

WEAVING THE NAVAJO.NET

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INTRODUCTION

Today indigenous peoples must use the arrows of 0's and 1's and satellites. Information is a way to overcome today's monsters.¹

Speaking before the World Summit on the Information Society, Navajo Nation President Joe Shirley, Jr.'s statement captures a vision of the telecommunications revolution the Navajos find themselves leading today. A geosynchronous satellite orbiting thousands of miles above the rugged remote Four Corner landscape is breaking down the "Digital Divide"² and creating a communication revolution for North America's largest native tribe. Over the past ten years, the tribe has begun a process of technological integration and innovation that will play an important role in shaping, developing, and preserving Navajo culture.

Ten years ago, the U.S. Commerce Department's National Telecommunications and Information Administration ("NTIA") began using the term "Digital Divide" to capture the growing separation between the Internet "haves" and "have-nots."³ The NTIA report showed that Native Americans living on rural reservations lagged considerably behind the U.S. national average in access to the Internet and to computers.⁴

Historically, extending even basic telephone service onto tribal lands has proven difficult. The Navajo Nation's remote and rugged landscape, low population densities, and low incomes have discouraged the deployment of telephone infrastructure.⁵ Even with the backing of

1. Tara Tidwell Cullen, *Sovereignty Unplugged: Wireless Technology and Self-Governance in the Navajo Nation*, CULTURAL SURVIVAL Q., June 15, 2004, at 2 (internal brackets omitted) (quoting Navajo Nation President Joe Shirley, Jr. at preparation meeting for the World Summit on the Information Society), <http://www.culturalsurvival.org/ourpublications/csq/article/sovereignty-unplugged-wireless-technology-and-self-governance-navajo-nat>.

2. See National Telecommunications and Information Administration, *Falling Through the Net: Toward Digital Inclusion 13* (Oct. 2000) (discussing computer and internet access for Native Americans), available at <http://search.ntia.doc.gov/pdf/fttn00.pdf>.

3. *Id.* at 2-3.

4. *Id.* at 12-13; see also Press Release, The Navajo Nation, Navajo President Joe Shirley, Jr., receives tribal leadership technology award at 20th RES 2006 (Feb. 12, 2006) (noting that in 2002, 15% of Navajo families had computers and only 10% had Internet access), <http://www.navajo.org/images/pdf%20releases/George%20Hardeen/feb06/Navajo%20President%20receives%20ICT%20award%20at%20RES%202006%20%20for%20Feb%202013.pdf> [hereinafter Shirley Press Release 1].

5. See USDA RURAL DEVELOPMENT TELECOMMUNICATIONS PROGRAM SUCCESS STORY: COMMUNITY CONNECT PROGRAM; TRADITIONAL TELEPHONE PROGRAM HUERFANO, NM (Oct. 2007), <http://www.usda.gov/rus/telecom/highlights/huerfano-connect-success.pdf>; see also FEDERAL COMMUNICATIONS COMMISSION, TELEPHONE SUBSCRIBERSHIP ON AMERICAN INDIAN RESERVATIONS AND OFF-RESERVATION TRUST LANDS 1 (May 2003), http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-

Universal Service Fund (“USF”) money, which provides federal dollars to back basic phone service to rural America, including tribal lands, the Navajo Nation has remained far behind the national average, and even behind the average of other tribes, in obtaining phone service.⁶ Data from the 2000 Census estimated that 67.9% of Native American households on reservations had telephone service.⁷ In stark contrast, Navajo telephone penetration rates fell far below this average at 37.4%.⁸ At the same time, 94% of non-native rural households had telephones.⁹

Since 2000, the Navajo Nation has begun to overcome this communication divide with the help of earth-orbiting satellites.¹⁰ This development reflects the shift towards more spectrum-based technology¹¹ that has occurred across the United States over the past decade. This technological revolution through wireless technology helps to tackle a long-standing problem facing the Navajo Nation—how to spread telecommunications and information technology across the Navajo Nation.¹²

Spectrum-based technologies remove the need to lay wires to reach individual Navajo households on the Nation. Some have described this as “technological leapfrogging.”¹³ As Navajos incorporate wireless technologies into their lives, an opportunity arises for the Nation to consider the broader question of how to shape the use of these telecommunications and information services in a way that helps the Nation develop economically and still preserve its culture. One of the first comprehensive studies of contemporary communications technology in Indian Country made the following important point:

State_Link/IAD/subsai03.pdf (providing statistics regarding telephone subscribership on the Navajo Nation).

6. *Id.* at tbl.3.

7. *Id.* at tbl.1.

8. *Id.* at tbl.3.

9. John C. Miller & Christopher P. Guzelian, *A Spectrum Revolution: Deploying Ultrawideband Technology on Native American Lands*, 11 COMMLAW CONSPECTUS 277, 278 (2003).

10. See Cullen, *supra* note 1, at 1.

11. Spectrum-based technologies range from radio to cell phones; I will use the term to cover any communications technology that uses the electromagnetic spectrum, rather than wires, to transmit signals.

12. The terms “telecommunications” and “information services” help differentiate how the FCC regulates these different services under the 1996 Telecommunications Act. Generally, “telecommunications” refers to basic telephone services, while “information services” are more advanced services like broadband Internet services. See NUCHECHTERLEIN & WEISER, *infra* note 21, at 152. The significance of the difference between these two types of service will be discussed below and will help shape several of the arguments made within this paper. See *infra* Part II.

13. See Kade L. Twist, *Native Networking Trends: Wireless Broadband Networks*, BENTON FOUNDATION, Sept. 21, 2001, <http://www.digitaldivide.net/articles/view.php?ArticleID=280> (discussing the ideas of technological leapfrogging).

Community and cultural development is perhaps the development area most commonly considered for tribal communications. Many projects within Indian Country fit under this label. Noncommercial radio and television stations have been part of the tribal landscape for years, and have as their main purpose the provision of culturally appropriate services to Indian communities. Other examples include Internet education and access projects, satellite services, and public safety radio networks.¹⁴

This paper examines the cultural and legal issues surrounding the Navajo Nation's efforts to provide and regulate advanced telecommunications services ("ATs"), specifically high-speed wireless Internet access, on tribal lands. Part I connects the Navajo's history of technological incorporation, such as weaving and silversmithing, with the tribe's growing use of Internet technologies. The discussion focuses on the Navajo's most recent plans to develop its own high-speed wireless Internet network called "Internet to the Hogan." Part II provides an overview of federal telecommunications law and explores how the Federal Communications Commission historically regulated the telecommunications and electronic information industry. The role that the states have taken in this field will be reviewed. The discussion ends with an examination of the specific statutory language that covers ATs. Part III then provides an analysis of how tribal sovereignty, federal regulation, and state jurisdiction issues should be viewed to help provide the tribe with the strongest arguments for asserting control over ATs on tribal lands. Part IV concludes this paper with a look to the future of the Navajo Internet network, making several recommendations for policy and statutory changes to further empower Navajo cultural and legal control over its Internet infrastructure.

I. THE INTERNET AND NAVAJO CULTURAL ADAPTABILITY

We used silver that came from outside and learned to silversmith and became world-renowned for that. We took the technology of weaving and made it our own and we've become world-renowned. Internet technology is a tool that has come from outside. Now we have to take that and become world-renowned.¹⁵

Navajo culture is well known for its ability to adapt and to

14. JAMES CASEY ET AL., *NATIVE NETWORKING: TELECOMMUNICATIONS AND INFORMATION TECHNOLOGY IN INDIAN COUNTRY* 15 (Jean Smith ed., 1999), <http://www.benton.org/publibrary/native/bentonne.pdf>.

15. Cullen, *supra* note 1, at 4 (quoting Ernest Franklin of the Navajo Nation Department of Capital Improvement).

incorporate new technologies that it encounters.¹⁶ “The Navajos have always brought in new people, new ideas, and new elements and, over time, made them Navajo.”¹⁷ The Internet is no different. Just as the Navajos have developed their own style of weaving and silversmithing, “the Navajos w[ill] continue to demonstrate their capacity for learning initially from others and ultimately develop[] forms of cultural expression that, regardless of their derivation, w[ill] emerge as fundamentally, centrally Navajo.”¹⁸

Over the past ten years, the Navajo Nation has begun the process of weaving the Internet into Navajo life. Starting in 1998, grants from the Bill and Melinda Gates Foundation’s Native American Access to Technology Program have helped to launch a program that provides funding to install computers in all 110 Navajo chapter houses and to connect each chapter house to the Internet.¹⁹ Because of the rugged landscape and remoteness of many of the chapter houses, the primary ways that most Americans obtain access to the Internet, either through their phone line or through cable, are not practical for most Navajos. Rather, the Navajos turn to the skies above and receive their connection to the Internet using a geosynchronous satellite orbiting thousands of miles above the Navajo Nation.²⁰

The use of satellite technology to connect to the Internet shows one way that the Navajos are tapping into the rapidly evolving world of telecommunications technology. Commentators call it technological convergence and digital migration.²¹ Where once communications were sent via analog signals, whether over wires or airwaves, today communications are usually sent via digital signals. While the significance of this analog to digital switch may not be obvious, the key is that digital technology reduces the world of communications to a binary system, where messages are translated into a coded series of 0s and 1s.²² As a result, it does not matter if one is trying to connect to the Internet using a phone line, fiber optic cable, radio tower, or satellite. All this information, in the end, is reduced to the same basic building blocks of

16. See PETER IVERSON, DINÉ: A HISTORY OF THE NAVAJOS 3 (2002).

17. *Id.*

18. *Id.* at 32.

19. Andrew C. Gordon et al., *Native American technology access: the Gates Foundation in Four Corners*, 21 ELEC. LIBR. 428, 431-32 (2003); Navajos – Overview, History, Modern Era, The first Navajos in America, Settlement, Acculturation, and Assimilations, <http://www.everyculture.com/multi/Le-Pa/Navajos.html> (“The basic unit of local government in the Navajo Nation is the Chapter, each with its own Chapter House. The Chapter system was created in 1922 as a means of addressing agricultural problems at a local level”).

