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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

La Loma Grande LLC,
Plaintiff,
v.
United States of America,
Defendant.

No. CV-11-00476-TUC-RM
**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

Following an eleven-day bench trial, and pursuant to Federal Rule of Civil Procedure 52(a), the Court makes the following findings of fact and conclusions of law.¹

FINDINGS OF FACT

A. Background

1. Plaintiff La Loma, LLC (“La Loma”) is a limited liability corporation engaged in the business of real estate investment and industrial development in Nogales, Arizona. (Doc. 164 at 6; Tr. (1/22/16) at 131:10-22.)
2. Jose Nohé Garcia is the manager and sole owner of La Loma. (Doc. 164 at 4; Tr. (1/22/16) at 131:23-132:4.)
3. On August 13, 2004, La Loma paid \$1.25 million to purchase approximately 355 acres of vacant, undeveloped land in the Nogales area. (Doc. 164 at 4; Tr. (1/22/16) at 120:3-14, 121:15-122:20; Exh. 987 at 1.) The 355-acre property,

¹ Prior to trial, the parties stipulated to certain facts. (See Doc. 164 at 4-8.) The following findings of fact and conclusions of law are based on the stipulated facts as well as the evidence and testimony presented at trial.

1 known as the Wilson Ranch, is La Loma's sole real estate holding. (Tr. (1/22/16)
2 at 130:13-15.)

3 4. The Wilson Ranch consists of an approximately 216-acre northern parcel
4 ("Northern Parcel") and a non-contiguous, approximately 138-acre southern parcel
5 ("Southern Parcel"). (Doc. 164 at 4, 6-7; Tr. (1/14/16) at 69:19-70:5; Tr. (1/27/16)
6 at 156:22-157:2.)²

7 5. La Loma purchased the Wilson Ranch as an investment, with the intent of
8 developing it into an industrial subdivision. (Doc. 164 at 4.)

9 6. The Wilson Ranch is strategically located near the international border and the
10 newly expanded Mariposa Port of Entry. (Tr. (1/14/16) at 78:23-81:1, 84:2-22; Tr.
11 (1/27/16) at 174:22-25.) The volume of commercial traffic in the area has
12 increased since La Loma's 2004 purchase. (Tr. (1/22/16) at 60:20-61:14.)

13 7. In addition to its strategic location, the Wilson Ranch enjoys certain features that
14 increase ease of development. For example, the soil is generally free of caliche,
15 making it easier to grade and build upon. (Tr. (1/14/16) at 81:2-19; Tr. (1/19/16)
16 at 94:5-22.) In addition, adjacent landowners have a tradition of cooperating in
17 pursuit of development goals—a tradition that Mr. Garcia has both joined and
18 benefitted from in the years since La Loma's purchase. (*See, e.g.*, Tr. (1/14/16) at
19 71:9-17; Tr. (1/15/16) at 53:3-6; Tr. (1/22/16) at 120:17-25.)

20 8. Though the Wilson Ranch property has development potential, transforming it into
21 an industrial subdivision will require significant on-site and off-site development
22 costs, including the cost of extensive grading, establishing proper road access, and
23 extending utility lines to the property boundary. (*See, e.g.*, Tr. (1/27/16) at 56:3-
24 21, 57:6-58:24, 72:4-73:5, 84:15-93:12, 117:4-124:17, 173:8-174:21, 234:7-16;
25 Exhs. 1039, 1040, 1043.) Mr. Garcia has never before tackled such an ambitious

27
28 ² At one point in time, the Wilson Ranch consisted of a single, larger,
contiguous piece of land. It was transformed into non-contiguous parcels due to real
estate transactions occurring prior to La Loma's purchase. (Tr. (1/14/16) at 70:6-21.)

1 real estate development project.³

2 9. The Northern Parcel of the Wilson Ranch is not affected by the bullets and
3 contamination at issue in this lawsuit. (Doc. 164 at 6.) La Loma is currently in
4 the process of developing the Northern Parcel into an industrial subdivision, but it
5 has yet to sell or lease any lots. (Doc. 164 at 6; Tr. (1/15/16) at 113:4-24; Tr.
6 (1/22/16) at 103:11-104:2, 149:15-24, 151:10-17, 153:14-154:21; Tr. (1/27/16) at
7 159:17-21.) Mr. Garcia has reduced grading costs for the Northern Parcel by
8 performing his own grading. (Tr. (1/22/16) at 104:3-16; Tr. (1/27/16) at 159:5-
9 13.)

10 10. The Southern Parcel consists of tax parcel numbers 113-49-006, 113-46-002B, and
11 113-46-003A (“Parcel 6,” “Parcel 2B,” and “Parcel 3A”). (Doc. 164 at 7; Tr.
12 (1/25/16) at 16:23-18:1; Exh. 987 at 2.)⁴ Parcel 2B cannot presently be developed
13 on account of its zoning and its location outside the Nogales city limits. (Doc. 164
14 at 7; Tr. (1/20/16) at 108:11-17; Tr. (1/25/16) at 32:25-33:22.) In this lawsuit, La
15 Loma seeks compensation for alleged damage to the remaining, 98.61-acre portion
16 of the Southern Parcel, which consists of Parcels 6 and 3A and will be referred to
17 herein as “the Subject Property.” (Doc. 164 at 7; Tr. (1/25/16) at 18:2-9; Tr.
18 (1/27/16) at 173:4-7.)

19 11. Parcel 6 is hilly and is transected by a ridgeline running east to west. (Doc. 164 at
20

21 ³ Mr. Garcia’s professional background is primarily in the produce industry.
22 (Tr. (1/22/16) at 51:16-59:1, 132:11-18.) He is neither a civil engineer nor a general
23 contractor, and he has never been employed in the construction industry. (Tr. (1/22/16)
24 at 133:3-5, 134:1-6; Tr. (1/25/16) at 30:10-12.) He has only one prior experience with
25 real estate development: in approximately 1996, he purchased vacant property on which
26 he built two warehouses. (Tr. (1/22/16) at 59:11-60:19, 67:7-70:4, 137:22-138:2.)
27 Though that real estate venture was a success—Mr. Garcia sold the property at a profit in
28 approximately 2004—it was considerably less ambitious in scope, involving a relatively
small property that was already connected to utilities and graded to Mr. Garcia’s
specifications. (Tr. (1/22/16) at 59:14-21, 68:23-70:24, 137:22-138:9, 139:25-140:13,
142:7-8.)

⁴ La Loma paid varying amounts per acre for the tax parcels encompassed by
the Wilson Ranch. (Tr. (1/25/16) at 18:10-20:1; Exh. 987 at 2.) For Parcel 6, La Loma
paid \$2,000 per acre, and for Parcel 3A, La Loma paid \$3,000 per acre. (Tr. (1/25/16) at
16:23-18:1, 18:10-20:1; Exh. 987 at 2.) In total, La Loma paid \$218,990 for the Subject
Property. (Tr. (1/25/16) at 19:24-20:1.)

1 7.) Approximately 20 acres of Parcel 6 are north of the ridgeline and
2 approximately 40 acres are south of the ridgeline. (Doc. 164 at 8.)

