

# HOW A NINETEENTH CENTURY INDIAN TREATY STOPPED A TWENTY-FIRST CENTURY MEGABOMB

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## INTRODUCTION

The U.S. Defense Threat Reduction Agency (DTRA) created controversy beginning in 2006 when it announced its intention to detonate Divine Strake,<sup>1</sup> a 700-ton fuel oil and fertilizer bomb at the Nevada Test Site (NTS). The DTRA maintained the purpose of the bomb was to “advance conventional weapons,” even though government documents had described the test as a simulation of a low-yield nuclear explosion.<sup>2</sup> Opponents contended the explosion would kick up radioactive dust remaining at the NTS resulting from more than 900 above and below-ground nuclear tests conducted there from 1951 to 1992.<sup>3</sup>

Hiroshima, Japan suffered the first attack of nuclear weapons in 1945.<sup>4</sup> Whereas 13 kilotons of fallout fell on Hiroshima, 620 kilotons rained on Nevada, Arizona, and Utah during the forty-year period of NTS testing.<sup>5</sup> In addition, radioactive material vented from underground nuclear tests at the American sites 433 times.<sup>6</sup> The Atomic Energy Commission described “Downwinders” (those subject to nuclear fallout) as a “low-use segment of the population,” thereby suggesting such people were expendable.<sup>7</sup> However, in

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<sup>1</sup> Ann Scott Tyson, *Pentagon to Test a Huge Conventional Bomb*, WASH. POST, Mar. 31, 2006, at A9.

<sup>2</sup> Ann Scott Tyson, *Pentagon Clarifies Nevada Intent*, WASH. POST, Apr. 7, 2006, at A12.

<sup>3</sup> Ken Ritter, *Experts: Divine Strake “Mushroom Cloud” Could have Sickened Many*, LAS VEGAS SUN, June 27, 2007, available at <http://www.lasvegassun.com/sunbin/stories/nevada/2007/jun/27/062710103.html>; Posting by BobbieoAZ to NATIVE UNITY DIGEST, <http://nativeunity.blogspot.com/2007/06/experts-divine-strake-mushroom-cloud.html> (June 29, 2007, 12:41); Nev. Div. of Env'tl. Protection, Bureau of Fed. Facilities, <http://ndep.nv.gov/boff/maps.htm> (last visited June 15, 2009).

<sup>4</sup> Jessica Barkas Threet, *Testing the Bomb: Disparate Impacts on Indigenous Peoples in the American West, the Marshall Islands, and in Kazakhstan*, 13 U. BALT. J. ENVTL. L. 29, 29 (2005).

<sup>5</sup> *Id.* at 36.

<sup>6</sup> C.R. SCHOENGOLD ET AL., *RADIOLOGICAL EFFLUENTS RELEASED FROM U.S. CONTINENTAL TESTS 1961 THROUGH 1992*, at ii (1996), available at [http://www.nv.doe.gov/library/publications/historical/DOENV\\_317.pdf](http://www.nv.doe.gov/library/publications/historical/DOENV_317.pdf).

<sup>7</sup> Kristen Potter Farnham, *Grass Roots Activism: Terry Tempest Williams Offers a Model for Change*, 15 B.C. THIRD WORLD L.J. 443, 444 n.6 (1995).

the Radiation Exposure Compensation Act of 1990 (RECA),<sup>8</sup> Congress admitted to and apologized for nuclear fallout that harmed United States citizens and nuclear exposure that harmed workers.<sup>9</sup> To date, the government has made payments of almost \$1.3 billion dollars to more than 20,000 claimants.<sup>10</sup> These include Downwinders, onsite participants, uranium miners and millers, and ore transporters.<sup>11</sup> Additionally, more than 600 claims are pending.<sup>12</sup> The government has denied almost 8,000 claims.<sup>13</sup>

Some believe the United States government engages in “disinformation campaigns” to hide the true dangers of nuclear exposure.<sup>14</sup> The Utah Downwinders maintain a coalition to keep citizens apprised of potentially harmful government activities.<sup>15</sup> Cancer-stricken Downwinders and their families question the political powers under which testing has occurred.<sup>16</sup> Not just Downwinders,<sup>17</sup> but Native American Western Shoshones (Shoshones) who lived near the NTS claimed potential injury by Divine Strake. The Shoshone argued that the development and testing of weapons of mass destruction at the site destroyed their way of life to a degree that was tantamount to genocide.<sup>18</sup> After more than 120 above-ground tests were conducted there,<sup>19</sup> the Shoshone began to report increased rates of cancer,<sup>20</sup> even though epidemiological studies linking Shoshone cancer rates to an exposure to radiation at the NTS are entirely lacking.<sup>21</sup>

Invoking RECA, a group of residents living downwind of the site joined the Shoshones as parties in a lawsuit, *Winnemucca Indian Colony v. United States*.<sup>22</sup> The Shoshones brought a claim, *inter alia*, under the treaty between the United States of America and the Western Bands of Shoshonee Indians (Treaty) made at Ruby Valley in 1863.<sup>23</sup> Notably, invocation of the Treaty

<sup>8</sup> Radiation Exposure Compensation Act, Pub. L. No. 101-426, 104 Stat. 920 (1990) (codified as a note at 42 U.S.C. § 2210 (2006)).

<sup>9</sup> *Id.* § 2(c), 104 Stat. at 920.

<sup>10</sup> Civil Div., Dep’t of Justice, Radiation Exposure Compensation System Claims to Date Summary of Claims Received by 2/12/2009, [http://www.usdoj.gov/civil/omp/omi/Tre\\_Sys\\_ClaimsToDateSum.pdf](http://www.usdoj.gov/civil/omp/omi/Tre_Sys_ClaimsToDateSum.pdf) (last visited Feb. 16, 2009).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> Threet, *supra* note 4, at 31.

<sup>15</sup> See generally Downwinders, <http://www.downwinders.org/> (last visited June 15, 2009).

<sup>16</sup> Farnham, *supra* note 7, at 444.

<sup>17</sup> RECA applies to those “exposed individuals who lived in the downwind affected area in Nevada, Utah and Arizona.” Radiation Exposure Compensation Act, Pub. L. No. 101-426, § 2(a)(1), 104 Stat. 920, 920 (1990) (codified as a note at 42 U.S.C. § 2210 (2006)).

<sup>18</sup> Letter from Ian Zabarte and Joe Kennedy, W. Shoshone Nat’ls, to the U.S. Dep’t of Energy (Feb. 7, 2007), available at <http://www.shundahai.org/dswesternshoshoneea.html>.

<sup>19</sup> VALERIE L. KULETZ, *THE TAINTED DESERT: ENVIRONMENTAL RUIN IN THE AMERICAN WEST* 5 (1998).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 4.

<sup>22</sup> Second Amended Motion for Temporary Restraining Order and for Preliminary Injunction at 1-2, 13-14, *Winnemucca Indian Colony v. United States*, No. 2:06cv-00497-LDG-PAL (D. Nev. May 22, 2006).

<sup>23</sup> *Id.* at 2 (citing Treaty with the Western Bands of Shoshonee Indians, U.S.-W. Bands of Shoshonee Indians, Oct. 1, 1863, 18 Stat. 689, 689 [hereinafter Treaty of Ruby Valley]).

allowed the tribe to maintain that the United States did not have the right to test weapons at the site.<sup>24</sup> On February 22, 2007, nine months after the filing of *Winnemucca*, the DTRA announced cancellation of Divine Strake.<sup>25</sup>

The lawsuit's effectiveness in stopping weapons testing at the site may have been temporary. In the announcement canceling Divine Strake, DTRA Director James A. Tegnalia, Ph.D., asserted the department planned to conduct similar experiments "at a much smaller scale,"<sup>26</sup> thus invoking the possibility of further testing at the NTS.

Indians and non-Indians face grave danger from nuclear fallout. RECA recognizes injuries due to exposure from nuclear testing and provides for "compassionate payments" to the victims.<sup>27</sup> In the Act, Congress admitted, *inter alia*, that fallout during above-ground testing at the NTS exposed residents in Nevada, Utah, and Arizona to radiation and gave them cancer.<sup>28</sup> Congress apologized to the individuals and established a procedure to make partial restitution to the victims.<sup>29</sup>

The types of cancers the government cited in its apology included certain leukemia, multiple myeloma, certain lymphomas, and primary cancer of the thyroid, female breast, esophagus, stomach, pharynx, small intestine, pancreas, bile ducts, gall bladder, and liver.<sup>30</sup> People diagnosed with any of these cancers, provided some limitations, might have a claim under the Act.<sup>31</sup>

The Act defined victims as those who lived in specified "affected areas."<sup>32</sup> In Utah, these areas included the counties of Washington, Iron, Kane, Garfield, Sevier, Beaver, Millard, and Piute.<sup>33</sup> In Arizona, the Act compensated individuals living north of the Grand Canyon and west of the Colorado River.<sup>34</sup>

In Nevada, the affected counties included White Pine, Nye, Lander, Lincoln, Eureka, and a portion of Clark County consisting of certain townships.<sup>35</sup> They did not include Las Vegas, the metropolitan area currently home to

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<sup>24</sup> Second Amended Motion for Temporary Restraining Order and for Preliminary Injunction, *supra* note 22, at 2.

<sup>25</sup> News Release, Def. Threat Reduction Agency, Cancellation of Proposed Divine Strake Experiment (Feb. 22, 2007), [http://www.dtra.mil/newsservices/press\\_releases/display.cfm?pr=divine\\_strake\\_cancelled](http://www.dtra.mil/newsservices/press_releases/display.cfm?pr=divine_strake_cancelled).

<sup>26</sup> *Id.*

<sup>27</sup> Radiation Exposure Compensation Act, 101 Pub. L. 101-426, § 2(b), 104 Stat. 920, 920 (1990) (codified as a note at 42 U.S.C. § 2210 (2006)).

<sup>28</sup> *Id.* § 2(a)(1), 104 Stat. at 920.

<sup>29</sup> *Id.* § 2(c), 104 Stat. at 920.

<sup>30</sup> Second Amended Motion for Temporary Restraining Order and for Preliminary Injunction, *supra* note 22, at 18 (citing Radiation Exposure Compensation Act § 4(b)(2), 104 Stat. at 920).

<sup>31</sup> Radiation Exposure Compensation Act § 4(a)(2), 104 Stat. at 920.

<sup>32</sup> *Id.* § 2(a)(1), 104 Stat. at 920.

<sup>33</sup> *Id.* § 4(b)(1)(A), 104 Stat. at 920.

<sup>34</sup> *Id.* § 4(b)(1)(C), 104 Stat. at 920.

