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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

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| GRAND CANYON SKYWALK DEVELOPMENT, LLC,<br><br>Plaintiff,<br><br>vs.<br><br>'SA' NYU WA, et al.,<br><br>Defendants. | No. 3:12-cv-08030-DGC<br><br>**DEFENDANTS' OPPOSITION TO MOTION FOR TEMPORARY RESTRAINING ORDER**<br><br>(Oral argument requested) |

Defendants oppose the Motion for Temporary Restraining Order filed by Plaintiff Grand Canyon Skywalk Development LLC ("GCSD"), which asks the Court to once again reconsider its prior ruling involving the Hualapai Tribe's sovereign power of eminent domain. This Court previously rejected GCSD's request for the same relief, dismissed the entire case and denied reconsideration, all on the grounds that GCSD must exhaust its judicial remedies in Hualapai Tribal Court. The Court was right the first, second and third times, and nothing has changed to call those decisions into question.

The renewed request for a temporary restraining order should be denied again.

## I. INTRODUCTION.

GCSD ignores this Court's previous decisions and requests a temporary restraining order that not only would enjoin the legislative and executive leaders of the Hualapai Tribe ("Tribe") from exercising their sovereign power of eminent domain, but also would enjoin the Hualapai Tribal Court – the body that, according to this Court, likely has primary jurisdiction over GCSD's claims – from moving forward with the eminent domain action. In an attempt to justify its complete disregard for the Court's prior rulings, GCSD tries to paint tribal representatives as corrupt manipulators out to fleece GCSD by unfairly condemning its contract rights. This story is completely false, but also irrelevant. Although Defendants have ample evidence that the Tribe's exercise of its sovereign power of eminent domain was valid, served a legitimate public purpose and was necessary to protect one of the Tribe's most valuable assets, this Court clearly and repeatedly told GCSD to wage that evidentiary battle in Tribal Court. Injunctive relief should be denied again, and this case should be stayed or dismissed to allow GCSD to exhaust its remedies and to obtain just compensation in Tribal Court.

## II. BACKGROUND.

### A. GCSD's Failure To Perform Under The 2003 Agreement.

This Court is well aware of the pertinent background facts. In 2003, GCSD entered into a Development and Management Agreement with 'Sa' Nyu Wa, Inc. ("SNW"), a tribally-chartered corporation located on the Hualapai Reservation and wholly owned by the Tribe. Development and Management Agreement, December 31, 2003, as amended, attached as **Exhibit 1** ("2003 Agreement"). GCSD acknowledged in the 2003 Agreement that SNW was an affiliate of the Tribe, that SNW and the Tribe were "related parties," and that the Tribe was the sole shareholder of SNW. *Id.* §§ 1.1

(definitions of "affiliate" and "related parties") and 14.1(b). Therefore, GCSD understood that in contracting with SNW it also was dealing with the Tribe.

The 2003 Agreement gave GCSD limited rights. The Skywalk is on reservation land, and the Skywalk Project, including all improvements (including the glass bridge, visitor's center, all furniture and equipment, supplies, inventory, and other items of real, personal, or intangible property used in connection with the development, management and/or operation of the Skywalk) belongs exclusively to the Tribe.[1] In fact, GCSD's only interest in the 2003 Agreement was its license to build and operate the Skywalk:

> **2.9 Negation of Property Interest**: The Covenants of SNW and other provisions of this Agreement are not intended (and shall not be construed) to create or grant a leasehold or any other property interest in favor of Manager with respect to all or any part of the Project, *other than a license to use the Project* as set forth in this Article 2 for so long as this Agreement remains in effect (emphasis added).

The license gave GCSD permission to develop and manage the Skywalk on reservation land. GCSD agreed to construct the Skywalk and a "building that includes a VIP Room, a gift shop, a coffee shop, a display area, at least two restrooms and a small kitchen, (iii) a 2000-3000 square foot outside seating area, (iv) a separate building to house the generator, (v) outdoor landscape and (vi) additional improvements required under the Development and Management Agreement or agreed upon by the parties." *Id.* at Ex. B. More than eight years later, completion of the facilities GCSD was obligated to build have remained in indefinite suspension, with no completion date in sight. Instead

[1] *See* 2003 Agreement, Recital A ("The Nation is the owner of the real property"); Article 1.1 ("Project" means the Project Improvements, the site, all furniture and equipment, inventories, all other [property used in connection with the Project]"); § 10.2(d) (intangible property, such as IP and service agreements belongs to the Tribe); § 2.2(s) (Ownership of the Project shall remain in the Nation throughout the contract); § 2.9 (GCSD only has a license to develop and operate, no other interest).

of approaching the Skywalk through a state of the art visitor's center, tourists walk around the empty building onto a temporary wooden walkway. Instead of buying coffee and snacks at the promised indoor coffee shop, visitors stand outside in the elements to eat food purchased at a hastily-built and flimsy out-building, or a trailer. Instead of using the promised restrooms inside the building, guests are forced to use port-a-pottys. In addition, GCSD has failed to account for money and perform other contractual obligations. *See* Hualapai Tribal Council Resolution No. 15-2012, attached as **Exhibit 2**.

As GCSD observes, the Skywalk was supposed to be an economic engine for the Tribe. Instead, GCSD's shoddy work, uncompleted construction and abject failure to fulfill the material goals of its contractual obligations have drastically impacted the viability of the project and the economic welfare of the Tribe and its people.

