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11 **UNITED STATES DISTRICT COURT**
12 **DISTRICT OF NEVADA**

13 WINNEMUCCA INDIAN COLONY,)
14 THOMAS WASSON, JUDY ROJO,)
15 SHARON WASSON, ELVERINE)
16 CASTRO, PETER LITSTER,)
17 STEPHEN ERICKSON, VIRGINIA)
18 SANCHEZ, JACK MALOTTE, KIM)
19 TOWNSEND, ARVILLA)
20 MASCARENAS, PATRICIA)
21 AXELROD, and TIMIBISHA)
22 SHOSHONE TRIBE,)

23 Plaintiffs,

24 v.

25 UNITED STATES OF AMERICA,)
26 DONALD RUMSFELD, Secretary)
27 of the United States Department)
28 of Defense, LINTON BROOKS,)
Director of the National Nuclear)
Security Administration, JAMES)
TEGNETIA, Director of the Defense)
Threat Reduction Agency,)

29 Defendants.

Case No: 2:06-cv-00497-LDG-PAL

SECOND AMENDED
COMPLAINT AND
DEMAND FOR JURY TRIAL

GENERAL ALLEGATIONS

30 Plaintiffs, WINNEMUCCA INDIAN COLONY, THOMAS WASSON, JUDY
31 ROJO, SHARON WASSON, ELVERINE CASTRO, PETER LITSTER, STEPHEN
32 ERICKSON, VIRGINIA SANCHEZ, JACK MALOTTE, KIM TOWNSEND,
33 ARVILLA MASCARENAS, PATRICIA AXELROD, and TIMBISHA SHOSHONE
34 TRIBE, by and through their attorney, Robert R. Hager, Esq., allege as follows:

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Jurisdiction

1. This Court has jurisdiction over the subject matter of this action as an independent action under FRCP Rule 60(b) and pursuant to the Constitution and laws of the United States, including, but not limited to, 5 U.S.C. 702, 28 U.S.C. §§ 1331, 1362, 1367, and 2201, 42 U.S.C. § 4321, et seq., 16 U.S.C. § 1536(a)(2) and the Constitution, treaties and laws of the United States, including federal common law. This is a civil action brought by a Native American or Indian Nation, and by individuals who are members of that Nation, and other citizens of the United States of America, and the claims arise under the Constitution, treaties and laws of the United States.

Parties

(Western Shoshone Plaintiffs)

2. Plaintiffs WINNEMUCCA INDIAN COLONY and TIMBISHA SHOSHONE TRIBE are federally-recognized tribes of the Western Shoshone.

3. The individual Western Shoshone Plaintiffs, THOMAS WASSON, JUDY ROJO, SHARON WASSON, ELVERINE CASTRO, VIRGINIA SANCHEZ, JACK MALOTTE, KIM TOWNSEND, and ARVILLA MASCARENAS, are individual descendants and successors in interest of the Western Shoshone people who held aboriginal and Indian title to Western Shoshone Territory and entered into the Ruby Valley Treaty of 1863, and are, therefore, alleged herein to have present rights recognized under said Treaty.

(Downwinder Plaintiffs)

4. Plaintiffs PETER LITSTER and STEPHEN ERICKSON are not of Western Shoshone descent, and they are citizens of the United States and residents of the County of Salt Lake, State of Utah, and Plaintiffs VIRGINIA SANCHEZ, JACK MALOTTE, KIM TOWNSEND, and ARVILLA MASCARENAS are citizens of the United States and residents of Nye County, Nevada, and PLAINTIFF PATRICIA is not of Western Shoshone descent and a resident of

1 Washoe County, Nevada.

2 (Defendants)

3 5. Defendant UNITED STATES OF AMERICA (“United States”) is the
4 other party to the Ruby Valley Treaty of 1863, and which is, therefore, bound by
5 the terms of said Treaty as alleged herein.

6 6. Defendant DONALD RUMSFELD is the Secretary of the Department of
7 Defense of the United States.

8 7. Defendant LINTON BROOKS is the Director of the National Nuclear
9 Security Administration, the agency of the United States with the responsibility
10 and authority of the management of the Nevada Test Site.

11 8. Defendant JAMES TEGNELIA is the Director of the Defense Threat
12 Reduction Agency, the agency of the United States with the responsibility and
13 authority to make, and who did make, the final agency decision to detonate the
14 700 tons of high explosives at the Nevada Test Site named “Divine Strake,” and
15 who did make the final agency decision to detonate 700 tons of high explosives at
16 the Nevada Test Site on a date specified of June 2, 2006, and then later changed to
17 June 23, 2006.

18 **GENERAL ALLEGATIONS**

19 **Facts**

20 **(Western Shoshone Claims)**

21 9. Historically, from time immemorial and to the present, the Western
22 Shoshone have occupied their lands at issue in this Complaint and described in the
23 Treaty as “Shoshonee country” (hereinafter Western Shoshone Territory), by
24 activities including but not limited to maintaining fixed places of residence,
25 commuting as necessary to harvest pine nuts, hunt game, collect herbs and plants
26 for their health and welfare, fishing the streams for their sustenance, and carrying
27 on such other and varied activities that are the life and culture of their people on
28 the lands used by them for generations. These activities allow the Western

1 Shoshone, who call themselves the ***Newe***, which means “the people,” to sustain
2 life and spirituality on ***Newe Sogobia***, their term for Shoshone lands, ever
3 preserving it for the continued existence of the future generations of the ***Newe*** so
4 that the earth will always be a means of nurturing the future of the ***Newe***.

