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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

WESTERN SHOSHONE NATIONAL
COUNCIL, JOE KENNEDY, JOHN WELLS,
PAULINE ESTEVES, and KEVIN GILLETTE,

Plaintiffs,

Case No:

v.

Motion for Preliminary Injunction

UNITED STATES OF AMERICA,
SAMUEL W. BODMAN, Secretary of
the United States Department of Energy,
and GALE NORTON, Secretary of the
United States Department of the Interior,

Defendants.

COMES NOW, Plaintiffs, WESTERN SHOSHONE NATIONAL COUNCIL, JOE KENNEDY, JOHN WELLS, PAULINE ESTEVES and KEVIN GILLETTE, and respectfully requests that this Court hear their arguments that prove violations of their rights under the Treaty with The Western Shoshone (hereinafter the Treaty of Ruby Valley), 1863 Stat 689, and grant Plaintiffs a preliminary injunction against Defendants under the authority of FRCP 65(a). The Defendants are the United States of America and its agents, Gale Norton, Secretary of the United States Department of the Interior, and Samuel W. Bodman, Secretary of the United States Department of Energy, who have ignored the rights of the Western Shoshone Nation and its

people and now have set a schedule to violate the Treaty of Ruby Valley and desecrate the lands of the Western Shoshone people, all in disregard for the Treaty of Ruby Valley and in violation of the rights of the Western Shoshone Nation and its people. The land now referred to by Defendants as Yucca Mountain is land which is within the boundaries of the Western Shoshone lands covered by the Treaty, and the Western Shoshone people hold the land sacred as a part of their lives and culture.

Unless Defendants are enjoined by order of this Court to stop the development of Yucca Mountain as a nuclear waste repository and from constructing a railroad and other transportation facilities to transport nuclear waste to Yucca Mountain, the Defendants will defile the earth, violate Western Shoshone spiritual principals, and violate the rights of the Western Shoshone Nation and its people under the Treaty of Ruby Valley, all as set forth in the Affidavit of Raymond Yowell, Chief of the Western Shoshone Nation, filed concurrently herewith. Furthermore, the Western Shoshone people and all people will be deprived of the use of Yucca Mountain for the purposes agreed to by the parties to said Treaty. This motion is made on the additional ground that Plaintiffs have no adequate remedy at law.

Furthermore, Plaintiffs request that this Court make a declaration that the Treaty of Ruby Valley prohibits Defendants from acting to authorize, permit or construct any nuclear waste storage facility and any railroad or road designed to transport nuclear waste to any such facility, on any lands covered by the Treaty.

DATED this ____ day of March, 2005.

HAGER & HEARNE

By: _____
ROBERT R. HAGER, ESQ.
Attorneys for Plaintiffs

POINTS AND AUTHORITIES

I. CHRONOLOGY OF FACTS

Before the memory of the elders presently living and in the stories handed down from

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

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

Several small bands fled to the Great Basin with separate White Knife warriors as their protection. These small bands joined their relatives and mainly hid in remote areas like Ruby Valley, Crescent Valley, Winnemucca, Battle Mountain, and Elko, Nevada, and Death Valley where very little white settlement had occurred and where Shoshone people had lived since before recorded time. After the last Shoshone War in Battle Mountain in 1878, many of the Shoshone settled in hidden encampments and traveled by stealth, as a result they were referred to as homeless Shoshone. They were, however, home in the lands where their people, the Western Shoshone Nation, had been for centuries.

In 1863 the Western Shoshone were scattered over the lands of what later became referred to as the State of Nevada in settlements and ranches of their own as well as wandering bands that moved from encampment to encampment. The railroad and certain mining interests approached the United States government to give them the authority to begin operations in the Great Basin and to allow the railroad to be built through what was obviously Shoshone territory. The Western Shoshone Nation, the White Knife warriors and the other scattered Shoshone were enticed to enter into a treaty, now referred to as the Treaty of peace and friendship of Ruby

