No. 20-35694

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL GRONDAL, a Washington resident; MILL BAY MEMBERS ASSOCIATION, a Washington non-profit corporation,
Plaintiff-Appellee,

v.

UNITED STATES OF AMERICA, ET AL.,
Defendant-Appellees,

v.

WAPATO HERITAGE LLC; GARY REYES, ET AL.,
Third-party-defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Washington
No. 2:09-cv-00018-RMP
Hon. Rosanna Malouf Peterson

REPLY BRIEF ON MOTION FOR STAY OF EXECUTION OF JUDGMENT PENDING APPEAL BY APPELLANTS PAUL GRONDAL & MILL BAY MEMBERS ASSOCIATION, INC.

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I. INTRODUCTION

Mill Bay seeks a short stay to remain on MA-8 during this appeal, anticipated to last around one year as Mill Bay would not oppose a motion to expedite. Appellees have no plan for the land through at least March 30, 2021, during which they will permit Mill Bay's property to remain. Thus, Mill Bay realistically seeks only several additional months thereafter to remain during this Court's review. For this reason, Appellees' parade-of-horribles arising from a stay is significantly minimized. And despite some whiplash between conflicting rulings of Judges Quackenbush and Peterson, below, Appellants have demonstrated a likelihood of success on the merits, and will be irreparably harmed absent a stay.

II. ARGUMENT

A. The Standard of Review is De Novo, Not Abuse of Discretion.

Appellees attempt to derail the analysis from the get-go, articulating an incorrect standard of review. Appellants do not seek *review* of the denial of a stay below, but filed a direct motion to this Court under Fed. R. App. Pro. 8(a)(2) on which this Court applies "the same standard that governs a district court's consideration of a motion for preliminary injunction." *Ravalli Cty. Republican Cent. Comm. v. McCulloch*, No. 15-35967, 2016 WL 1161301, at *1 (9th Cir. Mar. 3, 2016). Appellees' "abuse of discretion" cases are inapposite.

B. Factor 1: Appellants Show a Likelihood of Success on the Merits.

Appellees (and Judge Peterson) claim Mill Bay is judicially estopped to argue MA-8 lost its trust status. (They seem to forget Wapato Heritage is not.) But it is axiomatic that Mill Bay cannot be judicially estopped from challenging jurisdiction and standing. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95–100 (1998) (standing is jurisdictional); *Terenkian v. Republic of Iraq*, 694 F.3d 1122, 1137 (9th Cir. 2012) (citing *Gray v. City of Valley Park*, 567 F.3d 976, 982 (8th Cir. 2009)) ("judicial estoppel is not a substitute for subject matter jurisdiction . . . Rather, a federal court must assure itself of its own jurisdiction to entertain a claim regardless of the parties' arguments or concessions."); *Hansen v. Harper Excavating, Inc.*, 641 F.3d 1216, 1228 (10th Cir. 2011). BIA's standing and the court's jurisdiction are contingent on the trust status of the land. *U. S. ex rel. Noel v. Moore Mill & Lumber Co.*, 313 F.2d 71, 73 (9th Cir. 1963).

Relying predominantly on jurisprudence from over 100 years ago, Appellees argue tenants may not challenge a lessor or grantor's title in response to an eviction.[1] The only cited contemporary precedent is *French v. Starr,* 691 Fed. Appx. 885 (9th Cir. 2017). But unlike *French*, in which an owner-lessor tribe asserted claims directly against the tenant, Mill Bay challenges *BIA's* standing to

[1] A theory on which the District Court neither relied on nor addressed.

bring a trespass action *on behalf of* MA-8's beneficial owners. If the owners were asserting claims directly against Mill Bay, *French* might apply; but they are not.[2]

a. The Master Lease's Sub-Tenancy Survival Applies.

The Membership and Expanded Membership Agreements (the "Agreements") constitute subleases under the Master Lease—meaning its Paragraph 8 permits Mill Bay's presence through 2034 even if the Lease terminated. Appellees dispute this, asserting Judge Quackenbush's flawed reasoning that the Agreements lacked sublease "indicia." Dkt. 7 at p. 14.[3] "Indicia" or form are not required for a sublease, and Appellees cite no authority therefor.

