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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WATER WHEEL CAMP
RECREATIONAL AREA, INC.,

Plaintiff / Cross-Appellant,
and

ROBERT JOHNSON,

Plaintiff / Appellee,
v.

GARY LaRANCE, in his official capacity
as Chief and Presiding Judge of the
Colorado River Indian Tribal Court, and
JOLENE MARSHALL, in her capacity as
Clerk of the Colorado River Indian Tribal
Court,

Appellants / Cross-Appellees.

) Case Nos. 09-17349 & 09-17357
) (CONSOLIDATED)
)
) District Court Case No.: 2:08-cv-00474
)
)
) **REPLY IN SUPPORT OF WATER**
) **WHEEL'S EMERGENCY**
) **MOTION UNDER CIRCUIT RULE**
) **27-3 & FRAP 8(a) FOR ORDER**
) **ENJOINING TRIBAL COURT**
) **PARTIES FROM ISSUING WRIT**
) **OF RESTITUTION ORDERING**
) **CRIT TRIBAL POLICE TO EVICT**
) **WATER WHEEL NOW**
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I. INTRODUCTION

At issue is the Emergency Motion of Water Wheel Camp Recreational Area, Inc. ("Water Wheel") asking this Court to immediately enjoin Colorado River Indian Tribes ("CRIT") Tribal Court Judge Gary LaRance and CRIT Tribal Court Chief Court Clerk Jolene Marshall ("Tribal Court Parties") from issuing or filing with the Tribal Court the [Proposed] Writ of Restitution ("Writ"). The Writ was sought in the Motion for Writ filed by CRIT in Tribal Court on August 17, 2010 ("CRIT Motion").

The requested stay would maintain the *status quo* until this Court has ruled on the merits of the parties' cross-appeals which have been fully briefed and are pending before this Court.

II. DISCUSSION

The Emergency Brief was filed by Water Wheel alone (and not its principal, Appellee Robert Johnson) because the Writ proposes to evict only Water Wheel from its business premises on the West Bank of the Colorado River. The relief sought here goes to the basic issue before this Court of whether the Tribal Court had jurisdiction over Water Wheel for the purposes of ordering the very eviction the Writ would mandate. Yet, the Tribal Court Parties cavalierly suggest that an eviction executed now is not particularly important because all of the other elements of the Tribal Court order would be unaffected by anything decided by this

Court, including "damages, attorney fees and rents," adding that "[o]nly the eviction issue would **arguably** become moot." (Dkt. 43 at 11-12) (emphasis added.) Because eviction is the only relief sought in the Writ, its issuance will definitely – and not just "arguably" – moot Water Wheel's appeal.

A. The Facts Before This Court Clearly Demonstrate The Very Harm Upon Which Injunctive Relief Should Be Ordered.

As discussed in the Emergency Motion, the CRIT Motion asks the Tribal Court to issue the Writ of Restitution ordering the CRIT Tribal Police to immediately enter Water Wheel's business site, **forcibly evict** Water Wheel and **confiscate** any property on the site belonging to the company. That fact is beyond dispute.

If the Writ is issued by the Tribal Court Parties, the CRIT Police will be **required** under tribal law to execute the forcible eviction and property confiscation dictated by the Writ. That fact is beyond dispute.

If CRIT is allowed to seize possession of the Water Wheel business premises through eviction, there will be **no legal process** through which Water Wheel ever would be able to recover the position it occupied prior to the forcible eviction and property confiscation because CRIT's sovereign immunity defeats any remedial actions otherwise available in a legal dispute. That fact is beyond dispute.

Absent a stay by this Court now, the Tribal Court Parties will be able to permanently resolve the Water Wheel appeal challenging their original exercise of jurisdiction because tribal sovereign immunity would deny Water Wheel any legal remedy to reverse the eviction and property confiscation. That fact is beyond dispute.

Thus, contrary to the Tribal Court Parties' argument, the facts upon which this Court may order the requested injunction are present, clear and beyond dispute.

B. Water Wheel Correctly Articulated And Applied The Legal Standards Applicable To This Motion.

The Tribal Court Parties creatively have endeavored to revise the law applicable to this Court's consideration of the injunctive relief sought, by accusing Water Wheel of "cherry picking" language from *Alliance for the Wild Rockies v. Cottrell*, 2010 U.S. App. LEXIS 15537 (9th Cir. 2010), in order to construct an erroneous "sliding scale" test. (Dkt. 43 at 7). In support, they argue that the "sliding scale" test for balancing irreparable harm and success on the merits was "clearly rejected" by the Supreme Court in *Winter v. NRDC*, 555 U.S. ___, 129 S. Ct. 365 (2008). *Id.* The Tribal Court Parties' argument is in direct conflict with *Wild Rockies*.