5 10. Prior to the appearance of Euro-Americans, the Western Shoshone
6 lived in extended family groups throughout their territory, which stretched from
7 the Salt Lake Valley to the west across most of what is also known as eastern and
8 southern Nevada into California, and includes the Nevada Test Site, which area
9 includes lands sacred to the Western Shoshone since time immemorial. The
10 Western Shoshone people were joined by other Western Shoshones fleeing from
11 the massacres of their people to the north and to the east. The Great Basin, Ruby
12 Valley, and over to what is now referred to as California has been a homeland for
13 Western Shoshone since time immemorial and a refuge for other Western
14 Shoshone since the early 1800's.

15 11. The people of the Western Shoshone, and their bands, tribes and
16 communities shall be collectively referred to as the “Western Shoshone Nation.”
17 The Western Shoshone Plaintiffs bring this action on behalf of themselves and the
18 Western Shoshone Nation, and bring this action as representatives of the Western
19 Shoshone people.

20 12. Prior to the incursion of immigrant settlers, the Western Shoshone
21 Nation owned and occupied a large tract of land consisting of more than 60
22 million acres in what is now referred to as the States of Nevada, California, Idaho
23 and Utah.

24 13. On October 1, 1863, the United States and the representatives of the
25 Western Shoshone Nation entered into a Treaty of Peace and Friendship (Treaty
26 With The Western Shoshoni, 1863, 18 Stat. 689, Ratified June 26, 1866,
27 Proclaimed October 21, 1869.) In the 1863 Treaty (“Treaty of Ruby Valley” or
28 “Treaty”) the United States recognized that the Western Shoshone Nation

1 “claimed and occupied” Western Shoshone Territory, and in consideration of
2 payments the representatives of the Western Shoshone agreed to cease “hostilities
3 and all depredations upon the emigrant trains, the mail and telegraph lines, and
4 the citizens of the United States within their country,” as well as allowing certain
5 uses of the lands by the immigrants. The Treaty of Ruby Valley by its terms does
6 not convey the ownership of the lands, mineral rights, water rights nor natural
7 resources of the Western Shoshone Territory, nor does it relinquish any right of
8 reversion, nor does it allow unconditional use of the lands of the Western
9 Shoshone Nation to the United States of America. A copy of the Treaty of Ruby
10 Valley is attached hereto as Exhibit 1, and it is incorporated herein by this
11 reference.

12 14. Prior to 1863, the United States had entered into treaties with various
13 Indian Tribes and Nations and knew the proper words that would accomplish the
14 ceding of lands for purposes of holding title and having all rights to the lands in
15 the name of the United States government. The Treaty of Ruby Valley contained
16 no such words of land cessation or specific conveyance.

17 15. Article 5 of the 1863 Treaty of Ruby Valley states as follows:
18 It is understood that the boundaries of the country claimed and
19 occupied by said bands are defined and described by them as follows:
20 On the north by Wong-goga-da Mountains and Shoshone River
21 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.

22 A map depicting Western Shoshone Territory is attached hereto as Exhibit 2.

23 16. The Treaty of Ruby Valley is a valid and binding contract between the
24 United States and the Western Shoshone Nation. The Treaty of Ruby Valley is
25 enforceable by law.

26 17. Under the Treaty of Ruby Valley, the Western Shoshone Nation and the
27 United States of America agreed that there would be certain specific uses allowed
28 to occur on these lands covered by the Treaty, which uses were specified to

1 include only the establishment of mines, ranches, settlements, and military posts,
2 and the construction of communication routes, roads and a railroad to facilitate
3 those specified uses.

4 18. The restriction of uses on land covered by the Treaty of Ruby Valley was
5 a bargained for consideration under that written agreement between the Western
6 Shoshone Nation and the United States of America, and that restriction of use is a
7 covenant and restriction which runs with the land to forever prohibit any use
8 which is inconsistent with those uses specifically allowed under the Treaty.

9 19. On April 4, 2006, the Defendants announced a final decision that they
10 will conduct "Divine Strake," an above-ground detonation of 700 tons of high
11 explosives at the Nevada Test Site, and that the resulting "mushroom cloud . . .
12 may reach an altitude of 10,000 feet."

13 20. The "mushroom cloud" resulting from "Divine Strake" will contain
14 poisonous, toxic, radioactive nuclear debris which is located in the soil at the
15 Nevada Test Site solely as a proximate result of Defendant United States having
16 conducted atmospheric and underground nuclear testing at the Site in the 1950's
17 and 1960's, and, upon information and belief, the Defendants contemplate that
18 said "mushroom cloud" will travel in the direction of the downwinder Plaintiffs
19 herein. See Affidavits of Plaintiffs Virginia Sanchez, Jack Malotte and Arvilla
20 Mascarenas attached hereto as Exhibits 3, 4 and 5.

21 21. The Defendant United States fraudulently and maliciously vouched for
22 the safety of said atmospheric nuclear testing with full knowledge at the time of
23 serious, permanent and fatal health risks to those affected by radiation exposure
24 from such tests, including without limitation, leukemia, multiple myeloma,
25 lymphoma, primary cancer of the thyroid, male or female breast, esophagus,
26 stomach, pharynx, small intestine, pancreas, bile ducts, gall bladder, salivary
27 gland, urinary bladder, brain, colon, ovary, liver and lung, and genetic problems,
28 sterility, and birth defects.

1 22. The Defendant United States is similarly fraudulently and maliciously
2 vouching for the safety of “Divine Strake,” with knowledge that the “mushroom
3 cloud” will disseminate deadly, highly radioactive debris across the United States
4 and the world, and that the radiation exposure to humans poses a clear and
5 present danger of irreparable harm to the cellular RNA and DNA of persons
6 exposed to that radioactive material, including without limitation the health
7 problems described above in Paragraph 21, which were admitted to be so caused
8 by Defendant United States in the Radiation Exposure Compensation Act, 42
9 U.S.C. § 2210.

