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14 **UNITED STATES DISTRICT COURT**
15 **SOUTHERN DISTRICT OF CALIFORNIA**

15 QUECHAN INDIAN TRIBE, a federally) Case No. 02CV1096-JAH (MDD)
16 recognized Indian Tribe, on its own behalf, and)
17 as parens patriae on behalf of its members,) PLAINTIFF’S PRE-TRIAL MEMORANDUM
18)
19 Plaintiff,) HONORABLE JOHN A. HOUSTON
20 vs.) Trial Date: Commencing Aug. 21, 2012
21) Courtroom No. 11, 2nd Floor
22)
23 UNITED STATES OF AMERICA)
24)
25 Defendant.)
26)
27)
28)

24 Pursuant to Civil Local Rule 16.1.f.9.a, Plaintiff Quechan Indian Tribe submits this pre-trial
25 memorandum regarding its position on disputed issues of law, procedural, and evidentiary matters.

26 **I. PROCEDURAL HISTORY**

27 Plaintiff, Quechan Indian Tribe originally filed its complaint in this matter on June 7, 2002.
28 On July 18, 2003, the action was stayed pursuant to stipulation pending the outcome of land ownership

1 issues arising from *Arizona v. California*, 530 U.S. 392 (2000). On March 23, 2004, Plaintiff filed a
2 First Amendment Complaint under seal. Following a lifting of the stay, Plaintiff filed a Second
3 Amended Complaint on March 16, 2005 (Dkt. #86). The Second Amended Complaint alleges claims
4 of negligence, negligence per se, gross negligence, trespass, and public and private nuisance pursuant
5 to the Federal Tort Claims Act, 28 U.S.C. § 2674.

6 On September 2, 2005, Plaintiff filed two motions for summary judgment, one of which sought
7 partial summary judgment as to liability for negligence, gross negligence, negligence per se, trespass,
8 and private and public nuisance (Dkt. #103). The second motion sought partial summary judgment on
9 the issue of the Tribe's beneficial title to, and non-property interests in, the lands located within an
10 alleged United States right-of-way (Dkt. #105). Defendant filed cross-motions for summary judgment
11 (Dkt. #109, 114). On January 10, 2008, the Court entered an order on the respective motions, which
12 will be discussed in more detail below. The Court's order is published at *Quechan Indian Tribe v.*
13 *United States*, 535 F. Supp. 2d 1072 (S.D. Cal. 2008).

14 Following the Court's order, the parties diligently, but unsuccessfully, attempted to settle the
15 case. On November 20, 2009, the United States moved to dismiss Plaintiff's claims for lack of subject
16 matter jurisdiction as to the land within the right-of-way, which the Court ruled is held in fee simple
17 by the United States. (Dkt. 244, 245). In the same document, the United States also moved for
18 "clarification" of numerous rulings contained in the Court's 2008 summary judgment order. *Id.* The
19 Court denied the United States' motion on September 29, 2010. (Dkt. #261).

20 On December 13, 2011, the Court entered a pre-trial order (Dkt. #285) setting the Phase I trial,
21 which will address disputed facts regarding the scope of the United States' impacts to affected cultural
22 resource sites, for commencement on August 21, 2012. Following the August 2012 trial and
23 subsequent expert discovery on damages, a Phase II trial will commence to determine the appropriate
24 measure of damages to which the Tribe is entitled to recover.

25 II. DISPUTED ISSUES OF LAW

26 A. Subject Matter Jurisdiction As To Impacts Within the Right-of-Way.

27 In its pre-trial conference memorandum (Dkt. #283), the United States argued that the Court
28 does not have subject matter jurisdiction over the United States under the FTCA with respect to

1 impacts and damage to cultural sites that occurred within the right-of-way. The Court has specifically
2 addressed this argument twice in this litigation and has rejected the United States argument on both
3 occasions. To the extent the Court entertains this argument for the third time (which it should not), the
4 Court should again reject it.

5 The Court specifically addressed and rejected the United States subject matter jurisdiction
6 argument in the 2008 summary judgment order:

7 The government argues the Tribe's claims should be dismissed to the extent they assert
8 claims for damage to property held by the United States in fee title. Defendant maintains
9 all the Tribe's claims rely in whole or in part, on a determination that the Tribe owns the
10 land. The government contends that, should the Court find the United States owns the
11 land in fee, the Tribe's claims should be dismissed.

