Vermont Superior Court
Orleans Civil Division

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STATE OF VERMONT

SUPERIOR COURT
Orleans Unit

CIVIL DIVISION
Docket No. 256-10-11 Oscv

Green Mountain Power Corporation
Plaintiff

v.

Donald and Shirley Nelson
Defendants

PRELIMINARY INJUNCTION

This matter came before the court on Plaintiff's Motion for a Preliminary Injunction. Pursuant to V.R.C.P. 65(b), Defendants received notice and the court held hearings on October 20 and 25, 2011 at which Plaintiff and Defendants presented evidence. Having considered the evidence as well as the parties' various motions, supporting memoranda of facts and law, affidavits, and exhibits, the court GRANTS the requested Preliminary Injunction.

The court finds, based on the evidence presented by both parties, that Plaintiff will sustain irreparable harm if an injunction is not issued. The court finds that Defendants Donald and Shirley Nelson and other persons acting in concert and participation with Defendants are improperly interfering with Plaintiff's development of a wind generation project in Lowell, Vermont, known as the Kingdom Community Wind Project (the "Project"). Specifically, the evidence shows that the Nelsons and those acting in concert and participation with them are intentionally occupying the northwesterly boundary of the Nelsons' property adjoining the Project in close proximity to blasting on GMP property where the Project is being constructed.

The purpose of Defendants and those acting in concert and participation with them is to 1) place themselves far inside a 1,000 foot safety zone in order to create a risk to human safety that will prevent the blasting from taking place, and thereby 2) cause irreparable harm to GMP and the public. Plaintiff has presented sufficient evidence that it is likely to succeed on the merits of its nuisance and contract interference claims, and that issuing the below order will impose no or little cost on Defendants.

IT IS HEREBY ORDERED:

Pursuant to V.R.C.P. 65(d), that Defendants Donald and Shirley Nelson, and any and all of their agents, employees, attorneys, invitees, licensees, permittees and all and any other persons acting in concert or in participation with Defendants Donald and Shirley Nelson are ENJOINED, PROHIBITED and RESTRAINED FROM ENGAGING IN ANY AND ALL OF THE FOLLOWING:

1. **Being present within 1,000 feet of the northwesterly boundary of Donald and Shirley Nelson's Lowell, Vermont property and adjoining GMP's land for two hours before blasting until the all-clear whistle is sounded.**

2. **Inviting, encouraging or permitting other individuals to be present within 1,000 feet of the northwesterly boundary of Donald and Shirley Nelson's Lowell, Vermont property and adjoining GMP's land for two hours before blasting until the all-clear whistle is sounded.**

IT IS FURTHER ORDERED, that Donald and Shirley Nelson permit GMP to post signs warning of the blasting and giving notice of this Order on their property on access routes to the above described northwesterly boundary area and at visible locations in that boundary area. GMP shall delineate the 1,000-foot safety zone for each blast and shall properly post the 1,000-foot safety zone to warn the public of any blasting. GMP shall provide law enforcement with notice of blasting sufficient to allow for execution of this order.

Pursuant to V.R.C.P. 65(c) the court waives any security requirement. A wrongful issuance of an order will pose little or no cost or burden on Defendants, and Plaintiff has resources to pay for any such minimal costs.

The Orleans County Sheriff, with any assistance provided by other County Sheriff Offices, and the Vermont State Police are authorized to arrest and remove any individuals within 1,000 feet of that boundary within the specified two hour period. The Sheriffs' Offices and Vermont State Police are authorized to enter onto the land of Donald and Shirley Nelson within 1,000 feet of the Green Mountain Power Project boundary to effectuate the implementation and enforcement of all aspects of this Order.

The Sheriffs' Offices and the Vermont State Police shall read this Preliminary Injunction out loud and provide or make available a copy to persons on the Nelsons' land within 1,000 feet of the boundary. Persons who refuse to move away from the boundary as directed by this order shall be removed, arrested, and after being properly identified, issued a citation to appear before this court at the earliest possible date to receive Notice of the charge of Criminal Contempt, pursuant to V.R.Cr.P. 42(b), and to be served with any process for civil contempt to be served by Plaintiff pursuant to 12 V.S.A. § 122.

VIOLATION OF THIS ORDER MAY RESULT IN PROSECUTION FOR CRIMINAL CONTEMPT BY FINE, IMPRISONMENT, OR BOTH.

This order shall expire at 5 P.M. on Friday, December 2, 2011.

Dated at North Hero, Vermont this 1st day of November, 2011.

Hon. Martin A. Maley,
Superior Court-Orleans Unit

STATE OF VERMONT

SUPERIOR COURT
Orleans Unit

CIVIL DIVISION
Docket No. 256-10-11 Oscv

Green Mountain Power Corporation
Plaintiff

v.

