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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

LUMMI NATION,

Plaintiff,

vs.

WHIDBEY TELEPHONE COMPANY d/b/a  
WHIDBEY TELECOM, et al.,

Defendants.

Case No. 2:26-cv-01435-KKE

**PLAINTIFF LUMMI NATION'S  
MEMORANDUM OF LAW IN  
SUPPORT OF MOTION FOR  
PRELIMINARY INJUNCTION**

**NOTE ON MOTION CALENDAR:  
June 4, 2026**

**ORAL ARGUMENT REQUESTED**

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**I. INTRODUCTION**

From time immemorial, Lummi Nation (the “Nation”) and its ancestors have lived, fished, gathered, and laid their dead to rest at Point Roberts, Washington. The Lummi belong to the Coast Salish people, who call the Point Roberts peninsula Chelhtenem and regard it as a sacred landscape. The burial grounds within Point Roberts are the resting places of Lummi ancestors to whom the Nation owes living, ongoing, ceremonial obligations. Dkt. #1 ¶¶ 21–26. Those obligations cannot be performed by any other party on the Nation’s behalf. Dkt. #1 ¶ 24.

Lummi Nation, a federally recognized Tribal Nation, now seeks an immediate injunction to stop Whidbey Telephone Company d/b/a Whidbey Telecom (“Whidbey Telecom”) and Whatcom County from further disturbing ancestral remains and to compel Whatcom County and Whidbey Telecom to allow the Nation access for damage assessment and reinterment. Across three successive broadband projects using \$13,744,474.20 in federal funds, Whidbey Telecom has trenched thousands of feet into known burial grounds, ignored archaeological indicators and human remains its own crews were trained to recognize, defied a stop work order, refused to notify required authorities, left ancestral remains exposed to the weather for years, and most recently, in November 2025, without providing reasonably adequate notice to the Nation, again commenced ground disturbance in close proximity to a known burial site. Dkt. #1 ¶¶ 36–41, 71–83, 95–107. This latest disturbance permanently lost a Lummi cranial fragment that can never be recovered or reinterred. Decl. of L. Tso ¶ 24.<sup>1</sup> In defiance of state law, Defendants have failed to ensure the Nation the opportunity to properly rebury its ancestors. The Nation requires both Whidbey Telecom’s and Whatcom County’s

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<sup>1</sup> Plaintiff is simultaneously filing a Motion to Seal certain exhibits referenced in the supporting declarations and reserves the right to file supplemental declarations should the Court deny that Motion.

1 cooperation in allowing the Nation to access the sites, conduct a comprehensive damage  
2 assessment to understand the scope of disturbance, recover all disturbed ancestral remains, and  
3 reinter those remains with dignity.

4 Without timely reinterment, the harm is severe, ongoing, and accelerating. Out of the 2.8  
5 miles of construction for Community Connect—including trenching, boring, and use of existing  
6 conduits—only four pot holes and five soil piles have been assessed for damage; the unassessed  
7 construction includes approximately 1,000 feet of trenching at archaeological site 45WH560  
8 (“45WH560”). Decl. of R. Whitlam ¶ 8. Fragmented human remains and grave goods likely  
9 abide on the surface of the disturbed soil, exposed to the elements and vulnerable to further  
10 damage. The same conditions persist at archaeological site 45WH525 (“45WH525”), where  
11 Whidbey Telecom conducted another 2,100 feet (about twice the height of the Empire State  
12 Building) of trenching through a known burial ground, which remains unassessed for damage to  
13 Lummi ancestral remains. Dkt. #1 ¶ 99. But for the illegal permitting of two of the three  
14 Whidbey Telecom projects by Whatcom County, issued without required advanced consultation  
15 with Lummi Nation, this trenching on County property would not have occurred. Dkt. #1 ¶¶  
16 118–20. Now, despite ongoing requests, Lummi Nation lacks a comprehensive damage  
17 assessment for all three projects and cannot assess where disturbed remains lie, retrieve them, or  
18 plan reburial.

19 Defendants have shown no sense of urgency to protect exposed human remains from  
20 further damage or permanent loss. In addition to losing the cranial fragment in November 2025,  
21 Whidbey Telecom left open trenches and excavated soil piles containing human remains and  
22 funerary objects at 45WH560 for nearly two years, covered, if at all, with plywood or tarps.  
23 Dkt. #1 ¶¶ 96–97. Whidbey Telecom’s failure to secure the site and follow appropriate  
24

1 protocols for handling human remains severely exacerbated the damage from initial disturbance.  
2 Now, each passing day bears further consequences for any remains still disinterred or unsecured  
3 at 45WH560 or 45WH525. Each weather event causes further degradation. Each day leaves  
4 artifacts and human remains vulnerable to looting by members of the public. Each new ground  
5 disturbing activity threatens further loss.

6 Lummi Nation seeks a preliminary injunction to halt this desecration before losing more  
7 ancestors. The Nation asks the Court to enjoin Whidbey Telecom and Whatcom County to (a)  
8 refrain from conducting any further ground disturbing activity at Point Roberts pending the  
9 merits; (b) secure 45WH560 and 45WH525 against further weathering and trespass; (c) grant  
10 the Nation full cooperation to access the areas of activity for all three federally-funded projects  
11 to conduct its own comprehensive damage assessment, recovery, and reinterment of disturbed  
12 remains; and (d) produce all project documentation necessary for the Nation to evaluate the  
13 scope of harm.

## 14 **II. STATUTORY AND REGULATORY FRAMEWORK**

15 Lummi Nation’s claims for injunctive relief are anchored in a comprehensive framework  
16 of federal, state, and local laws designed to protect irreplaceable cultural resources; minimize  
17 disturbance, damage, and irreparable harm to human remains; and ensure Tribes have the  
18 immediate ability and necessary authority to reinter disturbed ancestral remains.

### 19 **A. The Washington Indian Graves and Records Act (IGRA)**

20 The Washington Indian Graves and Records Act (“IGRA”), codified at Chapter 27.44 of  
21 the Revised Code of Washington (“RCW”), provides both the substantive protections and the  
22 civil remedy framework at the center of this Motion. The Washington State Legislature enacted  
23 IGRA, recognizing “Native Indian burial grounds and historic graves” as “finite, irreplaceable,  
24

1 and nonrenewable cultural resource[s]” and “the spiritual significance of such sites to the people  
2 of” Washington State. RCW 27.44.030. The purpose of IGRA is to protect these burial grounds  
3 from “deliberate desecration” and “careless indifference.” *Id.*; *see also Swinomish Tribal Cmty.*  
4 *v. Island Cnty.*, 87 Wn. App. 552, 557 (Wash. Ct. App. 1997) (describing the Legislature’s  
5 intent to safeguard tribal burial sites).