Instead, *federal* courts look to the Restatement (Second) of Property to determine whether an agreement is a sublease: "(1) space having a fixed location, (2) transfer of the right of possession, and (3) legal capacity of each party to enter into the agreement." *Wash. Metro. Area Transit Auth. v. Potomac Inv. Props., Inc.*, 476 F.3d 231, 236 (4th Cir. 2007) (citing Restatement (Second) of Property §§ 1.1–1.3). And under *Washington* law, the right conveyed determines whether an agreement is a sublease. *Draper Mach. Works v. DNR*, 117 Wn. 2d 306, 319 (1991) (en banc) (internal quotation marks omitted) ("[T]he court must look at the

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[2] Mill Bay stands on the trust/fee arguments in its Motion and joins those in the accompanying brief of Wapato Heritage ("Wapato").
[3] In contrast, at times Judge Peterson described Mill Bay's interest as a "sublease." ECF 503 at 11.

nature of the right, rather than to the name that the parties gave it, in order to learn its true character."); ECF 423-1 at p. 16. Judge Quackenbush erred in dismissing Mill Bay's claimed subtenancy for lack of magic words. ECF 144 at pp. 20-21.

In contrast, Judge Bridges analyzed Mill Bay's property interest in *Grondal, v. Chief Evans Inc.*, Chelan County Cause No. 02-2-01100-9 (June 2003). ECF 423-1 at 11-20. While leaving open whether the interests were "subleases" or "licenses," he concluded property interests were conveyed. *Id.* at 14 ("the expanded membership entitled the purchaser to the exclusive use of a designated space, presumably on a continuous basis"), 19 ("These memberships included the right to use the Mill Bay facilities but in addition, to utilize a designated site exclusively."), 20 ("the members received from the Sellers the right to 'use' the facilities"). In fact, the Agreements *do* contain indicia of subleases. Use rights (in some cases, exclusive) were conveyed, none were revocable at will, all had an express duration, the RVs were living quarters, with extended stays permitted.

Appellees parrot Judge Quackenbush's erroneous conclusion that applying Paragraph 8 would violate Paragraph 7 of the Master Lease by extending the sublease beyond the Master Lease term. But they fail to respond to Appellants' explanation that this misinterprets the Lease (Dkt. 7 at 12). And to the extent Appellees cite the Public Offering Statement as Lease terms, this is incorrect. Nor

do Appellees justify Judge Quackenbush's specious conclusion that Paragraph 8's "cancellation *or otherwise*" excluded ineffective renewal. That challenge stands.[4]

b. Trustee Immunity Should Not Bar Mill Bay's Estoppel Defense to the Ejectment Counterclaim.

BIA officials testified under oath they had authority to, *and did*, represent to Washingtonians and the State that memberships lasted through 2034; they knew Mill Bay would rely thereon, and Mill Bay had a right to (ECF 294 ¶¶39-80); they: (i) notified MA-8's majority interest-holders of the 2034 date (*id.* ¶¶48-49); (ii) attended the 2004 mediation on the landowners' behalf (*id.* ¶¶121-126); (iii) received notice of, and did not object to, the 2004 Settlement Agreement for Mill Bay to pay the landowners rents to use MA-8 through 2034 (*id.* ¶¶130-141); and (iv) sent settlement notice and Mill Bay's payments to the landowners. *Id.* ¶¶142-151. On this record, Judge Quackenbush *repeatedly* acknowledged estoppel, while rare against the Government, may be appropriate. ECF 144 at 37-38; ECF 329 at 21, 38. But this argument that so intrigued Judge Quackenbush was summarily dismissed by Judge Peterson on the basis of *U.S. v. City of Tacoma*, 332 F.3d 574 (9th Cir. 2003) decided years before this case was even filed. ECF 503 at 66-67.

[4] Even if a subtenancy was *not* created, an irrevocable license *was* (ECF 144 at 29-30) in part because Mill Bay as licensee, acting on the faith of the license, incurred expenses and made improvements to the land. ECF 295 at 21-22.