<sup>35</sup> *Id.* § 4(b)(1)(B), 104 Stat. at 920. These townships did not include Lake Mead, a man-made reservoir with a water capacity of 28.6 million-acre feet for communities in Nevada, California, and Arizona. Hoover Dam and Lake Mead, <http://www.a2zlasvegas.com/other-side/sights/hoover.html> (last visited June 15, 2009).

1,777,539 people.<sup>36</sup> Thus, not one of the multitudes of people living in Las Vegas can stop further Divine-Strake explosions at the NTS. Nevertheless, a small band of Shoshone Indians, who have lived in the area since ancestral times,<sup>37</sup> might.

The Shoshone can prevail if the court determines the Treaty is still valid. In recent decisions, courts have sought to minimize the Treaty's validity to secure United States interests in the land.<sup>38</sup> Therefore, litigants need to convince courts to narrowly construe prior interpretations of the Treaty's validity or to re-examine the Treaty under current circumstances.

This Note begins by offering a reinterpretation and reexamination of the Treaty between the United States of America and the Western Bands of Shoshonee Indians made at Ruby Valley in 1863.<sup>39</sup> Section II examines the historical background and cases interpreting the Treaty. Section III discusses the case, *Winnemucca Indian Colony v. United States*,<sup>40</sup> and subsequent condemnation by world courts of United States treatment of Shoshone tribe members. Section IV offers an analysis of how United States courts might reinterpret the Treaty. Reinterpretation of the Treaty is important because the Shoshone are not likely to find remedy under the federal trust doctrine, under which courts must construe treaties to favor Indians.<sup>41</sup> Furthermore, treaty rights support potential claims under the American Religious Freedoms Act of 1978.<sup>42</sup> Treaty reinterpretation also bolsters findings for the world courts.<sup>43</sup> Such interpretations might persuade state and federal courts to stop further testing at the NTS. Section V concludes by urging environmentalists and Shoshone Indians to continue joining forces and continue using the Treaty as a powerful legal roadblock to stop future bombing at the NTS.

## I. HISTORICAL DEVELOPMENT

The Treaty gave the United States limited access to Shoshone land and granted land use to the United States only for specific purposes.<sup>44</sup> As such, the Treaty granted restricted easement rights.<sup>45</sup> A plain reading of the Treaty indi-

<sup>36</sup> Press Release, U.S. Census Bureau, 50 Fastest-Growing Metro Areas Concentrated in West and South tbl.3 (Apr. 5, 2007), available at <http://www.census.gov/Press-Release/www/releases/archives/cb07-51tbl3.pdf>.

<sup>37</sup> See *infra* Part III.

<sup>38</sup> See *infra* Part I.B.

<sup>39</sup> Treaty of Ruby Valley, *supra* note 23, at 689.

<sup>40</sup> Order at 2, *Winnemucca Indian Colony v. United States*, No. 2:06-cv-00497-LDG-PAL (D. Nev. Feb. 22, 2008).

<sup>41</sup> *Tulee v. Washington*, 315 U.S. 681, 684-85 (1942).

<sup>42</sup> American Indian Religious Freedom Act, Pub. L. No. 95-341, 92 Stat. 469 (1978) (codified at 42 U.S.C. § 1996 (2006)).

<sup>43</sup> Deborah Schaaf & Julie Fishel, *Mary and Carrie Dann v. United States at the Inter-American Commission on Human Rights: Victory for Indian Land Rights and the Environment*, 16 TUL. ENVTL. L.J. 175, 185 n.50 (2002).

<sup>44</sup> Treaty of Ruby Valley, *supra* note 23, at 869; Schaaf & Fishel, *supra* note 43, at 178.

<sup>45</sup> Treaty of Ruby Valley, *supra* note 23, at 869; Second Amended Motion for Temporary Restraining Order and for Preliminary Injunction, *supra* note 22, at 21.

cates the United States may not conduct weapons testing on the land.<sup>46</sup> Because of the enormous stake the government has at the NTS, courts over the years have sought to abrogate Indian rights under the Treaty.

A. *The Treaty of Ruby Valley of 1863: Easement to the United States*

The Western Shoshone have occupied their land “[s]ince time immemorial.”<sup>47</sup> Congress recognizes several bands of Shoshone under the Indian Reorganization Act.<sup>48</sup> Article I of the Constitution gives the federal government authority to create treaties with Indian nations.<sup>49</sup> By 1861, violent conflicts arose between the Shoshone and white settlers.<sup>50</sup> To establish peace, Nevada Territorial Governor James Nye sought to execute a treaty with tribal leader Tu-tu-wa.<sup>51</sup> The latter did not surrender any land, but instead agreed the government could use their land and its resources.<sup>52</sup> The United States Senate did not ratify the treaty, but the Civil War came to require additional resources.<sup>53</sup> In 1862, the United States government established a military fort on Shoshone land in Ruby Valley.<sup>54</sup> Once the military arrived, Colonel Patrick E. Connor instructed his troops to “destroy every male Indian whom you may encounter . . . .”<sup>55</sup> At the same time, while seeking to provide access to California gold, the United States government enacted the Pacific Railroad Act<sup>56</sup> to construct a railroad through the same Shoshone land.<sup>57</sup> Seeking again to avoid conflict with Indians, the United States entered into a series of five treaties known as the Doty Treaties,<sup>58</sup> including the Treaty of Ruby Valley.<sup>59</sup> The Treaty gave the United States usufructuary rights in the land.<sup>60</sup> In this regard, the Shoshone attitude toward land possession had not changed since the unratified treaty with Tu-tu-wa. In the Treaty of Ruby Valley, the Indians only permitted the government to conduct specified activities on their land. These were easements giving “routes of travel . . . military posts . . . telegraph and overland stage lines . . . construction of a railway . . . [and] that the Shoshone country may be explored and prospected for gold and silver, or other minerals . . . .”<sup>61</sup> According to the

<sup>46</sup> Second Amended Motion for Temporary Restraining Order and for Preliminary Injunction, *supra* note 22, at 22.

<sup>47</sup> *W. Shoshone Nat'l Council v. United States*, 73 Fed. Cl. 59, 61 (2006).

<sup>48</sup> *Id.* (citing 25 U.S.C. § 461 (1934)).

<sup>49</sup> *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 172 n.7 (1973) (citing U.S. CONST. art. 1, § 8, cl. 3, art. 2, § 2, cl. 2).

<sup>50</sup> STEVEN J. CRUM, *THE ROAD ON WHICH WE CAME: A HISTORY OF THE WESTERN SHOSHONE* 24 (1994).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 23.

<sup>55</sup> *Id.*

<sup>56</sup> Act of July 1, 1862, ch. 120, 12 Stat. 489.

<sup>57</sup> Second Amended Motion for Temporary Restraining Order and for Preliminary Injunction, *supra* note 22, at 5. *See also* CRUM, *supra* note 50, at 24.

<sup>58</sup> *W. Shoshone Nat'l Council v. United States*, 73 Fed. Cl. 59, 61 (2006).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> Treaty of Ruby Valley, *supra* note 23, at 869-90.

terms of the Treaty, the Shoshone ceded no land.<sup>62</sup> Today, the NTS sits on Shoshone land controlled by the terms of the Treaty.<sup>63</sup>

The Indian Trade and Intercourse Act of July 22, 1834<sup>64</sup> further strengthens the United States government's obligations under the Treaty to protect the Indian tribes in dealings involving their land.<sup>65</sup> Today the United States has the right to use almost ninety percent of Western Shoshone lands.<sup>66</sup> The land, comprising 864,000 acres (1350 square miles) in Nye County, Nevada,<sup>67</sup> has become the largest area of contiguous "public" land in the continental United States that is not privately owned.<sup>68</sup>

*B. 1945: A "Casual" and Therefore Meaningless Acknowledgement of Indian Title*

Judicial efforts to limit Indian rights under the Treaty of Ruby Valley began with a holding against the Shoshone in 1945. Shortly after the parties signed the Treaty in 1863, the United States government opened Shoshone land to public settlement.<sup>69</sup> By 1945, such settlements occurred on fifteen million acres of Shoshone land.<sup>70</sup> In *Northwestern Bands of Shoshone Indians v. United States*, the tribe brought suit to recover damages for the taking of its land.<sup>71</sup> The Shoshone brought their claim under the treaty they signed at Box Elder, Utah Territory on July 30, 1863.<sup>72</sup>

Although the Shoshone brought their claim under this specific treaty, the Court noted five treaties made with the Shoshone in a similar time period.<sup>73</sup> One of these was the Treaty of Ruby Valley,<sup>74</sup> though the Treaty was not the subject of the claim. The Court then noted all the Shoshone treaties were "similar in form."<sup>75</sup> Regarding the treaties negotiated for Shoshone land, the Court said,

Nowhere in any of the series of treaties is there a specific acknowledgment of Indian title or right of occupancy. It seems to us a reasonable inference that had either the Indians or the United States understood that the treaties recognized the Indian title to these domains, such purpose would have been clearly and definitely expressed by

<sup>62</sup> Julie Ann Fishel, *United States Called to Task on Indigenous Rights: The Western Shoshone Struggle and Success at the International Level*, 31 AM. INDIAN L. REV. 619, 623 (2007).

<sup>63</sup> *Id.* at 633. Another Indian tribe, the Southern Paiute, also claims the land. KULETZ, *supra* note 19, at 150.

<sup>64</sup> 25 U.S.C. § 177 (2006).

<sup>65</sup> *Fort Sill Apache Tribe v. United States*, 477 F.2d 1360, 1366 (Ct. Cl. 1973).

<sup>66</sup> Fishel, *supra* note 62, at 623.

<sup>67</sup> U.S. Dep't of Energy, Environmental Management, Nevada Test Site, [http://www.em.doe.gov/Publications/fy1995\\_5-04nts.aspx](http://www.em.doe.gov/Publications/fy1995_5-04nts.aspx) (last visited June 15, 2009).

<sup>68</sup> Fishel, *supra* note 62, at 623.

<sup>69</sup> *Nw. Bands of Shoshone Indians v. United States*, 324 U.S. 335, 346 (1945).

<sup>70</sup> *Id.* at 336.

<sup>71</sup> *Id.*

<sup>72</sup> Treaty with the Shoshonee Indians, U.S.-Nw. Bands of Shoshonee Indians, July 30, 1863, 13 Stat. 663, 663 [hereinafter Box Elder Treaty].

<sup>73</sup> *Nw. Bands of Shoshone Indians*, 324 U.S. at 341-42.

<sup>74</sup> *W. Shoshone Nat'l Council v. United States*, 73 Fed. Cl. 59, 61 (2006).

