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6 **UNITED STATES DISTRICT COURT**  
7 **DISTRICT OF NEVADA**

8 WINNEMUCCA INDIAN COLONY, )  
9 THOMAS WASSON, JUDY ROJO, )  
10 SHARON WASSON, ELVERINE )  
11 CASTRO, PETER LITSTER, and )  
12 STEPHEN ERICKSON, )

11 Plaintiffs,

Case No:

13 v.

14 UNITED STATES OF AMERICA, )  
15 DONALD RUMSFELD, Secretary )  
16 of the United States Department )  
17 of Defense, LINTON BROOKS, )  
18 Director of the National Nuclear )  
19 Security Administration, JAMES )  
20 TEGNELIA, Director of the Defense )  
21 Threat Reduction Agency, )

20 Defendants.

20 COMES NOW, Plaintiffs, WINNEMUCCA INDIAN COLONY, THOMAS  
21 WASSON, JUDY ROJO, SHARON WASSON, and ELVERINE CASTRO, (“the  
22 Western Shoshone Plaintiffs”), and Plaintiffs PETER LITSTER and STEPHEN  
23 ERICKSON, (“the Downwinder Plaintiffs”), by and through their attorney, Robert  
24 R. Hager, Esq., and respectfully request that this Court hear their arguments that  
25 prove violations of the aboriginal and Treaty rights of the Western Shoshone  
26 Plaintiffs, and of the National Environmental Policy Act as to all Plaintiffs, and  
27 grant a temporary restraining order and a preliminary and permanent injunction  
28 under the authority of FRCP 65(a), against the Defendants. The Defendants are

1 the UNITED STATES OF AMERICA (“United States”), and its agents, DONALD  
2 RUMSFELD, Secretary of the United States Department of Defense, and, JAMES  
3 TEGNELIA, Director of the Defense Threat Reduction Agency, who have ignored  
4 the rights of the Western Shoshone Nation and its people, and now have made a  
5 final agency decision to detonate 700 tons of high explosives at the Nevada Test  
6 Site on the specified date of June 2, 2006, code named by Defendants as “Divine  
7 Strake.”.

8 The challenged final agency action, “Divine Strake,” threatens every  
9 Plaintiff with clear and present danger if irreparable injury and harm as more  
10 particularly described below, and further threatens to violate the Treaty of peace  
11 and friendship signed at Ruby Valley in 1863, and to irreparably desecrate the  
12 lands of the Western Shoshone both within and without the Nevada Test Site, in  
13 disregard for the Treaty and in violation of the rights of the Nation and its people  
14 who have lived on and claimed the land now referred to as the Nevada Test Site.

15 The Western Shoshone Plaintiffs hold the Nevada Test Site as a sacred part  
16 of their lives and culture, and the Defendants’ final agency decision “Divine  
17 Strake” to detonate 700 tons of high explosives is unlawful and offensive to the  
18 standards of decency to which the Western shoshone Nation and the Western  
19 Shoshone people are entitled.

20 By Defendants’ own admission, “Divine Strake” will create a “mushroom  
21 cloud” that will rise 10,000 feet, and the air-borne radioactive debris contained  
22 therein will rain death and severe, permanent and disabling injuries and health  
23 problems to those persons thereafter exposed to that radioactive fallout.  
24 Plaintiffs, and each of them, and millions of persons down-wind or off the Nevada  
25 Test Site, are threatened with clear and present danger of irreparable injury  
26 unless Defendants are restrained and enjoined by order of this Court to prevent  
27 Defendants, their agents and employees from authorizing and directing the  
28 detonation of high explosives named “Divine Strake.” Defendants should be

1 further restrained or enjoined from authorizing or directing any action by any  
2 person or entity which is designed to permit or condone or conduct any  
3 detonation of high explosives at the Nevada Test Site unless in conformance with  
4 the notice and comment provisions and an adequate Environmental Impact  
5 Statement as required by NEPA.

6 The atmospheric detonation of high explosives at the Nevada Test Site is  
7 major federal action, the reasonably foreseeable result of which will be to  
8 disseminate the highly radioactive debris which permeates the ground at the  
9 Nevada Test Site as a sole and proximate result of the atmospheric and  
10 underground nuclear testing at the Nevada Test Site by Defendants and their  
11 predecessors in interest.

12 The Western Shoshone Plaintiffs are further entitled to an order restraining  
13 and enjoining the Defendants from defiling the earth by "Divine Strake," and  
14 from acting in violation of the rights of the Western Shoshone people as those  
15 rights were given to them in the Treaty of Ruby Valley, and as protected by the  
16 Constitution of the United States and recognized by Decisions of the United  
17 Nations and the Organization of American States.

