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7 SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY

8 LOWER ELWHA KLALLAM TRIBE, a
9 federally-recognized Indian Tribe, CARMEN
10 WATSON-CHARLES, ARLENE WHEELER,
11 and ARNOLD "ROBERT" ELOFSON,
individually and on behalf of all others similarly
situated,

12 Plaintiffs,

13 v.
14

15 THE STATE OF WASHINGTON, acting
16 through its WASHINGTON STATE
17 DEPARTMENT OF TRANSPORTATION and
18 WASHINGTON STATE DEPARTMENT OF
19 ARCHAEOLOGY AND HISTORIC
20 PRESERVATION, formerly known as
21 Washington State Office of Archaeology and
22 Historic Preservation; DOUGLAS B.
23 MCDONALD, in his official capacity as the
24 Secretary of Transportation, Washington State
25 Department of Transportation; ALLYSON
BROOKS, in her official capacity as the State
Historic Preservation Officer, Washington State
Department of Archaeology and Historic
Preservation; PETER KIEWIT SONS, INC., a
Delaware corporation; KIEWIT PACIFIC CO.,
a Delaware corporation and subsidiary of Peter
Kiewit Sons, Inc.; GENERAL
CONSTRUCTION CO., a Delaware

NO.
COMPLAINT

COMPLAINT - 1

1733193.4

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1 corporation and subsidiary of Peter Kiewit Sons,
2 Inc.; JONATHAN SHOTWELL
3 CORPORATION, a Washington corporation;
4 FIELDS SHOTWELL CORPORATION, a
5 Washington corporation; PLATINUM C
6 LIMITED PARTNERSHIP, a Washington
7 limited partnership; and JOHN DOES I through
8 X,

9 Defendants.

10 COME NOW plaintiffs Lower Elwha Klallam Tribe, Carmen Watson-Charles, Arlene
11 Wheeler and Arnold "Robert" Elofson, in complaint against defendants, alleging as follows:

12 I. INTRODUCTION

13 1.1 The last remains of 335 Native American people, laid to rest with extreme care
14 along with their toys or other prized possessions, and in some cases with loved ones who
15 appear to have died in the same catastrophe, sit in simple cedar boxes in a temporary
16 warehouse. These people are members of a culture which believed, and still believes, that the
17 living must respect, but leave undisturbed, those returned to the earth. The 335 individuals
18 were torn from their resting places in a cacophony of excavators, trucks, pile drivers, and the
19 other insults of a major construction project. It is extremely important in their culture –
20 plaintiffs' culture – that these remains be returned to their resting places promptly and without
21 further insult. Unfortunately, that has not been accomplished.

22 1.2 This case involves the knowing and intentional desecration of hundreds of
23 Native American graves. The State and its contractors invaded an historical cemetery and
24 archaeological treasure at a Port Angeles construction site. The ancestors of the Klallam
25 people have been made pawns in a prolonged legal and political chess match regarding the fate
of a State transportation project and the pursuit of federal transportation funds. Having now

1 decided to abandon the construction site, the State is attempting to walk away from its
2 contractual, statutory and moral obligations concerning the Indian cemetery and human
3 remains.

4 1.3 This case proves the adage that history repeats itself. This is not the first time
5 that occupants of this cemetery have fallen victim to grave desecration. In the 1920s, during
6 excavation for water and sewer lines at approximately the same location, Indian burials were
7 reported to have been disturbed and human bones used as backfill. In 2003, while undertaking
8 a massive excavation of an onshore graving dock, the State and its contractors knowingly
9 unearthed, and drove enormous steel sheet piles through, an intact historical Indian cemetery.
10 Human remains were broken and scattered. Indian burials were desecrated.

11 1.4 Lower Elwha Klallam Tribal members and elders watched helplessly as heavy
12 construction equipment desecrated the historical cemetery. They viewed skulls, bones and
13 cultural artifacts protruding from spoil piles. They objected to continued excavation and pled
14 with the State and its contractors to slow down and stop work, in respect for their ancestors.
15 Although the defendants purported to listen to the Tribe and its members, nobody heard them.

16 1.5 Several hundred Indian graves – more than 335 at last count – were disturbed or
17 destroyed. Thousands of human remains were unearthed. Fine and fragile artifacts, such as a
18 hair comb thought to be handmade from elk or deer bone, were damaged. The burials of young
19 Indian children, lovingly laid to rest before they passed into what the Klallam believe is the
20 next world, were desecrated. Graves in which husbands and wives and mothers and children
21 were placed together, were destroyed.

22 1.6 Two thousand trucks full of dirt, so-called construction spoils, were transported
23 to a landfill on the west side of Port Angeles. Those soils, known to contain human remains
24 and artifacts, presently sit in that refuse dump, unsecured and exposed to the elements. Despite
25

1 contractual and legal obligations, the State refuses to screen these spoils to recover the
2 remnants of the Indian graves and rebury them.