Valley, known by the Shoshone people as *Bah-Gah-Zoo*. “Treaty with the Western Shoshone, 1863”; 18 Stat. 689, Ratified June 26, 1866, Proclaimed October 21, 1869 (The “Treaty of Ruby Valley”)(Exhibit 1). This Treaty allowed the United States of America to have certain usufructuary rights in the lands of the Western Shoshone. The Treaty allowed the railroads to build across lands recognized as belonging to the Shoshone and allowed mining, ranching, and developments of settlements on the lands described in the Treaty. These activities were the only uses that the Western Shoshone agreed to allow under the Treaty. The Western Shoshone have never intended to nor actually participated in any act that would diminish their rights under the Treaty. The Western Shoshone have never agreed to modify the restrictions on use agreed to by the Treaty, nor has the right of the Western Shoshone under the Treaty to restrict use ever been waived.

The Defendants Norton and Bodman have intentionally designated Yucca Mountain as the repository for high level nuclear waste in the United States and for some European countries. (Press release of the DOE, February 14, 2005) The Western Shoshone have never violated the Treaty of Ruby Valley and continue to assert their rights under the Treaty. (Crum, “**The Road On Which We Came, A History of the Western Shoshone**”) The Defendants have failed to seek the permission and consent of the Western Shoshone people to use the Yucca Mountain in a manner not contemplated nor allowed under the Treaty of Ruby Valley.

The Defendants have recently determined a schedule for developing the nuclear waste repository at Yucca Mountain and have stated, directly or through agents, that they will file their license and begin permitting and approving said nuclear waste repository and the construction of a railroad through the so called “Caliente Corridor” by the end of 2005. This is the final step by the Defendants to develop the nuclear repository and no other entity has stopped the development as the Plaintiffs have anticipated would occur. Accordingly, Plaintiffs are compelled by the duty they have to protect their sacred lands from this threatened desecration and abomination, on behalf of themselves and all other Western Shoshone people, to bring this action and seek this relief before Defendants make good on their promise to immediately begin

licensing the Yucca Mountain nuclear waste dump project.

The use of Yucca Mountain as a nuclear waste repository will make it unapproachable and unusable by human beings for the uses agreed to under the Treaty, and the land will be defiled and lost to the future generations of the Western Shoshone people for so long as they endure because of the contamination and the prohibitions of the government to keep it closed. Yucca Mountain will no longer be known as the land which the United States of America caused to be used and shared with the Western Shoshone as promised under the Treaty, but instead as the final resting place of the most toxic and deadly substances known to mankind brought from far away lands for the sole purpose of being dumped there.

No agent or representative of the Defendant United States of America ever disclosed in 1863 to the Western Shoshone Nation or its representatives who signed the Treaty that the intention of the United States was to accumulate toxic, radioactive waste from around the country and world and deposit the same on any lands covered by the Treaty. The Western Shoshone Nation would not and did not, and does not now, consent to such inconceivable degradation, desecration and defilement of lands which are covered by the Treaty. The Western Shoshone Nation has been singled out for this treatment by Defendants because the Nation is not rich or powerful, and the Plaintiffs look to this Court and pray for the relief requested, so that the Western Shoshone people can fulfill their promise and the duty they owe to future generations to protect the earth by preventing Defendants' threatened project.

II.
A PRELIMINARY INJUNCTION
IS APPROPRIATE.

A. THE PETITIONERS WILL SUFFER IRREPARABLE HARM IF THE INJUNCTION IS NOT GRANTED

The Defendants have acted in their designation of Yucca Mountain as a nuclear waste repository and have acted and threaten to further act in a manner that will violate the treaty rights of the Western Shoshone people. Injunctive relief is appropriate when the plaintiff will suffer

“irreparable harm” and when the plaintiff shows “a reasonable probability of success on the merits of its claim.” *Barahona & Gomez v. Reno*, 164 F.3d 1228, 1234 (9th Cir. 1999). In this case, injunctive relief is appropriate because Plaintiffs will suffer irreparable harm by losing the use of their lands at Yucca Mountain. Further injunctive relief is appropriate because intend to construct roads and a railroad to transport the radioactive waste to Yucca Mountain. The Plaintiffs have a high probability of success based upon the rights given to them in the Treaty of Ruby Valley.