18 Plaintiffs have no adequate remedy at law. This Motion is made and based  
19 on the Complaint and Exhibits thereto filed concurrently herewith, the Points and  
20 Authorities herein below, the Exhibits attached hereto, and the arguments of  
21 counsel at the hearing requested to be held on this Motion.

22 DATED this \_\_\_\_\_ day of April, 2006.

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**POINTS AND AUTHORITIES**

**I.**

**Chronology of Facts**

(Western Shoshone Claims for Injunctive Relief)

Before the memory of the elders presently living and in the stories handed down from generation to generation by oral tradition, the Western Shoshone have watched the sun set over the desert with the Ruby Mountains rising up behind and around them. The Ruby Mountains to the east and the desert to the west acted as great silent barriers protecting the Western Shoshone people from the incursion of white immigrant settlement in the Great Basin for many, many years. The Western Shoshone lived in bands of families and migrated as the food supply required over the sixty million of acres of the Great Basin and beyond claimed as their homeland.

Within this unfriendly rugged territory, prior to the invasion of the Euro-Americans, the Western Shoshone struggled with nature and in their own way prospered. Nowhere in the history of mankind can there be found a more impressive example of man's adapting himself to an inhospitable environment than that provided by the tribes of the Great Basin, including the Western Shoshone.

It was around 1840 when the Euro-American immigration into the Great Basin and the far west began, first with the caravans following the Oregon Trail and the Mormon settlements around the Great Salt Lake. The discovery of gold in California then led to the invasion called the California Gold Rush, with the most direct routes taking travelers through the heart of the Great Basin and Western Shoshone Territory.

In 1862, the Defendant United States of America (United States) was engaged in a great civil war that had included many of the States of the Eastern United States. The United States was required to fund the war effort and needed

1 the gold and other precious minerals being mined in California. In order to  
2 obtain the gold and silver and other valuables to fund the war effort, the United  
3 States enacted on July 1, 1862, the Pacific Railroad Act (12 Statutes at Large, 489)  
4 in order to finance and construct a transcontinental railroad which the Defendant  
5 UNITED STATES knew at the time would be required to cross more than 500  
6 miles lands then known by that Defendant to be held by Indian title of Plaintiff's  
7 predecessors in interest. The Defendant UNITED STATES knew and understood,  
8 as specifically acknowledged in Section 2 of the Pacific Railroad Act of 1862, that  
9 unless Indian title to Western Shoshone Territory were "extinguished," by act of  
10 Congress, title to the lands so traversed by the railroad would continue to be held  
11 by the Indian Nations occupying those lands.

12 On January 29, 1863 one of the most brutal massacres of native Indians  
13 occurred near what are now the Oregon and Utah borders. See, Ontoko, Gale,  
14 ***Thunder over the Ochoco, Volumes I - V., Maverick Publications.*** The  
15 massacre was aimed at annihilating the remnant of the White Knife warriors and  
16 their families of the Shoshone bands. After this massacre, many of the followers  
17 went with Chief Washakie to Wind River, Wyoming, where the Eastern Shoshone  
18 have settled.

19 Several small bands fled to the Great Basin with separate White Knife  
20 warriors as their protection. These small bands joined their relatives and mainly  
21 hid in remote areas like Ruby Valley, Crescent Valley, Winnemucca, Battle  
22 Mountain, and Elko, Nevada, and Death Valley where very little white settlement  
23 had occurred and where Shoshone people had lived since before recorded time.  
24 They were, however, home in the lands where their people, the Western Shoshone  
25 Nation, had been for centuries.

26 In 1863, the Western Shoshone Nation, the White Knife warriors and the  
27 other scattered Western Shoshone were enticed to enter into a treaty, now  
28 referred to as the Treaty of peace and friendship of Ruby Valley, known by the

1 Shoshone people as ***Bah-Gah-Zoo***, Treaty With The Western Shoshone, 1863;  
2 18 Stat. 689, Ratified June 26, 1866, Proclaimed October 21, 1869 (The “Treaty of  
3 Ruby Valley” or “Treaty”), which allowed the United States of America to have  
4 certain usufructuary rights in the lands of the Western Shoshone. The Treaty  
5 allowed the railroads to build across lands recognized as belonging to the  
6 Shoshone and allowed mining and development of communities, transportation  
7 and communication routes on Shoshone “country.” Only these activities were  
8 agreed upon and are allowed by the Treaty. The Western Shoshone Nation and  
9 its members and representatives have never intended to nor actually participated  
10 in any act that would diminish their rights under the Treaty, and have at all times  
11 acted in good faith and kept their promises.