3 1.7 The remains of the 335 Indian graves now rest in red cedar boxes, traditionally
4 hand-crafted by Tribal members and friends, awaiting reburial. But, the State refuses to allow
5 the Tribe access to the construction site to place their ancestors back into the earth from which
6 they were exhumed. Furthermore, even though Tse whit zen is an historical cemetery, the
7 State refuses to acknowledge that it is dedicated, as a matter of law, for burial purposes -- as it
8 would if the cemetery contained the ancestors of a non-Indian community.

9 1.8 The Lower Elwha Klallam Tribe believes it is an inherent responsibility of the
10 living to care for the spirits of the deceased by ensuring that they remain at rest. Tribal
11 religious traditions dictate that in order for the spirit of a deceased individual to be at rest, his
12 or her remains must be returned to the earth, not to be disturbed or displaced, except by natural
13 occurrence.

14 1.9 Native American human remains, funerary items and religious sites have long
15 been subjected to different and unequal treatment compared to those of the dominant
16 European-driven culture. Indian tribes have suffered the desecration of their ancestral graves
17 in the interest of science and the antiquities market for hundreds of years.

18 1.10 The Lower Elwha Klallam Tribe has a strong governmental interest in
19 preserving its religious, historical and cultural foundation and ensuring that it remains a living
20 part of community life. The blatant destruction and disturbance of Tribal ancestral graves not
21 only undermines the dignity of Indian people, but is an outrageous violation of the Tribe's
22 spiritual, human and civil rights.

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II. PARTIES

2.1 Plaintiff Lower Elwha Klallam Tribe, also known as the Lower Elwha Tribal Community, is a federally-recognized Indian Tribe pursuant to the Treaty of Point No Point of 1855 (the "Tribe").

2.2 Plaintiffs and class representatives Carmen Watson-Charles, Arlene Wheeler and Arnold "Robert" Elofson are enrolled members of the Tribe and residents of the State of Washington. They bring this suit individually and on behalf of all similarly situated people whose ancestors are buried in the Tse whit zen historical cemetery. The Tribe and its members have suffered, and continue to suffer, substantial physical, emotional, economic and property damage as a direct and proximate result of defendants' wrongful actions and failures to act.

2.3 Defendant Department of Transportation is an agency of defendant State of Washington ("WSDOT").

2.4 Defendant Douglas B. McDonald serves as the Washington State Secretary of Transportation and in that official capacity oversees and directs WSDOT ("McDonald").

2.5 Defendant Department of Archaeology and Historic Preservation is an agency of defendant State of Washington, formerly known as the Office of Archaeology and Historic Preservation ("WSDAHP").

2.6 Defendant Allyson Brooks serves as the State Historic Preservation Officer and in that official capacity oversees and directs WSDAHP ("Brooks").

2.7 Defendant Kiewit Pacific Co. is a Delaware corporation headquartered in Vancouver, Washington, and a subsidiary of defendant Peter Kiewit Sons, Inc., a Delaware corporation with its principal place of business in Omaha, Nebraska (collectively "Kiewit").

2.8 Defendant General Construction Co. is a Delaware corporation headquartered in Poulsbo, Washington, and a subsidiary of defendant Peter Kiewit Sons, Inc. ("General").

1 Kiewit and General formed a joint-venture to serve as the prime contractor for WSDOT's
2 Graving Dock project.

3 2.9 Defendants Jonathan Shotwell Corporation and/or Fields Shotwell Corporation
4 are Washington corporations that own and operate a county-permitted landfill known as the
5 Shotwell Recycling Facility, in Port Angeles, Washington and defendant Platinum C Limited
6 Partnership is a Washington limited partnership that owns the real property on which the
7 Shotwell Recycling Facility operates (collectively "Shotwell").

8 2.10 Defendants John Doe I through X are WSDOT contractors, or Kiewit and/or
9 General subcontractors, which participated in the conduct complained of herein or which have
10 property interests relative to the claims herein. All references below to Kiewit and/or General
11 shall be read to include any or all of defendants John Doe I through X.

12 III. JURISDICTION AND VENUE

13 3.1 This Court has jurisdiction over all claims asserted in this action, pursuant to
14 RCW 2.08.010, *et seq.*

15 3.2 Concurrent with the filing of this Complaint, plaintiffs duly file tort claims for
16 damages with the State of Washington Office of Risk Management, in compliance with RCW
17 4.92.100.

18 3.3 Venue properly lies in Thurston County under RCW §§ 4.92.010(5),
19 4.12.025(1), 4.12.020(3) and 27.44.050(1).

20 3.4 This lawsuit involves an actual, present and existing dispute between parties
21 having genuine, opposing, direct and substantial interests, over which a judicial determination
22 will be final and conclusive.

23 IV. FACTUAL ALLEGATIONS

24 4.1 The Tribe, which is presently comprised of over 800 enrolled members, is a
25 successor in interest to the signatories of the 1855 Treaty of Point No Point with the United

1 States. The Tribe's traditional lands include the present-day Port Angeles waterfront. While a
2 majority of the Tribe now lives in Port Angeles or on reservation or off-reservation trust lands
3 west of Port Angeles, during treaty times and well into the 20th Century Tribal families
4 occupied Ediz Hook and other land on Port Angeles Harbor. According to recent studies
5 conducted by the U.S. Bureau of the Census, thirty-three percent (33%) of the Tribal members
6 living on the reservation live below the national poverty level and the per capita annual income
7 for such Tribal members is approximated to be \$8,591. The Tribe does not own a casino.