<sup>75</sup> *Nw. Bands of Shoshone Indians*, 324 U.S. at 342-43.

instruction, by treaty text or by the reports of the treaty commissioners, to their superiors or in the transmission of the treaties to the Senate for ratification.<sup>76</sup>

The Shoshone argued that the Treaty's grant of permission by the Indians for United States travel or mining and for the maintenance of communication and transportation facilities implied United States recognition of Indian title.<sup>77</sup> The Court, however, saw nothing inconsistent with non-recognition of the Indian title and the provisions permitting structures, travelers, or mineral exploiters on Shoshone territory.<sup>78</sup>

The Court then asserted as "unimportant" its earlier acknowledgements that Shoshone treaties recognized Indian title because those cases did not involve payment and acknowledged title only casually.<sup>79</sup>

### C. *The Dann Case: An Abrogation of Rights*

In 1985, the Supreme Court case *United States v. Dann*<sup>80</sup> further eroded Indian land rights. Specifically, the Court played a role in the government's efforts to stop Shoshone sisters Mary and Carrie Dann from grazing livestock on Shoshone lands to which they claimed a right.<sup>81</sup> The Court's question, seemingly narrow in the then eleven-year battle between the Danns and the federal government,<sup>82</sup> was whether deposit of funds into a Treasury account constituted "payment" under § 22(a) of the Indian Claims Commission Act.<sup>83</sup> The question was important because in the Court's eyes, payment meant relinquishment of title to the land.<sup>84</sup>

In 1946, Congress passed the Indian Claims Commission Act (ICCA), with the purported purpose of providing a means for Indian tribes via the Indian Claims Commission (ICC) to bring claims against the United States for the taking of their land and other related actions.<sup>85</sup> Conveniently for the United States, payment would allow extinguishment of Indian aboriginal rights to land, thus following the suggestion in *Johnson v. M'Intosh*<sup>86</sup> that the white sovereign had the power to extinguish Indian occupancy rights by "purchase or by conquest."<sup>87</sup> Although title abrogation may not have been Congress' intent, over the years it had passed broad statutes with no awareness of the impact on treaty

<sup>76</sup> *Id.* at 348.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 349.

<sup>79</sup> *Id.* at 350 n.8 (citing *United States v. Shoshone Tribe*, 304 U.S. 111, 113 (1938); *Shoshone Tribe v. United States*, 299 U.S. 476, 485 (1937); *United States v. Bd. of Comm'rs of Fremont County, Wyo.*, 145 F.2d 329, 331 (10th Cir. 1945); *Shoshone Tribe of Indians v. United States*, 85 Ct. Cl. 331, 335 (1937)).

<sup>80</sup> *United States v. Dann*, 470 U.S. 39 (1985).

<sup>81</sup> *Id.* at 43.

<sup>82</sup> The government first brought its case in 1974. *Id.* at 43.

<sup>83</sup> *Id.* at 40-41 (citing *Indians Claims Commission Act*, 60 Stat. 1055, 25 U.S.C. § 70u(a) (1976)) (omitted after the dissolution of the ICC).

<sup>84</sup> *Id.* at 44.

<sup>85</sup> *W. Shoshone Nat'l Council v. United States*, 73 Fed. Cl. 59, 61 (2006).

<sup>86</sup> *Johnson v. M'Intosh*, 21 U.S. 543 (1823).

<sup>87</sup> *Id.* at 545.

rights, allowing for “quiet” abrogation of title.<sup>88</sup> Indeed, in its interlocutory ruling against the Shoshone, the ICC held that aboriginal land rights had been lost to “gradual encroachment by whites. . . .”<sup>89</sup> The ICC then ordered the United States to pay the Shoshone \$26 million for their land.<sup>90</sup> The United States tendered payment by depositing the funds into a United States Treasury account.<sup>91</sup>

The Supreme Court held that the appropriation of funds into a Treasury account constituted “payment” under § 22(a) of the ICCA.<sup>92</sup> The Court did not care whether the Indians actually received the funds, noting, “[f]unds transferred from a debtor to an agent or trustee of the creditor constitute payment, and it is of no consequence that the creditor refuses to accept the funds from the agent or the agent misappropriates the funds.”<sup>93</sup> The Court agreed with the government that payment had been made because the certification to the General Accounting Office automatically appropriated the amount of the award and deposited it on behalf of the tribe into a trust account with the Treasury.<sup>94</sup> The Court made its determination without commenting on the government’s argument of white encroachment. The Justices made no mention of treaty construction because they were answering the narrow question of whether the United States made the payments and not whether the payments abrogated either aboriginal or legal rights under the Treaty of Ruby Valley.

All was not lost for the Danns, however. Upon final remand, the appeals court ultimately held that although the Danns had lost their tribal aboriginal title as a result of the ICC ruling, they held individual aboriginal rights, restricted to the number and type of animals their lineal ancestors grazed.<sup>95</sup> The court explained the difference between tribal and individual rights:

It is true that this policy [of respecting the Indian right of occupancy] has had in view the original nomadic tribal occupancy, but it is likewise true that in its essential spirit it applies to individual Indian occupancy as well; and the reasons for maintaining it in the latter case would seem to be no less cogent, since such occupancy being of a fixed character lends support to another well understood policy, namely, that of inducing the Indian to forsake his wandering habits and adopt those of civilized life. That such individual occupancy is entitled to protection finds strong support in various rulings of the Interior Department, to which in land matters this Court has always given much weight.<sup>96</sup>

The United States Supreme Court denied certiorari to the government.<sup>97</sup>

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<sup>88</sup> Robert Laurence, *The Bald Eagle, the Florida Panther and the Nation’s Word: An Essay on the “Quiet” Abrogation of Indian Treaties and the Proper Reading of United States v. Dion*, 4 J. LAND USE & ENVTL. L. 1, 4 (1988).

<sup>89</sup> *Shoshone Tribe of Indians of the Wind River Reservation v. United States*, 11 Ind. Cl. Comm’n 387, 416 (1962).

<sup>90</sup> *Dann*, 470 U.S. at 42 (citing *W. Shoshone Identifiable Group v. United States*, 40 Ind. Cl. Comm’n 38 (1977)).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 44.

<sup>93</sup> *Id.* at 48.

<sup>94</sup> *Id.* at 44-45 (citing 31 U.S.C. § 724a (Supp. V 1976)).

<sup>95</sup> *United States v. Dann*, 873 F.2d 1189, 1200 (9th Cir. 1989).

<sup>96</sup> *Id.* at 1197 (quoting *Cramer v. United States*, 261 U.S. 219, 227 (1923)).

<sup>97</sup> *Dann*, 873 F.2d 1189, *cert. denied*, 493 U.S. 890 (1989).



*D. The Federal Claims Case: An Outright Dismissal of Rights*

After the Supreme Court *Dann* ruling, the United States Court of Federal Claims in *Western Shoshone National Council v. United States* held that the Shoshone had no right to occupy their land.<sup>98</sup> The court revisited the case when the Shoshone challenged the ICC proceeding in response to *Dann*.<sup>99</sup> This time, the plaintiffs asserted their rights under the Treaty of Ruby Valley of 1863.<sup>100</sup> The United States government countered that the finality provision of the ICCA barred the action.<sup>101</sup> Section 22(a) of the ICCA states, “[t]he payment of any claim, after its determination in accordance with this Act, shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy.”<sup>102</sup> However, the court ruled that Congress did not intend the finality provision to bar challenges to the ICC process pursuant to Rule 60 of the United States Court of Federal Claims.<sup>103</sup> Under the Rule, which is similar to Federal Rule of Civil Procedure 60,<sup>104</sup> the court may, under certain circumstances, grant a party relief from a judgment that does not result from clerical error.<sup>105</sup> The court noted that in *Andrade v. United States*,<sup>106</sup> the court of claims allowed an action to proceed eight years after an ICC judgment payment, concluding the court could not dismiss the Shoshone’s claim under the finality provision.<sup>107</sup>

The court outlined the steps under which the Shoshone might bring a future claim under Rule 60.<sup>108</sup> Plaintiffs must show “that they could not have discovered such evidence through due diligence prior to when they found it.”<sup>109</sup> In addition, plaintiffs must prove that a “grave miscarriage of justice” would result if relief were denied.<sup>110</sup>

Next, however, the court relied on *Northwestern Bands of Shoshone Indians v. United States* to reject the Shoshone’s claim under treaty rights.<sup>111</sup> The court dismissed the fact that the case centered on the Treaty at Box Elder and said the Court’s dismissal of Indian rights applied to all the Doty Treaties.<sup>112</sup> The court also looked to *Tee-Hit-Ton Indians v. United States*,<sup>113</sup> which stated that there must be a definite intention by Congress to accord legal rights to occupancy.<sup>114</sup> Thus, the court concluded the plaintiff Indians “cannot rely on

<sup>98</sup> *W. Shoshone Nat’l Council v. United States*, 73 Fed. Cl. 59, 66 (2006).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 62.

<sup>101</sup> *Id.* at 63.

<sup>102</sup> *Id.* (quoting 25 U.S.C. § 70u(a) (1976)) (omitted after the dissolution of the ICC).

<sup>103</sup> *Id.* (citing RCFC 60).

<sup>104</sup> FED. R. CIV. P. 60.

<sup>105</sup> *Id.*

<sup>106</sup> *Andrade v. United States*, 485 F.2d 660, 661 (Ct. Cl. 1973).

<sup>107</sup> *W. Shoshone Nat’l Council*, 73 Fed. Cl. at 63 (citing *Andrade*, 485 F.2d at 661).

<sup>108</sup> *Id.* at 64.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 65 (citing *United States v. Beggerly*, 524 U.S. 38, 47 (1998)).

<sup>111</sup> *Id.* at 66-67.

<sup>112</sup> *Id.* at 67.

<sup>113</sup> *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955).