6 RCW 27.44.040(1) establishes two separate grounds for liability. First, it imposes  
7 criminal and civil liability on “[a]ny person who knowingly removes, mutilates, defaces,  
8 injures, or destroys any cairn or grave of any native Indian,” making such conduct a class C  
9 felony. Second, for disturbances that occur “through inadvertence, including disturbance  
10 through construction... or any other activity,” the statute imposes a mandatory duty to “reinter  
11 the human remains under the supervision of the appropriate Indian tribe.” *Id.* The inadvertence  
12 exemption that shields some disturbers from criminal liability does not extinguish the  
13 reinterment duty. Moreover, if the disturber does not properly report the disturbance and make  
14 reasonable efforts to preserve the remains, the inadvertence defense no longer applies. *Id.* at (4).

15 RCW 27.44.055 imposes a separate set of immediate, non-discretionary duties triggered  
16 at the moment of discovery. “Any person engaged in ground disturbing activity...who  
17 encounters or discovers skeletal human remains in or on the ground” is required to: “(a)  
18 [i]mmEDIATELY cease any activity which may cause further disturbance; (b) [m]ake a reasonable  
19 effort to protect the area from further disturbance; [and] (c) [r]eport the presence and location of  
20 the remains to the coroner and local law enforcement in the most expeditious manner possible.”  
21 RCW 27.44.055(2)(a)–(c). Like RCW 27.44.040, this provision releases the disturber from  
22 criminal or civil liability for an inadvertent disturbance only if they comply with these  
23 mandatory duties and are “otherwise in compliance with applicable law.” RCW  
24

1 27.44.055(2)(d). The coroner, in turn, bears corresponding duties to notify affected Tribes. *See*  
2 RCW 27.44.055(3). When this notification chain is broken at the outset—by a contractor who  
3 does not report—Tribes cannot exercise their supervisory rights over reinterment, and the  
4 downstream harm to Tribes is the direct consequence of that breach.

5 RCW 27.44.050 authorizes Tribes to pursue civil action when disturbers fail to adhere to  
6 IGRA. A Tribe or any enrolled member may bring “a civil action to secure an injunction,  
7 damages, or other appropriate relief against any person” who violates RCW 27.44.040. RCW  
8 27.44.050(1). Courts have also affirmed that this civil action is not limited to parties injured by  
9 criminal violations of the Act. *See Swinomish*, 87 Wn. App. at 560. The court may award actual  
10 damages, including special and general damages and damages for emotional distress, and may  
11 award punitive damages on a showing of willfulness—even “without proof of actual damages.”  
12 RCW 27.44.050(3)(c)–(e). The statute expressly authorizes the remedy of injunctive relief and  
13 the reinterment of human remains as equitable relief. RCW 27.44.050(1), (3)(b).

14 **B. Whatcom County Code § 20.72.652**

15 Whatcom County Code § 20.72.652 imposes sequential duties, establishing a parallel set  
16 of local archaeological resource protections that require the County to consult with Lummi  
17 Nation before issuing encroachment permits. Upon receipt of a permit application for a project  
18 within 500 feet of a known archaeological site, the County “shall require an archaeological  
19 resources site assessment.” *Id.* § 20.72.652(2)(a). If that assessment identifies significant  
20 archaeological resources, the County must obtain an Archaeological Resource Management  
21 Plan (“ARMP”), and the preparing archaeologist “shall solicit comments from the...Lummi  
22 Nation Historic Preservation Office.” *Id.* § 20.72.652(2)(b). The ARMP must identify  
23 potentially impacted resources, assess adverse effects, and provide proposals to avoid, mitigate,  
24

1 or minimize those effects. *Id.* § 20.72.652(2)(b)(i). Before the County approves an ARMP, the  
2 County’s technical administrator must consult with Lummi Nation’s THPO. *Id.* §  
3 20.72.652(2)(b)(ii). Separately, Washington courts have upheld injunctions requiring counties  
4 to institutionalize consultation procedures before issuing permits that affect tribal burial  
5 grounds. *Swinomish*, 87 Wn. App. at 554–55 (affirming injunction directing county to notify the  
6 Tribe before issuing ground disturbing permits within recorded archaeological sites).

7 “Within 15 days of receipt” of development permit applications “in an area of known  
8 archaeological resources,” the County “shall notify and request a recommendation” from the  
9 Nation’s THPO. Whatcom County Code § 20.72.652(2)(c). In assessing these permits, the law  
10 requires the County to provide “for the protection and preservation of archaeological sites... to  
11 the maximum extent possible.” *Id.* § 20.72.652(2)(d). In the event of inadvertent discovery  
12 during active construction, County Code requires “work on that portion of the development site  
13 [to] be stopped immediately and the find reported as soon as possible to the county,” whose  
14 administrator is then required to notify Lummi Nation and conduct a site assessment. *Id.* §  
15 20.72.652(3)(a)–(b).

16 The County’s encroachment permit for Community Connect (Encroachment Permit No.  
17 ENC2022-00059) incorporated these requirements directly into its conditions: “If  
18 archaeological materials (bone, shell midden, cobble tools, etc.) are observed during site work,  
19 work in the area of discovery shall cease and the Whatcom County [State Environmental Policy  
20 Act] SEPA Administrator ... shall be contacted immediately to determine the significance of  
21 the discovery[.]” Decl. of L. Tso ¶ 18; Exs. 7, 8 at p. 13. This condition is not merely advisory;  
22 it is a binding obligation whose breach provides an independent basis for injunctive relief.  
23  
24

### C. Washington Common Law: Gross Negligence

The elements of a negligence claim under Washington law are “the existence of a duty to the plaintiff, breach of the duty, and injury to plaintiff proximately caused by the breach.” *Hertog v. City of Seattle*, 138 Wn.2d 265, 275 (Wash. 1999) (citing *Degel v. Majestic Mobile Manor, Inc.*, 129 Wn.2d 43, 48 (Wash. 1996)). In this case, the duties of care arise from multiple, overlapping sources: the requirements of Whatcom County Code § 20.72.652; the express conditions of the County’s encroachment permits; the Inadvertent Discovery Plan provided to Whidbey Telecom; and the mandatory requirements of Washington State’s IGRA (Chapter 27.44).

Washington courts define gross negligence as a “substantial” breach of duty— “failing to act with even slight care.” *Harper v. Dep’t of Corr.*, 192 Wn.2d 328, 340–41 (Wash. 2018). The standard requires “substantially or appreciably” less care than a reasonably prudent person would exercise under the same circumstances. *Id.* at 342–43 (quoting *Nist v. Tudor*, 67 Wn.2d 322, 331 (Wash. 1965)); *see also Peterhans v. Univ. of Wash.*, 34 Wn. App. 2d 745, 752–54 (Wash. Ct. App. 2025). Whidbey Telecom’s repeated, deliberate disregard of the duty to stop work upon encountering human remains and refusal to notify required authorities support a finding of willfulness, activating the exemplary damages provision of RCW 27.44.050(3)— additional deterrent force to any preliminary injunction the Court issues.

For ordinary negligence claims, Washington courts apply the same *Hertog* elements; the County’s own Code anchors its duty. *See* Whatcom County Code § 20.72.652 (mandating site assessment and Tribal consultation before permitting work within 500 feet of a known archaeological site). Where a government entity violates a mandatory statutory duty protecting a specific class of persons—here, Lummi Nation as the Tribe with cultural and legal interests in

1 the affected burial grounds—Washington courts recognize such a violation may establish both  
2 the duty and breach elements of negligence simultaneously. *See generally Hertog*, 138 Wn.2d at  
3 275–77.

