A SPECTRUM REVOLUTION: DEPLOYING ULTRAWIDEBAND TECHNOLOGY ON NATIVE AMERICAN LANDS

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I. INTRODUCTION

While most Americans depend on cell phones and the Internet, many Native American tribes still lack access to adequate telecommunications services.[1] The recent development of ultrawideband ("UWB") technology, which operates by utilizing spectrum occupied by existing radio services,[2] could provide tribes with access to high-speed, wireless telecommunications services. However, a fierce political struggle and technological debate has culminated in a recent decision by the Federal Communications Commission ("FCC" or "Commission") to limit use of UWB for outdoor communications systems.[3] Because this technology might be a solution to the difficulties that tribes have in modernizing their telecommunications infrastructures, tribal lawyers should explore legal tools to enable deployment of UWB-based communication systems on tribal lands. In addition to benefiting tribes, successful tribal UWB usage could also pave the way for widespread use of UWB. Indeed, some wireless crusaders have already begun to aid tribes by establishing wireless infrastructures employing UWB technology in the hope of creating public pressure for loosening FCC UWB regulations.[4]

This article provides a thorough analysis of the legal options available to tribes in attempting to obtain the legal right to use UWB-based communication systems. Part II describes the dire needs of Native Americans in the telecommunications arena and Part III explains how UWB technology could provide a solution. Parts IV and V investigate FCC policy regarding UWB technology and tribal telecommunications services. Finally, Part VI sets forth the legal strategies available to tribes wishing to use UWB-based communication systems. Initially, tribes can seek a declaratory judgment in court that: (1) tribal sovereignty bars FCC regulation of tribal telecommunications services; or (2) the FCC has a responsibility to exempt tribes from UWB restrictions. Alternatively, tribes can petition the FCC to waive their UWB regulations. We demonstrate that litigation would be time-consuming, costly and unlikely to succeed. Thus, we conclude tribes should invest their re-

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1 *See, e.g.*, Dr. Linda Ann Riley et. al., *Assessment of Technology Infrastructure in Native Communities, at* http://www.doc.gov/eda/pdf/ATINC.pdf (1996) (prepared by the College of Engineering at New Mexico State University for the Department of Commerce) [hereinafter *Riley*].

2 *See In re* Revision of Part 15 of Commission's Rules Regarding Ultra-Wideband Transmission Systems, *First Report and Order*, 17 FCC Rcd. 7435, para. 1 (2002) [hereinafter *Revision of Part 15 Rules*]; *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 18 FCC Rcd. 3857 (2003) [hereinafter *Part 15 FNPRM*].

3 *Revision of Part 15 Rules, supra* note 2, paras. 2, 5.

4 For example, Dewayne Hendricks is helping Turtle Mountain Chippewa Reservation in North Dakota to install a wireless network that may eventually violate FCC regulations. In return for a state of the art network, the tribe is willing to assert its sovereignty against the FCC by arguing that because it is a sovereign, the FCC's Rules do not apply within their sovereign territory. *See* Brent Hurtig, *Broadband Cowboy*, WIRED, *at* http://www.wired.com/wired/archive/10.01/hendricks.html (Jan. 2002) [hereinafter Hurtig].

> The sovereignty argument might win in court. It might lose. The FCC might not take the bait. Congress might intervene. Any of these outcomes would serve Hendricks' larger purpose: to create public pressure that will force the FCC to loosen its grip. "People on the outside are going to feel like cavemen when they see the tribes with these amazing systems," he says. "If the reservations can have them, why can't everyone?" *Id.* at 1.

sources in lobbying the FCC to waive their UWB regulations.

II. THE TRIBAL TELECOMMUNICATIONS CRISIS

Although the late 1990s have witnessed an increased use of telecommunications technologies[5] on tribal lands, there are still many tribes that lack adequate telecommunications services. A comprehensive study in 1999 resulted in the following conclusions:

- Only 39% of rural households in Native American communities have telephones compared to 94% for non-Native rural communities;
- 44% of tribes have no local radio stations, and for those tribes with radio stations, these stations are rarely tribally owned;
- Of rural Native American households, only 22% have cable television, 9% have personal computers, and of those, only 8% have Internet access.[6]

A large number of tribes in the United States have expressed interest in acquiring telecommunications technology.[7] Despite high poverty rates of almost 45% of the populace on many reservations,[8] the Native American population is nonetheless expected to double in the next 30 years.[9] Telecommunications capabilities are necessary to produce a more skilled and marketable workforce in Native American communities, as well as increase business and investment on tribal lands.[10] Tribal telecommunications services can also be used as a vehicle for cultural education, political participation, and inter-tribal communications.[11] Indeed, many tribes have recognized telecommunications technology as "essential to their future growth" and are "looking for opportunities to acquire the level of technological infrastructure that will ensure their place on the Information Superhighway."[12]

III. ULTRAWIDEBAND TECHNOLOGY

Ultrawideband ("UWB") technology operates by employing very narrow or short duration pulses that result in large or wideband, transmissions.[13] UWB devices can operate using spectrum occupied by existing radio services, thereby permitting scarce spectrum resources to be used more efficiently.[14] Although opponents of the technology argue that UWB emissions cause interference with other users of the radio spectrum,[15] there is persuasive evidence indicating that there is no harmful interference.[16]

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5 We use the term "telecommunications" loosely to refer to any wired or wireless communications system.

6 *Riley, supra* note 1.

7 James Casey et. al., *Native Networking: Telecommunications and Information Technology in Indian Country*, 1, *at* http://www.benton.org/library/Native (Apr. 1999) [hereinafter *Casey*]. Although there is substantial tribal interest in advanced telecommunications, there is also some reluctance to embrace new technologies. Some tribal members fear that technology, modernization and connectivity will sacrifice cultural preservation, identity and core values. *Id.*

8 U.S. Census Bureau, *Population, Land Area, and Poverty Data for American Indian and Alaska Native Areas, at* http://www.ntda.rockyboy.org/members/predoc11.html (Apr. 4, 2000).

9 U.S. DEPARTMENT OF COMMERCE ET AL., DYNAMIC DIVERSITY: PROJECTED CHANGES IN U.S. RACE AND ETHNIC COMPOSITION 1995 TO 2050, *at* http:/www.mbda.gov/documents/unpubtext.pdf (Dec. 1999).

10 Casey, *supra* note 7, at 15 ("The creation of tribal information economies could greatly improve the economic situation of many tribes and their members.").

11 *Id.* at 12. Tribal telecommunications and information services allow for widespread dissemination of historical knowledge and customs. As Casey observes, "[c]ommunity and cultural development is perhaps the development area most commonly considered for tribal communications." *Id.* Increased access to information also enables tribes to more effectively "control their own destinies and respond to potential political threats and opportunities." *Id.* Telecommunications technologies also allow tribes to reestablish links with tribal members no longer living in Indian country. "These links would serve to strengthen the social and cultural fabric of Indian communities and provide for expanded human resources." *Id.*

12 *Id.* at 1.

13 *Revision of Part 15 Rules, supra* note 2, at para. 1.

14 *Id.*

15 *See, e.g., US GPS Industry Council Comments on FCC First Report on Ultra-wideband Technology*, 45 MICROWAVE J. 33 (2002); Heather Forsgren, *All Sides in UWB Debate Ask For Reconsideration of FCC Rules*, RCR WIRELESS NEWS, June 24, 2002, at 15.

16 *See* Joab Jackson, *Ultra Wideband Steps Forward*, WASH. TECH., *at* http://www.uwb.org/news/articles/03_2002/WashTechMar1902a.pdf (Mar. 19, 2002) ("The Federal Communications Commission has preliminarily agreed [that ultra wideband signals won't interfere], though it is doing more testing.") [hereinafter *Jackson*]; John McCorkle, *Why Such Uproar Over Ultrawideband? - Low Power, Low Cost, High Data Rates, Precise Positioning Capability and No Interference - UWB Seems To Have It All. But How Does It Do That?*, COMM. SYS. DESIGN, Mar. 1, 2002 at 31. For a technical explanation of the testing taking place, *see* Steven K. Jones, *Measured Emissions Data For Use In Evaluating the Ultra-Wideband (UWB) Emissions Limits in the Frequency Bands Used By The Global Positioning System (GPS)*, Project TRB 02-02 Report, at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-02-2786A2.doc (Oct. 22,

Applications of UWB technology include motion sensing, range finding and radar. One of the most promising uses of UWB is wireless communications systems. Wireless communication networks using UWB technology can support many more hosts than wireless networks using other protocols. Also, UWB can be used in "areas too obstacle-laden for other wireless protocols to work in."[17] Because UWB is a "simple, cheap method for distributing high-bandwidth data wirelessly at up to a kilometre in range,"[18] it could be a cost-effective way to provide high-speed Internet access to underserved communities.[19] Indeed, in preliminary tests on Tonga,[20] UWB Internet connections functioned at two to five times the speed of the fastest cable modem connection in the United States.[21] Finally, many tribes are geographically isolated and do not have telecommunications infrastructures so there is little risk of harmful interference to other spectrum users.[22] Thus, UWB technology could offer a cost-effective solution to the tribal telecommunications crisis.

IV. FEDERAL COMMUNICATIONS COMMISSION REGULATION OF UWB

Pursuant to the Communications Act of 1934, as amended by the Telecommunications Act of 1996 ("the 1996 Act" or "the Communications Act"), the FCC is responsible for regulating interstate and international communications by radio, television, wire, satellite and cable.[23] Section 301 of the Communications Act prohibits the "use or operat[ion] of any apparatus for the transmission of energy or communications or signals by radio" without a license issued by the FCC.[24] Part 15 of the Commission's Rules authorize the operation of certain types of radio transmissions without a license.[25] Until recently, the FCC prohibited deployment of all UWB technologies under Part 15 of the Commission's Rules due to concerns that UWB transmission would interfere with other users of the radio spectrum.[26]

Mounting evidence that the risks of interference from UWB devices are minimal, has resulted in the FCC's loosening of its restrictions on UWB operations. The *Revision of Part 15 Rules* permits the marketing and operation of certain types of imaging, vehicular radar, and communications and measurement systems that employ UWB technology.[27] Because of unresolved interference issues, the FCC chose to "proceed cautiously" in promulgating UWB emission limits.[28] Specifically, UWB devices are only authorized to operate in the frequency band 3.1–10.6 GHz.[29] The FCC continues to block use of UWB for long range, wireless Internet.

Recently, the Commission completed reviewing its UWB rules and issued a further notice of proposed rulemaking seeking additional comment on a few narrow issues.[30] Due to substantial political opposition to more relaxed standards, however, the current regulations are likely to remain in place in the foreseeable future.[31]

2002).

17 *See Jackson, supra* note 16.

18 Mike Butcher, *UWB: Widening the Possibilities For Wireless,* NEW MEDIA AGE, *at* http://www.uwb.org/news/articles/04_2002/NewMediaAgeApril402.pdf (Apr. 4, 2002).

19 Jennifer Park, *Unlicensed Spectrum Seen As Key For High-speed Internet Access,* COMM. DAILY, Feb. 17, 2000 (noting that industry executives stated at an FCC-sponsored forum that "[w]ireless services offered on unlicensed spectrum will be key to providing high-speed Internet access to underserved communities . . . .").

20 Tonga is a South Pacific island located in Western Polynesia.

21 *See* LAWRENCE LESSIG, THE FUTURE OF IDEAS 80-81 (Random House 2001).

22 *See, e.g.,* Hurtig, *supra* note 4, at 1 (noting in reference to the project to develop a wireless infrastructure using UWB and other technologies that "[w]hat might work well for several thousand people amid the uncrowded airwaves surrounding Turtle Mountain—125 miles from Minot, North Dakota, the nearest American city—would be a lot trickier to deploy for the same number of people in Chicago, and currently impossible to manage for the city's entire population.").

23 47 U.S.C. §151 (2000).

24 47 U.S.C. §301 (2000).

25 47 C.F.R. §15.1(b) (2002).

26 47 C.F.R. §15.1(c) (2002) (Devices are permitted to operate after they have been verified to comply with existing operational restrictions.).

27 *See Revision of Part 15 Rules, supra* note 2, at para. 5.

28 *Id.* at para. 1. The Commission maintained that it was "proceeding cautiously" based "in large measure on standards that the National Telecommunications and Information Administration found to be are necessary to protect against interference to vital federal government operations." *Id.*

29 *Id.* at para. 5.

30 *See Part 15 FNPRM,* supra note 2, at paras. 1, 153 (proposing changes to the FCC's Part 15 Rules in order to accommodate the MSSI radar system, the Siemans VDO radar system, Part 15 transmitters and the replacement of the current UWB definition in the Part 15 Rules with a broader one.).

31 *See* Patrick Mannion, *Busting UWB Clouds,* COMM. SYS. DESIGN, July 1, 2002, at 5 ("[T]he sheer impossibility of proving a negative, combined with the sway the military has over all things governmental, still hang like a cloud over UWB's progression."); Bruce Nordwall, *UWB Decision Not a Final Fix,*

V. FCC REGULATION OF TRIBAL TELECOMMUNICATIONS SERVICES

Since the passage of the Communications Act, the Commission has applied its regulations to tribally owned and non-tribally owned telecommunication carriers serving tribal lands.[32] The FCC maintains that it has jurisdiction "over the 50 states, the District of Columbia and U.S. possessions."[33]

The 1996 Act, directed the FCC to take measures to provide "low-income consumers and those in rural, insular, and high cost areas" with greater access to affordable telecommunications services.[34] In response to this mandate, the FCC adopted an official protocol regarding tribes and took specific actions to facilitate deployment of telecommunications services to Native American lands.

In June 2000, the FCC announced a statement of policy establishing a government-to-government relationship with Indian tribes.[35] The Com-

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AVIATION WK. & SPACE TECH., Mar. 4, 2002, at 68 ("Just beneath the surface are lingering reservations and doubt about future regulation. . . . [W]hen the FCC reviews standards for UWB devices in 6-12 months, it could decide to tighten the reins[.]"); Jeffrey Silva, *Gov't, Carriers Decry UWB,* RCR WIRELESS NEWS, Feb. 18, 2002, at 1.

> Various Bush administration agencies and mobile-phone carriers are exploring options to challenge last week's Federal Communications Commission decision to authorize ultra-wideband technology, a reaction directly contradicting agency statements that its action was fully coordinated within the U.S. government and represented a consensus of federal agencies. Far from settling the UWB issue, which over the past three years mushroomed into a nasty lobbying war that has now driven a wedge in the administration, the FCC ruling may have actually fueled the controversy.

[32] Casey, *supra* note 7, at 18.

[33] *See* FEDERAL COMMUNICATIONS COMMISSION, ABOUT THE FCC, *at* http://www.fcc.gov/aboutus/html (last modified Feb. 3, 2003).

[34] 47 U.S.C. §254(b)(3) (2000). Under Section 254, Congress directed the Commission to establish a Federal-State Joint Board to make recommendations for the preservation and advancement of universal service. Specifically, the Joint Board and the Commission were directed to base their policies on principles such as:

> Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.

47 U.S.C. §254(b). The statute also set forth provisions outlining a universal service support system. The Act requires a carrier to meet certain criteria to be designated an eligible telecommunications carrier in order to receive Lifeline and other universal service support. 47 U.S.C. §214(e)(1) (2000). The law requires states to make these designations for carriers over which they have jurisdiction and the FCC to make designations for carriers that are not subject to state jurisdiction. 47 U.S.C. §214(e)(2)-(6) (2000). Further, "[i]f no common carrier will provide the services that are supported by [the] universal service support mechanisms . . . , the Commission, with respect to interstate services or an area served by a common carrier"—not subject to State commission jurisdiction "or a State commission, with respect to intrastate services, shall determine which common carrier or carriers are best able to provide such service to the requesting unserved community or portion thereof and shall order such carrier or carriers to provide such service for that unserved community or portion thereof." 47 U.S.C. §214(e)(3) (2000).

[35] *In re* Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes, *Policy Statement,* 16 FCC Rcd. 4078 (2000) [hereinafter *Statement of Policy*]. The following goals and principles were outlined in the Order:

> 1. The Commission will endeavor to work with Indian Tribes on a government-to-government basis consistent with the principles of Tribal self-governance to ensure, through its regulations and policy initiatives, and consistent with Section 1 of the Communications Act of 1934, those Indian Tribes have adequate access to communications services.
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> 2. The Commission, in accordance with the federal government's trust responsibility, and to the extent practicable, will consult with Tribal governments prior to implementing any regulatory action or policy that will significantly or uniquely affect Tribal governments, their land and resources.
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> 3. The Commission will strive to develop working relationships with Tribal governments, and will endeavor to identify innovative mechanisms to facilitate Tribal consultation in agency regulatory processes that uniquely affect telecommunications compliance activities, radio spectrum policies, and other telecommunications service-related issues on Tribal lands.
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> 4. The Commission will endeavor to streamline its administrative process and procedures to remove undue burdens that its decisions and actions place on Indian Tribes. As administrative and organizational impediments that limit the FCC's ability to work with Indian Tribes, consistent with this Policy Statement, are identified, the Commission will seek to remove those impediments to the extent authorized by law.
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> 5. The Commission will assist Indian Tribes in complying with Federal communications statutes and regulations.
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> 6. The Commission will seek to identify and establish procedures and mechanisms to educate Commission staff about Tribal governments and Tribal cultures, sovereignty rights, Indian law, and Tribal communications needs.
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> 7. The Commission will work cooperatively with other Federal departments and agencies, Tribal, state and local governments to further the goals of this policy and to address communications problems, such as low penetration rates and poor quality services on reservations, and other problems of mutual concern.

mission affirmed its commitment to nine goals and principles including: working with Indian tribes on a government-to-government basis consistent with the principles of tribal self-governance; consulting with tribal governments prior to implementing any regulatory action or policy that will significantly or uniquely affect tribal governments, their land and resources; and assisting tribes in complying with the Communications Act and Commission regulations.[36]

The FCC has promulgated two rulemakings regarding telecommunications and Native American tribes. The first rulemaking resulted in changes to the Commission's Universal Service rules aimed at promoting deployment of telecommunications infrastructure and subscribership on tribal lands.[37] The second rulemaking made changes to the Commission's wireless service rules to encourage deployment of wireless service on tribal lands.[38]

VI. LEGAL TOOLS FOR TRIBES TO OBTAIN UWB-BASED OUTDOOR COMMUNICATIONS SYSTEMS

Because UWB-based outdoor communications systems could provide cost-effective telecommunications capabilities, tribes should explore legal tools to enable deployment of such systems on tribal lands. Only two strategies to legalize the use of

8. The Commission will welcome submissions from Tribal governments and other concerned parties as to other actions the Commission might take to further the goals and principles presented herein.