**B. The Court's Denial of GCSD's First Motion for a TRO and Dismissal of the Complaint for Declaratory and Injunctive Relief.**

On March 30, 2011, GCSD filed the first lawsuit against members of the Hualapai Tribal Council requesting declaratory and injunctive relief challenging the Tribe's right to condemn GCSD's interest in the 2003 Agreement ("*GCSD I*"). GCSD requested a TRO enjoining the Tribe from taking any steps to condemn its interest in the 2003 Agreement. On April 12, 2011, the Court denied GCSD's request for the TRO.

On April 27, 2011, defendants in *GCSD I* moved to stay or dismiss the complaint on the grounds that principles of comity warranted initial consideration of GCSD's objections by Haulapai Tribal Court. On June 23, 2011, this Court agreed with the Tribe's position, ruling that the Tribal Court must be given the first chance to rule on GCSD's claim: "Plaintiff's claim in this case challenges tribal authority to enact and enforce a tribal condemnation ordinance, a claim central to tribal self-government, and the tribal court must be given an opportunity to both decide whether it has jurisdiction and to interpret the ordinance." *Grand Canyon Skywalk Development Co. v. Vaughn*,

CV11-8048-PCT-DGC, 2011 WL 2491425 *3 (D. Ariz., June 23, 2011) ("June 23, 2011 Order"). Because the Tribe had not condemned GCSD's property, the Court dismissed rather than stayed the complaint. *Id.* at *4.

After GCSD moved for reconsideration, the Court affirmed its prior ruling and again rejected GCSD's argument that the Tribal Court lacked jurisdiction:

> Plaintiff's claim in this Court concerns the validity of a tribal ordinance, passed by the tribal council on reservation land, to condemn contract rights that affect reservation land. Even if the Court were to accept Plaintiff's argument that this case concerns Plaintiff's contract right, the contract in question concerns the construction and operation of the skywalk on reservation land. The Court cannot say that this kind of case concerns the activities of a non-Indian on non-reservation land as required for the application of *Montana* after *Water Wheel.* As a result, the Court cannot conclude that there is a "plain" lack of tribal court jurisdiction over this claim as required to avoid exhaustion.

*GCSD I*, 2011 WL 2981837, *2 (July 22, 2011).

**C. <u>The Tribe's Condemnation Action.</u>**

After GCSD filed *GCSD I*, the relationship between the parties continued to deteriorate. Despite the Tribe's' vigorous attempts to negotiate a resolution, GCSD still refused to take any steps toward completion of the Skywalk facilities and initiated arbitration against SNW.[2] In the meantime, GCSD stonewalled the Tribe's request for financial and accounting records, as it had done throughout the parties' relationship.

On February 7, 2012, the Tribe decided enough was enough and passed Resolution No. 15-2012 to condemn GCSD's interest in the 2003 Agreement. On February 8, 2012,

[2] GCSD had filed an action in Hualapai Tribal Court to compel SNW to arbitrate. The Tribal Court denied GCSD's request and dismissed the case based on sovereign immunity, but ruled that GCSD had exhausted its tribal court remedies regarding arbitration and could seek resolution in federal court. Rather than come to this Court, GCSD initiated arbitration directly with the American Arbitration Association.

the Tribe filed a condemnation action and Declaration of Taking in Hualapai Tribal Court. The legal and practical effects of the condemnation were that the Tribe stepped into GCSD's shoes under the 2003 Agreement, so the arbitration over SNW's compliance with the terms of the 2003 Agreement became moot. Furthermore, the Tribe succeeded to GCSD's rights and obligations of management and operation of the Skywalk, including ticket sales, employee supervision, cash control and accounting oversight.

Shortly after the Tribe took over management and operation of the Skywalk, GCSD precipitated an event it now blames on the Tribe – and did so in violation of a TRO the Tribe had obtained in Tribal Court to preserve the status quo. Prior to February 9, 2012, GCSD used a point of sale ("POS") system known as SiriusWare to transact sales of all tickets, merchandise, and food and beverage at the Skywalk. Declaration of Ken Zachreson, attached as **Exhibit 3**, ¶ 2. GCSD controlled the POS system remotely from outside reservation land, and did not grant administrative access to the SiriusWare software or POS terminals to the Tribe or its corporate affiliates. *Id.* ¶¶ 3, 6. Because of this lack of administrative access, no sales of any kind (whether food, beverage, merchandise, or Skywalk tickets) could be transacted if GCSD remotely disabled SiriusWare. *Id.* ¶ 6. On Saturday, February 11, 2012, after the Tribe took control of Skywalk operations pursuant to the Declaration of Taking, GCSD began remotely disabling access to SiruisWare. *Id.* ¶¶ 7, 12-14. Therefore, to remain in business the employees were forced to use backup standalone cash registers to process all sales, and all Skywalk tickets had to be processed through the GCSD's own separate POS system. *Id.* ¶ 15. Although the Tribe is being forced to print its own tickets, it still is honoring the tickets issued by GCSD. *Id.* ¶ 10.

While this background provides a glimpse into the Tribe's strong disagreement with GCSD's portrayal of the events and the parties' relationship, GCSD's factual

recitation is largely immaterial because this lawsuit does not involve a contractual dispute between GCSD and SNW. This action is another attempt to convince this Court to ignore the sovereignty of the Tribe by enjoining its legislative and judicial authority over the exercise of its constitutional power of eminent domain. As the Court has already ruled, the arguments that GCSD has raised about the validity of the eminent domain action and GCSD's rights to compensation belong in the first instance in Tribal Court.

