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2
3 UNITED STATES DISTRICT COURT
4 EASTERN DISTRICT OF CALIFORNIA
5

6 KANT MUCHHALA, et al.,
7 Plaintiffs,
8 v.
9 UNITED STATES OF AMERICA,
10 Defendant.

1:05-CV-0863 OWW

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

11
12 I. INTRODUCTION

13 On May 9, 2004, Jay David Muchhala, a twenty-seven year old
14 man, climbed a high voltage power pole in Yosemite National Park
15 ("Yosemite"). He was electrocuted and died, either as a result
16 of the electrocution or from the resulting fall. Plaintiffs, Jay
17 Muchhala's parents, filed suit against the United States of
18 America, which owns and operates the Park as well as the high
19 voltage electric pole at which the accident occurred. Brought
20 under the Federal Tort Claims Act, 28 U.S.C. § 2671, et seq., the
21 complaint alleges (1) negligence and (2) dangerous condition of
22 public property. (Doc. 1, June 30, 2005.)

23 On August 4, 2006, Magistrate Judge Lawrence J. O'Neill
24 granted the United States' motion for summary judgment with
25 respect to the issue of negligence per se, but denied the motion
26 as to all other issues. (Doc. 36.) Evidence was taken during a
27 three day bench trial on September 21-23, 2006. (Docs. 69-71.)
28 The parties presented oral summations at the close of evidence.

1 The parties were also invited to submit proposed findings of fact
2 and conclusions of law, and did so. (Docs. 73, 74.) Having
3 considered all submissions and the arguments of the parties, the
4 following findings of fact and conclusions of law are entered.
5

6 **II. FINDINGS OF FACT**

7 **A. Overview of the Accident.**

8 1. On May 9, 2004, Jay David Muchhala climbed a 30-foot,
9 galvanized steel utility pole (the "accident pole") adjacent to
10 the Four Mile Trail in Yosemite National Park ("Yosemite").

11 (Agreed Statement of Facts ("ASF") #3 (Joint Exhibit ("JE") 13.))

12 2. Jay Muchhala paid admission and was lawfully on the
13 premises of Yosemite. (ASF #1.)

14 3. While climbing the accident pole, Jay Muchhala was
15 electrocuted and died, either as a result of the electrocution,
16 or from the fall from the pole. (Coroner's Report, Plaintiffs'
17 Exhibit ("PE") 180.) Jay Muchhala's head wounds were "also
18 lethal in extent." (*Id.*)

19 4. Shortly before the accident, Jay Muchhala wrote in his
20 journal "[c]limbed two electricity towers and am just below the
21 third." (Journal Entry, PE 176.)

22 5. Mr. Muchhala was 27 years old at the time of the
23 accident. (ASF #7.)

24 **B. The Accident Pole and the Glacier Point Line.**

25 6. The accident pole is one of ten steel poles that form a
26 high voltage electrical distribution line within Yosemite,
27 referred to as the Glacier Point Line. (ASF #2.)
28

1 7. The Glacier Point Line is one of four high voltage
2 power lines operated and maintained by Defendant United States of
3 America within Yosemite. (ASF #2; Testimony of Kent Summers.)

4 8. Witnesses testified that the accident pole is located
5 anywhere from 20 to 200 feet from the Four Mile trail.
6 (Testimony of Kent Summers (100-200 feet), Keith Guy (20 feet),
7 Deposition Testimony of Susan Whittier (25-30 feet).)

8 9. To access the accident pole from the trail, one must
9 scramble down some boulders in a boulder field. (Testimony of
10 Keith Guy, Kent Summers.)

11 10. The trail is visible from the base of the pole.
12 (Testimony of Keith Guy.) However, the lines and pole are not
13 particularly noticeable from the trail. Stephen Whittier, a
14 witness to part of the accident, did not notice the power line
15 until he and his family heard a snapping noise and saw Jay
16 Muchhala fall from the pole. (Deposition Testimony of Stephen
17 Whittier.) Susan Whittier, who also witnessed the accident,
18 noticed the power lines on her way up the trail, but didn't take
19 particular note of them until the accident. (*Id.*)

20 11. The accident pole is 30 feet tall and made of
21 galvanized steel. The accident pole has two cross arms close to
22 the top. The lower cross arm, which was not in use at the time
23 of the accident, may have previously been used to carry
24 communication wires. Located approximately four feet above the
25 lower cross arm was the upper cross arm, on which run four lines,
26 three conductor lines that each carry 12,000 volt current and a
27 "static line." (Testimony of Kent Summers.)
28

1 12. As each conductor line approaches the pole, it meets
2 insulators, one on each side of the pole, which keep the electric
3 current from being conducted through the pole to the ground. A
4 "jumper cable" or "jumper" bypasses the insulators, carrying
5 electricity from the outside of the insulator on one side of the
6 pole to the outside of the insulator on the other side of the
7 pole. (Testimony of Kent Summers.)

8 13. Nine of the ten poles in the Glacier Point Line are
9 substantially identical to the accident pole. The remaining pole
10 ("Pole #1"), which is located at the bottom of the valley,
11 differs in construction. It is a "riser" pole, where the high
12 voltage power line is transferred from below ground to above
13 ground. (Testimony of Kent Summers.)

14 14. There were no warning signs on the accident pole at the
15 time of the accident. (ASF #4.) Nor was there physical evidence
16 indicating a sign had previously been located on the pole.
17 (Testimony of Kent Summers, Steven Yu.)

18 15. At the time of the accident, a number of other poles on
19 the Glacier Point Line also did not have high voltage warning
20 signs. (Testimony of Kent Summers, Robert Armstrong.)

21 16. The riser pole had high voltage markings on the top
22 cross arm on the date of the incident. (JE. 8 & 9; Testimony of
23 Kent Summers & Paul Laymon.) After the accident, a yellow high
24 voltage warning sticker was also placed near the base of the
25 riser pole. Two years later, in 2006, a picture taken of that
26 sticker reveals that the yellow warning sticker had begun to peel
27 off the pole. (Testimony of Kent Summers.)
28

1 17. All of the poles on the Glacier Point Line have
2 removable steel pegs. (Testimony of Kent Summers.) The
3 removable pegs attach to the pole by screwing or bolting into
4 steel flanges. These flanges are also known as "saddles."
5 (Testimony of Kent Summers.)

6 18. At the time of the accident, the lowest climbing peg on
7 the accident pole was located approximately four feet above
8 ground level. Three additional pegs were located lower than 7'6"
9 feet above ground level. Every pole in the Glacier Point Line,
10 with the exception of the riser pole, had climbing pegs at the
11 same heights. (Testimony of Kent Summers.)

12 19. Even with the pegs removed below at 7'6", a climber
13 could climb the pole by climbing the flanges that support the
14 pegs. (Testimony of Keith Guy.)

15 20. However, climbing the pole without the pegs in place is
16 difficult. Some of the workers had difficulty accessing the pole
17 without the assistance of an "aid," even with the pegs installed.
18 (Testimony of Kent Summers, Testimony of Keith Guy).

19 21. At the time of the accident, the subject pole had a
20 sticker attached to bearing the words "Proud to Be an American."
21 (PE 148). At the time of the accident, the sticker was not new,
22 and had partially peeled off of the pole. (Testimony of Kent
23 Summers.) The sticker was located just above the "flange" on the
24 pole, approximately half way up the pole, at a height of fifteen
25 or sixteen feet. (PE 148; Testimony of Kent Summers & Steven
26 Yu.)

27 22. The sticker had not been seen by a park employee prior
28 to the incident. (Testimony of Kent Summers).

1 23. There is no evidence that the pole was dangerous or
2 defective, and it was implemented for its intended use.

3 **C. Relevant Regulations & Standards.**

4 24. State of California Rules of Overhead Electric Line
5 Construction prescribed by the Public Utilities Commission of the
6 State of California, General Order 95 ("GO 95") became effective
7 on July 1, 1942. (PE 179, GO 95, at 3.)

8 25. GO 95 provides that every high voltage power pole be
9 marked with high voltage signs located no more than 40 inches
10 below the lowest line conductors; that the lowest climbing peg on
11 any high voltage pole should be no lower than 7'6" feet from
12 ground level; and that latticed towers located near frequently
13 traveled trails should be "guarded" to prevent easy climbing of
14 the towers by young persons who do not realize the danger of
15 contact with live conductors. GO 95 contains no provisions
16 regarding the guarding of non-latticed electric poles. (GO 95,
17 Rules 51.6 & 51.7.)