Donald and Shirley Nelson
Defendants

ORDER RE: DEFENDANTS' MOTION FOR TEMPORARY RESTRAINING ORDER

This trespass claim is before the court on Defendants' October 31, 2011 ex parte motion for a temporary restraining order. Defendants claim that a blast conducted by Plaintiff on October 28 caused debris particles and a piece of a blasting mat to fall on Defendants' property. Defendants seek to bar Plaintiff from conducting further blasting within 1,000 feet of Defendants' property line until Plaintiff adopts a new blasting plan.

In support of their motion for a TRO, Defendants have submitted the affidavits of R. Fred Scholz and Margot Kempers, who claim to have been on the Nelsons' land in the vicinity of the boundary line with Plaintiff's property during the October 28 blast. They state that some small particles, smaller than pea size, fell on the Defendants' property after the blast as well as a fragment of rubber blasting mat and possibly some chunks of stone. Plaintiff admits that a piece of blasting mat landed on Defendants' property, but deny that anything else was cast onto their property. Assuming the affidavits are accurate, the evidence presented by Defendants is insufficient to support a temporary restraining order.

Courts consider four factors in determining whether to issue a preliminary injunction: (1) the threat of irreparable harm to the plaintiff; (2) the potential harm to the other parties; (3) the likelihood that plaintiff will succeed on the merits; and (4) the public interest. *In re J.G.*, 160 Vt. 250, 255 n.2 (1993); see also *Dataphase Systems, Inc. v. C.L. Systems, Inc.*, 640 F.2d 109, 114 (8th Cir. 1981); 11A Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 2948. The most important factor is irreparable harm. *Kamerling v. Massanari*, 295 F.3d 206, 214 (2d Cir. 2002); V.R.C.P. 65(a).

Here, Defendants have not shown that they will suffer irreparable harm absent injunctive relief. "Because of the often drastic effects of the temporary injunction, the power to issue it must be used sparingly, and only upon a showing of irreparable damage during the pendency of the action . . . ." *State v. Glens Falls Ins. Co.*, 134 Vt. 443, 450 (1976). "To establish irreparable harm, a party seeking preliminary injunctive relief must show that there is a continuing harm which cannot be adequately redressed by final relief on the merits and for which money damages

cannot provide adequate compensation." *Kamerling v. Massanari*, 295 F.3d 206, 214 (2d Cir. 2002) (citations omitted). Defendants have not shown that more particles are likely to fall on their property. Moreover, Defendants have not shown the court that money damages cannot provide adequate compensation in the event that GMP is trespassing by casting particles on their land. See *Welch v. Lague*, 141 Vt. 644, 647 (1982) (holding that it was appropriate to award money damages based on the reasonable rental value of the property in a trespass case).

In addition, Defendants have failed to show that they are likely to succeed on the merits of their trespass claim. In order to get injunctive relief, Defendants must present a prima facie case of trespass. *Janvey v. Alguire*, 647 F.3d 585, 596 (5th Cir. 2011) (citing 11A Wright, Miller & Kane, supra, § 2948.3). A person who intentionally enters or remains upon land in the possession of another without a privilege to do so is subject to liability for trespass. *Harris v. Charbonneau*, 165 Vt. 433, 437 (1996). A person may be held liable for trespass if he or she performs an act, knowing with substantial certainty that it will result in entry of foreign matter onto another's land. *In re MTBE Prod. Liability Litig.*, 379 F.Supp.2d 348, 441 (S.D.N.Y. 2005) (citing Restatement (Second) of Torts § 158 cmt. I). Here, Defendants have not alleged that Plaintiff intended for particles to enter Defendants' land or that Plaintiff knew it was substantially certain that particles would enter Defendants' land. Thus, Defendants have failed to show the element of intent, which is required to establish a prima facie case for trespass that would support injunctive relief.

Defendants appear to conflate trespass with strict liability. Under Vermont law, blasting is considered to be an extrahazardous activity, such that the person carrying on the blasting is strictly liable for harm resulting to other persons, land, or chattel. *Malloy v. Lane Constr. Corp.*, 123 Vt. 500, 503 (1963). Under a strict liability theory, Defendants must show that they suffered actual damages, not merely an interference with technical possession. D. Dobbs, The Law of Torts § 51, at 100 (2001). Defendants have not shown how Plaintiff's blasting has actually harmed persons, land, or chattel in this case. Therefore they have also not set forth a prima facie case for strict liability.

Defendants have failed to demonstrate that the circumstances in this case warrant the issuance of a temporary restraining order. Therefore, their motion is DENIED.

Dated at North Hero, Vermont this 1st day of November, 2011.

Martin A. Maley
Superior Court Judge
Orleans Unit

STATE OF VERMONT

SUPERIOR COURT
Orleans Unit

CIVIL DIVISION
Docket No. 256-10-11 Oscv

Green Mountain Power Corporation
Plaintiff

v.