20. Gordon et al., *supra* note 19, at 431-32.

21. See JONATHAN E. NUECHTERLEIN & PHILIP J. WEISER, DIGITAL CROSSROADS: AMERICAN TELECOMMUNICATIONS POLICY IN THE INTERNET AGE 23-27 (2005).

22. See *id.* at 116.

0s and 1s.

The significance of this digital revolution is that many forms of technology can more easily switch from one means of reaching individuals to another, and one device can handle many different types of applications. This is known as technological convergence.²³ In the past, different technologies required different devices, whether it be televisions, phones, or computers. Now, technological convergence and digital technology allows all these technologies to come together as one. Therefore, the satellite Internet connection to each Navajo chapter house can allow for a wide variety of technologies through one device.

The relevance of this technological convergence as it pertains to tribal and cultural sovereignty is that the evolving state of telecommunications technology provides different options for tribes to consider when developing telecommunications infrastructure and how to regulate it. Although the Navajo Nation may have lagged behind the rest of the nation with respect to basic telecommunications services through the year 2000, technological convergence now allows the Nation to make a technological leapfrog forward.²⁴ The Navajo Nation faces critical decisions about where it wants to land in this new technological world. As will be discussed in subsequent sections of this paper, the state of telecommunications regulation in America has established several avenues by which tribes can seek to regulate these services on tribal lands with an eye towards establishing greater cultural sovereignty and self-governance.²⁵

The Navajo Nation has already started making these choices by the ways that it utilizes the Internet and makes the Internet its own. One of the original motivations for connecting each chapter house to the Internet was so that the Nation could help satisfy “the Local Governance Act (LGA), which had been passed in 1998 to encourage the Navajo Nation’s 110 chapters to become more self-sufficient.”²⁶ Each chapter house has its own website through which community planning and development information is provided.²⁷ As a result, over fifty local Navajo communities have developed land-use plans based on information gathered by locals through the Internet that have

23. *Id.* at 23.

24. See Electa Draper, *Tech Tidal Wave Heads Toward Tribe*, DENVERPOST.COM, Mar. 1, 2007, http://www.denverpost.com/news/ci_5326782 (discussing Navajo technological leapfrogging).

25. See *infra*.

26. See Cullen, *supra* note 1, at 1-2; see generally, NAVAJO NATION CODE tit. 26, § 1B (1998).

27. Marty Logan, *Vast Navajo Nation Connects Communities via Web*, INTER PRESS SERVICE, Dec. 6, 2005, available at http://www.finalcall.com/artman/publish/article_2314.shtml.

“empower[ed] individual communities to take the lead in rebuilding their lives.”²⁸ These decentralized efforts at community empowerment go to the heart of Navajo culture: “the Diné are far from being a unified nation but rather constitute a series of autonomous groups with highly localized leadership patterns.”²⁹ At the same time, as Navajo Nation President Joe Shirley, Jr. said more broadly, “The most important thing is that our people are communicating with their government, and their government is communicating with them.”³⁰

Navajo chapter houses are using their satellite connection to the Internet as a cultural preservation and adaptation tool on several other levels. Along with providing a means for better government services, the Internet also helps bridge generations.³¹ Young Navajos drive much of the interest in integrating the Internet into Navajo society.³² “Some chapters have created programs in which youth teach elders to use computers that have been installed in senior centers. In return, the elders teach the youth traditional Navajo stories.”³³ Furthermore, the Navajo Nation is providing Internet access at all the Navajo’s Head Start schools.³⁴ As a tool, the Internet allows teachers to “use online resources to plan their classroom curricula and find out about changing federal [education] requirements.”³⁵ Navajo President Shirley commented, “Education, as we see it, as an indigenous nation, is one of the ways to get back to standing on our own two feet, sustaining ourselves as individuals, as families, as communities, and, ultimately, as a nation.”³⁶

More broadly, the Internet helps protect Navajo culture through the Internet’s other educational and economic aspects. Older Navajos are taking online distance education classes and earning both undergraduate and graduate degrees.³⁷ Navajos are also participating in eCommerce; over 600 Navajo artists presently sell their works, including jewelry, rugs, and pottery, online.³⁸ Navajo President Shirley is now talking with other

28. Marty Logan, *Navajos Go Global: An Indigenous Web Builds Up*, INTER PRESS SERVICE, Nov. 17, 2005, <http://www.ipsterraviva.net/TV/Tunis/viewstory.asp?idnews=383>.

29. IVERSON, *supra* note 16, at 25.

30. Kathy Helms, *Navajo president attends World Summit in Africa*, GALLUPIDEPENDENT.COM, Nov. 16, 2005, <http://www.gallupindependent.com/2005/nov/111605wsmt.html>.

31. Cullen, *supra* note 1, at 3.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. Press Release, Navajo Nation, Navajo President Joe Shirley, Jr., addresses international UN conference on information, communication, technology (Apr. 24, 2007), available at <http://opvp.org/cms/kunde/rts/opvporg/docs/828919834-04-26-2007-15-20-49.pdf>.

37. See Shirley Press Release 1, *supra* note 4, at 2.

38. *Id.*

less developed nations about the “Navajo Model” for utilizing Internet technology: “[t]he Navajo Nation has demonstrated to the world that a people who value culture, language, and tradition can use satellite and wireless technology to help maintain their way of life.”³⁹

The next step on this path of technological transformation involves spreading the “Internet to the Hogan.”⁴⁰ Leaders of the transformation plan “to leapfrog the Navajo Nation ahead of what’s available in the finest homes and communities in New York City or Denver.”⁴¹ The Internet to the Hogan Plan involves establishing a state of the art wireless broadband network that is owned and operated by the Navajos rather than relying on a non-Navajo Internet Service Provider (“ISP”) as the Nation has done to date.⁴² Furthermore, instead of utilizing satellite communications, the Internet to the Hogan network will rely on terrestrial wireless technology.⁴³ This will allow the Navajo network to become true high-speed broadband, as the satellite technology used to date is more comparable to slow narrow-band dial-up access to the network.⁴⁴ The new network will allow Navajos to achieve Internet speeds 10 to 100 times faster than what they have experienced so far.⁴⁵ Furthermore, Navajo chapter houses and Navajo colleges will have portable mini-supercomputers onsite to help build the backbone of this network.⁴⁶

As the Navajo Nation establishes its Internet to the Hogan network, the Nation will use wireless technology to allow individual Navajo homes to go online through wireless connections to communication towers, similar to the technology used for cell phones. According to the Internet to the Hogan Plan, “[t]he Navajo Nation culture and values will help shape the strategic plan[] and provide guidance in developing [and] implementing modern information

39. *Id.*

40. See DEPT OF INFORMATION TECH., NAVAJO NATION INFORMATION TECH. PLAN 2007 – 2008: “INTERNET TO THE HOGAN – ENTERING THE INFORMATION AGE” (Jan. 2, 2007), <http://www.dit.navajo.org/pdf/NAVAJO%20NATION%20Strategic%20Information%20Technology%20Plan%205.0.pdf.pdf> [hereinafter INTERNET TO THE HOGAN TECH. PLAN].

41. Draper, *supra* note 24, at 1 (quoting Tom Davis, Dean of Instruction at Navajo Technical College).

42. OnSat Network Communications provides satellite Internet to the Navajo chapter houses. See Gordon et al., *supra* note 19, at 431. A recent audit, however, suggests that OnSat inappropriately billed the Navajos over \$650,000. See John Christian Hopkins, *Bates: ‘Gross negligence’ in OnSat dealings*, GALLUPINDEPENDENT.COM, June 21, 2007, http://www.gallupindependent.com/2007/june/062107jch_onsatdealings.html.

43. See Draper, *supra* note 24, at 1.

44. See Digital Equity Network, <http://www.nnden.org/> (providing information about OnSat, the satellite Internet Service Provider to the Navajos).

45. *See id.*

46. See Draper, *supra* note 24, at 2.

technology within the Navajo Nation[’s] boundaries and beyond.”⁴⁷ “From Chapter Houses to the central government Navajos still integrate traditional prayers in hopes of acquiring the best for [the Navajo] people. Values generated by [Navajo] way of life will be the driving mechanism in this plan; integrat[ion] with current technology will also drive the implementation of [information technology].”⁴⁸

At its root, the Internet to the Hogan Plan will allow the Navajos to control their connection to the Internet. Navajo President Shirley has talked about the importance of such indigenous Internet portals that connect peoples like the Navajo to the rest of the world: “Our portal will allow us to share, with our own voices, our traditions, values, history and language as well as our aspirations for the future.”⁴⁹ The creation of indigenous Internet portals like the Navajo Network will help “stave off complete cultural assimilation . . . [as] indigenous peoples are embracing the technology of the digital age to ensure their continued survival.”⁵⁰ Nonetheless, there are several important jurisdictional issues that may impact the Navajo Nation’s power to control their own wireless network and its connection to the global Internet. The following sections of this paper examine how the different jurisdictional arguments that the federal, state, and tribal governments may assert could affect the Internet to the Hogan Plan.

II. ADVANCED TELECOMMUNICATIONS SERVICES: UNDERSTANDING FEDERAL TELECOMMUNICATIONS AND INFORMATION LAW IN THE NAVAJO CONTEXT

The Navajo way of life is a process of moving from a domain of perfect beauty into history, the threat of chaos motivates a return to ritual in order to achieve re-creation and renewal. Navajo life can be portrayed as a pathway out of the domain of the perfect beauty of fresh creation and into history, into the profane world.⁵¹

Understanding the legal issues that may arise when the Navajo Nation provides and regulates Internet services requires delving into the complex world of federal communications law. Several broad conceptual

47. INTERNET TO THE HOGAN TECH. PLAN, *supra* note 40, at 9-10.

48. *Id.* at 5.

49. Joe Shirley, Jr., President, Navajo Nation, Address to the World Summit on the Information Society: Towards an Indigenous Portal (Nov. 23, 2005), <http://www.itu.int/wsis/tunis/statements/docs/pe-indigenous/1.doc>.

50. Angela R. Riley, “*Straight Stealing*”: *Towards an Indigenous System of Cultural Property Protection*, 80 WASH. L. REV. 69, 113 (2005).