3 12. The Subject Property cannot presently be developed due to contamination issues.
4 (See Tr. (1/12/16) at 144:13-15; Tr. (1/13/16) at 112:6-8.)

5 13. Even if the Subject Property did not suffer from contamination issues, it is
6 unlikely that La Loma would have developed the Southern Parcel prior to
7 development of the Northern Parcel, since La Loma has always planned to
8 develop the Wilson Ranch in phases, and the Northern Parcel is more easily
9 developable than the Southern Parcel, with lower per-acre development costs.
10 (See Doc. 164 at 6; Tr. (1/15/16) at 101:9-102:12, 106:9-12; Tr. (1/19/16) at
11 19:19-21:21; Tr. (1/21/16) at 105:6-14; Tr. (1/27/16) at 234:7-235:4; Exh. 322 at
12 5.) Furthermore, before La Loma can proceed with development of the Southern
13 Parcel, its development plan will need to be revised, because the plan includes
14 Parcel 2B, which cannot be developed unless it is annexed by the City of Nogales
15 and re-zoned. (See Doc. 164 at 7; Tr. (1/20/16) at 108:11-17; Tr. (1/21/16) at
16 86:9-87:2; Tr. (1/25/16) at 32:16-33:22; Exh. 322.)

17 14. At all relevant times, La Loma has leased both the Northern and Southern Parcels
18 of the Wilson Ranch to Paul De La Ossa for cattle grazing, which results in tax
19 benefits. (Tr. (1/15/16) at 80:12-14; Tr. (1/25/16) at 42:11-43:13, 127:14-128:10;
20 Exh. 233.) In exchange for the value of the lease, Mr. De La Ossa acts as a
21 caregiver of the land. (Tr. (1/25/16) at 137:25-138:14.)

22 **B. The Arbo Range**

23 1. The Subject Property is located near property owned by Paul Arbo (“Arbo
24 Property”). (See Tr. (1/12/16) at 110:5-12; Exh. 671 at Figure 2.) An
25 approximately 40-foot-wide strip of land owned by the Barr family (“Barr
26 Property”)⁵ separates the Subject Property from the Arbo Property. (Tr. (1/12/16)

27
28 ⁵ The 40-foot strip is part of tax parcel 113-49-027, which surrounds the
Arbo Property. (Tr. (1/12/16) at 110:5-12; Tr. (1/15/16) at 5:15-24; Exh. 671 at Figure
2.)

1 at 110:5-12; Tr. (1/15/16) at 4:21-6:11, 83:8-10; Exh. 671 at Figure 2.) The Barr
2 Property and Arbo Property are located south of the Subject Property. (See Doc.
3 164 at 8; Exh. 671 at Figure 2.)

- 4 2. From approximately 1972 until June 29, 2010, the United States Customs and
5 Border Protection (“Border Patrol”) used a portion of the Arbo Property as an
6 outdoor shooting range (“Arbo Range”). (Tr. (1/19/16) at 98:6-99:5; Tr. (1/25/16)
7 at 92:16-93:7; Tr. (1/26/16) at 22:22-23:3.) Specifically, the Border Patrol used
8 approximately half of an acre as the range proper and an additional half-acre for
9 parking. (Tr. (1/25/16) at 111:21-112:3.) The range was located in a low-lying
10 wash and surrounded by vacant land. (Doc. 164 at 4.)
- 11 3. The Border Patrol used the Arbo Range with Mr. Arbo’s permission but without a
12 written lease from 1972 until 1979. (Tr. (1/25/16) at 92:21-93:4.) The Border
13 Patrol has leased the property from Mr. Arbo since 1979. (Tr. (1/25/16) at 92:9-
14 93:7, 95:2-7) Since 2001, the Border Patrol has paid \$3,100 per month for the
15 lease. (Tr. (1/25/16) at 95:17-19, 109:6-19; Exh. 994 at 1.) Though the Border
16 Patrol has not used the property as a shooting range since 2010, it continues to
17 lease the property pending remediation of contamination on the Arbo Property.
18 (Tr. (1/25/16) at 94:15-95:7, 109:6-19; Exh. 994 at 1.)
- 19 4. As part of its lease arrangement with Mr. Arbo, the Border Patrol agreed that it
20 was responsible for maintaining the Arbo Range in a safe condition. (Tr.
21 (1/25/16) at 110:14-25; Exh. 994 at 1.)
- 22 5. The Border Patrol used the Arbo Range for quarterly agent qualifications and
23 target practice. (Tr. (1/21/16) at 26:24-27:18; Tr. (1/26/16) at 11:20-12:21, 20:9-
24 15, 26:2-19.) Though the Border Patrol’s lease with Mr. Arbo indicates that the
25 Arbo Range is to be used as a pistol range, the Border Patrol also used the range
26 for shotgun and rifle qualifications. (Tr. (1/25/16) at 123:13-19; Tr. (1/26/16) at
27 16:16-19:13, 26:2-19; Exh. 994 at 1.) In addition, agents sometimes shot
28 familiarization rounds with grenade launchers on the range. (Tr. (1/26/16) at

1 19:17-20:6.) Evidence was presented at trial indicating that agents shot automatic
2 weapons at the range. (*See, e.g.*, Tr. (1/25/16) at 122:16-23, 160:9-20; Tr.
3 (1/26/16) at 70:4-7.)

4 6. During qualifications, agents shot from standing, kneeling, and prone positions.
5 (Tr. (1/21/16) at 20:4-21:8; Tr. (1/26/16) at 41:4-19.)

6 7. The number of Border Patrol agents using the Arbo Range increased significantly
7 over time. (Tr. (1/25/16) at 96:5-12.) In 1985, only approximately 38 Border
8 Patrol agents in Nogales carried firearms. (Tr. (1/26/16) at 6:21-23.) By 2010,
9 over 500 agents were qualifying at the Arbo Range. (Tr. (1/21/16) at 27:19-28:7,
10 54:19-23; Tr. (1/26/16) at 9:4-8.)

11 8. From 1972-1979, the Arbo Range did not contain a backstop berm. (Tr. (1/25/16)
12 at 96:23-97:9.) The Border Patrol installed an earthen backstop berm at
13 approximately the same time that it signed its first lease with Mr. Arbo, in 1979.
14 (Doc. 164 at 4; Tr. (1/25/16) at 97:1-9.)

15 9. Witnesses estimated the height of the backstop berm at the Arbo Range to be
16 anywhere from five to fourteen feet tall. (*See* Tr. (1/19/16) at 38:3-39:4, 138:11-
17 15; Tr. (1/21/16) at 38:19-21; Tr. (1/26/16) at 27:11-18, 33:12-15.) The side
18 berms at the Arbo Range were approximately six to seven feet tall. (Tr. (1/26/16)
19 at 29:6-8.) Targets were approximately six to eight feet tall. (Tr. (1/21/16 at
20 16:24-17:4, 37:1-9; Tr. (1/26/16) at 31:18-32:10.)