Donald and Shirley Nelson
Defendants

ORDER RE: CROSS-MOTIONS FOR TEMPORARY INJUNCTIVE RELIEF

This land dispute is before the court on Plaintiff's motion for a preliminary injunction and Defendants' motion for a temporary restraining order. Plaintiff seeks to prohibit Defendants from allowing individuals to place themselves on land owned by Defendants in proximity to blasting performed by employees of Plaintiff. Defendants seek to prevent Plaintiff from conducting blasting and other construction on land allegedly owned by Defendants. On October 14, 2011, this court granted Plaintiff's ex parte Motion for Temporary Restraining Order. The court held evidentiary hearings on October 20 and 25, 2011. Plaintiff Green Mountain Power Corporation (GMP) is represented by R. Jeffrey Behm, Esq., Debra L. Bouffard, Esq., and Jon T. Alexander, Esq.; Defendants Donald and Shirley Nelson are represented by P. Scott McGee, Esq., and Anthony Z. Roisman, Esq. For the reasons discussed below, Plaintiff's motion is GRANTED and Defendants' motion is DENIED.

FACTS

Plaintiff Green Mountain Power Corporation (GMP) is an electric public utility, and as such is regulated by the Public Service Board (PSB). GMP has entered into a long-term lease of land in Lowell, Vermont, for the purpose of constructing and operating the Kingdom Community Wind Project (the "project"). Defendants Donald and Shirley Nelson own a residence and approximately 600 acres of land adjacent to the property leased by GMP for developing this wind power project.

On May 31, 2011, GMP was granted a Certificate of Public Good (CPG) by the PSB to construct and operate this wind project. The PSB considered the potential economic benefit to the State of Vermont as well as any adverse environmental impacts of the project. In granting approval the PSB found that the project will yield significant economic benefit to the State. The total cost of the project is estimated to be 136 million dollars. GMP is also eligible for federal Production Tax Credits (PTCs) of approximately 47 to 48 million dollars during the first ten years of operation, but only if the project is operational by December 31, 2012.

The project consists of a wind power electric generating facility with up to 63 Megawatts of maximum capacity. The construction phase includes building a gravel access road from Route 100 up to a 3.2-mile "crane road" along a ridge line on Lowell Mountain where 21 wind turbines are to be erected.

Building the crane road involves cutting trees, excavating, and blasting rock.[1] The construction of the crane road must proceed in a linear fashion due to environmental concerns. Therefore, GMP does not have the option to commence construction of the project at an arbitrary site along the path. In this case they are proceeding to the north and the south from the point where the access road meets the crane road. In order to obtain material necessary to fill low-lying areas along the crane road they must take blast material from certain locations along its path. One of the first areas where GMP's blasting contractor must remove rock is the area that is the subject of this lawsuit. The rock removed from this area will be used to fill in other sections of the crane road as it is constructed.

Once the crane road is constructed, tower pads will be erected and wind turbines will be placed upon the pads. GMP is attempting to have the pads in place before winter. Construction of the project began on September 1, 2011. The access road has been completed. Blasting was scheduled to commence on October 17, 2011, and cease by November 23, 2011.

Blasting is an ultra-hazardous activity. In this case it involves digging holes into which explosives are placed at a depth necessary to avoid flying rock (fly rock). The danger of fly rock varies depending upon conditions and can be unpredictable. Generally, the more shallow the placement of the explosives, the greater risk of fly rock. Methods can be used to reduce the risk. Crushed rock may be placed into the hole as a cap to limit the amount of fly rock. Large mats can also be placed to reduce and deflect fly rock. Blasts may be set off such that the force is directed away from a particular area.

Maine Drilling and Blasting, Inc. (MDB) is the blasting subcontractor for this project. MDB is one of the largest blasting firms in New England and has many years of experience in the field. Not surprisingly, the blasting industry is highly regulated and must comply strictly with various state and federal regulations. For this project, MDB was required to develop a blasting plan, which has been approved by the PSB. The blasting plan was developed in accordance with applicable federal and state regulations. Basic precautions include limiting traffic in blasting areas and notifying nearby residents of planned blasts. Also as part of the blasting plan, MDB conducted two public meetings. All residents who live within one-half mile of the project were invited to attend the meetings, at which MDB explained the blasting schedule and what warnings neighbors should expect prior to a blast.

The plan limits blasting to certain days and times according to the blasting schedule. Blasting will generally occur once or twice per day in the afternoon. The plan requires that warning signals be audible within a half-mile radius of the blast site. Access to the blast area is regulated to protect the public from effects of the blasts. Blasting mats are to be used as necessary to control excessive amounts of fly rock.

[1] An estimated 330,000 cubic feet of blasting material will be removed from areas located within 1,000 feet of the Nelsons' property line.