<sup>114</sup> *W. Shoshone Nat’l Council*, 73 Fed. Cl. at 67 (citing *Tee-Hit-Ton Indians*, 348 U.S. at 278-79).

the allegation that the Treaty of Ruby Valley recognized the Western Shoshones' ownership of land."<sup>115</sup>

*E. The Yucca Mountain Case: Mention of War*

The district court case, *Western Shoshone National Council v. United States*,<sup>116</sup> was notable in its mention of war as a possible remedy for the Shoshone. In this case, the Shoshone brought suit against the United States to stop the government from locating the Yucca Mountain Nuclear Waste Repository on Shoshone land.<sup>117</sup> The government made several arguments. First, it alleged the court had no jurisdiction because the plaintiffs lacked standing.<sup>118</sup> Second, it argued the United States had not waived its sovereign immunity.<sup>119</sup> Third, it maintained the court of appeals had jurisdiction, and the finality of ICC adjudications barred the plaintiffs' claims.<sup>120</sup> Fourth, it argued the defendants had no enforceable rights under the Treaty of Ruby Valley.<sup>121</sup> The court granted the government's motion to dismiss.<sup>122</sup> Its rationale included adherence to Supreme Court precedent:

A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress which may in the end be enforced by actual war.<sup>123</sup>

II. THE LAWSUIT: *WINNEMUCCA INDIAN COLONY v. UNITED STATES*

*A. Downwinders and Indians*

The stakes for the Shoshone became higher when in 2006, the DTRA announced plans to detonate Divine Strake.<sup>124</sup> Not just land rights but radiation exposure became the issue, and the cause united the Shoshone with the Utah Downwinders.<sup>125</sup> On May 22, 2006, the Shoshone made their claims under both aboriginal and treaty rights, while both parties made claims, *inter alia*, under the National Environmental Policy Act (NEPA).<sup>126</sup> The Nuclear Test Ban Treaty,<sup>127</sup> which the United States had signed but not ratified,<sup>128</sup> was

<sup>115</sup> *Id.*

<sup>116</sup> *W. Shoshone Nat'l Council v. United States*, 408 F. Supp. 2d 1040, 1051 (D. Nev. 2005).

<sup>117</sup> *Id.* at 1046.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 1052.

<sup>123</sup> *Id.* at 1051 (quoting *Edye v. Robertson*, 112 U.S. 580, 598 (1884)).

<sup>124</sup> Tyson, *supra* note 2.

<sup>125</sup> Second Amended Motion for Temporary Restraining Order and for Preliminary Injunction, *supra* note 22, at 1-2.

<sup>126</sup> *Id.* at 2 (citing 42 U.S.C. § 4321-4368a (2006)).

<sup>127</sup> Comprehensive Nuclear Test-Ban Treaty, Sept. 24, 1996, S. TREATY DOC. NO. 105-28 (1997).

not a source of law either party could invoke.<sup>129</sup> The plaintiffs sought a temporary restraining order and preliminary and permanent injunctions against the government.<sup>130</sup> The Shoshone claimed the government did not give them notice and opportunity to comment on the impending blast on their “sacred sites.”<sup>131</sup> The plaintiffs also claimed the test should not proceed without notice and comment of an adequate Environmental Impact Statement, as NEPA required.<sup>132</sup>

The plaintiffs described the Supreme Court *Dann* case as arising from a “sham claim.”<sup>133</sup> They then invoked the authority of the Organization of American States (OAS), which filed a report critical of the *Dann* holding and the United Nations (UN) Committee on the Elimination of Racial Discrimination (CERD), which filed a report critical of further nuclear testing on Shoshone land.<sup>134</sup>

#### B. *The World Takes Notice*

The invocation of the CERD report represented the first time in history a UN Committee issued a full decision against United States federal Indian law and policies.<sup>135</sup> Three months before plaintiffs filed their suit against Divine Strake, the CERD convened and issued its Decision 1 (68), urging the United States to “[d]esist from all activities planned and/or conducted on the ancestral lands of Western Shoshone or in relation to their natural resources, which are being carried out without consultation with and despite protests of the Western Shoshone peoples.”<sup>136</sup> The CERD made its decision pursuant to its Early-Warning Measures and Urgent Procedures, the goal of which was “preventing

<sup>128</sup> CTBTO Preparatory Commission, Country Profiles: United States of America, <http://www.ctbto.org/member-states/country-profiles/?country=184&cHash=e699720b55> (last visited June 16, 2009).

<sup>129</sup> If the United States had ratified the treaty, Divine Strake would have been a violation. Comprehensive Nuclear Test-Ban Treaty, *supra* note 127, at 124 (“Each State Party undertakes not to carry out any nuclear weapon test explosion or any other nuclear explosion, and to prohibit and prevent any such nuclear explosion at any place under its jurisdiction or control”).

<sup>130</sup> Second Amended Motion for Temporary Restraining Order and for Preliminary Injunction, *supra* note 22, at 2.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 3. See 42 U.S.C. § 4332(C)(i), (v) (2006).

<sup>133</sup> Second Amended Motion for Temporary Restraining Order and for Preliminary Injunction, *supra* note 22, at 7. The *Dann* case arose because in 1951, some Shoshones sought compensation for the loss of their aboriginal title to lands. *United States v. Dann*, 470 U.S. 39, 39 (1985).

<sup>134</sup> Second Amended Motion for Temporary Restraining Order and for Preliminary Injunction, *supra* note 22, at 8.

<sup>135</sup> Elizabeth Burleson, *Tribal, State, and Federal Cooperation to Achieve Good Governance*, 40 AKRON L. REV. 207, 240 (2007) (citing Press Release, U.N. Comm. on the Elimination of Racial Discrimination, Committee on the Elimination of Racial Discrimination Concludes Sixty-Eighth Session (Mar. 10, 2006), available at <http://www.unhchr.ch/hurricane/hurricane.nsf/view01/D85D881B5C5CF007C125712D007A1035?opendocument>).

<sup>136</sup> Second Amended Motion for Temporary Restraining Order and for Preliminary Injunction, *supra* note 22, at 9. See also U.N. Comm. for the Elimination of Racial Discrimination [CERD], *Early Warning and Urgent Action Procedure, Decision 1 (68)*, U.N. Doc. CERD/C/USA/DEC/1 (Apr. 11, 2006), available at <http://www.unhchr.ch/tbs/doc.nsf/898586b1dc>

existing situations escalating into conflicts and urgent procedures to respond to problems requiring immediate attention to prevent or limit the scale or number of serious violations of the [International] Convention [on the Elimination of All Forms of Racial Discrimination].”<sup>137</sup> The United States joined a handful of nations receiving a negative CERD decision, including Suriname, New Zealand, Israel, Guyana, the Lao People’s Democratic Republic, the Ivory Coast, and Sudan, the latter for genocide in Darfur.<sup>138</sup>

The Divine Strake plaintiffs invoked an equally chiding OAS decision as support for their position. The United States is one of thirty-five countries of the Americas that have ratified the OAS Charter.<sup>139</sup> In 2002, the OAS urged the United States to provide the Danna a remedy to secure their ancestral rights and review the land rights of indigenous people.<sup>140</sup> The decision regarding the Danna from the OAS Inter-American Commission on Human Rights represents the first time that the Commission acknowledged the United States violation of American Indian rights.<sup>141</sup> Although OAS decisions legally bind the United States<sup>142</sup> and the United States has affirmed that OAS judgments apply,<sup>143</sup> the United States took no affirmative steps to give remedy to the Danna. Understanding this history, the *Winnemucca* plaintiffs referenced the OAS decision to support their objection to Divine Strake.<sup>144</sup>

On February 7, 2007, the Western Shoshone reported to the CERD that the United States continued to ignore Decision 1 (68).<sup>145</sup> The United States also ignored a July 15, 2006 deadline to submit a written response regarding compliance with Decision 1.<sup>146</sup> The United States further failed to respond to an August 2006 letter from the Chairman of the CERD requesting information on implementation.<sup>147</sup> The report from the Shoshone stated that plans for Divine Strake continued, despite the Committee’s admonitions.<sup>148</sup> The National Nuclear Security Administration (NNSA) failed to schedule any meetings in Western Shoshone territory inviting feedback regarding the project’s revised

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[hereinafter Decision 1 (68)].

<sup>137</sup> Decision 1 (68), *supra* note 136; Office of the U.N. High Comm’r for Human Rights, Committee on the Elimination of Racial Discrimination: Early-Warning Measures and Urgent Procedures, <http://www2.ohchr.org/english/bodies/cerd/early-warning.htm> (last visited June 16, 2009).

<sup>138</sup> Office of the U.N. High Comm’r for Human Rights, *supra* note 137.

<sup>139</sup> Org. of Am. States, Member States and Permanent Missions, <http://www.oas.org/documents/eng/memberstates.asp> (last visited June 16, 2009).

<sup>140</sup> Mary and Carrie Dann, Case No. 11.140, Inter-Am. C.H.R., Report No. 75/02, OEA/Ser.L/V/II.117, doc. 1 rev. 1 (2002).

<sup>141</sup> Schaaf & Fishel, *supra* note 43, at 177.

<sup>142</sup> Fishel, *supra* note 62, at 634.

<sup>143</sup> Schaaf & Fishel, *supra* note 43, at 185.

<sup>144</sup> Second Amended Motion for Temporary Restraining Order and for Preliminary Injunction, *supra* note 22, at 8.

<sup>145</sup> W. SHOSHONE NAT’L COUNCIL ET AL., UPDATE TO COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION ON THE EARLY WARNING AND URGENT ACTION PROCEDURE DECISION 1(68), at 1 (2007), [http://www.wsdp.org/70th\\_Session\\_Update\\_Feb\\_07.pdf](http://www.wsdp.org/70th_Session_Update_Feb_07.pdf).

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 2.

Environmental Assessment.<sup>149</sup> Instead, the NNSA scheduled one meeting in Las Vegas, and two others in Utah, well outside NTS territory.<sup>150</sup> The Western Shoshone urged the Committee to consider the United States transgressions at its seventieth session and reiterate its recommendations against Divine Strake.<sup>151</sup> The Western Shoshone also urged the CERD to make an on-site visit of the territory.<sup>152</sup>

The arguments unique to the Shoshone influenced the DTRA's detonation postponement. On February 22, 2007, just fifteen days after the Shoshone complained of the United States government's noncompliance to the CERD's warning, the DTRA dropped its plans for Divine Strake without comment on the lawsuit.<sup>153</sup>

Even after the lawsuit ended, however, the UN continued to advocate on behalf of Shoshone land rights. On September 13, 2007, the UN General Assembly adopted The Declaration on the Rights of Indigenous Peoples.<sup>154</sup> Article 26 of the Declaration states,

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.<sup>155</sup>

The UN passed the Declaration by a vote of 143 in favor, 4 against and 11 abstaining.<sup>156</sup> Only Canada, Australia, and New Zealand joined the United States in voting against the language securing land rights to indigenous peoples.<sup>157</sup>

In the Yucca Mountain case, the court said international negotiations must address treaty violations, "which may in the end be enforced by actual war."<sup>158</sup> As if to answer the court's observation, international courts have begun to issue statements in support of the Shoshone.

### C. *Events after Withdrawal of Divine Strake Plans*

The international community continues to condemn the mistreatment of the Shoshone, even after the government dropped plans for Divine Strake. When the CERD held its seventy-second session from February 18 to March 7,

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<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 7.