21 10. Over time, the backstop berm was moved backward such that, eventually, it was
22 located on the 40-foot-wide Barr Property separating the Arbo Property from the
23 Subject Property. (Tr. (1/15/16) at 141:18-21; Tr. (1/25/16) at 117:23-119:9.) The
24 Border Patrol did not obtain the Barrs' permission to place the berm on the Barr
25 Property, and it has not compensated the Barrs for use of the property. (Tr.
26 (1/19/16) at 81:2-6; Tr. (1/26/16) at 70:13-18; Exh. 237(e) at 2.)

27 11. The Arbo Range was inadequately designed to contain bullets shot by Border
28 Patrol agents on the range. The range itself was insufficiently large, and the berms

1 were insufficiently tall, in light of the types of weapons used and the angles at
 2 which shots were fired. (*See* Tr. (1/19/16) at 144:11-19; Tr. (1/20/16) at 45:12-22,
 3 60:19-61:3.)

4 12. As a result of the Border Patrol's use of the Arbo Range, stray bullets and bullet
 5 fragments landed on a portion of the Subject Property and on the Barr Property.
 6 (Doc. 164 at 4, 6-7; Tr. (1/13/16) at 50:14-51:3; Tr. (1/20/16) at 47:1-5, 47:16-18.)

7 13. Although the evidence does not indicate that Border Patrol agents intentionally
 8 shot bullets onto adjoining property, the Border Patrol knew to a substantial
 9 certainty that bullets from the Arbo Range were landing on adjacent property.
 10 (*See, e.g.*, Tr. (1/21/16) at 13:15-17, 45:5-8; Tr. (1/26/16) at 49:13-50:10, 52:4-6.)

11 14. In essence, the Border Patrol used La Loma's land as an extension of the Arbo
 12 Range, without negotiating for or paying for the use. (Tr. (1/20/16) at 29:10-19.)

13 **C. Bullets and Contamination**

14 1. As a result of the deterioration of bullet fragments from the Arbo Range, the soil
 15 on the Subject Property has been contaminated with lead and other contaminants.
 16 (Doc. 164 at 4-7; Tr. (1/13/16) at 50:23-51:3; *see generally* Exh. 850.)

17 2. The contamination poses environmental and human health risks. (*See, e.g.*, Tr.
 18 (1/13/16) at 45:15-20, 49:4-50:4, 98:3-12, 102:24-103:7; Tr. (1/22/16) at 126:18-
 19 127:22.)

20 3. Although the Subject Property was likely contaminated with lead from the Arbo
 21 Range at the time of La Loma's purchase of the Wilson Ranch in 2004, Mr. Garcia
 22 was not aware of any contamination at the time of the purchase, and the purchase
 23 price that La Loma paid for the Wilson Ranch did not reflect the contamination.
 24 (Doc. 164 at 7; Tr. (1/22/16) at 126:3-5; Tr. (1/25/16) at 21:20-22:3; Tr. (1/27/16)
 25 at 195:2-196:3; Exh. 846 at 63.)⁶ At the time of the purchase, the sellers

26
 27 ⁶ Plaintiff's expert real estate appraiser, Steven Cole, concluded that the 2004
 28 sale was below market price. (Tr. (1/21/16) at 103:12-17; Tr. (1/27/16) at 195:2-196:3.)
 The Court finds this conclusion lacking in credibility; it appears to have been premised
 entirely or in large part upon information provided by Mr. Garcia at a time when Mr.
 Garcia had an interest in maximizing estimates of the property's current market value.

1 represented that they had no knowledge of the existence of any hazardous
2 materials on the property. (Doc. 164 at 5; Exh. 987 at 5.)

3 4. Prior to the events at issue in this lawsuit, Mr. Garcia had no experience with
4 shooting ranges or with contaminated industrial property. (Tr. (1/22/16) at
5 135:16-25.)

6 5. Mr. Garcia did not obtain an environmental assessment prior to purchasing the
7 Wilson Ranch property.⁷ (Doc. 164 at 5; Tr. (1/25/16) at 12:19-21.) Based on the
8 evidence presented at trial, it is not uncommon for sales of unimproved vacant
9 land in the Nogales area to occur in the absence of an environmental assessment,
10 even when the sales involve relatively sophisticated buyers and sellers. (*See, e.g.*,
11 Tr. (1/15/16) at 72:9-73:7, 74:6-76:20, 81:11-82:6.)

12 6. When the Arbo Range was active, it could be seen and heard from portions of the
13 Southern Parcel of the Wilson Ranch. (Doc. 164 at 7.) Mr. Garcia heard shooting
14 from the Arbo Range prior to La Loma's purchase of the Wilson Ranch and "knew
15 there was something there," but he did not observe the shooting range until after
16 the purchase. (Tr. (1/22/16) at 126:6-17; Tr. (1/25/16) at 16:5-10.)

17 7. With proper management, an outdoor shooting range does not pose an
18 environmental risk to adjoining properties. (*See, e.g.*, Tr. (1/14/16) at 34:13-
19 35:20.) The Border Patrol agreed in its lease with Mr. Arbo that it would be
20 responsible for maintaining the Arbo Range in a safe condition. (*See, e.g.*, Exh.
21 994 at 1.) Mr. Arbo assumed that the Border Patrol would honor that commitment
22 by taking steps to contain firing within the Arbo Property. (Tr. (1/25/16) at
23 119:14-18.) Based on the entirety of the evidence presented at trial, it is clear that

24
25 Other, more credible evidence presented at trial indicated that the 2004 sale price
represented fair market value. (*See, e.g.*, Tr. (1/27/16) at 195:2-196:3; Exh. 846 at 63.)

26 ⁷ Mr. Garcia testified that he had access to files in the Barrs' office prior to
27 his purchase of the Wilson Ranch, and that, prior to the purchase, he reviewed a 1999
28 Phase I Environmental Assessment commissioned by the Barrs. (Tr. (1/25/16) at 48:15-
49:18, 74:2-6; Exh. 321.) The Court gives little weight to this testimony, because it
conflicts with Mr. Garcia's discovery responses and with the testimony of James Barr.
(*See, e.g.*, Tr. (1/15/16) at 123:19-124:19; Tr. (1/25/16) at 49:19-56:23.)

1 neighboring landowners also mistakenly trusted that the Border Patrol would
2 operate and maintain the Arbo Range in a safe manner.

3 8. Mr. Garcia first observed bullet fragments on the Subject Property in late 2004 or
4 early 2005. (Doc. 164 at 5; Tr. (1/25/16) at 21:11-14.) He was not aware at that
5 time that the bullets posed a contamination concern. (Tr. (1/25/16) at 21:15-22:3.)
6 However, Mr. Garcia knew that the bullets were cutting fences, becoming
7 embedded in trees, and accumulating on the ground of the Subject Property. (Tr.
8 (1/25/16) at 144:10-149:4.)⁸

9 9. After visiting the Subject Property when the Arbo Range was active and finding
10 himself “rac[ing] for [his] life” to escape bullets, Mr. Garcia asked the Border
11 Patrol in approximately 2006 to stop shooting on the Arbo Range when people
12 wanted to go onto the portion of the Subject Property behind the range. (Doc. 164
13 at 5.) The Border Patrol took steps to comply with these instructions, including
14 using a flag to signal when the range was active and calling cease-fires when
15 people or livestock were observed on the Subject Property behind the Arbo Range.
16 (Tr. (1/21/16) at 36:8-25, 46:7-48:12; Tr. (1/26/16) at 50:16-25, 54:6-21.) The
17 Border Patrol understood that Mr. Garcia did not consent to conduct that risked
18 bodily harm to himself or his invitees. (See Tr. (1/22/16) at 127:14-22.)