## III. GCSD HAS NOT MET THE STANDARDS FOR INJUNCTIVE RELIEF.

### A. Injunction Standards.

The Tribe disputes that the Court needs to follow the standards for injunctive relief in *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011). The threshold question is whether the Court has subject matter jurisdiction to grant any relief at all. In *GCSD I*, the Court determined that Tribal Court likely had jurisdiction and that GCSD had to exhaust its remedies in that court. Nothing GCSD has alleged in this new lawsuit changes that. Therefore, the sliding scale analysis is unnecessary and the prior decisions denying injunctive relief and dismissing the complaint should stand. *Zepeda v. United States*, 753 F.2d 719, 727 (9th Cir. 1983) (a federal court may issue an injunction only if it has personal jurisdiction over the parties and subject matter jurisdiction over the claim). However, even under the *Cottrell* analysis GCSD loses.

GCSD suggests that as long as it raises "serious questions" about likelihood of success and alleges harm, the injunctive relief it requests should be granted. Motion at 35. In addition to "serious questions going to the merits," GCSD must also show a "likelihood" of irreparable harm, that the balance of equities tips "sharply" in its favor and that an injunction would be in the public interest. *Cottrell*, 632 F.3d at 1135. Although the Court considers these factors on a "sliding scale," GCSD must demonstrate that all four fall in its favor. *Id.* GCSD has failed to meet its burden.

First, GCSD has not raised any issues that rise to the level of a "serious question" about Tribal Court jurisdiction. GCSD cannot establish on the merits that the Tribal Court's lack of jurisdiction is "plain;" therefore, GCSD is not entitled to relief in this Court without having first exhausted its Tribal Court remedies. Second, GCSD has not shown a likelihood of irreparable harm. The Tribe must pay just compensation to condemn GCSD's contract rights, which adequately protects GCSD's economic interest in the value of its license. Third and fourth, the equities and public interest in the continuation of the Tribal Court eminent domain proceeding fall squarely in the Tribe's favor; to the extent GCSD can challenge the condemnation process or contest the Tribe's estimate of just compensation, well-honed principles of self-governance demand that the Tribal Court resolve those issues in the first instance. And it is not unfair to require GCSD, which knowingly entered into an agreement with a wholly-owned tribal entity to build, manage and operate a tribally-owned asset on reservation land for the benefit of the Tribe, to litigate the eminent domain action involving that agreement in Tribal Court.

**B. GCSD Is Not Likely To Succeed On The Merits.**

**1. The Tribal Court Has Jurisdiction Over GCSD And Its Claims.**

The path in this case has been well paved by this Court's June 23, 2011 Order. As the Court recognized in *GCSD I*, the tribal exhaustion doctrine directs a federal court to stay its hand until a party has exhausted all tribal remedies. *See Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 n. 8, 107 S.Ct. 971, 94 L.Ed.2d 10 (1987). This is particularly true when the litigation involves the validity of a tribal ordinance concerning the exercise of an inherently vital power such as eminent domain. Such litigation goes to the heart of sovereign self-governance, which demands that a tribe be allowed to determine its own jurisdiction and interpret its own ordinance before a federal court takes action. *See Burlington N. R.R. Co. v. Crow Tribal Council*, 940 F.3d 1239, 1246 (9th Cir. 1991).

Measuring the controversy presented by GCSD to this Court against the tribal exhaustion doctrine's overarching purposes, it is apparent the Court should again enforce the exhaustion requirement.

**a. *Water Wheel* Applies To Give Tribal Court Jurisdiction.**

As this Court has already ruled, *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802 (9th Cir. 2011), provides the correct jurisdictional test to apply in cases involving a tribe's civil jurisdiction over a non-Indian's conduct, activities and property interests on reservation land. Indeed, as the Court's June 23, 2011 Order noted, the fundamental principles supporting this separate jurisdictional test are explicitly recognized by the Supreme Court in, *inter alia*, *Nevada v. Hicks*, 533 U.S. 353, 121, S.Ct. 2304, 150 L.Ed.2d 398 (2001) and *Iowa Mutual Ins.*, 480 U.S. at 18. Both cases provide that civil jurisdiction over non-Indians on reservation land is presumptive. *See also Allstate Indemnity Co. v. Stump*, 191 F.3d 1071 (9th Cir. 1999) (tribal court had colorable jurisdiction over insurer bad faith action occurring on tribal land).

GCSD's attempt to distinguish *Water Wheel* falls flat. *Water Wheel* was not a case regarding whether an Indian tribe has an inherent power to exclude trespassers from its land. As the opinion correctly noted in its analysis of the law, there is no question that Indian Tribes have the power to exclude non-Indians from tribal land. 642 F.3d at 819. The question was to what extent the inherent authority to exclude includes the authority to set conditions on non-Indians entry to tribal land through regulations. *Id*. at 811. The court in *Water Wheel* concluded that the power to exclude generally includes the power to regulate non-Indians on tribal land. *Id*. at 812. Moreover, this power to regulate includes the power "to place conditions on entry, on continued presence, or on reservation conduct" of non-Indians on tribal land. *Id*. at 811, quoting *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144, 102 S.Ct. 894, 71 L.Ed.2d 21 (1982). Indeed,

furthering Congress' broad commitment to tribal self-government requires that "tribes have the power to manage the use of [their] territory and resources by both member and non-members, [and] to undertake and regulate economic activity within the reservation…" *Id*. at 813-814, quoting *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335-336, 103 S.Ct. 2378, 76 L.Ed.2d 611 (1983).

