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19 **UNITED STATES DISTRICT COURT**
 20 **SOUTHERN DISTRICT OF CALIFORNIA**

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| <p>21 QUECHAN TRIBE OF THE FORT YUMA 22 INDIAN RESERVATION, a federally 23 recognized Indian Tribe, on its own behalf and 24 as parens patriae on behalf of its members, 25 26 Plaintiff, 27 28 v. 29 UNITED STATES OF AMERICA, et al., 30 31 Defendants</p> | <p>Civil Action No. 02cv1096-JAH (MDD) PLAINTIFF’S MEMORANDUM OF CONTENTIONS OF FACT AND LAW PURSUANT TO LOCAL RULE 16.1(f)</p> |
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32 Pursuant to Civil Local Rule 16.1(f)(2)(a), Plaintiff hereby submits its Memorandum of
 33 Contentions of Fact and Law.

34 CONTENTIONS OF FACT

35 1. In the early 1990’s, the United States Department of Energy, Western Area
 36 Power Administration (herein “Western”) decided to replace the wood-pole transmission line
 37
 38

1 towers along the Gila-Knob 161-kv transmission line, with steel frame towers (the “Pole
2 Replacement Project”).

3 2. Approximately nine miles of the Gila-Knob 161-kv transmission line is located
4 within the exterior boundaries of the Fort Yuma Indian Reservation.

5 3. In 1994, Western directed and retained archaeological consultant firm Western
6 Cultural Resource Management (“WCRM”) to conduct a Class III-cultural resource inventory
7 of the Gila-Knob 161-kv transmission line and associated access roads in anticipation of
8 Western’s Pole Replacement Project.

9 4. In July 1994, WCRM conducted a survey over a six-day period, in which two
10 crews composed of three persons each walked along the transmission line to identify and
11 evaluate archaeological sites.

12 5. Following the survey, at the direction of the United States, WCRM prepared a
13 report entitled Intensive Cultural Resource Inventory for the Western Area Power
14 Administration Gila-Knob 161-kv Transmission Line, Imperial County, California and Yuma
15 County, Arizona for U.S. Department of Energy Western Area Power Administration, April 19,
16 1995 (the “WCRM Report”).

17 6. A purpose of the WCRM Report was “to provide documentation, management
18 recommendations, and National Register eligibility recommendations pertaining to all historic
19 properties located within the [right-of-way] along the transmission line and access roads
20 between the Gila and Pilot Knob substations.”

21 7. A further purpose of the report was “to identify the management-specific needs
22 of the archaeological resources for their future protection during pole replacement, road
23 maintenance, and transmission line maintenance activities.”

24 8. During the inventory, WCRM surveyors identified and recorded 26
25 archaeological sites, 10 of which were recommended eligible for inclusion on the National
26 Register of Historic Places.

27 9. The archaeological sites recorded by WCRM during its survey are within the
28 exterior boundaries of the Fort Yuma Indian Reservation and located on tribal trust land.

1 10. The archaeological sites are within a short walking distance and in plain view of
2 the mountain known as Pilot Knob.

3 11. Pilot Knob is one of the most sacred places for the Quechan Tribe due to its role
4 in the creation story of the Yuman people.

5 12. WCRM concluded that the sites were “probably part of a larger complex” of
6 sites on the mesa lands that could qualify as a Traditional Cultural Property (“TCP”) of the
7 Quechan Tribe.

8 13. A TCP is a place associated with a tribe’s traditional beliefs about its origins,
9 cultural history, or the nature of the world; or where tribal religious practitioners historically
10 went and go today to perform traditional ceremonial activities.

11 14. During its survey, WCRM identified the existence of cleared circles, cobble
12 clusters, lithic scatters and ceramic scatters within the boundaries of the archaeological sites.

13 15. A cleared circle, or sleeping circle, exhibits evidence of prehistoric camps used
14 by travelers for religious/spiritual purposes.

15 16. A cobble cluster represents a shrine associated with prehistoric ceremonial
16 activities.

17 17. A lithic scatter is an assemblage of rock or mineral flakes that evidence pre-
18 historic tool making or other resource use.

19 18. A ceramic scatter is an assemblage of pre-historic ceramics or pottery sherds.

20 19. During its survey, WCRM identified and mapped existing disturbance to each of
21 the archaeological sites examined.

22 20. During its survey, WCRM specifically looked for evidence of World War II
23 military maneuvers within the project area and within the archaeological sites.

24 21. WCRM found that “although the region is known for its World War II military
25 maneuvers near Camp Pilot Knob, only one site (4-IMP-7149/H) [which is not at issue in this
26 action] exhibited evidence of the military presence, in the form of tank tracks.”

1 22. In its report, WCRM provided pole-by-pole and site-by-site management
2 recommendations to avoid further disturbance to cultural resources during Western's Pole
3 Replacement Project.

4 23. After WCRM completed its survey of the archaeological sites, WCRM
5 conducted an "on-site consultation" with Western representatives, which emphasized issues
6 "regarding site eligibility and the nature of maintenance-related impacts."

7 24. During the "on-site consultation," WCRM informed Western maintenance
8 personnel "how their activities could impact sites."

9 25. On May 31, 1995, based on the WCRM survey, Western informed the Tribe via
10 letter that 26 archaeological sites were recorded within the Western right-of-way and that
11 Western's Pole Replacement Project "will have no effect on historic properties."

12 26. In the May 31, 1995 letter, Western promised the Tribe that it would "ensure
13 that all construction and maintenance activities avoid eligible properties."

14 27. In the May 31, 1995 letter, Western promised the Tribe that "access for this
15 project will be restricted to existing access roads. Rubber tired vehicles will be used for all
16 work. All access roads were also surveyed should the road need upgrading through blading,
17 leveling, or filling."

18 28. Over three years later, on August 3, 1998, Western informed the Tribe that:

19 The Western Area Power Administration (Western) had previously
20 consulted with your office on May 31, 1995, on the effects of the Gila-
21 Knob 161-kv Wood Pole Transmission Line Replacement Project on
22 cultural resources. It was determined that the undertaking will have no
23 effect on historic properties.

24 In this previous correspondence, Western had agreed to use only rubber-
25 tired vehicles for all maintenance activities. Due to the sandy soil
26 composition of the lands located in the right-of-ways of this transmission
27 line, Western needs to use a tracked vehicle for pulling line trucks and
28 other maintenance equipment along the currently disturbed access roads.
Western will use the existing access road to bring in tracked vehicle
(with the blade up), and where necessary, pull other maintenance
equipment through very sandy areas. Western has determined that there
will be no effect on historic properties from using tracked vehicles.
Western's former recommendation of only rubber-tired vehicles would

1 severely hamper our ability to replace the structures along this
2 transmission line.

3 29. On September 3, 1998, Western informed the Tribe that:

4 Western plans to replace most of the old wood pole structures on
5 this line (approximately 20 miles) with lightweight steel structures.
6 Structure replacement will start the 1st of October and continue for
7 several months. This work will require construction of landing sites
8 around some structures and will involve several pieces of heavy
9 equipment to complete the task. . . . Western has determined our
10 actions will not affect biological and cultural resources.

11 30. On September 15, 1998, Western acknowledged in a letter to the California
12 SHPO that “roads leading to and ending at wood pole structures are only maintained by
13 Western” and that “due to the nature of the topography and soils, these roads have not required
14 any maintenance in years.”

15 31. On October 5, 1998, Western executed a “Categorical Exclusion Determination”
16 pursuant to NEPA that required “monitoring” as mitigation and provided that “monitoring will
17 be accomplished by an Archaeologist for those structures near or within eligible cultural sites.”

18 32. Western did not provide work crews with the management recommendations
19 developed by WCRM.

20 33. Instead, Western provided work crews with Environmental Work Restrictions
21 (“EWRs”) drafted by Alison Jarrett, Western’s “environmental protection specialist.”

