

1 The parties filed separate supplemental briefs following trial.¹ Having considered the testimony,
2 argument presented by the parties at the trial, and the supplemental briefs, this Court makes
3 the following findings of fact and conclusions of law:

4 **FINDINGS OF FACT**

5 1. In July 1994, Western retained Western Cultural Resource Management
6 (“WCRM”) to conduct an inventory of cultural resources of the Gila-Knob 161-kv transmission
7 line and access roads.

8 2. The Gila-Knob transmission line is located within the exterior boundaries of the
9 Fort Yuma Indian Reservation.

10 3. The United States retains the 100-foot right-of way for the transmission line and
11 a 50 foot access road in fee simple absolute.

12 4. WCRM prepared a report dated April 19, 1995 entitled “Intensive Cultural
13 Resource Inventory for the Western Area Power Administration Gila-Knob 161-KV
14 Transmission Line, Imperial County, California and Yuma County, Arizona.”

15 5. WCRM surveyors located 26 archeological sites and 7 isolates which included
16 lithic scatters, temporary camps, ceremonial areas and geoglyphs.

17 6. Defendant notified the Tribe by letter on May 31, 1995, of the pole replacement
18 project along the Gila-Knob transmission line and that it considered the effects of the project
19 on cultural resources and determined it would have no effect on historic properties.

20 7. In a letter dated May 31, 1995, Defendant stated it would ensure all construction
21 and maintenance activities avoid eligible properties and construction personnel would be briefed
22 on avoidance of the areas.

23 8. In 1997, Merrick and Co. took aerial photographs of the area upon Defendant’s
24 request.

25 9. In a letter dated August 3, 1998, Defendant notified the Tribe of the need to use
26

27 ¹Defendant conceded to the Court’s findings as to the cause of the impacts to
28 Sites 689, 7138, 7140, and 7147 and continued to challenge Plaintiff’s assertions of
additional impacts to those sites as well as impacts to other sites.

1 tracked vehicles for the project and determined there would be no effect on historic properties
2 from using the tracked vehicles.

3 10. By letter dated September 3, 1998, Defendant notified the Tribe the pole
4 replacement project would begin on October 1, 1998 , and requested help in coordinating the
5 project.

6 11. The Tribe did not respond to Defendant's letters.

7 12. Defendant flagged the cultural sites prior to work beginning on the project.

8 13. On October 5, 1998, Defendant executed a "Categorical Exclusion Determination"
9 under the National Environmental Policy Act that provided that an archeologist would monitor
10 the structures near or within eligible cultural sites.

11 14. From October 1998 to February 1999, Defendant conducted the pole replacement
12 project along the Gila-Knob transmission line.

13 15. No archeologist monitored the sites.

14 16. Environmental Work Recommendations Lists were provided to the line crews by
15 Defendant's Environmental Protection Specialist, Alison Jarrett, which included handwritten
16 notes regarding cultural sites.

17 17. Western used heavy construction equipment and trucks during the project.

18 18. The trucks and heavy equipment used by Western during the project are longer,
19 wider and heavier than conventional vehicles, such as sports utility vehicles, passenger vehicles
20 or light trucks and all-terrain/recreational vehicles.

21 19. Defendant used a bulldozer, which moves on a continuous track instead of wheels.

22 20. On February 22, 1999, Defendant discovered impact to an archeological feature.

23 21. On March 2, 1999, Defendant reported the damage to the Tribe.

24 22. On April 6, 1999, Lorey Cachora, the Tribe's Cultural Committee representative,
25 and Jay von Werlhof, an archeologist, visited the sites.

26 23. Jay von Werlhof wrote a report identifying impacts, following the visit.

27 24. On April 28, 1999, Defendant issued a report entitled "Environmental Lessons
28 Learned Investigation Damage to Archeological Resources During the Gila-Knob Pole

1 Replacement Protect” that discussed impacts to Site 7140.

2 25. The Tribe submitted an administrative tort claim on February 13, 2001.

3 26 The Tribe asked Western to survey all the sites.

4 27. In June 2001, URS Corporation submitted a report entitled “Documentation of
5 Activities Along the Gila-Knob 161-kv transmission Line Rehabilitation Project, Imperial
6 County, California.”

7 28. URS surveyed Sites 689, 7138, 7140, 7141, 7142, 7143, and 7147 and found
8 impact to certain portions of Sites 689, 7138, 7140, and 7147. Sites 7144, 7151, 7152 and
9 7153 were not surveyed by URS.

10 29. Plaintiff asserts Defendant caused impacts to Sites 689, 7138, 7140, 7141, 7142,
11 7143, 7144, 7147, 7151, 7152, 7153.

12 30. This Court previously found there is no dispute as to whether Western impacted
13 certain portions of cultural Sites 689, 7138, 7140, and 7147. See Quechan Indian Tribe v.
14 United States, 535 F.Supp.2d 1072 (S.D.Cal. 2008).

15 31. James Cleland, Plaintiff’s archeological expert, visited the sites on June 4, 2003,
16 and June 5, 2003.

17 32. James Cleland and William Bodziak visited the sites on February 9, 2009, and
18 February 10, 2009.

19 33. James Cleland prepared a report based upon his visits to the sites entitled “Expert
20 Witness Report on Impacts to Cultural Resources on the Fort Yuma Indian Reservation Related
21 to the 1998 Western Area Power Administration Gila-Knob 161 KV Transmission Line Pole
22 Replacement Project.”

23 34. Reference to “tracks” herein after references tracks left by heavy construction
24 equipment described in paragraphs 17, 18, and 19.

25 35. Defendant caused the damage noted by URS for Site 689. Defendant caused
26 additional damage to Site 689 by (1) creating and leaving vehicle tracks to the north of Tower
27 18-2 and beyond the impact area mapped by URS and (2) creating and leaving vehicle tracks
28 in an area to the east of Tower 18-1.

