

1 ROBERT R. HAGER, ESQ., #1482
HAGER & HEARNE
2 910 Parr Blvd., #8
Reno, NV 89512
3 Tel: 775.329.5800
Fax: 775.329.5819
4 email: parrlawoffices@sbcglobal.net
Attorney for Plaintiffs
5

6 **UNITED STATES DISTRICT COURT**
7 **DISTRICT OF NEVADA**
8

9 WINNEMUCCA INDIAN COLONY,)
THOMAS WASSON, JUDY ROJO,)
10 SHARON WASSON, ELVERINE)
CASTRO, PETER LISTER,)
11 STEPHEN ERICKSON, VIRGINIA)
SANCHEZ, JACK MALOTTE, KIM)
12 TOWNSEND, ARVILLA)
MASCARENAS, PATRICIA)
13 AXELROD, and TIMBISHA)
SHOSHONE TRIBE,)

14 Plaintiffs,

15 v.

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

21 Defendants.
22

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

SECOND AMENDED
MOTION FOR TEMPORARY
RESTRAINING ORDER AND FOR
PRELIMINARY INJUNCTION

23 COMES NOW, Plaintiffs, WINNEMUCCA INDIAN COLONY, THOMAS
24 WASSON, JUDY ROJO, SHARON WASSON, ELVERINE CASTRO, VIRGINIA
25 SANCHEZ, JACK MALOTTE, KIM TOWNSEND, and ARVILLA MASCARENAS,
26 and TIMBISHA SHOSHONE TRIBE (“the Western Shoshone Plaintiffs”), and
27 Plaintiffs PETER LITSTER, STEPHEN ERICKSON, VIRGINIA SANCHEZ, JACK
28 MALOTTE, KIM TOWNSEND, ARVILLA MASCARENAS, and PATRICIA

1 AXELROD (“the Downwinder Plaintiffs”), by and through their attorney, Robert
2 R. Hager, Esq., and respectfully request that this Court hear the arguments that
3 prove violations of the aboriginal and Treaty rights of the Western Shoshone
4 Plaintiffs, and of the National Environmental Policy Act, as to all Plaintiffs, and
5 grant a temporary restraining order and a preliminary and permanent injunction
6 under the authority of FRCP 65(a), against the Defendants. The Defendants are
7 the UNITED STATES OF AMERICA (“United States”), and its agents, DONALD
8 RUMSFELD, Secretary of the United States Department of Defense, LINTON
9 BROOKS, Director of the National Nuclear Security Administration and, JAMES
10 TEGNELIA, Director of the Defense Threat Reduction Agency, who have ignored
11 the rights of the Western Shoshone Plaintiffs and the Downwinder Plaintiffs, and
12 now have made a final agency decision to detonate 700 tons of high explosives at
13 the Nevada Test Site on the specified date of June 23, 2006, code named by
14 Defendants as “Divine Strake.”

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

22 The Western Shoshone Plaintiffs hold the Nevada Test Site as a sacred part
23 of their lives and culture, and the Defendants’ final agency decision “Divine
24 Strake” to detonate 700 tons of high explosives is unlawful and offensive to the
25 standards of decency to which the Western Shoshone Nation and the Western
26 Shoshone people are entitled. The Defendants have failed to provide the Western
27 Shoshone Plaintiffs with notice and opportunity to comment on the impact of
28 “Divine Strake” on the sacred sites which will be adversely affected by that

1 planned blast.

2 By Defendants' own admission, "Divine Strake" will create a "mushroom
3 cloud" that will rise 10,000 feet, and the air-borne radioactive debris contained
4 therein will rain death and severe, permanent and disabling injuries and health
5 problems to those persons thereafter exposed to that radioactive fallout.
6 Plaintiffs, and each of them, and millions of persons down-wind or off the Nevada
7 Test Site, are threatened with clear and present danger of irreparable injury
8 unless Defendants are restrained and enjoined by order of this Court to prevent
9 Defendants, their agents and employees from authorizing and directing the
10 detonation of high explosives named "Divine Strake." Defendants should be
11 further restrained or enjoined from authorizing or directing any action by any
12 person or entity which is designed to permit or condone or conduct any
13 detonation of high explosives at the Nevada Test Site unless in conformance with
14 the notice and comment provisions and an adequate Environmental Impact
15 Statement as required by National Environmental Policy Act (NEPA), 42 U.S.C. §
16 4321 et seq.

17 The atmospheric detonation of high explosives at the Nevada Test Site is
18 major federal action, the reasonably foreseeable result of which will be to
19 disseminate the highly radioactive debris which permeates the ground at the
20 Nevada Test Site as a sole and proximate result of the atmospheric and
21 underground nuclear testing at the Nevada Test Site by Defendants and their
22 predecessors in interest.