19 10. Prior to 2010, beyond asking the Border Patrol not to shoot when people were on
20 the Subject Property behind the range, Mr. Garcia did not complain to the Border
21 Patrol about bullets entering the Subject Property. (Tr. (1/15/16) at 142:8-18; Tr.
22 (1/25/16) at 108:1-8; Tr. (1/26/16) at 53:6-15.)

23 11. Based on the evidence presented at trial, reasonable people without specialized
24 knowledge or experience are often unaware that discarded bullet fragments can
25

26 ⁸ As early as 2005, Mr. De La Ossa complained to Mr. Garcia about bullets
27 from the Arbo Range cutting fences, becoming embedded in trees, and accumulating on
28 the ground on the Subject Property. (Tr. (1/25/16) at 144:10-149:4.) Mr. De La Ossa
also complained to the Border Patrol, though the timeframe of his complaints to the
Border Patrol is unclear. (Tr. (1/25/16) at 156:23-159:24.) The Border Patrol was not
responsive to Mr. De La Ossa’s complaints. (Tr. (1/25/16) at 158:22-25.)

1 lead to environmental contamination. For example, the Barr family is a prominent
2 family of Nogales landowners, with years of land development and civil
3 engineering experience but no specialized knowledge related to environmental
4 contamination issues. (Tr. (1/14/16) at 64:3-67:6; Tr. (1/15/16) at 53:23-54:3.)
5 James Barr testified that, although he had been aware of the Arbo Range since
6 1990, he did not realize until 2010 that bullets from the range were contaminating
7 property adjacent to the range. (Tr. (1/14/16) at 75:6-13.) When Mr. Garcia asked
8 Mr. Barr for his opinion of the Wilson Ranch prior to La Loma's purchase, Mr.
9 Barr spoke highly of the property and told Mr. Garcia that it was "perfectly clean
10 land." (Doc. 164 at 5; Tr. (1/14/16) at 78:6-79:9, 84:23-85:6.) As another
11 example, Mr. Arbo did not realize until approximately a month before trial in this
12 lawsuit that the Border Patrol's operation of the Arbo Range had resulted in the
13 contamination of his own property. (Tr. (1/25/16 at 114:14-115:11).⁹ There is
14 evidence that even an environmental specialist failed to realize the contamination
15 problems associated with the range: a 2005 Phase I Environmental Assessment
16 covering the Wilson Ranch and other adjacent properties noted the existence of the
17 Arbo Range but did not find that it posed an environmental risk. (Exh. 337 at 5,
18 22-23.)

19 12. In 2009, Santa Cruz County funded an environmental assessment by Allwyn
20 Environmental of the Subject Property and other neighboring properties, using a
21 grant from the Environmental Protection Agency. (Doc. 164 at 5; Tr. (1/12/16 at
22 93:23-95:25, 97:12-17.)

23 13. On March 10, 2009, Allwyn Environmental prepared a Phase I Environmental
24 Assessment ("Phase I Assessment") that identified potential contamination
25 concerns related to bullet fragments on the Subject Property. (Doc. 164 at 5; *see*
26 *generally* Exh. 846.) Specifically, the Phase I Assessment identified lead

27 ⁹ The United States never informed Mr. Arbo of the human health risks
28 associated with the lead contamination, despite knowing that Mr. Arbo lives on the
property that the Border Patrol contaminated. (Tr. (1/25/16 at 116:4-9, 117:12-22.)

1 fragments on Parcel 6. (Doc. 164 at 5, 7; Tr. (1/12/16) at 125:6-127:24, 131:2-13;
2 *see generally* Exh. 846.) Allwyn Environmental did not identify lead fragments or
3 contamination concerns on Parcels 2B or 3A. (Doc. 164 at 7; Tr. (1/12/16) at
4 131:14-140:6; *see generally* Exhs. 847, 848.)

5 14. On December 11, 2009, Allwyn Environmental prepared a Phase II Environmental
6 Assessment (“Phase II Assessment”) that identified lead contamination levels in
7 the soil of a portion of Parcel 6 in excess of the residential limit of 400mg/kg and
8 the industrial limit of 800mg/kg. (Doc. 164 at 5-6; *see generally* Exh. 850.)
9 Specifically, lead concentration in excess of 400mg/kg was shown to exist in
10 surface samples on 1.2 acres of the Subject Property, and lead concentration in
11 excess of 800mg/kg was shown to exist on 0.6 acres. (Tr. (1/26/16) at 157:16-
12 158:12.)

13 15. Although confirmed contamination exists only on Parcel 6, it is likely that
14 contamination has spread to other portions of the Subject Property, including a
15 portion of Parcel 3A. (*See, e.g.*, Tr. (1/12/16) at 143:8-144:2; Tr. (1/13/16) at
16 45:21-46:5, 47:5-22, 90:13-91:10, 110:20-111:25.) The acidic nature of the
17 environment causes lead on the Subject Property to degrade faster than would
18 otherwise be expected. (Tr. (1/13/16) at 49:4-50:4, 97:8-98:12.)

19 16. After the Allwyn Phase I and II Assessments, adjoining landowners formed a
20 coalition to address the contamination concerns related to the Arbo Range. (Tr.
21 (1/19/16) at 11:16-12:11; Exh. 237(a) at 1.) On May 26, 2010, La Loma directed
22 the Border Patrol to cease depositing bullets on the Subject Property. (Doc. 164 at
23 6; Tr. (1/19/16) at 13:22-14:9; Exh. 237(e) at 2.) Mr. Barr issued a similar
24 directive on June 15, 2016. (Doc. 164 at 6; Tr. (1/19/16) at 14:10-15:8; Exh.
25 237(e) at 2.)

26 17. The Border Patrol continued using the Arbo Range and depositing bullets on the
27 Subject Property in violation of La Loma’s directions from May 26, 2010 until
28 June 29, 2010. On June 29, 2010, the Border Patrol ceased use of the Arbo Range