18 26. The stated purpose of GO 95 is to "formulate, for the
19 State of California, uniform requirements for overhead electrical
20 line construction, the application of which will insure adequate
21 service and secure safety to persons engaged in the construction,
22 maintenance, operation or use of overhead electrical lines and to
23 the public in general." (GO 95 Rule 11.)

24 27. General Order 95 only formally applies to poles
25 constructed after its effective date, 1941. (Testimony of Robert
26 Armstrong; GO 95 Rule 12.3.)

27 28. The accident pole was erected in approximately 1928 and
28 has not been reconstructed or altered since that date.

1 (Testimony of Kent Summers, Testimony of Paul Laymon, Defendant's
2 Exhibits ("DE") 209 and 210.)

3 29. A new riser pole (Pole one) was installed in
4 approximately 1997 at the lowest point of the Glacier Point Line.
5 The riser pole was constructed in accordance with a Project
6 Manual, which required that all climbing pegs below ten feet be
7 removable pegs. (PE 175 at 16372-6.)

8 30. Robert Armstrong testified that it was the intent of GO
9 95 that all pre-existing poles should eventually be brought into
10 conformity with its provisions. Armstrong appears to have been
11 making reference to the following language in Decision No. 34884
12 before the Railroad Commission of the State of California, which
13 adopted GO 95:

14 Under the terms of the new general order, existing
15 facilities lawfully erected in accordance with earlier
16 general orders, are permitted to be maintained
17 according to the rules effective when such facilities
18 were constructed or reconstructed, except as to certain
19 safety factor requirements specified in Rule 12.2;¹ but
20 any lines constructed or reconstructed after the new
21 general order becomes effective, must comply with the
22 rules therein contained. In other words, the new
23 general order does not require a complete and immediate
24 reconstruction of existing lines installed prior to its
25 effective date. Such an order would be unreasonable to
26 operator and to the public alike. The new order, like
27 its predecessors, is part of a long-range progressive
28 program designed to eventually bring all lines up to
the standards required in new construction. Completion
of that program is not economically feasible within a
short period and, in fact, the revision of the order at
this time clearly indicates that no program may be
considered completed and static. There is another
phase to the adoption of rules such as these, in that

26 ¹ The safety factor requirements referenced in Rule 12.2
27 concern "allowable ratios of ultimate strengths of materials to
28 the maximum working stresses..." as set forth in Rule 44, et
seq. These safety factor requirements have nothing to do with
peg height, warning signs, or guarding.

1 the rules must not only be practical, from a physical
2 point of view, but likewise they must be within
3 reasonable economic limits; otherwise costs to serve
4 and consumer rates may be adversely and unreasonably
5 affected. Having in mind these considerations, Rule
6 12.3 in the new general order permits prior
7 construction to remain in service and provides as
8 follows:

9 "12.3 Lines Constructed Prior to This Order
10 The requirements of this Order, other than
11 the safety factor requirements specified in Rule
12 12.2, do not apply to lines or portions of lines
13 constructed or reconstructed prior to the
14 effective date of this Order. In all other
15 particulars, such lines or portions of lines shall
16 conform to the requirements of the rules in effect
17 at the time of their construction or
18 reconstruction."

19 (PE 179 at 15-16.)

20 31. Robert Armstrong also testified that GO 95 required
21 guarding (i.e. fencing or placing a barrier around) any "readily
22 climbable pole," but GO 95 does not utilize this terminology.
23 Rather, GO 95 Rule 51.6(B) provides:

24 Where the pole or structure is of latticed metal or of
25 similar construction and supports supply conductors in
26 excess of 750 volts and is located in urban districts,
27 or in rural areas adjacent to schools, dwellings,
28 permanent or seasonal camps, or in orchards, or near
roads, or trails which are frequently traveled, a
barrier shall be so located on the pole or structure as
to prevent easy climbing.

Note: It is the intent of Rule 51.6-B to require such
guarding as will prevent easy climbing of these poles
or structures by young persons who do not realize the
danger of contact with live conductors supported
thereon. It is not intended that such guarding will be
required in sparsely settled districts, mountainous and
desert areas, and similar locations.

(PE 179 (emphasis added).)

32. Prior to the adoption of GO 95, the applicable
standards in California were the Rules for Overhead Electric Line
Construction prescribed by the Railroad Commission of the State

1 of California, General Order 64 ("GO 64"). GO 64 generally
2 requires that lines be maintained in a condition which insures
3 the safety of utility personnel and the public, but contained no
4 provisions regarding "guarding" or fencing of electric poles. GO
5 64 also required that pegs be no lower than 7'6" and that a high
6 voltage warning sign be located on the cross arms of any high
7 voltage pole. (Testimony of Robert Armstrong).

8 33. Robert Armstrong opined that it would have been good
9 practice to have guarding around this pole, although it was not
10 actually required by GO 95. GO 95 Rule 13 provides that poles
11 should be maintained in accordance with good practice for local
12 conditions. (Testimony of Robert Armstrong.)

13 34. The National Electric Code is not followed by high
14 voltage electricians in California. (Testimony of Robert
15 Armstrong.)

16 **D. Maintenance and Operation of the Glacier Point Line.**

17 35. The Government's High Voltage Electric Operations Shop
18 ("High Voltage Operations Shop"), located in Yosemite Valley,
19 operates and maintains the Glacier Point Line. (Testimony of
20 Kent Summers.)

21 36. The government electricians referenced GO 95 for
22 guidance in operating the high voltage electrical system.
23 (Testimony of Paul Laymon; Kent Summers.) For example, although
24 he believed that GO 95 was generally a "construction document,"
25 Kent Summers, an electrician who works in the High Voltage
26 Operations Shop, used GO 95 as a reference "for various issues
27 that might come up." (Testimony of Kent Summers.)
28

1 37. In response to requests for production of documents,
2 the United States produced a copy of GO 95, representing that it
3 was "used as guidance by the National Park Service at Yosemite."
4 (PE 179.)

5 38. Robert Armstrong, Plaintiffs' expert, opined that the
6 knowledge of government electricians regarding applicable
7 maintenance standards was "minimal." (Testimony of Robert
8 Armstrong.)

9 39. Kent Summers testified that, prior to the accident, he
10 may not have been aware of the high voltage marking requirement
11 contained in GO 95. (Testimony of Kent Summers.)

12 40. Paul Laymon, who now oversees the High Voltage
13 Operations Shop and worked in it from 1987 to 1997, believed that
14 GO 95 required a yellow sign to be posted on the cross arms of
15 any high voltage pole. He also believed that GO 95 required that
16 there be no pegs below four feet. He recalls that during the
17 early part of his career, which began in the late 1970s, he
18 inspected all of the lines in the Park and removed any pegs that
19 were below four feet. (Testimony of Paul Laymon.)

20 41. Donald Coon, Supervisor of the High Voltage Operations
21 Shop, directed that his employees should comply with GO 95 to the
22 extent possible in order to keep the system safe. (Testimony of
23 Donald Coon.)

24 42. Although there were no warning signs on the subject
25 pole on the date of the incident, it was the normal custom and
26 practice of the High Voltage Operations Shop to have warning
27 signs on the poles. At the time of the accident, there was a
28 warning sign on the crossarms of at least one other pole in the

1 Glacier Point Line, the riser pole. (Testimony of Kent Summers,
2 Keith Guy, and Paul Laymon.)

3 43. Warning signs would generally be placed at "about eye
4 level" on a steel pole. The signs used on steel poles were
5 yellow stickers with black lettering, which were approximately
6 four inches wide by approximately twelve inches high. (Testimony
7 of Kent Summers.)

8 44. It was the normal custom and practice to inspect the
9 poles and lines on an annual basis. Any inspections of the
10 overhead power lines by Government electricians are performed by
11 "walking the line," i.e., walking below the line and using
12 binoculars to look for equipment in need of repair. Workers
13 would specifically look to see that warning signs are in place.
14 (Testimony of Kent Summers.)

15 45. The accident pole is located in an area where the
16 weather conditions are harsh, including heavy snow, rain, and
17 rockfall. (ASF #7.)

18 46. The Four Mile Trail is closed and the pole is largely
19 inaccessible during the winter. The trail opens for hiking in
20 the early spring, depending on the weather conditions and whether
21 there is snow remaining on the trail. (ASF #7.)

22 47. As of the date of the incident, May 9, 2004, the High
23 Voltage Operations Shop had not yet been able to access the poles
24 on the Glacier Point Line to check on the status of the signs,
25 which often erode or fall off during the harsh winter.
26 (Testimony of Kent Summers, Donald Coon.)

