UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

PAUL GRONDAL, a Washington resident; MILL BAY MEMBERS ASSOCIATION, INC., a Washington non-profit corporation, Plaintiffs, v. UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF INTERIOR; BUREAU OF INDIAN AFFAIRS; FRANCIS ABRAHAM; CATHERINE GARRISON; MAUREEN MARCELLAY, MIKE PALMER, also known as Michael H. Palmer; JAMES ABRAHAM; NAOMI DICK; ANNIE WAPATO; ENID MARCHAND; GARY REYES; PAULWAPATO, JR.; LYNN BENSON; DARLENE HYLAND; RANDY MARCELLAY; FRANCIS REYES; LYDIA W. ARMEECHER; MARY JO GARRISON; MARLENE MARCELLAY; LUCINA O'DELL; MOSE SAM; SHERMAN T. WAPATO; SANDRA COVINGTON; GABRIEL MARCELLAY; LINDA	NO: 2:09-CV-18-RMP ORDER DENYING MOTION TO STAY EXECUTION OF JUDGMENT, GRANTING MOTION FOR LEAVE TO FILE SUR-REPLY, AND GRANTING MOTION TO EXPEDITE

MILLS; LINDA SAINT; JEFF M. CONDON; DENA JACKSON; MIKE MARCELLAY; VIVIAN PIERRE; SONIA VANWOERKON; WAPATO HERITAGE, LLC; LEONARD WAPATO, JR.; DERRICK D. ZUNIE, II; DEBORAH L. BACKWELL; JUDY ZUNIE; JAQUELINE WHITE PLUME; DENISE N. ZUNIE; CONFEDERATED TRIBES COLVILLE RESERVATION; and ALLOTTEES OF MA-8, also known as Moses Allotment 8,

Defendants.

BEFORE THE COURT is Plaintiffs' Motion to Stay Execution of Judgment, ECF No. 508. The Amended Judgment and relevant Order[1] find that Plaintiffs are trespassing on a parcel of Indian trust land known as MA-8 and authorize Plaintiffs' ejectment from the property. The Court has considered the record, the briefing, and is fully informed.

[1] The Court's Order at ECF No. 503 resolves, among other motions, the Government's Motion for Summary Judgment on its trespass counterclaim and finds that Plaintiffs are in trespass. After entering its Order and Judgment, the Court granted Plaintiffs' Motion to Clarify Judgment, which requested that the Court amend its Judgment by adding express language to indicate that the Judgment is immediately appealable. *See* ECF No. 518. The Third Amended Judgment, ECF No. 540, contains the Court's initial Judgment, consistent with the Court's Order at ECF No. 503, as well as the express language requested by Plaintiffs in their Motion to Clarify Judgment, which the Court granted.

BACKGROUND

The Court has discussed the background of this case at length in its prior Order, granting the Government's Motion for Summary Judgment re Ejectment. ECF No. 503. Accordingly, the Court gives only a brief summary of the facts relevant to the instant motion here.

This case involves a fractionated Indian allotment called MA-8. In the 1980s, William Evans Jr., an allottee with a beneficial interest in MA-8, planned to gain control of MA-8 to build a camping resort on that land. *See* ECF No. 90-6 at 9. As MA-8 was fractionated, Mr. Evans could develop the land only if he leased the entirety of the allotment from the remainder of the allottees in accordance with federal regulations. In 1984, Mr. Evans did lease MA-8 from the remaining allottees through the "Master Lease," which was approved by the Bureau of Indian Affairs. *See* ECF No. 90-2 (Master Lease). Upon gaining control of the land through the Master Lease, Mr. Evans developed Mill Bay RV Resort and began to sell camping memberships to those interested in using the resort.

Plaintiffs in this case represent people who purchased special, extended camping memberships from Mr. Evans, which gave them the right to use assigned RV spots at the resort. *See* ECF No. 16 at 2–3. Mr. Evans represented that Plaintiffs' extended membership contracts were valid through 2034. *Id.* When Mr. Evans passed away, Defendant Wapato Heritage, LLC inherited Mr. Evans' interest

in the camping contracts with Plaintiffs, as well as Mr. Evans' interest in the Master Lease.

In 2007, the Government informed Wapato Heritage that the Master Lease would expire in 2009. See ECF No. 90-15 at 15. Wapato Heritage subsequently sued the Government over the term of the Master Lease, arguing that it expired in 2034, not 2009, because Mr. Evans had effectively renewed its term. *See Wapato Heritage, L.L.C. v United States*, 637 F.3d 1033 (9th Cir. 2011). Eventually, the Ninth Circuit found that Mr. Evans had not renewed the Master Lease and that the Master Lease expired on the final day of its 25-year term, in 2009. *Id.* at 1040.