12 Article 5 of the 1863 Treaty of Ruby Valley states as follows:

13 It is understood that the boundaries of the country claimed and  
14 occupied by said bands are defined and described by them as follows:  
15 On the north by Wong-goga-da Mountains and Shoshone River  
16 Valley; on the west by Su-non-to-yah Mountains or Smith Creek  
Mountains; on the south by Wi-co-bah and the Colorado Desert; on  
the east by Po-Ho-no-be Valley or Steptoe Valley and Great Salt Lake  
Valley.

17 A map depicting Western Shoshone Territory is attached to the Complaint as  
18 Exhibit 1, and is incorporated herein by this reference. The Nevada Test Site is  
19 within Western Shoshone Territory as described in the Treaty and that Exhibit 1.  
20 Attached hereto is the Affidavit of Corbin Harney, Spiritual Leader of the Western  
21 Shoshone Nation, which reflects that the lands within the Nevada Test Site are  
22 sacred to the Western Shoshone.

23 Prior to 1863, the United States had entered into treaties with various  
24 Indian Tribes and Nations and knew the proper words that would accomplish the  
25 ceding of lands for purposes of holding title and having all rights to the lands in  
26 the name of the United States government. The Treaty of Ruby Valley contained  
27 no such words of land cessation or specific conveyance, and at most the treaty can  
28 only be read to reflect the agreement of the Western Shoshone to allow safe

1 passage and permit certain specified uses on Western Shoshone lands.

2 The United States failed to take the second step required by the Pacific  
3 Railroad Act that would have required the cession or extinguishment of title to  
4 the lands of the Western Shoshone in exchange for reservation for the people of  
5 the Western Shoshone as was the usual and regular progression of the settlement  
6 of the Indian lands into the name of the United States. (See Exhibit 2, Chart of  
7 the treaties and cession under treaties with the Indian tribes and the United  
8 States)

9 During the decades that followed, the United States allowed private  
10 individuals to take the lands of the Western Shoshone in clear violation of the  
11 Indian Trade and Intercourse Act of July 22, 1790 25 U.S.C. § 177. Because the  
12 United States had failed to follow the law and proper procedure to extinguish the  
13 Western Shoshone's right to their lands, the United States supported a sham  
14 claim before the Indian Claims Commission in the 1951. The United States  
15 Supreme Court in the Dann case, **United States v. Dann**, 470 U.S. 39; 105  
16 S.Ct. 1058; 84 L.Ed.2d 28 (1985) made its decision under the presumption that  
17 the ICC had filed its final report as required by law. The failure to file a report  
18 deprived the Western Shoshone Nation of a substantive right of fundamental due  
19 process because Congress made the report mandatory for the purpose of  
20 protecting the Indian claimants.

21 The Inter-American Commission on Human Rights (IACHR) of the  
22 Organization of American States (OAS) in its Report in Case No. 11.140,  
23 December 27, 2002, **Mary and Carrie Dann v. United States** concluded  
24 that the United States had violated the human rights of the Western Shoshone  
25 under the American Declaration of the Rights and Duties of Man, by denying the  
26 right to equality before the law (Article II), the right to a fair trial (Article XVIII)  
27 and the right to property (Article XVIII), in connection with determination and  
28 protection of Western Shoshone property rights in their ancestral lands.

1 The United States ratified the OAS Charter on June 19, 1951, and is subject  
2 to the authority of the IACHR to examine communications submitted to it  
3 regarding member states and to make recommendations to such states, when it  
4 finds this appropriate, in order to bring about more effective observance of  
5 fundamental human rights.

6 On March 10, 2006, the Committee for the Elimination of Racial  
7 Discrimination of the United Nations (“the UN CERD Committee”), expressed  
8 “particular concern about:

- 9 a) Reported legislative efforts to privatize Western Shoshone ancestral  
10 lands for transfer to multinational extractive industries and energy  
11 developers.
- 12 b) Information according to which destructive activities are conducted  
13 and/or planned on areas of spiritual and cultural significance to the  
14 Western Shoshone peoples, who are denied access to, and use of, such  
15 areas. It notes in particular the reinvigorated federal efforts to open a  
16 nuclear waste repository at the Yucca Mountain; the alleged use of  
17 explosives and open pit gold mining activities on Mont Tenabo and Horse  
18 Canyon; and the alleged issuance of geothermal energy leases at, or near,  
19 hot springs, and the processing of further applications to that end.
- 20 c) The reported resumption of underground nuclear testing on Western  
21 Shoshone ancestral lands.
- 22 d) The conduct and/or planning of all such activities without consultation  
23 with and despite protests of the Western Shoshone peoples.
- 24 e) The reported intimidation and harassment of Western Shoshone people  
25 by the (United States’) authorities, through the . . . restrictions on hunting,  
26 fishing and gathering, as well as arrests which gravely disturb the  
27 enjoyment of their ancestral lands.
- 28 f) The difficulties encountered by Western Shoshone peoples in  
appropriately challenging all such actions before national courts and in  
obtaining adjudication on the merits of their claims, due in particular to  
domestic technicalities.