Contrary to the Tribal Court parties' position, it must be noted that this Court's decision in *Wild Rockies* plainly states that "the serious questions approach

survives *Winter* when applied as part of the four-element *Winter* test." *Wild Rockies*, at *10 (noting Justice Ginsburg's conclusion that "the majority opinion in *Winter* did not disapprove the sliding scale approach"). Indeed, in *Wild Rockies*, this Court conducted a careful and in-depth analysis of the "serious questions" test in light of the Supreme Court's decision in *Winter* (*Wild Rockies*, at *9-19) and discussed how other federal circuit courts have approached the application of the "serious questions" test in the wake of *Winter*. In the end, this Court joined several other circuit courts in concluding that the "sliding scale" test for injunctions "remains viable after the Supreme Court's decision in *Winter*." *Id.* at *18-19. With that finding, the Court declared that, in this Circuit:

A preliminary injunction is appropriate when a plaintiff demonstrates . . . that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor.

Wild Rockies *18-19. Admittedly, this Court also made clear that, in addition to satisfying the serious questions test, a plaintiff must also meet the **other two** elements of *Winter*'s test: irreparable harm and public interest. *Wild Rockies* at *10. Nevertheless, a strong showing of irreparable harm might offset a lesser showing of likelihood of success on the merits, *id.* at *9-10, assuming the remaining elements of the test are met.

Without reconciling their argument with the standards enunciated by this Court, the Tribal Court Parties contend that *Wild Rockies* simply stands for the

proposition that the "sliding scale application may still be used if the applicant for injunctive relief has demonstrated that the **first two** elements of the *Winter* test have been met." (Dkt. 43 at 7-8) (emphasis added). In reality, their argument proposes to effectively eviscerate altogether this Court's careful and deliberate analysis of the serious questions test.

After arguing that Water Wheel's interpretation of the governing standard is wrong, the Tribal Court Parties assert that Water Wheel "continues to argue the existence of ephemeral serious questions" because it cannot make the "other required showings." (Dkt. 43 at 8). However, Water Wheel correctly applied **and satisfied** the serious question test which was reaffirmed by this Court in *Alliance for the Wild Rockies*. Moreover, for all the reasons discussed in the Emergency Motion (Dkt. 43-1 at 11-13), Water Wheel will experience irreparable harm if the Writ is issued and the public interest weighs in its favor. Water Wheel has made all the required showings and the balance of equities weighs in its favor.

The Tribal Court Parties then offer a half-hearted argument with respect to the serious questions raised by Water Wheel's appeal on the merits. (Dkt. 43 at 9.) First, they claim that Water Wheel's argument – that the Lease and the comprehensive federal regulations governing the Lease (and the parties thereto) preclude Tribal Court jurisdiction – is "demonstrably weak due to several references in the lease to tribal enforcement authority . . ." *Id.* However, they

neither identify the Lease provisions vaguely referred to nor offer any explanation regarding how or why the unidentified provisions have any impact.

The Tribal Court Parties make an unfounded and specious claim that "Water Wheel's lease-based arguments have nothing to do with jurisdiction at all" *Id.* Water Wheel's lease- and regulation-based arguments have **everything** to do with the Tribal Court's lack of jurisdiction over Water Wheel. It is well established that tribal courts do not have jurisdiction over non-members, like Water Wheel, unless one of the two exceptions articulated in *Montana v. United States*, 450 U.S. 544 (1981), have been met. Water Wheel's argument always has been that the Lease and the federal leasing regulations incorporated therein demonstrate that Water Wheel never consented to tribal court jurisdiction and thus is not subject thereto.

In any event, the irreparable harm that Water Wheel will experience in being completely denied any remedy or restitution for a wrongful CRIT eviction is so strong that any potential weakness in its arguments must give way. On the other hand, the Tribal Court Parties will be unaffected by any decision by this Court¹ and CRIT has alternative remedies.

¹ Even CRIT itself has admitted to this Court that the Tribal Court Parties have no interest in either the outcome of the case brought by CRIT or whether CRIT actually can enforce the judgment in its favor. *See* Brief of Amicus Curiae in Opposition to Plaintiffs' Brief "Concerning the Lack of Tribal Court Jurisdiction Pursuant to the Rule of *Montana v. United States*," Case No. 2:08-cv-474-PHX-DGC, at 11 (D. Ariz. lodged Apr. 24, 2009). CRIT has further conceded that the

C. In Balancing, The Equities, This Court Must Assess The Impact Of An Injunction On the Parties to this Appeal and Not Third Parties.