9. The Commission will incorporate these Indian policy goals into its ongoing and long-term planning and management activities, including its policy proposals, management accountability system and ongoing policy development processes. *Id.* at 4081–82.

36 *Id.*

37 *In re* Federal-State Board on Universal Service; Promoting Deployment and Subscribership in Unserved and Underserved Areas, Petitions for Designation as an Eligible Telecommunications Carrier and for Related Waivers to Provide Universal Service, *Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking*, 15 FCC Rcd. 12208, para. 1 (2000) (The changes were intended to: (1) substantially reduce the costs of telecommunications for subscribers on Tribal lands; and (2) establish a clear and efficient framework to govern requests for eligible telecommunications carrier status.) [hereinafter *Universal Services Order*]. First, the *Universal Services Order* amended the Commission's universal service rules to substantially reduce the cost of telephone service for people on tribal lands by providing additional targeted support to carriers. Specifically, the *Universal Service Order*:

- increased the discount off the local phone bill that eligible low-income consumers on tribal lands could receive under the federal Lifeline program by $25. Under the new rules, carriers could receive between $30.25 - $32.85, depending on various factors such as state matching. The agency hoped that this change would result in most customers receiving basic local phone service for $1 a month.
- increased the assistance available for the costs of initiating service provided under the current Link Up program. This was intended to reduce the initial connection charges and line extension costs associated with initiating phone service to income eligible customers on tribal lands.
- broadened the consumer qualification criteria for Lifeline and Link Up so that means-tested, or income-based, programs in which low-income tribal members are more likely to participate in are included.
- required eligible telecommunications carriers to publicize the availability of Lifeline and Link Up support in a manner designed to reach those likely to qualify for those discounts.

Id. at para. 12. Second, the *Universal Services Order* attempted to establish a clear and efficient framework to govern requests for eligible telecommunications carrier status. The Telecommunications Act provides that only an "eligible telecommunications carrier" as designated under Section 214(e) of the Commission's Rules shall be eligible to receive federal universal support. 47 U.S.C. §214(e) (2000). Section 214(e)(2) directs the state commissions to perform the designation, and Section 214(e)(6) directs the Commission to perform the designation in those instances where the state commission lacks jurisdiction to perform the designation. *Universal Services Order*, 15 FCC Rcd., at para. 108 (Because the statute did not address the issue of whether the state or the Commission makes the threshold determination of which governmental entity has jurisdiction to make the designation, there was uncertainty and confusion regarding the process for obtaining eligible telecommunications carrier status. The Order provided that the FCC may designate carriers serving tribal lands as eligible carriers if the Commission determines that the state lacks jurisdiction to designate and regulate carriers wishing to serve tribal lands. The FCC must consider "whether state regulation is preempted by federal regulation, whether state regulation is consistent with tribal sovereignty and self-determination, and whether the Tribe has consented to state jurisdiction.").

38 *In re* Extending Wireless Telecommunications Services to Tribal Lands, *Report and Order and Further Notice of Proposed Rulemaking*, 15 FCC Rcd. 11794, para. 1 (2000) [hereinafter *Wireless Policy Order*]. First, the *Wireless Policy Order* established that bidding credits will be available in future auctions in markets that contain qualifying tribal areas that have a telephone service penetration rate below 70 percent. *Id.* at para. 39. Second, although the FCC sought comment on relaxing certain operational and licensing rules to encourage extension of service to tribal lands, it concluded that across-the-board changes to rules aimed at tribes were unnecessary. Instead, the Commission noted, "parties should seek waivers of specific rules or file other requests for regulatory relief in instances where greater flexibility than the rules allow would facilitate the provision of service to tribal lands." *Id.* at para. 64. Finally, the Order stated that to avoid splitting tribal lands among multiple licensing areas, the Commission will consider tribal land boundaries in defining licensing areas for future services. *Id.* at para. 64.

UWB-based communications systems on tribal lands will be discussed further in this article. Pursuant to the first strategy, tribes can turn to courts for relief. One potentially colorable legal argument is tribal sovereignty prevents the FCC from regulating telecommunications services on tribal lands. Assuming instead the FCC is empowered to regulate on tribal lands, a second, alternative argument is that the FCC has a fiduciary duty to tailor its general regulations to the particular needs of tribes. This second strategy encourages tribes to petition the FCC for a waiver of its rules rather than to litigate.

1. Judicial Relief

A. *Does Tribal Sovereignty Bar FCC Regulation of Tribes?*

First, tribes can argue that tribal sovereignty does bar FCC regulation of tribes. Because tribes have not asserted their authority to regulate telecommunications services, this legal claim is "largely untested."[39] Although a state supreme court case and a Commission ruling have discussed tribal sovereignty with regard to state regulation of non-Indians engaged in commerce on Indian reservations, they are not pertinent.[40] The FCC has never "seriously considered its regulatory authority within Indian Country, nor has that authority ever been seriously challenged."[41] Thus, judicial review of the Commission's authority to regulate tribes will be a matter of first impression.

The Commission can make four arguments in response to a claim that tribes have sovereignty to regulate telecommunications services. First, the Commission can assert that tribes do not have inherent sovereignty to regulate UWB, because that power has been impliedly divested by virtue of the tribes' dependent status. Second, even if tribes do have the sovereignty to regulate telecommunications, Congress has stripped that right under the plenary power doctrine. Third, if Congress has not abrogated tribal sovereignty, then it has been divested by the failure to assert it. Fourth, even if tribes do have some authority to regulate, it is limited to regulating Indians on tribal lands. Below, we address these counterarguments' merits.

i. *Implied Divestiture: Have Tribes Lost the Power to Regulate Telecommunications Services By Virtue of Their Dependent Status?*

The Commission can argue that tribes do not have inherent sovereignty to regulate UWB. Indian tribes derive their authority to exclusively regulate their internal affairs from: (1) grants of sovereignty by federal treaties and statutes;[42] and (2) "inherent" sovereign powers that were not divested by virtue of the tribes' dependent status.[43] Sovereign powers are divested "where the

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[39] Casey, *supra* note 8, at 18. *See also* Daniel J. Adam, *Tribal Telecom: Telecommunications Regulation in Indian Country*, 27 J. LEGIS. 153, 155 (2001).

> It is difficult however to determine the full extent of tribal jurisdictional authority over telecommunications operation and regulation. Courts and legislatures have not settled the extent to which tribes can assert jurisdiction over telecommunications on tribal lands. Typically, parties disagree as to the extent of tribal authority over physical telecommunications infrastructure on tribal lands, and over frequency spectrum in the air over tribal lands. Applying the traditional telecommunications regulatory structure to Federal Native American law is a complicated exercise. There has never been a clear definition of the amount of control that state and federal regulatory agencies possess over telecommunications services in Indian country. Most often, federal and state regulatory agencies have assumed jurisdiction over telecommunications services within the boundaries of tribal lands by default, because the tribes on those lands have not exercised their authority to regulate these services.

[40] *Compare In re* Federal–State Joint Board on Universal Service; Western Wireless Corp. Petition for Designation as an Eligible Telecommunications Carrier for the Pine Ridge Reservation in South Dakota, *Memorandum Opinion and Order*, 16 FCC Rcd. 18133 (2001) (detailing example where tribal sovereignty bars state regulation) *with* Cheyenne River Sioux Tribe Tel. Auth. v. Publ. Utils. Comm'n, 595 N.W.2d 604 (S.D. 1999) (detailing example where tribal sovereignty does not bar state regulation).

[41] *See* Casey, *supra* note 7, at 18.

[42] *See generally* VINE DELORIAM JR. & RAYMOND J. DEMALLIE, DOCUMENTS OF AMERICAN INDIAN DIPLOMACY (Univ. Okla. Press 1999) (Treaty/statute sovereignty involves rights granted to Indians by Congressional legislation). Since the formation of the United States, the federal government has negotiated and ratified hundreds of treaties with tribes. *Id.*

[43] The Supreme Court has likened the relationship between the federal government and native tribes to a "guardianship," creating a trust relationship between the two. *See* Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831) ("[A Tribe's] relation to the United States resembles that of a ward to his guardian."). In this relationship, tribes *generally* retain sovereign power over their own political, economic, and social affairs. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832) ("[A] weaker power does not surrender its independence—its right to self government, by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state."). Inherent sovereignty can be thought of almost as natural law. *Id.* at 559

exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government."[44] Courts have held that tribes have an inherent sovereignty to self-govern, including the power to punish tribal offenders, regulate domestic relations among members,[45] and levy taxes.[46] Courts have also held that tribes do not have the sovereignty to freely alienate to non-Indians the land they occupy,[47] enter into direct commercial or governmental relations with foreign nations,[48] govern any nonmember on a reservation however the tribe wishes,[49] try nonmembers in tribal courts,[50] or regulate nonmembers on fee lands or non-Indian easements within reservation

(stating that Indian tribes have "always been considered [ ] distinct, independent political communities, retaining their original natural rights . . . ."). It is also wholly separate from treaty or statutory tribal sovereignty. *See* Brendale v. Confederated Tribes, 492 U.S. 408, 425 (1989) ("[T]ribes have inherent sovereignty independent of [treaty] authority . . . ."); Dep't of Labor v. Occupational Safety & Health Comm'n, 935 F.2d 182, 186 (9th Cir. 1991) ("[W]e recognize[ ] that Native Americans possess an inherent sovereign right, independent of express treaty language, to exclude non-Native Americans from their reservation."). Conquest extinguished tribes' external sovereign powers, such as their abilities to wage war, conduct foreign relations or have ambassadors. But tribes, as "a separate people, with the power of regulating their internal and social relations," United States v. Wheeler, 435 U.S. 313, 322 (1978), have largely retained exclusive control over their internal sovereign power. United States v. Mazurie, 419 U.S. 544, 557 (1975) ("Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory."). Inherent sovereignty only exists to the extent it is consistent with the dependent status of tribes. Atkinson Trading Co. v. Shirley, 532 U.S. 645, 650-51 (2001) ("[T]he inherent sovereignty of Indian tribes [is] limited . . . 'exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes.'") (internal citations omitted).

44 *See* Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 153–54 (1980).

> Tribal powers are not implicitly divested by virtue of the tribes' dependent status. This Court has found such a divestiture in cases where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government, as when the tribes seek to engage in foreign relations, alienate their lands to non-Indians without federal consent, or prosecute non-Indians in tribal courts which do not accord the full protections of the Bill of Rights. In the present cases, we can see no overriding federal interest that would necessarily be frustrated by tribal taxation.

(internal citations omitted). *See also* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 147 n.13 (1982) (NLRB v. Pueblo of San Juan, 276 F.3d 1186, 1194 (10th Cir. 2002) ("Federal limitations on tribal sovereignty can also occur when the exercise of tribal sovereignty would be inconsistent with overriding national interests."); *Wheeler*, 435 U.S. at 326 ("These limitations rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations.").

45 *See* Montana v. United States, 450 U.S. 544, 564 (1981).

> [Inherent sovereignty includes] the power to punish tribal offenders, to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members. But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.

(internal citations omitted). *See also Wheeler*, 435 U.S. at 326 (finding that the powers of self-government, including the power to prescribe and enforce internal criminal laws, are "not such powers as would necessarily be lost by virtue of a tribe's dependent status.").

46 *Merrion*, 455 U.S. at 141 ("[T]he Tribe's authority to tax non-Indians who conduct business on the reservation . . . is an inherent power."); Southland Royalty Co. v. Navajo Tribal Council, 715 F.2d 486, 488 (10th Cir. 1983) ("Indian taxation of oil and gas leases is a valid exercise of tribal authority. The tribe has a power to tax which derives from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction."). There are other examples of inherent sovereignty. Tribes also have the power to be immune from lawsuit unless the sovereign consents. United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 512 (1940) ("[W]ithout congressional authorization," the "Indian Nations are exempt from suit."). Tribes even have the power to exclude individuals from the jurisdiction and generally regulate nonmembers on the reservation. *Cf. Occupational Safety & Health Comm'n*, 935 F.2d at 186 (allowing OSHA inspectors onto reservation if statute "implicitly" allows for enforcement, though Indians retain general right of exclusion from their lands, per treaty and inherent sovereignty rights.); Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 18 (1987) ("Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty."). In January 2002, the Tenth Circuit potentially expanded the scope of inherent sovereignty when it concluded that "like states and territories, [a tribe] has a strong interest as a sovereign in regulating economic activity involving its own members within its own territory, and it therefore may enact laws governing such activity." *Pueblo of San Juan*, 276 F.3d at 1200. These enumerated capabilities are merely examples, and not an exhaustive set, of inherent sovereign powers. Nevada v. Hicks, 533 U.S. 353, 361 (2001) ("These examples [given in *Montana*] show, we said, that Indians have "the right . . . to make their own laws and be ruled by them. . ."). Note that these examples of inherent sovereignty may have been statutorily undermined and that exceptions do exist.

47 O'Neida Indian Nation v. County of O'Neida, 414 U.S. 671, 667-68 (1985).

48 *Worcester*, 31 U.S. at 553–54.

49 Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 147 (1810) (afirming that tribes have lost any "right of governing every person within their [reservation boundary] limits except themselves") Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 209 (1978)).

50 *Oliphant*, 435 U.S. at 191, 196–97.

boundaries.[51]

The FCC could argue that tribes' freedom to control tribal spectrum was divested by virtue of the tribes' dependent status. The federal government has an interest in a national telecommunications policy, and such a policy requires coherent and universal regulations that cover tribal lands. If tribes establish their own spectrum regulations, interference might occur resulting in chaos, and undermine the reliability of the entire system.[52] As the Supreme Court pronounced in *Red Lion Broadcasting Co. v. FCC*, "if there is to be any effective communication by radio, only a few can be licensed and the rest must be barred from the airwaves."[53]

Tribes can respond that they have the sovereignty to regulate telecommunications systems completely within the boundaries of the reservation. There would be no interference from UWB telecommunications systems on a reservation to other spectrum users, because the Commission would be permitted to regulate any source that emits waves outside the boundaries of the reservation. The FCC can counter that it will be an enforcement nightmare to distinguish between those sources that are confined to the reservation and others that might leak off the reservation. However, tribes can highlight the fact that the Commission has experience in resolving jurisdictional issues involving states and foreign countries.[54] Furthermore, administrative burdens may not be the type of "overriding interests of the National Government" that compel a conclusion of implied divestiture of sovereignty.[55] Ultimately, it is uncertain if a court would conclude that telecommunications regulations are like other forms of tribal self-government and consistent with the dependent status of Indian tribes.

ii. *Has Congress Abrogated Sovereignty Under the Plenary Power Doctrine?*

If a court concludes that tribal power to regulate telecommunications services was not divested by virtue of the dependent status of tribes, it will then need to evaluate whether Congress has abrogated tribal sovereignty under the plenary power doctrine. Tribal sovereignty "exists only at the sufferance of Congress."[56] Thus, Congress can divest any tribal powers under the plenary power doctrine.[57] To divest tribal power, a court will first try to determine if Congress intended to abrogate tri-

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[51] *See infra* Part VI(1)(A)(ii).

[52] *See, e.g.*, Jonathan Weinberg, *Broadcasting & Speech*, 81 CALIF. L. REV. 1103, n.10 (1993) ("When more than one station in a particular geographic area simultaneously attempts to use the same piece of spectrum space, the result is chaos. Thus, for the spectrum to have reliable utility, the right to exclusive use of a portion of the spectrum must be protected.").

[53] Red Lion Broadcasting. Co. v. FCC, 395 U.S. 367, 388–89 (1969).

[54] Ruth Milkman, senior legal advisor to former FCC Commissioner Reed E. Hundt, identified the jurisdictional issues that the FCC must consider: "Should it be regulated by the federal government, or should it be regulated by the states? Well, radio waves do not stop at state borders. Interference does not stop at state borders. And so that suggests that you should have federal or even international regulation, because spectrum does not stop at country boundaries either." *See* Ruth Milkman, *The State Role in Telecommunications Regulation: Working Together: Suggestions For Federal & State Cooperation in Telecommunications*, 6 ALB. L.J. SCI. & TECH. 141, 144 (1996).

[55] The Supreme Court has often rejected "administrative convenience" arguments as justifications for subordinating rights. *See, e.g.*, Bowsher v. Synar, 478 U.S. 714, 737–41 (1986) (Stevens, J., concurring) (rejecting administrative convenience argument as justification for overriding separation of powers); INS v. Chadha, 462 U.S. 919, 944 (1983); Reed v. Reed, 404 U.S. 71, 76–77 (1971) (holding that administrative convenience is an insufficient justification for gender discrimination). *See also* Richard B. Saphire & Michael E. Solimine, *Shoring Up Article III: Legislative Court Doctrine in the Post CFTC v. Schor Era*, 68 B.U. L. REV. 85, 122 (1988) (noting that Court has rejected "administrative convenience" arguments in separation of powers context).

[56] *Wheeler*, 435 U.S. at 323.