8 4.2 Beginning in August 2003, an Indian village and ancestral burial ground on the
9 Port Angeles waterfront were disturbed and destroyed during construction and excavation for a
10 state transportation project. Tse whit zen (pronounced "ch-WHEET-son") is a Klallam village
11 and ancestral burial ground on the shoreline at the base of Ediz Hook, on Port Angeles Harbor
12 ("Tse whit zen" or "Village"). The Village contains innumerable Indian graves, ancestral
13 human remains, and funerary items buried there before November 11, 1889. Although Tse
14 whit zen's last Native American inhabitants were displaced by lumber mill construction after
15 1920 and the cemetery was covered over by industrial fill, the Tribe never forgot or abandoned
16 Tse whit zen.

17 4.3 The written and oral historic record, as well as ethnographic documentation,
18 contains numerous references to Tse whit zen and its cemetery. The Village and historical
19 cemetery have been determined eligible and nominated for listing on the National Register of
20 Historic Places. In addition to the Village's archaeological and historic importance, Tse whit
21 zen is a sacred part of the Tribe's heritage – a cultural setting the Tribe considers its ancestral
22 and spiritual home. Moreover, Tse whit zen and archaeological deposits excavated from the
23 Village contain a rich trove of historic information and traditional cultural properties of
24 immense value to the Tribe and wider community.
25

1 4.4 In or around November 2002, WSDOT selected a 22.5-acre parcel of land at the
2 base of Ediz Hook for the construction of a State-owned "Graving Dock," an onshore dry dock.
3 WSDOT intended to use its Graving Dock to construct reinforced concrete pontoons and
4 anchors that would be used to retrofit the Hood Canal (State Route 104) and Lake Washington
5 (SR 520) floating bridges. The Port of Port Angeles sold that land parcel to WSDOT.

6 4.5 WSDOT's Graving Dock Project included three elements: (1) an Upper Graving
7 Dock that would be excavated to a depth somewhat lower than four feet below existing ground
8 surface; (2) a Lower Graving Dock that would be excavated to a depth of about 28.5 feet below
9 ground surface; and (3) areas beyond the Graving Dock area where excavation would be
10 undertaken to various depths up to 20 feet, for sediment ponds, bioswales, utilities, water,
11 pipelines and staging areas. In addition, enormous steel sheet pilings were to be driven into the
12 earth around and within the Upper and/or Lower Graving Docks to depths far exceeding the
13 planned excavations.

14 4.6 In or about mid-November 2002, WSDOT commissioned a cursory
15 archaeological assessment of only a portion of the Graving Dock site. In or around December
16 2002, WSDOT's contract archaeologists incorrectly reported, "it is unlikely that any
17 prehistoric sites will be encountered where excavations are less than 4 feet deep," but put
18 WSDOT on notice that such sites might be present below that depth.

19 4.7 In or about February 2003, the Tribe wrote WSDOT, warning it of the close
20 proximity between the Graving Dock project and Tse whit zen and urging WSDOT to proceed
21 cautiously with any construction or excavation. The Tribe hoped to prevent any potential harm
22 to their heritage and ancestors that could arise before WSDOT commenced substantive work,
23 but did not have a cultural resources department or an archaeologist on staff to scrutinize
24 WSDOT's limited archaeological assessment or WDAHP's apparent acceptance of such
25 conclusions.

1 4.8 Before the start of excavation by Kiewit and General, WSDOT failed to take
2 reasonable protective steps, including but not limited to: requiring adequate investigation of the
3 Lower Graving Dock footprint; imposing a four-foot limit on vertical excavation of the Upper
4 Graving Dock; and/or, investigating the areas wherein the steel sheet piles were to be driven far
5 in excess of 4 or even 28.5 feet. Such failures were inexplicable, considering the Tribe's
6 caution and WSDOT's own archaeological evidence of the site. Thus, WSDOT, Kiewit and
7 General, and other WSDOT contractors knew or should have known of the likely existence of
8 archaeological deposits, including Indian burials in vertical or horizontal proximity to the
9 excavations and steel sheet-pile lines. WSDOT, WSDAHP, Kiewit and General failed to make
10 any attempt to comply with state laws protecting cemeteries and Indian graves or requiring
11 permits for excavation of archaeological deposits, including Indian burials.

12 4.9 In or about mid-August 2003, during excavation of the Graving Dock Facility,
13 WSDOT, Kiewit and General excavated portions of the Tse whit zen village and cemetery,
14 disturbing and destroying archaeological deposits and Indian graves, including human remains,
15 grave markers, funerary items, sacred objects, objects of cultural patrimony and other artifacts.
16 Although construction was originally halted in some areas of the site when this initial
17 discovery was made, WSDOT, Kiewit and General continued to excavate adjacent areas until
18 August 26, 2003, when the entire project was temporarily shut down. Although these adjacent
19 areas contained archaeological deposits and Indian graves, such areas had not received an
20 appropriate archaeological assessment before they were excavated.