#### 4 **D. Federal Overlay: NHPA Section 106 and the APA**

5 The federal statutory framework also provides essential context for the legal duties  
6 Whidbey Telecom and Whatcom County violated and for the public interest analysis that  
7 supports the relief sought. Section 106 of the National Historic Preservation Act (“NHPA”),  
8 codified at 54 U.S.C. § 306108, requires every federal agency to “take into account the effect of  
9 [its] undertaking[s] on any historic property.” The implementing regulations, 36 C.F.R. Part  
10 800, require consultation with federally recognized Tribes that attach religious and cultural  
11 significance to affected properties “regardless of the location of the historic property.” *Id.* §  
12 800.2(c)(2)(ii). The Administrative Procedure Act (“APA”) allows judicial review of agency  
13 compliance with Section 106 and with any governing Programmatic Agreement. 5 U.S.C. §§  
14 701–706; *See Tohono O’Odham Nation v. U.S. Dep’t of the Interior*, 138 F.4th 1189, 1202 (9th  
15 Cir. 2025) (failure to comply with a Programmatic Agreement constitutes arbitrary and  
16 capricious agency action reviewable under the APA). Relevant to this Motion, RUS’s 2018  
17 Nationwide Programmatic Agreement (“2018 Nationwide PA”) prohibits the release of federal  
18 construction funds prior to completion of Section 106 review and assigns the grantee—here,  
19 Whidbey Telecom—primary responsibility for initiating and carrying out certain aspects of the  
20 106 process. Dkt. #1 ¶¶ 57–58, 147–50. This obligation confers an additional duty of care on  
21 Whidbey Telecom and reinforces its responsibility to ensure compliance with NHPA.

1 **III. FACTUAL BACKGROUND**

2 **A. Point Roberts Is a Sacred Lummi Cultural Landscape Containing Known Burial**  
3 **Grounds.**

4 Point Roberts has held ceremonial, subsistence, and burial significance to Lummi Nation  
5 across generations. Decl. of R. Whitlam ¶ 3; Decl. of L. Tso ¶¶ 3, 27–28. Best estimates by  
6 archaeologists and historians indicate that Lummi ancestors occupied and buried their loved  
7 ones at Point Roberts for over 5,000 years, up through the late nineteenth century. Dkt. #1 ¶ 42.  
8 Point Roberts’ 4.9 square miles includes thirteen recorded archaeological sites, more than 3,000  
9 individual archaeological features, and potentially even more unrecorded historic properties, as  
10 parts of Point Roberts have not been surveyed for the presence of archaeological resources.  
11 Decl. of R. Whitlam ¶ 3; Decl. of L. Tso ¶¶ 3, 27. The Treaty of Point Elliott reserves Lummi  
12 rights at and around Point Roberts, and federal courts have judicially determined that Point  
13 Roberts lies within Lummi Nation’s usual and accustomed fishing places. Dkt. #1 ¶¶ 28–31;  
14 *United States v. Washington*, 384 F. Supp. 312, 360 (D. Wash. 1974), *aff’d*, 520 F.2d 676 (9th  
15 Cir. 1975).

16 Whidbey Telecom conducted project activities at two different archaeological sites at  
17 Point Roberts, disturbing Lummi remains at those sites for three different projects. Decl. of R.  
18 Whitlam ¶¶ 5, 9, 19, 26; Exs. 4, 5, 6, 10. Sites 45WH560 and 45WH525 are known to contain  
19 Lummi ancestral human remains and associated cultural materials, and both are treated as  
20 eligible for the National Register of Historic Places (“NRHP”), as repeatedly confirmed by the  
21 Washington State Historic Preservation Officer (“SHPO”). Decl. of R. Whitlam ¶¶ 3, 5, 18.  
22 Whidbey Telecom has operated at Point Roberts for nearly forty years and employs a Tribal  
23 Affairs official charged with liaising with Tribes in its service area, including Lummi Nation.  
24 Dkt. #1 ¶ 7. Whidbey Telecom knew or should have known of Lummi Nation’s cultural

1 resources and burial grounds at Point Roberts before it ever began construction or project  
2 planning. Dkt. #1 ¶¶ 7, 44–45. Yet, Whidbey Telecom repeatedly chose to conduct ground  
3 disturbing activities at sensitive sites, without the proper project permits or notice to the Nation.  
4 According to its Project Director, Whidbey Telecom has laid more than eighteen miles of fiber  
5 at Point Roberts as of 2023, causing untold damage on a peninsula dense with cultural resource  
6 material. Dkt. #1 ¶ 41.

7 Lummi spiritual and cultural traditions impose sacred obligations on the Nation to  
8 protect and reinter ancestral human remains. Decl. of L. Tso ¶¶ 3, 27– 28. Washington law  
9 recognizes those obligations as the basis for mandatory legal duties, requiring anyone who  
10 disturbs Native Indian graves—whether knowingly or inadvertently—to “reinter the human  
11 remains under the supervision of the appropriate Indian tribe.” RCW 27.44.040(1). Once  
12 ancestral remains are exposed, fragmented, displaced, or commingled with construction spoils,  
13 the harm to the Nation is never fully reversible, adding to the urgency of the requirement to  
14 reinter. Decl. of L. Tso ¶¶ 19, 27–28. Whidbey Telecom has not complied with this duty to  
15 reinter disturbed Lummi ancestral remains on any of its three projects operating at Point  
16 Roberts; this failure constitutes a continuing violation of state law.

17 **B. Whidbey Telecom Disturbed Ancestral Remains across Three Successive**  
18 **Projects.**

19 **1. Community Connect (45WH560)**

20 The United States Department of Agriculture – Rural Utilities Service (“RUS”) issued a  
21 federal environmental permit for Whidbey Telecom’s Community Connect project  
22 (“Community Connect”) on June 29, 2022, and the County issued encroachment permits for the  
23 project on February 27, 2023, July 26, 2024, and September 9, 2024. Dkt. #1 ¶ 35. In August  
24 2024, the County conceded it issued Community Connect’s permits without reviewing the

1 project or notifying the Nation, failing to properly operate its software used to indicate the  
2 presence of cultural resources in project areas. Decl. of L. Tso ¶ 18; Ex. 7. In April 2023,  
3 construction for Community Connect encountered shell midden deposits, which are widely  
4 recognized indicators of the presence of human remains, and other archaeological material at  
5 45WH560. Decl. of R. Whitlam ¶ 5; Exs. 9, 10, 11.