[57] *See* Donovan v. Couer d'Alene Tribal Farm, 751 F.2d 113, 115 (9th Cir. 1985) ("Indian tribes possess only a limited sovereignty that is subject to complete defeasance."). Under the plenary power doctrine, Congress can abrogate formerly guaranteed treaty or statutory rights. *See* Reich v. Great Lakes Indian Fish & Wildlife Comm'n, 4 F.3d 490, 493 (7th Cir. 1993) ("Indian treaties are deemed the legal equivalent of federal statutes and they can therefore be modified or even abrogated by Congress."); *Brendale*, 492 U.S. at 422 (which affirmed *Montana*, 450 U.S. at 561) ("treaty rights with respect to reservation lands must be read in light of the subsequent alienation of those lands pursuant to a Congressional statute."); Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 594 (1977) ("When treaties were entered into between the United States and a tribe of Indians it was never doubted that the power to abrogate existed in Congress . . . [and] the judiciary cannot question or inquire into the motive which prompted [abrogation]."). Even tribal self-government is subject to termination or limitation if Congress clearly divests a tribe of such authority. *See* Menominee Tribe v. United States, 391 U.S. 404, 412–13 (1968) (upholding Congress's right to terminate tribes, but cautioning that a court must base a finding that Congress has abrogated or modified a treaty with Indian tribe on clear evidence); STEPHEN L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES 58 (2d ed. 1992) ("Termination abolishes tribal government and eliminates all tribal landholdings.").

bal sovereignty. If a court finds that Congress intended to abrogate tribal sovereignty, then the statute in question governs those activities on tribal lands. If Congress' intent is uncertain, the court will need to determine whether Congress intended to abrogate sovereignty under the *Tuscarora* rule.[58]

a. *Is there Congressional Intent to Abrogate Tribal Sovereignty In Telecommunications?*

To determine whether Congress intended to abrogate tribal sovereignty,[59] a court will first look for explicit language in the legislative history of the Communications Act stating that the statute applies to tribes. If the text of the statute does not discuss applicability to tribes, a court may conclude that congressional intent is uncertain and proceed to an analysis of what inference should be made about tribal sovereignty in light of this congressional silence.[60] However, most courts will evaluate whether the wording of the statute, legislative history and the existence of a comprehensive statutory plan evidence Congressional intent to strip tribal sovereignty.[61] Some courts even accord some deference to an agency's interpretation of congressional intent to abrogate sovereignty; although other courts explicitly refuse to do so.[62] Generally, intent must be "plain and unambiguous" for stripping *nontreaty* sovereignty (i.e. inherent sovereignty)[63] and "clear and reliable" and "sufficiently compelling" for stripping

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58 *See infra* Part VI(1)(A)(ii)(b).

59 Tribal sovereignty is distinct from tribal sovereign immunity. Tribal sovereignty bars application of a statute to a tribe while tribal sovereign immunity bars a private suit by an individual brought against the tribe. There is a higher standard of proof for congressional intent to abrogate sovereign immunity than sovereignty. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978) (quoting United States v. Testan, 424 U.S. 392, 399 (1976)) (stating that a Congressional waiver of sovereign immunity from suit "'cannot be implied but must be unequivocally expressed'"). The Eleventh Circuit holds that the test for abrogating tribal sovereign immunity applies to federal agencies. *See* Florida Paraplegic Ass'n v. Miccosukee Tribe of Indians, 166 F.3d 1126, 1131 (11th Cir. 1999). However, this is a misstatement of commonly understood law. Tribal sovereign immunity can only be invoked in private suits by individuals—not the federal government. *See* EEOC v. Karuk Tribe Hous. Auth., 260 F.3d 1071, 1075 (9th Cir. 2001) ("Indian tribes do not, however, enjoy sovereign immunity from suits brought by the federal government.").

60 *See, e.g.,* Reich v. Mashantucket Sand & Gravel, 95 F.3d 174, 177 (2d Cir. 1996) (rejecting tribe's proposal to force "Congress [to] express[ ] its specific intent to abrogate tribal sovereignty" as unworkable and also failing to review the legislative history or comprehensive statutory plan to determine the general applicability of OSHA).

61 *See, e.g.,* Phillips Petroleum Co. v. EPA, 803 F.2d 545, 554 (10th Cir. 1986).

> We now examine congressional intent as an aid to interpreting the statute. That intent is so clearly expressed in legislative history and so strong that it is dispositive of the issue of the statute's reach. When "interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute (or statutes on the same subject) and the *objects and policy* of the law, as indicated by its various provisions, *and give to it such a construction as will carry into execution the will of the Legislature.*"

Id. (internal citations omitted).

62 *Compare Phillips Petroleum,* 803 F.2d at 557 ("Finally, we have taken into consideration the EPA's own interpretation of the statute. Soon after the passage of the 1977 amendments to the Act, the EPA's general counsel ruled that the EPA has the authority to prescribe an underground injection program for the Osage Reserve. As stated previously, the EPA promulgated its regulation asserting jurisdiction over Indian lands under Part C of the SDWA. Appropriate deference is due to the agency's own interpretation of the statute." (internal citations omitted)) *with* Montana v. EPA, 137 F.3d 1135, 1140 (9th Cir. 1998) ("We agree with appellants insofar as they contend that the scope of inherent tribal authority is a question of law for which EPA is entitled to no deference."). Because "courts are the final authorities on issues of statutory construction," such deference bears little weight in the final determination. *Phillips Petroleum,* 803 F.2d at 557 (citing Volkswagenwerk Aktiengesellschaft v. FMC, 390 U.S. 261, 272 (1968)).

63 County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 247–48 (1985) ("The Court has applied canons of construction in nontreaty matters. Most importantly, the Court has held that congressional intent to extinguish Indian title must be 'plain and unambiguous,' and will not be 'lightly implied.'") (internal citations omitted)) United States v. Santa Fe Pac. R.R. Co., 314 U.S 339,346 (1941); EEOC v. Cherokee Nation, 871 F.2d 937, 939 (10th Cir. 1989) ("We believe that unequivocal Supreme Court precedent dictates that in cases where ambiguity exists (such as that posed by the ADEA's silence with respect to Indians), and there is no *clear* indication of congressional intent to abrogate Indian sovereignty rights (as manifested, *e.g.,* by the legislative history, or the existence of a comprehensive statutory plan), the court is to apply the special canons of construction to the benefit of Indian interests."); *Pueblo of San Juan,* 276 F.3d at 1194 (which affirmed *Cherokee Nation,* 871 F.2d at 939); EEOC v. Fond du Lac Heavy Equip. & Const. Co., 986 F.2d 246, 248 (8th Cir. 1993) ("Specific Indian rights will not be deemed to have been abrogated or limited absent a 'clear and plain' congressional intent. A clear and plain intent may be demonstrated by an 'express declaration' in the statute, by the 'legislative history,' and by 'surrounding circumstances.'" (internal citations omitted)). However, in at least one case, the Tenth Circuit has required a nondescript lower bound of merely "some" legislative history to sovereignty-strip. *See* Donovan v. Navajo Forest Prods. Indus., 692 F.2d 709, 714 (10th Cir. 1982) (holding that "[l]imitations on tribal self-government cannot be implied from a treaty or statute; they must be *expressly* stated or otherwise made clear from surrounding circumstances and legislative history," and that "[a]bsent *some* expression of such legislative intent, [the court] shall not per-

treaty sovereignty.[64]

The Communications Act does not explicitly state that tribes are subject to regulation. As such, tribes could argue that a court should conclude that there is no clear congressional intent to abrogate sovereignty and proceed to an analysis of where presumption should lie under *Tuscarora*. The FCC can contend that the scope of application sections set out in the 1934 Act, the Universal Service mandate and the minority broadcasting provisions inserted in the 1996 Act and the failed 1997 Indian Telecommunications Act are "plain and unambiguous" evidence that Congress intended to strip tribes of sovereignty over telecommunications regulation.

1. *The Communications Act of 1934: 47 U.S.C. §§152, 153 and 301*

The Commission can point to several provisions of the Communications Act to prove Congressional intent to strip tribes of spectrum regulatory authority. The most compelling provisions are 47 U.S.C. §§152, 153, and § 301. Section 152 states that the provisions of the Communications Act apply to:

> "*[A]ll persons* engaged *within the United States* in such communication or such transmission of energy by radio, and to the licensing and regulating of *all radio stations* as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in [the Philippine Islands or] the Canal Zone, or to the wire or radio communication or transmission wholly within the [Philippine Islands or] the Canal Zone."[65]

Section 153 of the U.S. Code defines the United States as: "the several *States and Territories*, the District of Columbia, and the possessions of the United States, but does not include the Canal Zone."[66] Section 301 of the U.S. Code describes the scope of regulations governing radio communications or transmissions of energy:

> "No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any State, Territory, or possession of the United States or in the District of Columbia to another place in the same State, Territory, possession, or District . . . except under and in accordance with this [Act] . . . ."[67]

Finally, the Act includes delegation provisions empowering the FCC to take any action necessary to fulfill its mandate.[68]

The FCC can argue that "states, territories, and possessions" include tribes; because the Communications Act regulates "all persons" within the defined regions, it is arguable that the terms refer to geographic areas and not to "states, territories, or possessions" in their political sense. Thus, the FCC can contend that because tribal lands are included within the exterior boundaries of the United States and within any state or territory in which they are located, Congress intended to regulate tribal lands.[69]

In response, tribes can argue that the weight of authority concludes that tribes are not "states, territories, or possessions." The Constitution refers to States and Indian tribes as distinct entities for commerce purposes.[70] Further, courts have held that reservations are not "states, territories, or possessions" of the United States pursuant to full

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mit divestiture of the tribal power to manage reservation lands so as to exclude non-Indians from entering [ ] merely on the predicate that federal statutes of general application apply to Indians . . . unless Indians are expressly excepted therefrom.") (internal citations omitted) (emphasis added)).

64 United States v. Dion, 476 U.S. 734, 739–40 (1986). [W]e have looked to the statute's "legislative history" and "surrounding circumstances" as well as to "the face of the Act." Explicit statement by Congress is preferable for the purpose of ensuring legislative accountability for the abrogation of treaty rights. We have not rigidly interpreted that preference, however, as a *per se* rule; where the evidence of congressional intent to abrogate is sufficiently compelling, "the weight of authority indicates that such an intent can also be found by a reviewing court from clear and reliable evidence in the legislative history of a statute." What is essential is clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty. *Id.*

65 47 U.S.C. §152 (2000) (emphasis added).

66 47 U.S.C. §153 (2000) (emphasis added).

67 47 U.S.C. §301 (2000) (emphasis added).

68 *See* 47 U.S.C. §154(i) (2000) (authorizing the Commission to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this [Act], as may be necessary in the execution of its functions."). *See also* 47 U.S.C. §303(r) (2000) (authorizing the Commission to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act.").

69 *Worcester*, 31 U.S. at 560 (stating boundary lines separate the States and Indian lands and that the regulation of "intercourse" with Indian tribes belongs to the U.S. government).

70 U.S. CONST. art. I, § 8, cl. 3 ("Congress shall have Power . . . to regulate commerce with foreign nations, and *among the several States, and with the Indian tribes*.") (emphasis added).

faith and credit statutes,[71] the National Labor Relations Act,[72] and the Occupational Safety and Health Act ("OSHA").[73]

A court is likely to be able to distinguish the terms used in these statutes and conclude that the Communications Act includes tribes. Where the National Labor Relations Act ("NLRA") permits "states and territories" to enact "right to work" laws, Congress was clearly referring to states and territories as political entities and not as geographic entities.[74] In the context of full faith and credit statutes, the terms are referring *to the courts* of "states, territories, or possessions."[75] Conversely, in the context of telecommunications law, the terms "states, territories, or possessions" make more sense if they are understood as describing geographic boundaries and not political entities. Telecommunications laws are intended to govern activities on the lands of states, territories and possessions—not the activities of the governments of states, territories or possessions.

The Tenth Circuit adopted this latter reasoning in the context of environmental regulation. In *Phillips Petroleum,* the Safe Drinking Water Act ("SDWA") required "states" to adopt and adequately enforce an approved underground injection control program.[76] The Tenth Circuit held that Congress' emphasis on a national concern for unsafe drinking water and the fact that water "does not respect state boundaries," means the term "state refers to a geographic area, not necessarily a political entity."[77] Tribes can attempt to distinguish *Phillips Petroleum* by pointing out that the tribe in *Phillips* supported application of the Safe Drinking Water Act.[78] Here, tribes are asserting their sovereignty to resist the application of the Communications Act to tribal lands. However, like environmental pollution, radio communications cross state boundaries and the existence of a comprehensive scheme to regulate communications proves that Congress "did not intend to leave any lands, regardless of the jurisdictional control over those lands, unprotected."[79]

The legislative history of the Communications Act provides support for interpreting "states, territories, and possessions" as geographic terms. The language defining the scope of the Communications Act was modeled after the Interstate Commerce Act.[80] Courts have held that Congress clearly intended the Interstate Commerce Act to

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71 *See* Wilson v. Marchington, 127 F.3d 805 (9th Cir. 1997); New York *ex rel.* Kopel v. Bingham, 211 U.S. 468, 474–75 (1909) (citing with approval *Ex Parte* Morgan, 20 F. 298, 305 (W.D. Ark. 1883) in which the district court held that the Cherokee nation was not a "territory" under the federal extradition statute); Brown v. Babbit Ford, Inc., 571 P.2d 689, 694 (Ariz. Ct. App. 1977) (citing *Morgan,* 20 F. 298) (holding that an Indian reservation is not a territory for purposes of full faith and credit); John v. Baker, 982 P.2d 738 (Alaska 1999); Anderson v. Engelke, 954 P.2d 1106 (Mont. 1998). *But see* United States *ex rel.* Mackey v. Coxe, 59 U.S. (18 How.) 100, 104 (1855) (holding that "territory" included the Cherokee nation when used in a statute requiring the courts of the District of Columbia to give full faith and credit to the appointments of administrators by the courts of the territories); Raymond v. Raymond, 83 F. 721 (8th Cir. 1897) (federal courts bound to accord full faith and credit to the laws and judgments of tribal courts); Cornells v. Shannon, 63 F. 305 (8th Cir. 1894); Standley v. Roberts, 59 F. 836 (8th Cir. 1894); Exendine v. Pore, 56 F. 777 (8th Cir. 1893); Mehlin v. Ice, 56 F. 12 (8th Cir. 1893); Jim v. CIT Fin. Servs. Corp., 533 P.2d 751 (N.M. 1975) (citing *Mackey* and considering tribes within state borders as territories for purposes of the Full Faith and Credit Act); Sheppard v. Sheppard, 655 P.2d 895 (Idaho 1982) (categorizing Idaho tribes as territories pursuant to 28 U.S.C. §1738); *In re* Huehl, 555 P.2d 1334 (Wash. 1976) (concluding that tribes are entitled to full faith and credit).

72 *Pueblo of San Juan,* 276 F.3d at 1192 ("Indian tribes are neither states, nor part of the federal government, nor subdivisions of either. Rather, they are sovereign political entities possessed of sovereign authority not derived from the United States, which they predate.").

73 *Reich,* 95 F.3d at 181 ("[T]ribes are not states under OSHA and thus, OSHA does not preempt tribal safety regulations in the same manner in which it preempts state laws.") (internal citations omitted).

74 29 U.S.C. §164(b) (2000).

75 28 U.S.C. §1738 (2000) ("Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.").

76 *Phillips Petroleum Co.,* 803 F.2d at 548.

77 *Id.* at 554–55 (emphasis removed).

78 *See Pueblo of San Juan,* 276 F.3d at 1199 ("Far from attempting to exercise its sovereign authority to enact a competing regulation, the tribe supported the federal regulation and indicated its approval by tribal resolution; it was a third party (Phillips Petroleum) that challenged the application of the regulation.").

79 *Phillips Petroleum,* 803 F.2d at 556 ("Like the SDWA, the Resource Conservation Recvery Act provides for a comprehensive federal-state scheme to regulate the disposal of hazardous waste.").

80 *See* S. REP. No. 781, at 1–11 (1934), *reprinted in* IRVING J. SLOAN, 5 AM. LANDMARK LEGISLATION 496, 507 (1977) ("This bill is so written as to enact the powers which the Interstate Commerce Commission and the Radio Commission now exercise over communications, by means of definite statutory provisions . . . . In this bill many provisions are copied verbatim from the Interstate Commerce Act because they apply directly to communication companies doing a common carrier business.") [hereinafter *Irving*]. "I recommend that the Congress create a new agency to be known as the Federal

apply to tribes.[81] By extension, Congress may also have intended the Communications Act to govern communications taking place on tribal lands.[82]

2. *The Telecommunications Act of 1996: Universal Service and Minority Broadcasting*

The Commission can argue that the Communications Act of 1934 ("1934 Act") is not dispositive, but that the Universal Service mandate and the minority broadcasting provisions of the 1996 Act do provide evidence of Congress' intent to abrogate tribal sovereignty. First, the 1996 Act directed the FCC to take measures to provide "low-income consumers and those in rural, insular, and high cost areas" with greater access to affordable telecommunications services.[83] Although the statute does not explicitly identify Indians or tribes as part of the consumers located in "rural, insular, and high cost areas," the legislative history could be interpreted to suggest that the Act intended to enhance telecommunications deployment to Native Americans on tribal lands.[84] Accordingly, the FCC can argue that the duty created by the 1996 Act reaffirms a background assumption that tribes are subject to its regulations; that is, the Commis-

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Communications Commission, such agency to be vested with the authority now lying in the Federal Radio Commission and with such authority over communications as now lies with the Interstate Commerce Commission—the services affected to be all of those which rely on wires, cables, or radio as a medium of transmission." *Id.* at 512-13.

