

No. 20-35694

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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

v.

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

v.

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

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

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**MOTION FOR RECONSIDERATION OF ORDER DENYING STAY OF  
EXECUTION OF JUDGMENT PENDING APPEAL BY APPELLANTS  
PAUL GRONDAL AND MILL BAY MEMBERS ASSOCIATION, INC.**

**EMERGENCY MOTION UNDER CIRCUIT RULE 27-3**

**DECISION REQUESTED BY: SEPTEMBER 30, 2020**

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellants Paul Grondal and the Mill Bay Members Association, Inc., a Washington Non-Profit Corporation (collectively, “Mill Bay”), state that the Mill Bay Members Association has no parent corporation and that no publicly held corporation owns 10% or more of the Mill Bay Members Association’s stock.

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## I. INTRODUCTION

In a remarkable display of flip-flopping best reserved for politicians on the campaign trail, the United States and the Confederated Tribes of the Colville Reservation (the “Tribes”) seek to breach an express agreement reached with Appellants Paul Grondal and the Mill Bay Members Association (“Mill Bay”) only two weeks ago.

The United States and the Tribe originally gave Mill Bay a September 30, 2020 deadline to completely vacate MA-8, but explicitly agreed with Mill Bay on September 14, 2020 that Mill Bay would have until March 30, 2021 to remove all its personal property and improvements from MA-8. However, on the afternoon of Friday, September 25, 2020, the United States expressed its intention to breach this express agreement, and the Tribes joined the United States’ position via email shortly afterward. The United States and the Tribes have threatened further legal action if all Mill Bay personal property and improvements are not removed from MA-8 by September 30, 2020—a request that is simply impossible at this juncture.

Because irreparable harm is now assured, and the United States and the Tribes now unequivocally admit their intent to *immediately* dismantle, remove, and otherwise damage Mill Bay’s costly improvements to the land, as well as inadequately winterize or not winterize at all the irrigation, electrical, and other

systems Mill Bay installed to the RV Park, Mill Bay respectfully requests that this Court reconsider its decision denying a stay of the execution of the district court's judgment authorizing Mill Bay's ejectment based on changes in factual circumstances.

## **II. JURISDICTIONAL STATEMENT**

The District Court certified its ejectment judgment as immediately appealable under Fed. R. Civ. P. 54(b). This Court denied Appellants' Motion for Stay of Execution of Judgment Pending Appeal on September 17, 2020. Dkt. Entry 14. Appellants seek reconsideration of that decision pursuant to 9th Cir. R. 27-10.

## **III. BACKGROUND**

On July 9, 2020, the district court ruled in favor of the United States on its summary judgment motion seeking Mill Bay's ejectment from MA-8. ECF 504. On July 28, 2020 the United States and the Tribes agreed to extend the date for execution of the judgment to September 30, 2020. *See* Declaration of Sally W. Harmeling ("SWH Dec.") at Exhibit J-K. A Third Amended Judgment was entered on August 18, 2020. ECF 540.

On August 31, 2020, Mill Bay wrote to the United States in response to the United States' request for an itemization of the personal property Mill Bay planned to take:

Please do recognize that the task of having the Mill Bay Members exit the RV Park by September 30, 2020, is a massive one. Approximately 90 RVs will need to be removed. Contrary to the Government's representations to the District Court and the 9th Circuit Court of Appeals, many of the RVs are not of the type that can simply be "driven off" the property. Rather, there are many fixed trailers with fixed improvements, including stairways, awnings, decks, rockeries, etc. On the expanded side of the park, for example, almost 50 of these trailers have been sitting in place for decades and will require the assistance of professional moving companies to pull those trailers out and move them. **In the middle of COVID, Mill Bay simply does not have the ability to move these trailers by September 30 in a timely and orderly fashion.**

Separate and apart from that complication, the property belonging to Mill Bay includes but is not limited to the following: 2 industrial-strength lawnmowers (gators), 2 custom-built removable docks and 2 floats, a tractor, multiple sheds, numerous mowers, miscellaneous tools, a pump, network equipment including approximately 12 access points (Wi-Fi antennas), picnic tables, decks, gazebos, buoys, pool table, ping pong table, miracle rake, pole saw[,] sheds, kayaks, file cabinets. **Some of this property is so large that Mill Bay has nowhere for it to be removed to.** Would the Tribe be willing to designate a location on MA-8 where **the very large property** can be temporarily moved to until such time as Mill Bay can find another home for it, but by no means later than March 30, 2021?