51. SAM D. GILL, *NATIVE AMERICAN RELIGIONS: AN INTRODUCTION* 24-25 (2nd ed. 2005).

ideas will help clarify the legal and jurisdictional issues pertinent to this paper. First, the Communications Act of 1934 (“the 1934 Act”), provides the basis for almost all regulation of communications over wire or air.⁵² Federal and state regulation which arose under the 1934 Act compartmentalized communications under different statutory titles.⁵³ Technological convergence and digital migration are now causing problems with this compartmentalization. Fortunately, the Telecommunications Act of 1996 (“the 1996 Act”),⁵⁴ which amended the 1934 Act, provides some regulatory flexibility that is important for the analysis of the provision and regulation of wireless broadband services by the Navajo through the Internet to the Hogan Plan.

A. *The Communications Act of 1934*

Federal legislation regarding telecommunications started during the early part of the twentieth century, in part as a result of the tragic sinking of the Titanic and also the need to create a functional national telephone system. During the sinking of the Titanic, distress signals were sent out over radios, but the lack of a coordinated, unified system for using radios led to calls for help going unheeded.⁵⁵ Around the same time, local telephone companies were starting up around the country. However, because again no coordination amongst telephone companies existed, connecting users of different phone services often proved impossible.⁵⁶ By 1934, Congress passed the 1934 Act, providing broad statutory authority for a new federal agency, the Federal Communications Commission (“FCC”), to oversee telecommunications development across the country.⁵⁷ While the FCC’s power to regulate telecommunications preempted the states from regulating interstate communications, state public utility commissions could still regulate intrastate communications.⁵⁸

52. Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064 (codified as amended in scattered sections of 47 U.S.C.).

53. *Id.*

54. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.) [hereinafter *The 1996 Act*].

55. See NUCHECHTERLEIN & WEISER, *supra* note 21, at 232.

56. See *id.* at 5-6.

57. See STUART MINOR BENJAMIN ET AL., TELECOMMUNICATIONS LAW AND POLICY Ch. 2 (Carolina Academic Press 2006) (2001) (providing an overview of the FCC and its regulatory powers).

58. See NUCHECHTERLEIN & WEISER, *supra* note 21, at 47-49 (discussing dual jurisdiction between federal and state governments with respect to traditional telephone service).

i. The Multi-Silo Approach to Telecommunications Regulation

Depending on the nature of the service, whether over the air (like radio broadcasts) or over wires (like traditional telephone service), both the FCC and state public utility commissions apply regulations under several statutory titles of the 1934 Act, as amended. For the purposes of this paper, Titles I, II, and III provide the key provisions shaping the discussion. Title I ancillary jurisdiction is the most significant to this paper as it is a catch-all title allowing for regulation of communication services and technologies that do not fit neatly into any of the other categories yet may impact the services provided under the other titles.⁵⁹ Title II provides for regulation of traditional common carrier services over wires, such as basic telephone service. Common carrier regulation typically involves industries that have natural monopolies, and thus the regulation imposes upon phone companies the obligation to ensure equality in how they provide services.⁶⁰ Title II's importance to this discussion relates to the division between federal and state regulation of common carriers, creating dual jurisdiction issues; the FCC regulates interstate telecommunications, while the states regulate intrastate telecommunications.⁶¹ Under Title III, the FCC regulates the use of the airwaves, or electromagnetic spectrum. Historically, this involved regulating radio and television broadcasters. Today, however, with the rise of more wireless technology, whether wi-fi hubs or cell phones, Title III covers a broader category of services than it originally did.⁶² Typically, Title III federal regulation completely preempts state regulation. Several other titles fill out the FCC's regulatory authority: Cable Enforcement (Title IV), Penalties (Title V), and Miscellaneous Provisions (Title VII).⁶³

Because FCC regulation is divided into several different titles, the rise of digital technology and technological convergence has caused numerous regulatory headaches. A new telecommunications technology often fits under several different titles. The following sections of this paper will present specific regulatory aspects affecting different communication services and technologies.⁶⁴ These sections will provide a

59. *See id.* at 218 (providing an overview of Title I ancillary jurisdiction). Section 4(i) gives the FCC the power 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.” 47 U.S.C. § 154(i) (2000).

60. *See* NUCHESTERLEIN & WEISER, *supra* note 21, at 23.

61. *Id.* at 47-48.

62. *See id.* at 24.

63. *See* BENJAMIN ET AL., *supra* note 57, at 54-55.

64. *See infra.*

broader discussion regarding how tribal sovereignty over advanced telecommunications services, such as the broadband wireless network of the Internet to the Hogan Plan, will allow the Navajo Nation to determine how it wants to provide and regulate Internet infrastructure on tribal lands. Each of the following sections examines the key elements of federal regulation but also provides a closer look at where states play a role in regulating some of these telecommunications services. This provides a basic framework for further analysis when considering how tribes like the Navajo might take on more roles that bear resemblance to telecommunications regulation by federal or state regulators.

ii. Common Carrier Regulation under Title II

Under Title II, the FCC regulates interstate common carrier services that are provided over wires.⁶⁵ Long distance telephone service is the best known interstate common carrier service.⁶⁶ However, states regulate intrastate telephone service, typically through state public utility commissions.⁶⁷ On both the state and federal levels, regulators play an important role in approving the rates that are charged for phone services.⁶⁸ In addition, regulators also ensure that telephone service is provided in a non-discriminatory way.⁶⁹ As discussed in later sections, both the federal and state governments have established Universal Service Funds, which are additional charges tacked onto phone bills.⁷⁰ These help to subsidize underserved communities, either because of income disparity or difficulty in providing service (i.e., remote communities).⁷¹ The important take-away is that both the federal government and state governments play a role in regulating phone service because of its separate, yet interconnected, interstate and intrastate aspects.

Although the Navajo's Internet to the Hogan Plan involves using wireless technology to create a communications network for the Navajo Nation, it does have aspects that are reminiscent of common-carriers. The network will provide access to a potentially essential service, which is similar to many common carriers like traditional phone. In addition, the Internet to the Hogan Plan has similarities to intrastate phone services as it provides service within the reservation boundary. If the Internet to the Hogan Plan becomes the only real means for Navajos to connect to the

65. See The 1996 Act, *supra* note 54.

66. See NUCHESTERLEIN & WEISER, *supra* note 21, at 48.

67. *Id.*

68. See *id.* at 214.

69. *Id.*

70. *Id.* at 52.

71. *Id.*

broader communications world, the resemblances to common carriers may suggest that the Internet to the Hogan Plan be regulated as a common carrier under Title II.

iii. Spectrum Regulation under Title III

Because electromagnetic radio signals, such as AM and FM, can easily cross state boundaries, the federal government has taken exclusive jurisdiction over spectrum regulation since 1927 when Congress passed the precursor to the 1934 Communications Act.⁷² Two essential principles provide guidance to spectrum regulation. First, spectrum regulation at its root is about avoidance of interference between different users.⁷³ As a result, much of the past eight decades of spectrum regulation placed the FCC in a command-and-control position, where the FCC dictated who gets to use which slices of spectrum for what purposes and where.⁷⁴ Nonetheless, since the passage of the 1996 Telecommunications Act, a slow shift has begun towards deregulation that chips away at the FCC's historic command-and-control of spectrum.⁷⁵

The other essential principle is that spectrum is owned by the public.⁷⁶ Because the "airwaves" are seen as being owned and shared by the public, Congress wrote language into the original Communications Act that imposed public trust obligations on those who used spectrum to broadcast to the public; Congress called on the FCC to regulate spectrum "from time to time, as public convenience, interest, or necessity requires."⁷⁷ When a radio or television station needs to use spectrum to transmit its signal, it has to go to the FCC and get a license.⁷⁸ Historically, these licenses were, in effect, given away. More recently, spectrum has been auctioned off, most notably to cell phone companies.⁷⁹

Because the Internet to the Hogan Plan will rely on wireless technology and spectrum, Title III regulation has the most significance to the future of the Navajo network. On some level, the Navajo Nation will have to work with the FCC to coordinate spectrum usage. In Part III, this paper discusses in more detail the jurisdictional issues that could impact this issue.

72. Radio Act of 1927, 44 Stat. 1162 (1927); NUCHESTERLEIN & WEISER, *supra* note 21, at 232.

73. See NUCHESTERLEIN & WEISER, *supra* note 21, at 229.

74. See BENJAMIN ET AL., *supra* note 57, at 67.

75. See NUCHESTERLEIN & WEISER, *supra* note 21, at 239.

76. See *id.* at 229.

77. 47 U.S.C § 303 (2000).

78. See NUCHESTERLEIN & WEISER, *supra* note 21, at 236.

79. *Id.* at 237.

iv. Internet Regulation under Title I

Generally, Congress and the FCC have avoided regulating the Internet. In the 1996 Telecommunications Act, Congress added a statement suggesting its Internet policy: “to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.”⁸⁰ However, services that rely on the Internet have faced scrutiny to determine if regulation is necessary. Two active areas caught both Congressional and FCC Commissioners’ attention over the past few years (1) Internet Service Provider (“ISP”) discrimination towards content providers and (2) Internet telephone services, like Voice-over-Internet-Protocol (“VoIP”).⁸¹ Under the FCC’s Title I ancillary authority, the FCC can take steps to regulate telecommunications industries that may impact the other spheres that the FCC more formally regulates.⁸² VoIP is of significance to this paper as this Internet-based telephone service has drawn the attention of state regulators.⁸³ Furthermore, the Navajo Nation has taken active steps to begin using VoIP to provide phone service for its government agencies.⁸⁴ For the purposes of this paper, what is most relevant is that Section 706,⁸⁵ discussed in the following section, specifically contemplates both the FCC and state utility commissions using different regulatory approaches to help ensure that all Americans have access to high-speed broadband Internet connections, regardless of the specific applications that might be used.

80. 47 U.S.C. § 230(b)(2) (2000); *see also* NUECHTERLEIN & WEISER, *supra* note 21, at 197.

81. *See* NUECHTERLEIN & WEISER, *supra* note 21, at 155, 197 (discussing network neutrality and VoIP regulation, respectively).

82. *See id.* at 218; *see also* United States v. Sw. Cable, 392 U.S. 157, 178 (1968) (upholding FCC ancillary authority to regulate industries like cable that may impact broadcasters).