21 4.10 In or about mid-August 2003, the Tribe was notified regarding the disturbance
22 and destruction of archaeological deposits and Indian graves within the Graving Dock site.
23 Tribal officials and members arrived at the site to witness WSDOT, Kiewit and General's
24 continued excavation, removal and destruction of what turned out to be archaeological deposits
25 and Indian graves. Despite the Tribe's objection to further construction and excavation until

1 WSDOT, Kiewit, General and the Tribe could jointly ascertain the full extent of archaeological
2 deposits and Indian graves within the Graving Dock project, WSDOT, Kiewit and General
3 continued to disturb and destroy archaeological deposits and Indian graves until late August
4 2003. Defendants proceeded to desecrate archaeological deposits and Indian graves in the face
5 of the Tribe's articulated objections and concerns.

6 4.11 From mid- to late August 2003, WSDOT, Kiewit and General transported the
7 excavated archaeological deposits and Indian graves, including ancestral remains and funerary
8 items to construction spoil sites. Defendants disturbed and destroyed at least 6,000 cubic yards
9 of soil that contained archaeological deposits and Indian graves. That soil was stockpiled on
10 the periphery of the Graving Dock site. An estimated 20,000 cubic yards of additional soil –
11 the equivalent of roughly 2,000 dump truck loads – containing archaeological deposits, Indian
12 ancestral human remains and funerary items, were hauled to the Shotwell Recycling Facility, a
13 landfill owned and operated by Shotwell on the west side of Port Angeles, where those
14 construction spoils lie exposed and unsecured to this day.

15 4.12 In the face of mounting criticism and adverse exposure, WSDOT stopped
16 further construction of its Graving Dock project from late August 2003 to March 2004. During
17 that time, the Tribe, WSDOT, WSDAHP, the Federal Highway Administration ("FHWA") and
18 U.S. Army Corps of Engineers ("USACE") collaborated to investigate and monitor the
19 excavation sites at WSDOT's Graving Dock project. In mid-March 2004, the Tribe, WSDOT
20 and WSDAHP, and the federal agencies negotiated a Memorandum of Agreement under the
21 National Historic Preservation Act and implementing regulations (hereinafter "MOA"), which
22 incorporated by reference a Site Treatment Plan ("STP") for recovery and repatriation of
23 archaeological and human remains exhumed from the Graving Dock Facility, described therein
24 as the "Area of Potential Effect."
25

1 4.13 During the negotiations, the Tribe insisted that WSDOT and/or FHWA agree to
2 provide funding to remediate the disturbance and destruction of archaeological deposits and
3 Indian graves at the Graving Dock Facility. In particular, the Tribe sought remediation or
4 “mitigation” funds to purchase and maintain land near the Graving Dock site where the
5 disturbed/destroyed Indian burials could be reinterred and to provide for long-term curation of
6 the unearthed archaeological and funerary items. FHWA refused. To avoid an impasse that
7 would foreclose any further construction, WSDOT offered to provide the mitigation funding
8 the Tribe had sought. Representing that the State had not legislatively authorized the
9 remediation funding sought by the Tribe, WSDOT then proposed that the Tribe enter into an
10 agreement with WSDOT to resolve the disagreement regarding that element of historic
11 property mitigation.

12 4.14 WSDOT and the Tribe then executed an agreement to “compromise and settle”
13 the mitigation funding issue. The Tribe-WSDOT “settlement” agreement, which incorporates
14 by reference the MOA, and in turn the STP, obligates WSDOT to screen, sample and recover
15 the human remains from the on- and off-site construction spoils for purposes of reburial. The
16 settlement agreement further obliges WSDOT to repatriate any and all artifacts, records and
17 photographs generated by the STP following analysis and documentation of such items
18 according to the U.S. Department of Interior’s standards for archaeological documentation.

19 4.15 In or about April 2004, before WSDOT contract archaeologists had completed
20 additional data sampling, WSDOT, Kiewit and General resumed excavation and construction
21 of the Graving Dock Facility. The archaeologists soon discovered Tse whit zen’s magnitude:
22 the Village is one of the largest and most significant archaeological finds in North America,
23 containing more than 10,000 artifacts and structures, including a type of etched stones not
24 previously found south of the U.S.-Canada border. The Village contains evidence of the fabric
25 and texture of Northwest Native Americans’ complex and developed civilization, which should

1 not be, and should never have been, obliterated. Contrary to the WSDOT contract
2 archaeologists' estimate that only 25 Indian burials would be found in the construction site, the
3 archaeologists have now learned that the Graving Dock footprint sat astride an extensive Indian
4 historical cemetery. Thus, WSDOT's Graving Dock project threatened to desecrate
5 innumerable Indian graves for the purpose of constructing concrete pontoons.

6 4.16 Before the project was finally halted in December 2004, WSDOT, Kiewit and
7 General exhumed more than 335 intact Indian graves and 1,000 isolates (skeletal remains from
8 disturbed burials). Given that such Indian graves and isolates were exhumed from a relatively
9 small portion of the Graving Dock footprint, WSDOT's portion of the cemetery likely contains
10 hundreds more Indian burials.