10 23. The Defendants’ final decision and final agency action to conduct the
11 “Divine Strake” explosion is subject to judicial review and ripe for decision.

12 24. The detonation of 700 tons of high explosives on Western Shoshone
13 Territory is not an allowed use agreed to by the parties under the Treaty, and is,
14 therefore, a use which is prohibited by law.

15 25. “Divine Strake” and any other above-ground or below-ground nuclear
16 or non-nuclear explosion can only be caused or allowed by Defendants if an
17 amendment is negotiated and agreed to by both parties to the Treaty of Ruby
18 Valley, and the Western Shoshone Nation has never consented to such an
19 amendment of the Treaty.

20 26. The Treaty of Ruby Valley provides for certain easements in favor of the
21 United States and the people of the United States generally. Those easements
22 include:

23 **Article 2:** “The several routes of travel through the Shoshonee
24 country, now or hereafter used by white men, shall be forever free, and
25 unobstructed by the said bands, for the use of the government of the United
26 States, and of all emigrants and travellers (sic) under its authority and
27 protection, without molestation or injury from them.”

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

28 **Article 3:** “. . . telegraph and overland stage lines having been
established and operated . . . may be continued without hindrance,

1 molestation, or injury. . . And further, it being understood that provision has
2 been made by the government of the United States for the construction of a
3 railway from the plains west to the Pacific ocean, it is stipulated by the said
bands that the said railway or its branches may be located, constructed, and
operated, and without molestation . . .

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

7 27. Neither Articles 2, 3, or 4 of the Treaty of Ruby Valley provide for the
8 right to the United States to cause an above-ground or below-ground nuclear or
9 non-nuclear explosion that will create or disseminate existing nuclear debris. This
10 would destroy the reversion implied in favor of the Western Shoshone peoples by
11 the use easement granted to the United States by the Treaty.

12 28. In the late 19th century and throughout the 20th century, mining and
13 agricultural settlements were formed and ranches were established on the Western
14 Shoshone lands and in keeping with the treaty provisions, the Western Shoshone
15 people have not waged war against the United States for the use of these lands.

16 29. Upon information and belief, the Defendants have proposed to cause or
17 allow activities at the Nevada Test Site which will create or spread poisonous,
18 toxic, radioactive nuclear debris, in deliberate disregard of the rights of the
19 Western Shoshone Nation and the Western Shoshone Plaintiffs herein, and in
20 deliberate disregard of the rights and safety of all Plaintiffs herein and of all other
21 persons likely to be injured by the air-borne radioactive debris which will result
22 from said blast.

23 30. Principles of trust and fair dealing have been the declared government
24 policy for dealing with Indian nations, and Treaties between Indian Tribes and the
25 United States are to be interpreted as the Indians understood them, with any
26 ambiguities construed liberally in favor of the Tribes.

27 31. The Western Shoshone people continue to occupy and use the land
28 covered by the Treaty, and continue to hold the land in reverence as the place that

1 their future generations will make their home, and have kept their promises made
2 in the Treaty.

3 32. The restrictions on use of lands covered by the Treaty reflect the
4 spiritual beliefs of the Western Shoshone people who hold the earth and all living
5 things sacred, and it is the responsibility of the Western Shoshone Plaintiffs to
6 past, present and future generations to prevent the despoiling of traditional
7 Western Shoshone lands which the threatened “Divine Strake” would portend.

8 33. The Western Shoshone Nation and its members and representatives
9 have at all times acted in good faith and kept their promises.

10 34. The Inter-American Commission on Human Rights (IACHR) of the
11 Organization of American States (OAS) in its Report in Case No. 11.140, December
12 27, 2002, ***Mary and Carrie Dann v. United States*** concluded that the
13 United States had violated the human rights of the Western Shoshone under the
14 American Declaration of the Rights and Duties of Man, by denying the right to due
15 process (Article XVIII), to equality before the law (Article II), the right to a fair
16 trial (Article XVIII) and the right to property (Article XVIII), in connection with
17 determination and protection of Western Shoshone property rights in their
18 ancestral lands.

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

24 36. On March 10, 2006, the Committee for the Elimination of Racial
25 Discrimination of the United Nations (“the UN CERD Committee”), in an action in
26 which the Plaintiffs Winnemucca Indian Colony and Timbisha Shoshone Tribe
27 were named parties, expressed particular concern about:
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- 1 a) Reported legislative efforts to privatize Western Shoshone ancestral
- 2 lands for transfer to multinational extractive industries and energy
- 3 developers.
- 4 b) Information according to which destructive activities are conducted
- 5 and/or planned on areas of spiritual and cultural significance to the
- 6 Western Shoshone peoples, who are denied access to, and use of, such areas.
- 7 It notes in particular the reinvigorated federal efforts to open a nuclear
- 8 waste repository at the Yucca Mountain; the alleged use of explosives
- 9 and open pit gold mining activities on Mont Tenabo and Horse Canyon; and
- 10 the alleged issuance of geothermal energy leases at, or near, hot springs, and
- 11 the processing of further applications to that end.
- 12 c) The reported resumption of underground nuclear testing on Western
- 13 Shoshone ancestral lands.
- 14 d) The conduct and/or planning of all such activities without consultation
- 15 with and despite protests of the Western Shoshone peoples.
- 16 e) The reported intimidation and harassment of Western Shoshone people
- 17 by the (United States') authorities, through the . . . restrictions on hunting,
- 18 fishing and gathering, as well as arrests which gravely disturb the enjoyment
- 19 of their ancestral lands.
- 20 f) The difficulties encountered by Western Shoshone peoples in
- 21 appropriately challenging all such actions before national courts and in
- 22 obtaining adjudication on the merits of their claims, due in particular to
- 23 domestic technicalities.