1 36. Defendant caused the damage noted by URS outside the right-of-way at Site
2 7138. Defendant caused additional damage to Site 7138 by (1) creating and leaving vehicle
3 tracks that extend 19.5 meters north of the tower; (2) creating and leaving vehicle tracks that
4 extend 9 meters beyond the main disturbed area, as referred to by URS, to the south of the
5 tower; and (3) creating and leaving parallel scars on the desert pavement just to the east of
6 Tower 18-7.

7 37. Defendant caused damage to a “little polygon” at Site 7140 noted by URS that
8 extends outside the right-of-way. Defendant caused additional damage to the northwestern
9 corner of Site 7140.

10 38. Defendant caused damage to Site 7141 during pole replacement by creating and
11 leaving vehicle tracks located about 35 meters northwest of Tower 18-6, described by the
12 parties as “Disturbance C.”

13 39. Defendant caused damage to Site 7142 during the pole replacement project by
14 creating and leaving vehicle tracks located about 100 meters northwest of Tower 18-6 and a
15 circular track measuring about 30 meters in diameter, described by the parties as “Disturbance
16 A.” Defendant caused additional damage to Site 7142 by (1) creating and leaving vehicle tracks
17 located about 85 meters northwest of Tower 18-6 and extending approximately 23 meters west
18 of the access road, described by the parties as “Disturbance B” and (2) creating and leaving
19 vehicle tracks located about 35 meters northwest of Tower 18-6 and extending approximately
20 10 meters west of the access road, described by the parties as “Disturbance D.”

21 40. Defendant caused damage to Site 7144 by (1) creating and leaving vehicle tracks
22 in an area extending 30 to 40 meters south of Tower 18-4 and extending approximately 15 to
23 24 meters outside the southern boundary of the right-of-way; and (2) creating and leaving
24 vehicle tracks in an area to the east of the impact area mapped by URS and west of the “two-
25 track.”

26 41. Defendant caused the damage noted by URS for Site 7147. Defendant caused
27 additional damage to Site 7147 by (1) creating and leaving tracks (including, in part, a three-
28 point turn) extending 40 meters south of the Western right of way; and (2) by creating and

1 leaving tracks in an area outside of the “Western Activity Area” extending south of the tower
2 measuring 20 meters north to south and up to 24.3 meters east to west and extending up to 18
3 meters outside the Western right-of-way.

4 42. Defendant caused damage to Site 7151 by creating and leaving vehicle tracks
5 resulting in a spatial expansion of previous impacts in an area north of the Western right-of-way
6 and in the western portion of Site 7151.

7 43. Defendant caused damage to Site 7152 by creating and leaving vehicle tracks both
8 north and south of the access road.

9 44. Defendant caused damage to Site 7153 by creating and leaving vehicle tracks and
10 blading in an extensive portion of the site, including most of the terrace north of the right-of-
11 way.

12 45. The pole thief did not cause the damage noted above. The pole thief took the
13 poles from a location not on the archeological sites.

14 46. Plaintiff did not prove by a preponderance of the evidence Defendant caused the
15 impacts to any of the disputed sites that are not specifically discussed in the findings in
16 paragraphs 35 through 44.

17 CONCLUSIONS OF LAW

18 1. Defendant waived sovereign immunity for liability pursuant to the Federal Tort
19 Claims Act, 28 U.S.C. § 2764.

20 2. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1346 and 2679.

21 3. Defendant breached its duties and the applicable standards of care by failing to
22 adequately mark or identify cultural resource sites, failing to adequately inform its crews of the
23 locations of cultural resource sites, and by failing to monitor the work performed during the
24 pole replacement project.

25 4. Defendant breached its duties and applicable standards of care by repeatedly
26 driving heavy equipment over, across, and through cultural resource sites on the Fort Yuma
27 Indian Reservation, resulting in permanent scarring of the sites.

28 5. Defendant’s breach of its duties directly and proximately caused damage to the

1 Tribe's cultural resources.

2 6. Defendant is liable for negligence.

3 7. Defendant's failure to exercise due care, and its negligence *per se*, is presumptively
4 established under California Evidence Code § 669 due to its violation of California Public
5 Resources Code §§ 5097.9, 5097.5, California Penal Code § 622 ½ .

6 8. Defendant did not act with "scant care" or an "extreme departure from the
7 ordinary standard of conduct," and therefore, is not liable for gross negligence.

8 9. Defendant trespassed on the Fort Yuma Indian Reservation and damaged tribal
9 cultural resource sites during the trespass.

10 10. Defendant's conduct of repeatedly driving heavy equipment over cultural sites on
11 the Fort Yuma Indian Reservation during the pole replacement project resulted in substantial
12 actual damage to cultural sites, interfered with the use and enjoyment of the Tribe's property
13 and was unreasonable.

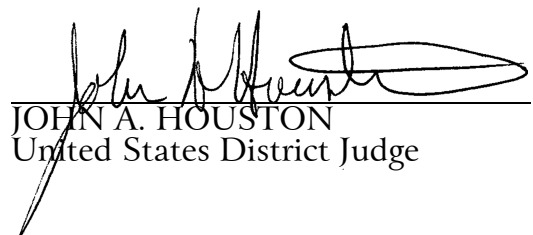
14 **ORDER**

15 Based on the foregoing, IT IS HEREBY ORDERED:

16 1. Defendant is liable for negligence, negligence *per se*, trespass and public nuisance
17 and private nuisance.

18 2. Defendant is not liable for gross negligence.

19 Dated: September 30, 2014

20 
21 JOHN A. HOUSTON
22 United States District Judge
23
24
25
26
27
28