11 4.17 In May 2004, the Tribe asked WSDOT and WSDAHP to halt construction and
12 excavation so all additional Indian burials could first be found and repatriated. WSDOT and
13 WSDAHP refused the Tribe's request, and Tribal members were forced to carry out burial
14 recovery in a maelstrom of construction trucks, excavators and pile-drivers. Tribal workers
15 explained to WSDOT, Kiewit and General that it was impossible to recover disturbed or
16 destroyed Indian graves in an efficient and dignified manner, while in the midst of heavy
17 construction and machine operation.

18 4.18 By the end of 2004, WSDOT faced heightened public attention and media
19 scrutiny regarding the project. In December 2004, because of the increasingly large number of
20 burials being discovered throughout the site, the Tribe declined a suggestion made by
21 McDonald in the late Fall, that the Tribe endorse continuation of the project, and urged
22 WSDOT to find a new site. WSDOT decided to abandon construction at Tse whit zen in late
23 December 2004.

24 4.19 From January through June 2005, the Tribe and WSDOT negotiated concerning
25 two issues relative to the Graving Dock Facility: (1) the reinterment of the 335 Indian burials,

1 along with certain isolates, which had been exhumed from the Tse whit zen cemetery; and (2)
2 return of the construction spoils at the Shotwell landfill to the more-secure Graving Dock
3 Facility, where the human remains in the soil could be recovered. Then, in mid-June 2005,
4 WSDOT refused to allow the 335 Indian burials to be reintered in the areas from which they
5 had been exhumed and to return the Shotwell soil to the Graving Dock enclosure unless the
6 Tribe released the State from its obligation to recover remains and funerary objects from on-
7 and off-site construction spoils. Using the leverage of permanent desecration and stockpiling
8 of exhumed human remains in a landfill, WSDOT attempted to extract a legal release.

9 4.20 As of the date of this Complaint:

10 • The Tribe stores 316 traditionally hand-made cedar boxes containing 335 sets of
11 human remains and funerary objects, along with some isolates, because WSDOT has denied
12 the Tribe access to the Graving Dock site for reburial purposes;

13 • Even if WSDOT allows the Tribe access to the Graving Dock site for reburial,
14 WSDOT refuses to in any way guarantee that any undisturbed or reintered burials will not be
15 further disturbed and/or destroyed by future development;

16 • WSDOT has failed to remove human remains from the on- and off-site
17 construction spoils and has also declined to return the Shotwell materials to its Graving Dock
18 enclosure, allowing the spoils and the human remains therein to be unprotected and exposed to
19 the elements;

20 • The steel sheet piles driven into the Tse whit zen cemetery by Kiewit and
21 General remain in place with no commitment from WSDOT to remove the pilings; and

22 • Despite its understanding that the Graving Dock Facility rests atop an Indian
23 burial ground, WSDOT and WSDAHP refuse to treat Tse whit zen as an historical cemetery, to
24 be held and used exclusively for burial purposes, as required under State law.
25

1 4.21 As a result of the desecration of the Tse whit zen cemetery and Indian graves,
2 plaintiffs have experienced devastating damage to Tribal property, as well as significant mental
3 anguish and emotional distress. This harm was, and continues to be, the direct and proximate
4 result of WSDOT, WSDAHP, Kiewit and General's wrongful acts or failures to act.

5 V. CLASS ACTION ALLEGATIONS

6 5.1 Plaintiffs Carmen Watson-Charles, Arlene Wheeler and Arnold "Robert"
7 Elofson bring this action individually, and on behalf of all other persons similarly situated,
8 seeking to represent a class defined as: All present members of the Lower Elwha Klallam
9 Tribe, and members of other tribes whose ancestors are buried within the Tse whit zen
10 historical cemetery (hereinafter "Class"). The Class that plaintiffs represent is composed of
11 well over 800 people, such that joinder of all members is impracticable.

12 5.2 Defendants' acts and omissions with respect to the Class are substantially
13 similar to the acts and omissions alleged herein and constitute a violation of the Indian Graves
14 and Records Act, RCW 27.44, *et seq.*, negligence, negligent and intentional infliction of
15 emotional distress, and civil rights violations. There are common questions of law and fact
16 affecting each Class member with respect to the application of such laws and determination of
17 legal and equitable relief as a result of defendants' conduct. These common questions
18 predominate over any questions that might affect only individual members of the Class.

19 5.3 The interests of the Class are fairly and adequately represented by plaintiffs
20 Carmen Watson-Charles, Arlene Wheeler and Arnold "Robert" Elofson, and plaintiffs'
21 undersigned counsel possess the requisite background, training, experience and resources to
22 competently and zealously represent the Class.

23 5.4 Defendants have acted, or refused to act, on grounds generally applicable to the
24 Class, as alleged herein. This action seeks to require defendants to satisfy their contractual
25 and/or legal duties relative to the disturbance and destruction of Indian graves and to provide

1 damages for the resultant physical, emotional and economic harm to plaintiffs and their
2 property.