23 The Defendants have further failed to seek consultation regarding the
24 desert tortoise, those animals protected by the Wild and Free Roaming Horse and
25 Burro Act, 16 U.S.C. § 1331, and the Migratory Bird Act, 16 U.S.C. § 703, and the
26 bird species protected by the State of Nevada all in violation of 16 U.S.C. § 1536
27 (a)(2).

28 The Western Shoshone Plaintiffs are further entitled to an order restraining

1 and enjoining the Defendants from defiling the earth by "Divine Strake," and
2 from acting in violation of the rights of the Western Shoshone people as those
3 rights were given to them in the Treaty of Ruby Valley, and as protected by the
4 Constitution of the United States and recognized by Decisions of the United
5 Nations and the Organization of American States.

6 Plaintiffs have no adequate remedy at law. This Motion is made and based
7 on the Second Amended Complaint and Exhibits thereto filed concurrently
8 herewith, the Points and Authorities herein below, the Exhibits attached hereto,
9 and the evidence and arguments of counsel to be presented at the hearing on this
10 Motion presently scheduled for June 8, 2006.

11 DATED this 22d day of May, 2006.

12 ss//Robert R. Hager

13 ROBERT R. HAGER, ESQ., #1482
14 910 Parr Blvd., #8
15 Reno, NV 89512
16 Tel: 775.329.5800
17 Fax: 775.329.5819
18 email: parrlawoffices@sbcglobal.net
19 Attorney for Plaintiffs

18 **POINTS AND AUTHORITIES**

19 **I.**
20 **Chronology of Facts**

21 (Western Shoshone Claims for Injunctive Relief)

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

1 required over the sixty million acres of the Great Basin and beyond claimed as
2 their homeland.

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

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

15 In 1862, the Defendant United States of America (United States) was
16 engaged in a great civil war that had included many of the States of the Eastern
17 United States. The United States was required to fund the war effort and needed
18 the gold and other precious minerals being mined in California. In order to
19 obtain the gold and silver and other valuables to fund the war effort, the United
20 States enacted on July 1, 1862, the Pacific Railroad Act (12 Statutes at Large, 489)
21 in order to finance and construct a transcontinental railroad which the Defendant
22 United States knew at the time would be required to cross more than 500 miles of
23 lands then known by that Defendant to be held by Indian title of the Western
24 Shoshone Plaintiffs’ predecessors in interest. The Defendant United States knew
25 and understood, as specifically acknowledged in Section 2 of the Pacific Railroad
26 Act of 1862, that unless Indian title to Western Shoshone Territory were
27 “extinguished,” by act of Congress, title to the lands so traversed by the railroad
28 would continue to be held by the Indian Nations occupying those lands.

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

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

15 In 1863, the Western Shoshone Nation, the White Knife warriors and the
16 other scattered Western Shoshone were enticed to enter into a treaty, now
17 referred to as the Treaty of peace and friendship of Ruby Valley, known by the
18 Shoshone people as ***Bah-Gah-Zoo***, Treaty With The Western Shoshone, 1863;
19 18 Stat. 689, Ratified June 26, 1866, Proclaimed October 21, 1869 (The “Treaty of
20 Ruby Valley” or “Treaty”), which allowed the United States of America to have
21 certain usufructuary rights in the lands of the Western Shoshone. The Treaty
22 allowed the railroads to build across lands recognized as belonging to the
23 Shoshone and allowed mining and development of communities, transportation
24 and communication routes on Shoshone “country.” Only these activities were
25 agreed upon and are allowed by the Treaty. The Western Shoshone Nation and
26 its members and representatives have never intended to nor actually participated
27 in any act that would diminish their rights under the Treaty, and have at all times
28 acted in good faith and kept their promises.

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

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

9 A map depicting Western Shoshone Territory is attached to the Second Amended
10 Complaint as Exhibit 1, and is incorporated herein by this reference. The Nevada
11 Test Site is within Western Shoshone Territory as described in the Treaty and is
12 attached hereto as Exhibit 1. The Affidavit of Corbin Harney, Spiritual Leader of
13 the Western Shoshone Nation, reflects that the lands within the Nevada Test Site
14 are sacred to the Western Shoshone. See attached Exhibit 2.

15 Prior to 1863, the United States had entered into treaties with various
16 Indian Tribes and Nations and knew the proper words that would accomplish the
17 ceding of lands for purposes of holding title and having all rights to the lands in
18 the name of the United States government. The Treaty of Ruby Valley contained
19 no such words of land cessation or specific conveyance, and at most the treaty can
20 only be read to reflect the agreement of the Western Shoshone to allow safe
21 passage and permit certain specified uses on Western Shoshone lands.

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

1 because Congress made the report mandatory for the purpose of protecting the
2 Indian claimants.