22 34. Alison Jarrett does not have a degree in archaeology or cultural resource
23 management and had little understanding of cultural resources when drafting the
24 “Environmental Work Restrictions” provided to Western crews.

25 35. Jarrett’s EWRs did not incorporate or follow the WCRM management
26 recommendations.

27 36. Western’s archaeologist was not present during any flagging of the
28 archaeological sites or features and did not examine any flagging that occurred.

37. No person checked whether any flagging was still in place on archaeological
sites when Project work began.

1 38. The archaeological sites and features are difficult for a layperson without
2 expertise in archaeology to identify.

3 39. The boundaries of the archaeological sites and features are not visible to a
4 layperson without expertise in archaeology.

5 40. No archaeologist was present on-site during Western's work.

6 41. No person monitored Western's work during the Pole Replacement Project for
7 the purpose of protecting the archaeological sites.

8 42. Western did not flag or otherwise mark the boundaries and location of the
9 Western right-of-way and Western's workers were not informed of the boundaries or limits of
10 Western's right-of-way.

11 43. Western commenced the Pole Replacement Project on or around October 1998.

12 44. During the Pole Replacement Project, Western crews drove, operated, and used
13 heavy construction equipment and trucks that included:

14 44.1 Caterpillar bulldozer;

15 44.2 90-foot Condor bucket truck;

16 44.3 Lorrain 23-ton all-terrain crane;

17 44.4 Texoma auger (or "digger") trucks;

18 44.5 Telelect line truck;

19 44.6 Semi-Tractors with attached pole trailers;

20 44.7 Other large trucks and utility vehicles.

21 45. The trucks and heavy equipment used by Western during the Pole Replacement
22 Project have a wider wheel base and wider tires than all-terrain/recreational vehicles ("ORVs")
23 typically used in the California desert.

24 46. The trucks and heavy equipment used by Western during the Pole Replacement
25 Project have a wide turning radius and are difficult to turn around within the confines of the
26 access roads.

27 47. Many of the trucks and heavy equipment used by Western during the Pole
28 Replacement Project exceed twenty feet in length.

1 48. The trucks and heavy equipment used by Western during the Pole Replacement
2 are longer and weigh substantially more than all-terrain/recreational vehicles typically used in
3 the California desert.

4 49. The heavy equipment used by Western during the Pole Replacement Project is
5 longer, wider, and heavier than “conventional” vehicles such as large pickup trucks, suburban
6 utility vehicles, or large passenger automobiles.

7 50. During the Pole Replacement Project, Western crews used a bulldozer.

8 51. A bulldozer is a “tracked vehicle,” meaning it moves on a continuous track
9 instead of wheels.

10 52. During the Pole Replacement Project, Western used a bulldozer to blade and
11 maintain the condition of access roads.

12 53. During the Pole Replacement Project, Western used a bulldozer to pull heavy
13 equipment from site to site.

14 54. Western noted in its Wood Pole Rehabilitation Program Weekly Log that on
15 October 19 through 22, 1998, “a 50-ton crane in conjunction with the loader was used to pull
16 old wood poles (came out pretty easily in the blow sand). . . . 50-ton crane was used to lift one
17 of the poles until x-brace bolts could be stabbed.”

18 55. Western noted in its Wood Pole Rehabilitation Program Weekly Log that on
19 October 26 through 29, 1998, the “Crew decided to use dozer to drag 50-ton crane around until
20 it could be driven again (19/6, 19/5 and 19/4 erected this week).”

21 56. During the Pole Replacement Project, Western crews constructed crane pads,
22 which are leveled areas about 25 feet wide by 30 feet long to stabilize the heavy equipment
23 during operation.

24 57. Western’s pole disposal contractor used heavy equipment, including a fork lift,
25 and a four wheel drive truck that pulled a 20 to 25 foot pole trailer, when picking up the
26 wooden poles for disposal.

27 58. Western’s pole disposal contractor also operated without an archaeological
28 monitor.

1 59. During the Pole Replacement Project, Western operated its heavy equipment
2 outside the boundaries of the access road.

3 60. During the Pole Replacement Project, Western operated its heavy equipment
4 outside the boundaries of the Western right-of-way.

5 **SITE 7140**

6 61. Site 4-IMP-7140 (Site 7140) is a 95 meter (North-South) by 15 meter (East-
7 West) sparse lithic scatter that contains two cleared circles.

8 62. Site 7140 is graphically depicted at WCRM Report p. 66 and in the Cleland
9 Report (2009) at EDAW Figure PR-2.

10 63. The Western right-of-way and access road go through Site 7140, but Site 7140
11 extends to the north of and beyond the Western right-of-way.

12 64. WCRM identified 19 artifacts within Site 7140 during its 1994 survey.

13 65. WCRM reported that “current disturbance to [Site 7140] is confined to a 10 m
14 (33 ft) diameter surrounding structure PK 18-8.”

15 66. WCRM also reported that “an unbladed access road leads to the structure along
16 the eastern edge of the site. The access road is represented by a two-track road and has
17 introduced minimal damage to the site.”

18 67. WCRM determined that Site 7140, as it existed in 1994, “has the potential to
19 significantly contribute new information to the prehistory of the lower Colorado River region
20 and is recommended eligible for the NRHP under criterion d.”

21 68. WCRM “recommended that future access be confined to the existing two-track
22 road and maintenance activities be restricted to the previously disturbed area around the
23 structure.”

24 69. WCRM “recommended that no blading occurs from 102 m (335 ft) north to
25 17 m south of the structure unless an archaeologist is present.”

26 70. On or around November 4, 1998, during the Pole Replacement Project, Western
27 damaged Site 7140, including the lithic scatter and the two sleeping circles, by driving heavy
28 equipment over the site that created and left vehicle tracks.

1 71. Western employee Alison Jarrett authorized Western's disposal contractor to
2 drive over a cleared circle on Site 7140 with a forklift.

3 72. In March 1999, Western informed the Tribe about the damage to Site 7140.

4 73. Western prepared a report on the damage to Site 7140, known as the "Lessons
5 Learned" report.

6 74. In its 1999 Lessons Learned Report, Western admitted that it caused damage to
7 Site 7140 by driving its heavy equipment over the site.

8 75. Western admitted that its actions impacted approximately 88.5% of Site 7140.

9 76. In its April 1999 Lessons Learned report, Western made the following
10 statements:

11 In the afternoon structure #18-8 was replaced. The lithic scatter and two
12 sleeping circles were damaged by driving and operating the equipment
13 used to perform the work. That equipment included: 90-foot Condor
14 bucket truck; Texoma digger truck; Lorain 23-ton all-terrain crane;
15 Telelect line truck; work and crew trucks."

16 There is no record monitoring was accomplished. Once the damage
17 occurred; it was not reported as required by both DOE and Phoenix Area
18 (now Desert Southwest Region) orders. No direction was given to the
19 project manager or crew for reporting, and it appears there was a general
20 lack of awareness for all involved as to formal reporting requirements.

21 The foreman should also have the responsibility to ensure on-site
22 environmental compliance. Those responsibilities were transmitted to
23 the foreman by the project manager through the environmental work
24 recommendations document. There was a clear failure to follow those
25 recommendations.

26 Although the foreman and crew were apparently unaware of the formal
27 requirement to report, there was still a breakdown in communication
28 because they were known to be aware of the archaeological sensitivity of
the location around structure #18-8.

Construction equipment driven over the resources during the Pole
Replacement Project was the direct cause of damage to the
archaeological resources. The project manager and foreman were aware
of the presence of the resources through direct pre-construction briefings
on site, and through written instructions. No attempt was made to avoid
the resources. No attempt was made to stop the project and seek
consultation regarding potential imminent damage. No attempt was
made to report after the damage was done.

1 Failure to follow the requirements of the NEPA Record of Categorical
2 Determination, specifically to do archaeological monitoring for those
3 structures near or within eligible cultural sites is the root cause for the
4 archeological resources damage. Had the monitoring been done, damage
5 would likely not have occurred.