27 48. The High Voltage Operations Shop usually waited until
28 the Glacier Point Road was open, so that they could drive to the

1 top of the line, where they would have easy access to their gear.
2 This would permit them to perform an inspection working from the
3 highest point on the line down to the valley. (Testimony of Kent
4 Summers.)

5 49. The High Voltage Operations Shop did not maintain a log
6 or other form of record of when each line was inspected.
7 (Testimony of Kent Summers.)

8 50. Other than the evidence that it was the High Voltage
9 Operations Shop's normal practice to inspect each line every
10 year, there is no evidence that the Glacier Point Line had been
11 inspected at any time after 2002. Any such inspection would have
12 been performed by one of the high voltage electricians. In 2003,
13 this would have been either Donald Coon, Howard Keith, Kent
14 Summers or Keith Guy. Mr. Coon testified that he was last on the
15 Glacier Point Line in 1997; Howard Keith started with the High
16 Voltage Operations Shop in the fall of 2003 (after the accident);
17 and neither Mr. Summers nor Mr. Guy specifically remembers
18 inspecting the line in 2003. (Depositions of Donald Coon &
19 Howard Keith, Testimony of Keith Guy, Kent Summers.)

20 51. Paul Laymon, Facility Manager for Utilities, has seen
21 numerous items, including bandanas and signs, ten to twelve feet
22 up on power poles in Yosemite over the time he has been working
23 there. This indicated to him that poles may have been climbed by
24 park visitors or that these items had been hoisted up the poles.
25 But, most of these items were on wood poles down in Yosemite
26 Valley, not on remote poles like those on the Glacier Point Line.
27 Moreover, none of these items were located up near the wires.
28 (Testimony of Paul Laymon.)

1 52. Warning signs located near the crossarms of poles were
2 observed to go missing on occasion by Government electricians.

3 53. Kent Summers testified that he and other High Voltage
4 Operations Shop personnel thought either theft or weather might
5 explain why some warning signs went missing. He did not
6 specifically associate theft with those signs that went missing
7 from the crossarms. Rather, he mentioned theft in the context of
8 testimony regarding the sticker warning signs, normally placed at
9 eye level. (Testimony of Kent Summers.)

10 54. There are over 3.5 million visitors a year to Yosemite.
11 There are over 200 search and rescues a year in Yosemite.
12 (Testimony of Steve Yu.) There has never been an injury or death
13 in Yosemite from climbing an electric power pole, even though the
14 subject pole has been unchanged in the same location for over 70
15 years. (Testimony of Steve Yu, Kent Summers, Paul Laymon, Keith
16 Guy; DE 209 & 210.)

17 55. No witness ever saw any individual, other than a
18 utility worker, climbing the utility poles. (Testimony of Steve
19 Yu, Kent Summers, Paul Laymon, Keith Guy; Deposition Testimony of
20 Donald Coon, Edward Visnovske.)

21 56. Following the accident, the High Voltage Operations
22 Shop removed pegs lower than 7'6" from all the poles on the
23 Glacier Point Line. (Testimony of Paul Laymon, Kent Summers.)

24 57. Also following the accident, there was some discussion
25 among the employees of the High Voltage Operations Shop as to
26 whether removing the pegs would serve any purpose, as some
27 believed the saddles affixed to the poles could be climbed
28 without the pegs in place. (Testimony of Kent Summers.)

1 58. No one considered removing the saddles to make the pole
2 less climbable, as this would have made them too hard to
3 maintain. (Testimony of Kent Summers.)

4 59. Following the accident, the High Voltage Operations
5 Shop ensured that warning signs were placed on all high voltage
6 power poles in Yosemite, including the poles on the Glacier Point
7 Line. At least some of the poles on the other high voltage lines
8 already had warning signs. Weather causes considerable damage to
9 the signs. (Deposition testimony of Howard Keith.)

10 **E. Additional Circumstances of the Accident.**

11 60. Mr. Muchhala began his hike at the Four Mile trailhead.

12 61. There are two gates on the Four Mile Trail. The lower
13 of these two gates, which lies within a few hundred yards of the
14 start of the trail, was open. The trail was open from there to
15 at least the second gate, which is located approximately three
16 quarters of the way up the trail, well past the accident scene.
17 (Testimony of Steven Yu.)

18 62. The sign at the trailhead states "dangerous to stray
19 from trail." (Testimony of Steven Yu, Joint Ex. 11).

20 63. Under most circumstances, however, including along the
21 Four Mile trail, it is permissible to leave designated trails.
22 (Testimony of Steven Yu.)

23 64. Mr. Muchhala went off the four mile trail at the first
24 hairpin turn.

25 65. If a person walked off of the trail at the first
26 hairpin turn and looked left (downhill), they would see the riser
27 pole (Pole #1). If the person looked right instead (uphill),
28 they would see two more electrical poles (Poles #2 & #3).

1 66. There is a field of boulders used by climbers for
2 recreational purposes at the base of the Four Mile Trail, but the
3 boulders under the Glacier Point Line are not part of any
4 established bouldering area. (Testimony of Steven Yu.)

5 67. Mr. Muchhala was wearing climbing shoes when he climbed
6 the electricity towers. He had changed into them after leaving
7 the Four Mile Trail. (Testimony of Steven Yu; PE 176.)

8 68. Mr. Muchhala's backpack and other personal effects were
9 found on the ground between pole three and pole four. (Testimony
10 of Steven Yu.)

11 69. Before climbing the subject pole, Mr. Muchhala wrote
12 "At the first hairpin turn up the 4 mile hike in Yosemite Valley.
13 [sic] I slingshot off into the boulders then roll down the
14 hillside. Swapped to my climbing shoes and was agile as a
15 gazelle! Doing prince of Persia moves, jumping from rock to
16 rock. Having a backpack and a bag of painting supplies really
17 slows me down. Can do maybe 1/3 of the moves. Climbed 2
18 electricity towers and am just below the third...." (PE 176)

19 70. Mr. Muchhala was standing on the lower cross arms and
20 resting his hips on or near the upper cross arms when he was
21 shocked. (Testimony of Robert Armstrong, Mark Rhodes.)

22 71. The two primary contact points were his left hip and
23 left foot. There were no burns on his hands, indicating he did
24 not touch or grab the conductor lines with his hands. Instead,
25 the current arced from the jumper into his left hip prior to
26 physical contact between his body and the jumper. (Testimony of
27 Steven Yu, Robert Armstrong, and Mark Rhodes.)
28

1 72. After the accident, there was a burn mark on the lower
2 cross arm. There was also burned nylon or melted nylon on one of
3 the jumper cables on the upper cross arm on the trail side of the
4 pole. (Testimony of Kent Summers.)

5 73. There were no broken or down lines after the accident.
6 (Testimony of Kent Summers.)

7 74. Mr. Muchhala was approximately 30 feet up on the pole
8 when he fell from it. (Testimony of Robert Armstrong, Mark
9 Rhodes.)

10 75. Mr. Muchhala was not using any fall protection when he
11 fell from the pole. (Testimony of Mark Rhodes, Steven Yu.)

12 76. An inherent risk of climbing a 30 foot structure
13 without adequate fall protection is falling and suffering injury.
14 (Testimony of Steve Yu, Mark Rhodes.)

15 77. An inherent risk of climbing an "electricity tower" is
16 electrocution. (Testimony of Mark Rhodes.)

17 78. Mr. Muchhala climbed the utility pole for "enjoyment or
18 thrill," not because he was lost or disoriented.

19 79. Susan Whittier, who along with her husband and son
20 witnessed Mr. Muchhala falling to the ground, initially thought
21 Mr. Muchhala fell from the cliffs above as she could not believe
22 anyone would climb a power pole. (Deposition Testimony of Susan
23 Whittier.)

24 80. Mr. Muchhala's death was deemed an accident. He did
25 not commit suicide. (Testimony of Steven Yu.)

26 81. Mark Rhodes, an expert on the biomechanics of
27 electrocution, testified that it was likely that Mr. Muchhala
28 died as a result of the fall, not the electric shock. He

1 explained that strong shocks can sometimes be less deadly than
2 shocks of lesser intensity. He also opined that the fact that
3 one of the first responders indicated that Jay Muchhala was
4 exhibiting pulseless electrical activity (PEA) after the accident
5 is evidence that the electrocution did not stop the electric
6 activity of his heart. Moreover, the path the current took was
7 through the lower body. However, the electric shock may have
8 caused him to lose control of his muscles, leading to the almost
9 involuntary reflex of pushing away from the source of the shock.
10 (Testimony of Mark Rhodes.)