<sup>152</sup> *Id.*

<sup>153</sup> News Release, Def. Threat Reduction Agency, *supra* note 25.

<sup>154</sup> G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007).

<sup>155</sup> *Id.* at 8.

<sup>156</sup> Press Release, General Assembly, General Assembly Adopts Declaration of Rights of Indigenous Peoples; 'Major Step Forward' Towards Human Rights for All, Says President, U.N. Doc. GA/10612 (Sept. 13, 2007).

<sup>157</sup> *Id.*

<sup>158</sup> *W. Shoshone Nat'l Council v. United States*, 408 F. Supp. 2d 1040, 1051 (D. Nev. 2005) (quoting *Edye v. Robertson*, 112 U.S. 580, 598 (1884)).

2008, the Committee reiterated its Decision 1 (68) entirely and urged the United States once more to implement all of the Committee's recommendations.<sup>159</sup> The Committee said it "strongly regretted" the United States government's inaction.<sup>160</sup>

Meanwhile, in the United States, the Divine Strake plaintiffs appeared one more time before court. After the government withdrew its bombing plan, it moved to dismiss the plaintiffs' motion to enjoin any further such experiments.<sup>161</sup> The plaintiffs argued for judicial oversight of "the Defendant's dangerous plans to detonate high explosives."<sup>162</sup> The judge determined that the relief the plaintiffs sought did not address an existing decision.<sup>163</sup> Therefore, the court granted the government's motion to dismiss.<sup>164</sup> The plaintiffs have no plans to appeal, given that the Ninth Circuit is unlikely to overrule.<sup>165</sup> The local media concluded the "bunker-buster bomb test has hope for resurrection."<sup>166</sup>

### III. HOW TO PREVENT THE RESURRECTION OF DIVINE STRAKE

Despite urgent warnings by the international community, the United States government has not announced it will completely abandon its plans for bombing at the NTS.<sup>167</sup> Moreover, any sanctions by the CERD are unenforceable.<sup>168</sup> True, the CERD's strongly worded decisions against the United States in response to the Divine Strake case may have a powerful moral effect on future NTS bombing cases. However, combining such decisions with a reformed interpretation of the Treaty of Ruby Valley creates a more persuasive argument for Shoshone territory protection. Re-examination is necessary because through recent rulings, courts have reduced the power of the Treaty in three ways. First, the recent Supreme Court rulings do not comport with norms of judicial treaty interpretation, fail to ignore the Treaty's uniqueness, and undermine Congress' role in treaty execution. Second, the ruling in *Dann* raised the ICC ruling as an excuse to abrogate aboriginal rights, ignoring any treaty rights. Third, the reading of the Treaty in the federal claims case goes against canons of treaty interpretation. Ironically, courts have used the trust doctrine against Indians. Still, with re-examination, the Treaty can provide a strong moral force that buttresses the sympathetic declarations and decisions of

<sup>159</sup> U.N. Comm. for the Elimination of Racial Discrimination [CERD], *Consideration of Reports Submitted by States Parties Under Article 9 of the Convention: Concluding Observations of the Committee on the Elimination of Racial Discrimination*, U.N. Doc. CERD/C/USA/CO/6 (May 8, 2008).

<sup>160</sup> *Id.*

<sup>161</sup> Order, *supra* note 40, at 2.

<sup>162</sup> *Id.* at 2.

<sup>163</sup> *Id.* at 3.

<sup>164</sup> *Id.*

<sup>165</sup> Telephone Interview with Robert R. Hager, Member, Hager & Hearne Law Office, in Reno, Nev. (Mar. 10, 2008).

<sup>166</sup> Keith Rogers, *Judge Rejects Downwinders' Request*, LAS VEGAS REV.-J., Mar. 4, 2008, at 2B.

<sup>167</sup> News Release, Def. Threat Reduction Agency, *supra* note 25.

<sup>168</sup> Andrew J. Butcher, Note, *In Search of a Remedy to the Nuclear Storage Conundrum: Western Shoshone National Council v. United States*, 28 ENERGY L.J. 207, 216 (2007).

world courts. The Treaty's assertion of a grant of easement may also offer a basis for a stronger property rights.<sup>169</sup> In addition, the Treaty may support a call for protection of sacred sites on the NTS and thereby stop future bombing.

A. *The Court Should Re-examine Its 1945 Holding*

In *Northwestern Bands of Shoshone Indians v. United States*, the Court ignored the trust doctrine, failed to notice the Treaty's lack of cession, and usurped Congress' right to abrogate treaties. This Note takes each feature in turn and argues for re-examination.

1. *The Court Should Apply the Trust Doctrine In Favor of the Shoshone*

With strong consistency, the Supreme Court has applied the trust doctrine, under which the Justices construe treaties in favor of the Indians instead of the United States government. The Court recognizes "the distinctive obligation of trust" the United States government has in its dealings with "dependent and sometimes exploited people."<sup>170</sup> Therefore, courts must understand treaties as they were understood by the tribes who negotiated them.<sup>171</sup> Courts must interpret treaties liberally and resolve ambiguities in favor of Indians.<sup>172</sup> Courts should not construe treaties to the prejudice of the tribes.<sup>173</sup> The Supreme Court has previously ruled against Indian interests only when the clear language of the treaty warrants such a ruling.<sup>174</sup> Under the doctrine, the United States government also has an obligation to protect Indian interests, including tribal property.<sup>175</sup> Accordingly, funds the United States government holds for a tribe are presumed to be held in trust.<sup>176</sup> Applying this Indian-favored treaty interpretation doctrine, the Court, in *United States v. Winans*, held that fishing rights were part of a larger set of rights the Yakima Indians of Washington retained.<sup>177</sup> The Treaty was not "a grant of rights to the Indians, but a grant of right from them."<sup>178</sup> Thus, the Court applies the trust doctrine and understands the treaty from the Indians' point of view.

Although the Court has not applied the doctrine of favorable treaty construction in all cases,<sup>179</sup> the weight of the Court's decision should apply to a re-examination of the 1945 case. According to Shoshone teachings, individuals do not hold title to the land; this right belongs to the Creator alone.<sup>180</sup> Many Indians view concepts of "ownership" or "title" differently than do most non-

<sup>169</sup> See *infra* Part III.C.

<sup>170</sup> *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942).

<sup>171</sup> *Tulee v. Washington*, 315 U.S. 681, 684-85 (1942).

<sup>172</sup> *Seneca Nation of Indians v. New York*, 382 F.3d 245, 259 (2d Cir. 2004).

<sup>173</sup> *Antoine v. Washington*, 420 U.S. 194, 199 (1975); *Squire v. Capoman*, 351 U.S. 1, 7 (1956).

<sup>174</sup> *Or. Dep't of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 774 (1985).

<sup>175</sup> *HRI, Inc. v. EPA*, 198 F.3d 1224, 1245 (10th Cir. 2000).

<sup>176</sup> *Rogers v. United States*, 697 F.2d 886, 890 (9th Cir. 1983).

<sup>177</sup> *United States v. Winans*, 198 U.S. 371, 380 (1905).

<sup>178</sup> *Id.* at 381.

<sup>179</sup> See *Montana v. United States*, 450 U.S. 544 (1981) (stating treaty setting aside land for Indians did not give them title to the river within the land).

<sup>180</sup> Fishel, *supra* note 62, at 622-23.

Indians.<sup>181</sup> The Shoshone who negotiated the Treaty of Ruby Valley would not think that an express claim of ownership would be necessary to stop certain types of encroachment upon their land.

2. *The Court Should Note the Absence of Cession Language in the Treaty*

The Court's holding in the 1945 case relies on its observation that none of the Shoshone Treaties specifically acknowledge Indian title or right of occupancy.<sup>182</sup> However, words of cession occur nowhere in them.<sup>183</sup> The Court casually observes this fact but fails to understand its relevance.

Words of cession occur in four of the eight treaties the United States government drafted and signed with Indians in 1863. In a treaty with the Chippewa, the cession clause reads, "The reservations known as Gull Lake, Mille Lac, Sandy Lake, Rabbit Lake, Pokagomin Lake, and Rice Lake . . . are hereby ceded to the United States, excepting one-half section of land . . . hereby granted in fee simple . . ." <sup>184</sup> Cession language in a treaty with different Chippewa tribes reads, "The said Red Lake and Pembina bands of Chippewa Indians do hereby cede, sell, and convey to the United States all their right, title and interest in and to all the lands now owned and claimed by them . . ." <sup>185</sup> In a treaty with the Nez Percé, the cession clause reads, "The said Nez Percé tribe agree to relinquish, and do hereby relinquish, to the United States the lands heretofore reserved for the use and occupation of the said tribe . . ." <sup>186</sup> The cession clause in the treaty with the Utah-Tabeguache Band reads, "Said Tabeguache band of Utah Indians hereby cede, convey, and relinquish all of their claim, right, title, and interest in and to any and all lands . . ." <sup>187</sup> In contrast, the United States omitted any words of cession in the four Doty treaties it drafted and signed with the Shoshone tribes.<sup>188</sup>

By ignoring the lack of cession in any of the Doty Treaties, the Court ignored its earlier holding in *Buttz v Northern Pacific Railroad*,<sup>189</sup> identifying a two-step process for extinguishing treaty rights.<sup>190</sup> In *Buttz*, the Court clarified that Indians extinguish their treaty rights when they sign a treaty ceding their

<sup>181</sup> *Id.*

<sup>182</sup> *Nw. Bands of Shoshone Indians v. United States*, 324 U.S. 335, 348 (1945).

<sup>183</sup> *Id.* at 343.

<sup>184</sup> Treaty with the Chippewa Indians art. I, U.S.-Chippewas of the Miss.-Pillager and Lake Winibigoshish bands of Chippewa Indians in Minn., Mar. 19, 1863, 12 Stat. 1249.

<sup>185</sup> Treaty with the Chippewa Indians art. II, U.S.-Red Lake and Pembina Bands of Chippewa Indians, May 5, 1864, 13 Stat. 667.

<sup>186</sup> Treaty with the Nez Percé Tribe of Indians art. I, U.S.-Nez Percé Tribe of Indians, Apr. 20, 1867, 14 Stat. 647.

<sup>187</sup> Treaty with the Tabeguache Indians art. II, U.S.-Tabeguache Band of Indians, Dec. 14, 1864, 13 Stat. 673.

<sup>188</sup> Treaty with Western Bands of Shoshonee Indians, U.S.-W. Bands of Shoshonee Indians, Oct. 21, 1869, 18 Stat. 689; Treaty with Eastern Bands of Shoshone Indians, U.S.- E. Bands of Shoshonee Indians, June 7, 1869, 18 Stat. 685; Box Elder Treaty, *supra* note 72; Treaty with the Shoshone-Goship Bands of Indians, U.S.-Shoshonee-Goship Bands of Indians, Jan. 17, 1865, 13 Stat. 681.