6 Whidbey Telecom did not stop when it encountered these deposits, despite its crews  
7 having pictures and descriptions of shell midden deposits in the project’s Inadvertent Discovery  
8 Plan. Decl. of R. Whitlam ¶ 7; Exs. 9, 10, 11, 4 at p. 22–29<sup>2</sup>. Instead, Whidbey Telecom dug a  
9 trench running approximately 1,000 feet long and at least thirty-six inches deep through the site,  
10 conducted at least 300 feet of directional boring, and created at least five exploratory “pot hole”  
11 trenches within the total 2.8 miles of completed construction for Community Connect. Decl. of  
12 L. Tso ¶¶ 10–11, 14; Decl. of R. Whitlam ¶ 8; Ex. 3, 4 at p. v. Whidbey Telecom disturbed  
13 human remains in four of the five exploratory trenches and dispersed additional human remains  
14 in four of the removed soil piles. Ex. 4 at p. 56–57. The trenching also disinterred funerary  
15 objects and thousands of cultural artifacts. Ex. 4 at p. v, 67.

16 Whidbey Telecom did not provide notice of the disturbance to the County’s SEPA  
17 Administrator, RUS, or Lummi Nation. Trenching ultimately stopped only after the SHPO  
18 intervened upon learning of the activity from a member of the public with archaeological  
19 training. Decl. of R. Whitlam ¶¶ 5–6, 8; Decl. of L. Tso ¶¶ 4–5, 7. Upon information and belief,  
20 Whidbey Telecom still resumed construction-related activities after the imposition of the stop  
21

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22  
23 <sup>2</sup> All page references to exhibits refer to the footer page numbers of the original document. Where no footer page  
24 numbers exist, references are to the page’s sequential position within the submitted PDF, excluding the cover page,  
with the first non-cover page designated as page 1.

1 work order, further damaging Lummi ancestral remains. Decl. of L. Tso ¶ 6; Exs. 1, 2. Whidbey  
2 Telecom’s activities for Community Connect did not constitute an inadvertent incident that  
3 went uncorrected but rather a pattern of independent violations, each compounding the one  
4 before it.

## 5 **2. ReConnect (45WH525)**

6 RUS issued environmental permits for another RUS-funded project at Point Roberts  
7 (“ReConnect”) on January 15, 2021, and the County issued encroachment permits in March and  
8 August 2021. Dkt. #1 ¶ 37. In August 2024, the County admitted it had issued ReConnect’s  
9 permits without reviewing the project or providing the Nation notice, failing to properly operate  
10 software used to indicate the presence of cultural resources in project areas. Decl. of L. Tso ¶  
11 18; Ex. 7. Between Community Connect and ReConnect, this failure occurred on at least two  
12 separate occasions more than one year apart in time, which means the County could have  
13 permitted numerous incursions into burial grounds at Point Roberts for projects beyond those  
14 subject to this suit. ReConnect continues to operate without a proper encroachment permit or  
15 required consultation between the County and the Nation. Dkt. #1 ¶ 121.

16 Whidbey Telecom began construction in March 2021 within the boundaries of  
17 45WH525, another known Lummi burial ground, ultimately digging at least 2,100 feet of  
18 trench. Dkt. #1 ¶¶ 37–38. ReConnect is now fully constructed and operating. Dkt. #1 ¶ 37.  
19 Upon information and belief, Whidbey Telecom’s construction crews encountered shell midden  
20 deposits and other archaeological indicators during ReConnect’s trenching and did not cease  
21 work. Decl. of L. Tso ¶¶ 16–17; Ex. 6. Whidbey Telecom did not provide notice of the project  
22 activities to the Nation or the disturbance to any required authority. Decl. of R. Whitlam ¶¶ 19–  
23 22. Lummi Nation learned about likely disturbance at 45WH525 only through its own  
24

1 investigation after discovering the damage at 45WH560. Dkt. #1 ¶ 94; Decl. of L. Tso ¶¶ 16–  
2 17; Ex. 6. Defendants have never initiated discussion or consultation about the damage from  
3 ReConnect, and the full scope of the construction conducted for the project, or its impacts to  
4 Lummi burial grounds, remains unknown to the Nation. Decl. of L. Tso ¶ 19; Decl. of R.  
5 Whitlam ¶ 21.

### 6 **3. Middle Mile (45WH525)**

7 The third Whidbey Telecom project at Point Roberts (“Middle Mile”) is funded by the  
8 National Telecommunications and Information Administration (“NTIA”). Dkt. #1 ¶¶ 10, 33.  
9 NTIA issued its National Environmental Policy Act (“NEPA”) Decision Memo for the  
10 terrestrial portion of Middle Mile on February 18, 2025, releasing federal funds. Dkt. #1 ¶ 40.  
11 Whidbey Telecom’s May 29, 2025 report to NTIA confirmed project construction had begun.  
12 *Id.*

13 On November 6, 2025, with only three days’ notice to Lummi Nation and after receiving  
14 repeated warning about project activities at known archaeological sites, Whidbey Telecom  
15 undertook ground disturbing activities for Middle Mile in close proximity to 45WH525, once  
16 again displacing human remains. Dkt. #1 ¶ 39. A Lummi cranial fragment displaced by Middle  
17 Mile is now permanently lost and cannot be recovered or reinterred. Decl. of L. Tso ¶ 24; Decl.  
18 of R. Whitlam ¶ 25. There is no current restraint on further ground disturbance or project  
19 activities for Middle Mile.

### 20 **C. Defendants Have Left Ancestral Remains Exposed and Refused Damage 21 Assessment.**

22 Defendants left open trenches, and piles of excavated soil containing human remains and  
23 funerary artifacts, exposed to the elements at 45WH560 for nearly two years. Decl. of L.  
24 Tso ¶¶ 8, 10, 14. During that period, if covered at all, the disturbed remains were only protected

1 by temporary materials such as plywood or tarps. Ex. 4 at p. 22, 26. Human remains and  
2 associated cultural materials may still be exposed to weather and environmental conditions at  
3 45WH560, and upon information and belief, the same is true at 45WH525, where exposure has  
4 continued since March 2021. Dkt. #1 ¶¶ 37–38, 96–99.

5 Without comprehensive damage assessments of the projects’ impacts, the Nation cannot  
6 determine where disturbed remains lie, how to recover them, or a reburial plan. Decl. of L.  
7 Tso ¶ 26. Ten months after discovery of the damage from Community Connect, Defendants  
8 only assessed damage at 45WH560 from four pot holes and five spoil piles (*i.e.*, a miniscule  
9 fraction of the 2.8 total miles of construction) and have still not assessed damage from the  
10 approximately 1,000-foot trench dug at the site. Decl. of L. Tso ¶¶ 10, 14; Ex. 4 at p. v, 15, 28,  
11 56-57. Notwithstanding Whidbey Telecom’s failure to assess the vast majority of the project  
12 route, the incomplete damage assessment documented seventeen fragments of human remains  
13 and more than 1,000 removed artifacts. Decl. of R. Whitlam ¶¶ 9, 16; Decl. of L. Tso ¶ 13.  
14 Damage from the remainder of the 2.8 miles of construction is potentially exponential,  
15 numbering in the thousands of fragments of ancestral remains or more; it includes damage to  
16 burial sites along the project route that do not lie within the boundaries of 45WH560, because  
17 not all of Point Roberts has been surveyed for the presence of archaeological resources. Decl. of  
18 L. Tso ¶ 27. Defendants have failed to conduct any damage assessment for ReConnect. Decl. of  
19 L. Tso ¶ 19. Defendants have failed to conduct any damage assessment for Middle Mile. Dkt.  
20 #1 ¶ 112. To date, Defendants have failed to enable Lummi Nation to reinter any of the Lummi  
21 ancestral remains disturbed by the projects. Decl. of L. Tso ¶ 27.