11 **F. Other Evidence Regarding Common Knowledge & Dangers of High**
12 **Voltage Power Lines.**

13 82. Robert Armstrong testified that, in his experience,
14 laypersons do not commonly understand that electricity can arc
15 away from a high voltage line and shock a person before that
16 person even touches the line. (Testimony of Robert Armstrong.)

17 83. Robert Armstrong also testified that having knowledge
18 that a pole was an electric pole does not necessarily equate to
19 having a full understanding of the dangers associated with a high
20 voltage electric pole. The purpose of high voltage warning signs
21 is to put persons on notice that they are not just dealing with
22 electricity, but with high voltage electricity. (Testimony of
23 Robert Armstrong.)

24 84. Steven Yu testified about the effectiveness of warning
25 signs. Specifically, the National Park Service ("NPS") maintains
26 warning signs at the top of every major waterfall in the
27 Yosemite, warning people not to swim at the top of the waterfall.
28 Yet, people frequently disregard the warnings, sometimes with

1 tragic results. Steve Yu indicated that the purpose of warning
2 signs in the Park is to warn people about hazards they are not
3 used to encountering (animals, waterfalls, etc.). (Testimony of
4 Steven Yu.)

5 **G. Decedent's Relationship With His Family & Friends.**

6 85. Plaintiff Kant Muchhala, Decedent's father, was 62 as
7 of the date of the death of his son.

8 86. Plaintiff Carolyn Muchhala, Decedent's mother, was 60
9 as of the date of the death of her son.

10 87. Jay Muchhala had no alcohol or drugs in his system at
11 the time of his fall. (Agreed Statement of Facts, No. 11.)

12 88. Jay Muchhala was in excellent health at the time of his
13 death.

14 89. Jay Muchhala maintained an extremely close and loving
15 relationship with his parents, other members of his family, and
16 friends. It is undisputed that his death was a tragic and
17 excruciating loss to all of them. (Testimony of Hedi Leinz, Kant
18 Muchhala, Carolyn Muchhala.)

19 90. At the time of his death, Jay Muchhala was residing and
20 employed in San Francisco, California. His parents were
21 residents of Wisconsin.

22
23 **III. CONCLUSIONS OF LAW**

24 **A. Federal Tort Claims Act.**

25 1. This action is brought pursuant to 28 U.S.C. § 1331,
26 federal question jurisdiction, under the Federal Tort Claims Act
27 ("FTCA"). The FTCA waives the federal government's immunity as
28 to torts committed by government employees in the scope of their

1 employment, 28 U.S.C. § 1346(b), and makes the government liable
2 "in the same manner and to the same extent as a private
3 individual under like circumstances." *Id.* § 2674.

4 2. Here, even though the relevant events took place within
5 the boundaries of Yosemite National Park, an exclusive federal
6 enclave, 16 U.S.C. § 57, it is undisputed that California tort
7 law provides the applicable substantive law with respect to the
8 underlying tort claim.

9 3. The FTCA is a limited waiver of sovereign immunity
10 which preserves the immunity of the United States from tort
11 liability in a number of circumstances. One such circumstance is
12 covered by the "discretionary function exception," which provides
13 that the United States will not be liable for "[a]ny claim...
14 based upon the exercise or performance or the failure to exercise
15 or perform a discretionary function or duty on the part of a
16 federal agency or an employee of the Government, whether or not
17 the discretion involved be abused." 28 U.S.C. § 2680(a).
18 Defendant asserts that the discretionary function exception
19 applies here.

20 4. A court must apply a two-part test to determine whether
21 the discretionary function exception applies. The first inquiry
22 is whether the challenged conduct is "discretionary—that is, it
23 must involve an element of judgment or choice." *Kelly v. United*
24 *States*, 241 F.3d 755, 760 (9th Cir. 2001) (citing *Berkovitz v.*
25 *United States*, 486 U.S. 531 (1988).) If the decision concerns "a
26 federal statute, regulation, or policy [that] specifically
27 prescribes a course of action for an employee to follow," the
28 exception does not apply. *Berkovitz*, 486 U.S. at 536. The

1 second inquiry is whether the judgment is "of the kind that the
2 discretionary function exception was designed to shield." *Id.*
3 Decisions about the implementation of safety considerations have
4 been protected by the exception where "circumstances clearly
5 showed [the decisions] were the result of a judgment grounded in
6 social, economic and political policy." *Soldano v. United*
7 *States*, 453 F.3d 1140, 1146 (9th Cir. 2006). The government
8 bears the burden of proving both elements. *Kelly*, 241 F.3d at
9 760.

10 5. Plaintiff alleges that Defendant failed to follow
11 standard electrical power industry practices with respect to the
12 poles on the Glacier Point Line. Specifically, Plaintiff alleges
13 that Defendant failed to post proper high voltage warning signs
14 on the poles, failed to remove climbing pegs situated below 7'6"
15 from ground level, and failed to erect a guard fence around the
16 pole. Although industry standards arguably required such
17 protective measures, no law, rule or regulation required that the
18 United States take these precautions. Accordingly, the extent to
19 which any such precautionary measures are taken involves an
20 element of discretion.

21 6. The Ninth Circuit has suggested that this type of
22 decision is not "of the kind that the discretionary function
23 exception was designed to shield." For example, in *Seyler v.*
24 *United States*, 832 F.2d 120 (1987), the plaintiff claimed that
25 the Bureau of Indian Affairs ("BIA") was negligent in failing to
26 erect a speed limit sign on a particular road. The Ninth Circuit
27 held that the BIA's failure was not "grounded in social, economic
28 or political policy." *Id.* at 123. The Ninth Circuit also

1 "doubt[ed] that any decision not to provide signs would be of the
2 nature and quality that Congress intended to shield from tort
3 liability." *Id.* Similarly, in *ARA Leisure Services v. United*
4 *States*, 931 F.2d 193, 195-96 (9th Cir. 1987), the Ninth Circuit
5 examined two situations in which NPS was accused of negligence in
6 connection with road construction and maintenance in Denali
7 National Park. The Ninth Circuit found that NPS's decision to
8 design and construct a road without guardrails was shielded by
9 the discretionary function exception because the choice was
10 grounded in policy considerations such as esthetics and minimal
11 impact construction. *Id.* However, NPS's failure to maintain a
12 different road in a safe condition was not the kind of decision
13 Congress intended to be shielded by the discretionary function
14 exemption. *Id.*

15 7. Here, the "decision" not to post warning signs or
16 remove pegs below a certain height is not shielded by the
17 discretionary function exception. First, the government has
18 offered absolutely no evidence to suggest that any decision-
19 making of a policy nature was involved. NPS's alleged failures
20 in this case are more like failing to properly maintain a road,
21 to which the discretionary function exception was not applied in
22 *ARA Leisure*.²

23
24 ² The government also argues that the "decision" not to
25 guard the pole (with a fence or other obstruction) concerns
26 policy matters that must be balanced, such as resource
27 allocation, visitor experience in the park, and the impact of
28 man-made structures in wilderness. There is some merit to this
argument. However, in this case, the guarding provisions
contained within GO 95 and GO 64 are inapplicable, as they apply
only to latticed poles.

1 8. Defendant does not suggest the government's decisions
2 at issue in this case -- to place warning signs, to remove
3 climbing pegs, or to otherwise guard against climbing by
4 unauthorized persons -- have any political significance, as no
5 such significance could attach to such decisions.

6 **B. Negligence Per Se.**

7 9. California Evidence Code § 669 provides that a
8 rebuttable presumption of a defendant's negligence is created if
9 "(1) [defendant] violated a statute, ordinance, or regulation of
10 a public entity; (2) [t]he violation proximately caused death or
11 injury to person or property; (3) [t]he death or injury resulted
12 from an occurrence of the nature which the statute, ordinance, or
13 regulation was designed to prevent; and (4) [t]he person
14 suffering the death or the injury to his person or property was
15 one of the class of persons for whose protection the statute,
16 ordinance, or regulation was adopted."

17 10. The magistrate judge previously ruled that the doctrine
18 of negligence per se may not be asserted against the United
19 States in this case because the regulations that were allegedly
20 violated were not applicable to the federal government entity at
21 the time of the alleged negligence. (Doc. 36, Order on Mot. for
22 Sum. J., at 9.) NPS representatives testified at trial they
23 endeavor to follow GO 95, making GO 95 and its predecessor, GO
24 64, otherwise relevant. However, there was no proof that these
25 rules were binding on the United States. There is no reason to
26 disturb the magistrate judge's decision.