In that Decision “(T)he Committee urges the (United States government) to  
adopt the following measures until a final decision or settlement is reached on the  
status, use and occupation of Western Shoshone Ancestral lands in accordance  
with due process of law and the (government’s) obligations under the Convention:

- a) Freeze any plan to privatize Western Shoshone ancestral lands for

- 1 transfer to multinational extractive industries and energy developers;
- 2 b) Desist from all activities planned and/or conducted on the ancestral
- 3 lands of the Western Shoshone or in relation to their natural resources,
- 4 which are being carried out without consultation with and despite protests
- 5 of the Western Shoshone peoples;
- 6 c) Stop imposing . . . restrictions on hunting, fishing and gathering, as well
- 7 as arrests, and rescind all notices already made to that end, inflicted on
- 8 Western Shoshone people while using their ancestral lands.

9 The UN CERD Committee Decision 1 (68) is attached to the Complaint as Exhibit  
10 4, and incorporated herein by this reference.

11 The United States of America is a party to the International Convention on  
12 the Elimination of All Forms of Racial Discrimination, the legal instrument  
13 provided by the UN General Assembly which came into force in 1969, and is  
14 subject to the authority of the UN CERD Committee to monitor the compliance of  
15 the government with basic measures designed to eliminate the fundamental  
16 injustice of racial discrimination and the dangers it represents.

17 The Western Shoshone have never violated the Treaty of Ruby Valley and  
18 continue to assert their rights under the Treaty. (Crum, **“The Road On Which  
19 We Came, A History of the Western Shoshone”**) The Defendants have  
20 failed to request or seek the permission and consent of the Western Shoshone  
21 people to use the Nevada Test Site in a manner not contemplated nor allowed  
22 under the Treaty. Plaintiffs and the Western Shoshone have been intentionally  
23 excluded by Defendants from any consultation or participation in the final agency  
24 decision to conduct the “Divine Strake” blast on Western Shoshone Territory.

25 “Divine Strake” threatens to make Western Shoshone lands within and  
26 without the Nevada Test Site unapproachable and unusable by human beings,  
27 and will defile those other Western Shoshone lands for any other purpose, and  
28 those lands will be lost to the future generations of the Western Shoshone people  
for so long as they endure because of the air-borne dissemination of radioactive  
debris and contamination. “Divine Strake” portends a clear and present danger

1 to the desecration and irreparable despoiling of other sacred lands of the Western  
2 Shoshone by the air-borne dissemination of radioactive substances that cause  
3 death, birth defects and permanent and disabling injuries to the health of humans  
4 and other living things.

5 At present, as reflected by the attached Affidavit of Corbin Harney, the  
6 Defendants' actions at the Nevada Test Site are causing ongoing irreparable harm  
7 to the spiritual and religious practices of the Western Shoshone people. Sacred  
8 ancestral remains have been unearthed and removed from their burial places at  
9 the Nevada Test Site, and more ancestral remains are threatened with the same  
10 fate unless the Defendants are enjoined from further desecration of the Sacred  
11 burial areas at the Nevada Test Site.

12 (Claims of All Plaintiffs for Injunctive Relief)

13 On April 4, 2006, the Defendants announced a final decision that they will  
14 conduct "Divine Strake," an above-ground detonation of 700 tons of high  
15 explosives at the Nevada Test Site, and that the resulting "mushroom cloud . . .  
16 may reach an altitude of 10,000 feet." See Press Release dated April 4, 2006,  
17 attached to the Complaint as Exhibit 3, and incorporated herein by this reference.  
18 This press release confirms final agency action which was made in violation of  
19 NEPA in that, *inter alia*, there has never been a required final EAS, EIS or FONSI  
20 decision.

21 The "mushroom cloud" resulting from "Divine Strake" will contain  
22 poisonous, toxic, radioactive nuclear debris which is located in the soil at the  
23 Nevada Test Site solely as a sole and proximate result of Defendant United States  
24 having conducted atmospheric and underground nuclear testing at the Site in the  
25 1950's and 1960's. The location of the "Large Scale, Open-Air Explosive  
26 Detonation DIVINE STRAKE at the Nevada Test Site" is reflected by the oval-  
27 shaped symbol on the map taken from Defendants Pre-Approval Draft EAS, dated  
28 November 2005, and attached hereto as Exhibit 2. Exhibit 3 hereto is the map of

1 Defendant United States reflecting the admitted presence of radioactive  
2 contamination at the Nevada Test Site, which reflects the presence of the most  
3 dangerous and deadly, if inhaled, of all radioactive contaminants, the alpha  
4 emitters plutonium, americium, and curium, in the location in which Divine  
5 Strake is planned.