83. However, the FCC has determined that VoIP is “indivisibly interstate,” thus preempting state regulation. NUECHTERLEIN & WEISER, *supra* note 21, at 205.

84. *See* INTERNET TO THE HOGAN TECH. PLAN, *supra* note 40, at 70.

85. 47 U.S.C.A. § 1302 (2008) (codifying Pub. L. No. 110-385, 122 Stat. 4096 (2008)) [hereinafter Section 706].

B. The 1996 Act and Section 706: Advanced Telecommunications Services

In 1996, Congress amended the 1934 Act to account for the many changes that had occurred in the ways we communicate.⁸⁶ The Telecommunications Act of 1996 focuses on deregulating the telecommunications industry by having the FCC promote competition within the markets.⁸⁷ In addition, the 1996 Act contains new provisions to account for emerging technologies like the Internet. Section 706 specifically provides the FCC and state public utilities commissions with broad discretionary powers as to how these commissions can either regulate or deregulate Internet infrastructure.⁸⁸ The language of Section 706 focuses on what are called “advanced telecommunications capabilities.”⁸⁹ Basically, it refers to high-speed broadband service, which is the form of telecommunications and information service within the Navajo Nation’s Internet to the Hogan technology plan.⁹⁰ The goal of Section 706 is to see the timely deployment of broadband Internet service to all Americans, and the section includes a requirement that the FCC make regular inquiries into the deployment of this advanced telecommunications service.⁹¹ The specific language of Section 706 is informative:

The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price-cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove

86. See The 1996 Act, *supra* note 54.

87. See NUCHTERLEIN & WEISER, *supra* note 21, at ch.3.

88. See BENJAMIN ET AL., *supra* note 57, at 955.

89. Section 706, *supra* note Error! Bookmark not defined., § 1302(d) (“The term ‘advanced telecommunications capability’ is defined, without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.”).

90. See INTERNET TO THE HOGAN TECH. PLAN, *supra* note 40, at 13-14.

91. *Id.* For the remainder of this paper, I will use the terms “advanced telecommunications capabilities,” “advanced telecommunications services,” and “ATs” interchangeably.

barriers to infrastructure investment.⁹²

In effect, Section 706 opens up the regulatory and deregulatory toolboxes that the FCC and the state commissions have used in the past and anticipated needing in the future in order to ensure that broadband Internet access (along with other advanced technologies) reach Americans in a reasonable and timely fashion as called for in the 1996 Act.

The FCC has applied many of these different approaches over the past ten years. Most notably, the FCC has moved towards minimizing regulation of advanced telecommunications services (“ATs”). For example, the FCC categorized both cable modems and telephone digital subscriber lines (“DSL”), the two prominent ways that many Americans achieve access to high-speed broadband Internet service, as “information services,” rather than as offerings of “telecommunications services.”⁹³ This distinction brought these ATs outside of the sphere of Title II common carrier regulation and put them under the more deregulatory approach of Title I ancillary jurisdiction. While wireless broadband ATs—like those the Navajo’s Internet to the Hogan Plan anticipate—have yet to be categorized, the general trend of FCC regulation would suggest the FCC will not treat wireless broadband providers as common carriers.

However, the specific provisions of Section 706 do give the FCC and state commissions the power to impose regulation in order to help ensure that all Americans have access to broadband Internet services.⁹⁴ Thus, if regulation is needed to help ensure the viability of the Internet to the Hogan Plan, Section 706 provides a means to achieve these regulations. As discussed in the next two Parts of this paper, the Navajo Nation should play a role in determining what type of regulation will be helpful for the Internet to the Hogan Plan.

The states also play a role, though more limited by the jurisdictional restriction to intrastate matters, in regulating ATs. Most important for this discussion, some state legislatures have passed laws that prohibit local municipalities from providing wireless broadband services.⁹⁵ This

92. Section 706, *supra* note Error! Bookmark not defined., § 1302(a).

93. See Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Serv., 545 U.S. 967 (2005) (giving *Chevron* deference to the FCC’s categorization of cable modem service as an information service rather than an offering of telecommunications services); Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, *Notice of Proposed Rule Making*, 17 FCC Rcd. 3019 (2002) (developing rules to treat digital subscriber line broadband as an information service).

94. See Section 706, *supra* note Error! Bookmark not defined., § 1302(a); see also BENJAMIN ET AL., *supra* note 57, at 955.

95. See *Nixon v. Mo. Mun. League*, 541 U.S. 125 (2004) (affirming a state’s power to

could potentially impact the Navajo Internet to the Hogan Plan if a state, such as Utah, were to try to assert this authority over the Navajo wireless broadband network; this issue is further analyzed in the following section.⁹⁶

III. INTERNET TO THE HOGAN: TRIBAL SOVEREIGNTY, FEDERAL TRUST, AND STATE JURISDICTION

[Jurisdiction] gives [tribes] the governmental power required to operate cultural and economic programs on which to build a future for the people living on the reservation. Indians see this ability to make and enforce laws in particular territory as an essential force necessary to preserve a geographic and cultural core, and to perpetuate their survival as tribal peoples.⁹⁷

The extent to which federal and state regulatory authority over telecommunications services in Indian Country exists has never been universally defined. In most cases, for example, because the tribes have not exercised their authority to regulate telecommunications services within reservation boundaries, the state regulatory agencies have exercised jurisdiction over telecommunications services within Indian Country by default.⁹⁸

As the tension between these two quotes suggests, tribes have an important role in asserting jurisdiction over activities that impact a tribe's culture. Yet within the arena of common carrier telecommunications, tribes have generally not asserted such jurisdiction and, in some cases, states have stepped in to fill the void.⁹⁹ At the same time, however, some states have gone back and forth as to whether they have jurisdiction over telecommunications on tribal lands.¹⁰⁰ In the area of spectrum regulation, the FCC has generally regulated Title III telecommunications services

prohibit local municipalities from providing broadband Internet services); *see also* FTC, MUNICIPAL PROVISION OF WIRELESS INTERNET (FTC Staff Report, Sept. 2006) (providing an analysis of the pros and cons of municipal wireless), <http://www.ftc.gov/os/2006/10/V060021municipalprovwirelessinternet.pdf> [hereinafter MUNICIPAL PROVISION REPORT].

96. *See* Cybertelecom, Municipal Broadband, <http://cybertelecom.org/broadband/muni.htm> (providing a list of states that prohibit or restrict municipal broadband, including the state of Utah) [hereinafter Municipal Broadband].

97. DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 456-57 (5th ed. 2005).

98. CASEY ET AL., *supra* note 14, at 15.

99. *Id.*

100. *Id.* (pointing out that both California and Arizona have at different times stated they do not have jurisdiction over telecommunications services on tribal lands).

on tribal lands since the passage of the Communications Act of 1934.¹⁰¹ However, the FCC did little to promote and support tribal use of spectrum until recently.¹⁰² As the remainder of this paper argues, an important shift occurred over the past decade in which the Navajo began to assert more control and jurisdiction over telecommunications services on tribal lands.¹⁰³

This section examines more closely the principles of tribal sovereignty and the federal trust relationship as they impact tribal jurisdiction and regulation of ATSS on tribal lands. In addition, this section looks at issues that may arise if states assert jurisdiction in the telecommunications arena. This section provides the foundation for the conclusion where this paper argues that the FCC should promote the Navajo Nation's desire to require that the FCC and the states "[r]ecognize the rights of tribal governments and communities to exercise regulatory jurisdiction over telecommunication activities within the boundaries of reservations."¹⁰⁴

Despite the apparent de facto FCC and state jurisdiction over telecommunications service to native nations, some commentators argue that the questions of jurisdiction still remain unresolved therefore leaving ambiguity over the authority the FCC has to regulate telecommunications on tribal lands.¹⁰⁵ This section addresses three specific questions: (A) how does tribal sovereignty affect the power of the FCC to regulate on tribal lands; (B) what role does the federal trust relationship play in defining the FCC's relationship with tribes; and (C) what role do states play in regulating telecommunications services on tribal lands. Through examining these three questions, this paper will develop a vision of tribal telecommunications regulation.

101. Miller & Guzelian, *supra* note 9, at 280.

102. See, e.g., Extending Wireless Telecommunications Services To Tribal Lands, *Third Report & Order*, 19 FCC Rcd. 17,652 (2004); Extending Wireless Telecommunications Services To Tribal Lands, *Second Report & Order & Second Further Notice of Proposed Rulemaking*, 18 FCC Rcd. 4775 (2003); Extending Wireless Telecommunications Services To Tribal Lands, *Report & Order & Further Notice of Proposed Rule Making*, 15 FCC Rcd. 11,794 (2000).

103. See Navajo Nation Telecommunications Regulatory Commission, History, <http://www.nntrc.org/content.asp?CustComKey=21364&CategoryKey=21413&pn=Page&DoMName=nntrc.org>.

104. PowerPoint presentation: Ron Lee, Navajo National Telecommunication Regulatory Commission, Ariz. Telecomm. & Information Council Pre-Summit, *Telecommunications Issues in Indian Country* 13 (Apr. 19, 2007) (on file with author).

105. See CASEY ET AL., *supra* note 14, at 15; see also Daniel J. Adam, Note, *Tribal Telecom: Telecommunications Regulation in Indian Country*, 27 J. LEGIS. 153 (2001) (providing a basic overview of telecommunications regulation in Indian country).

A. Tribal Sovereignty and Federal Telecommunications Jurisdiction

Tribal sovereignty goes to the heart of the Navajo Nation's power to self-govern. Within the tribe's inherent sovereignty exists cultural sovereignty, "the effort of Indian nations and Indian people to exercise their own norms and values in structuring their collective futures."¹⁰⁶ This section examines the different arguments the Navajo Nation could make in asserting exclusive jurisdiction over advanced telecommunications services on tribal lands. While exclusive jurisdiction might do the most to empower Navajo cultural sovereignty, it is a difficult case to argue. Instead, this paper suggests that the Navajo Nation should work with the federal government to establish a telecommunications regulation for a tribal status somewhere between that of a state and a foreign nation. This is the best position to take to avoid individual state control while also taking advantage of the FCC's telecommunications expertise and financial support programs.