6 77. Western's Alison Jarrett took photographs of the damage to Site 7140 in 1999.

7 78. Jarrett's photographs show the following types of vehicle tracks left by
8 construction equipment on Site 7140:

9 78.1 V-tread tracks from a rubber-tired vehicle.

10 78.2 Wide hexagonal tread tracks likely from a rubber-tired vehicle.

11 78.3 Parallel tracks caused by an apparent tracked vehicle.

12 79. In 2008, this Court found that "Western's pole-replacement activities of driving
13 through and otherwise impacting [Site 7140] with its heavy equipment proximately caused
14 damage to Plaintiff's cultural resources." *Quechan Indian Tribe v. United States*, 535 F. Supp.
15 2d 1072, 1120 (S.D. Cal. 2008).

16 80. During its Pole Replacement Project, Western caused additional damage to the
17 northwestern corner of Site 7140, as depicted on EDAW Figure PR-2 of the Cleland Report
18 (2009) and labeled as "Additional Construction Related Disturbance-Multiple Tracks."

19 81. Following the Lessons Learned report regarding Site 7140, the Tribe asked
20 Western to more thoroughly investigate Project impacts on eligible and non-eligible sites along
21 the Gila-Knob line, resulting from the Pole Replacement Project.

22 82. Western agreed to conduct an additional investigation, but limited its inquiry to
23 the ten eligible sites.

24 83. In June 2001, Western's contractor issued a report that showed additional
25 damage to the sites resulting from the Pole Replacement Project (the "URS Report")

26 84. URS identified and mapped "Western Activity Areas" that depicted areas in
27 which Western impacted the sites.

28 85. URS determined that Western had impacted six National Register eligible sites
during the Pole Replacement Project and that in some cases the impacts extended beyond
Western's right-of-way.

1 **SITE 7147**

2 86. Site 4-IMP-7147 (Site 7147) is a 200 meter (North-South) by 32 meter (East-
3 West) lithic scatter with features including one flaking station, one distinct cleared circle, and
4 three possible cleared circles.

5 87. Site 7147 is graphically depicted at WCRM Report p. 58 and on EDAW Figure
6 PR-1 of the Cleland Report (2009).

7 88. The Western right-of-way and access road go through Site 7147, but Site 7147
8 extends both to the north and south of the Western right-of-way.

9 89. WCRM identified a total of 241 artifacts within Site 7147 during its 1994
10 survey.

11 90. WCRM identified the existence of pre-existing impacts to Site 7147 during its
12 1994 survey, specifically the access road cut, impacts at the base of the transmission tower, and
13 tracks of off-road vehicles (ORVs).

14 91. WCRM determined that Site 7147, as it existed in 1994, “has the potential to
15 significantly contribute new information to the prehistory of the lower Colorado River region
16 and is recommended eligible for the NRHP under criterion d.”

17 92. WCRM “recommended that [future] disturbance be confined to the existing road
18 cut and maintenance be restricted to the previously disturbed area around [the tower].”

19 93. Western admitted that it caused damage to Site 7147 during its Pole
20 Replacement Project by creating and leaving vehicle tracks within the area described by URS
21 as the “Western Activity Area,” which is located both within and outside of Western’s right-of-
22 way. *Quechan Indian Tribe*, 535 F. Supp. 2d at 1118.

23 94. In 2008, this Court found that “Western’s pole-replacement activities of driving
24 through and otherwise impacting [Site 7147] with its heavy equipment proximately caused
25 damage to Plaintiff’s cultural resources.” *Quechan Indian Tribe*, 535 F. Supp. 2d at 1120.

26 95. During its Pole Replacement Project, Western caused additional damage to
27 Site 7147 by creating and leaving vehicle tracks extending at least 35 meters north of the area
28

1 mapped by URS as the “Western Activity Area” and wholly outside the Western right-of-way,
2 as depicted on EDAW Figure PR-1 of the Cleland Report (2009).

3 96. During its Pole Replacement Project, Western caused additional damage to
4 Site 7147 by creating and leaving multiple vehicle tracks in an area outside of the “Western
5 Activity Area” extending south of the tower and access road and measuring 20 meters north to
6 south and up to 24.3 meters east to west, and extending up to 18 meters outside the Western
7 right-of-way, as depicted on EDAW Figure PR-1 of the Cleland Report (2009).

8 97. The V-tread and tracked vehicle tracks at Site 7147 are similar to those recorded
9 by Western personnel at Site 7140.

10 98. During its Pole Replacement Project, Western caused additional damage to
11 Site 7147 by creating and leaving vehicle tracks extending up to 40 meters south of the Western
12 right-of-way, as depicted on EDAW Figure PR-1 of the Cleland Report (2009).

13 **SITE 7142**

14 99. Site 4-IMP-7142 (Site 7142) is a 160 meter (North-South) by 100 meter (East-
15 West) sparse lithic scatter with flaking stations, cleared circles, cobble clusters, and a trail
16 segment.

17 100. Site 7142 is graphically depicted at WCRM Report p. 77 and at Cleland Report
18 (2009), EDAW Figure PR-3.

19 101. The entirety of Site 7142 is located to the north of the Western right-of-way, and
20 an access road goes through the middle of the site.

21 102. WCRM identified 60 lithic artifacts and 134 flaked artifacts within Site 7142
22 during its 1994 survey.

23 103. WCRM identified the existence of pre-existing impacts to Site 7142 during its
24 1994 survey, specifically tracks of off-road vehicles (ORVs).

25 104. WCRM concluded that Site 7142, as it existed in 1994, “has the potential to
26 significantly contribute new information to the prehistory of the lower Colorado River region
27 and is recommended eligible for the NRHP under criterion d.”
28

1 105. WCRM further concluded that:

2 Because of the substantial history concerning the ceremonial nature of
3 Pilot Knob, the archaeological evidence indicating that the clusters may
4 be offerings, and the intensive use of the area through time, this site is
5 probably a location associated with the traditional beliefs of the lower
6 Colorado River Indian tribes about their origins and cultural history. In
7 addition, [Site 7142] appears to be a place where Native American
8 religious practitioners have historically gone to perform ceremonial
9 activities in accordance with traditional cultural practice. As a result, the
10 clusters qualify as traditional cultural properties making this site also
11 eligible for the NRHP under criterion (a).

12 106. WCRM recommended that “future access be confined to the existing road cut
13 and that no blading occur from 30 m (100 ft) to 152 m (500 ft) north/northwest of structure
14 PK 18-6.”

15 107. During its Pole Replacement Project, Western caused damage to Site 7142 by
16 creating and leaving vehicle tracks located about 100 meters northwest of Tower 18-6, wholly
17 outside the Western right-of-way, and in the form of a circular track measuring about 30 meters
18 in diameter on the east-west axis. This area of impact is depicted on EDAW Figure PR-3 of the
19 Cleland Report (2009) and labeled “Disturbance A.”

20 108. The tread width for the tracks identified at Site 7142 is consistent with the
21 “wide-track” tread widths observed in direct association with Western’s impact area adjacent to
22 several transmission towers.

23 109. During its Pole Replacement Project, Western caused additional damage to
24 Site 7142 by creating and leaving vehicle tracks located about 85 meters northwest of Tower
25 18-6, wholly outside the Western right-of-way, and extending approximately 23 meters west of
26 the access road. This area of impact is depicted on EDAW Figure PR-3 of the Cleland Report
27 (2009) and labeled “Disturbance B.”

28 110. During its Pole Replacement Project, Western caused additional damage to
Site 7142 and Site 7141 by creating and leaving vehicle tracks located about 35 meters
northwest of Tower 18-6, wholly outside the Western right-of-way, and extending
approximately 10 meters west of the access road. This area of impact is depicted on EDAW
Figure PR-3 of the Cleland Report (2009) and labeled “Disturbance D.”