Plaintiffs initiated this litigation against the Government, the Confederated Tribes of the Colville Reservation, Wapato Heritage, and the individual allottee landowners of MA-8 to establish their right to remain on MA-8 through 2034, consistent with their camping membership contracts with Evans (and subsequently Wapato Heritage). In response, the Government filed a trespass counterclaim, which requested Plaintiffs' ejectment from MA-8, arguing that Plaintiffs could not legally occupy MA-8 past the expiration of the Master Lease's term in 2009. In 2012, the Government moved for summary judgment on its trespass counterclaim. On July 9, 2020, after prolonged litigation on this issue, the Court granted the Government's Motion for Summary Judgment on its counterclaim and found that Plaintiffs are in trespass. ECF No. 503 at 71. The Court's Order and Judgment authorize Plaintiffs' ejectment from MA-8. *Id.*; ECF No. 519 (Amended Judgment).

Plaintiffs have appealed the Court's Order and Judgment. They also have filed the instant Motion to Stay, which requests that the Court stay execution of its Judgment and allow Plaintiffs to remain on MA-8 until their appeal is resolved. The Government and the Colville Tribes oppose the motion.

DISCUSSION

I. Stay as a Matter of Right

Plaintiffs argue that they are entitled to a stay as a matter of right under Federal Rule of Civil Procedure 62(b). Pursuant to Rule 62(b), "any time after judgment is entered, a party may obtain a stay by providing a bond or other security." Fed. R. Civ. P. 62(b). "'[A] party taking an appeal from the District Court is entitled to a stay of a money judgment as a matter of right if he posts a bond' in accordance with Rule 62(b)." *Wishtoyo Found. v. United Water Conservation Dist.*, Case No. CV 16-3869-DIC-PLA, 2019 WL 8226058, at *2 (C.D. Cal. April 11, 2019) (quoting *American Mfrs. Mut. Ins. Co. v. American Broad.-Paramount Theaters, Inc.*, 87 S. Ct. 1, 3 (1966)). A party appealing a money judgment is entitled to a stay upon posting a supersedeas bond in order to protect "the prevailing plaintiff from the risk of a later uncollectible judgment and compensate[] him for delay in the entry of the final judgment." *Id*. (quoting *N.L.R.B. v. Westphal*, 859 F.2d 818, 819 (9th Cir. 1988)).

When injunctive relief is at issue, rather than monetary damages, Rule 62(c) and (d) apply. *See id*. (explaining that Fed. R. Civ. P. 62(c) pertains to injunctive

relief, "in contrast" to Fed. R. Civ. P. 62(b), which governs other relief); Fed. R. Civ. P. 62(c), (d). Under these subsections, a party is not entitled to a stay upon posting a supersedeas bond. *See Wishtoyo Found.*, 2019 WL 8226058, at *2; Fed. R. Civ. P. 62(c), (d).

As the Court explained in its previous Order granting Plaintiffs' Motion to Clarify and Amend Judgment, the contested Order and Judgment are sufficiently injunctive such that they are immediately appealable pursuant to 28 U.S.C. § 1292(a)(1). ECF No. 518 at 4; *see also Carson v. American Brands, Inc.*, 450 U.S. 79, 83–84 (1981); *Thompson v. Enomoto*, 815 F.2d 1323 (9th Cir. 1987). Additionally, the Court has awarded no monetary damages or attorneys' fees at this juncture.

Because the relevant relief is injunctive in nature, Plaintiffs are not entitled to a stay as a matter of right upon posting a supersedeas bond pursuant to Rule 62(b).

II. Discretionary Stay

In the alternative, Plaintiffs move for a discretionary stay pending appeal. When evaluating a motion for a discretionary stay, district courts consider the *Nken* factors, which are: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the 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) (quoting *Nken v. Holder*, 556 U.S. 418, 433 (2009)). In considering these factors, district courts should keep in mind that the first two factors are the "most critical." *Id*. at 1204 (quoting *Nken*, 556 U.S. at 434). "The party requesting a stay bears the burden of showing that the circumstances justify an exercise of [this Court's] discretion." *Id*. at 1203 (quoting *Nken*, 556 U.S. at 433–34).