6 The Defendant United States fraudulently and maliciously vouched for the  
7 safety of said atmospheric nuclear testing in the 1950's and 1960's with full  
8 knowledge at the time of serious, permanent and fatal health risks to those  
9 affected by radiation exposure from such tests. Those serious, permanent, and  
10 fatal health risks are now known to include without limitation, leukemia, multiple  
11 myeloma, lymphomas, and primary cancer of the thyroid, male or female breast,  
12 esophagus, stomach, pharynx, small intestine, pancreas, bile ducts, gall bladder,  
13 salivary gland, urinary bladder, brain, colon, ovary, and liver, and genetic  
14 problems, sterility, and birth defects. See Affidavit of Harvey Bigelsen, M.D.  
15 attached hereto as Exhibit 4, and incorporated herein by this reference. Those  
16 same health problems were admitted by Defendant United States to be so caused  
17 to Downwinders in the states of Nevada, Utah, and Arizona in the Radiation  
18 Exposure Compensation Act, 42 U.S.C. § 2210.

19 The "mushroom cloud" will disseminate deadly, highly radioactive debris  
20 across the United States and the world, and the radiation exposure to humans  
21 poses a clear and present danger of irreparable harm described above, and to the  
22 cellular RNA and DNA of persons exposed to that radioactive material. See  
23 Affidavit of Harvey Bigelsen, M.D., Exhibit 4. In violation of NEPA, the  
24 Defendants have failed to give proper notice of their planned decision, and  
25 allowed no public comment period. Plaintiffs, including the Downwinder  
26 Plaintiffs have, therefore, been denied any opportunity to comment on and object  
27 to the Defendants' "Divine Strake" action, despite the knowledge by Defendants  
28 that the "Large Scale open-Air Explosive Detonation" poses a clear and present

1 danger of irreparable harm to the health of Plaintiffs and other persons similarly  
2 situated.

3 **II.**  
4 **A PRELIMINARY INJUNCTION**  
5 **IS APPROPRIATE.**

6 **A.**  
7 **THE PLAINTIFFS WILL SUFFER IRREPARABLE HARM IF THE**  
8 **RESTRAINING ORDER AND INJUNCTION NOT GRANTED.**

9 The Defendants have acted in an arbitrary and capricious manner in their  
10 decision to conduct “Divine Strake” without proper notice, without allowing  
11 public comment, and without completing the Environmental Impact Statement  
12 (EIS), all as required by NEPA, and in violation of the trust responsibility to the  
13 Western Shoshone. The final agency decision of Defendants threatens immediate  
14 and irreparable violation of the Treaty rights of the Western Shoshone people.

15 Injunctive relief is appropriate when the plaintiff will suffer “irreparable  
16 harm” and when the plaintiff shows “a reasonable probability of success on the  
17 merits of its claim.” *Barahona & Gomez v. Reno*, 164 F.3d 1228, 1234 (9<sup>th</sup> Cir.  
18 1999). In this case, injunctive relief is appropriate because Plaintiffs are  
19 threatened with clear and present danger of irreparable harm of death, cancer,  
20 leukemia, birth defects and other permanent and disabling health problems  
21 which are reasonably foreseeable from the air-borne dissemination of radioactive  
22 debris which Defendants’ “Divine Strake” portends. The Western Shoshone  
23 Plaintiffs face the clear and present danger of irreparable injury to their lands by  
24 the threatened loss of use of their lands on which the air-borne radioactive fallout  
25 from Defendants’ planned “mushroom cloud” will ultimately alight. The  
26 Plaintiffs have a high probability of success based upon the requirements of  
27 NEPA, and the rights given to the Western Shoshone Plaintiffs in the Treaty of  
28 Ruby Valley, and under applicable principles of aboriginal rights under the  
Constitution and laws of the United States, and under International Law as found  
in Decisions of the United Nations and the Organization of American States.



1 Plaintiffs without the injunction versus the harm to the Defendants if the  
2 injunction is granted. As stated in Part A, hereinabove, all of the Plaintiffs face the  
3 harm of death, cancer, leukemia, genetic problems, sterility, birth defects, and  
4 thyroid, kidney, and liver damage. The Western Shoshone Plaintiffs suffer the  
5 loss of the right to the use of their ancestral lands and lose the right to preserve for  
6 their future generations the right to their sacred sites. The only harm to the  
7 Defendants is that they must perform an environmental impact study to  
8 determine:

- 9 1) the environmental impact of the proposed action;
- 10 (2) any adverse environmental effects which cannot be avoided should the  
11 proposal be implemented;
- 12 (3) alternatives to the proposed action;
- 13 (4) the relationship between local short-term uses of man's environment  
14 and the maintenance and enhancement of long-term productivity; and
- 15 (5) any irreversible and irretrievable commitments of resources which  
16 would be involved in the proposed action should it be implemented.