The Communications Act of 1934, as amended, is best described as a federal statute of general applicability. While a Supreme Court decision held that "general Acts of Congress apply to Indians as well as to all others in the absence of a clear expression to the contrary,"¹⁰⁷ the 9th Circuit outlined the generally applied exceptions to this rule in *Donovan v. Coeur d'Alene Tribal Farm*:

A federal statute of general applicability that is silent on the issue of applicability to Indians tribes will not apply to them if: (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. . . ."¹⁰⁸

Because the 1934 Act is a federal statute of general applicability that is silent with regards to Indians, it is appropriate to apply the *Donovan* exceptions to this analysis. One may first argue that the 1934 Act should not apply to the Navajo Nation because it impacts tribal self-governance in purely intramural matters. The Nation is developing its telecommunications infrastructure under the Internet to the Hogan Technology Plan in large part to implement the Nation's Local

106. Wallace Coffey & Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 STAN. L. & POL'Y REV. 191, 196 (2001).

107. *Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 120 (1960).

108. 751 F.2d 1113, 1116 (9th Cir. 1985) (quoting *United States v. Farris*, 624 F.2d 890, 893-94 (9th Cir. 1980)).

Governance Act.¹⁰⁹ The use of telecommunications infrastructure further aids chapter house self-sufficiency.¹¹⁰ Thus, telecommunications is being used as part of the Nation's self-governance in purely intra-mural matters. The Nation should therefore have exclusive jurisdiction over the telecommunications issues related to the Internet to the Hogan Technology plan.

Closely reading different sections of the 1934 Act, several commentators have further argued that tribal governments should have exclusive jurisdiction over telecommunications on tribal lands based in part upon factors similar to the *Donovan* exceptions.¹¹¹ For example, Section 152 of the 1934 Act reads broadly, applying to "all persons engaged within the United States in such communication or such transmission of energy by radio."¹¹² Section 301 goes on to refer to radio transmissions taking place in "any State, Territory, or possession of the United States."¹¹³ Some commentators have used this language to argue that because cases "have held that reservations are not states, territories, or possessions of the United States pursuant to full faith and credit statutes, the National Labor Relations Act, and the Occupational Safety and Health Act," tribes should have exclusive jurisdiction over telecommunications on tribal lands.¹¹⁴

Because the Communications Act does not explicitly apply to tribal lands, arguments are made that any implicit intent to regulate telecommunications services on tribal lands is ambiguous. In *NLRB v. Pueblo of San Juan*, the 10th Circuit held that tribal economic regulation can preempt a federal statute of general applicability when federal intent to regulate the tribes is uncertain.¹¹⁵ The Navajo's establishment of a regulatory commission to oversee telecommunications services,¹¹⁶ along with the provisions and plans the Navajo have created to oversee the development of advanced telecommunications services,¹¹⁷ contains enough similarities to tribal economic regulation that the reasoning of

109. See *supra* Part I.

110. *Id.*

111. See Miller & Guzelian, *supra* note 9, at 286-88.

112. 47 U.S.C. § 152 (2000); see also Miller & Guzelian, *supra* note 9, at 286-88 (providing a more detailed analysis of this argument).

113. 47 U.S.C. § 301 (2000).

114. Miller & Guzelian, *supra* note 9, at 286-87. However, the National Labor Relations Board in 2004 held that federal labor law does apply to tribes as employers, "overruling 30 years of its own precedent." *GETCHES ET AL.*, *supra* note 97, at 339 (citing *San Manuel Indian Bingo & Casino*, 341 NLRB No. 138 (2004)).

115. Miller & Guzelian, *supra* note 9, at 293 (discussing *NLRB v. Pueblo of San Juan*, 276 F.3d 1186 (10th Cir. 2002)).

116. See Navajo Nation Telecommunications Regulatory Commission, <http://www.nntrc.org>.

117. See generally *INTERNET TO THE HOGAN TECH. PLAN*, *supra* note 40.

the Pueblo of San Juan decision may be applied.

Upon further examination of the Navajo Nation's Internet to the Hogan Plan, several points of the plan favor an exclusive tribal jurisdiction position. First, the initial drive to develop Internet infrastructure on Navajo land was the desire to help Navajo connect to their government, while maintaining their decentralized ways of living.¹¹⁸ The Navajo Nation thus use the Internet for intra-cultural purposes. Furthermore, the Internet to the Hogan Plan creates an intra-network for the entire reservation.¹¹⁹ While the network will allow access to Internet resources outside the Navajo Nation, the purpose of developing the broadband wireless network is essentially an internal one. One could reasonably argue that the way that the Navajo Nation has put the Internet to the Hogan Plan together fits *Donovan's* first exception.

However, making these arguments may prove risky, especially because the wireless broadband plans for Navajo involve the use of spectrum rather than wireline connections. Using spectrum inevitably implicates the key reasons for federal exclusive jurisdiction. The airwaves know no boundaries; thus the Navajo's use of spectrum could potentially cause interference problems for other spectrum users outside of the reservation. In comparison, if the Navajo were using wire or cable infrastructure, like DSL over phone lines or cable modems, the Navajo would be able to argue that they were creating an exclusive intra-tribal infrastructure and could then regulate as do states with regard to intrastate phone services. However, this argument also runs into problems since the Internet itself seems "indivisibly interstate," a feature that has been used to preempt state regulation for Voice over Internet Phone service.¹²⁰

Rather than seeking exclusive jurisdiction over advanced telecommunications services on their tribal lands, the Navajo Nation might find strategic advantages in working with the FCC to help establish and regulate the Internet to the Hogan broadband wireless network. Examining the potential trust relationship between the FCC and the Navajo Nation represents the next step in advancing this discussion.

118. See *Cullen*, *supra* note 1, at 1; see also INTERNET TO THE HOGAN TECH. PLAN, *supra* note 40, at 7.

119. See INTERNET TO THE HOGAN TECH. PLAN, *supra* note 40, at 41.

120. See NUCHESTERLEIN & WEISER, *supra* note 21, at 205-06; see also Vonage Holding Corporation Petition for Declaratory Rule Concerning an Order of the Minnesota Public Utilities Commission, *Memorandum Opinion & Order*, 19 FCC Rcd. 22,404 (2004) (ruling that VOIP is indivisibly interstate), *aff'd in part* Minn. Pub. Utils. Comm'n v. FCC, 483 F.3d 570 (8th Cir. 2007).

B. *The Trust Relationship*

Although the Navajo Nation could attempt to assert complete jurisdiction over advanced telecommunications services on its tribal lands, a more fruitful approach may involve an examination of the federal trust relationship. Invoking the trust relationship does not necessarily go against the Nation's efforts to assert more cultural sovereignty and self-governance. Supreme Court jurisprudence with respect to the trust relationship focuses on the specific obligations of the federal government with respect to tribes based on the language of federal statutes. The *Mitchell* cases show the extremes, from a bare trust to a fiduciary trust.¹²¹ The key consideration is often the degree of management a federal agency takes in overseeing and regulating a tribal resource or asset.¹²²

Within the context of telecommunications law, there are several important points in this trust relationship analysis. First, when focusing on providing telephone services to underserved low-income and rural Americans under the USF provisions of the 1996 Act, the FCC interpreted the USF to include efforts to reach tribal communities who do not have adequate phone service.¹²³ Furthermore, the FCC effectively asserted control of spectrum available to tribal lands because of its exclusive jurisdiction over spectrum.¹²⁴ Thus, while the 1996 Act does not explicitly invoke the word "trust," the actions of the FCC show its intent to establish this relationship.

This last argument is bolstered by the fact that the FCC in 2000 established a specific government-to-government policy statement regarding its relationship to native nations like the Navajo.¹²⁵ To

121. *United States v. Mitchell*, 463 U.S. 206, 225 (1983) (finding a fiduciary relationship is established when a statute authorizes an agency to manage a tribal resource) [hereinafter *Mitchell II*]; *United States v. Mitchell*, 445 U.S. 535, 542 (1980) (holding that the General Allotment Act "created only a limited trust relationship").

122. *See Mitchell II*, 463 U.S. at 225; *see also* *Seminole Nation v. United States*, 316 U.S. 286 (1942) (discussing the fiduciary duty of the federal government regarding tribal trust funds).

123. *See* Federal-State Joint Board on Universal Service, *Twelfth Report & Order, Memorandum Opinion & Order, & Further Notice of Proposed Rulemaking*, 15 FCC Rcd. 12,208 ¶ 124 (Jun. 8, 2000) [hereinafter *Tribal ETC*].

124. *See supra* Part II, A, iii.

125. FCC, Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes 4-5, FCC-00-207, June 23, 2000 (

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, that Indian Tribes have adequate access to communications services.

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

establish this policy, the FCC looked first to the 1996 Act, which mandates that “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.”¹²⁶ The FCC realized that tribal lands fall distinctly within this category and affirmed its “commitment to promote a government-to-government relationship between the FCC and federally-recognized Indian Tribes.”¹²⁷ This government-to-government relationship suggests several things. First, it provides a basis for treating tribal governments, such as the Navajo, who have telecommunications regulatory structures as if the tribal governments have inherent power to regulate in this area. This gives support for the idea that with respect to telecommunications regulation on tribal lands, the Navajo Nation should be treated on a level at least comparable to how the states are treated with respect to intrastate telecommunications regulation. At a minimum, the policy requires that tribes like the Navajo be brought into all proposed rule making that impacts their interests. This is discussed more in the last section of this

uniquely affect Tribal governments, their land and resources.

3.The Commission will strive to develop working relationships with Tribal governments, and will endeavor to identify innovative mechanism 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.

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.

5.The Commission will assist Indian Tribes in complying with Federal communications statutes and regulations.

6.The Commission will seek to identify and establish procedures and mechanism to educate Commission staff about Tribal governments and Tribal culture, sovereignty rights, Indian law, and Tribal communications needs.

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 of services on reservations, and other problems of mutual concern.

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

), available at <http://www.fcc.gov/Bureaus/OGC/Orders/2000/fcc00207.doc> [hereinafter FCC Tribal Policy].

126. *Id.* at n.2 (quoting 47 U.S.C. § 254(b)(3) (2006)).

127. *Id.* at 2-3.

paper.