1           **D. The Harm Is Imminent, Ongoing, and Compounding.**

2           Middle Mile’s activities near 45WH525 pose an ongoing threat of further ground  
3 disturbance to known burial grounds. The project is funded, permitted, and underway. Whidbey  
4 Telecom has demonstrated, as recently as November 2025, that it will commence ground  
5 disturbance near these sites without proper notice, and it will do so again absent injunctive  
6 relief. Additionally, the Nation has no assurance that further damage has not occurred from  
7 Community Connect and ReConnect, leaving unaccounted-for human remains disinterred from  
8 both projects. The exposed and unprotected condition of 45WH560 and 45WH525 causes  
9 irreversible harm every day: degradation from weather, physical disturbance from trespass, and  
10 permanent loss of materials whose archaeological and cultural context is already compromised.  
11 This harm is not contingent on any future act by Whidbey Telecom; it is occurring continuously  
12 and independently.

13           Finally, the absence of a comprehensive damage assessment for any of the projects  
14 leaves the full scope of harm unknown, and the reinterment that RCW 27.44.040 mandates  
15 cannot begin. Each day of continued non-assessment diminishes the Nation’s ability to fulfill its  
16 obligations to its ancestors as conditions on the ground worsen—with deepening emotional  
17 harms. Active construction increases the amount of disturbed ground requiring assessment.  
18 Unprotected sites degrade the remains that assessment would otherwise locate and enable the  
19 Nation to recover. Delayed assessment allows further deterioration of the evidence and physical  
20 material on which the reinterment process depends.

21                           **IV. LEGAL STANDARD**

22           A preliminary injunction is appropriate where the movant establishes (1) likelihood of  
23 success on the merits, (2) likelihood of irreparable harm in the absence of preliminary relief, (3)

1 that the balance of equities tips in the movant’s favor, and (4) that an injunction is in the public  
2 interest. *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008). Where, as here, the  
3 government is a defendant, the third and fourth factors merge. *Drakes Bay Oyster Co. v. Jewell*,  
4 747 F.3d 1073, 1092 (9th Cir. 2014); *Nken v. Holder*, 556 U.S. 418, 435 (2009).

5 The Ninth Circuit’s sliding-scale formulation provides an alternative path. “Serious  
6 questions going to the merits” combined with a balance of hardships that tips “sharply” in the  
7 movant’s favor, together with a likelihood of irreparable harm and a public interest in relief,  
8 supports issuance. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131–35 (9th Cir. 2011).

9 The Nation seeks relief that is principally prohibitory and restorative of the status quo  
10 ante. *See GoTo.com, Inc. v. Walt Disney Co.*, 202 F.3d 1199, 1210 (9th Cir. 2000). To the extent  
11 any component is properly characterized as mandatory, the Nation must show that the law and  
12 facts “clearly favor” its position. *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*,  
13 571 F.3d 873, 879 (9th Cir. 2009); *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (en  
14 banc). The Nation meets that standard and satisfies both the *Winter* and *Cottrell* formulations.

## 15 V. ARGUMENT

### 16 **A. Plaintiffs Have Standing.**

17 Lummi Nation satisfies Article III’s requirements of injury in fact, traceability, and  
18 redressability as to the defendants against whom preliminary relief is sought. *Lujan v. Defs. of*  
19 *Wildlife*, 504 U.S. 555, 560–61 (1992).

20 The Nation suffered and continues to suffer concrete and particularized injuries from the  
21 conduct of Whatcom County and Whidbey Telecom. Whidbey Telecom’s ground disturbing  
22 activities at 45WH560 and 45WH525 have disturbed, damaged, and in some instances  
23 permanently lost Lummi ancestral remains and associated funerary objects, leaving exposed  
24

1 remains to weather and degrade for extended periods. Decl. of L. Tso ¶¶ 8, 10, 12–14, 24.  
2 Whatcom County issued encroachment permits authorizing the projects without conducting the  
3 consultation and archaeological review required by its own code. Decl. of L. Tso ¶ 18. The  
4 Nation’s interest in protecting its ancestral burial grounds and exercising its sacred obligations  
5 to its ancestors is concrete, particularized, and ongoing. Decl. of L. Tso ¶¶ 26–28. These injuries  
6 are fairly traceable to Whidbey Telecom’s ground disturbance and to Whatcom County’s  
7 permitting and oversight failures.

8 An order halting further ground disturbance, securing the affected sites, and enabling  
9 damage assessments and reinterment would redress these injuries, preventing additional harm  
10 and permitting the Nation to fulfill its cultural and spiritual obligations to its ancestors. *See Pit*  
11 *River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 779 (9th Cir. 2006).

12 **B. Lummi Nation Is Likely to Succeed on the Merits.**

13 **1. *Whidbey Telecom’s knowing and ongoing disturbance of Lummi burial***  
14 ***grounds violates the Indian Graves and Records Act.***

15 Washington State’s IGRA, codified at Chapter 27.44, prohibits knowing removal,  
16 mutilation, defacement, injury, or destruction of any Native Indian grave; requires reinterment  
17 under Tribal supervision even for inadvertent disturbance; and is enforceable through civil  
18 injunctive relief, damages, and—on a showing of willfulness—punitive damages even without  
19 proof of actual loss. RCW 27.44.040–050. RCW 27.44.055 separately mandates immediate  
20 cessation, site protection, and notification to authorities upon discovery of skeletal remains.  
21 Whidbey Telecom violated each of these provisions across all three projects.

22 Whidbey Telecom acted with knowledge, as established by the following facts: (a)  
23 Whidbey Telecom’s crews had Whatcom County’s Inadvertent Discovery Plan, which  
24 contained detailed descriptions and pictures of shell midden deposits, widely recognized