<sup>189</sup> *Buttz v. N. Pac. R.R.*, 119 U.S. 55 (1886).

<sup>190</sup> *Nw. Bands of Shoshone Indians v. United States*, 324 U.S. 335, 346 (1945) .



title to the land and then abandoning their right of occupancy.<sup>191</sup> In the case of the Shoshone, neither of these steps occurred.<sup>192</sup>

### 3. *Congress, not the Court, Has the Power to Abrogate Treaties*

The 1945 case also warrants re-examination because Congress, not the Court, has the power to abrogate treaties.<sup>193</sup> Through treaty or statute, Congress recognizes Indian title.<sup>194</sup> As long as Indian title is not extinguished, a party may not initiate any pre-emptive right to the land.<sup>195</sup> Understanding this point, the plaintiffs in the Divine Strake case asserted,

Prior to 1863, the United States had entered into treaties with various Indian Tribes and Nations and knew the proper words that would accomplish the ceding of lands for purposes of holding title and having all rights to the lands in the name of the United States government. The Treaty of Ruby Valley contained no such words of land cessation or specific conveyance, and at most the treaty can only be read to reflect the agreement of the Western Shoshone to allow safe passage and permit certain specified uses on Western Shoshone lands.<sup>196</sup>

### B. *Courts Should Narrow the Holding in Dann*

Courts should narrow the *Dann* holding for several reasons. First, the Court erred in treating an interlocutory order by the ICC as a final judgment. Second, the Court misconstrued legislative intent behind the ICCA. Third, the Court decided *Dann* under aboriginal, not treaty, rights.

An interlocutory judgment is not considered final.<sup>197</sup> Further evidence in court may modify an interlocutory judgment.<sup>198</sup> Therefore, an interlocutory judgment is preliminary or provisional<sup>199</sup> and does not adjudicate the parties' ultimate rights or finalize the case.<sup>200</sup>

In the case to which the *Dann* sisters were a party, the ICC had not entered a final judgment.<sup>201</sup> The Court noted the lower court's observation that "the extinguishment question was not necessarily in issue, it was not actually litigated, and it has not been decided."<sup>202</sup> Since then, the Shoshone have not accepted the federal money because doing so would mean abrogation of their aboriginal rights.<sup>203</sup> The Court, however, wrongly deemed the case closed

<sup>191</sup> *Buttz*, 119 U.S. at 69.

<sup>192</sup> *CRUM*, *supra* note 50, at 26.

<sup>193</sup> *South Dakota v. Bourland*, 508 U.S. 679, 687 (1993).

<sup>194</sup> *Sac & Fox Tribe of Indians of Okla. v. United States*, 315 F.2d 896, 897 (Ct. Cl. 1963).

<sup>195</sup> *Buttz*, 119 U.S. at 70.

<sup>196</sup> Second Amended Motion for Temporary Restraining Order and for Preliminary Injunction, *supra* note 22, at 7.

<sup>197</sup> *Gen. Elec. Co. v. Marvel Rare Metals Co.*, 287 U.S. 430, 432 (1932); *TBS Pac., Inc. v. Tamura*, 686 P.2d 37, 44 (Haw. Ct. App. 1984).

<sup>198</sup> *Yeboah v. Progeny Ventures, Inc.*, 27 Cal. Rptr. 3d 150, 154 (Cal. Ct. App. 2005).

<sup>199</sup> *In re Blalock*, 64 S.E.2d 848, 858 (N.C. 1951).

<sup>200</sup> *Potter v. Emerol Mfg. Co.*, 89 N.Y.S.2d 68, 70 (N.Y. App. Div. 1949).

<sup>201</sup> *United States v. Dann*, 572 F.2d 222, 225 (9th Cir. 1978).

<sup>202</sup> *United States v. Dann*, 470 U.S. 39, 44 (1985) (quoting *Dann*, 572 F.2d at 226-27).

<sup>203</sup> *Id.* at 48 (stating payment has been satisfied even when not possessed by the creditor). At the time of the Supreme Court *Dann* case, the fund had grown to forty-three million dollars. *Id.* at 43, 50.

because of the ICC's certification and payment.<sup>204</sup> The statement by the litigants in the Divine Strake case that the ICC ruling deprived the Shoshone of a substantive right to substantive due process remains correct.<sup>205</sup>

To rationalize away the due process rights of the Shoshone, the Court looked to legislative intent. The Court quoted from Congressional notes to the ICCA that the Act's purpose was "to dispose of the Indian claims problem with finality."<sup>206</sup> The Court further quoted Congress, that the "payment of any claim . . . shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy."<sup>207</sup> Thus, the Court argued the ICC paid the Shoshone, because to hold otherwise would frustrate Congressional intent and hold the United States liable for claims and demands touching upon the matter.<sup>208</sup> Through such logic, the Court played a hand in the "quiet abrogation"<sup>209</sup> of Shoshone land rights. However, Congress' intent of "full discharge" through payments does not denote extinguishment. The Court might hold that the matter is not the right to occupy land, but the payment itself, because treaty abrogation must be made through an express Congressional act.<sup>210</sup>

The type of matter is important because Congress passed the Western Shoshone Claims Distribution Act of 2004.<sup>211</sup> The bill entitled any United States citizen with at least a one-quarter degree of Western Shoshone blood and who was alive at the date of the Act's enactment to be eligible for payment.<sup>212</sup> In addition, the Act created a "Western Shoshone Educational Trust Fund,"<sup>213</sup> consisting of funds satisfying Shoshone judgment awards under the ICC ruling.<sup>214</sup> By 2004 the funds had grown to \$145 million.<sup>215</sup> Under the bill, the payment would be in full for twenty-four million acres of Western Shoshone land.<sup>216</sup> Future proceedings regarding the Shoshone on the NTS would give the Court an opportunity to rectify the abuse of due process.<sup>217</sup>

Litigants can also argue that *Dann* is not applicable to a reading of the Treaty of Ruby Valley because, as the Supreme Court noted, the Danns did not argue their case under the Treaty, but rather, under aboriginal rights.<sup>218</sup> In

<sup>204</sup> *Id.* at 44.

<sup>205</sup> Second Amended Motion for Temporary Restraining Order and for Preliminary Injunction, *supra* note 22, at 7.

<sup>206</sup> *Dann*, 470 U.S. at 45 (quoting H.R. REP. NO. 79-1466, at 10 (1945)).

<sup>207</sup> *Id.* at 45 (quoting Indian Claims Commission Act § 22(a), 60 Stat. 1049, 1055 (repealed 1966)).

<sup>208</sup> *Id.*

<sup>209</sup> Laurence, *supra* note 88.

<sup>210</sup> *Sac & Fox Tribe of Indians of Okla. v. United States*, 315 F.2d 896, 897 (Ct. Cl. 1963).

<sup>211</sup> Western Shoshone Claims Distribution Act, Pub. L. No. 108-270, 118 Stat. 805 (2004).

<sup>212</sup> *Id.* § 3(a)-(b).

<sup>213</sup> *Id.* § 4(b)(1).

<sup>214</sup> *Id.* § 2(2)(A).

<sup>215</sup> Jerry Reynolds, *Bush Signs Western Shoshone Legislation*, INDIAN COUNTRY TODAY (S.D.), July 9, 2004, available at <http://www.indiancountry.com/archive/28212424.html>.

<sup>216</sup> *Id.*

<sup>217</sup> U.S. CONST. amend. V.

<sup>218</sup> *United States v. Dann*, 470 U.S. 39, 43 (1985). To determine whether an Indian tribe has a land interest, a court first determines whether the claim derives from a treaty or statutory right (recognized title), or aboriginal title, secured through continuous occupancy and

addition, the Supreme Court made no holdings regarding the Treaty, answering only the narrow question of ICC payment.<sup>219</sup>

Regardless of the inapplicability of *Dann* to the Treaty of Ruby Valley, litigants in future NTS cases may wish to continue evoking *Dann* as a case of gross injustice to the Shoshone. *Dann* remains a *cause célèbre* for advocates of Shoshone land rights.<sup>220</sup> A 2005 obituary of Mary Dann recalled and decried that even after the final ruling, Bureau of Indian Affairs agents conducted a helicopter-assisted raid of the Dann ranch in 2002, confiscated 232 head of cattle, and sold them at auction.<sup>221</sup>

### C. *The Federal Claims Court Should Not Have Relied on the 1945 Supreme Court Case*

Even assuming the Court's decision in 1945 was not flawed, the Federal Claims court should not have relied on it. The Court in the 1945 case grouped all the Doty treaties together in its analysis. However, the Box Elder Treaty, which was the subject of the case, differs from the Treaty of Ruby Valley in its discussion of title or occupancy, in that the latter expressly grants an easement.

The Box Elder Treaty reads, "The country claimed by Pokatello for himself and his people is bounded on the west by Raft River and on the east by the Porteneuf Mountains."<sup>222</sup> By contrast, Article V of the Treaty of Ruby Valley reads,

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 Shoshonee 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.<sup>223</sup>

In the Box Elder Treaty, the Indians "claimed" the land. In the Treaty of Ruby Valley, the Shoshones affirmatively asserted in plain language that they "claimed and occupied" the land.<sup>224</sup> The Treaty also specifically delineates the boundaries of the land the Shoshones claimed and occupied.<sup>225</sup> In this context, the Treaty gives the United States an easement to traverse, build, and develop the land—a more express restriction than in the Box Elder Treaty.

An easement grants one person the right to use and enjoy another person's land.<sup>226</sup> The right exists only for a limited, specific purpose.<sup>227</sup> Easements do

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use. *Bennett County, S.D. v. United States*, 394 F.2d 8, 11 (8th Cir. 1968). Before the district court analyzed the Dann's claim, it noted this distinction. *United States v. Dann*, 873 F.2d 1189, 1194-95 (9th Cir. 1989).

<sup>219</sup> *Dann*, 470 U.S. at 40-41.

<sup>220</sup> See generally Western Shoshone Defense Project Brochure, [http://wsdp.org/brochure\\_page1.pdf](http://wsdp.org/brochure_page1.pdf) (last visited June 16, 2009).

<sup>221</sup> Susan Bates, Snowwowl.com, For Mary Dann the Fight is Over (May 1, 2005), <http://www.snowwowl.com/hhmarydann.html>.

<sup>222</sup> Box Elder Treaty, *supra* note 72, at 663.

<sup>223</sup> Treaty of Ruby Valley, *supra* note 23, at 690.