C. *Dealing with State Jurisdiction Assertions*

State legislatures and their public utility commissions present potentially the greatest problem for tribes like the Navajo that try to assert control over advanced telecommunications services. Because federal communication laws like the 1934 and 1996 Acts allow state jurisdiction over telecommunications that pertain to intrastate matters, some states have taken this power to impose their state regulation on tribes.¹²⁸ As the quotes at the beginning of this Part suggests, these state public utility commissions often act to fill the regulatory void where tribes have not regulated telecommunications.¹²⁹

At the same time, state public utility commissions have not taken the initiative to help tribes develop telecommunications infrastructure even if commissions do assert jurisdiction over tribal lands in this arena.¹³⁰ Part of the problem is that states have often gone back and forth as to their jurisdictional power over tribal telecommunications. Consider Arizona, for example, within which the largest percentage of Navajo lands is found.¹³¹ For many years, Arizona's state public utility commission did not assert telecommunications jurisdiction over Indian-owned and operated telecommunications companies.¹³² More recently, it started asserting jurisdiction when the telecommunications provider is non-tribally owned.¹³³ However, with the growing governmental structures of many tribes, most notably the Navajo,¹³⁴ the time has come to reconsider the whole question as to whether states should have any regulatory power over telecommunications services on tribal lands, regardless of who provides the telecommunications services.

Asserting tribal jurisdiction over advanced telecommunications services like the Navajo's Internet to the Hogan broadband plan is especially important today because of recent regulatory efforts on the part of several states. The Utah state legislature and numerous other states have passed laws banning local municipalities from providing wireless

128. CASEY ET AL., *supra* note 14, at 15.

129. *Id.*

130. *Id.*

131. Encarta, Navajo (people), [http://encarta.msn.com/encyclopedia_761576887/Navajo_\(people\).html](http://encarta.msn.com/encyclopedia_761576887/Navajo_(people).html).

132. See CASEY ET AL., *supra* note 14, at 15; see also Federal State Joint Board on Universal Service, Order, 15 FCC Rcd. 8544, ¶ 9 (1999) (finding that Arizona state public utility commission does not have jurisdiction over tribally owned and operated telecommunications companies on tribal lands).

133. See *Tribal ETC*, *supra* note 123, ¶ 142.

134. See, e.g., Navajo Nation Telecommunications Regulatory Commission, *supra* note 116.

Internet or other forms of broadband to their community members.¹³⁵ The Supreme Court held that such state laws are valid.¹³⁶ If a state like Utah, Arizona, or New Mexico were to try to assert this type of law over the Navajo Nation, it could have a devastating effect on the Internet to the Hogan project.

However, the Navajo Nation has several strong arguments it can make to counter any argument a state might use if the state were to try to assert jurisdiction over Navajo-provided telecommunications services. In *Nixon v. Missouri*, a local government which provided broadband internet to its community relied upon 47 U.S.C. § 253,¹³⁷ which states that: “No state or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”¹³⁸ When the state of Missouri tried to shut down the local government broadband service, the U.S. Supreme Court upheld the right of states to restrict local municipalities from delivering telecommunications services explaining that:

[W]hen a government regulates itself (or the subdivision through which it acts) there is no clear distinction between the regulator and the entity regulated. Legal limits on what may be done by the government itself (including its subdivisions) will often be indistinguishable from choices that express what the government wishes to do with the authority and resources it can command. That is why preempting state or local government self-regulation (or regulation of political inferiors) would work so differently from preempting regulation of private players that it is highly unlikely that Congress intended to set off on such uncertain adventures.¹³⁹

In effect, the Court pointed out that because local governments receive their power from the state government, local governments cannot try to bypass that state authority using federal preemption, even if the federal government may have appeared to have preempted such power. Because tribal governments do not receive their power from the states, it would be a simple argument to make that states can thus not limit a tribal government from providing telecommunications services.

However, in *Nixon* the Court acknowledged that a local government is an “entity,” yet argued, “that the strange and indeterminate results of using federal preemption to free public entities

135. See Municipal Broadband, *supra* note 96.

136. See *Nixon*, 541 U.S. at 131-40.

137. *Id.* at 130.

138. 47 U.S.C. § 253(a) (2000).

139. *Nixon*, 541 U.S. at 134.

from state or local limitations is the key to understanding that Congress used ‘any entity’ with a limited reference to any private entity when it cast the preemption net.”¹⁴⁰ So, while the Court on one hand emphasized that local governments cannot bypass state law through a preemption analysis, in this case, the Court may have inadvertently limited Section 253 to private entities.

Because Section 253 may only apply to private entities, any analysis regarding tribal jurisdiction over telecommunications services in Indian Country should also examine the core Supreme Court rulings pertaining to state civil jurisdiction over Indian Country. The following analysis shows that none of the three states within which the Navajo Nation resides should have regulatory powers over the tribe’s advanced telecommunications services in the Internet to the Hogan Plan.

In general, the Court applies a fact-specific, balancing-of-interest test when determining whether federal law preempts state jurisdiction in Indian Country.¹⁴¹ “State jurisdiction is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority.”¹⁴²

Further Supreme Court decisions help fill out this understanding of how state jurisdiction may be precluded in Indian Country, including the “infringement” analysis from *Williams v. Lee*¹⁴³ and the “preemption” analysis from *McClanahan v. Arizona Tax Comm’n*.¹⁴⁴ Under all these tests, state regulation of Navajo owned and operated advanced telecommunications services should not be allowed. Furthermore, state regulation of non-tribally owned and operated advanced telecommunications should also be preempted based on the analysis in *Warren Trading Post v. Arizona Tax Comm’n*.¹⁴⁵ In addition, *California v. Cabazon Band of Mission Indians*¹⁴⁶ shows that states cannot prohibit the Navajo Nation from providing advanced telecommunications services if the state allows its municipalities to provide similar services.

140. *Id.* at 133.

141. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333-34 (1983).

142. *Id.* at 334.

143. 358 U.S. 217, 223 (1959) (providing for exclusive tribal jurisdiction when state jurisdiction would infringe on tribes’ right to self-government).

144. 411 U.S. 164, 172 (1973) (precluding state regulation on reservation when federal law preempts state authority, based on a balancing of state, federal, and tribal interests).

145. *Warren Trading Post v. Ariz. Tax Comm’n*, 380 U.S. 685, 690 (1965) (ruling that states cannot regulate non-Indian traders in Indian Country because of federal preemption based on extensive federal regulation and tribal interests test).

146. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 209 (1987) (holding that if a state permits certain forms of conduct, and doesn’t absolutely ban such conduct, it does not have authority to enforce its regulation within an Indian reservation if the state regulation is incident upon the tribe or its members).

The Navajo Nation has its strongest arguments against state regulation when the activity regulated is performed by its own tribal members or the tribe itself.¹⁴⁷ Since the Internet to the Hogan Plan directly involves advanced telecommunications services that the Navajo Nation will provide, allowing state regulation would directly infringe upon the rights of the Navajo to make their own laws and be ruled by them, thus violating the principles in *Williams* and *McClanahan*.¹⁴⁸ The incidence of any such state regulation would fall directly on individual Navajos or the tribe itself.

The strongest argument that a state could make for regulatory authority in this case would be if the state was directly funding the Internet to the Hogan Plan through a funding mechanism like the state's Universal Service Fund. However, even in this case, the Navajo Nation would have a strong argument against state jurisdiction because funding alone does not create a regulatory nexus.¹⁴⁹ The Navajo Nation should nonetheless be cautious before accepting such funds from the state, and should turn to federal USF for support instead.

A stronger case for state regulatory authority arises when non-tribal telecommunications service providers are involved. Presently, the Navajo Nation does rely on a non-tribal telecommunications company to provide its satellite-based Internet service to chapter houses. In such cases, the preemption test in *Warren Trading Post*, *White Mountain Apache Tribe v. Bracker*, and *Cent. Mach. Co. v. Arizona Tax Comm'n* is appropriate.¹⁵⁰ These cases again involve balancing-of-interest tests like that used in *McClanahan*. Here, the Navajo Nation has a strong argument because tribal members and the tribe itself are directly benefiting from the services on the reservation. The only real reason for the state to regulate is to provide possible revenues for its Universal Service Fund. Again, as discussed above, this is a critical issue. If states are funding telecommunications infrastructure development or subsidizing tribal telecommunications in some way, then states have a stronger argument for regulation. However, as discussed further in the following section, private grants and some federal dollars have primarily helped fund the

147. See *Williams*, 358 U.S. at 223; see also *McClanahan*, 411 U.S. at 172.

148. See generally *Williams*, 358 U.S. 217; *McClanahan*, 411 U.S. 164.

149. Cf. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 105 S.Ct. 2399 (1985) (invalidating a state tax on tribal royalty interests).

150. These three cases all involve non-tribal companies that have commercial relationships for services on the reservations with tribal members or the tribe itself. Preemption precludes state regulation in *White Mountain* and *Central Machinery* because the tribes are the buyers and the value added is on the reservation. See *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980); *Cent. Mach. Co. v. Ariz. Tax Comm'n*, 448 U.S. 160 (1980); see also *Warren Trading Post*, 380 U.S. at 690.

advanced telecommunications infrastructure on Navajo land to date.¹⁵¹ Furthermore, the fact that the FCC has worked to establish a government-to-government relationship with the Navajo Nation through policy statements goes to the heart of preemption analysis.¹⁵² If a state were to assert authority over the Internet to the Hogan, it would need to show that its interests in regulating outweighed the interferences it would place on the government-to-government relationship between the FCC and the Navajo Nation.

Lastly, *Cabazon* provides an argument for final preclusion of any state effort to stop the Navajo Nation from providing advanced telecommunications services itself, even if a state—like Utah—prohibits municipal wireless broadband services.¹⁵³ In *Cabazon*, the Supreme Court held that if a state permits certain forms of conduct, and doesn't completely ban such conduct, it does not have authority to enforce its regulation within an Indian reservation if the state regulation is incident upon the tribe or its members.¹⁵⁴ Although a state might try to stop local governmental entities from providing ATSS, they rarely if ever ban private entities from providing advanced telecommunications services.¹⁵⁵ Thus, states would not have authority to enforce their telecommunications regulation in Indian Country, such as the Navajo Nation. Furthermore, ATSS regulation falls under a civil/regulatory category, rather than a criminal/prohibitory category, the critical distinction found in *Cabazon*.¹⁵⁶ Accordingly, states should not be allowed to prohibit tribal governments from providing ATSS such as the Navajo's Internet to the Hogan Plan.¹⁵⁷

151. See *infra* Part IV.

152. See FCC Tribal Policy, *supra* note 125.

153. See *Cabazon*, 480 U.S. at 209.

154. *Id.*

155. See *generally Nixon*, 541 U.S. at 125 (discussing situation in Missouri where private companies could provide broadband service but state wanted, and succeeded, in stopping local municipalities from providing municipal broadband services).