1 **SITE 7141**

2 111. Site 4-IMP-7141 (Site 7141) is a 180 meter (North-South) by 170 meter (East-
3 West) moderately dense lithic scatter with flaking stations, cleared circles, and cobble clusters.

4 112. Site 7141 is graphically depicted at WCRM Report p. 80 and at Cleland Report
5 (2009), EDAW Figure PR-4.

6 113. The Western right-of-way and access road go through Site 7141, but Site 7141
7 extends both to the north and south of the Western right-of-way.

8 114. WCRM identified at least 246 artifacts present on the surface of Site 7141
9 during its 1994 survey, and identified fourteen flaking stations, five cleared circles, a rock ring,
10 and fourteen cobble clusters.

11 115. WCRM noted that “cobble clusters” are “offerings associated with ceremonial
12 activities related to Pilot Knob.”

13 116. WCRM identified the existence of pre-existing impacts to Site 7141 during its
14 1994 survey, specifically tracks of off-road vehicles (ORVs).

15 117. WCRM specifically identified a 10 meter diameter “disturbance zone”
16 surrounding the tower and mapped “intensive” ORV tracks along the terrace top of the site.

17 118. WCRM concluded that Site 7141 “has the potential to significantly contribute
18 new information to the prehistory of the lower Colorado River region and is eligible for the
19 NRHP under criterion (d).”

20 119. WCRM further concluded that:

21 Because of the substantial history concerning the ceremonial nature of
22 Pilot Knob, the archaeological evidence indicating that the clusters may
23 be offerings, and the intensive use of the area through time, this site is
24 probably a location associated with the traditional beliefs of the lower
25 Colorado River Indian tribes about their origins and cultural history. In
26 addition, [Site 7142] appears to be a place where Native American
27 religious practitioners have historically gone to perform ceremonial
28 activities in accordance with traditional cultural practice. As a result, the
clusters qualify as traditional cultural properties making this site also
eligible for the NRHP under criterion (a).

1 120. WCRM recommended that “future access be confined to the existing road cut
2 and that maintenance activities be restricted to the previously disturbed area around PK 18-6. It
3 is further recommended that no blading be conducted from structure PK 18-6 for 46 m (150 ft)
4 north and 110 m (360 ft) east unless an archaeologist is present.”

5 121. During its Pole Replacement Project, Western caused damage to Site 7142 by
6 creating and leaving vehicle tracks within the “Western activity area” identified by URS, which
7 measured 8 meters by 12 meters, and is depicted on EDAW Figure PR-4 of the Cleland Report
8 (2009).

9 122. During its Pole Replacement Project, Western caused additional damage to
10 Site 7141 by creating and leaving vehicle tracks outside of the Western right-of-way and
11 outside of the access road just north of Tower 18-6, which extend approximately 35 meters in
12 length, and are depicted on EDAW Figure PR-4 of the Cleland Report (2009) and labeled as
13 “Disturbance C.”

14 123. During its Pole Replacement Project, Western caused additional damage to
15 Site 7141 by creating and leaving vehicle tracks immediately south of Disturbance C in an area
16 that measures 5.5 meters north-south and 4 meters east-west, as depicted on EDAW Figure
17 PR-4 of the Cleland Report (2009), and labeled as “Disturbance E.”

18 124. During its Pole Replacement Project, Western caused additional damage to
19 Site 7141 by creating and leaving vehicle tracks outside of the Western right-of-way and
20 outside of the access road southwest of Tower 18-6, which extend seven meters outside the
21 access road, as depicted on EDAW Figure PR-4 of the Cleland Report (2009) and labeled as
22 “Disturbance F.”

23 125. The tracks identified at Site 7141 are consistent with tracks left at other sites.

24 **SITE 7138**

25 126. Site 4-IMP-7138 (Site 7138) is a 120 meter (North-South) by 165 meter (East-
26 West) sparse lithic scatter with cleared circles and flaking stations.

27 127. Site 7138 is graphically depicted on WCRM Report, p. 74 and at EDAW Figure
28 PR-5 of the Cleland Report (2009).

1 128. The Western right-of-way and access road go through Site 7138, but Site 7138
2 extends both to the north and south of the Western right-of-way.

3 129. WCRM examined 82 flaked artifacts on Site 7138 during its 1994 survey,
4 including two cleared circles and four flaking stations.

5 130. WCRM identified the existence of pre-existing impacts to Site 7138 during its
6 1994 survey, specifically faint tracks of off-road vehicles (ORVs).

7 131. WCRM identified a 10 meter diameter “zone of previous impact” surrounding
8 the tower.

9 132. WCRM concluded that Site 7141 “has the potential to significantly contribute
10 new information to the prehistory of the lower Colorado River region and is eligible for the
11 NRHP under criterion (d).”

12 133. WCRM recommended that future road and structure maintenance should be
13 confined to the existing road cut and to the previously disturbed area surrounding the structure,
14 and further recommended that no blading occur from 72 meters north to 90 meters south of
15 structure PK 18-7 unless an archaeologist is present.

16 134. Western has admitted that it caused damage to Site 7138 during its Pole
17 Replacement Project by creating and leaving vehicle tracks within the area described by URS
18 as the “Western Activity Area,” which measured approximately 20 meters by 20 meters on the
19 west side of the structure. *Quechan Indian Tribe*, 535 F. Supp. 2d at 1118.

20 135. In 2008, this Court found that “Western’s pole-replacement activities of driving
21 through and otherwise impacting [Site 7138] with its heavy equipment proximately caused
22 damage to Plaintiff’s cultural resources.” *Quechan Indian Tribe*, 535 F. Supp. 2d at 1120.

23 136. During its Pole Replacement Project, Western caused additional damage to
24 Site 7138 by creating and leaving vehicle tracks in the area depicted on EDAW Figure PR-5 of
25 the Cleland Report (2009) and labeled as the “Problematic Area,” which is south of the tower
26 and partially outside of the Western right-of-way.

27 137. During its Pole Replacement Project, Western caused additional damage to
28 Site 7138 by creating and leaving vehicle tracks that extend 19.5 meters north of the tower,

1 which tracks measured approximately 35 cm across, with a track width (center of tread to
2 center of tread) of about 195 cm, and which is similar to tracks observed at other Western
3 towers.

4 138. During its Pole Replacement Project, Western caused additional damage to
5 Site 7138 by creating and leaving vehicle tracks that surround Tower 18-7 and extend about
6 20 meters east of the tower and 30 meters south of the tower, as depicted on EDAW Figure
7 PR-5 of the Cleland Report (2009), and labeled as “Additional Construction Related
8 Disturbance – Multiple Tracks.”

9 139. During its Pole Replacement Project, Western caused additional damage to
10 Site 7138 by creating and leaving vehicle tracks that extend 9 meters beyond the main
11 disturbed area to the south of the tower, as depicted on EDAW Figure PR-5 of the Cleland
12 Report (2009) and labeled as “Additional Construction Related Disturbance – Turn Around.”

13 140. During its Pole Replacement Project, Western caused additional damage to Site
14 7138 by creating and leaving parallel scars on the desert pavement just to the east of Tower
15 18-7, which were caused by pulling or dragging the transmission poles on the ground prior to
16 emplacement.

17 141. During its Pole Replacement Project, Western caused additional damage to
18 Site 7138 by creating and leaving a “blade cut” that is located approximately 20 meters
19 southwest of Tower 18-7.

20 **SITE 7143**

21 142. Site 4-IMP-7143 (Site 7143) is a 257 meter (North-South) by 100 meter (East-
22 West sparse lithic scatter with cleared circles and flaking stations.

23 143. Site 7143 is graphically depicted at WCRM Report, p. 84 and at EDAW Figure
24 PR-6 of the Cleland Report (2009).

25 144. The Western right-of-way and access road go through Site 7143, but Site 7143
26 extends both to the north and south of the Western right-of-way.

27 145. WCRM identified 82 lithic artifacts and 164 flaked artifacts within Site 7143
28 during its 1994 survey.