3 5.5 This action is properly maintainable as a class action because the prosecution of
4 separate actions by individual members of the Class would create a risk of inconsistent or
5 varying adjudications which would establish incompatible standards of conduct for defendants
6 and would also create a risk of adjudications with respect to individual members of the Class
7 which would, as a practical matter, be dispositive of the interests of other persons who are not
8 parties to the adjudication or would substantially impair or impede their ability to protect their
9 interests.

10 5.6 This action is properly maintainable as a class action because the questions of
11 law or fact common to the members of the Class predominate over any questions affecting only
12 individual members, and a class action is superior to other available methods for the fair and
13 efficient adjudication of the controversy. All of the criteria set forth in CR 23(b)(2) and (3) are
14 satisfied here. First, the members of the Class have no interest in individually controlling the
15 prosecution of separate actions. Secondly, there is no other litigation concerning this
16 controversy commenced by plaintiffs or any member of the Class. Finally, few, if any,
17 difficulties would likely be encountered in the management of a class action.

18 VI. FIRST CAUSE OF ACTION: BREACH OF CONTRACT
19 (AGAINST WSDOT)

20 6.1 The Tribe incorporates the allegations set forth in paragraphs 1.1 through 4.21
21 as though fully set forth herein.

22 6.2 Pursuant to the Tribe-WSDOT settlement agreement, which incorporates by
23 reference the MOA, which in turn incorporates by reference the STP, WSDOT is obligated to
24 screen, sample and recover the human remains from the on- and off-site construction spoils for
25 reburial. Additionally, WSDOT shall repatriate to the Tribe any and all artifacts, records and

1 photographs generated by performing the STP following analysis and documentation of such
2 items according to the Department of Interior's standards for archaeological documentation.

3 6.3 WSDOT's failure to fulfill such obligations, among others, constitutes a
4 material breach of the Tribe-WSDOT settlement agreement that has directly and proximately
5 caused harm to the Tribe and will cause additional harm through weathering, human
6 interference and violation of cultural and religious tenets, entitling the Tribe to continuing
7 monetary damages in an amount to be proven at trial.

8 VII. SECOND CAUSE OF ACTION: SPECIFIC PERFORMANCE
9 (AGAINST WSDOT)

10 7.1 The Tribe incorporates the allegations set forth in paragraphs 1.1 through 4.21
11 and 6.1 through 6.3 as though fully set forth herein.

12 7.2 Because WSDOT's material breach of the Tribe-WSDOT settlement agreement
13 leaves the Tribe without an adequate remedy at law, the Tribe seeks an order requiring
14 WSDOT to specifically perform its contractual obligations.

15 VIII. THIRD CAUSE OF ACTION: VIOLATION OF RCW 27.44.040(1)
16 (AGAINST ALL DEFENDANTS EXCEPT SHOTWELL)

17 8.1 Plaintiffs incorporate the allegations set forth in paragraphs 1.1 through 7.2 as
18 though fully set forth herein.

19 8.2 WSDOT, WSDAHP, Kiewit and General knowingly and intentionally disturbed
20 and/or destroyed Indian graves and grave markers during excavation at the Graving Dock site
21 and owe a statutory duty to plaintiffs to reinter the unearthed human remains and isolates, with
22 the Tribe's supervision. WSDAHP has a separate and additional legal duty to plaintiffs to pay
23 the expenses of reinterment.

24 8.3 Defendants refuse to reinter the human remains and isolates in violation of their
25 legal duty.

1 8.4 Plaintiffs seek a declaratory judgment order requiring WSDOT, Kiewit and
2 General to remediate the damage caused to plaintiffs and their property described herein,
3 including the recovery of the human remains from the on- and off-site construction spoils.
4 Plaintiffs further seek a declaratory judgment order mandating that WSDAHP pay the expenses
5 of such reinterment activities.

6 IX. FOURTH CAUSE OF ACTION: PRELIMINARY INJUNCTION
7 (AGAINST WSDOT, MCDONALD & SHOTWELL)

8 9.1 Plaintiffs incorporate the allegations set forth in paragraphs 1.1 through 8.4 as
9 though fully set forth herein.

10 9.2 Plaintiffs seek a preliminary injunction ordering that WSDOT, McDonald and
11 Shotwell take such actions as are required to protect the construction spoils at the Graving
12 Dock site and the Shotwell Recycling Facility, respectively, so as to prevent any additional
13 damage to or loss of human remains and funerary items therein, and other irreparable harm
14 which would be expected to result from the spoils sitting exposed to the outdoor elements in an
15 unsecured area. Such preliminary injunction is proper, as here, where there is no other
16 adequate remedy available to plaintiffs to prevent further damage to or loss of such human
17 remains and funerary items.

18 X. FIFTH CAUSE OF ACTION: CIVIL DAMAGES RESULTING FROM VIOLATION OF
19 RCW 27.44.040(1) & .050(3)(C)
20 (AGAINST KIEWIT & GENERAL)

21 10.1 Plaintiffs incorporate the allegations set forth in paragraphs 1.1 through 9.2 as
22 though fully set forth herein.

23 10.2 Kiewit and General owe a duty to refrain from disturbing and/or destroying
24 Indian graves.