156. *Id.*

157. Furthermore, a state's ability to stop a municipality from providing ATSS is based on the fact that municipalities get their power delegated to them from the state. Tribal governments have inherent sovereignty that is not delegated to them from either the states or the federal government. See *Talton v. Mayes*, 163 U.S. 376, 384 (1896) (holding that tribal powers of self-government are not delegated but rather are inherent). Congress could step in with its plenary power and try to change this, effectively giving the state the power to stop tribally-provided ATSS. See *Lone Wolf v. Hitchcock*, 187 U.S. 553, 564-65 (1903) (holding that Congress has plenary power over tribes). However, the efforts in Congress recently have tended to go the other direction, geared at stopping the states that have passed prohibitions on municipal ATSS. See MUNICIPAL PROVISION REPORT, *supra* note 97, 35-38 (providing examples of proposed federal legislation preempting states from limiting municipal provision of wireless internet).

IV. WEAVING THE FUTURE NAVAJO.NET

Navajo people consider the opening [of the hogan] as a pathway leading out of the enclosed space. It is always seen as the road out, and this road is the road of life. . . . The pathway through the opening in the circle shows that the space inside and the space outside, the time of story and the time of humans in history, the world of beauty and order and the world of ugliness and disorder, are intimately interdependent.¹⁵⁸

Looking to the future of the Navajo Nation's Internet to the Hogan Plan, this paper concludes with several policy, regulatory, and statutory suggestions that could help foster more cultural empowerment to the Navajos as they work with their advanced telecommunications services. These recommendations focus on actions both the federal government and the Navajo Nation can take to enhance the provision and regulation of ATSS. At their root, these suggestions explore the idea of developing advanced telecommunications regulation in the tribal interest.

The idea of tribal interest regulation is a merging of two key principles within present telecommunications law and policy. The first foundation of tribal interest regulation comes from Title III spectrum regulation. Within Title III, the FCC is mandated to regulate the use of the airwaves in the name of public interest, necessity, and convenience.¹⁵⁹ This public interest mandate has resulted in numerous regulations that encourage diversity of voices over the public airwaves and localism for broadcasters.¹⁶⁰ While the public interest standard generally applied to TV and radio, it is still applicable to all uses of the electromagnetic spectrum. Emphasizing the importance of localism, the second foundation of tribal interest, the FCC's government-to-government relationship with the tribes,¹⁶¹ would allow the Navajo Nation and the FCC together to establish principles for regulating in the tribal interest. The root of the tribal interest standard would be based on notions of cultural sovereignty and tribal self-government. The following sections address specific federal and Navajo programs—beyond the Internet to the Hogan Plan—and how they might incorporate this notion of regulating in the tribal interest.

158. GILL, *supra* note 51, at 24-25.

159. *See supra* Part II, A, iii.

160. *See* NUECHTERLEIN & WEISER, *supra* note 21, at 358.

161. *See supra* Part III, B.

A. Federal Programs

After releasing its government-to-government policy statement,¹⁶² the FCC took several steps to try to improve access to telecommunications services on tribal lands like the Navajo Nation. At the same time, they also took steps that may have inadvertently thwarted these efforts. The FCC needs to reconsider how these programs and regulatory decisions may impact the interest of tribes like the Navajo in light of tribal programs like the Internet to the Hogan Plan.

i. FCC's Indian Telecommunications Initiative

In 2002, the FCC established the Indian Telecommunications Initiative ("ITI") to improve telecommunications services on tribal lands.¹⁶³ The ITI has 3 primary goals (1) increase the number of Native Americans who have phone service; (2) increase telecommunications infrastructure on tribal lands; and (3) "inform consumers in Indian Country about financial support available through federal government programs."¹⁶⁴ To date, the ITI has focused most of its work on educating tribes about the Enhanced Lifeline and Link-Up programs (discussed in the following section), which provide federal dollars to subsidize the cost of telephone service for individuals.¹⁶⁵ Senior FCC officials have also met with tribal leaders to discuss telecommunications issues on tribal lands.¹⁶⁶

While educating tribes and their members about the availability of federal dollars to help pay for phone service may be useful, it does not address some of the more fundamental problems that plague tribal lands, where the basic technological infrastructure has not even been established to provide services like basic telephone. However, the Navajo's Internet to the Hogan Plan provides one means to leapfrog this problem—use wireless technology instead of traditional wirelines. The Internet to the Hogan Plan will allow for phone service to reach individual hogans, using VoIP technology.¹⁶⁷ The FCC's ITI should take into consideration such innovative ways of addressing long-standing infrastructure problems. Furthermore, instead of just educating tribes about the programs the FCC has to offer, the FCC should also use the ITI to educate itself about the specific tribal cultural issues that impact

162. See FCC Tribal Policy, *supra* note 125.

163. See FCC, Federal Tribal Initiatives, <http://www.fcc.gov/indians/iti.html>.

164. *Id.*

165. See UNITED STATES GOV'T ACCOUNTABILITY OFFICE, TELECOMMS.: CHALLENGES TO ASSESSING AND IMPROVING TELECOMMS. FOR NATIVE AMS. ON TRIBAL LANDS 27 (GAO-06-189, Jan. 2006) [hereinafter GAO TRIBAL TELECOM REPORT].

166. *Id.*

167. See INTERNET TO THE HOGAN TECH. PLAN, *supra* note 40, at 35.

telecommunications services on tribal lands. For example, the FCC could educate itself about how Navajos are utilizing Internet access via chapter houses to provide the FCC with more insight as to how Navajos perceive, incorporate, and maybe even reject the Internet within the context of Navajo culture. Considering cultural issues will thus allow the FCC to tailor its ITI program to help fit the notion of regulating in the tribal interest.

ii. The Universal Service Fund

As noted above, since 2000, the FCC has directed its ITI work towards educating tribes about federal dollars that were historically targeted at subsidizing low-income or rural individuals to help with paying for telecommunications services. Under the federal Universal Service Fund, the FCC implements two national programs, the Enhanced Link-Up and Lifeline programs.¹⁶⁸ The Enhanced Link-up program provides a one-time discount to help with installation fees for setting up the cost of basic phone service.¹⁶⁹ The Lifeline program provides ongoing discounts on basic telephone service, allowing low-income Indians on tribal lands to pay as low as \$1 a month for such service.¹⁷⁰

Unfortunately, USF data is not broken down into enough detail to allow for analysis of how many individual Indians or individual tribes have been able to take advantage of this program.¹⁷¹ One important step that the FCC's ITI could take is to start collecting data on individual Indian and tribal utilization of USF funds. These subsidies, however, are generally targeted at phone service, either through wireline phones or wireless cell phones. The FCC should adjust this program so that Indians can utilize both programs to help connect individual Indian homes, like Navajo hogans, through alternative communications technology, like the broadband wireless network being established through the Internet to the Hogan Plan.

iii. Eligible Telecommunications Carriers

Another aspect of the USF is its High Cost program. This program provides funds to telephone service providers rather than subsidizing individuals. The funds are intended to help companies provide service to customers in remote or rural areas, where the cost of providing these

168. *Id.* at 23.

169. *Id.*

170. *Id.*

171. *Id.* at 24.

services is substantially higher than in urban areas.¹⁷² In 2004, the High Cost Fund dwarfed the Lifeline and Link-up programs by nearly 360% (\$3.5 billion compared to \$758.8 million).¹⁷³ It is through programs like High Cost that communications companies can actually find the federal dollars needed to help deploy infrastructure into native communities. In addition, High Cost Funds are also used to support the deployment of broadband Internet infrastructure.¹⁷⁴

In order for a telecommunications company to get High Cost Fund dollars, it must be designated as an Eligible Telecommunications Carrier (“ETC”) by either the FCC or a state public utility commission.¹⁷⁵ Receiving ETC status commits these companies to certain obligations to provide service to rural and remote areas, and the ETC receives in exchange money to subsidize the work. A critical problem that has arisen with regard to ETCs is uncertainty over whether the surrounding state or the FCC needs to make the ETC designation for a telecommunications provider wanting to serve tribal lands. As the FCC has stated, this issue is “a legally complex and fact specific inquiry, informed by the principles of tribal sovereignty, federal Indian law, treaties, as well as state law.”¹⁷⁶ The FCC decided these issues based on principles from *Montana v. United States*.¹⁷⁷

In *Montana*, the Court held that Indian tribes, in general, cannot regulate the activities of non-Indians on land held in fee simple within reservation boundaries by non-tribal members.¹⁷⁸ There are several exceptions, however. First, a tribe may regulate such activities when the non-Indians have entered into contractual or business agreement with the tribe.¹⁷⁹ Second, a tribe may regulate such activities if the activities “so threaten the Tribe’s political or economic security as to justify tribal regulation.”¹⁸⁰ As argued in Part III.C above, the preemption analysis under *McClanahan* or *Warren Trading Post* is more appropriate in this context. First, the telecommunications services provided either by or for the Navajo Nation involve activities that will occur predominantly on

172. GAO TRIBAL TELECOM REPORT, *supra* note 165, at 22.

173. *See id.* at 21.

174. *See* Federal-State Joint Board on Universal Service, *Recommended Decision*, 22 FCC Rcd. 20,477, ¶ 10 (2007) [hereinafter Federal-State High Cost Decision].

175. *See Tribal ETC*, *supra* note 123, ¶¶ 112-127 (discussing ETC designation process on both non-tribal and tribal lands).