> I call attention, however, in the beginning to the fact that probably 70 to 75 pages of it comprise a rewriting of existing radio law and its amendments and of the Interstate Commerce Act and its amendments . . . . In 1910 an amendment was adopted which applied certain provisions of the then Interstate Commerce Act to telephone and telegraph companies and added certain new provisions. Since that time the Interstate Commerce Commission has given what might be called cursory attention to the regulation of telephone and telegraph matters, but in practical operation the regulation of the telephone and telegraph companies has been really nothing effective. It has amounted to very little. The Interstate Commerce Commission has been so busy with railroad questions that it has never given much attention to telephone and telegraph companies, and the latter business has grown only recently to such proportions that there have been sufficient complaints on the part of the public to seem to justify a separate organization to regulate and control them . . . . Most of the definitions—and there are considerable number of definitions—are taken from the present Radio Act, from the Interstate Commerce Act . . . . Title II is the common-carrier section, and provides for the regulation of telephones and telegraphs, both wire and wireless. Under this title most of the sections are taken from the Interstate Commerce Act.

[81] *Id.* Missouri, K. & T. Ry. Co. v. Bowles, 40 S.W. 899, 902 (Indian Terr. 1897).

> Counsel for appellee contend that the words "territory of the United States," used in this act, apply only to the organized territories, and that, as the Indian Territory is neither a state nor an organized territory of the United States, the interstate commerce act does not apply to the Indian Territory. . . . The words "from any state or territory of the United States" having been used in the first part of the section, subsequently the act refers to "any place in the United States to an adjacent foreign country, or from any place in the United States through any foreign country to any other place in the United States." From this it would appear that congress at least intended that these latter clauses of the act should apply to the Indian Territory, for it is a place in the United States . . . . These clauses in the act, taken in connection with the words "or territory of the United States," evidently determine the intention of congress, and show its intention to make the interstate commerce law apply to any shipment from any place in the United States to any other place in a different jurisdiction. In other words, it is to apply to all shipments which are not wholly made within the bounds of any state in the Union.

Navajo Tribe v. NLRB, 288 F.2d 162, 165 (D.C. Cir. 1960).

> The Tribe says that Congress in the National Labor Relations Act did not rely on, or purport to exercise, its power to regulate commerce 'with the Indian Tribes,'. . . The Board regulates labor disputes affecting interstate commerce, and the Act authorizes it to do so without stating any exception which would preclude its acting with respect to a plant located within an Indian reservation, or one employing Indians. Congress need not cite or purport to rely on all its powers, when reliance on a single power is ample to sustain its mandate. Nor is its failure to mention its power over commerce with the Indian tribes any indication that it intended to narrow its action with respect to interstate commerce in the manner suggested by appellants.

Chicago, R.I. & P.R. Co. v. Gist, 190 P. 878, 885 (Okla. 1920) (noting that "defendants complied with the provisions of the Interstate Commerce Act and filed with the Interstate Commerce Commission their tariff rates on shipments from the Indian Territory . . .").

[82] *Cf.* Tafflin v. Levitt, 493 U.S. 455, 462 (1990) (citing Lou v. Belzberg, 834 F.2d 730, 737 (9th Cir. 1987)) ("The 'mere borrowing of statutory language does not imply that Congress also intended to incorporate all of the baggage that may be attached to the borrowed language.'").

[83] 47 U.S.C. §254(b)(3) (2000).

[84] *See, e.g.,* Testimony of Senator Burns before the S. Committee on Comm, Sci. & Transp., 103rd Cong. 110-11 (1994) ("My vision of the National Information Infrastructure is a broadband interactive communications network accessible at affordable rates that also empowers minorities, individuals with disabilities, women, especially single mothers and native Americans. This is what I mean when I say all Americans."). *See also id.* at 503 (President of a Native American owned telecommunications company notes, "United Utilities customers and rural residents nationwide have been the beneficiaries of the universal service goal set out in the 1934 Communications Act. Without Congress' and the FCC's pursuance of this goal, our customers would not have telephone service.").

sion could not facilitate deployment of telecommunications services on tribal lands without first having the jurisdiction to regulate such services.

Tribes can argue that the duty created by the Universal Service provisions does not give rise to the right to apply general communications regulations to tribes. However, a court is likely to conclude that the Universal Service mandate supports the Commission's position that it may regulate communications services on tribal lands. In *Phillips Petroleum,* the SDWA mandated that the EPA install its own federally administered program if a "state" failed to adopt or adequately enforce an approved underground injection control program.[85] In concluding there was Congressional intent to regulate tribes, the court stressed the fact that "Congress expressly stated its concern that Indians should enjoy the benefits of clean drinking water as should all Americans."[86]

Second, the Communications Act directs the Commission to grant licensing preferences to minority groups. These include American Indians.[87] The Commission can argue that Congress intended tribally owned carriers serving tribal lands to use these licensing procedures. Tribes can argue that the provisions are directed at carriers owned by Native American people as a racial group and not tribes *per se.* Ultimately, a court is likely to conclude that the 1996 Act further bolsters the conclusion that there is Congressional intent to include tribes within the jurisdiction of the Commission.

3. *The 1997 Indian Telecommunications Act*

The failure of Congress to pass the Native American Telecommunications Act of 1997 ("Native American Telecom Act" or "NATA")[88] may provide additional evidence of Congressional intent to include tribes within the jurisdiction of the FCC. The NATA states that the Commission "shall promote the exercise of sovereign authority of tribal governments over the establishment of communications policies and regulations within their jurisdictions."[89] Under the NATA, the Commission is required to "forbear from applying any provision of this Act, or any regulation thereunder to the extent that such forbearance—is necessary to ensure compliance with the trust responsibility of the United States."[90] The Commission can argue that failure to enact legislation that would have increased tribal sovereignty is further evidence of an underlying understanding that tribal sovereignty has already been abrogated. The weight accorded to this argument will depend on the court's willingness to consider a failed bill as evidence of Congressional intent.[91]

In the final analysis, after a court evaluates the goals and wording of the Communications Act and the corresponding legislative history, the court will be able to conclude that Congress intended to abrogate tribal sovereignty in telecommunications.

b. *If There Is No Congressional Intent, Does Silence Mean Sovereignty Has Been Abrogated?*

If the court does not find evidence of Congressional intent to abrogate tribal sovereignty for telecommunications services, the court will decide whether it should presume the Communications Act is intended to regulate tribes. Courts have generally relied on the *Tuscarora* rule, which creates a presumption that legislation applies to tribes in the absence of congressional intent.[92] A recent decision by the Tenth Circuit, however, suggests a dramatic shift in the favor of tribes under such circumstances.[93]

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85 *Phillips Petroleum,* 803 F.2d at 548 (construing The Safe Drinking Water Act §1422(c), 42 U.S.C. §300 h-1(c) (1986)).

86 *Id.* at 555-56.

87 *See* 47 U.S.C. §309(i)(3)(C)(ii) (2000).

88 *See* Native Am. Telecomm. Act of 1997, H.R. 555, 105th Cong. (1997).

89 *Id.* at §2(a) (adding § 12(b)(2) to Title I of the Communications Act of 1934).

90 *Id.* at §2(a) (adding § 12(d) to Title I of the Communications Act of 1934).

91 *Compare* Central Bank v. First Interstate Bank, 511 U.S. 164, 186 (1994) (noting that "it is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of the [courts'] statutory interpretation . . . . Congress may legislate, moreover, only through the passage of a bill which is approved by both Houses and signed by the President" (internal citations omitted) (quotation marks omitted)) *with* Bob Jones Univ. v. United States, 461 U.S. 574, 601 (1983) (holding that the IRS decision to deny tax-exempt status to two fundamentalist schools which maintained racially discriminatory admissions policies was consistent with congressional intent in part because the legislative history revealed that Congress had failed to enact 13 bills introduced to overturn the IRS interpretation of the statute which was silent on the issue).

92 Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99 (1960).

93 *See infra* Part VI(1)(A)(ii)(b)(2).

1. *The Tuscarora Rule & Couer d'Alene Exceptions*

In *Federal Power Commission v. Tuscarora Indian Nation*,[94] the Supreme Court stated in *dicta* that generally applicable federal statutes apply to tribes: "It is now well settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests."[95] Although legal commentators have criticized the *Tuscarora* Rule[96] and the Tenth Circuit has recently rejected it,[97] most courts continue to adhere to it.[98] In *Donovan v. Couer d'Alene Tribal Farm*, the Ninth Circuit observed three exceptions to the *Tuscarora* Rule. The Rule does not apply where "(1) the law touches 'exclusive rights of self-governance in purely intramural matters'; (2) the application of the law to the tribe would 'abrogate rights guaranteed by Indian treaties'; or (3) there is proof 'by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations . . . .'"[99]

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94 *Tuscarora*, 362 U.S. at 99.

95 Id. at 116. The statute at issue in *Tuscarora* was the Federal Power Act ("FPA"). In the FPA, Congress authorized the licensing of construction of a power plant. The Federal Power Commission, authorized under the FPA, determined that plant construction necessitated appropriation of portions of the Tuscaroras' tribal land. The portions to be appropriated were held by the tribe in fee simple rather than by treaty with the United States. Yet, the FPA explicitly protected lands designated as "reservations" by providing that "the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired." *Id.* at 110. The FPA further defined reservations as "national forests, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the United States . . . ." *Id.* at 111. The *Tuscarora* Court, relying solely on tax cases involving individual Indians (not tribes), extended a canon of interpretation (which theretofore had been unique to tax statutes) to all statutes of general applicability, as they relate to Indian tribes. Thus, interpreting the statute literally using a canon taken out of context, the Court reasoned that interference with tribal reservations occurred only when the United States had an ownership interest in the land. In spite of the Tuscaroras holding the land in fee simple, the Court reasoned that the land was not a part of the reservation, and hence, was subject to condemnation under the FPA. *Id.* at 123-24. *Couer d'Alene*, 751 F.2d at 1115 ("The [defendant] may be correct when it argues that this language from *Tuscarora* is dictum, but it is dictum that has guided many of our decisions.") (emphasis in original); *Pueblo of San Juan*, 276 F.3d at 1202 (Murphy, J., dissenting) ("Though *dicta*, [Tuscarora's] language indicates the Court's position that the case law supports a presumption that federal statutes of general applicability apply to Indian tribes.").

96 See Kristen E. Burge, *ERISA & Indian Tribes: Alternative Approaches For Respecting Tribal Sovereignty*, 2000 WIS. L. REV. 1291 (2000); William Buffalo & Kevin J. Wadzinski, *Application of Federal & State Labor & Employment Laws to Indian Tribal Employers*, 25 U. MEM. L. REV. 1365 (1995); Vicki J. Limas, *Application of Federal Labor & Employment Statutes to Native American Tribes: Respecting Sovereignty & Achieving Consistency*, 26 ARIZ. ST. L.J. 681 (1994); Alex Tallchief Skibine, *Applicability of Federal Laws of General Application to Indian Tribes & Reservation Indians*, 25 U.C. DAVIS L. REV. 85 (1991). The soundness of the Tuscarora rule is primarily questionable, because the case dealt solely with property interests of Indians, and addressed neither tribal sovereignty, nor tribal self-governance. Moreover, the Tuscarora Court consistently referred to "persons" and "Indians," not "tribes." The calculus whether a federal statute of general applicability applies to Indian tribes is fundamentally different than that reserved for Indians in their individual capacity, as only the former must entertain issues of sovereignty and self-governance. Another important, yet frequently overlooked criticism of Tuscarora is the "federal policy context" argument. The Court has suggested that a statute that is purported to strip inherent sovereignty must be viewed in the context of the prevailing federal policy toward tribes at the time of statutory interpretation. *See Santa Clara Pueblo*, 436 U.S. at 60 (quoting McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172 (1973)) ("Indian sovereignty. . .[is] a backdrop against which the applicable. . .federal statut[e] must be read . . . ."); *Pueblo of San Juan*, 276 F.3d at 1195 ("The Court's teachings also require us to consider tribal sovereignty as a 'backdrop,' against which vague or ambiguous federal enactments must always be measured . . . ."); F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 242 (1982) (noting that statutes should be interpreted in light of the current federal policy to promote tribal self-determination and economic self-sufficiency). Tuscarora was decided in the Termination Era (1953-1968), during which Indian sovereignty was sharply curtailed. This hostility against tribal rights has most definitely softened in both the judiciary and the political branches. As such, there is a persuasive argument that the Tuscarora Rule, even if it was once good law, is inconsistent with the modern federal view of the scope of tribes' sovereign rights, and must be reevaluated.

97 *See Pueblo of San Juan*, 276 F.3d at 1186 (rejecting *Tuscarora*).

98 *See Reich*, 95 F.3d at 174; United States v. White, 237 F.3d 170 (2d Cir. 2001); Smart v. State Farm Ins. Co., 868 F.2d 929, 932 (7th Cir. 1989); EEOC v. Karuk Tribe Hous. Auth., 260 F.3d 1071, 1078 (9th Cir. 2001); United States v. Baker, 63 F.3d 1478 (9th Cir. 1995); Lumber Indus. Pension Fund v. Warm Springs Forest Prods. Indus., 939 F.2d 683 (9th Cir. 1991); *Occupational Safety & Health Comm'n*, 935 F.2d at 182; Nero v. Cherokee Nation of Okla., 892 F.2d 1457, 1462 (10th Cir. 1989); Taylor v. Ala. Intertribal Council Title IV J.T.P.A., 261 F.3d 1032, 1035 (11th Cir. 2001); *Florida Paraplegic Ass'n*, 166 F.3d at 1129.

99 *Couer d'Alene*, 751 F.2d at 1116. *Couer d'Alene* involved a commercial farm owned and operated by an Indian Tribe. The farm sold produce from the farm in open interstate markets. It employed non-Indians and "[a]part from its tribal ownership, the farm [wa]s similar in its operation and activities to other farms in the area." *Id.* at 1114. An OSHA inspector issued fines for a myriad of workplace safety violations on the farm. The Indian tribe contended that its inherent sovereign powers barred application of OSHA to its activities, absent an express Congressional decision to that effect. Consistent with the *Tuscarora* Rule, the Ninth Circuit observed that the issue was "whether congressional silence should be taken

There is nothing in the legislative history of the Communications Act indicating that Congress intended to exempt tribes from the Act's scope. This renders the third *Couer d'Alene* exception inapposite. Thus, if the court chooses to adhere to the presumptions afforded by *Tuscarora* and the *Couer d'Alene* exceptions, tribes can argue that regulation of tribal telecommunications falls within one of the other two *Couer d'Alene* exceptions: (1) federal regulation of telecommunications touches exclusive rights of self-governance in purely intramural matters; or (2) the application of the Telecommunications Act to tribes abrogates rights guaranteed by Indian treaties.

(i) *Does Federal Regulation of Tribal Telecommunications Services "Touch Exclusive Rights of Self-Governance In Purely Intramural Matters"?*

First, tribes can argue that federal regulation of telecommunications services touches the exclusive rights of self-governance in purely intramural matters. *Couer d'Alene* described "purely intramural matters" as those that threaten the "political integrity, the economic security, or the health or welfare of the tribe."[100] For example, courts have held that "purely intramural matters" includes matters relating to tribal membership,[101] domestic relations,[102] tribal hiring practices,[103] and private suits for actions arising on a reservation.[104] Some courts have even held that "purely intramural matters" include the right to exclude non-Indians in general—and federal employees, in particular—from a reservation[105] as well as tribal control of economic activity on the reservation.[106] To determine whether a matter is purely intramural, courts evaluate (1) the nature of the activity, (2) whether non-Indians are involved and (3) whether the activity operates in interstate commerce.[107]

Tribes can argue that tribal regulation of UWB

as an expression of intent to exclude tribal enterprises from the scope of an Act to which they would otherwise be subject." *Id.* at 1115.

100 *See Coeur d' Alene*, 751 F.2d at 1115; *Reich*, 95 F.3d at 179; *Montana*, 450 U.S. at 566. *See also* Duro v. Reina, 495 U.S. 676, 685–86 (1990) (The tribes' "retained sovereignty" reaches only that power "needed to control . . . internal relations, . . . preserve their own unique customs and social order[, and] . . . prescribe and enforce rules of conduct for [their] own members.").

101 *Nero*, 892 F.2d at 1463 ("[N]o right is more integral to a tribe's self-governance than its ability to establish its membership.").

102 *See, e.g.*, Strate v. A–1 Contractors, 520 U.S. 438, 445 (1997) ("The inherent sovereign powers of an Indian tribe . . . do not extend to the activities of nonmembers of the tribe."); *Montana*, 450 U.S. at 563-65 (The "Indian tribes retain their inherent power . . . to regulate domestic relations among members. . . ."); United States v. Quiver, 241 U.S. 602, 605 (1916) (holding that adultery committed by one Indian with another Indian on an Indian reservation is domestic relations, and generally, domestic relations are "the relations of the Indians among themselves—the conduct of one toward another."); *Reich*, 95 F.3d at 179; United States v. White, 237 F.3d 170, 173 (2d Cir. 2001); *Great Lakes Indian Fish & Wildlife Comm'n*, 4 F.3d at 502 ("It is rather obvious that off-reservation fishing, hunting and gathering involve relations between Indians and non-Indians and thus by definition are not 'purely intramural.'"); *Smart*, 868 F.2d at 932; *Florida Paraplegic Ass'n*, 166 F.3d at 1129.

103 *See Fond du Lac*, 986 F.2d at 249.

104 *Karuk Tribe Hous. Auth.*, 260 F.3d at 1080 (holding that tribal housing authority is "an arm of the tribal government" and thus immune from suit by an Indian member in federal court); Hagen v. Sisseton-Wahpeton Cmty. Coll., 205 F.3d 1040, 1043 (8th Cir. 2000) (holding a non-profit with Indian members is an "arm of the sovereign tribes" and "more than a mere business" and is entitled to sovereign immunity as an agent of tribal government); *Fond du Lac*, 986 F.2d at 249 (holding the ADEA will not apply to Indians for employer age rules because age "should be allowed to be restricted (or not restricted) by the tribe in accordance with its culture and traditions."); Taylor v. Ala. Intertribal Council Title IV J.T.P.A., 261 F.3d 1032, 1036 (11th Cir. 2001) (following the rationale of *Fond du Lac*).