A. First *Nken* Factor: Strong Showing of Success on the Merits

With respect to the first *Nken* factor, which considers the merits of the appeal, the Ninth Circuit has explained that "'at a minimum,' a petitioner must show that there is a 'substantial case for relief on the merits.'" *Lair*, 697 F.3d at 1204 (quoting *Leiva-Perez v. Holder*, 640 F.3d 962, 968 (9th Cir. 2011)). However, the standard does not require petitioners to demonstrate that "it is more likely than not that they will win on the merits." *Id*. (quoting Leiva-Perez, 640 F.3d at 968). In their reply brief, Plaintiffs maintain that they have a strong chance of prevailing on the merits on one of at least three issues that they have identified. The Court addresses each issue in turn.

Trust Status of MA-8

First, Plaintiffs argue that they are likely to succeed in arguing that the Government does not have standing to eject them from MA-8 because MA-8 has lost its trust status. The Court found that Plaintiffs are judicially estopped from

making this argument.[2] ECF No. 503 at 24–27. Additionally, out of an abundance of caution, the Court analyzed the parties' arguments, as well as the statutes pertaining to MA-8's trust status and determined that MA-8 remains trust land. *Id.* at 27–50. The Court arrived at the same conclusion after analyzing in the alternative and thoroughly addressing Plaintiffs' arguments on this issue, even after finding that Plaintiffs were estopped from arguing that MA-8 is not trust land. The Court acknowledges that this is a complex issue. However, given the Court's detailed analysis of Plaintiffs' arguments and Plaintiffs' failure to adequately explain the errors they believe the Court made in its reasoning, Plaintiffs have not met their burden of demonstrating that they have a "substantial case for relief" on appeal.

Government's Immunity from Equitable Defense of Estoppel

Secondly, Plaintiffs maintain that they are likely to succeed in arguing that the Government is not immune from equitable defenses when it acts as trustee of Indian lands. Essentially, Plaintiffs argue that the Ninth Circuit will limit or abrogate its reasoning in *United States v. City of Tacoma*, which states, "[W]hen the Government acts as trustee for an Indian Tribe," it is not "at all" subject to the defense of equitable estoppel. 332 F.3d 574, 581 (9th Cir. 2003).

[2] Plaintiffs advanced no argument before this Court in response to the Government's contention that they should be judicially estopped from arguing that MA-8 lost its trust status.

United States v. City of Tacoma also dealt with trespass on Indian allotments. In 1920, the City of Tacoma began to develop plans for a hydroelectric power project on the North Fork of the Skokomish River. *Id*. at 576. To develop the project as planned, the City needed to condemn five Indian allotments. *Id*. Eventually, the Assistant Commissioner of Indian Affairs at the Department of the Interior authorized the condemnation, explaining in writing that the "condemnation of allotted lands for public purposes was authorized by [statute]." *Id*. Additionally, an Assistant United States Attorney involved in the issue advised in writing that the condemnation was legal, and that the appraisal of the subject, allotted land was "fully sufficient and fair and just to all concerned." *Id*. at 577.

In 1996, the United States sued the City of Tacoma on behalf of the Skokomish Indian Tribe, "seeking for the Tribe a declaratory judgment that would invalidate the condemnation proceedings, and seeking damages for trespass." *Id*. at 578. The district court granted the Government's motion for summary judgment and found that the Government was not equitably estopped from seeking relief on behalf of the Skokomish Tribe, even though its agents had expressly endorsed the condemnation of the allotments. *Id*. The Ninth Circuit agreed, explaining, "[T]here can be no argument that equitable estoppel bars the United States' action because, when the government acts as trustee for an Indian tribe, it is not at all subject to that defense." *Id*. at 581 (citing *Cramer v. United States*, 261 U.S. 219, 134 (1923); *United States v. Ahtanum Irr. Dist.*, 236 F.2d 321, 334 (9th Cir. 1956);

and *Cato v. United States*, 70 F.3d 1103, 1108 (9th Cir. 1995) (noting "the well-established rule that a suit by the United States as trustee on behalf of an Indian tribe is not subject to state delay-based defenses")).

Plaintiffs argue that the Circuit's holding in *United States v. City of Tacoma* does not extend beyond enforcing restraints on alienation. Put another way, they argue that the Ninth Circuit's reasoning does not apply to the specific facts of their case, in which Plaintiffs assert the right to occupy trust land for a finite period of time. However, the reasoning in the Circuit's opinion does not support the limitation for which Plaintiffs argue.