1 146. Site 7143 contains seven flaking stations and four cleared circles.

2 147. WCRM identified the existence of pre-existing impacts to Site 7143 during its
3 1994 survey, specifically including ORV tracks which caused “considerable damage to the
4 site” with vehicle tracks heaviest in the north portion of the site adjacent to the access road.

5 148. WCRM also identified a roughly 10 meter diameter disturbed area surrounding
6 the tower structure.

7 149. WCRM concluded that Site 7143 “has the potential to significantly contribute
8 new information to the prehistory of the lower Colorado River region and is eligible for the
9 NRHP under criterion (d).”

10 150. WCRM recommended that “access be confined to the existing road cut and the
11 previously disturbed area surrounding the structure” and “further recommended that no blading
12 occur from 75 m (246 ft) northwest to 110 m (289 ft) southeast of structure PK 18-5 unless an
13 archaeologist is present.”

14 151. During its Pole Replacement Project, Western caused damage to Site 7143 by
15 creating and leaving vehicle tracks within the “Western activity area” identified by URS, which
16 is depicted on EDAW Figure PR-6 of the Cleland Report (2009).

17 152. During its Pole Replacement Project, Western caused additional damage to Site
18 7143 by creating and leaving vehicle tracks to the east of tower 18-5 and north of the access
19 road, which extends 14 meters east of the access road and which surrounds flaking station #3,
20 as depicted on EDAW Figure PR-6 of the Cleland Report (2009) and labeled “Additional
21 Disturbance (Severe).”

22 153. During its Pole Replacement Project, Western caused additional damage to
23 Site 7143 by creating and leaving vehicle tracks to the east of tower 18-5 and approximately
24 36 meters east of the access road, as depicted on EDAW Figure PR-6 of the Cleland Report
25 (2009) and labeled “Additional Tracked Vehicle Disturbance.”

26 154. During its Pole Replacement Project, Western caused additional damage to
27 Site 7143 by creating and leaving vehicle tracks to the south and southeast of tower 18-5,
28

1 which extend approximately 37 meters south of the tower, as depicted on EDAW Figure PR-6
2 of the Cleland Report (2009) and labeled as “Additional Disturbance A, B, C”).

3 **SITE 689**

4 155. Site 4-IMP-689 (Site 689) is a 130 meter (North-South) by 450 meter (East-
5 West) low density lithic scatter situated on a complex series of heavily eroded dune ridges.

6 156. Site 689 is graphically depicted at WCRM Report, p. 90, and at EDAW Figure
7 PR-7 of the Cleland Report (2009).

8 157. The Western right-of-way and access road go through Site 689, but Site 689
9 extends both to the north and south of the Western right-of-way.

10 158. WCRM identified 264 lithic artifacts within Site 689 during its 1994 survey.

11 159. WCRM identified the existence of pre-existing impacts to Site 689 during its
12 1994 survey, specifically tracks of off-road vehicles (ORVs).

13 160. WCRM determined that Site 689 was the “focus of significant ceremonial
14 activities associated with Pilot Knob, and involving the traditional beliefs of the lower
15 Colorado River tribes regarding their origin and culture history” and concluded that Site 689
16 “is recommended eligible for inclusion in the NRHP based on the potential to contribute to the
17 prehistory of the area under criterion (d).”

18 161. WCRM recommended that access to Site 689 be confined to the existing road
19 cut and maintenance be restricted to the previously disturbed areas around the structures.

20 162. Western has admitted that it caused damage to Site 689 during its Pole
21 Replacement Project by creating and leaving vehicle tracks within the area described by URS
22 as the “Western Activity Area.” *Quechan Indian Tribe*, 535 F. Supp. 2d at 1118.

23 163. In 2008, this Court found that “Western’s pole-replacement activities of driving
24 through and otherwise impacting [Site 689] with its heavy equipment proximately caused
25 damage to Plaintiff’s cultural resources.” *Quechan Indian Tribe*, 535 F. Supp. 2d at 1120.

26 164. During its Pole Replacement Project, Western caused additional damage to
27 Site 689 by creating and leaving vehicle tracks to the north of tower 18-2 and beyond the
28

1 impact area mapped by URS, as depicted on EDAW Figure PR-7 of the Cleland Report (2009)
2 and labeled as “Disturbance Tree of 18-2.”

3 165. During its Pole Replacement Project, Western caused additional damage to
4 Site 89 by creating and leaving vehicle tracks adjacent to the “spur access road” mapped by
5 URS, as depicted on EDAW Figure PR-7 of the Cleland Report (2009).

6 166. During its Pole Replacement Project, Western caused additional damage to
7 Site 689 by creating and leaving vehicle tracks in an area to the east of tower 18-1, as depicted
8 on EDAW Figure PR-7 of the Cleland Report (2009) and labeled as “Disturbed Area.”

9 **SITE 7144**

10 167. Site 4-IMP-7144 (Site 7144) is a 145 meter (North-South) by 180 meter (East-
11 West) sparse lithic scatter with flaking stations and situated on top of a river terrace.

12 168. Site 7144 is graphically depicted at WCRM Report p. 87 and at EDAW Figure 8
13 of the Cleland Report (2009).

14 169. The Western right-of-way and access road go through Site 7144, but Site 7144
15 extends both to the north and south of the Western right-of-way.

16 170. WCRM identified 110 lithic artifacts and 170 flaked artifacts within Site 7144
17 during its 1994 survey, including three flaking stations.

18 171. WCRM identified and mapped significant pre-existing impacts to Site 7144,
19 specifically including ORV tracks and also including “bulldozer swaths” in the “western
20 portion of the site surrounding the structure and on both sides of the access road” and
21 evidenced grading in the central portion of the site that displaced the desert pavement.

22 172. WCRM measured the disturbance existing in 1994 in the western portion of the
23 site at 40 m (131 ft) by 40 m (131 ft) and the disturbed area in the center of the site at 100 m
24 (328 ft) by 30 m (98 ft).

25 173. WCRM concluded that “field documentation has exhausted site potential and
26 [Site 7144] is recommended not eligible for inclusion in the NRHP.”

27 174. During its Pole Replacement Project, Western caused damage to Site 7144 by
28 creating and leaving vehicle tracks in an area extending 30 to 40 meters south of tower 18-4

1 and extending approximately 15 to 24 meters outside the southern boundary of the Western
2 right-of-way, as depicted on EDAW Figure 8 of the Cleland Report (2009).

3 175. During its Pole Replacement Project, Western caused damage to Site 7144 by
4 creating and leaving vehicle tracks in an area to the east of the impact area mapped by URS,
5 and west of the “two-track,” as depicted on EDAW Figure 8.

6 **SITE 7151**

7 176. Site 4-IMP-7151 (Site 7151) is an 88 meter (North-South) by 120 meter (East-
8 West) lithic scatter with one flaking station and two cleared circles located on a high alluvial
9 terrace overlooking the Colorado River floodplain.

10 177. Site 7151 is graphically depicted at WCRM Report, p. 106 and at EDAW
11 Figure 9 of the Cleland Report (2009).

12 178. The Western right-of-way and access road go through Site 7151, but Site 7151
13 extends to the north of the Western right-of-way.

14 179. WCRM identified 59 lithic artifacts within Site 7151 during its 1994 survey.

15 180. WCRM identified pre-existing impacts to Site 7151 during its 1994 survey,
16 specifically including damage from drainage and erosion.

17 181. WCRM concluded that “based on the limited nature of the site assemblage and
18 the large amount of disturbance to the site relative to its size, this site is recommended not
19 eligible for inclusion in the NRHP.”

20 182. During its Pole Replacement Project, Western caused damaged to Site 7151 by
21 creating and leaving vehicle tracks in an area north of the Western right-of-way and in the
22 western portion of Site 7151, as depicted on EDAW Figure 9 and labeled as “Additional
23 Construction Related Disturbance – Multiple Tracks.”