1 indicators of archaeological sites that contain human remains, Dkt. #1 ¶ 71–72; Decl. of R.  
2 Whitlam ¶ 5; Exs. 10, 11; (b) Whidbey Telecom’s crews encountered shell midden deposits  
3 during Community Connect’s trenching, but they kept digging, ultimately, at the least,  
4 disturbing human remains in four of the five exploratory trenches at 45WH560 and dispersing  
5 remains throughout removed soil piles, Dkt. #1 ¶ 36, 73; (c) Whidbey Telecom has never  
6 addressed the trenching at 45WH525 for ReConnect or its potential, ongoing damage,  
7 stonewalling the Nation’s repeated questions about the project, Decl. of L. Tso ¶¶ 17, 19; (d)  
8 after the Nation’s repeated warnings about ReConnect’s damage to 45WH525, Whidbey  
9 Telecom commenced Middle Mile in close proximity to 45WH525, again disturbing human  
10 remains, Decl. of L. Tso ¶¶ 21–24; (e) Whidbey Telecom has operated at Point Roberts for  
11 approximately forty years and employs a Tribal Affairs official charged specifically with  
12 liaising with Tribes in its service area, including Lummi Nation, Dkt. #1 ¶ 7; and (f) 45WH560  
13 and 45WH525 have long been treated as eligible for the NRHP, Dkt. #1 ¶¶ 43, 128. In short,  
14 Whidbey Telecom excavated through a burial ground whose location, character, and  
15 significance were documented in advance, in materials it possessed, and confirmed in real time  
16 by archaeological materials its own crews were trained to identify. To the extent Defendants  
17 argue that “knowing” under RCW 27.44.040(1) requires subjective awareness of a specific  
18 grave, that reading cannot be reconciled with the statute. The inadvertence carve-out at RCW  
19 27.44.040(4) presumes that knowing-with-suspicion-of-presence triggers liability, leaving the  
20 carve-out only for genuinely accidental discovery. Whidbey Telecom, however, had advance  
21 notice of likely burial deposits, encountered confirming archaeological materials in real time,  
22 and continued to trench.

1 Whidbey Telecom’s violations of RCW 27.44.055 are separate and ongoing. Whidbey  
2 Telecom violated the duty to “immediately cease” disturbing activities, RCW 27.44.055(2)(a),  
3 when it continued trenching after encountering shell midden deposits and human remains. Dkt.  
4 #1 ¶¶ 75–79. Whidbey Telecom violated the duty to report the disturbance to the coroner and  
5 local law enforcement immediately, RCW 27.44.055(2)(c); notice reached the Nation only  
6 because a third-party archaeologist alerted the SHPO, who then notified the appropriate  
7 authorities. Dkt. #1 ¶¶ 87–91. Whidbey Telecom continues to violate the duty to “make a  
8 reasonable effort to protect the area from further disturbance,” RCW 27.44.055(2)(b), today, as  
9 it proceeds with project activities for Middle Mile near 45WH525, where it has already  
10 disturbed and lost a cranial fragment and now fully operates ReConnect. This ongoing violation  
11 independently supports the injunctive relief requested. In addition, while Community Connect  
12 remains stalled at 45WH560, Whidbey Telecom’s work did not stop until the SHPO essentially  
13 caught them in the act of trenching through Lummi remains, and upon information and belief,  
14 Whidbey Telecom conducted even more work after the SHPO imposed a stop work order.  
15 Delays in securing exposed remains at 45WH560—and the bare coverage of those remains, if at  
16 all, by tarp and plywood for nearly two years—also defy any definition of reasonable effort to  
17 protect the area from further disturbance. The statute’s exemption for accidental, properly  
18 reported, and reasonably preserved disturbance does not apply. Whidbey Telecom met none of  
19 those conditions given the repeated, knowing violations and the demonstrable failure to protect  
20 or report.

21 Whidbey Telecom also continues to violate the requirement to reinter disturbed human  
22 remains “under the supervision of the appropriate Indian tribe.” RCW 27.44.040. Whidbey  
23 Telecom has not honored the Nation’s request for a comprehensive damage assessment at either  
24

1 45WH560 or 45WH525. The incomplete damage assessment conducted at 45WH560 covered a  
2 tiny fraction of the completed construction, and none of the disinterred remains have been  
3 reinterred. The loss of the cranial fragment disturbed by Middle Mile’s activities demonstrates  
4 Whidbey Telecom’s continued recklessness and inability to bring the projects into compliance,  
5 which requires ensuring the protection and reinterment of disturbed remains.

6 **2. *Whidbey Telecom’s pattern of conduct constitutes gross negligence under***  
7 ***Washington common law.***

8 Under Washington law, the elements of negligence are “the existence of a duty to the  
9 plaintiff, breach of the duty, and injury to plaintiff proximately caused by the breach,” with  
10 gross negligence requiring a breach that is “substantially or appreciably” less care than a  
11 reasonably prudent person would exercise—failing to act with “even slight care.” *Hertog*, 138  
12 Wn.2d at 275; *Harper*, 192 Wn.2d at 340–43. Whidbey Telecom owed multiple, overlapping  
13 duties of care: duties arising from its County encroachment permits, which expressly required  
14 cessation upon archaeological discovery and notice to the SEPA Administrator, Dkt. #1 ¶ 185;  
15 duties arising from the Inadvertent Discovery Plan provided to its crews, Dkt. #1 ¶ 71; duties  
16 delegated under RUS’s 2018 Nationwide Programmatic Agreement implementing Section 106  
17 of NHPA, which assigns compliance responsibilities to grantees, Dkt. #1 ¶¶ 57–58, 147–49; and  
18 duties imposed by RCW 27.44.040 and 27.44.055.

19 Whidbey Telecom breached every duty of care it owed Lummi Nation. It continued  
20 trenching at 45WH560 after its crews encountered shell midden deposits and human remains.  
21 Dkt. #1 ¶¶ 73, 75. It did not notify required authorities. Dkt. #1 ¶¶ 87–91. Upon information and  
22 belief, it resumed work after the SHPO issued a stop work order. Dkt. #1 ¶¶ 105–07. It  
23 commenced Middle Mile within close proximity to 45WH525 with three days’ notice despite  
24 years of warnings about damage to 45WH525 from another Whidbey Telecom project. Dkt. #1

¶¶ 39, 81. It has failed to conduct damage assessments for two of the three projects, and the only damage assessment it has done for Community Connect is incomplete. Dkt. #1 ¶¶ 110–12. Finally, Whidbey Telecom has failed to reinter any disturbed remains under the supervision of Lummi Nation, and the disturbed cranial fragment from Middle Mile is lost and can never be reinterred. Decl. of L. Tso ¶¶ 24–27.

Considered together, these failures establish appreciably less care than a reasonably prudent developer would exercise. Whidbey Telecom ignored its own knowledge of Point Roberts’ cultural significance, ignored its own training materials, defied a stop work order, disregarded repeated Tribal warnings, and repeatedly chose to operate at known Lummi burial grounds with little to no notice to the Nation. As a matter of law, Whidbey Telecom continues exercising less than “slight care.” *Harper*, 192 Wn.2d at 340–41. Proximate cause is unbroken: the disturbance, the displacement, and the continued exposure of remains are direct results of Whidbey Telecom’s breaches.