To support their argument, Plaintiffs cite to the dissent in *United States v. Washington*, 864 F.3d 1017 (9th Cir. 2017), which is an order denying a petition for rehearing and petition for rehearing en banc. *United States v. Washington* involved Tribal fishing rights under the Stevens Treaties, and whether Washington State's construction of culverts violated those treaty rights. *See United States v. Washington*, 853 F.3d 946 (9th Cir. 2017). There, the State "asserted a defense of 'waiver and/or estoppel' based on action and inaction by the United States that, according to Washington, led the State to believe that its barrier culverts did not violate the Treaties." *Id*. at 966. On appeal, the State dropped its estoppel argument and asserted only its waiver argument. *Id*.

In response to the State's waiver argument, the Ninth Circuit held that the United States could not "diminish or render unenforceable otherwise valid Indian

treaty rights," which had been reserved by the Stevens Treaties, based on a theory of laches or estoppel. *Id*. at 967 (9th Cir. 2017). Upon request, rehearing and rehearing en banc were denied. *United States v. Washington*, 864 F.3d at 1018. The Ninth Circuit judges who dissented from the Circuit's decision to deny rehearing en banc asserted that rehearing should have been granted, in part, to decide whether laches could have applied to the Government.

Upon review of *United States v. Washington*, the Court finds that the facts of that case, as well as the rights at issue, were markedly distinct from the facts of this case and the rights at issue here. Moreover, in that case, rehearing and rehearing en banc were denied, not granted, which further undermines Plaintiffs' reliance on the case. Therefore, the Court finds that Plaintiffs have not met their burden of establishing that they have a substantial case for relief by citing to *United States v. Washington*.

Other Equitable Doctrines

Plaintiffs argue that the Court erred when it failed to consider "whether an equitable grace period or other doctrine remedied Wapato Heritage's failure to properly renew the Master Lease." ECF No. 526 at 4 (citing *Pardee v. Jolly*, 182 P.3d 967, 976 (Wash. 2008)). Plaintiff does not explain why the state-law doctrine of equitable grace periods should apply here, where: (1) federal trust land is involved; (2) Plaintiffs are not the lessee of the Master Lease and are not tenants on MA-8; and (3) the Ninth Circuit already has held that "the [Master] Lease

terminated upon the last day of its 25-year term." *Wapato Heritage, L.L.C.*, 637 F.3d at 1040. Additionally, Plaintiffs have not identified what "other doctrine[s]" the Court had an obligation to consider *sua sponte* such that it erred by failing to consider them. Therefore, the Court finds that Plaintiffs have not met their burden of demonstrating that they have a substantial case for relief on appeal due to the third potential error identified.

After consideration of Plaintiffs' arguments, the Court finds that Plaintiffs have not made a strong showing that they are likely to succeed on the merits of their appeal. *See Lair*, 697 F.3d at 1203. Therefore, the first *Nken* factor does not weigh in favor of staying execution of the Court's Judgment.

B. Second *Nken* Factor: Irreparable Injury to the Stay Applicant

Next, the Court considers the second *Nken* factor, which addresses irreparable injury that will occur absent a stay. To demonstrate that this factor weighs in favor of granting a stay, the stay applicant must show that there is more than "some possibility of irreparable injury." *Lair*, 697 F.3d at 1214 (quoting *Nken*, 556 U.S. at 434–35). Indeed, the stay applicant must show that there is a "probability of irreparable injury." *Id.*

Generally, pure economic harm does not inflict irreparable injury, "as money lost may be recovered later." *Idaho v. Coeur d'Alene Tribe*, 794 F.3d 1039, 1046 (9th Cir. 2015) (describing "irreparable harm" in the context of preliminary injunctions). However, the Ninth Circuit has found that financial harm can

constitute irreparable injury in the context of preliminary injunctions when the money lost cannot be recovered later due to sovereign immunity. *See id*.

Irreparable Harm: Improvements to the Land

Plaintiffs argue that, if they are successful on appeal and the Court does not issue a stay, they will suffer harm that cannot be redressed. They maintain that if the Court refuses to stay execution of its Judgment, then the improvements that they have made to MA-8 will be removed. These improvements include utilities, such as water and fiber optics, as well as landscaping and driveways. *See* ECF No. 508 at 4. Plaintiffs argue for the first time in their reply brief that they will not be able to recover monetary damages for those lost improvements later, should they be successful on appeal, because the Colville Tribes and the Government are entitled to sovereign immunity. *See* ECF No. 526 at 5 (citing *Idaho v. Coeur d'Alene Tribe*, 794 F.3d at 1046). As Plaintiffs raised this apparently significant issue for the first time in their reply brief, the Court instructed Defendants to file sur-responses on the narrow issue of sovereign immunity and irreparable harm.