MDB has also developed a safety protocol which establishes a 1000-foot "safety zone" around each blasting site. No persons are to be within this zone for a specified period prior to and after each blast. The court heard extensive testimony with regard to the safety zone. The recognized practice in the industry is that the safety zone should extend 1000 feet from the blasting site. The basic premise is that the safety zone should extend beyond the potential fly rock zone.

The northwestern boundary of the Nelson property is contiguous with a portion of the GMP property. Some sections of the planned crane road are close to the boundary—in some places, less than 100 feet away. The Nelsons claim that portions of the planned crane road will encroach upon on their property. The boundary line is in a remote area nearly one mile from the Nelsons' residence. To reach the area from the Nelsons' homestead requires a hike of approximately 45 minutes.

There are no structures within 1000 feet of the ridge line. The Nelsons' residence is nearly 4500 feet from the project. However, the route of the crane road and certain blasting areas are well within 1000 feet of the disputed boundary line. Tower pads #4 and #5 will be within 100 feet of the boundary.

MDB follows accepted blasting industry standards. While it cannot be guaranteed with complete certainty that no fly rock will reach the Nelsons' property, due to the variable nature of rock blasting, MDB has stated that it is confident that it can confine fly rock to property leased by GMP. However, in their October 31, 2011 Motion for Temporary Restraining Order, the Nelsons submitted affidavits by two persons who claim that small debris particles and a piece of blasting mat were cast onto the Nelsons' property following a nearby blast on October 28. See Def. Mot. TRO (Oct. 31, 2011).

The Nelsons' property has been owned by the Nelson family for several generations. The land has been used for farming and recreation. The Nelsons have kept the land open to allow public use. Students from Sterling College have conducted outdoor programs on the land. There are hiking and snowmobile trails on the property, and it is possible to access the Lowell Mountain ridge line near the boundary of the Nelsons property.

The Nelsons have listed the property for sale for several years. Recently, GMP made an offer to purchase the property from the Nelsons at the listed price. The Nelsons declined the offer and raised the price.

On September 28, 2011, the Nelsons sent a letter to GMP advising that they would have "guests" camping on their property in the area near the construction site. Thereafter GMP observed that several individuals had erected tents along the boundary line area within 1000 feet of where GMP would be conducting blasting. GMP asserts that these campers have purposely placed themselves within this so-called "safety zone" in order to delay or stop construction of the project.

MDB has commenced blasting near tower pad #7. The campers were within 750–800 feet of that blasting site. In order to maintain safety, MDB modified the blasting by using blasting mats and smaller blasts. These extra precautions cause delays in the construction of the crane

road and therefore the entire project. GMP's construction plan requires that 5,000 cubic yards of rock be removed each day to remain on schedule.MDB estimates that if the campers remain within the safety zone throughout the blasting phase, the construction schedule will be lengthened by more than five weeks. This delay will increase the cost of the project by more than one million dollars.

The evidence is essentially uncontroverted that the goal of the campers is to delay or prevent the construction of the project. The Nelsons are aware of the intention of these individuals. In fact, the Nelsons have assisted in their efforts to interfere with the blasting schedule by allowing them to enter and camp on the Nelsons' property for this purpose, by allowing to use the Nelsons' home as a base prior to the scheduled blasting, and by guiding some of the individuals to the site where they have placed themselves within the safety zone.

The Nelsons have been vocal opponents of the project. Donald Nelson testified that he knew that the campers planned "to put a monkey wrench" into the construction. Mr. Nelson also admitted that the camping was a last resort to stop the construction.

The court heard extensive testimony regarding the location of the boundary line between GMP and the Nelsons. The Nelsons offered testimony from Paul Hannan, a surveyor who recently conducted a survey of the boundary evidence along the range line between the parties. Using the best evidence of a clear boundary line on adjacent lots to the north and south of the Nelsons' lots along the range line, and running a straight line between the points gathered on those lots, Hannan avers that a portion of the crane path will encroach upon land actually belonging to the Nelsons. Hannan calculated that the true boundary line is between 156--181 feet within the line claimed by GMP.

GMP offered the testimony of two surveyors who dispute Hannan's analysis. GMP's property claim is supported by a survey recorded in 2002 which contains an agreed-upon boundary line between the Nelsons and the owner of the neighboring land.

DISCUSSION

A. GMP's Motion for Preliminary Injunction

GMP has asked this court to issue a preliminary injunction ordering the Nelsons and parties acting in concert with them to stay 1,000 feet from the border of the Nelsons' property with GMP's property for two hours prior to the blasting until the all-clear whistle. Courts consider four factors in determining whether to issue a preliminary injunction: (1) the threat of irreparable harm to the plaintiff; (2) the potential harm to the other parties; (3) the likelihood that plaintiff will succeed on the merits; and (4) the public interest. *In re J.G.*, 160 Vt. 250, 255 n.2 (1993); see also *Dataphase Systems, Inc. v. C.L. Systems, Inc.*, 640 F.2d 109, 114 (8th Cir. 1981); 11A Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 2948. The court will consider each factor in turn.