Contrary to Appellees, Mill Bay does not ask the Court to "overrule" 100 years of precedent, but to consider a more nuanced application of *City of Tacoma* based on factual distinctions and policy goals. Unlike *City of Tacoma*, which dealt with condemnations that would *permanently* encumber or alienate Indian land (while proposing to estop the U.S.' intervention), *this* case is a dispute in which nothing purports to *permanently* encumber or alienate MA-8 (although seeking to estop the U.S.' intervention). Even had the Master Lease been renewed, Mill Bay would have the right to occupy MA-8 only temporarily, through 2034. Lease Paragraph 8 contemplates a sublease surviving the Lease's termination, consistent with the full 50-year term. A122. Thus, applying estoppel would not ratify illegal occupancy, but grant Mill Bay temporary use consistent with the Lease.

Moreover, the Supreme Court questioned the wisdom of categorically rejecting equitable principles in Indian land disputes. *City of Sherrill, N.Y. v. Oneida Indian Nation of New York*, 544 U.S. 197, 214 (2005). The Second Circuit extended this reasoning to claims in which the Government sought to vindicate long-dormant third-party rights against state and local municipalities. *E.g.*, *Cayuga Indian Nation of N.Y. v. Pataki*, 413 F.3d 266, 279 (2d Cir. 2005). Mill Bay simply asks that the Court apply equitable principles where, as here, it would not run afoul of federal restraints on alienation or ratifying an otherwise illegal agreement.

Appellees ignore that BIA acted as proprietor (not trustee) when it marketed Memberships, with Evans, to the public, as lasting till 2034. A192–193, A375, A391. A question of fact exists whether individual BIA officials (who historically have overlapping roles at BIA and CTCR, *see* ECF 382 at 8-9; A372) ultimately profited from the sales. Thus, BIA drawing commercial acts under its trust responsibility resembles Judge Quackenbush's concerns raised years ago. *U.S. v. Newmont USA Ltd.*, 504 F. Supp.2d 1050, 1053 (E.D. Wash. 2007) (describing U.S. treatment and policies vis-a-vis Indians as "Flying Trapeze Policies, swinging back and forth from protection to termination as the political winds directed.").

And Appellees' attempted sanitizing of BIA's misrepresentations as "negligence," not "affirmative misconduct," is wrong. "There is no single test for detecting the presence of affirmative misconduct; each case must be decided on its own particular facts and circumstances." *Watkins v. U.S. Army*, 875 F.2d 699, 707 (9th Cir. 1989). Affirmative misconduct means "a deliberate lie or a pattern of false promises" (*Elim Church of God v. Harris*, 722 F.3d 1137, 1144 (9th Cir. 2013)), but "does not require that the government intend to mislead a party." *Watkins*, 875 F.2d at 707. In *Watkins*, this Court held 14 years of misrepresentation in violation of its regulations amounted to affirmative misconduct. *Id.* at 708. Here, the BIA engaged in *23-years of false promises* that the Master Lease ran through 2034; affirmative misconduct is clear, and equitable estoppel must apply.

c. Estoppel Against the Landowners.

Appellees' claim that Mill Bay asserts estoppel against only "a small fractional interest in MA-8" (Dkt. 7 at 18; Dkt. 10 at 10) is incorrect. Mill Bay asserts estoppel against *all* landowners, including the Tribe. Questions whether individual landowners are estopped create genuine issues of material fact that should preclude summary judgment on ejectment. The Tribe's purchase of individual interests does not eliminate Mill Bay's claims vis-à-vis those interests, which run as an equitable servitude on the land. ECF 485 at 7. Despite Appellees' strategic purchase of those interests, Mill Bay's estoppel claim remains. *Id.* at 5–8.