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

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

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

Four of the guiding factors relied upon by the courts to determine whether a preliminary injunction is appropriate are listed as follows in Wright & Miller, Federal Practice and Procedure: Civil, § 2948:

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

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

The irreparable harm to the Nation is the loss of the use of its lands and the loss of the part of their lands referred to as Yucca Mountain and Caliente Corridor. The members suffer the loss of the use of their lands so far into the future, tens of thousands of years that it is the same as forever.

B.

**WHEN THE COURT WEIGHS THE IRREPARABLE HARM TO THE COLONY,
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 injunction is granted. As stated in Part A, hereinbefore, the Nation and its people suffered the loss of the right to the use of their native lands and lose the right to preserve for their future generations the right to their sacred sites. The only harm to the Defendants is that they must find another site or another alternative to geological storage of nuclear waste.

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

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

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

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

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

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

Contamination by nuclear waste is the most significant threat of irreparable injury that

exists. The ability of human beings to comprehend the enormity of the nuclear contamination is stretched to its logical extreme. The Department of Energy forecasts that it will begin closure within three hundred years, but it also forecasts that the site would not be accessible for thousands of years. The amount of waste now projected for storage from the United States alone exceeds 100,000 metric tons according to the Department of Energy. As the Court stated in *Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251 (D.C. Dist. 2004), “nuclear waste has the capacity to outlast human civilization as we know it and to devastate human health and the environment.” From the D.C. Court of Appeals case, we know that 10,000 years is not long enough to consider the implications of the burial of nuclear waste at Yucca Mountain.

Irreparable harm could not be more “substantial” than to measure it in terms of more than 10,000 years. The Western Shoshone have held claim to the land longer than recorded time, longer than any other group of human beings that we know and, yet, would be deprived more into the future of their land than the time for which they have claimed it, given the toxicity of nuclear waste proposed to be buried there.

C.
THE WESTERN SHOSHONE NATION IS
LIKELY TO PREVAIL UPON THE MERITS OF ITS TREATY CLAIM.

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

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

It is understood that the boundaries of the country claimed and occupied by said bands are defined and described by them as follows: On the north by Wong-goga-da Mountains and Shoshone River 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.

The boundaries described in Article 5 are generally shown in the map attached hereto as Exhibit 1. This is the map approved and adopted by the Western Shoshone National Council as an accurate representation of the lands owned and occupied by the Western Shoshone Nation. Under the Treaty of Ruby Valley, the Western Shoshone Nation granted the United States

certain privileges for use and access of the land described in the Treaty.

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

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

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

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

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

Neither Articles 2, 3, or 4 of the Treaty of Ruby Valley provide for the United States to have the right to develop a nuclear waste repository that will render the land toxic for any other use. This would destroy the reversion implied in favor of the Western Shoshone people by the

use easement granted to the United States by the Treaty.

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

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

“The Way it Is, One Water. . . One Air. . . One Mother Earth,” by Corbin Harney, Spiritual 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).

The United States of America is the current tenant of the usufructuary rights to the lands of the Western Shoshone for those uses specified in the Treaty. The current tenant, the United States, is required to take reasonable steps to prevent deterioration of the property in anticipation of its transfer upon the reversionary interest of the Nation. The United States' use of its usufructuary rights to develop a nuclear waste dump is a permissive waste of the property which will result in the loss of the property for other use for something over 10,000 years. The appropriate remedy for permissive waste is generally an injunction. See, *White Mountain Apache Tribe v. U.S.*, 249 F.3d 1364, 1371 (Fed.Cir. 2001). Reasoning by analogy, the Western Shoshones' interest in the property is an indefeasibly vested future interest and the United States has a present interest in the usufructuary rights only. For this reason, the Western Shoshone Nation will prevail as the Treaty preserves the lands for the Western Shoshone people subject

only to the right to the uses specified in the Treaty for the benefit of the United States of America and its emigrant settlers.

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

WHEREFORE THE ABOVE-STATED REASONS, the Plaintiffs, respectfully request that the Court enjoin the Defendants from taking any further steps to license or develop the Yucca Mountain as a nuclear waste repository dump on the lands of the Western Shoshone Nation in violation of the Treaty of Ruby Valley.

Dated this ____ day of March, 2005.

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