1) Irreparable Harm

The first and most important factor is irreparable harm to the movant. "Because of the often drastic effects of the temporary injunction, the power to issue it must be used sparingly,

and only upon a showing of irreparable damage during the pendency of the action . . . ." *State v. Glens Falls Ins. Co.*, 134 Vt. 443, 450 (1976). "To establish irreparable harm, a party seeking preliminary injunctive relief must show that there is a continuing harm which cannot be adequately redressed by final relief on the merits and for which money damages cannot provide adequate compensation." *Kamerling v. Massanari*, 295 F.3d 206, 214 (2d Cir. 2002) (citations omitted). Moreover, the harm "must be shown to be actual and imminent, not remote or speculative." *Id.* "The showing of irreparable harm is perhaps the single most important prerequisite for the issuance of a preliminary injunction, and the moving party must show that injury is likely before the other requirements for an injunction will be considered." *Id.* (citations omitted).

Potential loss of business may satisfy the irreparable harm requirement for the issuance of an injunction and demonstrate the inadequacy of a remedy at law. *Campbell Inns, Inc. v. Banholzer, Turnure & Co., Inc.*, 148 Vt. 1, 7 (1987) (upholding preliminary injunction issued to purchasers of inn for specific performance of subordination clause of purchase and sale agreement which was necessary for them to get financing for business); see also *Campbell "66" Express, Inc. v. Rundel*, 597 F.2d 125, 128 (8th Cir. 1979) (evidence that some trucks would not cross picket line and that, as a result, employer suffered a loss of income was sufficient to demonstrate possible irreparable harm as a result of the picketing and to enjoin picketing).

The court is satisfied that GMP has met its burden of proof of irreparable harm. In order to be eligible for federal Production Tax Credits (PTCs) worth approximately $48 million over the first ten years of operation, the project must be operational by December 31, 2012. The PTC benefits would be passed on to customers in the form of lower energy costs. GMP began construction on September 1, 2011, and currently anticipates completion by early December 2012. The access road to the ridgeline has been completed, and GMP must now construct a road for the crane which will assemble the wind turbines. The construction of the road requires a linear approach, as the earth movers and blasting team must build their way along the crane road in order to move their equipment forward.

It is possible for GMP's blasting subcontractor MDB to blast in the area where the Nelsons and their guests are encamped. However, in order to guarantee safety of persons at the property line, MDB would have to use substantially more blasting mats, reduce its blasting charges, drill more charge holes and rely on a greater number of blasts with smaller charges. MDB estimates that the presence of the Nelsons and their guests at the property line will delay completion of blasting of the crane road by nearly six weeks, doubling the planned time for blasting from 5.5 weeks to 11.5 weeks. MDB's original plan did not require these precautions because the area along the ridge top is uninhabited forest. MDB has worked on several wind projects in the past and has never encountered a situation where persons refuse to leave the safety zone during a blast. MDB estimates that $1.4 million in expenses will be incurred if MDB has to use the extra safety precautions. More importantly, the delay jeopardizes GMP's chances of completing the project by December 31, 2012, and thus its ability to qualify for the valuable PTCs. This would be a major blow to the viability of the project and would significantly harm GMP and its customers.

2) Harm to Nonmoving Party

Second, the court must consider the harm to the nonmoving party if the injunction is granted. *In re J.G.*, 160 Vt. 250, 255 n.2 (1993); 11A Wright, Miller & Kane, *supra*, § 2948.2. Here, granting the preliminary injunction will displace the Nelsons and their guests from a portion of their property for brief periods of time. Any harm is thus temporary in nature. The Nelsons argue that this is a taking, creating a temporary easement over the Nelsons' land. The court finds this argument unpersuasive. "[N]ot every 'invasion' of private property resulting from government activity amounts to an appropriation" that is compensable as a taking. *Ondovchik Family Ltd. P'ship v. Agency of Transp.*, 2010 VT 35, ¶ 16, 187 Vt. 556. "[T]emporary, repeated incursions can sometimes rise to the level of a taking, but only in instances where the incursions amount to the taking of an easement . . . When the intrusion is "limited and transient" in nature and occurs for legitimate governmental reasons, it does not amount to a taking." *Id.* ¶ 18.

Here, there is no permanent physical occupation of the Nelsons' property by GMP. GMP does not seek permission to physically invade the Nelsons' property, either with equipment or flyrock.[2] Rather, GMP seeks to clear a 1,000-foot radius around the blast site during each blast as a voluntary precaution to protect human safety. The Nelsons and their guests will be prevented from occupying a small, uninhabited, remote portion of their property for a few hours a day for roughly one month. This is an intrusion that is limited and transient in nature, and occurs for a legitimate government reason: public safety. Accordingly, it does not amount to a taking.