176. GAO TRIBAL TELECOM REPORT, *supra* note 165, at 29 (quoting *Tribal ETC*, *supra* note 123, ¶ 8).

177. Western Wireless Corporation Petition for Designation as an Eligible Telecommunications Carrier for the Pine Ridge Reservation, *Memorandum Opinion & Order*, 16 FCC Rcd. 18,145, ¶ 14 (2001).

178. 450 U.S. 544, 564-65 (1981).

179. *Id.* at 566.

180. *Id.*

tribal lands as there is very little land held by non-tribal members within the borders of the Navajo Nation; this suggests that the *Montana* rules do not even apply in this case. Second, in the case of non-tribal related telecommunications providers, the providers in almost all cases would have some contractual or business relationship with the Navajo Nation; this would give the Nation the authority to regulate. So, while the Navajo Nation may regulate based on this analysis, the surrounding states such as Arizona should have no authority to regulate based on the preemption analysis of Part III.C above.

One should note that one applicant for ETC status, Smith Bagley Inc., has been waiting over 3 years to hear if it would receive ETC status.¹⁸¹ The FCC should reconsider the whole basis for how it is making these decisions. In order to regulate in the tribal interest, the FCC should allow individual tribes to determine ETCs that may provide subsidized telecommunications services on a tribe's land, taking on a role comparable to a state public utility commission.

Unfortunately, the FCC recently took steps that could curtail native telecommunications programs from tapping the High Cost Fund.¹⁸² Because of widespread criticism of the USF's growing size, the FCC adopted an interim cap on competitive eligible telecommunications carriers ("CETC").¹⁸³ Thus, High Cost Fund dollars are only available to incumbent ETCs. Tribal lands often do not have an established or incumbent telephone provider, so this policy could effectively stop High Cost Fund dollars from reaching these communities. Furthermore, new companies are often the entities that are actively seeking opportunities to help deploy facilities and services to Native American households.¹⁸⁴ The FCC should reconsider its cap on CETCs, at least for new CETCs on tribal lands.

The issues surrounding ETCs suggest that the FCC needs to hear tribal voices more clearly when addressing these critical USF issues. In the continuing discussion over regulation in the tribal interest, placing tribal representatives on the Federal-State Joint Board on Universal Service would help deal with the problems tribes face in dealing with access to High Cost USF.

181. GAO TRIBAL TELECOM REPORT, *supra* note 165, at 29.

182. See Federal-State High Cost Decision, *supra* note 174, ¶35.

183. *Id.*

184. Comments of General Communications to *High Cost Universal Service Support Federal-State Joint Board on Universal Service*, WC Dkt. No. 05-337, ii (June 6, 2007), available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519518397.

B. Empowering the Navajo Nation Telecommunications Regulatory Commission

Over twenty years ago, the Navajo Nation took its first steps to actively try to regulate telecommunications services on its tribal lands. In 1984, the Navajo Nation Council established the Navajo Nation Telecommunications Regulatory Commission (“NNTRC”).¹⁸⁵ Through the NNTRC, the Nation “develop[ed] and adopt[ed] a regulatory code subject to Navajo Nation Council enactment, which will govern any and all Navajo Nation telecommunications activities, not inconsistent with Federal Communications Commission (FCC) regulation.”¹⁸⁶ The NNTRC works to establish policies regarding regulation of telecommunications activities on the Navajo Nation including telephone, cellular, satellite, internet, and two-way radio.¹⁸⁷ The NNTRC’s policies show indirectly how the Nation sees its role in regulating this industry as an exercise of tribal sovereignty over telecommunications on tribal lands. Besides the Internet to the Hogan Plan, the NNTRC has focused on other wireless technology deployment like cell phone towers.¹⁸⁸

i. NNTRC Right of Way Regulation

To date, the NNTRC has directed most of its efforts at providing policies that facilitate the deployment of telecommunications infrastructure on tribal lands, focusing primarily on “enabl[ing] telecommunications providers to furnish comprehensive and efficient wireless communication services to the community, while minimizing the adverse impacts their facilities may have on neighboring properties.”¹⁸⁹ The NNTRC presently works on ways to streamline the process to obtain tribal consent for rights-of-way (“ROW”) on tribal land for telecommunications equipment and infrastructure.¹⁹⁰

The ROW issue is one of the factors that has contributed to the

185. Navajo Nation Telecommunications Regulatory Commission, History, <http://www.nntrc.org/content.asp?CustComKey=21364&CategoryKey=21413&pn=Page&DomName=nntrc.org>.

186. *Id.*

187. *See* Navajo Nation Telecommunications Regulatory Commission, FAQs, <http://www.nntrc.org/content.asp?CustComKey=24433&CategoryKey=24434&pn=FAQ&DomName=nntrc.org#1>.

188. *See* Navajo Nation Telecommunications Regulatory Commission, Policy Documents, <http://www.nntrc.org/content.asp?CustComKey=106193&CategoryKey=120237&pn=Page&DomName=nntrc.org>.

189. Navajo Nation Telecommunications Regulatory Commission, Policy on ROW, <http://www.nntrc.org/content.asp?CustComKey=106193&CategoryKey=120226&pn=Page&DomName=nntrc.org>.

190. *See* GAO TRIBAL TELECOM REPORT, *supra* note 165, at 51.

slow deployment of telecommunications infrastructure onto tribal lands. The ROW process on tribal lands tends to be more complicated than on non-tribal land because the Bureau of Indian Affairs (“BIA”) must give its approval for all ROW requests on Indian land.¹⁹¹ The complexity of getting BIA approval has caused confusion and delays for some telecommunications service providers.¹⁹² Part of the problem is that ROW regulations are outdated, focusing on “the size of the right-of-way needed and voltage levels of electrical equipment that may be installed for commercial purposes, but similar descriptions and guidance are not available for advanced telecommunications rights-of-way.”¹⁹³ The NNTRC’s effort to streamline the process for a wireless company to gain tribal approval for a ROW is one way to address this problem.

ii. A Proposal for Future NNTRC Regulation

While this paper has focused on the Navajo Nation’s development of advanced telecommunications service infrastructure as a tool to develop their culture, another critical issue not explored in any great detail is the actual regulation of the content that is accessed and distributed through the Navajo’s intranet network. As Angela Riley argues:

[T]he proliferation of the Internet presents a new threat to indigenous cultural property. Sacred materials can be taken, distorted, and sent around the world almost instantaneously. Until recently, if a sacred ceremony was viewed without authorization from the tribe, the viewer had limited means of communicating the ceremony’s contents. Today, if that same ceremony is recorded on a digital camera, for example, it can be placed on the Internet and sold or disseminated globally in a matter of moments.¹⁹⁴

While traditional intellectual property law may not have proved effective in guarding against this threat to indigenous cultures,¹⁹⁵ the Navajo Nation may have another regulatory tool to consider—Intranet content regulation. As a first step down this path, the NNTRC, working with the tribal council, could work to fashion tribal codes that would impose penalties on anyone who uses the Navajo’s Internet to the Hogan network to distribute secret sacred information.¹⁹⁶ While the

191. *Id.* at 37.

192. *Id.* at 37-39.

193. *Id.* at 38.

194. Riley, *supra* note 50, at 116.

195. *See id.*

196. For an interesting discussion of Navajo secret sacred information, see KATHY M’CLOSKEY, TOWARDS AN UNDERSTANDING OF NAVAJO AESTHETIC 14 (2004),

jurisdictional boundaries of the Navajo Nation may limit the effectiveness of this proposed regulation, it has potential for dealing in part with the problem of cultural misappropriation that has historically plagued tribes like the Navajo.

This proposed regulation suggests several questions that will have to await a future paper. Can the Navajo Nation legally regulate Internet content distributed through the Navajo network? Several issues immediately come to mind. If the Internet itself is "indivisibly interstate," would the FCC's or Congress's power in this area preempt any such regulation? What about the free speech implications of such regulation? The U.S. Congress has faced strict scrutiny from the Supreme Court every time that it has tried to regulate Internet content.¹⁹⁷ Yet, tribal governments are not limited by the federal Constitution, but rather the Indian Civil Rights Act ("ICRA"). What are the implications of *Santa Clara Pueblo v. Martinez*?¹⁹⁸ in assessing the remedies someone could seek if the Navajo Nation imposed penalties on them for violating this regulation? Does the compelling interest standard apply to free speech claims brought before tribal courts with respect to tribal Internet content regulation? All these questions suggest there is still much to explore within the topic of the Internet and Indian tribes.

CONCLUSION

As Navajo President Shirley has recognized, the Internet and information technology will play a critical role in the future of the Navajo Nation.¹⁹⁹ This paper examined the cultural and legal issues surrounding the Navajo Nation's efforts to provide and regulate ATSS, specifically high-speed wireless Internet access, on tribal lands. Navajo culture has a long history of technological incorporation, such as weaving and silversmithing. New broadband infrastructures and the Internet used as a cultural preservation and advancement tool will be no different. The Navajo's most recent plans to develop its own high-speed wireless Internet network called "Internet to the Hogan" reflect this continued cultural adaptation. It is time for the Navajo Nation to take a more active

<http://www.library.utoronto.ca/see/SEED/Vol4-1/M%27Closkey.pdf>.

197. See *Reno v. ACLU*, 521 U.S. 844, 879 (1997) (applying strict scrutiny to Communications Decency Act of 1996, finding the Act not narrowly tailored).

198. See 436 U.S. 49, 58-59 (1978) (holding that a federal court does not have jurisdiction to resolve actions brought against an Indian tribe or one of its officers under ICRA, except for a habeas corpus petition); see also Tribal Restrictions on Sharing of Indigenous Knowledge on Uses of Biological Resources, Memorandum for the Assistant Attorney General for the Environment and Natural Resources Division, Oct. 12, 1999 (suggesting federal precedents under analogous constitutional provisions should be applied to tribal government action under ICRA), available at <http://www.usdoj.gov/olc/biodiv14.htm>.

199. See Cullen, *supra* note 1, at 1.

role in overseeing the regulation of their advanced telecommunication services. While the Federal Government has a part to play in this regulation, the Navajo Nation has several strong arguments it can make if the states try to interfere with the Navajo's Internet to the Hogan Plan. In weaving the Navajo.Net, the Nation can develop regulation for its advanced telecommunications in the tribal interest and look to other ways to help preserve Navajo culture through Internet regulation.