105 *Compare* Donovan v. Navajo Forest Prods. Indus., 692 F.2d 709, 712 (10th Cir. 1982) ("[A]n Indian tribe's power to exclude non-Indians from tribal lands is an inherent attribute of tribal sovereignty, essential to a tribe's exercise of self-government and territorial management.") (emphasis omitted) *with Coeur d'Alene*, 751 F.2d at 1117 n.3 ("To whatever extent the Tenth Circuit's [right-to-exclude] decision [in *Navajo Forest Products*] is not tied to the existence of an express treaty right, we disagree with it."); *see Occupational Safety & Health Comm'n*, 935 F.2d at 186 (which affirmed California v. Cabazon Band of Mission Native Am., 480 U.S. 202 (1987)) (agreeing that a tribe usually has a right to exclude non-Indians from its reservation, but "[f]ederal law enforcement officers have the capability to respond to violations of [federal laws that implicate tribal lands] on Native American reservations.").

106 *See Southland Royalty Co.*, 715 F.2d at 488 (which affirmed *Merrion*, 455 U.S. at 137) ("The tribe has a power to tax which derives from 'the tribe's general authority, as sovereign, to control economic activity within its jurisdiction.'"). *But see Occupational Safety & Health Comm'n*, 935 F.2d at 184 ("Although revenue from the [tribal] mill is critical to the tribal government, application of the [OSHA] Act does not touch on the Tribe's 'exclusive rights of self-governance in purely intramural matters,'" because the mill employs non-Indians and sells its produce in interstate commerce.).

107 *Couer d'Alene* established the groundwork of this test, asserting that "because the Farm employs non-Indians as well as Indians, and because it is in virtually every respect a normal commercial farming enterprise, we believe that its operation free of federal health and safety regulations is 'neither

relates to matters that threaten the political integrity, the economic security, or the health or welfare of the tribe in three ways. First, advanced telecommunications services are essential to the future economic and political growth of tribes.[108] Emissions would be confined to the reservation and non-Indians would not be subject to tribal telecommunication regulations. This argument would likely fail because of the economic security exception. This exception has been construed as inapplicable to activities that involve the open market; advanced telecommunications services would further tribal economic growth by facilitating the linkage between tribes and the open market.[109]

Second, tribes could argue that telecommunications services, which enable tribal members to effectively communicate with one another, are part of "domestic relations."[110] However, "domestic relations" probably do not include telecommunications. The few cases that discuss "domestic relations" involve issues such as adultery.[111] Furthermore, if tribal UWB emissions have any affect on non-Indians (such as those who live on the reservation, but on non-Indian fee lands), then telecommunications services would not be a pure "domestic relations" activity.

Third, if general regulation of telecommunications services on tribal lands is not a "purely intramural matter," tribes can argue that use of UWB technology for government functions is a "purely intramural matter."[112] For example, a high-speed wireless network involving the tribal courthouse, council building, and town hall is necessary for effective governance and administration of justice. It may be possible that a court will determine the "intramural matter" exception applies to the deployment of telecommunications services in tribal government buildings.

(ii) *Does the Federal Regulation of Tribal Telecommunications Services Abrogate Tribal Rights Guaranteed by Indian Treaties?*

If a court does not conclude that telecommunications falls under the "self-governance in intramural matters" exception, tribes can argue that the application of the Communications Act to tribes abrogates rights guaranteed by Indian treaties. There are two types of treaty provisions that

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profoundly intramural . . . nor essential to self-government.'" *Coeur d'Alene*, 751 F.2d at 1116 (quoting United States v. Farris, 624 F.2d 890, 893 (9th Cir. 1980)). The Second Circuit formalized the *Coeur d'Alene* logic into a "mosaic test" of whether a matter is purely intramural; factors include: (i) the nature of work (ii) whether the tribe employs non-Indians, and (iii) whether the activity operates in interstate commerce. *Reich*, 95 F.3d at 181 ("These separate tiles—the nature of MSG's work, its employment of non-Indians, and the construction work on a hotel and casino that operates in interstate commerce—when viewed as a whole, result in a mosaic that is distinctly inconsistent with the portrait of an Indian tribe exercising exclusive rights of self-governance in purely intramural matters."). *See Smart*, 868 F.2d at 935–36 (Because the insurer was a non-Indian and "ERISA does not broadly and completely define the employment relationship . . . [it] merely imposes beneficiary protection while in no way limiting the way in which the Tribe governs intramural matters." So, the statute of general applicability is applicable to tribes and tribal employers.); *Occupational Safety & Health Comm'n*, 935 F.2d at 184 (employing the Second Circuit mosaic test and noting that "[t]he mill employs a significant number of non-Native Americans and sells virtually all of its finished product to non-Native Americans through channels of interstate commerce."); *Florida Paraplegic Ass'n*, 166 F.3d at 1129 ("The Miccosukee Tribe's restaurant and gaming facility is a commercial enterprise open to non-Indians from which the Tribe intends to profit. The business does not relate to the governmental functions of the Tribe, nor does it operate exclusively within the domain of the Tribe and its members. In fact, it is precisely the sort of facility within 'the array of establishments . . . available to others who do not currently have disabilities' that Congress intended to make 'equal[ly] access[ible]' to disabled individuals through enactment of Title III of the ADA."; *Farris*, 624 F.2d at 893 (gambling operations conducted on Indian trust land that are of "the large-scale professional gambling involved here . . . is neither profoundly intramural (the casinos' clientele was largely non-Indian) nor essential to self-government"). *But see Fond du Lac*, 986 F.2d at 249 (refusing to apply "general applicability" rule to Age Discrimination in Employment Act where employment relationship was between Indian tribe employer and Indian applicant, because "the tribe's specific right of self-government would be affected.").

[108] *See supra*, Part II.

[109] *See, e.g., Occupational Safety & Health Comm'n*, 935 F.2d at 184 ("Although revenue from the [tribal] mill is critical to the tribal government, application of the [OSHA] Act does not touch on the Tribe's "exclusive rights of self-governance in purely intramural matters," because the mill employs non-Indians and sells its produce in interstate commerce."); *See also* Richard J. Ansson, Jr. & Ladine Oravetz, *Tribal Economic Development: What Challenges Lie Ahead for Tribal Nations as They Continue to Strive for Economic Diversity?*, 11 KAN. J.L. & PUB. POL'Y 441, 460 (2002) (noting that "any operations that may promote a tribe's economic growth by participating in open markets would clearly be too broad.").

[110] *See, e.g., Quiver*, 241 U.S. at 603–05 (holding that adultery committed by one Indian with another Indian on an Indian reservation is domestic relations, and generally, domestic relations are the "relations of the Indians among themselves—the conduct of one toward another.").

[111] *See Id.*

[112] *See also Coeur d'Alene*, 751 F.2d at 1115 (purely intramural matters are those involving the political or economic viability of a tribe or a tribe's "health or wefare.").

could be used to prove that the Communications Act abrogates treaty rights. First, some tribes have agreements with the federal government that give them the right to exclude non-Indians from tribal lands. It is arguable that such a treaty prevents FCC officials from inspecting tribal lands and enforcing regulatory violations. Second, some tribes have been granted a right to remain forever independent of any United States state, territory or possession. This treaty right may exempt tribes from federal statutes (such as the Communications Act) that regulate "states, territories, or possessions." A court is likely to reject these arguments, because treaties do not specifically grant tribes the right to regulate telecommunications services.[113]

2. *The Tenth Circuit's Pueblo of San Juan Rule of Tribal Legislative Sovereignty*

NLRB v. Pueblo of San Juan,[114] a recently decided Tenth Circuit case, stands for the tribe-friendly proposition that when congressional intent underlying a federal statute is uncertain and a tribal council enacts legislation "regulating economic activity involving its own members within its own territory,"[115] then the tribal law trumps any contrary provisions of the generally applicable federal statute.[116] In the ruling that National Labor Relations Act did not prevent the Pueblo tribal council from enacting a "right-to-work law," the court concluded that "[s]ilence is not sufficient to establish congressional intent to strip Indian tribes of their retained inherent authority to govern their own territory . . . . The correct presumption is that silence does not work a divestiture of tribal power."[117] The court distinguished its holding from the *Tuscarora* genealogy by stating that its decision was motivated by the fact that the tribe was exercising its authority as a sovereign rather than in a proprietary capacity such as that of an employer or landowner.[118]

Accordingly, tribes can argue that the regulation of telecommunications services is an exercise of its authority as a sovereign rather than in a proprietary capacity; therefore, a court should presume that sovereignty has not been abrogated under *Pueblo of San Juan*. However, there are several reasons why a court may reject this argument.

First, the *Pueblo* court stated that "[t]he suggestion that tribes . . . might 'enact ordinances allowing *precisely* what generally applicable federal law prohibits' finds no support . . . ," yet it offered no standard for determining when a tribal ordinance allows "precisely" what the general federal statute prohibits.[119] Second, the concurring and dissenting opinions in *Pueblo of San Juan* heavily criticized the property/sovereignty dichotomy as unworkable.[120] Third, the holding in *Pueblo of San Juan* can be limited based on the facts of the case.[121] Finally, the Supreme Court frequently rejects novel opinions on tribal sovereignty originat-

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113 *See, e.g.*, Confederated Tribes of Warm Springs v. Kurtz, 691 F.2d 878 (9th Cir. 1982) (holding federal tax statutes applied to the tribe when a treaty with a general exclusion clause contained no specific exemption language for taxes).

114 276 F.3d at 1186 (10th Cir. 2002).

115 *Id.* at 1200.

116 *Id.* at 1198-2000.

117 *Id.* at 1196 (citing *Merrion*, 455 U.S. at 148 n.14).

118 *Id.* at 1199.

119 *Id.* at 1191 (emphasis added). If this limitation were read broadly, a tribe that enacts legislation that permits a UWB wireless network for Internet access violates "precisely" Part 15 of the FCC's Rules. However, a more literal reading would show that the 1996 Act itself does not specifically outlaw UWB, so it can be legalized for tribal members on the tribal reservation by a tribal statute.

120 *See id.* at 1204 (Murphy, J., dissenting) ("[T]he majority offers no logical, precedential, or authoritative support for the proposition that a tribe's sovereign power to enact *general legislation* is afforded more protection than any other aspect of its sovereignty.") (emphasis in original). Dissenting Judge Murphy observed that the Tenth Circuit in *Nero*, had applied the *Tuscarora* Rule to determine whether a silent general statute divested the tribe of inherent sovereignty. *Id.* Judge Murphy also feared that the *Pueblo* Rule will decimate Congress's ability to regulate Indian tribes through statutes of general applicability. *Id.* He cited opinions from several other circuit courts appearing to hold to the contrary, and concluded:

> By holding that Congress can never implicitly divest tribes of their power to enact laws that conflict with generally applicable federal statutes, the majority effectively bestows upon Indian tribes sovereign powers far greater than those possessed even by the states. As a result of the majority opinion, tribes will now have unfettered power to enact ordinances that directly conflict with any federal statute of general application. For example, the Pueblo . . . could [ ] enact legislation declaring its members to be exempt from all federal tax laws. Such an ordinance would effectively preempt the application of all federal tax laws until Congress remedied the situation by expressly including Indian tribes within the reach of the federal tax laws. This certainly cannot be the rule.

Id. at 1205.

121 The first and most obvious limiting factor is that states and territories were statutorily enabled to enact similar legislation to the Pueblo of San Juan. It is perhaps the permissibility of comparable state legislation that allowed the *Pueblo* court to so easily construct its holding and to state, "*[l]ike states and territories*, the Pueblo has a strong interest as a

ing in the Tenth Circuit.[122] Assuming that *Pueblo of San Juan* is able to withstand all of these objections, its rule implies that the FCC might not be able to prohibit the passage of a tribal ordinance authorizing UWB telecommunications network on a reservation.[123]

iii. *"The Gloss": If Congress Has Not Abrogated Tribal Sovereignty, Can Sovereignty Be Divested By a Tribe's Failure To Assert It?*

If a court finds that Congress has not abrogated tribal sovereignty, the Commission might argue that a "gloss" has been established by the continued FCC regulation of telecommunications services on tribal lands. In other words, because the Commission has regulated telecommunications services on tribal lands for many years, tribal sovereignty has been divested.[124] This argument could be effectively rebutted. First, failure to challenge federal regulation does not erode tribal sovereignty.[125] Second, even if a "gloss" has been established to allow the FCC to regulate telecommunications services on tribal lands, tribes are asserting their sovereignty over the regulation of new technologies such as UWB. Accordingly, it would be unjust to deny tribes the benefit of their sovereignty over novel forms of telecommunications services because they failed to assert control over other communications services, such as basic telephone service, nearly a century ago.

iv. *The Scope of Tribal Regulatory Authority and the Montana Limitation*

If a court holds that tribes have sovereignty to regulate UWB, the FCC can argue that tribes only have the authority to allow UWB emissions on Indian land. The emissions cannot "leak" onto non-Indian lands. As a direct result of the General Allotment Act of 1887 (Dawes Act),[126] many Indian reservations are a jurisdictional quagmire, a checkerboard of tribal and federal jurisdiction over trust lands and state jurisdiction over non-Indian fee lands.[127] In *Montana v. United States*,[128] the Supreme Court held that on Indian-country fee lands,[129] the general rule is that "absent a different congressional direction, Indian tribes lack

sovereign in regulating economic activity involving its own members within its own territory, and it therefore may enact laws governing such activity." *Id.* at 1200 (emphasis added). To further buttress the insight that its broad grant of inherent legislative sovereign authority was not so broad, the *Pueblo* court also stated, "[t]here is [ ] no showing before us that the Pueblo's right-to-work ordinance is a kind of law that a state or territory might not be permitted to enact and enforce." *Id.* Second, when distinguishing *Phillips Petroleum* from the case before it, the Court observed that "the facts differ significantly between [*Phillips Petroleum*] and the instant [case]. There, the statute gave delegated authority to the Environmental Protection Agency to promulgate regulations governing underground injection, which threatened to pollute groundwater and endanger the nation's drinking water supply." *Id.* at 1199. To justify the holding, the court could have observed that *Phillips Petroleum* involved the tribe's proprietary, rather than its sovereign, interest. While the *Phillips Petroleum* comment may be in dictum, it still suggests that a tribal statute that conflicts with a federal ordinance of widespread importance will be struck down as invalid.

122 The Tenth Circuit's last attempt to extend tribes' inherent sovereignty came in Atkinson Trading Co. v. Shirley, 210 F.3d 1247 (10th Cir. 2000), which was overturned by the Supreme Court in Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001).

123 The tribal law would have to be carefully and narrowly construed to come within the scope of tribal authority offered by *Pueblo of San Juan*. In particular, only tribal members could use UWB, and because the autonomy granted by the Tenth Circuit is closely linked to tribal sovereignty, the law should err on the side of conservatism by permitting UWB use only for tribal government institutions.

124 In advancing this argument, the Commission could draw a parallel to the "gloss" argument used in separation of powers jurisprudence. In *Youngstown*, Justice Frankfurter noted "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on 'Executive Power' vested in the President . . . ." *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610–11 (1952).

125 *Wheeler*, 435 U.S. at 323 ("[U]ntil Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status."); Bottomly v. Passamaquoddy, 599 F.2d 1061, 1066 (1st Cir. 1979) ("The mere passage of time with its erosion of the full exercise of the sovereign powers of a tribal organization cannot constitute such an implicit divestiture.").

126 General Allotment Act of 1887 (Dawes Act), 24 Stat. 388 (codified at 25 U.S.C. §§331–58 (1994)).

127 *See generally* Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L. J. 1, 83 (1995). The Allotment Era officially ended when Congress passed the Indian Reorganization Act of 1934, 25 U.S.C. §§461–79 (1994).

128 450 U.S. 544, 547 (1981) (considering the sources and scope of the power of an Indian tribe to regulate hunting and fishing by non-Indians on lands inside reservation boundaries that were owned in fee simple by non-Indians). It should be noted that *Montana* analysis does not apply to regulations on tribal lands. *See, e.g.*, Allstate Indem. Co v. Stump, 191 F.3d 1071, 1074 (9th Cir. 1999) ("[T]he *Montana* rule governs only disputes arising on non-Indian fee land, not disputes on tribal land; otherwise, the *Strate* Court's analysis of why a state highway on tribal land was equivalent to non-tribal land would have been unnecessary.").

129 *Strate*, 520 U.S. at 446 ("The term 'non-Indian fee

civil authority over the conduct of nonmembers on non-Indian land within a reservation."[130] *Montana*, however, excluded from this general principle a tribe's regulation of the activities of nonmembers who (1) "enter consensual relationships with the tribe or its members";[131] or (2) "threaten[ ] or [have] some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[132]

Courts have construed the first exception narrowly and it is not likely to be of much use in overcoming a non-tribal resident's challenge to a tribal UWB telecommunications network.[133] The second exception, which has primarily been discussed by the Ninth Circuit, likewise has been construed narrowly.[134] The Supreme Court has also taken a limited view of the matter,[135] and has concluded that "[t]he [second *Montana*] excep-

lands' . . . refers to reservation land acquired in fee simple by non-Indian owners.").

130 *Id.*

131 *Montana*, 450 U.S. at 565.