In their sur-responses, the Government and the Colville Tribes argue that the alleged financial harm is too speculative and too remote to provide a basis for a finding of irreparable harm. The Government asserts that "Mill Bay's claim for 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 might apply." ECF No. 539 at 1 (emphasis in original).

Additionally, these Defendants argue that Defendant Wapato Heritage is not immune from suit, and thus sovereign immunity does not bar Plaintiffs' recovery, distinguishing this case from *Idaho v. Coeur d'Alene Tribe*.

In response to the Government's and the Colville Tribes' sur-responses, Plaintiffs have requested leave to file a sur-reply, arguing that Defendants have raised new issues in their sur-responses. Plaintiffs filed an accompanying motion to expedite hearing on their motion for leave to file a sur-reply. Plaintiffs assert that the Government and the Colville Tribes cannot demonstrate any prejudice resulting from the Court's consideration of their sur-reply. However, as Plaintiffs explain in their motion to expedite hearing on their motion for leave to file a sur-reply, Plaintiffs were unable to contact the Government or the Colville Tribes regarding their late motion. ECF No. 542 at 3.

The Court disagrees with Plaintiffs that Defendants raised any new issues in their sur-responses. Rather, as the Court previously has explained, Plaintiffs' decision to vaguely and conclusively assert in their reply brief that sovereign immunity would lead to irreparable harm necessitated the Court to allow Defendants to file sur-responses on that discrete issue. Thus, Defendants addressed that discrete issue, raised by Plaintiffs for the first time in their reply brief in Defendants' sur-responses, as the Court directed. Therefore, arguably, Plaintiffs have no right to request an opportunity to file a sur-reply on an issue that Plaintiffs themselves raised for the first time in their reply brief. Furthermore,

Plaintiffs' request to file a sur-reply arguably is untimely, coming four days after Defendants filed their sur-responses, and the day after the instant Motion to Stay Execution of Judgment (the relevant motion filed by Plaintiffs) was noted for hearing. Nevertheless, as the Court is prepared to rule on the underlying Motion to Stay and does not want to delay a resolution of this matter any longer, the Court will grant Plaintiffs' motion to expedite hearing on their motion for leave to file a sur-reply, and incorporate the sur-reply arguments in the Court's consideration now. While the Court does not agree with Plaintiffs' assessment that Defendants raised new issues, the Court will allow Plaintiffs to have the final word as the moving party.

In considering Plaintiffs' sur-reply, the Court notes that Plaintiffs did not limit their arguments to the discrete issue that was addressed by Defendants in their sur-responses. Rather, Plaintiffs' sur-reply delves into an issue that was decided by this Court many years ago. Specifically, Plaintiffs attempt to relitigate whether they are lessees (or sublessees) under the Master Lease of MA-8. In 2010, the Court determined that Plaintiffs are "mere licensees" of MA-8; thus, they do not have the rights of tenants or subtenants. *See* ECF No. 144 at 29. That issue is final in this Court and has been final since 2010.

Plaintiffs now argue that Defendants' sur-responses maintain that Plaintiffs are lessees or sublessees, in contravention of the Court's prior Order. However, the Court understands Defendants to argue that Plaintiffs' rights to use and develop

MA-8 cannot be greater than those of the Lessee of the Master Lease (Evans/Wapato Heritage), as Plaintiffs only are licensees of Wapato Heritage. Additionally, the Court understands the Government and the Colville Tribes to argue that Defendant Wapato Heritage, the Lessee, would be liable under the terms of the Master Lease for any damage to MA-8. However, if Plaintiffs are correct, and Defendants are arguing that Plaintiffs themselves are lessees or sublessees, the Court will not reconsider its prior ruling on that issue. *See* ECF No. 144 at 29 (Court's 2010 Order finding that Plaintiffs are "mere licensees").

Plaintiffs argue in their sur-reply that the Government's and the Colville Tribes' "great master plan all along" has been to "wrongfully take possession" of the RV park and the improvements that Plaintiffs have made to it. ECF No. 541-1 at 5. Plaintiffs willfully ignore this Court's Order and Amended Judgment to the contrary, finding that Plaintiffs have been trespassing on Indian trust land since 2009. Indeed, the Court found that Plaintiffs have been in wrongful possession of MA-8 for over eleven years, depriving Native Americans of valuable land that they are entitled to use.

