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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
	Resident; and THE MILL BAY)	
7	MEMBERS ASSOCIATION, INC., a)	
	Washington Non-Profit Corporation,)	
8)	CONFEDERATED TRIBES OF
	<i>Plaintiffs,</i>)	THE COLVILLE RESERVATION’S
9)	RESPONSE TO PLAINTIFFS’
	vs.)	MOTION TO STAY EXECUTION
10	THE UNITED STATES OF)	OF JUDGMENT PENDING
	AMERICA, <i>et al.</i> ,)	APPEAL
11)	
	<i>Defendants.</i>)	
12)	

13 **I. INTRODUCTION**

14 The Confederated Tribes of the Colville Reservation (“Colville Tribes”)
15 and the United States seek an orderly and reasonably timed departure of the Mill
16 Bay Members Association (“Mill Bay”) from Moses Allotment 8 (MA-8)
17 following this Court’s July 9, 2020, Order in favor of the United States on its
18 motion for ejectment (ECF No. 503) and some nine years after the Ninth Circuit
19 held that the Master Lease for the Mill Bay RV Park had terminated. In contrast,
20 Mill Bay requests a stay on the execution of the judgment pending appeal, a

1 process which is likely to last multiple years, intended to thereby allow Mill Bay
2 members to continue trespassing on MA-8 and depriving the Colville Tribes and
3 the individual allottees of their rightful possession of this portion of MA-8.

4 The requested stay is not only unwarranted under the applicable legal
5 standard, it is also unnecessary to achieve the orderly and peaceful departure from
6 the property required by the Court's order while accommodating Mill Bay's
7 concerns about relocating during the COVID-19 pandemic. Recently, the United
8 States (with the support of the Colville Tribes) informed Mill Bay that all
9 members may take until September 30 to remove their RVs, trailers, and other
10 camping equipment from the property and take other required actions under the
11 Master Lease. A two-month window in which to relocate equipment that is by
12 definition – and by Mill Bay's own rules – non-permanent in nature, will allow
13 Mill Bay members to occupy the RV Park for the remainder of the summer, make
14 arrangements to relocate their mobile camping vehicles, and wind down
15 operations. That timing will also coincide with the approximate annual departure
16 of members for their permanent homes or warmer locales during the winter
17 months and the seasonal closure of the RV Park.

18 After Mill Bay vacates MA-8, the land will be available for Colville Tribal
19 members to access and use in order to restore the vital connection they have to
20 this land and its cultural properties, which are at the heart of the constituent

1 Chelan Tribe’s traditional territory. Full access to MA-8 will allow Tribal elders
2 to bring Tribal youth to the land and pass on cultural teachings to future
3 generations. Once MA-8 is vacated, any Tribal development planning processes,
4 including additional cultural property surveys and archaeological site monitoring,
5 will be able to proceed unhindered.

6 The motion should be denied, and Mill Bay should stop stalling and
7 proceed to vacate MA-8 by autumn.

8 II. ARGUMENT

9 A. Rule 62(b) Is Inapplicable Because the Court’s Order and 10 Judgment on Ejectment Are Injunctive in Nature.

11 In many cases, Federal Rule of Civil Procedure 62 provides for an
12 automatic 30-day stay of execution of a judgment and a longer stay after approval
13 of a supersedeas bond. Fed. R. Civ. P. 62(a), (b). However, the rule specifically
14 carves out injunctions from this provision. Fed. R. Civ. P. 62(c). Even when an
15 appeal is pending on an interlocutory order in an action for an injunction, there is
16 no right to a stay upon posting a bond. *Id.* Rather, a stay only issues when a
17 court, in its discretion, “orders otherwise.” *Id.*

18 As the Colville Tribes explained in responding to Mill Bay’s motion for
19 clarification, ECF No. 515, the Court’s July 9, 2020, Order is injunctive in nature
20 because it has “the practical effect of denying [or granting] an injunction.”

21 *Carson v. American Brands, Inc.*, 450 U.S. 79, 83-84 (1981). This Court, in its

1 Order on that motion, agreed. ECF No. 518 at 4. Although Mill Bay takes pains
2 to avoid characterizing the order and judgment from which it intends to appeal as
3 an injunction, *see* ECF No. 508 at 6, its arguments – which articulate the objective
4 of avoiding the clear direction of this Court’s Order on ejectment, *i.e.*, removal
5 from MA-8 – are contrary to the Court’s conclusion that the Judgment and Order
6 are subject to immediate appeal under 28 U.S.C. § 1292(a)(1) “due to their
7 injunctive nature.” ECF No. 518 at 4. The Court should likewise determine that a
8 stay may only issue if Mill Bay satisfies the requirements for a discretionary stay.
9 *See* Fed. R. Civ. P. 62(c), (d); *Nken v. Holder*, 556 U.S. 418, 434 (2009). *See also*
10 Fed. R. Civ. P. 62, Committee Notes on Rules – 2018 Amendments (noting that
11 the revised Rule 62 “include[s] all of the words used in 28 U.S.C. § 1292(a)(1)”).¹