The dispositive factor in *Water Wheel's* determination that the tribe had authority to regulate non-Indian defendants was the ownership of the Water Wheel Resort by the tribe and its location on reservation land. *Id*. at 814. The trespass itself was not the issue. The facts that gave rise to the appropriate exercise of civil jurisdiction were that the non-Indian defendants were managing and collecting funds despite the expiration of their lease to operate Water Wheel Resort, as well as their refusal to comply with the tribe's request that they surrender control and management of the Water Wheel Resort back to the tribe. *Id*. at 805-806. As the tribal appellate court noted, such activity "interfered with the tribe's ability to manage and use its own land." *Id*. at 807. The Ninth Circuit emphatically agreed. *Id*. at 814 ("[interfering] directly with the tribe's inherent powers to . . . manage its own lands . . . is enough to support regulatory jurisdiction without considering *Montana*").

GCSD's position vis-à-vis the Tribe is no different than the defendants in *Water Wheel*. GCSD was to receive a fee from Skywalk tourist revenues (also tribal property and an economic resource) for fulfilling its obligations with respect to its license to develop, manage and operate the Skywalk. These obligations included, among others, developing reservation land at the Skywalk site and constructing numerous improvements on the reservation land by May 2005,[3] as well as managing and operating the Skywalk.

[3] Timely completion was a material term of the contract. Section 2.2(r)("Time is of the essence of the provisions of this Section 2.2 [Development of the Project]).

GCSD failed to meet those obligations, with the result that the Tribe has not had its tribal land developed or managed in accordance with the 2003 Agreement. Seven years after the original deadline, GCSD failed to complete any improvement other than the glass bridge. GCSD abandoned construction of the visitor's center and refused to initiate work on any other on or off-site infrastructure. There are not even real bathroom facilities to greet guests after what may be hours of travel. In addition to its construction failures, GCSD's management and operation of the uncompleted Skywalk has been inadequate, temperamental, and conducted in secrecy to keep the Tribe and SNW in the dark about actual ticket sales, revenues, and side agreements involving the Skywalk between GCSD and its affiliated business running tourist operations to the Skywalk. Such actions by GCSD have adversely impacted the Tribe's ability to manage its property and a primary driver of its economy – tourism at the Grand Canyon and the Skywalk project.

GCSD's complete failure to meet the obligations of its entry on reservation land interfered with the Tribe's management of its land and economic resources. The Tribe spent several long years attempting to persuade GCSD to honor its construction and management obligations. GCSD rebuffed these attempts and continued to refuse to comply with the Tribe's requests and the terms of the 2003 Agreement. Rather than negotiate, GCSD instituted costly arbitration with SNW seeking, among other things, a declaration to excuse certain development, construction, and management obligations under the contract. Faced with hostile litigation and with no prospect that the unfinished Skywalk Project would ever be completed, the Tribe determined that the only way its tribal property could be developed and managed properly was to remove GCSD from control of the Tribe's valuable asset. Therefore, in exercise of its sovereign power to exclude and manage its land, the Tribe passed a Declaration of Taking condemning GCSD's rights to manage the tribal property.

GCSD theorizes that *Water Wheel* does not apply because the Tribe is not condemning real property; therefore, the right to exclude is not at issue. However, GCSD's overly narrow view has already been rejected by this Court. Condemning *GCSD's* rights to manage and control reservation land and tribal property intrinsically arises out of the *Tribe's* control and management of its land and economic resources – the underlying rationale of *Water Wheel*. As this Court noted in denying reconsideration in *GCSD I*, "Plaintiff's claim in this Court concerns the validity of a tribal ordinance, passed by the tribal council on reservation land, to condemn contract rights that affect reservation land." 2011 WL 2981837 at *2. *See also* June 23, 2011 Order at *6, n. 3 ("Plaintiff's attempt to invalidate a tribal ordinance designed to condemn interests on reservation land would appear directly to implicate the Hualapai tribe's power to manage its own lands"). Therefore, this Court should reaffirm its prior orders finding that *Water Wheel* applies to this case and that tribal civil jurisdiction over GCSD is likely under the circumstances.

**b. *Frito-Lay* Does Not Compel a Different Result.**

GCSD relies heavily on *Rolling Frito-Lay Sales LP v. Stover*, CV11-1361-PHX-FJM, 2012 WL 252938 (Slip. Op. D. Ariz., Jan. 26, 2012), which appears to be an unreported district court order. The district court's ruling, which has no precedential value, incorrectly refused to apply *Water Wheel* and relied solely on *Montana v. United States*, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981). In *Frito-Lay*, non-Indian Stover was injured when she slipped on a box owned by Rolling Frito-Lay Sales LP, also a non-Indian, at a store owned by a member of the Salt River Pima-Maricopa tribe located on reservation and. 2012 WL 252938 at *1. After Stover sued in tribal court, Frito-Lay filed a motion in district court to enjoin her from proceeding, arguing lack of jurisdiction. *Id.* Applying *Montana*, the district court found no tribal jurisdiction

between Stover and Frito-Lay because the two non-Indians had no consensual relationship between them or with the tribe, and the conduct giving rise to the claim did not sufficiently impact the tribe. *Id*. at *3-4.