<sup>224</sup> Treaty at Ruby Valley, *supra* note 23, at 690; Box Elder Treaty, *supra* note 72, at 663.

<sup>225</sup> Treaty at Ruby Valley, *supra* note 23, at 690.

<sup>226</sup> *Commercial Wharf E. Condo. Ass'n v. Waterfront Parking Corp.*, 552 N.E.2d 66, 73 (Mass. 1990).

not provide ownership interests.<sup>228</sup> A *profit à prendre* grants a right to acquire, by severance or removal from another's land, some thing or things previously constituting a part of the land.<sup>229</sup> The same rules apply to profits and easements.<sup>230</sup> Profits and easements may be created by express agreement.<sup>231</sup>

The Treaty of Ruby Valley articulates specific rights the United States has in Indian land. First, the Treaty allows trains, mail and telegraph lines, and passage of white settlers upon the land.<sup>232</sup> Second, the Treaty allows military posts and station houses for travelers or mail and telegraph company employees.<sup>233</sup> Third, the Treaty allows the construction of railways on Shoshone land.<sup>234</sup> Fourth, the Treaty allows gold and silver prospecting and mining, agricultural settlements, ranches, lumber mills and buildings, and the taking of timber for the purpose of building on the land.<sup>235</sup> In its plain language, the Treaty grants easement or *profit à prendre* rights to the United States. As such, the United States does not have legal ownership rights over the land—an oversight that remains unresolved today. Although no court in the land is likely to give the NTS back to the Shoshone, the ownership interests the Shoshone can assert through the Treaty should at least persuade future courts to desist from bombing the land.

Plaintiffs can also argue that any decision by the federal claims court cannot determine the validity of the Treaty because the court was created only to allow suits for money claims against the government.<sup>236</sup>

Nevada statutes recognize the validity of general treaty law, requiring that state's public lands administered by the United States under treaties "must continue to be administered by the state in conformance with those treaties or compacts."<sup>237</sup> Neither the United States Congress nor the Nevada Legislature has declared an abrogation of the Treaty. In fact, Nevada's 1861 Act establishing Nevada territory provided that nothing in the Act would impair Indian rights as long as further treaties did not extinguish the rights.<sup>238</sup> The Act continues, stating nothing in the Act would be construed

to include any territory which, by treaty with any Indian tribe, is not, without the consent of said tribe, to be included within the territorial limits or jurisdiction of any State or Territory; but all such territory shall be excepted out of the boundaries and constitute no part of the Territory of Nevada, until said tribe shall signify their assent to the President of the United States to be included within the said Territory, or to affect the authority of the Government of the United States to make any regulations

<sup>227</sup> *Id.* at 74.

<sup>228</sup> *Russakoff v. Scruggs*, 400 S.E.2d 529, 531 (Va. 1991).

<sup>229</sup> *Jackson County v. Compton*, 609 P.2d 1293, 1294 (Or. 1980); Herman H. Hahner, *An Analysis of Profits A Prendre*, 25 OR. L. REV. 217, 221, 227 (1946).

<sup>230</sup> *Willamette Quarries, Inc. v. Wodtli*, 761 P.2d 1356, 1360 (Or. Ct. App. 1988), *aff'd*, 781 P.2d 1196 (Or. 1989).

<sup>231</sup> *Boyd v. McDonald*, 408 P.2d 717, 720 (Nev. 1965).

<sup>232</sup> Treaty at Ruby Valley, *supra* note 23, at 689.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.* at 690.

<sup>235</sup> *Id.*

<sup>236</sup> *United States v. Testan*, 424 U.S. 392, 397-98 (1976); *United States v. Jones*, 131 U.S. 1, 18 (1889).

<sup>237</sup> NEV. REV. STAT. § 321.5973 (2007).

<sup>238</sup> Act of Mar. 2, 1861, ch. 83, 12 Stat. 209 (establishing the Territory of Nevada).

respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise . . . .<sup>239</sup>

*D. Why the Trust Relationship is Not a Viable Remedy*

Although the trust doctrine's purpose is to favor Indians, the *Dann* Court turned the doctrine on its head. If Divine Strake plaintiffs are to further succeed, they will need to persuade courts of the proper intent behind the doctrine.

The Court's use of the trust doctrine to disfavor the Shoshone may not have been an oversight, contrary to what one scholar suggests. Andrew J. Butcher argues that the court in *Western Shoshone National Council v. United States* may have failed to consider the fiduciary relationship between the United States government and the Shoshone.<sup>240</sup> He notes the Supreme Court has recognized the trust relationship and the fundamental right of Indians to sue the United States for breach of trust.<sup>241</sup>

Butcher cites *Minnesota v. Mille Lacs Band of Chippewa Indians*,<sup>242</sup> where the Court held that treaty rights under the 1837 treaty with the Chippewas<sup>243</sup> were still available because there was no clear evidence of the Treaty's abrogation.<sup>244</sup> Butcher notes that the Court was observing the trust doctrine, under which courts give Indian treaties the effect that Indians themselves would have given them.<sup>245</sup> Similarly, in a case closer to Shoshone territory, the Paiute tribe of Nevada successfully invoked the trust doctrine to demand the United States government bring water to Pyramid Lake for the benefit of fish.<sup>246</sup>

However, in *Dann*, the trust doctrine gave the Court a reason to imply the Treaty's abrogation. The special "obligation" under the trust doctrine to put money in trust on behalf of Indians allows the government to make the claim, as in *Dann*, that the government has placed the money in a fund for the good of Indians.<sup>247</sup> By paying the trust, the government assumes to have paid the Shoshone. Next, through payment the government claims abrogation of the Treaty.<sup>248</sup> Remedy is unlikely for the Shoshone under this trust doctrine logic. Instead of seeking the protection of a trustee the Shoshone no longer trusts, they have demanded their legal rights under the Treaty—not as trust beneficiaries, but as equal co-signers to an agreement.

*E. The Treaty Bolsters the Moral Authority of Strongly Worded Statements by Courts of International Law*

Both the CERD and the OAS have criticized the United States for its treatment of the Western Shoshone. The Winnemucca plaintiffs will be wise to

<sup>239</sup> *Id.*

<sup>240</sup> Butcher, *supra* note 168, at 216.

<sup>241</sup> *Id.* at 217.

<sup>242</sup> *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999).

<sup>243</sup> Treaty with the Chippewas, U.S.-Chippewa Nation, July 29, 1837, 7 Stat. 536.

<sup>244</sup> Butcher, *supra* note 168, at 217 (citing *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172).

<sup>245</sup> *Id.* at 216-17 (citing *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172).

<sup>246</sup> *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252, 256 (D.D.C. 1972).

<sup>247</sup> *United States v. Dann*, 470 U.S. 39, 44 (1985).

<sup>248</sup> *W. Shoshone Nat'l Council v. United States*, 73 Fed. Cl. 59, 63 (2006).

continue referencing international comments in any future litigation over Divine Strake.

In its Decision 1 (68), the CERD revealed an absurdity in the United States argument of “encroachment.” The Committee said it was

concerned by the [United States’] position that Western Shoshone peoples’ legal rights to ancestral lands have been extinguished through gradual encroachment, notwithstanding the fact that the Western Shoshone peoples have reportedly continued to use and occupy the lands and their natural resources in accordance with their traditional land tenure patterns.<sup>249</sup>

Indeed, not only have the Western Shoshone never left their land, but the United States has never fully settled onto it, leaving most of the land uninhabited and remote to most non-Indians.<sup>250</sup> Proof of lack of encroachment is the very fact that the United States has used the “unpopulated”<sup>251</sup> land as a test site for nuclear weapons. In Western Shoshone territory, the Indians themselves have always and gradually encroached upon the land.<sup>252</sup> They have occupied the land, as the 2006 court observed, since “time immemorial.”<sup>253</sup> Archaeologists have found evidence of Shoshone habitation going back 12,000 years.<sup>254</sup> The NTS, however, has been in existence only since the 1950s.<sup>255</sup>

The Shoshone are unlikely to go to war over their loss of land rights at the NTS. However, courts might consider the moral force of the logic by the UN and the OAS in further proceedings by the United States government to pursue cluster bombing Shoshone land. The United States should respect the Shoshones’ aboriginal and treaty rights to strengthen its alliances in the UN with respect to actions it might wish to take against Iran or other countries. Even though decisions by the CERD are not binding,<sup>256</sup> the United States has reasons to comply. The United States cannot rightfully urge countries such as Iran to comply with UN demands if the United States itself ignores CERD recommendations. For example, in March 2006, just two months before the Divine Strake case, the United States, as members of the UN Security Council,<sup>257</sup> urged Iran to end its enrichment-related programs and to comply with the nuclear Non-Proliferation Treaty and the International Atomic Energy

<sup>249</sup> Natsu Taylor Saito, *Border Constructions: Immigration Enforcement and Territorial Presumptions*, 10 J. GENDER RACE & JUST. 193, 213 (2006) (quoting the Organization of American States, Inter-American Commission on Human Rights, *Mary and Carrie Dann versus United States* (Case 11.140, 27 December 2002)); Decision 1 (68), *supra* note 136.

<sup>250</sup> Threet, *supra* note 4, at 34.

<sup>251</sup> U.S. Dep’t of Energy, Nevada Test Site, <http://www.nv.doe.gov/nts/default.htm> (last visited June 16, 2009).

<sup>252</sup> The CERD refer to this fact when they note, “[T]he Western Shoshone peoples have reportedly continued to use and occupy the lands and their natural resources in accordance with their traditional land tenure patterns.” Decision 1 (68), *supra* note 136.

<sup>253</sup> *W. Shoshone Nat’l Council*, 73 Fed. Cl. at 61.

<sup>254</sup> KULETZ, *supra* note 19, at 65.

<sup>255</sup> TERRENCE R. FEHNER & F.G. GOSLING, U.S. DEP’T OF ENERGY, ORIGINS OF THE NEVADA TEST SITE (2000), [http://www.nv.doe.gov/library/publications/historical/DOE\\_MA0518.pdf](http://www.nv.doe.gov/library/publications/historical/DOE_MA0518.pdf)

<sup>256</sup> Butcher, *supra* note 168, at 216.

<sup>257</sup> U.N. Security Council, Membership of the Security Council, <http://www.un.org/sc/members.asp> (last visited June 16, 2009).

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Agency.<sup>258</sup> Still, United States courts may reject the argument for a need to abide by CERD recommendations and make the contrary argument that Divine Strake is necessary to prepare for a future bunker-busting war with Iran.<sup>259</sup> Future litigants would need to hope for courts more interested in diplomacy than war.