- 1 in response to the concerns of neighboring landowners, including La Loma. (Doc.
2 164 at 6; Tr. (1/19/16) at 98:21-99:5; Tr. (1/26/16) at 22:22-23:14; Exh. 982 at 2.)
- 3 18. Though the Border Patrol ceased use of the Arbo Range in 2010, as of the date of
4 trial, the United States had not removed bullets and bullet fragments from the
5 Subject Property, and it had not remediated contamination on the Subject
6 Property. (*See* Tr. (1/13/16) at 106:5-7; Tr. (1/26/16) at 102:19-103:6.)
- 7 19. The Subject Property can be remediated and returned to a developable state. (Tr.
8 (1/12/16) at 144:13-15; Tr. (1/13/16) at 112:6-8; Tr. (1/26/16) at 154:3-156:8.)
9 Remediation will likely cost over \$3.1 million. (Tr. (1/13/16) at 106:18-108:12.)¹⁰
- 10 20. The Border Patrol has developed a proposed cleanup for remediating
11 contamination on the Arbo Property; however, the cleanup effort is currently
12 underfunded and it is unclear when sufficient funding will be obtained. (Tr.
13 (1/26/16) at 98:11-102:18, 104:3-105:12, 120:17-121:4; *see generally* Exhs. 671,
14 800.)
- 15 21. The Border Patrol has taken the position that it is committed to remediating
16 contamination on the Subject Property. (Tr. (1/26/16) at 97:11-98:3, 102:19-
17 103:6.) However, assessment and remediation of the Subject Property has been
18 halted pending a determination of whether the property qualifies for remediation
19 under the Formerly Used Defense Sites (“FUDS”) program.¹¹ (Tr. (1/26/16) at
20 94:11-97:10.) To date, no remediation plan has been developed for the Subject
21 Property, and it is unclear when remediation will occur. (*See* Tr. (1/26/16) at
22 103:16-104:2.)
- 23 22. On November 3, 2010, La Loma filed an administrative claim for property damage

24
25 ¹⁰ Plaintiff presented an offer of proof regarding cleanup estimates made by
26 environmental consultant Brian Beck. (*See* Tr. (1/13/16) at 106:18-109:15.) The Court
27 finds that Mr. Beck’s testimony concerning the estimated cost of remediation of the
Subject Property is relevant and admissible with respect to the issue of whether damages
should be measured by lost value or the cost to cure.

28 ¹¹ FUDS assessment was triggered by concerns regarding the potential
existence of unexploded ordnance on the property stemming from a former military base
that was located in the vicinity. (*See* Tr. (1/26/16) at 94:11-97:10.)

1 and lost profits caused by contamination from the Arbo Range. (Doc. 164 at 6.)

2 This lawsuit followed.

3 **D. Value of Subject Property**

- 4 1. The highest and best use of the Subject Property is to hold as an investment for
5 eventual development into an industrial subdivision. (Tr. (1/27/16) at 188:11-
6 189:1.)¹²
- 7 2. The property is not developable in a contaminated state. (*See, e.g.*, Tr. (1/12/16) at
8 144:13-15; Tr. (1/13/16 at 112:6-8.)
- 9 3. All areas of Parcels 6 and 3A will need to be assessed for solid waste removal or
10 hazardous material remediation. (Tr. (1/13/16) at 111:18-25.) The approximately
11 25 acres of Parcel 6 proven to contain bullet fragments is the flattest, most easily
12 developed portion of that tax parcel. (Tr. (1/27/16) at 128:23-129:1.) Excising
13 that portion of the Subject Property from Mr. Garcia's development plan will
14 hinder the ease of development and the marketability of the Subject Property.
15 Furthermore, the uncertainty regarding the extent of the spread of contamination
16 will significantly hamper market interest in Parcel 3A; indeed, the pendency of
17 this litigation has hampered market interest in industrial lots on the
18 uncontaminated Northern Parcel. (*See, e.g.*, Tr. (1/22/16) at 81:10-84:7.) The
19 Court finds that contamination and potential contamination, combined with the
20 uncertainty regarding remediation, have destroyed the value of Parcels 6 and 3A.¹³
- 21 4. After a decline in the real estate market from approximately 2007 to 2011, there

22
23 ¹² The Court finds that the highest-and-best-use opinion of the United States'
24 expert real estate appraiser, Thomas Baker, is more credible and reliable than the opinion
25 of Plaintiff's expert real estate appraiser, Steven Cole. (*See* Tr. (1/27/16) at 189:23-
190:23.) Mr. Baker's opinion relies on a more thorough and accurate analysis of market
conditions, development costs, and usable acreage. (*Id.*)

26 ¹³ Thomas Baker opined that the diminution in value caused by contamination
27 of the Subject Property is only \$100,000 because the Border Patrol is committed to
28 voluntary remediation of the contamination. (Tr. (1/27/16) at 229:11-231:19.) The Court
finds that Mr. Baker's opinion does not sufficiently reflect the uncertainties regarding the
future remediation of the Subject Property. Based on the entirety of the evidence
presented at trial, the Court finds that there is no market demand for the Subject Property
so long as the issues regarding contamination and future remediation remain uncertain.

1 has been increased demand for smaller industrial lots in the Nogales area, but
2 demand remains weak for large parcels of vacant industrial land due to oversupply
3 in the market. (Tr. (1/27/16) at 176:4-177:22.)

4 5. Plaintiff opined that the value of the Subject Property in an uncontaminated state
5 is \$120,000 per acre. (Tr. (1/22/16) at 116:21-117:11.) The Court finds this
6 valuation opinion to be inflated and unsupported by the evidence; it appears to be
7 based on the unadjusted sale price of a smaller property purchased by a single
8 user. (*See* Doc. 236 at 9 n.11; Tr. (1/27/16) at 194:14-23.) Neither of the parties'
9 real estate appraisal experts felt it was appropriate to rely on the sale price of that
10 property without making adjustments. (*See* Exhs. 938, 970.)

11 6. Plaintiff's expert real estate appraiser, Steven Cole, opined that the value of the
12 Subject Property in an uncontaminated state is \$36,000 per acre. (Tr. (1/21/16 at
13 67:13-15; Tr. (1/22/16) at 25:15-17.) The Court finds that Mr. Cole's valuation
14 opinion suffers from a number of problems rendering the opinion unreliable. First,
15 the comparable sales used by Mr. Cole are not truly comparable; they are sales to
16 end users of smaller lots that, at the time of sale, were generally graded, connected
17 to utilities, and ready to be built upon. (*See* Tr. (1/21/16) at 137:6-11; Tr.
18 (1/22/16) at 15:25-16:3; Tr. (1/27/16) at 190:15-194:23.) Second, Mr. Cole failed
19 to analyze the supply of vacant industrial land in the Nogales region in
20 determining whether development of the Subject Property is currently
21 economically feasible. (*See* Tr. (1/21/16) at 112:2-5; Tr. (1/27/16) at 190:15-23.)
22 Third, Mr. Cole failed to adjust his comparable sales analysis to account for usable
23 acreage. (*See* Tr. (1/21/16) at 115:8-23; Tr. (1/27/16) at 198:3-16, 199:17-20.)
24 Finally, and most importantly, Mr. Cole applied an inappropriate "zonings and
25 entitlements" adjustment which significantly distorted his valuation opinion. (*See*
26 Tr. (1/22/16) at 23:25-25:17; Tr. (1/27/16) at 199:21-22, 203:17-204:21; Exh.
27 970.)

28 7. Defendant's expert real estate appraiser, Thomas Baker, opined that the Subject

1 Property is worth \$5,500 per acre in an uncontaminated state. (Tr. (1/27/16) at
2 224:22-225:2.) The Court finds this valuation opinion to be more accurate and
3 reliable than the opinions of Mr. Garcia and Mr. Cole.

- 4 8. If any conclusions of law below are found to constitute findings of fact, they are
5 incorporated by this reference.