The question was whether the tribal court had adjudicative jurisdiction over a non-Indian defendant with respect to the claims of a non-Indian plaintiff for conduct occurring on tribal land. The district court in *Frito-Lay* should have applied *Water Wheel*, since the case involved whether the tribe had jurisdiction over a non-member arising out of conduct that occurred on reservation land. The Supreme Court has never set a standard for the determination of the extent of adjudicative tribal jurisdiction, other than to say it may not exceed regulatory jurisdiction. *See Water Wheel*, 642 F.3d at 815-16. In *Frito-Lay*, the conduct subject to the court's assertion of adjudicative power (potential negligence in regards to placement of a box inside a convenience store) did not implicate in any significant manner the tribe's authority to exclude or control internal relations. No internal relations were implicated regarding a tort between two non-members that happened to occur on tribal land. As a result, since regulatory jurisdiction would have been lacking under *Water Wheel*, adjudicative jurisdiction also would be lacking, because adjudicative jurisdiction, whatever its reach, cannot exceed regulatory jurisdiction.

Regardless of the district court's failure to apply *Water Wheel*, however, the facts in *Frito-Lay* are not present here. Unlike *Frito-Lay*, this is an action arising out of a consensual relationship that goes to the heart of the Tribe's ability to manage and control its reservation land, tribal property and resources, as well as to provide for the economic security of the Tribe. Even under *Montana*, the Tribal Court has jurisdiction over the Tribe's condemnation case.

**c. The Action Also Satisfies the *Montana* Tests.**

The Court in *Montana* articulated two exceptions allowing tribal civil jurisdiction over non-members "even on non-Indian fee lands." *Montana*, 450 U.S. at 565. First, "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements," and second, a tribe may regulate "conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id*. at 565-66. These exceptions are not founded on the power to exclude, but on Indian tribes' inherent power to "protect tribal self-government or control internal relations." *Id*. at 564.

**i. Consensual Relationship.**

There is no dispute that GCSD voluntarily entered into the 2003 Agreement providing GCSD a license to develop and manage tribal land. Although the contract was with SNW, GCSD understood from the express terms of the 2003 Agreement that the Tribe was an affiliate and sole owner of SNW, and agreed to build a project that would be owned by the Tribe, generate revenues for the Tribe and be located on reservation land. The Tribe's exercise of its constitutional power of condemnation arose directly out of GCSD's contractual relationship with SNW and the Tribe. *Stock W. Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1228 (9th Cir. 1989) (management agreement to build and manage tribe's sawmill, entered into between Stock West Inc. and tribally-chartered corporation is sufficient activity on part of non-member that exhaustion was required before district court would entertain action contesting civil subject matter jurisdiction); *see also Lanphere v. Wright*, 387 F. Appx. 766, 767 (9th Cir. 2010) (sale and purchase of cigarettes on tribal land creates a colorable claim of civil subject matter

jurisdiction requiring federal court to abstain until remedies exhausted).

Under *Montana*, consent to civil jurisdiction may be established "expressly **or** by the [nonmember's] actions." *Water Wheel*, 642 F.3d at 818, quoting *Plains Commerce Bank v. Long Family Land and Cattle*, 554 U.S. 316, 337, 128 S.Ct. 2709 (2008) (emphasis added). Here, there is ample ground for express consent to jurisdiction due to the fact that GCSD accepted appointment of its license responsibilities with the understanding that its conduct was required to be in accordance with the Tribe's laws, ordinances, rules, and regulations. *See* 2003 Agreement, Article 2, § 2.1("[GCSD] agrees to develop, supervise, manage, and operate the Project…in accordance with . . . and compliance with all . . . Nation . . . laws, ordinances, rules, and regulation . . . ."). In addition, GCSD agreed to a condemnation provision in 2003 Agreement recognizing that all or part of the subject matter of the agreement was subject to condemnation, and that its only recourse was to compensation for loss of its rights under the 2003 Agreement. *Id.* § 9.2.c ("All condemnation awards payable with respect to a taking of all or part of the Project shall belong solely to SNW . . . but [GCSD] shall be entitled to seek compensation with respect to its rights under this Agreement . . .").

Even without express consent, this Court must consider whether, under the circumstances, GCSD could have reasonably anticipated that its actions may trigger tribal authority. *Water Wheel*, 642 F.3d at 818. Like the non-Indian members in *Water Wheel*, GCSD was operating on reservation land for almost a decade. As in *Water Wheel*, GCSD understood from the 2003 Agreement that the land and project it was to manage and develop were completely owned by the Tribe, which was depending upon GCSD's performance to develop a tribal asset. Given these facts, among others, GCSD cannot argue that it was unreasonable to anticipate that the Tribe could exercise its eminent domain authority over GCSD's license to develop and manage tribal property. *City of*

*Cincinnati v. Louisville & Nashiville R.R. Co.*, 223 U.S. 390, 400, 32 S. Ct. 267, 268, 56 L. Ed. 481, 483 (1912) ("There enters into every engagement the unwritten condition that it is subordinate to the right of appropriation to a public use"). Moreover, GCSD availed itself of tribal jurisdiction to declare its rights under the 2003 Agreement by moving to compel arbitration. "A nonmember who knowingly enters tribal courts for the purpose of filing suit against a tribal member has, by the act filing his claims, entered into a 'consensual relationship' with the tribe within the meaning of *Montana*." *Smith v. Salish Kootenai Coll.*, 434 F.3d 1127, 1140 (9th Cir. 2006).