12 535 F. Supp. 2d at 1100. The Court rejected the United States' argument with respect to the Tribe's
13 nuisance and negligence claims:

14 Nuisance claims do not rely upon damage to an individual's property, but require
15 interference with a plaintiff's use and enjoyment of his or her property. [internal citation
16 omitted]. The Court's holding that the United States owns the [right-of-way] land is not
17 fatal to Plaintiff's nuisance claim. Accordingly, the government's motion to dismiss the
18 nuisance claim is DENIED. . . .

19 Defendant argues the United States has no duty for actions taken on fee property, so the
20 negligence claims should be dismissed. . . . Because the negligence claims do not rise and
21 fall upon ownership of land, the Court's holding that the United States owns the land is
22 not fatal to the negligence claims. As such, Defendant's motion to dismiss the negligence
23 claim is DENIED.

24 *Id.* The Court did distinguish and dismiss the Tribe's claims for trespass relating to the United States'
25 actions within the right-of-way, finding that plaintiff's ownership of land was a necessary element to a
26 trespass claim. *Id.* at 1101.

27 The United States renewed its motion to dismiss for lack of subject matter jurisdiction on
28 November 20, 2009. The Tribe responded in opposition to the motion on February 22, 2010 (Dkt.
29 249) and, to avoid duplication of effort, incorporates the arguments made in that response herein by
30 reference. In its September 29, 2010 order (Dkt. #261), addressing the United States' argument for the
31 second time, this Court did not change its position:

32 Defendant argues the Court's ruling that the government holds the right-of-way lands in
33 fee simple and the Tribe has no proprietary interest in the right-of-way lands is fatal to

1 Plaintiff's FTCA claims for damages to cultural resources within the right-of-way lands. .
2 . . In its order ruling on the parties' motion for summary judgment, this Court determined
3 the government owned the land in fee simple and Plaintiff had no proprietary interest in
4 the right-of-way lands. The Court then specifically addressed the effect of this finding on
5 the merits of Plaintiff's tort claims and determined the nuisance and negligence claims
6 survived. The Court is not persuaded by Defendant's argument that the claim should be
7 dismissed because the Tribe has no proprietary interest in the lands. Plaintiff asserts the
8 government's conduct within the right-of-way lands impacted its property rights to lands
9 outside the right-of-way and therefore properly asserts jurisdiction over its claims for
10 damages. Plaintiff sufficiently alleges an injury to its property to support jurisdiction
11 under the FTCA. Accordingly, the motion to dismiss for lack of subject matter
12 jurisdiction is DENIED.

13 The United States has latched on to the Court's footnote 1 in its 2010 order, which states: "Plaintiff is
14 required to prove the actions within the right-of-way lands injured its property to prevail on its claims.
15 However, at this stage, Plaintiff need only allege property damage to survive the motion to dismiss."
16 (Dkt. #261, fn. 1). This footnote says nothing about the subject matter jurisdiction of the Court or
17 otherwise contradicts the Court's ruling, and is merely a statement that Plaintiff is ultimately required
18 to prove the merits of its case. The issue, for purposes of this argument, is not whether the Plaintiff
19 ultimately prevails on all of its claims – the issue is whether this Court has subject matter jurisdiction
20 to entertain Plaintiff's claims. As the Court ruled on two occasions, it plainly does have the requisite
21 jurisdiction.

22 B. Questions of Law Relating to Plaintiff's Claims

23 The pre-trial order (Dkt. #285) states "the Tribe submits that the questions of law pertaining to
24 its claims of negligence, negligence per se, gross negligence, trespass, private and public nuisance
25 have been previously resolved in this Court's order on summary judgment and that only the factual
26 disputes which could not be decided on summary judgment remain for trial." The pre-trial order goes
27 on to state that "the United States disagrees with plaintiff's characterization of the Court's orders . . .
28 ." Like its prior arguments on this Court's subject matter jurisdiction, the United States has
previously asked the Court to reconsider its legal rulings on Plaintiff's claims in the 2008 summary
judgment order. Nearly two years after the Court's summary judgment order, the United States
moved for "clarification" on many of the key legal rulings made by the Court. In its September 29,
2010 order, this Court found that "a review of the motion for clarification clearly demonstrates

1 Defendant is seeking reconsideration of the Court’s order on the motion for summary judgment.”
2 (Dkt. #261, p. 4). The Court construed the motion as an untimely request for reconsideration and
3 denied it. *Id.*

4 The Court’s 2008 order clearly resolved many issues of law relating to the Tribe’s claims,
5 which need not and should not be revisited here. The pending trial will focus only on those issues of
6 disputed fact that the Court identified in that order. Below, the Tribe provides its view on the issues
7 of law resolved by the 2008 order and those issues that remain unresolved at the time of trial.