6 CONCLUSIONS OF LAW

7 A. Background

- 8 1. This action was filed pursuant to the Federal Tort Claims Act (“FTCA”), 28
9 U.S.C. § 2671, *et seq.*¹⁴
- 10 2. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and
11 1346.¹⁵
- 12 3. Venue is proper in the District of Arizona pursuant to 28 U.S.C. §§ 1391 and
13 1402.
- 14 4. Under the FTCA, the United States is liable for injury or loss of property caused
15 by the negligent or wrongful acts or omissions of United States employees acting
16 within the scope of their employment, in the same manner and to the same extent
17 as a private individual under like circumstances, in accordance with the law of the
18 place where the acts or omissions occurred, except that the United States shall not
19 be liable for pre-judgment interest or punitive damages. 28 U.S.C. §§ 1346(b)(1),
20 2674.
- 21 5. Because the acts and omissions at issue occurred in Arizona, the Court applies

23 ¹⁴ In addition to the FTCA claim, Plaintiff originally brought claims arising
24 under the Comprehensive Environmental Response, Compensation and Liability Act
25 (“CERCLA”) and the Resource Conservation and Recovery Act (“RCRA”). The parties
26 stipulated to the dismissal of the RCRA claim on August 13, 2012. (Docs. 66, 67.) On
February 11, 2015, the Court granted summary judgment on the CERCLA claim. (Doc.
156.)

27 ¹⁵ “[T]imely compliance with the statute of limitations in 28 U.S.C. § 2401(b)
28 is jurisdictional.” *Rosales v. United States*, 824 F.2d 799, 802 (9th Cir. 1987). As set
forth below, the Court finds that the statute of limitations in 28 U.S.C. § 2401(b) does not
preclude Plaintiff’s claim.

1 Arizona law.¹⁶

2 **B. Standing**

- 3 1. Although the Subject Property was likely already contaminated when La Loma
4 purchased the Wilson Ranch in 2004, the Court finds that La Loma has standing to
5 pursue an action for damages caused by contamination, because the contamination
6 was discovered after La Loma's purchase, and the purchase price that La Loma
7 paid did not reflect the contamination. (*See* Doc. 156 at 6-11.)

8 **C. Negligence**

- 9 1. To establish a claim for negligence under Arizona law, a plaintiff must prove four
10 elements: "(1) a duty requiring the defendant to conform to a certain standard of
11 care; (2) a breach by the defendant of that standard; (3) a causal connection
12 between the defendant's conduct and the resulting injury; and (4) actual damages."
13 *Gipson v. Kasey*, 150 P.3d 228, 230 (Ariz. 2007).
- 14 2. In order to avoid intruding on the property interests of adjacent landowners, to
15 avoid causing bodily injury to persons and livestock present on adjacent
16 properties, and to conform to the standard of care that it agreed to in its lease
17 arrangement with Mr. Arbo, Defendant had a duty to design and operate the Arbo
18 Range in such a manner that bullets were contained within the range. Defendant
19 breached its duty by shooting rifles and other weapons that were inappropriate in
20 relation to the size of the range and the height of the range's berms, and by
21 shooting the weapons at angles that increased the likelihood of overshooting the
22 berms. Defendant's negligent design and operation of the Arbo Range resulted in
23 the entry of bullets onto the Subject Property and, ultimately, in contamination of
24 the Subject Property.
- 25 3. Although the entry of bullets onto the Subject Property resulted from the negligent
26 design and operation of the Arbo Range, Border Patrol knew to a substantial

27
28 ¹⁶ In the absence of contrary Arizona authority, Arizona courts follow the Restatement of the Law. *In re Krohn*, 52 P.3d 774, 779 (Ariz. 2002); *Lerner v. DMB Realty, LLC*, 322 P.3d 909, 916 n.7 (Ariz. App. 2014).

1 certainty that operation of the range would result in such entry. Accordingly, the
 2 entry—if unauthorized—would fall under the definition of intentional trespass.
 3 *See* Restatement (Second) of Torts § 158 cmt. i (an actor commits an intentional
 4 trespass if, in the absence of consent or another privilege, he does an act “with
 5 knowledge that it will to a substantial certainty result in the entry” of a thing on
 6 another’s land).¹⁷

7 **D. Implied Consent**

- 8 1. Under Arizona law, “[t]respass is any unauthorized physical presence on another’s
 9 property.” *Ranch 57 v. City of Yuma*, 731 P.2d 113, 116 (Ariz. App. 1986) (citing
 10 *State ex rel. Purcell v. Superior Ct.*, 535 P.2d 1299, 1301 (Ariz. 1975)).
- 11 2. Prior to 2010, based on La Loma’s failure to complain about the operation of the
 12 Arbo Range, the Border Patrol reasonably believed that it had implied consent for
 13 bullet fragments resulting from overshots and ricochets to land on the Subject
 14 Property, so long as Border Patrol agents did not shoot bullets onto the Subject
 15 Property when people were present on the property behind the range. *See*
 16 Restatement (Second) of Torts § 892(1) (“Consent is willingness in fact for
 17 conduct to occur. It may be manifested by action or inaction and need not be
 18 communicated to the actor.”); *id.* § 892 cmt. b (consent need not be “manifested
 19 by words or by affirmative action. It may equally be manifested by silence or
 20 inaction, if the circumstances or other evidence indicate that the silence or inaction
 21 is intended to give consent”); *id.* § 167 (rules set forth at Restatement (Second) of
 22 Torts §§ 892-892D as to the effect of consent apply to entry or remaining on land).
- 23 3. La Loma’s implied consent to the entry of bullets was induced by a substantial
 24 mistake concerning the extent of harm to be expected from the entry. *See*
 25 Restatement (Second) of Torts § 892B(2). La Loma knew that the entry of bullets

26
 27 ¹⁷ La Loma characterized its FTCA claim as one for negligent trespass,
 28 presumably in an attempt to avoid a statute-of-limitations defense. As discussed below,
 the statute-of-limitations analysis does not hinge on whether the claim is characterized as
 one for intentional or negligent trespass.

1 caused certain harms, such as the cutting of fences and trees. But La Loma did not
2 know that the entry of bullets could cause contamination of the Subject Property.
3 In contrast, the Border Patrol knew that shooting ranges pose contamination
4 concerns, which in turn pose human health risks. Indeed, the Border Patrol has a
5 department, run by Paul Enriquez, that is dedicated to environmental compliance
6 and remediation of Border Patrol facilities, including shooting ranges. The Border
7 Patrol also understood—based on Mr. Garcia’s instructions not to shoot on the
8 Arbo Range when people were located on the Subject Property behind the range—
9 that La Loma was concerned about safety risks associated with bullets from the
10 range. The Border Patrol represented that it would maintain the Arbo Range in a
11 safe condition. Based on the Border Patrol’s knowledge of the contamination
12 concerns associated with shooting ranges, and its understanding of La Loma’s
13 concerns regarding safety risks, the Court finds that the Border Patrol had
14 sufficient knowledge to understand that La Loma’s consent to the entry of bullets
15 was induced by La Loma’s erroneous belief that the Border Patrol would maintain
16 the range in a safe condition and by La Loma’s lack of knowledge that bullets
17 could cause contamination resulting in human health risks.