*F. Claims under the Treaty Offer a Different Perspective on Property Rights*

Future courts might interpret rights under the Treaty not just as an opportunity to provide remedy for indigenous peoples who have been victims of dispossession,<sup>260</sup> but also as a source of sounder property doctrine. William H. Rodgers, Jr. argues Indians “are the most creative and effective agents for positive environmental change in play today.”<sup>261</sup> Rodgers discusses various Indian notions that make them better claimants in environmental cases, such as concern for the “seventh generation” and a philosophy of permanence.<sup>262</sup> Some reject these notions and argue that romantic notions of Indians as better guardians of the land are based on myths.<sup>263</sup> Rather than judging the romanticism of Indian spirituality, Valerie Kuletz comments that such romanticism, regardless of its correctness, is rooted in the Indians’ “long-term habitation and consequent commitment to place.”<sup>264</sup> Perhaps this understanding of an alternative authority lay behind the Utah Downwinders’ request that the Western Shoshone join them as parties in the Divine Strake case. Once joined, the Shoshone garnered further attention of the UN, something a non-indigenous group could not accomplish so effectively. Only after the Western Shoshone and the Downwinders demanded an Environmental Impact Statement did the DTRA abandon its bombing plans, at least temporarily. Their success should galvanize environmental groups to seek support from Indian tribes.

*G. The Treaty Holds the Promise of Other Remedies, such as through the American Indian Religious Freedom Act of 1978*

The Shoshone may bolster their property rights claims under the American Indian Religious Freedom Act of 1978 (AIRFA),<sup>265</sup> despite the fact that the Act

<sup>258</sup> William M. Reilly, Analysis: *UN to Iran: Comply with IAEA*, UPI, Mar. 30, 2006, available at [http://www.spacewar.com/reports/UN\\_To\\_Iran\\_Comply\\_With\\_IAEA.html](http://www.spacewar.com/reports/UN_To_Iran_Comply_With_IAEA.html).

<sup>259</sup> See, e.g., Seymour M. Hersh, *The Iran Plans: Would President Bush Go to War to Stop Tehran?*, NEW YORKER, Apr. 17, 2006, at 30 available at [http://www.newyorker.com/archive/2006/04/17/060417fa\\_fact](http://www.newyorker.com/archive/2006/04/17/060417fa_fact).

<sup>260</sup> Jérémie Gilbert, *Historical and Indigenous Peoples’ Land Claims: A Comparative and International Approach to the Common Law Doctrine on Indigenous Title*, 56 INT’L & COMP. L.Q. 583, 586 (2007).

<sup>261</sup> William H. Rodgers Jr., *Tribal Government Roles in Environmental Federalism*, NAT. RESOURCES & ENV’T, Winter 2007, at 3, 3.

<sup>262</sup> *Id.* at 5.

<sup>263</sup> James M. Grijalva, *Origins of EPA’s Indian Program*, 15 KAN. J.L. & PUB. POL’Y 191, 212 n.136 (2006).

<sup>264</sup> KULETZ, *supra* note 19, at 190.

<sup>265</sup> 42 U.S.C. § 1996 (2006).

has so far been unsuccessful in securing the rights of Indians to protect their sacred sites.<sup>266</sup> The Act provides,

On and after August 11, 1978, it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.<sup>267</sup>

The Act was simply one of policy without any right of action and did little to protect sacred sites.<sup>268</sup> Congress established a procedure merely encouraging consultation with Indians about sacred sites without requiring any actual protection.<sup>269</sup> As a result, courts have routinely dismissed most claims made under AIRFA.<sup>270</sup> The Supreme Court held that activities causing “incidental interference” with religious beliefs are acceptable, even without any compelling government reasons.<sup>271</sup>

However, in 1997 President Bill Clinton signed Executive Order No. 13007, requiring:

Accommodation of Sacred Sites. (a) In managing Federal lands, each executive branch agency with statutory or administrative responsibility for the management of Federal lands shall, to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions, (1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites. Where appropriate, agencies shall maintain the confidentiality of sacred sites.<sup>272</sup>

Although federal agencies must consider, “but not necessarily to defer to, Indian religious values,”<sup>273</sup> a sympathetic judge could use the Executive Order to decide in favor of Indians.<sup>274</sup> After all, the Executive Order uses “shall,” not “may,” an imperative, instead of a suggestion.

The policies of protecting sacred sites that AIRFA and Executive Order No. 13007 express may provide the Shoshone a cause of action to stop any further bombing at the NTS. Indeed, the area is rife with sacred burial grounds.<sup>275</sup> In March 2002, Western Shoshone “spirit runners” held a run to call attention to the fact that the NTS is on sacred ground.<sup>276</sup> They planted

<sup>266</sup> Katosha Belvin Nakai, *When Kachinas and Coal Collide: Can Cultural Resources Law Rescue the Hopi at Black Mesa?*, 35 ARIZ. ST. L.J. 1283, 1306 (2003) (noting that “[the] AIRFA does not even effectively protect tribal lands”).

<sup>267</sup> 42 U.S.C. § 1996.

<sup>268</sup> *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 471 (1988).

<sup>269</sup> Robert Retherford, *A Local Development Agreement on Access to Sacred Lands*, 75 U. COLO. L. REV. 963, 986 (2004).

<sup>270</sup> *Id.* at 985 n.142.

<sup>271</sup> *Id.* at 988 (quoting *Lyng*, 485 U.S. at 450).

<sup>272</sup> Exec. Order No. 13,007, 61 Fed. Reg. 26,771 (May 24, 1996).

<sup>273</sup> *Conservation Law Found. v. Fed. Energy Regulatory Comm’n*, 216 F.3d 41, 50 (D.C. Cir. 2000).

<sup>274</sup> Retherford, *supra* note 269, at 987.

<sup>275</sup> KULETZ, *supra* note 19, at 129.

<sup>276</sup> Frank X. Mullen Jr., *Spirit Runners Encircle Sacred Test Site Ground*, RENO GAZETTE-J., May 9, 2002, available at [http://www.turtletrack.org/Issues02/Co05182002/CO\\_05182002\\_Yucca.htm](http://www.turtletrack.org/Issues02/Co05182002/CO_05182002_Yucca.htm).



willows and said prayers into the planting holes.<sup>277</sup> In its Environmental Assessment for Divine Strake, the U.S. Department of Energy (DOE) described the site as containing “Native American religious or sacred places.”<sup>278</sup>

However, the Environmental Assessment for Divine Strake asserts that no “specific” religious or sacred sites have been identified,<sup>279</sup> and thus the project would pose no danger to Indian culture. The DTRA makes this claim even though the DOE has been keeping an inventory of Shoshone artifacts buried on the site since 1985, in a direct effort to comply with AIRFA.<sup>280</sup> To date, the Shoshone have not made a legal claim under AIRFA.

The Shoshone might be uniquely suited to pursue protection of sacred sites as an extension of their pursuit to secure property rights under the Treaty. Scholar Kristen A. Carpenter suggests that Indian nations seeking a legal remedy in sacred sites cases should consider treaty-based property rights arguments.<sup>281</sup> She first notes that most treaties provide for Indians to cede their lands, and the government creates reservations for them.<sup>282</sup> Carpenter argues that when Indians ceded lands, they reserved the right to continue using them for religious purposes.<sup>283</sup> She argues that courts might grant religious rights as an extension of other rights granted to Indians.<sup>284</sup>

For example, in *Minnesota v. Mille Lacs Band of Chippewa Indians*,<sup>285</sup> the Supreme Court granted hunting and fishing rights to the Chippewa on the theory of aboriginal rights.<sup>286</sup> The Court granted these rights despite an executive order revoking Chippewa rights, a second treaty ceding more lands, and an act admitting Minnesota to the Union.<sup>287</sup> Despite all these events, the Court held that Congress had never explicitly abrogated Chippewa rights to fish on the land.<sup>288</sup> If, by extension, a court might be willing to grant religious rights under a theory of aboriginal title, the Shoshone may have an even greater claim, using both AIRFA and legal title under the Treaty.

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<sup>277</sup> *Id.*

<sup>278</sup> NAT'L NUCLEAR SEC. ADMIN., U.S. DEP'T OF ENERGY, LARGE-SCALE, OPEN-AIR EXPLOSIVE DETONATION, DIVINE STRAKE, AT THE NEVADA TEST SITE: PRE-APPROVAL DRAFT, at 3-35 (2005), [http://www.nv.doe.gov/library/publications/Environmental/DOEEA\\_1550.pdf](http://www.nv.doe.gov/library/publications/Environmental/DOEEA_1550.pdf).

<sup>279</sup> *Id.* at 4-38.

<sup>280</sup> U.S. DEP'T OF ENERGY, FINAL ENVIRONMENTAL IMPACT STATEMENT FOR THE NEVADA TEST SITE AND OFF-SITE LOCATIONS app. G (1996), available at [http://www.globalsecurity.org/wmd/library/report/enviro/eis-0243/eis0243\\_g.html](http://www.globalsecurity.org/wmd/library/report/enviro/eis-0243/eis0243_g.html). The report is otherwise not available in electronic form to the public. See [http://www.gc.energy.gov/NEPA/documents/SecureEISList\\_2009.pdf](http://www.gc.energy.gov/NEPA/documents/SecureEISList_2009.pdf).

<sup>281</sup> Kristen A. Carpenter, *A Property Rights Approach to Sacred Sites Cases: Asserting a Place for Indians as Nonowners*, – 52 UCLA L. REV. 1061, 1061 (2005).

<sup>282</sup> *Id.* at 1101.

<sup>283</sup> *Id.*

<sup>284</sup> *Id.*

<sup>285</sup> *Id.* at 1102.

<sup>286</sup> *Id.*

<sup>287</sup> *Id.*

<sup>288</sup> *Id.*

## IV. CONCLUSION

The Treaty of Ruby Valley of 1863 was a powerful component of the lawsuit, *Winnemucca Indian Colony v. United States*. However, the plaintiffs never exercised the Treaty's full force because the United States government halted its Divine Strake experiment. The United States government stopped the experiment as a direct result of the lawsuit. The government's quick cancellation of Divine Strake suggests that the Indians' strong land claims make them a powerful partner for environmentalists concerned about the impact of future tests at the site.

Because of its security interests at the NTS, the United States government has pursued a rationale leaving little room for the Shoshone to claim land rights. Such a "Cowboys v. Indians" worldview, however, is not the only paradigm for Shoshone-United States government relations. Rather, a legal holding in favor of the Shoshone would simply express the notion that some indigenous rights to land have survived colonial conquest.<sup>289</sup>

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<sup>289</sup> Gilbert, *supra* note 260, at 585.