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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

PAUL GRONDAL, *et al.*, Plaintiffs, vs. UNITED STATES OF AMERICA, *et al.*; Defendants.	NO. 2:09-CV-00018-RMP PLAINTIFFS' REPLY IN SUPPORT OF MOTION TO STAY EXECUTION

I. INTRODUCTION

Plaintiffs (or "Mill Bay") made significant investments to purchase camping club memberships entitling them to use and occupy MA-8 through 2034. Many of those members are now elderly and/or with families and some use the RV Park as their permanent residence every summer. They made expensive improvements to the property with the expectation of using these through 2034. Meanwhile, a global pandemic looms with no sign of letting up within the next six to twelve months. Yet, the Government and Tribe take the position that their offer to permit Plaintiffs to remain on the property an extra few weeks mitigates all harm that would result from the lack of issuance of a stay. Indeed, an offer that initially seemed compassionate in the midst of COVID now seems designed solely to avoid issuance of a stay. Nevertheless, the offer does not and cannot eliminate the inevitable irreparable harm Plaintiffs will suffer in the absence of a stay. *Several weeks is simply no substitute for 14 years*. And because Mill Bay's right to occupy MA-8 has always been finite (i.e., even best case scenario, they have only until February 2, 2034), if the Government ejects Mill Bay *now (Sept. 30)*, it will render success on appeal a limited and potentially hollow victory as Plaintiffs will have forever lost time on the property. Mill Bay therefore seeks a stay preserving the pre-judicial relief status quo pending appeal.

II. ARGUMENT

In evaluating discretionary stays, courts consider: "'(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the

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applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.'" *Lair v. Bullock*, 697 F.3d 1200, 1203 (9th Cir. 2012). Mill Bay satisfies each.

A. Factor One: Mill Bay Has Shown Serious Questions on the Merits and a Fair Chance of Success.

The Government and Tribe overstate Mill Bay's burden under the serious questions standard. The Ninth Circuit has affirmed that serious questions on the merits can satisfy the first element for a discretionary stay in complex cases. *See Fed. Trade Comm'n v. Qualcomm Inc.*, 935 F.3d 752, 756 (9th Cir. 2019) ("We are satisfied that Qualcomm has shown, at minimum, the presence of serious questions on the merits of the district court's determination[.]"). Under that standard, a district court may issue a stay even if it cannot determine that the moving party is more likely than not to prevail on the merits. *See All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1133, (9th Cir. 2011) (explaining standard in preliminary injunction context); *Leiva-Perez v. Holder*, 640 F.3d 962, 967 (9th Cir. 2011) ("We find additional evidence that this stay factor does not require the moving party to show that her ultimate success is probable from other post-*Nken* opinions."). Instead, the moving party must show a "fair chance of success on the merits." *Gilder v. PGA Tour, Inc.*, 936 F.2d 417, 422 (9th Cir. 1991) (internal quotation marks omitted). So while the Government and Tribe are correct that Mill Bay cannot obtain a stay if it has no chance of success, the Court need not find Mill Bay more likely than not to prevail.

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The Government and Tribe also suggest Mill Bay should have gone through the hollow exercise of re-hashing the same points that just failed to persuade this Court, or raised new arguments not yet advanced. By that logic, a district court could never stay execution of its judgment unless already inclined to entertain a motion for reconsideration.

Even were that the standard *(it is not)*, Mill Bay maintains it has a strong chance on the merits of prevailing on at least one of three issues on appeal. **One**, that MA-8 fell out of trust status, so the Government lacks standing to eject. **Two**, even if MA-8 remains trust land, the United States' immunity from equitable defenses when it purports to act as trustee—as in *United States v. City of Tacoma, Wash.*, 332 F.3d 574, 581 (9th Cir. 2003)—does not extend beyond enforcing restraints on alienation or to disputes over limited periods of occupancy. This is especially true given (1) the dissent's citation from *United States v. Washington*, 864 F.3d 1017, 1024 (9th Cir. 2017) to *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197, 125 S. Ct. 1478, 161 L.Ed.2d 386 (2005); and (2) the Second Circuit's application of *Sherrill*. *See, e.g.*, *Cayuga Indian Nation of N.Y. v. Pataki*, 413 F.3d 266, 279 (2d Cir. 2005). **Three**, *Wapato Heritage, L.L.C. v. United States*, 637 F.3d 1033 (9th Cir. 2011) decided Wapato Heritage did not properly renew the Master Lease, but did not resolve Plaintiffs' property interest in MA-8, if any. *See* ECF 144 at 21–23; ECF 227 at 3; ECF 329 at 20. As a result, the Court should have considered whether an equitable grace period or other doctrine remedied Wapato Heritage's failure to properly renew the Master Lease. *E.g.*, *Pardee v. Jolly*, 182 P.3d 967, 976 (Wash. 2008).

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The complexity and novelty of these questions combined with conflicting views on the law by reasonable judicial minds signals at least some chance of success on the merits.