In their sur-reply, Plaintiffs also intimate that they may seek leave to amend their Complaint to add three new claims, including a common law conversion claim for the "hundreds of thousands of dollars-worth of improvements" that they have made on MA-8. *See* ECF No. 541-1 at 5. First, Plaintiffs have never submitted evidence to support the claim that installing some driveways, fiber

optics, and utilities such as water resulted in the expenditure of "hundreds of thousands of dollars-worth of improvements" to the land. Even though Defendants pointed out the lack of evidence for that proposition in their initial responses, Plaintiffs continue to argue, without support, that they have spent a small fortune adding improvements to the land, rather than just maintaining it for their own use.

Plaintiffs take contradictory positions on the issue of improvements. In support of the instant motion, Plaintiffs argue that they are entitled to a stay, in part, because the Government and the Tribes have no immediate plans to develop the land, which undermines Plaintiffs' contention that improvements will be removed. ECF No. 508 at 3–4. Plaintiffs maintain, "In essence, the Federal Defendants admit their immediate plan is to leave the land barren and fallow—thereby depriving the allottees of income they are otherwise entitled to receive—until the litigation is over, and possibly for some undetermined period thereafter." *Id*. While it is possible that improvements will be removed before Plaintiffs' appeal is resolved, Plaintiffs have not provided evidence that shows a "probability of irreparable injury." *See Lair*, 697 F.3d at 1214 (quoting *Nken*, 556 U.S. at 434–35).

Plaintiffs cite to *Idaho v. Coeur d'Alene Tribe* to argue that they will not be able to recover damages for potential lost improvements due to Defendants' sovereign immunity. ECF No. 526 at 5 (citing 794 F.3d at 1046). However, even in their sur-reply, Plaintiffs have not explained why sovereign immunity bars

recovery for lost improvements in this case, especially when Defendant Wapato Heritage is not protected by sovereign immunity. Because Plaintiffs have not explained their reasoning, and because Defendant Wapato Heritage does not have sovereign immunity, it is speculative to assume that Plaintiffs' potential future harm of lost improvements is irrecoverable due to sovereign immunity. Accordingly, Plaintiffs have not met their burden of showing that the alleged harm is irreparable due to some of the Defendants' potential immunity.

Throughout the extensive briefing and record in this case, including Plaintiffs' sur-reply and all supporting exhibits, Plaintiffs do not demonstrate sufficiently that there is a probability that they will suffer irreparable harm caused by potential lost improvements. *See Lair*, 697 F.3d at 1214 (quoting *Nken*, 556 U.S. at 434–35). The Court is mindful that Plaintiffs have the burden to prove irreparable harm. *Nken*, 556 U.S. at 433–34. The Court does not accept Plaintiffs' self-serving, unsupported factual allegations to meet their burden.

Irreparable Harm: Lost Use of RV Resort

Plaintiffs also maintain that lost use of MA-8 constitutes irreparable harm. In support of this argument, Plaintiffs direct the Court to the sworn declaration of Van Botts, President of the Mill Bay Members Association. ECF No. 510. Ms. Botts explains that she and the other members are profoundly disappointed to lose the RV park. She states: "I leave my RV at Mill Bay and use it exclusively there.

If we lose this place, I will likely sell the RV and stop camping, as both the geography and the companionship of Mill Bay are irreplaceable." *Id*. at 2.

While the geography of the area and the companionship at Mill Bay RV Resort may be unique, those aspects will not be lost if the Court's Judgment is executed now, and Plaintiffs later succeed on appeal. Should Plaintiffs' appeal be successful, and should Plaintiffs be allowed to occupy MA-8 through 2034, then Plaintiffs will have the option to return to the land and reunite there.

The Court also understands Plaintiffs to argue that, if the pending appeal is not resolved before the next vacation season, they will lose irreplaceable time at the resort, constituting irreparable harm. *See* ECF No. 508 (arguing that irreparable harm may be found when a party is deprived of using a property with unique characteristics). The Court cannot predict how long Plaintiffs' appeal will take. However, Plaintiffs maintain that they expect an expedited appeal pursuant to Ninth Circuit Rule 27-12. Therefore, without more, the Court finds that the alleged harm is too speculative and too remote to constitute more than a possibility of harm, which is insufficient to justify a stay.[3] *See Lair*, 697 F.3d at 1214 (quoting *Nken*, 556 U.S. at 434–35).