The Nelsons have not shown that they will be harmed by having to leave the safety zone for a few hours during each blast. The injunction will not prevent the Nelsons from using their land for the majority of the time. Nor does it allow GMP to enter the Nelsons' property against their will. The court concludes that the harm to the defendants will be minimal in this case.

3) Likelihood of Success on the Merits

Third, the party seeking an injunction must show that it is likely to succeed on the merits of its claim. The party must present a prima facie case but need not show that it is certain to win. *Janvey v. Alguire*, 647 F.3d 585, 596 (5th Cir. 2011) (citing 11A Wright, Miller & Kane, supra, § 2948.3). "[T]he greater the relative hardship to the moving party, the less probability of success must be shown." *Immigrant Assistance Project of L.A. Cnty. Fed'n of Labor (AFL-CIO) v. I.N.S.*, 306 F.3d 842, 873 (9th Cir. 2002). Conversely, a preliminary injunction may be granted even if the plaintiff has not adequately demonstrated irreparable harm, if the plaintiff demonstrates a substantial likelihood that it will ultimately prevail. *Id.*

GMP has sued the Nelsons for nuisance. "In order to be a private nuisance, an individual's interference with the use and enjoyment of another's property must be both substantial and unreasonable." *Coty v. Ramsey Assoc., Inc.*, 149 Vt. 451, 457 (1988). In considering whether a landowner's use constitutes a nuisance, "courts must consider the extent of the interference and the reasonableness of the challenged activities in light of the particular circumstances of the case." *Trickett v. Ochs*, 2003 VT 91, ¶ 37, 176 Vt. 89.

[2] However, the Nelsons allege that GMP has in fact physically invaded their property with fly rock and other debris. See Def. Mot. TRO (Oct. 31, 2011).

The court finds that GMP has met its burden of demonstrating that the Nelsons' activities substantially interfere with GMP's use of its land. The Restatement (Second) of Torts provides a nonexhaustive list of factors that courts may consider in determining the extent of the interference: (1) the extent of the harm involved; (2) the character of the harm involved; (3) the social value that the law attaches to the type of use or enjoyment invaded; (4) the suitability of the particular use or enjoyment invaded to the character of the locality; and (5) the burden on the person harmed of avoiding the harm. Restatement (Second) of Torts § 827. In this case, the court finds the first, third and fifth factors to be decisive. The presence of the Nelsons and their guests within the safety zone may cause GMP to lose millions of dollars in valuable tax credits that would otherwise benefit GMP's consumers. The Public Service Board (PSB) has provided the project with a Certificate of Public Good, finding that the project will help the state of Vermont meet its demand for electricity while increasing the proportion of energy that derives from renewable resources. PSB also determined that the project will provide hundreds of jobs as well as tax benefits to Lowell and surrounding towns. Finally, the burden on GMP of avoiding the harm is significant. To proceed with blasting while the campers remain on the boundary line will delay the project by six weeks, jeopardizing GMP's ability to qualify for the PTCs and costing GMP more than a million dollars in extra construction expenses.

The court recognizes that this is a somewhat unusual application of the nuisance doctrine, but finds that it is warranted in this case. The court finds persuasive the Pennsylvania case relied upon by Plaintiff, *Brewster v. Highway Materials, Inc.*, 7 Pa. D. & C. 5th 514, 2009 WL 2055951 (Pa. Com. Pl. 2009), *aff'd*, 987 A.2d 231 (Pa. Commw. Ct. 2010). In *Brewster*, a quarry operator obtained state and local approval to blast within 25 feet of the defendant's residential property so that it could excavate stone from that portion of the quarry. The defendant appeared on his property line right before the quarry operator was set to begin blasting and refused to move back to a safe location. The quarry operator sued defendant for nuisance and sought an injunction ordering defendant to stay at least 300 feet from the blast location on his own property during blasting. The trial court found that the elements of nuisance were satisfied because the defendant intentionally and unreasonably interfered with the lawful use of the quarry operator's property. The court found that "[the defendant's] obvious intention is to stand on the property line when Highway Materials intends to blast for the sole objective of obstructing Highway Materials from blasting." The defendant's behavior was unreasonable, because he was deliberately exposing himself to blasting hazards. In addition, the interference was substantial, because the quarry would suffer roughly $15 million in economic losses if it could not mine that portion of the quarry. Accordingly, the court granted the preliminary injunction. *Id.* The defendant appealed the trial court's decision, and the appellate court affirmed without opinion. *Brewster*, 987 A.2d 231 (Pa. Commw. Ct. 2010).