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

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

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

20 a) Reported legislative efforts to privatize Western Shoshone ancestral
21 lands for transfer to multinational extractive industries and energy
22 developers.

23 b) Information according to which destructive activities are conducted
24 and/or planned on areas of spiritual and cultural significance to the
25 Western Shoshone peoples, who are denied access to, and use of, such
26 areas. It notes in particular the reinvigorated federal efforts to open a
27 nuclear waste repository at the Yucca Mountain; the alleged use of
28 explosives and open pit gold mining activities on Mont Tenabo and Horse
Canyon; and the alleged issuance of geothermal energy leases at, or near,
hot springs, and the processing of further applications to that end.

c) The reported resumption of underground nuclear testing on Western
Shoshone ancestral lands.

d) The conduct and/or planning of all such activities without consultation

1 with and despite protests of the Western Shoshone peoples.

2 e) The reported intimidation and harassment of Western Shoshone people
3 by the (United States') authorities, through the . . . restrictions on hunting,
4 fishing and gathering, as well as arrests which gravely disturb the
5 enjoyment of their ancestral lands.

6 f) The difficulties encountered by Western Shoshone peoples in
7 appropriately challenging all such actions before national courts and in
8 obtaining adjudication on the merits of their claims, due in particular to
9 domestic technicalities.”

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

14 a) Freeze any plan to privatize Western Shoshone ancestral lands for
15 transfer to multinational extractive industries and energy developers;

16 **b) Desist from all activities planned and/or conducted on the
17 ancestral lands of the Western Shoshone or in relation to their
18 natural resources, which are being carried out without
19 consultation with and despite protests of the Western Shoshone
20 peoples;** (Emphasis Added)

21 c) Stop imposing . . . restrictions on hunting, fishing and gathering, as well
22 as arrests, and rescind all notices already made to that end, inflicted on
23 Western Shoshone people while using their ancestral lands.¹

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

The Western Shoshone have never violated the Treaty of Ruby Valley and

¹ The UN CERD Committee Decision 1 (68) is attached hereto as Exhibit 3.

1 continue to assert their rights under the Treaty.² The Defendants have failed to
2 request or seek the permission and consent of the Western Shoshone people to
3 use the Nevada Test Site in a manner neither contemplated nor allowed under the
4 Treaty. The Western Shoshone Plaintiffs have been intentionally excluded by
5 Defendants from any consultation or participation in the final agency decision to
6 conduct the “Divine Strake” blast on Western Shoshone Territory.

7 “Divine Strake” threatens to make Western Shoshone lands within and
8 without the Nevada Test Site unapproachable and unusable by human beings,
9 and will defile those other Western Shoshone lands for any other purpose, and
10 those lands will be lost to the future generations of the Western Shoshone people
11 for so long as they endure because of the air-borne dissemination of carcinogenic
12 substances including radio nuclides. “Divine Strake” portends a clear and present
13 danger to the desecration and irreparable despoiling of other sacred lands of the
14 Western Shoshone by the air-borne dissemination of carcinogenic substances
15 including radio nuclides that cause death, birth defects and permanent and
16 disabling injuries to the health of humans and other living things.

17 At present, as reflected by the attached Affidavit of Corbin Harney (Exhibit
18 2), the Defendants’ actions at the Nevada Test Site are causing ongoing
19 irreparable harm to the spiritual and religious practices of the Western Shoshone
20 people. Sacred ancestral remains have been unearthed and removed from their
21 burial places at the Nevada Test Site, and more ancestral remains are threatened
22 with the same fate unless the Defendants are enjoined from further desecration of
23 the sacred burial areas at the Nevada Test Site.

24 (Claims of All Plaintiffs for Injunctive Relief)

25 On April 4, 2006, the Defendants announced a final decision that they will
26

27 ² (Crum, **“The Road On Which We Came, A History of the Western Shoshone”**
28 University of Utah Press, 1994).

1 conduct "Divine Strake," an above-ground detonation of 700 tons of high
2 explosives at the Nevada Test Site, and that the resulting "mushroom cloud . . .
3 may reach an altitude of 10,000 feet." ³ This Press Release confirms final agency
4 action which was made in violation of NEPA in that, *inter alia*, there has never
5 been the required public notice nor opportunity for comment. No final EA
6 (Environmental Assessment) had ever been approved or adopted by the lead
7 agency prior to the adoption of the purported Finding of No Significant Impact
8 (FONSI) on January 30, 2006. ^{4, 5} This press release was the first notice by
9 Defendants to Plaintiffs of the contemplated or planned detonation of explosives
10 called "Divine Strake."