12 **B. Mill Bay Cannot Satisfy the Requirements for a Discretionary Stay.**

13 Because Rule 62(b) does not apply in this case, a stay may only issue if
14 Mill Bay satisfies the criteria for a discretionary stay articulated in *Lair v. Bullock*,
15 697 F.3d 1200, 1203 (9th Cir. 2012) (quoting *Nken*, 556 U.S. at 434). Mill Bay
16

17 ¹ Mill Bay’s emphasis on the amount of the bond, ECF No. 508 at 6-7, highlights
18 the disjunction between the objective of Rule 62(b) – to protect the prevailing
19 party from monetary loss during a stay – and this Court’s order, which cleared the
20 way for removal of Mill Bay from MA-8, but did not involve money.

1 bears the burden of demonstrating that “the circumstances justify an exercise of
2 [this Court’s] discretion.” *Id.*

3 Here, the circumstances do not justify a stay pending appeal. On July 28,
4 counsel for the United States wrote to the attorneys for Mill Bay and Wapato
5 Heritage seeking “to address Mill Bay vacating MA-8 in a peaceful manner in
6 light of the 2009 termination of the Master Lease and the Federal Court’s recent
7 order authorizing the removal of Mill Bay RV Park.” July 28, 2020, Letter at 1
8 (attached as an exhibit to Declaration of Joseph P. Derrig). The United States’
9 letter provides instructions for winding down Mill Bay’s occupancy of the
10 property under the terms of the Master Lease, including itemizing all personal
11 property that Mill Bay proposes to leave and removing “all trailers, motor
12 vehicles,” and certain other moveable items no later than September 30, 2020. *Id.*
13 These instructions provide Mill Bay and its members with a reasonable window of
14 time in which to arrange and undertake an orderly departure from the property.
15 The two-month period also allows the members to remain on the property for the
16 duration of the summer season at Lake Chelan and to work through “any
17 complications the COVID pandemic may present.” *Id.* Accordingly, a stay is not
18 necessary to ensure a reasonable opportunity for Mill Bay to vacate the RV Park
19 in an orderly and safe manner consistent with this Court’s order.

1 1. *Mill Bay Fails To Make a Strong Showing of Likely Success on the*
2 *Merits.*

3 Although courts have described the degree of likely success that a party
4 seeking a stay must show using various formulations, the Ninth Circuit recently
5 determined that they “are largely interchangeable” and, at a minimum, require a
6 showing that “there is a ‘substantial case for relief on the merits.’” *Lair*, 697 F.3d
7 at 1204 (quoting *Leiva-Perez v. Holder*, 640 F.3d 962, 968 (9th Cir. 2011)). Mill
8 Bay cannot satisfy this criterion because Mill Bay has already presented
9 exhaustive arguments on the merits to this Court, and the July 9, 2020, Order
10 thoroughly analyzed them and concluded they are without merit. Mill Bay raises
11 no new arguments in its motion for stay. The issues of whether MA-8 is trust land
12 and whether ejectment of Mill Bay is proper are the heart of this case and were
13 convincingly decided by this Court adverse to Mill Bay’s position.

14 The Colville Tribes agree that the issues in this case have important
15 consequences, ECF No. 508 at 9, but this is entirely different from whether Mill
16 Bay has shown a “substantial case” *on the merits*. Nor does the long history of
17 this case demonstrate a likelihood of appellate success on the core issues of trust
18 status and ejectment, which were fully and fairly determined by this Court.
19 Finally, Mill Bay cannot show likely success on the merits by comparing this
20 action to an inapposite case addressing an entirely different area of Indian law.

1 See ECF No. 508 at 9 (citing to Ninth Circuit opinion affirming western
2 Washington tribes’ right to the protection of salmon habitat under treaty fishing
3 rights).

4 2. *Mill Bay Will Not Suffer Irreparable Harm in the Absence of a Stay.*

5 The second factor, “whether the applicant will be irreparably injured
6 absent a stay,” requires more than ‘some possibility of irreparable injury.’” *Lair*,
7 697 F.3d at 1214 (quoting *Nken*, 556 U.S. at 434-35). The Ninth Circuit has
8 contrasted this with the first stay factor and required the applicant show “there is a
9 probability of irreparable injury if the stay is not granted.” *Id.* (citing *Leiva-Perez*,
10 640 F.3d at 968) (emphasis in original).