**3. *Whatcom County breached its statutory duty to consult with Lummi Nation before issuing permits.***

Whatcom County’s liability stems from the same negligence framework, anchored in the mandatory sequential duties detailed in Whatcom County Code § 20.72.652: the County “shall require” a site assessment before permitting activities “within 500 feet of a site known to contain archaeological resources,” *Id.* § 20.72.652(2)(a); the archaeologist “shall solicit comments” from Lummi Nation’s THPO if the “assessment identifies the presence of significant archaeological resources,” *Id.* § 20.72.652(2)(b); and the technical administrator “shall consult” with the Nation before approving any Archaeological Resource Management Plan. *Id.*; *see also Swinomish*, 87 Wn. App. at 554–59 (upholding injunction against county that issued ground disturbing permits without tribal consultation, rejecting county’s claim of

1 exemption from IGRA civil liability). Whatcom County Code also requires the County to notify  
2 the Nation upon receipt of a permit application “in an area of known archaeological resources”  
3 and to allow “sufficient time and/or conditions for consultation” with the Nation about those  
4 permits. Whatcom County Code § 20.72.652(2)(c)–(d). In the event of an inadvertent discovery,  
5 the County is required to notify Lummi Nation and initiate an “immediate site assessment.” *Id.*  
6 § 20.72.652(3)(b).

7 The County did not follow any of these requirements for Community Connect or  
8 ReConnect. Dkt. #1 ¶¶ 50–53. Instead, it issued illegal encroachment permits for both projects  
9 without conducting any prior consultation, providing the Nation time to comment, or providing  
10 the Nation with notice. More than one year after the Nation began inquiring about the projects  
11 with the County, the County admitted it had issued both permits without full review, attributing  
12 the failure to human error in operating software that recurred on at least two separate occasions  
13 more than one year apart, but which may have been persistent throughout the intervening year.  
14 Dkt. #1 ¶¶ 118–20. Lawful permitting would have triggered consultation, site assessment, and  
15 project modification before construction. ReConnect continues to operate today without a  
16 lawful encroachment permit or required consultation—an ongoing legal deficiency that the  
17 forward-looking relief requested directly corrects. Dkt. #1 ¶ 121.

18 **C. Absent Preliminary Relief, Lummi Nation Will Suffer Imminent and**  
19 **Irreparable Harm.**

20 Multiple independent factors pose a risk of ongoing, irreparable harm to Lummi Nation,  
21 all of which contribute, most distressingly, to the ongoing disinterment of—and potential further  
22 damage to—Lummi ancestral remains. The Supreme Court has recognized that  
23 “[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages  
24 and is often permanent or at least of long duration, i.e., irreparable.” *Amoco Prod. Co. v. Vill. of*

1 *Gambell*, 480 U.S. 531, 545 (1987); *see also Wilderness Watch v. Iwamoto*, 853 F.Supp. 2d.  
 2 1063, 1078 (D. Wash. 2012). Courts have applied that principle to disturbance of Native  
 3 American burial grounds and cultural resources, recognizing that such harms cause spiritual and  
 4 ceremonial injury. *See, e.g., Quechan Tribe of Fort Yuma Indian Rsrv. v. U.S. Dep't of the*  
 5 *Interior*, 755 F. Supp. 2d 1104, 1120–22 (D. Cal. 2010); *Pueblo of Sandia v. United States*, 50  
 6 F.3d 856, 860–61 (10th Cir. 1995); *Comanche Nation v. United States*, No. CIV-08-849-D,  
 7 2008 WL 4426621, at \*50–58 (D. Okla. Sept. 23, 2008).

8 ***1. Permanent loss has already occurred and continues to occur.***

9 The cranial fragment displaced by Middle Mile’s project activities, and subsequently  
 10 lost, cannot be recovered or reinterred. Dkt. #1 ¶¶ 100, 102. In addition, due to Whidbey  
 11 Telecom’s multiple other failures to follow necessary protocols to timely secure disturbed  
 12 ancestral remains at 45WH560 and 45WH525, notify appropriate officials, and stop work, the  
 13 risk that other Lummi ancestral remains can never be recovered or reinterred is high at both  
 14 45WH560 and 45WH525. Decl. of L. Tso ¶¶ 7, 17, 24. The harm is not speculative but  
 15 documented and recurring. Each day that Lummi ancestors remain exposed to further damage,  
 16 the harm increases. Moreover, no damages remedy can restore ancestral remains to the ground.  
 17 The harm is per se irreparable on two independent grounds: the permanence of physical loss and  
 18 the structural inadequacy of any legal remedy.

19 ***2. The spiritual and cultural harm to Lummi Nation is categorically irreparable.***

20 Lummi spiritual and cultural traditions impose sacred obligations on the Nation to  
 21 protect, care for, and reinter ancestral human remains and associated funerary objects. Decl. of  
 22 L. Tso ¶¶ 3, 19, 27. The Nation maintains specific protocols, carried forward through hereditary  
 23 knowledge and the work of Lummi Nation’s Cultural Department, governing the identification,  
 24 treatment, and reinterment of ancestral remains. Dkt. #1 ¶ 24. These protocols are not

1 discretionary practices. They are sacred duties that bind the Nation across generations and  
2 cannot be performed by any other party on the Nation’s behalf. Decl. of L. Tso ¶¶ 19, 27.

3 Once ancestral remains are exposed, fragmented, displaced, or commingled with  
4 construction spoils, the harm is never fully reversible. Decl. of L. Tso ¶¶ 27–28. Even where  
5 remains can be recovered and reinterred, the disturbance itself imposes spiritual injury on the  
6 ancestors and on the living members of the Nation, and it requires the Nation to undertake  
7 additional ceremonial work to address what has been done, work that imposes its own  
8 emotional and cultural costs on Tribal members, elders, and ceremonial practitioners. That  
9 injury compounds with each new disturbance.

10 ***3. Additional ground disturbing activity is imminent, not speculative.***

11 Whidbey Telecom has stated its intent to continue project activities on all three  
12 projects—including Community Connect once it receives approvals for modified construction  
13 plans. It has the funding and approvals in hand for Middle Mile, continues to operate  
14 ReConnect at a known burial ground site, and has demonstrated, repeatedly and recently, that it  
15 will begin ground disturbance with minimal or no notice and despite known harm. Dkt. #1 ¶ 39–  
16 40. These conditions pose imminent harm to Lummi ancestors at damaged burial ground sites.  
17 Whidbey Telecom’s repeat-violator history—disregarding a stop work order, Dkt. #1 ¶¶ 105–  
18 07, ignoring the SHPO’s and Nation’s repeated warnings about operating at known burial  
19 grounds, Dkt. #1 ¶¶ 129–30, and refusing substantive disclosure about ReConnect and Middle  
20 Mile, Dkt. #1 ¶¶ 116–17, forecloses any argument that voluntary cessation will protect the  
21 burial grounds pending trial. The absence of any damage assessment for Middle Mile and  
22 ReConnect, and an incomplete assessment that fails to evaluate all of Community Connect’s  
23 trenching, means the full scope of disturbance is unknown, and the reinterment duty mandated

1 by RCW 27.44.040 cannot begin. It also leaves the Nation with no confidence that all disturbed  
2 human remains have been properly secured from further damage, exposure to the elements, or  
3 permanent loss. Dkt. #1 ¶¶ 96–99. Here, past conduct, the most reliable predictor of future  
4 conduct, is unambiguous.