24 **SITE 7152**

25 183. Site 4-IMP-7152 is a circular shaped lithic scatter with a radius of 55 meters
26 situated on a high terrace between two ridges overlooking the Colorado River.

27 184. Site 7152 is graphically depicted at WCRM Report, p. 105 and EDAW
28 Figure 11 of the Cleland Report (2009).

1 185. The Western right-of-way and access road go through Site 7152, but Site 7152
2 extends both to the north and south of the Western right-of-way.

3 186. WCRM identified 72 artifacts within Site 7152 during its 1994 survey.

4 187. WCRM identified pre-existing impacts to Site 7152 during its 1994 survey,
5 specifically including damage from drainage and erosion.

6 188. WCRM concluded that Site 7152 is “recommended not eligible for inclusion in
7 the NRHP.”

8 189. During its Pole Replacement Project, Western caused damage to Site 7152 by
9 creating and leaving vehicle tracks both north and south of the access road, as depicted on
10 EDAW Figure 11 of the Cleland Report (2009) and labeled as “Additional Construction
11 Related Disturbance – Multiple Tracks/Blading.”

12 **SITE 7153**

13 190. Site 4-IMP-7153 (Site 7153) is a 80 meter (North-South) by 152.5 meter (East-
14 West) lithic scatter with two flaking stations and a cleared circle situated at the edge of an
15 eroded alluvial terrace.

16 191. Site 7153 is graphically depicted at WCRM Report, p. 103 and at EDAW
17 Figure 10 of the Cleland Report (2009).

18 192. The Western right-of-way and access road go through Site 7153, but Site 7153
19 extends both to the north and south of the Western right-of-way.

20 193. WCRM identified 95 artifacts within Site 7153 during its 1994 survey.

21 194. WCRM identified pre-existing impacts to Site 7153 during its 1994 survey,
22 specifically including structure and access road construction and maintenance.

23 195. WCRM concluded that Site 7153 “can provide little new information regarding
24 lithic technology or prehistoric lifeways” and Site 7153 “is recommended not eligible for
25 inclusion in the NRHP.”

26 196. During its Pole Replacement Project, Western caused damage to Site 7153 by
27 creating and leaving vehicle tracks and blading in an extensive portion of the Site, including
28

1 most of the terrace north of the right-of-way, as depicted on EDAW Figure 10 and labeled as
2 “Additional Construction Related Disturbance Multiple Tracks – Blading.”

3 **POINTS OF LAW AND AUTHORITIES**

4 197. Western has waived its sovereign immunity from tort liability pursuant to the
5 Federal Tort Claims Act, 28 U.S.C. § 2674.

6 **Negligence, Negligence Per Se, Gross Negligence**

7 198. The State of California recognizes a cause of action against private individuals
8 for negligence. California Civil Code § 1714(a); *Quechan Indian Tribe v. United States*, 535 F.
9 Supp. 2d 1072, 1117-1120 (S.D. Cal. 2008).

10 199. The State of California recognizes a cause of action against private individuals
11 for negligence per se. California Evidence Code § 669(a)(1); *Quechan Indian Tribe*, 535 F.
12 Supp. 2d at 1121-1122.

13 200. The State of California recognizes a cause of action against private individuals
14 for gross negligence. *Van Meter v. Bent Const. Co.*, 46 Cal. 2d 588 (1956); *Quechan Indian*
15 *Tribe*, 535 F. Supp. 2d at 1120.

16 201. In a negligence action, Plaintiff must show that defendant had a legal duty, that
17 defendant breached the duty, and that the breach was a proximate or legal cause of injuries
18 suffered by the plaintiff. *Quechan Indian Tribe*, 535 F. Supp. 2d at 1117, citing *Ann M. v.*
19 *Pacific Plaza Shopping Center*, 6 Cal.4th 666, 673, 25 Cal.Rptr.2d 137, 863 P.2d 207 (1993).

20 202. Western had a legal duty to not damage or impact cultural and historic resources
21 on the Fort Yuma Indian Reservation when performing work during the Pole Replacement
22 Project. *Quechan Indian Tribe*, 535 F. Supp.2d at 1117-18.

23 203. Western had a legal duty to affirmatively protect cultural and historic resources
24 on the Fort Yuma Indian Reservation. *Quechan Indian Tribe*, 535 F. Supp.2d at 1117-18.

25 204. Western’s duties are established by California Civil Code § 1714(a), which
26 imposes liability for injuries caused by a failure to exercise ordinary care or skill in the
27 management of his or her property or person.

1 205. Western's duties are established by California Penal Code § 622 ½ which
2 prohibits the injury, defacement, or destruction of objects or things of archaeological or
3 historical interest or value. *Quechan Indian Tribe*, 535 F. Supp.2d at 1108.

4 206. Western's duties are established by California Public Resources Code § 5097.9,
5 which prohibits interference with Native American religion and damage to Native American
6 religious, sacred, or ceremonial sites. *Quechan Indian Tribe*, 535 F. Supp.2d at 1108.

7 207. Western's duties are established by California Public Resources Code § 5097.5
8 which prohibits damage to historic, prehistoric, and archaeological sites. *Quechan Indian*
9 *Tribe*, 535 F. Supp. 2d at 1122.

10 208. Western's duties are established by the Restatement of Torts (Second),
11 Sections 162 and 165, which subject a trespasser to liability for physical harm done to the land
12 during the trespass. *Quechan Indian Tribe v. United States*, 535 F. Supp.2d at 1108.

13 209. Western's duties are established by the Restatement of Torts (Second),
14 Section 214, which subjects a person with a privilege to enter land to liability for harm caused
15 by unreasonable conduct. *Quechan Indian Tribe*, 535 F. Supp.2d 1072 at 1108.

16 210. Western's duties are established by affirmative promises made by Western to
17 the Tribe that Western would avoid eligible cultural and historic properties during the Pole
18 Replacement Project. *Quechan Indian Tribe*, 535 F. Supp.2d 1072 at 1118, citing *Aim*
19 *Insurance Co. v. Culcasi*, 229 Cal. App. 3d 209, 215, 280 Cal. Rptr. 766 (1991); *Bloomberg*
20 *Interinsurance Exchange*, 162 Cal. App. 3d 571, 575-76 (1984); *Valdez v. Taylor Auto Co.*,
21 129 Cal. App. 2d 810, 278 P.2d 91 (1954).

22 211. Western's duties are established pursuant to the fiduciary trust relationship that
23 exists between the United States and the Tribe. *Quechan Indian Tribe*, 535 F. Supp.2d 1072
24 at 1108-1110.

25 212. Once the plaintiff demonstrates a duty established by state law, federal law may
26 provide the standard for reasonable care in exercising the state law duty. *Quechan Indian*
27 *Tribe*, 535 F. Supp.2d at 1107, citing *Lutz v. United States*, 685 F.2d 1178, 1184 (9th Cir. 1982).

1 213. Standards of care applicable to Western's conduct based on state and common
2 law are found in California Civil Code § 1714(a), California Penal Code, § 622 1/2, California
3 Public Resources Code § 5097.9, Restatement of Torts (Second), §§ 162, 165, 214.

4 214. Standards of care applicable to Western's conduct based on federal law are
5 found in the Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001-13
6 (prohibiting damage to cultural resources belonging to or affiliated with an Indian tribe); the
7 American Indian Religious Freedom Act, 42 U.S.C. § 1996 (protecting and preserving Indian
8 religion, including access, use, possession of sacred sites); the National Historic Preservation
9 Act, 16 U.S.C. §§ 470 et seq. (requiring preservation and protection of historic resources); the
10 Archaeological Resources Protection Act, 16 U.S.C. §§ 470aa-470mm (prohibiting damage to
11 archaeological resources and sites); the Archaeological and Historic Preservation Act,
12 16 U.S.C. §§ 469-469c-2 (preservation of historic and archaeological data); the National
13 Environmental Policy Act, 42 U.S.C. § 4321 et seq. (requiring evaluation of impacts to
14 environmental and cultural resources); the American Antiquities Act, 16 U.S.C. § 431-33; the
15 Historic Sites, Buildings and Antiquities Act, 16 U.S.C. §§ 461-467 (preservation of historic
16 sites and objects of national significance); Executive Order 11593, Protection and Enhancement
17 of the Cultural Environment (May 13, 1971) (requiring preservation of cultural properties); and
18 the fiduciary trust duty owed by the United States to the Quechan Indian Tribe.