132 *Id.* at 566. In light of recent Supreme Court and Ninth Circuit jurisprudence, there might be a third, implicit Montana exception that is forming. This exception recognizes that "tribes have inherent sovereignty over water quality management and habitat protection in reservation waters." H. Scott Althouse, *Idaho Nibbles at Montana: Carving Out a Third Exception for Tribal Jurisdiction Over Environmental & Natural Resource Management*, 31 ENVTL. L. 721, 766 (2001). The rationale underlying this possible exception is that the Supreme Court in its line of precedent since *Montana* was improperly fixated on property interests as a bright line to determine whether tribes simply have no inherent sovereignty claim to regulate behavior in a certain area, or instead might have inherent sovereignty rights to control certain activities, such as water or air quality management. The challenges to the proprietary bright line test established by the Supreme Court in *Montana*, finds support in the Tenth Circuit's recent decision, *Pueblo of San Juan*, 276 F.3d at 1198–99 ("Proprietary interests and sovereign interests are separate . . . a government may exercise sovereign authority over land it does not own."). Indeed, the Court itself has struggled to identify the correct scope of inherent sovereignty within its property-based analysis; the quintessential example of this is usufructuary rights (i.e. off-reservation hunting and fishing control). To allow Indians this sovereign right, the Court has deemed that Indian property rights include "profits a prendre," regardless of whether a tribe bargained for such rights in a treaty. *See, e.g.*, Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999). *But see*, Idaho v. United States, 533 U.S. 262 (2001) (showing the Supreme Court also appears to be backtracking on its property-based *Montana* logic and moving in yet another direction).

133 *See Atkinson Trading Co.*, 532 U.S. at 655 (finding that "a nonmember's actual or potential receipt of tribal police, fire, and medical services," or "a person's status as a licensed Indian trader" do not qualify a person to have entered into a "consensual relationships with a tribe," per the first *Montana* exception); *Strate*, 520 U.S. at 457 (holding that there was no tribal jurisdiction although the construction company "was engaged in subcontract work on the Reservation, and therefore had a 'consensual relationship' with the Tribes, '[the plaintiff driver] was not a party to the subcontract, and the Tribes were strangers to the [car] accident.'") (quoting *A–1 Contractors*, 76 F.3d at 940); Big Horn County Elec. Coop. v. Adams, 219 F.3d 944, 951 (9th Cir. 2000) ("An ad valorem tax on the value of utility property is not a tax on the activities of a nonmember, but is instead a tax on the value of property.") Therefore, this is outside the first *Montana* exception. *See also* Burlington N. R.R. v. Red Wolf, 196 F.3d 1059, 1064 (9th Cir. 1999) (holding that a "right-of-way created by congressional grant is a transfer of a property interest that does not create a continuing consensual relationship between a tribe and the grantee."); Yellowstone County v. Pease, 96 F.3d 1169, 1176 (9th Cir. 1996) (holding that a statute which gave the state portions of tribal land in exchange for a guarantee that tribal children could attend state public schools is not "a consensual commercial agreement," but is instead "a legislative directive from Congress."). *But see In re* Western Wireless Corporation: Petition for Designation as an Eligible Telecommunications Carrier for the Pine Ridge Reservation in South Dakota, *Memorandum Opinion and Order*, 16 FCC Rcd. 18,145, paras. 15–16 (2001) (finding that because a wireless carrier had a consensual relationship with the Tribe, the first *Montana* exception provided the tribe with the sovereignty to regulate).

134 In subsequent cases, this exception has occasionally provided tribes with greater inroads to achieving inherent sovereignty. *See, e.g., Montana*, 137 F.3d at 1141 (holding that for a lake that lies on both non-Indian and Indian-owned reservation lands, the Clean Water Act defers regulation to the tribe because "'[a] water system is a unitary resource. The actions of one user have an immediate and direct effect on other users.'" (quoting Colville Confederated Tribes v. Walton, 647 F.2d 42, 52 (1981)). To come within the second *Montana* exception, the court ruled that the potential impacts of regulated activities (here, the impairment of lake waters) on the tribe must be "serious and substantial."). *Id.* at 1140–41. However, tribal success has generally been restricted to tribal assertions of zoning authority over fee lands. *See, e.g.*, Governing Council of Pinoleville Indian Cmty. v. Mendocino County, 684 F. Supp. 1042, 1045 (N.D. Cal. 1988) (holding Pinoleville Rancheria could impose a one-year moratorium on development, including non-Indian fee lands); Coleville Confederated Tribes v. Cavenham Forest Indus., 14 Indian L. Rep. 6043 (Colville Tr. Ct. 1987) (upholding tribal zoning of non-Indian fee lands); Knight v. Shoshone & Arapahoe Indian Tribes of Wind River Reservation, 670 F.2d 900, 903–04 (10th Cir. 1982) (holding tribal zoning ordinance applies to nonmember reservation residents); Bugenig v. Hoopa Valley Tribe, 229 F.3d 1210, 1220–21 (9th Cir. 2000) (quoting *Pease*, 96 F.3d at 1176–77 and *Strate*, 520 U.S. at 458) (the nonmember's impact on a tribe be "demonstrably serious," or "trench unduly on tribal self-government.").

135 *See Hicks*, 533 U.S. at 360 (stating that the existence of tribal ownership is not alone enough to support regulatory jurisdiction over nonmembers. "The ownership status land . . . is only one factor to consider in determining whether regulation of the activities of nonmembers is 'necessary to protect tribal self-government or to control internal relations.' It may sometimes be a dispositive factor."); *Atkinson Trading Co.*, 532 U.S. at 657 (finding that "operation of a hotel on non-Indian fee land" is not a second exemption from *Montana.*); *Strate*, 520 U.S. at 459 (observing that forcing "[a

tion is only triggered by *nonmember conduct* that threatens the Indian tribe; it does not broadly permit the exercise of civil authority wherever it might be considered 'necessary' to self-government."[136] Furthermore, the Supreme Court has held that a high ratio of tribal to non-member reservation acreage will *NOT* affect the *Montana* analysis.[137] Thus, if there are even small parcels of non-Indian land on the reservation and tribal UWB telecommunications network causes interference, the FCC may be able to enjoin tribes from broadcast.

To avoid the *Montana* pitfalls when implementing a UWB telecommunications network, a model tribal reservation should contain no non-tribal residents living on non-Indian fee lands. But even those tribes with non-tribal residents may well be able to satisfy the *Montana* concerns in two ways. First, tribes can argue that there will be no interference to non-Indian lands. Second, even if tribal emissions did leak onto non-Indian reservation lands, tribes could argue that *Montana's* "political and economic" exception is applicable: UWB telecommunications networks are necessary to the continued "economic security" of the tribe.[138]

B. *Does the FCC Have a Duty To Exempt Tribes From UWB Regulation Under the Trust Doctrine?*

If a court holds that tribal sovereignty is not a bar to FCC regulation, tribes can alternatively argue that the Commission has a duty to exempt tribes from restrictions on UWB telecommunications networks. In ruling on this argument, a court will determine: (1) if the Commission has a limited or fiduciary duty to Indian tribes; (2) the scope of that duty; and (3) whether the Commission has breached that duty by applying UWB regulations to tribes.[139]

i. *Does the Commission Have a Limited Duty or a Fiduciary Duty?*

The Supreme Court has recognized the "undisputed existence of a general trust relationship between the United States and the Indian people."[140] The trust relationship extends "not only to Indian tribes as governmental units, but to tribal members living collectively or individually, on or off the reservation."[141]

In analyzing trust claims, courts distinguish between duties arising from a general or limited, trust and a fiduciary trust. The Supreme Court

non–Indian owned corporation working on the reservation] and [a negligent non-Indian driver employed by the corporation who caused an accident with an Indian driver] to defend against this commonplace state highway accident claim in an unfamiliar court is not crucial to 'the political integrity, the economic security, or the health or welfare of the [Three Affiliated Tribes]'") (quoting *Montana*, 450 U.S. at 566); *Montana*, 450 U.S. at 564-65 ("Since regulation of hunting and fishing by nonmembers of a tribe on lands no longer owned by the tribe bears no clear relationship to tribal self-government or internal relations, the general principles of retained inherent sovereignty did not [empower] the [ ] Tribe.").

136 *Atkinson Trading Co.*, 532 U.S. at 657 n.12 (emphasis in original).

137 *See* Brendale v. Confederated Tribes & Bands of Yakima Nation, 492 U.S. 408 (1989) (holding the tribe authorized to zone a small, non-Indian parcel of land in the middle of a closed, largely uninhabited 800,000 acre tribal land). But *Atkinson Trading* rejected that *Brendale* stood for the general proposition that tribes can regulate non-members whenever the parcel of non-Indian land is "miniscule in relation to the surrounding tribal land." *Atkinson Trading Co.*, 532 U.S. at 657. The *Atkinson Trading* Court concluded that "[i]rrespective of the percentage of non-Indian fee land within a reservation, Montana's second exception grants Indian tribes nothing beyond what is necessary to protect tribal self-government or to control internal relations." *Id.* at 658. (citing *Strate*, 520 U.S. at 459 (quoting *Montana*, 450 U.S. at 564)).

138 Beyond the economic resource arguments provided herein, tribes might contend that UWB installation that interference with tribal telecommunications networks by non-Indians from cellular telephone transmissions are encroaching on a "unitary resource" of the tribe, and that tribes may regulate their resource as they see fit. *See Montana*, 137 F.3d at 1141 (holding that exclusive tribal regulation of a lake lying on both Indian and non-Indian land was permitted and that Indian regulation was integral to the tribe's economic future because "'[a] water system is a unitary resource. The actions of one user have an immediate and direct effect on other users'") (quoting *Coleville Confederated Tribes*, 647 F.2d at 52; Lummi Indian Tribe v. Hallauer, 9 Indian L. Rep. 3025 (W.D. Wash. 1982) (upholding tribe's authority to require non-Indian reservation residents to connect to the tribal government's sewer system).

139 *See generally* Jicarilla Apache Tribe v. Supron Energy Corp, 728 F.2d 1555, 1563–73 (10th Cir. 1984) (Seymour, J., dissenting).

140 United States v. Mitchell, 463 U.S. 206, 225 (1983) (which affirmed Seminole Nation v. United States, 316 U.S. 286, 296 (1942) [hereinafter *Mitchell II*]; United States v. Cherokee Nation of Okla., 480 U.S. 700, 707 (1987) (stating that the law is "well established that the Government in its dealings with Indian tribal property acts in a fiduciary capacity."); *Cherokee Nation*, 30 U.S. at 17 (Marshall, C.J.) (drawing upon the concept of a protectorate or alliance relationship founded upon agreement by treaty and describing Indian tribes as "domestic dependent nations" which "look to [the U.S.] government for protection.").

141 Little Earth of United Tribes, Inc. v. HUD, 675 F. Supp. 497, 535 (D. Minn. 1987).

clarified this distinction in the *Mitchell* cases.[142] The cases involve tribal claims for monetary damages for the government's mismanagement of forest resources.[143] In *Mitchell I,* the Court held that the General Allotment Act, which provided that the United States would hold land "in trust" for Indian allottees, created only a limited or general trust relationship.[144] The Court remanded the case and requested more specific standards to support fiduciary duties.[145] In *Mitchell II,* the Court held that (1) the identified statutes and regulations directly supported the existence of a fiduciary relationship;[146] and (2) the government's "elaborate control over forests and property belonging to Indians" gave rise to a fiduciary relationship.[147]

Under *Mitchell I,* courts first evaluate the relevant statutes and regulations to determine if a fiduciary trust relationship exists.[148] The Tenth Circuit established a test for making this determination in *Jicarilla Apache v. Supron Energy Corporation*:[149]

> [N]o particular words or phrases are critical to the finding of a trust relationship. "The use of the word 'trustee' is not absolutely essential to the finding of a trust relationship when it is otherwise clear that Congress intended a trust relationship to exist." Rather, the test is whether "the relevant statutory and regulatory provisions [contain] an enumeration of duties which would justify a conclusion that Congress intended the Secretary to be a trustee."[150]

In *Mitchell II,* the statute expressly mandated that sales of timber from Indian trust lands be based upon the Secretary's consideration of "the needs and best interests of the Indian owner and his heirs" and that proceeds from such sales be paid to owners "or disposed of for their benefit."[151] In promulgating regulations under the General Allotment Act, the government recognized its duties in "managing the Indian forests so as to obtain the greatest revenue for the Indians consistent with [the] proper protection and improvement of the forests."[152] Thus, the Court held that the government has "expressed a firm desire that the Tribe should retain the benefits derived from the harvesting and sale of reservation timber."[153] In *Jicarilla Apache Tribe v. Supron Energy Corp.,* the Indian Mineral Leasing Act of 1938 provided detailed responsibilities for the Secretary in managing leases under the General Allotment Act.[154] The Tenth Circuit held that "the evident purpose of the statute was to ensure that Indian tribes receive the maximum benefit from mineral

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142 *See generally* United States v. Mitchell, 445 U.S. 535 (1980) [hereinafter *Mitchell I*] and *Mitchell II,* 463 U.S. at 206.

143 *Mitchell II,* 463 U.S. at 207.

144 *Mitchell I,* 445 U.S. at 546. Because the General Allotment Act did not establish a fiduciary responsibility for management of allotted forest lands, the Court could not impose any duties for purposes of monetary damages. *Id.*

145 *Id.* at 546.

146 *Mitchell II,* 463 U.S. at 224.

147 *Id.* at 225.

148 Pawnee v. United States, 830 F.2d 187, 190–91 (1987) (holding that a fiduciary obligation existed with respect to the management of oil and gas leases when the statutory language included: "to fulfill the trust responsibility of the United States for the administration of Indian oil and gas resources"; "to effectively utilize the capabilities of the States and Indian tribes in developing and maintaining an efficient and effective Federal royalty management system"; and "the Secretary should aggressively carry out his trust responsibility in the administration of Indian oil and gas"); Cobell v. Babbit, 91 F. Supp. 2d 1 (D.D.C. 1999) (holding that a fiduciary relationship existed when Congress created the Individual Indian Money Trust.); Short v. United States, 50 F.3d 994, 998 (Fed. Cir. 1995) (holding that certain federal statutes providing for the payment of interest on tribal trust funds held by the United States, "in conjunction with the government's fiduciary duty to Native American tribes, give the plaintiffs a substantive right to damages, including interest" for breach of that duty) (citing *Mitchell II,* 463 U.S. at 224-26); Navajo Nation v. Hodel, 645 F. Supp. 825, 827-30 (D. Ariz. 1986) (holding that the use of the terms "special relationship" and "trustee" and the description of the Indian children as a "resource" for which Congress has "assumed the responsibility [of] protection and preservation" in the Indian Child Welfare Act ("ICWA") suggests that Congress has assumed a fiduciary relationship.); Blue Legs v. United States, 867 F.2d 1094, 1100–01 (8th Cir. 1989) (noting that Congress intended the Bureau of Indian Affairs ("BIA") and Indian Health Service to have fiduciary responsibilities under the Resource Conservation and Recovery Act.); Grey v. United States, 21 Cl. Ct. 285, 293 (1990), *aff'd,* 935 F.2d 281 (Fed. Cir. 1991), *cert denied,* 502 U.S. 10570 (refusing to find a fiduciary trust relationship where plaintiff could not point to a statute or regulation that created a duty on behalf of the government that would require the government to manage water delivery to and irrigation of individual farm allotments.); Osage Tribal Council v. Dep't of Labor, 187 F.3d 1174, 1183-84 (10th Cir. 1999) (holding no fiduciary relationship when the Secretary of Labor brought an action against a Tribal Council under the Safe Drinker Water Act's whistle blower provisions, because the Secretary was simply carrying out his duties with respect to Congress' mandate on safe drinking water and the Council could not identify any specific statutory obligation.); Wheeler v. Dep't of the Interior, 811 F.2d 549, 552 (10th Cir. 1987) (holding no fiduciary duty for the federal government to intervene in Tribal election disputes); *Nero,* 892 F.2d at 1457.

149 *Jicarilla Apache,* 728 F.2d at 1563–73.

150 *Id.* at 1564 (citing Whiskers v. United States, 600 F.2d 1332, 1338 (10th Cir. 1979)) (internal citations omitted).

151 *Mitchell II,* 463 U.S. at 224.

152 *Id.*

153 *Id.* at 224–25.

154 *Jicarilla Apache,* 728 F.2d at 1565.

deposits on their lands through leasing."[155] This interpretation is supported by legislative history of the Indian Mineral Leasing Act and extensive regulations promulgated by the Department of the Interior.[156] Because the statutes and regulations contained "such an explicit and detailed enumeration of duties," it is clear that Congress intended a fiduciary trust relationship.[157]

If a statute is not sufficiently detailed to support the existence of a fiduciary relationship, courts can find a fiduciary relationship when the federal government has control or supervision over tribal monies or properties.[158] Some courts have held that there is a fiduciary duty even when the government has less than complete management control of the resources.[159]

The Commission should concede that at least a general trust relationship exists between the Commission and Indian tribes. In its *Statement of Policy*, the Commission maintains that it recognizes its own "general trust relationship with, and responsibility to, federally recognized Indian Tribes."[160] The Commission will most likely contest the existence of a fiduciary relationship with Indian tribes.

Tribes can make two arguments to support a conclusion of fiduciary duty with the Commission. First, the 1996 Act, its legislative history and FCC regulations suggest the Commission has a fiduciary duty with respect to tribes. Admittedly, the 1996 Act does not mention the words "trust," "best interests," or Indians." However, the Universal Service provisions of the 1996 Act can be interpreted to imply a duty to ensure telecommunications regulations benefit Indian tribes.[161] This interpretation is supported by the 1996 Act's legislative history.[162] Further, the FCC's *Statement of Policy* notes that the Commission will act "in accordance with the federal government's trust responsibility"[163] and the goals and principles outlined in the policy can be understood as committing the Commission to act in the best interests of the tribes. The detailed rules adopted by the Commission to promote tribal telecommunications services are part of the agency's "federal trust responsibility to ensure a standard of livability for members of Indian tribes on tribal lands."[164]

Second, if the statute and regulations are not sufficiently specific, the Commission's "control or supervision" over "tribal . . . propert[y]" gives rise to a fiduciary relationship.[165] Just as the government assumed elaborate control over forests and property belonging to Indians in *Mitchell II*, the FCC has long sought to establish elaborate control over physical telecommunications infrastructure on tribal lands and the use of frequency spectrum on tribal lands.[166]

The Commission can probably convince a court that a fiduciary relationship does not exist. First, the Commission may argue that spectrum is not a resource that can be treated as a trust *corpus*.[167] In *Grey v. United States*, the court held that water is not a trust *corpus*, because it is not a source of wealth that must be managed to maximize income that is distributed as profits.[168] The Commission may also argue that spectrum use does not produce income that can be disbursed as profits. Tribes can respond to these arguments by pointing to cases that undermine *Grey*[169] and arguing that spectrum is a limited resource that

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155 *Id.*

156 *Id.*

157 *Id.*

158 *Mitchell II*, 463 U.S. at 225 ("[A] fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and property belonging to Indians. . . . [Where] the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection." (citing Navajo Tribe of Indians v. United States, 624 F.2d 981, 987 (1980)). *See* Cobell v. Norton, 240 F.3d 1081, 1098 (D.C. Cir. 2001) (noting that "courts correctly recognize a trust relationship even where it is not explicitly laid out by statute").

