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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.

1 II. PARTIES

2 2.1 Plaintiff Lower Elwha Klallam Tribe, also known as the Lower Elwha Tribal
3 Community, is a federally-recognized Indian Tribe pursuant to the Treaty of Point No Point of
4 1855 (the "Tribe").

5 2.2 Plaintiffs and class representatives Carmen Watson-Charles, Arlene Wheeler
6 and Arnold "Robert" Elofson are enrolled members of the Tribe and residents of the State of
7 Washington. They bring this suit individually and on behalf of all similarly situated people
8 whose ancestors are buried in the Tse whit zen historical cemetery. The Tribe and its members
9 have suffered, and continue to suffer, substantial physical, emotional, economic and property
10 damage as a direct and proximate result of defendants' wrongful actions and failures to act.

11 2.3 Defendant Department of Transportation is an agency of defendant State of
12 Washington ("WSDOT").

13 2.4 Defendant Douglas B. McDonald serves as the Washington State Secretary of
14 Transportation and in that official capacity oversees and directs WSDOT ("McDonald").

15 2.5 Defendant Department of Archaeology and Historic Preservation is an agency
16 of defendant State of Washington, formerly known as the Office of Archaeology and Historic
17 Preservation ("WSDAHP").

18 2.6 Defendant Allyson Brooks serves as the State Historic Preservation Officer and
19 in that official capacity oversees and directs WSDAHP ("Brooks").

20 2.7 Defendant Kiewit Pacific Co. is a Delaware corporation headquartered in
21 Vancouver, Washington, and a subsidiary of defendant Peter Kiewit Sons, Inc., a Delaware
22 corporation with its principal place of business in Omaha, Nebraska (collectively "Kiewit").

23 2.8 Defendant General Construction Co. is a Delaware corporation headquartered in
24 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

