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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

PAUL GRONDAL, a Washington resident; and THE MILL BAY MEMBERS ASSOCIATION, INC., a Washington Non-Profit Corporation,

Plaintiffs,

vs.

UNITED STATES OF AMERICA, et al.,

Defendants.

No. 09-CV-00018-RMP

FEDERAL DEFENDANTS' SUR-RESPONSE TO PLAINTIFF'S MOTION TO STAY

WITHOUT ORAL ARGUMENT

August 17, 2020

"Speculative injury cannot be the basis for a finding of irreparable harm" and the application of *Idaho v. Coeur d'Alene Tribe*[1] here is entirely speculative. *See Goldie's Bookstore, Inc. v. Superior Court*, 739 F.2d 466, 472 (9th Cir. 1984) (reversing district court's preliminary injunction preventing defendants from evicting sub-lessee). Mill Bay's claim of financial harm would occur *only if* utilities/improvements were destroyed pending appeal, Mill Bay prevailed on appeal, and it had a cognizable claim to which sovereign immunity may apply. None of these things are likely to occur, Mill Bay presents no evidence that they are likely, and under the Master Lease, Mill Bay's remedy has always been against Wapato Heritage, LLC (WHL), which does not possess sovereign immunity.

[1] 794 F.3d 1039, 1046 (9th Cir. 2015)

First, there is no evidence (or logical reason) that the government would destroy utilities pending appeal. It is unclear why Mill Bay believes this to be the case. Indeed, Mill Bay has argued just the opposite, *i.e.* that the Federal Defendants will not change the land in the near term. ECF No. 508 at p. 2 (stating that the Federal Defendants have no plan for the property). Accordingly, Mill Bay has not presented evidence, beyond mere speculation, that any alleged improvements made to the property would be harmed pending appeal. For this reason alone, Mill Bay's speculative injury cannot be the basis for irreparable harm.[2]

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[2] In evaluating the harm that will occur, depending upon whether the stay is granted, a court should consider: "(1) the substantiality of the injury alleged; (2) the likelihood of its occurrence; and (3) the adequacy of the proof provided." *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991).

Mill Bay provides only vague assertions of its claimed monetary expenditures and appears to even exaggerate those costs. For example, Mill Bay claims Mr. Johnson spent "tens of thousands . . . on a driveway" (ECF No. 508 at p. 3), but Mr. Johnson's states his block driveway and other improvements amounted to only "thousands of dollars." ECF No. 93 at p. 3, ¶ 6. Notably, Mr. Johnson made these expenditures in 2007 and the driveway likely retains little economic value.

Additionally, pursuant to the WHL and Mill Bay's 2004 settlement agreement, it appears Mill Bay was only responsible for "maintenance and upkeep" and that WHL was responsible for costs assorted with utility services (water, sewer, gas, electric, phone, cable, etc.). ECF No. 346-1 at p. 16-17, 20-21 (e.g. "All work will be paid for by Wapato Heritage, LLC"). Many of Mill Bay's claimed expenditures appear related to maintenance and upkeep rather than utility services and construction of improvements. Without conducting discovery, however, the United

Second, even if destruction of utilities by the United States was imminent *and even if Mill Bay prevailed on appeal*, Mill Bay still has no claim against the United States, regardless of sovereign immunity, under the explicit terms of the Master Lease. The Master Lease, which was once Mill Bay's valid basis for being on MA-8 and which it sought to have this Court extend through 2034, has long barred any damages claims against the United States. ECF No. 73 at p. 22 ("Neither the Lessor nor the United States Government . . . shall be liable for any loss, damage, or injury of any kind whatsoever . . .."). The Master Lease already requires the Lessee (Evans[3]), *at Lessee's sole cost and expense*, to reconstruct any destruction to any building or improvement. ECF No. 73 at p. 22 ("In the event of partial or total destruction to any building or improvement on the leased premises . . . the Lessee, at the Lessee's sole cost and expense, shall reconstruct the building or improvement . . .."). The Master Lease further requires Lessee to carry adequate insurance. ECF No. 73 at pp. 20-21.

At bottom, even under Mill Bay's hypothetical future events, its speculative and unidentified claim for money damages, would be – and its cognizable claims

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States has little means to rebut Mill Bay's vague assertions and accordingly these assertions should be given little weight. The BIA approved the Master Lease in 1984 but Mill Bay has not submitted any evidence that it performed any subsequent construction *in accordance with the terms of the Master Lease*. ECF No. 73 at p. 18 ("Before commencement of any subsequent construction of each improvement costing more than Twenty Thousand Dollars . . . or relocation of existing improvements . . . Lessee shall . . . furnish written proof . . .").

[3] For clarity, the United States adopts the Court's prior use of Evans as referring to the actions of Mar-Lu, Ltd., Chief Evans, Inc., and Evan's successor in interest Wapato Heritage, LLC.

have always been – only available against WHL under the plain language of the Master Lease.

Finally, even if Mill Bay could bring some cognizable claim for monetary damages against the United States, it is not clear whether sovereign immunity would apply to this unidentified cause of action. Without Mill Bay articulating exactly the claim it believes it may have against the United States, its highly speculative to assume sovereign immunity would apply, or for that matter, would be asserted or has been waived.

CONCLUSION

It is not sufficient for Mill Bay to argue there may be some speculative possibility that irreparable monetary injury will occur if a stay does not issue. Rather, irreparable injury must be "the more probable or likely outcome" if a stay is not issued. *Leiva-Perez v. Holder*, 640 F.3d 962, 968 (9th Cir. 2011). Because Mill Bay bears the burden of establishing that a stay is warranted, *Nken v. Holder*, 556 U.S. 418, 433-34 (2009), its failure to provide a coherent argument why *Idaho v. Coeur d'Alene Tribe* stands for the proposition that unrecoverable monetary injury is an imminent and a "probable or likely outcome" justifies the Court's denial of the requested stay. *Leiva-Perez*, 640 F.3d at 968.

If Mill Bay's concern about protecting any 'improvements' it made is so pressing, it can move for an expedited appeal. The United States has no interest in delaying a final resolution of this case, but it is almost certain that Mill Bay would oppose the United States request for an expedited appeal if a stay is granted so that Mill Bay can continue its trespass on MA-8 to the detriment of the allottees.

Given the history of this case, opportunities for years of further delay must be denied.

RESPECTFULLY SUBMITTED on this 14th day of August, 2020.

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United States Attorney

/s/ Joseph P. Derrig
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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 will send notification of such filing to the following:

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