1 C. Primary Assumption of Risk.

2 11. The doctrine of primary assumption of risk is a
3 complete defense to a negligence claim. "Where, by virtue of the
4 nature of the activity and the parties' relationship to the
5 activity, defendant owed no legal duty to protect plaintiff from
6 the particular risk of harm that caused the injury (so-called
7 'primary assumption of the risk'), plaintiff is completely barred
8 from recovery." *Knight v. Jewett*, 3 Cal. 4th 296, 308-309,
9 (1992).

10 12. Defendant asserts that the primary assumption of the
11 risk doctrine should bar recovery in this case because decedent
12 assumed the risk of electrocution.

13 13. A key factor in determining whether the doctrine of
14 primary assumption of the risk applies is the nature of the
15 activity and the role of defendant whose conduct is at issue.
16 *Id.* at 313.

17 14. Whether defendant owes a duty of care is a legal
18 question "which depends on the nature of the sport or activity in
19 question and on the parties' general relationship to the
20 activity...." *Id.* "In general, the doctrine applies to
21 activities or sports where 'conditions or conduct that otherwise
22 might be viewed as dangerous often are an integral part of the
23 sport itself.'" *Saville v. Sierra College*, 36 Cal. Rptr. 3d 515,
24 521 (Cal. App. 3 Dist. 2005) (quoting *Knight*, 3 Cal. 4th at 315).

25 15. For the most part, the primary assumption of the risk
26 doctrine is applied to cases involving sporting activities (or
27 other related forms of recreation). For example, the *Knight*
28 court discussed skiing as an example of a circumstance in which

1 the primary assumption of the risk doctrine might apply,
2 reasoning that "although moguls on a ski run pose a risk of harm
3 to skiers that might not exist were these configurations removed,
4 the challenge and risks posed by the moguls are part of the sport
5 of skiing, and a ski resort has no duty to eliminate them."
6 *Knight*, 3 Cal. 4th at 315. "In these types of activities, the
7 integral conditions of the sport or the inherent risks of
8 careless conduct by others render the possibility of injury
9 obvious, and negate the duty of care usually owed by the
10 defendant for those particular risks of harm. A duty imposed in
11 those situations would significantly change the very purpose or
12 nature of the activity." *Seville*, 133 Cal. App. 4th at 522.

13 16. "While Commercial sponsors and operators of a sporting
14 activity have a duty not to increase the risks inherent in the
15 activity, the overriding consideration in the application of
16 primary assumption of risk is to avoid imposing a duty which
17 might chill vigorous participation in the implicated activity and
18 thereby alter its fundamental nature." *Regents of the Univ. of*
19 *Calif. v. Roettgen*, 41 Cal. App. 4th 1040, 1046 (1996) (emphasis
20 added).

21 17. Cases similar to the skiing example given in *Knight* are
22 myriad. See *Saville*, 36 Cal. Rptr. 3d at 525 (applying primary
23 assumption of the risk doctrine to bar recovery by a student
24 injured practicing arrest and control techniques during a peace
25 officer training course); *Ferrari v. Grand Canyon Dories*, 32 Cal.
26 App. 4th 248, 253 (1995) (primary assumption of the risk doctrine
27 barred recovery by individual injured while whitewater rafting
28 when head struck metal frame of raft; owner of the rafting

1 company did not increase the inherent risks of the sport);
2 *Roettgen*, 41 Cal. App. 4th at 1046-47 (primary assumption of the
3 risk barred recovery by individual injured during rock climbing
4 class; "risk of harm was not beyond that inherent in any top rope
5 climbing activity."); see also *Moser v. Ratinoff*, 105 Cal. App.
6 4th 1211 (2003) (long distance bicycle race); *Peart v. Ferro*, 13
7 Cal. Rptr. 3d 885 (2004) (minor operating a motor craft); *Calhoon*
8 *v. Lewis*, 81 Cal. App. 4th 108, 115 (2000) (skateboarding); *Vine*
9 *v. Bear Valley Ski Co.*, 118 Cal. App. 4th 577 (2004)
10 (snowboarding); *Lackner v. North*, 37 Cal. Rptr. 3d 863 (2006)
11 (skier struck by snowboarder); *Souza v. Squaw Valley Ski Corp.*,
12 138 Cal. App. 4th 262 (2006) (child skier's collision with
13 plainly visible aluminum snowmaking hydrant); *Kahn v. East Side*
14 *Union High School Dist.*, 31 Cal. 4th 990 (2003) (high school
15 student injured at swim meet).

16 18. Defendant correctly asserts that the doctrine of
17 assumption of the risk is not limited in application only to
18 "sports" but also applies more broadly to some types of
19 "activities" that resemble sports. *Rostai v. Neste Enterprises*,
20 138 Cal. App. 4th 326, 329 (2006). Specifically, an "activity"
21 may qualify as a "sport" for purposes of the primary assumption
22 of the risk doctrine if the activity is done for enjoyment or
23 thrill, requires physical exertion as well as elements of skill,
24 and involves a challenge containing a potential risk of injury.
25 *Record v. Reason*, 73 Cal. App.4th 472, 482 (1999). For example,
26 in *Record*, the activity of "tubing" -- riding behind a motorboat
27 on an inner tube -- was found to be subject to primary assumption
28 of risk because it involved physical exertion, elements of skill,

1 and is done for enjoyment or thrill. Similarly in *Rostai*,
2 working out in a gym with a personal fitness trainer was deemed
3 an activity subject to the primary assumption of risk doctrine.

4 19. The underlying purpose of the primary assumption of the
5 risk doctrine is "to avoid imposing a duty which might chill
6 vigorous participation in the implicated activity and thereby
7 alter its fundamental nature." *Roettgen*, 41 Cal. App. 4th at
8 1046. Here, unlike with tubing, working out in a gym, skiing, or
9 even rock climbing, the activity in which Jay Muchhala engaged,
10 climbing a high voltage electric pole, is not an activity the
11 vigorous participation in which should be encouraged. To the
12 contrary, the numerous regulatory provisions discussed in this
13 case, which require warning signs and discourage access to
14 electric poles impose duties of care designed, at least in part,
15 to prevent the activity from taking place. The risks raised by
16 electric pole climbing, falling and electrocution, are not ones
17 that have any value as "sport" nor is such activity deserving of
18 encouragement. The primary assumption of the risk doctrine does
19 not apply here.

20 **D. Overview of California Negligence Principles.**

21 20. California Civil Code § 1714 provides: "Everyone is
22 responsible, not only for the result of his or her willful acts,
23 but also for an injury occasioned to another by his or her want
24 of ordinary care or skill in the management of his or her
25 property or person, except so far as the latter has, willfully or
26 by want of ordinary care, brought the injury upon himself or
27 herself. The design, distribution, or marketing of firearms and
28 ammunition is not exempt from the duty to use ordinary care and

1 skill that is required by this section." This statutory
2 provision "serves as the foundation" of California's negligence
3 law. *Rowland v. Christian*, 69 Cal. 2d 108, 113 (1968),
4 superceded by statute on other grounds as stated in *Perez v.*
5 *Southern Pac. Tansp. Co.*, 218 Cal. App. 3d 462, 467 (1990).

6 21. A plaintiff in a negligence action must establish "[1]
7 that the defendant owed the plaintiff a legal duty, [2] that the
8 defendant breached the duty, and [3] that the breach was a
9 proximate or legal cause of his or her injuries." *Ambriz v.*
10 *Kelegian*, --- Cal. Rptr. 3d ---, 2007 WL 172015, *6 (Cal. App. 4
11 Dist.).

12 22. The existence of a legal duty on the part of a person
13 in the defendant's situation to the class of persons of which
14 plaintiff is a member is a question of law for the court, while
15 issues of due care, causation, and contributory fault are
16 questions of fact for the jury. 6 Witkin, Summary 10th, Ch. IX,
17 Torts, § 860 (2005).

18 **E. The Existence of a Legal Duty.**

19 23. The question of whether the defendant owes the
20 plaintiff a duty of care is usually treated as a threshold
21 question. Whether a duty exists is an "expression of the sum
22 total of those considerations of policy which lead the law to say
23 that the particular plaintiff is entitled to protection." *Dillon*
24 *v. Legg*, 68 Cal.2d 728, 734 (1968).

25 24. In California, the general rule is that all persons
26 have a duty "to use ordinary care to prevent others being injured
27 as the result of their conduct...." *Rowland*, 69 Cal.2d at 112;
28 Cal Civ. Code § 1714.

