]laims for loss of, or damage to, or loss of use of property which is located at the site of and used in connection with the licensed activity where the nuclear incident occurs[, *except where such property is leased or rented by third parties to those conducting the licensed activity.*]"<sup>238</sup> This would ensure that the Goshutes could recover in the unlikely event that their land is contaminated.

Changes to section 2014(w)'s exemption of workmen's compensation claims from the Act must be weighed against considerations of policy and fairness toward the affected parties. Congress may consider workmen's compensation as more efficient than Price-Anderson type recovery and wish to bar the latter when the former is available. Likewise, the defense waivers reflect a desire on the part of Congress not to expose the nuclear industry to too much liability.<sup>239</sup> Perhaps Congress could fashion a limited strict liability plan to be invoked only when an ISFSI involves Native Americans. This would have the added benefit of promoting safety at the facility by removing substantial barriers to recovery by any Goshute member affected by a nuclear incident.

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("A claim growing out of any nuclear incident is under the terms of the act or it is not compensable at all.")

<sup>234</sup> See 42 U.S.C. § 2012 (1994) (Congressional findings).

<sup>235</sup> See Woolf, *supra* note 9 (mentioning that some Goshute members are concerned about the hazards of radiation).

<sup>236</sup> See 42 U.S.C. § 2012(i) ("In order to protect the public . . . the United States may make funds available for a portion of the damages suffered by the public from nuclear incidents . . ."); see also S. REP. NO. 100-70, at 13 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1424, 1426.

<sup>237</sup> See 42 U.S.C. § 2014(w).

<sup>238</sup> *Id.*

<sup>239</sup> See S. REP. NO. 89-1605, *reprinted in* 1966 U.S.C.C.A.N. at 3213-14 (acknowledging that waivers may expose the nuclear industry to nuisance suits).

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IX. CONCLUSION

By choosing to host a spent fuel storage facility, the Skull Valley Goshutes are not just making a business decision, but are doing the whole nation a favor. To ensure that this favor does not harm the Goshutes or their land, the modifications to the Price-Anderson Act and the Nuclear Waste Fund recommended above should be implemented. These modifications update the statutes regarding the nuclear industry and nuclear waste to reflect the reality of a spent fuel storage facility sited on an Indian reservation. Furthermore, these modifications are consistent with the dual purposes for passage of the Price Anderson Act of protecting the public, namely the Goshutes, while allowing the nuclear industry to seek innovative solutions to the problems of nuclear waste.