8 1. Negligence

9 “Under California law, the plaintiff bears the burden of showing the ‘defendant owed the
10 plaintiff a legal duty, the defendant breached the duty, and the breach was a proximate or legal cause
11 of injuries suffered by the plaintiff’ in negligence actions.” *Quechan Indian Tribe v. United States*,
12 535 F. Supp. 2d 1072, 1117 (S.D. Cal. 2008), quoting *Ann M.*, 6 Cal.4th at 673 (1993). In its 2008
13 order, this Court ruled that the United States owed a legal duty to the Plaintiff, stating: “California law
14 imposes duties on Defendant to refrain from causing severe damage to any Native American religious
15 or ceremonial site or sacred shrine located on public property, from destroying an object of
16 archaeological or historical value, to protect cultural resources both on Indian and public land and to
17 take reasonable steps to protect trust property.” 535 F. Supp. 2d at 1117-18. *See also id.* at 1108.

18 The Court also found a duty arising from the promises that Western made to Quechan, stating:
19 “It was reasonable for Western to believe Quechan would rely on its repeated promises to avoid
20 eligible sites and cause no additional impacts. Accordingly, the Court finds duties arise from
21 Western’s promises.” *Id.* at 1118.

22 The Court also found that a duty arose from the fiduciary relationship between the federal
23 government and Indians and their land. *Id.* at 1110. “The Court finds the various federal statutes
24 aimed at protecting Indian cultural resources, located both on Indian land and public land, demonstrate
25 the government’s comprehensive responsibility to protect these resources and, thereby establishes a
26 fiduciary relationship.” *Id.* at 1109. This fiduciary relationship “requires the government’s conduct in
27 its dealings with Indian tribes to be judged ‘by the most exacting fiduciary standards.’” *Id.* at 1110,
28 quoting *Seminole Nation*, 316 U.S. 286, 297 (1942).

1 The Court further found that California law also imposes a duty upon the United States to
2 protect the sites not eligible for inclusion in the National Register (in addition to its duty to protect
3 those that are eligible). *Id.* at 1115.

4 Based on these rulings, the United States' legal duty to not harm Plaintiff's cultural resources
5 is established. The Court also addressed breach and proximate cause with regard to certain sites in its
6 2008 order. With regard to breach, "The Court finds there is no dispute as to whether Western
7 impacted cultural site numbers 7140, 7147, 7138 and 689. Accordingly, Defendant breached its duties
8 as to those sites." *Id.* at 1120. With regard to proximate cause:

9 Based on the undisputed facts this Court discusses above, the Court finds the only
10 conclusion to be drawn is Western's pole-replacement activities of driving through and
11 otherwise impacting the eligible sites with its heavy equipment proximately caused
12 damage to Plaintiff's cultural resources.

12 *Id.* The Court granted Plaintiff judgment on its claim of negligence as to sites 7140, 7147, 7138, and
13 689, leaving only the question of the scope of damage to these and other sites for trial.

14 In summary, with regard to Plaintiff's claim for negligence, the issues remaining for trial are
15 (a) whether Defendant's pole-replacement activities negligently impacted sites other than 7140, 7147,
16 7138, and 689; and (b) what is the full extent of impacts attributable to the Defendant's pole-
17 replacement project on all sites. Plaintiff intends to rely, in part, on the legal doctrine of *res ipsa*
18 *loquitur* to establish a presumption of Defendant's negligence. *Res ipsa loquitur* is applicable here,
19 because the injury is of the kind that ordinarily does not occur in the absence of negligence; the injury
20 was caused by an agency in the exclusive control of the Defendant; and the injury was not due to any
21 voluntary action or contribution on the part of the Plaintiff. *Blackwell v. Hurst*, 46 Cal. App. 4th 939
22 (1996); *Ford v. Miller Meat Co.*, 28 Cal. App. 4th 1196 (1994) (re conditions for *res ipsa loquitur*).

23 2. Negligence Per Se

24 Under California law, (a) the failure of a person to exercise due care is presumed if: (1) he
25 violated a statute, ordinance, or regulation of a public entity; (2) the violation proximately caused
26 death or injury to person or property; (3) the death or injury resulted from an occurrence of the nature
27 which the statute, ordinance, or regulation was designed to prevent; and (4) the person suffering the
28 death or injury to his person or property was one of the class of persons for whose protection the

1 statute, ordinance, or regulation was adopted. *Id.* at 1121; Cal. Evid. Code, § 669. The Court
2 analyzed four statutory bases supporting Plaintiff's negligence per se claim: California Public
3 Resources Code § § 5097.9, 5097.5, 5097.995 and California Penal Code 622 ½. *Id.*