- 18 4. La Loma’s implied consent is effective to preclude liability for *expected* harm
19 caused by the entry of bullets, such as bullet impacts to trees and fences. *See*
20 Restatement (Second) of Torts § 892(2) (“If words or conduct are reasonably
21 understood by another to be intended as consent, they constitute apparent consent
22 and are as effective as consent in fact.”). However, because La Loma’s implied
23 consent was induced by a substantial mistake concerning the extent of expected
24 harm, it does not preclude an action for damages associated with the *unexpected*
25 harm of contamination. *See id.* § 892B(2) (“If the person consenting to the
26 conduct of another is induced to consent by a substantial mistake concerning . . .
27 the extent of the harm to be expected from it and the mistake is known to the other
28 or is induced by the other’s misrepresentation, the consent is not effective for the

1 unexpected . . . harm.”).¹⁸

2 **E. Statute of Limitations**¹⁹

3 1. Under the FTCA, “[a] tort claim against the United States shall be forever barred
4 unless it is presented in writing to the appropriate Federal agency within two years
5 after such claim accrues....” 28 U.S.C. § 2401(b). “An FTCA claim accrues
6 when the plaintiff discovers, or in the exercise of reasonable diligence should have
7 discovered, the injury and its cause.” *Bartleson v. United States*, 96 F.3d 1270,
8 1277 (9th Cir. 1996) (internal quotation omitted). “While the limitations period
9 begins to run even if the claimant does not know the full extent of the injuries, the
10 claimant must have sufficient knowledge to know that an injury has occurred.”
11 *Loughlin v. United States*, 230 F. Supp. 2d 26, 40 (D.D.C. 2002) (internal citation
12 omitted).

13
14 ¹⁸ La Loma’s implied consent was restricted: Mr. Garcia instructed the Border
15 Patrol not to shoot when people were present on the Subject Property behind the Arbo
16 Range. “Conditional consent or consent restricted as to time, area or in other respects is
17 effective only within the limits of the condition or restriction.” Restatement (Second) of
18 Torts § 892A(3). La Loma’s implied consent was thus not effective with respect to harm
19 caused by the Border Patrol violating Mr. Garcia’s instructions by shooting bullets onto
20 the Subject Property when people were located on the Subject Property behind the Arbo
21 Range. However, La Loma failed to prove any instances within the statute-of-limitations
22 period in which the Border Patrol exceeded the limits of La Loma’s consent in such a
23 manner, and La Loma further failed to prove any damages specific to such instances.

24 ¹⁹ In the Court’s Order on Defendant’s Motion for Summary Judgment, the
25 Court noted that a purely harmless intrusion resulting from negligence does not create
26 liability for trespass and that, accordingly, a cause of action for negligent trespass accrued
27 when La Loma discovered that the entry of bullets on the Subject Property had caused
28 contamination. (Doc. 156 at 13-14.) However, the evidence presented at trial establishes
that the entry of bullets on the Subject Property cannot be characterized as harmless, even
if the bullets had not caused contamination. The evidence shows that bullets and bullet
fragments from the Arbo Range damaged the Subject Property by cutting holes in fences,
trees, and other vegetation. The evidence also shows that it was not safe for Mr. Garcia
and his leasees and invitees, such as Mr. De La Ossa, to stand on the Subject Property
behind the Arbo Range when the range was active. The entry of bullets and bullet
fragments harmed the land, as well as Mr. Garcia’s interest in his own bodily security and
in the bodily security of his leasees and invitees. *See* Restatement (Second) of Torts §
165 cmt. c (harm giving rise to liability for negligent trespass includes “impairment of the
physical condition of the land” as well as invasion of the possessor’s interest in bodily
security). La Loma learned of the entry of bullets at approximately the same time that it
learned that the entry of bullets was causing harm to fences, vegetation, and interests in
bodily security. Accordingly, even if La Loma’s claim could properly be characterized
as one for negligent rather than intentional trespass, the statute-of-limitations analysis is
the same.

- 1 2. An action for damages related to contamination is not precluded by the statute of
2 limitations, because La Loma filed an administrative claim within two years of
3 discovering the unexpected harm of contamination. Prior to the Phase I and II
4 Assessments performed by Allwyn Environmental, La Loma did not have
5 sufficient knowledge to know that La Loma's implied consent to the entry of
6 bullets on the Subject Property had been induced by a substantial mistake
7 concerning the extent of expected harm. Neither the doctrine of implied consent
8 nor the statute of limitations precludes liability for damages specific to the
9 unexpected harm of contamination.
- 10 3. After learning the true extent of harm, La Loma withdrew consent on May 26,
11 2010. Despite the withdrawal of consent, Border Patrol continued shooting bullets
12 on the Subject Property for approximately one month, until June 29, 2010.
13 Neither the doctrine of implied consent nor the statute of limitations precludes La
14 Loma from maintaining a cause of action for trespass occurring between May 26
15 and June 29, 2010. However, La Loma failed to prove damages specific to the
16 trespass of bullets during this approximately one-month period.
- 17 4. Since La Loma's withdrawal of consent, it has been clear that La Loma does not
18 consent to bullets and contamination remaining on the Subject Property.
19 Nevertheless, the United States has failed to remove bullets from the Subject
20 Property and has failed to remediate contamination. Bullets remain on the Subject
21 Property and continue to degrade, further contaminating the land. The United
22 States' failure to remove the bullets constitutes a continuing trespass. *See*
23 *Ellermann v. Snyder*, No. 1 CA-CV 12-0002, 2013 WL 636728, at *4 (Ariz. App.
24 Feb. 21, 2013) (holding that the defendant's failure to remove dirt that he placed
25 on the plaintiff's property constituted a continuing trespass); *Augusta Ranch Ltd.*
26 *P'ship v. City of Mesa*, No. 1 CA-CV 08-0162, 2009 WL 1482219, at *2 (Ariz.
27 App. May 26, 2009) ("when a trespasser erects a structure or places something on
28 or underneath another's land, the trespasser's actions constitute a trespass until the

1 harmful condition is removed”); Restatement (Second) of Torts § 158(c) (“One is
2 subject to liability to another for trespass . . . if he intentionally . . . fails to remove
3 from the land a thing which he is under a duty to remove.”); Restatement (Second)
4 of Torts § 160(a) (trespass may be committed by the continued presence on the
5 land of a thing which the actor has placed on the land with the consent of the
6 person then in possession of the land, if the actor fails to remove the thing after
7 consent has been effectively terminated); *see also Hoery v. United States*, 64 P.3d
8 214, 222 (Colo. 2003) (holding that the defendant’s failure to remove pollution
9 wrongfully placed on the plaintiff’s property constituted a continuing trespass);
10 *Cal. Dep’t of Toxic Substances Control v. Payless Cleaners*, 368 F. Supp. 2d
11 1069, 1082 (E.D. Cal. 2005) (denying motion to dismiss because allegation that
12 defendant failed to remove contaminants from plaintiff’s land supported claim for
13 continuing trespass).

