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5 UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

6 PAUL GRONDAL, a Washington ) Case No. 2:09-CV-00018-RMP  
7 Resident; and THE MILL BAY )  
MEMBERS ASSOCIATION, INC., a )  
8 Washington Non-Profit Corporation, )  
9 *Plaintiffs,* )

10 vs. )

11 THE UNITED STATES OF )  
AMERICA, *et al.*, )

12 *Defendants.* )  
13

CONFEDERATED TRIBES OF  
THE COLVILLE RESERVATION’S  
SURRESPONSE TO PLAINTIFFS’  
MOTION TO STAY

14 **I. INTRODUCTION**

15 Mill Bay Members Association seeks to delay ejection of their  
16 recreational vehicles from Moses Allotment-8 (MA-8) via their Motion for Stay of  
17 Execution of Judgment, ECF No. 508, currently pending before the Court. Mill  
18 Bay’s proffered concerns about hypothetical, prospective irreparable harm to the  
19 land improvements are speculative, unwarranted and unlikely to give rise to viable  
20 claims.

1 Mill Bay fails to meet its burden to show probable irreparable harm for the  
2 following reasons. (1) There are currently no firm land development plans for  
3 MA-8. (2) Any such development may well call for preserving the existing  
4 permanent infrastructure improvements. (3) Even if MA-8 were developed in a  
5 manner that affected existing infrastructure, it is quite possible that appeal  
6 proceedings will conclude before development commenced. And (4) even in the  
7 unlikely events of Mill Bay’s success on appeal and the removal of infrastructure  
8 improvements resulting in a cognizable claim for economic loss, the proper party  
9 against whom such a claim should be brought would be Wapato Heritage – not the  
10 Tribe.

11 The hypothetical, prospective economic losses alleged by Mill Bay are  
12 limited and minor, especially when compared to the spiritual, cultural and  
13 economic losses that MA-8 allottees have suffered for the last 11 years while Mill  
14 Bay has unlawfully occupied the property. *See* ECF No. 520 at 9-10. As  
15 previously noted by this Court, further delay of the allottees’ use and enjoyment of  
16 the property would only prolong that injustice. ECF No. 411 at 9.

## 17 II. ARGUMENT

### 18 A. Mill Bay Bears the Burden to Prove Probable Irreparable Harm.

19 “[W]hether the applicant will be irreparably injured absent a stay,’ requires  
20 more than ‘some possibility of irreparable injury.’” *Lair, v. Bullock*, 697 F.3d

1 1200, 1214 (9th Cir. 2012) (quoting *Nken v. Holder*, 556 U.S. 418, 434-35  
2 (2009)). The Ninth Circuit requires the applicant to show “there is a *probability*  
3 of irreparable injury if the stay is not granted.” *Id.* (citing *Leiva-Perez v. Holder*,  
4 640 F.3d 962, 968 (9th Cir. 2011)) (emphasis in original). Mill Bay bears the  
5 burden of demonstrating that “the circumstances justify an exercise of this Court’s  
6 discretion.” *Id.* at 1203 (quoting *Nken*, 556 U.S. at 433-34). As explained *infra*,  
7 Mill Bay has failed to carry that burden: it has not demonstrated that the  
8 hypothetical, prospective harm it alleges is probable or irreparable.

9 **B. The Alleged Economic Loss Is Too Speculative to Establish a**  
10 **Probability of Irreparable Harm.**

11 *1. Mill Bay Fails to Establish That the Permanent Improvements Have*  
12 *Value or Belong to Mill Bay.*

13 The only permanent improvements that Mill Bay claims as potential  
14 economic losses are infrastructure-related: two driveways,<sup>1</sup> electrical and water  
15 systems, fiber optics,<sup>2</sup> and a dock.<sup>3</sup> But whether there would be an actual  
16 economic loss if Mill Bay prevailed on appeal and the improvements were  
17 damaged is questionable because Mill Bay has benefitted from these

18 <sup>1</sup> ECF No. 93 at 3; ECF No. 95 at 3

19 <sup>2</sup> ECF No. 508 at 4; ECF No. 509 at 10.

20 <sup>3</sup> ECF No. 89 at 13.

1 improvements for many years and they may be damaged, in disrepair, or at the  
2 end of their useful life.

3       Additionally, the Master Lease provides that any permanent improvements  
4 belong to the lessor, not the lessee or sublessee:

5       All buildings and improvements, including removable personal  
6 property and trade fixtures, on the leased land shall remain on said  
7 property at the termination of this lease as the property of Lessor.

8 ECF No. 73-3. at 8. Likewise, at the conclusion of the Lease, the lessee is  
9 required to deliver the premises, *including any improvements*, to lessor. *Id.* at 24  
10 (stating “at the termination of this lease, by normal expiration or otherwise, Lessee  
11 will peaceably and without legal process deliver up the possession of the premises  
12 ... and buildings and improvements”). Thus, Mill Bay is not entitled to be  
13 compensated for any permanent improvements it made to the land.