Finally, to the extent that tribal jurisdiction depends on a "nexus" between the assertion of sovereignty and the consensual relationship, the existence is absolute in this case. *See Phillip Morris USA, Inc. v. King Mountain Tobacco Co., Inc.*, 569 F.3d 932, 941-942 (9th Cir. 2009) ("*Montana*'s consensual relationship exception requires that the tax or regulation imposed by the Indian tribe have a nexus to the consensual relationship itself") (citation omitted). As evidenced by its name, ***G***rand ***C***anyon ***S***kywalk ***D***evelopment's sole reason for being is to construct and manage the Skywalk – a tribal asset on tribal property. The Tribe is condemning GCSD's contractual interest (a license to develop and manage tribal property) because GCSD is interfering with the Tribe's control and management of its land and economic resources, a primary source of the Tribe's revenue.

**ii. Threat to Economic Security.**

GCSD was obligated to perform obligations under the 2003 Agreement and has not done so. GCSD's failure develop and manage tribal property is depriving the Tribe of its power to govern and regulate its own land, but also its right to manage and control one of its most valuable tribal assets. Resolution No. 15-2012, attached as **Exhibit 2**, speaks for itself with regard to the importance to the Tribe of a completed Skywalk

Project and development of its reservation land abutting the edge of the Grand Canyon. Tourism and reservation land, which coalesce in the Skywalk, are the Tribe's most vital economic resources.

At minimum, there is at least a colorable claim that the construction, operation and management of the Skywalk is such a vital economic component of the Tribe's well-being that the *Montana* second exception is met. Therefore, the Court cannot say that the Tribal Court's lack of jurisdiction is "plain." *See Allstate*, 191 F.3d at 1076 ("colorable" jurisdictional issue requires litigant to exhaust tribal remedies)

**2. The Ordinance Does Not Violate GCSD's Constitutional Rights.**

Without citing a single case, GCSD alleges that the Ordinance, which is modeled after the federal and state counterparts, violates its due process rights. The short answer is that if GCSD believes the Ordinance is unconstitutional, its remedy is to make those arguments in Tribal Court in the eminent domain action. Yet again, we circle back to the central issue in this case, which is the Tribal Court's jurisdiction to entertain challenges to the Ordinance. Nevertheless, the Ordinance, attached as **Exhibit 4**, provides all the process GCSD is due.[4]

GCSD's argument appears to be that its due process rights are violated because the Ordinance: (1) fails to provide prior notice of the taking; (2) does not require the Tribe to

[4] GCSD does not question's the Tribe's power of eminent domain. The power of eminent domain "is an incident of sovereignty [and] requires no constitutional recognition." *United States v. Jones*, 109 U.S. 513, 518, 3 S.Ct. 346, 350, 27 L.Ed. 1015 (1883). The Indian Civil Rights Act, 25 U.S.C. § 1302(5), reflects congressional recognition of the power. It also is not disputed that intangible property can be condemned. *See City of Cincinnati*, 223 U.S. at 400 ("[Ohio's power of eminent domain] extends to tangibles and intangibles alike"); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984) (intangible rights such as trade secrets are property interests for purposes of Fifth Amendment); *Mayor & City Council v. Baltimore Football Club, Inc.*, 624 F. Supp. 278, 282 (D. Md. 1986) ("[I]t is now beyond dispute that intangible property is the subject of condemnation proceedings"); *City of Oakland v. Oakland Raiders*, 646 P.2d 835, 844 (1982) (acknowledging City of Oakland's ability to condemn the Raiders football franchise despite argument that partnership owning the interest was domiciled outside of the city).

post a bond; (3) does not provide an adequate process for determining just compensation; (4) forces GCSD to give up its rights to contest the condemnation upon withdrawal of a bond; and (5) fails to ensure payment. To put these claims in context, the Court should understand the basic provisions of the Ordinance.

A taking is initiated by filing a complaint for condemnation in Tribal Court. Ordinance § 2.16(F)(1). A declaration of taking may be filed with the court at or any time after filing the complaint. The declaration must contain a statement of public use, a description of the property, a statement that the estate or interest in the property is taken, a statement of the amount of money estimated to be just compensation. *Id.* § 2.16(F)(3). The Tribe may, but is not required to post a bond as a condition of filing the declaration or initiating a condemnation proceeding. *Id.* § 2.16(F)(5). Upon filing the declaration of taking, title to the property vests in the Tribe. If the property is an intangible, such as a contract, the Tribe is the party thereto "in full place and stead of the defendant, to the full extent as if the Tribe and not the defendant were the original signator or party thereto, and the defendant shall no longer be a party thereto." *Id.* § 2.16(F)(4)(a). The right to just compensation also vests in the defendant. *Id.* § 2.16(F)(4).