24 In that Decision "(T)he Committee urges the (United States government) to

25 adopt the following measures until a final decision or settlement is reached on the

26 status, use and occupation of Western Shoshone Ancestral lands in accordance

27 with due process of law and the (government's) obligations under the Convention:

- 28 a) Freeze any plan to privatize Western Shoshone ancestral lands for
- 29 transfer to multinational extractive industries and energy developers;
- 30 b) Desist from all activities planned and/or conducted on the ancestral
- 31 lands of the Western Shoshone or in relation to their natural resources,
- 32 which are being carried out without consultation with and despite protests
- 33 of the Western Shoshone peoples;
- 34 c) Stop imposing . . . restrictions on hunting, fishing and gathering, as well
- 35 as arrests, and rescind all notices already made to that end, inflicted on
- 36 Western Shoshone people while using their ancestral lands.

37 37. The United States of America is a party to the International Convention

38 on the Elimination of All Forms of Racial Discrimination, the legal instrument

39 provided by the UN General Assembly which came into force in 1969, and is

1 subject to the authority of the UN CERD Committee to monitor the compliance of
2 the government with basic measures designed to eliminate the fundamental
3 injustice of racial discrimination and the dangers it represents.

4 38. The Western Shoshone Nation and its people continue to own, claim,
5 inhabit and have all rights to the lands, natural resources, water rights and
6 minerals on the Western Shoshone Territory described in the Treaty of Ruby
7 Valley.

8 39. The 1861 Nevada Territorial Act explicitly acknowledged Indian title
9 and set it aside from state lands.

10 40. The 1787 Northwest Ordinance guaranteed to the Indians that “their
11 property, rights and liberty, they shall never be invaded or disturbed, unless in just
12 and lawful wars authorized by Congress.”

13 41. The 1790 Non-intercourse Act is a federal guarantee of Indians’ right to
14 possession, subject only to public treaty, held under the authority of the United
15 States.

16 42. Encroachment by individual persons onto Western Shoshone lands
17 cannot be the basis for extinguishment of Western Shoshone title to the lands.

18 43. Indian title extends from generation to generation, and will cease only
19 by the dissolution of the Nation.

20 44. Title to the lands which are the subject of this action has never been the
21 subject of any prior litigation or settlement involving the Western Shoshone
22 people or the Western Shoshone Nation.

23 **FIRST CAUSE OF ACTION**

24 (Request under FRCP Rule 60(b) that the Court relieve the Western
25 Shoshone Plaintiffs from the Judgment in ***United States v. Dann***)

26 45. Plaintiffs incorporate each and every Paragraph of this Complaint as if
27 fully set forth in this Cause of Action.

28 46. In 1985, the United States Supreme Court erroneously determined that

1 when payment was placed into an account by the United States Treasury on behalf
2 of the Western Shoshone, the Western Shoshone had been paid for their land
3 claims as provided under the Indian Claims Commission Act and, thus, their
4 claims were extinguished. **United States v. Dann**, 470 U.S. 39; 105 S.Ct. 1058;
5 84 L.Ed.2d 28 (1985)

6 47. Section 22 (a) of the Indian Claims Commission Act, Aug. 13, 1046, ch.
7 959, 60 Stat. 1049 (25 U.S.C. 70u et seq.) required that the Claims Commission
8 submit its report to Congress and that report shall contain 1) the final
9 determination of the Commission; 2) a transcript of the proceedings or judgment
10 upon review, if any, with the instructions of the Court of Claims; and 3) a
11 statement of how each Commissioner voted upon final determination of the claim.

12 48. The final report of the Commission on the Western Shoshone Docket
13 326 - K was never prepared or submitted to Congress, and there could not have,
14 therefore, been any extinguishment of any Western Shoshone Claims pursuant to
15 the specific Congressional mandate reflected by the Indian Claims Commission
16 Act.

17 49. The Defendant United States knew that the final report was never filed
18 or submitted to Congress, and did not disclose this to the parties of the **Dann**
19 case.

20 50. The judgment in the **Dann** case should not, in equity and good
21 conscience, be enforced against these Western Shoshone Plaintiffs.

22 51. The evidence that a final report was not submitted to Congress would
23 be a good defense to the judgment in **Dann**.

24 52. The Western Shoshone Plaintiffs in this action were not represented in
25 the **Dann** case, and were not in privity to the action, and due to no fault or lack of
26 diligence of their own, they were unable to discover this new evidence of no final
27 report to Congress, which evidence was in the possession of the Defendant United
28 States.

1 53. Fraud, accident or mistake by the Defendant United states prevented
2 the parties in the *Dann* case from using this evidence.

3 54. The evidence would have been admissible and credible because it was
4 in the records of the Commission, the Court of Claims and the Congress.

5 55. The evidence that no final report was submitted to Congress is material
6 because without that final report no finality could be achieved according to the
7 Indian Claims Commission Act and that was material to the Supreme Court's
8 decision and would have had the critical importance to change the decision of the
9 Supreme Court.

10 56. There is no other adequate remedy at law to relieve the Western
11 Shoshone Plaintiffs herein from the effect of the *Dann* judgment than to so
12 petition the equitable powers of this Court.

13 **SECOND CAUSE OF ACTION**

14 (Request for a Declaration that the Treaty is in Full Force and Effect)

15 57. Plaintiffs incorporate each and every Paragraph of this Complaint as if
16 fully set forth in this Cause of Action.