17 Thus, the only impact on Defendants is to require them to provide proper notice of  
18 the planned major federal action, provide the required public comment period,  
19 and properly assess the environmental effect of "Divine Strake", and to issue an  
20 EIS which addresses the issue of whether there exists a better alternative to  
21 accomplish whatever it is that Defendants seek to do than the above-ground  
22 detonation of 700 tons of high explosives at the Nevada Test Site causing a  
23 radioactive "mushroom cloud . . . that may reach an altitude of 10,000 feet.

24 A preliminary injunction/temporary restraining order is "an extraordinary  
25 remedy, which should be granted only in limited circumstances." *Instant Air*  
26 *Freight Co. v. C.F. Freight, Inc.*, 882 F. 2d 797, 800 (3d Cir. 1989). This remedy  
27 should only be granted where the merits of the case clearly favor one party over  
28 the other. See, *Remlinger v. Nevada*, 896 F. Supp. 1012, 1015 (D.Nev. 1995). The

1 *Remlinger* Court explained that:

2           The cases best suited to preliminary relief are those in which  
3 the important facts are undisputed, and the parties simply disagree  
4 about what the legal consequences are of those facts. The court in  
5 such a case can take the undisputed facts, apply the law to them, and  
6 fairly easily decide which party is likely to prevail.

7           A party seeking a preliminary injunction must meet a standard as explained  
8 by the Courts which includes:

9           the moving party may meet its burden by demonstrating either (1) a  
10 combination of probable success on the merits and the possibility of  
11 irreparable injury; or (2) that serious questions exist and the balance  
12 of hardships tips sharply in its favor.

13           *Cassim v. Bowen*, 824 F. 2d 791, 795 (9<sup>th</sup> Cir. 1987)

14           This latter formulation represents two points on the sliding scale in which the  
15 required degree of irreparable harm increases as the probability of success  
16 decreases. See, *Oakland Tribune, Inc. v. Chronicle Publishing Co.*, 762 F.2d 1374,  
17 1376 (9<sup>th</sup> Cir. 1985). Under this test, a plaintiff must demonstrate the existence of  
18 a significant threat of irreparable injury.

19           Contamination by radioactive debris from nuclear weapons is the most  
20 significant threat of irreparable injury that exists. The ability of human beings to  
21 comprehend the enormity of radioactive nuclear contamination is stretched to its  
22 logical extreme. The Department of Defense appears to have learned nothing  
23 from the lessons of Hiroshima, Nagasaki, Chernobyl, and the devastating and  
24 tragic deaths and health problems caused to the nuclear veterans and the down-  
25 winders by the Defendants' atmospheric nuclear testing at the Nevada Test Site in  
26 the 1950's and 1960's. Defendants' previously caused "mushroom clouds" rained  
27 death, misery and birth defects on countless Americans, yet Defendants  
28 arrogantly propose to repeat their "mushroom cloud" performances of the past  
without so much as an EIS to assess the health ramifications that such clouds of  
radioactive dust portend.

          Radioactive contamination is the most damaging and threatening material

1 known to man. As the Court stated in *Nuclear Energy Inst., Inc. v. EPA*, 373  
2 F.3d 1251 (D.C.Dist. 2004), “nuclear waste has the capacity to outlast human  
3 civilization as we know it and to devastate human health and the environment.”  
4 From the D.C. Court of Appeals case, we know that 10,000 years is not long  
5 enough to consider the implications of the burial of nuclear waste at The Nevada  
6 Test Site. The Defendants’ “Divine Strake” has even worse implications than the  
7 proposed The Nevada Test Site project in that it is not known where the  
8 radioactive debris kicked up and disseminated by the blast will ultimately end up.  
9 Wherever such radioactive fallout ends up, death and misery will surely follow.

10 Irreparable harm could not be more “substantial” than to measure it in  
11 terms of more than 10,000 years. The Western Shoshone have held claim to the  
12 land longer than recorded time, longer than any other group of human beings that  
13 we know and yet would be deprived more into the future of their land than the  
14 time for which they have claimed it, given the toxicity of radioactive debris which  
15 will be disseminated by “Divine Strake.”

16 **C.**

17 **THE WESTERN SHOSHONE PLAINTIFFS ARE LIKELY**  
18 **TO PREVAIL UPON THE MERITS OF THEIR CLAIMS.**

19  
20 The Treaty of Ruby Valley is a valid and binding contract between the  
21 United States and the Western Shoshone Nation. The Treaty of Ruby Valley is  
22 enforceable by law.