25 10.3 Kiewit and General knowingly and intentionally disturbed and/or destroyed
Indian graves during excavation at the Graving Dock Facility, which directly and proximately

1 caused plaintiffs to suffer severe emotional distress, mental anguish, special damages and
2 general damages to be proven at trial.

3 10.4 Plaintiffs are entitled to recover such compensation as allowed by RCW
4 27.44.050, *et seq.*, and other applicable law, as a result of Kiewit and General's actions and/or
5 omissions.

6 **XI. SIXTH CAUSE OF ACTION: REPLEVIN**
7 **(AGAINST SHOTWELL)**

8 11.1 Plaintiffs incorporate the allegations set forth in paragraphs 1.1 through 10.4 as
9 though fully set forth herein.

10 11.2 Plaintiffs are entitled to the possession of the human remains and funerary
11 objects in Shotwell's wrongful possession by virtue of a special property interest therein,
12 including plaintiffs' right to possession of the property; to receive the property in the condition
13 in which it was buried, without mutilation; to have the property treated with respect, without
14 indignity thereto; and, to rebury the property without interference.

15 11.3 Plaintiffs are entitled to an order that awards plaintiffs the possession of the
16 human remains and funerary objects in Shotwell's wrongful custody.

17 **XII. SEVENTH CAUSE OF ACTION: CONSTRUCTIVE TRUST**
18 **(AGAINST WSDOT, MCDONALD, WSDAHP, BROOKS & SHOTWELL)**

19 12.1 Plaintiffs incorporate the allegations set forth in paragraphs 1.1 through 11.3 as
20 though fully set forth herein.

21 12.2 Plaintiffs are entitled to the possession of the human remains and funerary
22 objects in the possession of WSDOT and Shotwell by virtue of a special property interest
23 therein, including the right to receive the property in the condition in which it was buried,
24 without mutilation, to have the property treated with respect, without indignity thereto, and to
25 rebury the property without interference.

1 12.3 Irrespective of WSDOT and Shotwell's intent in possessing the human remains
2 and funerary objects, defendants have been or would be unjustly and improperly enriched by
3 holding title to and/or selling this material and have an equitable duty and moral obligation to
4 convey it to the Tribe. It is unconscionable for WSDOT and Shotwell to permanently possess
5 and/or dispose of the human remains and funerary objects.

6 12.4 Plaintiffs are entitled to an order establishing a constructive trust and declaring
7 that WSDOT, McDonald, WSDAHP, Brooks and Shotwell are trustees with regard to all
8 human remains and funerary objects within their possession in the on- and off-site construction
9 spoils and hold those materials for recovery and reburial by the Tribe or as otherwise directed
10 by the Court.

11 XIII. EIGHTH CAUSE OF ACTION: DECLARATORY JUDGMENT DEDICATING
12 HISTORIC CEMETERY UNDER RCW 68.60, RCW 68.04 & RCW 68.24
13 (AGAINST BROOKS, MCDONALD, WSDAHP & WSDOT)

14 13.1 Plaintiffs incorporate the allegations set forth in paragraphs 1.1 through 12.4 as
15 though fully set forth herein.

16 13.2 The Tse whit zen cemetery is an historical cemetery, containing remains buried
17 therein prior to November 11, 1889.

18 13.3 RCW 68.60, 68.24 and 68.04 provide that an historical cemetery is permanently
19 dedicated and cannot be used for any other purpose.

20 13.4 Plaintiffs seek an order declaring that the Tse whit zen cemetery is an historical
21 cemetery that shall be held and used exclusively for burial purposes according to state law.

22 XIV. NINTH CAUSE OF ACTION: VIOLATION OF RCW 49.60
23 (AGAINST MCDONALD & BROOKS)

24 14.1 Plaintiffs incorporate the allegations set forth in paragraphs 1.1 through 13.4 as
25 though fully set forth herein.

1 14.2 Plaintiffs have the right to be free from discrimination based on race and creed.
2 McDonald and Brooks, acting in their official capacity, under color of state authority and under
3 color of state law, discriminated against plaintiffs.

4 14.3 Upon information and belief, plaintiffs aver that were the State to disturb and
5 subsequently abandon a non-Indian cemetery then, by operation of state cemetery laws, public
6 pressure or other considerations, the burials inadvertently, knowingly or intentionally exhumed
7 during construction would be recovered and restored, to the maximum extent possible, to the
8 original graves. The only distinction between such non-Indian cemeteries and Tse whit zen is
9 that the decedents buried at the Village and their descendants belong to a racial and religious
10 minority. McDonald and Brooks are applying state law, without lawful authority, in a manner
11 which imposes prejudicial racial and religious classifications on plaintiffs and their ancestors.

12 14.4 McDonald and Brooks' actions and/or omissions have directly and proximately
13 harmed plaintiffs and their ancestors and descendants by depriving them of rights guaranteed
14 by the Washington State Constitution.

15 14.5 Plaintiffs seek a declaratory judgment requiring McDonald to remediate the
16 discrimination against plaintiffs, by causing the removal of human remains from the on- and
17 off-site construction spoils and return of the Shotwell materials to the Graving Dock enclosure
18 under the Tribe's supervision for that purpose, and to allow the Tribe to rebury 316
19 traditionally hand-made cedar boxes containing 335 sets of human remains and funerary
20 objects in the enclosure.