Just compensation is determined by the Tribal Court in accordance with the process outlined in § 2.16(L). If the Tribe fails to pay just compensation within 180 days after the date of the award, title reverts back to the original owner. *Id.* § 2.16(N). The Tribe may be granted extensions, but only "for good cause shown." *Id.*

GCSD cannot meet its burden of showing that these provisions, which are presumed constitutional, violate its due process rights. *See Heller v. Doe by Doe*, 509 U.S. 312, 320, 113 S.Ct. 2637, 2643 (1993) (A statute is presumed constitutional and "[t]he burden is on the one attacking the legislative arrangement to negative every

conceivable basis which might support it,'" quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364, 93 S.Ct. 1001, 1006, 35 L.Ed.2d 351 (1973).

**Notice.** GCSD complains that it received no prior notice of the taking, citing *Walker v. City of Hutchinson*, 352 U.S. 112, 77 S.Ct. 200, 1 L.Ed.2d 178 (1956). However, the Court in *Walker* merely held that a property owner is entitled to adequate notice prior to a hearing on the determination of *just compensation*. The due process clause does not require the Tribe to hold a hearing prior to the legislative determination to condemn. *See North Laramie Land Co. v. Hoffman*, 268 U.S. 276, 284, 45 S.Ct. 491, 69 L.Ed. 953 (1925) (decision to take is a legislative question "and a hearing thereon is not essential to due process in the sense of the Fourteenth Amendment") (citation omitted). The Ordinance provides GCSD with the opportunity for a full trial on just compensation, which satisfies due process. *See Williamson County Reg'l Planning Com'n v. Hamilton Bank*, 473 U.S. 172, 195, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985) ("the Constitution is satisfied by the provision of meaningful postdeprivation process").

**Bond.** GCSD's also challenges the constitutionality of the Ordinance because the Tribe is not required to post a bond prior to the taking. Neither the Hualapai Constitution nor the Fifth Amendment to the United States Constitution requires just compensation to be paid in advance of, or even contemporaneously with, a taking.[5] *See Williamson County*, 473 U.S. at 194. All that is required is the existence of a "reasonable, certain and adequate provision for obtaining compensation" at the time of the taking. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 124-125, 95 S.Ct. 335, 42 L.Ed.2d 320 (1974),

[5] The Hualapai Constitution, like the United States Constitution, limits the government's power to take private property "without just compensation." Hualapai Constitution, art. IX § c. This language contrasts with the Arizona Constitution, which expressly prohibits the government from taking private property "without just compensation *having first been made, paid into court for the owner . . .*" Ariz. Const., art. 2 § 17 (emphasis added).

quoting *Cherokee Nation v. Southern Kansas R. Co.*, 135 U.S. 641, 659, 10 S.Ct. 965, 34 L.Ed. 295 (1890). Accordingly, the Tribe is not constitutionally required to deposit money before the taking when the Ordinance provides reasonable means for obtaining compensation. *See also United States v. Meyer*, 113 F.2d 387, 393 (7th Cir. 1940) ("The requirement of the Fifth Amendment is that just compensation shall be paid for property taken but that does not mean that the funds must be deposited prior to taking").[6]

**Adequacy of Compensation Process.** The Ordinance provides adequate means for GCSD to obtain just compensation for the taking of its contractual interest. GCSD simply would prefer not to have to go through the process or to have its contract rights condemned. However, GCSD is subject to the Tribe's inherent sovereign power of condemnation. *See United States v. General Motors*, 323 U.S. 373, 382, 65 S.Ct. 357 ("Whatever of property the citizen has the Government may take"). GCSD will receive just compensation after having the opportunity for a full trial on the merits of its claim.

**Loss of Challenge to Public Use.** GCSD suggests that a party withdrawing a bond loses all rights to challenge the taking or the amount of just compensation. Since the Tribe did not post a bond, nor was constitutionally required to do so, this discussion is academic and cannot affect GCSD's due process rights. *See Rindge Co. v. Los Angeles County*, 262 U.S. 700, 709-710, 43 S.Ct. 689, 67 L.Ed. 1186 (1923) ("A litigant can be heard to question the validity of a statute only when and in so far as it is applied to his disadvantage"). However, as discussed above, GCSD has no constitutional right to require the Tribe to post a bond or deposit, and hence no corresponding right to withdraw

[6] The court in *Meyer* held that appropriation by Congress of funds to pay compensation was adequate security. 113 F.2d at 393. GCSD does not question that theTribe can pay an $11 million judgment, which is theTribe's estimate of just compensation. GCSD speculates that theTribe may not be able to pay the $100 million plus GCSD wants for its condemned interest, but no authority requires a condemnor to assure payment of a condemnee's desired compensation. In addition, unlike the Tribe's estimate of just compensation, which is based on a professionally prepared report, GCSD's figure has no evidentiary support.

one. Since GCSD would have not a constitutional right to withdraw the deposit had the Tribe made one, GCSD's due process rights cannot be violated by conditions on the withdrawal. *See Mt. San Jacinto Community College Dist. v. Superior Court*, 151 P.3d 1166, 1175 (Cal. 2007) (condition on bond withdrawal waiving the statutory right to litigate the legality of the taking is not unconstitutional).

**Assurances of Payment.** GCSD also argues that the Ordinance requires the Tribal Court to give the Tribe unlimited extensions for payment of just compensation. This is not true. The Tribe must pay just compensation within 180 days. The Tribe will obtain an extension *if* it can show "good cause," but the Tribal Court retains the discretion to determine whether good cause exists. GCSD cannot base a constitutional challenge on a mere assumption that this process may be abused. "The fact that the . . . Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it . . . invalid." *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 634, 109 S.Ct. 2646, 2657, 105 L.Ed.2d 528 (1989), quoting *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 2100, 95 L.Ed.2d 697 (1987).