23 Article 5 of the Treaty of Ruby Valley states as follows:  
24 It is understood that the boundaries of the country claimed and occupied by  
25 said bands are defined and described by them as follows: On the north by Su-  
26 non-to-yah Mountains and Shoshone River Valley; on the west by Wi-co-  
27 bah an dthe Colorado Desert; on the east by Po-ho-no-be Valley or Steptoe  
28 Valley and Great Salt Lake Valley.

27 The boundaries described in Article 5 are generally shown in the map  
28 attached to the Complaint as Exhibit 2. This is the map approved and adopted by

1 the Western Shoshone National Council as an accurate representation of the lands  
2 owned and occupied by the Western Shoshone Nation. Under the Treaty of Ruby  
3 Valley, the Western Shoshone Naiton granted the United States certain privileges  
4 for use and access of the land described in the Treaty.

5 The Western Shoshone Nation continues to have rights to the lands  
6 described in Exhibit 1. The Western Shoshone Nation continues to occupy and use  
7 a substantial portion of the Western Shoshone lands. The Treaty of Ruby Valley  
8 provides for certain easements in favor of the United States and the people of the  
9 United States generally. Those easements include:

10 **Article 2:** “The several routes of travel through the Shoshonee  
11 country, now or hereafter used by white men, shall be forever free, and  
12 unobstructed by the said bands, for the use of the government of the United  
13 States, and of all emigrants and travellers under its authority and  
14 protection, without molestation or injury from them.”

15 “Military posts may be established by the President of the United  
16 States along said routes or elsewhere in their country; and station houses  
17 may be erected and occupied at such points as may be necessary fo the  
18 comfort and convenience of travellers or for mail or telegraph companies.”

19 **Article 3:** “. . .telegraph and overland stage lines having been  
20 established and operated. . . may be continued without hindrance,  
21 molestation, or injury. . . And further, it being understood that provision has  
22 been made by the government of the United States for the construction of a  
23 railway from the plains west to the Pacific ocean, it is stipulated by the said  
24 bands that the said railway or its branches may be located, constructed, and  
25 operated, and without molestation. . .

26 **Article 4:** “It is further agreed by the parties hereto, that the Shoshonee  
27 country may be explored and prospected for gold and silver, or other  
28 minerals; and when mines are discovered, they may be worked, and mining  
and agricultural settlements formed, and ranches established wherever they  
may be required. Mills may be erected and timber taken for their use. . .”

Neither Articles 2, 3, or 4 of the Treaty of Ruby Valley provide for the  
United States to have the right to conduct “Divine Strake” or any other activity  
that will render the land toxic for any other use. “Divine Strake” would destroy  
the reversion implied in favor of the Western Shoshone peoples by the use  
easement granted to the United States by the Treaty.

In the late 19<sup>th</sup> century and throughout the 20<sup>th</sup> century, mining and  
agricultural settlements were formed and ranches were established on the  
Western Shoshone lands and, in keeping with the Treaty provisions, the Western

1 Shoshone people have not waged war against the United States during the use of  
2 these lands. The Western Shoshone people continue to occupy and use their land  
3 sand continue to hold the land in reverence as the place that their future  
4 generations will make their home.

5 The old people used to say that the trees, the rocks, the birds, and the  
6 animals used to talk. They have a voice, and today, as I realize it, they still  
7 have a voice. My people always say that you have to take care of them in  
order for you to continue on. If you don't, when they die off, you are going  
to die off with them.

8 ***“The Way it Is, One Water. . . One Air. . . One Mother Earth,”*** by  
9 Corbin Harney, Spritual Leader of the Western Shoshone Nation, Blue  
Dolphin Publishing, 1995.

10 The Treaty of Ruby Valley of 1863 is still in force and none of the rights  
11 under the Treaty have been waived by the Western Shoshone and none of the  
12 rights under the Treaty have been abrogated by Congress. Congress must clearly  
13 express an intent to abrogate Indian treaty rights. See, ***United States v. Dion,***  
14 476 U.S. 734, 90 L.Ed.2d 767, 106 S.Ct. 2216 (1986).