This appeal concerns only whether the Tribal Court had jurisdiction over Water Wheel and Johnson; it is not an appeal of the Tribal Court judgment as such. Yet, the Tribal Court Parties have gone beyond defending their exercise of jurisdiction and are now arguing the merits of CRIT's Tribal Court case, to the point of declaring that allegedly-unpaid rental payments are causing "daily" damage **to the Tribe** which this Court should stop by allowing the Writ to be issued. (Dkt 43 at 10). Indeed, they even have the temerity to propose that Water Wheel should post a bond to secure the Tribal Court damages award of \$4 million. *Id.* This, of course, ignores that the harm allegedly being suffered by CRIT is only monetary, and it is well established that monetary damages, even if substantial, can be recovered. *Sampson v. Murray*, 415 U.S. 61, 90, 94 S. Ct. 937, 39 L. Ed. 2d 166 (1974) ("[i]t seems clear that the temporary loss of income, ultimately to be recovered, does not usually constitute irreparable injury The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm"). No bond would be appropriate even if CRIT were before this Court, and certainly is not appropriate to protect the interests of an absent entity.

Tribal Court Parties "were not parties to the Lease, and **stand to gain or lose nothing** depending on the outcome of the case." *Id.* at 11 (emphasis added).

While aggressively advocating the interests of the non-party CRIT, the Tribal Court Parties have not identified a single equitable factor in their own favor, strongly suggesting that none exist. *Cf. Amoco Prod. Co. v. Gambell*, 480 U.S. 531, 542 (1987) ("courts must balance the **competing claims** of injury and must consider the effect on each party of the granting or withholding of the requested relief") (emphasis added). And this Court has made clear that an injunction "must do more good than harm (which is to say that the balance of equities favors the [movant])." *See Wild Rockies* at *14.

In addition, the Tribal Court Parties fail to discuss the fact that CRIT itself elected to pursue eviction in Tribal Court which it knew was outside the enforcement option agreed to in the Water Wheel Lease. Nonetheless, CRIT proceeded to litigate and win a judgment potentially worth millions of dollars if it wins its jurisdictional gamble, a judgment which the Tribal Court Parties contend balances the equities against Water Wheel.

There may have been a delay in resolving the conflict between CRIT and Water Wheel, but the delay is the product of CRIT's election to litigate in Tribal Court rather than pursuing the clear remedies outlined in the Lease. Whether CRIT selected a forum with jurisdiction will be decided by this Court.

D. Whether Water Wheel Is, Or Is Not, Occupying Its Business Premises Without A Lease Is Irrelevant To The Emergency Motion.

Water Wheel explained in its Emergency Motion why the stay of execution of the Writ is in the public interest. (Dkt. 43-1 at 14-16). In response, the Tribal Court Parties denigrate the legal substance of this appeal as dismissing an eviction as "arguably . . . moot" with the suggestion that the public interest is best served by allowing the Writ to be issued and the Tribal Court to Order Water Wheel's eviction. (Dkt. 43 at 11-12). To the contrary, the public interest is best served by insuring that no judicial body – including the CRIT Tribal Court – is permitted to impose penalties on any litigant in the absence of jurisdiction. That is the legal principle of *Montana v. United States*, and the Tribal Court Parties should be defending the principle rather than seeking to invalidate it.

III. CONCLUSION AND RELIEF REQUESTED

For the foregoing reasons, Cross-Appellant Water Wheel respectfully requests that this Honorable Court grant this Motion and enter an order immediately enjoining Cross-Appellees LaRance and Marshall, from issuing the

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Writ sought by CRIT's motion of August 17, 2010, or otherwise taking any action to evict Water Wheel unless and until this Court has ruled on the merits of the parties' pending appeals.

Dated: September 3, 2010

Respectfully submitted,

s/ Dennis J. Whittlesey

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of September 2010, I did file with this Court and did serve on all parties, via ECF/Pacer Electronic Filing, Reply in Support of Water Wheel's Emergency Motion Under Circuit Rule 27-3 and FRAP 8(a) for Order Enjoining Tribal Court from Issuing Writ of Restitution Ordering CRIT Tribal Police to Evict Water Wheel Now.

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