11 In response to the commencement of this litigation, the defendants have
12 engaged in a sham administrative proceeding which included: 1) the cancellation
13 of the scheduled Divine Strake explosion previously scheduled for June 2, 2006;
14 2) the revision and adoption of a final Environmental Assessment (Final EA);
15 and, 3) the adoption of a revised FONSI to purportedly justify the Divine Strake
16 explosion. ⁶ After asking this Court for an emergency hearing to continue the
17 injunction hearing in this action, the Defendants quickly tried to make up for
18 their unlawful administrative procedure. Concurrent with their May 1, 2006,
19 request to vacate the injunction hearing scheduled herein for May 23, 2006, the
20 Defendants requested a revised briefing schedule and later hearing date merely in
21 order to accommodate a later explosion. The Defendants knew at that time the
22 results of their "revised" Environmental Assessment" and the "revised" FONSI
23 would have the same conclusion as the first. The Defendants insult this Court by
24

25 ³ See Press Release dated April 4, 2006, attached as Exhibit 4.

26 ⁴ See, Affidavit of Robert R. Hager, Exhibit 5

27 ⁵ See, Exhibit 6, FONSI, dated January 30, 2006.

28 ⁶ See, Exhibit 7, Revised FONSI, May 9, 2006.

1 making any argument that the further EA and FONSI are objective or revised by
2 any meaningful information. In fact, the final EA issued May 5, 2006, reflects the
3 intentional failure of Defendants to test the soil at the specific blast site for radio
4 nuclides⁷, and instead merely make a procedural genuflection to the
5 administrative process that requires notice and an opportunity to comment on
6 meaningful information.

7 The “mushroom cloud” resulting from “Divine Strake” will contain
8 poisonous, toxic, radio nuclides which are found in the soil at the Nevada Test
9 Site solely as a result of Defendant United States having conducted atmospheric
10 and underground nuclear testing at the Site in the 1950's and 1960's. The location
11 of the “Large Scale, Open-Air Explosive DIVINE STRAKE at the Nevada Test Site”
12 is reflected by the oval-shaped symbol on the map taken from Defendants Pre-
13 Approval Draft EAS,” dated November 2005.⁸ Exhibit 1 hereto is the map of the
14 Defendant United States reflecting the admitted presence of radioactive
15 contamination at the Nevada Test Site. This map reflects the presence of the
16 most dangerous and deadly, if inhaled or ingested, of all radioactive
17 contaminants, the alpha emitters plutonium, americium, and curium, in the
18 location in which Divine Strake is planned.

19 The Defendant United States fraudulently and maliciously vouched for the
20 safety of said atmospheric nuclear testing in the 1950's and 1960's, with full
21 knowledge at the time, of serious, permanent and fatal health risks to those
22 affected by radiation exposure from such tests. Those serious, permanent, and
23 fatal health risks are now known to include without limitation, leukemia, multiple
24 myeloma, lymphomas, and primary cancer of the thyroid, male or female breast,
25 esophagus, stomach, pharynx, small intestine, pancreas, bile ducts, gall bladder,
26

27 ⁷ See, Affidavit of Diane Stearns, PhD., Exhibit 8

28 ⁸ Exhibit 9, Map from the EA.

1 salivary gland, urinary bladder, brain, colon, ovary and liver and genetic
2 problems, sterility and birth defects. The Defendant United States admitted that
3 those health problems were caused to Downwinders in the States of Nevada,
4 Utah, and Arizona by the Defendant's testing of nuclear weapons at the Nevada
5 Test in the Radiation Exposure Compensation Act, 42 U.S.C. § 2210.

6 The "mushroom cloud" from Divine Strake will disseminate deadly radio
7 nuclides across the United States and the world, and that the radiation exposure
8 to humans poses a clear and present danger of irreparable harm described above
9 and to the cellular RNA and DNA of persons exposed to that radioactive material.
10 Millions of citizens living downwind of the Nevada Test Site are at risk of inhaling
11 radioactive particles that would be dispersed into the atmosphere. The radio
12 nuclides that will be disseminated by the 10,000 foot high "mushroom cloud"
13 Defendants intend to create, poses a clear and present danger of genetic
14 problems, sterility, and birth defects to Downwinders.⁹

15 In violation of NEPA, the Defendants have failed to give proper notice of
16 their planned decision, and allowed no public comment period. Plaintiffs,
17 including the Downwinder Plaintiffs, have, therefore, been denied any
18 opportunity to comment on and object to the Defendants' "Divine Strake" action,
19 despite the knowledge by Defendants that the "Large-Scale, Open-Air Explosive
20 Detonation" poses a clear and present danger of irreparable harm to the health of
21 Plaintiffs and other persons similarly situated.

22 The Defendants have engaged in a forbidden "post hoc" justification of the
23 proposed explosion. The Defendants have failed to obtain proper air pollution
24 and water pollution discharge permits in violation of State and Federal laws. The
25 purpose of these laws and the requirement of application and proper notice is in
26 order to give those affected by the acts fair and complete notice so that any

27
28 ⁹ Affidavit of Thomas M. Fasy, M.D., Ph.D., Exhibit 10.