19 215. Western breached its duties and the applicable standards of care by failing to
20 adequately mark or identify cultural resources sites, failing to adequately inform its crews of
21 the locations of cultural resources sites, and by failing to monitor the work performed during
22 the Pole Replacement Project.

23 216. Western breached its duties and the applicable standards of care by repeatedly
24 driving heavy equipment over, across, and through cultural resource sites on the Fort Yuma
25 Indian Reservation, resulting in permanent scarring of the sites. *Quechan Indian Tribe*, 535 F.
26 Supp. 2d at 1118-1120.

1 217. Western’s breach of its duties directly and proximately caused damage to the
2 Quechan Indian Tribe’s cultural resources; thus Western is liable for its negligence. *Quechan*
3 *Indian Tribe*, 535 F. Supp. 2d at 1120.

4 218. California Evidence Code § 669 establishes that a person’s failure to exercise
5 due care is presumed if: (1) he violated a statute, ordinance, or regulation of a public entity;
6 (2) the violation proximately caused property damage; (3) the property damage resulted from
7 an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent;
8 and (4) the person suffering the property damage was one of the class of persons for whose
9 protection the statute, ordinance, or regulation was adopted.

10 219. In California, negligence per se may be established by showing defendant
11 violated a statute “embodying a public policy” even if the statute does not contain a specific
12 civil remedy, provided the plaintiff is an injured member of the public for whose benefit the
13 statute was enacted. *Quechan Indian Tribe*, 535 F. Supp. 2d at 1106.

14 220. Plaintiff Quechan Indian Tribe falls within the class of persons for whose
15 protection the above-named state and federal statutes were designed to protect.

16 221. Western’s failure to exercise due care, and its negligence per se, is
17 presumptively established under California Evidence Code § 669 due to its violation of
18 California Public Resources Code §§ 5097.9, 5097.5, and California Penal Code, § 622 ½.
19 *Quechan Indian Tribe*, 535 F. Supp. 2d at 1121-1122.

20 222. Western’s failure to exercise due care, and its negligence per se, is
21 presumptively established under California Evidence Code § 669 due to its violation of the
22 federal statutes identified above.

23 223. Gross negligence is defined as “the want of even scant care or extreme departure
24 from the ordinary standard of conduct.” *Quechan Indian Tribe*, 535 F. Supp. 2d at 1107, citing
25 *Eastburn v. Regional Fire Protection Authority*, 31 Cal.4th 1175, 7 Cal.Rptr.3d 552, 80 P.3d
26 656 (2003) (citing *Franz v. Board of Medical Quality Assurance*, 31 Cal.3d 124, 181 Cal. Rptr.
27 732, 642 P.2d 792 (1982)).

1 224. Western's actions of repeatedly driving over un-marked cultural resources
2 during its un-monitored Pole Replacement Project show that Western failed to exhibit even
3 "scant care" and is an "extreme departure from the ordinary standard of conduct"; thus Western
4 is liable for gross negligence. *Quechan Indian Tribe*, 535 F. Supp. 2d at 1120.

5 225. In establishing Western's negligence, the Tribe may rely upon the doctrine of
6 *res ipsa loquitur* to the extent needed to establish that the heavy equipment tracks found on the
7 cultural resource sites resulted from Western's Pole Replacement Project. Reliance on the
8 doctrine of *res ipsa loquitur* is based on the negligent acts already established in this
9 proceeding relating to the Pole Replacement Project and the consistency between the tracks
10 impacting the sites and the heavy equipment used during the Pole Replacement Project.

11 Trespass

12 226. The State of California recognizes a cause of action against private individuals
13 for trespass. *Quechan Indian Tribe*, 535 F. Supp. 2d at 1123.

14 227. Trespass is an unlawful interference with possession of property. *Quechan*
15 *Indian Tribe*, 535 F. Supp. 2d at 1123, citing *Staples v. Hoefke*, 189 Cal.App.3d 1397, 1406,
16 235 Cal. Rptr. 165 (citing *Girard v. Ball*, 125 Cal. App.3d 772, 788, 178 Cal. Rptr. 406 (1981).

17 228. Liability for trespass may be imposed for conduct which is intentional, reckless,
18 negligent or the result of an extra-hazardous activity. *Quechan Indian Tribe*, 535 F. Supp. 2d
19 at 1123.

20 229. One who enters land in the possession of another without consent is subject to
21 liability for trespass irrespective of any harm caused thereby. Restatement of Torts (Second)
22 §§ 158, 159.

23 230. A trespasser is subject to liability for harm caused during the trespass.
24 Restatement of Torts (Second), §§ 162, 165.

25 231. Western trespassed on the Fort Yuma Indian Reservation and damaged Quechan
26 cultural resource sites during the trespass. *Quechan Indian Tribe*, 535 F. Supp. 2d at 1123.

Private and Public Nuisance

232. The State of California recognizes independent causes of action against private individuals for private and public nuisance. California Civil Code § 3479, 3480; *Quechan Indian Tribe*, 535 F. Supp. 2d at 1123.

233. A private nuisance is the substantial and unreasonable interference with or invasion of another's use or enjoyment of his or her property. California Civil Code § 3479; *Quechan Indian Tribe*, 535 F. Supp. 2d at 1123.

234. A public nuisance is a substantial and unreasonable interference or invasion of another's use or enjoyment of property, which affects at the same time an entire community or neighborhood, or any considerable number of persons. California Civil Code, § 3480; *Quechan Indian Tribe*, 535 F. Supp. 2d at 1123.

235. To demonstrate the interference or invasion was substantial, the plaintiff must provide evidence of "substantial actual damage." *Quechan Indian Tribe*, 535 F. Supp. 2d at 1123, citing *Fashion 21 v. Coalition for Humane Immigrant Rights of Los Angeles*, 117 Cal.App.4th 893, 938, 55 Cal. Rptr.2d 724, 920 P.2d 669 (1996).

236. The interference or invasion is unreasonable if "the gravity of the harm outweighs the social utility of the defendant's conduct." *Quechan Indian Tribe*, 535 F. Supp. 2d at 1123, citing *Fashion 21 v. Coalition for Humane Immigrant Rights of Los Angeles*, 117 Cal.App.4th 893, 938, 55 Cal. Rptr.2d 724, 920 P.2d 669 (1996); *County of Santa Clara v. Atlantic Richfield Co.*, 137 Cal.App.4th 292, 305, 40 Cal. Rptr.3d 313 (2006).

237. Western's conduct of repeatedly driving heavy equipment over cultural sites on the Fort Yuma Indian Reservation during its Pole Replacement Project resulted in substantial actual damage to cultural sites and interfered with the use and enjoyment of the Tribe's property.

238. The gravity of the harm resulting from Western's permanent destruction of irreplaceable, priceless, and sacred sites outweighs the social utility of Western's conduct, especially given the fact that the destruction could have been avoided through exercise of due care by Western; thus, Western's actions constituted a private and public nuisance.

Statement of Abandoned Issues

239. Pursuant to stipulation, Plaintiff's claims for conversion, tortious interference with property, and invasion of privacy have been dismissed with prejudice. *See* Dkt. No. 88. No other issues are abandoned.