Similarly, GMP has presented a prima facie case that the Nelsons' activities are intentional and unreasonable. Whether a particular use is reasonable depends on the circumstances of the case. *Trickett*, 2003 VT 91, ¶ 37. "Where a defendant acts solely out of malice or spite, such conduct is indefensible on social utility grounds, and nuisance liability attaches." *Coty*, 149 Vt. at 458. "Irrespective of the utility of the land use, the question may come down to whether the activities causing the harm are reasonably avoidable." *Trickett*, 2003 VT 91, ¶ 37.

In this case, the area of the Nelsons' property that is within the safety zone is rugged forested ridgeline that was completely uninhabited until the campers arrived. The Nelsons and their guests can easily remove themselves from the area during the time of blasting, so the harm is reasonably avoidable. Instead, they are deliberately exposing themselves to potential blasting hazards. Donald Nelson admitted at the October 25 hearing that the campers' sole purpose for remaining in the safety zone is to interfere with the project because they oppose large-scale ridgeline wind projects. While camping in the woods is not in and of itself unreasonable, the evidence shows that the Nelsons and their guests are acting out of a desire to injure GMP. The activities of the Nelsons are unreasonable given the circumstances of this case.

The court also concludes that GMP has presented a prima facie claim of intentional interference with contract. "One who intentionally and improperly interferes with the performance of a contract . . . between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract." *Williams v. Chittenden Trust Co.*, 145 Vt. 76, 80 (1984) (quoting Restatement (Second) of Torts § 766). "Intent to interfere with a contractual relationship exists if the actor acts for the primary purpose of interfering with the performance of the contract, and also if he [or she] desires to interfere, even though he [or she] acts for some other purpose in addition." *Id.* at 80–81. "Intent also exists if the actor does not act with the desire to interfere with the contract but knows that interference will be substantially certain to occur as a result of his or her action." *Id.* at 81. Here, GMP has presented substantial evidence that the Nelsons and their guests intentionally have taken up positions within the safety zone in order to prevent MDB from blasting and therefore inhibiting MDB's performance of its contract with GMP. Because they are acting intentionally to derail the project, the Nelsons may be held liable whether or not they specifically intend to interfere with MDB's contract with GMP.

Therefore, this court concludes that GMP has met its burden of showing that it is likely to succeed on the merits of both of its claims.

4) Public interest

Finally, the court must evaluate whether the public interest would be furthered or injured by an injunction. 11A Wright, Miller & Kane, *supra*, § 2948.4. As noted above, the Public Service Board held extensive hearings on all aspects of this project, and ultimately granted a Certificate of Public Good. See *Auclair v. Vt. Elec. Power Co., Inc.*, 133 Vt. 22, 26 (1974) ("[T]he issuance of a certificate of public good is a resolution that the project for which the certificate is granted is in the public interest of the State of Vermont."). Completion of the project by December 31, 2012 is necessary to ensure that the public receives the maximum benefit from this project via the federal PTCs. Thus, the public has a vital interest in avoiding delays to the project, and that interest is served by granting a preliminary injunction.

Having analyzed the factors above, the court concludes that injunctive relief is necessary to avoid irreparable injury to GMP. Accordingly, GMP's motion for a preliminary injunction is granted.

B. Nelsons' Motion for a Temporary Restraining Order

The Nelsons filed a counterclaim against GMP, alleging that they are the true owners of a portion of the property that GMP has leased for the purposes of constructing the project, and that GMP is trespassing on their property. They have asked the court for a temporary restraining order (TRO)[3] to enjoin GMP from trespassing on their land, whether directly or by casting flyrock on it. GMP received notice of the TRO motion, and a lengthy hearing was held on October 25 where this court heard evidence on the trespass issue from both parties.

In considering whether a TRO is necessary, the court considers four factors: (1) the threat of irreparable harm to the plaintiff; (2) the potential harm to the other parties; (3) the likelihood that plaintiff will succeed on the merits; and (4) the public interest. *In re J.G.*, 160 Vt. 250, 255 n.2 (1993).

1) Likelihood of Success on the Merits

Trespass is an invasion of a person's interest in the exclusive possession of his land. *John Larkin, Inc. v. Marceau*, 2008 VT 61, ¶ 8, 184 Vt. 207. The party showing a direct and tangible invasion of their property generally may obtain injunctive relief and at least nominal damages without proof of any other injury. *Id.* ¶ 9. In order to get injunctive relief for trespass, the Nelsons must present a prima facie case that the disputed area is in fact their property. *Janvey v. Alguire*, 647 F.3d 585, 596 (5th Cir. 2011) (citing 11A Wright, Miller & Kane, supra, § 2948.3).