1 comments will address the substantive environmental and health issues. Without
2 the proper permits, the Defendants could not adopt an EA nor revise it. The
3 Defendants have sought a permit from the State of Nevada but one has not been
4 issued. The public has not been given the opportunity to comment, and the State
5 has not been given all the information it required to make the permit decision.
6 Without this process these Plaintiffs are not able to comment on the threat to
7 their physical well-being from airborne pollutants. The Defendants have used
8 blatant misinformation and omitted critical information in order to avoid the
9 NEPA process.¹⁰

11 **II.**
12 **A PRELIMINARY INJUNCTION**
13 **IS APPROPRIATE.**

14 **A.**
15 **THE PLAINTIFFS WILL SUFFER IRREPARABLE HARM IF THE**
16 **RESTRAINING ORDER AND INJUNCTION ARE NOT GRANTED.**

17 The Defendants failed to give adequate and legal notice of their plan to
18 conduct “Divine Strake,” including without limitation failing to publish notice in
19 the Federal Register, and failing to give notice reasonably designed to inform
20 groups and individuals which Defendants knew would be affected. Defendants
21 knew that persons exist who would voice the same objections as Plaintiffs herein
22 to the proposed “Divine Strake” during the comment period required by law, and
23 failing to give notice to those persons already known by Defendants to have
24 contracted certain cancers and other serious diseases in geographic areas known
25 to Defendants as reflected by Radiation Exposure Compensation Act (RECA), 42
26 U.S.C. § 2210 creates an inherently flawed process and failure of notice.

27 The Defendants have never taken the steps necessary to make a proper

28 ¹⁰ *Hall v. Norton*, 266 F.3d 969 (9th Cir. 2001) wherein the Court recognized that
substantive threats of physical injury or harm to the Plaintiff by acts of the federal government
require a full blown NEPA process with an Environmental Impact Statement to address those
threats.

1 final agency decision to conduct “Divine Strake,” and they have failed and refused
2 to perform any EIS or a programmatic EIS¹¹ or to conduct the necessary
3 evaluation of “Divine Strake” as required under the National Environmental
4 Policy Act (NEPA). The Defendants have failed and refused to comply with the
5 requirements that they demonstrate, pursuant to the Clean Air Act, 42 U.S.C.
6 7412 et seq., that federal and state air contaminant levels will not be exceeded, all
7 to be completed **before** a Finding of No Significant Impact was adopted. The
8 Defendants have further completely omitted any analysis of the effects on
9 groundwater, which the USGS was given a grant to study in 1998.¹²

10 Upon information and belief, the Defendants have failed to seek
11 consultation regarding the desert tortoise, those animals protected by the Wild
12 and Free Roaming Horse and Burro Act, 16 U.S.C. § 1331, and the Migratory Bird
13 Act, 16 U.S.C. § 703, and the bird species protected by the State of Nevada all in
14 violation of 16 U.S.C. § 1536 (a)(2). The administrative record herein reflects that
15 the Defendants have failed to consider the impacts of their proposed major
16 federal act on the treaties entered into by the United States of America, including
17 but not limited to the Treaty of Ruby Valley.

18 The Defendants have acted in an arbitrary and capricious manner in their
19 decision to conduct “Divine Strake” without required public notice and
20 opportunity for public comment, and without completing the Environmental
21 Impact Statement (EIS), all as required by NEPA, and in violation of the trust
22 responsibility to the Western Shoshone people. The decision to conduct “Divine
23 Strake” is a final agency action pursuant to the Administrative Procedure Act, 5
24

25
26 ¹¹ (Environmental Impact Statement) which would evaluate the cumulative effects of
27 more than a single test. The single test misrepresentation made in the Environmental Analysis
28 Report of this project, was corrected in the letters to the State of Nevada for an Air Permit., See
Exhibit 11.

¹² Exhibit 12. Studies by the USGS.

1 U.S.C. § 706(2)(A). The final agency decision of Defendants threatens immediate
2 and irreparable violation of the Treaty rights of the Western Shoshone people,
3 and of irreparable harm to Downwinders.