21 14.6 Plaintiffs further seek a declaratory judgment mandating Brooks to remediate
22 the discrimination against plaintiffs by causing WSDAHP to pay the costs of WSDOT's
23 reinterment activities and to dedicate and maintain Tse whit zen cemetery as an historical
24 cemetery as required by state law.
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XV. TENTH CAUSE OF ACTION: NEGLIGENCE
(AGAINST KIEWIT & GENERAL)

15.1 Plaintiffs incorporate the allegations set forth in paragraphs 1.1 through 14.6 as though fully set forth herein.

15.2 Kiewit and General owed a duty to exercise reasonable care to avoid disturbing and/or destroying Indian graves.

15.3 Kiewit and General knew or should have know about the presence of Indian burials below the surface of the construction site and failed to exercise reasonable care, thus disturbing and destroying Indian graves during excavation for the Graving Dock Facility.

15.4 Kiewit and General's breach directly and proximately caused substantial damage to plaintiffs, who are entitled to recover such compensation as allowed by law or equity in an amount to be proven at trial.

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XVI. ELEVENTH CAUSE OF ACTION: NEGLIGENT INFLICTION OF EMOTIONAL
DISTRESS
(AGAINST KIEWIT & GENERAL)

16.1 Plaintiffs incorporate the allegations set forth in paragraphs 1.1 through 15.4 as though fully set forth herein.

16.2 Kiewit and General owed a duty to exercise reasonable care to avoid disturbing and/or destroying Indian graves.

16.3 Kiewit and General knew or should have know about the presence of Indian burials below the surface of the construction site and failed to exercise reasonable care by disturbing and/or destroying Indian graves within the Tse whit zen historical cemetery, thus directly and proximately causing plaintiffs emotional distress and substantial damage in an amount to be proven at trial.

1 XVII. TWELFTH CAUSE OF ACTION: OUTRAGE/INTENTIONAL INFLICTION OF
2 EMOTIONAL DISTRESS
3 (AGAINST KIEWIT & GENERAL)

4 17.1 Plaintiffs incorporate the allegations set forth in paragraphs 1.1 through 16.3 as
5 though fully set forth herein.

6 17.2 Kiewit and General's disturbance, destruction and desecration of Indian graves
7 constitutes intentional or reckless, extreme and outrageous conduct, which has directly and
8 proximately caused plaintiffs to suffer severe emotional distress, mental anguish, special
9 damages and general damages to be proven at trial.

10 17.3 Plaintiffs are entitled to recover such compensation as allowed by law or equity
11 as a result of Kiewit and General's outrageous and intentional infliction of emotional distress
12 upon plaintiffs.

13 XVIII. PRAAYER FOR RELIEF

14 Plaintiffs pray for the following relief:

15 A. That the Court enter an order requiring WSDOT to specifically perform its
16 obligations under the Tribal-WSDOT settlement agreement.

17 B. That the Court enter a preliminary injunction order mandating that WSDOT,
18 McDonald and Shotwell take such actions as required to protect the construction spoils at the
19 Graving Dock site and the Shotwell landfill pending reinterment of all remains.

20 C. That the Court enter an order mandating that WSDOT and McDonald cause the
21 removal of human remains from the on- and off-site construction spoils and return of the
22 Shotwell materials to the Graving Dock enclosure under the Tribe's supervision for that
23 purpose, and to allow the Tribe to rebury 316 traditionally hand-made cedar boxes containing
24 335 sets of human remains and funerary objects in the enclosure.

25 D. That the Court enter an order that WSDOT, McDonald, WSDAHP, Brooks and
Shotwell are trustees for plaintiffs with regard to all human remains, associated artifacts and

1 organic materials within the on- and off-site construction spoils; have a fiduciary duty to secure
2 such property from further weathering or interference post haste; owe a fiduciary duty to locate
3 and return to plaintiffs such property from said construction spoils; shall unconditionally pay
4 the expenses of such reinterment; and, provide plaintiffs and the Court with an accounting for
5 all such trust property as soon as is practicable.

6 E. That the Court enter an order awarding the Tribe the possession of the human
7 remains and funerary objects in WSDOT and Shotwell's ownership or possession.

8 F. That the Court enter an order declaring the Tse whit zen a dedicated historical
9 cemetery that shall be held and used exclusively for burial purposes under the direction of the
10 Tribe.

11 G. That the Court issue injunctive and equitable relief as the Court finds just and
12 proper;

13 H. That the Court award common law and statutory damages, including punitive,
14 special and general damages in favor of plaintiffs in an amount to be proven at trial;

15 I. That the Court award such attorneys' fees and costs as may be recoverable
16 under applicable law; and

17 J. That the Court award such further relief as the Court deems just and equitable.

18 DATED this 12th day of August, 2005

19 WILLIAMS, KASTNER & GIBBS PLLC

20 By 

21 John A. Knox, WSBA #12707

22 Debora G. Juarez, WSBA #17199

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25 Tribe, Carmen Watson-Charles, Arlene
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