17 58. Upon information and belief, the Defendant United States detonated
18 100 nuclear weapons above-ground and 828 nuclear weapons underground
19 between 1951 and 1993 at the Nevada Test Site, making the Western Shoshone
20 Nation the most nuked Nation in the history of the world.

21 59. Ancestors of the Western Shoshone who had lived on lands within the
22 Nevada Test Site were forcibly removed from those ancestral lands by Defendant
23 United States.

24 60. The signors of the Treaty were all and each of them members of the
25 Western Shoshone Nation who were able to sign on behalf of all and each of the
26 members of the Western Shoshone Nation.

27 61. The Defendant United States was represented by agents of the
28 government who were legally able to bind the Defendant United States.

1 land on which such use is proposed.

2 71. The premises of the Nevada Test Site is covered with poisonous, toxic,
3 radioactive debris for which no technology exists to reclaim the land for use by
4 humans, and said land has been forever lost for the use of the Western Shoshone
5 Nation, its people, and all other people.

6 72. As a result of the atmospheric and below-ground nuclear testing and
7 the biological and chemical weapons testing of the Defendant United States, the
8 premises of the Nevada Test Site are no longer available for uses allowed under the
9 Treaty.

10 73. The Western Shoshone Nation, the Western Shoshone people and the
11 individual Plaintiffs will suffer irreparable harm to Western Shoshone Territory by
12 the dissemination of radioactive debris, and to their health as alleged herein if
13 “Divine Strake” is allowed to occur on June 2, 2006, as decided by Defendants.

14 74. The Western Shoshone Plaintiffs are entitled to an order in the nature
15 of a Writ of Prohibition to prevent Defendant officials and employees and
16 Defendant United States of America from authorizing or approving any action by
17 any person or entity which is designed to permit, condone, or conduct “Divine
18 Strake” or any above-ground or below-ground explosion or other “testing” of high
19 explosives, or nuclear, biological, and chemical weapons at the Nevada Test Site
20 and on any other lands within Western Shoshone.

21 **FOURTH CAUSE OF ACTION**

22 (Injunction)

23 75. Plaintiffs incorporate each and every Paragraph of this Complaint as if
24 fully set forth in this Cause of Action.

25 76. The Treaty of Ruby Valley only allows certain specific activities and uses
26 to occur on the lands covered by the Treaty. None of those activities that were
27 stated or contemplated included the above-ground or below-ground explosion or
28 other “testing” of high explosives, or nuclear, biological, or chemical weapons at

1 the Nevada Test Site or on any other lands within Western Shoshone Territory, or
2 any activity which would make the lands unuseable by the Western Shoshone
3 people or the people of the United States of America.

4 77. The Defendants have decided to conduct “Divine Strake” that will
5 disseminate existing radioactive debris, with the effect of contaminating other
6 lands in Western Shoshone Territory and making it unfit for millions of years for
7 any use by the Western Shoshone people or any other human beings.

8 78. The Defendants have allowed and directed persons to “test” nuclear,
9 biological and chemical weapons at the Nevada Test Site, and to prevent the
10 Western Shoshone people from engaging in traditional prayer and religious
11 activities at traditional, sacred prayer areas at the Nevada Test Site.

12 79. The Defendants intend to allow and direct persons to enter the Nevada
13 Test Site for the purpose of further desecration of the sacred lands, by further
14 irreparable destruction and desecration of sacred sites and by contaminating those
15 lands for all future generations.

16 80. The Western Shoshone Plaintiffs have no other adequate remedy at law
17 than to prohibit the desecration, irreversible toxic radioactive contamination, and
18 unlawful use of their lands threatened by the Defendants.

19 81. The action threatened by Defendants is unlawful under the Treaty and
20 the laws of the United States, and will cause irreparable harm to the Western
21 Shoshone lands and to the all the Plaintiffs.

22 82. The Western Shoshone Plaintiffs are entitled to an order declaring the
23 above-described implementation of the Defendant’s “Divine Strake” scheme to be
24 in violation of the Treaty of Ruby Valley, and of the uses allowed under the Treaty,
25 and the laws of the United States, and to be contrary to decisions of the United
26 Nations and the Organization of American States, and enjoining the Defendants
27 from implementation of the “Divine Strake” explosion.

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FIFTH CAUSE OF ACTION

(Declaratory Judgment)

83. Plaintiffs incorporate each and every Paragraph of this Complaint as if fully set forth in this Cause of Action.

84. The Western Shoshone Plaintiffs desire a judicial determination of the Western Shoshone Plaintiff's rights and duties to restrict uses on lands covered by the Treaty of Ruby Valley, and those acts of Defendants, and to permit and authorize only those uses allowed under the Treaty on lands covered by the Treaty, regardless of who holds title to said lands.

85. The Western Shoshone Plaintiffs are entitled to a decree which declares that Defendants are prohibited from approving or permitting "Divine Strake" and any other uses on lands covered by the Treaty of Ruby Valley which are not specifically authorized under said Treaty.

SIXTH CAUSE OF ACTION

(Violation of Treaty Rights)

86. Plaintiffs incorporate each and every Paragraph of this Complaint as if fully set forth in this Cause of Action.

87. The Western Shoshone Plaintiffs are individual and corporate descendants and successors in interest of the Western Shoshone people who held aboriginal and Indian title to Western Shoshone Territory and entered into the Ruby Valley Treaty, and the Defendants have announced plans to violate the provisions of the Treaty.

88. The Defendants have announced to the public that they have adopted a schedule to conduct "Divine Strake" on June 2, 2006, at the Nevada Test Site on lands within Western Shoshone Territory covered by the Treaty of Ruby Valley.