Meanwhile, in yet another internal conflict, Judge Quackenbush expressly found Mill Bay's affirmative claim of equitable estoppel was properly pled against the landowners (ECF 197 at 2), while Judge Peterson found it was not. A491–493. As explained, Judge Peterson was wrong, and Washington law—which governs (*see* ECF 485 at 8—10)—*does* support the claim. Regardless, equitable estoppel is available under federal common law. *E.g.*, *Acri v. Int'l Ass'n of Machinists & Aerospace Workers*, 781 F.2d 1393, 1397 (9th Cir. 1986); *First Nat. Bank of Portland v. Dudley*, 231 F.2d 396, 400 (9th Cir. 1956); *see also City of Sherrill*, 544 U.S. at 214 (equitable principles may apply to disputes over Indian land).

C. Factor 2: Mill Bay Will Suffer Irreparable Harm Absent a Stay.

Appellees collect cases concerning loss of commercial property, to argue Mill Bay will not suffer irreparable harm via loss of the Park. Dkt. 7-1 at 19. But its members *reside* there while open, as on residential (not commercial) property. Appellees meanwhile ignore Mill Bay's principal harm: *loss of finite time to use and enjoy MA-8*—lost forever during the appeal, absent a stay (notwithstanding further loss of money, time, and energy). Dkt. 4-1 at 23–24. In no event will Mill Bay be granted *longer* than 2034 on MA-8, even if successful on appeal; the lost time is gone for good. Also, Appellees' preoccupation with some (not all) RVs' mobility ignores that many purchased Memberships *to use RVs at the Park*. If they just wanted an RV, they would not have purchased Memberships at a collective cost of *millions*, much less invested in the Park's infrastructure. A286; A38–39, A46–48, A263, A267, A276. Moving RVs does not remedy lost access to the Park.

Finally, Mill Bay appreciates Appellees' extension through March 30 to remove personal property, but that concession was the product of this Motion (not offered until Sept. 14). In fact, Appellees first expressed an intent to confiscate Mill Bay's improvements. ECF No. 537 at 4. Nevertheless, since Appellees will leave the Park as-is for the foreseeable future—even considering opening a *new* RV park in the future (ECF No. 537 at 4)—it is unclear why a stay will harm them.

D. Factors 3 & 4: Other Parties & the Public Interest Will be Unharmed During A Stay.

Appellees incorrectly argue *Mill Bay* extended this litigation for 11 years. In fact, Appellees often did not comply with court orders; as one example, BIA let the case languish for over *five* years between Judge Quackenbush's Order on Representation (ECF 329) and Recusal (ECF 366) without complying with or appealing his directive. Self-inflicted injuries do not preclude a stay. *Al Otro Lado v. Wolf*, 952 F.3d 999, 1008 (9th Cir. 2020). BIA's acts should not harm Mill Bay.

The Tribe argues Mill Bay interfered with its connection with the land, citing "no trespassing" signs placed, but no evidence these were intended to deter Appellees (as opposed to tourists). And the disrespectful acts of unidentified men in Mr. Vance's Declaration, though unfortunate, do not represent Mill Bay.

As to economic harms, landowners may not have received rents during the lawsuit, but only because *BIA* refused them from Wapato. ECF No. 346-7; *see also* ECF No. 346-2. Mill Bay never stopped paying Wapato and wants those rents distributed to the landowners. As Appellees lack plans to modify MA-8 (potentially resurrecting an RV Park long-term), CTCR will suffer no harm, and Mill Bay supports a stay order granting them unrestricted access for planning.

III. CONCLUSION

For the foregoing reasons, this Court should stay execution of the ejectment judgment against Mill Bay pending the outcome of this appeal.

Respectfully submitted this 16th day of September, 2020.

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CERTIFICATE OF COMPLIANCE

This motion complies with the typeface and formatting requirements of Federal Rules of Appellate Procedure 27(d)(1) and 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this motion has been prepared in a proportionally spaced typeface using Microsoft Office Word for Windows 2016, in Times New Roman, 14-point type.

This motion also complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2) and Ninth Circuit Local Rules 27-1(1)(d) and 32-3(2). This motion contains 2,471 words over 10 pages, excluding those parts exempted by Federal Rules of Appellate Procedure 27(a)(2)(B) and 32(a).

Respectfully submitted this 16th day of September, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of September 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit, 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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