1 25. A specific line of cases concerning operators of power
2 lines holds that such operators have a duty to "make [their]
3 wires 'safe under all the exigencies created by the surrounding
4 circumstances.' Thus, [the operator] has a choice 'either to
5 insulate the wires or to locate them to make them comparatively
6 harmless.'" *Scally v. Pacific Gas & Electric Co.*, 23 Cal. App.3d
7 806, 815-16 (1972).

8 26. Where, as in this case, a line is not insulated, the
9 operator has a duty to locate the line in such a way as to make
10 it "comparatively harmless." *Id.*

11 27. However, courts do depart from general duty rules under
12 certain circumstances. A number of considerations are relevant
13 to a court's determination of whether a departure from the
14 general rule is appropriate: "[1] the foreseeability of harm to
15 the plaintiff, [2] the degree of certainty that the plaintiff
16 suffered injury, [3] the closeness of the connection between the
17 defendant's conduct and the injury suffered, [4] the moral blame
18 attached to the defendant's conduct, [5] the policy of preventing
19 future harm, [6] the extent of the burden to the defendant and
20 consequences to the community of imposing a duty to exercise care
21 with resulting liability for breach, and [7] the availability,
22 cost, and prevalence of insurance for the risk involved."
23 *Rowland*, 69 Cal. 2d at 113.

24 28. The foreseeability of a particular kind of harm is
25 particularly critical to the analysis. *Dillon*, 68 Cal.2d at 739.
26 It is error, however, for a court to only consider foreseeability
27 when analyzing whether any duty is owed to Plaintiff. All the
28 *Rowland* factors must be considered. *Henderson v. United States*,
846 F.2d 1233, 1236 (9th Cir. 1988).

1 **1. Foreseeability.**

2 29. The most important *Rowland* factor is foreseeability.
3 "[T]he obligation to refrain from...particular conduct is owed
4 only to those who are foreseeably endangered by the conduct and
5 only with respect to those risks or hazards whose likelihood made
6 the conduct unreasonably dangerous. Duty, in other words, is
7 measured by the scope of the risk which negligent conduct
8 foreseeably entails." *Dillon*, 68 Cal.2d at 739 (quoting 2 Harper
9 & James, *The Law of Torts* (1956), at 1018).³

10 30. "The degree of foreseeability necessary to warrant the
11 finding of a duty will...vary from case to case. For example, in
12 cases where the burden of preventing future harm is great, a high
13 degree of foreseeability may be required. On the other hand, in
14 cases where there are strong policy reasons for preventing the
15 harm, or the harm can be prevented by simple means, a lesser
16 degree of foreseeability may be required." *Romito v. Red Plastic*
17 *Co.*, 38 Cal. App. 4th 59, 66 (1995).

18 31. California courts have drawn lines around the various
19 roles the court and jury would usually play in this foreseeability

20
21 ³ "The existence of a duty of care is a separate issue
22 from the question whether (on the basis of foreseeability among
23 other factors) a particular defendant breached that duty of care,
24 which is an essentially factual matter." *Kockelman v. Segal*, 61
25 Cal. App. 4th 491, 498 (1998) (emphasis added). Foreseeability
26 is relevant to both inquiries: the existence of a duty of care;
27 and, if a duty of care is found to exist, whether that duty has
28 been breached. See 6 Witkin, Ch. IX, § 868 (citing *Bilyeu v.*
29 *Standard Freight Lines*, 182 Cal. App. 2d 536, 542, (1960) ("Many
30 of the circumstances involved in a consideration of the
31 foreseeability of an occurrence which will determine the
32 existence of a duty to exercise due care toward a particular
33 person may...be equally pertinent in considering the test of
34 foreseeability of an injury to determine whether a precedent act
35 of negligence proximately caused that injury.")).

1 analysis: "[A] court's task-in determining 'duty' - is not to
2 decide whether a particular plaintiff's injury was reasonably
3 foreseeable in light of a particular defendant's conduct, but
4 rather to evaluate more generally whether the category of
5 negligent conduct at issue is sufficiently likely to result in
6 the kind of harm experienced that liability may appropriately be
7 imposed on the negligent party." *Ballard v. Uribe*, 41 Cal. 3d
8 564, 572 n.6 (1986). If reasonable factfinders could differ as
9 to foreseeability of the harm, this issue would be left for the
10 jury to decide. See *Bigbee v. Pac. Tel. & Tel. Co.*, 34 Cal. 3d
11 49, 56 (1983). The jury would then consider "the likelihood or
12 foreseeability of injury in determining whether, in fact, the
13 particular defendant's conduct was negligent...." *Ballard*, 41
14 Cal. 3d at 572 n.6.

15 32. Here, however, where the court is the finder of both
16 fact and law, it is appropriate for the court to determine
17 whether, under the facts and circumstances of this case, it is
18 reasonable to impose a duty on the United States to prevent the
19 harm that occurred here. See, e.g., *Henderson*, 846 F.2d 1233
20 (affirming district court finding that no duty was owed after
21 bench trial in FTCA case).

22 33. Some general guidance can be taken from California
23 cases which have discussed foreseeability when determining
24 whether a legal duty exists. For example, in *Robison v. Six*
25 *Flags Theme Parks Inc.*, 64 Cal. App. 4th 1294 (1998), the owners
26 of the Magic Mountain theme park maintained a flat grassy area
27 with tables for picnickers within a large, paved parking lot.
28 The picnic area was in line with the traffic flow (which was
subject to a 25 mile per hour speed limit), but was uncurbed.

1 Plaintiffs, who were picnicking at a table, were injured when a
2 car drove over the word "stop" painted on the pavement and
3 crossed 40 feet of grass before striking their table. The car,
4 which had a malfunctioning starter motor, had been push-started
5 and had, at the wheel, a developmentally disabled woman who had
6 never driven a car before. The California Court of Appeal,
7 Second District, held that the unique circumstances of the
8 accident did not absolve Magic Mountain of liability, concluding
9 that "it was open to simple observation that Magic Mountain had
10 aimed a heavily traveled parking lane...directly at the picnic
11 table with no separation other than 40 feet of flat grass, and
12 that a car traveling at a speed no higher than Magic Mountain's
13 own speed limit would cover this distance in less than 2
14 seconds.... When such an observable danger ripens into an
15 accident, the accident is foreseeable for purposes of duty
16 analysis." *Id.* at 1301.

17 34. Hence, the relevant inquiry in this case is whether it
18 was reasonably foreseeable, in view of all the circumstances,
19 including the location of Pole Four, the use of the Four Mile
20 Trial, and other observable evidence, that an adult might climb
21 the thirty-foot accident pole and be injured as a result.

22 35. The Ninth Circuit's opinion in *Henderson*, 864 F.2d
23 1233, provides some guidance in this analysis.

24 a. In *Henderson*, two individuals were injured trying
25 to steal copper wire from a power pole near a water tank on an
26 abandoned military installation. The two trespassed through a
27 breach in a fence, past signs that warned "Government Property No
28 Trespassing." One of the two, Harmon, climbed a thirty three
foot power pole with the assistance of spiked shoes and a safety

1 belt. As he attempted to cut copper cable from the pole, Harmon
2 touched an exposed live wire. His partner, Henderson, who was
3 standing on the ground, saw a flash and saw Harmon's body lurch
4 backwards. Henderson climbed the pole in an effort to provide
5 aid to Harmon, but Henderson also contacted a live wire, received
6 a shock, and fell to the ground. His fall left him permanently
7 paralyzed. *Henderson*, 827 F.3d 1233, 1234 (9th Cir.
8 1986) (opinion withdrawn and superceded in part by *Henderson*, 846
9 F.2d 1233).

10 b. The Ninth Circuit agreed with the district
11 court's conclusion that the accident was not foreseeable.
12 Specifically, although there was some indication that members of
13 the public entered the facility to "sightsee, picnic, drink beer,
14 have parties, spray paint graffiti, commit vandalism, and take
15 copper wiring and other material" in a nearby area within the
16 abandoned military installation, "[t]here was no evidence of
17 tampering with pole lines which reasonably should have put
18 cognizant employees of the United States on notice that members
19 of the public might enter the facility and climb the poles to
20 remove or tamper with conductors." 846 F.2d at 123. This latter
21 fact, the Ninth Circuit found to be adequate to support the
22 district court's conclusion that the accident was not
23 foreseeable. *Id.*

24 c. "Despite the presence of picknickers and vandals,
25 the government had little reason to foresee that thieves might
26 climb the power poles to steal copper wires." *Id.* at 1235. The
27 Ninth Circuit rejected Henderson's argument that a few references
28 in the record to "cut tail-ends and dangling wires...should have
put the government on notice that thieves were active in the

1 area...."