[3] Even accepting Plaintiffs' arguments that the potential for lost resort time constitutes a probability of irreparable harm, the Court finds that a stay is not appropriate here, upon consideration of the remaining *Nken* factors. Plaintiffs have not demonstrated a strong showing of success on the merits, and the third and fourth *Nken* factors weigh in favor of denying a stay, as described *infra*.

Irreparable Harm: Permanent Residences

Plaintiffs also assert that some members use their RV spaces as permanent residences and will have nowhere else to go if forced to leave MA-8. Therefore, they argue that the Court's Judgment is the equivalent of an eviction and will cause irreparable harm when executed.

There are several problems with this argument. First, Plaintiffs are not tenants or lessees; rather, they are campers with camping membership contracts that provided them with the right to use the RV park for recreational purposes. *See* ECF No. 16-3 at 6 ("This membership constitutes only a contractual license to use such facilities as may be provided by Seller from time to time."); ECF No. 144 at 29 (Court's 2010 Order finding that Plaintiffs' occupancy is not a sub-tenancy and that Plaintiffs are "mere licensees"). The camping contracts did not contemplate that members would use their RV spaces as permanent residences, nor did the contracts consider Plaintiffs to be tenants. *See* ECF No. 144 at 29–30.

Second, Plaintiffs' own rules and regulations do not allow members to permanently reside on the land. Those regulations state:

> No permanent occupancy shall be permitted. Expanded members may occupy a campsite for up to 83 days during each stay. They must then vacate the campsite for a period of 7 days before they may again occupy their campsite.

ECF No. 524-1 at 1.

Third, Plaintiffs have until September 30, 2020, to find another place to park their RVs, as the Government has represented that it will not remove Plaintiffs from MA-8 until after that date. *See* ECF No. 524-5.

This is not a case in which Plaintiffs are being evicted immediately from permanent housing, or from an RV park that was intended to provide permanent residences for its members. Rather, Plaintiffs have the ability and opportunity to drive, or tow, their RVs out of the recreational RV park.

Ms. Botts asserts that the people who use their RVs as seasonal residences in the summer months are not ready for the disruption caused by the ejectment and that they feel "blindsided." ECF No. 510 at 3. This assertion raises serious questions about how Plaintiffs' counsel has been communicating with their clients, and what the Mill Bay Members Association has told its members about this litigation. This litigation has been ongoing for eleven years. At the outset, the Government asserted a counterclaim of trespass against Plaintiffs, seeking their ejectment from MA-8. It is confounding that any member of the Mill Bay Members Association would be blindsided by the Court's Order and Judgment finding them in trespass, after eleven years of litigation, during which the Government has sought their removal from the property.

Irreparable Harm: Travel During the COVID-19 Pandemic

Plaintiffs argue that displacing the RV Park during the COVID-19 pandemic "will compound the stress and anxiety for all members, and subject elderly

members to increased risk of exposure to the pandemic," thus causing irreparable harm. ECF No. 508 at 10. The Court acknowledges that additional precautions must be taken to ensure the health and safety of the community due to COVID-19. Limiting travel is one of those precautions.

However, when vacation season is over, Mill Bay Members will travel away from the RV park and back to their permanent homes. *See* ECF Nos. 524-2–524-4 (indicating that most members leave the RV park by October); ECF No. 526 at 6 (explaining that the park's caretakers who view the park as their permanent home leave the park during the winter months). Therefore, Plaintiffs almost certainly will travel during the pandemic, regardless of whether the Court stays its Judgment. Additionally, it is arguable that returning home and isolating, rather than remaining in a communal RV park, is safer for Plaintiffs during a pandemic. Accordingly, the Court rejects the argument that the Judgment imposes irreparable harm by requiring people to return to their homes during the pandemic.

After considering the bases upon which Plaintiffs assert irreparable harm, the Court finds that Plaintiffs have not shown a probability of irreparable harm. Therefore, the Court finds that the second *Nken* factor does not weigh in favor of entering a stay.

C. Third *Nken* Factor: Injury to Other Interested Parties

The third *Nken* factor requires courts to consider whether other interested parties will be harmed if a stay is issued. Plaintiffs contend that a stay will not

harm any other interested parties, as there are no immediate plans to develop MA-8, and as Plaintiffs continue to pay rent for their use of the property.

The Colville Tribes argue that they are harmed by Plaintiffs' continued use of MA-8. They explain:

> The Colville Tribes attach extraordinary importance on the land. . . . The ability of the Colville elders to connect with the land and share that connection with Colville youth is vital. The continued presence of the RV park on the shore of Lake Chelan in MA-8 impairs the Tribes' efforts to restore that connection and pass it on to future generations.