4 Injunctive relief is appropriate when the plaintiff will suffer “irreparable
5 harm” and when the plaintiff shows “a reasonable probability of success on the
6 merits of its claim.” *Barahona & Gomez v. Reno*, 164 F.3d 1228, 1234 (9th Cir.
7 1999). In this case, injunctive relief is appropriate because Plaintiffs are
8 threatened with clear and present danger of irreparable harm of death, cancer,
9 leukemia, birth defects and other permanent and disabling health problems
10 which are reasonably foreseeable from the air-borne dissemination of radio
11 nuclids which Defendants’ “Divine Strake” portends. The Western Shoshone
12 Plaintiffs face the clear and present danger of irreparable injury by the threatened
13 loss of use of their lands on which the air-borne radio nuclide fallout from
14 Defendants’ planned “mushroom cloud” will ultimately alight. The Plaintiffs have
15 a high probability of success based upon the Defendants’ failure to comply with
16 the requirements of NEPA, and the rights given to the Western Shoshone
17 Plaintiffs in the Treaty of Ruby Valley, and under applicable principles of
18 aboriginal rights under the Constitution and laws of the United States, and under
19 International Law as found in the Decisions of the United Nations and the
20 Organization of American States.

21 The two tests for issuance of a restraining order or preliminary injunction
22 “are not separate, but rather represent the outer reaches of a single continuum.”
23 *Los Angeles Memorial Coliseum v. National Football League*, 634 F.2d 1197,
24 1201 (9th Cir. 1980).

25 At one end of the continuum, the moving party is required to show
26 both a probability of success on the merits and the possibility of
irreparable injury.

27 *Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983).

28 Four of the guiding factors relied upon by the courts to determine whether

1 a preliminary injunction is appropriate are listed as follows in Wright & Miller,
2 Federal Practice and Procedure: Civil, § 2948:

- 3 “(1) The significance of the threat of irreparable harm to plaintiff if the
4 injunction is not granted;
5 (2) The state of the balance between this harm and the injury that granting
6 the injunction would inflict on the defendant;
7 (3) The probability that plaintiff will succeed on the merits; and,
8 (4) The public interest.

9 *Mountain States Telephone & Telegraph Co. v. Dept. of Public Service*
10 *Regulation*, 588 F. Supp. 5,8 (D.C. Montana 1983), also see, *Barahona-Gomez v.*
11 *Reno*, cited *supra*.

12 The irreparable harm to all the Plaintiffs is the loss of their right to life
13 should they succumb to cancer or other serious diseases due to exposure from
14 the air-borne radioactive debris from Defendants’ intended “mushroom cloud,”
15 and/or sterility or irreversible damage at the genetic RNA and DNA level which
16 is passed on in the form of birth defects to future generations. Under the
17 “precautionary principle,” the burden of proof is shifted to the proponent of the
18 potential environmental insult to show that serious or irreparable injury will not
19 be caused to human health or the environment.

20 The irreparable harm to the Western Shoshone Plaintiffs is the loss of the
21 use of their lands, the loss of their spiritual and religious practices at sacred sites,
22 and the spiritual and emotional trauma that results from the Defendants’
23 continued desecration and despoiling of Mother Earth, which the Western
24 Shoshone hold sacred. The Defendants’ failure to consult with the Western
25 Shoshone regarding sacred sites and the presence of sacred ancestral remains at
26 the planned blast site is alone sufficient grounds for the requested Preliminary
27 Injunction.

28 **B.**
WHEN THE COURT WEIGHS THE IRREPARABLE HARM TO THE
PLAINTIFFS, THE HARM TO THE PLAINTIFFS IS SUBSTANTIAL.

The second consideration of the Court, is the weighing of the harm to the
Plaintiffs without the injunction versus the harm to the Defendants if the

1 injunction is granted. As stated in Part A, herein above, all of the Plaintiffs face
2 the harm of death, leukemia, multiple myeloma, lymphomas, and primary cancer
3 of the thyroid, male or female breast, esophagus, stomach, pharynx, small
4 intestine, pancreas, bile ducts, brain, colon, ovary, liver, and lung, and genetic
5 problems, sterility, and birth defects. As reflected by the Affidavit of Dr. Fasy,
6 and as will be shown at the hearing hereon, the inhalation of only one particle of
7 alpha-emitting radio nuclides will cause cancer in the down-wind population.
8 The Western Shoshone Plaintiffs suffer the loss of the right to the use of their
9 ancestral lands, and the loss of the right to preserve for their future generations
10 the right to their sacred sites. The only harm to the Defendants is that they must
11 complete an EIS to determine:

12 (1) the environmental impact of the proposed action;

13 (2) any adverse environmental effects which cannot be avoided should the
14 proposal be implemented;

15 (3) alternatives to the proposed action;

16 (4) the relationship between local short-term uses of man's environment
17 and the maintenance and enhancement of long-term productivity; and

18 (5) any irreversible and irretrievable commitments of resources which
19 would be involved in the proposed action should it be implemented.¹³

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

27
28 ¹³ ***42 U.S.C. §§ 4321-4370(e)***

1 A preliminary injunction/temporary restraining order is “an
2 extraordinary remedy, which should be granted only in limited circumstances.”
3 *Instant Air Freight Co. v. C.F. Freight, Inc.*, 882 F. 2d 797, 800 (3d Cir. 1989).
4 This remedy should only be granted where the merits of the case clearly favor
5 one party over the other. See, *Remlinger v. Nevada*, 896 F. Supp. 1012, 1015
6 (D.Nev. 1995). The *Remlinger* Court explained that:

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

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

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

18 *Cassim v. Bowen*, 824 F. 2d 791, 795 (9th Cir. 1987)

19 This latter formulation represents two points on the sliding scale in which the
20 required degree of irreparable harm increases as the probability of success
21 decreases. See, *Oakland Tribune, Inc. v. Chronicle Publishing Co.*, 762 F.2d
22 1374, 1376 (9th Cir. 1985). Under this test, a plaintiff must demonstrate the
23 existence of a significant threat of irreparable injury.

24 Contamination by radio nuclides from nuclear weapons’ testing that exists
25 in the soils at the Nevada Test Site and will exist at the Nevada Test Site for many
26 years¹⁴ is the most significant threat of irreparable injury that exists. The ability
27 of human beings to comprehend the enormity of radioactive nuclear
28 contamination is stretched to its logical extreme. The Department of Defense
appears to have learned nothing from the lessons of Hiroshima, Nagasaki,
Chernobyl, and the devastating and tragic deaths and health problems caused to

¹⁴ See, Affidavit of Thomas M. Fasy, Exhibit 10.

1 **THE WESTERN SHOSHONE PLAINTIFFS ARE LIKELY**
2 **TO PREVAIL UPON THE MERITS OF THEIR CLAIMS.**

3 The Treaty of Ruby Valley is a valid and binding contract between the
4 United States and the Western Shoshone Nation. The Treaty of Ruby Valley is
5 enforceable by law.

6 Article 5 of the Treaty of Ruby Valley states as follows:
7 It is understood that the boundaries of the country claimed and occupied
8 by said bands are defined and described by them as follows: On the north
9 by Wong-goga-da Mountains and Shoshone River Valley; on the west by
10 Su-non-to-yah Mountains or Smith Creek Mountains; on the south by Wi-
11 co-bah and the Colorado Desert; on the east by Po-ho-no-be Valley or
12 Steptoe Valley and Great Salt Lake Valley.

13 The boundaries described in Article 5 are generally shown in the map
14 attached to the Complaint as Exhibit 2. This is the map approved and adopted
15 by the Western Shoshone National Council as an accurate representation of the
16 lands owned and occupied by the Western Shoshone Nation. Under the Treaty
17 of Ruby Valley, the Western Shoshone Nation granted the United States certain
18 privileges for use and access of the land described in the Treaty.

19 The Western Shoshone Nation continues to have rights to the lands
20 described in Exhibit 1 of the Complaint. The Western Shoshone Nation
21 continues to occupy and use a substantial portion of the Western Shoshone
22 lands. The Treaty of Ruby Valley provides for certain easements in favor of the
23 United States and the people of the United States generally. Those easements
24 include:

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

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

34 **Article 3:** “. . .telegraph and overland stage lines having been
35 established and operated. . . may be continued without hindrance,
36 molestation, or injury. . . And further, it being understood that provision
37 has been made by the government of the United States for the construction

1 of a railway from the plains west to the Pacific ocean, it is stipulated by the
2 said bands that the said railway or its branches may be located,
constructed, and operated, and without molestation. . .

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

8
9 Neither Articles 2, 3, or 4 of the Treaty of Ruby Valley provide for the
10 United States to have the right to conduct "Divine Strake" or any other activity
11 that will render the land toxic for any other use. "Divine Strake" would destroy
12 the reversion implied in favor of the Western Shoshone peoples by the use
13 easement granted to the United States by the Treaty.

14
15 In the late 19th century and throughout the 20th century, mining and
16 agricultural settlements were formed and ranches were established on the
17 Western Shoshone lands and, in keeping with the Treaty provisions, the Western
18 Shoshone people have not waged war against the United States during the use of
19 these lands. The Western Shoshone people continue to occupy and use their
20 land and continue to hold the land in reverence as the place that their future
21 generations will make their home.

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

27 **"The Way it Is, One Water. . . One Air. . . One Mother Earth,"** by
28 Corbin Harney, Spritual Leader of the Western Shoshone Nation, Blue
Dolphin Publishing, 1995.