15 The United States of America is the current tenant of the usufructuary  
16 rights to the lands of the Western Shoshone for those uses specified in the Treaty.  
17 The current tenant, the United States, is required to take reasonable steps to  
18 prevent deterioration of the property in anticipation of its transfer upon the  
19 reversionary interest of the Tribe. The United States use of its usufructuary rights  
20 by conducting “Divine Strake” or any other blast or surface disturbance which  
21 disseminates radioactive debris on or off the Nevada Test Site is a permissive  
22 waste of the property which will result in the loss of the property for other use for  
23 something over 10,000 years. The appropriate remedy for permissive waste is  
24 generally an injunction. ***See, White Mountain Apache Tribe v. U.S.,*** 249  
25 F.3d 1364, 1371 (Fed.Cir. 2001). Reasoning by analogy, the Western Shoshones’  
26 interest in the property is an indefeasibly vested future interest and the United  
27 States has a present interest in the usufructuary rights only. For this reason the  
28 Western Shoshone Nation will prevail as the Treaty preserves the lands for the

1 Western Shoshone people subject only to the right to the uses specified in the  
2 Treaty for the benefit of the United States of America and its emigrant settlers.

3 Even if the Court should determine that the Western Shoshone Nation only  
4 retains the right to use the lands that were granted to it under the Treaty of Ruby  
5 Mountain, the United States cannot deprive the Nation of those rights entirely by  
6 contaminating the land beyond all use. "Divine Strake" will so pervasively  
7 contaminate the lands of the Western Shoshone that the lands will be lost to any  
8 use whatsoever.

9 **Conclusion**

10 The Defendants' final agency decision to detonate 700 tons of high  
11 explosives on June 2, 2006, at the Nevada Test Site, code-named "Divine Strake,"  
12 is final agency action subject to judicial review under the Administrative  
13 Procedures Act. 'Divine Strake' is major federal action which will have an effect  
14 on the human environment which triggers the EIS requirement of NEPA. The  
15 foreseeable effect on the human environment of "Divine Strake" will be death and  
16 irreparable health problems caused by the air-borne dissemination of the most  
17 deadly and threatening substance known to man.

18 The Defendants have failed to give proper notice and to provide the  
19 required opportunity for public comment prior to final agency action. A final  
20 agency decision has been made and announced by public press release despite the  
21 fact that no final EAS, EIS or FONSI has ever been approved. Persons whose  
22 claims for compensation under RECA for cancers and other serious diseases have  
23 been approved by the Defendant United States, have not been notified. No  
24 attempt has been made by Defendants to give notice to persons who reside in  
25 areas of Nevada, Utah, and Arizona where the Defendant United States has  
26 admitted causing those cancers and other serious diseases by air-borne radiation  
27 likely to be caused by "Divine Strake."

28 The Western Shoshone Plaintiffs have shown clear and present danger from

1 “Divine Strake” of the loss of the use and enjoyment of their ancestral lands, in  
2 violation of their Treaty and aboriginal rights under the Constitution and laws of  
3 the United States, and under International Law as recognized by the Decisions of  
4 the United Nations on March 10, 2006, and of the Organization of American  
5 States on December 27, 2002. At the very least, there is no doubt that the  
6 Western Shoshone Plaintiffs have shown that “Divine Strake” creates the clear and  
7 present danger to the loss of the reversionary interest of the Western Shoshone by  
8 the dissemination of radioactive debris within and without the Nevada Test Site  
9 on lands within Western Shoshone Territory.

10 Accordingly, the Defendants, and each of them, and their agents,  
11 employees, and contractors, should be temporarily restrained, and preliminarily  
12 enjoined from conducting “Divine Strake” pending proper notice and public  
13 comment period, and completion of the requisite EIS. This Court should maintain  
14 jurisdiction over the Defendants’ actions relating to “Divine Strake,” in order to  
15 assure that proper notice is provided, that the requisite opportunity for public  
16 comment is afforded, and that the Defendants’ planned “Large-Scale, Open-Air  
17 Explosive Detonation DIVINE STRAKE at the Nevada Test Site” occurs only in  
18 conformance with applicable law.

19 WHEREFORE, the Plaintiffs, respectfully request that the Court enjoin  
20 each of the Defendants, their agents, employees, and contractors:

21 1. From taking any further steps to detonate any high explosives above  
22 ground at the Nevada Test Site, including without limitation the Defendants’ plan  
23 to detonate 700 tons of high explosives at the Nevada Test Site on June 2, 2006,  
24 reflected by the final agency decision presently code-named “Divine Strake,”  
25 pending proper notice and opportunity for public comment, and the completion of  
26 a proper Environmental Impact Statement.

27 2. From resuming atmospheric and/or underground nuclear testing, and  
28 chemical and biological weapons testing at the Nevada Test Site and on any other

1 lands described in the Treaty of Ruby Valley as Western Shoshone Territory.  
2 3. For such other and further relief by way of restraining order or  
3 preliminary injunction as the Court deems just and proper in these premises and  
4 upon hearing on this Motion, including the Court maintaining jurisdiction over  
5 Defendants' actions relating to "Divine Strake."

6 Dated this \_\_\_\_ day of April, 2006.

7  
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