**3. The Arbitration is Moot.**

The Tribe's condemnation of GCSD's contractual interest in the 2003 Agreement rendered the arbitration moot, since the right to initiate arbitration arose from the terms of the 2003 Agreement. The eminent domain proceeding taking GCSD's contractual interests includes *all* such interests, including GCSD's limited rights to request, initiate or continue arbitration against SNW. By "stepping into the shoes" of GCSD for all matters relating to the 2003 Agreement, there is nothing left to arbitrate because there is no dispute between SNW and the Tribe.

**C. The Continuation Of The Eminent Domain Proceeding in Tribal Court Will Not Cause Irreparable Harm to GCSD.**

GCSD will not be harmed in any legal sense if this Court defers jurisdiction over

the eminent domain case to Tribal Court. GCSD will be entitled to challenge the taking if it chooses to do so, and we expect a spirited battle over just compensation. However, GCSD is wrong about its claims of irreparable harm, which it alleges will result from (1) the loss of business and goodwill during the condemnation process; and (2) the possibility that the Tribe may not be able to pay GCSD's estimate of just compensation.

First, GCSD forgets that the process it is trying to enjoin is a condemnation action. Loss of business and goodwill are not compensable damages in such a proceeding. *General Motors*, 323 U.S. at 379 (compensation does not include future loss of profits, the loss of goodwill or other consequential losses which would result from the sale of the property to someone other than the sovereign); *St. Bernard Parish v. United States*, 88 Fed.Cl. 528, 549 (2009) ("Compensation Clause of the Fifth Amendment does not afford Plaintiffs profits attendant to their commercial ventures"). Since business losses are not recoverable as damages, they cannot form the basis for GCSD's argument that the ongoing eminent domain proceeding in Tribal Court will cause it irreparable harm. Even so, GCSD is not being deprived of its contract rights by any post-condemnation conduct or events. Tickets sold by GCSD are being honored at the Skywalk, and GCSD's entitlement to just compensation for the taking accrued as of the filing of the Declaration of Taking on February 9, 2012. Ordinance § 2.16(F)(4)(d). Just compensation for the value of GCSD's interest in the 2003 Agreement is quantifiable and has been quantified by the Tribe.[7]

Second, GCSD cannot carry its burden of showing irreparable harm by making baseless and unsupported allegations that its estimate of just compensation will be more than $100 million and the Tribe does not have that much money. "[M]erely alleging an

[7] GCSD concedes that the standards for determining just compensation are "well established." Motion at 25-26, n. 13.

opponent's inability to pay damages does not constitute irreparable harm." *Rosewood Apartments Corp. v. Perpignano*, 200 F. Supp. 2d 269, 278 (S.D.N.Y. 2002). It is only in "some limited circumstances" where "parties have demonstrated such a *strong likelihood* that their opponent will be unable to pay that courts have awarded them equitable relief." *Id.* (emphasis added). Moreover, "[s]peculative injury does not constitute a showing of irreparable harm." *Public Serv. Co. of New Hampshire v. Town of West Newbury*, 835 F.2d 380, 383 (1st Cir. 1987); *see also RoDa Drilling Co v. Siegal*, 552 F.3d 1203, 1210 (10th Cir. 2009) ("Purely speculative harm will not suffice."); *Maximus, Inc. v. Thompson*, 78 F. Supp. 2d 1182, 1189 (D. Kan. 1999) ("Speculation or unsubstantiated fears of what may happen in the future cannot provide the basis for a preliminary injunction."). An independent appraisal valued GCSD's contractual interest in the 2003 Agreement at $11 million, which the Tribe is well capable of paying, and GCSD will have the burden and opportunity to prove it is entitled to more.

**D. The Equities And Public Interest Favor Defendants.**

Our courts have strongly and repeatedly held that the tribal rights of self-governance and self-determination are essential public policies to be advanced by federal court deference to tribal court jurisdiction. *See Iowa Mut. Ins.*, 480 U.S. at 16; *Crawford v. Genuine Parts Co.*, 947 F.2d 1405, 1407 (9th Cir. 1991) ("the requirement of exhaustion of tribal remedies is not discretionary; it is mandatory") (citation omitted). Enjoining the legislative and judicial tribal processes will subjugate the Tribe's power of self-governance without the requisite showing that Tribal Court plainly lacks jurisdiction. Furthermore, if the Court enjoins the Tribe's legislature and judiciary from proceeding with the exercise of its power of eminent domain, the Tribe will continue to be deprived of the benefits of the 2003 Agreement due to GCSD's unabated failure to perform. In contrast, GCSD will receive due process and just compensation in the proper forum, with

potential relief in federal court after exhausting its remedies in Tribal Court. Therefore, the equities and public interest on the sliding *Cottrell* scale favor the Tribe.

## IV. CONCLUSION.

This Court should reject GCSD's most recent attempt to enjoin the Tribe's legislative and judicial processes and avoid defending the Tribe's eminent domain action in Tribal Court. The TRO should not be granted, and this action should be dismissed or stayed to allow GCSD to pursue its remedies in Tribal Court.

Respectfully submitted this 22nd day of February, 2012.

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**CERTIFICATE OF SERVICE**

I hereby certify that on February 22, 2012, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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