There is a genuine issue of fact as to whether the property in question belongs to the Nelsons or their neighbors. At the hearing, the Nelsons introduced testimony by their surveyor, Paul Hannan, who stated that the Nelsons' property line actually sits 160–180 feet further east than is shown on town land records. Thus, in Hannan's opinion the Nelsons are the true owners of the westernmost portion of the land that GMP leases from the Nelsons' neighbors, Moose Mountain Forestry, LLC and Moose Mountain Wind, LLC. Mr. Hannan has not created a recordable survey, however. GMP introduced testimony from its own surveyors that challenged the survey method used by Mr. Hannan and indicated that GMP had relied in good faith on an existing recorded survey. The court cannot determine based on the evidence presented where the true boundary line is. However, the Nelsons have set forth a prima facie case of trespass.[4]

2) Irreparable Harm to Defendants, Harm to Plaintiff, and Public Interest

The Nelsons have not demonstrated that they will be irreparably harmed by the alleged trespass. See *Kamerling v. Massanari*, 295 F.3d 206, 214 (2nd Cir. 2002). Any harm is speculative at this point because the Nelsons have not conclusively established that the land is theirs. In addition, the Nelsons have not shown the court that money damages cannot provide adequate compensation in the event that GMP is trespassing. The case of *Welch v. Lague* is instructive here. In that case, plaintiff landowners sued to quiet title in a ten-acre parcel occupied by defendants, who believed they owned the parcel. *Welch v. Lague*, 141 Vt. 644, 645 (1982).

[3] This motion is different from Defendants' October 31 Motion for TRO, which the court has dealt with in a separate order. As this court explained in that order, the Nelsons' claim of trespass by flyrock is also insufficient to support injunctive relief. See Order re: Def. Mot. TRO (Oct. 31, 2011).

[4] The court wishes to emphasize that its analysis here deals solely with the issue of the disputed boundary area, and does not apply to the Nelsons' second TRO motion regarding fly rock cast onto the Nelsons' property. See Order re: Def. Mot. TRO (Oct. 31, 2011).

The Supreme Court held that it was appropriate to award damages based on the reasonable rental value of the property during the defendants' wrongful occupancy. *Id.* at 647. This suggests that a landowner can be adequately compensated by money damages in a trespass case.

In addition, as GMP points out, in the event that this court determines that the Nelsons own the property in question, GMP could initiate proceedings to condemn the property. In such a case, the Nelsons would be entitled only to monetary compensation. *Auclair v. Vt. Elec. Power Co., Inc.*, 133 Vt. 22, 24–25 (1974); 30 V.S.A. §§ 110, 112.

The Nelsons argue that any trespass to land that results in alteration of the land is irreparable harm per se, citing *Ferrone v. Rossi*, 42 N.E.2d 564, 566 (Mass. 1942) (issuing mandatory injunction ordering defendant to remove structures he wrongfully placed on plaintiff's land). The court does not find this argument to be supported by the case cited. Moreover, even in encroachment cases like *Ferrone*—i.e., where a landowner has placed a building or structure on his neighbor's land—courts still weigh the benefit to the plaintiff against the harm to the defendant that will result from granting a mandatory injunction to remove the offending structure. See, e.g., *Nichols v. City of Evansdale*, 687 N.W.2d 562, 572 (Iowa 2004) (injunction would not be issued to remove city sewer lines that encroached on plaintiff's lot where expense of removal would be great and plaintiff could be adequately compensated by damages); *Amkco, Ltd., Co. v. Welborn*, 21 P.3d 24, 28 (N.M. 2001) (declining to issue injunction even though defendant's building encroached 58 feet onto plaintiff's property because defendant was unaware of true boundary line and would suffer great hardship if ordered to remove building).

In this case, it is impossible for this court to tell at this point whether GMP is in fact trespassing, so the benefit to the Nelsons of issuing an injunction is at best uncertain. By contrast, as discussed above, the harm to GMP of issuing an injunction that turns out to be erroneous would be great. As also discussed above, the public has a strong interest in this project being completed on time.

The court concludes that the Nelsons have not demonstrated that they will suffer irreparable injury if GMP is in fact trespassing on their land. Nor do other factors weigh in favor of granting injunctive relief. Accordingly, the Nelsons' motion for a TRO is denied.

The court emphasizes that its ruling on the parties' cross-motions for injunctive relief does not represent an adjudication on the merits. The court is not precluded from rendering a different decision based on a more fully developed evidentiary record. See *Gardner v. Jefferys*, 2005 VT 56, ¶ 14, 178 Vt. 594 (mem.).

ORDER

Plaintiff's Motion for Preliminary Injunction is GRANTED. Defendants' Motion to Dissolve TRO is therefore rendered moot. Defendants' Motion for Temporary Restraining Order is DENIED.

In order to execute this order, law enforcement shall have the authority to enter upon the land of the Defendants.

GMP shall delineate the 1000-foot safety zone for each blast and shall properly post the 1,000-foot safety zone to warn the public of any blasting.

GMP shall provide law enforcement with notice of blasting sufficient allow for execution of this order.

This order shall expire after December 2, 2011.

Dated at North Hero, Vermont this 1st day of November 1, 2011.

Martin A. Maley
Superior Court Judge
Orleans Unit