- 14 5. The statute of limitations does not bar a claim for continuing trespass resulting
15 from the United States’ failure to remove bullets and remediate contamination.
16 *See Ellermann*, 2013 WL 636728, at *4 (holding that continuing trespass claim
17 was not barred by the applicable two-year statute of limitations even though the
18 plaintiff had actual knowledge of the trespass more than two years prior to filing
19 suit); *Augusta Ranch*, 2009 WL 1482219, at *3 (“each day a trespass continues, a
20 new cause of action arises”); *see also Hoery*, 64 P.3d at 223 (“a tortfeasor’s
21 liability for continuing trespass . . . creates a new cause of action each day the
22 property invasion continues”); *Champion Labs., Inc. v. Metex Corp.*, No. Civ. 02-
23 5284(WHW), 2005 WL 1606921, at *4-5 (D.N.J. July 8, 2005) (contamination of
24 the plaintiff’s property constituted a continuing tort not barred by the statute of
25 limitations).

26 **F. Damages**

- 27 1. Because La Loma’s implied consent to the entry of bullets was induced by a
28 substantial mistake concerning the extent of expected harm, Defendant is liable for

1 the unexpected harm of contamination, which has destroyed the value of the
2 Subject Property.

- 3 2. Though the contamination of the Subject Property can be remediated, the cost of
4 remediation significantly exceeds the value of the property. Further, the United
5 States has taken the position throughout this litigation that it will voluntarily
6 remediate the Subject Property in a manner compliant with the Comprehensive
7 Environmental Response, Compensation and Liability Act (“CERCLA”).
8 Accordingly, the Court finds that lost value, rather than the cost of restoration, is
9 the appropriate measure of damages. *See Blanton & Co. v. Transamerica Title*
10 *Ins. Co.*, 536 P.2d 1077, 1080 (Ariz. App. 1975) (the measure of damages for
11 injury to land is the difference in the market value of the land immediately before
12 and after the injury, or the cost of restoration if the land can be restored to its
13 original condition and the cost of restoration does not exceed the diminution in
14 market value of the land).²⁰
- 15 3. At a value of \$5,500 per acre for the 98.61-acre Subject Property, Defendant is
16 liable to Plaintiff in the amount of \$542,355.
- 17 4. The contamination interferes with La Loma’s development plan for the Southern
18 Parcel. However, the Court declines to award consequential damages related to
19 the cost of obtaining the development plan, because the plan would need to be
20 revised even in the absence of any contamination issues, due to the plan’s
21 erroneous inclusion of Parcel 2B.²¹

22
23 ²⁰ Where a trespass is continuing, the plaintiff may recover damages sustained
24 within the statutory period prior to the commencement of the action. *Ellermann*, 2013
25 WL 636728, at *4; *see also* Dan B. Dobbs, Paul T. Hayden, & Ellen M. Bublick, *The*
26 *Law of Torts* § 57 (2d ed.) (if a trespass is continuing, the “plaintiff may sue for all harms
27 that have occurred to the time of suit or trial, but may not sue for future harms that would
28 be incurred only if the trespass continues”). La Loma did not establish damages specific
to the entry or continued presence of bullets on the Subject Property during the statutory
period. However, La Loma is entitled to damages resulting from the unexpected harm of
contamination, which has destroyed the value of the Subject Property; accordingly, even
though a portion of the United States’ conduct constitutes a continuing trespass, the Court
finds lost-value damages to be appropriate under the unique circumstances of this case.

²¹ Furthermore, the cost of obtaining the development agreement is not clear

1 5. At all relevant times, the Subject Property has been leased out for cattle grazing.
2 The contamination issues have not interfered with that lease arrangement. La
3 Loma failed to prove that, in the absence of any contamination issues, it would
4 have developed the Subject Property by the time of trial. The Northern Parcel is
5 more readily developable than the Southern Parcel and likely would have been
6 developed first, notwithstanding the contamination. Development of the Northern
7 Parcel has not yet been completed and no lots have been sold or leased.
8 Accordingly, La Loma failed to prove non-speculative lost-use or lost-profit
9 damages.

10 6. On February 11, 2015, this Court granted Defendant's Motion for Summary
11 Judgment with respect to La Loma's claim for a declaratory judgment allocating
12 future response costs pursuant to CERCLA § 113(g)(2), 42 U.S.C. § 9613(g)(2),
13 because La Loma had failed to establish a claim for remuneration of past response
14 costs under CERCLA § 107(a)(4), 42 U.S.C. § 9607(a)(4). As explained in the
15 Court's Order (Doc. 156), declaratory relief under § 113(g)(2) "is available only if
16 liability for past costs has been established under section 107." *City of Colton v.*
17 *Am. Promotional Events, Inc.*, 614 F.3d 998, 1008 (9th Cir. 2010). Though La
18 Loma did not request summary judgment with respect to Defendant's
19 Counterclaim for allocation of response costs under CERCLA § 113(g)(2), the
20 substance of the Court's ruling on Defendant's Motion for Summary Judgment

21
22 based on the evidence presented at trial. Mr. Cole attributed \$418,216, or \$1,178 per
23 acre, to development agreement costs. (Tr. (1/22/16) at 16:23-17:9.) However, Exhibit
24 1023 indicates that development agreement costs were only \$33,178, or \$93 per acre, and
25 that the higher figure used by Mr. Cole includes appraisal, title report, due diligence,
26 closing, taxes, insurance, permitting, administrative, and other costs. (Tr. (1/22/16) at
27 20:3-21:7; Exh. 1023 at 7.) Mr. Garcia testified that the expense of re-doing his drawings
28 and engineering studies would be approximately \$278,000, but he was uncertain as to the
accuracy of that figure. (See Tr. (1/22/16) at 118:24-119:11.) Even if there were clear
evidence of the total expenses that La Loma incurred to obtain the City of Nogales's
approval of its development plan and engineering plans, it is unclear which portion of the
overall expenses should properly be attributed to the Subject Property; it appears the
majority of expenses thus far incurred are associated with development of the Northern
Parcel of the Wilson Ranch. For example, it appears that La Loma has provided the City
of Nogales with engineered grading, utility, and sewer plans for the Northern Parcel, but
not for the Southern Parcel. (See Tr. (1/22/16) at 154:6-156:16.)

1 resolved that Counterclaim, as declaratory relief under § 113(g)(2) is not available
2 in the absence of a valid claim under § 107. Accordingly, the Counterclaim will
3 be dismissed.

- 4 7. If any findings of fact above are found to constitute conclusions of law, they are
5 incorporated by this reference.

6 **DISPOSITION**

7 **IT IS ORDERED:**

- 8 1. Defendant's Motion for Judgment on Partial Findings (Doc. 225) is
9 **granted in part and denied in part.** The Motion is granted to the
10 extent that the Court finds that La Loma failed to prove damages
11 with respect to tax parcel 113-46-002B. The Motion is denied in all
12 other respects.
- 13 2. Defendant's Counterclaim for a declaratory judgment allocating
14 response costs under 42 U.S.C. § 9613 (Doc. 90 at 16-18) is
15 **dismissed.**
- 16 3. The Clerk of Court shall enter judgment against Defendant and in
17 favor of Plaintiff in the amount of \$542,355, and close this case.

18 Dated this 26th day of July, 2016.

19
20
21 
22 _____
23 Honorable Rosemary Marquez
24 United States District Judge
25
26
27
28