In addition, please be advised that the RV Park typically closes the 4<sup>th</sup> week of October each year; however, Mill Bay undertakes a significant amount of work to accomplish this closing for the winter. . . . If the winterization process is not done properly, the entire water system will blow, the entire electrical system will be jeopardize[d], the bath houses will freeze, and the docks will be damaged, all at a loss of hundreds of thousands of dollars and long-term damage to the real property.



Therefore, absent the parties reaching a different agreement at mediation or a court-ordered stay of the execution of the judgment, Mill Bay proposes that all of its members exit the property (cease overnight or recreational use) and the RV Park be formally closed by September 30, but that Mill Bay be granted until March 30, 2021 to remove all of its property from MA-8 to ensure a safe and orderly departure that does not jeopardize the property of Mill Bay and the real property on which it presently sits. The Mill Bay Members will in turn assist with winterizing the park and with providing information necessary to operate and maintain the systems that will remain, such as the water and electrical systems.

SWH Dec. at Exhibit A, pp. 1–2 (emphasis added).

On September 14, 2020, Federal Defendants wrote back:

This letter responds to your letter dated August 31, 2020 . . . .

**The United States agrees to Mill Bay’s request to be allowed additional time to remove all of its personal property from MA-8 by no later than March 30, 2021. The Colville Tribes, as the majority interest holder in MA-8, are also in agreement.** While we are amenable to this accommodation to the RV Park, we wish to convey the need for the Tribes’ and Indian allottee landowners unfettered access to the land without any risk of harassment or intrusion at the earliest possible date, but by no later than September 30, 2020.

As you requested, we will work to coordinate with the Colville Tribes to designate a location on MA-8 where **a portion of** Mill Bay’s personal property may be temporarily moved to and stored while Mill Bay works toward removing all of its personal property from MA-8 by no later than March 30, 2021. We will coordinate the issuance of a permit to cover this temporary storage arrangement.

We will also coordinate with the Tribes and you regarding winterization, as you suggested in your letter. Please provide me with a date that Mill Bay anticipates performing

winterization activities as soon as possible so that we can ensure to identify the individuals that will be participating in performing those procedures in the future and ensure their availability.

SWH Dec. at Exhibit B at p. 1 (emphasis added).

Days later, on September 16, 2020, Mill Bay articulated the parties' agreement to this Court via their Reply Brief in Support of Motion to Stay Execution of the Judgment: "Appellees have no plan for the land through at least March 30, 2021, during which they will permit Mill Bay's property to remain," and "Appellees will leave the Park as-is for the foreseeable future—even considering opening a *new* RV park in the future." Dkt. Entry 12, at 3, 11.

On September 21, 2020 consistent with their agreement, Mill Bay wrote to the United States to coordinate the winterization process. SWH Dec. at Exhibit C. On September 22, 2020 the Tribe requested the square footage of the additional storage space for Mill Bay's very large items. *See* SWH Dec. at Exhibit D.

At 6:45 a.m. on September 25, 2020, Mill Bay responded: "Concerning your request for the square footage of the storage unit, my client confirms with the extension of their ability to keep personal property at the RV Park through March 2021, they no longer need the storage area. Thank you for offering it, however." SWH Dec. at Exhibit E. Mill Bay requested confirmation that their proposed schedule for the winterization process was agreeable. *Id.*

Late on the afternoon of Friday, September 25, 2020, the United States unequivocally reneged on their prior agreement to permit Mill Bay's property to remain in place through March 2021:

This letter is in response to your 6:45 am email this morning stating your client Mill Bay's (and its members') intention not to comply with Judge Peterson's Order of Ejectment, and to not voluntarily remove their continued unlawful presence (e.g., RVs) at the RV park on MA-8, until at least next spring, March 31, 2021.

...

[T]his letter is being sent to *once again* make clear that Mill Bay and its members need to voluntarily vacate the RV park by no later than 11:59 p.m. on September 30, 2020. Although your client has requested a designated area for *storage* until March 31, 2021 – to be clear – *the United States and the Tribes did not at any point represent or agree to allow Mill Bay to keep personal property on the RV park portion of MA-8 after September 30, 2020, or through March 2021.*

...

Ms. Harmeling, respectfully, the gamesmanship must end. Absent a formalized permit granting your clients a place to temporarily store its personal property on MA-8 after September 30, 2020, the United States will pursue full enforcement of Judge Peterson's Ejectment Order and all over available remedies.

...