2 Although the record does contain references to cut
3 tail-ends and dangling wires-items that Henderson
4 argues should have put the government on notice that
5 thieves were active in the area-we have found no
6 evidence in the record that these cut tail-ends or
7 dangling wires were cut and dangling prior to
8 Henderson's accident. The sole exception, one reference
9 to wires cut by the government prior to the accident,
10 does not support Henderson's claim. Wires cut by the
11 government before the accident could not have notified
12 the government of the presence of thieves.

13 Henderson's attorney attempted to prove at trial that
14 some wires left dangling after the accident were in
15 fact dangling prior to the accident, and that these
16 wires had been left in that state by Harmon on his
17 previous trip to the facility. However, Henderson
18 himself testified that he did not notice any dangling
19 wires before the accident. In light of the
20 uncontradicted testimony at trial that no wires were
21 dangling before the accident, the district court did
22 not commit clear error by concluding that no telltale
23 signs reasonably afforded the government notice of
24 tampering before the accident.

25 The only evidence of prior thefts proved at trial that
26 might have put the government on notice was the absence
27 of the wires stolen by Harmon on his previous trip to
28 the site. However, in the vast area that the government
had to patrol, with a tangle of wires overhead, we
cannot say that the government should have noticed the
absence of a few wires. Thus, the district court's
finding that the accident was not foreseeable was
supported by the record because no evidence of
tampering prior to the accident was so apparent that
the government should have recognized the potential for
Henderson's injury.

21 *Id.* at 1235-36.

22 36. Here, even when viewed with the benefit of hindsight,
23 and considering any evidence that suggests the partial climbing
24 of electric poles by visitors was foreseeable, there is no
25 evidence suggesting that anyone person had previously climbed an
26 electric pole in Yosemite to the height of the electric wires,
27 other than authorized NPS maintenance personnel.

28 a. Paul Laymon, who was supervisor of the High
Voltage Operations Shop for ten years and presently oversees its

1 operations, testified that he had seen items up on the poles in
2 Yosemite valley on occasion. For example, he had seen a bandana
3 tied ten feet up a pole in the valley and he had seen sticker on
4 a metal pole once. He specifically acknowledged that none of
5 these items were ever found in the wires.

6 b. At the time of the accident, there was, in fact, a
7 sticker placed half way (fifteen or sixteen feet) up the accident
8 pole.

9 c. The subject pole was approximately 50 feet from
10 the Four Mile Trail, which is frequently hiked by park visitors,
11 although a boulder field had to be traversed to reach the pole
12 from the trail.

13 d. Donald Coon, in deposition testimony entered into
14 evidence, testified that some metal high voltage warning signs
15 that had been located up in the wires occasionally went missing.

16 i. Plaintiff's counsel argued that Donald Coon's
17 deposition testimony suggested that these signs had been stolen,
18 but Mr. Coon made no such assertion, expressly or impliedly. He
19 merely stated that some signs located up in the wires went
20 missing. Kent Summers testified that he and other High Voltage
21 Operations Shop personnel thought either theft or weather might
22 explain why some warning signs went missing. But, Mr. Summers
23 did not specifically associate theft with signs that went missing
24 from the crossarms. Rather, he mentioned theft in the context of
25 testimony regarding the sticker warning signs, normally placed at
26 eye level. Other witnesses talked about the destructive effect
27 of harsh weather on signs and stickers.

28 37. The weight of the evidence suggests that an adult
climbing one of the Glacier Point Line poles was not a reasonably

1 foreseeable event:

2 a. No witness had ever seen a member of the public
3 climb or attempt to climb an electric pole in the Park.

4 b. No other person in the preceding seventy-five
5 years since the accident pole was erected has ever climbed a high
6 voltage electric pole and been injured in the Park.

7 c. Yosemite National Park is a popular place for rock
8 climbing and hiking, offering numerous places to climb for
9 enjoyment or thrill, other than power poles.

10 d. The accident pole was located in a fairly remote
11 area, at least twenty feet off of a trail, and was accessible
12 only by scrambling over a boulder field.

13 e. The accident pole was not located in a campground,
14 picnic area, parking lot, or other area frequented by families or
15 unsupervised children.

16 f. Susan Whittier, a witness to the accident,
17 believed at first that Jay Muchhala had fallen from a cliff,
18 because she thought it so unlikely that he had climbed the power
19 pole.

20 38. Although Jay Muchhala may not have known that the lines
21 held up by the accident pole carried high voltage electricity, it
22 is undisputed that he knew he was climbing thirty foot high
23 electric poles.

24 39. Under the facts and circumstances of this case, it was
25 not foreseeable that an adult would have climbed the accident
26 pole to the height of the wires.

27 40. As in Henderson, there was no evidence here which
28 reasonably should have put cognizant employees of the United

1 States on notice that adult members of the public might
2 intentionally climb up into the wires.

3 41. This conclusion is further supported by the fact that
4 neither the court nor the parties have located a single case in
5 which a duty was found to be owed to an adult who intentionally
6 climbed an electric pole, whether high voltage or not.

7 42. Numerous cases have examined the duties of care owed by
8 operators of power lines to various types of individuals who
9 might come into contact with uninsulated wires or electrical
10 current:

11 a. The vast majority of such cases concern children.
12 For example, a long line of cases have sustained findings of
13 negligence against electric companies where children are injured
14 by coming into contact with electrical wires while climbing
15 trees, when the risk of such harm was foreseeable. *Baltimore Gas*
16 *and Elec. Co. v. Flipppo*, 348 Md. 680 (1998) (citing numerous
17 cases, including *Dolata v. Ohio Edison Co.*, 2 Ohio App. 3d 293
18 (1981) (evidence sufficient to support finding that power company
19 was negligent where a child was electrocuted when he came in
20 contact with a power line while climbing a tree located on his
21 family's property; the power line ran in close proximity to tree;
22 the tree had not been trimmed by the power company for several
23 years and was easily climbable with large outreaching branches);
24 *Petroski v. Northern Indiana Pub. Service Co.*, 171 Ind. App. 14
25 (1976) (power company owed duty to boy injured while climbing a
26 tree that electric company failed to trim where high voltage
27 wires ran through the tree and the possibility of injury was
28 foreseeable); *Alabama Power Co. v. Taylor*, 293 Ala. 484 (1975)
(defendant electric company was liable where child was injured

1 while attempting to climb a tree with low branches that had not
2 been trimmed in seven years and grew beside a public alley in a
3 residential neighborhood occupied by numerous small children)).

4 b. Other cases concern adults who came into contact
5 with power lines indirectly and unintentionally. For example, in
6 *Polk v. City of Los Angeles*, 26 Cal.2d 519, 526 (1945), the
7 default standard of care -- that wires be insulated or located so
8 as to be comparatively harmless -- applied in a case where a tree
9 trimmer was electrocuted by wires passing through the tree on
10 which he was working. The municipality maintaining the wires
11 should have anticipated that property owners would need to trim
12 those trees. Similarly, in *Sulphur Springs Valley Electric*
13 *Cooperative, Inc. v. Beltran*, 13 Ariz. App. 513 (1970), a power
14 company was found to owe a duty of care to an individual who was
15 electrocuted when an antenna he was attaching to the side of a
16 house fell and touched a 28-foot-high bare electric wire. The
17 court pointed out that the electric company was "required to know
18 there is a certain amount of negligence in the world," and was
19 required to anticipate that "some human beings will fail on
20 occasion to behave as a reasonable man would behave." *Id.* at
21 515.

22 43. Still other cases concern children who have
23 intentionally climbed electricity poles or towers. *C.f.*, *Arroyo*
24 *v. Chicago Transit Auth.*, 643 N.E. 2d 1322, 1328 (Ill.
25 1994) (finding no liability under attractive nuisance doctrine
26 where there was no evidence that owner elevated train tower with
27 electric third rail knew or should have known that children
28 frequented the premises). But, "[e]ven without [] express
warnings [on a pole or tower], anyone as old as [fourteen] is

1 charged with the knowledge that electric wires are ordinarily
2 dangerous; that they should be avoided wherever possible...and
3 that it is dangerous to come in close proximity to them." *Texas*
4 *Utilities Elec. Co. v. Timmons*, 947 S.W.2d 191, 194 (Tex.
5 1997) (finding no liability).