ECF No. 520 at 9 (citing ECF No. 521 at 2).

Guy Moura, the Program Manager of the History/ Archaeology Program for the Confederated Tribes of the Colville Reservation and the Tribal Historic Preservation Officer, submitted a declaration explaining the cultural significance of the land. ECF No. 522. Mr. Moura explains that the RV park is adjacent to a cemetery at which over 100 Tribal ancestors have been buried or reinterred. *Id*. at 4. He states that many Tribal members are hesitant to access this important cultural site because the RV park controls access to the site, and because the park is immediately next to it. *Id*. at 5. Among other documents, Mr. Moura submitted a photograph of a portion of the cemetery with his declaration that depicts RVs parked side by side and immediately next to what appears to be gravestones. *See* ECF No. 522-2. Mr. Moura testifies, and it appears from the photograph, that one RV has backed into a fence post, causing the post to lean into a gravestone. ECF No. 522 at 5; *see* ECF No. 522-2. Mr. Moura maintains that physical intrusions

onto the cemetery such as this have led to numerous complaints by Tribal members. ECF No. 522 at 5.

In reply, Plaintiffs state that "this is the first time in 20-plus years that the Tribe has ever raised these [cultural] concerns," suggesting that these concerns come as a surprise. ECF No. 526 at 7. However, the record does not support Plaintiffs' alleged surprise. As Mr. Moura's declaration and supporting exhibits demonstrate, at least some of these cultural concerns are openly apparent, marked with stone memorials. The record also reflects that BIA agents have attempted to enter the RV park to monitor the cultural artifacts on at least one occasion on behalf of the Colville Tribes, but have been denied access by Wapato Heritage and instructed to get a court order due to the pending litigation. *See* ECF Nos. 522-5 and 522-6.

For the foregoing reasons, the Court finds that other interested parties, specifically members of the Colville Tribes, will face harm if the Court issues a stay that allows Plaintiffs to remain on MA-8 after finding them in trespass.

D. Fourth *Nken* Factor: Public Interest

The Fourth *Nken* Factor requires the Court to consider the public interest implicated by Plaintiffs' motion. Plaintiffs argue that the public interest favors a stay in this matter because the Judgment requires Plaintiffs to travel during the COVID-19 pandemic. The Court rejects this argument for the reasons explained above, specifically the fact that Plaintiffs almost certainly will return to their

permanent homes by the end of September during the pandemic regardless of the Court's Judgment. Moreover, the Court finds that the public interest is served by allowing the Government to take actions consistent with its trust obligations in this case.

Upon consideration of the *Nken* Factors the Court finds that a stay is not warranted here. First, Plaintiffs have not made a strong showing of success on the merits. With respect to the second factor, Plaintiffs have not established a probability of irreparable harm. Additionally, after considering the interests of other parties and the public, the Court finds that those interests weigh against entering a stay.

As the *Nken* factors do not support entry of a stay, the Court declines to stay execution of its Amended Judgment pending appeal.

Moreover, Plaintiffs' suggestion that they might seek leave to amend their Complaint, after eleven years of litigation and after partial judgment has been entered against them, is more appropriate as a plot twist in Dickens' *Bleak House*, than an appropriate tactic in modern day litigation. Plaintiffs' arguments and suggestion of an amended complaint laid out in Plaintiffs' sur-reply support the Colville Tribes' and the Government's concerns that Plaintiffs will attempt to perpetuate this litigation *ad infinitum*, relitigating the same issues over and over while attempting to add new claims, prolonging the litigation unnecessarily, all to achieve their desired outcome: occupancy of MA-8 through 2034.

Accordingly, **IT IS HEREBY ORDERED:**

1. Plaintiffs' Motion for Leave to File Sur-reply, **ECF No. 541**, is **GRANTED**. The Court considered Plaintiffs proposed sur-reply in ruling on this motion, presently submitted at ECF No. 541-1.
2. Plaintiffs' Motion to Expedite, **ECF No. 542**, is **GRANTED**.
3. Plaintiffs' Motion for Stay of Execution of Judgment, **ECF No. 508**, is **DENIED**.

IT IS SO ORDERED. The District Court Clerk is directed to enter this order and provide copies to all parties.

DATED August 20, 2020.

s/ Rosanna Malouf Peterson
ROSANNA MALOUF PETERSON
United States District Judge