1 *Quechan Indian Tribe v. United States of America*

Case No: 02cv1096-JAH(MDD)

2 **List of Plaintiff's Exhibits**

| 3 Number | Date 4 Marked | Date 5 Admitted | Description |
|----------|------------------|--------------------|---|
| 6 1 | | | 7 Intensive Cultural Resource Inventory for the Western Area 8 Power Administration Gila-Knob 161-kv Transmission Line, 9 Imperial County, California and Yuma County, Arizona for 10 U.S. Department of Energy Western Area Power 11 Administration, prepared by Moreno et al., April 19, 1995 12 (WCRM Report) (FED 1 – 381) |
| 13 2 | | | 14 Letter from WCRM to Fritz Brown, Quechan President, July 15 14, 1994 (Quechan SUMF Exh. 22) |
| 16 3 | | | 17 Letter from Western (Duarte) to Fritz Brown, Quechan 18 President, May 31, 1995 (FED 382-384) |
| 19 4 | | | 20 Letter from Western (Carlson) to Fritz Brown, Quechan 21 President, August 3, 1998 (FED 433) |
| 22 5 | | | 23 Letter from Western (Watson) to Mike Jackson, Sr., 24 Quechan President, Sept. 3, 1998 (FED 513) |
| 25 6 | | | 26 Letter from Western to Cal. SHPO Abeyta, Sept. 15, 1998 27 (FED 516-518) |
| 28 7 | | | Wood Pole Rehabilitation Program Weekly Log, Quechan SUMF Exh. 38 (FED 2647-2656) |
| | | | E-mail from DePoe to Jarrett, Sept. 21, 1998 (FED 519) |
| | | | E-mail from DePoe to Bullock, Logan et al., Sept. 28, 1998 (FED 521-526) |
| | | | Record of Categorical Exclusion Determination, Oct. 5, 1998 (FED 529-530) |
| | | | Modified Environmental Work Restrictions, Jarrett (FED 2628-2646) |
| | | | Memo of Alison Jarrett to File, March 5, 1999 re damage near structure 18/8 (FED 573) |
| | | | Letter from Western (Holt) to Pauline Owl, March 19, 1999 (FED 575-576) |
| | | | E-mail from DePoe to Koreski, Holt, Mathias, April 27, 1999 (FED 591) |
| | | | Western Area Power Administration Environmental Lessons Learned Investigation, Damage to Archaeological Resources During the Gila-Knob Replacement Project, April 28, 1999 (Lessons Learned Report) (FED 592 -630) |
| | | | Letter from Jozwiak to Western (Harness), February 13, 2001 (FED 849-850). |

| | | | |
|----|----|--|--|
| 1 | 17 | | Letter from Western (Harness) to Jozwiak, March 2, 2001 (FED 878) |
| 2 | 18 | | Documentation of Activities Along the Gila-Knob 161-kv Transmission Line Rehabilitation Project, Imperial County, California, prepared for Western Area Power Administration, by URS Corporation (June 2001) (URS Report) (FED 894-911, and pages omitted from FED docs) |
| 3 | | | |
| 4 | | | |
| 5 | 19 | | Statement of Work Disposal of Wood Powerline Structures and Associated Hardware (FED 980-982) |
| 6 | 20 | | List of Western Equipment (FED 3026-3027) |
| 7 | | | |
| 8 | 21 | | Representative Photographs of Equipment |
| 9 | 22 | | Witness Report on Impacts to Cultural Resources On the Fort Yuma Indian Reservation Related to the 1998 Western Area Power Administration Gila-Knob 161 kv Transmission Line Pole Replacement Project, February 27, 2009 (Cleland Report (2009) |
| 10 | | | |
| 11 | | | |
| 12 | 23 | | Examination of Tire Track and Tire Tread Impressions, William J. Bodziak, February 26, 2009 (Bodziak 2009) |
| 13 | 24 | | Deposition Transcript of William Logan (Jan. 12, 2005) |
| 14 | 25 | | Deposition Transcript of Thomas Plummer (Jan. 13, 2005) |
| 15 | 26 | | Deposition Transcript of Mary Barger (Jan. 12, 2005) |
| 16 | 27 | | Deposition Transcript of Mark Depoe (Jan. 13, 2005) |
| 17 | 28 | | Deposition Transcript of John Holt (Jan. 13, 2005) |
| 18 | 29 | | Deposition Transcript of Alison Jarrett (Jan. 14, 2005) |
| 19 | 30 | | Deposition Transcript of John Brent Bowen (June 1, 2005) |
| 20 | 31 | | Deposition Transcript of Ed Harris (June 2, 2005) |
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2 **Plaintiff's Prospective Witnesses**

- 3 1. James H. Cleland, Ph.D., R.P.A.
4 2. William J. Bodziak
5 3. Lorey Cachora
6 4. Pauline Jose
7 5. Vernon Smith
8 6. Felix Montague
9 7. William Logan (adverse)
10 8. Thomas Plummer (adverse)
11 9. Mary Barger (adverse)
12 10. John Holt (adverse)
13 11. Mark Depoe (adverse)
14 12. Alison Jarrett (adverse)
15 13. John Brent Bowen (adverse)
16 14. Ed Harris (adverse)

17 **Plaintiff's Expert Witnesses**

- 18 1. James H. Cleland, Ph.D., R.P.A.

19 Statement of Qualifications: Dr. Cleland has a Ph.D. in anthropology with specialty in
20 archaeology. Dr. Cleland is a Registered Professional Archaeologist (RPA). He has 30 years
21 of experience in California archaeology and cultural resources management, including working
22 with the National Historic Preservation Act and other Federal cultural resources legislation and
23 guidelines. He has 25 years of cultural resources experience in the California deserts and over
24 ten years experience with the cultural resources concerns of the Quechan Tribe. Dr. Cleland
25 has extensive experience in the assessment of cultural resources impacts for proposed
26 transmission line projects and extensive experience in the monitoring of construction activities
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28

1 at or near cultural resource sites. A complete description of Dr. Cleland's qualifications,
2 including publications, are included in Appendix A of the Cleland Report (2009).

3 Substance of Testimony:

4 Dr. Cleland will provide expert testimony relating to his *Witness Report on Impacts to*
5 *Cultural Resources on the Fort Yuma Indian Reservation Related to the 1998 Western Area*
6 *Power Administration Gila-Knob 161 KV Transmission Line Pole Replacement Project* (Feb.
7 27, 2009). Dr. Cleland will offer testimony regarding the cultural resources affected by
8 Western's actions. Dr. Cleland will offer testimony relating to his opinions that (1) Western
9 and its consultants substantially and materially under-reported the extent of ground disturbance
10 that is attributable to Western's 1998 Pole Replacement Project; (2) Western did not restrict the
11 use of tracked vehicles to existing access roads, leading to material damage to cultural
12 resources; and (3) Western's construction crews repeatedly impacted Reservation lands outside
13 of Western's right-of-way and access roads during the 1998 Pole Replacement Project. Dr.
14 Cleland will offer testimony regarding the specific areas that exhibit evidence of construction-
15 related damage attributable to Western's 1998 Pole Replacement Project. Dr. Cleland will also
16 discuss photographs and drawings that evidence the construction-related damage.

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18 2. William J. Bodziak

19 Statement of Qualifications: Mr. Bodziak holds a Bachelor of Arts degree in Biology
20 and a Masters of Science in Forensic Science (MSFS) degree from the George Washington
21 University in Washington, D.C. Mr. Bodziak was appointed a Special Agent for the Federal
22 Bureau of Investigation in January 1970. From August 1973 to December 1997, Mr. Bodziak
23 was assigned to the FBI Laboratory in Washington, D.C. During that tenure, he conducted
24 thousands of forensic examinations of questioned documents and footwear and tire tread
25 impressions. Mr. Bodziak is the author of *Footwear Impression Evidence: Detection,*
26 *Recovery and Examination* (2000) and *Tire Tread and Tire Track Evidence: Recovery and*
27 *Forensic Examination* (2008). A complete description of Mr. Bodziak's qualifications are
28 found in the Appendix of the Bodziak Report (2009).