5 These harms also compound one another, adding to the urgency to reinter Lummi  
6 ancestors. Active construction increases the area requiring assessment; unprotected sites  
7 degrade the remains that assessment would enable the Nation to recover; delayed assessment  
8 prevents the reinterment that RCW 27.44.040 mandates. Whidbey Telecom’s Project Director  
9 has stated that more than eighteen miles of fiber have been installed at Point Roberts as of 2023.  
10 Dkt. #1 ¶ 41. Whatever further disturbance that footprint has caused remains wholly  
11 unknown—and will remain unknown, and will worsen, absent this Court’s intervention.

12 **D. The Balance of Equities Tips Sharply in Favor of the Nation.**

13 The harm to the Nation as a sovereign and to its citizens with hereditary obligations is  
14 permanent. Decl. of L. Tso ¶¶ 3, 27–28. By contrast, Whidbey Telecom’s and Whatcom  
15 County’s purported hardship is economic and remediable. Community Connect is already  
16 stalled due to the disturbance at 45WH560; an injunction would allow Whidbey Telecom to  
17 ensure resolution and potentially resume project activities, pending proper review and  
18 permitting of new project plans. Middle Mile’s Point Roberts activities are on the cusp of  
19 accelerating, presenting an optimal time to allow the Nation to examine the site before further  
20 damage occurs from increasing construction work. ReConnect is fully operational, but Whidbey  
21 Telecom has had nearly three years to resolve the Nation’s concerns about the project’s damage,  
22 and continuing the project without this resolution only poses greater liability. Indeed, Whidbey  
23 Telecom’s hardship is self-inflicted from violating state laws and defying permit conditions.

1 The hardship against Whatcom County is also minimal, as there is no cognizable hardship in  
2 being required to follow—and enforce—its own ordinances and protocols for reinterring  
3 disturbed human remains, which the Nation now asks the County to do.

4 **E. Preliminary Relief Serves the Public Interest.**

5 The public interest weighs strongly in favor of the requested relief, because protecting  
6 Lummi Nation’s burial grounds also protects the heritage of all citizens of the United States and  
7 upholds the rule of law by federal, state, local, and tribal governments. The Washington  
8 Legislature has spoken directly to this question, as RCW 27.44.030 declares that Native Indian  
9 burial grounds are “a finite, irreplaceable, and nonrenewable cultural resource” and are an  
10 intrinsic” part of the “cultural heritage” of Washington State. Whatcom County’s own Code  
11 also reflects public policy in favor of consultation with Lummi Nation on projects at Point  
12 Roberts, particularly where there is a disturbance. Whatcom County Code § 20.72.652. Finally,  
13 the Treaty of Point Elliott, 12 Stat. 927 (1859), and the federal trust responsibility reinforce the  
14 public interest showing. Point Roberts lies within Lummi Nation’s judicially determined usual  
15 and accustomed fishing places. *United States v. Washington*, 384 F. Supp. 312, 360 (D. Wash.  
16 1974). Enforcing a state burial-protection statute to protect Treaty-recognized Lummi cultural  
17 resources unquestionably serves the public interest and the laws undergirding the sovereign  
18 interests of Lummi Nation, Washington State, and the United States.

19 **F. The Court Should Waive Bond or Set a Nominal Amount.**

20 Under Rule 65(c), the Court has broad discretion to waive bond or set a nominal amount  
21 where the movant vindicates a significant public interest. *Save Our Sonoran, Inc. v. Flowers*,  
22 408 F.3d 1113, 1126 (9th Cir. 2005). Lummi Nation is a federally recognized sovereign seeking  
23 protection of irreplaceable cultural resources, the merits showing is strong, and imposing a  
24

1 substantial bond would erect a financial barrier to the protection of resources whose loss is  
2 permanent and unrecoverable. The Court should waive bond or set a nominal amount.

3 **VI. RELIEF REQUESTED**

4 For the reasons set forth above, Lummi Nation respectfully requests that this Court enter  
5 a preliminary injunction ordering the following relief pending final judgment:

6 **A. Immediate Cessation of Ground Disturbing Activities at Point Roberts**

7 The Court should order Whidbey Telecom and all those acting in concert with it to  
8 immediately cease all ground disturbing activities at Point Roberts—including all trenching,  
9 boring, potholing, and grading. The Order does not preclude maintenance or monitoring work  
10 that does not implicate subsurface disturbance in culturally sensitive areas.

11 **B. Mandatory Security Measures**

12 Within fourteen days of this Order, Defendants Whidbey Telecom and Whatcom County  
13 shall: (1) properly cover and protect all exposed areas at 45WH560 and 45WH525 containing or  
14 likely to contain ancestral human remains or associated cultural materials, using methods  
15 approved by the Lummi Nation THPO; (2) install fencing or other barriers sufficient to prevent  
16 unauthorized access to the affected areas at both sites and implement security measures to  
17 monitor and prevent looting, including but not limited to the installation of security cameras that  
18 the Nation can access remotely and weekly security patrols by law enforcement; and (3)  
19 implement erosion controls adequate to prevent further environmental degradation pending  
20 assessment and reinterment. These measures are compelled by RCW 27.44.055(2)(b)'s ongoing  
21 duty to protect disturbed remains.

22 **C. Access for Comprehensive Damage Assessment**

23 Defendants Whidbey Telecom and Whatcom County shall permit Lummi Nation—  
24 through its THPO, cultural staff, and retained archaeologists—immediate and unrestricted

1 access to sites 45WH560 and 45WH525 and to all excavated soil piles and displaced materials  
2 from the three projects, for the purpose of conducting a comprehensive damage assessment and  
3 planning recovery and reinterment. Defendants may not interfere with or condition the Nation’s  
4 access without prior Court approval. This Order is the prerequisite to all other relief: without it,  
5 the mandatory reinterment duty under RCW 27.44.040 cannot be discharged.

6 **D. Disclosure of Project Records**

7 Within thirty days, Defendants Whidbey Telecom and Whatcom County shall preserve  
8 and disclose to Lummi Nation: (1) all project maps, as-built drawings, GPS coordinates, boring  
9 logs, and construction records sufficient to identify the location, depth, and extent of all ground  
10 disturbance at Point Roberts for the three projects; (2) all records relating to archaeological  
11 materials, human remains, or cultural objects encountered during construction; and (3) all  
12 communications relating to the handling, storage, or disposition of any disturbed remains or  
13 cultural materials. Without these records, the damage assessment cannot be scoped. Disclosure  
14 imposes no burden beyond the recordkeeping obligations Defendants already bear under federal  
15 grant agreements and applicable preservation and environmental review law.

16 **VII. CONCLUSION**

17 Lummi Nation respectfully requests that the Court grant this Motion for Preliminary  
18 Injunction and enter the relief requested. Ancestors have already been lost. Each additional day  
19 sites remain unprotected, and construction and operations continue, extends the harm in ways  
20 that no judgment after trial can repair. The Motion should be granted.

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Respectfully submitted,

Dated: May 7, 2026

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We certify that this Memorandum contains 8,187 words, in compliance with the Local Civil Rules.

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document was served on Defendants via CM/ECF electronic notice.

s/ Gabriel D. Cantu  
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*Counsel for Plaintiff*

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