Your recent email correspondence indicates, however, the Mill Bay members are presently no longer interested in a storage permit and also do not intend to comply with Judge Peterson's Order of Ejectment and/or her Order authorizing Mill Bay's physical removal from the property. If Mill Bay is indeed rejecting the proposed temporary storage permit accommodation, and does not remove all personal property from MA-8 by the end of next Wednesday, you and your clients

will leave the United States no alternative but to pursue all available remedial actions to protect and preserve the trust property and its landowners' possessory rights.

SWH Dec. at Exhibits F–G (emphasis in original).

Shortly thereafter, the Tribe sent a similar email. SWH Dec. at Exhibit H. Mill Bay responded in utter disbelief, detailing the history of the parties' communications and reiterating their understanding of the parties' agreement, *i.e.*, Mill Bay's personal property could remain in place through March 2021. SWH Dec. at Exhibit I. Mill Bay explained, in reliance on the parties' agreement, its members had forewent other opportunities for urgent storage and moving of their personal property. *Id.* Under these circumstances, it was not possible to move all personal property off of the RV Park, whether onto a storage unit or otherwise, *within five days*, by September 30, 2020. *Id.* This was late on the afternoon of Friday, September 25, 2020. Mill Bay has heard nothing further.

#### IV. ARGUMENT

9th Cir. R. 27-10 allows for a litigant to move this Court to reconsider its orders. One basis to move this Court for reconsideration is due to “[c]hanges in legal or factual circumstances which may entitle the movant to relief.” 9th Cir. R. 27-10(a)(3).

This Court is to evaluate four factors when evaluating whether to issue a stay pending appeal:

(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.

*Fed. Trade Comm'n v. Qualcomm Inc.*, 935 F.3d 752, 755 (9th Cir. 2019) (quoting *Nken v. Holder*, 556 U.S. 418, 426 (2009)). Mill Bay rests on its arguments made in Dkt. Entries 4-1 and 12 on the first, third, and fourth factors, but submits this motion to the Court based on changed facts regarding the third factor: irreparable harm.

Irreparable harm has “no adequate legal remedy.” *Arizona Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1068 (9th Cir. 2014). The focus is on the “individualized nature of irreparable harm.” *Leiva-Perez v. Holder*, 640 F.3d 962, 969 (9th Cir. 2011).

Despite their earlier agreement with Mill Bay to the contrary, the United States and the Tribes now demand dismantlement of all of Mill Bay’s improvements to the RV Park on MA-8 by midnight on September 30, 2020. Mill Bay’s improvements include infrastructure for water, electricity, fiber optics, and site-specific improvements such as driveways and landscaping—improvements that are frankly impossible to remove by September 30, 2020 now that most Mill Bay members have vacated MA-8 without their personal property and

improvements, in good-faith reliance on the agreement between the United States, the Tribes, and Mill Bay. *See* Declaration of Franklin Smith ¶¶ 5–8.

Additionally, because neither the United States nor the Tribes have responded to Mill Bay’s September 21, 2020 proposal for a winterization schedule, they also no longer appear interested in assisting Mill Bay in the winterization efforts to preserve the irrigation, electrical, and other systems Mill Bay expended significant sums installing. The winters in Eastern Washington can be harsh, and the United States’ and the Tribes’ indifference to the cold weather’s effect on Mill Bay’s personal property and improvements will prove to be irreparably harmful to them, as it could be impossible to replace or restore such property and improvements should Mill Bay prevail on appeal.

Thus, Mill Bay respectfully requests reconsideration of their Motion for Stay of Execution of Judgment Pending Appeal given this newly discovered evidence that they will suffer irreparable harm in the absence of a stay, by virtue of their many improvements to the land being dismantled and destroyed as a result of the United States’ the Tribes’ willful breach of an express agreement.

## V. CONCLUSION

For all of the foregoing reasons, during the pendency of this appeal, this Court should stay the execution of the judgment authorizing the ejectment of Mill Bay.

Respectfully submitted this 28<sup>th</sup> day of September, 2020.

s/ SALLY W. HARMELING

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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 2,326 words over 9 pages, excluding those parts exempted by Federal Rules of Appellate Procedure 27(a)(2)(B) and 32(a).

Respectfully submitted this 28th day of September, 2020.

s/Sally W. Harmeling  
SALLY W. HARMELING, WSBA No. 49457



## CERTIFICATE OF SERVICE

I hereby certify that I, counsel for Appellants Paul Grondal and Mill Bay Members Association, Inc., electronically filed the foregoing document with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on the 28<sup>th</sup> day of September, 2020. Notice of this filing will be sent to the parties listed below by operation of the Court's electronic filing system.

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I hereby certify that on the 28th day of September, 2020, Notice of this filing is being sent this date via United States Postal Service First Class Mail to the parties below at the addresses indicated below.

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