159 Brown v. United States, 86 F.3d 1554, 1558–62 (Fed. Cir. 1996) (holding that the statutes and regulations governing commercial leasing of Indian lands need not give the government "ongoing management responsibility over the day-to-day administration of commercial leases," in order to satisfy the *Mitchell* II "control or supervision" test.).

160 *Statement of Policy*, *supra* note 35, at para. 4.

161 *See e.g.*, *Jicarilla Apache*, 728 F.2d at 1564–65 ("[I]t [is] evident that the purpose of the statute was to ensure that the Indian tribes receive the maximum benefit.").

162 The legislative history contains strong language supporting the duty to increase telecommunications on tribal lands. *See supra* note 83.

163 *See Statement of Policy*, *supra* note 35.

164 *Universal Services Order*, *supra* note 37, para. 23.

165 *Mitchell II*, 463 U.S. at 224.

166 *See supra* Part V.

167 In order for a common-law trust to exist, there must be "a trustee (the United States), a beneficiary (the Indian allotees), and a trust corpus (Indian timber, lands and funds)." *Mitchell II*, 463 U.S. at 225.

168 *See Grey*, 21 Cl. Ct. at 293.

169 *See, e.g.*, Fort Mojave Indian Tribe v. United States, 23

could generate income for tribes. Even if tribes can effectively rebut these arguments, they will have difficulty responding to the Commission's other arguments.

Second, the Commission can argue that even if Congress did intend to impose an obligation to increase telephone penetration rates on tribal lands, Congress did not intend to create a fiduciary relationship between the Commission and Indian tribes. The Communications Act does not mention the words "trust" or "tribes." *Mitchell II*,[170] *Jicarilla Apache*,[171] and other cases finding a fiduciary relationship can be distinguished, because they generally involve agencies that specialize in Indian affairs and involve statutes that list specific responsibilities such as the management of Indian trust accounts, the distribution of government resources to tribes or the management of natural resources on tribal lands. The Commission can cite to cases where the courts have found no fiduciary duty even though a statute imposed more specific obligations than the Communications Act.[172]

Third, the Commission can argue that the general regulation of tribal lands do not give rise to a fiduciary duty. The "control or supervision" test in *Mitchell II* applies to active management of Indian funds or property such as leasing of resources located on Indian resources or holding and distributing Indian funds—not generally applicable statutes that regulate Indians.[173] For example, in *Osage Tribal Council v. Dep't of Labor*, the Tenth Circuit found that the language of the Safe Drinking Water Act was sufficiently clear to abrogate tribal sovereign immunity,[174] and the Secretary of Labor did not have a duty to abstain from suing a tribe under the same Act.[175]

ii. *What Is The Scope Of The FCC's Duty?*

Once a court determines whether a limited or fiduciary trust relationship exists, it must determine the scope of the trust—the specific duties and standards by which to judge the government's conduct. Although there are many cases discussing the scope of fiduciary duties (Indian trust accounts,[176] distributing government resources to tribes,[177] adequately representing Indian interests

Cl. Ct. 417, 423–27 (1991) (holding that water rights can be a trust corpus).

170 *Mitchell II*, 463 U.S. at 206.

171 *Jicarilla Apache*, 728 F.2d at 1555.

172 *See, e.g.*, White Mountain Apache Tribe v. United States, 249 F.3d 1364, 1372–77 (Fed. Cir. 2001) (the following statutes and regulations do not impose fiduciary obligations: the National Historic Preservation Act ("NHPA") (requiring federal agencies to manage and maintain historic properties under their control); the Historic Sites, Buildings, Objects and Antiquities Act of 1935, (requiring the Secretary of the Interior to "restore, reconstruct, rehabilitate, preserve and maintain" any historic or prehistoric buildings or property); Title XI of the Education Amendments Act of 1978 (requiring the Secretary of the Interior to bring "all schools, dormitories, and other facilities" operated by the Bureau of Indian Affairs "into compliance with all applicable Federal, tribal, or State health and safety standards"); the Improving America's School's Act of 1994 (requiring federal government to "maintain all school and residential facilities to meet appropriate Tribal, State or Federal safety, health and child care standards"); 25 U.S.C. §177 (2000) (precluding conveyance of Native American lands without United States' approval); the American Indian Trust Fund Management Act of 1994 (requiring Special Trustee for Native Americans to certify that the Department of the Interior's budget requests to Congress are adequate to "discharge, effectively and efficiently, the Secretary's trust responsibilities" to Native Americans)).

173 *See, e.g.*, Morongo Band of Mission Indians v. FAA, 161 F.3d 569, 574 (9th Cir. 1998) ("Thus, although the United States does owe a general trust responsibility to Indian tribes, unless there is a specific duty that has been placed on the government with respect to Indians, this responsibility is discharged by the agency's compliance with general regulations and statutes not specifically aimed at protecting Indian tribes.")

174 *Osage Tribal Council*, 187 F.3d at 1184 ("[W]e affirm the Secretary's determination that the Osage Tribal Council is not entitled to tribal sovereign immunity in this case because the SDWA whistle blower provision explicitly abrogates that immunity.").

175 *Id.* at 1183–84 ("[T]he Secretary was not carrying out his duties with respect to administering Indian property or funds, rather the Secretary was carrying out his duties with respect to Congress' mandate on safe drinking water.").

176 *See, e.g.*, Manchester Band of Pomo Indians, Inc. v. United States, 363 F. Supp. 1238, 1243 (N.D. Cal. 1973) (allowing recovery against government for mismanagement of tribal trust funds); Lounder v. United States, 108 F.3d 896, 903 (8th Cir. 1997) ("We hold that by providing an unreasonably short time period to allow beneficiaries to apply for their share of the fund and failing to provide beneficiaries with adequate notice, the Secretary acted contrary to his common-law obligations as trustee."); Red Lake Band of Chippewa Indians v. Barlow, 834 F.2d 1393, 1399 (8th Cir. 1987) ("We believe the Secretary must actively seek the best use of the funds to ensure that they are in fact used 'for the benefit' of the Band.").

177 *See, e.g.*, Lincoln v. Vigil, 508 U.S. 182, 195 (1993) (holding that fiduciary duty could not limit the Service's discretion to reorder its priorities from serving a subgroup of beneficiaries to serving the broader class of all Indians nationwide.); *Hodel*, 645 F. Supp. at 828 ("The court can discern no practical alternative method by which the BIA can fulfill its fiduciary duty to all Indian tribes and organizations under the ICWA and Snyder Act . . . . The BIA cannot be expected to know the needs of each applicant without input from the

in litigation,[178] and managing natural resources on tribal lands),[179] few cases discuss the scope of a general duty.

If a fiduciary relationship exists, the duties are broad and demanding.[180] The duties are primarily defined by the relevant statutes and regulations. Where the statutes and regulations fail to specify the precise nature of the trustee's duties, common law fiduciary standards define the trustee's responsibilities.[181] Courts will likely turn to the Restatement (Second) of Trusts and other secondary sources to establish standards to judge

applicants. Nor can the BIA be expected to do independent research into the circumstances and needs of each applicant."); Busby Sch. of the N. Cheyenne Tribe v. United States, 8 Cl. Ct. 596, 601 (Cl. Ct. 1985) (Indian Schools); St. Paul Intertribal Hous. Bd. v. Reynolds, 564 F. Supp. 1408, 1413 (D. Minn. 1983) (Indian housing); Eric v. HUD, 464 F. Supp. 44, 49 (D. Alaska 1978) (holding that Bartlett Act, enacted to provide housing for Alaskan Natives, falls within the trust doctrine); Little Earth of United Tribes, Inc. v. S. High Non-Proft Hous. Corp., 675 F. Supp. 497, 535 (D. Minn. 1987) (agreeing that trust obligation imposes affirmative duty upon HUD to act in best interests of American Indian people).

178 *See, e.g.*, Shoshone-Bannock Tribes v. Reno, 56 F.3d 1476, 1479–83 (D.C. Cir. 1995) (holding that government did not breach any duty when Attorney General failed to assert the Tribes' claims in water rights litigation, because government undertook instream flow studies; discussed with the Tribes their claim to off-reservation water rights; retained a historian to determine if the treaty might be read as the Tribes apparently viewed it; and actively sought the assistance of the tribes and their experts.); *Fort Mojave Indian Tribe*, 23 Cl. Ct. at 419–20 (holding that the government had an obligation to sue on behalf of Indians); Chemehuevi Indian Tribe v. Wilson, 987 F. Supp. 804, 807–09 (N.D. Cal. 1997) (holding that that the United States had a mandatory duty to represent the tribes because the tribes had no legal remedy to bring the State to the bargaining table and obtain the benefits of the IGRA.).

179 *See, e.g., Mitchell II*, 463 U.S. at 226–27 (holding that the statutes and regulations at issue could fairly be interpreted as mandating compensation by the government for violations of its fiduciary responsibilities in the management of Indian property); *Jicarilla Apache*, 728 F.2d at 1569 (holding breach of fiduciary duty in mismanaging oil and gas leases on Indian lands, because the Department of the Interior failed to apply the accounting method that yielded the tribe the greatest royalties and failed to adequately monitor development of the leases sufficiently to insure compliance with the terms thereof); Confederation Tribes of the Warm Springs Reservation of Or. v. United States, 248 F.3d 1365, 1371–76 (Fed. Cir. 2001) (holding that BIA mismanaged Indian timber resources by including too much green timber in the sale, serious errors in BIA's accounting procedures resulted in an undercount of the actual amount harvested, and trees were taken from areas that were not designated in the timber contract); Navajo Nation v. United States, 263 F.3d 1325, 1332–33 (Fed. Cir. 2001) (holding the United States breached its fiduciary duties to the tribe, since the United States' actions were clearly in the mining company's interest and contrary to the tribe's interest); *Pawnee*, 830 F.2d at 192 (rejecting the argument that the Government did not pay Indians as royalties on the basis of the highest market value for the particular type of gas produced by the leases and stating that Interior is "not required to go beyond directives and leases which are consistent with the statutes and regulations."); Smith v. United States, 515 F. Supp. 56, 60–62 (N.D. Cal. 1978) (holding that the Department of the Interior and HEW breached its duties pertaining to the installation of sanitation and irrigation facilities); Northwest Sea Farms v. United States Army Corps of Engineering, 931 F. Supp. 1515, 1524, n.15 (W.D. Wash. 1996) (holding Corps upheld its fiduciary duty to ensure that Lumni Nation's treaty fishing rights are not abrogated or impinged absent an act of Congress); Woods Petroleum Corp. v. Dep't of Interior, 47 F.3d 1032, 1040 (10th Cir. 1995) (holding the Secretary had violated his fiduciary duty in managing Indian mineral interests); Cheyenne-Araphaho Tribes v. United States, 966 F.2d 583, 590 (10th Cir. 1992) (holding that defendant secretary's failure to consider market conditions prior to approving lessee's request for a communitization agreement was an arbitrary and capricious abuse of discretion).

180 Supreme Court decisions contain statements that the trust obligation owed by the United States to the Indians must be exercised according to the strictest fiduciary standards. *See* United States v. Mason, 412 U.S. 391, 398 (1973); *Seminole Nation*, 316 U.S. at 296–97. Although federal officials retain a substantial amount of discretion, a Secretary cannot "escape his role as trustee by donning the mantle of administrator" to claim the courts must defer to his expertise and delegated authority. *Jicarilla Apache*, 728 F.2d at 1567; *Cobell*, 240 F.3d at 1099 ("When faced with several policy choices, an administrator is generally allowed to select any reasonable option. Yet this is not the case when acting as a fiduciary for Indian beneficiaries as 'stricter standards apply to federal agencies when administering Indian programs.'") (citing *Jicarilla Apache*, 728 F.2d at 1567.).

181 Nevada v. United States, 463 U.S. 110, 142 (1983) ("[W]here only a relationship between the government and the tribe is involved, the law respecting obligations between a trustee and a beneficiary in private litigation will in many, if not all, respects, adequately describe the duty of the United States."); *Seminole Nation*, 316 U.S. at 296; *Mason*, 412 U.S. at 398; Dep't of Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 14 (2001) (citing Restatement (Second) of Trusts); Assiniboine & Sioux Tribes v. Bd. of Oil & Gas Conservation, 792 F.2d 782, 794 (9th Cir. 1986) ("[T]he same trust principles that govern the conduct of private fiduciaries" determine the scope of the Federal Energy Regulatory Commission's ("FERC") obligations to the Community.); *Cobell*, 240 F.3d at 1099:

> This does not mean that the failure to specify the precise nature of the fiduciary obligation or to enumerate the trustee's duties absolves the government of its responsibilities. It is well understood that 'the extent of [a trustee's] duties and powers is determined by the trust instrument and the rules of law which are applicable.' Restatement (Second of Trusts) §201, at 442 (1959). It is the nature of any instrument that establishes a trust relationship that many of the duties and powers are implied herein. They arise from the nature of the relationship established. While the government's obligations are rooted in and outlined by the relevant statutes and treaties, they are largely defined in traditional equitable terms.

government conduct.[182]

In contrast, the conduct of the government in a general trust is not judged by private fiduciary standards,[183] and the government is not subject to monetary damages.[184] Tribal claimants should be eligible for equitable or declaratory relief when there is a general trust relationship.[185] The duties of the bare or limited trust are defined by the statutes and regulations.[186]

iii. *Has The FCC Breached Its Duty?*

Assuming that a court finds a limited trust and not a fiduciary trust, tribes can argue that the scope of the Commission's duty is defined by the FCC's *Statement of Policy*[187] and Executive Order 13175.[188] Tribes may also argue that prohibiting the use of UWB on tribal lands breaches these duties in three ways.

First, the Commission has a duty to "consult with Tribal governments prior to implementing any regulatory action or policy that will significantly or uniquely affect Tribal governments, their land and resources."[189] Tribes can contend that prior to the issuance of UWB regulations on February 14, 2002, the FCC had a duty to analyze whether application of the regulations to Tribal lands was appropriate. The restrictions on UWB "significantly or uniquely" affect tribal governments and resources in several ways. The regulation has a *prima facie* impact on tribal resources by preventing tribes from using their spectrum in a particular manner. Additionally, the regulations have an impact on tribal governments by precluding tribal governments from using certain applications of UWB. For example, UWB technology could be installed in government buildings and used by government officials to provide much

182 For example, in *Fort Mojave Indian Tribe,* the court held that the government's duty was to "do all acts necessary for the preservation of the trust res which would be performed by a reasonably prudent man employing his own like property for purposes similar to those of the trust." *Fort Mojave Indian Tribe,* 23 Cl. Ct. at 426. *See also Mason,* 412 U.S. at 398 (citing 2 A. Scott, Trusts 1408 (3d ed. 1976)). Fiduciary duty includes the "exercise [of] such care and skill as a man of ordinary prudence would exercise in dealing with his own property."). *White Mountain Apache Tribe,* 249 F.3d at 1378–79 (using the standards from common law to hold that the government has a fiduciary obligation to make appropriate repairs to buildings and other properties).

183 *Mitchell I,* 445 U.S. at 545; Eastern Band of Cherokee Indians v. United States, 16 Cl. Ct. 75, 78 (1988) (citing Montana Bank v. United States, 7 Cl. Ct. 601, 613 (1985)) ("If the source of substantive law establishes only a general trust relationship, the government's fiduciary obligations are not those of a private trustee.").

184 *Mitchell I,* 445 U.S. at 544 (noting that allegations of a general trust relationship with an Indian Tribe do not establish a "claim for money" within the meaning of the Tucker Act).

185 The explanation for this statement is somewhat complex. Under the Tucker Act, a claim for monetary damages must be based on violations of the Constitution, statutes, regulations, treaties and executive orders. Thus, a claimant cannot sue for monetary damages under the Tucker Act without the existence of a fiduciary trust relationship derived from specific statutory or regulatory language. However, a claimant should be able to sue for equitable relief based on a general trust relationship. *See* Kimberly T. Ellwager, *Recent Developments: Money Damages For Breach of the Federal Indian Trust Relationship After Mitchell II,* 59 WASH. L. REV. 675, 685 (1984) (noting that a general trust relationship continues to provide the basis for equitable relief after *Mitchell*); Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited,* 1994 UTAH L. REV. 1471, 1522 (1994).

It is crucial to note that the Mitchell cases are confined to the Tucker Act context and the cases should have only limited applicability to tribal claims for equitable or declaratory relief under the APA or other statutes. Any rippling effect of the Mitchell opinions to these other contexts is unwarranted, as the holdings are very much tied to the limitations expressed in the Tucker Acts, which afford damages solely for violations of the Constitution, statutes, regulations, treaties and executive orders. Because common law claims are normally not actionable in the Claims Court under the Tucker Act, the Court in the Mitchell cases was forced to derive the trust obligation from specific statutory or regulatory language. Federal district courts, on the other hand, have broad authority to hear federal common law claims and to grant equitable and declaratory relief for such claims.