11 Mill Bay focuses on the harm its members would allegedly suffer from
12 losing “their permanent homes.” ECF No. 508 at 10. This assertion is not
13 supported by the evidence, which indicates the RV Park is a seasonal recreation
14 site. Mr. Smith’s declaration makes clear that members who “use the RV Park on
15 MA-8 as their residence” do so on a seasonal basis because ejection would leave
16 them with “very few options of where else to go *during the summer months.*”
17 ECF No. 509, Ex. A ¶ 4 (emphasis added). Mr. Botts’ declaration states only that
18 he “leave[s his] RV at Mill Bay and use[s] it exclusively there” and that members
19 who “use this land permanently” do so “at least for the season.” ECF No. 510 ¶¶
20 3, 7. Finally, in describing the RV Park as a “permanent home” for some

1 members, Mill Bay fails to mention that its own rules and regulations prohibit
2 “permanent occupancy.”² As noted above, under the schedule set forth in the
3 United States’ July 28, 2020, letter, members would not be required to vacate the
4 property until the end of this summer, which will allow them to wind down their
5 seasonal occupancy in an orderly manner.

6 Mill Bay also points to the loss of improvements to the RV Park, but fails to
7 acknowledge that memberships do not confer any title to the land, making it
8 unreasonable for Mill Bay members to expect to benefit from such improvements
9 years after the Master Lease expired. *See* ECF No. 16-2 at 6 (§ IV). Further,
10 while vacating the RV Park may be disappointing to Mill Bay members, that does
11 not entitle them to hold over on the property indefinitely when the courts have
12 determined that the lease expired over a decade ago and Mill Bay is in trespass by
13 continuing to occupy the RV Park. ECF No. 503 at 65, 71. Such arguments
14 merely bely Mill Bay’s true objective – to use any means at their disposal to
15 continue occupying MA-8 until 2034.

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18 ² *See* [http://www.millbayrvresort.com/uploads/1/0/4/7/10477134/mbma_expanded](http://www.millbayrvresort.com/uploads/1/0/4/7/10477134/mbma_expanded_rule_s_&_regs_final_revised_01-01-15.pdf)
19 [rule_s_&_regs_final_revised_01-01-15.pdf](http://www.millbayrvresort.com/uploads/1/0/4/7/10477134/mbma_expanded_rule_s_&_regs_final_revised_01-01-15.pdf) (last visited July 29, 2020) (stating
20 “No permanent occupancy shall be permitted.”).

1 Like all other parties, the Colville Tribes are dealing with the COVID-19
2 pandemic and making daily decisions about how to carry on life, work, recreation
3 and other basic human needs in a safe and healthy manner. While the Tribes
4 understand the need to take precautions under these circumstances, that need does
5 not justify continued trespass on MA-8. This is particularly true in light of Mill
6 Bay members' affirmative decisions to travel from their permanent homes and
7 stay at the RV Park this summer during the pandemic. They now have more than
8 60 days to make plans to safely vacate the property.

9 *3. Harm to the Colville Tribes and Consideration of the Public Interest*
10 *Disfavors a Stay.*

11 A stay would harm the Colville Tribes in numerous ways which Mill Bay
12 fails to acknowledge – or even comprehend. ECF No. 508 at 10. The Colville
13 Tribes attach extraordinary importance on the land. Declaration of Chairman
14 Rodney Cawston ¶ 4 (“It is our identity. It is the foundation of our culture,
15 spirituality and way of life.”). The ability of Colville elders to connect with the
16 land and share that connection with Colville youth is vital. *Id.* ¶ 8. The continued
17 presence of the RV Park on the shore of Lake Chelan in MA-8 impairs the Tribes’
18 efforts to restore that connection and pass it on to future generations. *Id.* ¶ 9.

19 MA-8 is the heart of the homeland of the Chelan Tribe, and is of
20 tremendous cultural and spiritual value. *Id.* ¶ 8; Declaration of Guy F. Moura ¶¶

1 4, 6. At least seven cultural properties have been identified on MA-8, and the
2 Tribal cemetery adjacent to the RV Park houses the remains of over 100 Tribal
3 ancestors and is where the remains of Colville ancestors whose burials were
4 displaced from other locations are reinterred. Moura Decl. ¶¶ 5, 6. The RV Park
5 has physically intruded on the cemetery and deters Tribal members from
6 accessing the cemetery. *Id.* ¶¶ 6, 7. Conducting archaeological surveys or even
7 routine monitoring of existing archaeological sites has been impaired by the
8 presence of the RV Park. *Id.* ¶¶ 8-11 and Ex. 4. Finally, the presence of the RV
9 Park makes it difficult for the Colville Tribes to proceed with exploring options
10 for development and making plans for future use of the property. Cawston Decl.
11 ¶¶ 11, 13.

12 A stay would not serve the public interest. Mill Bay fails to explain how
13 extending their trespass on MA-8 is warranted under any circumstances, much
14 less when a stay pending appeal could persist for years. Eleven years of unlawful
15 occupancy is enough. *See* ECF No. 518 at 4-5.

16 III. CONCLUSION

17 Mill Bay has failed to carry their burden of demonstrating a strong
18 likelihood of success on the merits or that they would suffer irreparable harm in
19 the absence of a stay. Further, the Colville Tribes would be harmed and the public
20 interest would not be served if a stay were granted. The motion should be denied.

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Dated this 29th day of July, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on July 29, 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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18 Dated this 29th day of July, 2020

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