4 The Court ruled Plaintiff was entitled to judgment on its negligence per se claim for Site 7140
5 based on the United States breach of California Public Resources Code 5097.9. *Id.* at 1121-22. The
6 Court further ruled Plaintiff was entitled to judgment on its negligence per se claim for Sites 7140,
7 7147, 7138, and 689 based on the United States breaches of California Public Resources Code 5097.5
8 and California Penal Code 622 ½. *Id.* at 1122. On these latter claims, the Court found that: "the
9 undisputed evidence demonstrates Western knowingly destroyed, injured and defaced archaeological
10 sites" and that "Defendant willfully destroyed items of archeological interest when its employees
11 drove over sites and proximately caused damage to the sites." *Id.*

12 With regard to Plaintiff's negligence per se claim, the issues remaining for trial are whether
13 Defendant's conduct with respect to sites other than 7140, 7147, 7138 and 689 violated California
14 Public Resources Code § § 5097.9, 5097.5, 5097.995, and/or Penal Code 622 ½. If Plaintiff
15 establishes that Defendant's activities injured the sites, it will establish negligence per se under
16 Sections 5097.5 and 622 ½. If Plaintiff establishes that Defendant's activities resulted in "severe or
17 irreparable damage" to the sites, it will establish negligence per se under Section 5097.9. If Plaintiff
18 establishes that the damage to the sites was committed with a specific intent to cause damage, it will
19 establish negligence per se under Section 5097.995. *Id.* at 1121-22.

20 3. Gross Negligence

21 Gross negligence is defined as "the want of even scant care or extreme departure from the
22 ordinary standard of conduct." *Id.* at 1120. The Court, its 2008 order, found that a genuine issue of
23 material fact existed as to whether the Defendant acted with "scant care." *Id.* at 1121. Thus, this
24 factual question remains an issue for trial on the gross negligence claim.

25 4. Trespass

26 "Trespass is an unlawful interference with possession of property." *Id.* at 1123. In its 2008
27 order, the Court ruled that "the undisputed evidence demonstrates Western negligently impacted sites
28 outside the right-of-way. Accordingly, Plaintiff is entitled to judgment on the claim for trespass for

1 lands outside the right-of-way.” *Id.* At trial, if the Tribe establishes that the United States impacted
2 other sites, or portions of sites, located outside of the right-of-way, it will be entitled to judgment for
3 trespass. *Id.*

4 5. Nuisance

5 Private nuisance is the interference with or invasion of another’s use and enjoyment of his or
6 her life or property. *Id.*; Cal. Civ. Code § 3479. The interference must be both substantial and
7 unreasonable. Similarly, a public nuisance is one which affects at the same time an entire community
8 or neighborhood, or any considerable number of persons. *Id.*; Cal. Civ. Code § 3480. A nuisance
9 must be substantial and unreasonable to qualify as a public nuisance. *Id.* In its 2008 order, the Court
10 found that Western’s acts caused “substantial actual damage” to the Tribe’s cultural resources. *Id.*
11 However, “the reasonableness of Western’s acts must be judged by the trier of fact.” *Id.* An invasion
12 of another’s use of property is unreasonable if “the gravity of the harm outweighs the social utility of
13 the defendant’s conduct.” *Id.* This question of the reasonableness of Defendant’s conduct must be
14 analyzed by the Court following a review of the evidence at trial.

15 C. Conclusion re Issues of Law

16 In summary, the purpose and focus of the current trial is to establish the scope of impacts
17 caused by Western’s pole-replacement project. Based on the 2008 summary judgment order, if the
18 Tribe establishes that Western’s pole-replacement project impacted or damaged a cultural site, the
19 Court should find that Western is negligent, negligent per se, and perhaps grossly negligent. If the
20 impact or damage occurred in an area of a site located outside the right-of-way, Western should also
21 be held liable for trespass. If the Court determines that the invasion on Plaintiff’s property interests
22 was unreasonable, Western should be held liable for nuisance.

23 III. PROCEDURAL AND EVIDENTIARY ISSUES

24 Plaintiff and Defendants have filed, prior to today, two joint motions regarding certain
25 procedural and evidentiary issues. Those motions address a joint request to file certain documents
26 under seal pursuant to the applicable Protective Order, as well as a joint request for leave to admit
27 testimony of certain witnesses via deposition transcript in lieu of their live testimony at trial. (Dkt.
28

CERTIFICATE OF SERVICE

I hereby certify that on August 14, 2012, I electronically transmitted PLAINTIFF'S PRE-TRIAL MEMORANDUM to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following recipients:

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