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DEPARTMENT OF JUSTICE MOVES TO STRIKE ITS OWN
NATIONAL SECURITY DEFENSE IN GROOM LAKE ENVIRONMENTAL CRIME CASE

Motion to Strike Rules out Military and State Secrets Privilege
at This Juncture in Cases Filed against
EPA and Military and Intelligence Agencies
By GW Law Professor Jonathan Turley

Washington, D.C. -- At a hearing held in Las Vegas, NV, the Department of Justice moved today to strike its own affirmative defense under the Military and State Secrets Privilege in cases filed against the Environmental Protection Agency and the three principal military and intelligence figures with jurisdiction over the Groom Lake top-secret Air Force base -- the Department of Defense, The National Security Advisor and the Air Force.

The government's decision was made in response to a motion filed by The George Washington University Law Professor Jonathan Turley. The Military and State Secrets Privilege is a common law evidentiary rule that allows the government to object to specific discovery or production requests on the basis of national security. In the past, courts have not permitted the Privilege to be used as a general defense.

The filing of the Groom Lake case marks the first time a "black program" has been sued. The invocation of the Military and State Secrets Privilege at this stage of the case is the first time the government has tried to use the Privilege to dismiss an entire case on jurisdictional grounds. The decision on the part of the government to yield to Turley's motion clears the way for a trial and is considered a significant hurdle for the Plaintiffs.

"The government's argument failed to recognize that the Privilege is an evidentiary rather than a jurisdictional challenge," said Jonathan Turley, director of the Environmental Crimes Project at GW in his motion opposing the use of the invocation of the Privilege at this point in the case.

"The Privilege does not deny a court jurisdiction but rather denies the use of specific access to specific items of evidence at trial," stated Turley in the motion.

In today's hearing the Court also addressed the question of the government's answering a complaint before being formally

served. The issue was raised in Turley's Motion in which he states that Counsel for the Air Force was not served with the Air Force case complaint at the time of filing in August, due to the pending approval of a verified petition for the appointment of local counsel and approval of a Motion Pro Hoc Vice for Plaintiffs' Counsel in Washington, D.C. On October 19, 1994, however, Counsel for the Air Force filed an answer to the complaint, without having yet been served.

By successfully challenging the use of the Privilege during the jurisdictional phase of the case, Turley has established precedent for restricting the use of Privilege to non-jurisdictional evidentiary questions. "Today's hearing removed the final jurisdictional barriers to trial of these cases," said Turley.

After acknowledging its mistake in invoking the Privilege, Government Counsel asked the court to delay discovery so that it could consider other possible grounds for staying this action. That request was denied and the court ordered discovery to begin immediately and set a trial schedule.