14       2. *Whether and When the Property Will Be Developed Is Unknown, and  
15 Development May Preserve the Permanent Improvements.*

16       Currently, the Colville Tribe, as the controlling owner of MA-8, has no  
17 plans to develop the property. However, even if MA-8 were to be developed,  
18 dismantling the infrastructure may be counterproductive to utilizing the property.  
19 Indeed, the most parsimonious and immediately available use of MA-8 by the  
20 allottees would be the same as its current use – an RV park – for which the  
21 existing infrastructure is suited. Moreover, before any substantial development of

1 the property could commence, considerable planning would occur. For example,  
2 there would be cultural surveys, which are difficult if not impossible to conduct  
3 while Mill Bay occupies MA-8. ECF No. 522 ¶¶ 7-9, 11. Thus, it is possible that  
4 the appeal would be resolved before any development activities that could damage  
5 the permanent improvements, especially if the appeal is expedited. Indeed, the  
6 Colville Tribe would likely not oppose an effort by Mill Bay for expedited  
7 appellate review.

8 **C. In the Unlikely Event That Mill Bay Accrues a Claim for Loss to**  
9 **Permanent Improvements, the Tribe's Sovereign Immunity Would Not**  
10 **Bar Mill Bay From Recovering Against the Proper Party.**

11 Mill Bay makes no showing that there are plans to dismantle the permanent  
12 improvements. Nevertheless, even if there was a prospective claim for loss of the  
13 several permanent improvements, such a claim is remote and premature. *If* Mill  
14 Bay prevails on appeal, *and* the permanent improvements have been removed, *and*  
15 Mill Bay can show it has suffered a loss *and* Mill Bay identifies a cognizable  
16 claim for the loss of those improvements, *and* it is a claim against the Colville  
17 Tribe, *then* the claim would likely be barred by sovereign immunity. *Kiowa Tribe*  
18 *v. Mfg. Techs.*, 523 U.S. 751, 754 (1998) (an Indian tribe is subject to suit only  
19 when Congress has abrogated the tribe's sovereign immunity by statute or when  
20 the tribe has waived its immunity).

1           However, Mill Bay’s reliance on *Idaho v. Coeur d’Alene Tribe*, 794 F.3d  
2 1039 (9th Cir. 2015) is inapposite. There, unlike here, the alleged irreparable  
3 economic harm was not only probable – it had already occurred. *See Idaho v.*  
4 *Coeur d’Alene Tribe*, 49 F. Supp. 3d 751, 754, 764 (D. Idaho 2014) (explaining  
5 that the tribe had conducted the challenged gaming tournaments in the past and  
6 “will continue to do so absent an injunction”), *aff’d* 794 F.3d at 1046.  
7 Additionally, while the tribe was the only party from which the plaintiff could  
8 attempt to recover economic losses in *Idaho*, here numerous parties are involved,  
9 so the Colville Tribe’s sovereign immunity would not function as an absolute bar  
10 to recovery.

11           In fact, the Master Lease undermines any prospective, hypothetical claim  
12 by Mill Bay against the Tribe. The Master Lease expressly bars claims against the  
13 lessor, *i.e.* allottees, including the Colville Tribe. ECF No. 73-3 at 16 (“Neither  
14 the Lessor nor the United States Government ... shall be liable for any loss,  
15 damage, or injury of any kind whatsoever to the person or property of the Lessee  
16 or sublessees ...”). Similarly, the Master Lease already requires the lessee, at  
17 lessee’s cost and expense, to repair any damage to infrastructure. *Id.* at 15 (“In the  
18 event of partial or total destruction to any building or improvement on the leased  
19 premises ... the Lessee, at the Lessee’s sole cost and expense, shall reconstruct the  
20 building or improvement ...”).

1 While claims against the Tribe would fail, other potential defendants would  
2 not be immune from suit. In the unlikely event that all of the above conditions for  
3 a claim of economic harm are met, such a claim ostensibly could be made against  
4 Wapato Heritage, which may be liable to Mill Bay's members, who allegedly  
5 relied on their membership privileges when they invested in improvements and  
6 infrastructure.

### 7 III. CONCLUSION

8 As confirmed by the Ninth Circuit and this Court, Mill Bay has been in  
9 trespass for 11 years. ECF No. 503 at 65, 71. The remote chance of a claim for  
10 economic loss by Mill Bay is minimal when compared to the spiritual, cultural  
11 and economic losses that the allottees have actually suffered and will continue to  
12 suffer if the motion for stay is granted. Colville Tribal members have waited long  
13 enough for unencumbered access to MA-8 to restore their vital connection to the  
14 land and its cultural properties. ECF No. 520 at 9-10. In the vanishingly unlikely  
15 event that Mill Bay accrues a cognizable claim for economic loss related to  
16 infrastructure and permanent improvements, the Tribe's sovereign immunity  
17 would not preclude Mill Bay from recovering against the proper party, in keeping  
18 with the terms of the Master Lease. Accordingly, the prospective, hypothetical  
19 harm alleged by Mill Bay is not irreparable. The motion for stay should be  
20 denied.

1 Dated this 14th day of August, 2020.

2 s/ Brian W. Chestnut

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CERTIFICATE OF SERVICE

I hereby certify that on August 14, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, which caused the following CM/ECF Participants to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

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