B. Factor Two: Mill Bay Did Not "Manufacture" or "Self-Inflict" Irreparable Harm.

The Government's offer of a several-week grace period on the ejectment order—agreeing (due to COVID) to permit Plaintiffs' presence through September 30—does not eliminate the irreparable harm Mill Bay will suffer absent a stay. Mill Bay's expectation was *nearly 14 more years, not several more weeks*. Mill Bay's time to use and enjoy MA-8 is finite; if Mill Bay's appeal succeeds, they cannot occupy MA-8 after 2034. If Mill Bay is ejected now but prevails on appeal, the time they lost awaiting success on appeal is irreplaceable. The Government's claim that monetary injuries do not constitute irreparable harm fails to take into account that the monetary losses here are non-recoverable due to sovereign immunity. *Idaho v. Coeur d'Alene Tribe*, 794 F.3d 1039, 1046 (9th Cir. 2015) (finding purely economic harms constituted irreparable harm because plaintiff would be barred from recovering monetary damages from the defendant tribe due to tribal sovereign immunity). The Government's removal of Mill Bay's improvements to MA-8 will thus cause Mill Bay monetary harm that a successful appeal will not redress.

Like pouring salt on a fresh wound, the Government argues Mill Bay's harm is "manufactured" and "self-inflicted." Apparently, the members who poured their hard-earned money into memberships and improvements well-before this litigation began in

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2009 could see into the future and did so to delay the Government from evicting them in an un-filed lawsuit decades in the future. Apparently, by driving RVs into the park to use during the summer—which the Government also contends is the only time of year anyone uses the park—Mill Bay *actually* was planning to frustrate the Government from evicting them. Apparently, since Mill Bay should have already known they would lose since 2009, their decision to return to the park this year was calculated to support this exact Motion. And apparently, Mill Bay knew in April that the COVID-19 pandemic would continue to deteriorate over four months later. Although the Government has the benefit of hindsight in making these arguments, the members facing ejectment did not.

And contrary to the Government's assertions several of Mill Bay's caretakers, like Daniel Rice, use the RV Park as a permanent residence. ECF 509 at 32–33, Ex. E. It is irrelevant that Mill Bay's regulations drafted 25 years ago do generally prohibit this, as these have not been followed in practice. While Mr. Rice and other caretakers do not spend the entire winter at the park, they use and view the park as their permanent residence, leaving only during the coldest months of the year. They are losing these residences.

The Government is also wrong that "Mill Bay members will simply have to drive their RV's off of MA-8." ECF 523 at 3. Multiple member declarations in the record detail the costly permanent improvements made by the members on MA-8 with the expectation of staying another 14 years. Many simply cannot be removed. Absent a stay, these will all be lost. Others will require costly dismantlement. In the event of success on appeal,

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further cost will be incurred to put everything back—to the extent it could be dismantled and then put back. And while the Government argues the Master Lease requires improvements be left in place, that should not have occurred until 2034, not in 2020.

In short, without a stay, Mill Bay will suffer several irreparable harms that even success on appeal will not address.

C. Factor Three: A Carefully-Crafted Stay Will Eliminate Harm to the Tribe.

Besides a single sentence about returning MA-8 to the allottees (ECF 523 at 5), the Government seems more concerned with retrospectively disproving Mill Bay's injury than addressing the other parties' situation. Meanwhile, the Tribe expresses a variety of cultural concerns (ECF 520 at 9–10). Mill Bay is troubled by these statements and notes this is the first time in 20-plus years that the Tribe has ever raised these concerns. Moreover, this Court specifically reaffirmed that MA-8 is not part of the Colville Reservation since only the residents of the Columbia Reservation who did not want to receive allotments under the Moses Agreement went to the Colville Reservation, and those who did receive allotments chose not to live among the Colville Tribes. ECF 503 at 29–31. And it is unclear from Chairman Cawston's declaration how the RV Park's presence prevents surveying or other planning for future uses, given that land surveying and planning efforts usually account for existing improvements by necessity. While disputing that it has impaired such rights of the Tribe, Mill Bay also acknowledges it has no intent to do so; it is simply seeking a stay pending appeal to preserve the pre-judicial-relief status quo pending the Ninth

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Circuit's determination of the correctness of that relief. *See Finder v. Leprino Foods Co.*, 113CV02059AWIBAM, 2017 WL 1355104, at *2 (E.D. Cal. Jan. 20, 2017) (citing *Nken v. Holder*, 556 U.S. 418, 434, 129 S. Ct. 1749, 1761, 173 L. Ed. 2d 550 (2009)).

That said, a carefully-crafted stay order can no doubt remedy both parties' concerns. During the pendency of any stay, Mill Bay has no objection to the Tribe and its members entering the disputed land as needed to reconnect with the land, conduct studies needed to plan for future development, to access critical cultural areas, and other cultural purposes. If the Court is inclined to issue a stay, Mill Bay is willing to work with the Tribe's counsel to craft appropriate language to this end.