89. By the final agency decision to conduct "Divine Strake", the Defendants are violating the treaty rights of the Western Shoshone Nation, the Western Shoshone people and the Western Shoshone Plaintiffs by using the lands in a

1 manner that are not allowed or provided for under the Treaty.

2 90. The Western Shoshone Nation and its people have at all times honored
3 the Treaty of Ruby Valley and its provisions, and the threatened use of lands
4 covered by the Treaty to detonate 700 tons of high explosives with the effect of
5 disseminating on and off Western Shoshone Territory the most toxic substance
6 ever known to mankind, is offensive to the spiritual principles of the Western
7 Shoshone Plaintiffs, and to the standards of comity and decency to which the
8 Western Shoshone people are entitled.

9 91. The United States, through the individual Defendants, is violating the
10 provisions of the Treaty by deciding to conduct the “Divine Strake” explosion,
11 which is inconsistent with the uses allowed on lands covered by the Treaty of Ruby
12 Valley.

13 92. The Western Shoshone Plaintiffs will be irreparably harmed by the
14 violation of the Treaty and its entitlements.

15 93. The Western Shoshone Plaintiffs are entitled to a judgment by this
16 Court holding that Defendants’ past approvals, permits, and activities in planning
17 and deciding to conduct “Divine Strake,” were unlawful, and further holding that
18 the full force and effect implementation of Defendants’ said decisions, to be
19 unenforceable and void, and enjoining further implementation or enforcement
20 thereof.

21 **SEVENTH CAUSE OF ACTION**

22 (Waste)

23 94. Plaintiffs incorporate each and every Paragraph of this Complaint as if
24 fully set forth in this Cause of Action.

25 95. Upon information and belief, some or all of the Defendants and their
26 predecessors in interest have committed voluntary waste and permissive waste of
27 the lands, minerals, water, and other resources which are located at the Nevada
28 Test Site on lands within Western Shoshone Territory, in that said Defendants

1 have engaged in abuse and destructive use of said property by activities not
2 authorized or allowed by the Treaty including, inter alia, above-ground and below-
3 ground “testing” of nuclear, chemical and biological weapons
4 without restoring and making impossible the restoration of the land to its original
5 condition, thereby causing permanent and irreparable harm to the lands,
6 minerals, water and other resources, and desecrating Western Shoshone Territory
7 both within and without the Nevada Test Site with toxic substances including,
8 without limitation, radioactive debris, radioactive waste, chemical and biological
9 weapons, and other substances.

10 96. Having fraudulently obtained possession of the Nevada Test Site, as
11 alleged herein, the Defendants had a duty to the Western Shoshone Plaintiffs, the
12 Western Shoshone Nation and the Western Shoshone people, to treat the subject
13 lands, minerals, water, and other resources which are located at the Nevada Test
14 Site on lands within Western Shoshone Territory in such a manner that no harm
15 would be done to Western Shoshone lands both within and without Western
16 Shoshone Territory.

17 97. As a direct and proximate result of the waste alleged herein, the
18 Western Shoshone Plaintiffs have been injured and have suffered damages, and
19 continue to be injured and will continue to suffer damages, and are entitled to fair
20 and reasonable compensation.

21 **EIGHTH CAUSE OF ACTION**

22 (Trespass)

23 98. Plaintiffs incorporate each and every Paragraph of this Complaint as if
24 fully set forth in this Cause of Action.

25 99. Having fraudulently obtained possession of the lands, water, minerals,
26 and other resources which are located at the Nevada Test Site, as alleged herein,
27 each of the Defendants and their predecessors in interest has committed and/or
28 continues to commit trespass in violation of the duty each Defendant owes to the

1 Western Shoshone Plaintiffs, the Western Shoshone Nation and the Western
2 Shoshone people, and by excluding the Western Shoshone from using, enjoying
3 and possessing said property.

4 100. As a direct and proximate result of the trespass alleged herein, the
5 Western Shoshone Plaintiffs have been injured and have suffered damages, and
6 continue to be injured and will continue to suffer damages, and are entitled to fair
7 and reasonable compensation.

8 **NINTH CAUSE OF ACTION**

9 (Class Certification)

10 101. Plaintiffs incorporate each and every Paragraph of this Complaint as if
11 fully set forth in this Cause of Action.

12 102. Western Shoshone Plaintiffs THOMAS WASSON and JUDY ROJO, on
13 behalf of themselves and for all others similarly situated, allege that there are
14 thousands of Western Shoshone who hold Indian and Treaty title to the lands
15 within Western Shoshone Territory both within and without the Nevada Test Site,
16 and who would be in the Equitable Relief and Damages Class described more
17 specifically hereinafter.

18 103. The class consists of persons so numerous as to make it impracticable
19 to bring all class members before this Court.

20 104. Plaintiffs THOMAS WASSON and JUDY ROJO will fairly and
21 adequately protect the interests of all members of the class in the monetary and
22 equitable relief sought herein.

23 105. Plaintiffs THOMAS WASSON and JUDY ROJO are represented by
24 counsel who is experienced and competent in complex litigation and class action
25 litigation.

26 106. The prosecution of separate actions by individual members of the class
27 would create risk of inconsistent or varying adjudications, and the questions of law
28 or fact common to the members of the class predominate over any questions

1 affecting the individual members, and a class action is superior to other available
2 methods for the fair and efficient adjudication of the controversy.

3 107. All class members have been treated identically in the waste of lands,
4 water, minerals, and other resources which are located within Western Shoshone
5 Territory, and which have been irreparably damaged by Defendants and their
6 predecessors as a result of Defendants' activities at the Nevada Test Site as alleged
7 herein.

8 108. The claims of Plaintiffs THOMAS WASSON and JUDY ROJO are
9 typical of the claims of class members, and all class members have the same legal
10 rights to, and interest in, the monetary and equitable relief sought herein.