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

1 The United States of America is the current tenant of the usufructuary
2 rights to the lands of the Western Shoshone for those uses specified in the
3 Treaty. The current tenant, the United States, is required to take reasonable
4 steps to prevent deterioration of the property in anticipation of its transfer upon
5 the reversionary interest of the Tribe. The United States' use of its usufructuary
6 rights by conducting "Divine Strake" or any other blast or surface disturbance
7 which disseminates radioactive debris on or off the Nevada Test Site is a
8 permissive waste of the property which will result in the loss of the property for
9 other use for something over 10,000 years. The appropriate remedy for
10 permissive waste is generally an injunction. *See, White Mountain Apache*
11 *Tribe v. U.S.*, 249 F.3d 1364, 1371 (Fed.Cir. 2001). Reasoning by analogy, the
12 Western Shoshones' interest in the property is an indefeasibly vested future
13 interest and the United States has a present interest in the usufructuary rights
14 only. For this reason the Western Shoshone Nation will prevail as the Treaty
15 preserves the lands for the Western Shoshone people subject only to the right to
16 the uses specified in the Treaty for the benefit of the United States of America
17 and its emigrant settlers.

18 Even if the Court should determine that the Western Shoshone Nation
19 only retains the right to use the lands that were granted to it under the Treaty of
20 Ruby Valley, the United States cannot deprive the Nation of those rights entirely
21 by contaminating the land beyond all use. "Divine Strake" will so pervasively
22 contaminate the lands of the Western Shoshone that the lands will be lost for any
23 use whatsoever.

24 **D.**

25 **THE "DIVINE STRAKE" BLAST AND PROGRAM ARE UNLAWFUL**
26 **VIOLATIONS OF THE NUCLEAR NON-PROLIFERATION TREATY**
AND THE CONGRESSIONAL BAN ON NEW NUCLEAR WEAPONS.

27 The Defendants admit that the planned "Divine Strake" blast is intended
28 to provide information to improve the warfighter's confidence in selecting the

1 smallest proper nuclear yield necessary to destroy underground, hardened
2 targets while minimizing “collateral damage.” This notion of the employment of
3 nuclear weapons in a tactical, pre-emptive fashion is not only novel since the
4 time of Nagasaki and Hiroshima, it is also unlawful under the Nuclear Non-
5 Proliferation Treaty and the Congressional ban on the development of new
6 nuclear weapons.¹⁶

7 **Conclusion**

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

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

26 The Western Shoshone Plaintiffs have shown clear and present danger
27

28 ¹⁶ See Declaration of John Burroughs, Exhibit 14.

1 from “Divine Strake” of the loss of the use and enjoyment of their ancestral
2 lands, in violation of their Treaty and aboriginal rights under the Constitution
3 and laws of the United States, and under International Law as recognized by the
4 Decisions of the United Nations on March 10, 2006, and of the Organization of
5 American States on December 27, 2002. At the very least, there is no doubt that
6 the Western Shoshone Plaintiffs have shown that “Divine Strake” creates the
7 clear and present danger to the loss of the reversionary interest of the Western
8 Shoshone by the dissemination of radioactive debris within and without the
9 Nevada Test Site 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
13 opportunity for comment by the Plaintiffs herein and pending completion of the
14 requisite EIS. This Court should maintain jurisdiction over the Defendants’
15 actions relating to “Divine Strake, in order to assure that proper notice is
16 provided, that the requisite opportunity for public comment is afforded, and that
17 the Defendants’ planned “Large-Scale, Open-Air Explosive Detonation DIVINE
18 STRAKE at the Nevada Test Site” occurs only in conformance with applicable
19 law.

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

22 1. From taking any further steps to detonate any high explosives above
23 ground at the Nevada Test Site, including, without limitation, the Defendants’
24 plan to detonate 700 tons of high explosives at the Nevada Test Site on June 2,
25 2006, reflected by the final agency decision presently code-named “Divine Strake
26 until such time as there is proper notice and opportunity for public comment,
27 and the completion of a proper EIS;

28 2. From resuming atmospheric and/or underground nuclear testing, and

1 chemical and biological or large scale weapons testing at the Nevada Test Site
2 and on any other lands described in the Treaty of Ruby Valley as Western
3 Shoshone Territory;

4 3. From conducting any further “surveys” or alleged sampling of soils
5 likely to become airborne as a result of “Divine Strake” or any other detonation of
6 explosives at the Nevada Test Site without the direct participation and
7 involvement of some independent, qualified scientist who is not operating under
8 the conflict of interest which has to date constrained the Defendants and their
9 contractor, Bechtel of Nevada, from fulfilling their obligations in an objective
10 manner; and

11 4. For such other and further relief by way of restraining order or
12 preliminary injunction as the Court deems just and proper in these premises and
13 upon hearing on this Motion, including the Court maintaining jurisdiction over
14 Defendants’ actions relating to “Divine Strake.”

15 Dated this ^{22d} day of May, 2006.

17 ss//Robert R. Hager
18 ROBERT R. HAGER, ESQ., #1482
19 910 Parr Blvd., #8
20 Reno, NV 89512
21 Tel: 775.329.5800
22 Fax: 775.329.5819
23 email: parrlawoffices@sbcglobal.net
24 Attorney for Plaintiffs
25
26
27
28