However, and contrary to the Tribe, Mill Bay disagrees that an appeal will last for years. The Ninth Circuit authorizes expedited appeals, which Mill Bay anticipates the Government and Tribe will seek. 9th Circuit Rule 27-12; *see also Papakosmas v. Papakosmas*, 483 F.3d 617, 621, n.2 (9th Cir. 2007). Mill Bay's requested stay will simply maintain the pre-judicial relief status quo during what will likely be an expedited appeal period. *See Fed. Trade Comm'n v. Qualcomm Inc.*, 935 F.3d 752, 757 (9th Cir. 2019) ("This stay has the effect of maintaining the status quo ante during this expedited appeal.").

Finally, neither the Tribe nor Government address the impact of the requested stay on the other interested parties, like Wapato Heritage and the individual allottees, many of whom rely on the income generated by MA-8. Wapato Heritage has repeatedly stressed its concern that the Government has no plan or intent to replace Mill Bay's rental income.

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Mill Bay requests that the Court consider these concerns in ruling on this motion.

D. Factor Four: The Government's Litigation Posture is Not Coextensive with Public Interest.

"In assessing [the public] interest, [the Court is] not bound by the government's litigation posture. Rather, [the Court] make[s] an independent judgment as to the public interest." *Lopez v. Heckler*, 713 F.2d 1432, 1437 (9th Cir. 1983). As explained in Mill Bay's motion, Washington State has articulated an interest in preventing evictions during the COVID-19 crisis, which Governor Inslee recently extended through October 15, 2020.[1] The public also has a strong interest in keeping the Government accountable for its actions and the reliance interests that result from those actions:

> Justice Holmes famously wrote that "[m]en must turn square corners when they deal with the Government." *Rock Island, A. & L. R. Co. v. United States*, 254 U.S. 141, 143, 41 S.Ct. 55, 65 L.Ed. 188 (1920). But it is also true, particularly when so much is at stake, that "the Government should turn square corners in dealing with the people." *St. Regis Paper Co. v. United States*, 368 U.S. 208, 229, 82 S.Ct. 289, 7 L.Ed.2d 240 (1961) (Black, J., dissenting).

Dep't of Homeland Sec. v. Regents of the Univ. of California, 140 S. Ct. 1891, 1909 (2020);

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[1] That proclamation is available here: https://www.governor.wa.gov/sites/default/files/proclamations/20-19.3%20Coronavirus%20Evictions%20%28tmp%29.pdf?utm_medium=email&utm_source=govdelivery (last accessed August 2, 2020).

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see also United States v. City of Tacoma, Wash., 332 F.3d 574, 587 (9th Cir. 2003) (Ferguson, J., dissenting) ("Nevertheless, the majority's form over substance approach shifts the burden of the United States' failure to act as a diligent trustee onto a state municipality that did everything in its power to ensure that the United States had an opportunity to validate the land transfer that underlies the instant case."). Both of those public interests are at issue, and favor a stay.

In a few sentences lacking citation to the record, the Government purports to rewrite the history behind the 2004 Settlement Agreement and Wapato Heritage's attempted renewal of the Master Lease. ECF 523 at 5. The Government turns a blind eye to the BIA's testimony under oath in this action that its representatives were present at the 2004 mediation on behalf of the allottees, received notice of the 2004 Settlement Agreement, gave notice of the same to the allottees, failed to object, knew of the underlying litigation at all relevant stages, and Michael Arch repeatedly asked it to intervene. *Compare* ECF 294 at 43–70 *with* ECF 307 at 43–71. The Government also ignores the dispute on whether Exhibit A to the Master Lease (which purportedly contained the names of the individual landowners) even existed. ECF 503 at 5, n.2.

E. The Equities Tip Sharply in Mill Bay's Favor.

Mill Bay acknowledges that to obtain a discretionary stay under the serious questions standard, it must show that the balance of hardships tips sharply in their favor. *Leiva-Perez v. Holder*, 640 F.3d 962, 970 (9th Cir. 2011). On the one hand, absent a stay, Mill Bay will

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suffer non-redressable harms even if it prevails on appeal. Mill Bay will forever lose finite time to enjoy MA-8, and its investment in improvements to the park. An appropriate bond will prevent harm to Wapato Heritage and the individual allottees concerned with enjoying monetary benefits from their interest in MA-8. On the other hand, any harm to the Tribe from maintaining the pre-judicial relief status quo during the stay period will ultimately be redressed either (1) at the end of an unsuccessful appeal or (2) in 2034 in the event of a successful appeal. And a well-crafted stay order can mitigate or eliminate these harms during the appeal period.

III. CONCLUSION

For all these reasons, Plaintiffs respectfully request a stay of execution pending appeal, with such modifications as are necessary to address the Tribe's concerns.

DATED this 3rd day of August, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of August, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System. Notice of this filing will be sent to the parties listed below by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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