11 109. Plaintiffs THOMAS WASSON and JUDY ROJO and other class
12 members are entitled to monetary damages and equitable relief as alleged herein.

13 110. Plaintiffs THOMAS WASSON and JUDY ROJO have no interest
14 adverse to the interests of the class.

15 111. Plaintiffs THOMAS WASSON and JUDY ROJO herein sue on behalf of
16 themselves and the other class members for a Declaratory Judgment that title to
17 the Nevada Test Site is held by the Western Shoshone Nation and its people, for an
18 Injunction, and to recover damages due to members of the class for waste and
19 trespass, all as more specifically alleged above.

20 **(Downwinder Claims)**

21 **(TENTH CAUSE OF ACTION)**

22 (Injunction)

23 112. Plaintiffs incorporate each and every Paragraph of this Complaint as if
24 fully set forth in this Cause of Action.

25 113. The Plaintiffs named above in Paragraph 4 are residents of Salt Lake
26 County, Utah, and Nye County and Washoe County, Nevada.

27 114. Residents of the States of Utah and Nevada were exposed to wind-
28 borne radioactive fallout and debris caused by the atmospheric above-ground

1 testing of nuclear weapons at the Nevada Test Site during the 1950's and 1960's by
2 Defendants and their predecessors in interest.

3 115. As a direct, sole, and proximate result of the exposure to wind-borne
4 radioactive fallout and debris as alleged, residents of states including without
5 limitation the States of Nevada and Utah suffered serious, permanent and fatal
6 health problems, including without limitation, leukemia, multiple myeloma,
7 primary cancer of the thyroid, male or female breast, esophagus, stomach, pharynx,
8 small intestine, pancreas, bile ducts, gall bladder, salivary gland, urinary bladder,
9 brain, colon, ovary, liver, and lung, all as admitted by Defendant United States in
10 RECA, as well as genetic problems, sterility, and birth defects.

11 116. The "Divine Strake" explosion is a major federal action which
12 significantly affects the quality of the human environment in that, *inter alia*, the
13 reasonably foreseeable dissemination of wind-borne radio nuclides will cause
14 significant adverse effects to the quality of the human environment and the health
15 of the Plaintiffs.

16 117. "Divine Strake" comprises a "major federal action" with reference to
17 NEPA, such that the Defendants are required to satisfy the statutory mandates by
18 preparing an Environmental Impact Statement (EIS), including a written
19 statement by Defendants on:

- 20 (1) the environmental impact of the proposed action;
- 21 (2) any adverse environmental effects which cannot be avoided should the
22 proposal be implemented;
- 23 (3) alternatives to the proposed action;
- 24 (4) the relationship between local short-term uses of man's environment
25 and the maintenance and enhancement of long-term productivity; and
- 26 (5) any irreversible and irretrievable commitments of resources which
27 would be involved in the proposed action should it be implemented.

28 118. The Defendants failed to give adequate and legal notice of their plan to

1 conduct “Divine Strake,” including without limitation failing to publish notice in
2 the Federal Register, failing to give notice reasonably designed to inform groups
3 and individuals which Defendants knew would be affected and would voice the
4 same objections as Plaintiffs herein to the proposed “Divine Strake” during the
5 comment period required by law, and failing to give notice to those persons
6 already known by Defendants to have contracted certain cancers and other serious
7 diseases in geographic areas known to Defendants as reflected by Radiation
8 Exposure Compensation Act (RECA), 42 U.S.C. § 2210.

9 119. The Defendants are responsible for making the proper decision under
10 the National Environmental Policy Act (NEPA), and the Defendants were aware of
11 the objections of the Western Shoshone Plaintiffs and the Downwinders Plaintiffs
12 herein prior to Defendants having made their final agency decision to conduct
13 “Divine Strake”.

14 120. The Defendants have never taken the steps necessary to make a
15 proper final agency decision to conduct “Divine Strake,” and they have failed and
16 refused to perform any EIS or a programmatic EIS (which would evaluate the
17 cumulative effects of the more than single test which was misrepresented in the
18 Environmental Analysis Report of this project, but admitted to the State of
19 Nevada) or to conduct the necessary evaluation of “Divine Strake” as required
20 under the National Environmental Policy Act (NEPA).

21 121. The Defendants have failed to comply with the requirements of NEPA
22 which would require that there be a proper and meaningful publication of the
23 intent to conduct this test; and, this notification is intended by the Act to provide
24 an opportunity for public, federal and state agency comment and evaluation of
25 those comments and a proposal for mitigation of any significant impacts in the
26 final environmental analysis all to be completed **before** a Finding of No
27 Significant Impact was adopted and Plaintiff Axelrod attempted to make such
28 public comment but was denied.

1 122. The Defendants have failed and refused to comply with the
2 requirements that they demonstrate, pursuant to the Clean Air Act, 42 U.S.C.
3 7412 et seq., that federal and state air contaminant levels will not be exceeded, all
4 to be completed **before** a Finding of No Significant Impact was adopted.

5 123. The Defendants have failed and refused to comply with the
6 requirements of the Clean Air Act in that they have applied for a Class 2 permit
7 from the State of Nevada and failed to file an application with the United States
8 Environmental Protection Agency as is required.

9 124. The Defendants have failed and refused to provide the State of
10 Nevada with adequate information for the State to make an informed decision and
11 for the State of Nevada to publish proper notice to the citizens and residents of the
12 State of Nevada regarding the proposed Divine Strake explosion all in violation of
13 the laws of the State of Nevada.