Cf. Red Lake Band of Chippewa Indians v. Barlow, 834 F.2d 1393, 1398–1400 (8th Cir. 1987) (finding a fiduciary relationship is required before awarding equitable relief), *modified on other grounds,* 846 F.2d 474 (8th Cir. 1988).

186 *Mitchell II,* 463 U.S. at 216–17; *Mitchell I,* 445 U.S. at 542, 544 (noting that the trust is limited to the original purpose for the statute, which is protecting Indian land from taxation and involuntary alienation because of a failure to pay taxes or debts); Hydaburg Coop. Ass'n v. United States, 229 Ct. Cl. 250, 256 (1981) (holding that the statutory language of section 5 of the Indian Reorganization Act discloses that the trust is limited to ownership of, or rights in, real property acquired by the United States, is not a fiduciary trust). "[T]he trust established by section 5 of the Act imposes only duty on the United States to hold the acquired Indian lands so as to prevent continued alienation . . . [s]ection 5 does itself 'unambiguously impose' a fiduciary duty on the United States to promote all assets or enterprises acquired *by the Indians* pursuant to the Indian Reorganization Act." *Hydaburg Coop.,* 229 Ct. Cl. at 257.

187 *See Statement of Policy, supra* note 35.

188 65 Fed. Reg. 67,249 (Nov. 6, 2000) (superseding Exec. Order No. 13,084, Consultation and Coordination with Indian Tribal Governments, 63 Fed. Reg. 27,655 (May 14, 1998)) [hereinafter *Tribal Executive Order*].

189 *See Statement of Policy, supra* note 35 (outlining commission duties).

needed telecommunications services. Finally, the regulations have an adverse impact on tribal resources and tribal governments by preventing tribes from realizing the economic, social and cultural benefits of UWB deployment.[190]

Second, the Commission has a duty to "remove undue burdens that its decisions and actions place on Tribes."[191] Tribes can contend that, the regulations restricting UWB telecommunications networks limit economic, governmental and cultural development on tribal lands[192] and place an "undue burden" on the Indian tribes.

Third, tribes can argue that the Commission has a duty under the *Tribal Executive Order* to defer to tribes when they elect to promulgate their own regulatory scheme. The *Tribal Executive Order* states that the federal government should "grant Indian tribal governments the maximum administrative discretion possible" when enforcing regulations.[193] The *Tribal Executive Order* further requires that federal agencies "encourage Indian tribes to develop their own policies to achieve program objectives," "defer to Indian tribes to establish standards," and "in determining whether to establish Federal standards, consult with tribal officials as to the need for Federal standards and any alternatives that would limit the scope of Federal standards or otherwise preserve the prerogatives and authority of Indian tribes."[194] Because the tribe has decided to exercise its sovereignty by developing its own policies and standards with regard to UWB technology, the Commission has a duty to defer to the tribal government.

The Commission may be able to persuade a court it has not violated its general duty to Indian tribes by arguing that its duty to tribes is limited by competing duties spelled out in the Communications Act. The FCC has a mandate to facilitate a "rapid" and "efficient" national and global communication system serving "all the people of the United States."[195] The Commission is empowered to "perform any and all acts" to execute its functions.[196] The FCC's *Statement of Policy* highlights this limitation when it states that its goal of working with tribes must be "consistent with Section 1 of the Communications Act of 1934."[197] Because of unresolved interference issues, the Commission continues to restrict UWB deployment.[198] The Commission can argue that these interference concerns also pertain to tribal use of UWB. Not only would there be a risk of interference off the reservation, but there would be interference with other technologies in use on the reservation. Thus, to perform its general regulatory duties, the FCC must balance its duty to Indian tribes against the need to maintain universal restrictions on UWB. In exercising this duty, the Commission must determine that the need for uniform UWB regulations outweighs tribal sovereignty.

There is substantial case law to support this argument. In *Nevada v. United States,*[199] the Supreme Court concluded that an agency's duty to tribes is limited when the agency has conflicting duties for the general public.[200] Cases discussing whether an agency has violated its specific duties to tribes when implementing a general statute provide fur-

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190 *See supra* Part III for a discussion of the economic, social and governmental benefits of UWB.

191 *See Statement of Policy, supra* note 35.

192 *See supra* Part III.

193 *See Tribal Executive Order, supra* note 188 at 67,249–50 (§3(b)).

194 *Id.* §3(c).

> When undertaking to formulate and implement policies that have tribal implications, agencies shall:
> (1) encourage Indian tribes to develop their own policies to achieve program objectives;
> (2) where possible, defer to Indian tribes to establish standards; and
> (3) in determining whether to establish Federal standards, consult with tribal officials as to the need for Federal standards and any alternatives that would limit the scope of Federal standards or otherwise preserve the prerogatives and authority of Indian tribes.

195 47 U.S.C. §151 (2000).

196 47 U.S.C. §§154(i), 303(r) (2000).

197 *See Statement of Policy, supra* note 35.

198 *See supra* Part IV.

199 463 U.S. 110 (1983). This case involves the government's attempt to undo an earlier settlement decree regarding the distribution of water rights between a tribe (represented by the government) and an irrigation district (also represented by the government). The Court held that *res judicata* precluded the current attempt to seek additional water rights for the Indians. *Id.*

200 *Id.* at 128.

> Congress was requiring the Secretary of the Interior to carry water on at least two shoulders when it delegated to him both the responsibility for the supervision of the Indian tribes and the commencement of reclamation projects in areas adjacent to reservation lands. But Congress chose to do thus and it is simply unrealistic to suggest that the Government may not perform its obligation to represent Indian tribes in litigation when Congress has obliged it to represent other interests as well. In this regard, the Government cannot follow the fastidious standards of a private fiduciary, who would breach his duties to his single beneficiary solely by representing potentially conflicting interests without the beneficiary's consent. The Government does not 'compromise' its obligation to one interest that Congress obliges it to represent by the mere fact that it simultaneously performs

ther support for this conclusion.[201] For example, in *Skomish Indian Tribe v. FERC*,[202] a Tribe sought to obtain a preliminary permit to develop a hydropower facility. The FERC denied the permit application on the grounds that the tribal proposal conflicted with the city's relicense application for a hydropower facility.[203] The tribe argued that FERC, by following its regulations that mandated it deny the tribe's application, ignored its trust responsibility toward Indian tribes.[204] The Ninth Circuit noted that although FERC does have a fiduciary responsibility towards Indian tribes, the responsibility must be exercised in the context of the Federal Power Act ("FPA"). The court concluded that the FERC does not have to afford tribes "greater rights than they would otherwise have under the FPA and its implementing regulations."[205] Because the Tribe's permit application was barred by FERC regulations, the federal trust responsibility did not compel its acceptance.

Tribes can respond to the conflicting obligation argument in two ways. First, they may demonstrate that there would be no interference off the reservation because transmissions would be limited to the reservation. Second, the FCC does not have a duty to protect other people on the reservation from interference. The *Statement of Policy* specifically establishes the duty to "Indian Tribes" and "Tribal Governments;"[206] not tribal members and reservation residents.

Even if the scope of duty is not restricted by a competing interest, a court is likely to conclude that restricting UWB use on tribal lands does not violate the Commission's obligations. The universal service mandate in the Communications Act, the legislative history of the Communications Act and Commission regulations are primarily directed toward facilitating tribal access to telephone service—not wireless Internet or UWB.[207] Furthermore, the restrictions do not "significantly or uniquely affect tribal governments, their land and resources" or place an "undue burden" on tribes.[208] There is evidence that the FCC's *Statement of Policy*[209] has stimulated increased tribal access to telecommunications. Finally, wired technologies can be used to ensure tribal access to the Internet. UWB is not uniquely crucial to providing telecommunications services on tribal lands.

B. Administrative Action

Since litigation requires substantial resources and is unlikely to succeed, tribes interested in using UWB technology should pursue administrative relief. Specifically, tribes can file a petition with the Commission seeking a waiver of the Commission's Part 15 Rules. While promulgating rules to extend wireless telecommunications services to tribal lands, the Commission encouraged such petitions.[210]

There have been several published rulings on petitions for waivers of rules on tribal lands. However, these cases involve telephone companies seeking waivers of rules that restrict the purchase

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another task for another interest that Congress has obligated it by statute to do.

201 *See* Skomish Indian Tribe v. FERC, 121 F.3d 1303, 1308–09 (9th Cir. 1997).

> FERC is "subject to the United States' fiduciary responsibility towards Indian tribes, which, in essence consists of acting in the interests of the tribes." Nevertheless, it exercises this responsibility in the context of the FPA. Hence, FERC has previously rejected arguments that it must afford Indian tribes greater rights than they would otherwise have under the FPA and its implementing regulations. Here, the Tribe's permit application is barred by FERC's regulations, and the federal trust responsibility does not compel its acceptance.

(internal citations omitted); Covelo Indian Cmty. v. FERC, 895 F.2d 581, 586 (9th Cir. 1990) (holding that FERC did not violate private fiduciary standards when it did not provide a tribe with actual notice of a PG&E relicensing proceeding.).

202 121 F.3d at 1303 (9th Cir. 1997).

203 *Id.* at 1305.

204 *Id.* at 1308.

205 *Id.* at 1308–09.

206 *Statement of Policy, supra* note 35, at para. 3 ("In this Statement of Policy, we refer to 'Indian Tribes' and 'Tribal Governments.").

207 *See, e.g.*, Jennifer L. King, *Increasing Telephone Penetration Rates and Promoting Economic Development on Tribal Lands: A Proposal to Solve the Tribal and State Jurisdiction Problems*, 53 FED. COMM. L.J. 137, 139-41 2000 (explaining that the 1996 Telecommunications Act and FCC actions are intended to increase telephone penetration rates in tribal areas).

208 *See Statement of Policy, supra* note 35.

209 *Id.* In June 2000, the FCC adopted a policy statement outlining its goals for tribal telecommunications.

210 *Wireless Policy Order, supra* note 38, para. 39–41.

> [W]e believe that parties should seek waivers of specific rules or file other requests for regulatory relief in instances where greater flexibility than the rules allow would facilitate the provision of service to tribal lands. We strongly encourage parties to file such requests where needed, and delegate authority to the Wireless Telecommunications Bureau and the International Bureau to consider these waivers as they apply to terrestrial wireless and satellite-based services, respectively. Parties seeking a waiver are encouraged to provide evidence of an agreement with tribal authorities that includes a commitment to serve the tribal lands.

of service territory[211] or support available under universal service provisions,[212] not wireless companies seeking waivers of restrictions on certain types of technology. In general, Commission rules may be waived for "good cause shown," which is demonstrated if (1) special circumstances warrant a deviation from the general rule, and (2) such a deviation will serve the public interest.[213]

1. *Do "Special Circumstances" Warrant a Deviation From the General Rule?*

A lack of advanced telecommunications services on the tribe constitutes "special circumstances" warranting a deviation from the general rule. In ruling on Mescalero Apache Telecom's petition, the Commission found "special circumstances" existed where (1) the percentage of residences on the Reservation without telephone service was significantly greater than the national average;[214] (2) the carrier was tribally owned;[215] and (3) the high costs faced by Mescalero as a tribally-owned start-up company were "unusually severe."[216] In another ruling, the Commission held that no special circumstances existed because the telephone penetration rate on the reservation was approximately 80 to 85 percent.[217] Thus, assuming the tribes have an undeveloped telecommunications infrastructure, they should be able to prove that "special circumstances" exist.

2. *Would Deviation From the General Rule Serve the Public Interest?*

The Commission holds that it is in the public interest to waive a rule when (1) it is consistent with tribal policy[218] and (2) the waiver would have a minimal effect on policy goals.[219]

The Commission may decide that, in spite of the risk of interference, it would be in the public

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211 These rulings turn on the FCC's willingness to waive the typically applied definition of "study area."

> A study area is a geographic segment of an incumbent local exchange carrier's (LEC's) telephone operations. Generally, a study area corresponds to an incumbent LEC's entire service territory within a state. The Commission froze all study area boundaries effective November 15, 1984 and an incumbent LEC must apply to the Commission for a waiver of the study area boundary freeze if it wishes to sell or purchase additional exchanges.

In re Mesalero Apache Telecom, Inc., Joint Petition For Waiver of the Definition of "Study Area" Contained in the Part 36, Waiver of Sections 61.41(c)(2), 69.3(e)(11), 36.611, and 36.612 of the Commission's Rules, *Order*, 16 FCC Rcd. 3813 para. 4 (2001) [hereinafter *Mescalero I*]; *In re* ATEAC, Inc., Petition For Waiver of the Definition of "Study Area" Contained in the Part 36, Appendix-Glossary of the Commission's Rules, *Order*, 16 FCC Rcd. 849 para. 2 (2001) [hereinafter *ATEAC*].

212 *See, e.g., Mescalero I*, 16 FCC Rcd. 3813 at paras. 11–21 (discussing petition for (1) waiver of price cap rules under Section 61.41(c)(2); and (2) waiver of Section 69.3(e)(11) stating that "any change in NECA carrier common line tariff participation and long term support (LTS) resulting from a merger of acquisition of telephone properties is effective on the next annual access tariff filing date" following the merger or acquisition.); *In re* Mescalero Apache Telecom, Inc.: Waiver of Section 54.305 of the Commission's Rules, *Order*, 16 FCC Rcd. 1312 at para. 3 (2001) (discussing the waiver of Section 54.305 of the Commission's rules, which provide "that a carrier acquiring exchanges from an unaffiliated carrier shall receive the same per-line levels of high-cost universal service support for which the acquired exchanges were eligible prior to their transfer.") [hereinafter *Mescalero II*]; *In re* San Carlos Apache Telecommunication Utility, Inc.: Petition for Waiver of Sections 36.611 and 36.612 of the Commission's Rules, *Order*, 16 FCC Rcd. 15055 (2001) (discussing the waiver of Sections 36.611 and 36.612, which would enable San Carlos to receive accelerated high-cost loop support payments) [hereinafter *San Carlos Order*]; *In re of Federal State Board on Universal Service* (CC Docket No. 96-45), (Dec. 23, 1999) (discussing waiver of Section 54.403(a), which requires state commission action before carriers can receive federal Lifeline support reimbursements).

213 *Mescalero II, supra* note 212, at para. 8.

214 The percentage of residences on the Reservation without telephone service was 52 percent. The national average penetration level for all households in the United States is 94.6 percent. *See id. at* para. 7.

215 *Id. at* para. 8.

216 *Id.* at para. 9.

217 *San Carlos Order, supra* note 212, at para. 11.

218 *See Mescalero I, supra* note 211, at paras. 28–29 (holding that waiver of Sections 36.611 and 36.612 would be in the public interest, because a waiver would be consistent with the Universal Service mandate and consistent with the trust relationship); *see also Mescalero II, supra* note 212, at para. 11 ("We find that this result is consistent with our obligations under the historic federal trust relationship between the federal government and federally-recognized Indian tribes to encourage tribal sovereignty and self-governance and to ensure a standard of livability for members of Indian tribes on tribal lands.").

219 *See Mescalero I, supra* note 211, at para. 18 (holding that the public interest would be served by a waiver of price cap rules, because the circumstances surrounding Mescalero's acquisition of Valor's access lines fail to give rise to the dangers of cost-shifting and gaming of the system.); *see also Mescalero II, supra* note 212, at para. 11.

> We further note that waiver of section 54.305 in this instance will have minimal effect on the high-cost universal service mechanisms. We estimate that the additional support received by Mescalero as a result of this waiver will result in an annual aggregate shift that is less than one percent of any of the high-cost universal service mechanisms. This is consistent with the Commission's prior analysis of whether a transfer of exchanges has an adverse impact on the universal service support mechanisms.

interest to waive restrictions on the deployment of UWB-based outdoor communication systems on tribal lands. First, tribes can argue that there will be no interference. Since the tribes are geographically isolated and have no existing wireless capabilities, there would be little risk of emissions outside the reservation and no other wireless signals exist to interfere with UWB transmission on the reservation. Second, tribes can argue that a waiver would serve the public interest by promoting tribal sovereignty.[220] Third, a waiver would serve the public interest and be consistent with the Commission's duties expressed in its *Statement of Policy,* Commission regulations, the Communications Act and the federal trust doctrine.[221] Lastly, the project would further the public interest, because the reservation could serve as a "testing ground" for UWB telecommunications networks.[222]

While it is uncertain how the Commission would rule, there is a higher likelihood of tribes obtaining permission for the use of UWB-based outdoor communication systems though the administrative process at the Commission rather than through litigation in the courts. Furthermore, the costs of filing a petition for waiver with the FCC pale in comparison to the costs of litigation. Tribes should concentrate their resources on gaining administrative approval for the use of UWB telecommunications networks on tribal lands.

VII. CONCLUSION

Because UWB technology is the most promising technological solution to the tribal telecommunication crisis, tribal lawyers should analyze legal tools available to enable deployment of UWB-based communication systems. In addition to benefiting tribes, a successful tribal UWB telecommunications network may prompt the FCC to relax its UWB regulations for all users. However, as this article has demonstrated, litigation strategies are complex, time-consuming and ultimately unlikely to succeed. Therefore, UWB proponents should focus their resources on petitioning the FCC to waive their UWB restrictions on tribal lands.

220 *See Statement of Policy, supra* note 35.

221 *See* Legal Tools for Tribes to Obtain UWB-Based Outdoor Communications Systems, Part VI, *supra,* for a thorough discussion of how allowing UWB deployment on Tribal lands would meet the Commissions' responsibilities under the *Statement of Policy,* regulations, the Telecommunications Act and federal trust doctrine.

222 Uncertainty surrounding the interference issue has created a significant regulatory dilemma for the Commission. Assuming the project would involve testing of interference, the results of the project could save the Commission a great deal of time and resources. Moreover, the project could result in the deregulation of a technology that has substantial benefits and minimal risks. *See generally, Statement of Policy, supra* note 35.