6 44. A closely analogous unpublished case, *Gonzalez v.*
7 *Puerto Rico Electric Power Authority*, 36 F.3d 1089 (1st Cir. 1994)
8 (Table), is instructive. In *Gonzalez*, a twenty year old man
9 climbed up a guy wire supporting two electric poles at an
10 electrical equipment site maintained by the defendant power
11 company. 1993 WL 525644. He climbed so high that his head came
12 into contact with the high voltage power line suspended from the
13 pole. 36 F.3d 1089 at *1. The site was not fenced off, nor was
14 there any sign prohibiting access to the site. 1993 WL 525644
15 The First Circuit agreed with the district court's reasoning that
16 "defendant could not have foreseen that a twenty year-old would
17 climb 23 to 24 feet on a guy wire to amuse himself... [Defendant]
18 could not reasonably have foreseen the situation...[which] was
19 too fortuitous to require the electric company to guard against
20 it."

21 We agree. While anything is possible, there must be a
22 limit in a practical world to what conduct must
23 reasonably be foreseen. Small children could not be
24 expected to climb a wire to that height; a man of
25 twenty ought to know the difference between a slack,
supporting guy wire openly touchable at ground level,
and an electric power line, and that electricity is
dangerous. Hence there was no duty to either one to
provide a more complex structure.

26 36 F.3d 1089 at *1.

27 45. *Gonzalez*, 36 F.3d 1089, and *Timmons*, 947 S.W.2d at 194,
28 persuasively reason that a twenty-seven year old man should know
that coming close to electric wires and climbing to a height of

1 thirty feet without any form of fall protection are potentially
2 life-threatening activities. In *Gonzalez*, there were no warning
3 signs and, although there were warning signs present in *Timmons*,
4 the court specifically noted that the absence of such signs would
5 not have altered the finding of no liability in that case.

6 46. The Ninth Circuit in *Henderson*, although acknowledging
7 that foreseeability is the primary factor, makes it clear that a
8 finding of no duty must be based on a complete analysis of all of
9 the *Rowland* factors. 846 F.2d at 1236 (affirming the district
10 court's finding of no duty based on only the foreseeability
11 because no other factor weighed strongly in favor of finding a
12 duty). The remaining *Rowland* factors are:

13 [2] the degree of certainty that the plaintiff suffered
14 injury, [3] the closeness of the connection between the
15 defendant's conduct and the injury suffered, [4] the
16 moral blame attached to the defendant's conduct, [5]
17 the policy of preventing future harm, [6] the extent of
18 the burden to the defendant and consequences to the
19 community of imposing a duty to exercise care with
20 resulting liability for breach, and [7] the
21 availability, cost, and prevalence of insurance for the
22 risk involved.

23 *Rowland*, 69 Cal. 2d at 113.

24 a. For the obvious reason that Jay Muchhala was
25 killed either by electrocution or by the subsequent fall, the
26 second factor, degree of certainty that the plaintiff suffered
27 injury, weighs in favor of finding a duty. However, even though
28 the Plaintiff in *Henderson* was injured, the Ninth Circuit did not
29 give this factor controlling. See 846 F.2d at 1236.

30 b. The third factor, the closeness of the connection
31 between the defendant's conduct and the injury suffered, raises
32 questions as to whether the presence of a warning sign and/or the
33 removal climbing pegs below seven and a half feet would have

1 dissuaded the decedent from climbing the pole.

2 i. With respect to the presence of absence of a
3 warning sign, Robert Armstrong testified that having knowledge
4 that a pole was an electric pole does not necessarily equate to
5 having a full understanding of the dangers associated with a high
6 voltage electric pole. He opined that the purpose of high
7 voltage warning signs is to put persons on notice that they are
8 not just dealing with electricity, but with high voltage
9 electricity. However, Ranger Yu testified that warning signs
10 posted by the NPS are routinely ignored. For example, NPS
11 maintains warning signs at the top of every major waterfall in
12 the Park, warning of the dangers posed by swimming at the top of
13 the a waterfall. Yet, people routinely disregard these warnings,
14 with tragic results. In the final analysis, on this record,
15 which lacks any competent expert evidence regarding the
16 effectiveness of warning signs, it cannot be found with
17 reasonable certainty that a warning sign would have dissuaded Jay
18 Muchhala from climbing the accident pole.

19 ii. The evidence as to climbing pegs is
20 inconclusive. On the one hand, Keith Guy suggests that removal
21 of pegs below seven foot six inches would likely have had little
22 or no effect on the pole's climbability by Jay Muchhalla. He
23 testified that it would have been possible for Jay Muchhala, who
24 was over six feet tall and wearing climbing shoes at the time of
25 the accident, could have climbed the pole even with all pegs
26 below seven foot six inches removed. However, Kent Summers
27 testified that, without an aid device, it is difficult, although
28 possible, to climb the pole with the pegs at four feet.

1 iii. The evidence relevant to the third factor --
2 the closeness of the connection between the defendant's conduct
3 and the injury suffered -- does not weigh strongly in either
4 direction.

5 c. As to the moral blame attached to the defendant's
6 conduct, there was no evidence suggesting either party acted with
7 any moral culpability, although Plaintiff's conduct could support
8 a finding of recklessness.

9 d. With respect to the policy of preventing future
10 harm, it is clear that the regulations followed by the NPS
11 personnel, including GO 64 and GO 95, embody the general goal of
12 preventing inadvertent contact with electric wires, high voltage
13 or otherwise. However, there is no indication that the
14 regulations are designed to address the kind of intentional act
15 by an adult at issue in this case.⁴ This conclusion is supported
16 by the absence of any cases imposing liability upon the owner or
17 operator of an electric facility under like circumstances.

18 e. The next factor is the extent of the potential
19 burden to the defendant and consequences to the community of
20 imposing a duty to exercise care with resulting liability for
21 breach. On the one hand, one result of imposing a duty in this
22

23 ⁴ For example, although not directly on point, the most
24 relevant language is found within the section of GO 95 regarding
guarding. GO 95 Rule 52.6(B). A note to that section provides:

25 Note: It is the intent of Rule 51.6-B to require such
26 guarding as will prevent easy climbing of these poles
27 or structures by young persons who do not realize the
28 danger of contact with live conductors supported
thereon. It is not intended that such guarding will be
required in sparsely settled districts, mountainous and
desert areas, and similar locations.

1 case might be to encourage the government to conform more closely
2 to industry standards regarding the maintenance and operation of
3 high voltage power lines. There is indirect evidence that the
4 resulting financial and/or logistical burdens that would be borne
5 by the government would be modest. The pegs, in fact, have
6 already been removed and additional efforts have been undertaken
7 to ensure that warning signs are maintained on every high voltage
8 pole. On the other hand, the consequences to the community of
9 imposing a duty here are not insignificant. The public (either
10 the taxpayer or the fee-paying users of Yosemite National Park)
11 would ultimately bear the cost of an injury caused by the
12 unforeseeable, intentional act of grown man. These two
13 conflicting considerations counsel against giving this factor
14 considerable weight.

15 f. No relevant evidence was submitted on the
16 availability, cost, and prevalence of insurance for the risk
17 involved. This factor is neutral.

18 47. Other than foreseeability, the remaining *Rowland*
19 factors do not weigh strongly in either direction, giving the
20 court little reason to disregard the primacy of the
21 foreseeability factor.

22 48. Here, because Jay Muchhala's intentional act of
23 climbing the electric pole was unforeseeable under the totality
24 of the circumstances, the United States owed him no duty of care.

25 49. Based on this finding, is not appropriate to reach the
26 question of whether the United States breached any industry
27 standard of care by either failing to post adequate warning signs
28 or by failing to remove pegs below a particular height.

1 50. No evidence established any dangerous condition of
2 public property, as the pole was not defective or in disrepair.

3 51. This case arises out of an undeniably tragic loss for
4 Jay Muchhala's family and friends. However, the case cannot be
5 decided based on sympathy. The unforeseeability of the event under
6 all the circumstances bars imposing liability upon the United
7 States, as its negligence was not the cause of Jay Muchhala's
8 death.

9 **CONCLUSION**

10 The United States is not liable in negligence or for
11 dangerous condition of public property, as the Government owed
12 Jay Muchhala no duty of care under the unforeseeable
13 circumstances and there was no evidence to support a dangerous
14 condition of public property claim.

15
16 IT IS SO ORDERED.

17 Dated: February 5, 2007
18 b2e55c

19 /s/ Oliver W. Wanger
20 UNITED STATES DISTRICT JUDGE
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Carrizales, Miroslava (USACAE)

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