14 125. The Defendants have failed and refused to comply with the
15 requirements of the Clean Water Act, 33 U.S.C. § 1362 et seq. which prohibits the
16 discharge of any pollutant, of which radio nuclides is a pollutant according to 33
17 U.S.C. § 1251 et seq., into waters of the United States without an National Pollutant
18 Discharge Elimination Systems (NPDES) permit.

19 126. The detonation of this massive amount of explosives as is
20 contemplated by the Divine Strake project will cause potential discharge into the
21 wetlands, bodies of water and groundwater in and around the Nevada Test Site,
22 including but not limited to, bodies and water sources miles from the detonation.

23 127. The USGS has recognized that ground water movement from the
24 Nevada Test Site has the potential for high level radio nuclides to be transported
25 within regional aquifers and to contaminate future public water supplies.

26 128. Wetlands exist in and around the Nevada Test Site which, upon
27 information and belief, are connected to the Las Vegas Wash and by that and other
28 water connectors to Lake Mead.

1 129. The Defendants have failed to consider the impact upon the ground
2 water, wetlands, and surface waters of the Nevada Test Site and have failed to
3 make application for an NPDES permit for the detonation of this massive amount
4 of explosives contemplated by the Divine Strake project.

5 130. Upon information and belief, the Defendants have failed to seek
6 consultation regarding the desert tortoise, those animals protected by the Wild
7 and Free Roaming Horse and Burro Act, 16 U.S.C. § 1331, and the Migratory Bird
8 Act, 16 U.S.C. § 703, and the bird species protected by the State of Nevada all in
9 violation of 16 U.S.C. § 1536 (a)(2).

10 131. Upon information and belief, the Defendants have failed to consider
11 the impacts of their proposed major federal act on the treaties entered into by the
12 United States of America, including but not limited to the Treaty of Ruby Valley.

13 132. The Plaintiffs are entitled to a judgment by this Court holding that
14 Defendants' past approvals, permits, decisions, implementation and activities in
15 planning and deciding to conduct "Divine Strake," were unlawful and in violation
16 of the National Environmental Policy Act (NEPA), and further holding that the full
17 force and effect implementation of Defendants' said decisions, to be unenforceable
18 and void, and enjoining further implementation or enforcement thereof pending
19 the completion by Defendants of an Environmental Impact Statement (EIS) as
20 required by law.

21 WHEREFORE, the Western Shoshone Plaintiffs pray for relief as follows:

- 22 1. A declaration by this Court that these Western Shoshone Plaintiffs are
23 relieved from the judgment in *United States v. Dann*, 470 U.S. 39; 105 S. Ct.
24 1058; 84 L. Ed.2d 28 (1985);
- 25 2. A declaration by this Court that the Treaty of Ruby Valley is in full force
26 and effect in all respects;
- 27 3. For an Order in the nature of a Writ of Prohibition to prevent Defendant
28 officials and employees and Defendant United States of America from authorizing

1 or approving any action by any person or entity which is designed to permit or
2 condone or conduct the detonation of high explosives scheduled for June 2, 2006,
3 named by Defendants as “Divine Strake”;

4 4. For an Order declaring the implementation of Defendants’ scheme to
5 conduct “Divine Strake” to be in violation of the uses allowed under the Treaty of
6 Ruby Valley, and of the Treaty generally, and enjoining Defendants from
7 implementation of the “Divine Strake” explosion;

8 5. For a Declaratory Judgment which declares that Defendants are
9 prohibited from approving or permitting any uses on lands covered by the Treaty
10 of Ruby Valley which are not specifically authorized under said Treaty.

11 6. For an Order declaring and adjudging that Defendants are obligated to
12 perform as promised under the Treaty of Ruby Valley by permitting and allowing
13 only those uses which were agreed to by the parties to said Treaty;

14 7. For an Order declaring and adjudging that the prior decisions of
15 Defendants, and their predecessors, which have approved and authorized activities
16 at the Nevada Test Site designed to result in the above-ground and below-ground
17 testing of nuclear, chemical and biological weapons at that location, and the full
18 force and effect implementation of said prior decisions to be in violation of law and
19 the Treaty of Ruby Valley, and void, and enjoining further implementation or
20 enforcement thereof;

21 8. For past and future damages for waste and trespass;

22 9. For an order declaring that the Defendants have no right to possess or
23 use the lands, minerals, water, and other resources which are located at the
24 Nevada Test Site within Western Shoshone Territory, and enjoining the
25 Defendants from selling, exchanging, possessing, using, or entering upon said
26 property;

27 10. For an order certifying this action as a class action, and that the Court
28 find and conclude that Plaintiffs are appropriate representatives for the class, and

1 that judgment herein for the equitable and monetary relief herein be entered
2 against Defendants and in favor of Plaintiffs and the other class members;

3 11. For a trial by jury on all issues so triable; and

4 WHEREFORE, all of the Plaintiffs pray for relief as follows:

5 12. For a judgment by this Court holding that Defendants' past approvals,
6 permits, decisions, implementation and activities in planning and deciding to
7 conduct "Divine Strake," were unlawful and in violation of the National
8 Environmental Policy Act (NEPA), and further holding that the full force and
9 effect implementation of Defendants' said decisions, to be unenforceable and void,
10 and enjoining further implementation or enforcement thereof pending the
11 completion by Defendants of an Environmental Impact Statement (EIS) as
12 required by law.

13 13. For an award of attorney's fees and costs against Defendants and in
14 favor of the Plaintiffs; and

15 14. For such other and further relief as the Court deems just, proper, and
16 equitable.

17 Dated this 22nd day of May, 2006.

18 ss//Robert R. Hager

19 _____
20 ROBERT R. HAGER, ESQ.
21 Attorney for Plaintiffs

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